



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Acting Agency Officials and Delegations of Authority

Committee on Administration and Management

Proposed Recommendation for Committee | October 18, 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.

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 effect”
31 and may be susceptible to legal challenge.⁶ Even if the agency does not face legal challenge,
32 moreover, it could receive a formal violation letter from the Government Accountability Office
33 (GAO). The Vacancies Act requires agencies to report vacancies, nominations, and acting
34 officials in covered positions to the Comptroller General; the Comptroller General is charged
35 with reporting violations of the time limits to various House and Senate Committees, the
36 President, and the Office of Personnel Management.⁷

⁵ 5 U.S.C. §§ 3341–3349d.

⁶ *Id.* § 3348(d)(1).

⁷ *Id.* § 3349(b).



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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.⁸
40 The “first assistant” to the vacant job is the default acting official.⁹ The Vacancies Act provides
41 two main alternatives to the first assistant for acting service, but the President must actively
42 select them.¹⁰ 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.¹¹ 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.¹²

48 Acting officials can typically serve and use the title “acting” for 210 days from the
49 vacancy’s start.¹³ If the vacancy exists when a new President enters office, or occurs within the
50 next 60 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

⁸ *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.

⁹ 5 U.S.C. § 3345(a)(1).

¹⁰ 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(c)(1).

¹¹ *Id.* § 3345(a)(2).

¹² *Id.* § 3345(a)(3).

¹³ *Id.* § 3346(a)(1).



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56 second nomination, and for a final 210 days if the second nomination is returned as well.¹⁴ 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 (mostly
60 “down” to lower-level officials but sometimes “up” to the agency head). If the duties of the
61 Senate-confirmed position are not exclusive to that job—by statute or regulation—they can
62 typically be delegated to a lower level official. Even if some duties are exclusive to a position, its
63 other duties can be reassigned, leaving the delegate with nearly the same power as an acting
64 official. Delegations can operate far longer than 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
67 States and each House of Congress.¹⁵ The GAO, headed by the Comptroller General, receives
68 this information in hard copy but distributes it to the public online.

Agency-Specific Statutes

69 In addition to the Vacancies Act, Congress has also enacted various agency-specific
70 statutes that, when applicable, may provide for temporary leadership, including for chairpersons
71 at some independent regulatory commissions. Some statutes provide the exclusive mechanism
72 for agency succession, whereas other statutes provide a non-exclusive mechanism.¹⁶ Because
73 these agency-specific statutes vary, it is difficult to draw cross-cutting conclusions about them.
74 Their existence, however, further complicate the use of acting officials and delegations.

¹⁴ 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).

¹⁵ 5 U.S.C. § 3349(a).

¹⁶ O’Connell, Acting Agency Officials, *supra* note 2, at 9.



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The Need for Greater Compliance and Transparency

75 As the foregoing description shows, how and when agencies can use acting officials or
76 delegate authority can be complicated. There is often confusion about which positions and
77 agencies the Vacancies Act applies to and how the Act interacts with other agency-specific
78 statutes. Technological shortcomings also make compliance with agency reporting obligations
79 difficult. Some agencies have raised concerns that “[a]lthough the forms are online, the agency
80 must download them, fill them out, and send them in hard copy to the GAO (and to
81 Congress).”¹⁷ Agencies also vary in how transparent they are about their use of acting officials
82 and delegations of authority. Some agencies do not disclose publicly acting titles and delegations
83 of authority, and there is currently no good source for comprehensive information about acting
84 officials.

85 The goals of this Recommendation are to promote compliance with the Vacancies Act
86 and agency-specific succession statutes and, consistent with the Conference’s recent efforts to
87 promote access to agency information,¹⁸ to improve transparency regarding the use of acting
88 officials and agency delegations of authority in the face of staffing vacancies. This
89 Recommendation does not purport to address any legal questions that may arise in the
90 application of the Vacancies Act.¹⁹

¹⁷ *Id.* at 60.

¹⁸ 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).

¹⁹ 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).



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91 This is a companion to Recommendation 2019- __, *Listing Agency Officials*, which
92 _____.²⁰

RECOMMENDATION

Acting Officials under the Vacancies Act

- 93 1. As a preliminary matter, agencies should determine if they are subject to the Federal
94 Vacancies Reform Act (Vacancies Act).
- 95 2. Agencies with at least one presidentially-appointed, Senate-confirmed (PAS) position
96 covered by the Vacancies Act should establish processes and procedures to comply with
97 the Act. Agencies should consider assigning responsibility for compliance with the
98 Vacancies Act to a position within the agency, rather than a particular person, and
99 identify that position on its website.
- 100 3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that
101 officials responsible for compliance with the Vacancies Act have adequate training.
- 102 a. Officials assigned to track time limits should understand the Senate confirmation
103 process (including the likelihood of multiple returns) and how to access important
104 dates (official submission dates of nomination, returns, etc.).
- 105 b. Agencies should, whenever possible, coordinate with the Government
106 Accountability Office (GAO) or some other organization offering government-
107 wide information sessions in providing training.
- 108 4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order
109 of succession, agencies should formally name and disclose a first assistant position.
- 110 a. If there are multiple deputy positions to a covered position, agencies should
111 specify which deputy position is the first assistant position.
- 112 b. In the description of each first assistant position, agencies should explain that the
113 first assistant is the default acting official under the Vacancies Act.

Commented [ACUS1]: Can we be more precise?

²⁰ Admin. Conf. of the U.S., Recommendation 2019- __, *Listing Agency Officials*, __ Fed. Reg. ____ (____).



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- 114 5. Agencies with at least one PAS position covered by the Vacancies Act should
115 communicate the requirements of the Act to the relevant acting official(s).
116 6. Agencies with at least one PAS position covered by the Vacancies Act should disclose
117 acting officials on their websites, as well as start and, to the extent identifiable, permitted
118 end dates. If a vacancy is not filled by an acting officer and the agency has identified an
119 official to perform the delegable functions of the office, the agency should disclose that
120 official on its website.

Acting Officials Outside the Vacancies Act

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

Succession Planning

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

Delegations of Authority Related to Staffing Vacancies

- 127 9. All agencies should determine which functions and duties, if any, are exclusive to each
128 PAS position and which of the nonexclusive functions and duties, if any, should be
129 delegated in the face of staffing vacancies.
130 10. Agencies should make their delegations of authority in the face of staffing vacancies in
131 PAS positions easily accessible on their websites, to the extent possible. These
132 disclosures should include standing orders and ad hoc assignments.



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GAO's Role Under the Vacancies Act

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