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Acting Agency Officials and Delegations of Authority

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where recommendations of the Conference are cited.

I welcome suggestions and any corrections, particularly from the agencies discussed in the draft report, before I submit a final version.

* Adelbert H. Sweet Professor of Law, Stanford University. Nine Stanford Law School students contributed significantly to this report through a “Law and Policy Lab.” This is a unique program at the Stanford Law School, where students employ analytic approaches to work on real-world policy issues. Arielle Andrews (SLS 2021), Juan Pablo Gonzalez (SLS 2020), Nicholas Gonzalez (SLS 2020), Will Setrakian (SLS 2020), Thomas Veitch (SLS 2020), Alex Wu (SLS 2020), and Victor Xu (SLS 2020) participated in the policy lab during the spring quarter, and Chelsey Davidson (SLS 2021) and Arielle Mourrain (SLS 2020) worked on the project in the spring quarter and over the summer. Outside the policy lab, I am indebted to Natalie Peelish (SLS 2019) and the reference librarians at Berkeley Law and Stanford Law School, particularly Shay Elbaum and Kevin Rothenberg. Elan Dagenais programmed the agency survey into Qualtrics, and provided key advice on its content. Bobby Ochoa and Reeve Bull at ACUS helped me in innumerable ways throughout the project. Much of the background material in this report (for example, on the components of the Vacancies Act) is taken from a separate research paper that focuses on normative and legal issues surrounding acting officials and delegations of authority, which is forthcoming in the *Columbia Law Review*. The list of current succession statutory provisions was developed for ACUS, however. The empirical material, other than the recent staffing of Cabinet Secretary jobs and three EPA positions, was produced for this report (e.g., snapshot database, historical officers, GAO reporting for all the data sources, GAO violation letters, and agency practices). The information on recent staffing in the Cabinet Secretary and the EPA positions was originally produced for a Brookings Institution report and is reproduced here with permission. This report would not have been possible without the contributions of former and current agency officials who shared their expertise and experience.

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Introduction

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 (or Senate-confirmed) positions. But there are staggering vacancies in these positions—especially at the start of every Administration, but also at other times, including the final months (and years) of a President’s tenure. Many of these vacant positions can be filled temporarily. 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 report focuses on current federal agency practices in the face of vacancies in PAS positions. It has three objectives. First, it provides background on the scope of acting officials in cabinet departments and some single-headed executive agencies in recent Administrations, along with some historical comparisons. It also offers some examples of delegated authority in the face of staffing vacancies from cabinet departments, executive agencies, and independent regulatory commissions. Second, through surveying and interviewing key agency personnel as well as examining public materials, it describes agency practices concerning acting officials and delegated authority. Third, drawing from agency best practices, investigation of agency websites, and interviews with former acting officials, it develops recommendations for agencies to follow.

Part I provides some important background on the Vacancies Act, agency-specific succession provisions, and delegations of authority. It also flags some legal disputes, but the report does not address those conflicts in any meaningful way. After summarizing previous research and noting data access issues, Part II draws on new information sources to proffer an empirically grounded perspective of the recent and historical scope of acting officials. Part III gives some examples of delegations of authority in the face of staffing vacancies, and more widely. Part IV uses a survey of agency officials and interviews with agency experts and former acting leaders, among other sources, to summarize agency practices concerning acting officials. Part V focuses on the Government Accountability Office’s (GAO) role under the Vacancies Act, including agency compliance with reporting mandates to the GAO and GAO violation letters. Part VI draws on the survey and interviews to discuss agency practices related to delegations of authority when there are staffing gaps. Part VII offers recommendations to agencies for best practices in these areas, with emphasis on affirmative disclosures by agencies.

Three preliminary notes seem in order. First, early in this project, ACUS formally reached out to the Department of Justice’s Office of Legal Counsel (OLC), given their role in providing legal advice to agencies on these topics, to inform them of the research. This project does not explore legal questions about who is permitted to serve as an acting official or what authority can be properly delegated. Second, this project also does not examine the benefits and costs of acting officials and

delegated authority as a matter of policy. Third, because of the sensitivity of the covered issues, the agencies connected to survey respondents and interviewees are not identified.

I. Background on Acting Officials Under the Vacancies Act, Succession Provisions, and Delegations of Authority

This Part briefly describes key elements of the Vacancies Act, lays out all current agency-specific succession provisions, and explains how delegations of authority function when there are gaps in confirmed leaders.¹ It concludes by flagging some of the constitutional and statutory conflicts that have arisen in recent years, but does not address them in detail.

A. Vacancies Act

The current Vacancies Act is the latest in a long line of statutes, dating back to 1792.² I do not recount much of the history of relevant legislation here.³ The predecessor statute to the current system was enacted in 1988.⁴ That legislation rejected the Department of Justice's earlier view that agency heads "had independent authority apart from the Vacancies Act to temporarily fill vacant offices" but also extended the time limit for acting service to 120 days plus the time a nomination to the vacant position was pending.⁵ Nearly a decade later, "approximately 20 percent of [Senate-confirmed] offices in executive agencies were occupied by 'temporary designees, most of whom had served beyond the 120-day limitation period . . . without presidential submissions of nominations,'" angering Congress.⁶

The 1998 Vacancies Act⁷ tried to address congressional concerns while also giving more authority to the White House to use acting officials. This section lays out the parts of the Act relevant to this report, describing the positions covered by the Act, the authority and pay of acting leaders, who can serve as an acting leader and for how long, and agency reporting mandates.⁸ Compared to the statute enacted a decade earlier, the current legislation creates a much more formalized process. As one agency interviewee put it, "there are more places for agencies to trip up."⁹

¹ I draw much of the discussion in the first and third parts below from another project that focuses on the normative and legal issues surrounding acting officials and delegations of authority. Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. (forthcoming 2020). In turn, that project draws from VALERIE C. BRANNON, CONG. RES. SERV. REPORT R44997, THE VACANCIES ACT: A LEGAL OVERVIEW (2018) and Jen Kirby, *A Top Official at the Justice Department Is Resigning. The Federal Vacancies Act Has a Solution for That*, VOX (Feb. 9, 2018), <https://www.vox.com/2018/1/30/16924764/trump-government-appointees-vacancies-act> (an interview with me on the Act).

² NLRB v. SW General, Inc., 137 S. Ct. 929, 935-36 (2017) (recounting the history of relevant statutes); Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281.

³ In addition to the recounting in *SW General*, the Congress Research Service report, *supra* note 1, provides considerable detail.

⁴ Presidential Transitions Effectiveness Act, §7, 102 Stat. 985 (1988).

⁵ *SW General*, 137 S. Ct. at 935-36.

⁶ *Id.* (internal citation omitted).

⁷ The Federal Vacancies Reform Act of 1998, 112 Stat. 2681-611-16 (codified at 5 U.S.C. §§ 3345-3349d).

⁸ The report does not discuss enforcement mechanisms through the courts, for example. The Act does not establish a direct removal mechanism for officials serving in violation. *See* Brannon, *supra* note 1, at 19-20 It does, however, specify that certain actions by an improperly serving acting official should have "no force or effect." 5 U.S.C. § 3348(d)(1) (2017). This requires injured parties to sue, which rarely occurs. I have found only eighteen unique cases citing § 3348. *See* Brannon, *supra* note 1, at 21 n.182 (documenting fifteen cases). I performed the same search to locate additional cases. One case appears twice in the results but is counted only once in the tally above. Only ten of those cases discuss the "no force or effect" part of the statutory provision.

⁹ *See* Appendix G, *infra*.

1. Included PAS Positions

The Vacancies Act covers only some of the 1200-plus PAS positions in the Executive Branch. The Act generally applies to positions in agencies that are not solely part of multi-member leadership teams.¹⁰ In other words, almost all PAS jobs in the fifteen cabinet departments and executive agencies (such as the Environmental Protection Agency) are included.¹¹

Commissioners and members of multi-leader independent regulatory commissions and boards (such as the Securities and Exchange Commission) do not, however, typically fall under the Act's purview. If a specific member of an independent entity, however, has statutory duties separate from the multi-member board, the Act may apply to those separate functions. In addition, the Act includes several PAS positions (outside the main leadership body) in independent regulatory commissions, such as the General Counsel of the Federal Labor Relations Authority and the National Labor Relations Board.¹²

The Act covers far more positions than its predecessors but still excludes many agencies. Those agencies often have no other mechanism for accessing temporary leadership. For instance, the Merit Systems Protection Board has been without its statutorily mandated quorum since January 2017, resulting in substantial restrictions on case processing.¹³ The Federal Election Commission lost its four-person quorum at the end of August 2019, preventing the agency from undertaking enforcement actions or issuing regulations.¹⁴ Some of the entities excluded from the Vacancies Act do have agency-specific statutory provisions permitting service beyond the expiration of the appointed term and for acting chairpersons.

2. Authority and Pay

Acting officials generally have the same authority as confirmed leaders.¹⁵ This does not have to be the case. Corporate boards of directors, for example, sometimes restrict what interim CEOs can do. In rare cases, non-statutory devices limit the authority of acting officials. Until August 2019, widely-followed OPM guidance “stipulated that agencies face a moratorium on . . . review boards for SES candidates after their top leaders announced they were stepping down or the president announced a successor.”¹⁶

¹⁰ 5 U.S.C. §§ 3345(a), 3349(c) (2017). The Act also does not cover government corporations and independent establishments, Article I courts, and the GAO.

¹¹ A note on terminology. I use “executive agencies” to capture single-headed agencies; such entities are sometimes housed within cabinet departments, like the National Oceanic and Atmospheric Administration in the Commerce Department, while others are freestanding, like the EPA. I use “independent regulatory commissions and boards” to capture multi-leader-headed agencies, such as the National Labor Relations Board.

¹² 5 U.S.C. §§ 3348(e), 3349(c) (2017).

¹³ Eric Katz, *Federal Employee Appeals Board Can No Longer Decide Appeals*, GOV'T EXEC. (Jan. 5, 2017), <https://www.govexec.com/management/2017/01/federal-employees-appeals-board-can-no-longer-decide-appeals/134377/>; *Frequently Asked Questions About the Lack of Board Quorum and Lack of Board Members*, U.S. MERIT SYSTEMS PROTECTION BOARD, https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf (last updated March 1, 2019).

¹⁴ Emily Davies, *GOP Appointee Resigns from Federal Election Commission, Leaving It Without a Quorum*, WASH. POST (Aug. 26, 2019), https://www.washingtonpost.com/politics/gop-appointee-resigns-from-federal-election-commission-leaving-it-without-a-quorum/2019/08/26/d05b9cb6-c822-11e9-a4f3-c081a126de70_story.html.

¹⁵ 5 U.S.C. § 3345(a) (2017) (acting officials “perform the functions and duties of the office”).

¹⁶ Eric Katz, *Agencies with Acting Leaders Can Now Fill Top Career Ranks*, OPM SAYS, GOV'T EXEC. (Aug. 20, 2019), <https://www.govexec.com/management/2019/08/agencies-acting-leaders-can-now-fill-top-career-ranks-opm->

Interestingly, acting officials cannot “receive pay in addition to the pay for” their non-acting jobs.¹⁷ These officials continue to receive the salary for the position in which they serve when given the acting title. This rule creates some unusual situations. To start, it is possible for a special government employee to qualify for acting service, but because of lower pay be excluded from ethics reporting mandates.¹⁸ In addition, acting officials drawn from the senior career ranks may be paid more than a confirmed appointee would be in the position.¹⁹

3. Who Can Serve as Acting Leaders

For covered positions under the Vacancies Act, the “first assistant” to the vacant job is the default acting official.²⁰ The Act, however, does not specify who the “first assistant” is.²¹ For some positions, Congress has defined the first assistant; agencies have largely defined the rest.²² For example, if there is no confirmed or recess-appointed Secretary of Defense, the confirmed or recess-appointed Deputy Secretary of Defense, as the first assistant, becomes the acting Secretary of Defense.²³

The Vacancies Act provides two main alternatives to the first assistant for acting service, but the President must actively select them.²⁴ First, “the President (and only the President) may direct” another PAS official—within the agency or outside it—to serve as the acting leader.²⁵ 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 arises and earns a salary at the GS-15 level or higher.²⁶

The final category did not exist in previous renditions of the Vacancies Act and appears to have made cross-agency acting officials less common as the White House can now pull an acting official from the senior ranks of agency employees to step into a vacant position.

Here is an example of a presidential designation for the last presidential transition:²⁷

[says/159315/](https://www.opm.gov/policy-data-oversight/vacancies/159315/). Because of high vacancies, OPM changed its policy to allow acting leaders who are presidential appointees (whether or not confirmed by the Senate) to “process new top-ranking senior executives.” *Id.* Other acting leaders (i.e., career first assistants) “will receive authority to place SES candidates before review boards on a case-by-case basis.” *Id.* See also *Ensuring the Continuity of the United States Government: The Presidency: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Rules and Admin.*, 108th Cong. 11 (2003) (statement of John C. Fortier, Exec. Dir., Continuity of Gov’t Comm’n) (noting that non-confirmed acting secretaries would not be in the line of presidential succession).

¹⁷ 5 U.S.C. § 5535 (a) (2017). In the past, however, such acting officials received additional compensation. Designating an Acting Attorney General: Memorandum for Emmet T. Flood, Counsel to the President, Op. O.L.C., 2018 WL 6131923, at *11 (Nov. 14, 2018) (gathering cases).

¹⁸ See David Dayen, *America’s Most Dangerous Temp*, AMERICAN PROSPECT, May 17, 2017.

¹⁹ See Part IV.E.3, *infra*.

²⁰ 5 U.S.C. § 3345(a)(1) (2017).

²¹ See Brannon, *supra* note 1, at 9 n.74.

²² *Id.* at 9-10 n.75.

²³ 10 U.S.C. § 132 (2017).

²⁴ There is another category of allowed acting officials: Someone who is 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 to an additional term. § 3345(c)(1)). This report concentrates on the three main categories—first assistants, Senate-confirmed officials, and senior agency staffers.

²⁵ § 3345(a)(2).

²⁶ § 3345(a)(3).

²⁷ This document, along with other presidential designations, appears in the Department of Justice’s brief in *English v. Trump* in the D.C. Circuit.

THE WHITE HOUSE

WASHINGTON

January 17, 2017

MEMORANDUM FOR NORRIS COCHRAN
Deputy Assistant Secretary for Budget

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Secretary of Health and Human Services, effective January 20, 2017.

A handwritten signature in black ink, appearing to be "Peter Orszag", written over a faint circular stamp or watermark.

Nominations further restrict the pools of potential acting leaders, particularly after the Supreme Court's decision in 2017 in *NLRB v. SW General*.²⁸ Under the Act, formal nominees typically "may not serve as an acting officer" for the position to which they have been nominated.²⁹ For instance, Mark Esper had to relinquish his acting Secretary of Defense title when the Senate formally received his nomination for the post on July 15, 2019. Richard Spencer, Secretary of the Navy, then became the third acting Secretary of Defense in 2019 until the Senate confirmed Esper.

There are some limited exceptions to this bar: Unconfirmed first assistants can stay serving during their nominations if they held the first assistant position for at least 90 days in the year before the vacancy arose and confirmed first assistants can function as both the acting leader and the formal nominee.³⁰ Agency-specific statutes also may permit acting service of nominees. For example, under

²⁸ *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017).

²⁹ § 3345(b).

³⁰ *SW General*, 137 S. Ct. at 936. Prior to the Court's 2017 ruling, OLC had ruled that the restrictive conditions on nominees applied only to first assistants while Senate-confirmed officials and senior agency workers could serve both as the nominee

both the Vacancies Act and the agency’s succession provision, Gina Haspel (unconfirmed Deputy Director) was permitted to lead the CIA in an acting capacity while her nomination to head the agency was pending.³¹

4. How Long Acting Officials Can Serve

The permitted time limits under the current Act, which reset for each Administration, are much longer than under previous legislation. Acting leaders can typically use the title for 210 days from the vacancy’s start.³² If the vacancy exists when a new President enters the White House, or occurs within the next 60 days, the limit extends to 300 days.³³

Nominations extend these limits. Acting leaders can continue serving through two nominations to the vacant job. If each nomination fails (most typically because it is returned to the President in a recess), a new 210-day period of permitted tenure begins from the date of the failure. In other words, an acting leader could conceivably have the title for 210 (or 300) days before there is a nomination, during a first nomination, for 210 days after that nomination is returned, during a second nomination, and for a final 210 days if the second nomination is returned as well.³⁴

In 2006, Congress required that the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives be confirmed by the Senate. From then to July 2013, there was no confirmed or recess-appointed leader of ATF but there was almost always an acting official.³⁵ President George W. Bush submitted a nomination on March 22, 2007; the Senate returned it on January 2, 2009.³⁶ Under President Obama, a new 300-day period began. After 300 days, there was no acting official until he submitted his first nomination on November 17, 2010.³⁷ The Senate returned that nomination on December 22, 2011.³⁸ He re-nominated the same person well before the end of the first 210-day period following the first failed nomination—that nomination sat from January 5, 2011 to January 3, 2013, when the Senate returned it.³⁹ The Senate confirmed a third nomination (for a different person) on July 31, 2013, just within the final 210-period for acting service.

5. Reporting Mandates and GAO Determinations

Under the Act, agencies must report certain information to the GAO and Congress. Specifically, agencies must submit: “notification of a vacancy in a[] [covered] office ... and the date

and the acting official. *See* Guidance on Application of Federal Vacancies Reform Act of 1998 [Guidance], 23 Op. O.L.C. 60, 64 (1999). The Court disagreed with this view in *SW General*.

³¹ *See* 50 U.S.C. 3037(b)(2) (2017).

³² 5 U.S.C. § 3346(a)(1) (2017).

³³ 5 U.S.C. § 3349(a)(b) (2017).

³⁴ *See* Brannon, *supra* note 1, at 13 fig.2. If the 210 (or 300)-day limit with no nominations runs out, and the President later submits a nomination, there can be no acting official in between. But as soon as the nomination is pending, there can be an acting leader (the same person as before or a new one). *Id.* at 13 n.105. The time limits do not apply when the vacancy has been “caused by sickness.” § 3346(a).

³⁵ Sari Horwitz, *Senate Confirms ATF Director*, WASH. POST (July 31, 2013), http://wapo.st/1cpQigC?tid=ss_tw&utm_term=.482750acce6f.

³⁶ *Nomination of Michael J. Sullivan for Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives at Department of Justice*, PN381, 110th CONG., <https://www.congress.gov/nomination/110th-congress/381>.

³⁷ *Nomination of Andrew L. Traver for Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives at Department of Justice*, PN2296, 111th CONG., <https://www.congress.gov/nomination/111th-congress/2296>.

³⁸ *Id.*

³⁹ *Nomination of Andrew L. Traver for Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives at Department of Justice*, PN44, 112th CONG., <https://www.congress.gov/nomination/112th-congress/44>.

such vacancy occurred immediately upon the occurrence of the vacancy;” “the name of any person serving in an acting capacity and the date such service began immediately upon the designation;” “the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and” “the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.”⁴⁰ The GAO also asks agencies to report the end date of service of any acting official, though that is not required by the Vacancies Act.

These reports can be found at: <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act#search>. Here is the report for the latest vacancy in the Secretary of Homeland Security position:⁴¹

Secretary

Vacancy Identification Number: Trump Administration 19850, **Date reported to GAO:** April 19, 2019

[Quick View](#) 

Agency:	Department of Homeland Security		
Sub-Agency:	Department of Homeland Security : Office of the Secretary		
Position Title:	Secretary		
Date Vacancy Began:	04/10/19		
Information on Acting Official(s)			
	Name	Acting Service Dates	
		Start	Actual End
	Kevin K. McAleenan	04/11/19	—

The GAO cannot penalize agencies that do not report or that delay in reporting.⁴² Instead, the GAO “provide[s] regular reminders to agencies and departments to obtain required reports.”⁴³

The GAO then must assess whether acting officials are serving past the permitted time limits. If the Comptroller General so determines, she must notify congressional oversight and appropriation committees, the White House, and the Office of Personnel Management.⁴⁴

⁴⁰ § 3349(a).

⁴¹ DHS also reported to the GAO that McAleenan was serving under the agency’s succession provision, 6 U.S.C. § 113(g)(2), not under the Vacancies Act, but that information does not appear in the public database. Harrison Cramer & Zach C. Cohen, *Inside Trump’s Gambit To Install Another Acting DHS Secretary*, NAT’L J. (Nov. 22, 2019), <https://www.nationaljournal.com/s/702570/inside-trumps-gambit-to-install-another-acting-dhs-secretary>.

⁴² *Id.*

⁴³ 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 11 n.2 (2019), <https://www.gao.gov/assets/700/696799.pdf>.

⁴⁴ § 3349(b).

B. Agency-Specific Succession Statutes

Congress has enacted a number of agency-specific succession provisions. Appendix A lists current provisions meeting particular search criteria.⁴⁵

Here are just two of the approximately 100 examples. First, Congress has specified for the NLRB: “In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.”⁴⁶

Second, Congress provided for DHS: “Notwithstanding chapter 33 of Title 5, the Under Secretary for Management shall serve as the Acting Secretary if by reason of absence, disability, or vacancy in office, neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary.”⁴⁷ It further specified: “Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary.”⁴⁸ This is a rare example of an agency succession provision where Congress has referred explicitly to the Vacancies Act.

The interaction of these agency-specific provisions with the Vacancies Act has generated conflict in some cases. Congress specified that the Vacancies Act is the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [covered] office”⁴⁹ The Act, however, includes two exceptions: recess appointments and statutes that “expressly” provide for an alternative.⁵⁰

⁴⁵ With the assistance of the Stanford Law School reference librarians and Arielle Mourrain, I ran two searches in Westlaw Edge (limited to statutes and court rules in the All Federal database) to develop a list of nonrepealed agency-specific statutory provisions for temporary service: (1) ((absen! /20 disab!) or (absen! /20 vacan!) or (disab! /20 vacan!) or (unable /20 serve) or (unable /20 vacant) or (absen! /20 unavail!)) OR CA(deputy or assistant or (under /2 secretary) or undersecretary or under-secretary or acting); (2) (vacan! or absen! or disable! or unable!) AND CA(deputy or assistant or (under /2 secretary) or undersecretary or under-secretary or acting). The first produced 768 results; the second generated 65 results. Table 18 in Appendix A lists all relevant provisions, including those for actual interim leaders (rather than “acting” officials) (e.g., interim U.S. Attorneys) and those for positions outside the Executive Branch (e.g., House Office of Legislative Counsel). Some of these provisions cover positions that are clearly excluded from the Vacancies Act—because they are not in Executive Branch agencies or because they do not require Senate confirmation. I know of essentially one other list of such statutes, focusing on provisions in effect in 1998 when the Vacancies Act was passed. The Senate committee report accompanying the Act provided a list. S. Rep. No. 105-250, at 15-17 (1998). Ben Miller-Gootnick recently went through this list and republished it: “The Committee Report refers to forty-one statutes in place at the drafting of the legislation, and notes that the bill retains forty. The Report’s list skips from number twenty-five to number twenty-eight, so in total it only lists thirty-eight statutes. Three of those statutes provide for agencies to issue their own succession regulations” Ben Miller-Gootnick, *Boundaries of the Federal Vacancies Act*, 56 HARV. J. ON LEGIS. 459, 467 n.37 (2019). I am indebted to the reference librarians at Stanford Law School and Arielle Mourrain for their work on this task.

⁴⁶ 29 USC § 153(d) (2017).

⁴⁷ 6 USC § 113(g)(1) (2017).

⁴⁸ 6 USC § 113(g)(2) (2017).

⁴⁹ 5 U.S.C. § 3347(a) (2017).

⁵⁰ *Id.*

Under OLC guidance and limited case law, agency-specific statutes often co-exist with the Vacancies Act.⁵¹ As OLC has explained, “in calling the Vacancies Reform Act the ‘exclusive means’ for designations ‘unless’ there is another applicable statute, Congress has recognized that there will be cases where the Vacancies Reform Act is non-exclusive, i.e., one available option, together with the office-specific statute.”⁵² Thus, the Ninth Circuit held that the National Labor Relations Act’s provision for a temporary General Counsel did not displace the Vacancies Act.⁵³

On the other hand, Congress explicitly barred the use of the Vacancies Act for the top position at DHS if there is a confirmed Deputy Secretary or Undersecretary for Management. When President Trump asked Kirstjen Nielsen to step down earlier this spring, he also had to pressure Claire Grady, the confirmed Undersecretary for Management, to resign in order to make way for his preferred choice for the acting job, Kevin McAleenan.⁵⁴

This project does not address when these agency-specific succession provisions should displace the Vacancies Act as it does not explore the complicated legal and normative questions surrounding acting officials.

⁵¹ *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018), *appeal dismissed upon appellant’s motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018); Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. __, at *5-6 (Nov. 25, 2017).

⁵² Designating an Acting Director of the Bureau of Consumer Financial Protection, *supra* note 51, at *5-6.

⁵³ *Hooks*, 816 F.3d at 555-56.

⁵⁴ See Margaret Talev, Shannon Pettypiece, & Bloomberg, *Latest Homeland Security Resignation Clears Way for McAleenan*, FORTUNE (April 10, 2019), <https://fortune.com/2019/04/10/acting-dhs-secretary-mcaleenan/>.

C. Delegations of Authority

This report focuses on the statutory (and not the constitutional) aspects of delegations of authority, which often function as a substitute for acting officials. After the GAO determined that Nancy Berryhill was improperly serving as acting Commissioner of Social Security in early 2018, for example, Berryhill dropped the acting title and continued carrying out all the duties of the vacant position in her role as Deputy Commissioner through delegation.⁵⁵

Not all functions of the vacant position can be delegated, however. The Vacancies Act forbids the assignment “downward” of functions and duties that are established by statute or regulation to be performed by “the applicable officer (and only that officer).”⁵⁶ These are known as “non-delegable functions or duties.”⁵⁷ For those items tasked exclusively to lower-level officials, the Act does permit “upward” delegation to “the head” of the agency, except for a few independent positions such as Inspectors General.⁵⁸ Agencies can modify their “regulations” about non-delegable tasks, although what qualifies as a regulation is undefined in the statute. The Act does provide for a 180-day look back period, which counts as exclusive duties any functions that were exclusive by regulation in the 180-day period preceding the vacancy.⁵⁹

As OLC explained in its 1999 comprehensive guidance on the Vacancies Act:

Congress understood that there would be occasions when the time limits would expire or when there would, for a period, be no one qualified to serve in an acting capacity. Congress also understood that if everything the PAS officer may have done in the performance of his or her duties had to be performed by the head of the Executive agency, the business of the government could be seriously impaired. See S. Rep. No. 105-250, at 30-31 (Additional Views). As a result, Congress delimited which functions could be performed only by a qualified acting officer or the head of the Executive agency, defining them as only those functions or duties assigned exclusively to the PAS officer by statute or regulation. Most, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.⁶⁰

In short, most functions of vacant positions can be delegated downward.⁶¹ In the first year of an Administration, one sees a lot of “acting” titles on agency websites. After the Act’s time limits run out, one sees “performing the functions of [a particular vacant office]” language instead.

Here is a rare example of a prior non-delegable function. The Secretaries of Treasury, Labor, and Commerce make up the Board of Directors for the Pension Benefit Guaranty Corporation.⁶²

⁵⁵ Brannon, *supra* note 1, at 20.

⁵⁶ 5 U.S.C. § 3348(a) (2017).

⁵⁷ S. REP. NO. 105-250, at 18 (1998).

⁵⁸ 5 U.S.C. §§ 3348(b)(2), (e).

⁵⁹ See Guidance, *supra* note 30, at 71 (Question 44).

⁶⁰ *Id.* at 72 (Question 48).

⁶¹ *Stand Up for California! v. Department of Interior*, 298 F. Supp. 3d 136, 137 (D.D.C. 2018) (“[I]t turns out that, in practice, there are very few duties that cannot be delegated to an ‘acting’ officeholder ... or even another official who acts in the place of the principal pursuant to agency regulations or orders.”).

⁶² 29 U.S.C. § 1302(d)(1) (2017).

Acting Secretaries have the full power of the Secretaries and thus sit on the Board. Until 2017, only Secretaries and acting Secretaries counted for establishing a quorum. When the time limits of the Vacancies Act ran out in early 2013 for the acting Secretary of Commerce, the function of establishing a quorum could not be delegated.⁶³ (The Board maintained a quorum in this period from the leaders of the Treasury and Labor Departments.) But this function is now delegable: “A person who, at the time of a meeting of the Board of Directors, is serving in an acting capacity as, or performing the duties of, a Member of the Board of Directors will serve as a Member of the Board of Directors with the same authority and effect as the designated Secretary.”⁶⁴

Agencies not covered by the Vacancies Act may be allowed, by statute, to delegate particular functions of vacant positions as well. For instance, Congress allows the NLRB to “delegate to any group of three or more members any or all of the powers which it may itself exercise.”⁶⁵ Furthermore, the NLRB “is also authorized to delegate to its regional directors its powers . . . to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.”⁶⁶ This authority does not depend on vacancies, but could be helpful if there are vacancies.

Although courts generally permit “subdelegation to a subordinate federal officer or agency . . . absent affirmative evidence of a contrary congressional intent,”⁶⁷ agencies not covered by the Vacancies Act appear to also operate under far more affirmative constraints in assigning functions downward than agencies covered by the Act.

⁶³ 29 C.F.R. § 4002.3 (2008-2017).

⁶⁴ 29 C.F.R. § 4002.1(a)(1) (2017).

⁶⁵ 29 U.S.C. § 153 (b) (2017).

⁶⁶ *Id.*

⁶⁷ U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004); *cf.* Cudahy Packing Co. v. Holland, 315 U.S. 357, 361 (1942) (forbidding delegation of subpoena power from a particular office as two statutes specified that the identified office “shall have power” of subpoena).

D. Constitutional and Statutory Issues

In recent years, conflict has arisen on a number of legal questions involving the Vacancies Act, agency-specific succession provisions, and delegations of authority. Among them:

- **Non-confirmed acting leaders in principal offices:** Under the Vacancies Act and certain agency-specific succession statutes, acting officials who have not been confirmed to any position can serve temporarily in principal offices, such as the Attorney General and the Director of the Consumer Financial Protection Bureau. If these acting officials (for instance, Matthew Whitaker as acting AG) are inferior officers, there is no concern as the Appointments Clause allows Congress to permit the department head or the President alone to appoint them. If acting officials are not inferior officers, but rather employees, there is also no constitutional issue. But if these acting officials are principal officers, they would be serving in violation of the Constitution. OLC and lower courts have decided that the third category of the Vacancies Act does not run afoul of the Appointments Clause for these high-level positions, at least in the contexts considered.⁶⁸
- **Creation of offices and delegations of authority:** Assuming the delegatee is an inferior officer in carrying out the delegated functions (so as to keep the legal issues distinct from the ones above), Congress must have established the specific position or assigned the authority to create the job to the head of the agency under the Appointments Clause. Disputes have arisen over whether Congress has permitted agencies to create first assistant positions in the face of staffing vacancies (such as the new Principal Deputy Director of U.S. Citizenship and Immigration Services). These disputes are largely statutory. Even if the position is permitted by the Appointments Clause and relevant statutes, the agency also needs authority to assign the duties. OLC and the lower courts have generally upheld agency creation of offices and delegations of authority, though most of the court cases do not involve staffing vacancies.⁶⁹
- **Conflict with agency-specific succession provisions:** Many agency-specific succession provisions provide that the deputy to a vacant position serves as the acting official (e.g., the Deputy Attorney General or the Deputy Director). The Vacancies Act gives the White House two different alternatives to this first assistant—any Senate-confirmed appointee and any sufficiently senior agency staff member who has spent at least 90 days in the agency in the year before the vacancy. Disputes have arisen when the White House does not want the

⁶⁸ Designating an Acting Attorney General, *supra* note 17; *United States v. Santos-Caporal*, 2019 WL 468795, at *2-7 (E.D. Mo. Jan. 9, 2019), report and recommendations adopted by 2019 WL 460563 (E.D. Mo. Feb. 6, 2019); *United States v. Smith*, 2018 WL 6834712, at *3 (W.D.N.C. Dec. 28, 2018); *United States v. Peters*, 2018 WL 6313534, at *4-5 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, 2018 WL 6182755, at *7 (W.D. Tex. Nov. 27, 2018), appeal dismissed in 2019 WL 5061109 (W.D. Tex. Oct. 9, 2019). The D.C. Circuit avoided the question in its decision upholding the DOJ's Bump-Stock Rule, which Whitaker had signed, because Barr independently reevaluated the record and ratified the decision. *Guedes v. ATF*, 920 F.3d 1, 12-13 (D.C. Cir. 2019).

⁶⁹ On the creation of offices: *Willy v. Administrative Review Board*, 423 F.3d 483, 491-92 (5th Cir. 2005); *Varnadore v. Secretary of Labor*, 141 F.3d 625, 631-32 (6th Cir. 1998); *cf.* *U.S. v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). On delegation: *Guidance*, *supra* note 30, at 72 (Question 48); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *Donovan v. National Bank of Alaska*, 696 F.2d 678 (9th Cir. 1983); *Stand Up for California v. Department of Interior*, 298 F. Supp. 3d 136 (D.D.C. 2018); *Schaghticoke Tribal Nations v. Kempthorne*, 587 F. Supp. 2d 389, 418-19 (D. Conn. 2008).

first assistant to take on the acting role and turns to the Vacancies Act instead of relying on the agency-specific statute. OLC and the lower courts permitted the use of the Vacancies Act in the recent DOJ and CFPB disputes.⁷⁰ But no one suggested that the White House could use the Vacancies Act for an acting DHS Secretary when there was still a confirmed Deputy Secretary or Undersecretary of Management at the agency (as the DHS statute explicitly barred the use of the Act in that case).

- **Presidential removal of confirmed officials:** The Vacancies Act does not refer to presidential firing of appointees—neither including nor excluding such actions expressly from its coverage. The Act allows acting service when the previous officeholder of a covered position “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” The relevant statutory question is whether the inability “to perform the functions and duties” of the vacant office includes presidential removals. Conflict arose after President Trump fired David Shulkin and then named a Senate-confirmed Assistant Secretary in the Department of Defense as acting Secretary of Veterans Affairs, instead of allowing the Deputy Secretary under the agency-specific succession provision to step into the interim role. OLC has advised that the Vacancies Act applies to firings, but one district court has disagreed in dicta.⁷¹
- **Naming of first assistants after the vacancy:** The default acting official under the Vacancies Act is “the first assistant to the office.” That first assistant is usually in her job before the vacancy begins. For the times when she is not, the question is whether she still qualifies as the default acting official. OLC initially suggested she does not but changed its mind two years later.⁷² No court has ruled on whether a first assistant named after a vacancy occurs qualifies under the Vacancies Act, though a lawsuit over the new Principal Deputy Director of USCIS (which involves the creation of a new first assistant position after the vacancy) was filed in September 2019.⁷³
- **Applicability of removal provisions to acting officials:** Many removal protections of agency officials, outside of the civil service, apply to agencies not covered by the Vacancies Act or specific agency succession statutes.⁷⁴ But two agencies with removal restrictions, the

⁷⁰ On CFPB: Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. O.L.C. ___, at *5-6 (Nov. 25, 2017); *English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018), *appeal dismissed upon appellant’s motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018). On DOJ: OLC, *supra* note 68; *United States v. Patara*, 365 F. Supp. 3d 1085, 1087-91 (S.D. Cal. 2019); *Santos-Caporal*, 2019 WL 468795, at *6-7; *Peters*, 2018 WL 6313534, at *2-3; *Valencia*, 2018 WL 6182755, at *7. The D.C. Circuit also avoided the statutory question in its decision upholding the DOJ’s Bump-Stock rule. *Guedes*, 920 F.3d at 12-13. In a dispute involving the NLRB General Counsel, the Ninth Circuit also agreed that the Vacancies Act still applied, despite an agency-specific provision. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016).

⁷¹ Guidance, *supra* note 30, at 61 (Question 3) (citing 144 Cong. Rec. S12.823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson)); *id.* at S12.824 (statement of Sen. Byrd)); *Valencia*, 2018 WL 6182755, at *1.

⁷² Guidance, *supra* note 30 (Question 13); Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 180 (2001). The GAO subsequently adopted OLC’s 2001 reading. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-272R, CHANGED INTERPRETATION OF REQUIREMENTS RELATED TO FIRST ASSISTANTS UNDER THE FEDERAL VACANCIES REFORM ACT OF 1998, at 2 (2001), <https://www.gao.gov/assets/80/75053.pdf>.

⁷³ Complaint for Declaratory and Injunctive Relief, *L.M.-M. v. Cuccinelli*, No. 1:19cv2676 (D.D.C. Sept. 6, 2019).

⁷⁴ *See, e.g.*, 15 U.S.C. § 41 (2017) (“Any Commissioner [of the Federal Trade Commission] may be removed by the President for inefficiency, neglect of duty, or malfeasance in office”).

CFPB and the Federal Housing Finance Agency, can have acting leaders (at the least under agency-specific succession provisions, and under the Vacancies Act, if it applies). There is disagreement on whether the removal protections extend to acting officials—in other words whether the President needs some sort of “cause” to remove interim leaders. Litigants in various CFPB disputes mostly agreed removal protections did not apply, though Leandra English claimed they would cover her in her lawsuit over the acting Director title.⁷⁵ By contrast, the Fifth Circuit, sitting en banc and affirming the original panel decision, recently ruled that removal protections did extend to the acting Director of the FHFA.⁷⁶

As this project on acting officials and delegated authority aims to provide important descriptive information and recommend best agency practices, rather than offer legal analysis within the purview of OLC, this report does not address these disputes.⁷⁷

⁷⁵ English v. Trump, 279 F. Supp. 3d at 327; Brief of Plaintiff-Appellee Consumer Financial Protection Bureau at 8, Consumer Fin. Prot. Bur. v. All American Check Cashing, Inc., No. 18-60302, at 13 n.5 (5th Cir. Sept. 10, 2018).

⁷⁶ Collins v. Mnuchin, 896 F.3d 640, 655-56 (5th Cir. 2018), *aff'd in part, rev'd in part en banc*, No. 17-20364, 2019 WL 4233612, at *2 (5th Cir. Sept. 6, 2019).

⁷⁷ I address these and other issues in O'Connell, *supra* note 1.

II. Scope of Acting Officials

This Part, drawing from various data sources, describes agency use of acting officials. It starts by summarizing past research and the difficulty in getting relevant data. It then provides an “empirical snapshot” of agency staffing in all the cabinet departments, the EPA, and the Office of Management and Budget as of April 15, 2019. Next, it looks at the use of acting Cabinet Secretaries from the start of President Reagan’s Administration to the mid-way point of President Trump’s third year. Using the same time period, it turns to the use of acting Administrators, Deputy Administrators, and General Counsels at the EPA. Finally, it provides some historical information on Cabinet Secretaries.

A. Previous Research and Data Issues

Although there has been considerable academic research on agency appointment delays, few scholars have systematically examined acting officials, despite their prevalence in federal agencies. 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. My research from about a decade ago found that 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.⁷⁸

More recently, several political scientists, using agency reports of vacancies to the GAO and other sources, constructed a database of vacancies in 416 Senate-confirmed positions in cabinet departments and single-headed agencies from January 1989 to January 2013.⁷⁹ They focus on determinants of vacancies—finding that high-ranking jobs (including but not limited to agency heads) and timing early in an Administration were connected with fewer vacant days but not finding significant differences in vacancies related to institutional conflict between the White House and the Senate.⁸⁰ They report in their descriptive statistics that the positions were vacant, on average, at least 151 days during a congressional term.⁸¹ Given that congressional terms are two years, the vacancy rate is 21 percent in that period.

The situation has likely only deteriorated since 2012. More nominations have failed—returned to the White House or withdrawn—since then.⁸² For nominations that have succeeded, confirmation delays have worsened.⁸³

There has been some work on particular positions. The GAO recently summarized the number and length of vacancies in PAS Inspector General positions from FY2007-FY2016.⁸⁴ In that decade, there were 62 gaps between confirmed IGs, ranging from four in 2010 to nine in 2016. Of all the positions during that period, six had no gaps, six had vacancies that totaled under a year, nine had

⁷⁸ 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).

⁷⁹ William G. Resh, Gary Hollibaugh, & Patrick S. Roberts & Matthew Dull, *Who Isn’t Running American Government? Appointee Vacancies in Executive Agencies*, at 3 (Sept. 15, 2019), https://papers.ssrn.com/abstract_id=3310806.

⁸⁰ *Id.* at 29-31.

⁸¹ *Id.* at 39 tbl.1.

⁸² ANNE JOSEPH O’CONNELL, BROOKINGS INST., *STAFFING FEDERAL AGENCIES: LESSONS FROM 1981-2016* (2017).

⁸³ *Id.*

⁸⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-270, *INSPECTORS GENERAL: INFORMATION ON VACANCIES AND IG COMMUNITY VIEWS ON THEIR IMPACT* 11 fig.1 (2018).

vacancies that summed to between one and three years, and eleven had gaps that totaled over three years.⁸⁵

Evan Haglund has constructed a database of staffing and vacancies for U.S. Attorney (1981-2015) and PAS IG positions (1981-2017).⁸⁶ He does not provide an overall vacancy rate for either position. But he does find that the average time to nominate IGs and U.S. Attorneys was 8.5 months and 8.4 months (respectively) under President Clinton, 8.8 months and 6.5 months for President George W. Bush and 18.6 months and 9.2 months under President Obama.⁸⁷ It took the Senate, on average, 3.5 months and 2.3 months to confirm IGs and U.S. Attorneys, respectively in Clinton's Administration, 5 months and 2 months in Bush's Administration, and 4.4 months and 3.1 months in Obama's Administration.⁸⁸ In all of these studies, the focus is on vacancy period, not acting officials.⁸⁹

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)), she 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."⁹⁰ Because she relies on yearly reports, she cannot calculate tenure of interim officials or capture many short-term acting officials.⁹¹

There is no good comprehensive source of information on acting officials. The Office of Personnel Management does not keep information on acting officials. It does, however, keep data on start and end dates of confirmed and recess appointees, but does not publicly post it.⁹² For this report, ACUS formally asked OPM for these start and end dates so that I might be able to calculate vacancy rates. Although OPM did disclose the dates for each confirmed official and the agency in which that official served from 2005 to the present, it did not disclose positions for many of those officials, without which I could not calculate vacancy rates, without extensive additional research.⁹³

⁸⁵ *Id.* at 12 fig.2.

⁸⁶ Evan T. Haglund, Empty Seats: Vacancies, Vetting, and Nomination Delay in Presidential Appointments, at 18 (working paper May 31, 2017). The Project on Government Oversight tracks current vacancies in IG positions. *See* POGO, Inspector General Vacancy Tracker, <https://www.pogo.org/database/inspector-general-vacancy-tracker/>.

⁸⁷ Haglund, *supra* note 86, at 19 tbl.3.

⁸⁸ *Id.* at 21 tbl.4.

⁸⁹ The discussion here has focused on vacancy gaps in cabinet departments and single-headed agencies. There is some research on such gaps in independent regulatory commissions and boards. *See* David C. Nixon & Roisin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 ADMIN. & SOC'Y 679 (2006); David C. Nixon, *Appointment Delay for Vacancies on the Federal Communications Commission*, 61 PUB. ADMIN. REV. 483 (2001).

⁹⁰ Christina M. Kinane, Control without Confirmation: The Politics of Vacancies in Presidential Appointments, at 18-20 (working paper Sept. 1, 2018).

⁹¹ She does seem to have more comprehensive data on Cabinet Secretaries. *See* Alan Fram, *GOP Mutterers, Gently, as Trump Sidesteps Senate for Top Aides*, ASSOC. PRESS (June 17, 2019), <https://www.apnews.com/002bb07f6b8245d8abcfbac3322f4ede> (reporting Cabinet Secretary tallies).

⁹² 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>.

⁹³ OPM explained that it relies on agencies to provide that information. I, however, obtained comprehensive position information from OPM a decade ago for a different research project. OPM could not reproduce that earlier information for appointees who served between 2005 and 2009 in recent months.

Under the Vacancies Act, agencies are required to report vacancies, acting officials, and nominations to the GAO. But as described in Part V, compliance is mixed.

This Part now turns to four new sources of data on acting officials. First, for this project, with the help of the policy lab students' research, I created 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 seventeen major agencies shows which positions were staffed by a confirmed appointee, which were filled with acting officials, and which were empty (with functions typically delegated to lower-level officials).

Second, before this project, I created a database of all confirmed, recess, and acting Cabinet Secretaries since the start of President Reagan's Administration to July 19, 2019 (the half-way mark of President Trump's third year).⁹⁴ This database captures short-term acting officials who served only for a day or two, unlike the fourth source of data below.

Third, also before this project, I used data posted on the EPA'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 the Cabinet Secretary and EPA databases, I collected information on the type of acting official (for example, first assistant, other PAS official, senior agency worker (divided into political and career)).

Finally, I built a database of confirmed, recess, and longer-term acting Cabinet Secretaries from the first Administration in 1789 through the first term of President George W. Bush's Administration from the Biographical Directory of the United States Congress 1774-2005.⁹⁵

More details about these new data sources are provided in the subsequent sections (and connected Appendices).

⁹⁴ The Washington Post recently posted information on acting Cabinet Secretaries, though not as complete and accurate as the database I constructed. 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. Kinane's data also seem to be missing some acting Secretaries. See Fram, *supra* note 91.

⁹⁵ BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, H.R. DOC. NO. 108-222, at 3-29 (2005).

B. Snapshot Database

My policy lab students and I compiled a database of the staffing status of many Senate-confirmed positions in all fifteen cabinet departments and two other executive agencies (EPA, OMB) as of April 15, 2019. For each position, we noted whether the position was filled by a confirmed appointee, an acting official, or no one on that date. In the latter category, the functions of the vacant position presumably were delegated to someone. Many agencies noted such delegation; some did not (see Part IV.D, *infra*). See Appendix B for more details on the database.

Table 1 lists the staffing status breakdowns for each agency:

Table 1: Staffing Status as of April 15, 2019 in Cabinet Departments, EPA, and OMB

Agency	Confirmed	Acting	Vacant/Delegated
Agriculture	7	0	6
Commerce	17	3	2
Defense	23 ⁹⁶	3	5
Education	10	1	5
Energy	17	3	2
Health & Human Services	14	4	1
Homeland Security	7	7	3
Housing & Urban Development	7	3	3
Interior	8	1	9
Justice	15	3	6
Labor	9	3	3
State	21	5	9
Transportation	11	2	5
Treasury	16	2	7
Veterans Affairs	11	0	2
Environmental Protection Agency	8	2	3
Office of Management & Budget	4	1	2

The relatively few acting leaders on April 15, 2019 were properly serving mostly under one of two scenarios. First, they had the title because a confirmed official had left within the past 210 days and no nomination was pending, such as the Office of Information and Regulatory Affairs Administrator (at OMB) position. Or second, they could call themselves acting because a confirmed official under this Administration (or even the previous Administration) had left more than 210 days earlier but a first nomination was pending for the position, such as for the Undersecretary of State for Economic Growth, Energy, and the Environment.

Early in President Trump's third year, only 64.5 percent of these key PAS positions were filled with confirmed officials. Acting officials staffed 13.1 percent of the positions, but 22.4 percent sat empty, with their functions typically delegated downward to some other official.

⁹⁶ One of these officials was not actually confirmed to the job, which was transformed into a PAS position after President Trump took office but where Congress permitted the current occupant to continue serving.

C. Cabinet Secretaries⁹⁷

Using a range of sources, I created a database of confirmed, recess, and acting Cabinet Secretaries from the start of President Reagan’s Administration to July 19, 2019. See Appendix C for more details. Some short-term acting Secretaries are hard to find—not appearing on agency lists, for example. Any service (whether confirmed or interim) across two Administrations counts as two observations—so Robert Gates counts twice as Secretary of Defense. In addition, service in multiple capacities (recess, then confirmed, or acting, then confirmed) is treated separately. My overall counts differ somewhat from previously reported tallies by Philip Bump and Christina Kinane.⁹⁸

1. Tallies of Acting Secretaries

From January 20, 1981 to July 19, 2019 (the half-way mark of President Trump’s third year), there have been 168 confirmed and 3 recess-appointed Cabinet Secretaries. In that same period, Presidents relied on 145 acting officials—an astounding 46 percent of all the top leaders in this period. Table 2 breaks down these leaders by Administration. In parentheses in the acting column are the number of acting officials who served at least ten days. Although all recent Presidents have used acting officials in their cabinet, President Trump has turned to them far more often and for longer, given that he has served only 30 months.

Table 2: Types of Cabinet Secretaries by Administration

President	Confirmed	Recess	Acting (at least 10 days)
Reagan	33	1	25 (11)
Bush 41 (1 term)	20	1	20 (16)
Clinton	28	1	27 (11)
Bush 43	34	0	22 (13)
Obama	32	0	23 (14)
Trump (2.5 years)	21	0	28 (25)

Presidents must use some acting Secretaries at the start of their Administrations (and at the beginning of second terms) while the traditional appointments process churns. The mid-term years usually have few acting Secretaries. For instance, in his Administration’s second year, President Obama did not rely on a single acting Cabinet member. Presidents Reagan and George W. Bush each used one. Presidents Clinton and George H.W. Bush each turned to two. But President Trump relied on six in his second year (five, if you exclude Rod Rosenstein’s reported one-day of service as acting Attorney General before the White House picked Matthew Whitaker). With his third year at the half-way point, President Trump had used seven acting Secretaries—beating out President George H.W. Bush’s entire third year by one. But H.W. Bush is atypical among recent Presidents for the third year: President Reagan had three, President George W. Bush had two, and Presidents Clinton and Obama each had one.

⁹⁷ This section is taken directly from earlier work I did for the Brookings Institution and is used here, with a few wording changes, with permission. ANNE JOSEPH O’CONNELL, BROOKINGS INST., *ACTING LEADERS: RECENT PRACTICES, CONSEQUENCES, AND REFORMS* (2019).

⁹⁸ See Fram, *supra* note 91 (reporting research from Kinane); Philip Bump, *Trump Relies on Acting Cabinet Officials More than Most Presidents*, WASH. POST, April 8, 2019.

2. Tenures of Acting Secretaries

Although nearly half of all the Cabinet Secretaries since 1981 have been acting officials, their tenures are typically much shorter. Table 3 breaks down the tenures of the three types of Secretaries by Administration, rounded to the nearest five-day mark.⁹⁹ In parentheses in the final column is the average tenure, eliminating short-term acting officials of fewer than ten days. Confirmed Secretaries, on average, serve much longer than acting Secretaries. The numbers below undercount tenure in this Administration as service dates were cut off as of July 19, 2019, but confirmed and acting secretaries continued serving past that date.

Table 3: Average Tenures of Cabinet Secretaries by Type, Administration (rounded, 5 days)

President	Confirmed	Recess	Acting (<10 days excluded)
Reagan	1130	35	25 (50)
Bush 41 (1 term)	975	40	45 (55)
Clinton	1415	285	35 (80)
Bush 43	1245	0	30 (50)
Obama	1335	0	45 (75)
Trump (as of July 19)	585	0	50 (55)

President Trump’s acting Secretaries have served longer, on average, than recent Administrations. Excluding short-term acting officials, however, their tenure, *on average*, is similar to other Administrations. Because there are far more long-term acting Secretaries in this Administration, *in total*, their tenure is much longer. Specifically, acting Secretaries have served 10.2 percent of the days in this Administration. By contrast, interim Secretaries were in place for only 2.4 percent and 1.6 percent of the days in the Administrations of Presidents Obama and George W. Bush, respectively. (If the empty period at the Commerce Department in 2013 is included along with the interim Secretaries, President Obama’s acting (or empty) total increases to 2.7 percent).

Of the twenty-two acting Secretaries who had served at least 100 days (again rounding to the five-day mark), the Departments of Labor and Veterans Affairs lead in long-serving interim leadership, claiming four slots apiece. DHS, which was established only in 2003, has three (two in this Administration), as of July 19, 2019. President Trump has the highest number on this list—with seven acting Secretaries, despite having a Senate controlled by his party and being only half-way done with his third year. By contrast, Presidents Obama and Clinton come in with only four each.

3. Types of Acting Secretaries

When President Trump chose Matthew Whitaker, Jeff Sessions’ Chief of Staff, to step in as acting Attorney General after Sessions resigned under pressure, many commentators pointed out that having a non-confirmed acting head of the Justice Department was highly unusual in the modern era. While Whitaker is the only non-confirmed acting Attorney General in my database, non-confirmed acting Secretaries are not unprecedented.

⁹⁹ I rounded the tenure figures because the start and end dates sometimes conflicted across sources I consulted. I used July 19, 2019 as the end date for acting officials currently serving.

Under the Vacancies Act, acting officials can come from three pools: (1) first assistants to the vacant position (for a Cabinet Secretary, the Deputy Secretary); (2) Senate-confirmed officials in any agency (how Robert Wilkie served as acting Secretary of Veterans Affairs); and (3) agency workers who have served at least 90 days in the year prior to the vacancy and paid at least at the GS-15 level (Whitaker fell into this category).

Agency-specific statutes may constrain the use of the Vacancies Act. For instance, since 2016, Congress has explicitly barred the White House from turning to the Vacancies Act for the head of DHS if there is a confirmed Deputy Secretary or Undersecretary for Management.¹⁰⁰ Thus, when President Trump asked Kirstjen Nielsen to resign as Secretary of Homeland Security in the spring of 2019, he had to also ask Claire Grady, the confirmed Undersecretary for Management, to step down to make way for his preferred choice for the acting job, Kevin McAleenan.

Table 4 displays the number of acting Secretaries by type since the Vacancies Act took effect, broken down by Administration. I separate the final pool into two categories: long-time careerists and political officials.¹⁰¹

Table 4: Types of Acting Secretaries by Administration (November 20, 1998-July 19, 2019)

President	Deputy Secretary	Other PAS	Non-PAS Career	Non-PAS Political
Clinton	2	1	0	0
Bush 43	15	6	0	0
Obama	10	10	2	1
Trump	8	8	10	2

Looking at the start of Administrations under the Vacancies Act, the two previous Presidents drew from Deputy Secretaries of their predecessors, despite the party change in the White House. Both President Bush and President Obama asked three such appointees to stay on after inauguration. By contrast, only one of President Obama’s Deputy Secretaries continued into this Administration as an acting cabinet head—Sally Yates, whom the President fired soon after.

Finally, non-confirmed political officials are rare as acting Cabinet Secretaries. From other research I am conducting, they appear much more common in lower-level positions covered by the Vacancies Act.

¹⁰⁰ 6 U.S.C. §113(g) (2017).

¹⁰¹ Of the acting Secretaries since November 20, 1998, I could not determine with certainty the identity of only two: acting Secretary of Health and Human Services from January 19 to January 20, 2001 and acting Secretary of Education from January 20 to January 23, 2001. These two interim periods therefore are not included in Table 4.

D. Three Positions at the EPA¹⁰²

The Vacancies Act covers hundreds more positions than the fifteen Cabinet Secretaries. The EPA is rare among federal agencies in publicly posting service dates for all its leaders (confirmed, recess, acting) in three top Senate-confirmed positions—the Administrator, Deputy Administrator, and General Counsel. See Appendix D for more details on this data.

Table 5 lists the types of officials in these three positions, since the start of President Reagan’s Administration for the Administrator and Deputy Administrator, and since the fall of 1983 for the General Counsel (when the Senate-confirmed Office of the General Counsel was created). For all three positions, there have been more acting than confirmed officials.

Table 5: Types of Officials for Three Top EPA Positions (January 20, 1981-July 19, 2019)

Position	Confirmed	Recess	Acting	Empty
Administrator	12	0	14	0
Deputy Administrator	11	2	12	5
General Counsel (since 1983)	13	1	16	1

There have also been periods in the two lower-level positions when no one held the title, even in an acting capacity. During these “empty” periods, agencies often delegate functions of the position “down” to people below.

Table 6 breaks down the types of acting officials in these three positions, by Senate-confirmed officials, non-confirmed political officials, and non-confirmed senior careerists.

Table 6: Types of Acting Officials for Three Top EPA Positions (Reagan-present)

Position	Senate-Confirmed	Non-PAS Political	Non-PAS Career
Administrator	11	0	3
Deputy Administrator	5	3	4
General Counsel	2	4	10

Most of the careerists who stepped up as interim General Counsel were the first assistant, the Principal Deputy General Counsel—which is not a political position. As with acting Cabinet Secretaries, non-Senate confirmed political officials are less common than senior careerists in important acting roles in the EPA.

Table 7 provides the total days of tenure for confirmed and acting officials in these three positions, broken down by Administration, and rounded to the nearest five-day mark. President Trump’s numbers again are cut off at the July 19, 2019 mark, resulting in lower absolute numbers for certain positions.

¹⁰² This section is taken directly from earlier work I did for the Brookings Institution and is used here, with a few wording changes, with permission. O’CONNELL, *supra* note 97.

Table 7: Total Tenures of Three EPA Positions by Type and Administration (rounded, 5 days)

President	Administrator		Deputy Administrator		General Counsel	
	Confirmed	Acting	Confirmed	Acting	Confirmed	Acting
Reagan	2700	220	2510	160	1605	320
Bush 41	1445	15	1340	100	640	820
Clinton	2920	0	1970	780	1185	1600
Bush 43	2680	235	2085	385	1765	975
Obama	2760	160	1690	1220	2505	415
Trump (2.5 years)	640	265	465	580	560	350

If these three positions are representative of the administrative state, acting officials play a critical role in modern governance. As with Cabinet Secretaries, until recently, the EPA’s top leader on any given day is overwhelmingly likely to be a confirmed official—though there have been more acting than confirmed Administrators since 1981. In the current Administration, however, there has been an acting EPA head almost 30 percent of the time, as of July 19, 2019. But just one level down, acting Deputy Administrators have racked up about a quarter of the days that the job has been staffed since the start of President Reagan’s Administration (and more than half of the time in this Administration). And a level below that, acting General Counsels have been working 35 percent of the time there has been a confirmed or acting official from 1983 to present.

E. Historical Cabinet Officers

The previous Parts focus on recent use of acting officials. With the tremendous assistance of Natalie Peelish, I created a database of cabinet officials from President George Washington's Administration through the first term of President George W. Bush.¹⁰³ These officials include confirmed, recess, and acting/interim leaders but exclude some short-term acting officials. See Appendix E for more details.

Table 8 tallies the numbers of acting secretaries and recess-appointed or confirmed secretaries by cabinet agency.

Table 8: Leadership Types of Cabinet Officials, from April 30, 1789-January 20, 2005 (or relevant portion), by Agency/Position (in order of agency creation)

Agency/Position	Confirmed/Recess	Acting	Percentage Acting
State	93	31	25.0%
Treasury	104	23	18.1%
War	81	29	26.4%
Attorney General	110	13	10.6%
Postmaster General	89	9	9.2%
Navy	75	16	17.6%
Interior	67	16	19.3%
Agriculture	39	3	7.1%
Commerce & Labor	5	0	0.0%
Commerce	40	12	23.1%
Labor	31	5	13.9%
Defense	23	2	8.0%
Health, Education & Welfare/ Health & Human Services	21	2	8.7%
Housing & Urban Development	13	3	18.8%
Transportation	16	4	20.0%
Energy	11	1	8.3%
Education	8	1	11.1%
Veterans Affairs	4	3	42.9%
Homeland Security	1	0	0.0%

In this data source, where some short-term acting officials are excluded, two departments (Commerce and Labor, Homeland Security) had no listed acting heads. These departments also had the shortest lifespans in the database (Commerce and Labor lasted a decade, and DHS had only two years in existence).

At the other extreme, acting officials made up at least twenty percent of the listed leaders at five agencies (Veterans Affairs, War, State, Commerce, and Transportation). The Department of Veterans Affairs had the highest percentage of acting heads, at 43 percent.

¹⁰³ BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, H.R. DOC. NO. 108-222, at 3-29 (2005).

In contrast to the Defense Department, the Department of War had many more acting heads as a share of its top leadership, though over 60 percent of the acting leaders in the Department of War served in the first five decades after the founding.

The interim leaders usually varied by type within each agency. For example, in the Department of War, all but one of the interim heads had a position listed: two were Adjutant Generals, two were Assistant Secretaries, three were the Attorney General, seven were Chief Clerk, one was Commissioner of Indian Affairs, three were listed as being with the Army, one was Postmaster General, four were the Secretary of State, two were the Secretary of the Navy, and two were Secretary of the Treasury. By contrast, every interim Postmaster General was the First Assistant Postmaster General.

Table 9 examines how long the acting officials served at the five agencies with the highest share of interim leaders, by comparing the total days served by interim and noninterim leaders. For those officials still serving on January 20, 2005, that was treated as the relevant end date for these calculations.

Table 9: Total Tenures by Leadership Type in Five Agencies with Highest Share of Acting Heads

Agency/Position	Confirmed/Recess	Acting	Percentage Acting
Veterans Affairs	5182 days	616 days	11%
War	56076 days	1560 days	3%
State	77745 days	991 days	1%
Commerce	33501 days	985 days	3%
Transportation	13856 days	157 days	1%

Table 10 provides information about the longest serving acting head for each agency in the database.

Table 10: Longest Serving Acting Leader in Each Cabinet Agency (in order of creation)

Agency	Acting Leader	President	Background of Acting	Tenure
State	Richard Rush	Monroe	Attorney General	196 days
Treasury	William Jones	Madison	Secretary of the Navy	294 days
War	George Graham	Monroe	Chief Clerk	281 days
AG	Nicholas Katzenbach	LB Johnson	Deputy Attorney General	160 days
Postmaster	Horatio King	Buchanan	First Assistant PG	42 days
Navy	Charles Edison ¹⁰⁴	FD Roosevelt	Assistant Secretary	159 days
Interior	Roy O. West	Coolidge	Not listed	180 days
Agriculture	Eugene Moos	Clinton	Under Secretary	88 days
Commerce	Lewis L. Strauss	Eisenhower	Not listed	226 days
Labor	Cynthia Metzler	Clinton	Deputy Secretary	484 days
Defense	Thomas S. Gates, Jr.	Eisenhower	Not listed	56 days
HEW/HHS	Wilbur J. Cohen	LB Johnson	Not listed	75 days
HUD	Alphonso R. Jackson	Bush 43	Deputy Secretary	113 days
Transportation	James B. Busey IV	Bush 41	Deputy Secretary	72 days
Energy	Elizabeth Moler ¹⁰⁵	Clinton	Deputy Secretary	48 days
Education	Gary L. Jones	Reagan	Under Secretary	37 days
VA	Hershel W. Gober	Clinton	Deputy Secretary	306 days

When you break down leaders by Administration, four Administrations had no acting cabinet officials in the Biographical Directory: Presidents Polk, Taft, Harding, and Kennedy. At the other extreme, two Administrations had eleven: Presidents Madison and Tyler (the latter served only one term). According to one study, “[t]he Tyler Presidency proved the most unstable for Cabinet tenure in American history.”¹⁰⁶ In 1841, all but one member of President Tyler’s Cabinet resigned in protest, which contributed to his need to rely on acting officials. President Madison also had considerable difficulties with his Cabinet, given political and geographic conflict, contributing to turnover and use of interim leaders.¹⁰⁷

Finally, the historical data highlight an interesting contrast with current practices. Earlier Presidents needed acting officials less at the start of their Administrations as they often had cabinet officials from the preceding Administration “continue” into theirs. For example, before President Truman took office in 1945, 27 Attorneys General, 26 Secretaries of the Treasury, and 23 Secretaries of State kept serving from one Administration into the next.

¹⁰⁴ Charles Edison served as “acting” Secretary of the Navy for 147 days from Aug. 5, 1939 until Dec. 30, 1939. He then served as “ad interim” Secretary of the Navy for 12 days from Dec. 30, 1939 until Jan. 11, 1940. I included the total number of days he served as acting and interim Secretary combined in the table since he was not confirmed until Jan. 11, 1940.

¹⁰⁵ She was the only acting secretary of energy in the data source, which excluded some short-term acting officials.

¹⁰⁶ R. Gordon Hoxie, *The Cabinet in the American Presidency, 1789-1984*, 14 PRESIDENTIAL STUD. Q. 209, 218 (1984).

¹⁰⁷ *Id.* at 216.

III. Examples of Delegations of Authority in the Face of Staffing Vacancies

This Part turns to delegations of authority in the face of staffing vacancies. These delegations often function as substitutes to acting officials.¹⁰⁸ Because this report focuses primarily on acting officials, it does not attempt to provide comprehensive information on delegations of authority to address vacancies in agency management, focusing instead on some key examples.¹⁰⁹ The Part begins with an illustration of how delegated authority can have the same effects as an acting official. It then showcases some permanent delegations outside of the vacancies context before it turns to some examples when positions are not filled with Senate-confirmed officials.

A. Delegations as Substitute for Acting Officials

If the duties of the PAS position are not exclusive to that job—by statute or regulation—they can be delegated (within the constraints of the Appointments Clause, which this report does not examine). For such positions, an acting official and an official performing the delegated functions have the same authority, although they have different titles. Even if some duties are exclusive to a position, the other duties can be reassigned, leaving the delegatee with nearly the same power as an acting official. The main difference is that delegations can operate far longer than acting officials can serve.

The following answer by a recent DHS nominee to the written questionnaire from the minority members of the Senate Committee on Homeland Security and Governmental Affairs captures this equivalence:

Question 8

In May 2017, you began working as a Senior Advisor at the Department of Homeland Security. In June 2017, you began serving as the Deputy Under Secretary for Science and Technology (S&T) and the Acting Undersecretary. Since November 2017, you have continued to serve as Deputy Under Secretary and as the Senior Official Performing the Duties of the Under Secretary.

a. Please describe your role and responsibilities in each of these positions.

Response: My time as Senior Advisor gave me the opportunity to become familiar with the structure, the operations and the workforce at S&T. Upon assuming the role as the Deputy USST, Acting USST and SOPDUUST my responsibilities were no different and focused on what I see as the mission of S&T is to be which is to enable effective, efficient, and secure operations across all homeland security missions by applying timely scientific, engineering, and innovative solutions through research, design, test and evaluation, and acquisition support.

My role, should I be confirmed as USST, is to serve as the science advisor to the Secretary and ensure S&T is a Departmental resource to all the DHS components for all

¹⁰⁸ See Part I.C, *supra*.

¹⁰⁹ I know of no work that examines delegations tied to vacancies in PAS positions systematically. Cf. Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017) (providing some examples of delegations in the face of vacancies but focusing on agency organization issues outside of vacancies).

of their R&D needs. To enable that, I must ensure that we have processes and procedures in place that can be systemically applied to all programs to deliver solutions that address customer's needs via a deliberative approach and to execute each program efficiently and effectively with an objective of maximizing our return on investment.

b. Have you received any guidance regarding compliance with the Federal Vacancies Reform Act? If so, please describe what guidance you have received.

Response: In November, 2017, DHS directed me to use the title "Senior Official Performing the Duties of the Under Secretary for Science and Technology." The time-limit for an official to serve as the Acting Under Secretary for S&T under the Federal Vacancies Reform Act (FVRA) expired on November 15, 2017. Thus, after that date, I could not use the title "Acting Under Secretary."

c. How have your role and responsibilities changed since you ceased to be the Acting Under Secretary in November?

Response: There are no duties of the Under Secretary that by statute or regulation must be performed only by the Under Secretary.¹¹⁰

Only the nominee's title changed when the time limits of the Vacancies Act expired.

In some cases, delegations appear to substitute for nominations. For instance, in July 2017, President Trump nominated Anthony Kurta to be the Principal Deputy Under Secretary of Defense for Personnel and Readiness.¹¹¹ The White House withdrew the nomination on September 28, 2018.¹¹² As of September 2019, Kurta was currently performing the duties of the job through delegation.¹¹³

¹¹⁰ Nomination of William N. Bryan to be Under Secretary for Science and Technology, U.S. Department of Homeland Security, Hearing before the Sen. Comm. on Homeland Security and Governmental Affairs, 115th Cong. 73-74 (Minority Supplemental Pre-hearing Questionnaire) (2018).

¹¹¹ *Nomination of Anthony Kurta for Principal Deputy Under Secretary, Department of Defense*, PN812, 115th CONG., <https://www.congress.gov/nomination/115th-congress/812>.

¹¹² *Id.*

¹¹³ *Anthony M. Kurta*, U.S. DEP'T. OF DEF., <https://www.defense.gov/Our-Story/Biographies/Biography/Article/602728/anthony-m-kurta/> (last visited September 13, 2019).

B. Standing Delegations Outside of Vacancies

When Congress delegates authority to agencies, it typically names agency heads (or the President). Because of competing demands, the agency heads (or the President) then usually delegate at least some of that nonexclusive authority downward. Agencies often accomplish this internal organization through regulations that appear in the Code of Federal Regulations, but without prior notice and comment under the Administrative Procedure Act's exceptions.¹¹⁴

Here are three broad examples. First, the Department of Justice has provided, in part: "The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally."¹¹⁵

Second, the Department of Agriculture has established: "The following delegation of authority is made by the Secretary of Agriculture to the Deputy Secretary: Perform all of the duties and exercise all of the powers and functions which are now or which may hereafter be, vested in the Secretary of Agriculture. This delegation is subject to the limitation in § 2.10."¹¹⁶

Third, the Department of Transportation has specified: "The Deputy Secretary may exercise the authority of the Secretary, except where specifically limited by law, order, regulations, or instructions of the Secretary."¹¹⁷

These deputies are also allocated specific tasks. For instance, in the Transportation Department, the Deputy Secretary has been delegated authority to:

- (a) Exercise executive control over Departmental Budgeting and Program Evaluation.
- (b) Serve as Chairman of the Departmental Executive Resources Board and its Executive Committee.
- (c) Serve as the Chair of the Department's Safety Council.
- (d) Serve as the Chair of the Department's Credit Council.
- (e) Approve the establishment, modification, extension, or termination of:
 - (1) Department-wide (intra-department) committees affecting more than one program.
 - (2) OST-sponsored interagency committees.
- (f) Approve the designation of: (1) Departmental representatives and the chairman for interagency committees sponsored by the Office of the Secretary. (2) Departmental members for international committees.

¹¹⁴ 5 U.S.C. § 553(b)(A) (2017) (exception for "rules of agency organization, procedure, or practice").

¹¹⁵ 28 C.F.R. § 0.15(a) (2018).

¹¹⁶ 7 C.F.R. § 2.15 (2019). Section 2.10 provides: "The delegations made in this part shall not be construed to confer upon any general officer or agency head the authority of the Secretary to prescribe regulations which by law require approval of the President."

¹¹⁷ 49 C.F.R. § 1.23 (2018).

(g) Serve as the representative of the Secretary on the board of directors of the National Railroad Passenger Corporation and carry out the functions vested in the Secretary as a member of the board by 49 U.S.C. 24302.

(h) Approve the initiation of regulatory action, as defined in Executive Order 12866, by Secretarial offices and Operating Administrations.¹¹⁸

Standing delegations can also apply to positions beneath the second highest official. These delegations are often narrower in scope. Compare the regulation above concerning the authority of the Deputy Secretary of Transportation to the Undersecretary for Policy, who is given only specific duties:

The Under Secretary is delegated the following authorities:

(a) Lead the development of transportation policy and serve as the principal adviser to the Secretary on all transportation policy matters.

(b) Establish policy and ensure uniform departmental implementation of the National Environmental Policy Act of 1969, Pub. L. 91-190, as amended (42 U.S.C. 4321-4347) within the Department of Transportation.

(c) Oversee the implementation of 49 U.S.C. 303 (Policy on lands, wildlife and waterfowl refuges, and historic sites).

(d) Represent the Secretary of Transportation on various interagency boards, committees, and commissions to include the Architectural and Transportation Barriers Compliance Board and the Advisory Council on Historic Preservation and the Trade Policy Review Group and the Trade Policy Staff Committee.

(e) Serve as the Department's designated principal conservation officer pursuant to section 656 of the Department of Energy Organization Act, Pub. L. 94-91 [42 U.S.C. 7266], and carry out the functions vested in the Secretary by section 656 of the Act, which pertains to planning and implementing energy conservation matters with the Department of Energy.

(f) Carry out the functions of the Secretary pertaining to aircraft with respect to Transportation Order T-1 (44 CFR chapter IV) under the Defense Production Act of 1950, as amended, Pub. L. 81-774, 64 Stat. 798 [50 U.S.C. App. 2061 et seq.] and Executive Order 10480, as amended (see also Executive Order 10773 and 12919).

(g) Serve as Department of Transportation member of the Interagency Group on International Aviation, and pursuant to Executive Order 11382, as amended, serve as Chair of the Group.

(h) Serve as second alternate representing the Secretary of Transportation to the Trade Policy Committee as mandated by Reorganization Plan No. 3 of 1979 (5 U.S.C. App. at 1381), as amended, and Executive Order 12188, as amended.¹¹⁹

¹¹⁸ *Id.*

¹¹⁹ *Id.* at § 1.25 (2018) (omitting (i)-(o)).

Sometimes, delegations focus on a particular task, rather than a specific position. For instance, the State Department has delegated classification authority to various officials: “Authority for original classification of information as Top Secret may be exercised by the Secretary and those officials delegated this authority in writing by the Secretary. Such authority has been delegated to the Deputy Secretaries, the Under Secretaries, the Counselor, Assistant Secretaries and equivalents; Chiefs of Mission and U.S. representatives to international organizations; and certain other officers within the Department and at posts abroad.”¹²⁰

¹²⁰ 22 C.F.R. § 9.5(a) (2018).

C. Delegations in the Face of Vacancies

Agencies also delegate internally to respond to gaps in confirmed leadership. This section addresses general delegations to first assistants, general delegations that also mention vacancies, and delegations in response to specific vacancies.

1. First Assistant Delegations

The Vacancies Act does not define the first assistant to a covered position.¹²¹ If an agency's statutes do not specify a first assistant, the agency generally specifies one by regulation. Those specifications also usually provide for delegations of authority in the face of vacancies (as acting officials and delegated authority are largely two sides of the same coin).

For example, the Department of Transportation's regulations establish that the Deputy Administrator is the first assistant to the Administrator of the National Highway Transportation Safety Administration.¹²² The regulations also assign duties, with some limits:

(a) All authorities lawfully vested in and reserved to the Administrator in this title, part, or other NHTSA regulation or directive may be exercised by the Deputy Administrator and, in the absence or disability of both officials, by the Chief Counsel, unless specifically prohibited by statute, regulation, or order.

(b) In exercising the powers and performing the duties delegated by this part, officers of NHTSA and their delegates are governed by applicable laws, executive orders, regulations, and other directives, and by policies, objectives, plans, standards, procedures, and limitations as may be issued from time to time by or on behalf of the Secretary of Transportation, the Administrator, the Deputy Administrator, the Chief Counsel, and the Executive Director or, with respect to matters under their jurisdiction, by or on behalf of the Associate Administrators, the Regional Administrators, and the Directors of Staff Offices.

(c) Each officer to whom authority is delegated by this part may redelegate and authorize successive redelegations of that authority subject to any conditions the officer prescribes.

(d) Each officer to whom authority is delegated will administer and perform the functions described in the officer's respective functional statements.¹²³

2. Combination Delegations

Some standing delegations make general assignments of authority as well as address vacancies. For instance, while the State Department does not explicitly mention acting officials in top secret classification authority, it does refer to them for secret or confidential classification power: "Authority for original classification of information as Secret or Confidential may be exercised only by the Secretary, the Senior Agency Official, and those officials delegated this authority in writing by the Secretary or is often accomplished through the Senior Agency Official. Such authority has been

¹²¹ Part I.A.3, *supra*.

¹²² 49 C.F.R. § 501.4 (2018).

¹²³ *Id.* at § 501.5.

delegated to Deputy Assistant Secretaries, Principal Officers at consulates general and consulates abroad, and certain other officers within the Department and at posts abroad. In the absence of the Secret or Confidential classification authority, the person designated to act for that official may exercise that authority.”¹²⁴

3. Delegations for Specific Vacancies

Delegations for specific vacancies can be more permanent (i.e., available anytime there is a gap in leadership, like the first assistant delegations) or more targeted (i.e., issued to specific people). This section gives examples of both.

a. General Delegations to Address Vacancies

As appointment delays have lengthened, independent regulatory commissions and boards, whose leaders generally do not fall under the Vacancies Act, have issued new delegations and updated previous ones to address what functions could continue without a quorum.

In February 2017, the NLRB announced new delegations of certain functions:¹²⁵

Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge. During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to § 102.50 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46.¹²⁶

Administrative and procedural requests referred to Executive Secretary. During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under § 102.67, or exceptions under §§ 102.46 and 102.69, will be referred to the Executive Secretary for ruling. Rulings by the Executive Secretary, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board if such matters are raised by a party in its request for review or exceptions.¹²⁷

A year later, the Federal Trade Commission followed suit with its own rulemaking to “delegate[] certain limited functions where the Commission is unable to act because it lacks a quorum.”¹²⁸ Specifically, the FTC provided:

Delegation of functions.

(a) The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to a division of the Commission, an

¹²⁴ 22 C.F.R. § 9.5(b) (2018).

¹²⁵ NLRB, Procedural Rules and Regulations, 82 Fed. Reg. 11748 (Feb. 24, 2017).

¹²⁶ 29 C.F.R. § 102.179.

¹²⁷ 29 C.F.R. § 102.181.

¹²⁸ FTC, Delegation of Limited Authority, 83 Fed. Reg. 7109 (Feb. 20, 2018).

individual Commissioner, an administrative law judge, or an employee or employee board, and retains a discretionary right to review such delegated action upon its own initiative or upon petition of a party to or an intervenor in such action.

(b) The Commission delegates its functions, subject to certain limitations, when no quorum is available for the transaction of business. The delegate or delegates are authorized to act in instances in which no party or intervenor would be adversely affected by the delegated action and entitled to seek review by the Commission, as provided by section 1(b) of Reorganization Plan No. 4 of 1961, or in instances in which all such adversely affected parties or intervenors have waived such a right. In actions in which at least one Commissioner is participating, this delegation is to the participating Commissioner or to the body of Commissioners who are participating. In actions in which no Commissioner is available or no Commissioner is participating, the General Counsel in consultation, where appropriate, with the Directors of the Bureaus of Consumer Protection, Competition, and Economics shall exercise this delegated authority without power of redelegation. This delegation does not alter or affect other delegations to Commission staff. This delegation is only authorized for those instances in which the Commission lacks a quorum as set forth in Commission Rule 4.14(b), 16 CFR 4.14(b) (Commission quorum).¹²⁹

The Federal Energy Regulatory Commission revised its standing delegations in 2013 “to ensure that, during emergency conditions, there are staff members located outside the National Capitol Region to whom authority is delegated.”¹³⁰ Under the agency’s Continuity of Operations Plan:

(1) When, by reason of emergency conditions, there is no Commissioner available and capable of acting, the functions of the Commission are delegated to the first five members of the Commission staff on the list set forth in paragraph (b)(2) of this section who are available and capable of acting.

(2) The list referred to in paragraph (b)(1) of this section is:

- (i) General Counsel;
- (ii) Executive Director;
- (iii) Director of the Office of Energy Market Regulation;
- (iv) Director of the Office of Energy Projects;
- (v) Director of the Office of Electric Reliability;
- (vi) Director of the Office of Enforcement;
- (vii) Deputy General Counsels, in order of seniority;
- (viii) Deputy Directors, Office of Energy Market Regulation, in order of seniority;
- (ix) Deputy Directors, Office of Energy Projects, in order of seniority;

¹²⁹ 16 C.F.R. § 0.7.

¹³⁰ FERC, Continuity of Operations Plan, 78 Fed. Reg. 21245 (April 10, 2013).

- (x) Deputy Directors, Office of Electric Reliability, in order of seniority;
- (xi) Deputy Directors, Office of Enforcement, in order of seniority;
- (xii) Associate General Counsels and Solicitor, in order of seniority;
- (xiii) In order of seniority, Assistant Directors and Division heads, Office of Energy Market Regulation; Assistant Directors and Division heads, Office of Energy Projects; Assistant Directors and Division heads, Office of Electric Reliability; Deputy Associate General Counsels; Assistant Directors and Division heads, Office of Enforcement;
- (xiv) In order of seniority, Regional Engineers and Branch Chiefs of the Office of Energy Projects' regional offices; and Deputy Division Directors and Group Managers of the Office of Electric Reliability's regional offices.¹³¹

FERC already had in place delegations to particular commissioners: “Delegation of authority to one or two Commissioners. During emergency conditions, the Commission shall function as usual, if a quorum of the Commission is available and capable of acting. If by reason of such conditions a quorum of the Commission is not available and capable of acting, all functions of the Commission are delegated to the Commissioner or Commissioners who are available and capable of acting.”¹³²

b. Targeted Delegations to Address Vacancies

Of all the cabinet departments, on April 15, 2019, the Departments of Homeland Security and the Interior had the lowest percentage of Senate-confirmed positions filled with confirmed appointees.¹³³

When time limits for certain acting officials under the Vacancies Act ran out, the Department of Homeland Security only publicly noted delegations of duties on its leadership web page. For example, on April 15, 2019: “Deputy Secretary (vacant), David P. Pekoske, Senior Official Performing the Duties of the Deputy Secretary.”¹³⁴

The Department of the Interior, by contrast, has issued publicly accessible formal delegation orders.¹³⁵ One such order, issued by Secretary David Bernhardt on July 29, 2019, provides:

All functions, duties, and responsibilities of the following positions are hereby delegated to the specified employees:

- a. Deputy Secretary to Kate MacGregor, Deputy Chief of Staff
- b. Solicitor to Daniel Jorjani, Principal Deputy Solicitor
- c. Director, Bureau of Land Management to William Perry Pendley, Deputy Director, Policy and Programs, Bureau of Land Management

¹³¹ *Id.* at 21246 (18 C.F.R. § 376.204(b)).

¹³² 18 C.F.R. § 376.204(a).

¹³³ This is true both in the Snapshot Database and the Washington Post's Appointments Tracker.

¹³⁴ *Leadership*, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/leadership>.

¹³⁵ Not all of these delegations appear under the “Secretary's Orders” tab in the Department's Electronic Library of the Interior Policies, but they do come up when you search for “3345”.

- d. Special Trustee for American Indians to Jerold Gidner, Principal Deputy Special Trustee for American Indians
- e. Director, National Park Service to P. Daniel Smith, Deputy Director, National Park Service
- f. Director, Office of Surface Mining Reclamation and Enforcement to Glenda Owens, Deputy Director, Office of Surface Mining Reclamation and Enforcement
- g. Director, U.S. Fish and Wildlife Service to Margaret Everson, Principal Deputy Director, U.S. Fish and Wildlife Service¹³⁶

These individuals can further delegate as “necessary, consistent with 200 DM 1 and all applicable statutes and regulations.”¹³⁷

The order does place some limits on the delegation: “This delegation covers only those functions or duties that are not required by statute or regulation to be performed only by the Senate-confirmed official occupying the position. The Secretary must perform any functions or duties required by statute or regulation to be performed only by the Senate-confirmed official occupying the position. This redelegation does not supersede existing delegations of authority to or from the various vacant non-career positions to subordinate officials.”¹³⁸

Finally, the order is time limited: “It will automatically expire for each vacant non-career position when filled by a Senate-confirmed appointee, upon the subsequent designation of acting officials, or a subsequent delegation to alternate officials. In the absence of the foregoing actions, it will terminate on September 30, 2019, unless extended, modified, or revoked.”¹³⁹

¹³⁶ Department of Interior, Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions, Secretarial Order 3345, Amendment No. 28, § 3 (July 29, 2019).

¹³⁷ *Id.*

¹³⁸ *Id.* at § 4.

¹³⁹ *Id.* at § 5.

IV. Agency Practices Concerning Acting Officials

This Part addresses agency practices involving acting officials. It covers the following items: (1) confusion about the applicability of the Vacancies Act; (2) agency organization for reporting and tracking vacancies under the Vacancies Act; (3) agency-specific succession provisions and succession planning, including the naming of first assistants; (4) disclosure (if at all) of information about acting officials to the public; and (5) the experience of acting officials. The next Part addresses agency interactions with the GAO, specifically reporting of vacancies and acting officials and GAO violation letters.

To learn about agency practices involving acting officials, I drew on multiple sources, including: a survey of current agency officials (see Appendix F), telephone interviews with some of the survey respondents and other agency officials (see Appendix G), telephone interviews with former acting officials (see Appendix H), congressional hearing transcripts, agency web sites, and news stories.

I promised not to identify specific respondents or their agencies. I use third person pronouns (i.e., they, their) below to refer to specific interviewees.

A. Confusion about the Applicability of the Vacancies Act

Under the Vacancies Act, agencies must report vacancies in covered positions and information on any acting officials to the GAO (and to Congress).¹⁴⁰ As noted above, conflict has arisen about the applicability of the Act to some agency positions covered by specific succession provisions.¹⁴¹ No court, however, has held that any agency-specific provision that does not expressly exclude the Vacancies Act preempts the Act.

In its 1999 guidance on the Act, OLC advised that all cabinet departments and executive agencies fell under the Vacancies Act.¹⁴² Although agencies are generally supposed to treat OLC advice as binding, several of the surveyed agencies believed that they are not subject to the Vacancies Act. In addition, several other agencies, which acknowledged the Act's applicability, are not aware of OLC guidance finding that first assistants could be named after a vacancy arises.¹⁴³

¹⁴⁰ Part I.A.5, *supra*.

¹⁴¹ Part I.B, *supra*.

¹⁴² Guidance, *supra* note 30, at 61-62 (Questions 4-6).

¹⁴³ Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 180 (2001) (noting that the Act refers to the "office" and that if the first assistant is tied to the officer, the "words 'to the office'" would be "render[ed]...meaningless").

B. Internal Operations for Reporting Vacancies (and Acting Officials) and Tracking Time Limits

Agencies vary in how they comply with the Vacancies Act, including which offices handle GAO reporting and time-tracking, how agencies track time limits, how they communicate with acting officials, and the extent of training and resources dedicated to Vacancies Act compliance.

1. Assignment of Tasks within the Agency

Of the thirteen surveyed agencies who reported that the Vacancies Act applies to at least one of their Senate-confirmed positions, six noted that the same office handles reporting to the GAO and tracking the time limits under the Vacancies Act.

Often, it is the General Counsel's or Solicitor's office heading up these functions. The General Counsel's office often has subdivisions, so interviewees sometimes mentioned that one division handles tracking time limits and another division reports information to the GAO. Other agencies that rely entirely on the General Counsel's office explained that the "general law" division handles both duties.

Sometimes, the office in charge of White House coordination does both GAO reporting and tracking time limits. Some interviewees noted that connections to the White House are critical in this area because the Vacancies Act requires the President to personally select an acting official if she does not want to rely on the default first assistant.

Four agencies indicated that different offices manage reporting and tracking. The General Counsel's office and the White House coordinating office are prominent actors here as well. But the Human Resources group also plays a role for some of these agencies in reporting vacancies to GAO.¹⁴⁴

From the survey and interviews, the General Counsel's office almost always keeps track of the Vacancies Act's time limits. Even with these assignments, interviewees stressed the importance of communication with other units. For instance, several officials noted that other offices may know more about resignation dates and nominations—both of which are critical to tracking accurately the time limits under the Act.

2. Tracking Systems

Almost all agencies interviewed have a range of "systems" in place for tracking the time limits under the Vacancies Act. One agency admitted that it does not have any system in place. On the informal side, some agency officials count out the days and place reminders in their individual electronic calendars. On the more formal side, several agencies explained that they maintain spreadsheets of all PAS positions. For each position, officials track whether it is filled with a confirmed official, an acting official, or whether delegable functions are being performed by another official. Many of these spreadsheets also include dates on nominations and the dates that acting service lapses. All of these systems are internal and not posted publicly on agency websites.

¹⁴⁴ The remaining three agencies responding to the survey did not know one of the relevant offices: two did not know which office reported to the GAO and one lacked information on which office tracked time limits.

In addition, some agencies hold weekly meetings about their PAS positions to discuss onboarding for anticipated confirmed appointees or to learn about nominations that are expected to be submitted or returned.

3. Communicating with Acting Officials about the Vacancies Act's Constraints

Agencies vary in how they communicate with acting officials. Some officials reported that they both track the time limits and communicate with acting officials. Others noted that communication with acting officials is handled by more political offices, such as the Chief of Staff for the agency head or the office that coordinates with the White House. Several former acting officials stressed that communication needs to extend to lower-level officials who may use the acting title of their superior in official documents. These officials said they personally took responsibility for communication to other agency employees.

The formality of communication differs by agency. Some agencies use formal letters from the agency head. Other agencies rely on emails from either the General Counsel's office or the relevant political office. One agency remarked that they changed from formal to informal communication as the formal communication took time and resulted in critical gaps.

Acting officials generally know less about time limits than the officials tracking them. Some agency interviewees noted that acting officials have different preferences about time-limit reminders: some officials want frequent reminders; others want very few because many reminders confuse them. One former acting official did not believe anyone in their agency was tracking the time limits and only learned about them when the GAO issued a violation letter to a different agency. A friend had to assure the acting official that they were not serving in violation of the Vacancies Act. Another acting leader said they presumed someone was tracking but that "it was totally not on my radar."

Near the end of the permitted time limits, agencies almost always inform acting officials that they can no longer use the acting title or present themselves in meetings as the acting leader. Agencies typically tell the officials what title to use going forward. Agency interviewees stressed the importance of these communications as many acting officials enjoy using the title—one interviewee described the issue as "a resume problem."

Interviews with former acting officials who served under the current Vacancies Act showed a range of agency treatment of the Act. Some recalled no communication. Others noted that they discussed the Act's constraints at the start of their service.

As to the duties of the job, some agencies treat acting officials like confirmed officials, providing full briefing books (and in some cases adding material about the Vacancies Act). Other agencies provide reduced briefing to acting officials. And some do nothing. One former acting official joked that the agency's culture was "to learn on the job," having remarked that they had received no briefing whatsoever.

Several former acting officials recommended that the agency treat them like confirmed officials and "fully onboard them." Some indicated they did not need full onboarding as they were already performing many of the functions as the first assistant. Others thought it was sufficient to seek advice when they needed more information in the acting role.

Agencies also often notify potential acting officials, if they are the first assistant to a PAS position. Specifically, many position descriptions note if a job is the official first assistant for purposes of the Vacancies Act.

4. Training and Resources

Agency interviewees came to take on Vacancies Act-related duties in different ways. Some relished a challenge and noted that the Vacancies Act was a complex, interesting statute. Others were asked to take on a specific assignment and then took on more and more work in this area. For those officials, the work seemed tied to a person rather than a particular position. Some had no choice about doing the work as they believed the duties were assigned to their positions.

Only one agency interviewee noted comprehensive training on Vacancies Act issues, through an Office of Government Ethics conference over a decade ago (such training seems limited to presidential transitions, with the most recent training having occurred in 2016). Other interviewees essentially taught themselves about the Vacancies Act by reading the 1999 OLC guidance, internal records of OLC advice from previous agency queries, and/or the Senate Committee report on the Act. In one agency, more experienced officials presented Vacancies Act hypotheticals to new workers. In short, training was “ad hoc,” as one interviewee put it.

The number of officials working on Vacancies Act issues varies—from one to two in smaller agencies to five or six in larger ones. No official appeared to work full-time on these matters. Many noted that the first and last years of an Administration are particularly busy times.

Almost every interviewee sang the praises of OLC, noting that they often sought informal advice on related issues.

C. Agency-Specific Provisions and Succession Planning, Including Naming of First Assistants

1. Agency-Specific Provisions

Of the fifteen surveyed agencies seemingly covered by the Vacancies Act (for at least one PAS position), ten reported a specific statutory provision for succession in at least one of its Senate-confirmed positions. Four indicated that no agency-specific provisions applied to them. And one did not know. (Appendix A provides a comprehensive list of agency-specific succession provisions.)

Of the seven independent regulatory commissions and boards completely excluded from the Vacancies Act, none reported that their agency had a specific succession provision. Some of these agencies had issued regulations permitting acting Chairpersons despite the lack of explicit statutory authority for such temporary leaders.

2. Succession Planning

Many agencies reported that they have engaged in succession planning for at least one PAS position. Of the fifteen survey respondents covered by the Vacancies Act, eleven said that their agency has a succession plan for at least one PAS position. Two agencies reported that they did not. And two entities indicated that they did not know whether their agency has a succession plan.

Of the eleven agencies engaged in succession planning, most (six) claimed the relevant plans were published in the Federal Register. Three agencies said the plans are on their web sites or the White House's web site. And two noted that the plans are not publicly available, outside a FOIA request.

Of the seven independent agencies with no positions covered by the Vacancies Act, four have succession plans of some kind. Half of the agencies post those plans on their web sites; the other two do not publicly distribute them. There may have been some confusion about whether a continuity of operations plan (discussed in Part VI) counted as a succession plan.

One former acting official stressed the importance of these succession plans and recommended agencies have them in place for every Senate-confirmed position.

The policy lab students and I briefly examined the websites for the seventeen agencies covered by the Snapshot Database to see how easy agency succession plans were to find. We searched on a variety of terms, including "order of succession," "succession order," and even just "succession." On many agency websites, we could not quickly find any current succession plans.

3. First Assistants

For those agencies covered by the Vacancies Act, many have practices in place involving first assistants. Many agencies explicitly note in position descriptions that the first assistant is the default acting official. Some interviewees noted that there can be multiple deputy positions to a Senate-confirmed job, making it critical that one be designated as the first assistant for purposes of the Vacancies Act. Several officials noted that agency leaders sometimes shift the first assistant in the face of an expected vacancy, as leaders may have wanted one person as the first assistant when a confirmed official was in place but want someone else to be the default acting leader. As two officials explained, it can be difficult to get "the White House's attention" to choose an acting official outside the first assistant.

Some agencies reported that before a presidential transition they assess all their first assistant positions to PAS jobs and get individuals in place, making sure that the officials intend to stay at the agency for the first few months of the new Administration. One former acting leader noted that they helped senior agency staff coordinate in the closing months of an Administration how the agency would function after the impending presidential transition—well before the transition team contacted them. These coordination efforts consisted of multiple meetings among senior deputies throughout the agency.

Despite OLC guidance, some agencies will not let first assistants named after a vacancy occurs use the acting title. For those agencies, some remarked that departures of first assistants can cause more disruption than the departure of Senate-confirmed officials.

D. Disclosure of Titles

Not all agencies disclose acting titles publicly. Of the fifteen surveyed agencies who reported that the Vacancies Act applies to at least one of their PAS positions or that they operate under agency-specific succession provisions, nine post acting titles on their web sites. Three admitted that they do not. And three did not know.

The policy lab students and I examined the websites for the seventeen agencies covered by the Snapshot Database to see whether they explicitly mark when a position does not have a Senate-confirmed official (i.e., noting it is “vacant”), whether they list acting officials, and whether they note when someone is performing the duties of a vacant position through delegation. Table 11 summarizes what the public can easily access about vacancies and acting officials in PAS positions.

Table 11: Accessibility of Acting Leadership Information on Agency Websites

Agency	Leadership Information
Agriculture	No central leadership page for all PAS positions, each unit has a page (some note vacancies)
Commerce	Central leadership page for most PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies)
Defense	Central leadership page for PAS and many other positions but organized by person, not position (acting or delegation status noted) ¹⁴⁵
Education	Central leadership page for all PAS positions, with vacancies, some acting officials and delegations noted ¹⁴⁶
Energy	Central leadership page for some PAS positions staffed by confirmed officials, with no easy access to information on vacancies, acting officials, or delegations on unit pages
Health & Human Services	Central leadership page for all PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies)

¹⁴⁵ You can filter by key words but it is difficult to figure out the status of a particular position. During this project, the Defense Department appears to have changed its website; the revisions sadly made information on acting officials and delegated authority harder to access.

¹⁴⁶ The General Counsel position is marked vacant with no information on acting officials or delegations, for example. The linked page for the office of the General Counsel mistakenly lists in September 2019, I think, an acting official (the position is vacant and the duties are currently being carried out by delegation):

https://www2.ed.gov/about/offices/list/ogc/ogc_staff.html.

Homeland Security	Central leadership page for all PAS positions, with vacancies, acting officials, and delegations noted
Housing & Urban Development	Central leadership page for all PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies)
Interior	No central leadership page for all PAS positions, each unit has a page with acting officials and delegations noted (but not explicitly noting vacancies)
Justice	No central leadership page for all PAS positions, each unit has a page with acting officials and delegations noted (but not explicitly noting vacancies)
Labor	Central leadership page for all PAS positions, with vacancies, acting officials, and delegations noted
State	Central leadership page for all PAS and many other positions but organized by person, not position (acting status noted but not delegated authority) ¹⁴⁷
Transportation	Central leadership page for all PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies)
Treasury	Central leadership page for PAS positions filled by confirmed officials, with no easy access to information on vacancies, acting officials or delegations
Veterans Affairs	Central leadership page for all PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies)
Environmental Protection Agency	Central leadership page for all PAS positions, with acting officials and delegations noted (but not explicitly noting vacancies) ¹⁴⁸

¹⁴⁷ You can filter by key words but it is difficult to figure out the status of a particular position. During this project, the State Department appears to have changed its website as well; as with the Defense Department, the revisions sadly made information on acting officials and delegated authority harder to access.

¹⁴⁸ The EPA's historical web pages do have some errors concerning acting officials. *See* Appendix D, *infra* (discussing Darwin's and Wheeler's start and end dates as Deputy Administrator).

Office of Management & Budget	No central leadership page except for listing the top position, unit pages do not provide information on confirmed officials or vacant positions
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A companion ACUS project, *Listing Agency Officials*, “reviewed agency websites for the 15 cabinet departments, 15 department subcomponents (one selected subcomponent from each cabinet department, and 59 other independent agencies.” It found: “Most departments, departmental subcomponents, and other independent agencies did not provide clear and thorough information about vacancies among PAS/PA positions. A substantial number ... provided no information about vacant PAS/PA positions.”

E. Experience of Acting Officials

As described in Appendix H, I spoke to nineteen former acting officials, spanning the past five completed Administrations. Some of what I learned is incorporated in previous sections. Here I focus on how these officials perceived their temporary status, what they did after their acting service ended, and on some other unexpected aspects of their experience. I do not identify any of these officials or the agencies in which they served. I use the third person plural to refer to a specific interviewee below.

1. Authority

By law, acting officials have the same authority of confirmed officials. Theory often seemed to accord with practice here, as many former acting leaders felt no constraints on what they could do: “You need to lead the organization and do the responsibilities of the agency”; “You must move full speed ahead because you are in charge and must move forward”; “From the day I took over I acted as if I had all of the responsibility and authority of a permanent appointee.”

Even with a different pending nominee, some former temporary leaders did not delay in carrying out the functions of the vacant job: “I think if you have the job just do it. Don’t live in the shadow of someone who may take it. Many people try to read the tea leaves but so much of the day-to-day work is just putting one foot in front of another.” And when the acting official was the pending nominee, former leaders indicated that they did not change what they did in an acting capacity in light of the confirmation process.

Some noted that they knew a nomination would not be forthcoming so they “were going to be performing the role until the end.” One pointed out that they had served longer as an acting leader than any recent confirmed official in the role.

Several political acting leaders drew confidence from their White House support: “I never considered myself to be the acting. I had full authority to run the agency and the full confidence of the President”; “I knew that I had full authorization from the White House”; “The trust and confidence from the White House are more than sufficient” to give an acting official from outside the agency the needed authority. For acting officials who served before the 1998 Vacancies Act, when senior careerists were not eligible to serve as acting leaders and the White House had to rely more on cross-agency officials, those leaders plucked from different agencies took authority from being chosen by the White House for the acting role. Others drew from support of agency heads: “I had the Secretary’s support.”

Even careerists in the acting role often felt unconstrained. Some had been explicitly told by higher-level officials that they should fully perform the role: “The Secretary wanted everything moving.” One former official expressed, however, frustration when those officials then changed their minds months in. Another conceded that if they had been supervised by another acting (“no PAS in the driver seat”), the situation would have differed: “Career staff can do great things but it would be great to have someone connected to political leadership to drive the train.” One official mentioned relationships with congressional staff they had built up in their many years at the agency. Another acting leader noted they may have hesitated to make certain policy decisions but the work was almost entirely operational. Interestingly, one acting official noted that their “full speed ahead” style did result in several conflicts with their political supervisors.

Several former officials indicated that they may have acted differently if there had been a pending nomination during their acting service: “I wasn’t made acting and in the same week someone else was nominated. In the absence of anyone coming, I felt like there was no waiting.”

Some former leaders, however, pointed out restrictions they faced. Most of these leaders came from the agency’s career ranks and acknowledged they were “not part of the club.” A few such officials mentioned they were not invited to meetings a confirmed person in the role would have attended, and some noted that their political supervisors did not want them testifying in front of Congress: “I knew that there were strategy and other decisions being made that I wasn’t privy to but that I had an opinion about. Once I was confirmed it was like I was invited to the party.”

Most of these officials were fine with being excluded from certain meetings because of their status as careerists; others expressed frustration because they were critical to carrying out desired policies. Some noted that they knew they were there “to keep the seat warm” and acted accordingly.

Others mentioned self-imposed constraints. “I am not excited by an acting who takes a wide profile and orders a lot of changes. I think it invites controversy and you don’t need to do it”; “I did not think it was appropriate for me as an acting official to take on any bold new initiatives.” One former acting leader who had explicit backing from the White House still acted cautiously: “I didn’t want to make decisions that I knew might be reversed because I didn’t think that would be fair to the people below.” One former official noted how they came to a final decision on one project that had been ongoing for years but waited for the new agency leader to announce it and explained that they paused another project that had just started, leaving important planning decisions to the next confirmed official. Another leader noted that the tasks of the agency—which were policy driven—contributed to their cautiousness.

Former leaders also remarked on intangible differences: “I think Senate confirmation confers a certain gravitas that an acting capacity just doesn’t carry”; “You’re always tentative when you are acting because you haven’t been confirmed so you could be moved at any time. I didn’t live in fear of that but without confirmation it’s a little bit awkward”; “It’s a delicate dance. If you’ve got the job, even if you’re in an acting role, so long as there aren’t clear proscriptions on your duties, you should exercise the duties. But you should be mindful of what’s coming next”; “When you are a civil servant you either will not be in the room or you will not have the same gravitas as the political appointees.”

Acting officials sought buy-in from those beneath them and externally. Sometimes, buy-in seemed to come easily: “There was no challenge whatsoever from the employees as to what my responsibilities were. That was one of the things that was quite frankly very helpful and heartwarming of my acting service.”

Other times, it took more work. Internally, former acting leaders spoke of holding meetings (some by videoconference) with staff. One former political acting official stressed that they wanted to “get the allegiance of the career people” rather than “rule over them.” Another official noted that effective acting leaders “immediately learn about parts of the organization” with which they are unfamiliar. Someone else noted that they chose their chief of staff from a different part of the agency in which they had served. Externally, some acting leaders from the career ranks needed assistance in making connections with stakeholders.

Another leader noted that senior staff members react differently depending on whether they think the acting official is “truly temporary” or will be in charge for some time. In the former case, it is harder to get support. One former official discussed how staff divided their loyalties between the acting official and the announced nominee.

Others stressed the importance of having support from the agency’s head (or other senior appointees). “If there is no one there who can help, you don’t know what the new Administration wants.” For a former acting official who came from outside the agency, they “found a group of senior career executives who were highly capable and knew how to adjust to and train a new boss” but also drew on management skills from other agencies.

Some of the acting officials drawn from the agency’s senior career ranks complained about political officials not respecting careerists sufficiently and wished that the political appointees would treat careerists who were “team players” better. Others noted that even if they had internal support, obtaining external support was harder because of their acting title.

Many who had been the first assistant noted that they had built up important expertise and relationships from that role, from which they benefited when they took on the acting job: “I was sort of doing the job anyway without the title so it wasn’t much of a transition.” These officials often remarked that “dropping in a political person” had costs on the agency, as effort had to be expended to get political officials up to speed.

2. After Acting Service

Acting service ended in various ways. Some continued to perform the functions of the vacant office through delegation. These former acting officials often noted the lack of difference (in their minds) between the acting title and performing the functions through delegation.

Others stepped down from the acting role when a new person was confirmed. This transition did present some complexities. Often, the acting official had to brief the confirmed official, but not always. Several saw it as part of their duties. One former acting official felt it “was incumbent on me to ensure that the onboarding for the political appointee is good” as “you want to protect the incoming person from doing something stupid” and “you want to protect the agency and its interests.” By contrast, another political acting leader felt it was not their job to orient the new confirmed official—that such responsibility fell on the senior career staff. Another official expressed frustration with the new appointee, who “needed a lot of help as he had no idea what he was walking into.”

Nominees who shadowed the acting leaders created their own complexities. The nominees were not allowed to make any decisions but the acting leaders felt they were put in “untenable positions” with the nominees attending meetings.

For those acting leaders who could have returned to their first assistant positions, many chose to leave. For one such leader who stayed for a few months after the new leader took charge: “I wasn’t going to go back to the number 2 position [for long] because that might impede the new[ly] confirmed person’s ability to lead.” Another person said it felt uncomfortable to stay. One conceded that they should have “managed up” better and there may have been less conflict when the new person arrived.

For some acting officials who went back to their previous positions in the agency, there was sometimes conflict when they reported to the new confirmed officials. One mentioned that the

confirmed official wanted them to leave the agency so that people would go to the confirmed official with questions and concerns instead of the previous acting official. By contrast, another noted that the confirmed leader specifically asked them to stay, which they did for about a year.

3. Unexpected Aspects of Acting Service

On the advantage side, several former officials who had been nominated for the vacant position mentioned that they were glad, in part, that they were not confirmed because they were paid more as a senior career executive than they would have been as a confirmed political appointee.

On the cost side, some acting leaders drawn from the career ranks spoke of the difficulty in evaluating their former peers in their interim capacity. This human resources component of their job was among the hardest, according to several former acting leaders drawn from the senior career ranks, as their peers in the career ranks informally questioned their authority to make these personnel decisions. One such leader called for more training on that aspect of the role.

Finally, several former acting officials spoke about their decision to use the physical office of the position or not. For those who moved into the office: “It became important to people that I move into that office and reestablish the symbol of that office. It’s not Game of Thrones but the symbol is important to people.” One person regretted making the physical change: “It emphasized that I was trying to take over things. It was superficial but I shouldn’t have moved in.” For those who did not take the “big” office: “I knew I wasn’t the confirmed position.”

V. GAO Reporting and Violations

This Part focuses on agency interactions with the GAO, specifically reporting of vacancies and acting officials under the Vacancies Act as well as on GAO violation letters. It starts by summarizing past research on agency compliance with the Act’s reporting mandates and then turns to assessing agency performance for the vacancies in the snapshot database as well as the gaps since 1999 in the Cabinet Secretary and EPA databases. Next, it analyzes the violation letters issued by GAO since the enactment of the Vacancies Act and concludes by discussing agency recommendations for change. Appendix I details the data sources used.

A. Past Research

The GAO itself has issued multiple reports discussing problems with agency compliance under the Vacancies Act. Most recently, at the request of the Ranking Minority Member of the Senate Finance Committee, Senator Wyden, the GAO assessed “compliance with the Federal Vacancies Reform Act . . . by agencies and departments with respect to positions subject to the jurisdiction of the Senate Finance Committee”—a total of 36 positions.¹⁴⁹ For those positions vacant at some point in the studied period, the GAO determined that agencies submitted many reports months after the vacancy began.¹⁵⁰ And agencies did not report some vacancies at all.¹⁵¹ Earlier, the GAO determined that between the November enactment of the 1998 Vacancies Act and the end of June 2000 “agencies had not reported 17 vacancies (19 percent) and 21 acting officials (24 percent).”¹⁵²

Evan Haglund and David Lewis examined agency delays in reporting and found that agencies “with appointed general counsels are slower to report vacancies (larger number of days) than other agencies, even when controlling for differences across agencies such as agency size, location, and the number of appointed positions to be monitored.”¹⁵³

¹⁴⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 43, at 1.

¹⁵⁰ *Id.* at 4-11.

¹⁵¹ *See, e.g., id.* at 11 n.2.

¹⁵² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-701, PRESIDENTIAL APPOINTMENTS: AGENCIES’ COMPLIANCE WITH PROVISIONS OF THE FEDERAL VACANCIES REFORM ACT OF 1998, at 2 (2001).

¹⁵³ Evan Haglund & David E. Lewis, *Politicization and Compliance with the Law: The Case of the Federal Vacancies Reform Act of 1998*, at 17-18 (working paper April 2013).

B. Snapshot Database

I assessed agency compliance with the Vacancies Act’s reporting mandates for the three recent databases discussed in Part II. To start, for every position in the seventeen agencies comprising the Snapshot Database that was not filled with a confirmed appointee on April 15, 2019, I checked to see if it had been reported to the GAO, and if so, measured the delay from the vacancy (as stated in the report) to the submission of the report. Table 12 provides the relevant information for each agency.

Table 12: Reporting of Vacancies (existed April 15, 2019) to GAO as of August 15, 2019 in Cabinet Departments, EPA, and OMB

Agency	Vacancies	Reported	Average Delay
Agriculture	6	5 ¹⁵⁴	377 days
Commerce	5	5 ¹⁵⁵	425 days
Defense	8	8 ¹⁵⁶	183 days
Education	6	6	270 days ¹⁵⁷
Energy	5	5 ¹⁵⁸	129 days
Health & Human Services	5	5 ¹⁵⁹	429 days
Homeland Security	10	9 ¹⁶⁰	6 days
Housing & Urban Development	6	6	102 days
Interior	10	10	383 days
Justice	9	8 ¹⁶¹	388 days
Labor	6	5 ¹⁶²	50 days
State	13	13 ¹⁶³	168 days
Transportation	7	7	125 days

¹⁵⁴ The unreported vacancy, for the Assistant Secretary for Administration, seems to date back to January 2017.

¹⁵⁵ The agency did not report the vacancy starting date for one position, Assistant Secretary for Global Markets and Director General of U.S. and Foreign Commercial Service; the position therefore could not be included in the delay calculation. The agency also did not report any new acting Undersecretary for Industry and Security (a formal nomination for the position was submitted to the Senate on April 11, 2019, permitting acting service again). The agency’s report for that position in March 2019 did identify the acting official (and start and end dates) serving during the permitted 210 days without a nomination.

¹⁵⁶ Three of these vacancies were reported in the Obama Administration and were reported a second time in the Trump Administration (one with a vacant date shifted by one day); I used the earlier reports to calculate the delay.

¹⁵⁷ The agency reported one vacancy several days before it began. (I included the negative duration in the average.)

¹⁵⁸ One of these vacancies was reported in the Obama Administration and was reported a second time in the Trump Administration (with the vacant date shifted by two days); I used the earlier report to calculate the delay.

¹⁵⁹ One of these vacancies was reported in the Obama Administration and was reported a second time in the Trump Administration; I used the earlier report to calculate the delay.

¹⁶⁰ The unreported vacancy, for the Undersecretary for Strategy, Policy, and Plans, involves a new position.

¹⁶¹ Four of these vacancies date back to the Obama Administration and were reported in that Administration; the agency reported three of them again in the Trump Administration (despite there being no confirmed official in the meantime). I used the earlier reporting dates for those three vacancies. The unreported vacancy, for the Deputy Administrator of DEA, dates back to June 2018.

¹⁶² The unreported vacancy, for the Assistant Secretary for Disability Employment Policy, appears to date back to early 2015.

¹⁶³ One of these vacancies was reported in the Obama Administration and was reported a second time in the Trump Administration; I used the earlier report to calculate the delay.

Treasury	9	9 ¹⁶⁴	331 days
Veterans Affairs	2	1 ¹⁶⁵	226 days
Environmental Protection Agency	5	5	117 days
Office of Management & Budget	3	3	182 days

Five agencies did not report all of the vacancies that existed on April 15, 2019 as of August 15, 2019. Overall, however, agencies reported almost all of the vacancies in the Senate-confirmed positions analyzed in the Snapshot Database.¹⁶⁶

Agencies varied in their speed in reporting; while DHS took one week, on average, to report the vacancies that existed on April 15 (though it did not report at all on one vacancy), HHS took 429 days. The long average delays in the Department of Agriculture and HHS resulted from vacancies dating back to President Obama’s Administration that had not been reported until this Administration. The Department of State has a higher average because of one such vacancy. By contrast, the reporting delays in the Departments of Commerce, the Interior and the Treasury largely derived from submissions in the spring of 2018 for vacancies that began with President Trump’s inauguration.

¹⁶⁴ The agency did not report the vacancy starting date for one position, Deputy Undersecretary for International Finance; the position therefore could not be included in the delay calculation. Three vacancies (Assistant Secretary for Financial Markets, Assistant Secretary for Financial Stability, Chief Financial Officer) were reported in 2014; no confirmed official appears to have served since in any of the positions. I used the Obama Administration reports in calculating delays for those positions.

¹⁶⁵ The unreported vacancy, for the Deputy Secretary, seems to date back to June 2018.

¹⁶⁶ It took some effort to find some of the reports as the GAO organizes reports by Administration. Some of the vacancies that existed on April 15 began in the previous Administration and were reported at that time. These vacancies also reflect the long periods some positions go without confirmed officials as they had not been filled by a confirmed official in the meantime. Some of these vacancies were reported a second time in this Administration. I used the earlier report date for the delay calculations.

C. Cabinet Secretaries

From January 1, 1999 to July 19, 2019, there have been 77 acting Secretaries (see Appendix C for more on how vacant periods are defined in the Cabinet Secretary database). I examined whether agencies reported the vacancy associated with each acting Secretary and the next nomination to the GAO. For vacancies late in an Administration, I also checked reports for the next Administration. For those acting officials provided, I checked to see if start and end dates were also listed. Table 13 details compliance for the very highest positions in the fifteen cabinet departments.

Table 13: Reporting of Secretary Position to GAO

President	Vacancies	Reported	Acting Start	Acting End	Nomination
Clinton (since 1999)	4	2	1	0	1
Bush 43	22	19	12	5	19
Obama	23	18 ¹⁶⁷	16	8	18
Trump	28	25	20	14 ¹⁶⁸	17 ¹⁶⁹

Even for the highest positions in the federal bureaucracy, some vacancies were not reported. For those reported, agencies often included the acting official and their start date, but typically did not report an end date (which the GAO requests but the Vacancies Act does not mandate). In doing this compliance assessment, I observed that the GAO has no reports displayed from the Department of Veterans Affairs for the entire Obama Administration, for any position.

¹⁶⁷ One of the reports lists the right position but the wrong acting official and dates, so I did not count it as a report.

¹⁶⁸ Two acting Secretaries are currently still serving so there are no end dates to report for them.

¹⁶⁹ Two of the vacancies do not yet have formal nominations so there are no nominations to report for them.

D. EPA Positions

Tables 14-16 list by position the number of vacancies staffed by acting officials (as determined from the EPA’s own lists, see Appendix D), the number of reported vacancies, the number of acting officials listed with start date, the number of acting officials with listed end date, and the number of vacancies with nomination information (and outcome) reported.

Table 14: Reporting for Administrator Position to GAO

President	Vacancies	Reported	Acting Start	Acting End	Nomination
Clinton (since 1999)	0	N/A	N/A	N/A	N/A
Bush 43	4	1	0	0	0
Obama	3	2	2	0	2
Trump	2	2	2	2	2

Table 15: Reporting for Deputy Administrator Position to GAO

President	Vacancies	Reported	Acting Start	Acting End	Nomination
Clinton (since 1999)	1	0	0	0	0
Bush 43	1 ¹⁷⁰	1	1	0	1
Obama	3	2	2	1	2
Trump	2	2	2	1 ¹⁷¹	1

Table 16: Reporting for General Counsel Position to GAO

President	Vacancies	Reported	Acting Start	Acting End	Nomination
Clinton (since 1999)	0	N/A	N/A	N/A	N/A
Bush 43	5	4	2	0	3
Obama	2	2	2	0	2
Trump	1	1	1	1	1

Some items to note. First, the reported start and end dates provided generally do not match the dates of acting service listed on the agency’s web site. They differ by only a few days, however. Second, while most vacancies are reported in this and the past Administrations, there are considerable delays. The difference between the listed vacancy date and the reporting date for all the reported vacancies above averaged 102 days for the Administrator position, 170 days for the Deputy Administrator role, and 186 days for the General Counsel job.

¹⁷⁰ There is a second report for a period, where there was no acting official.

¹⁷¹ The acting official was still serving, as of July 19, 2019, so there could not have been a reported end date.

E. GAO Violation Letters

Under the Vacancies Act, the GAO is tasked with reporting on any agency violations of the Act’s time limits it finds.¹⁷² But the GAO is not required by the Act to search for non-compliance.¹⁷³ From the enactment of the Vacancies Act in 1998 to August 31, 2019, the GAO has released only twenty-three “violation letters”—finding twenty-five violations (one letter contained three issues). See Appendix I for more information on the GAO’s letters.

Of these violations, five occurred in the current Administration. The GAO found six, ten, and three violations under Presidents Obama, Bush, and Clinton, respectively. In none of the letters does the GAO recommend nullifying any agency action, and in some letters, because they involve Inspectors General and Chief Financial Officers, the GAO expressly notes why agency action performed by noncompliant acting officials should not be undone.¹⁷⁴

These time violations are spread across sixteen agencies. The Department of Health and Human Services (including the Social Security Administration and the Centers for Medicare and Medicaid Services) has racked up the most with five violation letters.¹⁷⁵ The Department of Defense comes in second with three violations.¹⁷⁶ The Departments of Education,¹⁷⁷ Energy,¹⁷⁸ Housing and Urban Development,¹⁷⁹ and Veterans Affairs¹⁸⁰ each have two. The remaining agencies—the Departments of Agriculture,¹⁸¹ Commerce,¹⁸² Justice,¹⁸³ State,¹⁸⁴ and Transportation,¹⁸⁵ the Tennessee

¹⁷² 5 U.S.C. § 3349(b).

¹⁷³ *Id.* (specifying reporting only “[i]f the Comptroller General of the United States makes a determination that” the time limit has been violated). The GAO appears to look for violations primarily from submitted agency reports. It does occasionally ask agencies for additional information. *See, e.g.*, Violation Letter B-318244 (Gen. Counsel, Dep’t of Health & Hum. Servs.) (Jun. 18, 2014).

¹⁷⁴ Natalie Peelish provided excellent analysis of almost all of these violation letters. *See* Memorandum from Natalie Peelish to Professor Anne Joseph O’Connell, Stanford Law School (Oct. 24, 2018) (on file with author).

¹⁷⁵ Violation Letter B-305939 (Comm’r, Food & Drug Admin.) (Mar. 17, 2006); Violation Letter B-318244 (Gen. Counsel, Dep’t of Health & Hum. Servs.) (Jun. 18, 2014); Violation Letter B-326794 (Assistant Sec’y for Health, Dep’t of Health & Hum. Servs.) (Nov. 25, 2015); Violation Letter, B-321357 (Adm’r, Ctr. for Medicare & Medicaid Servs.) (July 18, 2016); Violation Letter B-329853 (Comm’r, Social Security Admin.) (Mar. 6, 2018).

¹⁷⁶ Violation Letter B-286265 (Inspector Gen., Dep’t of Def.) (Sept. 15, 2000); Violation Letter B-305675 (Ass. Sec’y for Civil Works, Dep’t of the Army) (Dec. 22, 2005); Violation Letter B-329939 (Gen. Counsel, Dep’t of the Air Force) (May 9, 2018).

¹⁷⁷ Violation Letter B-302743 (Assistant Sec’y for Elementary & Secondary Educ., Dep’t of Educ.) (Aug. 19, 2004); Violation Letter B-308956 (Assistant Sec’y for Vocational & Adult Educ., Dep’t of Educ.) (Apr. 17, 2007).

¹⁷⁸ Violation Letter B-286265 (Chief Fin. Officer, EPA) (Sept. 15, 2000); Violation Letter B-328888 (Dir. of the Office of Sci., Dep’t of Energy) (Mar. 3, 2017).

¹⁷⁹ Violation Letter B-323112, (Inspector Gen., Dep’t of Hous. & Urban Dev.) (May 17, 2012); Violation Letter B-329918, (Inspector Gen., Dep’t of Hous. & Urban Dev.) (May 9, 2018).

¹⁸⁰ Violation Letter B-305188 (Under Sec’y for Health, Dep’t of Veterans Affairs) (July 20, 2005); Violation Letter B-326480 (Inspector Gen., Dep’t of Veterans Affairs) (March 30, 2015).

¹⁸¹ Violation Letter B-289367 (Assoc. Gen. Counsel, Dep’t of Agric.) (Mar. 18, 2000).

¹⁸² Violation Letter B-307351 (Ass. Sec’y for Import Admin., Dep’t of Commerce) (July 12, 2006).

¹⁸³ Violation Letter B-286265 (Inspector Gen., Dep’t of Justice) (Sept. 15, 2000). DOJ has another letter, where the GAO determined there was no violation. Violation Letter B-310780 (Assistant Att’y Gen., Office of Legal Counsel) (June 13, 2008).

¹⁸⁴ Violation Letter B-328671 (Chief Fin. Officer, Dep’t of State) (Mar. 3, 2017).

¹⁸⁵ Violation Letter B-305187 (Fed. Railroad Adm’r, Dep’t of Transp.) (July 20, 2005).

Valley Authority,¹⁸⁶ the U.S. Agency for International Development,¹⁸⁷ and the Institute of Museum and Library Services¹⁸⁸—come in with one apiece.

Noncompliance also varied by position. Eight of the twenty-five violations concern an acting Inspector General, over thirty percent of the total. Acting Assistant Secretaries make up the next highest, with five violations. Interim Directors and General Counsels chalk up three issues apiece, while acting Administrators, Chief Financial Officers, and Commissioners have two violations each. One acting Undersecretary is flagged. When time limits were provided, the average violation was about seven months (past the deadline).¹⁸⁹ At the highest end, acting General Counsels at the Department of Health and Human Services were in violation of the 1998 Vacancy Act for nearly three-and-a-half years.¹⁹⁰

Although the GAO must report noncompliance of only the time limits it finds, in two of its violation letters, it flagged additional violations of the Vacancies Act. First, reporting in 2002, it determined that the acting General Counsel at the Department of Agriculture had been improperly serving because the Secretary, and not the President, had chosen him from the third category of permitted acting officials (i.e., senior agency workers).¹⁹¹ Second, reporting in 2014, the GAO noted that three of the four acting General Counsels at the Department of Health and Human Services (from 2009 to 2014) were not eligible under the Act, again because the President had not chosen them (and because they were not the first assistant).¹⁹²

The GAO has also issued two additional letters. One, in June 2008, responded to a congressional request seeking the agency’s opinion about whether the first assistant to the Assistant Attorney General for OLC could be delegated all the functions of the Assistant Attorney General’s role. The GAO found such delegation acceptable.¹⁹³ The other, in February 2019, responded to a request by the Ranking Minority Member of the Senate Finance Committee about agency compliance with all of the Act’s requirements (including agency reporting to the GAO) for positions under its purview.¹⁹⁴ The GAO found a number of reporting violations; the one time limit violation it noted involved the SSA, about which it had earlier issued a violation letter.¹⁹⁵

Because the GAO relies on agency reports to find violations and not on agency websites and other announcements, the GAO’s letters seem to undercount agency non-compliance. In November 2017, when the 300-day time limit passed in President Trump’s first year, there were dozens of acting

¹⁸⁶ Violation Letter B-331027 (Inspector Gen., TVA) (Aug. 6, 2019).

¹⁸⁷ Violation Letter B-307400 (Inspector Gen., USAID) (July 24, 2006).

¹⁸⁸ Violation Letter B-287720 (Dir., Inst. of Museum & Library Servs.) (May 18, 2001).

¹⁸⁹ Many of the letters identified precise start and end dates of problematic service. The letter concerning the acting Director of the Institute of Museum and Library Services found the acting official using the title improperly on April 4, 2000, so I used that as the end date in that example. Similarly, the letter concerning the acting IG at HUD flagged the agency’s website on April 12, 2018 using the title, so I used that as the end date. For two other letters, one involving the acting General Counsel at the Agriculture Department and one involving the acting Commissioner of Social Security, I used the date of the letter as the end date of problematic service. For the acting Director of Science in DOE, I added the two periods of improper service.

¹⁹⁰ Violation Letter B-318244 (Gen. Counsel, Dep’t of Health & Hum. Servs.) (Jun. 18, 2014).

¹⁹¹ Violation Letter B-289367 (Assoc. Gen. Counsel, Dep’t of Agric.) (Mar. 18, 2000).

¹⁹² Violation Letter B-318244 (Gen. Counsel, Dep’t of Health & Hum. Servs.) (Jun. 18, 2014).

¹⁹³ Violation Letter B-310780 (Assistant Att’y Gen., Office of Legal Counsel) (June 13, 2008).

¹⁹⁴ Violation Letter B-329903 (collecting violations across agencies).

¹⁹⁵ *Id.*

officials seemingly serving in violation of the Act according to agency websites. By mid-December, according to Bloomberg, there were still about a dozen positions listed with acting officials, which should have been empty under the Vacancies Act, including at the Departments of Interior, Justice, and State.¹⁹⁶ The GAO did not issue any violation letters in November or December.

¹⁹⁶ Josh Eidelson, *Trump's Stand-In Bureaucrats May Have Overstay Limits*, BLOOMBERG NEWS, (Dec. 12, 2017).

F. Changes

Many agency officials in the interviews complained about the GAO's reporting system, particularly that they cannot submit required reports through an automated system. Although the forms are online, the agency must download them, fill them out, and send them in hard copy to the GAO (and to Congress). As one official noted, with other pressing demands, it is "easy to let the GAO reporting slip." By making reporting available online, these agency officials felt it would take less effort and may increase timeliness of their submissions.

VI. Agency Practices Concerning Delegations of Authority

This Part examines delegations of authority in the face of vacancies in PAS positions. It addresses (1) the prevalence of delegations; (2) types of delegations; (3) exclusivity of functions; (4) timing, time limits, exclusivity, and wording of delegations; (5) disclosure of delegations; and (6) continuity of operations plans.

To learn about agency practices in this area, I drew on multiple sources, including: a survey of current agency officials (see Appendix F), telephone interviews with some of the survey respondents and other agency officials (see Appendix G), telephone interviews with former acting officials (see Appendix H), agency web sites, and news stories.

As before, I do not identify the agencies of respondents or interviewees. I also use the third person plural below to refer to any specific individual.

A. Prevalence of Delegations

Of the fourteen surveyed agencies who have at least one position arguably covered by the Vacancies Act,¹⁹⁷ ten revealed that their agency uses delegated authority in the face of staffing vacancies in Senate-confirmed positions. Three indicated that they do not rely on such delegations, and one agency did not know.

For those agencies reporting no delegations, all noted that they always use acting officials to keep operating. In some cases, the agencies have specific statutory authority for the deputy to serve in an acting capacity indefinitely.

Of the seven surveyed agencies who are not covered by the Vacancies Act for any position, three use delegations in the face of staffing vacancies and at least one of the four other agencies does seem to have standing delegations in place.

For the four independent regulatory commissions and boards reporting no delegations, many revealed that they sometimes cannot perform certain functions. Even some of the agencies who do use delegations noted that delegations are not sufficient in some contexts and they could not perform some functions.

¹⁹⁷ One agency responded to questions on acting officials, agency-specific provisions, and succession planning but did not respond to questions on delegated authority.

B. Types of Delegation

The survey asked about delegations in the face of staffing vacancies in Senate-confirmed positions. The interviews helped clarify that some of those delegations occur through permanent or standing orders, and some happen through temporary assignments. Because both standing and temporary assignments generally qualify as internal agency organization and management practices under the Administrative Procedure Act,¹⁹⁸ none seem to have been issued after prior notice and comment.

Some of the permanent or standing orders are contingent on vacancies—for example, allowing particular tasks to be carried out only if there is no PAS official in a particular position. But many of the permanent or standing delegation orders allow lower-level officials to carry out particular duties even when higher-level officials are in place. These permanent delegations name particular positions, rather than specific individuals, that can carry out functions. Some orders have time limits under agency sunset policies that require regular revisiting of certain decisions. Others can be repealed at any time, assuming proper process (typically a decision by the agency head, which may include a vote of commissioners or board members in an independent agency).

Several interviewees expressed a preference for standing delegations because of their relative formality and transparency. Some former acting officials noted that when the time limits ran out on their acting service, standing delegations permitted them to carry out the delegable functions of the vacant positions without requiring new delegations.

By contrast, temporary delegations are often tied to staffing gaps. Interviewees described them as “ad hoc” devices to keep an agency functioning. Temporary delegations generally name a particular person who can carry out the delegated task, but some identify a position instead. They usually have time limits tied to the next confirmed official—in other words, they are valid until a specific position is filled through the traditional appointments process. Some have specific end-dates attached and can be renewed if the vacancy persists. Several interviewees noted that temporary delegations are more palatable to agency heads than standing orders, which require more effort to change. An agency head, one interviewee noted, might be willing to delegate to a specific lower-level official but not be willing to delegate to that position generally.

¹⁹⁸ 5 U.S.C. § 553(b)(A) (2017).

C. Exclusivity of Functions

Under the Vacancies Act, only non-exclusive functions of Senate-confirmed positions can be delegated downward.¹⁹⁹ Agencies covered by the Act for at least one position vary on the exclusivity of functions. Some interviewees reported that nothing is exclusive to any position in their agencies, allowing delegation of all duties. Others noted that a handful of specific tasks could not be delegated downward.

So as not to violate the Vacancies Act, many agencies officially assign “delegable functions” or “nonexclusive functions” of the “vacant office” when the Act’s time limits run out, without defining what those functions are. These agencies then address any questions about particular functions as they arise. Many agencies reported seeking OLC advice on whether particular duties are non-exclusive and therefore can be carried out by lower-level officials.

Some interviewees noted the importance of delegation in the face of lengthening staffing vacancies. Several agency officials recommend against creating exclusive functions or duties through regulation (separate from any mandated by statute), so that operations can continue in the face of vacancies.

By contrast, independent regulatory commissions and boards face more restrictions on delegation. Some of those agencies have quorum mandates, forbidding even a confirmed commissioner or board member from carrying out particular tasks if there is no quorum. Those independent agencies often keep lists of what functions can be carried out, and by whom, without a quorum. Several interviewees mentioned the Anti-Deficiency Act as a key enforcement mechanism. Under the Anti-Deficiency Act, agency officials can face criminal penalties for using appropriated funds in contravention of Congress’s desires.²⁰⁰

One agency noted that it had issued regulations with default outcomes, because it could not delegate certain functions downward in the face of vacancies. Instead of delegating functions, the agency allows decisions to take effect automatically if the agency does not act within a specified time period. If the agency cannot act in that period, the decisions still take effect.

¹⁹⁹ See Part I.C, *supra*.

²⁰⁰ 31 U.S.C. §§ 1341, 1359 (2017).

D. Timing, Time Limits, Exclusivity, and Wording of Delegations

Agencies differ in their timing of issuing temporary delegations. Often, agencies will delegate in advance of expected vacancies in lower-level positions. In such cases, the departing confirmed official will delegate relevant tasks. But one interviewee said that they can “go to the agency head” to delegate if the lower-level official does not assign duties before departing. Some agencies with quorum mandates do not have access to this alternative once a quorum is lost so there is more pressure to get delegations settled before that happens.

Other agencies have a policy to issue delegations in the months before a presidential transition. Interviewees stressed the importance of advance planning: “Imagine the worst”; “Think through what you can do legally before you lose a quorum and use the quorum to put the plan in place.” Many noted that delegations before vacancies have stronger legal grounding.

Agencies also vary in imposing time limits on their delegations. Four surveyed agencies indicated that they put time limits on delegations—for example, “until entry of duty of a presidential appointee.” Four agencies do not restrict their delegations in that way. Some agencies did not know.

As with permanent or standing delegation orders, agencies typically reserve residual authority to perform temporarily delegated tasks to higher-level officials. In other words, the agency head or deputy agency head is explicitly allowed to carry out any delegated function.

Agencies seem to have coalesced on the relevant wording for those carrying out delegated functions: “performing the duties of [fill in Senate-confirmed position].”

E. Disclosure of Delegations

As with acting titles, agencies do not always disclose delegations of authority in the face of staffing vacancies. Indeed, agencies disclose less about such delegations than about acting leaders.

Nine surveyed agencies indicated that they publish delegations in the Federal Register or on their web sites. But six agencies said they do not publicly post them, with some noting that they are available through FOIA.

Interviews helped to flesh out these disclosure policies. Several agencies explained that they publish permanent or standing delegations in the Federal Register but not temporary ones. Some noted the cost of Federal Register publication. For those agencies posting delegations on their web sites, the reasons vary. Some interviewees cited the importance of transparency or communication with their stakeholders, particularly if the agencies lacked a quorum. As one remarked, “transparency builds credibility.” One interviewee commented that the agency lacked an effective internal agency platform so these policies were posted on their website.

Jennifer Nou has noted the discrepancy in disclosure policies for standing delegations. She contrasted the SEC, “which routinely publishes its subdelegations in the Federal Register and Code of Regulations (CFR),” and the EPA, whose Delegations Manual is “hosted on an internal server” and can be accessed only “through a time-consuming Freedom of Information Act request.”²⁰¹ Nou has called for agencies to disclose their delegations publicly to “make [them] more credible.”²⁰²

The policy lab students and I looked in the spring and summer of 2019 at the websites of the fifteen cabinet departments, the EPA, OMB, FTC, and MSPB to see if we could easily locate delegations of authority, and delegations in response to staffing vacancies, in particular. Because Table 11 summarizes disclosure of titles on leadership pages that indicate whether an official is performing the functions of a vacant office, that form of disclosure is excluded below. Many agencies publish their permanent delegations in the Federal Register; these standing delegations also appear in the Code of Federal Regulations. We focused on websites to find delegations related to staffing vacancies. We searched for “directives,” “delegation(s) of authority,” “redelegation(s) of authority,” “perform nonexclusive,” “performing the duties,” “Federal Vacancies Reform Act,” “3345,” and “3348” and examined the first page of any results. Table 17 provides a summary assessment of our investigation.

²⁰¹ Nou, *supra* note 109, at 502-03.

²⁰² *Id.*

Table 17: Access to Delegations on Agency Websites

Agency	Availability of Delegations on Agency Websites
Agriculture	Central list of standing directives, which include delegations, unable to easily find any delegations related to staffing vacancies (no search results for relevant terms)
Commerce	Central list of standing directives, which include delegations (NOAA also has central list of delegations), some items referencing delegated authority related to specific staffing vacancies appear in search results
Defense	No easily accessible central list of standing directives or delegations, some items referencing delegated authority related to specific staffing vacancies appear in search results
Education	Central list of standing delegations, some items referencing delegated authority related to specific staffing vacancies appear in search results
Energy	Central lists of standing delegations and designations, some items referencing delegated authority related to specific staffing vacancies appear in search results
Health & Human Services	No easily accessible central list of standing directives or delegations (specific ones do appear in search results), unable to easily find any delegations related to staffing vacancies (no search results for relevant terms)
Homeland Security	Central list of standing directives (including one on delegations of authority, though the specific delegations are not easily accessible), many items referencing delegated authority related to specific staffing vacancies appear in search results
Housing & Urban Development	Central lists of standing delegations and directives, many items referencing delegated authority in connection to general staffing vacancies appear in search results
Interior	No easily accessible central list of standing directives or delegations (though many agencies within the department have them), many items referencing delegated authority related to specific staffing vacancies appear in search results (but some amendments to Order discussed in Part III.C.3 do not appear)
Justice	No easily accessible central list of standing directives or delegations (though the Justice Manual contains them), many items referencing delegated authority in connection to general staffing vacancies appear in search results

Labor	No easily accessible central list of standing directives or delegations (specific ones do appear in search results, some no longer apply), unable to easily find any delegations related to staffing vacancies (no search results for relevant terms)
State	No easily accessible central list of standing directives or delegations (specific ones do appear in search results), unable to easily find any delegations related to staffing vacancies (no search results for relevant terms)
Transportation	No easily accessible central list of standing directives or delegations (specific ones do appear in search results), many items referencing delegated authority in connection to general staffing vacancies appear in search results
Treasury	Central lists of standing directives and orders, which include delegations (IRS and IG also have central lists), some items referencing delegated authority in connection to general staffing vacancies appear in search results
Veterans Affairs	No easily accessible central list of standing directives or delegations (though search results produce a directive for the agency to provide this access and there is a link to the CFR), some items referencing delegated authority related to specific staffing vacancies appear in search results
Environmental Protection Agency	No easily accessible central list of standing directives or delegations (specific ones do appear in search results), unable to easily find any delegations related to staffing vacancies (no search results for relevant terms)
Office of Management & Budget	No easily accessible central list of standing directives or delegations, unable to easily find any delegations related to staffing vacancies (no search results for relevant terms) (looked only at OMB, not the White House)
Federal Trade Commission	No easily accessible central list of standing directives or delegations (but can search for delegations in the Federal Register notices centralized list)
Merit Systems Protection Board	Central list of standing delegations

F. Continuity of Operations Plans

Separate from agency succession plans, agencies are supposed to develop a continuity of operations plan (COOP) for emergencies. The Federal Emergency Management Agency, within DHS, leads COOP efforts for federal agencies, among other entities. According to the template for federal agencies: “Continuity planning facilitates the performance of Executive Branch Essential Functions during all-hazards emergencies or other situations that may disrupt normal operations.”²⁰³

Multiple interviewees informed me that they interpret their COOP to cover not only a terrorist attack or natural disaster but also vacancies in Senate-confirmed positions. These agencies typically face statutory restrictions on delegations and quorum mandates. They cited their COOP as the basis for limited actions if they have no quorum.

These limited actions do not include final agency decisions but rather focus on procedural elements. For example, agencies cited their COOP to permit lower-level officials to gather information, hold a hearing, and even make a tentative decision that could be appealed to the full agency when it regained a quorum. Interviewees often conceded the costs of this approach, specifically, the costs of the additional process on the agency and participants. But they stressed the need for making some decisions, even if they were constrained.

²⁰³ *Continuity of Operations Plan Template for Federal Departments and Agencies*, FEMA, (April 2013) <https://www.fema.gov/media-library-data/1386609058805-b084a7230663249ab1d6da4b6472e691/COOP-Planning-Template.pdf>.

VII. Recommendations

In light of Parts I-VI, this Part proposes recommendations to federal agencies, whether or not they are covered by the Vacancies Act, on their use of acting officials, succession planning, and delegated authority. It also proposes recommendations to the GAO. Part A addresses recommendations concerning acting officials for agencies with positions covered by the Vacancies Act. Part B offers recommendations on acting officials for agencies with Senate-confirmed positions not covered by the Act and on succession planning in all agencies. Part C proposes recommendations related to delegated authority in the face of staffing vacancies. Part D suggests some changes to the GAO's reporting system under the Vacancies Act.

These recommendations fit with ACUS's affirmative disclosure initiative and complement, in part, another on-going ACUS project, *Listing Agency Officials*. The Senate has recently passed legislation on succession planning, mandating that "the head of each agency shall ensure that a succession plan is in place for each senior noncareer position in the agency."²⁰⁴

A. Acting Officials Under the Vacancies Act

Agencies should engage, if they do not do so already, in the following practices:

- As a preliminary matter, agencies should determine if they are subject to the Federal Vacancies Reform Act (FVRA).
 - Agency-specific statutory succession provisions do not necessarily exclude agencies from the Vacancies Act, though there is little caselaw on this issue.
 - Agencies should consult with the Office of Legal Counsel, if necessary.
- Agencies with at least one PAS position covered by the FVRA should establish an internal organizational structure for complying with the Act, with good communication channels.
 - Organizational structure may vary among agencies. Some agencies may prefer to have one office handle all relevant aspects; other agencies may want to divide the tasks. Larger agencies with sub-agencies with covered positions may want to centralize the functions at the top or decentralize to the relevant sub-agencies or offices.
 - No matter the organizational structure, agencies should ensure strong internal communication with relevant offices (e.g., human resources for resignation dates, White House liaison for nomination information).
 - No matter the organizational structure, duties (e.g., tracking time limits) should be assigned to a position, rather than a particular person, so in case the occupant departs, the task is still performed.

²⁰⁴ Presidential Transition Enhancement Act of 2019, S.394, 116th Cong. §2 (passed by Senate on Aug. 1, 2019).

- Agencies should consider disclosing on their websites their organizational structure for the FVRA.
- Agencies with at least one PAS position covered by the FVRA should ensure that officials in positions responsible for aspects of the FVRA have adequate training.
 - Officials tracking time limits should understand the Senate process related to nominations (including the likelihood of multiple returns) and how to access important dates (official submission dates of nomination, returns, etc.).
 - Agencies ideally would coordinate on this training, perhaps with the GAO or some other organization offering government-wide information sessions.
- Agencies with at least one PAS position covered by the FVRA should name official first assistant positions to those covered PAS jobs.
 - If there are multiple deputy positions to a covered position, agencies should specify which deputy position is the official first assistant position.
 - These official first assistant positions should match other internal orders, position descriptions, and organization charts.
 - These official first assistant positions should be developed in communication with the White House if possible.
 - In the description of each official first assistant position, agencies should explain that the first assistant is the default acting official under the FVRA.
- Agencies with at least one PAS position covered by the FVRA should develop policies for the use of the acting title, applicable time limits, and communication of the FVRA's mandates to the acting official.
 - Agencies should develop some system for tracking the time limits, such as a spreadsheet with relevant dates.
 - Acting officials should be told that there are time limits on the use of the title (and how the time limits can be extended with nominations) and be updated as needed as to when they can no longer use the title.
- Agencies with at least one PAS position covered by the FVRA should disclose acting officials in those positions on their websites.
 - Agencies should consider disclosing start and any expected end dates as well.

- Agencies with at least one PAS position covered by the FVRA should consider how they orient acting officials.
 - Agencies should consider using the same orientation for confirmed officials with acting officials, particularly if the acting leaders come from outside the agency.
 - For acting officials drawn from the agency's senior career ranks, agencies should consider providing information on human resources duties, in particular (i.e., evaluation of former peers).
- Agencies with at least one PAS position covered by the FVRA should explore how best to reintegrate any senior careerists after they have served as acting officials and a confirmed official is put in place.

B. Acting Officials Outside the Vacancies Act and Succession Planning

- Agencies with PAS positions not covered by the FVRA where Congress has provided some alternative mechanism for acting officials (e.g., acting Chairperson) should disclose acting officials in those positions on their websites.
 - Agencies should consider disclosing start and any expected end dates as well.
- All agencies should have formal, clear, and easily accessible succession plans for each PAS position, to the extent permitted by law.
 - Each succession plan should have at least two lower-level positions listed, if permitted by law.
 - These succession plans should match other internal orders, position descriptions, and organization charts.
 - These succession plans should be developed in communication with the White House if possible.
- Agencies should make their succession plans publicly accessible on their web sites.

C. Delegations of Authority Related to Staffing Vacancies

- All agencies should determine, if possible, which functions and duties, if any, are exclusive to each PAS position.
 - Agencies should assess whether statutes or their own regulations make a function or duty exclusive to a PAS position.
 - Agencies should consult with the Office of Legal Counsel, if necessary.
- Agencies with quorum requirements should consider establishing a plan for operations without a quorum before any such loss of quorum.
 - Agencies should determine which functions they could perform without a quorum as well as which functions they could not perform without a quorum.
- Agencies that do establish plans for operations without a quorum should disclose, if possible, those plans on their websites.
 - Agencies should consider whether they want to disclose such plans before a loss a quorum or only if lose their quorum.
- To the extent possible, agencies should make their delegations of authority in the face of staffing vacancies in PAS positions publicly and easily accessible on their web sites.
 - These delegations should include standing orders and ad hoc assignments.

D. GAO's Role Under the Vacancies Act

- The GAO should consider whether it could change its reporting system so that agencies could report information on vacancies, acting officials (including start and end dates), and nominations online.

Appendix A
Agency-Specific Statutory Provisions

To come up with this list of agency-specific statutory provisions for temporary leadership, I ran, with the assistance of the Stanford Law School reference librarians and Arielle Mourrain, two searches in Westlaw Edge (narrowed to nonrepealed statutes and court rules, within the All Federal database):

- ((absen! /20 disab!) or (absen! /20 vacan!) or (disab! /20 vacan!) or (unable /20 serve) or (unable /20 vacant) or (absen! /20 unavail!)) OR CA(deputy or assistant or (under /2 secretary) or undersecretary or under-secretary or acting)
- (vacan! or absen! or disable! or unable!) AND CA(deputy or assistant or (under /2 secretary) or undersecretary or under-secretary or acting).

The first produced 768 results; the second generated 65 results. Table 18 lists all relevant provisions, including those for actual interim leaders (rather than “acting” officials) (e.g., interim U.S. Attorneys) and those for positions outside the Executive Branch (e.g., House Office of Legislative Counsel). Some of these provisions cover positions that are clearly excluded from the Vacancies Act—because they are not in Executive Branch agencies or because they do not require Senate confirmation.

Table 18: Agency-Specific Statutory Provisions

Code Section	Agency	Succession Provision
2 U.S.C. § 282a(b)(1)	House Office of Legislative Counsel	One of the attorneys appointed under subsection (a) shall be designated by the Legislative Counsel as Deputy Legislative Counsel. During the absence or disability of the Legislative Counsel, or when the office is vacant, the Deputy Legislative Counsel shall perform the functions of the Legislative Counsel.
2 U.S.C. § 285d(2)(A)	Office of the Law Revision Counsel	One of the employees appointed under paragraph (1) shall be designated by the Law Revision Counsel as Deputy Law Revision Counsel. During the absence or disability of the Law Revision Counsel, or when the office is vacant, the Deputy Law Revision Counsel shall perform the functions of the Law Revision Counsel.
2 U.S.C. § 287b	Office of Parliamentarian of House of Representatives	(a) With the approval of the Speaker, or in accordance with policies and procedures approved by the Speaker, the Parliamentarian shall appoint such attorneys and other employees as may be necessary for the prompt and efficient performance of the functions of the Office. Any such appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person so appointed may be removed by the Parliamentarian with

		<p>the approval of the Speaker, or in accordance with policies and procedures approved by the Speaker.</p> <p>(b)(1) One of the attorneys appointed under subsection (a) of this section shall be designated by the Parliamentarian as Deputy Parliamentarian. During the absence or disability of the Parliamentarian, or when the office is vacant, the Deputy Parliamentarian shall perform the functions of the Parliamentarian.</p>
2 U.S.C. § 288(a)(1)	Office of Senate Legal Counsel	<p>There is established, as an office of the Senate, the Office of Senate Legal Counsel (hereinafter referred to as the "Office"), which shall be headed by a Senate Legal Counsel (hereinafter referred to as the "Counsel"); and there shall be a Deputy Senate Legal Counsel (hereinafter referred to as the "Deputy Counsel") who shall perform such duties as may be assigned to him by the Counsel and who, during any absence, disability, or vacancy in the position of the Counsel, shall serve as Acting Senate Legal Counsel.</p>
2 U.S.C. § 601(a)(1)	Congressional Budget Office	<p>There is established an office of the Congress to be known as the Congressional Budget Office (hereinafter in this chapter referred to as the "Office"). The Office shall be headed by a Director; and there shall be a Deputy Director who shall perform such duties as may be assigned to him by the Director and, during the absence or incapacity of the Director or during a vacancy in that office, shall act as Director.</p>
2 U.S.C. § 1804	Architect of the Capitol	<p>On and after August 18, 1970, the Deputy Architect of the Capitol shall act as Architect of the Capitol during the absence or disability of that official or whenever there is no Architect.</p>
2 U.S.C. § 2214(a)	Architect of the Capitol	<p>The Architect of the Capitol shall --</p> <p>(1) upon recommendation of the Chief Executive Officer, appoint an assistant who shall perform the responsibilities of the Chief Executive Officer during the absence or disability of the Chief Executive Officer, or during a vacancy in the position of the Chief Executive Officer</p>

2 U.S.C. § 6532	Secretary of the Senate	For any period during which both the Secretary and the Assistant Secretary of the Senate are unable (because of death, resignation, or disability) to discharge such Secretary's duties as disbursing officer of the Senate, the Financial Clerk of the Senate shall be deemed to be the successor of such Secretary as disbursing officer.
5 U.S.C. § 595(b)	Administrative Conference of the United States	During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman.
5 U.S.C. § 1102(b)	Office of Personnel Management	There is in the Office a Deputy Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or when the office of Director is vacant.
5 U.S.C. § 1203(b)-(c)	Merit Systems Protection Board	(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman. (c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.
6 U.S.C. § 113(g)	Department of Homeland Security	(1) Absence, disability, or vacancy of Secretary or Deputy Secretary Notwithstanding chapter 33 of Title 5, the Under Secretary for Management shall serve as the Acting Secretary if by reason of absence, disability, or vacancy in office, neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary. (2) Further order of succession Notwithstanding chapter 33 of Title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary. (3) Notification of vacancies

		The Secretary shall notify the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives of any vacancies that require notification under sections 3345 through 3349d of Title 5 (commonly known as the “Federal Vacancies Reform Act of 1998”).
8 U.S.C. § 1324b(c)(1)	Office of Special Counsel for Immigration-Related Unfair Employment Practices (Department of Justice)	In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.
10 U.S.C. § 132(b)	Department of Defense	The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.
10 U.S.C. § 137a(b)	Department of Defense	Each Deputy Under Secretary of Defense shall be the first assistant to an Under Secretary of Defense and shall assist such Under Secretary in the performance of the duties of the position of such Under Secretary and shall act for, and exercise the powers of, such Under Secretary when such Under Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.
10 U.S.C. § 154(d)-(e)	Joint Chiefs of Staff (Department of Defense)	(d) When there is a vacancy in the office of Chairman or in the absence or disability of the Chairman, the Vice Chairman acts as Chairman and performs the duties of the Chairman until a successor is appointed or the absence or disability ceases. (e) When there is a vacancy in the offices of both Chairman and Vice Chairman or in the absence or disability of both the Chairman and the Vice Chairman, or when there is a vacancy in one such office and in the absence or disability of the officer holding the other, the President shall designate a member of the Joint Chiefs of Staff to act as and perform the duties of the Chairman until a successor to the Chairman or Vice Chairman is appointed or the absence or disability of the Chairman or Vice Chairman ceases.
10 U.S.C. § 196(b)(2)	Test Resource Management Center (Department of Defense)	There shall be a Deputy Director of the Center, selected by the Secretary from among individuals who have substantial experience in the field of

		test and evaluation. The Deputy Director shall act for, and exercise the powers of, the Director when the Director is disabled or the position of Director is vacant.
10 U.S.C. § 2773	Department of Defense	(b)(1) If a disbursing official of the Department of Defense dies, becomes disabled, or is separated from office, a deputy disbursing official may continue the accounts and payments in the name of the former disbursing official until the last day of the 2d month after the month in which the death, disability, or separation occurs. The accounts and payments shall be allowed, audited, and settled as provided by law. The Secretary of the Treasury shall honor checks signed in the name of the former disbursing official in the same way as if the former disbursing official had continued in office.
10 U.S.C. § 7016(b)(5)(B)	Department of the Army (Department of Defense)	The Assistant Secretary shall have a Principal Military Deputy, who shall be an officer of the Army on active duty. The Principal Military Deputy shall be appointed from among officers who have significant experience in the areas of acquisition and program management. The position of Principal Military Deputy shall be designated as a critical acquisition position under section 1733 of this title. In the event of a vacancy in the position of Assistant Secretary of the Army for Acquisition, Logistics, and Technology, the Principal Military Deputy may serve as Acting Assistant Secretary for a period of not more than one year.
10 U.S.C. § 7017	Department of the Army (Department of Defense)	If the Secretary of the Army dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases: (1) The Under Secretary of the Army. (2) The Assistant Secretaries of the Army, in the order prescribed by the Secretary of the Army and approved

		<p>by the Secretary of Defense.</p> <p>(3) The General Counsel of the Department of the Army.</p> <p>(4) The Chief of Staff.</p>
10 U.S.C. § 7018	Department of the Army	<p>(a) There is an Administrative Assistant in the Department of the Army. The Administrative Assistant shall be appointed by the Secretary of the Army and shall perform duties that the Secretary considers appropriate.</p> <p>(b) During a vacancy in the office of Secretary, the Administrative Assistant has charge and custody of all records, books, and papers of the Department of the Army.</p> <p>(c) The Secretary may authorize the Administrative Assistant to sign, during the temporary absence of the Secretary, any paper requiring his signature. In such a case, the Administrative Assistant's signature has the same effect as the Secretary's signature.</p>
10 U.S.C. § 7034(d)	Department of the Army (Department of Defense)	<p>When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff--</p> <p>(1) the Vice Chief of Staff shall perform the duties of the Chief of Staff until a successor is appointed or the absence or disability ceases; or</p> <p>(2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Army in the Army Staff who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first.</p>
10 U.S.C. § 8016(b)(4)(B)	Department of the Navy (Department of Defense)	<p>The Assistant Secretary shall have a Principal Military Deputy, who shall be an officer of the Navy or the Marine Corps on active duty. The Principal Military Deputy shall be appointed from among officers who have significant experience in the areas of acquisition and program management. The position of Principal Military Deputy shall be</p>

		designated as a critical acquisition position under section 1733 of this title. In the event of a vacancy in the position of Assistant Secretary of the Navy for Research, Development, and Acquisition, the Principal Military Deputy may serve as Acting Assistant Secretary for a period of not more than one year.
10 U.S.C. § 8017	Department of the Navy (Department of Defense)	If the Secretary of the Navy dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases: (1) The Under Secretary of the Navy. (2) The Assistant Secretaries of the Navy, in the order prescribed by the Secretary of the Navy and approved by the Secretary of Defense. (3) The General Counsel of the Department of the Navy. (4) The Chief of Naval Operations. (5) The Commandant of the Marine Corps.
10 U.S.C. § 8035(d)	Department of the Navy (Department of Defense)	When there is a vacancy in the office of Chief of Naval Operations or during the absence or disability of the Chief of Naval Operations-- (1) the Vice Chief of Naval Operations shall perform the duties of the Chief of Naval Operations until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Vice Chief of Naval Operations or the Vice Chief of Naval Operations is absent or disabled, unless the President directs otherwise, the most senior officer of the Navy in the Office of the Chief of Naval Operations who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Chief of Naval Operations until a successor to the Chief of Naval Operations or the Vice Chief of Naval Operations is appointed or until the absence or disability of the Chief of Naval Operations or Vice Chief of Naval Operations ceases, whichever occurs first.

10 U.S.C. § 8044(d)	Department of the Navy (Department of Defense)	When there is a vacancy in the office of Commandant of the Marine Corps, or during the absence or disability of the Commandant-- (1) the Assistant Commandant of the Marine Corps shall perform the duties of the Commandant until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Assistant Commandant of the Marine Corps or the Assistant Commandant is absent or disabled, unless the President directs otherwise, the most senior officer of the Marine Corps in the Headquarters, Marine Corps, who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of the Commandant until a successor to the Commandant or the Assistant Commandant is appointed or until the absence or disability of the Commandant or Assistant Commandant ceases, whichever occurs first.
10 U.S.C. § 8075	Department of the Navy (Department of Defense)	(a) When there is a vacancy in the office of chief of a bureau, or during the absence or disability of the chief of a bureau, the deputy chief of that bureau, unless otherwise directed by the President, shall perform the duties of the chief until a successor is appointed or the absence or disability ceases. (b) When subsection (a) cannot be complied with because of the absence or disability of the deputy chief of the bureau, the heads of the major divisions of the bureau, in the order directed by the Secretary of the Navy, shall perform the duties of the chief, unless otherwise directed by the President.
10 U.S.C. § 8089(d)-(e)	Department of the Navy (Department of Defense)	(d) When there is a vacancy in the Office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases. (e) When subsection (d) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the

		Assistant Judge Advocates General, in the order directed by the Secretary of the Navy, shall perform the duties of the Judge Advocate General.
10 U.S.C. § 9016(b)(4)(B)	Department of the Air Force (Department of Defense)	The Assistant Secretary shall have a Principal Military Deputy, who shall be an officer of the Air Force on active duty. The Principal Military Deputy shall be appointed from among officers who have significant experience in the areas of acquisition and program management. The position of Principal Military Deputy shall be designated as a critical acquisition position under section 1733 of this title. In the event of a vacancy in the position of Assistant Secretary of the Air Force for Acquisition, the Principal Military Deputy may serve as Acting Assistant Secretary for a period of not more than one year.
10 U.S.C. § 9017	Department of the Air Force (Department of Defense)	If the Secretary of the Air Force dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases: (1) The Under Secretary of the Air Force. (2) The Assistant Secretaries of the Air Force, in the order prescribed by the Secretary of the Air Force and approved by the Secretary of Defense. (3) The General Counsel of the Department of the Air Force. (4) The Chief of Staff.
10 U.S.C. § 9034(d)	Department of the Air Force (Department of Defense)	When there is a vacancy in the office of Chief of Staff or during the absence or disability of the Chief of Staff-- (1) the Vice Chief of Staff shall perform the duties of the Chief of Staff until a successor is appointed or the absence or disability ceases; or (2) if there is a vacancy in the office of the Vice Chief of Staff or the Vice Chief of Staff is absent or disabled, unless the President directs otherwise, the most senior officer of the Air Force in the Air Staff who is not absent or disabled and who is

		not restricted in performance of duty shall perform the duties of the Chief of Staff until a successor to the Chief of Staff or the Vice Chief of Staff is appointed or until the absence or disability of the Chief of Staff or Vice Chief of Staff ceases, whichever occurs first.
10 U.S.C. § 9037(d)(2)-(3)	Department of the Air Force (Department of Defense)	(2) When there is a vacancy in the office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases. (3) When paragraph (2) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the heads of the major divisions of the Office of the Judge Advocate General, in the order directed by the Secretary of the Air Force, shall perform the duties of the Judge Advocate General, unless otherwise directed by the President.
10 U.S.C. § 10502(f)	National Guard Bureau (Department of Defense)	(1) When there is a vacancy in the office of the Chief of the National Guard Bureau or in the absence or disability of the Chief, the Vice Chief of the National Guard Bureau acts as Chief and performs the duties of the Chief until a successor is appointed or the absence or disability ceases. (2) When there is a vacancy in the offices of both the Chief and the Vice Chief of the National Guard Bureau or in the absence or disability of both the Chief and the Vice Chief of the National Guard Bureau, or when there is a vacancy in one such office and in the absence or disability of the officer holding the other, the senior officer of the Army National Guard of the United States or the Air National Guard of the United States on duty with the National Guard Bureau shall perform the duties of the Chief until a successor to the Chief or Vice Chief is appointed or the absence or disability of the Chief or Vice Chief ceases, as the case may be.
12 U.S.C. § 4	Office of the Comptroller of the Currency (Department of the Treasury)	During a vacancy in the office or during the absence or disability of the Comptroller, each Deputy

		Comptroller shall possess the power and perform the duties attached by law to the office of the Comptroller under such order of succession following the First Deputy Comptroller as the Comptroller shall direct.
12 U.S.C. § 306	Federal Reserve	Subject to the approval of the Board of Governors of the Federal Reserve System, the Federal reserve agent shall appoint one or more assistants. Such assistants, who shall be persons of tested banking experience, shall assist the Federal reserve agent in the performance of his duties and shall also have power to act in his name and stead during his absence or disability.
12 U.S.C. § 341	Federal Reserve	The first vice president of the bank shall be appointed in the same manner and for the same term as the president, and shall, in the absence or disability of the president or during a vacancy in the office of president, serve as chief executive officer of the bank. Whenever a vacancy shall occur in the office of the president or the first vice president, it shall be filled in the manner provided for original appointments; and the person so appointed shall hold office until the expiration of the term of his predecessor.
12 U.S.C. § 635a(b)	Export–Import Bank	There shall be a First Vice President of the Bank, who shall be appointed by the President of the United States by and with the advice and consent of the Senate, who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank, and who shall at other times perform such functions as the President of the Bank may from time to time prescribe.
12 U.S.C. § 1427(g)(3)	Federal Home Loan Banks	(g)(3) In the event of a vacancy in the position of Chairperson of the board of directors or during the absence or disability of the Chairperson, the Vice Chairperson shall act as Chairperson.
12 U.S.C. § 1812(b)(3)	Federal Deposit Insurance Corporation	In the event of a vacancy in the position of Chairperson of the Board of Directors or during the absence or disability of the Chairperson, the

		Vice Chairperson shall act as Chairperson.
12 U.S.C. § 4703(b)(2)	Community Development Financial Institutions Fund (Department of the Treasury)	In the event of a vacancy in the position of the Administrator or during the absence or disability of the Administrator, the chief financial officer shall perform the duties of the position of Administrator.
12 U.S.C. § 5321(c)	Financial Stability Oversight Council	Any vacancy on the Council shall be filled in the manner in which the original appointment was made.
12 U.S.C. § 5491	Consumer Financial Protection Bureau	(5) Deputy Director There is established the position of Deputy Director, who shall-- (A) be appointed by the Director; and (B) serve as acting Director in the absence or unavailability of the Director
14 U.S.C. § 304	United States Coast Guard (Department of Homeland Security)	The President may appoint, by and with the advice and consent of the Senate, one Vice Commandant who shall rank next after the Commandant, shall perform such duties as the Commandant may prescribe and shall act as Commandant during the absence or disability of the Commandant or in the event that there is a vacancy in the office of Commandant.
14 U.S.C. § 950	United States Coast Guard (Department of Homeland Security)	(b)(1) If a disbursing official of the Coast Guard dies, becomes disabled, or is separated from office, a deputy disbursing official may continue the accounts and payments in the name of the former disbursing official until the last day of the second month after the month in which the death, disability, or separation occurs. The accounts and payments shall be allowed, audited, and settled as provided by law. The Secretary of the Treasury shall honor checks signed in the name of the former disbursing official in the same way as if the former disbursing official had continued in office.
15 U.S.C. § 633(b)(1)	Small Business Administration	The Deputy Administrator shall be Acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.
15 U.S.C. § 2053(b),(d)	Consumer Product Safety Commission	(b) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of

		such term. A Commissioner may continue to serve after the expiration of this term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire under this subsection. (d) The Commission shall annually elect a Vice Chairman to act in the absence or disability of the Chairman or in case of a vacancy in the office of the Chairman.
15 U.S.C. § 2204(c)	Fire Administration (Department of Homeland Security)	The Administrator may appoint a Deputy Administrator, who shall-- (1) perform such functions as the Administrator shall from time to time assign or delegate; and (2) act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.
15 U.S.C. § 2413(b)	National Center for Productivity and Quality of Working Life	The Executive Director shall appoint a Deputy Director, who shall perform such functions as the Executive Director may prescribe. The Deputy Director shall act for and exercise the powers of the Executive Director during the absence or disability of the Executive Director.
16 U.S.C. § 832i(a)	Bonneville Power Administration (Department of Energy)	The Assistant Administrator shall perform the duties and exercise the powers of the Administrator, in the event of the absence or sickness of the Administrator until such absence or sickness shall cease and in the event of a vacancy in the office of Administrator until a successor is appointed.
16 U.S.C. § 1157	North Pacific Fur Seal Commission	The Deputy Commissioner shall be the principal adviser of the Commissioner, and shall perform the duties of the Commissioner in the case of his death, resignation, absence, or illness.
19 U.S.C. § 2072(b)	U.S. Customs Service	The Secretary of the Treasury is authorized to designate an officer of the United States Customs Service to act as Commissioner of Customs, during the absence or disability of the Commissioner of Customs, or in the event that there is no Commissioner of Customs
20 U.S.C. § 47	Smithsonian Institution	The chancellor of the Smithsonian Institution may, by an instrument in writing filed in the office of the Secretary thereof, designate and

		<p>appoint a suitable person to act as Secretary of the Institution when there shall be a vacancy in said office, and whenever the Secretary shall be unable from illness, absence, or other cause to perform the duties of his office; and in such case the person so appointed may perform all the duties imposed on the Secretary by law until the vacancy shall be filled or such inability shall cease. The said chancellor may change such designation and appointment from time to time as the interests of the Institution may in his judgment require.</p>
20 U.S.C. § 2103(e)(1)	American Folklife Center (Library of Congress)	The Vice Chairman shall perform the duties of the Chairman in his absence. In case of a vacancy occurring in the chairmanship or vice-chairmanship, the Board shall elect a member to fill the vacancy for the remainder of the unexpired term.
20 U.S.C. § 3412(a)(1)	Department of Education	During the absence or disability of the Secretary, or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary. The Secretary shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.
21 U.S.C. § 1703(a)(2)(B),(a)(3)	Office of National Drug Control Policy (Executive Office of the President)	<p>(2) The Deputy Director of National Drug Control Policy shall--</p> <p>(A) carry out the duties and powers prescribed by the Director; and</p> <p>(B) serve as the Director in the absence of the Director or during any period in which the office of the Director is vacant. (3) Acting Director</p> <p>If the Director dies, resigns, or is otherwise unable to perform the functions and duties of the office, the Deputy Director shall perform the functions and duties of the Director temporarily in an acting capacity pursuant to subchapter III of chapter 33 of Title 5.</p>
22 U.S.C. § 287(d)	U.N. Ambassador	The President may, without the advice and consent of the Senate, designate any officer of the United States to act without additional compensation as the representative of the United States in either the

		Economic and Social Council or the Trusteeship Council (1) at any specified session thereof where the position is vacant or in the absence or disability of the regular representative or (2) in connection with a specified subject matter at any specified session of either such Council in lieu of the regular representative. The President may designate any officer of the Department of State, whose appointment is subject to confirmation by the Senate, to act, without additional compensation, for temporary periods as the representative of the United States in the Security Council of the United Nations in the absence or disability of the representatives provided for under subsections (a) and (b) or in lieu of such representatives in connection with a specified subject matter.
22 U.S.C. § 2021(c)	International Atomic Energy Agency	The President may designate any officer of the United States Government, whose appointment is subject to confirmation by the Senate, to act, without additional compensation, for temporary periods as the representative of the United States on the Board of Governors or to the General Conference of the Agency in the absence or disability of the representative and deputy representative appointed under subsection (a) or in lieu of such representatives in connection with a specified subject matter.
22 U.S.C. § 2384(b)	U.S. Agency for International Development	The President may also fix the order of succession among the officers provided for in subsection (a) of this section in the event of the absence, death, resignation, or disability of one or more of said officers.
25 U.S.C. § 2a	Bureau of Indian Affairs (Department of Interior)	Assistant or deputy commissioners of the Bureau of Indian Affairs, in the Department of the Interior, shall be appointed by the Secretary of the Interior, subject to the civil-service laws and chapter 51 and subchapter III of chapter 53 of Title 5. Appointments to these positions shall be considered as made under the authority of section 3101 of Title 5. Assistant and deputy commissioners so appointed shall be authorized to sign such letters,

		papers, and documents and to perform such other duties as may be directed by the commissioner of the Bureau of Indian Affairs. The Secretary may designate for the Bureau of Indian Affairs an assistant or deputy commissioner, who shall be authorized to perform the duties of the commissioner in case of the death, resignation, absence, or sickness of the commissioner.
25 U.S.C. § 53	Bureau of Indian Affairs (Department of Interior)	Any disbursing agent of the Indian Service, with the approval of the Commissioner of Indian Affairs, may authorize a clerk employed in his office to act in his place and discharge all the duties devolved upon him by law or regulations during such time as he may be unable to perform the duties of his position because of absence, physical disability, or other disqualifying circumstances: Provided, That such clerk, while acting for his principal, shall be subject to all the liabilities and penalties prescribed by law for official misconduct of disbursing agents.
28 U.S.C. § 508	Department of Justice	(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General. (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.
28 U.S.C. § 546	Department of Justice	(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant. (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate

		<p>refused to give advice and consent.</p> <p>(c) A person appointed as United States attorney under this section may serve until the earlier of--</p> <p>(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or</p> <p>(2) the expiration of 120 days after appointment by the Attorney General under this section.</p> <p>(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.</p>
28 U.S.C. § 562	Department of Justice	<p>(a) In the case of a vacancy in the office of a United States marshal, the Attorney General may designate a person to perform the functions of and act as marshal, except that the Attorney General may not designate to act as marshal any person who was appointed by the President to that office but with respect to such appointment the Senate has refused to give its advice and consent.</p> <p>(b) A person designated by the Attorney General under subsection (a) may serve until the earliest of the following events:</p> <p>(1) The entry into office of a United States marshal appointed by the President, pursuant to section 561(c).</p> <p>(2) The expiration of the thirtieth day following the end of the next session of the Senate.</p> <p>(3) If such designee of the Attorney General is appointed by the President pursuant to section 561(c), but the Senate refuses to give its advice and consent to the appointment, the expiration of the thirtieth day following such refusal.</p>
28 U.S.C. § 606	Administrative Office of the United States Courts	The Deputy Director shall perform the duties assigned to him by the Director, and shall act as Director during the absence or incapacity of the Director or when the Director's office is vacant.
29 U.S.C. § 153(d)	National Labor Relations Board	In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall

		so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.
29 U.S.C. § 552	Department of Labor	There is established in the Department of Labor the office of Deputy Secretary of Labor, which shall be filled by appointment by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such duties as may be prescribed by the Secretary of Labor or required by law. The Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.
31 U.S.C. § 301(c)(2),(f)(1)	Department of the Treasury	(c) The Department has a Deputy Secretary of the Treasury appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall carry out - (1) duties and powers prescribed by the Secretary; and (2) the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant. (f)(1) The Secretary may designate one of the Assistant General Counsels to act as the General Counsel when the General Counsel is absent or unable to serve or when the office of General Counsel is vacant. The General Counsel and Assistant General Counsels shall carry out duties and powers prescribed by the Secretary.
31 U.S.C. § 306(d)	Department of the Treasury	The Secretary of the Treasury may designate another officer or employee of the Department to act as the Fiscal Assistant Secretary when the Fiscal Assistant Secretary is absent or unable to serve or when the office of Fiscal Assistant Secretary is vacant.
31 U.S.C. § (b),(f)	Office of Management and Budget	(b) The Office has a Deputy Director of the Office of

		<p>Management and Budget, appointed by the President, by and with the advice and consent of the Senate. The Deputy Director--</p> <p>(1) shall carry out the duties and powers prescribed by the Director; and</p> <p>(2) acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant. (f) When the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant, the President may designate an officer of the Office to act as Director.</p>
31 U.S.C. § 703	Government Accountability Office	<p>(2) When a vacancy occurs in the office of Comptroller General or Deputy Comptroller General, a commission is established to recommend individuals to the President for appointment to the vacant office. The commission shall be composed of--</p> <p>(A) the Speaker of the House of Representatives;</p> <p>(B) the President pro tempore of the Senate;</p> <p>(C) the majority and minority leaders of the House of Representatives and the Senate;</p> <p>(D) the chairmen and ranking minority members of the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House; and</p> <p>(E) when the office of Deputy Comptroller General is vacant, the Comptroller General.</p> <p>(3) A commission established because of a vacancy in the office of the Comptroller General shall recommend at least 3 individuals. The President may ask the commission to recommend additional individuals.</p> <p>(b) Except as provided in subsection (e) of this section, the term of the Comptroller General is 15 years. The Comptroller General may not be reappointed. The term of the Deputy Comptroller General expires on the date an individual is appointed Comptroller General. The Deputy Comptroller General may continue to serve until a successor is</p>

		<p>appointed.</p> <p>(c) The Deputy Comptroller General--</p> <p>(1) carries out duties and powers prescribed by the Comptroller General; and</p> <p>(2) acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant.</p> <p>(d) The Comptroller General shall designate an officer or employee of the Government Accountability Office to act as Comptroller General when the Comptroller General and Deputy Comptroller General are absent or unable to serve or when the offices of Comptroller General and Deputy Comptroller General are vacant.</p>
33 U.S.C. § 857-14(c)	National Advisory Committee on Oceans and Atmosphere ²⁰⁵ (Department of Commerce)	The Vice Chairman shall act as Chairman in the absence or incapacity of, or in the event of a vacancy in the office of, the Chairman.
34 U.S.C. § 11111(c)	Office of Juvenile Justice and Delinquency Prevention (Department of Justice)	There shall be in the Office a Deputy Administrator who shall be appointed by the Attorney General. The Deputy Administrator shall perform such functions as the Administrator may from time to time assign or delegate and shall act as the Administrator during the absence or disability of the Administrator.
38 U.S.C. § 304	Department of Veterans Affairs	There is in the Department a Deputy Secretary of Veterans Affairs, who is appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such functions as the Secretary shall prescribe. Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.
40 U.S.C. § 302(b)	General Services Administration	The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer

²⁰⁵ This Committee was disbanded in the late 1980s, though the statutory authority remains. Kathryn J. Mengerink, *The Pew Oceans Commission Report: Navigating a Route to Sustainable Seas*, 31 *ECOLOGICAL L.Q.* 689, 712 (2004).

		of the Federal Government, when the office of Administrator is vacant.
42 U.S.C. § 206(a),(d)	Public Health Service (Department of Health and Human Services)	(a) Deputy Surgeon General The Surgeon General shall assign one commissioned officer from the Regular Corps to administer the Office of the Surgeon General, to act as Surgeon General during the absence or disability of the Surgeon General or in the event of a vacancy in that office, and to perform such other duties as the Surgeon General may prescribe, and while so assigned he shall have the title of Deputy Surgeon General. (d) Designation of Assistant Surgeon General with respect to absence, disability, or vacancy in offices of Surgeon General and Deputy Surgeon General The Surgeon General shall designate the Assistant Surgeon General who shall serve as Surgeon General in case of absence or disability, or vacancy in the offices, of both the Surgeon General and the Deputy Surgeon General.
42 U.S.C. § 902(b)(4)	Social Security Administration	The Deputy Commissioner shall perform such duties and exercise such powers as the Commissioner shall from time to time assign or delegate. The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.
42 U.S.C. § 1863(f)	National Science Foundation	The election of the Chairman and Vice Chairman of the Board shall take place at each annual meeting occurring in an even-numbered year. The Vice Chairman shall perform the duties of the Chairman in his absence. In case a vacancy occurs in the chairmanship or vice chairmanship, the Board shall elect a member to fill such vacancy.
42 U.S.C. § 1864a	National Science Foundation	The Deputy Director shall act for, and exercise the powers of, the Director during the absence or disability of the Director or in the event of a vacancy in the office of Director.
42 U.S.C. § 2000ee(j)(2)	Privacy and Civil Liberties Oversight Board	If the position of chairman of the Board is vacant, during the period of

		the vacancy, the Board, at the direction of the unanimous vote of the serving members of the Board, may exercise the authority of the chairman under paragraph (1).
42 U.S.C. § 2034	Atomic Energy Commission	(b) Deputy General Manager; duties; appointment; removal a Deputy General Manager, who shall act in the stead of the General Manager during his absence when so directed by the General Manager, and who shall perform such other administrative and executive functions as the General Manager shall direct. The Deputy General Manager shall be appointed by the General Manager with the approval of the Commission, shall serve at the pleasure of the General Manager, and shall be removable by the General Manager.
42 U.S.C. § 2286(c)(4)	Defense Nuclear Facilities Safety Board	The Vice Chairman shall act as Chairman in the event of the absence or incapacity of the Chairman or in case of a vacancy in the office of Chairman.
42 U.S.C. § 5812(i)	Energy Research and Development Administration	The Deputy Administrator (or in the absence or disability of the Deputy Administrator, or in the event of a vacancy in the office of the Deputy Administrator, an Assistant Administrator, the General Counsel or such other official, determined according to such order as the Administrator shall prescribe) shall act for and perform the functions of the Administrator during any absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.
42 U.S.C. § 7132(a)	Department of Energy	The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.
43 U.S.C. § 32	United States Geological Survey (Department of the Interior)	The Secretary of the Interior may authorize one of the geologists to act as Director of the United States

		Geological Survey in the absence of that officer.
44 U.S.C. § 304	Government Publishing Office	In case of the death, resignation, absence, or sickness of the Director of the Government Publishing Office, the Deputy Director of the Government Publishing Office shall perform the duties of the Director of the Government Publishing Office until a successor is appointed or the Director's absence or sickness ceases; but the President may direct any other officer of the Government, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the Director of the Government Publishing Office ceases. A vacancy occasioned by death or resignation may not be filled temporarily under this section for longer than ten days, and a temporary appointment, designation, or assignment of another officer may not be made except to fill a vacancy happening during a recess of the Senate.
44 U.S.C. § 2103(c)	National Archives and Records Administration	During any absence or disability of the Archivist, the Deputy Archivist shall act as Archivist. In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed under subsection (a).
47 U.S.C. § 155(a)	Federal Communications Commission	In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.
49 U.S.C. § 102(c)-(e)	Department of Transportation	(c) The Department has a Deputy Secretary of Transportation appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary-- (1) shall carry out duties and powers prescribed by the Secretary; and (2) acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant. (d) The Department has an Under Secretary of Transportation for

		<p>Policy appointed by the President, by and with the advice and consent of the Senate. The Under Secretary shall provide leadership in the development of policy for the Department, supervise the policy activities of Assistant Secretaries with primary responsibility for aviation, international, and other transportation policy development and carry out other powers and duties prescribed by the Secretary. The Under Secretary acts for the Secretary when the Secretary and the Deputy Secretary are absent or unable to serve, or when the offices of Secretary and Deputy Secretary are vacant.</p> <p>(e) Assistant Secretaries; General Counsel.--</p> <p>(1) Appointment.--The Department has 6 Assistant Secretaries and a General Counsel, including--</p> <p>(A) an Assistant Secretary for Aviation and International Affairs, an Assistant Secretary for Governmental Affairs, an Assistant Secretary for Research and Technology, and an Assistant Secretary for Transportation Policy, who shall each be appointed by the President, with the advice and consent of the Senate;</p> <p>(B) an Assistant Secretary for Budget and Programs who shall be appointed by the President;</p> <p>(C) an Assistant Secretary for Administration, who shall be appointed by the Secretary, with the approval of the President; and</p> <p>(D) a General Counsel, who shall be appointed by the President, with the advice and consent of the Senate.</p> <p>(2) Duties and powers.--The officers set forth in paragraph (1) shall carry out duties and powers prescribed by the Secretary. An Assistant Secretary or the General Counsel, in the order prescribed by the Secretary, acts for the Secretary when the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are absent or unable to serve, or when the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant.</p>
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49 U.S.C. § 106(i)	Federal Aviation Administration (Department of Transportation)	The Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant.
49 U.S.C. § 109(c)	Maritime Administration (Department of Transportation)	The Deputy Administrator shall be Acting Administrator during the absence or disability of the Administrator and, unless the Secretary designates another individual, during a vacancy in the office of Administrator.
49 U.S.C. § 114(b)(2)(B)	Transportation Security Administration (Department of Homeland Security)	The Deputy Administrator shall be Acting Administrator during the absence or incapacity of the Administrator or during a vacancy in the office of Administrator.
49 U.S.C. § 1111(d)	National Transportation Safety Board	When the Chairman is absent or unable to serve or when the position of Chairman is vacant, the Vice Chairman acts as Chairman.
50 U.S.C. § 2403(b)	Nuclear Security Administration (Department of Energy)	The Principal Deputy Administrator shall act for, and exercise the powers of, the Administrator when the Administrator is disabled or the position of Administrator is vacant.
50 U.S.C. § 2931(b)(2)	Office of the United States Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism	There shall be a Deputy United States Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism (in this section referred to as the “Deputy Coordinator”), who shall-- (A) assist the Coordinator in carrying out the responsibilities of the Coordinator under this subchapter; and (B) serve as Acting Coordinator in the absence of the Coordinator and during any vacancy in the office of Coordinator.
50 U.S.C. § 3026(a)(6)	Office of the Director of National Intelligence	The Principal Deputy Director of National Intelligence shall act for, and exercise the powers of, the Director of National Intelligence during the absence or disability of the Director of National Intelligence or during a vacancy in the position of Director of National Intelligence.
50 U.S.C. § 3037(b)	Central Intelligence Agency	The Deputy Director of the Central Intelligence Agency shall-- (1) assist the Director of the Central Intelligence Agency in carrying out the duties and responsibilities of the Director of the Central Intelligence Agency; and (2) during the absence or disability of the Director of the Central

		Intelligence Agency, or during a vacancy in the position of Director of the Central Intelligence Agency, act for and exercise the powers of the Director of the Central Intelligence Agency.
51 U.S.C. § 20111(b)	National Aeronautics and Space Administration	The Deputy Administrator shall act for, and exercise the powers of, the Administrator during the Administrator's absence or disability.
52 U.S.C. § 30106(a)(2)(D)(5)	Federal Election Commission	The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.
54 U.S.C. § 304101(f)	Advisory Council on Historic Preservation	The Vice Chairman shall perform the functions of the Chairman during the absence or disability of the Chairman or when the office is vacant.
5 U.S.C. Appendix 1 Reorg. Plan 3, 1970	Environmental Protection Agency	(c) There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate. The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.
5 U.S.C. Appendix 1 Reorg. Plan 4, 1970	National Oceanic and Atmospheric Administration (Department of Commerce)	(c) The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.
5 U.S.C. Appendix 1 Reorg. Plan 2, 1973	Drug Enforcement Administration (Department of Justice)	(c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.
5 USC Appendix 1 Reorg. Plan 2, 1978	Office of Personnel Management	The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or in the event of a vacancy in the Office of the Director.

5 U.S.C. Appendix 1 Reorg. Plan 3 1978	Federal Emergency Management Agency	The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or in the event of a vacancy in the Office of the Director.
5 U.S.C. Appendix 2 § 14	National Infrastructure Advisory Council	The President shall designate from among the members of the NIAC a Chair and a Vice Chair, who shall perform the functions of the Chair if the Chair is absent or disabled, or in the instance of a vacancy in the Chair.

Appendix B Snapshot Database

Using the 2016 Plum Book, policy lab students listed all Senate-confirmed positions in the fifteen cabinet departments, EPA, and OMB. From there, I eliminated some positions to make the data collection task manageable: for instance, I removed Service Secretaries and other PAS slots in the Services from the Defense Department; U.S. Marshal and Attorney positions and Commissioners of the Parole Commission and the Foreign Claims Settlement Commission from the Justice Department; U.S. Ambassador and Representative positions and Members of the U.S. Advisory Commission on Public Diplomacy from the State Department; Members of the Surface Transportation Board from the Transportation Department; Members of the Internal Revenue Service Oversight Board from the Treasury Department; and a number of other positions. I also removed positions mistakenly listed as PAS slots in the 2016 Plum Book where Congress in 2012 had eliminated the Senate's role.²⁰⁶

Where appropriate, I updated remaining position titles to reflect current agency organization (for instance, the Defense Department and the EPA had renamed some positions since 2016; the Department of Agriculture lost one of its PAS slots).

I list below which positions remained for each agency. For each position, we determined to the best of our ability whether it was filled by a confirmed official, an acting leader, or no one on April 15, 2019. That proved surprisingly difficult for a number of positions, particularly at agencies that disclose only confirmed officials on their web sites. We used the nominations database at congress.gov, Vacancies Act reports to the GAO, news searches, and other materials. For a number of positions, we defaulted to vacant, when we could find no evidence of a confirmed or acting official.

Department of Agriculture:

Secretary
Deputy Secretary
Assistant Secretary for Administration
Assistant Secretary for Civil Rights
Assistant Secretary for Congressional Relations
Chief Financial Officer
General Counsel
Under Secretary for Farm and Foreign Agricultural Services
Under Secretary for Food Nutrition and Consumer Services
Under Secretary for Food Safety
Under Secretary for Marketing and Regulatory Programs
Under Secretary for Natural Resources and Environment
Under Secretary for Research, Education, and Economics

²⁰⁶ See Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012).

Department of Commerce:

Secretary

Deputy Secretary

Assistant Secretary for Communications and Information

Assistant Secretary for Economic Development

Assistant Secretary for Enforcement and Compliance

Assistant Secretary for Environmental Observation and Prediction

Assistant Secretary for Export Administration

Assistant Secretary for Export Enforcement

Assistant Secretary for Global Markets and Director General of the United States and Foreign Commercial Service

Assistant Secretary for Industry and Analysis

Assistant Secretary for Legislative and Intergovernmental Affairs

Assistant Secretary for Oceans and Atmosphere

Chief Financial Officer and Assistant Secretary for Administration

Director of the Census

General Counsel

Inspector General

Under Secretary for Economic Affairs

Under Secretary for Industry and Security

Under Secretary for Intellectual Property and Director of the United States Patent and Trademark Office

Under Secretary for International Trade

Under Secretary for Oceans and Atmosphere and Administrator of the National Oceanic and Atmospheric Administration

Under Secretary for Standards and Technology

Department of Defense:

Secretary

Deputy Secretary

Assistant Secretary for Acquisition

Assistant Secretary for Health Affairs

Assistant Secretary for Homeland Defense and Global Security

Assistant Secretary for Indo-Pacific Security Affairs

Assistant Secretary for International Security Affairs

Assistant Secretary for Legislative Affairs

Assistant Secretary for Manpower and Reserve Affairs

Assistant Secretary for Nuclear & Chemical & Biological Defense Programs

Assistant Secretary for Readiness

Assistant Secretary for Special Operations and Low Intensity Conflict

Assistant Secretary for Strategy, Plans, and Capabilities

Assistant Secretary for Sustainment

Chief Information Officer

Chief Management Officer
Director of Cost Assessment and Program Evaluation
Director of Operational Test and Evaluation
General Counsel
Inspector General
Inspector General of the National Security Agency
Principal Deputy Under Secretary and Comptroller
Principal Deputy Under Secretary for Intelligence
Principal Deputy Under Secretary for Personnel and Readiness
Principal Deputy Under Secretary for Policy
Under Secretary and Comptroller/Chief Financial Officer
Under Secretary for Acquisition and Sustainment
Under Secretary for Intelligence
Under Secretary for Personnel and Readiness
Under Secretary for Policy
Under Secretary for Research and Engineering

Department of Education:

Secretary
Deputy Secretary
Assistant Secretary for Career, Technical, and Adult Education
Assistant Secretary for Civil Rights
Assistant Secretary for Elementary and Secondary Education
Assistant Secretary for Legislation and Congressional Affairs
Assistant Secretary for Office of Communications and Outreach
Assistant Secretary for Planning, Evaluation, and Policy Development
Assistant Secretary for Postsecondary Education
Assistant Secretary for Special Education and Rehabilitative Services
Chief Financial Officer
Commissioner of the Rehabilitation Services Administration
Director of the Institute of Education Sciences
General Counsel
Inspector General
Under Secretary

Department of Energy:

Secretary
Deputy Secretary
Administrator of the Energy Information Administration
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Electricity Delivery and Energy Reliability
Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environmental Management
Assistant Secretary for Fossil Energy
Assistant Secretary for International Affairs
Assistant Secretary for Nuclear Energy

Chief Financial Officer
Deputy Administrator for Defense Nuclear Nonproliferation
Deputy Administrator for Defense Programs, National Nuclear Security Administration
Director of the Advanced Research Project Agency (Energy)
Director of the Office of Minority Economic Impact
Director of the Office of Science
General Counsel
Inspector General
Principal Deputy Administrator for National Nuclear Security
Under Secretary for Management and Performance
Under Secretary for Nuclear Security and Administrator for Nuclear Security
Under Secretary for Science (and Energy)

Department of Health and Human Services:

Secretary
Deputy Secretary
Administrator of the Centers for Medicare and Medicaid Services
Assistant Secretary and Administrator of the Substance Abuse and Mental Health Service
Assistant Secretary for Aging and Administrator of the Administration for Community Living
Assistant Secretary for Children and Families
Assistant Secretary for Financial Resources
Assistant Secretary for Health
Assistant Secretary for Legislation
Assistant Secretary for Planning and Evaluation
Assistant Secretary for Preparedness and Response
Commissioner of the Administration for Children, Youth and Families
Commissioner of the Administration for Native Americans
Commissioner of Food and Drugs
Director of the Indian Health Service
Director of the National Institutes of Health
General Counsel
Inspector General
Surgeon General

Department of Homeland Security:

Secretary
Deputy Secretary
Administrator of the Federal Emergency Management Agency
Assistant Secretary for Immigration and Customs Enforcement
Assistant Secretary for Transportation Security Administration
Chief Financial Officer
Commissioner of United States Customs and Border Protection
Deputy Administrator of the Federal Emergency Management Agency
Deputy Administrator for Resilience at the Federal Emergency Management Agency
Director of the Cybersecurity and Infrastructure Security Agency
Director of United States Citizenship and Immigration Services

General Counsel
Inspector General
Under Secretary for Intelligence and Analysis
Under Secretary for Management
Under Secretary for Science and Technology
Under Secretary for Strategy, Policy, and Plans

Department of Housing and Urban Development:

Secretary
Deputy Secretary
Assistant Secretary for Administration and Chief Human Capital Officer
Assistant Secretary for Community Planning and Development
Assistant Secretary for Congressional and Intergovernmental Relations
Assistant Secretary for Fair Housing and Equal Opportunity
Assistant Secretary for Housing, Federal Housing Commissioner
Assistant Secretary for Policy Development and Research
Assistant Secretary for Public and Indian Housing
Chief Financial Officer
General Counsel
Inspector General
President of the Government National Mortgage Association

Department of the Interior:

Secretary
Deputy Secretary
Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary for Indian Affairs
Assistant Secretary for Insular Areas
Assistant Secretary for Land and Minerals Management
Assistant Secretary for Policy Management and Budget
Assistant Secretary for Water and Science
Chairman of the National Indian Gaming Commission
Commissioner of the Bureau of Reclamation
Director of the Bureau of Land Management
Director of the Geological Survey
Director of the National Park Service
Director of the Office of Surface Mining Reclamation and Enforcement
Director of the U.S. Fish and Wildlife Service
Inspector General
Solicitor
Special Trustee for American Indians

Department of Justice:

Attorney General
Deputy Attorney General
Administrator of the Drug Enforcement Administration

Assistant Attorney General for Antitrust
Assistant Attorney General for Civil
Assistant Attorney General for Civil Rights
Assistant Attorney General for Criminal
Assistant Attorney General for Environment & Natural Resources
Assistant Attorney General for Legislative Affairs
Assistant Attorney General for National Security Division
Assistant Attorney General for the Office of Legal Counsel
Assistant Attorney General for the Office of Legal Policy
Assistant Attorney General for the Office of Justice Programs
Assistant Attorney General for Tax
Associate Attorney General
Deputy Administrator of the Drug Enforcement Administration
Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives
Director of the Community Relations Service
Director of the Federal Bureau of Investigation
Director of the Office of Violence Against Women
Director of the U.S. Marshal's Service
Inspector General
Solicitor General
Special Counsel for Immigration-Related Unfair Employment Practices

Department of Labor:

Secretary
Deputy Secretary
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Disability Employment Policy
Assistant Secretary for Employee Benefits Security
Assistant Secretary for Employment and Training
Assistant Secretary for Mine Safety and Health
Assistant Secretary for Occupational Safety and Health
Assistant Secretary for Policy
Assistant Secretary for Veterans Employment and Training
Chief Financial Officer
Commissioner of Labor Statistics
Inspector General
Solicitor of Labor
Wage and Hour Administrator

Department of State:

Secretary
Deputy Secretary
Deputy Secretary for Management and Resources
Assistant Secretary for African Affairs
Assistant Secretary for Conflict and Stabilization Operations and Coordinator for Reconstruction and Stabilization

Assistant Secretary for Consular Affairs
Assistant Secretary for Democracy, Human Rights, and Labor
Assistant Secretary for Diplomatic Security
Assistant Secretary for East Asian and Pacific Affairs
Assistant Secretary for Economic and Business Affairs
Assistant Secretary for Educational and Cultural Affairs
Assistant Secretary for Energy Resources
Assistant Secretary for European and Eurasian Affairs
Assistant Secretary for Intelligence and Research
Assistant Secretary for International Narcotics and Law Enforcement Affairs
Assistant Secretary for International Organizational Affairs
Assistant Secretary for International Security and Non-Proliferation
Assistant Secretary for Legislative Affairs
Assistant Secretary for Near Eastern Affairs
Assistant Secretary for Oceans and International Environment and Scientific Affairs
Assistant Secretary for Political-Military Affairs
Assistant Secretary for Population, Refugees, and Migration
Assistant Secretary for South Asian Affairs
Assistant Secretary for Verification and Compliance
Assistant Secretary for Western Hemisphere Affairs
Chief Financial Officer
Director General of the Foreign Service and Director of Human Resources
Inspector General
Legal Adviser
Under Secretary for Arms Control and International Security
Under Secretary for Civilian Security, Democracy, and Human Rights
Under Secretary for Economic Growth, Energy, and the Environment
Under Secretary for Management
Under Secretary for Political Affairs
Under Secretary for Public Diplomacy

Department of Transportation:

Secretary
Deputy Secretary
Administrator of the Federal Aviation Administration
Administrator of the Federal Highway Administration
Administrator of the Federal Motor Carrier Safety Administration
Administrator of the Federal Railroad Administration
Administrator of the Federal Transit Administration
Administrator of the Maritime Administration
Administrator of the National Highway Traffic Safety Administration
Administrator of the Pipeline and Hazardous Materials Safety Administration
General Counsel
Chief Financial Officer and Assistant Secretary for Budget and Programs
Assistant Secretary for Aviation and International Affairs
Assistant Secretary for Governmental Affairs

Assistant Secretary for Research and Technology
Assistant Secretary for Transportation Policy
Inspector General
Under Secretary for Policy

Department of the Treasury:

Secretary
Deputy Secretary
Assistant Secretary for Economic Policy
Assistant Secretary for Financial Institutions
Assistant Secretary for Financial Markets
Assistant Secretary for Financial Stability
Assistant Secretary for Intelligence and Analysis
Assistant Secretary for International Markets and Development
Assistant Secretary (Deputy Under Secretary) for Legislative Affairs
Assistant Secretary for Tax Policy
Assistant Secretary for Terrorist Financing
Chief Counsel of the Internal Revenue Service
Chief Financial Officer
Commissioner of Internal Revenue
Comptroller of the Currency
Deputy Under Secretary/Designated Assistant Secretary for International Finance
Director of the Mint
Director of the Office of Financial Research
General Counsel
Inspector General
Inspector General for Tax Administration
Member of the Financial Stability Oversight Council
Under Secretary for Domestic Finance
Under Secretary for International Affairs
Under Secretary for Terrorism and Financial Intelligence

Department of Veterans Affairs:

Secretary
Deputy Secretary
Assistant Secretary for Congressional and Legislative Affairs
Assistant Secretary for Enterprise Integration
Assistant Secretary for Information and Technology
Assistant Secretary for Management and Chief Financial Officer
Assistant Secretary for the Office of Accountability and Whistleblower Protection
Chairman of the Board of Veterans' Appeals
General Counsel
Inspector General
Under Secretary for Benefits
Under Secretary for Health
Under Secretary for Memorial Affairs

Environmental Protection Agency:

Administrator

Deputy Administrator

Assistant Administrator for Air and Radiation

Assistant Administrator for Chemical Safety and Pollution Prevention

Assistant Administrator for Enforcement and Compliance Assurance

Assistant Administrator for International and Tribal Affairs

Assistant Administrator for Land and Emergency Management

Assistant Administrator for Mission Support

Assistant Administrator for Research and Development

Assistant Administrator for Water

Chief Financial Officer

General Counsel

Inspector General

Office of Management and Budget:

Director

Deputy Director

Deputy Director for Management

Administrator of the Office of Federal Procurement Policy

Administrator of the Office of Information and Regulatory Affairs

Controller of the Office of Federal Financial Management

Intellectual Property Enforcement Coordinator

Appendix C

Cabinet Secretary Database

Using data I had previously obtained from the OPM for other research, I had start and end dates of confirmed and recess appointees who served between 1981 and 2009. Almost all cabinet departments provide information on confirmed officials in the highest job (Secretary or Attorney General). Combining the OPM and agency-provided information with extensive searches of public material (including congressional documents, litigation materials, and news sources), I determined the start and end dates of all confirmed and recess appointees, within a few days. If someone served across two Administrations, she has two observations in the database, one for service in each Administration.

Using those extensive searches and the gaps in service, I was able to determine start and end dates of interim leaders in these very top jobs, again within a few days. For the 145 interim periods, I was able to locate information on the specific official serving in all but sixteen of them. As with confirmed service, if the interim period spanned two presidential Administrations (e.g., January 19 to January 23), I broke it into two observations, one in each Administration. All sixteen missing periods are in the final few days of an Administration or the first days of a new Administration. All but one of these stints are between one and three days, and the final one is under ten days. I excluded interim periods of under a day (i.e., where the departing Secretary left as of midnight, and the incoming Secretary started at noon on January 20).

The Secretary of Commerce is the only position in the database to lack a confirmed, recess, or acting Secretary at any point—specifically, during President Obama’s Administration when the Vacancies Act’s time limits ran out before the White House formally submitted Penny Pritzker’s nomination.

Two of the current fifteen cabinet departments came into existence after 1981—the Department of Veterans Affairs started in 1989 (after being elevated from a stand-alone agency) and the Department of Homeland Security commenced operations in 2003. The database includes officials for those agencies from 1989 and 2003, respectively.

Appendix D EPA Database

I started with the EPA’s publicly provided data on former Administrators, Deputy Administrators, and General Counsels.²⁰⁷

I confirmed the EPA’s data with other sources and made some corrections (for instance, when a start date preceded the official’s confirmation date). The agency incorrectly lists Andrew Wheeler’s end date as confirmed Deputy Administrator as July 7, 2018 and Henry Darwin’s start date as acting Deputy Administrator as July 9, 2018. Technically, Wheeler remained Deputy Administrator until he was confirmed as the agency’s Administrator on February 28, 2019. Darwin officially became the acting Deputy Administrator on March 1. As with the Cabinet Secretary data, I treated service—in any capacity—across two Administrations separately.

Four additional items to note: First, there is a two-day period unaccounted for in the EPA list for Administrators—from January 20 to January 22, 1993. I presume there was an acting official between the departure of William Reilly on January 20 and the start of Carol Browner’s service on January 22. I ignore this gap in the analysis. Second, I assume there was a sixth empty period in the Deputy Administrator role, from January 20, 1981 to May 19, 1981. The EPA lists nothing for that period; I exclude it from the analysis. Third, there is also a gap between April 3 and April 12, 2018 in the agency data for the Deputy Administrator. Because Mike Flynn could continue serving under the Vacancies Act until Wheeler was confirmed on April 12, I did not treat the short period as empty. I did not, however, add the time to the tenure of the acting Deputy Administrators in Table 7. Fourth, there is one gap in the EPA data for the General Counsel—between the departure of Jonathan Cannon on July 4, 1998 and the start of Gary Guzy on November 17, 1998. Both Cannon and Guzy were acting officials. I assume this period was entirely vacant after the enactment of the 1998 Vacancies Act and count it as empty in the analysis.

I also determined, through nomination records and other public information (including news stories), the background of the acting leaders—specifically, whether they had been confirmed to another position, held a non-confirmed political position, or were drawn from the agency’s career ranks.

²⁰⁷ For Administrators: <https://www.epa.gov/history/chronology-epa-administrators>. For Deputy Administrators: <https://www.epa.gov/history/chronology-epa-deputy-administrators>. For General Counsels: <https://www.epa.gov/history/current-and-former-epa-general-counsels>.

Appendix E

Historical Officer Database

The Biographical Directory of the United States Congress 1774-2005 lists longer-serving interim cabinet officials in its list of executive officers from the start of President George Washington's Administration through President George W. Bush's first term.²⁰⁸ Here is a typical entry (from President John Tyler for the Secretary of State position):

SECRETARY OF STATE—DANIEL WEBSTER, of Massachusetts, continued from preceding administration. HUGH S. LEGARE, of South Carolina (Attorney General), ad interim, May 9, 1843. WILLIAM S. DERRICK (chief clerk), ad interim, June 21, 1843. ABEL P. UPSHUR, of Virginia (Secretary of the Navy), ad interim, June 24, 1843. ABEL P. UPSHUR, of Virginia, July 24, 1843. (Killed by a gun explosion on the U.S.S. Princeton February 28, 1844.) JOHN NELSON, of Maryland (Attorney General), ad interim, February 29, 1844. JOHN C. CALHOUN, of South Carolina, March 6, 1844; entered upon duties April 1, 1844.²⁰⁹

Natalie Peelish took this information and entered into a spreadsheet all of these individuals, with start and end dates, whether they had served in the previous Administration (and therefore were “continued”), whether they served in an interim or acting capacity, and if they did serve in an interim capacity, what other position they held (if it was listed). As with the modern databases, any service across two Administrations counts as two observations. In addition, as with the modern databases, a person who served in different capacities (interim, then confirmed) also received two observations.

Not all the agencies existed for the entire period, 1789-2005. The Departments of Treasury and War, as well as the Attorney General and the Postmaster General, started in September 1789. The Postmaster General dropped out of the Cabinet in 1971. The Department of Navy started in June 1798 and dropped out of the Cabinet in 1947. The Departments of Interior, Agriculture, Commerce and Labor, Housing and Urban Development, and Homeland Security began in March 1849, February 1889, February 1903, January 1966, and January 2003, respectively.

I combined data for the Department of Health, Education, and Welfare (which began in April 1953) with its successor agency, the Department of Health and Human Services. But I did not combine data for the Department of Commerce and Labor (which ended in March 1913) with either the Department of Commerce or the Department of Labor (both began in March 1913). I also kept the Departments of War (which ended in September 1947) and Defense (which began at that time) separate.

²⁰⁸ BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, H.R. DOC. NO. 108-222, at 3-29 (2005).

²⁰⁹ *Id.* at 5.

Appendix F

Survey of Agency Officials

In June 2019, I emailed a link to a Qualtrics survey on acting officials and delegated authority to 51 agencies, some of which sit inside other agencies. Most of the emails were addressed to the agency's official representative to ACUS; the remainder were addressed to the General Counsel or Deputy General Counsel of major agencies that did not have a current ACUS representative. Of the 51 agencies, 27 were cabinet departments or executive agencies (some free standing, some within cabinet departments) and 24 were independent regulatory commissions or boards, or other entities. I followed up with those agencies that did not complete the survey on multiple occasions, encouraging submission. Several agencies informed me that they could not complete it due to the sensitivity of the requested material, even though respondents were promised that answers would not be tied to their particular agencies. In the end, ten cabinet departments or executive agencies and twelve independent agencies or other entities filled out the survey. Many of the dozen independent agencies or other entities who responded operate under a quorum requirement for taking particular actions, but not all.

Stanford University's Research Compliance Office informed me that I did not need to seek human subjects approval for the survey from the University's Institutional Review Board "[s]ince your work is about the agencies, not the individuals, and because it's primarily a project to provide recommendations to the agencies and not to develop generalizable knowledge"

The survey instrument is attached at the end of this report.

Appendix G

Interviews with Agency Officials

In the survey described in Appendix F, I asked respondents if they might be willing to speak with me by telephone. I then reached out to most of the willing respondents and asked to schedule an interview. I also contacted agency officials recommended to me as experts on acting officials or delegations of authority for interviews. I conducted fourteen interviews, each of which ranged from 20 to 60 minutes, in July and August 2019. The interviewees came from a range of agencies: seven were officials in cabinet departments or executive agencies with multiple positions covered by the Vacancies Act; four worked at agencies with at least one position covered by the Act; and three served in agencies with no positions covered by the Act. I promised that I would not identify the interviewees or their agencies.

These interviews focused on the use of acting officials (if any), compliance with the Vacancies Act (if relevant), and delegations of authority. I asked all interviewees about best practices from their agencies.

Stanford University's Research Compliance Office informed me that I did not need to seek human subjects approval for these interviews from the University's Institutional Review Board "[s]ince your work is about the agencies, not the individuals, and because it's primarily a project to provide recommendations to the agencies and not to develop generalizable knowledge"

Appendix H

Interviews with Former Acting Officials

In May and June 2019, I conducted nineteen interviews with former acting officials in Senate-confirmed positions, each for 30-60 minutes to learn more about their experiences. The former acting officials covered the past five completed Administrations, from President Reagan to President Obama and were mostly drawn from elected Fellows of the National Academy of Public Administration. Although some indicated that they were happy to speak on the record, I promised all of the former leaders that I would not identify them or their agencies.

These interviews were unstructured so as not to fall under the Paperwork Reduction Act. I aimed to learn about the attractions and frustrations of their acting service.

Stanford University's Research Compliance Office informed me that I did not need to seek human subjects approval for these interviews from the University's Institutional Review Board "[s]ince your work is about the agencies, not the individuals, and because it's primarily a project to provide recommendations to the agencies and not to develop generalizable knowledge ..."

Appendix I

Agency Reports to GAO and GAO Violations Data

The GAO posts agency reports under the Vacancies Act on its website:
<https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>.

For each of the previous Administrations covered by the Vacancies Act, the GAO provides three spreadsheets—one listing all the vacancies (with agency and position information), one noting any acting officials identified (along with any start and end dates provided), and one of any nominations that followed the vacancy (along with information about the outcome of those nominations). Each vacancy, which is tied to an agency and a specific position, is given an identifier, which can be used to connect any provided information on acting officials and nominations.

I am immensely grateful to Shay Elbaum, a reference librarian at Stanford Law School, who scraped the information from the GAO's web site for this Administration and placed it into spreadsheet form to match what the agency has provided for previous Administrations.

Agency reports on vacancies do not match how I counted vacancies perfectly. Most notably, I count a vacancy twice in my tallies if it spanned two Administrations, one for each Administration. In counting agency reports, I would count one report for such a vacancy twice (to match my counting). In calculating delays in agency reporting, however, I included the delay only once for such vacancies.

The GAO also makes available at the same link above its assessments of any violations under the Vacancies Act. As of the end of August 2019, there were 25 posted letters, which were analyzed for this report.



ACUS Survey PAS Vacancies

1 Published

Acting Agency Officials and Delegations of Authority

Block Options ▾



Administrative Conference of the United States | Stanford Law School
2019 Survey on Acting Agency Officials and Delegations of Authority



Introduction



Welcome to the 2019 Survey on Acting Agency Officials and Delegations of Authority. This survey is part of a project for the Administrative Conference of the United States (ACUS), which is exploring agency practices when there are vacancies in Senate-confirmed positions. This project seeks to gather information on the wide set of procedures federal agencies use when faced with vacancies in Senate-confirmed positions and to share best practices. The project is descriptive in nature—it will not explore legal questions about who is permitted to serve as an acting official or what authority can be properly delegated. For more information about the project, please visit the ACUS website here: <https://www.acus.gov/research-projects/acting-agency-officials-and-delegations-authority>.

Purpose of the Survey: This survey aims to learn about agency practices involving acting officials (if any) and delegated authority. We are seeking information from both agencies covered by the Federal Vacancies Reform Act of 1998 and those excluded from the Act. Your input will help foster a better understanding of the range of agency practices in this area. It will also help inform generalized recommendations about how agencies can best address vacancies in Senate-confirmed agency positions (outside of the traditional political appointments process).

Study Procedures: This survey should take 15 to 30 minutes to complete. The ideal respondent is an agency official with firsthand knowledge of the agency's use of acting officials (if any) and delegated authority in the face of staffing vacancies in Senate-confirmed agency positions. A senior attorney in the Office of General Counsel or a senior manager in the Office of Human Resources may be best suited to respond. You can share the survey link with multiple people; the link is not unique. All answers are voluntary. We would be very grateful if you could complete the survey by July 3.

Confidentiality of Responses: In the project report for ACUS, survey responses will not be connected to particular agencies unless you give explicit permission at the end of this survey. Rather, the project report will use survey responses to provide aggregated information about agency practices. For example, the report will summarize recommended best practices (but not which agency they come from).

Whom to Contact with Questions:

Anne Joseph O'Connell (J.D./Ph.D.)

Public Member
Administrative Conference of the United States
Adelbert H. Sweet Professor of Law
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-8721
(415) 710-8475 (mobile)
amjoc@law.stanford.edu

Bobby Ochoa (J.D.)

Attorney Advisor
Administrative Conference of the United States
1120 20th St NW, Suite 706 South
Washington, DC 20036
(202) 480-2098
bochoa@acus.gov

Please click on the arrow in the lower right to begin.

 Basic Information

Block Options ▾



Basic Information





What is the name of your agency?



What is your position at the agency (including the office in which you work)?



Federal Vacancies Reform Act of 1998

Block Options ▾



Federal Vacancies Reform Act of 1998



This survey covers topics including and beyond the 1998 Federal Vacancies Reform Act (FVRA). If you know that your agency is not covered by the FVRA, please answer below that you are familiar with the Act and then on the following question that your agency is not covered.



Are you familiar with the 1998 Federal Vacancies Reform Act and how the FVRA applies (if at all) to your agency? (Please check yes if you know that the Act does not apply to your agency.)

Yes

No



Display This Question:

If Are you familiar with the 1998 Federal Vacancies Reform Act and how the FVRA applies (if at all)... Yes Is Selected ▾



Does the FVRA apply to any Senate-confirmed positions in your agency?

Yes

No



Display This Question:

If Does the FVRA apply to any Senate-confirmed positions in your agency? Yes Is Selected



Which positions in your agency does the FVRA cover?



All Senate-confirmed positions

Only the executive director

Only the general counsel

Other: (fill in)

Don't know



Display This Question:

If Does the FVRA apply to any Senate-confirmed positions in your agency? Yes Is Selected



Is any official (or office) tasked with reporting to the GAO about vacancies?



Yes. Who (or which office)?

No

Don't know



Display This Question:

If Does the FVRA apply to any Senate-confirmed positions in your agency? Yes Is Selected



Is any official (or office) tasked with tracking the FVRA's time limits?



Yes. Who (or which office)?

No

Don't know



Display This Question:

If Does the FVRA apply to any Senate-confirmed positions in your agency? Yes Is Selected



For acting officials under the FVRA, is the "acting" status of the official placed on the agency's web site?



Yes, for all Senate-confirmed positions

Yes, for some positions but not for others

No, for all positions

Don't know



Display This Question:

If Does the FVRA apply to any Senate-confirmed positions in your agency? No Is Selected



Does your agency operate under a statutory quorum requirement to take particular actions (e.g., three Senate-confirmed or recess appointed commissioners needed to vote on a regulation)?



- Yes
- No
- Don't know



Display This Question:

If Are you familiar with the 1998 Federal Vacancies Reform Act and how the FVRA applies (if at all)... No Is Selected



Who might be familiar with the 1998 Federal Vacancies Reform Act at your agency? If you can, please provide an email address or telephone number.



Display This Question:

If Are you familiar with the 1998 Federal Vacancies Reform Act and how the FVRA applies (if at all)... No Is Selected



Can we use your name in contacting that person?



- Yes
- No

Agency-Specific Provisions and Succession Planning

Block Options



Agency-Specific Provisions and Succession Planning



Are there any agency-specific statutory provisions that provide for acting officials in the face of vacancies in Senate-confirmed positions in your agency (even if for just one or two positions)?



- Yes
- No
- Don't know



Display This Question:

If Are there any agency-specific statutory provisions that provide for acting officials in the face... Yes Is Selected



Which positions do they cover?



Display This Question:

If Are there any agency-specific statutory provisions that provide for acting officials in the face... Yes Is Selected



If you can, please provide citations or links to the relevant provisions.



Display This Question:

If Are there any agency-specific statutory provisions that provide for acting officials in the face... Yes Is Selected



For acting officials under these agency-specific provisions, is the “acting” status of the official placed on the agency’s web site?



- Yes, for all covered positions
- Yes, for some positions but not for others
- No, for all positions
- Don't know



Apart from any agency-specific statutory provisions providing for acting officials that may apply to your agency, does your agency have a leadership succession plan for any Senate-confirmed positions (even if for just one position, e.g., Chairman)?



- Yes
- No
- Don't know



Display This Question:

If Apart from any agency-specific statutory provisions providing for acting officials that may apply... Yes Is Selected



Which positions does the plan cover?



All Senate-confirmed positions

Only certain top positions

Other: (fill in)

Don't know



Display This Question:

If Apart from any agency-specific statutory provisions providing for acting officials that may apply... Yes Is Selected



When was the plan last revised? (If you don't know, please say so.)



Display This Question:

If Apart from any agency-specific statutory provisions providing for acting officials that may apply... Yes Is Selected



Can the public access the plan?



Yes, agency web site

Yes, published in Federal Register

Yes, other (fill in):

No

Don't know

General Questions on Acting Officials and Succession Planning

Block Options



General Questions on Acting Officials and Succession Planning





Which of your agency's practices, if any, pertaining to acting officials or succession planning for Senate-confirmed positions would you recommend to other agencies and why do you think they are desirable?



What help or changes would you like to see on acting officials or succession planning for Senate-confirmed positions from your agency? From outside your agency?



Delegated Authority

Block Options ▼



Delegated Authority



To repeat, this project aims to study the variation in agency practices and to recommend best practices. It is not examining the legality of what can be delegated in the face of vacancies in Senate-confirmed positions.



Are you familiar with delegations of authority (i.e., when the agency delegates functions of one position to someone else)?



Yes

No



Display This Question:

If Are you familiar with delegations of authority (i.e., when the agency delegates functions of one... Yes Is Selected



Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed positions?



- Yes
- No
- Don't know



Display This Question:

If Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed po... Yes Is Selected



Does your agency limit the length of time the delegated authority can operate (i.e., an expiration date set at the time of delegation, which may be extended through an additional order)?



- Yes
- No
- Other: (fill in)
- Don't know



Display This Question:

If Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed po... Yes Is Selected



Does your agency publish delegations of authority in the Federal Register?



- Yes
- No
- Don't know



Display This Question:

If Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed po... Yes Is Selected



Does your agency provide information about delegated authority on the agency's web site?



- Yes. If possible, please provide a link to the relevant page:
- No
- Don't know



Display This Question:

If Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed po... Yes Is Selected



Are there other ways that your agency provides information about delegated authority?



Display This Question:

If Does your agency use delegated authority in the face of staffing vacancies in Senate-confirmed po... No Is Selected



How does your agency operate without delegated authority in the face of vacancies in Senate-confirmed positions?



Agency always employs acting officials

Agency is sometimes unable to perform some functions

Other: (fill in)



Display This Question:

If Are you familiar with delegations of authority (i.e., when the agency delegates functions of one... No Is Selected



Who might be familiar with delegated authority at your agency? If you can, please provide an email address or telephone number.



Display This Question:

If Who might be familiar with delegated authority at your agency? If you can, please provide an emai... Text Response Is Not Empty



Can we use your name in contacting that person?



Yes

No



General Questions on Delegation

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Which of your agency's practices, if any, pertaining to delegated authority in the face of staffing vacancies in Senate-confirmed positions would you recommend to other agencies and why do you think they are desirable?



What help or changes would you like to see on delegated authority from your agency? From outside your agency?



 Closing Questions

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Closing Questions



Is there anything else you would like to share?



Who else should we contact, whether or not at your agency, to learn more about acting officials and delegated authority? If you can, please provide email address(es) or telephone number(s).





Display This Question:

If Who else should we contact, whether or not at your agency, to learn more about acting officials a... Text Response Is Not Empty ▼



Can we use your name in contacting any of these people?



- Yes
- No



Please provide your name and contact information for survey validity.



Would you be willing to talk in more detail, either on or off the record?



- Yes
- No
- Maybe



Are you willing to have your responses tied to your agency in the report? The default is that your responses will not be connected to your agency.



- Yes
- No

End of Survey

[Survey Termination Options...](#)