



Administrative Conference Recommendation 2019-7

Acting Agency Officials and Delegations of Authority

Adopted December 12, 2019

The federal government relies on both political appointees and career civil servants to operate effectively. Federal law provides for over 1,200 agency positions whose occupants must be appointed by the 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.

Vacancies in PAS and other high-level positions may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability.⁴ 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

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 (Dec. 1, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-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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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 for short periods. Acting officials are also prevalent in lower-level positions throughout the federal government. Similarly, in response to vacancies, agency leadership often can lawfully delegate certain duties that would otherwise be done by a PAS or other high-ranking official to other officials within the agency.

The Federal Vacancies Reform Act of 1998 (Vacancies Act)⁵ provides for temporary leadership primarily in single-headed executive departments and 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 formal training programs to agencies on the Vacancies Act, other vacancy-related statutes, or delegations of authority in response to staffing vacancies.⁶

The stakes for compliance, however, can be high. Under the Vacancies Act, for instance, certain actions taken by an acting official not serving under its terms “shall have no force or effect” and may be susceptible to legal challenge.⁷ 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,

⁵ 5 U.S.C. §§ 3345–3349d.

⁶ The Department of Justice’s Office of Legal Counsel provided substantial guidance on the Act in 1999, on which agencies continue to rely. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (1999); *see also* O’Connell, Acting Agency Officials, *supra* note 2, at 38, 41 (describing interviews with agency officials and noting agencies’ continued reliance on OLC guidance from 1999). Certain portions of the 1999 Guidance have been superseded. *See, e.g., Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179 (2001) (concluding that question 13 of the 1999 Guidance was incorrect in concluding that a first assistant could only serve as an acting officer under section 3345(a)(1) if he or she had served as first assistant before the vacancy arose); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017) (holding that the prohibition in section 3345(b) on acting service during a nomination is not limited to first assistants, contrary to OLC’s conclusion in question 15 of the 1999 Guidance).

⁷ 5 U.S.C. § 3348(d)(1); O’Connell, Acting Agency Officials, *supra* note 2, at 3 n.8. Some positions are excluded from this provision. *See* 5 U.S.C. § 3348(e).



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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.⁸

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.⁹ The “first assistant” to the vacant job is the default acting official.¹⁰ 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—within the agency or outside it—to serve as the acting official.¹¹ 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.¹²

Acting officials can typically serve and use the title “acting” for 210 days from the vacancy’s start.¹³ If the vacancy exists when a new President enters office, or occurs within the next 60 days, the limit extends to 300 days. Nominations also extend these limits: an acting official can continue serving through two pending nominations to the vacant job. If the

⁸ 5 U.S.C. § 3349(b).

⁹ *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. There is a fourth category of allowed acting officials involving holdover appointees: an official serving a fixed term in a covered agency, who 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. 5 U.S.C. § 3345(c)(1); *see also* O’Connell, Acting Agency Officials, *supra* note 2, at 5 n.24.

¹⁰ 5 U.S.C. § 3345(a)(1).

¹¹ *Id.* § 3345(a)(2).

¹² *Id.* § 3345(a)(3).

¹³ *Id.* § 3346(a)(1).



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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. In other words, an acting official could conceivably 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.¹⁴ These extensions require careful tracking of nominations and Senate actions.

After the time limits established by the Vacancies Act have passed, agencies have continued to perform the functions of the vacant offices through delegations of authority, often by the agency head.¹⁵ If the duties of the Senate-confirmed position are not exclusive to a job—by statute or regulation—they can typically be delegated to a lower-level official. Even if some duties are exclusive to a position, its other duties have been reassigned, leaving the delegate with nearly the same power as an acting official.

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.¹⁶ The GAO, headed by the Comptroller General, currently receives this information in hard copy. The GAO maintains these reports in an online searchable database.¹⁷

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

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); *see also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 66–67 (1999) (noting that an “acting officer may continue to serve until the sick PAS officer recovers” and is able to resume performing the office’s functions and duties).

¹⁵ O’Connell, Acting Agency Officials, *supra* note 2, at 11–12; *see also id.* at 13–15 (identifying several constitutional and statutory issues concerning delegation beyond the scope of this Recommendation).

¹⁶ 5 U.S.C. § 3349(a).

¹⁷ O’Connell, Acting Agency Officials, *supra* note 2, at 51–59.



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at some independent regulatory commissions.¹⁸ Some statutes may provide the exclusive mechanism for agency succession, whereas other statutes may provide a non-exclusive mechanism.¹⁹ Because these agency-specific statutes vary, it is difficult to draw cross-cutting conclusions about them. Their existence, however, further complicates the use of acting officials and delegations.

The Need for Increased Transparency and Training on Vacancies Act Requirements

As the foregoing description shows, how and when agencies can use acting officials or delegated 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).”²⁰ 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,²¹ 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 promote access to agency information,²² to improve transparency regarding the use of acting

¹⁸ *Id.* at 9–10; *see also id.* at 13–14 (identifying the legal issue of the applicability of the Vacancies Act in many of these circumstances where an agency-specific succession statute exists, which is beyond the scope of this Recommendation).

¹⁹ *Id.* at 9.

²⁰ *Id.* at 59.

²¹ *Id.* at 44–46, 64–66. Although some agencies lack disclosure policies, some agencies have a practice of publishing permanent or standing delegations in the Federal Register or on the agency’s website. *Id.* at 65; *see also* Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 502–03 (2017) (contrasting agency practices at SEC and EPA).

²² *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.



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officials and agency delegations of authority in response to staffing vacancies. This Recommendation does not purport to address any legal questions that may arise in the application of the Vacancies Act.

This Recommendation is a companion to Recommendation 2019-8, *Public Identification of Agency Officials*, which encourages federal agencies and the Office of Personnel Management to publish and maintain on their websites real-time information about a broad range of high-level agency officials.²³

RECOMMENDATION

Acting Officials under the Vacancies Act

1. 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, and identify that position on its website.
3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that officials responsible for compliance with the Vacancies Act have adequate training.
 - a. Officials assigned to track time limits should understand the Senate confirmation process (including the likelihood of multiple returns) and how to access important dates (official submission dates of nomination, returns, etc.).

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).

²³ Admin. Conf. of the U.S., Recommendation 2019-8, *Public Identification of Agency Officials*, 84 Fed. Reg. 71,354 (Dec. 27, 2019).



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- b. Agencies should, when needed, coordinate with the Government Accountability Office (GAO) on their reporting requirements.
 - c. A government agency (such as the Office of Government Ethics, the Department of Justice's Office of Legal Counsel, the GAO, or the Office of Personnel Management) or other organization should provide government-wide training on these issues. Agencies should avail themselves of this training.
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 vacant PAS position covered by the Vacancies Act should communicate the requirements of the Act to the relevant acting official(s).
6. Agencies with at least one vacant PAS position covered by the Vacancies Act should disclose on their websites the names of acting officials and the officials' start dates, and the legal provision under which the appointment was made. If a vacancy is not filled by an acting officer and the agency has identified an official to perform the delegable functions of the office, the agency should disclose that official 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 designating acting officials (e.g., acting chairperson) should, to the extent applicable, apply the foregoing recommendations 2 through 6.

Succession Planning

8. Agencies should consider having clear and easily accessible orders of succession on their websites for PAS positions.



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Delegations of Authority Related to Staffing Vacancies

9. 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 response to staffing vacancies.
10. To the extent reasonably possible, agencies should make their delegations of authority in response to staffing vacancies in PAS positions easily accessible to the public.

GAO's Role Under the Vacancies Act

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