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## ***BERNHARDT'S BAD ACTORS***

or

### *Interior's Detour Around Senate Confirmation*

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Synopsis:

- *Eight political appointees are leading most of the Department of the Interior bureaus without the required "advice and consent" of the Senate.*
  - *President Trump's tactic violates fundamental "checks and balances".*
  - *Acting Secretary of the Interior David Bernhardt is complicit in these violations.*
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**Act 1. Lead Interior officials are illegally "acting" in roles that require Senate confirmation.**

The U.S. Department of the Interior (DOI) now has eight improperly-designated quasi-"acting" officials in charge of most of its major bureaus. These political appointees who manage DOI lack the "advice and consent" of the Senate that is required to fully serve in their positions under the Appointments Clause of the Constitution and under Federal statutes. They control vast expanses - over 450 million acres - of the public's frequently-visited National Parks, National Wildlife Refuges and Bureau of Land Management lands,

amounting to almost one-fifth of the nation's land area.<sup>1</sup> Tens of thousands of DOI staff must answer to their orders and decision. Further, they hold the keys to unlocking billions of dollars' worth of Federal oil, gas, geothermal, wind, coal, timber, grazing lands and other Federal resources tied to those lands. One official, the Solicitor, decides DOI's legal positions in major natural resource disputes and another serves in the sensitive job of Special Trustee to Native Americans. The Administration is allowing them to work (and be paid by the taxpayers) without being confirmed by the Senate.

This is not some quirk of circumstances. After more than two years of Donald Trump's presidency it now is revealed as a deliberate tactic of the White House.<sup>2</sup> It violates the Constitution's fundamental "checks and balances" framework. If it goes unchallenged by the Senate, this Trump practice will pave the way for future Presidents to also successfully use the tactic of employing lesser, unconfirmed, political appointees to basically do the day-to-day running of whole agencies, not just DOI but other agencies too. It would be a step towards an unchecked and highly politicized autocracy. Such a frightening erosion of the Constitution cannot continue.

The DOI is tied for the lowest rate among all Federal agencies of actual Senate confirmation for those positions that require it -- a paltry 41% (as of February 2019). For most of the open DOI bureau leadership positions the President has not bothered to nominate anyone to fill them.<sup>3</sup>

When questioned about his record low number of Senate-confirmed officials compared to any other modern President Mr. Trump openly stated: ***I like acting because I can move so quickly. It gives me more flexibility.***<sup>4</sup> However, he is ignoring Federal law on designating "acting" officials (explained below). The President's goal is transparent: he aims to hollow out the normal, time-tested administrative framework of the Federal government and instead employ low-level, often unqualified, political appointees who are more "responsive" (Trump's word) and more pliable to his ends.

As with much else he does Mr. Trump's approach insults the Separation of Powers enshrined in the Constitution. The President is detouring around the Appointments Clause in Article II, Section 2, which mandates (emphasis added):

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<sup>1</sup> DOI. 2010. *Introduction To Interior Acquisitions: A Guide for Small Businesses*, Office of Small and Disadvantaged Business Utilization Report, p. 4, at: <https://www.doi.gov/sites/doi.gov/files/migrated/pmb/osdbu/upload/dbwdoi.pdf> .

<sup>2</sup> Doyle, M. 2019, "With vacancies galore, 'acting' leaders gain more time," *E&E News*, Jan. 31, at: <https://www.eenews.net/greenwire/stories/1060119173> .

<sup>3</sup> See, U.S. Government Accountability Office (GAO), Federal Vacancies Reform Act webpage and database "Search Federal Vacancies for Current Administration," at: <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>, search under Department of the Interior vacancies.

<sup>4</sup> Eilperin, J., et al. 2019. "Agency vacancies worrying the GOP," *Washington Post*, Feb. 4, p. A1, at: [https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-accumulate-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311\\_story.html](https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-accumulate-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html). Pres. Trump quotes in the article are per his interview with CBS News, Feb. 3, 2019.

[The President] ..... *by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.*

This give and take between the two branches represents an essential check and balance. The President is allowed to appoint acting officers to those positions, but only temporarily. However, within DOI now, these eight listed key positions have been long-occupied by non-Presidentially appointed and non-Senate confirmed “politicals” fully performing in the roles of the offices, but who merely have not been given an acting title (they are called “**bad actors**” herein):

- **Solicitor**, played by Daniel Jorjani, Principal Deputy Solicitor
- **Assistant Secretary for Policy, Management and Budget**, played by Susan Combs, Senior Advisor to the Secretary
- **Assistant Secretary for Fish and Wildlife and Parks**, played by Andrea Travnicek, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
- **Director, Bureau of Land Management**, played by Brian Steed, Deputy Director for Policy and Programs
- **Director, National Park Service**, played by P. Daniel Smith, Deputy Director
- **Director, Office of Surface Mining Reclamation and Enforcement**, played by Glenda Owens, Deputy Director
- **Director, U.S. Fish and Wildlife Service**, played by Margaret Everson, Principal Deputy Director
- **Special Trustee for American Indians**, played by Jerold Gidner, Principal Deputy Special Trustee

All of those DOI roles require Senate confirmation; none have it, going back to the Trump Inauguration on January 20, 2017. The individuals in those roles are violating the Federal Vacancies Reform Act (FVRA), which allows for acting officials, but only under detailed and time-limited conditions, generally for a maximum of 210 days with very limited exceptions, with which none of those individuals now comply.<sup>5</sup> These eight **bad actors** either never qualified as acting under FVRA or, even if they once were qualified, they were not properly appointed by the President or now have long exceeded the time period that they could have stayed if they had been properly appointed. They are now, in effect, “deputies to nobody”. But, nothing in Federal law or practice allows deputies to be elevated

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<sup>5</sup> 5 U.S.C. § 3345 *et seq.* The word “reform” is in FVRA’s title specifically because earlier Presidents had tried various ways to avoid the Senate advice and consent requirement from time to time.

to the chief position in a bureau and stay for a year or more in that role merely because the President and the DOI's Acting Secretary want to avoid the confirmation process.

Throughout his presidency his own party has controlled the Senate, which makes Mr. Trump's laggard approach even less justifiable. It is a negative drag on the morale of career staff to never have their bureau's official leadership position filled.

Senate confirmation offers numerous benefits – that is why the Founders wrote it into our nation's charter. It provides accountability and a record upon which to judge the nominee's qualifications. It allows Senators and affected stakeholders to engage in a public process to ensure nominees are “vetted” to confirm that they intend to serve the nation's interests. Such confirmed officials have more authority and greater willingness to make hard decisions. **Senators in the 116<sup>th</sup> Congress have no obligation to accept President Trump's tactic and every reason to demand that the Administration respect their competence to provide advice and consent under Article II, Section 2, for the unconfirmed individuals in those positions.**

### **Act II. David Bernhardt's starring role.**

Secretary of the Interior nominee David Bernhardt has aided and abetted these violations through his written “delegations” to the eight listed officials using word games that merely give the appearance of FVRA compliance. Mr. Bernhardt and his predecessor, the discredited former Secretary Ryan Zinke, who exited the stage under a dark ethics cloud, signed what they called “Temporary Redelegations of Authority” for all of the bad actors.<sup>6</sup> These unprecedented Secretarial Orders, now issued at least six times going back at least to November of 2017, allow those lesser political appointees to occupy the higher jobs, but also claim they are not exercising the actual legal authority that goes with the higher position.<sup>7</sup> That is rank fiction, like saying Tom Brady can play the position and throw passes, but he is not really the quarterback if the team roster does not put “quarterback” next to his name.

Other deceptions in the Redelegations are that they are “temporary,” since they have gone on continually for more than one year and three months now, plus this gross deceit (Sec. 1; emphasis added):

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<sup>6</sup> Secretary (Acting) of the Interior, Order No. 3345, Amendment No. 24, “Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions,” Jan. 29, 2019, at: [https://www.doi.gov/sites/doi.gov/files/elips/documents/so\\_3345\\_amendment\\_24\\_signed.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3345_amendment_24_signed.pdf) . Note that Sec. 5 of the Order extends the “Redelegation” for four months, through May 30, 2019, which is the longest such extension of the Orders to date. Bernhardt is a highly knowledgeable lawyer who was Mr. Zinke's top deputy during 2017 and 2018. It is likely that he was the author of the Temporary Delegation Orders or, at the least, he was heavily involved.

<sup>7</sup> The oldest known such order is Secretarial Order No. 3345, Amendment No. 12, “Temporary Redelegation of Authority for Certain Vacant Non - Career Senate - Confirmed Positions” (Nov. 14, 2017).

*This Order is Intended to ensure uninterrupted management and execution of the duties of these vacant non-career positions during the Presidential transition pending Senate-confirmation of new non-career officials.*

Mr. Trump has been in office for two years; his “transition” ended long ago. Further, the President has submitted, and now has “pending,” only two nominees for the eight positions at issue.<sup>8</sup> Americans should not tolerate such capricious deceit in an official Secretarial Order. It is not a game. And the delay obviously is not the fault of the Senate for the large majority of the positions for which the President has nominated no one.

Another fiction in the latest Bernhardt Redlegation Order is in Section 2 and its reliance on “Section 2 of the Reorganization Plan No. 3 of 1950”. That was the post-World War II DOI basic organization act signed by President Harry Truman. It contains no delegation authority that somehow could now override the specific rules about acting officials in FVRA, which Congress adopted in 1998.<sup>9</sup>

The recent Bernhardt Redelegations had an alarming effect – they benefitted him! Section 4 states the **bad actors** are not supposed to actually exercise any decision-making power that statutes or DOI regulations may have allowed for their positions. This means that, in many contexts, the only higher official left in DOI’s hierarchy with the power necessary to make such decisions is the Interior Secretary himself. Thus, the tactic of avoiding the Senate and using the Redlegation process amounts to a Secretarial “power grab” -- and one dripping with irony and confusion because there is no Senate-approved Interior Secretary now either, only the Acting Mr. Bernhardt.

**Because of his involvement in this dodge around the Constitution in which Bernhardt not only has arrogated all of his DOI subordinates’ decision-making power up to himself, but also is assisting President Trump in sidestepping the Senate’s authority to confirm or deny those same subordinate officials, the Senate should reject his nomination.** If the Senate were to confirm him, then it would itself become a player in this tragedy, which after two years is verging on a farce.

### **Act. III. Behind the scenes of two actors.**

Below are details on two of the DOI officials initially named in acting roles and still in the same positions, in violation of FVRA’s time limits, well more than one year later:

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<sup>8</sup> See pending nominations before the Senate Energy and Natural Resources Committee, at: <https://www.energy.senate.gov/public/index.cfm/nominations>, indicating only Susan Combs’ nomination for Assistant Secretary for Fish and Wildlife and Parks, and David Vela’s held-over nomination from the 115<sup>th</sup> Congress as Director of the NPS; and GAO, FVRA database, at: <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>; and White House, Presidential Actions, at: <https://www.whitehouse.gov/presidential-actions/>. The President made a few unsuccessful nominations to the positions at issue in the 115<sup>th</sup> Congress over the last two years, that is, who either were denied confirmation or withdrew.

<sup>9</sup> FVRA explicitly prohibits agency heads from relying on basic agency delegation powers to avoid the statute’s restrictions on “acting” officials. 5 U.S.C. § 3347(b).

**Paul Daniel (Dan) Smith:** Upon his appointment an NPS press release (PR), issued on January 24, 2018, overtly stated (emphasis added):<sup>10</sup>

*Today, U.S. Secretary of the Interior Ryan Zinke ..... named Paul Daniel (Dan) Smith the National Park Service's **acting** director....*

Mr. Smith's listing on the NPS webpage makes clear that he is: "exercising the authority of the Director of the National Park Service".<sup>11</sup> Yet, somehow we are now to believe, despite the explicit PR, that he is not the acting director, just some lesser official sitting in that chair.

**Brian Steed:** Then-Secretary Zinke named him to run the Bureau of Land Management (BLM) in November of 2017. In a remarkable piece of Orwellian "double-speak," the DOI spokeswoman upon Steed's appointment stated (emphasis added):<sup>12</sup>

*Technically, **he is acting** with the full delegated functions, duties, responsibilities and authority of the BLM director **but does not have the title of 'acting BLM director,'**" Interior spokeswoman Heather Swift said of Steed.*

That is, Ms. Swift admitted that everything Mr. Steed is doing is fully the same as being the acting BLM director, but since he does not have the magical title he is somehow something else. Amazing fantasy.

The other six **bad actors** suffer from the same defects. However, DOI has tried harder to craft its messaging about their roles with less *1984*-like deception. The Senate and the Courts can look behind the scenes of DOI's word manipulations and judge the illegal reality. As stated in 1998 by former Senator Fred Thompson when FVRA was adopted, as an indication of Congress's intent:<sup>13</sup>

*As participants in the appointments process, we Senators have an obligation, I believe, to ensure that the appointments clause functions as it was designed, and that manipulation of executive appointments not be permitted.*

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<sup>10</sup> For documentation of these facts, see PEER's complaint dated Feb. 12, 2018, to the DOI's Inspector General, at: [https://www.peer.org/assets/docs/doi/2\\_12\\_18\\_IG\\_Complaint.pdf](https://www.peer.org/assets/docs/doi/2_12_18_IG_Complaint.pdf) .

<sup>11</sup> At: <https://www.nps.gov/aboutus/contactinformation.htm> .

<sup>12</sup> Yachnin, J., and S. Streater. 2017. "Is appointment of 'acting' BLM chief legal?" *E&E News*, Nov. 17, at: <https://www.eenews.net/eenewspm/stories/1060066917/> .

<sup>13</sup> 144 CONG. REC. S11021 (daily ed. Sept. 28, 1998).

## RECOMMENDATIONS

**i. The Senate should complete its Constitutional advice on David Bernhardt's nomination as Secretary by withholding its consent.** There are numerous other substantive and conflict-of-interest reasons to deny Mr. Bernhardt the promotion Mr. Trump is proposing for him, beyond his aiding and abetting the Appointments Clause and FVRA violations described herein. But those violations are enough. The Senate must protect its prerogatives.

**ii. Go to Court.** Any Senator should have the legal standing to go to Federal Court and challenge the Trump Administration's practice of negating the advice and consent mandate of some or all of the eight **bad actors**.<sup>14</sup> One or more Senators should take the initiative and sue on both Constitutional and FVRA violation grounds.<sup>15</sup>

**iii. Challenge the infirm actions.** Individual actions taken by the **bad actors** also can be challenged and declared void, thus "without force or effect".<sup>16</sup> These could include a variety of actions, including, but not limited to, personnel actions such as terminating or suspending any DOI employee under their direction. However, this is a more incremental, official-by-official, action-by-action remedy than a Senatorial challenge to the Administration's overall tactic. Further, a specific DOI action voided by a Court might then be quickly "fixed" by having the action then signed off instead by the Secretary, rendering a legal challenge potentially moot and ineffective. Nevertheless, the **bad actors** need "the hook" and the curtain needs to come down on them before they do more damage to our basic governmental framework.

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<sup>14</sup> For an example of Senators successfully suing over an Appointments Clause violation by former President Richard M. Nixon, see Williams v. Phillips, 360 F.Supp. 1363 (D.D.C. 1973), *motion for stay denied* 482 F.2d 669 (D.C. Cir. 1973).

<sup>15</sup> There would be no point in seeking a legal opinion from the GAO because the agency has made clear that it does not offer such opinions regarding the potential illegality of actions of officials who are violating FVRA. Rather, the GAO merely records basic information about agency compliance with FVRA such as the titles and numbers of vacant positions, and the GAO may report to Congress when a properly-appointed acting official "is serving longer than permitted by the act". See, <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act> . None of the eight officials involved in this report has ever been properly appointed or served as acting under FVRA, thus GAO would not report on them.

<sup>16</sup> Brannon, V. 2018. *The Vacancies Act: A Legal Overview*, Congressional Research Service Report No. 7-5700. At: <https://fas.org/sgp/crs/misc/R44997.pdf> .