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

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3. Id. at 16 (citing ANNE JOSEPH O’CONNELL, BROOKINGS INST., STAFFING FEDERAL AGENCIES: LESSONS FROM 1981–2016 (2017)).
Vacancies in PAS and other high-level positions may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability. At many agencies, acting officials can temporarily fill the positions. 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 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. 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 leaders in this period, though many of these interim officials served very short periods.

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

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5 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).
6 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).
7 5 U.S.C. §§ 3341–3349d.
8 O’Connell, supra note 7, 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).
formal training programs to agencies on the Vacancies Act, other vacancy-related statutes, or
delusions of authority in the face of staffing vacancies.

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

The Vacancies Act

Under the Vacancies Act, acting officials generally 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.
For covered positions under the Vacancies Act, the "first assistant" to the vacant job is the
default acting official. The Vacancies Act provides two main alternatives to the first assistant
for acting service, but the President must actively select them. First, “the President (and only
the President) may direct” another Senate-confirmed official—with the agency or outside it—to
serve as the acting official. Second, “the President (and only the President) may select “an

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9 Id. § 3348(d)(1).
10 Id. § 3349(b).
11 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.
13 There is another category of allowed acting officials: Someone who is an official serving a fixed term in a covered
dagency 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).
14 Id. § 3345(a)(2).
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.\textsuperscript{15}

Acting officials can typically serve and use the title “acting” for 210 days from the vacancy’s start.\textsuperscript{16} If the vacancy exists when a new President enters the White House office, or occurs within the next 60 days, the limit extends to 300 days.\textsuperscript{12} Nominations also extend these limits; an acting official can continue serving through two pending nominations to the vacant job.\textsuperscript{16} 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{16} In other words, an acting official could conceivably have the title serve 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{20} These extensions require careful tracking of nominations and Senate actions.

There are also agency-specific succession statutes that provide for temporary leadership, including for chairpersons at some independent regulatory commissions.\textsuperscript{21} Some statutes provide the exclusive mechanism for agency succession, whereas other statutes provide a non-exclusive mechanism.\textsuperscript{22}

\textsuperscript{15} Id. § 3345(a)(3).
\textsuperscript{16} Id. § 3346(a)(1).
\textsuperscript{12} Id. § 3349a(b).
\textsuperscript{14} Id. § 3346.
\textsuperscript{16} Id. § 3346(b)(2).
\textsuperscript{20} 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).
\textsuperscript{21} O’Connell, supra note 2, at 1, 9–10, 75–99.
\textsuperscript{22} Id. at 9.
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.”

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). If the duties of the Senate-confirmed position are not exclusive to that job—by statute or regulation—they can typically be delegated to a lower level official. Even if some duties are exclusive to a position, other duties can be reassigned, leaving the delegate with nearly the same power as an acting official. Delegations can operate far longer than acting officials can serve.

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. The Government Accountability Office (GAO), headed by the Comptroller General, receives and records this information. The Vacancies Act requires in hard copy but distributes it to the Comptroller General to report violations of the time limits to various House and Senate Committees, the President, and the Office of Personnel Management. 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

24 O’Connell, supra note 2, at 1.
25 Id. at 28.
26 Id.
27 Id.
29 Id. § 3349(b).
succession provisions. This Recommendation is not intended to offer any legal analysis about the
extistence and scope of agency discretion in this area.

**Agency-Specific Statutes**

In addition to the Vacancies Act, Congress has also enacted various agency-specific
statutes that, when applicable, may provide for temporary leadership, including for chairpersons
at some independent regulatory commissions. Some statutes provide the exclusive mechanism
for agency succession, whereas other statutes provide a non-exclusive mechanism.\(^{30}\) Because
these agency-specific statutes vary, it is difficult to draw cross-cutting conclusions about them.
Their existence, however, further complicate the use of acting officials and delegations.

**The Need for Greater Compliance and Transparency**

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

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


\(^{31}\) *Id.* at 60.
prevent access to agency information, to improve transparency regarding the use of acting officials and agency delegations of authority in the face of staffing vacancies. This Recommendation does not purport to address any legal questions that may arise in the application of the Vacancies Act.

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

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 Presidential-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, and identify that position on its website.

3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that those officials responsible for aspects of compliance with the Vacancies Act have adequate training.


DRAFT September 18, October 9, 2019
a. For those officials tracking officials assigned to track time limits, they should understand the Senate confirmation 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 should, whenever possible, coordinate on this training, perhaps with the Government Accountability Office (GAO) or some other organization offering government-wide information sessions.

4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order of succession, agencies should formally name and disclose a first assistant position.

   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.

5. Agencies with at least one PAS position covered by the Vacancies Act should communicate the requirements of the Act to the relevant acting officials.

6. 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, to the extent identifiable, permitted end dates. If a vacancy is not filled by an acting officer and the agency has identified an individual to perform the delegable functions of the office, the agency should disclose that individual on its website.

**Acting Officials Outside the Vacancies Act**

7. 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, to the extent applicable, apply the foregoing recommendations 2 through 6.

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Succession Planning

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

Delegations of Authority Related to Staffing Vacancies

9. All agencies should determine which functions and duties, if any, are exclusive to each PAS position and which of the nonexclusive functions and duties, if any, should be delegated in the face of staffing vacancies.

10. Agencies should make their delegations of authority in the face of staffing vacancies in PAS positions easily accessible on their websites, to the extent possible. These delegation disclosures should include standing orders and ad hoc assignments.

GAO’s Role Under the Vacancies Act

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