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**CENTER FOR EFFECTIVE
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DEMOCRACY REFORM PRIMER SERIES

Bureaucratic Vacancies

A Practical Research Guide

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About the Democracy Reform Primer Series

Narrowing the gap between research and public dialogue, the University of Chicago Center for Effective Government's Democracy Reform Primers responsibly advance conversations and strategy about proposed changes to our political institutions. Each Primer focuses on a particular reform, clarifies its intended purposes, and critically evaluates what the best available research has to say about it. The Primers do not serve as a platform for either authors or the Center to advance their own independent views about the reform; to the contrary, they serve as an objective and authoritative guide about what we actually know—and what we still don't know—about the likely effects of adopting prominent reforms to our political institutions.

In some instances, the available evidence may clearly support the claims of a reform's advocates. In other instances, it may cut against them. And in still others, the scholarly literature may be mixed, indeterminate, or altogether silent. Without partisan judgment or ideological pretense, and grounded in objective scholarship, these Primers set the record straight by clarifying what can be said about democracy reforms with confidence and what requires further study.

About the Center for Effective Government

The University of Chicago Center for Effective Government was founded in 2019 at the University of Chicago's Harris School of Public Policy to help solve the problems of government ineffectiveness with a multi-faceted theory of action. The Center organizes its work and activities around three key areas—ideas, education, and engagement—and builds bridges across differences between scholars, students, practitioners, leaders, journalists, and advocates. Through robust, innovative programming, the Center works to strengthen institutions of democracy and improve government's capacity to solve public problems.

About the Author



Anne Joseph O’Connell is the Adelbert H. Sweet Professor of Law at Stanford Law School. She is a lawyer and social scientist (with a Ph.D. in Political Economy and Government) whose research and teaching focus on administrative law and the federal bureaucracy.

Outside of Stanford, O’Connell was a presidentially appointed member of the Council of the Administrative Conference of the United States an independent federal agency dedicated to improving regulatory procedures from October 2022 to January 2025. She is also an elected fellow of the American Academy of Arts and Sciences and the National Academy of Public Administration and an elected member of the American Law Institute. She frequently consults with congressional staff nonprofit organizations and others and has testified before Congress.

O’Connell has written on many topics, including agency rule making, the selection of agency leaders, and bureaucratic organization (and reorganization). Her publications have appeared in leading law and political science journals. She has co-edited a book (with Daniel A. Farber), *Research Handbook on Public Choice and Public Law*. She joined the Gellhorn and Byse’s *Administrative Law: Cases and Comments* casebook as a co-editor with the twelfth edition. She has issued a number of empirical reports for the Brookings Institution and Center for American Progress. O’Connell is currently working on a book, *Stand-Ins*, on temporary leadership in government, business, religion, and sports.

About the Series Editor



CEG Faculty Affiliate **Anthony Fowler** is a Professor at the Harris School of Public Policy at the University of Chicago. His research applies econometric methods for causal inference to questions in political science, with particular emphasis on elections and political representation. Fowler is currently the Co-editor in Chief of the Quarterly Journal of Political Science, and the co-author (with Ethan Bueno de Mesquita) of *Thinking Clearly with Data: A Guide to Quantitative Reasoning and Analysis* (Princeton University Press, 2021). Fowler earned his Ph.D. in government from Harvard University and completed undergraduate studies at the Massachusetts Institute of Technology.

Summary

Promise of the Reform

It is taking far longer for presidents to nominate, and the Senate to confirm, federal agency leaders than in the late twentieth century. These growing gaps in leadership have led to a corresponding increase in the use of acting officials and delegations of authority, where statutes permit such substitutes. These stand-ins for confirmed leaders generally hurt agency performance and accountability, but sometimes contribute needed expertise and yield a better nominee. Good governance advocates push to reduce the number of Senate-confirmed agency slots and to impose more restrictions on acting officials in the highest positions that remain. These reforms likely would improve governance and agency accountability but could have unexpected consequences.

Key Takeaways from the Research

- Presidentially appointed, Senate-confirmed (PAS) agency positions lack official occupants approximately 20 percent of the time across a range of earlier periods. And staffing delays have grown in the most recent administrations. In response, presidents are increasingly relying on acting officials to fill these positions. Cabinet secretary positions were staffed with acting officials for about ten percent of the days of the first Trump administration and over seven percent of the Biden administration days, as compared to under three percent of days for each of the two preceding presidents.
- The White House does not typically face significant external pressures to submit nominations and instead relies on acting officials strategically, in both Democratic and Republican administrations.
- When the same party controls the White House and the Senate, whether Democratic or Republican, the political branches appear to prefer to fill vacancies on the federal courts rather than in agencies.
- Longer vacancies in agency positions generally connect to performance problems, as acting officials often do not have the same stature in and outside the agency and may not feel authorized to act forcefully as appointed leaders. On the other hand, longer vacancies (and selection processes) may result in better leaders ultimately being chosen and confirmed. In addition, some acting officials drawn from the senior ranks of the career (nonpolitical) workforce may be more skilled than political picks.
- Reliance on acting officials and delegations of authority shrink Congress's role, decreasing the political accountability of agency decisions.
- Reforms since 2012 to reduce the number of positions requiring Senate confirmation and to speed up the process for those PAS jobs that remain have not produced the intended improvements; delays have instead worsened. More recent reforms have limited who can serve in an acting capacity in inspectors general positions, but long vacancies remain there as well. Other proposals are pending, with varying political feasibility. Court decisions may also limit the scope and tenure of acting leaders and delegations of authority, which would likely incentivize nominations.

Important Questions We Need Better Answers To

Researchers should explore more deeply the mechanisms by which vacancies shape agency performance. Specifically, future theoretical and empirical work could investigate:

- Using the variation in acting officials (e.g., some are confirmed to lower-level positions while others are not) and the use of delegations (e.g., when time limits on acting service run out or when there is no default acting official), what are the biggest contributors to poorer agency performance during vacancies—the lack of confirmation, use of delegation instead of an acting official, or something else?
- Under what conditions can acting leaders or delegations improve agency performance during vacancies?
- Given that vacancies will persist, at least to some degree, what is the best way to keep agencies operating, considering both agency functions and accountability?

While research has explored how the political environment shapes nomination delays, we do not understand how delays influence who is picked. Researchers could use theoretical models and data to examine:

- Drawing from search models in economics, under what conditions could longer vacancies yield better leaders? How does the length of vacancies connect to gender, race, geography, and skills of the nominees?
- What would be the optimal vacancy period for vetting potential leaders?

We also should know more about how constraints on the use of acting officials (and delegations) operate in practice, including:

- Drawing on variation in which agencies can use acting officials and who can serve as an acting official (as well as the availability of delegation of tasks), do constraints on the use of acting officials propel more formal nominations or delegations of authority downward?
- When there is no confirmed (or recess) appointee or acting official, are there situations when nonexclusive functions are not delegated downward when permitted?
- How would court decisions on the availability of delegation of tasks (when time limits for acting service run out), nonconfirmed officials in principal offices, and statutory ambiguities of the Federal Vacancies Reform Act of 1998 shape vacancies and the use of acting officials and delegations?

Introduction

Federal agencies make an incredible number of policy decisions, conducting more “lawmaking” than Congress and more “adjudication” than the federal courts. Statutes have created over 1,100 presidentially appointed, Senate-confirmed (PAS) positions to direct and make these policy decisions. But the White House and the Senate have not consistently staffed these leadership roles, producing vast and growing vacancies at the top of agency organization charts.

In many agencies, these vacant jobs are not exactly empty. Under the Federal Vacancies Reform Act of 1998 and various agency succession provisions, acting officials (“actings”) can serve in these empty posts. But those actings covered by the Vacancies Act may serve only for a limited period. When time limits run out—or as an alternative to relying on acting officials—almost all of the duties of the vacant job can be delegated downward, subject to the Constitution’s Appointments Clause, so that a lower-level official “performs the duties” of the “empty” position.

In 2019, President Trump called this part of his leadership team “my actings.” In talking to journalists, he boasted: “I have ‘acting’ [sic]. And my ‘actings’ are doing really great... I sort of like ‘acting.’ It gives me more flexibility.”¹ While President Trump publicly expressed his preference for acting officials—and will likely do so again in his second term—his predecessors and successor have more quietly relied on acting officials and delegations of authority.

“There are over 1,100 presidentially appointed, Senate-confirmed (PAS) positions to direct and make policy decisions.”

Introduction

Many commentators decry the heavy use of acting officials. Critics posit that acting leaders function as “substitute teachers,” lacking the necessary stature in and outside the agency, or worse, as “workarounds,” to the political accountability prescribed in the Constitution’s Senate confirmation process. And in many contexts that conventional wisdom pans out: vacancies go along with agency inaction, lower employee morale, lower external support, uncertainty, and less political accountability.

Acting leaders may, however, bring more issue expertise than political appointees chosen for more partisan reasons. In addition, selecting nominees outside the largely white and male pool of former appointees (the “in-and-outers” as they have been described) takes time, as does the vetting of potential nominees with no or minimal government experience (and no prior security clearances). Cutting back on appointment delays (through a range of mechanisms, including limits on acting officials) might thus impede efforts to diversify the top ranks of the executive branch.

Those who assume that vacancies are, on balance, costly have advanced various proposals to curb them. The most prominent suggestion involves cutting the number of Senate-confirmed positions. Other reforms include curbing who can serve as acting officials and further restricting their tenure. These two ideas sit in some tension: the use of acting officials functionally pares down the number of PAS roles. The prevalence of acting officials, at least in lower-level positions, produces in practice what Congress has not done formally, since it effectively reduces the number of officials that the Senate must confirm. Still, cutting PAS jobs and constraining the use of acting officials in the highest-level positions may incentivize the political branches to use the traditional appointments process for the Senate-confirmed jobs that remain.

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Introduction

This primer examines the existing descriptive and causal literature on vacancies in top agency roles (as well as acting officials and delegations of authority) and considers potential reforms, including unintended consequences of constraining acting officials. Specifically, the primer covers:

- Scope of vacancies, acting officials, and delegations
- Causes of vacancies and strategic uses of acting officials
- Performance consequences of vacancies
- Policy reforms for PAS positions and acting officials

This primer does not address vacancies in non-Senate confirmed roles—whether political or career. Vacancies lower down the agency organization chart also deserve attention from scholars and policy advocates.

The analysis here overlaps with two other primers in the Democracy Reform Primer Series, but also offers different insights. The Reducing the Number of Senate-Confirmed Appointees primer by Annie Benn focuses on confirmation delays and their immediate consequences, while this primer addresses nomination delays and refusals to nominate as well as the connection between delay and ultimate selections. The Political Appointees to the Federal Bureaucracy primer by David Lewis briefly addresses the performance consequences of vacant PAS roles, but it focuses primarily on performance differences between political and career officials. This primer treats interim leaders as a consequence of confirmation delays rather than as a substitute for cutting PAS positions. And because of its focus on bureaucratic vacancies, it also examines delegations of authority in the face of vacancies, the legal constraints on acting officials and delegations, and litigation as a potential reform avenue. Finally, this primer addresses reforms on the use of acting officials.

Definitions

What is a Vacancy?

This primer uses the term “vacancy” in a PAS position to indicate that there is no Senate-confirmed or recess appointee in that role. The vacancy runs from the departure of the last Senate-confirmed or recess appointee until the start of the next Senate-confirmed or recess appointee. There have been no recess appointees to agency positions since 2012, though President Trump has threatened to use recess appointments if the Republican Senate does not move quickly on his nominations in his second term.² Although nomination and confirmation dates are easy to find, departure and start dates prove much harder to track down.

Who Can Be an Acting Official?

For positions covered by the Federal Vacancies Reform Act of 1998 (Vacancies Act)—the latest statute governing agency vacancies—the “first assistant” to the vacant job serves as the acting leader by default. (In a cabinet department, for example, the deputy secretary is the “first assistant” to the secretary.) There cannot be “double” actings, so there must be a non-acting official in the first assistant role for that person to serve as an acting leader. The Vacancies Act provides for two other sources of acting officials, but only if the president (and not the agency) chooses from them. First, “the President (and only the President) may direct” another Senate-confirmed official—within the agency or outside it—to serve as the acting leader. Second, “the President (and only the President) may direct an officer or employee” who has not been Senate-confirmed to serve as the acting official, but only if that person has worked in the agency for at least ninety days during the year-long period before the vacancy occurred and is paid at the GS-15 level or higher. The Vacancies Act also sets time limits for how long an acting official may serve: an initial 210 days (or 300 at the start of an administration) plus the time for two nominations and 210 days after each of the two nominations, if they fail (including returns).³

Many agencies also have statutory provisions for acting leaders. In almost all cases, the White House can choose between these statutory provisions (which almost always lack time limits but severely restrict who can serve) and the Vacancies Act (with its time limits but wider pool of officials to choose from). President Biden often preferred the former; President Trump typically chose the latter in his first term.

The question of who qualifies as an acting official has increasingly been hashed out in court.

Definitions

Litigation brought by critics of acting officials jumped during the first Trump administration and continued into the Biden administration. The largest constitutional issue involves nonconfirmed leaders, which the Vacancies Act permits the president to choose under certain conditions. The Constitution's Appointments Clause (and Recess Appointments Clause) provides that the most important positions—known as principal offices—must be filled with Senate-confirmed (or recess) appointees, while so-called “inferior officers” may be appointed by the president or department heads, if Congress permits. Does the Constitution allow nonconfirmed leaders to serve temporarily in principal offices? The Supreme Court last addressed the issue in 1898, in *United States v. Eaton*, which seemingly treated someone serving temporarily in a principal office as an inferior officer. But that decision sits in some tension with its 1997 decision in *Edmond v. United States*, which did not involve acting service, where the Court determined that inferior officers are “officers whose work is directed and supervised at some level” by someone other than the president. That description would appear to exclude acting secretaries who have not been confirmed to another position. Litigants are also raising statutory claims, including arguments that the Vacancies Act does not permit the default acting leader (the first assistant) to be named after the vacancy, that the Act cannot be used if there is a specific agency succession provision, and that the Act does not apply after a president fires an agency leader.

None of these claims has yet gained traction in the courts. But the constitutional issue has not reached the Supreme Court, leaving lower courts bound by the 1898 decision. The statutory claims also have not percolated up, sometimes not even to the appellate courts. More litigation on these issues will surely be coming in the second Trump administration. In addition, President Trump has recently broken with executive branch practice since the Vacancies Act was enacted and has appointed acting officials in Senate-confirmed positions not covered by the Act, including in the Inter-American Foundation and the United States African Development Foundation. The White House claims that such appointments are permitted under the president's “inherent” Article II authority. One judge has already suggested that he disagrees with the White House. I expect the courts will not accept this avenue of acting appointments, outside of some genuine emergency.

What Is a Delegation of Authority?

According to lower court decisions (as this issue has not reached the Supreme Court), if the duties of the PAS role are not exclusive (in other words, assigned specifically to the PAS position by statute or regulation), they can be delegated downward (within the constraints of the Appointments Clause). For such positions, an acting leader and an official performing the duties (under a delegation order) possess the same formal power, but have different titles. Even if some duties are exclusive to a PAS job, the other nonexclusive functions can be delegated, giving the person operating under a delegation order nearly the same authority as an acting leader. Delegations during vacancies generally do not have time limits (except for sometimes expiring when the role is formally filled). While delegations are starting to generate more legal scrutiny, the Vacancies Act currently operates as a work around to the Constitution's appointments process. And, in turn, delegation functions as a work around to the Vacancies Act.⁴

Research on Scope of Vacancies, Acting Officials, and Delegations

Until recently, we knew very little about the prevalence of vacancies (beyond confirmation delays), acting leaders, and delegations of authority in federal agencies.

Research has largely centered on agencies covered by the Vacancies Act—cabinet departments and single-headed executive agencies—and not on entities directed by multi-headed leadership slates, such as the Securities and Exchange Commission and the National Labor Relations Board.

“Presidents Bush, Obama, and Trump did not nominate anyone in four years for 13, 15, and 26 percent of vacant Senate-confirmed roles in federal agencies, respectively.”

With respect to vacancies in PAS positions, one study determined that Senate-confirmed positions in cabinet departments and free-standing executive agencies (led by single heads) lacked confirmed or recess-appointed officials 15 to 25 percent of the time between the start of the Carter administration and the end of the first term of George W. Bush.⁵ A later article analyzed over 400 Senate-confirmed positions in cabinet departments and single-headed agencies from 1989 to 2013, finding that the roles were vacant, on average, for at least 151 days during a congressional term, a 21 percent vacancy rate.⁶ Most recently, a study highlighted extensive vacancies across recent administrations—specifically, that Presidents Bush, Obama, and Trump did not nominate anyone in four years for 13, 15, and 26 percent of vacant Senate-confirmed roles in federal agencies, respectively.⁷

Interestingly, President Trump appears to be moving more quickly in his second term, with an approximate six-fold increase in submitted nominations from Inauguration through the end of March.

Some research has focused on particular agencies or positions. On the former, one paper examined vacancy rates for PAS roles in the Departments of Commerce and Health and Human Services between 1989 and 2009. Averaging across those positions, Commerce and HHS were missing confirmed or recess leaders during more than one-fifth of the period.⁸ On specific positions, the Government Accountability Office (GAO) has reported on the number and duration of vacancies in 32 PAS inspector general positions from FY 2007 to FY 2016, finding 62 vacancies. The highest number of vacancies (nine) occurred in 2016, while the lowest (three) was in 2007. Of these 32 positions in the ten-year period, six had no vacancies, six had gaps lasting under one year, nine had vacancies that lasted between one and three years, and 11 had vacancies persisting over three years.⁹

“Considering the administrator, deputy administrator, and general counsel jobs at EPA, from the Reagan administration to the end of the third year of the first Trump administration, there were more acting officials than confirmed leaders in those three positions.”

Research on Scope of Vacancies, Acting Officials, and Delegations

The most comprehensive work on the scope of vacancies comes from research which compiled yearly data on Senate-confirmed positions in cabinet departments from 1977 to 2016. It found that nearly 20 percent of the more than 11,000 position-year observations did not have Senate-confirmed appointees.¹⁰

When these jobs lack Senate-confirmed leaders, their duties are often carried out by acting officials or officials operating under delegation orders. Research on the scope of acting officials and delegations is limited but growing. One descriptive study determined that between the start of the Reagan administration and the end of the third year of the first Trump administration, cabinet departments had 171 confirmed, three recess-appointed, and 147 acting secretaries. Of the 77 acting secretaries serving after the 1998 Vacancies Act, 36 were deputy secretaries (first assistants), 26 were other Senate-confirmed leaders, and 15 were nonconfirmed officials. As a percentage of the total days, acting secretaries (or no one) served less than three percent of the time under Presidents Obama and George W. Bush. For President Trump, both without and including his final year, that number jumped to ten percent.¹¹ President Biden's acting secretaries have racked up over seven percent of his administration's days through December 2024.¹²

Descriptive research on acting officials also examines specific agencies, like the Environmental Protection Agency (EPA) and the Federal Aviation Administration (FAA). Considering the administrator, deputy administrator, and general counsel jobs at EPA, from the Reagan administration to the end of the third year of the first Trump administration, there were more acting officials than confirmed leaders in those three positions. Under Presidents George W. Bush and Obama, acting administrators served for eight percent and 5.5 percent, respectively, of their administrations. By contrast, acting administrators served for nearly one-quarter of President Trump's first three years. And, across all three administrations, acting officials served even longer for the two lower-level positions.¹³ There have been roughly equal numbers of confirmed and acting heads of FAA in the same period (14 to 13). Since the George H.W. Bush administration, acting FAA administrators have been at the helm for at least 16 percent of the time in each administration.¹⁴

“Acting officials (and delegations) appear to be increasing over time and dominate in lower-level positions.”

Research on Scope of Vacancies, Acting Officials, and Delegations

When time limits for acting service run out (and in other contexts), lower-level officials typically carry out many functions of vacant positions through delegation orders. An Administrative Conference of the United States report flagged some examples of PAS roles delegated to lower-level officials during vacancies, but did not comprehensively collect delegations.¹⁵ Using the Federal Register and machine learning, another study discovered “3,358 subdelegations of discretionary governmental authority” from June 1979 to August 2019: 1,125 of those were from an appointee to another appointee, and 1,596 from an appointee to a career official (the remainder went between career officials, or from a career official to an appointee). The research also “show[ed] a declining number of new subdelegations to civil servants throughout [the] period... perhaps with a slight uptick around 2012.... By contrast, the number of new subdelegations to other appointees... remained essentially flat during this study period.”¹⁶ These delegations from the Federal Register are not specific to vacancies, however.

It makes most sense to consider acting officials and delegations together, as they are both substitutes for “filling” vacant roles. The most extensive descriptive work on acting officials and arguably delegations concluded that in the 1977-2016 period, of position-year observations, close to 11 percent “were filled by interim appointees” and nearly nine percent “were left empty.”¹⁷ The “empty” category almost certainly includes many delegations. A snapshot of 301 Senate-confirmed positions in cabinet departments on April 15, 2019 determined that confirmed officials filled only 64 percent of those roles. While acting leaders held 13 percent of the jobs, 23 percent of the positions lacked a confirmed or acting official. In short, “close to twice as many positions were presumably being carried out through delegated authority rather than staffed by official acting leaders.”¹⁸

In sum, acting officials (and delegations) appear to be increasing over time and dominate in lower-level positions.

Research on Causes of Vacancies

Considerable scholarship has analyzed the causes of Senate delays in confirming presidential nominees to federal agencies, with a focus on divided government and other partisan considerations.¹⁹

One more recent study, for instance, explored why the Senate drags its feet on nominations that will ultimately be confirmed. It found, using nominations between 1987 and 2012, that “delay can be used to protect allied agencies from presidential politicization” and that strategic delay most affects mid-level nominations.²⁰ In recent administrations, when the same party controls the Senate and the White House, it appears that the Senate processes judicial nominations faster than many agency picks, suggesting that the Senate is more invested in appointing federal judges with life tenure (and where you cannot have non-Senate confirmed acting judges) than in confirming agency officials.²¹

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Political scientists have only begun to examine the causes of vacancies beyond analyzing confirmation delays in the last decade. Recent scholarship has looked to the role of White House decisions. One study, using agency vacancies from 1999 to 2013, found that while “ideological and partisan gaps”

between the White House and the Senate lengthens the confirmation process, “the effects of ideological and partisan divergence are conditional on one another” for the nominations process.²² In other words, while nominations are made more quickly with lower ideological divergence, this effect is bolstered when the Senate and White House are controlled by different parties—“presumably because of a desire to seize these rare opportunities.” It also determined that presidents nominate officials to higher-level positions more quickly “as these positions are most important to the implementation of the president’s program.” And it found that presidents appear to “use nominations to influence agencies not deemed political allies, especially in the later part of administrations, a result consistent with a desire to maintain politicization via the appointments process” and slow nominations to “agencies deemed political allies ... over the courses of administrations.”²³ Theoretical work has suggested that delays in nominations may yield more preferred candidates.²⁴ Here too, looking at the range of appointment opportunities, the White House may care more about judges than lower-level agency leaders in recent years.

Looking at the entire vacancy period (nomination and confirmation delays), the study of 416 PAS agency roles from 1989 to 2013 addressed above, determined: “When agencies are ideologically divergent from the relevant Senate committee chair, vacancy length is shortened as much as half for lower status appointees as agency ideology diverges to the chair’s party extreme. This relationship holds across presidencies. In other words, ideological divergence matters most when the agency is to the right (left) of Republican (Democrat) Senate committee chairs.”²⁵

Research on Causes of Vacancies

“Presidents may strategically use vacancies in PAS positions to achieve their policy priorities, whether by deliberately leaving a position empty or installing an interim appointee rather than seeking Senate confirmation for a formal nominee.”

A new study considers the choice between traditional agency leaders and acting officials (or delegations to lower-level officials). It systematically models and empirically tests why presidents might prefer acting officials (or no one) to confirmed leaders, positing: “presidents may strategically use vacancies in PAS positions to achieve their policy priorities, whether by deliberately leaving a position empty or installing an interim appointee rather than seeking Senate confirmation for a formal nominee.” The theoretical model yields two predictions: First, “[a] president is more likely to leave high-value positions empty when prioritizing policy contraction [a shrinking of agency work].” Second, “[a] president will always immediately fill low-value positions with interim appointees and is more likely to immediately fill high-value positions with interims when prioritizing policy expansion.” Using the dataset of position-year observations from 1977-2016 described above, the research determined that, as predicted, “interim appointees are significantly more likely to fill high-capacity positions when presidents seek to expand an agency’s policy reach,” and “empty positions are significantly more likely among high-capacity positions when presidents prioritize contracting agency action,” but only in the period before the 1998 Vacancies Act.²⁶ Of course, while it is important not to “confound[d] empty positions and interim appointees,” the functions of a position with neither a Senate-confirmed nor an acting official are typically delegated to someone else in the agency.

A more recent study, grounded in the legal constraints of the Vacancies Act, examined when presidents “allow the default acting official directly in line for the position to serve” or “select an alternative, or strategic, acting official,” and then whether they nominate someone for the role. Collecting quarterly data on major PAS roles in executive agencies in the first year of the last three administrations (402 roles across 41 agencies), it found that “presidents use strategic acting officials more frequently in positions within ideologically opposed agencies, agencies connected to their campaign priorities, and the highest tier of leadership positions.” These results contrast with some of the work described above; specifically, this latest study determined that “presidents were less likely to leave positions in ideologically opposed agencies ‘empty’ or in the hands of career civil servants.” In sum, the research demonstrates that “the strategic use of vacancies and non-default acting officials is a readily available substitute for presidents seeking to gain control of agency operations.”²⁷

“Presidents emphasize picks for policy jobs over management roles, care more about nominations in more ideologically aligned agencies, and prioritize nominations to agencies with lower skills.”

Using nomination delays and surveys of political and career agency workers, other researchers have examined whether presidents invest strategically in agency capacity, which they define as “the ability of an agency to perform the tasks delegated to it.” They concluded that presidents emphasize picks for policy jobs (i.e., positions focusing on legislation, policy planning, and law) over management roles (i.e., positions targeting “management, finances, acquisition, or personnel”); presidents care more about nominations in more ideologically aligned agencies (e.g., EPA for Democrats and the Department of Homeland Security for Republicans); and presidents prioritize nominations to agencies with lower skills.²⁸

We are also starting to see some experimental work in this area. Scholars conducted three experiments to analyze whether negative public opinion could discourage the president from relying on acting officials and determined that only particular scandals seem to cause respondents to punish the White House.²⁹

Research on Performance Consequences of Vacancies

With no stock prices, individual approval ratings, or voting records, assessing agency leader performance presents more challenges that evaluating CEOs, presidents, or members of Congress, respectively.

The dominant narrative, however, is that vacancies produce poorer agency performance. Case studies show the costs of vacancies. Compiling 41 examples of government failures (defined as instances when agencies did not “design and deliver effective public policy”) between 2001 and 2014, one study contended that “vacancies and delays” in the appointments process played a role in eight.³⁰ Other work has focused on the Federal Emergency Management Agency (FEMA), finding that delays in getting confirmed leaders “slowed progress on the National Response Plan, which delineates different local, state, and federal responsibilities in the event of a catastrophic hurricane”—leaving officials “unprepared and uncoordinated” for Hurricane Katrina.³¹

“Acting officials likely avoid big initiatives, lacking the internal and external stature to propose ambitious policy change or expecting confirmed leaders to come in with their own agendas.”

Outside of case studies, research has linked gaps in agency leadership to lower rulemaking activity by federal agencies, suggesting that vacancies may contribute to inaction but not establishing a causal relationship.³² A more sophisticated study of U.S. attorneys determined that “higher turnover leads to lower output, when output is measured as the total prison sentences per prosecutor.”³³ While all but one acting inspector general in the GAO survey reported that “having an acting IG had no impact on the OIG’s [Office of Inspector General’s] ability to plan and conduct work,” one-quarter of employees reported a negative impact.³⁴ Similarly, most past acting leaders across a range of agencies, in an interview study, reported that they did not vacillate in carrying out the duties of their roles.³⁵ But acting officials likely avoid big initiatives, lacking the internal and external stature to propose ambitious policy change or expecting confirmed leaders to come in with their own agendas.

In addition, surveys of government workers intimate that vacancies depress agency morale. The Partnership for Public Service, whose head likened acting officials to “substitute teachers,” has connected “lack of leadership” to “static or declining employee engagement” in federal viewpoint surveys.³⁶ But causal claims again prove difficult: could poor agency outcomes drive vacancies? A recent study uses the Survey on the Future of Government Service and agency vacancies to explore directionality—at least for “a snapshot at one point in time” in the Trump administration. It determined that “persistent vacancies are correlated with lower self-reported performance. The mechanisms leading to these results are short time horizons, low morale, and a lack of investment by political officials. Agencies with regular turnover report less of a long-term focus, less satisfaction with the agency, and less effort by elected officials to give the agency what it needs to carry out its core mission.”³⁷

Research on Performance Consequences of Vacancies

“Persistent vacancies are correlated with lower self-reported performance.”

The conventional wisdom focuses on costs from vacancies. But vacancies (and, when permitted, the corresponding use of acting officials and delegations of authority) could bring benefits to agencies. In the period of the vacancy, acting officials and those operating under delegations may possess more expertise than confirmed appointees, especially if drawn from the career staff. A study of ambassadors determined that career picks had better language skills, regional experience, foreign policy experience, and organizational leadership skills than political selections from outside the ranks of the State Department.³⁸ But all the ambassadors studied—both the career officials and the political appointees—were Senate-confirmed.

In addition, vacancies may improve the morale of senior career leaders, as they take on more responsibility. A recent paper combined information on vacancies in 42 executive agencies with answers from high-level workers to six Federal Human Capital Surveys/Federal Employee Viewpoint Surveys. It concluded that “at times, upper-level employees experience marginally higher job satisfaction when their agency experiences an executive vacancy. Further, though the association is less strong, agency head vacancies in the prior year can lower the likelihood that employees intend to leave to take a job in another federal agency or outside of the federal government.”³⁹

Research on the benefits to agency performance from acting officials and delegations is spotty. One legal scholar has posited that vacancies in mid-level positions may not be as detrimental as feared; she noted that vacancies can thin out the political management layer and allow senior career officials with greater technical expertise (than “generalist political appointees”) to operate (and discourage these career leaders from leaving).⁴⁰ We could also infer that acting leaders drawn from the career ranks improve agency outcomes from the literature showing that career leaders score higher on performance metrics than appointees.⁴¹

Scholarly attention has typically focused on the performance consequences of vacancies during the relevant vacancy period. But even if agency performance suffers during a leadership vacancy, it could benefit in the long run if the vacancy period—when the search process grinds—ultimately yields a more effective leader. As one theoretical paper noted: “Vetting takes time, but it provides the executive and legislature with increasingly accurate information about a (potential) nominee’s competence... Overall, the model suggests delays in both nomination and confirmation hinge on both the quality of the pool of potential nominees and the information gathered in the screening and vetting processes.”⁴²

Outside of performance concerns (and benefits), the use of acting officials and delegation orders has consequences for the separation of powers in our constitutional system. Acting officials and officials operating under delegations of authority provide less accountability to Congress, as the Senate has not confirmed them for the jobs they are carrying out, even if the Senate has confirmed some of them to other positions.

Policy Reforms

Proposed reforms assume that vacancies (and acting officials), on net, harm federal agencies. The largest call for change—from good governance commissions and organizations, the GAO, and commentators—would cut the number of PAS jobs. As the Reducing the Number of Senate-Confirmed Appointees primer notes, however, “it is doubtful whether reducing the number of PAS positions would itself reduce delays.”⁴³

Many also clamor for fewer acting officials.

These two changes sit in some conflict with each other. The first asks Congress, under the Appointments Clause, to permit the president or the agency head to select lower-level leaders instead of defaulting to a PAS position. Because Congress is giving up political power when it cuts PAS roles, it rarely does so. It last used its power to vest appointments authority for these inferior offices outside of the traditional Senate-confirmation process for about 160 positions in 2012 under the Presidential Appointment Efficiency and Streamlining Act. But acting officials (and delegations of authority) functionally yield what Congress cannot do formally: they remove the confirmation process.

Given that using acting officials (and delegations of authority) and cutting PAS slots achieve similar outcomes, reform should focus on the most important agency roles (which have to be Senate-confirmed under the Constitution as principal offices) and Senate-confirmed roles where acting leaders (and delegations) are not permitted. The Accountability for Acting Officials Act, which the House of Representatives passed in 2022 (when under control of the Democrats), would cut the permitted time limits for acting officials (outside of pending nominations) almost in half in the most important agency roles—from 210 days to 120 days. It would also extend statutory qualification mandates that apply to confirmed appointees to certain acting officials picked by the president as well as clarify ambiguities in the Vacancies Act that have generated litigation in recent years. These last two changes would both largely restrict presidential choice.⁴⁴ The 2023 National Defense Authorization Act did limit the pool for acting inspectors general to other confirmed IGs or sufficiently senior official staff in the relevant IG office.⁴⁵ Perhaps similar restrictions could be imposed on national security positions.

“Reform should focus on the most important agency roles (which have to be Senate-confirmed under the Constitution as principal offices) and Senate-confirmed roles where acting leaders (and delegations) are not permitted.”

Policy Reforms

Because acting officials and delegated authority are essentially two sides of the same coin, constraining the former without changing the latter would presumably just lead agencies to use delegations more. If both are restricted, though, agencies may not be able to carry out their missions while the formal appointments process churns. But there are some reforms that could make acting officials and delegations of authority more accountable—including better disclosure and oversight of their use—without threatening agency operations. For instance, agencies could be mandated to post information about acting officials and delegations during vacancies in PAS roles on their websites.

Reforms also target the traditional appointments process and the appointees themselves. There are proposals to decrease delays in agency nominations and confirmations, and to lengthen appointee tenure—from decreasing overlap in vetting to setting deadlines on Senate votes to obtaining promises from appointees to stay for a certain number of years. Some of the adopted changes—for example, privileged nominations that can skip committee deliberation—have not resulted in shorter delays.⁴⁶ Others contend political appointees should bring particular expertise. Congress imposed new experience and expertise mandates on FEMA leaders after Hurricane Katrina. Most recently, the State Department Integrity and Transparency Act, which was introduced in the Senate in June 2024, would require that at least 75 percent of the State Department’s assistant secretaries be drawn from the agency’s senior foreign service and Senior Executive Service ranks. But these calls often run into political hurdles. As the formal appointments process takes longer—in the face of hyper-partisanship—reformers have to balance agency functioning and a desire for traditional appointees in top agency jobs.

The courts could also restrict the use of acting officials (and delegations of authority). To start, the Supreme Court could overturn or limit *United States v. Eaton*. Lower courts have relied on *Eaton* to permit nonconfirmed officials to serve temporarily in principal offices, such as Matthew Whitaker who was acting Attorney General in the first Trump administration. If the Supreme Court imposed a six-month limit on acting officials (which the 1795 Vacancies Act imposed), for example, it would achieve a tighter timeline than the Accountability for Acting Officials Act would require. In addition, though less likely, the Court could restrict delegations under the Vacancies Act. On a smaller scale, the courts, rather than legislation, could resolve (arguable) ambiguities in the Vacancies Act—such as whether the Act can be used when there is an agency succession provision, if a first assistant can be named after a vacancy, and whether it covers presidential removals.

“Because acting officials and delegated authority are essentially two sides of the same coin, constraining the former without changing the latter would presumably just lead agencies to use delegations more.”

Conclusion

“We should consider how to make acting officials and delegations more effective and more accountable, even if the mix cannot be changed substantially.”

Vacancies in Senate-confirmed agency roles, which can both hinder and help agency performance, will not go away.

Nominations and confirmations take time. Acting officials and delegations of authority provide functional substitutes in many cases, where statutes permit. As vacancies grow in the top ranks of the federal bureaucracy, we should determine the most effective and accountable (and most politically feasible) mix of confirmed officials, acting leaders, and delegations of authority. And we should carefully contemplate what reforms could get us closer to that mix. We should also consider how to make acting officials and delegations more effective and more accountable, even if the mix cannot be changed substantially.

To determine that optimal mix and to improve agency operations with any given mix, we need to learn more:

- How do vacancies, acting officials, and delegations affect agency performance—for the worse and for the better?
- How should agency performance be measured, in order to take into account performance during the vacancy period but also performance under the new leader who took time to select? How long should the search process last, weighing the costs of the vacancy period and the benefits of a more effective appointee?

- How would reforms (or court decisions) on one aspect of vacancies—Senate-confirmed slots, acting officials, delegations—affect the other parts? Would limits on acting officials incentivize formal nominations or delegations of authority, for example? And what level of acting officials and delegations are necessary to allow agencies to carry out their essential missions?

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- 11** O’Connell, Actings (2020): 642, 646, 648
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- 12** Author’s calculations
- There were delays in confirming Biden’s cabinet nominees at the start of his administration; Julie Su served as acting Labor secretary since March 2023, and Adrienne Todmann was acting HUD secretary since March 2024.*
- 13** O’Connell, Actings (2020): 651
- Acting deputy administrators (and one recess appointee) worked 15 percent and 42 percent of the days under Presidents George W. Bush and Obama, respectively, and 66 percent under the Trump administration when the position was occupied. Acting general counsels operated about one-third of the time when the job has been staffed under Presidents Bush and Trump (and 14.2 percent under President Obama).*
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- 28** Bednar & Lewis, Presidential Investment (2024): 442, 448, 450

More specifically, “[a]t any point in time, presidents are 59% more likely... to make a nomination to a key policy position than other positions. In contrast, presidents are a third less likely... to nominate individuals to key management positions.” While it took President Obama 134 days, on average, to make selections for top jobs at the EPA, his DHS nominations waited 191 days, on average. By contrast, President Trump took, on average, 250 days for his DHS picks but 384 days for those at the EPA. Another way to think about investment is turnover in positions. There was more turnover, for instance, at the top of DHS under Trump than the EPA. “Agencies with the lowest skills are 78%... more likely to receive a nomination than agencies with average skills. Conversely, agencies with the highest skills are 39% less likely to receive a nomination than an agency with average skills...” In the view of Bednar and Lewis, presidents seek to avoid government failures. But it could be that presidents know the marginal benefits to investment are greater in these agencies and look for easier payoffs. The survey showed no relationship between agency skill and perceived White House investment.

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