



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Acting Agency Officials and Delegations of Authority

Committee on Administration and Management

Proposed Recommendation for Committee | ~~October 18~~ **November 4, 2019**

1 The federal government relies on both political appointees and career civil servants to
2 operate effectively. Federal law provides for over 1,200 agency positions whose occupants must
3 be appointed by the President with the advice and consent of the Senate (PAS positions).¹ But
4 there are often numerous vacancies in these positions—not only at the start of every
5 administration, but also at other times, including after initial appointees leave and particularly
6 during the final months of a President’s tenure.² Government officials routinely vacate offices
7 before a successor has been chosen. Research has shown that PAS positions in executive
8 departments and agencies are not staffed with Senate-confirmed or recess appointees one-fifth of
9 the time.³ These pervasive vacancies exist for several reasons, including increasing delays related
10 to the presidential-nomination and Senate-confirmation process.

11 Vacancies in PAS and other high-level positions may lead to agency inaction, generate
12 confusion among nonpolitical personnel, and lessen public accountability.⁴ At many agencies,
13 acting officials can temporarily fill the positions. Indeed, between January 20, 1981, and July 19,
14 2019, there were 168 confirmed cabinet secretaries, 3 recess-appointed cabinet secretaries, and

¹ SEN. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 216 (THE PLUM BOOK) (Comm. Print 2016), available at <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>.

² Anne Joseph O’Connell, Acting Agency Officials and Delegations of Authority 1 (September 16, 2019) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-acting-agency-officials>.

³ *Id.* at 16 (citing ANNE JOSEPH O’CONNELL, BROOKINGS INST., STAFFING FEDERAL AGENCIES: LESSONS FROM 1981–2016 (2017)).

⁴ Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 920–21 (2008).



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15 145 acting cabinet secretaries. In other words, acting officials constituted 46% of all the top
16 leaders in this period, though many of these interim officials served for short periods. Acting
17 officials are also prevalent in lower-level positions throughout the federal government. Similarly,
18 in the face of vacancies, agency leadership often can lawfully delegate certain duties that would
19 otherwise be done by a PAS or other high-ranking official to other officials within the agency.

20 The Federal Vacancies Reform Act of 1998 (Vacancies Act)⁵ provides for temporary
21 leadership primarily in single-headed executive departments and agencies. When it applies, the
22 Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions.
23 Congress has also enacted other agency-specific statutes to address vacancies, which sometimes
24 provide the exclusive succession process. Unfortunately, navigating these statutes can be
25 challenging because their requirements are often complex and it can be technologically difficult
26 to provide required reports. Currently, the government offers no formal training programs to
27 agencies on the Vacancies Act, other vacancy-related statutes, or delegations of authority in the
28 face of staffing vacancies.⁶

29 The stakes for compliance, however, can be high. Under the Vacancies Act, for instance,
30 ~~any~~ action taken by an acting official not serving under its terms “shall have no force or
31 effect” and may be susceptible to legal challenge.⁷ Even if the agency does not face legal
32 challenge, moreover, it could receive a formal violation letter from the Government

⁵ 5 U.S.C. §§ 3341–3349d.

⁶ The Department of Justice’s Office of Legal Counsel provided substantial guidance on the Act in 1999, on which agencies continue to rely. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (1999). ~~[Cite report and other OLC Opinions]~~ O.L.C. 60 (1999); *see also* O’Connell, *Acting Agency Officials*, *supra* note 2, at 38, 41 (describing interviews with agency officials and noting agencies’ continued reliance on OLC guidance from 1999). Certain portions of the 1999 Guidance have been superseded. *See, e.g., Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179 (2001) (concluding that question 13 of the 1999 Guidance was incorrect in concluding that a first assistant could only serve as an acting officer under section 3345(a)(1) if he or she had served as first assistant before the vacancy arose); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017) (holding that the prohibition in section 3345(b) on acting service during a nomination is not limited to first assistants, contrary to OLC’s conclusion in question 15 of the 1999 Guidance).

⁷ ~~45~~ 5 U.S.C. § 3348(d)(1); O’Connell, *Acting Agency Officials*, *supra* note 2, at ~~5-3~~ n.8. Some positions are excluded from this provision. *See* 5 U.S.C. § 3348(e).

Commented [ACUS1]: (1) ACUS: We included the additional language in footnote 6 (noting that certain portions of 1999 Guidance have been superseded) based on OLC comments/suggestions.

(2) OLC: With respect to the footnote, we agree with the redlined suggestion to cite other OLC opinions.

ACUS: Should we include any additional OLC Opinions beyond these two? List of DOJ Opinions, [search results](#) for “Vacancies Act” (15 Opinions total, 6 predate the 1998 legislation).

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33 Accountability Office (GAO). The Vacancies Act requires agencies to report vacancies,
34 nominations, and acting officials in covered positions to the Comptroller General; the
35 Comptroller General is charged with reporting violations of the time limits to various House and
36 Senate Committees, the President, and the Office of Personnel Management.⁸

The Vacancies Act

37 Under the Vacancies Act, acting officials generally may come from three categories of
38 government officials: (1) first assistants to the vacant positions; (2) Senate-confirmed officials
39 designated by the President; and (3) certain senior agency officials designated by the President.⁹
40 The “first assistant” to the vacant job is the default acting official.¹⁰ The Vacancies Act provides
41 two main alternatives to the first assistant for acting service, but the President must actively
42 select them.¹¹ First, “the President (and only the President) may direct” another Senate-
43 confirmed official—within the agency or outside it—to serve as the acting official.¹² Second,
44 “the President (and only the President)” may select “an officer or employee” who has not been
45 Senate-confirmed to serve in an acting capacity, but only if that person has worked in the agency
46 for at least 90 days during the year-long period before the vacancy arose and earns a salary at the
47 GS-15 level or higher.¹³

⁸ 45 U.S.C. § 3349(b).

⁹ *Id.* § 3345(a); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); O’Connell, Acting Agency Officials, *supra* note 2, at 5. ~~[Beef up, cite 5 U.S.C. § 3345(e)(1)]~~ There is a fourth category of allowed acting officials involving holdover appointees: an official serving a fixed term in a covered agency, who may stay in that position in an acting capacity after the term expires if the President has nominated her or him to an additional term. 5 U.S.C. § 3345(e)(1); *see also* O’Connell, Acting Agency Officials, *supra* note 2, at 5 n.23.

¹⁰ 5 U.S.C. § 3345(a)(1).

¹¹ ~~There is another category of allowed acting officials: An official serving a fixed term in a covered agency may stay in that position in an acting capacity after the term expires if the President has nominated her or him to an additional term. *Id.* § 3345(e)(1).~~

¹² *Id.* § 3345(a)(2).

¹³ *Id.* § 3345(a)(3).

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48 Acting officials can typically serve and use the title “acting” for 210 days from the
49 vacancy’s start.¹⁴ If the vacancy exists when a new President enters office, or occurs within the
50 next 90 days, the limit extends to 300 days. Nominations also extend these limits: an acting
51 official can continue serving through two pending nominations to the vacant job. If the
52 nomination is rejected or returned to the President under Senate rules, a new 210-day period of
53 permitted tenure begins from the date of rejection or return. In other words, an acting official
54 could conceivably serve for 210 (or 300) days before there is a nomination, during the pendency
55 of a first nomination, for 210 days after that nomination is returned, during the pendency of a
56 second nomination, and for a final 210 days if the second nomination is returned as well.¹⁵ These
57 extensions require careful tracking of nominations and Senate actions.

58 After the time limits established by the Vacancies Act have passed, agencies can often
59 continue to perform the functions of the vacant offices through delegations of authority, often by
60 the agency head.¹⁶ If the duties of the Senate-confirmed position are not exclusive to that job—
61 by statute or regulation—they can typically be delegated to a lower-level lower-level official.
62 Even if some duties are exclusive to a position, its other duties can be reassigned, leaving the
63 delegate with nearly the same power as an acting official. Delegations can operate far longer than
64 acting officials can serve.

65 The Vacancies Act requires the head of each executive agency to report certain
66 information about vacancies in covered offices and notify the Comptroller General of the United

Commented [ACUS2]: OLC: In this discussion of delegations of authority, it might be useful to address very generally who it is that delegates the authority. A supervising official? The head of the agency? Does it depend on which position is receiving the delegated authority?
ACUS: We have included some additional language here (“often by the agency head”) to address OLC comment above.

¹⁴ *Id.* § 3346(a)(1).

¹⁵ O’Connell, Acting Agency Officials, *supra* note 2, at 7. The time limits do not apply when the vacancy has been “caused by sickness.” 5 U.S.C. § 3346(a-); see also Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 66–67 (1999) (noting that an “acting officer may continue to serve until the sick PAS officer recovers” and is able to resume performing the office’s functions and duties).

¹⁶ [Cite relevant sections of report (pages 13–14). Flag legal issues, including constitutional issues. Reminder about legal issues outside scope.] O’Connell, Acting Agency Officials, *supra* note 2, at 11–12; see also id. at 13–15 (identifying several constitutional and statutory issues concerning delegation beyond the scope of this Recommendation).

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67 States and each House of Congress.¹⁷ The GAO, headed by the Comptroller General, currently
68 receives this information in hard copy. The GAO maintains these reports in an online searchable
69 database.¹⁸

Agency-Specific Statutes

70 In addition to the Vacancies Act, Congress has also enacted various agency-specific
71 statutes that, when applicable, may provide for temporary leadership, including for chairpersons
72 at some independent regulatory commissions.¹⁹ Some statutes may provide the exclusive
73 mechanism for agency succession, whereas other statutes may provide a non-exclusive
74 mechanism.²⁰ Because these agency-specific statutes vary, it is difficult to draw cross-cutting
75 conclusions about them. Their existence, however, further complicates the use of acting officials
76 and delegations.

The Need for ~~Greater Compliance and~~ Increased Transparency and Training on Vacancies Act Requirements

77 As the foregoing description shows, how and when agencies can use acting officials or
78 delegate authority can be complicated. There is often confusion about which positions and
79 agencies the Vacancies Act applies to and how the Act interacts with other agency-specific
80 statutes. Technological shortcomings also make compliance with agency reporting obligations
81 difficult. Some agencies have raised concerns that “[a]lthough the forms are online, the agency
82 must download them, fill them out, and send them in hard copy to the GAO (and to Congress).”²¹
83 Agencies also vary in how transparent they are about their use of acting officials and delegations

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Commented [ACUS3]: OLC: We would recommend editing or striking this sentence to avoid implying that there are multiple position-specific statutes that provide the exclusive mechanism for succession to PAS positions that would otherwise be covered by the Vacancies Reform Act. Pages 9 and 10 of the draft report identify only DHS’s statute as an example of an exclusive, position-specific mechanism that would displace the Vacancies Reform Act in certain circumstances.

ACUS: We added “may” twice, on lines 72 and 73, to address OLC comment above.

Commented [ACUS4]: ACUS: Revised title based on OLC comment.

¹⁷ 5 U.S.C. § 3349(a).

¹⁸ ~~[Cite relevant sections of report]~~ O’Connell, *Acting Agency Officials*, *supra* note 2, at 51–60.

¹⁹ ~~[Cite relevant sections of report]~~ *Id.* at 9–10; *see also id.* at 13–14 (identifying the legal issue of the applicability of the Vacancies Act in many of these circumstances where an agency-specific succession statute exists, which is beyond the scope of this Recommendation).

²⁰ O’Connell, *Acting Agency Officials*, *supra* note 2, at 9; *Id.* at 9.

²¹ *Id.* at 60.

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84 of authority. Some agencies do not disclose publicly acting titles and delegations of authority,²²
85 and there is currently no good source for comprehensive information about acting officials.

Commented [ACUS5]: ACUS: Included new footnote here based on OLC comment recommending citing Draft Report and noting agency-disclosure policies. Supplemented with Nou citation.

86 The goals of this Recommendation are to promote compliance with the Vacancies Act
87 and agency-specific succession statutes and, consistent with the Conference’s recent efforts to
88 promote access to agency information,²³ to improve transparency regarding the use of acting
89 officials and agency delegations of authority in the face of staffing vacancies. This
90 Recommendation does not purport to address any legal questions that may arise in the
91 application of the Vacancies Act.

92 This is a companion to Recommendation 2019-__, *Listing Agency Officials*, which
93 _____.²⁴

RECOMMENDATION

Acting Officials under the Vacancies Act

- 94 1. As a preliminary matter, agencies should determine if they are subject to the Federal
- 95 Vacancies Reform Act (Vacancies Act).
- 96 2. Agencies with at least one presidentially-appointed, Senate-confirmed (PAS) position
- 97 covered by the Vacancies Act should establish processes and procedures to comply with
- 98 the Act. Agencies should consider assigning responsibility for compliance with the

²² *Id.* at 44–46, 65–67. Although some agencies lack disclosure policies, some agencies have a practice of publishing permanent or standing delegations in the Federal Register or on the agency’s website. *Id.* at 65; see also Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 502–03 (2017) (contrasting agency practices at SEC and EPA).

²³ See, e.g., Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*, 84 Fed. Reg. 21392,139 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 21422,142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017). Earlier Conference recommendations in accord include Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

²⁴ Admin. Conf. of the U.S., Recommendation 2019-__, *Listing Agency Officials*, __ Fed. Reg. ____ (____).



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- 99 Vacancies Act to a position within the agency, rather than a particular person, and
100 identify that position on its website.
- 101 3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that
102 officials responsible for compliance with the Vacancies Act have adequate training.
- 103 a. Officials assigned to track time limits should understand the Senate confirmation
104 process (including the likelihood of multiple returns) and how to access important
105 dates (official submission dates of nomination, returns, etc.).
- 106 b. Agencies should, when needed, coordinate with the Government Accountability
107 Office (GAO) on their reporting requirements.
- 108 c. A government agency or other organization should provide government-wide
109 training on these issues. Agencies should avail themselves of this training.
- 110 4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order
111 of succession, agencies should formally name and disclose a first assistant position.
- 112 a. If there are multiple deputy positions to a covered position, agencies should
113 specify which deputy position is the first assistant position.
- 114 b. In the description of each first assistant position, agencies should explain that the
115 first assistant is the default acting official under the Vacancies Act.
- 116 5. Agencies with at least one PAS position covered by the Vacancies Act should
117 communicate the requirements of the Act to the relevant acting official(s).
- 118 6. Agencies with at least one PAS position covered by the Vacancies Act should disclose
119 acting officials on their websites, as well as start and, to the extent identifiable, permitted
120 end dates. **If an end date is not identifiable, an agency should instead explain why by**
121 **providing a brief description of the contingency or triggering event at issue (e.g., a**
122 **first/second nomination is pending, during which time the acting official may serve until**
123 **the nomination is confirmed, rejected, withdrawn, or returned under Senate rules).** If a
124 vacancy is not filled by an acting officer and the agency has identified an official to
125 perform the delegable functions of the office, the agency should disclose that official on
126 its website.

Commented [ACUS6]: OLC: It is unclear what a “permitted end date[.]” would be. If it means a *projected* end date for a current acting official’s “permitted” service, then that will rarely be known with certainty. Except in the unusual circumstance where the President has already had two nominations withdrawn, rejected, or returned, the expected tenure of a current acting official will depend on non-public, or necessarily indeterminate, information about how long a current nomination will be pending or about whether the President will nominate a first or second person for the position. Even when a 210-day (or 300-day) period expires for want of a nomination, acting service will again become permissible whenever the President makes a first or second nomination.



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Acting Officials Outside the Vacancies Act

- 127 7. Agencies that have PAS positions that are not covered by the Vacancies Act and for
128 which Congress has provided some alternative mechanism for designating acting officials
129 (e.g., acting chairperson) should, to the extent applicable, apply the foregoing
130 recommendations 2 through 6.

Succession Planning

- 131 8. All agencies should consider having clear and easily accessible succession plans on their
132 websites for PAS positions.

Delegations of Authority Related to Staffing Vacancies

- 133 9. All agencies should determine which functions and duties, if any, are exclusive to each
134 PAS position and which of the nonexclusive functions and duties, if any, should be
135 delegated in the face of staffing vacancies.
- 136 10. ~~Agencies~~To the extent reasonably possible, agencies should make their delegations of
137 authority in the face of staffing vacancies in PAS positions easily accessible on their
138 websites, ~~to the extent possible. These disclosures should include standing orders and ad~~
139 ~~hoc assignments~~ and also, for standing delegations, the Code of Federal Regulations.

GAO's Role Under the Vacancies Act

- 140 11. The GAO should consider changing its reporting system so that agencies can report
141 information online for vacancies, acting officials (including start and end dates), and
142 nominations.