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Invalid appointments and the restoration of DACA

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After long uncertainty, the Deferred Action for Childhood Arrivals, aka DACA, program has finally been restored to its original terms.

In the wake of the U.S. Supreme Court's decision in June that the Department of Homeland Security's rescission of DACA was arbitrary and capricious under the Administrative Procedure Act, many Dreamers who had become eligible during the pendency of the litigation applied to the program for the first time. *See Department of Homeland Securty et al. v. Regents of the University of California et al.*, 2020 DJDAR 5909 (June 18, 2020). Current DACA holders also applied for advance parole — a feature of the program permitting travel abroad — for the first time since the Trump administration announced the rescission. But those applications lingered for months while DHS remained silent as to whether, when and how the agency would comply with the Supreme Court's decision.

DHS broke its silence on July 28 when Acting Secretary Chad F. Wolf issued a memorandum drastically cutting core components of the program. The memorandum directed DHS to reject all pending and future initial requests for DACA, to reject all pending and future applications for advance parole absent exceptional circumstances, and to shorten the time to renew DACA status from two years to one year, pending DHS's "thorough consideration" of the program as a whole.

Plaintiff groups across the country quickly challenged Wolf's memorandum on the theory that Wolf was not a valid acting secretary. Most recently, Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York ruled that Wolf was not validly appointed and vacated the Wolf memo. Though the court ruled on statutory grounds, Wolf's elevation is unlawful for an independent reason: that the manner of Wolf's appointment — via an acting secretary's invalid attempt to modify a succession order — violates the appointments clause under Article II of the U.S. Constitution. While the judiciary checked the executive's abuse of power in this instance, grave constitutional risks exist within the statutory framework governing vacancies for the top position of DHS that have yet to be remedied.

Legal and Factual Background

Unless Congress provides otherwise, most federal vacancy appointments are governed by the Federal Vacancies Reform Act. The FVRA provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency" when a presidential appointment requires the Senate's advice and consent. The FVRA applies *unless* an express statutory provision "authorizes the President, a court, or the head of an Executive department" to designate an officer to serve in an acting capacity.

The Homeland Security Act is one such exception. It provides an alternate rule for filling vacancies in DHS. As relevant here, if the top three positions of DHS are vacant, 6. U.S.C. Section 113(g) provides that notwithstanding the FVRA, the "Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." In other words, the secretary may create a succession plan for who will temporarily serve as the head of the department if there is a vacancy.

Wolf's purported appointment occurred pursuant to the HSA and is the product of a series of delegations under that statute. In December 2016, then-Secretary of Homeland Security Jeh Johnson issued "DHS Orders of Succession and Delegations of Authorities for Named Positions," a document that has since served as a repository for changes to the succession order governing the office of the secretary.

In February 2019, then-Secretary Kirstjen Nielsen issued the "February Delegation," a document amending Johnson's delegation and setting two separate tracks for delegating authority to an acting secretary in the event of a vacancy: one applicable to vacancies caused by the secretary's death, resignation or inability to perform the office's functions; and one (set out in "Annex A" to the February Delegation) applicable to vacancies occurring because the secretary was unavailable to act during a disaster or catastrophic emergency. At this time, the succession orders for both tracks would be based on the order in Executive Order 13753. In the final days of her tenure, Secretary Nielsen issued the "April Delegation" amending Annex A to establish a succession order that gave greater prominence to the commissioner of U.S. Customs and Border Patrol. Significantly, the April Delegation did not change the event that triggered application of Annex A. Thus, at this point, Annex A applied only if the secretary was unavailable due to a disaster or catastrophic emergency.

Secretary Nielsen thereafter resigned. But rather than following Executive Order 13753 — the succession order track applicable in the event of resignation — the department followed the amended Annex A, and then-CBP Commissioner Kevin McAleenan assumed the role of acting secretary.

In November 2019, then-Acting Secretary McAleenan issued the "November Delegation" further amending DHS's succession order so that Annex A — rather than Executive Order 13753 — applied when a secretary resigned. He also changed the order of succession in Annex A to give greater prominence to the undersecretary for strategy, policy, and plans.

Days later, McAleenan resigned, and Wolf, then-undersecretary for strategy, policy, and plans, assumed the role of acting secretary pursuant to Annex A, as the other offices higher in that succession order were vacant.

Batalla Vidal v. Wolf

When Judge Garaufis set out to resolve the legality of Wolf's appointment, he was not operating on a blank slate. The Government Accountability Office and district courts in California and Maryland had already determined that Wolf's appointment was either invalid or likely invalid under the HSA.

Consistent with those decisions, Judge Garaufis ruled that, under the HSA, Wolf lacked statutory authority to serve as acting secretary and therefore the Wolf memorandum was not an exercise of legal authority. *Batalla Vidal v. Wolf*, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). The court explained that when Secretary Nielsen issued her April Delegation, she "amended the order of officials in Annex A but did nothing to change when Annex A applied," which was "in the event [the secretary is] unavailable to act during a disaster or catastrophic emergency." As a result, when Secretary Nielsen resigned, Executive Order 13753, not Annex A, governed the order of succession, meaning that another official — the director of the Cybersecurity & Infrastructure Agency — "should have assumed the role" as acting secretary, not McAleenan.

McAleenan thus "had no authority" to issue the November Delegation that "had the effect of implanting Mr. Wolf as Acting Secretary of Homeland Security," and Wolf, in turn, "did not possess statutory authority when he assumed the role

of Acting Secretary in November 2019." Because Wolf's appointment was invalid, the court concluded that the Wolf memorandum should be set aside under the Administrative Procedure Act.

The principles underlying this decision are correct. The impact and importance of the DACA program cannot be denied; due to the gravity of the protections at stake for the Dreamers, "[h]olding senior government officials to their word is not an 'ideal and useless formality.'" *Casa de Maryland v. Wolf*, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020). As the Supreme Court recognized in reinstating DACA this past June, "when so much is at stake ... 'the Government should turn square corners in dealing with people.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020). And the government has not turned square corners: it has done so neither in rescinding DACA in the first place, nor in its responses to the Supreme Court's opinion holding that the government failed to follow the proper procedures with respect to DACA.

Appointments Clause

Significantly, Batalla Vidal did not reach the issue of whether Wolf was validly appointed as acting secretary under Article II of the U.S. Constitution. The appointments clause authorizes only two constitutionally permissible methods for appointing federal officers: (1) by the president with advice and consent of the Senate; and (2) by the president, the courts, and heads of executive departments, as authorized by statute. See U.S. Const. art. II, Section 2. "Principal" officers must be appointed by the first method, while "inferior" officers can be appointed by either method. *See Edmond v. United States*, 520 U.S. 651, 660 (1997).

"[B]ecause of the temporary nature of the office," "acting heads of department" are sometimes considered "inferior officer[s]" who may be appointed by either method. *United States v. Smith*, 962 F.3d 755, 765 (4th Cir. 2020). But even an acting department head — like Wolf — must be appointed to the office by someone vested with the appointment power. Thus, even if Wolf can be said to be acting as an inferior officer in exercising the secretary's powers on a temporary basis, he still must have been appointed acting secretary by the president, the courts, or the head of an executive department.

But Wolf was never appointed as acting secretary by any of the methods spelled out in Article II. In fact, he was never appointed to that role by anyone. President Donald Trump picked him for the role through a Twitter post, and Wolf purported to assume the role by virtue of the November Delegation, a succession order promulgated by his immediate predecessor.

Even if that succession order could be considered an appointment of Wolf by Acting Secretary McAleenan, McAleenan was not — and was never Senate confirmed as — the actual head of the DHS. He merely served as acting secretary pursuant to a temporary appointment as an inferior officer by Secretary Nielsen. Nor did Congress itself directly vest any authority in the office to which McAleenan was appointed — CBP commissioner — to serve as head of department, exercising the appointment power, in the event of a vacancy.

In fact, it is only by characterizing Acting Secretary McAleenan as an inferior officer — rather than a department head who must be Senate confirmed to that role — that McAleenan's own appointment to that role by Secretary Nielsen can be reconciled with the appointments clause. Either McAleenan, as acting secretary, was an inferior officer — not truly "head" of the department — and therefore lacked the appointment power entirely, or he was head of the department, rather than an inferior officer, and could not have been appointed by Secretary Nielsen.

As a result, Wolf was not appointed by a constitutionally permissible method under the appointments clause, thereby raising constitutional concerns regarding the application of the HSA and providing an additional basis to void the Wolf memorandum.

Conclusion

Though the DACA program has been restored, the infirmities with the HSA remain. As of this article, Wolf remains the nominal acting secretary, and his other actions in that role have largely escped challenge. At a minimum and in the future, the HSA must be read narrowly to avoid these constitutional difficulties. The HSA was never intended — and before the Trump administration, was never used — to authorize a series of successive acting secretaries to name their successors. The HSA vests the authority to promulgate succession orders only in the "secretary," not the "acting secretary," and the statute expressly distinguishes between those two positions. 6 U.S.C. Section 113(g).

In light of the attendant constitutional difficulties, Congress cannot be understood to have authorized someone it never confirmed as head of department to hand the reins to one of the most powerful federal agencies — with coercive authority over millions of U.S. immigrants, and the ability to send troops into U.S. cities and conduct surveillance of American citizens — without any oversight by Congress or even any by a Senate-confirmed officer. Congress may need to revisit this provision and clarify its operation to prevent the reality that persisted throughout the Trump administration — a series of invalid acting secretaries heading one of our nation's most powerful agencies. ■

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