



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Acting Agency Officials and Delegations of Authority

### Committee on Administration and Management

Proposed Recommendation | December 12, 2019

#### Proposed Amendments

**This document displays an amendment and an inquiry from the Council (with sources shown in the margin).**

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).<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> These pervasive vacancies exist for several reasons, including increasing delays related  
10 to the presidential-nomination and Senate-confirmation 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 (Dec. 1, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-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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11 Vacancies in PAS and other high-level positions may lead to agency inaction, generate  
12 confusion among nonpolitical personnel, and lessen public accountability.<sup>4</sup> 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  
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)<sup>5</sup> 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.<sup>6</sup>

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<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> 5 U.S.C. §§ 3341–3349d.

<sup>6</sup> 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).



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29           The stakes for compliance, however, can be high. Under the Vacancies Act, for instance,  
30 certain actions taken by an acting official not serving under its terms “shall have no force or  
31 effect” and may be susceptible to legal challenge.<sup>7</sup> Even if the agency does not face legal  
32 challenge, moreover, it could receive a formal violation letter from the Government  
33 Accountability Office (GAO). The Vacancies Act requires agencies to report vacancies,  
34 nominations, and acting officials in covered positions to the Comptroller General; the  
35 Comptroller General is charged with reporting violations of the time limits to various House and  
36 Senate Committees, the President, and the Office of Personnel Management.<sup>8</sup>

### **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.<sup>9</sup>  
40 The “first assistant” to the vacant job is the default acting official.<sup>10</sup> The Vacancies Act provides  
41 two main alternatives to the first assistant for acting service, but the President must actively  
42 select them. First, “the President (and only the President) may direct” another Senate-confirmed  
43 official—within the agency or outside it—to serve as the acting official.<sup>11</sup> Second, “the President  
44 (and only the President)” may select “an officer or employee” who has not been Senate-  
45 confirmed to serve in an acting capacity, but only if that person has worked in the agency for at

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<sup>7</sup> 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).

<sup>8</sup> 5 U.S.C. § 3349(b).

<sup>9</sup> *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.

<sup>10</sup> 5 U.S.C. § 3345(a)(1).

<sup>11</sup> *Id.* § 3345(a)(2).



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46 least 90 days during the year-long period before the vacancy arose and earns a salary at the GS-  
47 15 level or higher.<sup>12</sup>

48 Acting officials can typically serve and use the title “acting” for 210 days from the  
49 vacancy’s start.<sup>13</sup> 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  
56 second nomination, and for a final 210 days if the second nomination is returned as well.<sup>14</sup> 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, often by  
60 the agency head.<sup>15</sup> If the duties of the Senate-confirmed position are not exclusive to that job—  
61 by statute or regulation—they can typically be delegated to a lower-level official. Even if some  
62 duties are exclusive to a position, its other duties can be reassigned, leaving the delegate with  
63 nearly the same power as an acting official. Delegations can operate far longer than acting  
64 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

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<sup>12</sup> *Id.* § 3345(a)(3).

<sup>13</sup> *Id.* § 3346(a)(1).

<sup>14</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); *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).

<sup>15</sup> 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).



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67 States and each House of Congress.<sup>16</sup> The GAO, headed by the Comptroller General, currently  
68 receives this information in hard copy. The GAO maintains these reports in an online searchable  
69 database.<sup>17</sup>

### Agency-Specific Statutes

70 In addition to the Vacancies Act, Congress has also enacted various agency-specific  
71 statutes that, when applicable, may provide for temporary leadership, including for chairpersons  
72 at some independent regulatory commissions.<sup>18</sup> Some statutes may provide the exclusive  
73 mechanism for agency succession, whereas other statutes may provide a non-exclusive  
74 mechanism.<sup>19</sup> Because these agency-specific statutes vary, it is difficult to draw cross-cutting  
75 conclusions about them. Their existence, however, further complicates the use of acting officials  
76 and delegations.

### The Need for Increased Transparency and Training on Vacancies Act Requirements

77 As the foregoing description shows, how and when agencies can use acting officials or  
78 delegate authority can be complicated. There is often confusion about which positions and  
79 agencies the Vacancies Act applies to and how the Act interacts with other agency-specific  
80 statutes. Technological shortcomings also make compliance with agency reporting obligations  
81 difficult. Some agencies have raised concerns that “[a]lthough the forms are online, the agency  
82 must download them, fill them out, and send them in hard copy to the GAO (and to Congress).”<sup>20</sup>  
83 Agencies also vary in how transparent they are about their use of acting officials and delegations

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<sup>16</sup> 5 U.S.C. § 3349(a).

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

<sup>18</sup> *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).

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* at 59.



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84 of authority. Some agencies do not disclose publicly acting titles and delegations of authority,<sup>21</sup>  
85 and there is currently no good source for comprehensive information about acting officials.

86 The goals of this Recommendation are to promote compliance with the Vacancies Act  
87 and agency-specific succession statutes and, consistent with the Conference's recent efforts to  
88 promote access to agency information,<sup>22</sup> to improve transparency regarding the use of acting  
89 officials and agency delegations of authority in the face of staffing vacancies. This  
90 Recommendation does not purport to address any legal questions that may arise in the  
91 application of the Vacancies Act.

92 This Recommendation is a companion to Recommendation 2019-\_\_, *Listing Agency*  
93 *Officials*, which encourages federal agencies and the Office of Personnel Management to publish  
94 and maintain on their websites real-time information about a broad range of high-level agency  
95 officials.<sup>23</sup>

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<sup>21</sup> *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).

<sup>22</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>23</sup> Admin. Conf. of the U.S., Recommendation 2019-\_\_, *Listing Agency Officials*, \_\_ Fed. Reg. \_\_\_\_ (\_\_\_\_).



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RECOMMENDATION

Acting Officials under the Vacancies Act

- 96 1. As a preliminary matter, agencies should determine if they are subject to the Federal  
97 Vacancies Reform Act (Vacancies Act).
- 98 2. Agencies with at least one presidentially-appointed, Senate-confirmed (PAS) position  
99 covered by the Vacancies Act should establish processes and procedures to comply with  
100 the Act. Agencies should consider assigning responsibility for compliance with the  
101 Vacancies Act to a position within the agency, rather than a particular person, and  
102 identify that position on its website.
- 103 3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that  
104 officials responsible for compliance with the Vacancies Act have adequate training.
- 105 a. Officials assigned to track time limits should understand the Senate confirmation  
106 process (including the likelihood of multiple returns) and how to access important  
107 dates (official submission dates of nomination, returns, etc.).
- 108 b. Agencies should, when needed, coordinate with the Government Accountability  
109 Office (GAO) on their reporting requirements.
- 110 c. A government agency or other organization should provide government-wide  
111 training on these issues. Agencies should avail themselves of this training.
- 112 4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order  
113 of succession, agencies should formally name and disclose a first assistant position.
- 114 a. If there are multiple deputy positions to a covered position, agencies should  
115 specify which deputy position is the first assistant position.
- 116 b. In the description of each first assistant position, agencies should explain that the  
117 first assistant is the default acting official under the Vacancies Act.
- 118 5. Agencies with at least one PAS position covered by the Vacancies Act should  
119 communicate the requirements of the Act to the relevant acting official(s).
- 120 6. Agencies with at least one PAS position covered by the Vacancies Act should disclose on  
121 their websites the names of acting officials and the officials' start dates.~~acting officials on~~

**Commented [CA1]:** Council Inquiry: Should the Conference name or suggest a particular government agency to carry out this function?



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122 ~~their websites, as well as start and, to the extent identifiable, projected end dates. If an~~  
123 ~~end date is not identifiable, an agency should instead explain why by providing a brief~~  
124 ~~description of the contingency or triggering event at issue (e.g., a first/second nomination~~  
125 ~~is pending, during which time the acting official may serve until the nomination is~~  
126 ~~confirmed, rejected, withdrawn, or returned under Senate rules).~~ If a vacancy is not filled  
127 by an acting officer and the agency has identified an official to perform the delegable  
128 functions of the office, the agency should disclose that official on its website.

Commented [CA2]: Proposed Council Amendment #1

### Acting Officials Outside the Vacancies Act

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

### Succession Planning

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

### Delegations of Authority Related to Staffing Vacancies

- 135 9. All agencies should determine which functions and duties, if any, are exclusive to each  
136 PAS position and which of the nonexclusive functions and duties, if any, should be  
137 delegated in the face of staffing vacancies.
- 138 10. To the extent reasonably possible, agencies should make their delegations of authority in  
139 the face of staffing vacancies in PAS positions easily accessible on their websites and  
140 also, for standing delegations, the Code of Federal Regulations.



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

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