



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Acting Agency Officials and Delegations of Authority

#### Committee on Administration and Management

#### Proposed Recommendation for Committee | September 27, 2019

1           The federal government relies on both political appointees and career civil servants to  
2 operate effectively. There are currently over 1,200 agency positions that are supposed to be filled  
3 through the Presidential-nomination and Senate-confirmation process; these jobs are known as  
4 PAS positions.<sup>1</sup> But there are numerous vacancies in these positions—at the start of every  
5 administration, but also at other times, including in the final months of a President’s tenure.  
6 Indeed, between January 20, 1981, and July 19, 2019, there were 168 confirmed cabinet  
7 secretaries, 3 recess-appointed cabinet secretaries, and 145 acting cabinet secretaries. In other  
8 words, acting officials constituted 46% of all the top leaders in this period, though many of these  
9 interim officials served very short periods.<sup>2</sup> Acting officials are also prevalent in lower-level  
10 positions throughout the federal government.<sup>3</sup>

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

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

<sup>2</sup> 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).

<sup>3</sup> *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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

11 The Federal Vacancies Reform Act of 1998 (Vacancies Act)<sup>4</sup> provides for temporary  
12 leadership primarily in cabinet departments and single-headed executive agencies.<sup>5</sup> The  
13 Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions.

14 Generally, acting officials may come from three categories of government officials: (1)  
15 first assistants to the vacant positions; (2) Senate-confirmed officials designated by the President;  
16 and (3) certain senior agency officials designated by the President.<sup>6</sup> For covered positions under  
17 the Vacancies Act, the “first assistant” to the vacant job is the default acting official.<sup>7</sup> The  
18 Vacancies Act provides two main alternatives to the first assistant for acting service, but the  
19 President must actively select them.<sup>8</sup> First, “the President (and only the President) may direct”  
20 another Senate-confirmed official—within the agency or outside it—to serve as the acting  
21 official.<sup>9</sup> Second, “the President (and only the President)” may select “an officer or employee”  
22 who has not been Senate-confirmed to serve in an acting capacity, but only if that person has  
23 worked in the agency for at least 90 days during the year-long period before the vacancy arose  
24 and earns a salary at the GS-15 level or higher.<sup>10</sup>

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

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<sup>4</sup> 5 U.S.C. §§ 3341–3349d.

<sup>5</sup> 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).

<sup>6</sup> NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); *see also* O’Connell, *supra* note 2, at 5.

<sup>7</sup> 5 U.S.C. § 3345(a)(1) (2018).

<sup>8</sup> 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).

<sup>9</sup> *Id.* § 3345(a)(2).

<sup>10</sup> *Id.* § 3345(a)(3).

<sup>11</sup> *Id.* § 3346(a)(1).

<sup>12</sup> *Id.* § 3349a(b).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

28 official can continue serving through two pending nominations to the vacant job.<sup>13</sup> If the  
29 nomination is rejected or returned to the President under Senate rules, a new 210-day period of  
30 permitted tenure begins from the date of rejection or return.<sup>14</sup> In other words, an acting official  
31 could conceivably have the title for 210 (or 300) days before there is a nomination, during the  
32 pendency of a first nomination, for 210 days after that nomination is returned, during the  
33 pendency of a second nomination, and for a final 210 days if the second nomination is returned  
34 as well.<sup>15</sup>

35 There are also agency-specific succession statutes that provide for temporary leadership,  
36 including for chairpersons at some independent regulatory commissions.<sup>16</sup> Some statutes provide  
37 the exclusive mechanism for agency succession, whereas other statutes provide a non-exclusive  
38 mechanism.<sup>17</sup>

39 The Vacancies Act states that any action taken by an official who is not serving in  
40 accordance with the terms of the statute “in the performance of any function or duty of a vacant  
41 office . . . shall have no force or effect.”<sup>18</sup>

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

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<sup>13</sup> *Id.* § 3346.

<sup>14</sup> *Id.* § 3346(b)(2).

<sup>15</sup> 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).

<sup>16</sup> O’Connell, *supra* note 2, at 1, 9–10, 75–99.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> 5 U.S.C. § 3348(d).

<sup>19</sup> O’Connell, *supra* note 2, at 1.

<sup>20</sup> *Id.* at 28.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

47 leaving the delegate with nearly the same power as an acting official.<sup>21</sup> Delegations can operate  
48 far longer than acting officials can serve.<sup>22</sup>

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

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

Commented [ACUS2]: Consider whether to mention OLC in preamble.

RECOMMENDATION

Acting Officials under the Vacancies Act

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 5 U.S.C. § 3349(a).

<sup>24</sup> *Id.* § 3349(b).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 67 4. Agencies with at least one PAS position covered by the Vacancies Act should ensure that  
68 those responsible for aspects of compliance with the Vacancies Act have adequate  
69 training.
- 70 a. For those officials tracking time limits, they should understand the Senate process  
71 related to nominations (including the likelihood of multiple returns) and how to  
72 access important dates (official submission dates of nomination, returns, etc.).
- 73 b. Agencies ideally would coordinate on this training, perhaps with the Government  
74 Accountability Office (GAO) or some other organization offering government-  
75 wide information sessions.
- 76 5. Agencies with at least one PAS position covered by the Vacancies Act should formally  
77 name first assistant positions to those covered PAS jobs.
- 78 a. If there are multiple deputy positions to a covered position, agencies should  
79 specify which deputy position is the first assistant position.
- 80 b. In the description of each first assistant position, agencies should explain that the  
81 first assistant is the default acting official under the Vacancies Act.
- 82 6. Agencies with at least one PAS position covered by the Vacancies Act should develop  
83 policies for the use of the acting title and should communicate those policies to the acting  
84 official.
- 85 7. Agencies with at least one PAS position covered by the Vacancies Act should disclose  
86 acting officials in those positions on their websites, as well as start and expected end  
87 dates.

### **Acting Officials Outside the Vacancies Act**

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Succession Planning**

- 92 9. All agencies should have formal, clear, and easily accessible succession plans for each  
93 PAS position, if legally permitted. Each succession plan should have at least two lower-  
94 level positions listed.  
95 10. Agencies should make their succession plans publicly accessible on their websites.

### **Delegations of Authority Related to Staffing Vacancies**

- 96 11. All agencies should determine which functions and duties, if any, are exclusive to each  
97 PAS position.  
98 12. To the extent possible, agencies should make their delegations of authority in the face of  
99 staffing vacancies in PAS positions publicly and easily accessible on their websites.  
100 These delegations should include standing orders and ad hoc assignments.

### **GAO's Role Under the Vacancies Act**

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