The federal government relies on both political appointees and career civil servants to operate effectively. There are currently over 1,200 agency positions that are supposed to be filled through the Presidential-nomination and Senate-confirmation process; these jobs are known as PAS positions. But there are numerous vacancies in these positions—at the start of every administration, but also at other times, including in the final months of a President’s tenure. Indeed, between January 20, 1981, and July 19, 2019, there were 168 confirmed cabinet secretaries, 3 recess-appointed cabinet secretaries, and 145 acting cabinet secretaries. In other words, acting officials constituted 46% of all the top leaders in this period, though many of these interim officials served very short periods. Acting officials are also prevalent in lower-level positions throughout the federal government.

Commented [ACUS1]: Consider whether to include additional background information about the problems here that the Recommendation is targeted at resolving.

---

2 Anne Joseph O’Connell, Acting Agency Officials and Delegations of Authority 20 (September 16, 2019) (draft report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/draft-report-acting-agency-officials (database of cabinet secretaries, including acting secretaries of at least 10 days; also noting that acting officials serve shorter tenures on average).
3 Id. at 19, 100 (snapshot database of the staffing status of many Senate-confirmed positions in all 15 cabinet departments, EPA, and OMB as of April 15, 2019).
The Federal Vacancies Reform Act of 1998 (Vacancies Act)\(^4\) provides for temporary leadership primarily in cabinet departments and single-headed executive agencies.\(^5\) The Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions.

Generally, acting officials may come from three categories of government officials: (1) first assistants to the vacant positions; (2) Senate-confirmed officials designated by the President; and (3) certain senior agency officials designated by the President.\(^6\) For covered positions under the Vacancies Act, the “first assistant” to the vacant job is the default acting official.\(^7\) The Vacancies Act provides two main alternatives to the first assistant for acting service, but the President must actively select them.\(^6\) First, “the President (and only the President) may direct” another Senate-confirmed official—within the agency or outside it—to serve as the acting official.\(^9\) Second, “the President (and only the President)” may select “an officer or employee” who has not been Senate-confirmed to serve in an acting capacity, but only if that person has worked in the agency for at least 90 days during the year-long period before the vacancy arose and earns a salary at the GS-15 level or higher.\(^10\)

Acting officials can typically serve and use the title for 210 days from the vacancy’s start.\(^11\) If the vacancy exists when a new President enters the White House, or occurs within the next 60 days, the limit extends to 300 days.\(^12\) Nominations also extend these limits; an acting

\(^4\) 5 U.S.C. §§ 3341–3349d.

\(^5\) O’Connell, supra note 2, at 4 (explaining that the Vacancies Act covers almost all PAS position in the 15 cabinet departments and the single-headed executive agencies, but it does not generally cover commissioners and members of multi-leader independent regulatory commissions and boards).

\(^6\) NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); see also O’Connell, supra note 2, at 5.


\(^8\) There is another category of allowed acting officials: Someone who is 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(c)(1).

\(^9\) Id. § 3345(a)(2).

\(^10\) Id. § 3345(a)(3).

\(^11\) Id. § 3346(a)(1).

\(^12\) Id. § 3349a(b).
official can continue serving through two pending nominations to the vacant job.\textsuperscript{13} If the nomination is rejected or returned to the President under Senate rules, a new 210-day period of permitted tenure begins from the date of rejection or return.\textsuperscript{14} In other words, an acting official could conceivably have the title for 210 (or 300) days before there is a nomination, during the pendency of a first nomination, for 210 days after that nomination is returned, during the pendency of a second nomination, and for a final 210 days if the second nomination is returned as well.\textsuperscript{15}

There are also agency-specific succession statutes that provide for temporary leadership, including for chairpersons at some independent regulatory commissions.\textsuperscript{16} Some statutes provide the exclusive mechanism for agency succession, whereas other statutes provide a non-exclusive mechanism.\textsuperscript{17}

The Vacancies Act states that any action taken by an official who is not serving in accordance with the terms of the statute “in the performance of any function or duty of a vacant office... shall have no force or effect.”\textsuperscript{18}

After the time limits established by the Vacancies Act have passed, agencies can often continue to perform the functions of the vacant offices through delegations of authority (mostly “down” to lower-level officials but sometimes “up” to the agency head).\textsuperscript{19} If the duties of the Senate-confirmed position are not exclusive to that job—by statute or regulation—they can be delegated.\textsuperscript{20} Even if some duties are exclusive to a position, the other duties can be reassigned,

\begin{itemize}
\item \textsuperscript{13} Id. § 3346.
\item \textsuperscript{14} Id. § 3346(b)(2).
\item \textsuperscript{15} O’Connell, 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).
\item \textsuperscript{16} O’Connell, supra note 2, at 1, 9–10, 75–99.
\item \textsuperscript{17} Id. at 9.
\item \textsuperscript{18} 5 U.S.C. § 3348(d).
\item \textsuperscript{19} O’Connell, supra note 2, at 1.
\item \textsuperscript{20} Id. at 28.
\end{itemize}
leaving the delegate with nearly the same power as an acting official.21 Delegations can operate far longer than acting officials can serve.22

The Vacancies Act requires the head of each executive agency to report certain information about vacancies in covered offices and notify the Comptroller General of the United States and each House of Congress.23 The Government Accountability Office (GAO), headed by the Comptroller General, receives and records this information. The Vacancies Act requires the Comptroller General to report violations of the time limits to various House and Senate Committees, the President, and the Office of Personnel Management.24

This Recommendation offers best practices for them to consider related to the use of acting officials and delegations of authority under the Vacancies Act and agency-specific succession provisions. [This Recommendation is not intended to offer any legal analysis about the existence and scope of agency discretion in this area.]

RECOMMENDATION

Acting Officials under the Vacancies Act

1. As a preliminary matter, agencies should determine if they are subject to the Federal Vacancies Reform Act (Vacancies Act).
2. Agencies with at least one Presidentially-appointed, Senate-confirmed (PAS) position covered by the Vacancies Act should establish processes and procedures to comply with the Act. Agencies should consider assigning responsibility for compliance with the Vacancies Act to a position within the agency, rather than a particular person.
3. Agencies should disclose their processes and procedures for complying with the Vacancies Act on their websites.

21 Id.
22 Id.
24 Id. § 3349(b).
4. Agencies with at least one PAS position covered by the Vacancies Act should ensure that those responsible for aspects of compliance with the Vacancies Act have adequate training.
   a. For those officials tracking time limits, they should understand the Senate process related to nominations (including the likelihood of multiple returns) and how to access important dates (official submission dates of nomination, returns, etc.).
   b. Agencies ideally would coordinate on this training, perhaps with the Government Accountability Office (GAO) or some other organization offering government-wide information sessions.

5. Agencies with at least one PAS position covered by the Vacancies Act should formally name first assistant positions to those covered PAS jobs.
   a. If there are multiple deputy positions to a covered position, agencies should specify which deputy position is the first assistant position.
   b. In the description of each first assistant position, agencies should explain that the first assistant is the default acting official under the Vacancies Act.

6. Agencies with at least one PAS position covered by the Vacancies Act should develop policies for the use of the acting title and should communicate those policies to the acting official.

7. Agencies with at least one PAS position covered by the Vacancies Act should disclose acting officials in those positions on their websites, as well as start and expected end dates.

**Acting Officials Outside the Vacancies Act**

8. Agencies that have PAS positions that are not covered by the Vacancies Act and for which Congress has provided some alternative mechanism for acting officials (e.g., acting Chairperson) should disclose acting officials in those positions on their websites, as well as start and expected end dates.
Succession Planning

9. All agencies should have formal, clear, and easily accessible succession plans for each PAS position, if legally permitted. Each succession plan should have at least two lower-level positions listed.

10. Agencies should make their succession plans publicly accessible on their websites.

Delegations of Authority Related to Staffing Vacancies

11. All agencies should determine which functions and duties, if any, are exclusive to each PAS position.

12. To the extent possible, agencies should make their delegations of authority in the face of staffing vacancies in PAS positions publicly and easily accessible on their websites. These delegations should include standing orders and ad hoc assignments.

GAO’s Role Under the Vacancies Act

13. The GAO should consider whether it could change its reporting system so that agencies could report information on vacancies, acting officials (including start and end dates), and nominations online.