

Acting Attorneys General

From 1870 until 1953, the Solicitor General served as Acting Attorney General in the event that the office of Attorney General was vacant or the Attorney General was absent or disabled. This plan of succession was modified by Reorganization Plan No. 4 of 1953 and by the codification in 1977 at 28 U.S.C. § 508 providing for the following statutory succession: Deputy Attorney General, Associate Attorney General, and in such order as the Attorney General shall designate, the Solicitor General and the Assistant Attorneys General.

March 30, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have prepared in the time available a list of all of the documented occasions in which individuals have served as Acting Attorney General because of a vacancy in the office of the Attorney General.¹ From the time of the establishment of the Department of Justice in 1870 until 1953, the statute governing succession to the office of Attorney General designated the Solicitor General as the individual who would be Acting Attorney General in case of the absence or disability of the Attorney General, or of a vacancy in the office.² Reorganization Plan No. 4 of 1953, § 2, 67 Stat. 636 (1953), designated the Deputy Attorney General to be the first in order of succession, followed by the Solicitor General. This change was subsequently codified in 28 U.S.C. § 508. In 1977, the statute was amended to include the Associate Attorney General as the official who is next in line immediately after the Deputy Attorney General. The Solicitor General and Assistant Attorneys General were listed as the officials next in the line of succession, subject to the Attorney General's discretion as to their sequence. The statute now reads as follows:

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attor-

¹ Undoubtedly there are other occasions that are not as well documented but that could be located with further research. This list should not be viewed as exhaustive.

² See Act of July 20, 1870, ch. 150, § 2, 16 Stat. 162, 162; Rev. Stat. § 347 (1873); 5 U.S.C. § 293 (1952).

ney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

28 U.S.C. § 508.

We have found records of the following officials having acted as Attorney General during vacancies in that office pursuant to these various provisions:

<i>Name</i>	<i>Dates of Service</i>	<i>Reason for Vacancy</i>
Solicitor General Robert H. Bork ³	October 21, 1973 to January 3, 1974	Resignation of Elliot L. Richardson
Deputy Attorney General Richard G. Kleindienst	March 2, 1972 to June 12, 1972	Resignation of John N. Mitchell
Deputy Attorney General Ramsey Clark	October 3, 1966 to March 2, 1967	Resignation of Nicholas deB. Katzenbach
Deputy Attorney General Nicholas deB. Katzenbach	September 4, 1964 to February 10, 1965	Resignation of Robert F. Kennedy
Solicitor General Phillip B. Perlman	April 7, 1952 to May 27, 1952	Resignation of J. Howard McGrath
Solicitor General Francis Biddle	July 10, 1941 to September 5, 1941	Resignation of Robert H. Jackson
Solicitor General James M. Beck	March 4, 1925 to March 16, 1925	Resignation of Harlan Fiske Stone
Solicitor General John K. Richards	April 1, 1901 to April 5, 1901	Resignation of Joseph McKenna
Solicitor General John K. Richards	January 18, 1898 to February 1, 1898	Resignation of John W. Griggs
Solicitor General Samuel H. Phillips	October 24, 1881 to January 2, 1882	Resignation of Wayne MacVeagh
Secretary of the Interior Orville H. Browning	March 3, 1868 to July 14, 1868	Resignation of Henry Stanberry

³ At the time of Mr. Bork's service, there were vacancies in the offices of both the Attorney General and the Deputy Attorney General, each having resigned on the same day. The office of the Associate Attorney General had not yet been created. In *United States v. Halmo*, 386 F. Supp. 593 (E.D. Wis. 1974), the court held that Mr. Bork became Acting Attorney General pursuant to 28 U.S.C. § 508(b). The court also upheld his service as Acting Attorney General for an unlimited period of time.

<i>Name</i>	<i>Dates of Service</i>	<i>Reason for Vacancy</i>
Assistant Attorney General J. Hubley Ashton	July 17, 1866 to July 23, 1866	Resignation of James Speed
Secretary of the Navy John Y. Mason ⁴	March 18, 1848 to July 1, 1848	Resignation of Nathan Clifford

There is only one period on this list (for two-and-a-half months in late 1973) during which there was a sustained vacancy in both of the Department's two top positions. The longest absence we have documented in the office of Attorney General during which an Acting Attorney General served is approximately five months. We are aware of no other hiatus between confirmed Attorneys General in excess of five months.

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⁴ The President designated Mr. Browning, Mr. Ashton, and Mr. Mason prior to the establishment of the Department of Justice. Mr. Mason had previously served as Attorney General from March 4, 1845 until September 9, 1846.