



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Acting Agency Officials and Delegations of Authority

### Committee on Administration and Management

Proposed Recommendation for Committee | ~~September 27~~October 18, 2019

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

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<sup>1</sup> 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>.

<sup>2</sup> 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>.

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



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13 Vacancies in PAS and other high-level positions may lead to agency inaction, generate  
14 confusion among nonpolitical personnel, and lessen public accountability.<sup>4</sup> At many agencies,  
15 acting officials can temporarily fill the positions. Indeed, between January 20, 1981, and July 19,  
16 2019, there were 168 confirmed cabinet secretaries, 3 recess-appointed cabinet secretaries, and  
17 145 acting cabinet secretaries. In other words, acting officials constituted 46% of all the top  
18 leaders in this period, though many of these interim officials served ~~very~~for short periods.<sup>5</sup>  
19 Acting officials are also prevalent in lower-level positions throughout the federal government.<sup>6</sup>  
20 Similarly, in the face of vacancies, agency leadership often can lawfully delegate certain duties  
21 that would otherwise be done by a PAS or other high-ranking official to other officials within the  
22 agency.

23 The Federal Vacancies Reform Act of 1998 (Vacancies Act)<sup>7</sup> provides for temporary  
24 leadership primarily in ~~cabinet departments and~~ single-headed executive departments and  
25 agencies.<sup>8</sup> The When it applies, the Vacancies Act specifies who can serve in an acting capacity,  
26 for how long, and in what positions. Congress has also enacted other agency-specific statutes to  
27 address vacancies, which sometimes provide the exclusive succession process. Unfortunately,  
28 navigating these statutes can be challenging because their requirements are often complex and it  
29 can be technologically difficult to provide required reports. Currently, the government offers no

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

<sup>5</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>6</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).

<sup>7</sup> 5 U.S.C. §§ 3341–3349d.

<sup>8</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).



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30 formal training programs to agencies on the Vacancies Act, other vacancy-related statutes, or  
31 delegations of authority in the face of staffing vacancies.

32 Generally, acting officialsThe stakes for compliance, however, can be high. Under the  
33 Vacancies Act, for instance, any action taken by an acting official not serving under its terms  
34 “shall have no force or effect” and may be susceptible to legal challenge.<sup>9</sup> Even if the agency  
35 does not face legal challenge, moreover, it could receive a formal violation letter from the  
36 Government Accountability Office (GAO). The Vacancies Act requires agencies to report  
37 vacancies, nominations, and acting officials in covered positions to the Comptroller General; the  
38 Comptroller General is charged with reporting violations of the time limits to various House and  
39 Senate Committees, the President, and the Office of Personnel Management.<sup>10</sup>

### The Vacancies Act

40 Under the Vacancies Act, acting officials generally may come from three categories of  
41 government officials: (1) first assistants to the vacant positions; (2) Senate-confirmed officials  
42 designated by the President; and (3) certain senior agency officials designated by the President.<sup>11</sup>  
43 ~~For covered positions under the Vacancies Act, the~~The “first assistant” to the vacant job is the  
44 default acting official.<sup>12</sup> The Vacancies Act provides two main alternatives to the first assistant  
45 for acting service, but the President must actively select them.<sup>13</sup> First, “the President (and only  
46 the President) may direct” another Senate-confirmed official—within the agency or outside it—  
47 to serve as the acting official.<sup>14</sup> Second, “the President (and only the President)” may select “an

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<sup>9</sup> *Id.* § 3348(d)(1).

<sup>10</sup> *Id.* § 3349(b).

<sup>11</sup> *Id.* § 3345(a); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); *see also* O’Connell, *Acting Agency Officials*, *supra* note 2, at 5.

<sup>12</sup> 5 U.S.C. § 3345(a)(1)-(2018).

<sup>13</sup> There is another category of allowed acting officials: ~~Someone who is~~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(c)(1).

<sup>14</sup> *Id.* § 3345(a)(2).



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48 officer or employee” who has not been Senate-confirmed to serve in an acting capacity, but only  
49 if that person has worked in the agency for at least 90 days during the year-long period before the  
50 vacancy arose and earns a salary at the GS-15 level or higher.<sup>15</sup>

51 Acting officials can typically serve and use the title “acting” for 210 days from the  
52 vacancy’s start.<sup>16</sup> If the vacancy exists when a new President enters ~~the White House office~~, or  
53 occurs within the next 60 days, the limit extends to 300 days.<sup>17</sup> Nominations also extend these  
54 limits; an acting official can continue serving through two pending nominations to the vacant  
55 job.<sup>18</sup> If the nomination is rejected or returned to the President under Senate rules, a new 210-day  
56 period of permitted tenure begins from the date of rejection or return.<sup>19</sup> In other words, an acting  
57 official could conceivably ~~have the title serve~~ for 210 (or 300) days before there is a nomination,  
58 during the pendency of a first nomination, for 210 days after that nomination is returned, during  
59 the pendency of a second nomination, and for a final 210 days if the second nomination is  
60 returned as well.<sup>20</sup> These extensions require careful tracking of nominations and Senate actions.

61 ~~There are also agency specific succession statutes that provide for temporary leadership,~~  
62 ~~including for chairpersons at some independent regulatory commissions.<sup>21</sup> Some statutes provide~~  
63 ~~the exclusive mechanism for agency succession, whereas other statutes provide a non-exclusive~~  
64 ~~mechanism.<sup>22</sup>~~

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<sup>15</sup> *Id.* § 3345(a)(3).

<sup>16</sup> *Id.* § 3346(a)(1).

~~<sup>17</sup> *Id.* § 3349a(b).~~

~~<sup>18</sup> *Id.* § 3346.~~

~~<sup>19</sup> *Id.* § 3346(b)(2).~~

<sup>20</sup> 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).

~~<sup>21</sup> O’Connell, *supra* note 2, at 1, 9–10, 75–99.~~

~~<sup>22</sup> *Id.* at 9.~~



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65 ~~The Vacancies Act states that any action taken by an official who is not serving in~~  
66 ~~accordance with the terms of the statute “in the performance of any function or duty of a vacant~~  
67 ~~office . . . shall have no force or effect.”<sup>23</sup>~~

68 After the time limits established by the Vacancies Act have passed, agencies can often  
69 continue to perform the functions of the vacant offices through delegations of authority (mostly  
70 “down” to lower-level officials but sometimes “up” to the agency head).<sup>24</sup> If the duties of the  
71 Senate-confirmed position are not exclusive to that job—by statute or regulation—they can  
72 typically be delegated:<sup>25</sup> to a lower level official. Even if some duties are exclusive to a position,  
73 ~~the~~its other duties can be reassigned, leaving the delegate with nearly the same power as an  
74 acting official.<sup>26</sup> Delegations can operate far longer than acting officials can serve.<sup>27</sup>

75 The Vacancies Act requires the head of each executive agency to report certain  
76 information about vacancies in covered offices and notify the Comptroller General of the United  
77 States and each House of Congress.<sup>28</sup> The ~~Government Accountability Office (GAO),~~ headed by  
78 the Comptroller General, receives ~~and records~~ this information. ~~The Vacancies Act requires in~~  
79 ~~hard copy but distributes it to the Comptroller General to report violations of the time limits to~~  
80 ~~various House and Senate Committees, the President, and the Office of Personnel~~  
81 ~~Management.~~<sup>29</sup> public online.

82 ~~This Recommendation offers best practices for them to consider related to the use of~~  
83 ~~acting officials and delegations of authority under the Vacancies Act and agency specific~~

<sup>23</sup> 5 U.S.C. § 3348(d).

<sup>24</sup> O’Connell, *supra* note 2, at 1.

<sup>25</sup> *Id.* at 28.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 5 U.S.C. § 3349(a).

<sup>29</sup> *Id.* § 3349(b).

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84 ~~succession provisions. This Recommendation is not intended to offer any legal analysis about the~~  
85 ~~existence and scope of agency discretion in this area.~~

### Agency-Specific Statutes

86 ~~In addition to the Vacancies Act, Congress has also enacted various agency-specific~~  
87 ~~statutes that, when applicable, may provide for temporary leadership, including for chairpersons~~  
88 ~~at some independent regulatory commissions. Some statutes provide the exclusive mechanism~~  
89 ~~for agency succession, whereas other statutes provide a non-exclusive mechanism.<sup>30</sup> Because~~  
90 ~~these agency-specific statutes vary, it is difficult to draw cross-cutting conclusions about them.~~  
91 ~~Their existence, however, further complicate the use of acting officials and delegations.~~

### The Need for Greater Compliance and Transparency

92 ~~As the foregoing description shows, how and when agencies can use acting officials or~~  
93 ~~delegate authority can be complicated. There is often confusion about which positions and~~  
94 ~~agencies the Vacancies Act applies to and how the Act interacts with other agency-specific~~  
95 ~~statutes. Technological shortcomings also make compliance with agency reporting obligations~~  
96 ~~difficult. Some agencies have raised concerns that “[a]lthough the forms are online, the agency~~  
97 ~~must download them, fill them out, and send them in hard copy to the GAO (and to~~  
98 ~~Congress).”<sup>31</sup> Agencies also vary in how transparent they are about their use of acting officials~~  
99 ~~and delegations of authority. Some agencies do not disclose publicly acting titles and delegations~~  
100 ~~of authority, and there is currently no good source for comprehensive information about acting~~  
101 ~~officials.~~

102 ~~The goals of this Recommendation are to promote compliance with the Vacancies Act~~  
103 ~~and agency-specific succession statutes and, consistent with the Conference’s recent efforts to~~

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<sup>30</sup> O’Connell, Acting Agency Officials, *supra* note 2, at 9.

<sup>31</sup> *Id.* at 60.



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104 promote access to agency information,<sup>32</sup> to improve transparency regarding the use of acting  
105 officials and agency delegations of authority in the face of staffing vacancies. This  
106 Recommendation does not purport to address any legal questions that may arise in the  
107 application of the Vacancies Act.<sup>33</sup>

108 This is a companion to Recommendation 2019- , *Listing Agency Officials*, which

109 .<sup>34</sup>

**RECOMMENDATION**

**Acting Officials under the Vacancies Act**

- 110 1. As a preliminary matter, agencies should determine if they are subject to the Federal  
111 Vacancies Reform Act (Vacancies Act).
- 112 2. Agencies with at least one ~~Presidentially~~presidentially-appointed, Senate-confirmed  
113 (PAS) position covered by the Vacancies Act should establish processes and procedures  
114 to comply with the Act. Agencies should consider assigning responsibility for compliance  
115 with the Vacancies Act to a position within the agency, rather than a particular person,  
116 and identify that position on ~~the~~its website.
- 117 3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that  
118 ~~those~~officials responsible for ~~aspects of~~ compliance with the Vacancies Act have  
119 adequate training.

<sup>32</sup> 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. 2139 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (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).

<sup>33</sup> The Department of Justice's Office of Legal Counsel has addressed vacancies issues in the past. See, e.g., *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (1999).

<sup>34</sup> Admin. Conf. of the U.S., Recommendation 2019- , *Listing Agency Officials*, Fed. Reg. \_\_\_\_ (\_\_\_\_).

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- 120 a. ~~For those officials tracking~~Officials assigned to track time limits, ~~they~~ should  
121 understand the Senate confirmation process ~~related to nominations~~ (including the  
122 likelihood of multiple returns) and how to access important dates (official  
123 submission dates of nomination, returns, etc.).
- 124 b. Agencies ~~ideally would~~should, ~~whenever possible,~~ coordinate ~~on this training,~~  
125 ~~perhaps~~ with the Government Accountability Office (GAO) ~~or some other~~  
126 ~~organization offering government-wide information sessions~~ in providing  
127 training.
- 128 4. For PAS positions covered by the Vacancies Act but not addressed in ~~an~~ presidential  
129 order of succession ~~provided by the President~~, agencies should formally name and  
130 disclose a first assistant ~~positions~~ position.
- 131 a. If there are multiple deputy positions to a covered position, agencies should  
132 specify which deputy position is the first assistant position.
- 133 b. In the description of each first assistant position, agencies should explain that the  
134 first assistant is the default acting official under the Vacancies Act.
- 135 5. Agencies with at least one PAS position covered by the Vacancies Act should  
136 communicate the requirements of the Act to the relevant acting official-(s).
- 137 6. Agencies with at least one PAS position covered by the Vacancies Act should disclose  
138 acting officials ~~in those positions~~ on their websites, as well as start and, to the extent  
139 identifiable, permitted end dates. If a vacancy is not filled by an acting officer and the  
140 agency has identified an ~~individual~~ official to perform the delegable functions of the  
141 office, the agency should disclose that ~~individual~~ official on its website.

Commented [ACUS1]: Can we be more precise?

**Acting Officials Outside the Vacancies Act**

- 142 7. Agencies that have PAS positions that are not covered by the Vacancies Act and for  
143 which Congress has provided some alternative mechanism for acting officials (e.g.,  
144 acting ~~Chairperson~~ chairperson) should, to the extent applicable, apply the foregoing  
145 recommendations 2 through ~~76~~.



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### Succession Planning

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

### Delegations of Authority Related to Staffing Vacancies

- 148 9. All agencies should determine which functions and duties, if any, are exclusive to each  
149 PAS position and which of the nonexclusive functions and duties, if any, should be  
150 delegated in the face of staffing vacancies.
- 151 10. Agencies should make their delegations of authority in the face of staffing vacancies in  
152 PAS positions easily accessible on their websites, to the extent possible. These  
153 ~~delegations~~disclosures should include standing orders and ad hoc assignments.

### GAO's Role Under the Vacancies Act

- 154 11. The GAO should consider changing its reporting system so that agencies can report  
155 information on vacancies, acting officials (including start and end dates), and  
156 nominations online.

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