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## Acting Officers

*James A. Heilpern\**

### Introduction

On November 7, 2018, the day after the mid-term elections, President Donald Trump requested the resignation of Attorney General Jeff Sessions. In his stead, the President appointed Christopher Whitaker to serve as Acting Attorney General until a permanent replacement could be nominated and confirmed by the Senate. Prior to his appointment, Whitaker had served as Session’s chief of staff and had been a frequent critic of Special Counsel Robert Mueller’s investigation.

Almost immediately, the legality of Whitaker’s appointment was questioned. Article II, Section 2 of the U.S. Constitution governs the appointment of all “Officers of the United States.” In general, it requires that officers be nominated by the President “by and with the Advice and Consent of the Senate.”<sup>1</sup> Only two exceptions to this rule are outlined in the Constitution: (1) Officers “whose Appointments are . . . otherwise provided for” elsewhere in the constitutional text, such as the President, Vice President, and Congressional Officers; and (2) “inferior Officers”—but only when Congress has explicitly provided for such an appointment “in the President alone, in the Courts of Law, or in the Heads of Department.”<sup>2</sup> Whitaker’s position as Acting Attorney General did not fall into either of these exceptions.

The day after the announcement, President Obama’s former Acting Solicitor General Neal Katyal along with George Conway, the husband of one of Trump’s closest advisors, Kellyanne Conway, published an op-ed in the *New York Times* arguing that “Mr. Trump’s installation of Matthew Whitaker as acting attorney general of the United States after forcing the resignation of Jeff Sessions [was] unconstitutional. It’s illegal. And it

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>2</sup> *Id.*

means that anything Mr. Whitaker does, or tries to do, in that position is invalid.”<sup>3</sup> Katyal and Conway did not question the need for interim appointments from time to time, even at the highest levels of government: “Cabinet officials die, and wars and other tragic events occur.”<sup>4</sup> But when such vacancies arise, they argued, the President should turn to the pool of subordinates who have already received Senate confirmation. “[T]here are officials readily at hand, including the deputy attorney general and the solicitor general, who were nominated by Mr. Trump and confirmed by the Senate. Either could step in as acting attorney general.”<sup>5</sup> For Katyal and Conway, therefore, the problem was that “Matthew Whitaker [was] a nobody. His [prior] job as Mr. Sessions’s chief of staff did not require Senate confirmation. . . . For the president to install Mr. Whitaker as our chief law enforcement officer is to betray the entire structure of our charter document.”<sup>6</sup>

Professor John Yoo, former deputy Attorney General under President George W. Bush, concurred, concluding that

the Constitution prohibits filling the position of attorney general with a series of officials who never received Senate consent. Deputy Attorney General Rod Rosenstein, Solicitor General Noel Francisco, the several assistant attorneys generals, even any of the 93 U.S. attorneys in the nation’s major cities could all temporarily fill in for Sessions, as they received senatorial advice and consent. Whitaker . . . cannot.<sup>7</sup>

A week after Whitaker’s appointment, the Office of Legal Counsel (“OLC”) released a memorandum opinion supporting the President’s decision. The Opinion claimed that “all three branches of government have long recognized [that] the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.”<sup>8</sup> But in doing so, the OLC conceded that “[t]he President’s designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause *so long as Acting Attorney General is not a principle office that requires Senate Confirmation.*”<sup>9</sup> In other words, for Whitaker’s appointment to have been constitutional, he must have either been an “inferior officer” or not considered an “Officer of the United States” at all.

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<sup>3</sup> Neal K. Katyal & George T. Conway III, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://perma.cc/75LY-P7KD>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> John Yoo, *Whitaker’s Appointment Is Unconstitutional*, THE ATLANTIC (Nov. 13, 2018), <https://perma.cc/SL4V-LABP>.

<sup>8</sup> Designating an Acting Attorney Gen., 42 Op. O.L.C. 1, 2 (Nov. 14, 2018).

<sup>9</sup> *Id.* at 9 (emphasis added).

This article will show that neither position is tenable. In Part I, this article shows that under current Supreme Court case law, an interim Cabinet Head is clearly an “Officer of the United States.” Part II then refutes the OLC’s alternative argument that the interim Cabinet Head is not a principle officer. Part III discusses the manner in which similar interim appointments have been handled historically.

### I. An Acting Cabinet Secretary is an “Officer of the United States”

The President’s appointment of Whitaker as Acting Attorney General came less than six months after the Supreme Court resolved its most recent Appointments Clause case, *Lucia v. SEC*.<sup>10</sup> In *Lucia*, the Court was asked whether administrative law judges within the Security and Exchange Commission were “Officers of the United States” or simply employees of the Federal Government.<sup>11</sup> Although somewhat anachronistic, the Court has used the dichotomy of “officers” and “employees” for at least a hundred years.<sup>12</sup> Justice Kagan’s majority opinion in *Lucia* explained that when the Court determines that a federal appointee is a “mere employee” then “the Appointments Clause cares not a whit about who named them.”<sup>13</sup> Justice Kagan then laid out what appears to be a two-part test for conducting this analysis:

Two decisions set out this Court’s basic framework for distinguishing between officers and employees. [*United States v. Germaine* held that “civil surgeons” (doctors hired to perform various physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” Stressing “ideas of tenure [and] duration,” the Court there made clear that an individual must occupy a “continuing” position established by law to qualify as an officer. *Buckley v. Valeo*] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they “exercise[d] significant authority pursuant to the laws of the United States.” The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.<sup>14</sup>

The OLC Opinion acknowledged the *Lucia* test, but did not even attempt to apply it to the office of Acting Attorney General.<sup>15</sup> The following section will show that there are distinctions between “acting” Cabinet positions

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<sup>10</sup> *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

<sup>11</sup> *Id.* at 2051.

<sup>12</sup> See, e.g., Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 452–453, 465 (2018); James Heilpern, *A Corpus-Based Response to Justice Sotomayor’s Comments in Lucia v. SEC*, THE ORIGINALISM BLOG (May 4, 2018, 6:08 AM), <https://perma.cc/U3AF-XCXC> (arguing that “the word ‘employee’ is a French loan-word that . . . did not seem to enter into the American vernacular until sometime after the Civil War”).

<sup>13</sup> *Lucia*, 138 S. Ct. at 2051.

<sup>14</sup> *Id.* (internal citations omitted).

<sup>15</sup> O.L.C., *supra* note 8, at 10.

and the Senate-confirmed Cabinet positions whose duties are being assumed. The subsequent sections will then apply the *Lucia* test to the office of Acting Attorney General.

A. *An “Acting” Cabinet Secretary is a Separate, Distinct Position*

Before turning to the *Lucia* test, it must be determined what position—if any—Matthew Whitaker held during his time as Acting Attorney General. Was he *the* Attorney General of the United States—an office that has existed since the early days of the Washington administration?<sup>16</sup> Or is *Acting* Attorney General a separate and distinct office altogether? Or did he remain the Attorney General’s chief of staff and simply take on additional duties without assuming a different office?

The text of the Federal Vacancies Reform Act of 1998<sup>17</sup> (“VRA”) seems to suggest the latter. It authorizes “the President (and only the President) [to] direct an officer or employee of [an] Executive agency to perform *the functions and duties* of [a] vacant office temporarily in an acting capacity.”<sup>18</sup> Congress could have stated that the President was authorized to “appoint” an officer or employee to temporarily fill the vacant office, or to “appoint” an officer or employee to serve as “acting officer.” But it appears that Congress deliberately eschewed appointment terminology, and instead focused on the mere reallocation of “functions and duties” rather than the filling of offices.

Like the VRA, the first act addressing vacancies—passed by the first Congress in 1792—focused on the President’s authority to temporarily transfer the *duties* of vacant or disabled office to a pinch hitter, rather than appoint someone to an office:

[I]n case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion *to perform the duties* of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.<sup>19</sup>

Nearly identical language was used in the second act addressing vacancies, passed just three years later. This has led at least one scholar to argue that

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<sup>16</sup> See Judiciary Act of 1789, ch. 21, 1 Stat. 73, 93 (“And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States.”)

<sup>17</sup> 5 U.S.C. §§ 3345–3349 (2018).

<sup>18</sup> *Id.* § 3345(a)(3) (emphasis added).

<sup>19</sup> Act of May 8, 1792, ch. 38, 1 Stat. 279, 281 (emphasis added).

in passing these acts, “Congress . . . viewed these [acting] officials as *not officers at all*.”<sup>20</sup>

In drafting the text of the 1792 act, Congress seemed to take pains to avoid describing an acting officer as actually “holding” an office. Instead, these officials are “authorize[d] . . . to perform the duties of the said respective offices.” While such semantic distinctions should not necessarily make the difference between whether a statute is upheld or struck down, they do provide valuable insight into the *reasoning* of Congress when it passed the act. And they strongly suggest that Congress viewed an “authorization” under the act as an assignment to temporarily perform a set of duties for the express purpose of achieving a single project: that of caretaking. Congress most likely viewed such an assignment as distinct from holding an office.<sup>21</sup>

But this interpretation has been thoroughly rejected by the courts. For example, in *United States v. White*,<sup>22</sup> Chief Justice Roger Taney (while riding Circuit) was called upon to determine whether a navy-agent who had been appointed by the Secretary of the Navy “to discharge the duties of purser” at “the naval establishment at Annapolis” while that position remained vacant, was entitled to the salary of the purser in addition to that of the navy-agent.<sup>23</sup> After acknowledging that the Secretary of the Navy had a statutory “right to appoint a purser ad interim,” Chief Justice Taney equates the exercise of the duties of the office with the holding of that office.<sup>24</sup> White therefore held the office of acting purser—and was therefore entitled to additional compensation—*because* “[h]e performed all the duties of purser at the naval establishment; settled his accounts with the proper officer at Washington as such, and not as navy-agent; and was recognised as acting purser in the reports to congress concerning certain expenditures chargeable to that branch of the service.”<sup>25</sup> The fact that White “held the office of navy-agent at the same time can make no difference; there is no law which prohibits a person from *holding two offices at the same time*.”<sup>26</sup>

The U.S. Court of Claims quoted Chief Justice Taney’s opinion favorably in *Asbury Dickins v. United States*.<sup>27</sup> Asbury Dickins was chief clerk of the Department of the Treasury from 1829 to 1833 and then chief clerk of the Department of State from 1833 to 1836. On a number of occasions during this time period, President Andrew Jackson invoked the Vacancies

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<sup>20</sup> Thomas Berry, *Is Matthew Whitaker’s Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 26, 2018), <https://perma.cc/E5RL-ZV6F>.

<sup>21</sup> *Id.*

<sup>22</sup> 28 F. Cas. 586 (C.C.D. Md. 1851).

<sup>23</sup> *Id.* at 587.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> 1 U.S. Cong. Rep. C. C. 9 (Ct. Cl. 1856).

Act of 1795 and “authorized” Dickins to perform the duties of the Secretary of the Treasury or State while the same was sick or traveling.<sup>28</sup> As in *White*, the government tried to block him from receiving extra compensation for these services on the theory that Congress had specifically prohibited executive clerks from being granted any extra compensation. The Court of Claims disagreed, holding that “at the times he performed the duties of Secretary of the Treasury, [Dickins] held an office separate from his office of chief clerk; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State.”<sup>29</sup>

A nearly identical case—*In re Cornelius Boyle*<sup>30</sup>—appeared before the Court of Claims a few years later. Like Dickins, John Boyle had served for “many years [as] chief clerk of the Department of the Navy of the United States, and during his continuance in that office he was, at various times” appointed to serve “Acting Secretary of the Navy, and under those appointments he performed the duties of the Secretary of the Navy.”<sup>31</sup> The court specifically found that

when the President, under the 8th section of the [Vacancies] act of 1792, authorizes any person to perform the duties of [a Cabinet] Secretary . . . such person is thereby invested with an office, and becomes entitled, during his continuance therein, to the compensation provided by law for the services required of him.<sup>32</sup>

The Court quoted a number of legal authorities—Sir William Blackstone, Chancellor Francis Bacon, Judge St. George Tucker, Chancellor James Kent—to support the proposition that whenever someone exercised public duties or employment, even in an acting capacity, he holds an office.<sup>33</sup>

In light of this precedent, it is clear that Whitaker was not just taking on new responsibilities in his role as Chief of Staff but was actually appointed by the President to fill a separate position—even if the position would not qualify as an “office” under modern case law. But which position? Attorney General? Or *Acting* Attorney General? *Boyle* answers this question as well:

It seems to us to be equally plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary, for it exists simultaneously

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<sup>28</sup> *Id.* at 2; see also 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 585 (Gov’t Printing Office 1868) [hereinafter TRIAL OF ANDREW JOHNSON].

<sup>29</sup> *Dickins*, 1 U.S. Cong. Rep. C. C. 9, at 16.

<sup>30</sup> 3 Cong. Rep. C. C. 44 (Ct. Cl. 1857).

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> See *id.* at 7–8.

with that office, and both may be full at the same time. We do not consider that the mere fact that the *duties* of both offices are the same makes the offices themselves identical.<sup>34</sup>

B. *An Acting Cabinet Secretary is a “Continuous” Position*

Having determined that an acting cabinet secretary such as Whitaker occupies a position “distinct and independent” from the office of Secretary, one must turn back to the *Lucia* test to determine whether an acting cabinet secretary is an “officer” under modern case law. At first blush, an acting cabinet secretary such as Whitaker appears to fail *Lucia*’s continuity requirement. After all, Whitaker was just filling in temporarily until the president could appoint a permanent replacement. Once William Barr was nominated and confirmed, Whitaker’s authority (and perhaps entire position) ceased to exist. But this argument only *sounds* reasonable because of “linguistic drift” —the fact that our “language usage and meaning [has] shift[ed] over time.”<sup>35</sup> A careful investigation into the historical origins of the continuity requirement reveals that even short-lived, temporary positions can be continuous.

In *Lucia*, Justice Kagan claimed that the continuity requirement dates back to *United States v. Germaine*.<sup>36</sup> *Germaine* concerned a federal statute that criminalized and set a maximum penalty for any “officer of the United States who is guilty of extortion under color of his office.”<sup>37</sup> A surgeon found himself a defendant in *Germaine* after he was appointed by the Commissioner of Pensions to “make the periodical examination of pensioners” and “to examine applicants for pension” when the Commissioner found it needed.<sup>38</sup> The governing statute for the surgeon’s appointment set a pay rate of “two dollars” per examination conducted, “out of any money appropriated for the payment of pensions.”<sup>39</sup> Maine indicted the defendant “for extortion in taking [additional] fees from pensioners to which he was not entitled.”<sup>40</sup> The Court was tasked with determining the applicability of the criminal statute to the surgeon.<sup>41</sup> To resolve this question, it was necessary to determine whether the defendant was an officer of the United States.

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<sup>34</sup> *Id.* at 8.

<sup>35</sup> Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019).

<sup>36</sup> See *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citing *United States v. Germaine*, 99 U.S. 508, 510–12 (1879)).

<sup>37</sup> *Germaine*, 99 U.S. at 508–09 (quoting Act of 1825, 4 Stat. 118).

<sup>38</sup> *Id.* at 508–09.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 509.

<sup>41</sup> See *id.*

The Court held that Germaine was not an officer of the United States because the Commissioner of Pensions who had appointed him was not a department head.<sup>42</sup> The Court reasoned that acts of Congress must comport with the Constitution and that it therefore could not “be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed” by the President, the courts, or a department head.<sup>43</sup> The Court appears to have been bewildered at the possibility that Congress could have enacted legislation that created an office but called for an unconstitutional mode of appointment. For Congress identifies, *through* the selected appointment mechanism, those federal officials within the government who should be considered officers.<sup>44</sup>

*Lucia*—like *Freytag v. Commissioner*<sup>45</sup> and *Buckley v. Valeo*<sup>46</sup> before it—implicitly refutes this conclusion. Obviously, Congress does occasionally enact appointment mechanisms that fail to pass constitutional muster. Given this, it may seem odd for the Court to rely on *Germaine* at all. But *Lucia*’s continuity requirement is supported not by the holding of *Germaine*, but by its dicta, where the Court postulated that the term officer “embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional and temporary.”<sup>47</sup> The Court then concluded that Germaine’s duties as a surgeon were “not continuing and permanent” but rather were “occasional and intermittent” because the “surgeon [was] only to act when called on by the Commissioner of Pensions in some *special case*.”<sup>48</sup>

In an OLC opinion issued prior to *Lucia*, the OLC interpreted this language to mean that an individual hired by the government to perform a single, special task—no matter how important—cannot be an officer because his tenure is only temporary.<sup>49</sup> The Illinois Supreme Court exemplified this approach in *Bunn v. People ex rel. Laflin*,<sup>50</sup> a Reconstruction-era case interpreting the Appointments Clause of the state constitution. In 1867, the General Assembly of Illinois passed “[a]n act to provide for the

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<sup>42</sup> See *id.* at 512.

<sup>43</sup> *Germaine*, 99 U.S. at 510.

<sup>44</sup> See *Perkins v. United States*, 116 U.S. 483, 484 (1886) (concluding that a Navy cadet-engineer was an officer because Congress “has by express enactment vested the appointment” of the position in a department head).

<sup>45</sup> 501 U.S. 868 (1991).

<sup>46</sup> 424 U.S. 1 (1976).

<sup>47</sup> *Germaine*, 99 U.S. at 511–12.

<sup>48</sup> *Id.* at 512 (second emphasis added).

<sup>49</sup> See generally *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (Apr. 16, 2007).

<sup>50</sup> 45 Ill. 397 (1867).



erection of a new State house.”<sup>51</sup> The Act named the specific men that were to serve as the Commissioners overseeing the project. Their appointment was challenged, with plaintiffs claiming that the Act violated Article 5 of the Illinois Constitution of 1849, which authorized the legislature to determine the mode of appointment for each government office it created “*provided*, that no such officer shall be elected by the general assembly.”<sup>52</sup> The Illinois Supreme Court endorsed the argument of the Defendants that the Commissioners were not officers within the meaning of the clause in part because their “appointments were of a transient, evanescent character, terminating when the object was accomplished.”<sup>53</sup> Regardless of how long it took to erect the state house, the position was not continuous because “when [the building is completed] their functions, *ipso facto*, are at an end.”<sup>54</sup>

But the Illinois Supreme Court was interpreting a different provision in a different constitution authored at a different time period by a different legislative body. There is no reason to extrapolate *Bunn’s* holding to the federal appointments clause. In fact, if one looks to case law, another definition of “continuous” predating the U.S. Constitution appears. As Dr. Edward Corwin noted, Founding-era common law consistently used the term *office* to speak of “an *institution* distinct from the person holding it.”<sup>55</sup> An office was considered continuous whenever it was “capable of persisting beyond [an individual’s] incumbency.”<sup>56</sup> Chief Justice John Marshall relied on this Founding-era understanding of the term in *United States v. Maurice*,<sup>57</sup> a district court case he presided over while riding the Circuit. *Maurice* asked whether an “agent of fortifications” was an officer within the meaning of the Appointments Clause.<sup>58</sup> Chief Justice Marshall concluded that it was, distinguishing between those whose duties were defined by the government and those whose duties were defined by contract:

An office is defined to be “a public charge or employment,” and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is “an employment,” it does not follow that every employment is an office. A man may certainly be employed under a contract, express or

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<sup>51</sup> *Id.* at 399.

<sup>52</sup> *Id.* (citing ILL. CONST. art. V, § 23 (1849)).

<sup>53</sup> *See Id.* at 402.

<sup>54</sup> *Id.* at 405.

<sup>55</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE & POWERS 1787-1957*, at 70 (4th rev. ed., N.Y. Univ. Press, Inc. 1964) (1940); *see also* *Donaldson v. Beckett*, 1 Eng. Rep. 837, 840 (1774) (“An office is the work of civil policy, and [is a] being of positive institution.”).

<sup>56</sup> CORWIN, *supra* note 55, at 70.

<sup>57</sup> 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747).

<sup>58</sup> *See id.* at 1214.

implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, *if those duties continue, though the person be changed*; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.<sup>59</sup>

Marshall's distinction is helpful. One scholar, writing at the same time as Marshall, defined a contract as "a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other."<sup>60</sup> Necessarily, a contract is individually negotiated. One party can't simply plug a new appointee into the contract when the other party fails to live up to its obligations. A new contract would need to be entered into through a new negotiation with the new party. The opposite is true when a governmental body defines the duties and emoluments of a position by statute. In such a situation, there is no room for individual adaptation.

Under this theory, a position "summoned into existence only for specific temporary purposes" is still considered to be continuous as long as it is "capable of persisting beyond [an individual's] incumbency."<sup>61</sup> History is replete with instances of Presidents "[seeking] Senate confirmation even when appointing individuals to short-term assignments."<sup>62</sup> For example, during the Washington administration one of the President's Attorney Generals—likely Edmund Randolph—issued a "written opinion" which concluded "that the President had not power by the Constitution to appoint a Commissioner [to negotiate a treaty with a Native American tribe] without the advice and consent of the Senate."<sup>63</sup> Consequently, Senate confirmation was requested by Washington prior to the appointment of Indian commissioners throughout his two presidential terms.<sup>64</sup> To cite just

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<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> 1 JOHN JOSEPH POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS*, at vi–vii (1802).

<sup>61</sup> CORWIN, *supra* note 55, at 86.

<sup>62</sup> James A. Heilpern, *Temporary Officers*, 26 *GEO. MASON L. REV.* 753, 756 (2019).

<sup>63</sup> Letter from Timothy Pickering, Sec'y of State, to George Washington, President of the U.S. (Aug. 27, 1796), <https://perma.cc/TAH6-T9M5> (referencing the opinion).

<sup>64</sup> See Letter from George Washington, President of the U.S., to the U.S. Senate (Mar. 1, 1793), <https://perma.cc/68FG-Z3FV> (nominating Benjamin Lincoln, Beverly Randolph, and Timothy Pickering "to be Commissioners . . . for holding a Conference or Treaty with the hostile Indians [in the Northwest Territory]"); Letter from George Washington, President of the U.S., to the U.S. Senate (June 25, 1795), <https://perma.cc/9PF5-UPN4> (nominating Benjamin Hawkins, George Clymer, and Andrew Pickens as "Commissioners for holding the proposed treaty" with the Creeks) [hereinafter Letter from Washington (June 25, 1795)]; Letter from George Washington, President of the U.S., to the U.S. Senate (Mar. 2, 1797), <https://perma.cc/TC9L-MA7V> (nominating "Isaac Smith to be a Commissioner to hold a Treaty with the Seneca Nation") [hereinafter Letter from Washington (Mar. 2, 1797)]; Letter from

one example, in 1795 Washington appointed—with the advice and consent of the Senate—Jeremiah Wadsworth “to hold a treaty with the Cohnawaga Indians, stiling [sic] themselves the seven Nations of Canada, to enable the State of New York to extinguish by purchase a claim which the said Indians had set up to a parcel of land lying within the State.”<sup>65</sup> Wadsworth’s initial efforts were unsuccessful. When the negotiations failed Washington and the Senate considered Wadsworth’s appointment to be terminated.<sup>66</sup> This is clear from the fact that when New York and the Cohnawaga tribe agreed to return to the negotiating table the following year, Washington submitted Wadsworth’s name as Commissioner for Senate approval a *second time*.<sup>67</sup>

Washington’s successors, John Adams and Thomas Jefferson followed their predecessor’s precedent of seeking the Advice and Consent of the Senate before filling positions “summoned into existence only for specific temporary purposes,” such as negotiating treaties with Indian tribes.<sup>68</sup> For example, in 1808, Jefferson even sought the advice and consent of the Senate before appointing Return Jonathan Meigs to be a commissioner to negotiate a treaty between Tennessee and the Cherokees, despite the fact

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George Washington, President of the U.S., to the U.S. Senate (May 17, 1796), <https://perma.cc/MP2Y-Q7KD> (nominating Abraham Ogden as Commission “to hold a Treaty with the Cohnawaga Indians”).

<sup>65</sup> Letter from George Washington, President of the U.S., to the U.S. Senate (May 2, 1796), <https://perma.cc/RLC3-LY47>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> CORWIN, *supra* note 55, at 70–71; *see also* Letter from John Adams, President of the U.S., to the U.S. Senate (Jan. 8, 1798), <https://perma.cc/3QGW-Y25M> (nominating Fisher Ames, Bushrod Washington, and Alfred Moore “to be Commissioners of the United States with full Powers to hold Conference and Conclude a Treaty with the . . . Cherokee Nation”) [hereinafter Letter from Adams (Jan. 8, 1798)]; Letter from John Adams, President of the U.S., to the U.S. Senate (March 23, 1798), <https://perma.cc/C7UY-GDYH> (nominating George Walton and John Steel “to be Commissioners for treating with the Indians”) [hereinafter Letter from Adams (March 23, 1789)]; Letter from John Adams, President of the U.S., to the U.S. Senate (May 3, 1798), <https://perma.cc/7PLN-6KXW> (nominating Joseph Hopkinson “to be the Commissioner to hold a Treaty with the . . . Oneida tribe”) [hereinafter Letter from Adams (May 3, 1798)]; Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Jan. 6, 1802), <https://perma.cc/55LD-DXBA> (nominating “commissioners to treat with the Cherokees, Chickasaws, Choctaws, [] Creeks,” and Tuscaroras); Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Feb. 1, 1802), <https://perma.cc/NB7H-73QY> (nominating John Taylor “to be a Commissioner to hold a treaty between the state of New York and the Saint Regis Indians”); Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Mar. 9, 1802), <https://perma.cc/XVJ9-D8YK> (nominating John Taylor “to be Commissioner for the US[] to hold a convention or conventions between the state of New York and the confederacy of the six nations of Indians”) [hereinafter Letter from Jefferson (March 9, 1802)].

that at the time he was already an “agent for the US[] with the Cherokees.”<sup>69</sup> As authors Vine Deloria, Jr. and Raymond J. DeMallie have noted:

In almost every instance in which treaties and agreements were made [with Native Americans throughout American history], *Congress authorized a commission* to be sent to a specific tribe or group of tribes to seek certain concessions and sales of particular lands, to establish peace on the frontiers, or even to settle intertribal quarrels. . . . [T]he choice of commissioners became an opportunity for political appointment by the president.<sup>70</sup>

The same has been true for commissioners and envoys sent to negotiate treaties and trade deals with European nations since the very beginning of the Republic. Washington, Adams, and Jefferson all consistently sought Senate approval of their picks for treaty commissioners.<sup>71</sup> This is perhaps best exemplified by the Washington administration’s efforts to ratify a treaty with the “Barbary nations” of Algiers, Tripoli, and Morocco.

Nearly a half a decade before the Constitution was ratified, twenty-one American citizens were taken hostage after two American commercial vessels were seized “by an Algerine cruiser.”<sup>72</sup> John Lamb had recently been appointed by Congress to serve as an “[a]gent for treating of peace between the U.S. and the government of Algiers.”<sup>73</sup> However, Lamb had not been granted authority to engage in “[t]he ransom of prisoners, being a case not existing when [his] powers were prepared.”<sup>74</sup> John Adams and Thomas Jefferson—in their capacities as American Ambassadors to England and France, respectively<sup>75</sup>—took it upon themselves “to endeavor to ransom our countrymen, without waiting for orders” from Congress.<sup>76</sup> Aware that they were “acting without authority,” they still “gave a supplementary instruction to Mr. Lamb to ransom our captives,” if he could achieve it for

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<sup>69</sup> Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Mar. 18, 1808), <https://perma.cc/K7TY-CLL6>.

<sup>70</sup> 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979, at 177 (1999) (emphasis added).

<sup>71</sup> See Letter from Washington (June 25, 1795), *supra* note 64; Letter from Washington (Mar. 2, 1797), *supra* note 64; Letter from George Washington, President of the U.S., to the U.S. Senate (May 17, 1796), <https://perma.cc/QB5M-S262>; Letter from Washington (May 2, 1796), *supra* note 65; Letter from Adams (Jan. 8, 1798), *supra* note 68; Letter from Adams (Mar. 23, 1798), *supra* note 68; Letter from Adams (May 3, 1798), *supra* note 68; Letter from Jefferson (Mar. 9, 1802), *supra* note 68.

<sup>72</sup> Letter from Thomas Jefferson, Sec’y of State, to Admiral John Paul Jones (June 1, 1792), <https://perma.cc/U743-8N8H>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *John Adams’ Commission as Minister to Great Britain*, NAT’L ARCHIVES: FOUNDERS ONLINE (Feb. 24, 1785), <https://perma.cc/WR5F-VH6R>; Letter from John Adams to Francis Godolphin Osborne, Marquess of Carmarthen, Sec’y of State for Foreign Affairs, Court of St. James’s (Mar. 13, 1786), <https://perma.cc/97M5-FEYR> (introducing Jefferson as the new U.S. ambassador—“Minister Plenipotentiary”—to the Court of Versailles).

<sup>76</sup> Letter from Jefferson, *supra* note 72.

\$200 or less per man.<sup>77</sup> Lamb's negotiations were unsuccessful, as was a subsequent Congressionally approved effort in 1787.<sup>78</sup>

By the time the Constitution was ratified, the government adopted a policy of "avoid[ing] the appearance of any purpose . . . ever to ransom our captives, and by that semblance of neglect, to reduce the demands of the Algerines to such a price as might make it hereafter less their interest to pursue [American] citizens than any others."<sup>79</sup> In 1790, Congress allocated the funds necessary for securing the captives' release, on the condition that "a peace [should] be previously negotiated [sic]."<sup>80</sup>

The ill-timed deaths of a series of appointees impeded Washington's attempts to secure that treaty, giving the entire appointment process the milieu of a Byzantine Constitutional Law exam question. First, Washington appointed Admiral John Paul Jones of Revolutionary War fame to serve as "Commissioner for treating with the Dey and government of Algiers on the subjects of peace and ransom of our captives" on June 1, 1792.<sup>81</sup> This date is important because Congress was not in session at the time.<sup>82</sup> The Constitution contemplates such scenarios, stating that "the President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."<sup>83</sup> Secretary of State Jefferson explained this to Jones in his letter of instruction, emphasizing that Jones's commission, "being issued during the recess of the Senate, [was] in force, by the constitution, only till the next session of the Senate."<sup>84</sup>

When he appointed Jones, Washington knew that the admiral was living in Paris, having recently retired from the Russian navy. But Washington was concerned by the lack of correspondence he had received from Jones of late.<sup>85</sup> Fearing that "in the event of any accident to [Jones], it might occasion an injurious delay, were the business to await new commissions from [the United States]," Washington found it advisable to appoint a

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<sup>77</sup> *Id.*

<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Dates of Sessions of the Congress*, U.S. SENATE, <https://perma.cc/AWH2-AET2> (noting that Congress adjourned on May 8, 1792, and did not resume session until November 5, 1792).

<sup>83</sup> U.S. CONST. art. II, § 2, cl. 3. It is possible to argue that Washington's actions were nonetheless unconstitutional because the vacancy did not "happen" during the recess. This question merits further research.

<sup>84</sup> Letter from Jefferson, *supra* note 72.

<sup>85</sup> *See* Letter from George Washington, President of the U.S., to Thomas Barclay (June 11, 1792), <https://perma.cc/8UQC-YA46>.

backup commissioner to Jones.<sup>86</sup> To that end, Washington instructed Thomas Pinkney, who was tasked with carrying Jones's commission across the Atlantic, to also transmit to Thomas Barclay "all the papers addressed to Admiral Jones" if he found that some misfortune had befallen Jones, along with a letter signed by Washington "giving [Barclay] authority on receipt of those papers to consider them addressed to [him], and to proceed under them in every respect as if [Barclay's] name stood in each of them in the place of that of John Paul Jones."<sup>87</sup> The Barclay letter was dated on June 11, 1792—also during the Congressional recess.<sup>88</sup>

Washington's concerns proved prescient. Admiral Jones died on July 18, 1792, before his commission ever reached Paris.<sup>89</sup> Pinkney followed the President's instructions, delivering the papers to Barclay, who was then stationed in Morocco.<sup>90</sup> Unfortunately, Barclay too fell ill and passed away on January 19, 1793, in Lisbon, Portugal, still attempting to secure the necessary funds for his mission.<sup>91</sup> Two years would pass before Washington would appoint David Humphrey as a second replacement, who then successfully secured treaties with Algiers, Tripoli, and Morocco.<sup>92</sup>

This historical vignette highlights the original understanding of "continuity" with respect to officers. Washington was aware that the age and health of Admiral Jones might prevent the completion of his duties, so Barclay was appointed as an understudy who could assume the role of Commissioner if needed, and "proceed under [Jones's commission and instructions] in every respect as if [Barclay's] name stood in each of them in the place of that of John Paul Jones."<sup>93</sup> The President's instructions to Barclay and Pinkney illustrate that the commission was to transfer even if Jones had received his commission prior to his passing. Put another way, Washington intended for the office of Commissioner to function as an "institution" separate and apart from Jones and to "continue" after his death if the treaty was not yet fully negotiated. After Barclay died, the same post "continued once more, with the duties and emoluments eventually passing to Humphrey. That this type of situation did not arise with greater frequency is the result of mere probability. These appointments

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See id.*; *see also Dates of Sessions, supra* note 82 (noting that Congress adjourned on May 8, 1792, and did not reconvene until November 5, 1792).

<sup>89</sup> *John Paul Jones*, U.S. NAVAL ACAD., <https://perma.cc/G33U-GAZD>.

<sup>90</sup> Letter from David Humphreys to Thomas Jefferson, Sec'y of State (January 23, 1793), <https://perma.cc/JQ42-S36M>; Letter from Washington, *supra* note 85.

<sup>91</sup> Letter from Humphreys, *supra* note 90.

<sup>92</sup> *See* 2 FRANK LONDON HUMPHREYS, LIFE AND TIMES OF DAVID HUMPHREYS: SOLIDER-STATESMAN-POET "BELOV'D OF WASHINGTON," 242-43, 298 (1917).

<sup>93</sup> Letter from Washington, *supra* note 85.

were brief, typically lasting only a few months, making it unlikely that a vacancy would be created by a given commissioner resigning or passing away.

What is true for Indian Commissioners and special Envoys is equally true for acting cabinet secretaries. There is no question that the powers and duties of the Attorney General are “capable of persisting beyond [an individual’s] incumbency.”<sup>94</sup> They have passed in an unbroken line from Edmond Randolph to William Barr and will continue to “persist” as long as the Justice Department exists. But the same is true for Acting Secretaries and Acting Attorney Generals—as recent history has demonstrated. Whitaker was not the only acting principal officer in President Trump’s Cabinet. When Defense Secretary James Mattis announced his resignation in late 2018, the President appointed Patrick M. Shanahan—a former Boeing executive who was serving as Deputy Secretary of Defense at the time—as Acting Secretary of Defense.<sup>95</sup> Shanahan began serving in that capacity on January 1, 2019, and was officially nominated as Secretary of Defense five months later.<sup>96</sup> But before he could be confirmed by the Senate, Shanahan withdrew from consideration and resigned as Acting Secretary.<sup>97</sup> The President then tapped Mark Esper, the Secretary of the Army, to replace Shanahan as Acting Secretary of Defense until a suitable replacement for Mattis could be nominated and confirmed.<sup>98</sup> When Esper himself was confirmed as Secretary of Defense, he resigned as Acting Secretary of Defense, but was not formally sworn in for another week. During this time, Richard V. Spencer ran the department as Acting Secretary of Defense in his stead.

Likewise, in the early days of the Trump Administration—before the Senate confirmed Jeff Sessions as Attorney General—Deputy Attorney General Sally Yates served as Acting Attorney General at the President’s request.<sup>99</sup> However, when she publicly refused to defend Executive Order 13769<sup>100</sup>—the so-called “Muslim Travel Ban”—the President fired her and appointed Dana Boente, the U.S. Attorney for the Eastern District of

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<sup>94</sup> CORWIN, *supra* note 55, at 70.

<sup>95</sup> See Philip Rucker, Dan Lamothe & Josh Dawsey, *Trump Forces Mattis Out Two Months Early, Names Shanahan Acting Defense Secretary*, WASH. POST (Dec. 23, 2018), <https://perma.cc/BZ6E-VYH5L>.

<sup>96</sup> See W.J. Hennigan, *Patrick Shanahan Withdraws Nomination as Defense Secretary and Steps Down*, TIME (June 18, 2019), <https://perma.cc/R75E-RYPY>.

<sup>97</sup> *See id.*

<sup>98</sup> See Ellen Ioanes, *This Is Mark Esper, the Gulf War Army Veteran and Defense Lobbyist Who Trump Has Tapped to Lead the Pentagon*, BUS. INSIDER (June 24, 2019), <https://perma.cc/BL72-AWD5>.

<sup>99</sup> See Eli Watkins, *Yates on Trump’s Travel Ban: ‘Arguments Have to Be Based on Truth’*, CNN (May 8, 2017), <https://perma.cc/UG6Y-P543>.

<sup>100</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

Virginia, as Acting Attorney General in her stead.<sup>101</sup> Then when Tom Price resigned as President Trump's Secretary of Health and Human Services in September 2017, the President appointed Don J. Wright as Acting Secretary.<sup>102</sup> Wright held that position for twelve days, until Eric Hargan was confirmed by the Senate as Deputy Secretary of Health and Human Services, at which point the President appointed him to serve as Acting Secretary until a permanent replacement could be confirmed.<sup>103</sup>

Nor is this phenomenon limited to the Trump Administration. Following the resignation of Alberto Gonzalez as President George W. Bush's Attorney General, Solicitor General Paul D. Clement served as Acting Attorney General for one day, until the President invoked the VRA and appointed Assistant Attorney General Peter D. Keisler to that role.<sup>104</sup> President Obama had two back-to-back Acting Secretaries of Commerce,<sup>105</sup> and President Carter had *five* Acting Secretary of States in succession.<sup>106</sup> In fact, as Appendix A demonstrates there have been at least sixteen instances of an Acting Cabinet Position "persisting beyond [an individual's] incumbency."<sup>107</sup> When this happens the duties and emoluments of these positions have remained the same—defined by the VRA or its predecessors—without the capability of individual negotiation or adaptation. This clearly demonstrates that acting cabinet secretaries' offices—though temporary in one sense of the word—remain "continuous" in the constitutional sense.

### C. *An Acting Cabinet Secretary Exercises "Significant Authority"*

By contrast, there should be no dispute that an acting cabinet secretary such as Whitaker exercises "significant authority pursuant to the laws of the United States."<sup>108</sup> Although the Court has never provided an exact formula for determining when a position has been delegated enough power to constitute "significant" authority, it has held that members of

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<sup>101</sup> See Kevin Johnson, Gregory Korte & Alan Gomez, *After Yates Ouster, New Acting AG Dana Boente Says He Will 'Defend and Enforce' Laws*, USA TODAY (JAN. 30, 2017), <https://perma.cc/838V-DM2E>.

<sup>102</sup> See Stephanie Armour & Michelle Hackman, *Tom Price Resigns As Health and Human Services Secretary Amid Travel Uproar*, WALL ST. J. (Sept. 29, 2017), <https://perma.cc/RMU6-CRFE>.

<sup>103</sup> See Sophie Tatum, *Trump Announces Eric Hargan as Acting HHS Secretary*, CNN (Oct. 10, 2017), <https://perma.cc/6LK7-G8MF>.

<sup>104</sup> See *infra* notes 189–190.

<sup>105</sup> See *infra* notes 193–194.

<sup>106</sup> See *infra* notes 180–184.

<sup>107</sup> CORWIN, *supra* note 55, at 70.

<sup>108</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).



the Federal Election Commission,<sup>109</sup> tax judges,<sup>110</sup> administrative law judges,<sup>111</sup> the general counsel for the National Labor Relations Board,<sup>112</sup> military judges,<sup>113</sup> postmasters, and law clerks are all sufficiently powerful enough to satisfy this requirement. As the Court reasoned in *Buckley*, “[i]f a postmaster first class and the clerk of a district court are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely” an Acting Attorney General—wielding the full power of the Justice Department—is “at the very least” an inferior officer, as well.<sup>114</sup>

Whitaker’s authority as Acting Attorney General flowed from the VRA—one of the “laws of the United States”—which authorizes the President to direct “an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily *in an acting capacity*.”<sup>115</sup> Pursuant to this authority, he deported hundreds of people, brought charges against several multinational organizations, and supervised the investigation into whether the sitting President of the United States colluded with a hostile foreign state to influence the outcome of an election.<sup>116</sup> To say the power to perform these actions does not qualify as “significant authority” would be to abuse the English language beyond recognition.

## II. An Acting Cabinet Secretary is a Principal Officer

In the alternative, the OLC Opinion argues that “[w]hile a person acting as the Attorney General surely exercises sufficient authority to be an ‘Officer of the United States,’ it is less clear whether [an] Acting Attorney General is a principal office.”<sup>117</sup> In reaching this conclusion, the OLC once again ignored the most relevant Supreme Court precedent on point, this time *Edmond v. United States*.<sup>118</sup> The controversy in *Edmond* centered on the status of judges on the Coast Guard Court of Criminal Appeals. By

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<sup>109</sup> See *Buckley*, 424 U.S. at 126.

<sup>110</sup> See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

<sup>111</sup> See *Lucia*, 138 S. Ct. at 2057.

<sup>112</sup> See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring).

<sup>113</sup> See *Edmond v. United States*, 520 U.S. 651, 662 (1997).

<sup>114</sup> *Buckley*, 424 U.S. at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) and *Ex parte Hennen*, 38 U.S. 225 (1839)).

<sup>115</sup> 5 U.S.C. § 3345(a)(3) (2012) (emphasis added).

<sup>116</sup> See, e.g., Press Release, Dep’t of Just., Acting Attorney General Matthew Whitaker Announces National Security Related Criminal Charges Against China Telecommunications Conglomerate Huawei (Jan. 28, 2019), <https://perma.cc/2KTK-AGMW>; Pete Williams & Dartunorro Clark, *Whitaker Cleared to Oversee Mueller Investigation*, NBC (Dec. 20, 2018), <https://perma.cc/YNC7-HPY3>.

<sup>117</sup> O.L.C., *supra* note 8, at 10.

<sup>118</sup> 520 U.S. 651 (1997).

statute, these judges were appointed by the Secretary of Transportation—an appointment mechanism that would be grossly unconstitutional if those judges were deemed to be “principal officers.”<sup>119</sup> Justice Scalia, writing for the majority, upheld the statute, and in doing so, articulated for the first time a test for distinguishing between “principal” and “inferior” officers:

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: Whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.<sup>120</sup>

The Court concluded that the judges in question were inferior officers because their work was supervised by both “the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces.”<sup>121</sup> This supervision included the authority to “prescribe uniform rules of procedure for the court” and the ability to “remove a Court of Criminal Appeals judge from his judicial assignment without cause.”<sup>122</sup>

The Court’s test in *Edmond* was a natural extension of the approach it took a decade previously in *Morrison v. Olson*<sup>123</sup>—the case which concerned the constitutionality of the appointment of a special prosecutor under the Ethics and Government Act.<sup>124</sup> Unlike in *Edmond*, in *Morrison* the Court declined “to decide exactly where the line falls between the two types of officers,” but identified four factors that should be considered: (1) whether the officer was “subject to removal by a higher Executive Branch official”; (2) whether the officer’s authority is circumscribed to “only certain, limited duties”; (3) whether the “office is limited in jurisdiction”; and (4) whether the office has “ongoing responsibilities that extend beyond the accomplishment of” a single mission or task.<sup>125</sup> In light of these factors, the Court considered it obvious that the office of independent counsel “[fell] on the ‘inferior officer’ side of that line.”<sup>126</sup> The independent counsel

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<sup>119</sup> *Id.* at 660.

<sup>120</sup> *Id.* at 662–63 (emphasis added).

<sup>121</sup> *Id.* at 664.

<sup>122</sup> *Id.* (internal quotation marks omitted).

<sup>123</sup> 487 U.S. 654 (1988).

<sup>124</sup> *Id.* at 659.

<sup>125</sup> *Id.* at 671–72.

<sup>126</sup> *Id.* at 671.

could be removed by the Attorney General; was restricted to the investigation and prosecution of a limited set of federal crimes; had its jurisdiction limited to that “granted by the Special Division pursuant to a request by the Attorney General”; and was “appointed essentially to accomplish a single task.”<sup>127</sup>

The OLC, however, points to a handful of antiquated decisions that supposedly demonstrate that the Judiciary has “endorsed” the proposition “that the temporary nature of acting service weighs against principal-officer status.”<sup>128</sup> Mining these opinions for convenient quotations taken out of context, the OLC argued that:

[C]ourts [have] approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers [without actually becoming principal officers themselves]. Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. Furthermore, the court emphasized, the defining feature of the office of Secretary ad interim was its “temporary” character, and it must therefore be considered an inferior office.<sup>129</sup>

The OLC then turned to *United States v. Eaton*<sup>130</sup>—an 1893 case that constitutes the crown jewel of the OLC’s legal analysis. In *Eaton*, the Court considered whether the office of “vice-consul” was a principal officer under Article II of the Constitution.<sup>131</sup> The Appointments Clause specifically states that the President, and only the President, may “nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . *Consuls*.”<sup>132</sup> But a statute on the books at the time authorized the President “to provide for the appointment of vice-consuls . . . in such manner and under such regulations as he shall deem proper.”<sup>133</sup> The office of vice consul was *not* permanent position. Vice consuls were “consular officers, who [were] substituted, temporarily, to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty.”<sup>134</sup> Their salary was to be paid for out of the salary of the consul. The regulations stated that vice consuls were usually to be appointed by the secretary of state, but in an

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<sup>127</sup> *Id.* at 672.

<sup>128</sup> O.L.C., *supra* note 8, at 10.

<sup>129</sup> *Id.* at 18–19 (citations omitted).

<sup>130</sup> 169 U.S. 331 (1898).

<sup>131</sup> *Id.* at 343.

<sup>132</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

<sup>133</sup> *Eaton*, 169 U.S. at 336 (quoting Revised Statutes § 1695 (1876)).

<sup>134</sup> *Id.* at 336 (quoting Revised Statutes § 1674).

emergency could be appointed by the U.S. “diplomatic representative” in the country.<sup>135</sup>

Sempronius Boyd was minister resident and consul general of the United States in Siam.<sup>136</sup> In June 1892, he became so sick that he was no longer able to carry out the duties of his office.<sup>137</sup> The doctors of Siam advised him that the illness would probably be fatal. The State Department granted Boyd a four month leave of absence. Before leaving Bangkok, Boyd appointed Eaton (who may or may not have been a government employee at the time) to be vice consul.<sup>138</sup> Boyd stayed in Siam for three weeks and then returned to the United States. His illness prevented him from returning to his post at the conclusion of his leave of absence. He died in his home in Missouri in June 1894.<sup>139</sup>

Eaton ran the consulate for almost a year until Boyd’s replacement relieved him of duty in May 1893.<sup>140</sup> Eaton then sought payment for his services. As vice consul, his salary was to be deducted from that allotted by Congress for the consul. But Boyd—and later Boyd’s estate—claimed he was still entitled to his entire salary even though he had left Siam.<sup>141</sup> Both Eaton and Boyd sued, and the cases were consolidated.

Boyd’s estate argued that Eaton could not receive a portion of his salary because he had been unconstitutionally appointed.<sup>142</sup> The argument was that because Eaton was carrying out the duties of the consul, he must have needed Senate confirmation. The Supreme Court rejected this view, concluding that the term “consul” as used in Article II “does not embrace a subordinate and temporary officer like that of vice-consul . . . . Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.”<sup>143</sup>

The OLC seized on this language to argue that “an inferior officer may perform the duties of a principal officer ‘for a limited time[] and under special and temporary conditions’ without ‘transform[ing]’ his office into one for which Senate confirmation is required.”<sup>144</sup> Fair enough. But a careful analysis of more than a century of case law—including all of the cases the OLC cites—reveals that the Court has consistently circumscribed

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<sup>135</sup> *Id.* at 337 (quoting Revised Statutes § 1703(36)).

<sup>136</sup> *See id.* at 331.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* at 332.

<sup>139</sup> *See Eaton*, 169 U.S. at 333.

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* at 334–35.

<sup>142</sup> *See id.* at 335–36.

<sup>143</sup> *Id.* at 343.

<sup>144</sup> O.L.C., *supra* note 8, at 2 (quoting *Eaton*, 169 U.S. at 343).

those “special and temporary conditions” to circumstances when the incumbent remained in office but for one reason or another was temporarily out of commission, and *someone* needed to pick up the slack.

In *Eaton*, Boyd continued to serve, at least in name, as consul general even after he left Siam. After all, Boyd left Siam on a State Department approved “leave of absence.”<sup>145</sup> Eaton’s salary—per statute—was to be deducted *from* Boyd’s salary. Boyd clearly felt he was still consul or he would not have sued for a year’s worth of compensation for the time he was lying on his deathbed in Missouri thousands of miles away from his post. Eaton’s authority seems to be derived from Boyd’s continuing authority, as well. The same is true for *Boyle*. John Boyle served for “many years as chief clerk of the Department of the Navy of the United States, and during his continuance in that office he was, at various times . . . appointed . . . Acting Secretary of the Navy, and under those appointments he performed the duties of the Secretary of the Navy.”<sup>146</sup> Government records kept by the Secretary of State indicate that this occurred eleven times, for a total of four-hundred and sixty-six days.<sup>147</sup> All of these, however, took place during a period of time when there was an incumbent—albeit temporarily disabled or traveling—Secretary of Navy in place. The same was true for most—but admittedly not all—of the times Asbury Dickins served as Acting Secretary of the Treasury or Acting Secretary of State as discussed in *Dickins v. United States*.<sup>148</sup>

Thus, each of the cases on which the OLC relies is distinguishable, limited in application to instances where there was no real vacancy in the Cabinet, but rather a temporary need for someone to pinch hit while the incumbent was sick or traveling. In these circumstances it is natural to think of the Acting Secretary as an “inferior officer” because their work remained “directed and supervised at some level” by the incumbent officer who was “appointed by Presidential nomination with the advice and consent of the Senate.”<sup>149</sup> But Whitaker represents an entirely different species of officer—one who in both practice and spirit is the actual head of an executive department while the president decides on a permanent replacement.

Thomas Berry of the Pacific Legal Foundation has noted that—at least historically—Presidents have treated these two circumstances differently:

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<sup>145</sup> *Eaton*, 169 U.S. at 331.

<sup>146</sup> *Boyle v. United States*, 3 U.S. Cong. Rep. C. C. 44, at 5 (Ct. Cl. 1857).

<sup>147</sup> See TRIAL OF ANDREW JOHNSON, *supra* note 28, at 585–86.

<sup>148</sup> See *Dickins v. United States*, 1 U.S. Cong. Rep. C. C. 9, at 8–10 (Ct. Cl. 1856).

<sup>149</sup> *Edmond v. United States*, 520 U.S. 651, 663 (1997).

The State Department's Nineteenth Century records for all uses of the Vacancies Act to fill cabinet positions from the Jackson to the Fillmore Administrations put temporary service into two distinct categories: "acting" service, when the full-time secretary was in office but temporarily sick or travelling, and "*ad interim*" service, when the temporary officer filled a gap between one permanent secretary leaving office and the next permanent secretary being confirmed. Congress in the 1868 Vacancies Act likewise treated these two cases very different, placing a 10-day time limit on *ad interim* service but no time limit on acting service.<sup>150</sup>

Applying the *Edmond* test to a Cabinet Secretary *ad interim* such as Whitaker leads us to an opposite conclusion of the *acting* officer cases mentioned above. As Attorney General *ad interim*, Whitaker reported directly to the President. He had no "relationship" with any "higher ranking officer" who "directed and supervised" his work—certainly not one who "who [was] appointed by Presidential nomination with the advice and consent of the Senate." Only the President (or Congress through the impeachment process) could remove him from his post. His authority, jurisdiction, and duties were virtually limitless. Wielding the full authority of the Justice Department, he deported undocumented immigrants, brought suit against multinational corporations, and could have terminated the special prosecutor investigating whether the sitting President conspired with a hostile foreign state to get elected. Under either *Edmond* or the *Morrison* factors, it is clear that the office of Attorney General *ad interim* falls on the principal "side of the line."

### III. Historical Practices

Although an application of relevant Supreme Court precedents clearly indicates that Whitaker was both an Officer of the United States and a principal officer for purposes of the Appointments Clause, the OLC argued that his appointment conformed with executive practices since the early days of the Republic and was therefore constitutional:

Because [the question of whether Whitaker is a principal officer] involves the division of powers between the Executive and the Legislative Branches, "historical practice" is entitled to "significant weight." That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. . . . [O]ur non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or *ad interim* principal officer in the Cabinet.<sup>151</sup>

As a threshold matter, it should be noted that although early historical practice *can* provide evidence of a constitutional provision's meaning, it is not to be accepted as gospel without additional analysis. As Lawrence Solum has noted,

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<sup>150</sup> Berry, *supra* note 20 (citations omitted).

<sup>151</sup> O.L.C., *supra* note 8, at 10 (citations omitted).

There is no guarantee that the officials (e.g., presidents and members of Congress) did in fact make good faith efforts to remain in compliance with the Constitution. In some cases, they may simply have neglected to consider the constitutional questions; in other cases, they may have deliberately decided to violate the Constitution. Even if they acted in good faith, they may have engaged in motivated reasoning, convincing themselves that their action was consistent with public meaning of the text when in fact it was not.<sup>152</sup>

This is especially the case when the meaning of the text was in dispute *during* the Founding era.<sup>153</sup>

It should also be noted that a majority of the OLC's evidence came *after* the so-called Founding era. The OLC opinion cites just one example from President Jefferson's administration—the appointment of John Smith, the chief clerk of the Department of War to serve as Secretary of War ad interim for the last two weeks of Jefferson's second term.<sup>154</sup>

The remaining 160 examples were drawn from the transcript of the Trial of Andrew Johnson.<sup>155</sup> At first blush, this source may seem odd. But President Johnson was technically impeached for violating the Tenure of Office Act.<sup>156</sup> The Act—passed by the overwhelming Republican majority in Congress to protect pro-Reconstruction officials from President Lincoln's pro-Southern successor<sup>157</sup>—prohibited the President from dismissing a Senate-confirmed official without Senate approval.<sup>158</sup> Trying to operate within the confines of the law, Johnson suspended Secretary of War Edwin Stanton. However, when the Senate voted to reinstate Stanton, tensions escalated:

Determined to keep Stanton out of the department, Johnson went to great lengths to preclude the returning secretary from physically taking possession of his old office. The president thought he had secured [Acting Secretary of War Ulysses S.] Grant's promise to keep Stanton at bay, but Grant surrendered the office to Stanton, who savored his return. A furious Johnson believed Grant had betrayed him, and the president decided to strike out at Stanton yet again.

The means of Johnson's vengeance was a man whose name is almost entirely lost to history: Union general Lorenzo Thomas, whom the president appointed to replace Stanton even though, according to the Tenure of Office Act (which heretofore Johnson had actually followed), Stanton was now the rightfully restored secretary of war. Stanton and Thomas faced off against each other in the War Department, both men claiming that he, not the other, was the official in charge of the nation's defense. Stanton had a warrant issued for Thomas's arrest, and constables took the general—who was worse for the wear

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<sup>152</sup> Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621, 1658–59.

<sup>153</sup> *See id.* at 1659–60.

<sup>154</sup> *See O.L.C.*, *supra* note 8, at 13.

<sup>155</sup> *See TRIAL OF ANDREW JOHNSON*, *supra* note 28, at 585–88; *see also O.L.C.*, *supra* note 8, at 13–14.

<sup>156</sup> *See John Meachum, Andrew Johnson*, in *IMPEACHMENT: AN AMERICAN HISTORY* 47, 50 (2018).

<sup>157</sup> *See id.* at 50–51, 64.

<sup>158</sup> *See id.* at 51.

after an evening of drinking in the capital—into custody in the early morning hours. Determined to hold on to his position, Stanton moved into his office.<sup>159</sup>

Republicans in Congress had tried for years to find a justification to impeach Johnson, who they viewed as an obstructionist, hostile to Reconstruction. “[A]t last, at last, the Republicans believed that the Thomas maneuver gave them a specific offense with which to charge the president.”<sup>160</sup> As a result, the impeachment trial was full of arguments about mundane issues such as appointments and removals. Among other records entered into evidence was “[a] list of the names of those persons, as shown by the records of the Department of State, who discharged the duties of officers of the cabinet, whether by appointment made in recess and those confirmed by the Senate, as well as those acting ad interim or simply acting” during the Presidencies of Andrew Jackson, Martin Van Buren, William Henry Harrison, John Tyler, James K. Polk, Zachary Taylor, Millard Fillmore, Franklin Pierce, and James Buchanan.<sup>161</sup> But none of these sources shed light on the original public meaning of the Appointments Clause, because all of those presidents held office well after the Founding Era.

Furthermore, by the OLC’s own admission, the “160 occasions” it identifies is a conflation of instances in “which non-Senate-confirmed persons served temporarily as an acting [and] ad interim principal officer in the Cabinet.”<sup>162</sup> As demonstrated above, acting officers and officers ad interim have historically been treated differently, and there is reason to believe that the Appointments Clause imposes different standards for the appointment of each.

There are only fifteen instances of Secretaries ad interim listed in the State Department records submitted as part of the Johnson Impeachment trial.<sup>163</sup> Of those, six were the appointment of one Cabinet secretary to temporarily run two departments until a permanent replacement could be appointed.<sup>164</sup> There were nine instances of a chief clerk being appointed as a Secretary ad interim.<sup>165</sup> But it is worth noting that two of those occurred during periods when Congress was not in session, meaning that they were arguably appointed *viz-à-viz* a recess appointment.<sup>166</sup> Another two—President John Tyler’s appointment of McClintock Young to be Secretary of the Treasury ad interim in 1841 and President Fillmore’s

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<sup>159</sup> *Id.* at 71.

<sup>160</sup> *Id.*

<sup>161</sup> TRIAL OF ANDREW JOHNSON, *supra* note 28, at 585–88.

<sup>162</sup> O.L.C., *supra* note 8, at 10.

<sup>163</sup> TRIAL OF ANDREW JOHNSON, *supra* note 28, at 585–88.

<sup>164</sup> *See infra* text accompanying notes 268, 286, 290, 292, 306, 318.

<sup>165</sup> *See infra* text accompanying notes 258, 260, 264, 270, 278, 284, 296, 298, 314.

<sup>166</sup> *See infra* text accompanying notes 259, 261.



appointment of William Hunter to be Secretary of State ad interim in 1853—may have been appointed while Congress was in recess.<sup>167</sup> Both Young and Hunter were appointed on days Congress adjourned, meaning that it would depend on what time of day the appointment occurred. The remaining five instances all concerned McClintock Young serving as Secretary of the Treasury ad interim on different occasions.<sup>168</sup> Although Congress was in session each time, the appointment of one man to one position three different times is a far cry from the 160 occurrences the OLC claimed to have found—a weak foundation for establishing constitutional precedent.

A more thorough review of the appointment of Cabinet Secretaries ad interim is contained in Appendix B, covering the years 1789 to 1864—Washington through Lincoln. A total of sixty-two appointments of secretaries ad interim were identified. Of these, sixteen appointments were made by the Founding-era presidents—George Washington, John Adams, Thomas Jefferson, and James Madison. All but five of those appointments were of men who already occupied an office that had received Senate confirmation—either that of another Cabinet position or, in the case of John Marshall, Chief Justice of the United States. Of the remaining five, one appointment—George Graham, one of President Madison’s many Secretaries of War ad interim—was made when Congress was not in session, meaning Madison arguably used a recess appointment. Another appointment—Charles W. Goldsborough, who served as Madison’s Secretary of the Navy ad interim—was only made *after* the President had already nominated and the Senate confirmed a permanent replacement, strongly suggesting that they remained inferior officers.

Overall, just over half (thirty-three, or 54%) of all of the ad interim appointments made by Presidents from the election of Washington through the end of the Civil War were of officers who already held a Senate-confirmed office at the time of their appointment. But—as was the case during the Founding Era—the raw percentage does not tell the whole story. Of the remaining 29 appointments, seven were made on days Congress was in recess. Eight were made on the day that Congress adjourned or gavelled into session, making it unclear whether Congress was in session or not at the precise moment that the appointment was made. This leaves just fourteen instances where a president installed an inferior or non-officer—usually the chief clerk of the officer—as an interim head of a Cabinet Department. While those examples should not be discarded as irrelevant, it does not seem sufficient to outweigh clear Supreme Court case law on point.

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<sup>167</sup> See *infra* text accompanying notes 279, 315.

<sup>168</sup> See *infra* text accompanying notes 264, 270, 284, 296, 298.

### Conclusion

In conclusion, the arguments levied by the OLC to justify Whitaker's appointment appear to have been more wish-fulfillment than serious legal analysis. The opinion fails to engage with the two Supreme Court precedents most directly on point—*Lucia* and *Edmonds*—choosing instead to base their conclusion on historical praxis. But as shown above, the historical evidence is significantly less compelling than the OLC would like us to believe—due in large part to the historical differentiation between acting secretaries and secretaries ad interim. There are only a handful of instances in American history where the President has appointed a non-Senate-confirmed officer to fill a temporary vacancy in the Cabinet while a permanent replacement is determined. This inconsistent practice is not enough to overcome the weight of Supreme Court precedent. For these reasons, Whitaker's appointment was probably unconstitutional.

[Appendix A]  
**Instances of Back-to-Back Acting or Ad Interim Cabinet Secretaries**

Year	President	Acting Position	Acting Secretaries
1817	James Monroe	Secretary of State	John Graham (March 4, 1817–March 9, 1817); <sup>169</sup> Richard Rush (March 10, 1817–September 22, 1817) <sup>170</sup>
1843	John Tyler	Secretary of State	Hugh S. Legaré (May 9, 1843–June 20, 1843); <sup>171</sup> William S. Derrick (June 21, 1843–June 23, 1843); <sup>172</sup> Abel P. Upshur (June 24, 1843–July 23, 1843) <sup>173</sup>
1884	Chester A. Arthur	Secretary of the Treasury	Charles E. Coon (September 4, 1884–September 8, 1884); <sup>174</sup> Henry F. French (September 8, 1884–September 14, 1884); <sup>175</sup> Charles E. Coon (September 15, 1884–September 24, 1884) <sup>176</sup>
1895	Grover Cleveland	Secretary of State	Edwin F. Uhl (May 28, 1895–May 31, 1895); <sup>177</sup> Alvey A. Adee (May 31, 1895–June 1, 1895); <sup>178</sup> Edwin F. Uhl (June 1, 1895–June 8, 1895) <sup>179</sup>

<sup>169</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5 (2005).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 7.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 13.

<sup>175</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 13.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 14.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

1980	Jimmy Carter	Secretary of State	Warren M. Christopher (April 28, 1980–May 2, 1980); <sup>180</sup> David Newsom (May 2, 1980–May 3, 1980); <sup>181</sup> Richard N. Cooper (May 3, 1980); <sup>182</sup> David Newsom (May 3, 1980–May 4, 1980); <sup>183</sup> Warren M. Christopher (May 4, 1980–May 8, 1980) <sup>184</sup>
1993	Bill Clinton	Secretary of State	Arnold Kanter (January 20, 1993); <sup>185</sup> Frank G. Wisner (January 20, 1993) <sup>186</sup>
1997–1998	Bill Clinton	Secretary of Veterans Affairs	Hershel W. Gober (July 3, 1997–January 2, 1998); <sup>187</sup> Togo D. West, Jr. (January 2, 1998–May 5, 1998) <sup>188</sup>
2007	George W. Bush	Attorney General	Paul D. Clement (September 17, 2007–September 18, 2007); <sup>189</sup> Peter D. Keisler (September 18, 2007–November 8, 2007) <sup>190</sup>

<sup>180</sup> *Id.* at 26.

<sup>181</sup> RICHARDSON DOUGALL & MARY PATRICIA CHAPMAN, UNITED STATES CHIEFS OF MISSION, 1778–1982, at 280 (Evan M. Duncan ed., 2d ed. 1982).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Thomas L. Friedman, *Clinton Rounds Out State Dep. Team*, N.Y. TIMES, Jan. 20, 1993, at A12.

<sup>186</sup> *Frank G. Wisner II*, OFF. OF THE HISTORIAN, <https://perma.cc/NSM9-AF8N>.

<sup>187</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 29 (2005).

<sup>188</sup> *Id.* at 29; Press Release, The White House, President Clinton Names Togo D. West, Jr. As Acting Secretary of the Department of Veterans' Affairs (December 2, 1997), <https://perma.cc/WW4L-MM4>.

<sup>189</sup> See Dan Eggen & Elizabeth Williamson, *Democrats May Tie Confirmation to Gonzales Papers*, WASH. POST (Sept. 19, 2007), <https://perma.cc/B427-YSV5>.

<sup>190</sup> See *id.* (stating Keisler's start date as Attorney General); Carl Hulse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. TIMES (Nov. 9, 2007), <https://perma.cc/SJKV-GMYW> (stating Keisler's end date as Attorney General).

2009	Barack Obama	Secretary of Labor	Howard M. Radzely (January 20, 2009–February 2, 2009); <sup>191</sup> Edward C. Hugler (February 2, 2009–February 24, 2009) <sup>192</sup>
2013	Barack Obama	Secretary of Commerce	Rebecca Blank (June 11, 2012–June 1, 2013); <sup>193</sup> Cameron F. Kerry (June 1, 2013–June 26, 2013) <sup>194</sup>
2017	Barack Obama, Donald Trump	Secretary of Agriculture	Michael Scuse (January 13, 2017–January 20, 2017); <sup>195</sup> Mike Young (January 20, 2017–April 25, 2017) <sup>196</sup>
2017	Donald Trump	Attorney General	Sally Yates (January 20, 2017–January 30, 2017); <sup>197</sup> Dana J. Boente (January 30, 2017–February 9, 2017) <sup>198</sup>
2017–2018	Donald Trump	Secretary of Health and Human Services	Don Wright (September 30, 2017–October 10, 2017); <sup>199</sup> Eric Hargan (October 10, 2017–January 29, 2018) <sup>200</sup>

<sup>191</sup> *Hon. Howard M. Radzely*, THE FEDERALIST SOC'Y, <https://perma.cc/27WB-WG7H>.

<sup>192</sup> See Michael A. Fletcher, *After Delay, Panel to Vote on Solis Nomination*, WASH. POST (Feb. 5, 2009), <https://perma.cc/KG5R-ZMJL> (stating Hugler's start date as Acting Secretary of Labor); The Associated Press, *Senate Confirms Solis as Labor Secretary*, N.Y. TIMES (Feb. 24, 2009), <https://perma.cc/Z9MJ-6GKM> (stating start date of Hugler's successor as Secretary of Labor).

<sup>193</sup> See *Former Acting Secretary Rebecca Blank*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://perma.cc/2RZN-WPBV>; see also MJ Lee, *John Bryson Takes Medical Leave*, POLITICO (June 11, 2012), <https://perma.cc/QAF6-2QJ3> (stating Blank's start date as Acting Secretary of Commerce); cf. *Cameron F. Kerry, Acting Secretary of Commerce and General Counsel*, DEP'T OF COM. <https://perma.cc/DLB2-KHG6> (stating the date that Cameron F. Kerry replaced Rebecca Blank as Acting Secretary of Commerce).

<sup>194</sup> *Cameron F. Kerry, Acting Secretary of Commerce and General Counsel*, DEP'T OF COM. <https://perma.cc/DLB2-KHG6>.

<sup>195</sup> JENNIFER PETERS, UNDERSTANDING THE EXECUTIVE BRANCH: INSIDE THE DEPARTMENT OF AGRICULTURE 40 (2019).

<sup>196</sup> *Id.*

<sup>197</sup> MICHAEL C. LEMAY, HOMELAND SECURITY 238 (2018).

<sup>198</sup> *Former Acting Assistant Attorney General Dana J. Boente*, DEP'T OF JUST., <https://perma.cc/R8VE-XT6C>.

<sup>199</sup> O.L.C., *supra* note 8, at 23.

<sup>200</sup> *Eric Hargan*, C-SPAN, <https://perma.cc/SJ6Z-RK7N>.

2018	Donald Trump	Secretary of Veterans Affairs	Robert Wilkie (March 28, 2018–May 29, 2018); <sup>201</sup> Peter O'Rourke (May 29, 2018–July 30, 2018) <sup>202</sup>
2019	Donald Trump	Secretary of Defense	Patrick M. Shanahan (January 1, 2019–June 23, 2019); <sup>203</sup> Dr. Mark T. Esper (June 24, 2019–July 15, 2019); <sup>204</sup> Richard V. Spencer (July 15, 2019–July 23, 2019) <sup>205</sup>
2019–2020	Donald Trump	Secretary of Homeland Security	Kevin McAleenan (April 8, 2019–November 13, 2019); <sup>206</sup> Chad F. Wolf (November 13, 2019–Present) <sup>207</sup>

<sup>201</sup> *Secretary of Veterans Affairs*, U.S. DEP'T OF VETERANS AFF., <https://perma.cc/A8NL-MS8Q>.

<sup>202</sup> O.L.C., *supra* note 8, at 23.

<sup>203</sup> *Patrick M. Shanahan, Former Deputy Secretary of Defense*, DEP'T OF DEF., <https://perma.cc/C8TD-HPSJ>.

<sup>204</sup> *Dr. Mark T. Esper, Secretary of Defense*, DEP'T OF DEF., <https://perma.cc/JVZ5-JBRC>.

<sup>205</sup> *Richard V. Spencer, Former Secretary of the Navy*, DEP'T OF DEF., <https://perma.cc/Q2XS-3ER9>.

<sup>206</sup> *Kevin K. McAleenan*, DEP'T OF HOMELAND SECURITY (Aug. 1, 2019), <https://perma.cc/G2FL-NYRX>.

<sup>207</sup> *Chad F. Wolf*, DEP'T OF HOMELAND SECURITY (Apr. 7, 2020), <https://perma.cc/467Z-6QLH>.

**[Appendix B]**  
**Appointment of Secretaries Ad Interim**

Name	Ad Interim Office	Concurrent Office (*=Senate confirmed)	Appointing President	Dates	Congress in Session?
Timothy Pickering	Secretary of State	Secretary of War*	George Washington	August 20, 1795– December 10, 1795 <sup>208</sup>	No <sup>209</sup>
Charles Lee	Secretary of State	Attorney General*	John Adams	May 13, 1800– June 5, 1800 <sup>210</sup>	Yes <sup>211</sup>
Benjamin Stoddert	Secretary of War	Secretary of the Navy*	John Adams	June 1, 1800– June 12, 1800 <sup>212</sup>	No <sup>213</sup>
Samuel Dexter	Secretary of War	Secretary of the Treasury*	John Adams	January 1, 1801– March 5, 1801 <sup>214</sup>	Yes <sup>215</sup>

<sup>208</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3 (2005)

<sup>209</sup> *Dates of Sessions, supra* note 82 (noting that a special session of the 4th Congress adjourned on June 26, 1795 and the 4th Congress did not reconvene until December 7, 1795).

<sup>210</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3; DOUGALL & CHAPMAN, *supra* note 181, at 279 (stating Lee's end date as June 5, 1800).

<sup>211</sup> *Dates of Sessions, supra* note 82 (noting that the 6th Congress did not adjourn until May 14, 1800).

<sup>212</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3.

<sup>213</sup> *Dates of Sessions, supra* note 82 (noting that the 6th Congress adjourned on May 14, 1800 and did not reconvene until November 17, 1800).

<sup>214</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3.

<sup>215</sup> *Dates of Sessions, supra* note 82 (noting that the 6th Congress did not adjourn until March 3, 1801).

John Marshall	Secretary of State	Chief Justice of the United States*	John Adams, Thomas Jefferson	February 4, 1801–March 4, 1801 <sup>216</sup>	Yes <sup>217</sup>
Levi Lincoln	Secretary of State	Attorney General*	Thomas Jefferson	March 5, 1801–May 1, 1801 <sup>218</sup>	Yes <sup>219</sup>
Henry Dearborn	Secretary of the Navy	Secretary of War*	Thomas Jefferson	April 1, 1801–July 27, 1801 <sup>220</sup>	No <sup>221</sup>
John Smith	Secretary of War	Chief Clerk	Thomas Jefferson, James Madison	February 17, 1809–April 8, 1809 <sup>222</sup>	Yes <sup>223</sup>
Charles W. Goldsborough	Secretary of the Navy	Chief Clerk	James Madison	March 8, 1809–May 15, 1809 <sup>224</sup>	No <sup>225</sup>

<sup>216</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3–4 (Marshall had served as President Adams’s Secretary of State prior to his appointment to the Supreme Court. He is listed as ad interim here because Adams asked Marshall to serve simultaneously as Secretary of State and Chief Justice until the end of Adams’s term, which was only a month away).

<sup>217</sup> *Dates of Sessions, supra* note 82 (noting that the 6th Congress did not adjourn until March 3, 1801).

<sup>218</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4; DOUGALL & CHAPMAN, *supra* note 181, at 279 (stating Lincoln’s end date as May 1, 1801).

<sup>219</sup> *Dates of Sessions, supra* note 82 (noting that the 7th Congress convened on March 4, 1801).

<sup>220</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4 (noting that Dearborn’s successor entered duties on July 27, 1801).

<sup>221</sup> *Dates of Sessions, supra* note 82 (noting that the 7th Congress adjourned on March 5, 1801 and did not reconvene until December 7, 1801).

<sup>222</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4.

<sup>223</sup> *Dates of Sessions, supra* note 82 (noting that the 10th Congress did not adjourn until March 3, 1809).

<sup>224</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4.

<sup>225</sup> *Dates of Sessions, supra* note 82 (noting that the 11th Congress adjourned on March 7, 1809 and did not reconvene until May 22, 1809).



James Monroe	Secretary of War	Secretary of State*	James Madison	January 1, 1813–February 5, 1813 <sup>226</sup>	Yes <sup>227</sup>
Charles W. Goldsborough	Secretary of the Navy	Chief Clerk	James Madison	January 7, 1813–January 18, 1813 <sup>228</sup>	Yes <sup>229</sup>
James Monroe	Secretary War	Secretary of State*	James Madison	August 30, 1814–October 1, 1814 <sup>230</sup>	No <sup>231</sup>
Benjamin Homans	Secretary of the Navy	Chief Clerk	James Madison	December 2, 1814–January 16, 1815 <sup>232</sup>	Yes <sup>233</sup>

<sup>226</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4.

<sup>227</sup> *Dates of Sessions, supra* note 82 (noting that the 12th Congress did not adjourn until March 3, 1813).

<sup>228</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 4.

<sup>229</sup> *Dates of Sessions, supra* note 82 (noting that the 12th Congress did not adjourn until March 3, 1813). It should be noted that by the time Goldsborough was appointed as Acting Secretary of the Navy, the Senate had already confirmed and a commission been sent to William Jones, President Madison's permanent pick to serve as Secretary of the Navy. See Letter from William Jones, Sec'y of the Navy Designate, to James Madison, President of the U.S. (Jan. 14, 1813), <https://perma.cc/JN4W-G4X2> (noting that Madison sent his commission in a letter dated Jan. 12, 1813); see also Edward K. Eckert, *William Jones: Mr. Madison's Secretary of the Navy*, 96 PA. MAG. HIST. & BIOGRAPHY 167, 170 (1972).

<sup>230</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>231</sup> *Dates of Sessions, supra* note 82 (noting that the 13th Congress adjourned on April 18, 1814 and did not reconvene until September 19, 1814).

<sup>232</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>233</sup> *Dates of Sessions, supra* note 82 (noting that the 13th Congress did not adjourn until March 3, 1815). It should be noted that Benjamin W. Crowninshield, President Madison's permanent pick to serve as Secretary of the Navy, was not appointed until December 15, 1814, and was not confirmed by the Senate until December 19, 1814. See Letter from James Madison, President of the U.S., to Benjamin W. Crowninshield, Sec'y of the Navy Designate (Dec. 23, 1814), n. 1, <https://perma.cc/W7F3-WRHZ>. Crowninshield originally refused the commission on account of his "health & domestic arrangements." Letter from Benjamin W. Crowninshield, Sec'y of the Navy Designate, to James Madison, President of the U.S. (Dec. 26, 1814), <https://perma.cc/8JY3-7NN5>. At the urging of friends, he changed his mind and accepted his commission by letter on December 28, 1814, although that letter seems to

James Monroe	Secretary of War	Secretary of State*	James Madison	March 1, 1815– March 14, 1815 <sup>234</sup>	Yes <sup>235</sup>
Alexander J. Dallas	Secretary of War	Secretary of the Treasury*	James Madison	March 14, 1815– August 8, 1815 <sup>236</sup>	No <sup>237</sup>
George Graham	Secretary of War	Chief Clerk	James Madison, James Monroe	October 22, 1816– December 10, 1817 <sup>238</sup>	No <sup>239</sup>
John Graham	Secretary of State	Chief Clerk	James Monroe	March 4, 1817– March 10, 1817 <sup>240</sup>	Maybe <sup>241</sup>
John C. Calhoun	Secretary of the Navy	Secretary of War*	James Monroe	October 1, 1818– January 1, 1819 <sup>242</sup>	No <sup>243</sup>

have been lost to history. See Letter from James Madison, President of the U.S., to Benjamin W. Crowninshield, Sec'y of State Designate (Jan. 3, 1815), <https://perma.cc/6QAY-CV9K>.

<sup>234</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>235</sup> *Dates of Sessions*, *supra* note 82 (noting that the 13th Congress did not adjourn until March 3, 1815).

<sup>236</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>237</sup> *Dates of Sessions*, *supra* note 82 (noting that the 13th Congress adjourned on March 3, 1815 and the 14th Congress did not convene until December 4, 1815).

<sup>238</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>239</sup> *Dates of Sessions*, *supra* note 82 (noting that the 14th Congress adjourned on April 30, 1816 and did not reconvene until December 2, 1816).

<sup>240</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>241</sup> *Dates of Sessions*, *supra* note 82 (noting that the 15th Congress convened for a special session on March 4, 1817, meaning that it would depend on the time of day Graham was appointed).

<sup>242</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>243</sup> *Dates of Sessions*, *supra* note 82 (noting that the 15th Congress adjourned on April 20, 1818 and did not reconvene until November 16, 1818).

John Rodgers	Secretary of the Navy	Commodore, US Navy; President of the Board of Navy Commissioners*	James Monroe	September 1, 1823–September 16, 1823 <sup>244</sup>	No <sup>245</sup>
Daniel Carroll Brent	Secretary of State	Chief Clerk	John Quincy Adams	March 4, 1825–March 7, 1825 <sup>246</sup>	Maybe <sup>247</sup>
Samuel L. Southard	Secretary of the Treasury	Secretary of the Navy*	John Quincy Adams	March 7, 1825–August 1, 1825 <sup>248</sup>	Yes <sup>249</sup>
Samuel L. Southard	Secretary of War	Secretary of the Navy*	John Quincy Adams	May 26, 1828–June 21, 1828 <sup>250</sup>	Maybe <sup>251</sup>

<sup>244</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5.

<sup>245</sup> *Dates of Sessions*, *supra* note 82 (noting that the 17th Congress adjourned on March 3, 1823 and the 18th Congress did not convene until December 1, 1823).

<sup>246</sup> *Daniel Carroll Brent (1770-1841)*, OFF. OF THE HISTORIAN, <https://perma.cc/JH6X-KZH9>.

<sup>247</sup> *Dates of Sessions*, *supra* note 82 (noting that the 19th Congress convened for a special session on March 4, 1825, meaning that it would depend on the time of day Brent was appointed).

<sup>248</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 6.

<sup>249</sup> *Dates of Sessions*, *supra* note 82 (noting that the 19th Congress convened for a special session from March 4, 1825 to March 9, 1825).

<sup>250</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 6.

<sup>251</sup> *Dates of Sessions*, *supra* note 82 (noting that the 20th Congress adjourned on May 26, 1828, meaning that it would depend on the time of day Southard was appointed).

James A. Hamilton	Secretary of State	None	Andrew Jackson	March 4, 1829– March 28, 1829 <sup>252</sup>	Maybe <sup>253</sup>
Charles Hay	Secretary of the Navy	Chief Clerk	Andrew Jackson	March 4, 1829– March 9, 1829 <sup>254</sup>	Maybe <sup>255</sup>
John Boyle	Secretary of the Navy	Chief Clerk	Andrew Jackson	May 12, 1831– May 23, 1831 <sup>256</sup>	No <sup>257</sup>
Phillip G. Randolph	Secretary of War	Chief Clerk	Andrew Jackson	June 18, 1831– July 21, 1831 <sup>258</sup>	No <sup>259</sup>

<sup>252</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 6.

<sup>253</sup> *Dates of Sessions*, *supra* note 82 (noting that the 21st Congress convened for a special session on March 4, 1829, meaning that it would depend on the time of day Hamilton was appointed). Unlike Charles W. Goldsborough appointed by President Madison, James A. Hamilton was appointed before President Jackson nominated and the Senate confirmed a permanent Secretary of State. See *Journal of the executive proceedings of the Senate of the United States of America, 1829-1837: Friday, March 6, 1829*, AM. MEMORY, <https://perma.cc/L4ZQ-GVYP> (nominating Martin Van Buren as Secretary of State).

<sup>254</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 6.

<sup>255</sup> *Dates of Sessions*, *supra* note 82 (noting that the 21st Congress convened for a special session on March 4, 1829, meaning that it would depend on the time of day Hay was appointed). Like James A. Hamilton, Charles Hay was appointed Acting Secretary of the Navy before President Jackson nominated a permanent Secretary of the Navy. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 6.

<sup>256</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. 108-222, at 6.

<sup>257</sup> *Dates of Sessions*, *supra* note 82 (noting that the 21st Congress adjourned on March 3, 1831 and the 22nd Congress did not convene until December 5, 1831).

<sup>258</sup> TRIAL OF ANDREW JOHNSON, *supra* note 28, at 576.

<sup>259</sup> *Dates of Sessions*, *supra* note 82 (noting that the 21st Congress adjourned on March 3, 1831 and the 22nd Congress did not convene until December 5, 1831).

Asbury Dickins	Secretary of the Treasury	Chief Clerk	Andrew Jackson	June 21, 1831–August 8, 1831 <sup>260</sup>	No <sup>261</sup>
Roger B. Taney	Secretary of War	Attorney General*	Andrew Jackson	July 21, 1831–August 8, 1831 <sup>262</sup>	No <sup>263</sup>
McClintock Young	Secretary of the Treasury	Chief Clerk	Andrew Jackson	June 25, 1834–July 1, 1834 <sup>264</sup>	Yes <sup>265</sup>
Carey A. Harris	Secretary of War	Commissioner of Indian Affairs*	Andrew Jackson	October 5, 1836–October 26, 1836 <sup>266</sup>	No <sup>267</sup>
Benjamin F. Butler	Secretary of War	Attorney General*	Andrew Jackson	October 26, 1836–March 3, 1837 <sup>268</sup>	No <sup>269</sup>

<sup>260</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC 108-222, at 6.

<sup>261</sup> *Dates of Sessions, supra* note 82 (noting that the 21st Congress adjourned on March 3, 1831 and the 22nd Congress did not convene until December 5, 1831).

<sup>262</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC NO. 108-222, at 6.

<sup>263</sup> *Dates of Sessions, supra* note 82 (noting that the 21st Congress adjourned on March 3, 1831 and the 22nd Congress did not convene until December 5, 1831).

<sup>264</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC NO. 108-222, at 6.

<sup>265</sup> *Dates of Sessions, supra* note 82 (noting that the 23rd Congress did not adjourn until June 30, 1834).

<sup>266</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC NO. 108-222, at 6.

<sup>267</sup> *Dates of Sessions, supra* note 82 (noting that the 24th Congress adjourned on July 4, 1836 and did not reconvene until December 5, 1836).

<sup>268</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC NO. 108-222, at 6.

<sup>269</sup> *Dates of Sessions, supra* note 82 (noting that the 24th Congress adjourned on July 4, 1836 and did not reconvene until December 5, 1836).

McClintock Young	Secretary of the Treasury	Chief Clerk	Martin Van Buren	March 3, 1841–March 5, 1841 <sup>270</sup>	Yes <sup>271</sup>
J. L. Martin	Secretary of State	Chief Clerk	William Henry Harrison	March 4, 1841–March 5, 1841 <sup>272</sup>	Maybe <sup>273</sup>
Selah R. Hobbie	Postmaster General	First Assistant Postmaster General*	William Henry Harrison	March 4, 1841–March 8, 1841 <sup>274</sup>	Maybe <sup>275</sup>
John D. Simms	Secretary of the Navy	Chief Clerk	William Henry Harrison	March 4, 1841–March 5, 1841 <sup>276</sup>	Maybe <sup>277</sup>

<sup>270</sup> TRIAL OF ANDREW JOHNSON, *supra* note 28, at 578.

<sup>271</sup> *Dates of Sessions*, *supra* note 82 (noting that the 26th Congress adjourned on March 3, 1841, meaning that it would depend on the time of day Young was appointed). President Van Buren's Secretary of the Treasury, Levi Woodbury, resigned two days prior to the end of the administration and President Van Buren "appointed McClintock Young . . . to perform temporarily the duties of Secretary of the Treasury until a successor to Mr. Woodbury, resigned, should be sworn into office according to law." TRIAL OF ANDREW JOHNSON, *supra* note 28, at 576. President William Henry Harrison did not nominate a replacement until March 5, 1841. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>272</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>273</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress convened for a special session on March 4, 1841, meaning that it would depend on the time of day Martin was appointed). President William Henry Harrison did not nominate a permanent Secretary of State until March 5, 1841. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>274</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>275</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress convened for a special session on March 4, 1841, meaning that it would depend on the time of day Hobbie was appointed). President William Henry Harrison did not nominate a permanent Postmaster General until March 6, 1841. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>276</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>277</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress convened for a special session on March 4, 1841, meaning that it would depend on the time of day Simms was appointed).

McClintock Young	Secretary of the Treasury	Chief Clerk	John Tyler	September 13, 1841–September 13, 1841 <sup>278</sup>	Maybe <sup>279</sup>
John D. Simms	Secretary of the Navy	Chief Clerk	John Tyler	September 11, 1841–October 11, 1841 <sup>280</sup>	Yes <sup>281</sup>
Albert M. Lea	Secretary of War	Chief Clerk	John Tyler	September 12, 1841–October 12, 1841 <sup>282</sup>	Yes <sup>283</sup>
McClintock Young	Secretary of the Treasury	Chief Clerk	John Tyler	March 1, 1843–March 8, 1843 <sup>284</sup>	Yes <sup>285</sup>

<sup>278</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>279</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress adjourned on September 13, 1841, meaning that it would depend on the time of day Young was appointed).

<sup>280</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>281</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress did not adjourn until September 13, 1841).

<sup>282</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>283</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress did not adjourn until September 13, 1841). Lea's tenure was longer than Simms's or McClintock's because President Tyler's first choice—former Secretary of War John McLean—declined his commission. *See* DAN MONROE, *THE REPUBLICAN VISION OF JOHN TYLER* 108 (2003). He appointed John C. Spencer vis-à-vis a recess appointment. *See id.*

<sup>284</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>285</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress did not adjourn until March 3, 1843). President Tyler nominated John C. Spencer to serve as the permanent Secretary of the Treasury on March 3, 1843. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

Hugh S. Lagaré	Secretary of State	Attorney General*	John Tyler	May 9, 1843– June 21, 1843 <sup>286</sup>	No <sup>287</sup>
William S. Derrick	Secretary of State	Chief Clerk	John Tyler	June 21, 1843– June 24, 1843 <sup>288</sup>	No <sup>289</sup>
Abel P. Upshur	Secretary of State	Secretary of the Navy*	John Tyler	June 24, 1843– July 23, 1843 <sup>290</sup>	No <sup>291</sup>
John Nelson	Secretary of State	Attorney General*	John Tyler	February 29, 1844– March 31, 1844 <sup>292</sup>	Yes <sup>293</sup>

<sup>286</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>287</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress adjourned on March 3, 1843 and the 28th Congress did not convene until December 4, 1843). Hugh S. Lagaré died in office. It is interesting that the Johnson papers note that William S. Derrick began serving as *Acting* Secretary of State beginning on June 8, 1843. This is because Lagaré was traveling to Boston for the dedication of the Bunker Hill Monument and was therefore not in Washington to oversee the department. *See* TRIAL OF ANDREW JOHNSON, *supra* note 28, at 579; *see also* Lagaré, *Hugh Swinton*, ENCYCLOPEDIA BRITANNICA (1911), <https://perma.cc/3YFC-K94T>.

<sup>288</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>289</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress adjourned on March 3, 1843 and the 28th Congress did not convene until December 4, 1843).

<sup>290</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>291</sup> *Dates of Sessions*, *supra* note 82 (noting that the 27th Congress adjourned on March 3, 1843 and that the 28th Congress did not convene until December 4, 1843).

<sup>292</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>293</sup> *Dates of Sessions*, *supra* note 82 (noting that the 28th Congress did not adjourn until June 17, 1844).



Lewis Warrington	Secretary of the Navy	Captain, US Navy*	John Tyler	February 29, 1844–March 26, 1844 <sup>294</sup>	Yes <sup>295</sup>
McClintock Young	Secretary of the Treasury	Chief Clerk	John Tyler	May 2, 1844–July 4, 1844 <sup>296</sup>	Yes <sup>297</sup>
McClintock Young	Secretary of the Treasury	Chief Clerk	Zachary Taylor	March 6, 1849–March 8, 1849 <sup>298</sup>	Yes <sup>299</sup>
Selah R. Hobbie	Postmaster General	First Assistant Postmaster General*	Zachary Taylor	March 6, 1849–March 8, 1849 <sup>300</sup>	Yes <sup>301</sup>
Reverdy Johnson	Secretary of War	Attorney General*	Zachary Taylor	March 8, 1849–March 14, 1849 <sup>302</sup>	Yes <sup>303</sup>

<sup>294</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7 (2005).

<sup>295</sup> *Dates of Sessions, supra* note 82 (noting that the 28th Congress did not adjourn until June 17, 1844).

<sup>296</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 7.

<sup>297</sup> *Dates of Sessions, supra* note 82 (noting that the 28th Congress did not adjourn until June 17, 1844).

<sup>298</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>299</sup> *Dates of Sessions, supra* note 82 (noting that the 31st Congress convened for a special session from March 5, 1849 to March 23, 1849).

<sup>300</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>301</sup> *Dates of Sessions, supra* note 82 (noting that the 31st Congress convened for a special session from March 5, 1849 to March 23, 1849).

<sup>302</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>303</sup> *Dates of Sessions, supra* note 82 (noting that the 31st Congress convened for a special session from March 5, 1849 to March 23, 1849).

Samuel J. Anderson	Secretary of War	Chief Clerk	Millard Fillmore	July 23, 1850– July 24, 1850 <sup>304</sup>	Yes <sup>305</sup>
Winfield Scott	Secretary of War	Major General, US Army*	Millard Fillmore	July 24, 1850– August 15, 1850 <sup>306</sup>	Yes <sup>307</sup>
Daniel C. Goddard	Secretary of the Interior	Chief Clerk	Millard Fillmore	July 23, 1850– August 15, 1850 <sup>308</sup>	Yes <sup>309</sup>
Daniel C. Goddard	Secretary of the Interior	Chief Clerk	Millard Fillmore	August 27, 1850– September 16, 1850 <sup>310</sup>	Yes <sup>311</sup>

<sup>304</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>305</sup> *Dates of Sessions*, *supra* note 82 (noting that the 31st Congress did not adjourn until September 30, 1850). After the death of President Taylor, the entire Cabinet submitted their resignations as was customary, expecting President Fillmore to refuse them. However, Fillmore accepted them, only asking that they stay on for a month, which most refused. *See* PAUL FINKELMAN, MILLARD FILLMORE 73–74 (Arthur M. Schlesinger, Jr. & Sean Wilentz, eds. 2011). Hence the unexpected gap.

<sup>306</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>307</sup> *Dates of Sessions*, *supra* note 82 (noting that the 31st Congress did not adjourn until September 30, 1850).

<sup>308</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>309</sup> *Dates of Sessions*, *supra* note 82 (noting that the 31st Congress did not adjourn until September 30, 1850).

<sup>310</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8. This is not a typo. After Goddard's first tenure as Secretary ad interim, the President appointed, with the advice and consent of the Senate, Thomas M. T. McKennan. McKennan resigned after only serving in the post eleven days. *See id.*

<sup>311</sup> *Dates of Sessions*, *supra* note 82 (noting that the 31st Congress did not adjourn until September 30, 1850).

Charles M. Conrad	Secretary of State	Secretary of War*	Millard Fillmore	October 25, 1852–November 6, 1852 <sup>312</sup>	No <sup>313</sup>
William Hunter	Secretary of State	Chief Clerk	Franklin Pierce	March 4, 1853–March 7, 1853 <sup>314</sup>	Maybe <sup>315</sup>
Horatio King	Postmaster General	First Assistant Postmaster General*	James Buchanan	March 9, 1859–March 14, 1859 <sup>316</sup>	Yes <sup>317</sup>
Isaac Toucey	Secretary of the Treasury	Secretary of the Navy*	James Buchanan	December 10, 1860–December 12, 1860 <sup>318</sup>	Yes <sup>319</sup>
William Hunter	Secretary of State	Chief Clerk	James Buchanan	December 15, 1860–December 17, 1860 <sup>320</sup>	Yes <sup>321</sup>

<sup>312</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 8.

<sup>313</sup> *Dates of Sessions, supra* note 82 (noting that the 32nd Congress adjourned on August 31, 1852 and did not reconvene until December 6, 1852).

<sup>314</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>315</sup> *Dates of Sessions, supra* note 82 (noting that the 32nd Congress adjourned on March 3, 1853 and the 33rd Congress convened for a special session on March 4, 1853, meaning that it would depend on the time of the day Hunter was appointed).

<sup>316</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>317</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress convened for a special session on March 4, 1859 that stretched until March 10, 1859).

<sup>318</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>319</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress did not adjourn until March 3, 1861).

<sup>320</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>321</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress did not adjourn until March 3, 1861).

Horatio King	Postmaster General	First Assistant Postmaster General*	James Buchanan	January 1, 1861–February 12, 1861 <sup>322</sup>	Yes <sup>323</sup>
Joseph Holt	Secretary of War	Postmaster General*	James Buchanan	January 1, 1861–January 18, 1861 <sup>324</sup>	Yes <sup>325</sup>
Moses Kelly	Secretary of the Interior	Chief Clerk	James Buchanan, Abraham Lincoln	January 10, 1861–March 5, 1861 <sup>326</sup>	Yes <sup>327</sup>
John P. Usher	Secretary of the Interior	Assistant Secretary of the Interior*	Abraham Lincoln	January 1, 1863–January 8, 1863 <sup>328</sup>	Yes <sup>329</sup>
George Harrington	Secretary of the Treasury	Assistant Secretary of the Treasury*	Abraham Lincoln	July 1, 1864–July 5, 1864 <sup>330</sup>	Yes <sup>331</sup>

<sup>322</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>323</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress did not adjourn until March 3, 1861).

<sup>324</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>325</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress did not adjourn until March 3, 1861).

<sup>326</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 9.

<sup>327</sup> *Dates of Sessions, supra* note 82 (noting that the 36th Congress did not adjourn until March 3, 1861).

<sup>328</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 10.

<sup>329</sup> *Dates of Sessions, supra* note 82 (noting that the 37th Congress did not adjourn until March 3, 1863).

<sup>330</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 10.

<sup>331</sup> *Dates of Sessions, supra* note 82 (noting that the 38th Congress did not adjourn until July 4, 1864).