

Acting Agency Officials and Delegations of Authority

Project Outline

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Project Overview

The federal bureaucracy relies on both political appointees and careerists to operate effectively. There are currently over 1200 agency positions that are supposed to be filled through the presidential nomination and Senate confirmation process; these jobs are known as PAS positions. But there are staggering vacancies in these positions—at the start of every administration but also at other times, including in the final months (and years) of a president’s tenure. Many of these vacant positions can be filled temporarily. Namely, the Federal Vacancies Reform Act of 1998 (Vacancies Act) provides for temporary leadership primarily in cabinet departments and single-headed executive agencies. The Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions. Actions taken by an official not serving in accordance with the Vacancies Act generally are without legal effect, though the voiding of such actions typically requires litigation. After the time limits established by the Vacancies Act, which vary by timing in the administration and whether there are pending nominations, 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). There are also agency-specific succession statutes that provide for temporary leadership, including for chairpersons at some independent regulatory commissions.

This project will focus on current federal agency practices in the face of vacancies in PAS positions. It has three objectives. First, the project will provide background on the scope of acting officials and delegated authority in cabinet departments and some single-headed executive agencies in recent administrations. Second, through surveying and interviewing key agency personnel as well as examining public materials, it will describe agency practices concerning acting officials and delegated authority. Third, drawing from agency best practices, investigation of agency websites, and interviewing former acting officials, it will develop recommendations for agencies to follow.

Consultant and Research Team

Anne Joseph O’Connell will serve as the principal consultant for this project. Some research was performed at Stanford Law School in spring 2019 as a part of a “Law and Policy Lab.” This is a unique program at the law school, where students employ analytic approaches to work on real-world policy issues. Nine students were enrolled this spring to work on the project under O’Connell’s supervision. The students focused on the fifteen cabinet departments, the Environmental Protection Agency (EPA), the Office of Management and Budget (OMB), and a handful of independent regulatory commissions.

Project Plan and Methodology

Scope of Acting Officials

For covered positions under the Vacancies Act, the “first assistant” to the vacant job is the default acting official.¹ For example, if there is no confirmed or recess-appointed secretary of commerce, the confirmed or recess-appointed deputy secretary of commerce, as the first assistant, becomes the acting secretary of commerce. The Vacancies Act provides two 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 leader.² Second, “the President (and only the President)” may select “an officer or employee” who has not been Senate-confirmed to take over a position 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 and is paid at the GS-15 level or higher.³

While there has been considerable research on agency appointment delays, few have systematically studied acting officials, despite their prevalence in the administrative state. Much of the limited existing research provides upper bounds on the tenure of interim leaders by calculating vacancy periods (time between the departure of a confirmed or recess appointee and the start of a new confirmed or recess appointee) but does not target acting officials directly. This research finds approximately one-fifth of the time, on average, PAS positions in cabinet departments and single-headed executive agencies do not have confirmed or recess appointees.⁴

Until recently, only Christina Kinane had collected information on interim officials directly. From yearly data on all PAS positions in cabinet departments from 1977 to 2015 (using annual editions of the United States Government Manual and quadrennial editions of the “Plum Book” (i.e., the United States Government Policy and Supporting Publications)), Kinane finds that “[o]f the 20,110 position-year observations, 16,651 (83 percent) were filled by a permanent appointee, 1,593 (8 percent) were filled by an interim appointee, and 1,866 (9 percent) were empty.”⁵ Because she has annual snapshots, she cannot calculate tenure of interim officials or capture many short-term acting officials.

There is no good source for data on acting officials.⁶ The Office of Personnel Management (OPM) does not collect data on acting officials. It does, however, keep information on start and end

¹ 5 U.S.C. § 3345(a)(1) (2017).

² 5 U.S.C. § 3345(a)(2) (2017).

³ 5 U.S.C. § 3345(a)(3) (2017).

⁴ Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 PRESIDENTIAL STUDIES Q. 432, 441-442 figs.3-4 (2009); Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 962, 965 (2008); Matthew Dull, William G. Resh & Patrick S. Roberts, *Who Isn’t Running American Government? Appointee Vacancies in Executive Agencies*, at 3 (working paper June 9, 2017).

⁵ Christina M. Kinane, *Control without Confirmation: The Politics of Vacancies in Presidential Appointments*, at 18-20 (working paper Sept. 1, 2018).

⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-249, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED, at 13 (2019) (“Until the names of political appointees and their position, position type, agency or department name, start and end dates are publicly available at least quarterly, it will be difficult for the public to access comprehensive and reliable information.”), <https://www.gao.gov/assets/700/697593.pdf>.

dates of confirmed and recess appointees, but does not publicly post it. Under the Vacancies Act, agencies are required to report vacancies, acting officials, and nominations to the Government Accountability Office (GAO). Compliance is mixed.⁷

Before this project, O’Connell created a database of all confirmed, recess, and acting cabinet secretaries since the start of President Reagan’s administration to the present.⁸ In addition, she used data posted on the Environmental Protection Agency’s website to create another database on all confirmed, recess, and acting administrators, deputy administrators, and general counsels in that agency, going back to 1981 for the first two jobs and to 1983 for the third, when the office of the general counsel was created. In both databases, O’Connell collected information on the type of acting official (for example, first assistant, other Senate-confirmed official, senior agency worker (divided into political and career)). For this project, she will continue to extend, analyze, and distribute those databases.

In addition, with the help of the policy lab students’ research, she will create a new database on important lower-level PAS positions in the fifteen cabinet departments, EPA, and OMB as of April 15, 2019. This “snapshot” of 17 major agencies will show which positions are staffed by a confirmed appointee, which are filled with acting officials, and which are empty (with functions typically delegated to lower-level officials).

Finally, O’Connell hopes to obtain data from OPM on the start and end dates of confirmed and recess appointees in PAS positions from January 2005 to the present. In combination with earlier data, such information would allow the project to determine the scope of vacancies—an upper limit on the service of acting officials—from the start of President Clinton’s administration to the present.

Scope of Delegated Authority

Agencies often delegate tasks assigned (by statute) to the highest position(s) to lower-level officials. This delegation increases in the face of staffing vacancies after the time limits for acting service under the Vacancies Act have run. Under the Vacancies Act, agencies are permitted to delegate to lower-level staff members any functions and duties not assigned (by statute and in some cases by regulation) exclusively to the vacant office.⁹

Because this project focuses on acting officials, it will not attempt to gather comprehensive information on delegations of authority to address vacancies in agency management. Instead, O’Connell, with the help of policy lab students, will find some representative examples of such delegations through searches of the Federal Register and agency web sites. For instance, since the

⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, B-329903, LETTER TO SENATOR RON WYDEN, AGENCY COMPLIANCE WITH THE FEDERAL VACANCIES REFORM ACT FOR POSITIONS SUBJECT TO THE JURISDICTION OF SENATE FINANCE COMMITTEE, Feb. 7, 2019, <https://www.gao.gov/assets/700/696799.pdf>.

⁸ The Washington Post recently posted information on acting cabinet secretaries, though not as complete and accurate as the database constructed by O’Connell. Philip Bump, *Trump relies on acting Cabinet officials more than most presidents. It’s not an accident*, WASH. POST (April 8, 2019), https://www.washingtonpost.com/politics/2019/04/08/trump-relies-acting-cabinet-officials-more-than-most-presidents-its-not-an-accident/?utm_term=.8907dfe1a2ad.

⁹ See OFFICE OF LEGAL COUNSEL, GUIDANCE ON APPLICATION OF FEDERAL VACANCIES REFORM ACT OF 1998, (1999), at 72 (Question 48), https://www.justice.gov/sites/default/files/olc/opinions/1999/03/31/op-olc-v023-p0060_0.pdf.

start of President Trump’s administration, the Department of Interior has issued two dozen secretarial orders that largely delegate functions and duties of vacant offices to other individuals.

Agency Practices

Because so little is known about agency use of acting officials and delegated authority, this project will rely heavily on a survey and interviews. To supplement the information provided by agencies, O’Connell and policy lab students will examine congressional hearings, conduct news searches, and look carefully at agency web sites to learn more about relevant agency practices. Among other items, O’Connell and students will examine agency web sites to see if they contain names of acting officials or delegations for vacant positions, succession plans, and other items. O’Connell also will assess agency compliance with the Vacancies Act through the GAO’s Vacancies Act database and generate a comprehensive list of agency-specific statutory succession provisions through searches of legal databases.

The survey, which has recently been sent to a wide range of agencies (including cabinet departments, single-headed executive agencies, and independent regulatory commissions and boards), asks about the following items, among others:

- Whether the Vacancies Act applies to any PAS positions in the agency
 - If so, who in the agency reports to GAO and tracks the Vacancies Act’s time limits
- Whether any agency-specific succession statutes or regulations apply (including for acting chairpersons at independent regulatory commissions and boards)
- Whether the agency identifies acting officials on its web site
- Whether the agency has a succession plan
 - If so, when the plan was last revised
 - If so, whether the plan is posted on the agency web site
- Whether the agency uses delegated authority in the face of vacancies (to stress, this project is not focused on legal questions surrounding what can be delegated)
 - If so, whether that authority is time limited
 - If so, whether delegations are posted on the agency web site
- What practices the agency would recommend to other agencies
- What help or changes the agency would like to see on acting officials and delegated authority

In designing the survey, O’Connell drew from previous ACUS projects (for instance, Non-ALJ Adjudicators in Federal Agencies (2018), Public Engagement in Rulemaking (2018), Waivers, Exemptions, and Prosecutorial Discretion (2017), The Government in the Sunshine Act in the 21st Century (2014), and Petitions for Rulemaking (2014)). She also worked extensively with ACUS staff in developing the questions. Responses will be treated confidentially, so that no specific agency will be linked to any response, unless explicit permission is provided.

Relying on contacts provided by ACUS and survey responses (on who has responsibility for the implementation of the Vacancies Act, if relevant), O’Connell will conduct interviews with key officials in a smaller set of agencies, including at least one agency not covered by the Vacancies Act. These interviews will focus on the topics above but will hopefully provide more in-depth responses.

O’Connell (with the assistance of an ACUS attorney advisor) did confidential phone interviews with six agencies last year as part of efforts to see if this project would be feasible. Those conversations provided helpful information and examples of best agency practices.

Finally, in May and early June, O’Connell and policy lab students conducted nineteen interviews with former acting officials in PAS positions to learn more about their experiences serving in an interim role and to seek their advice for agency recommendations.

Best Practices and Recommendations

Using information collected from agency web sites, the GAO’s Vacancies Act database, congressional oversight, news searches, a survey of agencies, and interviews, the project will identify best practices and make recommendations.

Timeline

April 2019	Convene policy lab class (runs for nine weeks) Work with ACUS to draft survey for agencies Collect data on acting officials and delegated authority Collect and analyze congressional hearings on agency practices
May 2019	Revise and program survey in Qualtrics Collect data on acting officials and delegated authority Conduct interviews with former acting officials
June 2019	Conduct interviews with former acting officials Send survey to agencies Finalize “snapshot” database
July 2019	Analyze “snapshot” database If OPM data available, calculate vacancy periods Assess agency compliance with Vacancies Act’s reporting mandates for “snapshot” database Conduct interviews with current agency officials on agency practices Draft report
August 2019	Submit report to ACUS Revise report if needed
September 2019, October 2019	Participate in committee meetings Revise report
November 2019	Submit final report to ACUS