

## ACTINGS

Anne Joseph O'Connell\*

*Temporary leaders in federal agencies—commonly known as “actings”—are a fixture of the modern administrative state. These acting officials have recently come under fire, particularly after President Trump ousted Jeff Sessions and installed Matthew Whitaker as acting Attorney General in November 2018. Yet despite their ubiquity and the fervent criticism we know almost nothing about them.*

*This Article examines open questions about acting officials through empirical, legal, and normative frameworks. Empirically, it provides new data on acting department heads from the Reagan Administration through President Trump's third year. The data show that President Trump has turned to significantly more acting cabinet secretaries than prior Presidents. Using two agencies as case studies, this Article also examines acting officials outside the cabinet and discovers similar trends. But the data also reveal that previous administrations relied considerably on temporary leaders, particularly at the start and end of presidential terms.*

*These empirical findings inform the analyses of a slew of tricky constitutional and statutory questions. This Article addresses open constitutional questions about who can serve in the federal government's highest positions and for how long. It also examines undecided statutory issues, such*

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\* Adelbert H. Sweet Professor of Law, Stanford Law School. This Article is dedicated to the loving memory of Elena Górriz, a friend and colleague, who died on November 1, 2019, at the age of forty-six. This project has benefitted tremendously from student and faculty feedback at the University of Pennsylvania Law School Public Law Workshop and the Berkeley Law Public Law Workshop and from faculty talks at Stanford Law School, William & Mary Law School, and the University of Virginia School of Law. I am thankful as well for the opportunities to present connected research to the Government Accountability Office and the Department of Justice's Federal Programs Branch. I am particularly grateful for detailed feedback from Daniel Ho, Aziz Huq, Ronald Levin, Nina Mendelson, Stephen Migala, Jennifer Nou, Daphna Renan, Bijal Shah, and Peter Strauss and for Twitter, email, or in person conversations with Thomas Berry, Eric Columbus, Walter Dellinger, Daniel Farber, Jill Fisch, Michael Herz, Christina Kinane, Marty Lederman, and Steven Vladeck. These interactions have shaped my interest in temporary leaders and this specific Article in fundamental ways. Mendelson is writing separately on these issues; her earlier scholarship on the potential benefits to acting leaders helped motivate this and ongoing research, and our many conversations about these topics have been critical to my thinking. Arielle Mourrain, Natalie Peelish, and the reference librarians at University of California, Berkeley, School of Law and Stanford Law School provided stellar research contributions, from tiny details to important substance. Amanda Chuzi and the editors of the *Columbia Law Review* rendered significant editorial assistance. In 2019, I was the lead consultant for an Administrative Conference of the United States project on acting officials and delegated authority. This Article has been written independently of that work, except where the ACUS Report (and related Recommendation) are referenced. The Report and this Article do not necessarily reflect the opinions, views, and recommendations of members of ACUS or its committees, except where formal recommendations of ACUS are cited.

*as how the Federal Vacancies Reform Act of 1998 (Vacancies Act) interacts with agency-specific statutes, whether the Vacancies Act covers vacancies created by firings, and whether a “first assistant” can be named after the vacancy and then serve in an acting role. Finally, this Article highlights two thorny areas that have both constitutional and statutory components—the delegation of authority to lower-level agency officials and the applicability of removal restrictions to acting heads at the Consumer Financial Protection Bureau and the Federal Housing Finance Agency.*

*The new data raise additional questions about the conventional criticisms of acting officials as “substitute teachers,” or worse, “workarounds,” to the Senate confirmation process. This Article examines these criticisms and suggests that, while the concerns have some merit, acting officials provide needed expertise and stability—in some contexts, the Senate may prefer them to the President’s nominees.*

*In light of its empirical, legal, and normative findings, this Article then proposes several statutory fixes to change how the executive branch employs acting officials and delegations of authority in the face of staffing vacancies—balancing concerns over accountability and the need for the government to function.*

*Ultimately, this Article calls for thinking about actings and traditional appointees together. So many commentators have called for Congress to reduce the number of Senate-confirmed lower-level positions, mostly in agencies covered by the Vacancies Act. By largely ignoring temporary agency leaders, the forest may have been missed for the trees. Practically, by their prevalence, Presidents’ extensive use of acting officials has achieved what Congress largely refuses to do.*

INTRODUCTION.....	617
I. BASICS OF THE FEDERAL VACANCIES REFORM ACT OF 1998.....	625
A. Coverage of the Vacancies Act .....	627
B. Permitted Types of Acting Officials .....	628
C. Limits on Acting Service Tenure.....	630
D. Compliance and Oversight.....	631
E. Delegated Authority as a Substitute for Acting Officials .....	633
F. Interactions with Agency-Specific Succession Statutes .....	636
II. SCOPE OF ACTINGS.....	637
A. Past Research.....	638
B. Cabinet Secretaries.....	641
1. Counts of Secretaries.....	642
2. Tenures of Secretaries.....	645
3. Backgrounds of Acting Secretaries.....	647
C. Environmental Protection Agency.....	649

1. Types .....	649
2. Tenures .....	650
3. Backgrounds .....	651
D. The Federal Aviation Administration .....	652
E. Lower-Level Positions in the Cabinet Departments.....	654
F. Future Research .....	656
III. LEGAL ISSUES .....	657
A. Constitutional Dimensions .....	658
1. The Appointments Clause .....	659
2. Acting Officials in Principal Offices .....	660
a. Pre-Whitaker Case Law .....	661
b. Current Issues Through the Whitaker Controversy .....	662
c. Empirical Work .....	665
3. Separation of Powers.....	667
B. Statutory Questions .....	667
1. Agency-Specific Succession Statutes .....	667
a. Vacancies Act's Language.....	668
b. CFPB .....	669
c. DOJ .....	670
d. Comparison .....	671
2. Vacancies Created by Presidential Removal .....	672
a. Vacancies Act's Language.....	672
b. Firing of the Secretary of Veterans Affairs .....	673
c. Fleshing Out the Dispute .....	674
3. Naming a First Assistant After the Vacancy.....	675
a. Vacancies Act's Language and OLC Reversal .....	676
b. New First Assistant Position at U.S. Citizenship and Immigration Services .....	677
c. Other Considerations .....	679
4. Double Actings .....	679
a. Mueller Investigation Scenarios.....	680
b. DHS Order of Succession.....	680
c. Presidential Succession.....	681
C. Cross-Cutting Issues .....	682
1. Delegations of Authority .....	682
a. Constitutional Dimensions.....	683
b. Statutory Dimensions.....	685
i. Creation of Positions.....	685
ii. Department of the Interior Delegations.....	685
iii. Governing Statutes and Section 301 .....	686

iv. Delegations of Authority.....	687
v. Potential End Run of the Vacancies Act.....	689
2. The Applicability of Statutory Qualification Mandates and Removal Protections to Acting Officials.....	689
a. Removal Restrictions .....	689
b. Connecting Statutory and Constitutional Issues in the CFPB and FHFA Litigation.....	691
c. Appointment Qualifications.....	693
IV. DESIRABILITY OF ACTINGS.....	694
A. Costs.....	695
1. Inaction .....	696
2. Morale, Uncertainty, and Stature .....	697
3. Accountability .....	698
B. Countervailing Factors.....	699
1. Action .....	699
2. Morale, Stability, and Stature.....	700
3. Accountability and Expertise .....	701
C. Research, Assessment Factors, and Baselines from Each Political Branch.....	703
V. POTENTIAL REFORMS .....	707
A. Ambiguities of the Vacancies Act.....	708
1. Agency-Specific Succession Provisions .....	708
2. Presidential Removal.....	709
3. First Assistants .....	710
4. Qualifications and Removal Constraints.....	711
B. Types and Tenures of Acting Officials.....	712
1. Types .....	712
2. Tenures .....	714
3. Interaction of Types and Tenures .....	716
4. Nominees .....	716
C. Oversight of Agency Use of Acting Officials.....	717
1. Disclosures .....	718
2. Enforcement .....	720
D. Delegation .....	721
1. Scope of Delegation .....	721
2. Transparency .....	723
E. Traditional Appointments Process.....	724
1. Incentives to Nominate by Changes to Acting Officials and Delegations.....	724
2. Explanations for Delay .....	725

3. Cutting Senate-Confirmed Positions.....	726
CONCLUSION .....	727

## INTRODUCTION

President Trump has expressed deep affection for his nonconfirmed agency leaders. He came into the White House relying on “my generals.” He now calls part of his leadership team “my actings.” As he once explained to reporters: “I have ‘acting’ [sic]. And my ‘actings’ are doing really great . . . I sort of like ‘acting.’ It gives me more flexibility.”<sup>1</sup>

This Article examines temporary leaders in federal agencies—known colloquially as “actings.” They are everywhere in the administrative state, and not just in the Trump Administration. We are quick to judge them harshly, although we know nothing about many of them. These stand-ins also raise a slew of tricky constitutional and statutory questions, including some that have not been bandied about in the opinion pages of national newspapers.

President Trump did not always like his “actings.” At the start of the Trump Administration, President Obama’s Deputy Attorney General Sally Yates stayed on as acting Attorney General, intending to remain in the position until Jeff Sessions was confirmed.<sup>2</sup> President Trump, however, fired Yates after she refused to defend his first executive order that barred entry into the United States from certain Muslim-majority countries.<sup>3</sup> He then picked Dana Boente, another Obama appointee, to serve until Sessions was sworn in as Attorney General in February 2017.<sup>4</sup>

Just twenty-one months later, President Trump pressed Sessions to step down.<sup>5</sup> The President had long been angry with Sessions’s recusal from the decision to appoint and oversee Special Counsel Robert Mueller to

1. John T. Bennett, Frustrated by ‘My Generals,’ Trump Turns to ‘My Actings,’ Roll Call (Jan. 14, 2019), <https://www.rollcall.com/news/whitehouse/frustrated-generals-trump-turns-actings> [<https://perma.cc/6BCD-N83G>]. Early in his Administration, President Trump claimed that “in many cases, we don’t want to fill [Senate-confirmed] jobs.” Cody Derespina, Trump: No Plans to Fill ‘Unnecessary’ Appointed Positions, Fox News (Feb. 28, 2017), <https://www.foxnews.com/politics/trump-no-plans-to-fill-unnecessary-appointed-positions> [<https://perma.cc/KG3J-WAMP>].

2. See Matt Zapotosky, Sari Horwitz & Mark Berman, Trump Has Fired the Acting Attorney General Who Ordered Justice Dept. Not to Defend President’s Travel Ban, Wash. Post (Jan. 30, 2017), [https://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c_story.html) (on file with the *Columbia Law Review*).

3. *Id.*

4. *Id.*

5. Julia Ainsley, President Trump Has Replaced Sessions. Here’s What that Means for the Mueller Probe., NBC News (Nov. 7, 2018), <https://www.nbcnews.com/politics/justice-department/president-trump-has-replaced-ag-sessions-here-s-what-means-n933676> [<https://perma.cc/D4BK-E7CZ>].

investigate Russian interference in the 2016 election.<sup>6</sup> Because of Sessions's recusal, confirmed Deputy Attorney General Rod Rosenstein assumed the role of acting Attorney General with respect to appointing and overseeing Mueller.<sup>7</sup> But when Sessions resigned, President Trump did not intend to let Rosenstein serve as the acting Attorney General for all matters.<sup>8</sup> Instead, he turned to the Federal Vacancies Reform Act of 1998 (Vacancies Act) and named Matthew Whitaker, Sessions's Chief of Staff (a non-Senate-confirmed position) as acting Attorney General.<sup>9</sup>

Likely because of the heightened attention on Mueller's investigation of President Trump's 2016 campaign, the Vacancies Act suddenly was thrown into the national spotlight.<sup>10</sup> Could there be an acting Attorney General who was not Senate-confirmed? (Here came the dueling op-eds.<sup>11</sup>) The Vacancies Act permits it—under certain conditions—but some argued that the Act did not apply in light of the Attorney General Succession Act, and, even if the Vacancies Act did apply, the Constitution prohibits putting officials in cabinet-level positions without Senate confirmation.<sup>12</sup> Interestingly, Whitaker was not unique in his appointment. As this Article shows, acting cabinet secretaries have been drawn from non-Senate-confirmed ranks at least fifteen times since the start of President Reagan's Administration in 1981.<sup>13</sup>

Controversies over President Trump's use of acting officials have involved multiple agencies. About a year before Whitaker's selection, Richard Cordray resigned from his position as the first confirmed Director of the Consumer Financial Protection Bureau (CFPB).<sup>14</sup> Right before he left, Cordray named Leandra English as the agency's Deputy Director.<sup>15</sup> Under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, the deputy director “shall . . . serve” as the acting director of the Bureau if

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6. *Id.*

7. *Id.*

8. *Id.*

9. John E. Bies, *Matthew Whitaker's Appointment as Acting Attorney General: Three Lingering Questions*, *Lawfare* (Nov. 8, 2018), <https://www.lawfareblog.com/matthew-whitakers-appointment-acting-attorney-general-three-lingering-questions> [<https://perma.cc/E8UZ-6792>].

10. See Charlie Savage, *Justice Dept. Defends Legality of Trump's Appointment of Acting Attorney General*, *N.Y. Times* (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/matthew-whitaker-justice-dept-trump.html> [<https://perma.cc/YB6E-6PWY>].

11. E.g., Neal K. Katyal & George T. Conway III, *Opinion, Trump's Appointment of the Acting Attorney General is Unconstitutional*, *N.Y. Times* (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> [<https://perma.cc/6T4R-HYUE>].

12. See *infra* section III.A.2.

13. See *infra* section II.B.

14. Tara Siegel Bernard, *Dueling Appointments Lead to Clash at Consumer Protection Bureau*, *N.Y. Times* (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/us/politics/consumer-financial-protection-bureau-cordray-leader-trump-mulvaney.html> [<https://perma.cc/QFR5-6MC6>].

15. *Id.*

the director is absent or unavailable.<sup>16</sup> A few hours after Cordray stepped down, the White House designated Mick Mulvaney, the confirmed Director of the Office of Management and Budget (OMB), as the acting Director of the CFPB under the Vacancies Act.<sup>17</sup> Both English and Mulvaney turned up to work, each claiming to be the acting Director.<sup>18</sup> Mulvaney even brought donuts for the staff.<sup>19</sup> English filed suit, but eventually dropped the litigation.<sup>20</sup>

A few months later, President Trump fired Secretary of Veterans Affairs David Shulkin, naming Robert Wilkie, a Senate-confirmed Assistant Secretary in the Department of Defense (DOD), as acting Secretary.<sup>21</sup> Veterans sued, claiming that the Vacancies Act does not apply to openings created by firing.<sup>22</sup> That suit was also voluntarily dismissed.<sup>23</sup> President Trump seemed to like what he saw of Wilkie and nominated him for the permanent job.<sup>24</sup> Under the intricacies of the Vacancies Act, as recently interpreted by the Supreme Court,<sup>25</sup> Wilkie had to step down from his acting role while his nomination was pending.<sup>26</sup> Peter O'Rourke, a political

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16. 12 U.S.C. § 5491(b)(5)(B) (2018).

17. Bernard, *supra* note 14.

18. Katie Rogers, 2 Bosses Show Up to Lead the Consumer Financial Protection Bureau, *N.Y. Times* (Nov. 27, 2017), <https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html> [<https://perma.cc/5EQM-Z2GQ>]. Kathleen Kraninger was confirmed as the CFPB's second Director on December 6, 2018, a few days before President Trump selected Mulvaney as acting Chief of Staff. See Phillip Rucker, Josh Dawsey & Damian Paletta, Trump Names Budget Director Mick Mulvaney as Acting White House Chief of Staff, *Wash. Post* (Dec. 14, 2018), [https://wapo.st/2rDVJqa?tid=ss\\_tw](https://wapo.st/2rDVJqa?tid=ss_tw) (on file with the *Columbia Law Review*). For more on the legal dispute surrounding the question of CFPB's leadership, see *infra* section III.B.1.

19. Rucker et al., *supra* note 18.

20. Renae Merle, CFPB Official Drops Fight for Leadership of Watchdog Agency, *Wash. Post* (July 6, 2018), <https://www.washingtonpost.com/news/business/wp/2018/07/06/cfpb-official-drops-fight-for-leadership-of-watchdog-agency> (on file with the *Columbia Law Review*).

21. Andrew Restuccia, Did Shulkin Get Fired or Resign? This Is Why It Matters., *Politico* (Mar. 31, 2018), <https://www.politico.com/story/2018/03/31/did-shulkin-get-fired-or-resign-veterans-492877> [<https://perma.cc/PA7S-X8DW>].

22. Complaint at 2–4, *Hamel v. U.S. Dep't of Veterans Affairs*, No. 1:18-cv-1005 (D.D.C. filed Apr. 30, 2018), 2018 WL 2022014; Nicole Ogrysko, Facing a Lawsuit, VA Now a New Victim of Vacancy Act's Ambiguous Language, *Fed. News Network* (May 1, 2018), <https://federalnewsnetwork.com/veterans-affairs/2018/05/facing-a-lawsuit-va-now-a-new-victim-of-vacancy-acts-ambiguous-language> [<https://perma.cc/A9Z3-D7S4>].

23. Stipulation of Dismissal, *Hamel*, No. 1:18-cv-1005 (D.D.C. filed Aug. 1, 2018).

24. Zeke Miller, Hope Yen & Darlene Superville, Trump Nominates Acting VA Secretary Wilkie for Permanent Job, *Associated Press* (May 18, 2018), <https://www.apnews.com/ed35fec8fcb544a1bc583527a776217a> [<https://perma.cc/X68G-YMXR>].

25. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017).

26. Lisa Rein & Paul Sonne, Trump to Nominate Acting Veterans Affairs Secretary Robert Wilkie to Be the Agency's Permanent Leader, *Wash. Post* (May 18, 2018), <https://www.washingtonpost.com/news/post-politics/wp/2018/05/18/trump-announces-he-will-nominate-acting-veterans-affairs-secretary-robert-wilkie-to-become-departments-permanent-leader> (on file with the *Columbia Law Review*).

appointee who, like Whitaker, had not been confirmed to any position, took over as acting Secretary until the Senate confirmed Wilkie.<sup>27</sup> (There were no op-eds on O'Rourke.)

More recently, James Mattis resigned as Secretary of Defense to protest the President's foreign policy decisions. In announcing his resignation, Mattis promised to stay until the end of February 2019—"a date that should allow sufficient time for a successor to be nominated and confirmed."<sup>28</sup> But President Trump, upset by Mattis's "stinging rebuke" in his widely distributed resignation letter, pushed him out earlier.<sup>29</sup> Under DOD's succession provision and the Vacancies Act, Deputy Secretary Patrick Shanahan—a former Boeing executive with no prior government or military experience—became the default acting Secretary.<sup>30</sup>

Shanahan's tenure marked the first time that DOD had an acting defense secretary for more than one day since the start of President George H.W. Bush's Administration when the Senate voted down John Tower's nomination.<sup>31</sup> By the time details of family violence surfaced during Shanahan's vetting process for the permanent job,<sup>32</sup> he had spent almost six months as acting Secretary, nearly three times William Howard Taft

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27. Lisa Rein & Josh Dawsey, *Trump Loyalist at VA Forced Out After Collecting Pay but Doing Little Work*, Wash. Post (Dec. 11, 2018), [https://www.washingtonpost.com/politics/there-were-times-i-didnt-have-a-lot-to-do-trump-loyalist-at-va-forced-out-after-collecting-pay-but-doing-little-work/2018/12/11/26e4704a-fcb7-11e8-ad40-cdfd0e0dd65a\\_story.html](https://www.washingtonpost.com/politics/there-were-times-i-didnt-have-a-lot-to-do-trump-loyalist-at-va-forced-out-after-collecting-pay-but-doing-little-work/2018/12/11/26e4704a-fcb7-11e8-ad40-cdfd0e0dd65a_story.html) (on file with the *Columbia Law Review*).

28. Read Jim Mattis's Letter to Trump: Full Text, N.Y. Times (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/politics/letter-jim-mattis-trump.html> [<https://perma.cc/PR6C-J7QG>].

29. Helene Cooper & Katie Rogers, *Trump, Angry Over Mattis's Rebuke, Removes Him 2 Months Early*, N.Y. Times (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/trump-mattis.html> [<https://perma.cc/CL99-HGTG>].

30. See 10 U.S.C. § 132(b) (2018); Dan Lamothe, *Patrick Shanahan, Trump's Pick for Acting Defense Secretary, Steps into Spotlight After Mattis's Ouster*, Wash. Post (Dec. 23, 2018), <https://www.washingtonpost.com/national-security/2018/12/23/patrick-shanahan-trumps-pick-acting-defense-secretary-steps-into-spotlight-after-mattis-ouster> (on file with the *Columbia Law Review*).

31. See Historical Office, Office of the Sec'y of Def., Department of Defense Key Officials: September 1947–September 2017, at 11–14 (2017), [https://history.defense.gov/Portals/70/Documents/key\\_officials/KEYOFFICIALS-September%202017%20Update.pdf?ver=2017-11-13-115112-207](https://history.defense.gov/Portals/70/Documents/key_officials/KEYOFFICIALS-September%202017%20Update.pdf?ver=2017-11-13-115112-207) [<https://perma.cc/625B-NW8C>]; Bush Selects Taft as Ambassador to NATO, N.Y. Times (Mar. 26, 1989), <https://www.nytimes.com/1989/03/26/world/bush-selects-taft-as-ambassador-to-nato.html> [<https://perma.cc/6W4R-NTZR>]; Michael Orsek, *Senate Rejects Tower, 53-47; First Cabinet Veto Since '69; Bush Confers on New Choice*, N.Y. Times (Mar. 10, 1989), <https://www.nytimes.com/1989/03/10/us/senate-rejects-tower-53-47-first-cabinet-veto-since-59-bush-confers-new-choice.html> [<https://perma.cc/4JHG-W5F5>]; Andrew Rosenthal, *Pentagon, Decisions Await a Leader*, N.Y. Times (Feb. 14, 1989), <https://www.nytimes.com/1989/02/14/us/pentagon-decisions-await-a-leader.html> [<https://perma.cc/J2S8-2JLN>].

32. Michael D. Shear & Helene Cooper, *Shanahan Withdraws as Defense Secretary Nominee, and Mark Esper Is Named Acting Pentagon Chief*, N.Y. Times (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/patrick-shanahan-defense-secretary.html> [<https://perma.cc/S2TP-A2B9>].

IV's service in 1989.<sup>33</sup> President Trump named Army Secretary Mark Esper to take Shanahan's place as acting Secretary of Defense and announced his intention to nominate Esper for the permanent role three days later.<sup>34</sup> As with Wilkie, Esper had to leave the acting position when the Senate formally received his nomination, bringing the third acting Defense Secretary that year and prompting expedited confirmation proceedings.<sup>35</sup>

When President Trump pushed out Department of Homeland Security (DHS) Secretary Kirstjen Nielsen in the spring of 2019, he intended to elevate Customs and Border Protection Director Kevin McAleenan to acting Secretary.<sup>36</sup> But President Trump failed to realize he had to also fire Undersecretary Claire Grady, who was next in line for acting Secretary under the agency's mandatory succession statute, which explicitly preempts the Vacancies Act.<sup>37</sup> Moreover, President Trump wanted to nominate former Virginia Governor Ken Cuccinelli for the permanent DHS Secretary role.<sup>38</sup> In late June, after Senate Republicans expressed concern

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33. See Historical Office, Office of the Sec'y of Def., *supra* note 31, at 13.

34. See Helene Cooper, Trump Nominates Mark Esper as Next Defense Secretary, *N.Y. Times* (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/politics/mark-esper-defense-secretary-nomination.html> [<https://perma.cc/6PBK-82ML>] (announcing Esper's nomination for the permanent position on June 21, 2019); Shear & Cooper, *supra* note 32 (announcing Esper's appointment to the acting position on June 18, 2019). Esper was not formally nominated until July 15. Nomination of Mark T. Esper, PN934, 116th Cong. (2019), <https://www.congress.gov/nomination/116th-congress/934> [<https://perma.cc/7RTN-9GTS>].

35. Joe Gould & Aaron Mehta, Esper's Defense Secretary Confirmation Hearing Planned for Tuesday, *Def. News* (July 11, 2019), <https://www.defensenews.com/congress/2019/07/11/esper-confirmation-hearing-set-for-tuesday> [<https://perma.cc/37LE-U3S3>].

36. Matthew Yglesias, Trump's Possibly Illegal Designation of a New Acting Homeland Security Secretary, Explained, *Vox* (Apr. 8, 2019), <https://www.vox.com/2019/4/8/18299762/kevin-mcaleenan-claire-grady-acting-dhs-secretary> [<https://perma.cc/LM4J-TAYF>].

37. 6 U.S.C. § 113(g) (2018); see also Anne Joseph O'Connell (@AJosephOConnell), Twitter (Apr. 7, 2019), <https://twitter.com/AJosephOConnell/status/1115024242553151488> [<https://perma.cc/D35B-9HM8>]. See generally 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> (on file with the *Columbia Law Review*). Interestingly, McAleenan was placed in the acting role under 6 U.S.C. § 113(g) (2), not under the Vacancies Act, after Nielson revised the succession order before resigning. See Harrison Cramer & Zach C. Cohen, Inside Trump's Gambit to Install Another Acting DHS Secretary, *Nat'l J.* (Nov. 11, 2019), <https://www.nationaljournal.com/s/702570/inside-trumps-gambit-to-install-another-acting-dhs-secretary> [<https://perma.cc/JYL7-H3VP>]. House Democrats challenged McAleenan's service under the revised succession order—under the order's terms, he was not serving because the secretary was “unable to act during a disaster or catastrophic emergency.” Tanvi Misra, Legality of Wolf, Cuccinelli Appointments to DHS Questioned, *Roll Call* (Nov. 15, 2019), <https://www.rollcall.com/news/congress/legality-wolf-cuccinelli-dhs-appointments-questioned> [<https://perma.cc/JL2Y-UWVY>].

38. Daniel Lippman, Ian Kullgren & Anita Kumar, White House Plans to Name Chad Wolf Acting DHS Secretary, *Politico* (Oct. 31, 2019), <https://www.politico.com/amp/news/2019/10/31/chad-wolf-acting-dhs-secretary-063363> [<https://perma.cc/WQ6R-Z8EU>] (noting that the “White House had considered nominating acting Citizenship and Immigration Services Director Ken Cuccinelli for the [acting secretary] job, but learned that 20 senators opposed him”).

about Cuccinelli's confirmation prospects, President Trump had Cuccinelli named to a new "first assistant" position—that of Principal Deputy Director of U.S. Citizenship and Immigration Services (USCIS)—so he could then take the reins as acting Director.<sup>39</sup> But it is not clear if someone named as first assistant after the vacancy occurs qualifies to serve under the Vacancies Act.<sup>40</sup>

The leadership changes continue apace.<sup>41</sup> In some sense, President Trump's expressed adoration of acting leaders exposed what had been

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39. Ted Hesson, Cuccinelli Starts as Acting Immigration Official Despite GOP Opposition, *Politico* (June 10, 2019), <https://www.politico.com/story/2019/06/10/cuccinelli-acting-uscis-director-1520304> [<https://perma.cc/W5S8-PRRR>].

40. See *infra* section III.B.3.

41. In July 2019, Alex Acosta stepped down as Secretary of Labor "amid continuing questions about his handling of a sex crimes case involving the financier Jeffrey Epstein when Mr. Acosta was a federal prosecutor in Florida." Annie Karni, Eileen Sullivan & Noam Scheiber, Acosta to Resign as Labor Secretary over Jeffrey Epstein Plea Deal, *N.Y. Times* (July 12, 2019), <https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html> [<https://perma.cc/828X-N8X6>]. The Deputy Secretary took on the acting Secretary position. *Id.* The Senate confirmed Eugene Scalia as the next Secretary in late September. Noam Scheiber, Eugene Scalia Confirmed by Senate as Labor Secretary, *N.Y. Times* (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/business/economy/eugene-scalia-confirmed.html> [<https://perma.cc/DMH8-D9GX>]. In early October 2019, McAleenan announced he would resign after "managing a turbulent relationship with [the] [P]resident." Zolan Kanno-Youngs, Maggie Haberman & Michael D. Shear, Kevin McAleenan Resigns as Acting Homeland Security Secretary, *N.Y. Times* (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/us/politics/kevin-mcaleenan-homeland-security.html> [<https://perma.cc/7BDJ-R33R>]. The President then named Chad Wolf as the next acting Secretary, but Wolf's start date was not immediately clear. Nick Miroff, Trump Says Chad Wolf Now Acting Homeland Security Chief, Adding to Confusion About Transition, *Wash. Post* (Nov. 1, 2019), [https://www.washingtonpost.com/immigration/trump-says-chad-wolf-now-acting-homeland-security-chief-adding-to-confusion-about-transition/2019/11/01/dc81f0a2-fc3-11e9-ac8c-8eced29ca6ef\\_story.html](https://www.washingtonpost.com/immigration/trump-says-chad-wolf-now-acting-homeland-security-chief-adding-to-confusion-about-transition/2019/11/01/dc81f0a2-fc3-11e9-ac8c-8eced29ca6ef_story.html) (on file with the *Columbia Law Review*). Like Whitaker, Wolf had not been confirmed to any position at the time the President announced his selection, though his nomination to be the Under Secretary of Strategy, Policy, and Plans at DHS was pending in the Senate. See Nick Miroff, Chad Wolf to Take Over at DHS, but Senate Needs to Confirm Him for Different Job First, *Wash. Post* (Nov. 5, 2019), [https://www.washingtonpost.com/immigration/chad-wolf-to-take-over-at-dhs-but-senate-needs-to-confirm-him-for-different-job-first/2019/11/05/6a9e31d8-ffed-11e9-8501-2a7123a38c58\\_story.html](https://www.washingtonpost.com/immigration/chad-wolf-to-take-over-at-dhs-but-senate-needs-to-confirm-him-for-different-job-first/2019/11/05/6a9e31d8-ffed-11e9-8501-2a7123a38c58_story.html) (on file with the *Columbia Law Review*) [hereinafter Miroff, Wolf to Take Over DHS]. Like McAleenan, Wolf, once confirmed to the Undersecretary role, was appointed under the DHS succession order, not under the Vacancies Act. McAleenan revised the succession order before he departed (but after the Vacancies Act's time limit had run out) to permit Wolf's service. Misra, *supra* note 37. Although Nielsen's amendments to the succession order only permitted McAleenan to serve "during a disaster or catastrophic emergency," McAleenan's amendments allowed Wolf to serve more broadly "[i]n the case of the Secretary's death, resignation, or inability to perform the functions of the Office." *Id.*

Also, in October 2019, Secretary of Energy Rick Perry announced he would resign "amid scrutiny over his role in the Ukraine scandal." Lisa K. Friedman & Mariel Padilla, Trump Taps Dan Brouillette to Succeed Rick Perry as Energy Secretary, *N.Y. Times* (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/us/politics/dan-brouillette-energy-secretary-rick-perry.html> [<https://perma.cc/46AC-74GS>]. Unlike with DHS, President Trump quickly

previously unspoken: Modern Presidents rely heavily on acting officials. President Obama, for example, submitted far fewer agency nominations in his final two years than other recent two-term Presidents, turning instead to acting leaders and delegated authority in many important agency positions.<sup>42</sup> But President Trump's use of such temporary leaders has been far more extensive and controversial than his predecessors'.

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Given the prevalence of acting officials (and delegations of authority when time limits on acting officials run out) in modern presidential administrations, it is necessary to take a comprehensive look at these acting officials (and those exercising delegated functions) and the infrastructure through which they serve. To that end, this Article has several goals.

First, *descriptively*, in Part I, this Article explains the intricacies of the 1998 Vacancies Act and how that Act interacts with both agency-specific succession statutes and internal agency delegation. Notably, acting officials and delegation function as near substitutes. Not all agencies can take advantage of the Vacancies Act or other statutory provisions for acting officials, however. Specifically, independent regulatory commissions and boards may be paralyzed if they lose their mandated quorum as they typically both lack access to acting officials and cannot rely on delegation.

Second, *empirically*, in Part II, this Article provides much-needed grounding of the prevalence of acting officials in federal agencies. Using new data, it shows that the use of acting officials for the federal government's most senior positions—in the cabinet and for heads of the Environmental Protection Agency (EPA) and Federal Aviation Administration (FAA)—has increased significantly under the Trump Administration. But this empirical study also demonstrates that previous administrations relied considerably on temporary leaders for these important jobs, particularly at the start and end of presidential terms. Moreover, it shows that these positions were sometimes not filled with anyone—for instance, when the generous time limits of the Vacancies Act ran out (as happened for the secretary of commerce role for several months during President Obama's Administration). It also provides some information on acting officials and delegated authority in lower-level Senate-confirmed positions, across

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announced he would nominate the Deputy Secretary, Dan Brouillette, for the top position. Id. Although Perry did not leave until December 1, the Senate did not confirm Brouillette until December 2, so Brouillette served as acting Secretary for only a few days before he was officially sworn in. Nomination of Dan R. Brouillette, PN1268, 116th Cong. (2019), <https://www.congress.gov/nomination/116th-congress/1268> [<https://perma.cc/S3U6-B7TH>]; Ari Natter, Trump Nominates Energy Department's No. 2 to Replace Perry, Bloomberg (Nov. 7, 2019), <https://www.bloomberg.com/news/articles/2019-11-07/trump-nominates-energy-department-s-no-2-to-replace-perry> [<https://perma.cc/NQ7V-5BR4>].

42. Anne Joseph O'Connell, Staffing Federal Agencies: Lessons from 1981–2016, Brookings Inst. (Apr. 17, 2017), <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016> [<https://perma.cc/H3KW-M8N9>] [hereinafter O'Connell, Staffing Federal Agencies].

administrations in the EPA and at one point in 2019 (a “snapshot”) across all the cabinet departments.

Third, *legally*, in Part III, this Article considers a host of constitutional and statutory questions about temporary agency leadership. There are remarkably few cases addressing acting agency leaders or delegations of authority in the absence of acting or confirmed officials. There are open constitutional questions about who can serve in the federal government’s highest positions (principal offices) and for how long—questions that the new data can speak to, in part. As noted above, there are also unresolved statutory issues about how the Vacancies Act interacts with agency-specific statutes, whether the Vacancies Act covers firings, and whether a “first assistant” can be named after a vacancy arises and then serve in an acting role.

Some issues have both constitutional and statutory dimensions. Delegations of authority from vacant positions to lower-level actors, which often fully substitute for acting officials, can raise both Appointments Clause and statutory authority concerns. In addition, acting officials made key decisions that underlie high-profile separation of powers challenges to the CFPB and the Federal Housing Finance Agency (FHFA), including one case the Supreme Court heard in March 2020. Those structural challenges target the removal protections on the agencies’ leaders, which likely do not apply to acting officials. The presence of acting officials in those cases may therefore prevent resolution of the agencies’ constitutionality.

Fourth, *normatively*, in Part IV, this Article challenges the conventional concern about acting officials: that acting leaders function as “substitute teachers,” or worse, as “workarounds,” to the political accountability embedded in the Senate confirmation process. In some contexts, acting officials provide needed expertise and stability. This Article tries to flesh out both the attractions and costs of acting leadership in the administrative state (compared to other options, such as recess appointments), from each political branch’s perspective. The competing values and complex political incentives at stake preclude simple conclusions.

Finally, *prospectively*, in Part V, this Article tries to address some of the problems with acting leaders discussed in Parts III and IV by proposing politically feasible reforms to our current system that try to balance accountability and workability concerns. These reforms target, among other issues, the permissible types and tenures of acting officials, the interaction of relevant agency statutes and the Vacancies Act, and the scope and transparency of delegated authority in the absence of acting officials. In short, the reforms aim to reduce the legal ambiguity of the current Vacancies Act, restrict certain uses of acting officials and delegated authority while expanding others when formal nominations are pending, and improve public access to important information about these practices.

This Article concludes by calling on administrative law to pay attention not only to agency procedures but also to agency staffing, including temporary officials. These acting officials and delegations of authority are

another key example of “unorthodox” practices and the President’s growing role in the administrative state.<sup>43</sup>

One preliminary definitional issue seems in order. This Article distinguishes acting agency leaders from both confirmed and recess appointees. Even confirmed agency leaders, by nature of presidential elections or term limits, are temporary. These “in-and-outers,” as Hugh Hecla called them,<sup>44</sup> serve, on average, only two-and-a-half years.<sup>45</sup> Recess appointees are temporary too, limited by the length of the relevant congressional session.<sup>46</sup> Some of the distinction is formalistic. The former have the “acting” title; the latter do not. More importantly, acting leaders have not gone through an appointments process delineated in the Constitution. Some of their similarities (and differences) are taken up below.

Ultimately, we have to think about actings and traditional appointees together. By largely ignoring actings, we may have missed the forest for the trees in prior scholarly treatments of political appointments. Specifically, so many—commission after commission, scholar after scholar (myself included)—have called for Congress to reduce the number of Senate-confirmed lower-level positions across the federal bureaucracy. Practically, by their prevalence, Presidents’ extensive use of acting officials has done just that.

#### I. BASICS OF THE FEDERAL VACANCIES REFORM ACT OF 1998

Before providing an empirical portrait of acting officials, one must understand the primary components of the 1998 Vacancies Act, the latest statute providing mechanisms for acting agency leadership with all the formal authority of confirmed officials.<sup>47</sup> The first legislation for vacant positions dates to the Founding era.<sup>48</sup> In 1792, Congress allowed “any person or persons” to fill top jobs at the Departments of State, Treasury, and War until permanent officeholders returned to service or new ones were

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43. Cf. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *Colum. L. Rev.* 1789, 1791–96 (2015) (describing the emergence of unorthodox legislative and agency practices in recent decades).

44. Hugh Hecla, *A Government of Strangers: Executive Politics in Washington* 100 (1977).

45. Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 *Presidential Stud. Q.* 432, 436 (2009).

46. Since 2013, however, the Senate has not permitted the President to use recess appointments by conducting pro forma sessions. See *infra* notes 161–162 and accompanying text.

47. See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935–36 (2017) (recounting the history of the Vacancies Act). Since long before Congress enacted the current Vacancies Act, acting officials have been widely acknowledged to possess powers that a permanent officeholder would hold. See, e.g., *Ryan v. United States*, 136 U.S. 68, 81 (1890) (finding that the acting secretary of war had the full powers of the secretary of war).

48. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 1514–17 (2005).

appointed.<sup>49</sup> Three years later, Congress imposed a six-month time limit on these acting officials.<sup>50</sup> In the 1860s, Congress increased the number of positions the President could staff with acting officials, but reduced the permitted tenure to ten days in most instances and imposed qualifications on who could fill the roles.<sup>51</sup> In doing so, Congress restricted acting officials to the “first assistant” to the vacant position or another Senate-confirmed person.<sup>52</sup> In 1891, Congress extended the time limit for acting officials to thirty days.<sup>53</sup>

As described by the Supreme Court, “During the 1970s and 1980s, interbranch conflict arose over the [then-current] Vacancies Act.”<sup>54</sup> Presidents were pushing for more authority to name acting leaders; Congress for less. The Department of Justice (DOJ) claimed, in contrast to the Comptroller General, that an agency’s head “had independent authority apart from the Vacancies Act to temporarily fill vacant offices.”<sup>55</sup> In 1988, Congress stepped in by amending the Vacancies Act largely to adopt the Comptroller General’s position while also extending the time limit for acting to 120 days plus the time that passed while a nomination was pending.<sup>56</sup> The conflict did not abate—by the late 1990s, “[A]pproximately 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.’”<sup>57</sup>

In light of perceived massive noncompliance with the 1988 statute, Congress passed the current Vacancies Act in 1998, which further expanded the pool and tenure of potential acting officials but imposed more severe consequences for violations, or at least for successful lawsuits.<sup>58</sup> This Part describes the major components of the Act in more detail: which agencies are covered, the types of permissible acting officials, the time limits for acting service, consequences of violations and oversight of agency

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49. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

50. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

51. Act of July 23, 1868, ch. 227, 15 Stat. 168; Act of Feb. 20, 1863, ch. 45, 12 Stat. 656; see also Ian Bruckner, Tug of War: How the Federal Vacancies Reform Act Made Congress Lose Its Grip on Temporary Appointments 7 (2019) (unpublished working paper) (on file with the *Columbia Law Review*) (describing the stricter qualifications that Congress imposed on acting officials).

52. Act of July 23, 1868, ch. 227, § 1; see also Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* 113 (2017).

53. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

54. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

55. *Id.*

56. *Id.* at 936.

57. *Id.* (quoting Morten Rosenberg, Cong. Research Serv., No. 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative* 1 (1998), [https://www.everycrsreport.com/files/19981102\\_98-892\\_e35b004e5166781e938da36cf87598c023b03614.pdf](https://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf) [<https://perma.cc/U8XW-PJFY>]).

58. *Id.*

compliance, delegated authority as a substitute for acting officials, and the interaction of the Act with specific agency succession statutes.<sup>59</sup>

A. *Coverage of the Vacancies Act*

The Vacancies Act does not cover all 1,242 (by last official count) Senate-confirmed positions outside the federal courts.<sup>60</sup> Rather, it applies to roles in cabinet departments and agencies that are *not* led by multimember leadership teams—for example, in addition to the top leader, the Act covers assistant secretaries and inspectors general (IGs) in cabinet departments, as well as assistant administrators and IGs in single-headed agencies like the EPA, if those jobs are Senate confirmed.<sup>61</sup> Under the Act, these acting officials “perform the functions and duties of the office,” without any limitation on their formal authority.<sup>62</sup>

In addition to multimember leadership teams, the Vacancies Act excludes government corporations and independent establishments, Article I courts, and the Government Accountability Office (GAO).<sup>63</sup> The current statute thus leaves many entities without access to temporary leadership.<sup>64</sup> For example, the Merit Systems Protection Board (MSPB), which adjudicates

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59. In much of the discussion below, this Article draws from reports by Valerie C. Brannon and Jen Kirby. See generally Valerie C. Brannon, Cong. Research Serv., R44997, *The Vacancies Act: A Legal Overview* (2018), <https://fas.org/sgp/crs/misc/R44997.pdf> [<https://perma.cc/A4XH-52GQ>]; 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> [<https://perma.cc/4WCF-XUPB>].

60. S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong., *Policy and Supporting Positions* app. 1, at 216 (Comm. Print 2016) (a quadrennial report commonly referred to as the “Plum Book”).

61. 5 U.S.C. §§ 3345(a), 3349(c) (2018).

62. *Id.* § 3345(a); see also *Doolin Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 211 (D.C. Cir. 1998) (“The function of the Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to *validate the actions of those temporarily occupying the positions.*” (emphasis added)).

63. 5 U.S.C. § 3345(a). The Act does cover a few Senate-confirmed positions (outside the main leadership team) in independent regulatory commissions, such as the general counsel of the National Labor Relations Board. See *id.* §§ 3348(e), 3349(c).

64. Some of these agencies have specific statutory provisions for acting leaders. See, e.g., 15 U.S.C. § 2053(d) (2018) (providing that the Consumer Product Safety 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”). In addition, Congress has allowed leaders at some independent entities to stay beyond their appointed terms, through holdover provisions, if there is no confirmed successor. See generally Anthony Madonna & Ian Ostrander, *No Vacancy: Holdover Capacity and the Continued Staffing of Major Commissions*, 37 *J. Pub. Pol’y* 341 (2017) (describing and examining the effects of holdover provisions). These holdover provisions vary: Leaders at the Federal Communications Commission (FCC) and the Securities and Exchange Commission (SEC) “are allowed to serve until the end of the next session of Congress,” while appointees at the Federal Trade Commission (FTC) and the Federal Election Commission (FEC) “are allowed to serve until a successor replaces them.” *Id.* at 350.

disciplinary actions against federal employees, has been without a quorum since January 2017.<sup>65</sup> The Federal Election Commission (FEC) lost its quorum when Vice Chairman Matthew Peterson resigned at the end of August 2019.<sup>66</sup> The United States Postal Service's Board of Governors had no quorum from December 2014 to August 2019.<sup>67</sup> In the MSPB's case, critical adjudicatory work has stopped,<sup>68</sup> while the FEC is barred from "holding board meetings, starting audits, making new rules and levying fines for campaign finance violations."<sup>69</sup> The Postal Service delegated critical operating authority to a Temporary Emergency Committee, a legally questionable move.<sup>70</sup>

B. *Permitted Types of Acting Officials*

For covered positions, the "first assistant" to the vacant job is the default acting official.<sup>71</sup> For example, if there is no confirmed or recess-appointed secretary of commerce, the confirmed or recess-appointed deputy secretary of commerce, as the first assistant, typically becomes the acting secretary. The Vacancies Act does not define "first assistant."<sup>72</sup> Congress has specified who shall be the first assistant for certain positions in other statutes, and agencies generally have filled in the rest by

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65. Eric Katz, *Federal Employee Appeals Board Can No Longer Decide Appeals*, Gov't Executive (Jan. 5, 2017), <https://www.govexec.com/management/2017/01/federal-employees-appeals-board-can-no-longer-decide-appeals/134377> [https://perma.cc/2B6K-SESB].

66. Shane Goldmacher, *The Federal Election Commission Needs 4 of 6 Members to Enforce the Law. It Now Has 3.*, N.Y. Times (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/us/politics/federal-election-commission.html> [https://perma.cc/B4YV-GTFU].

67. Jory Heckman, *USPS Board Finally Reaches Quorum as 10-Year Postal Reform Plan Comes into Focus*, Fed. News Network (Aug. 2, 2019), <https://federalnewsnetwork.com/agency-oversight/2019/08/usps-board-finally-reaches-quorum-as-10-year-business-plan-comes-into-focus> [https://perma.cc/69Y6-D8NS]. From December 2016 to August 2018, there were no Senate-confirmed members of the Board. See Robert M. Duncan, *USPS*, <https://about.usps.com/who/leadership/board-governors/robert-duncan.htm> [https://perma.cc/93A6-RQ5Z] (last visited Oct. 14, 2019); David Thornton, *Postal Service's Future Uncertain with Empty Board of Governors*, Fed. News Network (Dec. 15, 2016), <https://federalnewsnetwork.com/postal-service-and-its-future-december-2016/2016/12/postal-services-future-uncertain-empty-board-governors> [https://perma.cc/RMB6-28D5].

68. U.S. Merit Sys. Prot. Bd., *Frequently Asked Questions About the Lack of Board Quorum and Lack of Board Members 1* (2019), [https://www.mspb.gov/FAQs\\_Absence\\_of\\_Board\\_Quorum\\_March\\_1\\_2019.pdf](https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf) [https://perma.cc/LHM6-63DJ].

69. Goldmacher, *supra* note 66; see also Courtney Bubl , *Election Oversight Agencies Struggle with Vacancies and Infighting*, Gov't Executive (Nov. 5, 2019), <https://www.govexec.com/oversight/2019/11/election-oversight-agencies-struggle-vacancies-and-infighting/161068> [https://perma.cc/W9S5-T3RJ] (noting that the FEC's "enforcement docket" is growing).

70. See *infra* notes 395–398 and accompanying text; see also Eleanor Eagan, *Year in Review—What Changed in Independent Agencies in 2019?*, CEPR (Jan. 27, 2020), <https://cepr.net/year-in-review-what-changed-at-independent-agencies-in-2019> [https://perma.cc/UF34-F5RT] (listing all agencies that lacked a quorum for at least part of 2019).

71. 5 U.S.C. § 3345(a)(1) (2018).

72. See Brannon, *supra* note 59, at 9 & n.74 (detailing case law, legislative history, and DOJ guidance on the term).

regulation.<sup>73</sup> It is not clear whether someone can be named first assistant after a vacancy occurs in order to step into the acting role.<sup>74</sup>

The Vacancies Act provides two alternatives to the “first assistant” for who can fill an acting position, but only the President, and not the agency, can exercise them.<sup>75</sup> First, “[T]he President (and only the President) may direct” another Senate-confirmed official—within the agency or outside it—to serve as the acting officeholder.<sup>76</sup> Acting officials drawn from this category typically served in the same agency previously.<sup>77</sup> There are, however, exceptions, such as Mulvaney and Wilkie.<sup>78</sup>

Second, “[T]he President (and only the President) may direct an officer or employee” who has not been Senate-confirmed to take over a position in an acting capacity, but only if that person has worked in the agency for at least ninety days during the year-long period before the vacancy occurred and is paid at the GS-15 level or higher.<sup>79</sup> During the early days of administrations, when there are few first assistants and confirmed officials, Presidents turn to this category for temporary leaders.<sup>80</sup> But this category is not restricted to the early months of a new President’s term, as evidenced by Whitaker’s service as acting Attorney General.<sup>81</sup>

Under the Vacancies Act, formal nominees usually “may not serve as an acting officer” for the position to which they have been nominated.<sup>82</sup> For instance, Wilkie and Esper had to step down as acting Secretaries while their nominations were pending.<sup>83</sup> There are only two exceptions—fewer now than before the Supreme Court upended nearly two decades of

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73. *Id.* at 9–10, 10 n.75.

74. See *infra* section III.B.3.

75. There is another set of permitted acting officials: Those who serve a fixed term in a covered agency (such as the head of the FHFA) may continue in that position in an acting capacity after the term expires if the President has nominated them to an additional term. 5 U.S.C. § 3345(c)(1). This Article focuses on the three main categories—first assistants, Senate-confirmed officials, and senior agency staffers.

76. *Id.* § 3345(a)(2).

77. See, e.g., Michael Tackett, Another Day, Another ‘Acting’ Cabinet Secretary as Trump Skirts Senate, *N.Y. Times* (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/us/politics/trump-acting-cabinet-secretaries.html> [<https://perma.cc/LP42-CH2Z>] (noting that former acting Secretary of Defense, Patrick Shanahan, and then-acting Secretary of the Interior, David Bernhardt, previously held Senate-confirmed positions within their departments).

78. See *supra* notes 17–21 and accompanying text (describing how President Trump named Mulvaney and Wilkie to acting positions leading agencies in which they had not been previously serving).

79. 5 U.S.C. § 3345(a)(3).

80. See *infra* section II.B.

81. See *supra* notes 5–9 and accompanying text.

82. 5 U.S.C. § 3345(b)(1)(B).

83. See *supra* notes 25–26, 34–35 and accompanying text.

executive practice.<sup>84</sup> Nominees can serve as the acting official only if they were confirmed as the first assistant or have been the first assistant for at least ninety days in the year prior to the vacancy.<sup>85</sup> For example, under the Vacancies Act, Gina Haspel could continue as acting Central Intelligence Agency (CIA) Director when her nomination was pending because she had been the (unconfirmed) Deputy Director for over a year when Mike Pompeo resigned to become Secretary of State.<sup>86</sup> Sometimes, it is complicated to determine eligibility.<sup>87</sup>

C. *Limits on Acting Service Tenure*

Although the Vacancies Act's time limits are longer than those of prior statutes, determining precisely how long any given acting official can serve presents a puzzle fit for a math class.<sup>88</sup> If there is no pending nomination, acting officials generally can serve for only 210 days from the vacancy's start date.<sup>89</sup> If the vacancy exists when a new President takes office, or comes within the next sixty days, acting officials can serve for 300 days.<sup>90</sup>

Nominations lengthen the permitted tenure of temporary leaders. Acting officials may serve during the pendency of two nominations to the vacant position. If each nomination fails, a new 210-day period of service runs from the date of the failure. Thus, it is possible for an acting official to work for 210 (or 300) days before there is a nomination, during a first nomination, for 210 days after that nomination fails, during a second nomination, and for a final 210 days if the second nomination fails as

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84. Until 2017, the White House followed 1999 guidance by the Office of Legal Counsel (OLC) that also permitted Senate-confirmed officials (in positions other than the first assistant) and senior agency workers with the requisite tenure and pay to serve as acting leaders while their nominations were pending. Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) [hereinafter Guidance on Application of the Vacancies Act]. In 2017, the Court disagreed, finding that the restrictions on nominees applied to all three categories of acting officials. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938 (2017).

85. See 5 U.S.C. § 3345(b)(1)(A), (b)(2)(B); *SW Gen.*, 137 S. Ct. at 938.

86. See Patricia Zengerle, U.S. Senate Confirms Haspel to Be First Woman CIA Director, Reuters (May 17, 2018), <https://www.reuters.com/article/us-usa-trump-haspel/u-s-senate-confirms-haspel-to-be-first-woman-cia-director-idUSKCN1II2SV> [<https://perma.cc/PCX5-AYKM>]. Even if Haspel had not met the Vacancies Act's time mandate, she could have continued serving as acting Director while her nomination was pending under the CIA's succession provision. 50 U.S.C. § 3037(b)(2) (2018).

87. See, e.g., Tal Kopan, Trump Nominates New ICE Director, CNN (Aug. 6, 2018), <https://www.cnn.com/2018/08/06/politics/ice-trump-vitiello/index.html> [<https://perma.cc/P5JV-KHHT>] ("When Vitiello was named acting director [of ICE], his career position with the department was also transferred from Customs and Border Protection to ICE, making him the top career official at ICE. That transfer allows him to remain in the position of acting director legally even while nominated.")

88. See *SW Gen.*, 137 S. Ct. at 935–36.

89. 5 U.S.C. § 3346(a)(1).

90. *Id.* § 3349(a)(b).

well.<sup>91</sup> For instance, during the President's first year, an acting official could serve through November 16; the President could submit a nomination on November 17 and the Senate could return it on January 3; and the second nomination could be made 211 days after the return of the first nomination (on August 1) and be returned on January 3 of the third year. The final 210 days would run out on July 31 again—over two and a half years after the acting official began.

These time limits reset for each President. For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) had no confirmed or recess-appointed leader from early 2006 (when Congress began to require Senate confirmation for the job) to July 2013, but it almost always had an acting director.<sup>92</sup> The vacancy endured for nearly a decade, due in part to the fact that the Vacancies Act clock reset when President Obama took office in January 2009.

#### D. *Compliance and Oversight*

In designing the Vacancies Act, Congress was frustrated with acting officials serving past established deadlines in earlier statutes.<sup>93</sup> While the current statute does not establish a direct way to remove a noncompliant acting official,<sup>94</sup> it does provide that certain actions by almost all improperly serving acting officials should have “no force or effect.”<sup>95</sup> For almost all covered positions, the agency thus cannot turn to a harmless error defense or the de facto officer doctrine.<sup>96</sup> In other words, officials serving in violation of the Act can be treated more harshly than those operating unconstitutionally.

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91. See Brannon, *supra* note 59, 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.” 5 U.S.C. § 3346(a).

92. Sari Horwitz, *Senate Confirms ATF Director*, Wash. Post (July 31, 2013), [http://wapo.st/1cpQigC?tid=ss\\_tw](http://wapo.st/1cpQigC?tid=ss_tw) (on file with the *Columbia Law Review*).

93. See *supra* notes 54–58 and accompanying text.

94. See Brannon, *supra* note 59, at 19–20.

95. 5 U.S.C. § 3348(d)(1).

96. See Brannon, *supra* note 59, at 6 (describing the D.C. Circuit's rejection of the harmless error defense and the de facto officer doctrine). It is unclear what would happen to actions by anyone acting improperly as the general counsel of the NLRB or Federal Labor Relations Authority (FLRA), as an inspector general, or as a chief financial officer. 5 U.S.C. § 3348(e); see also *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015) (assuming, because the parties agreed, that the actions of the acting General Counsel of the NLRB would be voidable but leaving open that the actions may be “wholly insulate[d]”). The Supreme Court did not decide this issue. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938 n.2 (2017). In 2017, the newly confirmed General Counsel of the NLRB ratified the decisions of his acting predecessor. See, e.g., *Butler Medical Transport, L.L.C.*, 365 N.L.R.B. No. 112, 1 n.2 (July 27, 2017).

The Act thus offered something to both the White House (longer time limits) and Congress (harsh penalties once they expired). The statute, however, has no enforcement mechanism; injured parties must sue to have actions made by illegally serving acting officials struck down.<sup>97</sup> As of December 31, 2019, there had been only twelve unique judicial decisions that cite the Vacancies Act's "no force or effect" provision.<sup>98</sup>

The statute tasks the GAO with notifying the relevant congressional committees if it finds violations of the Act's time limits.<sup>99</sup> Congress does, at times, follow up with oversight hearings.<sup>100</sup> For example, the House Ways and Means Subcommittee on Social Security held a hearing in March 2018 on leadership challenges at the Social Security Administration (SSA) after the acting Commissioner of the SSA, Nancy Berryhill, had used the title months after the 300-day limit had passed.<sup>101</sup>

The Vacancies Act also requires that agencies report vacancies, acting officials, and nominations to the GAO, but it offers no penalty for failing to report.<sup>102</sup> Despite regular reminders to report, agencies do not fully comply.<sup>103</sup> While many eventually report long-term vacancies, only some report the relevant acting official. Even fewer provide the start and end

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97. See S. Rep. No. 105-250, at 19–20 (1998) ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action.").

98. Following Brannon's methodology, I performed a search to locate cases from after the Vacancies Act's enactment on October 21, 1998 to August 1, 2019 that cite 5 U.S.C. § 3348. See Brannon, *supra* note 59, at 21 n.182. Of the nineteen unique cases (one case appears twice in the results), ten discuss the part of § 3348 relevant here. *SW Gen.*, 137 S. Ct. at 937; *Creative Vision Res., L.L.C. v. NLRB*, 882 F.3d 510, 528 n.6 (5th Cir. 2018); *Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375, 383 n.7 (1st Cir. 2017); *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 564 (9th Cir. 2016); *SW Gen.*, 796 F.3d at 71; *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009); *Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1133 (C.D. Cal. 2019); *United States v. Santos-Caporal*, 2019 U.S. Dist. LEXIS 19282, at \*9 (E.D. Mo. 2019); *United States v. Peters*, 2018 U.S. Dist. LEXIS 204067, at \*8 (E.D. Ky. 2018); *Hooks v. Remington Lodging & Hospitality, L.L.C.*, 8 F. Supp. 3d 1178, 1189 (D. Alaska 2014). Two other cases cite the relevant provision. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019), cert. denied, No. 19–296, 2020 WL 981797 (Mem.) (U.S. Mar. 2, 2020); *Stand Up for California! v. U.S. Dep't of Interior*, 298 F. Supp. 3d 136, 150 (D.D.C. 2018). See also Brannon, *supra* note 59, at 21 n.182 (documenting fifteen cases that cite 5 U.S.C. § 3348).

99. 5 U.S.C. § 3349(b).

100. See Brannon, *supra* note 59, at 20 ("[I]f the Comptroller General [reports noncompliance] to Congress, this reporting mechanism may prompt congressional action pressuring the executive branch to comply with the Vacancies Act, exerted through normal channels of oversight.").

101. *Lacking a Leader: Challenges Facing the SSA After over 5 Years of Acting Commissioners: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 115th Cong. 1 (2018) [hereinafter *Lacking a Leader*]; see also Brannon, *supra* note 59, at 20 (discussing the events that prompted the subcommittee hearing).

102. 5 U.S.C. § 3349(a).

103. See *infra* section V.C.1.

dates of acting service or information about who has been nominated to the permanent position. These deficiencies in agency reporting make it difficult for the GAO to identify violations of the statute.<sup>104</sup>

E. *Delegated Authority as a Substitute for Acting Officials*

For all the detail given to permissible types of acting officials, their tenures, and the severe consequences of violations, the Vacancies Act now appears to provide an easy workaround in many cases: delegate the tasks of the vacant office.<sup>105</sup> The Vacancies Act partially addresses this workaround by preventing delegation “downward” of any functions and duties that are established by statute or regulation that are to be performed by “the applicable officer (and only that officer).”<sup>106</sup> These functions and duties are commonly known as “non-delegable functions or duties.”<sup>107</sup> For those functions and duties assigned to lower-level officials, the Act permits only “the head” of the agency to perform them when the lower-level positions are vacant, except for a small set of more independent roles such as IGs.<sup>108</sup> Agencies can change their regulations about non-delegable tasks,

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104. See *infra* notes 567–570 and accompanying text.

105. Relying on legislative history and a close textual reading of the Vacancies Act, Mendelson has recently challenged this practice. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?* 21–29 (Dec. 17, 2019) (unpublished working paper) [hereinafter Mendelson, *The Permissibility of Acting Officials*] (on file with the *Columbia Law Review*). Specifically, she points out that “the definition in section 3348 [of the Vacancies Act] that contains the exemption for delegable duties states that it refers to the meaning of ‘function or duty’ ‘in this section,’ rather than the entire Act.” *Id.* at 26 (quoting 5 U.S.C. § 3348(a)). In addition, she argues that if the delegable duties in that section “carry throughout the statute . . . so that the entirety of a Senate-confirmed official’s responsibilities could be delegated to another individual,” it “would make trivial 5 U.S.C. [§] 3347(b)’s clear statement that the [Vacancies Act]’s acting provisions ‘are the exclusive means for temporarily authorizing an acting official to perform the functions and duties’ of a Senate-confirmed office, without exception for agency delegation statutes.” *Id.* at 27 (quoting 5 U.S.C. § 3347(a)–(b)). Because these delegation practices are pervasive and have largely been upheld by the limited courts to consider them, this Article treats them as permissible (though not necessarily desirable) under the Vacancies Act. Cf. *L.M.-M. v. Cuccinelli*, No. 19-2676, 2020 WL 985376, at \*23 (D.D.C. Mar. 1, 2020) (finding that “[d]epartment heads and other officials may . . . delegate duties to multiple officials so long as they do so 180 days before the vacancy arises”).

106. 5 U.S.C. § 3348 (a) (2), (b) (2). For example, the secretaries of treasury, labor, and commerce make up the board of directors for the Pension Benefit Guaranty Corporation. 29 U.S.C. § 1302(d) (1) (2018). Acting secretaries have the full power of the secretaries and thus sit on the board. Until recently, one had to be a secretary or acting secretary for constituting a quorum of the board. 29 U.S.C. § 1302(d) (3); 29 C.F.R. § 4002.3 (2008) (repealed 2017). Thus, when the Vacancies Act’s time limits ran out for the acting Secretary of Commerce in President Obama’s Administration, the board’s duties could not be delegated. Under the board’s current bylaws, that is no longer true. 29 C.F.R. § 4002.1(a) (1) (2018) (“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.”).

107. S. Rep. No. 105-250, at 18 (1998).

108. 5 U.S.C. §§ 3348 (b) (2), (e).

but there is a 180-day look-back period from the date of any vacancy (so any regulation in effect in that period that makes a function or duty non-delegable would remain in force).<sup>109</sup>

Despite the Vacancies Act's prohibition on certain delegations, many functions and duties are regularly delegated to lower-level officials when vacancies arise, particularly after the Act's time limits for acting service have expired—the scope of which Congress almost certainly did not anticipate. Early on, the Office of Legal Counsel (OLC) used the Act's ambiguity to acknowledge that “[m]ost, and in many cases all, the responsibilities performed by a [Senate-confirmed] officer will not be exclusive, and the Act permits nonexclusive responsibilities to be delegated to other appropriate officers and employees in the agency.”<sup>110</sup>

The SSA's statute, for example, provides that “[t]he Commissioner may assign duties, and delegate, or authorize successive redelegations of, authority to act and to render decisions, to such officers and employees of the Administration as the Commissioner may find necessary.”<sup>111</sup> After the GAO notified Berryhill of her noncompliance with the Vacancies Act, she stepped down as “acting Commissioner” of the SSA.<sup>112</sup> She continued to perform the same role as before, but without the acting title, until Andrew Saul was formally nominated as the next SSA Commissioner in January 2019.<sup>113</sup> As Deputy Commissioner of Operations, Berryhill could exercise all the functions of the commissioner through delegation.<sup>114</sup>

109. See Guidance on Application of the Vacancies Act, *supra* note 84, at 71.

110. *Id.* at 72 (noting Congress's understanding that there would be periods without acting officials and “that if everything the [Senate-confirmed] 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”).

111. 42 U.S.C. § 902(a)(7) (2018).

112. Charles S. Clark, Lawmakers on Both Sides of Aisle Ramp Up Pressure for Permanent SSA Leader, Gov't Executive (Mar. 7, 2018), <https://www.govexec.com/oversight/2018/03/lawmakers-both-sides-aisle-ramp-pressure-permanent-ssa-leader/146484> [<https://perma.cc/93SX-D4AR>] (quoting the agency's response to the news of Berryhill's noncompliance: “Out of an abundance of caution . . . Berryhill will continue to lead the agency from her position of record, deputy commissioner of operations . . . . Beyond the change in title, there will be no impact in the agency's service . . . .”).

113. *Id.*; see also Nomination of Andrew M. Saul, PN94, 116th Cong. (2019), <https://www.congress.gov/nomination/116th-congress/94> [<https://perma.cc/4AG3-LFD5>]. Saul's pending nomination allowed Berryhill to use the acting title again until the Senate confirmed him in June. See Andrew Saul, Commissioner, Soc. Sec. Admin., <https://www.ssa.gov/agency/commissioner.html> [<https://perma.cc/QTF9-3NGT>] (last visited Feb. 13, 2020).

114. Brannon, *supra* note 59, at 20. Agencies often have standing delegations in place, even in the absence of vacancies. See, e.g., 28 C.F.R. § 0.15(a) (2018) (“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.”). They can also usually issue ad hoc delegations as the need arises. Mendelson's research, however, “located no [public] delegation . . . or any other legal authority for” Berryhill's actions after the Vacancies Act's time limits ran out. Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 29.

Presidents can strategically use delegation to keep their preferred officials in control of certain administrative functions long past the Vacancies Act's time limits. When the first confirmed Director of the ATF stepped down in April 2015, Thomas Brandon, the nonconfirmed career deputy, stepped into the role of acting Director.<sup>115</sup> After the 210-day clock ran out, Brandon continued to perform the duties of the director but without the acting title.<sup>116</sup> Interestingly, with Republicans in control of the Senate, President Obama strategically chose not to nominate someone to the job.<sup>117</sup> Because of the delegability of the agency's functions and duties, the Administration could continue to press its policies on gun violence and "avoid a nasty confirmation hearing for a troubled agency."<sup>118</sup> Brandon continued to lead in a similar manner for over two years in the Trump Administration.<sup>119</sup>

Understandably, the media and even members of Congress often fail to distinguish acting officials from officials performing delegated functions. For example, a dozen Senate Democrats sent a letter to David Bernhardt, Secretary of the Interior, in late September 2019 asking him to "terminate" the authority of William Pendley, who had been delegated the duties of the director of the Bureau of Land Management (BLM).<sup>120</sup> The letter called Pendley "an [a]cting Director who spent his career attempting to dismantle the agency."<sup>121</sup> But the time limits for acting leadership had long since expired in the absence of any formal nomination for the director position.<sup>122</sup>

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115. Sarah Wheaton, *White House to Demote ATF Chief—To Keep Him on the Job*, Politico (Oct. 8, 2015), <https://www.politico.com/story/2015/10/atf-thomas-brandon-acting-head-demotion-214542> [<https://perma.cc/G2CF-N48E>].

116. *Id.*

117. See *id.* (suggesting that the White House "reversed course" on nominating Brandon for the permanent position in order to avoid a heated confirmation process).

118. *Id.*

119. A new Deputy Director was named in May 2019. Executive Staff: Acting Deputy Director Regina Lombardo, Bureau of Alcohol, Tobacco, Firearms & Explosives, <https://www.atf.gov/about-atf/executive-staff> [<https://perma.cc/MCH2-BQF2>] (last modified May 20, 2019).

120. Letter from Michael F. Bennet, Tom Udall, Jon Tester, Martin Heinrich, Kamala D. Harris, Dianne Feinstein, Sherrod Brown, Bernard Sanders, Jeffrey A. Merkley & Chris Van Hollen, U.S. Senators, to David L. Bernhardt, Sec'y, U.S. Dep't of the Interior (Sept. 26, 2019) (on file with the *Columbia Law Review*).

121. *Id.*

122. Because President Trump had not formally nominated anyone for the position since taking office, the Vacancies Act permitted only 300 days of acting service in the first year. See Steven Mufson, *Trump's Pick for Managing Federal Lands Doesn't Believe the Government Should Have Any*, Wash. Post (July 31, 2019), [https://www.washingtonpost.com/climate-environment/trumps-pick-for-managing-federal-lands-doesnt-believe-the-government-should-have-any/2019/07/31/0bc1118c-b2cf-11e9-8949-5f36ff92706e\\_story.html](https://www.washingtonpost.com/climate-environment/trumps-pick-for-managing-federal-lands-doesnt-believe-the-government-should-have-any/2019/07/31/0bc1118c-b2cf-11e9-8949-5f36ff92706e_story.html) (on file with the *Columbia Law Review*).

F. *Interactions with Agency-Specific Succession Statutes*

The Vacancies Act is generally intended to be the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [covered] office.”<sup>123</sup> But it does provide two exceptions: statutes that “expressly” provide for some alternative and recess appointments.<sup>124</sup>

There are many agency-specific succession statutes.<sup>125</sup> Few, however, unarguably “expressly” displace the Vacancies Act.<sup>126</sup> For example, the Attorney General Succession Act provides that “the Deputy Attorney General *may* exercise all the duties of [the office of Attorney General]” and identifies the deputy attorney general as the first assistant.<sup>127</sup> The Dodd-Frank Act specifies that the deputy director of the CFPB “shall . . . serve as acting Director in the absence or unavailability of the Director.”<sup>128</sup> And the Intelligence Reform and Terrorism Prevention Act of 2004 provides that 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.”<sup>129</sup> Part III addresses in more detail whether the DOJ, CFPB, or Director of National Intelligence (DNI) statutes “expressly” supersede the Vacancies Act.<sup>130</sup>

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The Vacancies Act is a complex statute. In the oral argument for *NLRB v. SW General, Inc.*, in which the Court narrowed who could be both a formal nominee and the acting official,<sup>131</sup> Justice Elena Kagan questioned the lawyer representing SW General. She suggested that the company should go to the press and say the NLRB violated the Act: “Who wouldn’t say that in that circumstance?” The lawyer replied: “Somebody who then was going to be pressed and had to explain the technicalities of why the appointment was illegal.”<sup>132</sup> The courtroom erupted in laughter.

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123. 5 U.S.C. § 3347(a) (2018).

124. *Id.*

125. See Anne Joseph O’Connell, Admin. Conference of the U.S., Acting Agency Officials and Delegations of Authority app. A, at 74–100 (2019), <https://www.acus.gov/sites/default/files/documents/final-report-acting-agency-officials-12012019.pdf> [<https://perma.cc/4LFN-ZPEW>] [hereinafter O’Connell, Acting Agency Officials] (listing agency-specific statutory provisions for temporary leadership).

126. See *infra* section III.B.1.

127. 28 U.S.C. § 508(a) (2018) (emphasis added).

128. 12 U.S.C. § 5491(b)(5)(B) (2018).

129. 50 U.S.C. § 3026(a)(6) (2018).

130. See *infra* section III.B.1.

131. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

132. Transcript of Oral Argument at 40, *SW Gen.*, 137 S. Ct. 929 (No. 15-1251), 2016 WL 6583480.

## II. SCOPE OF ACTINGS

This Part turns to the scope of acting officials in federal agencies. The press, from time to time, has provided snapshots of acting leadership. Currently, President Trump's professed adoration of "actings" has gained widespread attention.<sup>133</sup> But President Obama, too, was judged as being "outside the norm" for his use of acting leaders.<sup>134</sup> Citing departures of confirmed appointees for "higher paying gigs" and "replacements stuck in Senate limbo," *Politico* found in January 2016 that "dozens of crucial jobs in [President Obama's] administration [were] either totally empty or run by an acting deputy."<sup>135</sup> Moreover, as President Obama entered his final year, *Politico* reported that "[m]ore than a quarter of the administration's most senior jobs [out of 379 positions in cabinet-level agencies], more than 100 overall, [were] missing permanent occupants."<sup>136</sup> In the Department of Education, for example, there were acting officials in ten of the top sixteen spots, including the secretary and deputy secretary positions.<sup>137</sup>

President George W. Bush also relied heavily on acting officials. Professor Paul Light, a leading scholar of agency appointments, told the *New York Times* in October 2007 that "you've got more vacancies now than a hotel in hurricane season. In my 25 years of studying these issues, I've never seen a vacancy rate like this."<sup>138</sup> At that point, the Bush Administration had three acting cabinet secretaries (at the Departments of Agriculture, Justice, and Veterans Affairs) and only one submitted nomination.<sup>139</sup> Acting officials also staffed the next two highest positions at DOJ, and there were interim administrators of the Centers for Medicare and Medicaid Services, the Agency for International Development, and other programs.<sup>140</sup>

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133. See *supra* note 1 and accompanying text.

134. See Darren Samuelsohn, *Obama's Vanishing Administration*, *Politico* (Jan. 5, 2016), <https://www.politico.com/story/2016/01/obamas-vanishing-administration-217344> [<https://perma.cc/CL6Y-5FBA>] ("[T]he Obama vacancies are seen by experts as outside the norm, thanks in large part to a gridlocked congressional confirmation process that was blocking jobs from being filled even before the lame-duck phase began.").

135. *Id.*

136. *Id.*

137. *Id.*

138. Philip Shenon, *Interim Heads Increasingly Run Federal Agencies*, *N.Y. Times* (Oct. 15, 2007), <https://www.nytimes.com/2007/10/15/washington/15interim.html> [<https://perma.cc/LHJ4-G8ED>].

139. *Id.*

140. *Id.*; see also Spencer Hsu, *Job Vacancies at DHS Said to Hurt U.S. Preparedness*, *Wash. Post* (July 9, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/08/AR2007070801201.html> (on file with the *Columbia Law Review*) (finding that "Homeland Security had 138 vacancies among its top 575 positions [clearly many not Senate-confirmed], with the greatest voids reported in its policy, legal and intelligence sections, as well as in immigration agencies, the Federal Emergency Management Agency and the Coast Guard").

This Part provides more systematic data and analysis than previously available.<sup>141</sup> The first section summarizes the paucity of public data and the limited existing research. Using new data, the second section does a deep dive into the top leaders of the fifteen cabinet departments in modern administrations—confirmed, recess-appointed, and acting secretaries—comparing tenures and types of acting officials. The third section turns to three Senate-confirmed positions at the EPA (the administrator, deputy administrator, and general counsel) to provide a more complete picture of acting leaders in both principal and inferior offices in one sample agency. The fourth and fifth sections examine vacancies in the top position at the FAA and provide a recent snapshot of the staffing status of hundreds of Senate-confirmed positions in the cabinet departments, respectively. The final section discusses some avenues for future research.

#### A. *Past Research*

While there has been considerable research on agency appointment delays,<sup>142</sup> few have systematically studied acting officials, despite their prevalence in the administrative state. This paucity of attention presumably

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141. Some of the research here was previously reported in two online reports. See O’Connell, *Acting Agency Officials*, *supra* note 125; Anne Joseph O’Connell, *Acting Leaders: Recent Practices, Consequences, and Reforms*, Brookings Inst. (July 22, 2019), <https://www.brookings.edu/research/acting-leaders> [<https://perma.cc/9PRG-QCM6>] [hereinafter O’Connell, *Acting Leaders*]. I updated the cabinet secretary and EPA research from the Brookings report through January 19, 2020.

142. See Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 *Duke L.J.* 1645, 1654 nn.42–43 (2015) [hereinafter O’Connell, *Shortening Vacancies*] (collecting political science studies of agency nominations); *id.* at 1655 n.45 (collecting CRS studies of nominations for particular congresses); *id.* at 1681–82 nn.90–106 (collecting theoretical research; empirical work on the connection between confirmation times and presidential approval and nominations to independent agencies with “holdover capacity”; and empirical studies on the connection between nomination success or failure and various external factors including presidential popularity and partisan polarization). Since 2015, there has been some additional work. See generally, e.g., Heather Ba, Brandon Schneider & Terry Sullivan, *White House Transition Project, Presidential Leadership and Initiative in Appointments Politics* (2018), [http://www.whitehousetransitionproject.org/wp-content/uploads/2018/08/Roles\\_of\\_Leadership\\_in\\_Appointments\\_2018-08-10.pdf](http://www.whitehousetransitionproject.org/wp-content/uploads/2018/08/Roles_of_Leadership_in_Appointments_2018-08-10.pdf) [<https://perma.cc/ZT52-YBNS>]; Gary E. Hollibaugh, Jr., *Vacancies, Vetting, and Votes: A Unified Dynamic Model of the Appointments Process*, 27 *J. Theoretical Pol.* 206 (2015); Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *The When and Why of Nominations: Determinants of Presidential Appointments*, 45 *Am. Pol. Res.* 280 (2017); Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *The Who, When, and Where of Executive Nominations: Integrating Agency Independence and Appointee Ideology*, 62 *Am. J. Pol. Sci.* 296 (2018); O’Connell, *Staffing Federal Agencies*, *supra* note 42; Anne Joseph O’Connell, *After One Year in Office, Trump’s Behind on Staffing but Making Steady Progress*, Brookings Inst. (Jan. 23, 2018), <https://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress> [<https://perma.cc/29CP-QLM5>] [hereinafter O’Connell, *Trump’s First Year*]; Anne Joseph O’Connell, *Trump’s Staffing Record in the First 100 Days Was Slow, but Not Catastrophic*, Brookings Inst. (May 1, 2017), <https://www.brookings.edu/research/trumps-staffing-record-in-the-first-100-days-was-slow-but-not-catastrophic> [<https://perma.cc/6U2T-YEY2>].

derives largely from the absence of centrally collected data on acting agency leaders.<sup>143</sup> The limited work that exists has either examined vacancy lengths using data on the start and end dates of confirmed officials from the Office of Personnel Management (OPM) or agency-reported information to the GAO, or has analyzed yearly snapshots of agency leadership.

Some work on agency appointments provides upper bounds on the tenure of acting leaders but focuses on the lengths of vacancies rather than the identities and tenures of acting officials.<sup>144</sup> Using OPM start and end dates for cabinet departments and free-standing executive agencies (those run by single heads) from 1977 to 2005, I previously found that Senate-confirmed positions did not have confirmed or recess-appointed occupants between 15% and 25% of the time.<sup>145</sup> Other scholars determined vacancy rates for individual Senate-confirmed jobs at the Departments of Commerce and Health and Human Services (HHS) between 1989 and

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143. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2571 (2014) (“The Congressional Research Service is ‘unaware of any official source of information tracking the dates of vacancies in federal offices.’” (quoting Memorandum from Henry B. Hogue, Maeve P. Carey, Michael W. Green & Maureen Bearden, Cong. Research Serv., on *The Noel Canning* Decision and Recess Appointments Made from 1981–2013, at 3 n.6 (Feb. 4, 2013), <https://fas.org/sgp/crs/misc/m020413.pdf> [<https://perma.cc/M3W8-PZCA>])); U.S. Gov’t Accountability Office, GAO-19-249, *Federal Ethics Programs: Government-Wide Political Appointee Data and Some Ethics Oversight Procedures at Interior and SBA Could Be Improved* 13 (2019), <https://www.gao.gov/assets/700/697593.pdf> [<https://perma.cc/3SSA-56XP>] [hereinafter U.S. Gov’t Accountability Office, *Federal Ethics Programs*] (“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.”). ACUS has recently called on agencies to provide more information about confirmed and acting leaders. Admin. Conference of the U.S., *Administrative Conference Recommendation 2019-7: Acting Agency Officials and Delegations of Authority* 7 (Dec. 12, 2019), [https://www.acus.gov/sites/default/files/documents/12122019-adopted-recommendation-post-plenary-actings-dec272019\\_0.pdf](https://www.acus.gov/sites/default/files/documents/12122019-adopted-recommendation-post-plenary-actings-dec272019_0.pdf) [<https://perma.cc/G5HV-EV9E>] [hereinafter *ACUS Recommendation 2019-7*]; Admin. Conference of the U.S., *Administrative Conference Recommendation 2019-8: Public Identification of Agency Officials* 5 (Dec. 12, 2019), <https://www.acus.gov/sites/default/files/documents/12122019-adopted-recommendation-post-plenary-listing-dec272019.pdf> [<https://perma.cc/7EMM-EPA2>]; see also Admin. Conf. of the U.S., *Recommendation 2019-7, Acting Agency Officials and Delegations of Authority*, 84 Fed. Reg. 71,352 (Dec. 27, 2019) (recording recommendation 2019-7); Admin. Conf. of the U.S., *Recommendation 2019-8, Public Identification of Agency Officials*, 84 Fed. Reg. 71,354 (Dec. 27, 2019) (recording recommendation 2019-8).

144. The discussion here has focused on vacancy periods in cabinet departments and single-headed agencies. There is some limited work examining such periods in independent regulatory commissions and boards. See generally, e.g., David C. Nixon & Roisin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 *Admin. & Soc’y* 679 (2006) (examining the effects of external factors on appointments to the National Transportation Safety Board); David C. Nixon, *Appointment Delay for Vacancies on the Federal Communications Commission*, 61 *Pub. Admin. Rev.* 483 (2001) (building a dataset of vacancies at the Federal Communications Commission).

145. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 *S. Cal. L. Rev.* 913, 962, 965 (2009) [hereinafter *O’Connell, Vacant Offices*] (finding a 25% vacancy rate from 1977 to 2005 using the average vacancy period and the average tenure period).

2009.<sup>146</sup> Averaging across those positions, one sees that Commerce and HHS lacked confirmed or recess appointees more than 20% of the time.<sup>147</sup>

More recently, several researchers, 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.<sup>148</sup> They reported that the positions were vacant, on average, for at least 151 days during a congressional term—generating a 21% vacancy rate.<sup>149</sup>

There is some work on vacancies in specific positions.<sup>150</sup> Examining vacancies for FY 2007–FY 2016 in Senate-confirmed IG positions, the GAO reported on the number and length of vacancies.<sup>151</sup> During the ten-year period, there were sixty-two vacancies, with a high of nine in 2016, and a low of three in 2007.<sup>152</sup> Of all thirty-two Senate-confirmed positions in the period, six had no vacancies, six had vacancies totaling under one year, nine had gaps totaling between one and three years, and eleven had openings lasting over three years.<sup>153</sup>

The best research to date on acting leaders themselves comes from Professor Christina Kinane. She collected information on Senate-confirmed positions in all cabinet departments from 1977 to 2015 from annual editions of the United States Government Manual and quadrennial editions

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146. Dull & Roberts, *supra* note 45, at 441–42 figs.3 & 4.

147. See *id.* (finding that thirty-nine positions at HHS and Commerce were vacant for a total of 168.8 years over a twenty-year period).

148. William G. Resh, Gary Hollibaugh, Patrick S. Roberts & Matthew Dull, *Who Isn't Running American Government: Appointee Vacancies in U.S. Executive Agencies* 4 (Sept. 15, 2019) (unpublished manuscript), [https://papers.ssrn.com/abstract\\_id=3310806](https://papers.ssrn.com/abstract_id=3310806) (on file with the *Columbia Law Review*).

149. *Id.* at 24 tbl.1.

150. Evan Haglund has constructed a nomination and confirmation database for U.S. attorney (1981–2015) and IG positions (1981–2017) but does not provide an overall vacancy rate for either position. Evan T. Haglund, *Empty Seats: Vacancies, Vetting, and Nomination Delay in Presidential Appointments* 18 (May 31, 2017) (unpublished working paper) (on file with the *Columbia Law Review*); see also *Where's the OSHA Boss? 8.5 Years of Acting Administrators* (4/7), *Indus. Safety & Hygiene News* (Apr. 7, 2009), <https://www.ishn.com/articles/88543-wheres-the-osha-boss-85-years-of-acting-administrators-47> [<https://perma.cc/43XE-D6QX>] (focusing on the Occupational Safety and Health Administration and finding that “[s]ince the agency’s inception in 1971, it has had more acting administrators (13) than Senate-confirmed appointees (11),” and it had one recess appointee).

151. 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), <https://www.gao.gov/assets/700/690855.pdf> [<https://perma.cc/W4P2-QSGL>] [hereinafter *GAO, Inspectors General Report*].

152. *Id.* A vacancy spanning two calendar years was counted in each.

153. *Id.* at 12 fig.2. For current information, see Council of the Inspectors Gen. on Integrity & Efficiency, *Inspector General Vacancies*, *Oversight.gov*, <https://www.oversight.gov/ig-vacancies> [<https://perma.cc/B4WR-CWMG>] (last visited Feb. 4, 2020).

of the “Plum Book” (the United States Government Policy and Supporting Publications).<sup>154</sup> She finds:

Of 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 . . . . The percentage of [Senate-confirmed] positions without a confirmed appointee (vacancy) fluctuated between 10 and 40 percent between 1977 and 2015. Moreover, the breakdown of interim appointees and empty positions also varied; some years saw more empty positions than temporarily filled (e.g. 1987-1997) whereas others had more interims filling vacancies than empty chairs (e.g. 2009-2015).<sup>155</sup>

Because Kinane is relying on yearly reports, she cannot observe short-term acting officials or measure tenures. She also has not examined whether the acting leaders are drawn from the political or career ranks or whether they are later nominated to the position.

#### B. *Cabinet Secretaries*

In the considerable discussion over whether Whitaker could serve as acting Attorney General,<sup>156</sup> no one referred to past practices outside DOJ in any systematic manner. Indeed, until recently, there has been no comprehensive information on acting cabinet secretaries under the Vacancies Act.<sup>157</sup>

Utilizing a broad range of materials, I compiled a database of confirmed, recess, and acting cabinet secretaries from the start of President Reagan’s Administration to the end of President Trump’s third year (January 19, 2020).<sup>158</sup> Any service (acting or confirmed) across multiple

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154. Christina M. Kinane, Control Without Confirmation: The Politics of Vacancies in Presidential Appointments 18–19 (Sept. 1, 2018) (unpublished manuscript) (on file with the *Columbia Law Review*).

155. *Id.* at 18–20.

156. See *infra* section III.A.2; *supra* notes 5–13 and accompanying text.

157. Cf. Biographical Directory of the United States Congress 1774–2005, H.R. Doc. No. 108-222, at 3–29 (2005) (reporting long-serving acting cabinet secretaries in its list of executive officers through 2004). Agencies are supposed to report vacancies to the GAO but do so inconsistently and often miss short-term acting officials. See *infra* section V.C.1.

158. Using data obtained from OPM and extensive searches of public records, I compiled a dataset of all confirmed and recess-appointed agency leaders’ tenures (including start and end dates) for all fifteen cabinet-level departments from January 1981 to January 2020. I identified gaps in confirmed or recess-appointed service, and then I tracked down information on the 131 acting officials I could identify who filled those gaps. In some instances, multiple people served in an acting capacity between two confirmed leaders. For sixteen gaps, I could not determine who served in an acting capacity. The sixteen unaccounted-for periods all occurred at either the very end or the very beginning of an administration. All sixteen periods lasted for fewer than three days, with one ten-day exception. A few important caveats are worth mentioning. First, the Department of Veterans Affairs (VA) and DHS commenced operations as cabinet-level departments in 1989 and 2003, respectively. I

administrations counts as separate observations.<sup>159</sup> My overall tallies below do not match recently reported counts in the media, likely because my database includes hard-to-find acting officials who do not appear on agency lists.<sup>160</sup>

The first section provides some overall counts. The following sections examine the tenures and backgrounds of acting secretaries.

1. *Counts of Secretaries.* — Between January 20, 1981 and January 19, 2020, there have been 171 confirmed, 3 recess-appointed, and 147 acting cabinet secretaries. Since the Supreme Court's decision in *NLRB v. Noel Canning*<sup>161</sup> in 2013, the Senate has conducted pro forma sessions to prevent recess appointments.<sup>162</sup> Only the Department of Commerce lacked any kind of secretary during the relevant time period, because President Obama had not formally submitted his nomination of Penny Pritzker when the Vacancies Act's time limit expired in 2013.

Table 1 divides the three types of secretaries—confirmed, recess-appointed, and acting—by administration. In the acting secretary column,

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did not include data from before they became stand-alone agencies. Second, for some acting leaders whose start and end dates are not precisely known, I approximated dates that are either accurate or off by only a small margin. For consistency and in order to match agency records, all officials' start dates were recorded as overlapping with their predecessors' end dates. Third, when an official's tenure spanned two administrations, I divided it into two distinct segments and recorded them separately. Fourth, I excluded interim periods of less than one day—such as when a secretary departed at midnight on January 20, 2017, and a new secretary started at noon the same day. Finally, the Department of Commerce is the only agency in the database that lacked any kind of secretary—confirmed, recess, or acting—at any point. During President Obama's Administration, the Vacancies Act time limits expired before the President formally nominated Penny Pritzker. I excluded the empty period from the tenure measurements and analysis of Table 2.

159. Robert Gates, who served as Secretary of Defense under both Presidents George W. Bush and Obama, thus has two observations.

160. See, e.g., Aaron Blake, *Trump's Government Full of Temps*, Wash. Post: The Fix (Feb. 21, 2020), <https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days> (on file with the *Columbia Law Review*) (tracking acting officials under President Trump after his first cabinet officials were confirmed); Philip Bump, *Trump Relies on Acting Cabinet Officials More than Most Presidents. It's Not an Accident.*, Wash. Post (Apr. 8, 2019), <https://www.washingtonpost.com/politics/2019/04/08/trump-relies-acting-cabinet-officials-more-than-most-presidents-its-not-an-accident> (on file with the *Columbia Law Review*) (presenting data on vacancies without outlining the methodology involved in collecting that data); Alan Fram, *GOP Mutters, Gently, as Trump Sidesteps Senate for Top Aides*, Associated Press (June 17, 2019), <https://www.apnews.com/002bb07f6b8245d8abcfbac3322f4ede> [<https://perma.cc/S6HY-HZ4C>] (reporting new unpublished research from Kinane).

161. 134 S. Ct. 2550 (2014).

162. See, e.g., Jordain Carney, *Senate Blocks Trump from Making Recess Appointments over Break*, Hill (Aug. 3, 2017), <https://thehill.com/homenews/senate/345261-senate-blocks-trump-from-making-recess-appointments-over-break> [<https://perma.cc/39QT-Z5WF>] (describing how the Senate held a pro-forma session to prevent recess appointments in August 2017).

the numbers reported in the parentheses denote acting leaders who served more than nine days.<sup>163</sup>

TABLE 1: TYPES OF CABINET SECRETARIES BY ADMINISTRATION

President	Confirmed	Recess	Acting
Reagan	33	1	25 (11)
H.W. Bush <sup>164</sup>	20	1	20 (16)
Clinton	28	1	27 (11)
W. Bush	34	0	22 (13)
Obama	32	0	23 (14)
Trump <sup>165</sup>	24	0	30 (27)

All modern Presidents have relied heavily on acting officials in their cabinet, particularly in their first years (and in their fifth years, if applicable, at the start of their second term).<sup>166</sup> Indeed, nearly half of all secretaries are neither confirmed nor recess-appointed.

President Trump differs from his predecessors in several ways. First, he alone has used more acting secretaries than confirmed secretaries, as of January 19, 2020. In addition, while almost all of his acting secretaries served at least ten days, only President Trump faced a Senate controlled by their party during the entire period being analyzed.<sup>167</sup> Finally, President Trump has often turned to acting officials outside his first year, unlike previous Presidents. For instance, while President Trump relied on six—or five, if you exclude Rosenstein’s reported one-day tenure before the White House picked Whitaker—in his second year, Presidents George H.W.

163. The nine-day mark represents a natural division in the data between very short-term acting secretaries and longer-term acting leaders.

164. President George H.W. Bush served only one term.

165. Information for President Trump’s Administration represents findings through January 19, 2020.

166. By contrast, earlier Presidents relied more heavily on secretaries from their predecessors when they first took office. See O’Connell, *Acting Agency Officials*, supra note 125, at 27 (finding that “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”).

167. President Trump also only needed fifty votes in the Senate (with Vice President Pence’s tiebreaker power) to move a nomination to a confirmation vote. Studies have shown, however, that the 2013 change in the Senate rules (eliminating the need for sixty votes to advance a nomination to a vote) actually increased vacancy lengths (by upping confirmation delays) as minority members slowed down the process. O’Connell, *Shortening Vacancies*, supra note 142, at 1686–89; O’Connell, *Trump’s First Year*, supra note 142. The 2019 Senate rules change (reducing debate time) should decrease gaps in confirmed leadership if nominations are submitted. See Paul Kane, *Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy*, Wash. Post (Apr. 3, 2019), [https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6\\_story.html](https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html) (on file with the *Columbia Law Review*).

Bush and Clinton relied on two, Presidents Reagan and George W. Bush used only one, and President Obama had none. The number increased to nine in President Trump's third year. While President George H.W. Bush had six acting secretaries in his third year, President Reagan relied on three, President George W. Bush had two, and Presidents Clinton and Obama used one.

Table 2 breaks down the types of secretaries by agency.

TABLE 2: TYPES OF CABINET SECRETARIES BY AGENCY  
(JANUARY 20, 1981–JANUARY 19, 2020)

Agency	Confirmed	Recess	Acting
Agriculture	11	0	10
Commerce	13	1	14
Defense	14	0	6
Education	11	0	8
Energy	13	1	9
Health & Human Services	11	0	12
Homeland Security <sup>168</sup>	6	0	5
Housing & Urban Development	10	0	9
Interior	11	0	10
Justice	13	0	11
Labor	12	0	13
State	11	1	9
Transportation	12	0	10
Treasury	13	0	10
Veterans Affairs <sup>169</sup>	10	0	11

In the Departments of Commerce, HHS, Labor, and Veterans Affairs, there have been more acting than confirmed secretaries. DOD and DHS have had the fewest acting leaders, but the latter agency was only established in 2003. At DOD, two of the six acting secretaries served for only one day. Before Mattis was forced out in 2019, the last acting Defense Secretary for more than one day was Taft at the start of President George

168. Observations begin in 2003.

169. Observations begin in 1989.

H.W. Bush's Administration in 1989.<sup>170</sup> Previous Presidents have pushed out their defense secretaries—for instance, President Obama kicked out Chuck Hagel,<sup>171</sup> President George W. Bush asked Donald Rumsfeld to leave,<sup>172</sup> and President Clinton removed Les Aspin.<sup>173</sup> But all three Presidents managed the transitions so there were no acting secretaries.

2. *Tenures of Secretaries.* — While 45.8% of cabinet secretaries in this period were not confirmed or recess appointed, these acting leaders typically served for short periods. Table 3 provides the average tenures of secretaries, by administration.<sup>174</sup> Average tenures of acting secretaries who served at least ten days are in parentheses of the last column. President Trump's numbers should be treated with caution, as his current confirmed and acting secretaries' tenures are censored as of January 19, 2020 (in other words, treated as finishing as of that date), but some of his confirmed and acting secretaries served past that cutoff.

TABLE 3: AVERAGE TENURES OF CABINET SECRETARIES BY TYPE AND ADMINISTRATION (ROUNDED TO FIVE-DAY INCREMENTS)

President	Confirmed	Recess	Acting <sup>175</sup>
Reagan	1130	35	25 (50)
H.W. Bush <sup>176</sup>	975	40	45 (55)
Clinton	1415	285	35 (80)
W. Bush	1245	0	30 (50)
Obama	1335	0	45 (75)
Trump <sup>177</sup>	625	0	55 (60)

The Trump Administration's acting secretaries have served longer, on average, than under previous Presidents, if all the short-term acting officials are included. Restricting the list to acting leaders who have served at least ten days, however, that distinction no longer holds.

170. See *supra* note 31 and accompanying text.

171. See Peter Baker, Hagel's Departure Bears Little Likeness to Rumsfeld's Removal, *N.Y. Times* (Nov. 25, 2014), <https://www.nytimes.com/2014/11/26/us/hagels-departure-bears-little-likeness-to-rumsfelds-removal.html> [<https://perma.cc/7J8R-MLT5>] (describing how Presidents dating back to James Madison have forced out versions of the modern-day defense secretary).

172. *Id.*

173. *Id.*

174. These figures are rounded to the nearest five-day break because the start and end dates sometimes conflicted across the various sources. For the purposes of this Article, January 19, 2020, is the end date for acting officials currently serving.

175. The averages reported in the parentheses exclude tenures lasting fewer than ten days.

176. President George H.W. Bush served only one term.

177. Information for President Trump's Administration represents findings through January 19, 2020.

Combining Table 1 and Table 3 reveals that the total tenures of acting officials in the Trump Administration are much longer than in previous ones, as there are more acting leaders—and that’s comparing tenures that accumulated over three years to those from periods of four or eight years. As a fraction of the total days of an administration, acting secretaries (or a complete vacancy) under Presidents Obama and George W. Bush served 2.7 and 1.6% of the time, respectively. By contrast, in the first three years, acting secretaries served for 9.9% of the days in the Trump Administration.

Table 4 lists the twenty-two acting secretaries who served for at least 100 days (rounded), including one period with no acting or confirmed secretary. January 19, 2020 marks the end date for current acting secretaries.<sup>178</sup>

TABLE 4: LONGEST SERVING ACTING SECRETARIES AND VACANT PERIODS  
(ROUNDED TO FIVE-DAY INCREMENTS)

Name	Agency	Start Year (President)	Rank (days, rounded)
K. McAleenan	Homeland Security	2019 (Trump)	1 (215 days)
R. Blank	Commerce	2012 (Obama)	1
F. Ford	Labor	1984 (Reagan)	2 (210 days)
H. Gober	Veterans Affairs	1997 (Clinton)	3 (185 days)
S. Harris	Labor	2013 (Obama)	4 (180 days)
H. Gober	Veterans Affairs	2000 (Clinton)	4
P. Shanahan	Defense	2019 (Trump)	5 (175 days)
E. Duke	Homeland Security	2017 (Trump)	6 (130 days)
Vacant	Commerce	2013 (Obama)	6
C. Connor	Agriculture	2007 (W. Bush)	6
T. West, Jr.	Veterans Affairs	1998 (Clinton)	7 (125 days)
A. Principi	Veterans Affairs	1992 (H.W. Bush)	8 (115 days)
E. Hargan	Health & Human Services	2017 (Trump)	9 (110 days)
R. Beers	Homeland Security	2013 (Obama)	9
A. Jackson	Housing & Urban Development	2003 (W. Bush)	9
C. Metzler	Labor	1997 (Clinton)	9

178. Figures here were also rounded to the nearest five-day mark. For a list of the longest serving acting leader in each agency between 1789 and 2005, see O’Connell, *Acting Agency Officials*, supra note 125, at 27 tbl.10.

Name	Agency	Start Year (President)	Rank (days, rounded)
L. Eagleburger	State	1992 (H.W. Bush)	10 (105 days)
D. Bernhardt	Interior	2019 (Trump)	11 (100 days)
M. Whitaker	Justice	2018 (Trump)	11
E. Hugler	Labor	2017 (Trump)	11
C. Johnson	Health & Human Services	2009 (Obama)	11
M. Cino	Transportation	2006 (W. Bush)	11
W. Barr	Justice	1991 (H.W. Bush)	11

President Trump has the most acting secretaries of all Presidents on this list (seven), with only three years in office and a Senate controlled by his party.<sup>179</sup> By contrast, President Obama has five (including the one vacant period at the Department of Commerce) and President Clinton has four. President Clinton faced a Senate controlled by Republicans for all but two years of his Administration. Until the fall of 2013, under Senate rules, agency nominations also needed sixty Senators to support a confirmation vote.<sup>180</sup>

The Departments of Labor and VA have had the most long-term acting secretaries (four each). Notably, DHS has had three—with two under the Trump Administration alone—despite operating only since 2003. In late February 2020, Chad Wolf joined this list, increasing the DHS total.

3. *Backgrounds of Acting Secretaries.* — Under the Vacancies Act, acting secretaries can come from three categories: (1) deputy secretaries (as first assistants, they are the default); (2) Senate-confirmed appointees from any agency; or (3) agency employees paid at least the GS-15 salary who have served for at least ninety days in the year preceding the vacancy.<sup>181</sup> Agency-specific statutes may restrict the use of the Vacancies Act. Specifically, in 2016, Congress expressly prohibited use of the Act to fill the DHS secretary role when a confirmed or recess-appointed deputy secretary or undersecretary for management is otherwise available.<sup>182</sup>

Table 5 breaks down the acting secretaries by category since the Vacancies Act came into effect in November 1998.<sup>183</sup> PAS stands for “Presidential

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179. See *supra* Table 1, note 167.

180. See *supra* note 167.

181. See *supra* section I.B.

182. 6 U.S.C. § 113(g) (2018).

183. Of the acting secretaries since November 20, 1998, there were only two I could not identify with certainty: acting Secretary of HHS from January 19 to January 20, 2001, and acting Secretary of Education from January 20 to January 23, 2001. I excluded these two periods in Table 5.

Appointee with Senate confirmation.”<sup>184</sup> The third category is further divided into careerists and political appointees.

TABLE 5: CATEGORIES OF ACTING SECRETARIES BY ADMINISTRATION  
(NOVEMBER 20, 1998–JANUARY 19, 2020)

President	Deputy Secretary	Other PAS	Non-PAS Career	Non-PAS Political
Clinton	2	1	0	0
W. Bush	15	6	0	0
Obama	10	10	2	1
Trump <sup>185</sup>	9	9	10	2

As Table 5 shows, Whitaker was not the first nonconfirmed acting cabinet head. Indeed, President Trump has relied on a dozen nonconfirmed secretaries. Whitaker’s appointment was unusual, however, because he was selected from among political appointees rather than long-term career officials.

As previously mentioned, presidential transitions have accounted for many acting officials’ appointments. During the first year of their administrations, President Trump’s two predecessors each relied on three deputy secretaries from the preceding administration, despite the party change in the White House. By contrast, President Trump turned to only one, Sally Yates, whom he quickly removed from DOJ after she refused to defend the White House’s travel ban.<sup>186</sup> President Trump may not have requested that others remain, or the other deputy secretaries under President Obama may have refused to stay. The consequence was that President Trump had to rely on senior agency careerists to run his cabinet departments when he first took office. Some of those careerists—Ed Hugler at Labor and Michael Young at the Department of Agriculture (USDA)—served for months.

Of the twenty-two longest serving acting secretaries listed in Table 4, all but seven were first assistants. Five were Senate-confirmed officials (of which one, West, came from a different agency). And two were nonconfirmed agency workers—one political and one career.

Nonconfirmed actings appear to be much more common, however, in lower-level positions covered by the Vacancies Act. The next three sections take up this issue, using the EPA and FAA as case studies over a similar period and examining the status of hundreds of lower-level cabinet departments’ positions in April 2019.

184. U.S. Gov’t Accountability Office, *Federal Ethics Programs*, supra note 143, at iii.

185. Information for President Trump’s Administration represents findings through January 19, 2020.

186. See supra notes 2–4 and accompanying text. On January 20, 2017, there were thirteen acting cabinet secretaries: Nine were careerists at their agencies, three had been confirmed by the Senate to non-deputy positions in the Obama Administration, and one was Yates.

C. *Environmental Protection Agency*

The Vacancies Act and agency-specific succession statutes cover hundreds of positions in addition to the fifteen cabinet secretary roles discussed in section II.B. But data are hard to find on those other positions. The EPA presents a useful case study because, unlike most other agencies, the EPA posts on its website the start and end dates for all its leaders—confirmed, recess, and acting—in three of its Senate-confirmed positions—administrator, deputy administrator, and general counsel. I corrected and supplemented this information in a variety of ways.<sup>187</sup>

1. *Types.* — Table 6 breaks down the types of leaders in the three EPA positions. For the administrator and deputy administrator, the dataset runs from January 20, 1981 to January 19, 2020. For the general counsel position, it begins in October 1983, when the office of the general counsel was created.

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187. I confirmed the EPA's data with other sources and made some small corrections (for instance, when a start date was listed as preceding the confirmation date). The EPA incorrectly lists 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, under the Vacancies Act, 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 across two administrations—in any capacity—separately. I also separated out service as a recess appointee and as a confirmed appointee, which the EPA lumps together.

There are five additional items to note. First, there is a two-day period unaccounted for in the EPA list for administrator—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 on January 22. I ignored this gap in the analysis below. Second, I assume there were two additional empty periods in the deputy administrator role, from January 20, 1981, to May 19, 1981, and from March 26, 1983, to August 4, 1983. The EPA lists nothing for those periods; I excluded them from the analysis (so they are not listed in Table 6, for instance). 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 tenures of the acting deputy administrators in Table 7. Fourth, although the EPA's data still listed Darwin as acting Deputy Administrator on January 30, 2020, he left the position on September 1, 2019. The position was vacant from that departure to January 19, 2020 (as the Vacancies Act time limits had expired, and there was no pending nomination) and was included in the analysis as a vacant period. Fifth, 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 counted it as empty in the analysis. Additionally, I obtained nomination and confirmation dates for the confirmed appointees. 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 nonconfirmed political position, or were drawn from the agency's career ranks.

TABLE 6: TYPES OF OFFICIALS FOR THREE TOP EPA POSITIONS  
(JANUARY 20, 1981–JANUARY 19, 2020)

Position	Confirmed	Recess	Acting	Empty
Administrator	12	0	14	0
Deputy Administrator	11	2	12	6
General Counsel <sup>188</sup>	13	1	16	1

There have been more acting than confirmed leaders in all three positions. There have also been empty periods with no confirmed, recess-appointed, or acting official in the deputy administrator or general counsel slots. During these periods, agencies typically delegate nonexclusive duties to lower-level officials.<sup>189</sup> Half of the empty periods for the deputy role matched to the start of administrations.<sup>190</sup>

2. *Tenures.* — Table 7 provides the total number of days for which confirmed and acting officials served in these three positions, broken down by administration, and rounded to the nearest five-day mark.<sup>191</sup>

TABLE 7: TOTAL TENURES OF EPA POSITIONS BY TYPE AND ADMINISTRATION  
(ROUNDED TO FIVE-DAY INCREMENTS)

President	Administrator		Deputy Administrator		General Counsel	
	Confirmed	Acting	Confirmed	Acting	Confirmed	Acting
Reagan	2700	220	2510	160	1605	320
H.W. Bush <sup>192</sup>	1445	15	1340	100	640	820
Clinton	2920	0	1970	780	1185	1600
W. Bush	2680	235	2085	385	1765	975
Obama	2760	160	1690	1220	2505	415
Trump <sup>193</sup>	830	265	320	620	740	350

188. Observations begin in October 1983.

189. See *supra* section I.E.

190. Of the two presumably vacant periods for the deputy administrator position that I excluded from Table 6, one matches to the start of a new administration. See *supra* note 187.

191. This table reflects a correction to the tenure of the confirmed deputy administrator to what was reported in the Brookings Institution report. See O'Connell, *Acting Leaders*, *supra* note 141, at tbl.6 (listing Wheeler's tenure as 465 days instead of 320 days).

192. President George H.W. Bush served only one term.

193. Information for President Trump's Administration represents findings through January 19, 2020.

As with cabinet secretaries, until President Trump took office, the EPA's head was much more likely to be a confirmed official than an acting one. Under Presidents George W. Bush and Obama, acting administrators served for 8.1% and 5.5%, respectively, of their Administrations. Under President Trump, however, an acting EPA Administrator has led the agency for slightly under one quarter of his first three years.

This case study also shows that if the EPA's lower-level positions are representative, acting officials play critical roles in the federal bureaucracy. Acting deputy administrators have cumulatively served 14.9% and 41.9% of the days under Presidents Bush and Obama, respectively, including the recess appointment under President Bush, but 66% under the Trump Administration when the position was occupied.<sup>194</sup> Acting general counsels have racked up about one-third of the time when the job has been staffed under Presidents Bush and Trump (and 14.2% under President Obama).

Some acting officials at the EPA have served for significant durations. Wheeler's recent acting reign in 2018–2019 marked the longest in the top position, at 235 days (rounded), surpassing the second longest acting, Bob Perciasepe, in President Obama's fifth year, by nearly three months. In the second highest role, Stan Meiburg has had the longest acting tenure, serving as acting Deputy Administrator from October 2014 to the end of the Obama Administration, which was permitted under the Vacancies Act as his (eventually unsuccessful) nomination was pending in the Senate for most of that time. Behind him, Mike Flynn, a senior careerist, served 440 days (rounded) at the start of the Trump Administration, part of that time a nomination was pending for the job. Prior to the 1998 Vacancies Act, Cannon served around three years as acting General Counsel.

Acting officials at the EPA do not seem to be stopgaps for a slow confirmation process. The formal appointments process—from submitted nomination to confirmation—for all of the confirmed administrators and general counsels occurred while acting officials held those positions. In other words, no departing administrator or general counsel stayed on for any time while a successor's nomination was pending. Only one confirmed Deputy Administrator waited to depart until his successor was confirmed in the fall of 1994.

3. *Backgrounds.* — Table 8 divides the acting officials in these three positions by their background—Senate-confirmed officials, nonconfirmed political officials, and nonconfirmed senior careerists.

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194. Recall that the deputy administrator position has been vacant at least six times. See *supra* notes 187, 190 and accompanying text. Including the vacant period, a confirmed deputy administrator served slightly under 30% of the days in the first three years of the Trump Administration.

TABLE 8: CATEGORIES OF EPA ACTING OFFICIALS  
(JANUARY 20, 1981–JANUARY 19, 2020)

Position	Senate-Confirmed	Non-PAS Political	Non-PAS Career
Administrator	11	0	3
Deputy Administrator	5	3	4
General Counsel <sup>195</sup>	2	4	10

Of the eleven Senate-confirmed officials who served as acting administrator, only five were confirmed deputy administrators (in other words, the first assistant); all but one of the remaining were confirmed to positions in the EPA and one was a cross-agency official. By contrast, most of the acting general counsels were the first assistant, as the principal deputy general counsel (a career position).<sup>196</sup> As with acting cabinet secretaries, nonconfirmed political officials were more unusual than nonconfirmed careerists in these EPA roles in recent administrations.

#### D. *The Federal Aviation Administration*

The administrator of the FAA is another position that sits outside the President's cabinet. Like the EPA, the FAA has provided a public list of its acting administrators, but only through 2008, which I extended.<sup>197</sup> This section breaks down the available data.<sup>198</sup> Of the twenty-seven acting and

195. Observations begin in October 1983.

196. Some were repeat players: Gerald Yamada worked three separate stints as acting General Counsel, Anna Wolgast did two, and two others spanned across two administrations (so were counted as two each).

197. Theresa L. Kraus, *Fed. Aviation Admin., A Historical Perspective, 1903–2008*, at app. C (2008), [https://www.faa.gov/about/history/historical\\_perspective/media/historical\\_perspective\\_references.pdf](https://www.faa.gov/about/history/historical_perspective/media/historical_perspective_references.pdf) [<https://perma.cc/PUV6-S3QP>]; see also *FAA Administrator Biographies*, *Fed. Aviation Admin.*, [https://www.faa.gov/about/history/media/AOA\\_bios.pdf](https://www.faa.gov/about/history/media/AOA_bios.pdf) [<https://perma.cc/3UL7-2D7Z>] (last visited Feb. 5, 2020) (providing a list and some biographical material on former confirmed FAA administrators).

198. Using agency documents, news articles, and other public materials, I created a database of all confirmed and acting administrators from January 20, 1981 to January 19, 2020, including their start and end dates and, for the acting officials, their backgrounds. Using FAA records as support, I generally treated acting leaders as starting the day after a confirmed leader left and ending the day before a new confirmed leader began (or in two instances before a new acting administrator began). In several instances, there were small discrepancies in reported start and end dates (typically a day or two). I used dates that comported best with various sources and relevant events and rounded tenures to the five-day mark. To match the earlier analysis of the cabinet and three positions at the EPA, I broke service across administrations into two observations. Only three confirmed administrators (and no acting administrators) served across two administrations. For example, T. Allan McArtor served as a confirmed FAA administrator from July 1987 to February 1989; I

confirmed FAA administrators in the thirty-nine-year period, thirteen were acting administrators.<sup>199</sup>

Table 9 provides, broken down by administration, the total days of service for the confirmed and acting administrators, rounded to the nearest five-day mark, and the percentage of tenure by acting leaders.

TABLE 9: TOTAL TENURES OF FAA ADMINISTRATORS BY TYPE (ROUNDED TO FIVE-DAY INCREMENTS) AND PERCENTAGE OF TENURE BY ACTING FAA ADMINISTRATORS BY ADMINISTRATION (JANUARY 20, 1981–JANUARY 19, 2020)

President	Confirmed Administrators	Acting Administrators	% Acting
Reagan	2740	175	6.0
H.W. Bush <sup>200</sup>	1120	335	23.0
Clinton	2450	465	16.0
W. Bush	2385	535	18.3
Obama	2390	525	18.0
Trump <sup>201</sup>	510	580	53.2

Acting FAA administrators have not served short stints, on average, outside of President Reagan’s Administration. Since President George H.W. Bush held office, acting FAA administrators have led the agency for at least 16% of the time in each administration.

Once again, the data reveal the ways in which President Trump has taken advantage of acting officials more than his predecessors. In the first three years of the Trump Administration, a temporary leader led the FAA for longer than confirmed ones. Indeed, Daniel Elwell headed the agency in an acting capacity for nineteen months (from January 2018 to August

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thus allotted most of his service (until January 20, 1989) to President Reagan’s Administration and the rest to President George H.W. Bush’s Administration. Until August 1994, the FAA administrator did not have a fixed term, so splitting McArtor’s service into two observations parallels how I treated cabinet secretary tenures. Since August 1994, however, the FAA administrator has had a five-year term. 49 U.S.C. § 106(b) (2018). Jane Garvey and Michael Huerta also appear twice in the database as their terms fell over two administrations.

199. The total number of FAA administrators falls to twenty-five if the “term” administrators who served across two administrations only count once. In each dataset, this Article has counted officials who served in two administrations as serving two distinct tenures. See *supra* notes 158, 187, 198.

200. President George H.W. Bush served only one term.

201. Information for President Trump’s Administration represents findings through January 19, 2020.

2019),<sup>202</sup> in the middle of the crisis over the safety of Boeing's 737 Max aircraft.<sup>203</sup>

Table 10 details, by administration, the backgrounds of the acting FAA administrators—confirmed deputy administrator, unconfirmed deputy administrator, other political official (unconfirmed), and senior careerist (unconfirmed).<sup>204</sup> All of these administrators came from within the agency.

TABLE 10: CATEGORIES OF ACTING FAA ADMINISTRATORS BY ADMINISTRATION (JANUARY 20, 1981–JANUARY 19, 2020)

President	PAS Deputy	Non-PAS Deputy	Non-PAS Political	Non-PAS Career
Reagan	1	0	0	2
H.W. Bush <sup>205</sup>	1	0	0	1
Clinton	1	0	1	1
W. Bush	1	0	0	1
Obama	1	0	0	1
Trump <sup>206</sup>	0	1	0	0

The political and career ranks have contributed evenly to acting leadership at the FAA. As compared with Tables 5 and 8, Table 10 demonstrates that administrations have relied far more heavily on political officials to step in when there have been vacancies in cabinet-level positions and at the EPA.

#### E. *Lower-Level Positions in the Cabinet Departments*

Comprehensive data on acting officials in lower-level positions are difficult to find and compile across administrations. But it is possible to capture the current status of such positions using agency websites, the

202. Daniel K. Elwell, Deputy Administrator, Fed. Aviation Admin., [https://www.faa.gov/about/key\\_officials/elwell](https://www.faa.gov/about/key_officials/elwell) [<https://perma.cc/QR9V-5N74>] (last updated Aug. 27, 2019). The FAA has its own agency succession provision, which does not impose time limits on acting service. 49 U.S.C. § 106(i).

203. Glenn Thrush, F.A.A. Chief Defends Boeing Certification Process at House Hearing, N.Y. Times (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/politics/boeing-faa-congress.html> [<https://perma.cc/PP5S-M458>]. The deputy administrator can serve as acting administrator beyond the time limits of the Vacancies Act under an agency-specific statute. 49 U.S.C. § 106(i).

204. In 2012, Congress eliminated the confirmation requirement for the deputy administrator. Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (codified as amended in scattered titles of the U.S.C.).

205. President George H.W. Bush served only one term.

206. Information for President Trump's Administration represents findings through January 19, 2020.

GAO's database, and news sources, among other materials. Table 11 provides a snapshot of 301 Senate-confirmed positions in the fifteen cabinet departments, as of April 15, 2019.<sup>207</sup>

TABLE 11: STAFFING SNAPSHOT OF 301 CABINET DEPARTMENT PAS POSITIONS AS OF APRIL 15, 2019

Agency	Confirmed	Acting	Vacant/Delegated
Agriculture	7	0	6
Commerce	17	3	2
Defense	23	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

Table 11 shows that only 64.1% of the tracked positions were filled by confirmed officials. Acting officials sat in 13.3% of the positions. The remaining 22.6% of jobs had neither a confirmed nor acting official. In other words, close to twice as many positions were presumably being carried out through delegated authority rather than staffed by official acting leaders.<sup>208</sup>

207. This comes directly from O'Connell, *Acting Agency Officials*, supra note 125, at 19 tbl.1. ACUS provided funding support for this snapshot database, and has given permission for the results to be published here. For a list of the positions, see id. at 100–08.

208. By April 15, 2019, the Vacancies Act's time limits had expired for positions that were vacant on President Trump's Inauguration Day (January 20, 2017). See supra section I.C (explaining the time limits of the Vacancies Act). Due to resignations and nominations during the intervening period, the Vacancies Act's time limits had not expired for any acting official in office as of April 15. See O'Connell, *Acting Agency Officials*, supra note 125, at 19.

F. *Future Research*

The previous four sections capture only a slice of the modern bureaucracy: cabinet secretaries, three positions in the EPA, the top job at the FAA, and some lower-level positions in the cabinet departments at one particular point in time. Within cabinet departments, we do not have systematic data on acting officials below the top positions across administrations. Furthermore, we do not know if the EPA's use of acting leaders in some of its subordinate positions is similar to all cabinet departments, or other freestanding agencies such as the Small Business Administration.<sup>209</sup> The EPA, for example, is one of the most politicized federal agencies.<sup>210</sup>

There is both descriptive and predictive work to do. On the descriptive side, information on acting leaders needs to be more accessible. Once comprehensive data are available, either through better reporting or through data requests to agencies, the types and tenures of acting officials throughout the administrative state should be examined. This assessment should also consider how the scope, types, and tenures of acting leaders vary by who is President, timing within an administration, control of the Senate, specific agencies, and position type (including level and fixed terms, if any).<sup>211</sup> The connections between acting officials and nominees can also be explored—specifically, when and where acting officials are later nominated for the permanent position, and to what extent acting officials are serving while nominations are pending.

On the predictive side, more research should look at the strategic use of acting leaders. Kinane is at the forefront of this work, distinguishing among confirmed appointees, acting officials, and vacant offices. She finds that “the incidence of empty posts increases when [P]residents prioritize contraction and the likelihood of interim appointees increases when [P]residents prioritize expansion.”<sup>212</sup> The scope of the President's choice, however, is not constant. At the start of an administration, the President often chooses between acting leaders and leaving offices vacant. Without a first assistant in place to serve as the default acting official, the President must affirmatively choose acting officials from the other two categories under the Vacancies Act or agency heads need to name first assistants after the vacancy. In the middle of an administration, however, if the Act's time limits have not expired, there is almost always an acting leader (as opposed

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209. Presumably, the ATF is atypical. As noted above, it spent over seven years without a confirmed leader since 2006. See *supra* notes 92, 115–119 and accompanying text.

210. See Kendra Pierre-Louis, *From Kumbaya to Battleground: How'd the EPA Get So Political?*, *Popular Sci.* (Mar. 3, 2017), <https://www.popsci.com/epa-became-political> (on file with the *Columbia Law Review*).

211. For instance, term lengths that extend beyond a presidential term, such as those for the SSA commissioner and FAA administrator, may make the confirmation process harder, necessitating more reliance on acting officials.

212. Kinane, *supra* note 154, at 1.

to a vacant office) because there are typically first assistants in place. Empty offices result from the Act's restrictions, not choices made by the President.

In any event, Kinane's research does wrestle nicely with the choice between traditional appointees and acting officials.<sup>213</sup> What can we learn from President Trump's preference for acting leaders despite Republicans controlling the Senate? Kinane's research also generates questions that, with better data, could be explored. To start, how do Presidents strategically choose political and career acting leaders? In addition, how do Presidents use the Vacancies Act to audition potential nominees, and how did the use of acting officials shift after the Court's 2017 decision in *SW General*? Finally, when recess appointments are available, the President has more personnel choices: How does the President select among traditional appointees, acting officials, recess leaders, and leaving jobs empty? For commissions and boards that cannot have acting officials, how do the President's decisions change?

### III. LEGAL ISSUES

President Trump's selection of Whitaker for acting Attorney General in 2017 focused popular attention on a core constitutional issue: whether, in the absence of an emergency, someone who has not been Senate-confirmed can serve in a principal office temporarily.<sup>214</sup> Although that question was not new to legal scholars,<sup>215</sup> many other legal aspects of acting officials have garnered little attention, at least until the Trump Administration.

This Part considers a range of constitutional and statutory issues surrounding vacant offices. It turns first to potential Appointments Clause problems for nonconfirmed acting leaders in principal offices and briefly considers connections to separation of powers principles. It then pivots to statutory questions—specifically, the Vacancies Act's applicability to agencies covered by specific succession statutes, vacancies created by presidential

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213. See *id.* at 3 (explaining the study's focus on "the [P]resident's choice to nominate in a strategy space that includes deliberately leaving the position empty and unilaterally filling it with an interim appointee").

214. See, e.g., Katyal & Conway, *supra* note 11; Stephen I. Vladeck, *Whitaker May Be a Bad Choice, but He's a Legal One*, N.Y. Times (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/opinion/trump-attorney-general-constitutional.html> [<https://perma.cc/3HMB-HNZA>] [hereinafter Vladeck, *Bad Choice*].

215. See, e.g., Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1040–41 (1998) (arguing that the Clinton Administration's rejection of the Vacancies Act for appointing DOJ officials was an unconstitutional evasion of the Appointments Clause); Rappaport, *supra* note 48, at 1514–17; Joshua Stayn, *Note, Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 Duke L.J. 1511, 1513 (2001) (concluding that the Vacancies Act violates Article II); E. Garrett West, *Note, Congressional Power over Office Creation*, 128 Yale L.J. 166, 210 (2018) (arguing that the Appointments Clause prohibits Congress from "promulgat[ing] a statute that allows an acting officer to serve longer than she otherwise could under the Recess Appointments Clause").

removal, and first assistants appointed after a vacancy, as well as whether there can be “double actings.”

This Part concludes by discussing two important but understudied areas that have both constitutional and statutory components—the delegation of authority from vacant positions to lower-level agency officials and the applicability of statutory appointment and removal restrictions to acting heads. Delegation often fully substitutes for acting leaders, but there are potential constitutional and statutory limits on agency creation of inferior offices to carry out the delegated functions of vacant jobs. Current high-profile separation of powers challenges to the structures of the CFPB and FHFA—whose single heads have removal protections—rest in part on actions by acting leaders, who likely do not have such protection.<sup>216</sup>

Despite the ubiquity of acting officials and delegated authority, judicial answers to these legal questions are largely lacking.<sup>217</sup> To be sure, these questions are gaining attention, suggesting that litigation may bring needed clarification. Justiciability doctrines, however, make it hard for parties to raise challenges. As discussed in Part V, congressional action could resolve many of these issues.

#### A. *Constitutional Dimensions*

Almost all of the limited attention to legal questions surrounding acting officials has focused on the constitutionality of the Vacancies Act as

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216. See *infra* section III.C.2. This Article does not take on implications of acting officials or delegated authority for judicial review of agency action, which have been addressed elsewhere. O’Connell, *Vacant Offices*, *supra* note 145, at 980–84.

217. These issues do concern OLC. See Letter from Paul P. Colborn, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice, to Daniel Van Schooten, Investigator, Project on Gov’t Oversight (Apr. 18, 2019), <https://www.documentcloud.org/documents/5984477-OLC-Memo-List-1998-2019.html> (on file with the *Columbia Law Review*) (listing titles of many OLC opinions from 1998 to 2019 in response to a FOIA request). According to one of its former attorneys, OLC is “the most important centralized source of legal advice within the executive branch . . . because its legal advice is uniquely valuable to its clients.” Trevor W. Morrison, *Constitutional Alarmism*, 124 *Harv. L. Rev.* 1688, 1722 (2011) (reviewing Bruce Ackerman, *The Decline and Fall of the American Republic* (2010)). The value derives from OLC’s efforts to comply with “norms of detachment and professional integrity.” *Id.* (internal quotation marks omitted) (quoting Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 37 (2007)). But “its analyses may also reflect the institutional traditions and competencies of that branch of the Government.” Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Att’ys of the Office of Legal Counsel, U.S. Dep’t of Justice 2 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/7EQP-K6EB>]. Some commentators have argued OLC advice is biased, resulting from “deep structural pathologies.” Ackerman, *supra*, at 95; see also Emily Berman, *The Secondary Effects of Executive-Branch Legal Opinions* 3 (Sept. 17, 2019) (unpublished manuscript), [https://papers.ssrn.com/abstract\\_id=3455556](https://papers.ssrn.com/abstract_id=3455556) (on file with the *Columbia Law Review*) (arguing that OLC “place[s] a thumb on the scale in the executive’s favor, making it harder for Congress to access the information it seeks”).

applied to principal offices.<sup>218</sup> Rather than rehash that work, this section considers how the data from Part II might shape the constitutional analysis. It also briefly considers broader separation of powers concerns.

1. *The Appointments Clause.* — A few preliminary notes are in order. The Constitution creates minimal distinctions among agency professionals—explicitly establishing agency “[o]fficers,” and thereby implicitly acknowledging nonofficer, or employee, positions.<sup>219</sup> As the Supreme Court recently explained in *Lucia v. SEC*, there are two key differences between officers and employees.<sup>220</sup> First, “mere employees” have “duties” that are “‘occasional or temporary’ rather than ‘continuing and permanent.’”<sup>221</sup> Thus, “[A]n individual must occupy a ‘continuing’ position established by law to qualify as an officer.”<sup>222</sup> Second, “the extent of power an individual wields in carrying out his assigned functions” is critical.<sup>223</sup> Officers “exercis[e] significant authority pursuant to the laws of the United States.”<sup>224</sup>

The Constitution further distinguishes principal from inferior officers and delineates how individuals must be selected for each position.<sup>225</sup> The President must nominate and the Senate must confirm principal officers; but if Congress so chooses, inferior officers can be appointed instead by “the President alone,” “the Courts of Law,” or “the Heads of Departments.”<sup>226</sup> The “line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.”<sup>227</sup> Most recently, the Court described the line as follows: “‘[I]nferior officers’ are officers whose work is directed and supervised at

218. See *supra* notes 214–215 and accompanying text.

219. U.S. Const. art. II, § 2, cl. 2. For a detailed review of which federal positions arguably qualify as offices subject to the Appointments Clause, see generally Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73 (2007).

220. 138 S. Ct. 2044, 2051 (2018).

221. *Id.* (quoting *United States v. Germaine*, 99 U.S. 508, 511–12 (1878)).

222. *Id.* (quoting *Germaine*, 99 U.S. at 511). Some scholars distinguish continuing duties from a continuing office. Seth Barrett Tillman & Josh Blackman, Is Robert Mueller an ‘Officer of the United States’ or an ‘Employee of the United States’?, *Lawfare* (July 23, 2018), <https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states> [<https://perma.cc/4WGC-7EV7>] (arguing that the special counsel is an employee because the position is temporary, but noting that the former independent counsel was an officer because the position continued even if there was no person in it).

223. *Lucia*, 138 S. Ct. at 2051.

224. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Originalists have called for a more expansive definition of officers. See Jennifer L. Mascott, Who Are “Officers of the United States”?, 70 *Stan. L. Rev.* 443, 450 (2018) (arguing that “the original public meaning of . . . ‘officer’” is broader than modern doctrine implies, “encompass[ing] any individual who had ongoing responsibility for a governmental duty”).

225. See generally Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 32–38 (detailing the “few guideposts” provided by the Supreme Court and “highlight[ing] some potentially relevant characteristics” about the heads of subcabinet agencies).

226. U.S. Const. art. II, § 2, cl. 2. The President may also be able to use recess appointments. *Id.* cl. 3.

227. *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

some level' by other officers appointed by the President with the Senate's consent."<sup>228</sup>

The constitutional status of modern acting officials, who can serve for years under the Vacancies Act, is unclear. Are they employees, at least initially? Are they officers because they wield significant authority, even if for a limited period of time? If so, do the potential time limits (or actual time served) affect whether they are principal or inferior officers? What is the office that acting officials hold, if any—the new, temporary position or the original position with added duties? Does it make a difference whether the official performs the functions of a vacant office with an acting title or through delegation? The current tests do not easily resolve the constitutional status of acting officials and delegated authority.<sup>229</sup>

2. *Acting Officials in Principal Offices.* — Under the Vacancies Act and certain agency-specific succession statutes, acting officials can serve temporarily in inferior and principal offices. Acting officials in inferior offices do not generate concern because the Appointments Clause permits Congress to specify how inferior officers may be appointed, including through means made available under the Vacancies Act.<sup>230</sup> If acting officials are employees, rather than inferior officers, there is also no constitutional issue.

Because principal officers must be confirmed by the Senate (if not recess appointed), the constitutional status of acting officials in principal offices presents an important legal question. If they are principal officers, at least the third category of the Vacancies Act and some agency succession statutes (which rely on nonconfirmed deputies) would be unconstitutional.<sup>231</sup> This section examines the caselaw before Whitaker's selection as

228. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

229. "Temporary" likely holds different meanings in various legal contexts, such as for assessing whether a position is an office and determining what kind of office it is. See, for example:

"Temporary" has a somewhat different meaning in the context of *Morrison's* principal-inferior officer test than in the context of *Lucia's* officer-employee test, however; indeed, if the term "temporary" meant the same thing in both contexts, *Morrison's* "limited in tenure" factor would always weigh toward principal officer status, as a determination that one is an officer in the first place requires a determination that one's position is not "temporary." Instead, for purposes of determining whether an officer is principal or inferior, a position is "temporary" if limited in duration, i.e., the position eventually will be "terminated." For purposes of determining whether one is an officer of any kind, however, a position is "temporary" if the position's "duties" are "occasional," "intermittent" . . . , [ ] or "episodic."

In re Grand Jury Investigation, 315 F. Supp. 3d 602, 644 (D.D.C. 2018).

230. U.S. Const. art. II, § 2, cl. 2.

231. Memorandum from Steven A. Engel, Assistant Att'y Gen., Office of Legal Counsel, to Emmet T. Flood, Counsel to the President 17 (Nov. 14, 2018), <https://www.justice.gov/olc/page/file/1110881/download> [<https://perma.cc/U94J-KAAY>] (citing the statutes that provide for appointing acting heads for the FHFA, the CFPB, the Office of National Drug

acting Attorney General, the dispute over his selection, and what the empirical work in Part II contributes to the debate.

a. *Pre-Whitaker Case Law*. — In 1898, the Supreme Court upheld the temporary service of Sempronius Boyd, a private missionary, as consul general—a principal office at the time—to what is now Thailand in *United States v. Eaton*.<sup>232</sup> The Court explained: “In case a vacancy occurs in the offices both of consul and vice consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment . . . .”<sup>233</sup> In other words, the Court determined that although Boyd was performing the functions of a principal office, he was an inferior officer because he was only serving temporarily. The Court reasoned:

Because the subordinate *officer* is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.<sup>234</sup>

The Supreme Court has not ruled on the constitutional status of acting officials in principal offices since 1898, though it did “restat[e] *Eaton*’s holding that ‘a vice consul charged temporarily with the duties of the consul’ is an ‘inferior’ officer” in *Edmond v. United States*.<sup>235</sup> The Court also quoted *Eaton*’s reasoning in *Morrison v. Olson*.<sup>236</sup>

Two justices have weighed in on the current Vacancies Act to varying degrees. First, in a case about principal offices, Justice Scalia implicitly assumed the constitutionality of the Act by pointing to it and its predecessors as alternatives to recess appointments.<sup>237</sup> Second, Justice Thomas almost certainly believes that acting officials—at least those not confirmed

Control Policy, and the General Services Administration, as well as an acting archivist). The de facto officer doctrine, which does not apply to violations of the Vacancies Act, may, however, apply to any violations of the Appointments Clause in this context. See *Phillips v. Payne*, 92 U.S. 130, 132 (1876) (allowing courts to treat the “acts of an officer de facto” as “valid and binding,” even if the person was not “an officer de jure”); supra section I.D.

<sup>232</sup>. 169 U.S. 331, 338 (1898).

<sup>233</sup>. *Id.*

<sup>234</sup>. *Id.* at 343 (emphasis added); cf. Mendelson, *The Permissibility of Acting Officials*, supra note 105, at 39 (noting that “[t]he Court did not specify whether it considered the acting officer to be an inferior officer or merely an employee” but that “in two later cases, it suggested that the officer in *Eaton* was an inferior officer”).

<sup>235</sup>. Memorandum from Steven A. Engel to Emmet T. Flood, supra note 231, at 15 (quoting *Edmond v. United States*, 520 U.S. 651, 661 (1997)).

<sup>236</sup>. 487 U.S. 654, 672–73 (1988).

<sup>237</sup>. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2609 (2014) (Scalia, J., concurring in the judgment) (“Congress can authorize ‘acting’ officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792.”).

to any position—in top jobs violate the Constitution.<sup>238</sup> He distinguished *Eaton* in a footnote in his concurrence in *SW General*:

That Solomon was appointed “temporarily” to serve as *acting* general counsel does not change the analysis. I do not think the structural protections of the Appointments Clause can be avoided based on such trivial distinctions. Solomon served for more than three years in an office [under the current Vacancies Act’s generous time limits] limited by statute to a 4-year term, and he exercised all of the statutory duties of that office. 29 U.S.C. § 153(d). There was thus nothing “special and temporary” about Solomon’s appointment.<sup>239</sup>

By contrast, the acting official in *Eaton* had been pressed into service after the Senate-confirmed consul fell ill.<sup>240</sup> Moreover, for Justice Thomas, who takes a formalist view of the Appointments Clause, the special circumstances surrounding Boyd’s service presumably would not overcome his constitutional objections.

Outside the acting context, the Supreme Court has allowed the assignment of additional “germane” duties without “an additional appointment” by allowing military officers to serve as military judges.<sup>241</sup> Before getting to the germaneness inquiry, the Court determined that “Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office” and that there was no evidence that “Congress effected a ‘diffusion of the appointment power.’”<sup>242</sup>

b. *Current Issues Through the Whitaker Controversy.* — In commentary and litigation over Whitaker’s appointment as acting Attorney General, debate mostly centered on whether the emergency nature of the acting appointment was key to the Court’s decision in *Eaton*. On Whitaker’s side, some scholars contended that the temporary nature of the acting official in a principal office, not the surrounding circumstances, makes an acting official an inferior officer.<sup>243</sup> Some scholars suggested that such acting

238. See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (“Appointing principal officers under the FVRA, however, raises grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate.”).

239. *Id.* at 946 n.1 (quoting *Eaton*, 169 U.S. at 343).

240. *Eaton*, 169 U.S. at 332–33.

241. *Weiss v. United States*, 510 U.S. 163, 174 (1994); cf. *id.* at 191 (Souter, J., concurring) (noting that if military judges were principal officers, such an assignment to an inferior officer “would raise a serious Appointments Clause problem”).

242. *Id.* at 174 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)). The D.C. Circuit recently wondered whether relatedness of additional duties would “cure any Appointments Clause question with an inferior-to-principal assignment” but did not provide an answer. *In re al-Nashiri*, 791 F.3d 71, 85–86 (D.C. Cir. 2015) (emphasis omitted). See generally Separation of Powers—Appointments Clause—D.C. Circuit Furthers Uncertainty in Appointments Clause Test for Executive Branch Reassignments, 129 *Harv. L. Rev.* 1452 (2016) [hereinafter *In re al-Nashiri* Analysis] (analyzing the D.C. Circuit opinion).

243. See, e.g., Vladeck, *Bad Choice*, *supra* note 214.

leaders should even be considered employees because they do not meet the continuity mandate for officers.<sup>244</sup>

OLC took the position that Whitaker served as an inferior officer, but left open the possibility that he could be classified as an employee.<sup>245</sup> OLC drew support for its argument from historical practice, claiming that it had “identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.”<sup>246</sup> For the Government, “*Eaton* . . . confirmed the general rule” and did not impose an emergency condition on temporary service.<sup>247</sup>

On the other side, challengers to Whitaker’s appointment argued that such an acting official is a principal officer.<sup>248</sup> They contended that *Eaton*’s holding depended on the emergency nature of the appointment—an exigency not present when President Trump pushed out Sessions.<sup>249</sup>

All but the strictest formalists, however, would permit a person confirmed to a “germane” position to serve temporarily in a different, principal office—the classic example being a confirmed deputy secretary who serves as acting secretary.<sup>250</sup> Whether cross-agency acting officials would qualify

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244. See, e.g., Tillman & Blackman, *supra* note 222. Short-term appointments, such as an independent or special counsel, however, have qualified as sufficiently continuous to count as officers. *Morrison v. Olson*, 487 U.S. 654, 672, 721 (1988); see also *supra* note 229 (discussing the meaning of “temporary” in the context of *Morrison*).

245. Memorandum from Steven A. Engel to Emmet T. Flood, *supra* note 231, at 6 (“If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an ‘officer’ at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer . . .”). In earlier opinions, OLC has held that an employee who “act[s] in the vacant position of a Senate-confirmed officer” under the Vacancies Act “is, temporarily, a properly appointed inferior Officer of the United States.” Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121, 124 (2003).

246. Memorandum from Steven A. Engel to Emmet T. Flood, *supra* note 231, at 7.

247. *Id.* at 14–15.

248. See, e.g., Katyal & Conway, *supra* note 11 (“A principal officer *must be* confirmed by the Senate . . . . [This] means that Mr. Trump’s installation of Matthew Whitaker as acting attorney general of the United States after forcing the resignation of Jeff Sessions is unconstitutional.”).

249. Walter Dellinger & Marty Lederman, Initial Reactions to OLC’s Opinion on the Whitaker Designation as “Acting” Attorney General, Just Sec. (Nov. 15, 2018), <https://www.justsecurity.org/61483/initial-reactions-olc-opinion-whitaker-designation-acting-attorney-general> [<https://perma.cc/C35A-4DGQ>].

250. See Rappaport, *supra* note 48, at 1515–16 (arguing that “[a]cting appointments” of this kind “are not really appointments at all”); West, *supra* note 215, at 215. No court, however, has held that an inferior officer can be assigned duties of a principal office without a separate appointment. See *In re al-Nashiri*, 791 F.3d 71, 85 (D.C. Cir. 2015) (avoiding the constitutional question). One commentator has argued that acting officials who have been confirmed to a deputy position with a statutory duty to step in as the acting head could serve in the acting role indefinitely (or until the President fires them). See Marty Lederman (@marty\_lederman), Twitter (Jan. 4, 2019), [https://twitter.com/marty\\_lederman/status/](https://twitter.com/marty_lederman/status/)

poses a harder question. Could the Vacancies Act, which permits them, create the requisite germaneness?<sup>251</sup> In addition, the Court has required not just germaneness but also “accountability and anti-self-aggrandizement” to prevent the diffusing of appointment power, which would seem to cut against such cross-agency assignments.<sup>252</sup>

The conflict interestingly drives formalists and originalists to different sides. Many formalists, relying on the structure of the Appointments Clause, view acting officials in principal offices as principal officers.<sup>253</sup> Originalists, by contrast, relying on the 1792 Vacancies Act and other early historical practice, see acting officials in principal offices as inferior officers—at least if their service is under six months, as the 1795 statute prescribed.<sup>254</sup>

With Barr’s confirmation as Attorney General about three months after Sessions’s departure, only a few lower courts ruled on the constitutional claim. They all found that Whitaker’s service did not violate the

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1081226923181785088 [<https://perma.cc/359Z-2W6X>] (arguing that the deputy secretary of defense has “[n]o time limit under the statute or the Constitution” to serve as defense secretary, because he was confirmed to the deputy role).

251. See *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 356 F. Supp. 3d 109, 149 (D.D.C. 2019), cert. denied, No. 19–296, 2020 WL 981797 (Mem.) (U.S. Mar. 2, 2020) (noting that “department heads tapped to lead other, unrelated departments” in an acting capacity would fail the Appointments Clause’s germaneness test); Thomas A. Berry, *S.W. General: The Court Reins in Unilateral Appointments*, 2017 *Cato Sup. Ct. Rev.* 151, 178–79 (arguing that “[e]ven if the appointment of acting principal officers under (a)(1) and (a)(3) [of section 3345] is constitutionally suspect, their appointment under (a)(2) may well survive a future challenge [especially if the duties of the acting office are ‘germane’ to the office previously held by the appointee]”); West, *supra* note 215, at 220 n.281 (discussing whether Mulvaney’s service as acting Director of the CFPB was constitutional in light of his prior confirmation as Director of OMB). If the current Vacancies Act weren’t sufficiently explicit, some have suggested that Congress could impose potential responsibilities on all Senate-confirmed officials under a revised statute. See Email from Roderick Hills, William T. Comfort, III, Professor of Law, N.Y. Univ. Sch. of Law, to author (Nov. 12, 2019) (on file with the *Columbia Law Review*).

252. *In re al-Nashiri* Analysis, *supra* note 242, at 1458.

253. See, e.g., Will Baude, *Who Is Lawfully the Attorney General Right Now?, Reason: The Volokh Conspiracy* (Nov. 10, 2018), <https://reason.com/2018/11/10/who-is-lawfully-the-attorney-general-rig> [<https://perma.cc/87H5-4CJD>] (“If you asked me to consider this purely as a matter of text and structure, I doubt that the President can name an ‘Acting’ Attorney General without Senate confirmation . . .”). In addition, although no formalist appears to have made the argument, the Opinion Clause supports the view that acting officials in principal offices are principal officers. U.S. Const. art. II, § 2. If they are not, the President would not be able to “require the Opinion, in writing, of the principal Officer in each of the executive Departments” if there are any vacancies in the cabinet. *Id.* See generally Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 *Va. L. Rev.* 647 (1996) (providing one of the few discussions of the Opinion Clause but not addressing the status of acting leaders).

254. See, e.g., Andrew Hyman, *Old English Law Indicates that “Six Months” is the Maximum Necessary and Proper Constitutional Limit on Tenure of Acting Cabinet Secretaries*, *Originalism Blog* (Nov. 16, 2018), <https://originalismblog.typepad.com/the-originalism-blog/2018/11/old-english-law-indicates-that-six-months-is-the-maximum-necessary-and-proper-constitutional-limit-o.html> [<https://perma.cc/B3YA-HTJJ>].

Appointments Clause.<sup>255</sup> Some left open the possibility of a later challenge if Whitaker served for a much longer period.<sup>256</sup>

c. *Empirical Work.* — In support of its argument that Whitaker served as an inferior officer, OLC provided dozens of pre-Civil War examples of non-Senate-confirmed officials who served temporarily in principal offices. The empirical work in Part II also shows that Whitaker is not unusual in modern governance. Since 1981, there have been at least fifteen nonconfirmed acting secretaries.<sup>257</sup>

Part II also notes that acting officials in principal offices serve for much shorter periods than confirmed officers in those positions. For instance, the average tenure (rounding to the nearest five-day mark) of a confirmed secretary under Presidents George W. Bush and Obama was 1,245 and 1,335 days, respectively.<sup>258</sup> By contrast, the average tenure of an acting secretary in the George W. Bush and Obama Administrations was thirty and forty-five days, respectively.<sup>259</sup> When very short-term acting secretaries (those serving under ten days) are excluded, the average tenure jumps to fifty and seventy-five days, respectively.<sup>260</sup> Although President Trump has relied on more acting secretaries than his predecessors, their tenures, after

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255. *United States v. Santos-Caporal*, No. 1:18 CR 171 AGF (ACL), 2019 WL 468795, at \*2–7 (E.D. Mo. Jan. 9, 2019), adopted by 2019 WL 460563 (E.D. Mo. Feb. 6, 2019); *United States v. Smith*, No. 1:18-cr-00115-MR-WCM, 2018 WL 6834712, at \*3 (W.D.N.C. Dec. 28, 2018); *United States v. Peters*, No. 6:17-CR-55-REW-HAI-2, 2018 WL 6313534, at \*4–5 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at \*7 (W.D. Tex. Nov. 27, 2018), appeal dismissed, 940 F.3d 181 (5th Cir. 2019). These cases also addressed whether the President could use the Vacancies Act in light of DOJ’s specific succession provision. See *infra* note 292 and accompanying text (discussing the lower courts’ analyses of the succession provision and the Vacancies Act). The D.C. Circuit avoided the constitutional question in its decision upholding the denial of preliminary injunction to stop DOJ’s Bump-Stock Rule, which Whitaker had signed, because Barr independently reevaluated the record and ratified the decision. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 12–13 (D.C. Cir. 2019), cert. denied, No. 19–296, 2020 WL 981797 (Mem.) (U.S. Mar. 2, 2020) (noting that the analysis of ratification “parallels how this court analyzes the agency practice of post-promulgation notice and comment”).

256. See, e.g., *Valencia*, 2018 WL 6182755, at \*7 (“This opinion, however, does not foreclose a later challenge should the President either: (1) make a statement that implies Whitaker’s appointment is permanent; or (2) fail to nominate a permanent replacement within the time frame designated by statute.”). One court did not reach the constitutional issue as “the United States Attorney in this district . . . had the authority to prosecute Defendants’ case.” *United States v. Patara*, 365 F. Supp. 3d 1085, 1091 (S.D. Cal. 2019).

257. See *supra* Table 5. In enacting the 1998 Vacancies Act, Congress included the third category of nonconfirmed officials after an earlier version of the legislation failed on a cloture vote because it did not give the President sufficient flexibility. See 144 Cong. Rec. 27,496 (1998) (statement of Sen. Thompson) (explaining that the third category was added in response to concerns that “particularly early in a presidential administration . . . there will not be a large number of Senate-confirmed officers” and over “designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions”).

258. See *supra* Table 3.

259. See *supra* Table 3.

260. See *supra* Table 3.

three years, are similar—fifty-five days, on average, or sixty if one excludes short-term stints.<sup>261</sup>

At the EPA, acting administrators have served for longer, on average, than acting cabinet secretaries. But the acting EPA heads have still served for considerably shorter periods than confirmed administrators. Under Presidents George W. Bush, Obama, and Trump, confirmed EPA administrators served (rounded to the nearest five-day mark) for 895, 1,380, and 415 days on average, respectively.<sup>262</sup> Acting administrators, on the other hand, served for 60, 155, and 130 days on average, respectively.<sup>263</sup>

Very few acting secretaries or EPA administrators have approached the time limits in the Vacancies Act. Only Rebecca Blank had to step down as acting Secretary after 210 days because no nomination had been submitted to allow for longer service.<sup>264</sup> But there have been twenty-two acting secretaries and four acting EPA administrators who have served at least 100 days (when service is rounded to the closest five-day mark). Only two of those acting secretaries and one of the acting EPA administrators had not been confirmed to another position by the Senate.

What is the constitutional significance of these findings? Formalists would likely find any service by a nonconfirmed official in a principal office—no matter how short—to be problematic.<sup>265</sup> For originalists, any nonconfirmed acting secretary serving more than six months is troubling.<sup>266</sup> There are, however, no such people in the cabinet or in the top role at the EPA in recent administrations.<sup>267</sup> Functionalists and those who do not fall into the former categories have to figure out where to draw the line for “temporary” service—presumably somewhere past six months.<sup>268</sup> To the extent that modern practices shape constitutional analysis, if acting leaders are meant to fill gaps in the traditional appointments process, empirical realities can help us determine what makes a gap reasonable.

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261. See *supra* Table 3.

262. See *supra* Table 7 (providing the total tenure of the administrators under Presidents Bush (3), Obama (2), and Trump (2), respectively).

263. These calculations exclude acting administrators who served for fewer than ten days, leaving four under President Bush, one under President Obama, and two under President Trump, respectively. See *supra* Table 7 (providing the total tenure of all acting administrators by administration).

264. See Mahita Gajanan, *President Trump Likes Acting Cabinet Members. Research Shows They May Hurt Him*, *Time* (Apr. 9, 2019), <https://time.com/5566733/trump-acting-secretary-concerns-scholars> [<https://perma.cc/R775-4HTM>] (noting that Blank is the only official to have reached the 210-day limit).

265. See *supra* note 253 and accompanying text.

266. See *supra* note 254 and accompanying text.

267. See *supra* sections II.B.3, II.C.3.

268. A student note, drawing on a “structural analogy to the Recess Appointments Clause,” argues that an acting official cannot serve longer than a recess appointee could. West, *supra* note 215, at 217–18.

3. *Separation of Powers.* — At a much broader level, acting officials in federal agencies raise separation of powers concerns.<sup>269</sup> On one hand, the positions covered by the Vacancies Act are supposed to be filled by individuals nominated by the President and confirmed by the Senate. The Act, therefore, operates as a workaround to the constitutionally prescribed process that splits authority between the two political branches.

On the other hand, Senate confirmations no longer “follow[] on the same day, or the next” as nominations.<sup>270</sup> Provisions for temporary appointments allow the government to function in the gaps. In a case about an earlier version of the Vacancies Act, the D.C. Circuit quoted Justice Holmes: “[T]he machinery of government would not work if it were not allowed a little play in its joints.”<sup>271</sup> The Take Care and Necessary and Proper Clauses may therefore justify acting leaders.<sup>272</sup>

Figuring out the balance between accountability and workability is complicated. The need to balance these goals largely affects the proposed policy reforms in Part V, but it also comes into play in analyzing legal questions surrounding vacancies in top agency jobs. For instance, in analyzing whether Congress has permitted an agency to delegate a vacant job’s duties, it might be worth considering whether the White House has failed to nominate someone to the vacant job. A canon of constitutional avoidance (for both Appointments Clause and separation of powers concerns) could be applied to many of the statutory questions discussed in the next section.

## B. *Statutory Questions*

This section turns to statutory questions surrounding acting leaders, starting with conflicts over the interaction between the Vacancies Act and agency-specific succession statutes. It also examines the applicability of the Vacancies Act to firings and considers whether first assistants can be named after a vacancy arises. Finally, it discusses the bar on “double actings” under DOJ policy and its connections to presidential succession.

1. *Agency-Specific Succession Statutes.* — The last few years have brought high-profile statutory challenges to the Vacancies Act’s applicability in the face of agency-specific succession statutes—notably, Whitaker’s service as acting Attorney General and Mulvaney’s service as acting Director of the

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269. On a narrower level, whether restrictions on removal apply to acting leaders—a statutory matter—also plays into separation of power disputes about agency structures. See *infra* section III.C.2.

270. *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 209 (D.C. Cir. 1998).

271. *Id.* (internal quotation marks omitted) (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931)).

272. See Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 41–44.

CFPB.<sup>273</sup> In essence, the DOJ and CFPB statutes specify that the deputy to a vacant position serves as the acting official (for example, the deputy attorney general or the deputy director).<sup>274</sup> In contrast, the Vacancies Act provides the White House with two alternatives to this first assistant—any Senate-confirmed official and any sufficiently senior agency worker who has spent several months in the agency in the year before the vacancy.<sup>275</sup> Thus, conflict arises when the President does not want the first assistant to take on the acting role and turns to the Vacancies Act instead of relying on the agency-specific statute.

a. *Vacancies Act's Language.* — The Vacancies Act specifies that it is “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [covered] office.”<sup>276</sup> But it does permit “a statutory provision expressly” to provide for an alternative.<sup>277</sup> According to OLC, “[I]n 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 nonexclusive, i.e., one available option, together with the office-specific statute.”<sup>278</sup> In addition to relying on a Senate committee report, OLC reasoned: “If Congress had intended to make the Vacancies Reform Act unavailable whenever another statute provided an alternative mechanism for acting service, then it would have said so. It would not have provided that the Vacancies Reform Act ceases to be the ‘exclusive means’ when another

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273. Similar worries were raised about an acting Director of the FHFA. Brianne J. Gorod, Another Legally Questionable Acting Official Who's Not Wasting Any Time Before Making Big Decisions, Take Care (Jan. 15, 2019), <https://takecareblog.com/blog/another-legally-questionable-acting-official-who-s-not-wasting-any-time-before-making-big-decisions> (on file with the *Columbia Law Review*). And concerns were brewing about the DNI role. Specifically, if President Trump had not pushed out the Deputy DNI, Susan Gordon, when he asked Dan Coats, the Director, to leave and had chosen someone other than Gordon to step in as acting DNI, there would have been another high-profile clash. See Robert Chesney, Who Will Be the Acting Director of National Intelligence (DNI) on Aug. 15?, Lawfare (July 29, 2019), <https://www.lawfareblog.com/who-will-be-acting-director-national-intelligence-dni-aug-15> [<https://perma.cc/V7XX-Y5PJ>]. OLC advised, as it had with the attorney general and the CFPB director positions, that the President could turn to the Vacancies Act for an acting DNI and acting FHFA director even if there were a deputy at the relevant agency. Designating an Acting Dir. of Nat'l Intelligence, 43 Op. O.L.C., slip op. at 1 (Nov. 15, 2019) [hereinafter Designating an Acting Dir. of Nat'l Intelligence]; Designating an Acting Dir. of the Fed. Hous. Fin. Agency, 43 Op. O.L.C., slip op. at 1 (Mar. 18, 2019) [hereinafter Designating an Acting Dir. of the FHFA]. Prior Presidents also have relied on the Vacancies Act to name acting officials “even when an official designated by the office-specific statute was available to serve.” Designating an Acting Dir. of the FHFA, *supra*, at 5 n.4.

274. See *infra* sections III.B.1.b–c.

275. 5 U.S.C. § 3345(a) (2018).

276. *Id.* § 3347(a).

277. *Id.* § 3347(a)(1).

278. Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C., slip op. at 5 (Nov. 25, 2017) (quoting 5 U.S.C. § 3347(a)) [hereinafter Designating an Acting Dir. of the Bureau of Consumer Fin. Prot.].

statute applies.”<sup>279</sup> The few courts to consider the issue have adopted this reasoning.<sup>280</sup>

b. *CFPB*. — In the dispute over whether Mulvaney or English was the proper acting Director of the CFPB in late 2017, the key question was whether the Dodd–Frank Act prevented the White House from turning to the Vacancies Act. Interestingly, no one challenged the Dodd–Frank Act under the Appointments Clause by arguing that the nonconfirmed deputy director could not serve in a principal office.<sup>281</sup> Regarding the statutory conflict, the Government argued that the Dodd–Frank provision providing that the deputy director “shall serve as acting Director in the absence or unavailability” applied to Cordray’s resignation, but, drawing on OLC’s analysis above, that “fact . . . does not displace the President’s authority under the Vacancies Act.”<sup>282</sup> By contrast, English contended that “Dodd–Frank and the FVRA are in ‘unavoidable conflict,’ which ‘must be resolved against application of the FVRA’ because ‘Dodd–Frank was enacted later in time, and speaks with greater specificity to the question at hand.’”<sup>283</sup>

The district court sided with the Government, denying both a temporary restraining order and preliminary injunction. It explained:

The best reading of the two statutes is that Dodd–Frank requires that the Deputy Director “shall” serve as acting Director, but that under the FVRA the President “may” override that default rule. This reading is compelled by several considerations: the text of the FVRA, including its exclusivity provision, the text of Dodd–Frank, including its express-statement requirement and Deputy Director provision, and traditional principles of statutory construction.<sup>284</sup>

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279. *Id.* at 5–6 (emphases omitted) (quoting 5 U.S.C. § 3347(a)). The Senate report noted: “[W]ith respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.” S. Rep. No. 105-250, at 17 (1998).

280. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016) (holding that because the National Labor Relations Act (NLRA) “specifically provides for the temporary designation of an Acting General Counsel in the event of a vacancy,” neither the NLRA nor the Vacancies Act are the “exclusive means of appointing an Acting General Counsel of the NLRB”); *English v. Trump*, 279 F. Supp. 3d 307, 324 (D.D.C. 2018), appeal dismissed upon appellant’s motion, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018) (“[T]here is no clearly expressed congressional intent for Dodd–Frank to displace the President’s authority under the FVRA. In fact, both the FVRA’s exclusivity provision and Dodd–Frank’s express-statement requirement strongly suggest the opposite.”).

281. Memorandum from Steven A. Engel to Emmet T. Flood, *supra* note 231, at 18; cf. *English*, 279 F. Supp. 3d at 329–30 (noting that English raised constitutional concerns with non-Senate-confirmed officials permitted under the Vacancies Act and pointing out that English was not Senate-confirmed).

282. Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., *supra* note 278, at 1–2 (quoting 12 U.S.C. § 5491(b)(5) (2018)).

283. *English*, 279 F. Supp. 3d at 317 (citations omitted) (quoting Memorandum in Support of Plaintiff’s Motion for Preliminary Injunction at 7, 9, *English*, 279 F. Supp. 3d 307 (No. 1:17-cv-02534), 2018 WL 9458080).

284. *Id.* at 319.

The court noted that Dodd–Frank “is silent regarding the *President’s* ability to appoint an acting Director.”<sup>285</sup> English appealed, but she abandoned that effort when she left the agency in July 2018, soon after Trump nominated Kathy Kraninger as Director.<sup>286</sup>

c. *DOJ*. — A year later, the applicability of the Vacancies Act arose again in the conflict over whether Whitaker or Rosenstein was the proper acting Attorney General. Under the Attorney General Succession Act, the deputy attorney general is next in line if there is no attorney general.<sup>287</sup>

The Government advanced similar arguments to the CFPB case—about both statutes being available—in litigation challenging Whitaker’s appointment. In addition, the Government pointed out that the agency-specific statute “expressly states that the Deputy Attorney General is the ‘first assistant to the Attorney General’ for the purpose of section 3345 of title 5’ (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer)” and that “[i]t further provides that the Deputy Attorney General ‘may’ serve as Acting Attorney General, not that he ‘must,’ underscoring that the Vacancies Reform Act remains an alternative means of appointment.”<sup>288</sup>

Professors Walter Dellinger, who previously led OLC, and Marty Lederman, who worked at OLC, along with others, contended that the Attorney General Succession Act should take priority over the Vacancies Act. Noting that the earlier versions of the Vacancies Act had explicitly excluded the attorney general, the scholars stressed that if the Vacancies Act were read as OLC interpreted it, “it would . . . constitute a sea change

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285. *Id.* at 322.

286. Jim Puzzanghera, Leandra English Resigns from CFPB and Drops Her Legal Fight to Be Its Acting Director, *L.A. Times* (July 6, 2018), <https://www.latimes.com/business/la-fi-leandra-english-cfpb-20180706-story.html> [<https://perma.cc/746Z-BWGF>]. Two of the judges at oral argument seemed to think that the Vacancies Act applied but President Trump could not pick anyone from OMB under the Act because of a provision in Dodd–Frank that keeps the CFPB independent from OMB review. Oral Argument at 53:30, 56:00, *English v. Trump*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018), [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/D88BBE96D95EF8748525826D005C20AD/\\$file/18-5007.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/D88BBE96D95EF8748525826D005C20AD/$file/18-5007.mp3) (on file with the *Columbia Law Review*).

287. 28 U.S.C. § 508(a) (2018). This issue arose over a decade earlier. See Authority of the President to Name an Acting Att’y Gen., 31 *Op. O.L.C.* 208, 208 (2007) (addressing “whether the President has authority to name an Acting Attorney General under the Vacancies Reform Act . . . even if an officer of [DOJ] otherwise could act under [the Attorney General Succession Act]”).

288. Memorandum from Steven A. Engel to Emmet T. Flood, *supra* note 231, at 5 (quoting 28 U.S.C. § 508(a)). OLC also argued that because 5 U.S.C. § 3349(c) (2018) did not include the Attorney General Succession Act in its list, the Vacancies Act still applied. *Id.* at 4. But that section discusses multimember agencies and similar entities. Stephen Migala, The Vacancies Act and an Acting Attorney General, 36 *Ga. St. U. L. Rev.* (forthcoming 2020) (manuscript at 41–42), <https://ssrn.com/abstract=3285940> (on file with the *Columbia Law Review*) [hereinafter Migala, Vacancies Act and an Acting AG].

from the rules the legislature had prescribed for the preceding 130 years.”<sup>289</sup> In addition, they provided an alternative reading of the succession statute:

Section 508 further provides that in a case where there’s no Senate-confirmed Deputy AG in office, the Associate Attorney General (assuming there is such an officer in place, unlike today, where there’s not) “shall” perform the AG’s duties. []Moreover, even though subsection (a) says only that the Deputy AG “may” perform such duties, it might be fair to read that provision, too, to impose an obligation on the DAG (i.e., that Congress didn’t mean to suggest the DAG could decline to fill in)[.]<sup>290</sup>

Finally, they posited that courts should interpret the statutory question using a canon of constitutional avoidance.<sup>291</sup>

All of the lower courts to rule on the statutory issue concerning Whitaker’s acting service sided with the Government.<sup>292</sup>

d. *Comparison.* — While it may not be desirable as a matter of policy, the President appears capable of legally turning to the Vacancies Act unless Congress has explicitly referenced the Act and declared it does not apply.<sup>293</sup> There are, however, strong arguments on the other side, particularly for the CFPB. Dodd–Frank’s succession provision has mandatory language, postdates the Vacancies Act (and does not include elements of the Act), treats a more specific situation, and involves an agency with built-in independence from the White House, but lacks the express rejection of the Vacancies Act.<sup>294</sup> In addition, while the text of the Attorney General Succession Act may technically permit the use of the Vacancies Act, such a reading goes against decades of historical practice. The Supreme Court has not waded into these interpretation disputes, leaving uncertainty. Part V shows how Congress could bring needed resolution.

289. Dellinger & Lederman, *supra* note 249.

290. *Id.*

291. *Id.*; see also Migala, *Vacancies Act and an Acting AG*, *supra* note 288, at 23–24 (expanding on these arguments and providing additional ones, including from an in-depth examination of the legislative history of the 1998 Vacancies Act).

292. *United States v. Patara*, 365 F. Supp. 3d 1085, 1087–91 (S.D. Cal. 2019); *United States v. Santos-Caporal*, No. 1:18 CR 171 AGF (ACL), 2019 WL 468795, at \*2–3 (E.D. Mo. Jan. 9, 2019), adopted by 2019 WL 460563 (E.D. Mo. Feb. 6, 2019); *United States v. Peters*, No. 6:17-CR-55-REW-HAI-2, 2018 WL 6313534, at \*2–3 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at \*7 (W.D. Tex. Nov. 27, 2018), appeal dismissed, 940 F.3d 181 (5th Cir. 2019). The D.C. Circuit avoided the statutory question (as well as the constitutional claim) in its decision upholding the denial of a preliminary injunction to stop DOJ’s Bump-Stock Rule. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 12–13 (D.C. Cir. 2019), cert. denied, No. 19–296, 2020 WL 981797 (Mem.) (U.S. Mar. 2, 2020).

293. Congress did so in 2016 with respect to DHS. 6 U.S.C. § 113(g) (2018).

294. 12 U.S.C. § 5491(b)(5) (2018). The DNI statute also has mandatory language that postdates the Vacancies Act and refers to the Vacancies Act for positions “other than that of the Director of National Intelligence.” 50 U.S.C. §§ 3025(e), 3026(a)(6) (2018). On the other hand, unlike the CFPB, the DNI handles classic presidential issues.

2. *Vacancies Created by Presidential Removal.* — Firings or forced resignations of top officials used to be rare. According to Joshua Fatzick and Larry Sabato, between 1945 and the start of President Trump’s Administration, twelve Presidents fired a total of nineteen cabinet secretaries.<sup>295</sup> President Trump upped the pace.<sup>296</sup> Conflict has arisen over whether the President can use the Vacancies Act when he created the opening by removing the confirmed official.<sup>297</sup> This section examines the Vacancies Act’s text, litigation that followed President Trump’s use of the Act after firing the Secretary of Veterans Affairs, and policy considerations on both sides of the dispute.

a. *Vacancies Act’s Language.* — The Vacancies Act applies when the previous officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”<sup>298</sup> Earlier versions “applied only to four enumerated cases: death, resignation, sickness, or absence.”<sup>299</sup> As the current statute does not explicitly refer to presidential removal of confirmed officials—either to include or to exclude firings from its coverage—the key textual question is whether the inability “to perform the functions and duties” of the vacant office covers presidential removals.

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295. Joshua Fatzick, *Trump’s Firing of Cabinet Official Rare but Not Unprecedented*, VOA News (Jan. 31, 2017), <https://www.voanews.com/a/trump-firing-cabinet-official-rare-not-unprecedented/3700697.html> [<https://perma.cc/Q92A-L6UK>]; see also Larry J. Sabato, *The Politics of White House Firings*, Politico (May 26, 2014), <https://www.politico.com/magazine/story/2014/05/why-obama-isnt-going-to-fire-shinseki-107060> [<https://perma.cc/6V94-KXV3>] (compiling the data from 1945 until 2014).

296. Looking only at the official cabinet, President Trump has pushed out Tom Price (HHS), David Shulkin (VA), Rex Tillerson (State), Jeff Sessions (DOJ), Ryan Zinke (Interior), Kirstjen Nielsen (DHS), and Alex Acosta (Labor), and sped up James Mattis’s departure (DOD), in his first three years. Denise Lu & Karen Yourish, *The Turnover at the Top of the Trump Administration*, N.Y. Times, <https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html> (on file with the *Columbia Law Review*) (last updated Mar. 6, 2020).

297. See generally Ben Miller-Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 Harv. J. on Legis. 459 (2019) (arguing that the Vacancies Act “does not authorize the president to temporarily fill vacancies created by firing the prior officeholder”); Justin C. Van Orsdol, Note, *Reforming Federal Vacancies*, 54 Ga. L. Rev. 297 (2019) (arguing that “self-created vacancies, via termination, violate the Appointments Clause, but for clarity the FVRA should be amended to explicitly prohibit this practice”). I analyze only the statutory question. There is arguably an associated constitutional question:

[I]f one believes that the President has the constitutional power to remove executive officials, then certainly Congress cannot provide that a vacancy may be filled by an acting appointment only if the vacancy was not caused by the President’s removal of that official. This provision would operate to burden the President’s constitutionally protected removal power. While unconstitutional conditions are most often discussed in the context of burdening individual rights, they also can apply to the burdening of the different branches’ constitutional powers.

Rappaport, *supra* note 48, at 1516 n.81.

298. 5 U.S.C. § 3345(a) (2018).

299. Miller-Gootnick, *supra* note 297, at 474.

The limited legislative history—a few statements by members of Congress—suggests that the Act applies to firings. In its 1999 guidance on the Act, OLC noted: “In floor debate, Senators said, by way of example, that an officer would be ‘otherwise unable to perform the functions and duties of the office’ if he or she were fired, imprisoned, or sick.”<sup>300</sup> Senator Fred Thompson explained on the floor that the 1998 Vacancies Act was making changes to previous vacancy statutes with regard to firings:

For instance, the *Doolin* court stated that the current language of the Vacancies Act does not apply when the officer is fired, and for similar reasons, it might not apply when the officer is in jail if he does not resign. To make the law cover all situations when the officer cannot perform his duties, the “unable to perform the functions and duties of the office” language was selected.<sup>301</sup>

OLC affirmed this understanding in its recent memos on acting leaders at the CFPB and DOJ.<sup>302</sup>

No court has directly ruled on the question. In a challenge to Whitaker’s service as acting Attorney General, one district court, in dicta and without any analysis, stated that “[h]ad Sessions chosen to refuse to resign the President could have exercised his authority to fire him, which would make the [Vacancies Act] inapplicable.”<sup>303</sup>

b. *Firing of the Secretary of Veterans Affairs.* — After President Trump fired Shulkin, he could have relied on the VA statute, which provides for the deputy secretary to step up when there is no secretary at the department.<sup>304</sup> But as with Mulvaney at the CFPB and Whitaker at DOJ, President Trump turned to the Vacancies Act, naming Wilkie as acting Secretary (and then Peter O’Rourke, when he nominated Wilkie to the position itself).<sup>305</sup> In doing so, President Trump sparked the first lawsuit to focus on whether the Act could be used in cases of presidential removal.<sup>306</sup>

The plaintiffs alleged that because Shulkin did not fit into one of the Vacancies Act’s prescribed circumstances as “[h]e was ready and willing to continue serving as Secretary of Veterans Affairs,” the President “lacked

300. Guidance on Application of the Vacancies Act, supra note 84, at 61 (citing 144 Cong. Rec. 27,412, 27,498 (1998) (statements of Sens. Thompson & Byrd)).

301. 144 Cong. Rec. 27,496 (1998).

302. Miller-Gootnick, supra note 297, at 482. For a conflicting view of the legislative history, see id. at 475–81.

303. *United States v. Valencia*, No. 5:17-CR-882-DAE(1)(2), 2018 WL 6182755, at \*4 (W.D. Tex. Nov. 27, 2018), appeal dismissed, 940 F.3d 181 (5th Cir. 2019).

304. 38 U.S.C. § 304 (2018).

305. See supra notes 21–27 and accompanying text.

306. Complaint at 2–3, *Hamel v. U.S. Dep’t of Veterans Affairs*, No. 1:18-cv-1005 (D.D.C. filed Apr. 30, 2018). Plaintiffs challenging Cuccinelli’s acting role have raised this issue as well, arguing that because Francis Cissna “was forced to resign by President Trump,” he was “effectively fired” from his position as director of USCIS and “[a]ccordingly, the FVRA provides no authority for Mr. Cuccinelli to serve as Acting USCIS Director, even assuming he met the statutory requirements.” Complaint at 59, *L.M.-M. v. Cuccinelli*, No. 19-2676 (D.D.C. Mar. 1, 2020).

the power to appoint Wilkie or O'Rourke as acting Secretary.<sup>307</sup> The Government moved to dismiss, arguing that the Vacancies Act applies to openings created by presidential removal: "[A] former Secretary—regardless of the reason for his or her departure from office—is 'unable to perform the functions and duties of the office.' The plain language of the FVRA therefore permits the President to designate an Acting VA Secretary . . . ."<sup>308</sup> In addition to the textual argument, the Government relied on the legislative history discussed above, citing statements by senators in floor debates that the Act applied to firings.<sup>309</sup>

Had the plaintiffs—veterans who "receive health care from the VA and are therefore subject to the effects of any decisions [the acting secretary] makes"<sup>310</sup>—not voluntarily dismissed their suit in August 2018 in light of Wilkie's confirmation, the court presumably would have dismissed for lack of standing. Thus, the statutory question would have remained unresolved.

c. *Fleshing Out the Dispute.* — In addition to the textual and legislative history arguments, manageability and policy concerns also weigh in favor of the Vacancies Act applying to firings. On judicial manageability, courts cannot easily determine whether someone is "ready and willing to continue serving" in (or able "to perform the functions and duties of") a Senate-confirmed position covered by the Vacancies Act because the line between resignation and removal is often blurry. For instance, Tom Price "resigned under pressure" in September 2017 as Secretary of HHS "after racking up at least \$400,000 in travel bills for chartered flights."<sup>311</sup> Earlier that day, President Trump had announced to reporters: "I certainly don't like the optics" and "I'm not happy, I can tell you that."<sup>312</sup>

Some have argued that the Act should not apply to firings because "the purpose of the [Vacancies Act] is to give the [P]resident flexibility to deal with unexpected vacancies, not to create vacancies himself and then

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307. Amended Complaint at 2, 28, *Hamel*, No. 1:18-cv-01005 (D.D.C. filed June 20, 2018).

308. Motion to Dismiss at 25, *Hamel*, No. 1:18-cv-01005 (D.D.C. filed July 13, 2018) (citing 5 U.S.C. § 3345(a) (2012)). There are additional textualist arguments on the other side. Under the *expressio unius est exclusio alterius* canon, by listing specific cases when the Act applies, such as death and resignations, unlisted categories (firings) are excluded. See William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 *Harv. L. Rev.* 26 app. at 97 (1994) ("Expressio unius: expression of one thing suggests the exclusion of others.").

309. *Id.* at 25–26.

310. Amended Complaint, *supra* note 307, at 2.

311. Peter Baker, Glenn Thrush & Maggie Haberman, *Health Secretary Tom Price Resigns After Drawing Ire for Chartered Flights*, *N.Y. Times* (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/politics/tom-price-trump-hhs.html> [<https://perma.cc/XYR9-ZQB7>].

312. Ray Locker & David Jackson, *HHS Secretary Tom Price Resigns in Wake of Travel Spending Scandal*, *USA Today* (Sept. 29, 2017), <https://www.usatoday.com/story/news/politics/2017/09/29/trump-fire-tom-price-hhs-secretary-president-says-hell-decide-tonight/716209001> [<https://perma.cc/C2WQ-SJGZ>].

sidestep existing succession schemes.”<sup>313</sup> Even so, sometimes Presidents need to fire officials for good reasons. Without the Vacancies Act, Presidents would have to choose between firing “bad apples,” which would leave important positions unfilled until the Senate confirmed new officials, and keeping deeply problematic appointees in the meantime.

To be fair, very few leaders would refuse to resign under pressure from the President who appointed them, and courts could draw the line there for firings.<sup>314</sup> For instance, among the secretaries forced out by President Trump, it appears only Shulkin did not submit a resignation letter. Mattis presents some complications as he did resign, but President Trump moved up the end date.<sup>315</sup>

Consider, however, a hypothetical involving a presidential election that changes party control of the White House but leaves the Senate in the opposing party’s hands. The outgoing administration’s top officials refuse to resign on January 20. If the incoming President cannot use the Vacancies Act if they fire them, the President can either have the government led by appointees opposed to new policies or have the top positions vacant while the Senate slow-walks nominations. If that new President favors regulation more than the opposing party, the outgoing administration and the Senate could create considerable obstacles to governing.

3. *Naming a First Assistant After the Vacancy.* — The default acting official under the Vacancies Act is “the first assistant to the office.”<sup>316</sup> Typically, first assistants are in their positions when offices become vacant. But not always. Acting DHS Secretary McAleenan named Cuccinelli Principal Deputy Director of USCIS—a new first assistant position—after President Trump pushed out the USCIS Director.<sup>317</sup> No court has ruled on whether a first assistant named after a vacancy occurs qualifies under the Vacancies Act. OLC initially said a post-vacancy first assistant wouldn’t qualify, but

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313. Steve Vladeck, *The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence*, Lawfare (May 23, 2018), <https://www.lawfareblog.com/federal-vacancies-reform-act-and-va-study-uncertainty-and-incompetence> [<https://perma.cc/2WVJ-EMJX>].

314. See Miller-Gootnick, *supra* note 297, at 487 (arguing that courts could administer a workable standard of excluding firings from the Vacancies Act by not counting forced resignations as firings).

315. See *supra* notes 28–29 and accompanying text.

316. 5 U.S.C. § 3345(a)(1) (2018).

317. Stephen Migala, *The Vacancies Act and a Post-Vacancy First Assistant of USCIS 2–3* (Sept. 9, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3450843> (on file with the *Columbia Law Review*) [hereinafter Migala, *The Vacancies Act and a Post-Vacancy First Assistant*]. There are interesting parallels to Bill Lann Lee’s service as acting Assistant Attorney General for Civil Rights under President Clinton—an example that sufficiently angered members of Congress to help enact the 1998 Vacancies Act. *Id.* at 10–11. Cuccinelli’s acting title expired after 210 days because the White House did not submit a formal nomination for the position. He then moved up in the agency, becoming the “Senior Official Performing the Duties of the Deputy Secretary.” See Misra, *supra* note 37.

changed its mind a few years later.<sup>318</sup> The D.C. Circuit in *SW General* noted that “subsection (a) (1) may refer to the person who is serving as first assistant when the vacancy occurs,” but the court did not rule on the question.<sup>319</sup>

a. *Vacancies Act’s Language and OLC Reversal.* — As noted above, the Vacancies Act specifies that “the first assistant to the office of [the officer who left] shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of [the Act].”<sup>320</sup> The Act does not define first assistant or clearly specify the timing of the staffing of the first assistant position.<sup>321</sup>

In its initial guidance on the Act, OLC addressed whether “someone . . . designated to be first assistant after the vacancy occurs . . . still become[s] the acting officer by virtue of being the first assistant.”<sup>322</sup> OLC briefly noted: “While the Vacancies Reform Act does not expressly address this question, we believe that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.”<sup>323</sup>

Two years later, OLC reversed its stance when considering the appointment of the Principal Deputy Associate Attorney General (the first assistant to the associate attorney general) as acting Associate Attorney General, which occurred in the early months of President George W. Bush’s Administration.<sup>324</sup> OLC made two supporting arguments. First, the Act refers to the “office”; if the first assistant is tied to the officer, the “words ‘to the office’” would be “render[ed] . . . meaningless.”<sup>325</sup> Second, a reading connecting the first assistant to the officer “would also render (b) (1) (A) (i)

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318. See *infra* section III.B.3.a.

319. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 76 (D.C. Cir. 2015) (emphasis omitted); see also *Hooks v. Kitsap Tenant Support Servs., Inc.* 816 F.3d 550, 560 (9th Cir. 2016) (discussing first assistants in relation to subsection (a) (1)).

320. 5 U.S.C. § 3345(a) (1).

321. See *id.* § 3345(a)–(b).

322. Guidance on Application of the Vacancies Act, *supra* note 84, at 63–64.

323. *Id.* The GAO followed this initial advice and called for “documentation . . . to verify that the position (and individual) was designated as first assistant prior to the occurrence of the vacancy.” Letter from Carlotta C. Joyner, Dir., Strategic Issues, U.S. Gen. Accounting Office, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998, GAO-01-468R, at 2 (Feb. 23, 2001), <http://www.gao.gov/assets/80/75036.pdf> [<https://perma.cc/29JD-4P84>].

324. Designation of Acting Assoc. Att’y Gen., 25 Op. O.L.C. 177, 177 (2001) [hereinafter Designation of Acting Assoc. Att’y Gen.]. The GAO also adopted OLC’s later position. U.S. Gov’t Accountability Office, GAO-02-272R, Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act (2001), <https://www.gao.gov/assets/gao-02-272r.pdf> [<https://perma.cc/4W64-86DC>].

325. Designation of Acting Assoc. Att’y Gen., *supra* note 324, at 179–80; cf. Migala, The Vacancies Act and a Post-Vacancy First Assistant, *supra* note 317, at 21–23 (arguing that this reading does not make sense in light of § 3345(b) (1), which, in limiting first assistants from also serving as nominees, specifically refers to periods before the vacancy).

superfluous,” as it refers to service before a vacancy.<sup>326</sup> In *SW General*, the Supreme Court rejected OLC’s reading of that second statutory section—which contended that the section applied only to first assistants and not to the other categories of acting officials—about who could serve as both a nominee and as an acting leader.<sup>327</sup>

b. *New First Assistant Position at U.S. Citizenship and Immigration Services*.—In July 2019, Democracy Forward and immigration rights groups formally asked Attorney General William Barr to “institute a proceeding for writ of quo warranto” against Cuccinelli.<sup>328</sup> Such a writ allows the government to “call upon any person to show by what warrant he holds a public office.”<sup>329</sup> In their letter, the groups raised a number of statutory and constitutional challenges to Cuccinelli’s appointment. Relevant here, they contended that first assistants “may only fill a vacancy . . . if they served as the first assistant when the vacancy arose.”<sup>330</sup>

As support, the groups argued that the Act’s “text and structure confirm this understanding”—that § 3345(a)(1) “provides what courts have characterized as an ‘automatic,’ ‘default’ procedure for immediately filling a vacancy with the first assistant at the moment the office becomes vacant.”<sup>331</sup> Moreover, they posited that this reading “gives meaning to the FVRA’s other appointment mechanisms.”<sup>332</sup> In certain contexts, like the one here, “the underlying statute may not require Senate confirmation or tenure in the agency for an individual to serve as first assistant, meaning that the President’s power to fill the vacancy would be unbounded [if the President could name first assistants after the vacancy]” and “would undermine the FVRA’s carefully crafted scheme.”<sup>333</sup>

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326. Designation of Acting Assoc. Att’y Gen., *supra* note 324, at 180.

327. Berry, *supra* note 251, at 171–74. In the *SW General* case, the Government appeared to go back to its 1999 view of the timing of first assistants. Brief for the Petitioner at 38, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017) (No. 15-1251), 2016 WL 4363344 (describing how the Vacancies Act limits Presidents’ “ability to elevate their chosen nominees to PAS positions on an acting basis through designations as first assistants” either after or soon before the PAS vacancy, which prevents “‘manipulat[ing],’ or ‘gam[ing],’ the [Act]’s restrictions on categories of individuals qualified to serve” (alterations in original) (citations omitted)).

328. Letter from Democracy Forward and Immigrants’ Rights Groups to William Barr, Att’y Gen., U.S. Dep’t of Justice & Jessie K. Liu, U.S. Att’y, U.S. Att’y’s Office for D.C. 1 (July 22, 2019), <https://democracyforward.org/wp-content/uploads/2019/07/Cuccinelli-Letter.pdf> [<https://perma.cc/A85V-M8C9>].

329. *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 545–46 (1915).

330. Letter from Democracy Forward and Immigrants’ Rights Groups to William Barr & Jessie K. Liu, *supra* note 328, at 3.

331. *Id.* at 4 (citing *SW Gen.*, 137 S. Ct. at 940); see also *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 11 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 789 (2020) (mem.); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018)).

332. Letter from Democracy Forward and Immigrants’ Rights Groups to William Barr & Jessie K. Liu, *supra* note 328, at 4.

333. *Id.*

After making textual and structural arguments, the groups contended that OLC's reading "would also conflict with Congress's purpose in enacting the FVRA"—"to combat 'a threat to the Senate's advice and consent power.'"<sup>334</sup> They also responded to OLC's textual argument based on the "to the office" phrase: "[T]hat qualification was added to the statute to clarify that, if the first acting official—appointed under Subsections (a) (2) or (a) (3)—leaves the office, the first assistant at that time would ascend to fill the vacancy."<sup>335</sup>

There is an added complexity in the Cuccinelli case. Not only was he named as first assistant after the vacancy occurred, but the first assistant position itself was also created at that time. The groups therefore claimed that "[e]ven if one were to assume that a particular individual need not have been the first assistant at the time of the vacancy, then, at the very least, the *office* in which that individual serves must have existed at the time of the vacancy."<sup>336</sup>

Given that President Trump chose Barr as Attorney General and Cuccinelli as acting Director of USCIS, it should come as no surprise that Barr did not issue the desired writ. In September 2019, Democracy Forward filed a lawsuit, on behalf of detained immigrants and the Refugee and Immigrant Center for Education and Legal Services, over Cuccinelli's appointment.<sup>337</sup> On March 1, 2020, the district court struck down two asylum directives issued by Cuccinelli, holding that the new principal deputy position was not a legitimate first assistant role because it was temporary (specifically, it was set to expire when a new director was confirmed) and not

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334. *Id.* (quoting *SW Gen.*, 137 S. Ct. at 936).

335. *Id.* (citing Berry, *supra* note 251, at 171–72).

336. *Id.* at 5 (emphasis in original). The groups also suggested that Congress may need to specify first assistant positions by statute—which would make many first assistant positions created by agencies invalid—or "[a]t the very least . . . an agency must designate a first assistant by some formal, publicly available means, such as publication in the Federal Register—not simply by the agency's or the President's say-so." *Id.* Congress almost certainly does not need to specify first assistant roles, but agencies must publicly note such roles under the Administrative Procedure Act, even if they can skip prior notice and comment in establishing them. See 5 U.S.C. §§ 552–553 (2018).

337. See Complaint, *L.M.-M. v. Cuccinelli*, *supra* note 306, at 2–3. The city of Seattle added a similar claim to its suit against DHS for its public charge rule. Amended Complaint, *City of Seattle v. Dep't of Homeland Sec.*, No. 3:19-cv-07151 (N.D. Cal. filed Nov. 6, 2019).

subordinate to any official.<sup>338</sup> The court did not resolve whether the Vacancies Act permitted a first assistant to be named after a vacancy occurred.<sup>339</sup>

c. *Other Considerations.* — On one hand, the Vacancies Act does tie the first assistant to the office, not to the departing officer. The restrictions on first assistants also being nominees do reference the vacancy date, but the two provisions are not in conflict.

As noted above, the statutory text for the first assistant category does, however, push against the spirit of the Vacancies Act for unconfirmed first assistant positions. If a first assistant can be named after the vacancy, the administration will sometimes be able to staff that position with someone whom the Senate would not confirm to the vacant position. To be sure, if the first assistant position is staffed with a senior careerist, there are restrictions governing removal. But if the agency statute is read to allow broad power for internal restructuring, the head may be able to create a new first assistant position, as in the USCIS case.<sup>340</sup>

By restricting first assistants under the Vacancies Act to those serving when the vacancy occurred, agencies will not be left without acting leaders. Under the Act, there are two other categories of valid officials: Senate-confirmed appointees in any agency and senior agency workers with the requisite tenure and pay. Because the President, and not the agency head, must choose from these two categories, there will be more burdens on the White House for temporary staffing. The suggested congressional fix in Part V tries to balance these competing policy concerns.

4. *Double Actings.* — DOJ bars “double actings”—that is, it forbids one acting official from taking on another acting title.<sup>341</sup> This prohibition on double actings has intuitive appeal. Imagine a department that has confirmed officials in its top three positions—secretary, deputy secretary, and undersecretary. The deputy secretary is the first assistant to the secretary. But the deputy secretary’s first assistant is the principal associate to the deputy. If the top two positions become vacant at the same time, and double

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338. *L.M.-M. v. Cuccinelli*, No. 19-2676, 2020 WL 985376, at \*15–16 (D.D.C. Mar. 1, 2020). The Government argued that even if Cuccinelli was not properly serving as acting Director, any of his actions “could be ratified by another official” because no duty of the USCIS director is exclusive to that position—noting that the anti-ratification provision of the Vacancies Act applies only to a position’s exclusive functions. Supplemental Memorandum of Points and Authorities in Opposition to the Motion for a Preliminary Injunction at 19, *Cuccinelli*, 2020 WL 985376 (No. 19-2676). In striking down Cuccinelli’s appointment as acting USCIS Director, the district court did not rule on whether his actions could be ratified as no one had tried to do that. *Cuccinelli*, 2020 WL 985376, at \*20. This Article does not address ratification issues.

339. *Cuccinelli*, 2020 WL 985376, at \*15–16.

340. The creation of such a position may raise constitutional and statutory issues. See *infra* section III.C.1.

341. See Designating an Acting Dir. of Nat’l Intelligence, *supra* note 273, at 7 (“Our rationale for continuing to disapprove double-acting arrangements is grounded in statutory text, executive practice, and common sense.”).

actings were permitted, the principal associate to the deputy would become the acting leader of the department, and the confirmed undersecretary would not.<sup>342</sup> Notwithstanding this example, agency succession statutes and the Vacancies Act do not expressly include a ban on someone having two acting titles.

a. *Mueller Investigation Scenarios.* — In the midst of the Mueller investigation, commentators spun out possible scenarios that would arise if President Trump were to fire Rod Rosenstein, who, as acting Attorney General for this one task, supervised Mueller until Sessions resigned. Assuming that Sessions still served as Attorney General and recused himself from the investigation, the question would become to whom the acting title would pass. In February 2018, the third highest official at DOJ, the Associate Attorney General, resigned to become an executive vice president at Wal-Mart.<sup>343</sup> An acting official, Jesse Panuccio, took her place. Noel Francisco sat in the fourth highest position, that of the Solicitor General, as a confirmed appointee.<sup>344</sup>

Under DOJ's bar on "double actings," the supervision of the Mueller investigation would have passed to Francisco, and not to Panuccio. Specifically, the "double acting" policy would have prevented the acting Associate Attorney General from also serving as the acting Attorney General.

b. *DHS Order of Succession.* — Congress has allowed DHS to keep an acting secretary past the Vacancies Act's time limits under the agency's order of succession.<sup>345</sup> After McAleenan announced his intention to resign in October 2019, President Trump investigated whether it was possible to name Cuccinelli or Mark Morgan as acting Secretary. OLC advised the White House that the President could not use the Vacancies Act, as neither Cuccinelli nor Morgan qualified under the Act.<sup>346</sup> Although the DHS order of succession at the time included the director of USCIS, Cuccinelli was

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342. See Email from Neil J. Kinkopf, Professor of Law, Ga. St. Univ. College of Law, to author (Sept. 9, 2018) (on file with the *Columbia Law Review*) (suggesting that this hypothetical would lead to an undesired result).

343. Josh Gerstein & Eliana Johnson, Justice Department's No. 3 Official Resigns, *Politico* (Feb. 9, 2018), <https://www.politico.com/story/2018/02/09/rachel-brand-leaving-justice-department-402074> [<https://perma.cc/Y97L-J8JL>].

344. Philip Bump, The No. 3 Official at Justice Is Resigning. Here's How that Affects Mueller., *Wash. Post* (Feb. 9, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/02/09/the-number-three-person-at-justice-is-resigning-heres-how-that-affects-mueller> (on file with the *Columbia Law Review*).

345. 6 U.S.C. § 113(g) (2018) ("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.").

346. Michelle Hackman & Andrew Restuccia, White House Weighing Options to Tap Cuccinelli as Acting DHS Secretary, *Wall St. J.* (Oct. 30, 2019), <https://www.wsj.com/articles/white-house-weighing-ways-to-tap-cuccinelli-as-acting-dhs-secretary-11572407713> (on file with the *Columbia Law Review*).

serving in that position in an acting capacity.<sup>347</sup> Because of the bar on double actings, he could not take the top position through the succession order.

The White House found a potential way around the bar on double actings to elevate Cuccinelli to the acting secretary role. If the President named him Assistant Secretary of the Countering Weapons of Mass Destruction Office, a position created in 2018 that does not require Senate confirmation, and if McAleenan changed the succession order, Cuccinelli could arguably have become acting Secretary.<sup>348</sup> McAleenan subsequently indicated that he “ha[d] no present plans” to change the order to permit this chain of events.<sup>349</sup>

In the end, President Trump named Chad Wolf as the next acting Secretary in November 2019. Because Wolf was “[p]erforming the Duties of the Under Secretary, Office of Strategy, Policy, and Plans,” he could not start under the succession order until the Senate confirmed him to the undersecretary position.<sup>350</sup>

c. *Presidential Succession*. — A similar issue arises under the Presidential Succession Act, which provides for cabinet secretaries (in order of creation of the agency) to take over as acting President if there is no President, Vice President, Speaker of the House, or President pro tempore of the Senate.<sup>351</sup> Would acting secretaries be skipped? There is no clear answer.<sup>352</sup> The earlier 1886 Act “explicitly included only cabinet secretaries confirmed as such.”<sup>353</sup> The current statute, enacted in 1947, is “less clear.”<sup>354</sup> It

347. Exec. Order No. 13,753, 50 Fed. Reg. 90,667 (Dec. 9, 2016).

348. Zolan Kanno-Youngs, White House Finds Loophole in Search for Homeland Security Secretary, N.Y. Times (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/politics/white-house-homeland-security.html> [<https://perma.cc/AR5G-HJXB>].

349. Nick Miroff (@NickMiroff), Twitter (Oct. 30, 2019), <https://twitter.com/NickMiroff/status/1189579239483478016> [<https://perma.cc/D932-SRQV>].

350. See Leadership, U.S. Dep’t of Homeland Sec., <https://www.dhs.gov/leadership> [<https://perma.cc/85DM-V3PX>] [hereinafter U.S. Dep’t of Homeland Sec., Leadership] (last updated Feb. 20, 2020); see also Nick Miroff, Chad Wolf Sworn in as Acting Department of Homeland Security Chief, Ken Cuccinelli to Be Acting Deputy, Wash. Post (Nov. 13, 2019), [https://www.washingtonpost.com/immigration/chad-wolf-sworn-in-as-acting-department-of-homeland-security-chief-fifth-under-trump/2019/11/13/6633a614-0637-11ea-8292-c46ee8cb3dce\\_story.html](https://www.washingtonpost.com/immigration/chad-wolf-sworn-in-as-acting-department-of-homeland-security-chief-fifth-under-trump/2019/11/13/6633a614-0637-11ea-8292-c46ee8cb3dce_story.html) (on file with the *Columbia Law Review*) (noting that “Wolf cleared a key hurdle . . . when senators voted 54 to 41 to confirm him for a different job”).

351. Questions about the role of acting officials also arise under Section 4 of the Twenty-Fifth Amendment. U.S. Const. amend. XXV, § 4 (providing that if a President were deemed “unable to discharge the powers and duties of his office,” the Vice President would assume the role of “Acting President”). See generally Brian C. Kalt, Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment 62–64, 148–52 (2019) (exploring whether acting secretaries could participate in this process).

352. Clinic on Presidential Succession, Fordham Univ. Sch. of Law, Ensuring the Stability of Presidential Succession in the Modern Era, 81 Fordham L. Rev. 1, 43 (2012) (“It is unclear whether the acting cabinet secretaries are in the line of succession under the 1947 Act. During congressional debates leading up to the 1947 Act, the topic of their inclusion did not come up once.” (footnote omitted)).

353. *Id.* at 44.

354. *Id.*

specifies that the succession list “appl[ies] only to officers appointed, by and with the advice and consent of the Senate,” but does not link the confirmation to the secretary roles, suggesting a confirmed deputy secretary serving as an acting secretary might qualify.<sup>355</sup>

Some believe acting secretaries would be skipped in a doomsday scenario.<sup>356</sup> Others claim they would not, so long as they have been confirmed to some other position.<sup>357</sup> In February 2019, President Trump bypassed his acting secretaries and chose Rick Perry, then confirmed Secretary of Energy, as the “designated survivor” for his State of the Union address.<sup>358</sup>

### C. *Cross-Cutting Issues*

This section turns to two important yet relatively unnoticed issues that have constitutional and statutory dimensions: delegations of authority in the face of staffing vacancies and the applicability of statutory qualification mandates and removal restrictions to acting officials.

1. *Delegations of Authority.* — As discussed earlier, delegation of authority often acts as a complete (or nearly complete) substitute for acting officials. Instead of filling a vacant position temporarily with an acting official, the agency delegates the nonexclusive functions of that position to someone who does not hold the acting title, usually because the time limits to serve in an acting capacity have run out. In practice, these delegations can come in the form of standing directives. They may also result from ad hoc orders before the Vacancies Act’s time limits run out, or before quorum is lost in an agency not covered by the Act. Despite the prevalence of delegated authority due to vacant offices, little attention has been devoted to the interconnected constitutional and statutory issues in this context.<sup>359</sup>

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355. *Id.*

356. See Jordyn Phelps & Karma Allen, Energy Secretary Rick Perry Tapped as ‘Designated Survivor’ for Trump’s State of the Union, ABC News (Feb. 5, 2019), <https://abcnews.go.com/Politics/sotu-designated-survivor-choice-complicated-trumps-multiple-acting/story?id=60861912> [<https://perma.cc/K9XN-BERA>] (“The Presidential Succession Act specifies that only Senate-confirmed secretaries are eligible for the role, meaning that ‘acting’ secretaries are not.”).

357. Ensuring the Continuity of the United States Government: The Presidency: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Rules & Admin., 108th Cong. 11 (2003) (statement of John C. Fortier, Exec. Dir., Continuity of Gov’t Comm’n) (“[A]n [a]cting [s]ecretary is in the line of succession as long as that person has been confirmed by the Senate for some position.”).

358. Betsy Klein & Noah Gray, Energy Secretary Rick Perry Is the Designated Survivor, CNN (Feb. 5, 2019), <https://www.cnn.com/2019/02/05/politics/rick-perry-designated-survivor/index.html> [<https://perma.cc/V8P7-BZ6D>].

359. Cf. Mendelson, *The Permissibility of Acting Officials*, supra note 105, at 21–29 (examining whether the Vacancies Act permits delegation of non-exclusive functions outside the permitted time limits for acting officials); Jennifer Nou, *Subdelegating Powers*, 117 *Colum. L. Rev.* 473, 478, 504–05 (2017) (discussing internal delegation in the face of vacancies, but largely treating the wider issue of agency organization). There is some research on delegation among agencies. See, e.g., Bijal Shah, *Interagency Transfers of*

a. *Constitutional Dimensions.* — To start, such delegation raises issues under the Appointments Clause. In particular, delegating authority from a vacant, high-level office to a lower-level official raises two questions: whether the delegatee is an improper principal officer and whether the delegatee occupies a valid inferior office. Because very few functions of high-level positions are exclusively reserved for those jobs, officials who carry out delegated functions often exercise “significant authority pursuant to the laws of the United States.”<sup>360</sup> Indeed, such high-level positions are supposed to be filled by someone appointed by the President and confirmed by the Senate.

The first question requires an assessment of whether an official steps into the role of a “principal officer” by acting under authority that has been delegated from a vacant principal office. As with acting officials, one might argue that delegations are meant to be stopgap measures and, therefore, officials who carry out delegations are not equivalent to confirmed appointees under the Appointments Clause.<sup>361</sup> But the Court has not equated short tenures with a lack of necessary continuity.<sup>362</sup> In addition, delegations are not time-limited by statute, unlike acting officials under the Vacancies Act. Agencies may restrict delegations, but they can always extend the deadlines.<sup>363</sup> These factors suggest that professionals who exercise delegated authority may be considered officers for Appointments Clause purposes.

Assuming the delegatee is an inferior officer, another question arises—whether the delegatee occupies a valid inferior office—which has constitutional and statutory components. Constitutionally, Congress must have created the specific position in which the delegatee serves or delegated the authority to create the job to the agency head under the Appointments Clause.<sup>364</sup> In recent years, challenges have been raised to a number of offices that Congress did not specifically establish, including the special

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Adjudication Authority, 34 *Yale J. on Reg.* 279, 281–87 (2017). This section focuses on delegation downward from the vacant position. The Vacancies Act (and the Constitution) generally permit delegation upward to the agency head. See 5 U.S.C. § 3348(b)(2) (2018).

360. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

361. See *Tillman & Blackman*, *supra* note 222.

362. See *Morrison v. Olson*, 487 U.S. 654, 672, 721 (1988); see also *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 644 (D.D.C. 2018) (noting that “temporary” means “occasional, intermittent, or episodic” in the context of applying the officer–employee test under *Lucia v. SEC*, 138 S. Ct. 2044 (2018)).

363. The Department of the Interior has done this recently for the duties of the directors of the National Park Service and BLM. Sec’y of the Interior, U.S. Dep’t of the Interior, Order No. 3345, Amendment No. 28: Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions 2 (July 29, 2019).

364. Article II’s Excepting Clause “does not require that a law specifically provide for the appointment of a particular inferior officer.” *Pennsylvania v. U.S. Dep’t of Health & Human Servs.*, 80 F.3d 796, 804–05 (3d Cir. 1996); cf. *West*, *supra* note 215, at 189 (looking at early practice where “early nominations filled offices only after they had been created by acts of Congress”).

master of executive compensation for the Troubled Asset Relief Program during the financial crisis,<sup>365</sup> the special convener for military commissions for Guantanamo Bay detainees,<sup>366</sup> and the issuer of significant rules at the Food and Drug Administration (FDA).<sup>367</sup>

Similar issues arise when there are vacancies in Senate-confirmed positions. Congress did not create the position that allowed Cuccinelli to run USCIS.<sup>368</sup> Nor did Congress create the new deputy director positions at the Interior Department, the holders of which exercise the delegated functions of vacant director jobs.<sup>369</sup> But the issue is, in some ways, different in the vacancies context. The creation of these positions is closely connected to the appointments process (and lack thereof) for established offices. Challengers to Cuccinelli's acting service have stressed that the "extremely unusual sequence of events"—including the creation of a new first assistant position instead of nominating someone to the vacant job or even choosing "any number of permissible individuals to serve as Acting Director"—"may run afoul of the Appointments Clause."<sup>370</sup>

In short, on the constitutional side, Article II's Excepting Clause does not mandate that Congress create the specific office.<sup>371</sup> The issue is therefore largely a statutory inquiry, which is taken up below: If Congress did not establish the inferior office, did it delegate the power to create the position to the agency head?<sup>372</sup>

At times, the statutory inquiry is phrased in terms of whether the delegation of functions is permitted. In those cases, the courts (and presumably the parties) have often ignored the constitutional connection by saying nothing about whether the Appointments Clause would permit the

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365. See Michael W. McConnell, Martin Flaherty & Steven Schwinn, *The Pay Czar and the Appointments Clause: A Forum*, Federalist Soc'y (Jan. 4, 2010), <https://fedsoc.org/commentary/publications/the-pay-czar-the-appointments-clause-a-forum> [<https://perma.cc/QU2E-AQLM>].

366. See Brief for Petitioner at 13–34, *al Bahlul v. United States*, No. 19-1076 (D.C. Cir. filed July 8, 2019) (arguing that the military commission convener for the detainee's case lacked the authority to set up the tribunal because she was not a properly appointed officer).

367. See Complaint at 15, *Moose Jooce v. Food & Drug Admin.*, No. 18-cv-203 (D.D.C. Feb. 11, 2020) (claiming that the rules issuer, an FDA employee, is neither a principal nor inferior officer of the United States).

368. Complaint, *L.M.-M. v. Cuccinelli*, *supra* note 306, at 33.

369. Victoria Regis Knight & Casey Smith, *Interior's Many 'Acting' Officials 'Questionable at Best'*, Investigative Reporting Workshop (Feb. 11, 2019), <https://investigativereportingworkshop.org/investigation/interiors-many-acting-positions-questionable-at-best> [<https://perma.cc/86WX-ZKZY>] ("To get around the 'acting' title when time is running out under the Vacancies Act, Zinke created some new leadership positions, or 'deputy' positions.").

370. Letter from Democracy Forward and Immigrants' Rights Groups to William Barr & Jessie K. Liu, *supra* note 328, at 7.

371. See *supra* note 364.

372. See *infra* section III.C.1.b.

downward assignment.<sup>373</sup> As more attention comes to delegations, challengers will presumably start to raise constitutional claims as well.

b. *Statutory Dimensions.* — The constitutional questions surrounding delegation have connected statutory issues—specifically, whether Congress has permitted the agency head to create and staff an inferior office, and whether Congress (or the agency) has allowed delegation to that office.<sup>374</sup>

i. *Creation of Positions.* — Outside the acting leadership context, courts have generally relied on agency organic statutes to find the requisite authority for the executive branch’s creation of positions. In *Edmond v. United States*, the Supreme Court upheld an appointment of a Coast Guard judge that was permitted only by a general delegation to the secretary of transportation. The Court noted that “although the statute does not specifically mention Coast Guard judges, the plain language of § 323(a) appears to give the Secretary power to appoint them.”<sup>375</sup>

More recently, the D.C. Circuit upheld the appointment of Mueller as Special Counsel against an Appointments Clause challenge.<sup>376</sup> As part of its analysis, the court, quoting the Supreme Court’s 1974 decision in *United States v. Nixon*, noted that “[Congress] has also vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties.”<sup>377</sup>

ii. *Department of the Interior Delegations.* — The Department of the Interior has delegated authority of vacant offices after the Vacancies Act’s time limits ran out “to ensure uninterrupted management and execution

373. See, e.g., *Donovan v. Nat’l Bank of Alaska*, 696 F.2d 678, 681–83 (9th Cir. 1983) (finding that the secretary of labor had the authority to delegate investigative powers to federal banking officials based on a purely statutory analysis); *Stand Up for California! v. Dep’t of Interior*, 298 F. Supp. 3d 136, 142 (D.D.C. 2018) (finding that a federal statute did not preclude the secretary of interior from delegating authority to make a final decision to acquire land in trust for an Indian tribe); *United States v. Frederick*, No. 16-00048-03, 2017 U.S. Dist. LEXIS 40617, at \*2–3 (W.D. La. Mar. 21, 2017) (rejecting the argument that criminal prosecution initiated by a DOJ attorney was a nondelegable function in violation of the Vacancies Act); cf. *Schaghticoke Tribal Nations v. Kempthorne*, 587 F. Supp. 2d 389, 418–21 (D. Conn. 2008) (rejecting a challenge to deputy positions in the Department of the Interior under the Appointments Clause, in addition to a Vacancies Act claim).

374. See, e.g., *United States v. Concord Mgmt. & Consulting L.L.C.*, 317 F. Supp. 3d 598, 622 (D.D.C. 2018) (“[The] power to delegate duties to an existing officer is not the same as the power to appoint the officer in the first place.”).

375. *Edmond v. United States*, 520 U.S. 651, 656 (1997) (referring to 49 U.S.C. § 323(a) (1994), which allows the secretary of transportation to “appoint and fix the pay of officers and employees of the Department of Transportation and . . . prescribe their duties and powers”).

376. *In re Grand Jury Investigation*, 916 F.3d 1047, 1056 (D.C. Cir. 2019).

377. *Id.* at 1053 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 694 (1974)). But see Steven G. Calabresi & Gary Lawson, *Why Robert Mueller’s Appointment as Special Counsel Was Unlawful*, 95 *Notre Dame L. Rev.* 87, 90 (2019) (arguing that Mueller’s appointment “was unlawful on both statutory and constitutional grounds”).

of duties of these vacant non-career positions during the Presidential transition pending Senate-confirmation of new non-career officials.”<sup>378</sup> These temporary delegations were set to expire on March 15, 2018, but then-Secretary Ryan Zinke extended them.<sup>379</sup> Secretary Bernhardt subsequently continued the delegations in multiple orders.<sup>380</sup>

Some of this delegated authority went to newly created deputy director positions. The constitutional question thus turns on the Interior Department’s statutory authority to create those positions. The Interior Department’s orders rest on Reorganization Plan No. 3 of 1950, which provides: “The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.”<sup>381</sup>

iii. *Governing Statutes and Section 301.* — The Interior Department’s language is similar to the Department of Labor’s governing statute, which allows the secretary “from time to time [to] make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary.”<sup>382</sup> Both agencies also fall under 5 U.S.C. § 301, which allows “[t]he head of an Executive department or military department . . . [to] prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”<sup>383</sup>

The Fifth and Sixth Circuits interpreted the Labor Department’s statute and 5 U.S.C. § 301 to permit the Secretary of Labor to create the Administrative Review Board, appoint members to the Board, and delegate

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378. Sec’y of the Interior, U.S. Dep’t of the Interior, Order No. 3345, Amendment No. 15: Temporary Redefinition of Authority for Certain Vacant Non-Career Senate-Confirmed Positions 1 (Jan. 24, 2018) [hereinafter U.S. Dep’t of the Interior, Order No. 3345 Amendment No. 15]; see also Jory Heckman, Zinke’s Temporary Filling of Political Positions ‘Remains Murky,’ Says Public Employees Group, Fed. News Network (Sept. 14, 2018), <https://federalnewsnetwork.com/agency-oversight/2018/09/zinkes-temporary-filling-of-political-positions-remains-murky-says-public-employees-group> [<https://perma.cc/WLD8-9MP6>] (suggesting that Interior’s temporary redelegations of authority were intended to avoid the consequences of Vacancies Act time lapses).

379. U.S. Dep’t of the Interior, Order No. 3345 Amendment No. 15, *supra* note 378, at 2.

380. The latest extends the delegations to April 30, 2020. Sec’y of the Interior, U.S. Dep’t of the Interior, Order No. 3345, Amendment No. 30: Temporary Redefinition of Authority for Certain Vacant Non-Career Senate-Confirmed Positions 2 (Jan. 2, 2020).

381. Department of the Interior Reorganization Plan No. 3 of 1950, § 2, 64 Stat. 1262, 1262.

382. Department of Labor Reorganization Plan No. 6 of 1950, § 2, 64 Stat. 1263, 1264.

383. 5 U.S.C. § 301 (2018); cf. William Funk, Is the Environmental Appeals Board Unconstitutional or Unlawful?, 49 *Envtl. L.* 737, 742–43 (2019) (arguing that the EPA cannot establish its Environmental Appeals Board as the agency does not fall under § 301 and lacks specific “authority to appoint officers to carry out functions” of the agency).

decisionmaking authority to them.<sup>384</sup> But the Court of Appeals for the Armed Forces recently questioned this interpretation of § 301, noting that the text “grants only the power to prescribe regulations.”<sup>385</sup> That court refused to uphold the Secretary of Defense’s selection of an Air Force civilian employee as an appellate military judge.<sup>386</sup> It reasoned that § 301 and “5 U.S.C. § 3101 (which establishes a general authority to employ, subject to appropriations)” cannot “authorize the Secretary’s action . . . in the face of the statutory structure that Congress has enacted for the Department of Defense,” which “sets out in great detail the officials who make up the Office of the Secretary of Defense, and the procedures to be employed for their appointment.”<sup>387</sup>

The split in the appellate courts largely tracks a functional–formalist divide, with the Fifth and Sixth Circuits on the functional side and the Court of Appeals for the Armed Forces on the formalist end. In light of separation of powers concerns surrounding workarounds to the traditional appointments process, perhaps even functionalist-minded courts should interpret provisions like § 301 narrowly when agencies create positions or delegate authority in the face of vacancies in important Senate-confirmed roles. In other words, they should apply a constitutional avoidance canon to cut back on delegations. Separate from the constitutional concerns, unlike in the Fifth and Sixth Circuit cases, where the Secretary of Labor needed to assign some of his power over whistleblowing cases to a review board and Congress had provided no explicit mechanism for doing so, Congress in the Vacancies Act has authorized temporary service. In addition, there may be more concerns when an acting official creates the position.<sup>388</sup>

iv. *Delegations of Authority*. — As with the creation of positions, the delegation of powers within an agency generally requires minimal congressional permission.<sup>389</sup> Outside the vacancies context, courts “presumptively” permit “subdelegation to a subordinate federal officer or agency . . . absent affirmative evidence of a contrary congressional intent.”<sup>390</sup>

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384. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 491–92 (5th Cir. 2005); *Varnadore v. Sec’y of Labor*, 141 F.3d 625, 631–32 (6th Cir. 1998).

385. *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014).

386. *Id.* at 222.

387. *Id.* at 225.

388. Cf. Brief of Amicus Curiae Morton Rosenberg in Support of Plaintiffs’ Motion for Preliminary Injunction at 5–6, *L.M.-M. v. Cuccinelli*, No. 19-2676, 2020 WL 985376 (D.D.C. Mar. 1, 2020) (“And worst of all, the administration did all this through agency underlings [specifically, an acting secretary], rather than the President himself . . .”).

389. See, e.g., *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (holding that “[e]xpress statutory authority for delegation is not required” in the context of an internal delegation of power by the HHS secretary to a department administrator).

390. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); see also *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122–23 (1947) (permitting the agency

In the vacancies context, courts look both to statutory and regulatory bars to see if certain functions or duties of the vacant office are “non-delegable” under the Vacancies Act.<sup>391</sup> But there are few such bars. As one district court noted, “[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.”<sup>392</sup>

For agencies that are not covered by the Vacancies Act, other statutory issues over delegation have also generated concerns. Interestingly, unlike covered agencies that can almost always use both acting officials and delegations of authority, noncovered agencies are usually much more restricted in their use of delegated authority. In *New Process Steel, L.P. v. NLRB*, the Supreme Court rejected the NLRB’s attempt to delegate decisionmaking power to two remaining members at the agency.<sup>393</sup> When the MSPB and the FEC lost their required quorum, they could not have legally made up for their lack of leaders with delegations.<sup>394</sup> The U.S. Postal Service, however, did delegate “certain powers” of the Board of Governors to a “Temporary Emergency Committee” before it lost its quorum.<sup>395</sup> That committee ran the Postal Service, the second-largest civilian employer in the United States after Wal-Mart,<sup>396</sup> for nearly five years.<sup>397</sup> Although commentators argued that the delegation was illegal,<sup>398</sup> no lawsuits raised the issue.

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administrator to delegate their power to sign and issue subpoenas to regional officials in the absence of express statutory authority). But cf. *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 366–67 (1942) (finding, under a different statutory scheme, that the administrator’s subpoena power should be delegable “only when an authority to delegate is expressly granted”).

391. See *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (“The question before the Court is whether the authority to make tribal acknowledgment decisions is required by statute or regulation to be performed only or exclusively by the [vacant office].”), *aff’d*, 587 F.3d 132 (2d Cir. 2009); see also *supra* notes 106–109 and accompanying text.

392. *Stand Up for California! v. U.S. Dep’t of Interior*, 298 F. Supp. 3d 136, 137 (D.D.C. 2018); see also *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 539 n.1 (4th Cir. 2009) (upholding a delegation of power to the deputy general counsel of the NLRB as lawful under the Vacancies Act).

393. 560 U.S. 674, 676 (2010). The Vacancies Act applies to the NLRB’s general counsel but not to the agency’s board members. See 5 U.S.C. § 3348(e)(1) (2018).

394. See *supra* notes 65–69 and accompanying text.

395. *Exercise of Powers Reserved to the Governors and the Board of Governors*, 79 Fed. Reg. 74,780, 74,781 (Dec. 16, 2014).

396. See Alexander E.M. Hess, *The 10 Largest Employers in America*, USA Today (Aug. 22, 2013), <https://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249> [<https://perma.cc/3U77-JFLM>]; *Working at USPS*, U.S. Postal Serv., <https://about.usps.com/careers/working-usps> [<https://perma.cc/NPR2-V7CK>] (last visited Oct. 15, 2019).

397. See *supra* note 67 and accompanying text.

398. See Kevin R. Kosar & Daniel J. Richardson, R Street, *The U.S. Postal Service’s Ghost Ship Board 3–5* (2016), [https://www.rstreet.org/wp-content/uploads/2016/02/RSTREET51\\_2016.pdf](https://www.rstreet.org/wp-content/uploads/2016/02/RSTREET51_2016.pdf) [<https://perma.cc/T3YU-UT4N>] (describing how the U.S. Postal Service may

v. *Potential End Run of the Vacancies Act.* — At some point, presumably, statutory authorization for delegation to a nominee runs counter to the Vacancies Act’s restrictions, at least in spirit. If a nominee cannot serve in an acting capacity under the Vacancies Act, the agency should not be able to delegate the duties and functions of the vacant office to them when they are holding some other title. But some agencies have done just that. For instance, in October 2019, the nomination of William Bryan for Under Secretary for Science and Technology at DHS was pending in the Senate.<sup>399</sup> Under the Vacancies Act, Bryan could not simultaneously serve in an acting capacity.<sup>400</sup> Instead, DHS listed him as “[p]erforming the [d]uties” of the undersecretary position.<sup>401</sup>

While little attention is paid to legal questions surrounding acting officials, there is even less attention paid to delegations in the face of vacancies, even though they are largely interchangeable mechanisms in the administrative state.

2. *The Applicability of Statutory Qualification Mandates and Removal Protections to Acting Officials.* — While the main statutory disputes concerning acting officials focus on the applicability of the Vacancies Act in particular contexts—in the face of specific agency succession plans or a presidential firing—there are also conflicts over whether restrictions on confirmed officials also apply to acting leaders. Although these restrictions, from required qualifications to removal provisions, target both ends of the appointments process, most legal attention has focused on removal. In addition, this attention implicates high-profile separation of powers disputes concerning the CFPB and FHFA. Specifically, if acting directors of the CFPB and FHFA can be removed at will, then actions taken by acting leaders in those positions will raise lesser separation of powers concerns than those taken by confirmed directors who have more independence.

a. *Removal Restrictions.* — Most removal restrictions apply to agencies that are not covered by the Vacancies Act or specific agency succession statutes, such as the Federal Trade Commission (FTC) or the Securities and Exchange Commission (SEC).<sup>402</sup> But two agencies whose confirmed

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have acted outside of the scope of its delegated authority in creating the Temporary Emergency Committee); Peter Urban, *Nevada’s Bilbray Stands Alone on Postal Service Board*, *Las Vegas Rev.-J.* (Dec. 13, 2015), <https://www.reviewjournal.com/local/local-nevada/nevadas-bilbray-stands-alone-on-postal-service-board> [<https://perma.cc/FMV5-Z6MA>] (noting that then-Governor of the U.S. Postal Service, James Bilbray, stated that “[t]here is a question about whether the courts would hold [the Temporary Emergency Committee] valid”).

399. Nomination of William Bryan, PN182, 116th Cong. (2019), <https://www.congress.gov/nomination/116th-congress/182> [<https://perma.cc/HT7J-8YBC>].

400. Bryan was not the first assistant. See *supra* notes 82–87 and accompanying text (explaining that, under the Vacancies Act, only certain first assistants to a position may serve in an acting capacity in that position while simultaneously awaiting confirmation to the position).

401. U.S. Dep’t of Homeland Sec., *Leadership*, *supra* note 350.

402. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 771 & n.2 (2013). Senior career officials also typically

leaders have removal protection under their organic statutes, the CFPB and the FHFA, arguably fall under the Act—and even if they don't, they each have specific succession provisions allowing for acting leaders.<sup>403</sup>

For the CFPB and the FHFA, the interplay of removal protection and potential acting leadership sets up distinct legal challenges. Dodd–Frank specifies that “[t]he President may remove the Director [of the CFPB] for inefficiency, neglect of duty, or malfeasance in office.”<sup>404</sup> The Housing and Economic Recovery Act of 2008, which created the FHFA, similarly provides that “[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.”<sup>405</sup> The CFPB<sup>406</sup> and FHFA<sup>407</sup> both had acting directors recently. If Mulvaney had simply annoyed President Trump, could the President have fired him from his acting CFPB role? The specific statutory provisions for the CFPB and FHFA on acting directors do not contain removal protections.<sup>408</sup> The Vacancies Act is similarly silent on whether any removal restrictions extend to acting officials.<sup>409</sup>

Relatedly, there are procedural provisions concerning the removal of confirmed IGs—positions that unarguably fall under the Vacancies Act. Specifically, “[I]f an Inspector General is removed from office or is transferred to another position or location within an establishment, the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”<sup>410</sup> The GAO, without citation, has stated that “the IG Act’s requirement for congressional notification prior to removal of a permanent IG does not apply to an acting IG.”<sup>411</sup>

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have removal protection. See Jon O. Shimabukuro & Jennifer A. Staman, Cong. Research Serv., R45635, *Categories of Federal Civil Service Employment: A Snapshot 9–10* (2019), <https://fas.org/sgp/crs/misc/R45635.pdf> [<https://perma.cc/65TM-A58Q>] (describing the removal protections applicable to different kinds of senior government employees). Thus, first assistants who are senior careerists cannot be easily removed from their positions. See *id.* If Presidents do not want such a first assistant to continue serving as the acting official, however, they can turn to the other two permitted categories under the Vacancies Act. See *supra* section I.B. The first assistant would remain in that job but would no longer be the acting official. See *supra* notes 75–79 and accompanying text.

403. See 12 U.S.C. § 5491 (b)(5)(B) (2018) (CFPB statute); *id.* § 1427(g)(3) (FHFA statute); *supra* note 273.

404. 12 U.S.C. § 5491(c)(3).

405. *Id.* § 4512(b)(2).

406. See *supra* notes 15–20 and accompanying text.

407. Ben Lane, *Mark Calabria Takes Over as FHFA Director, Begins Push for Housing Finance Reform*, *Housing Wire* (Apr. 15, 2019), <https://www.housingwire.com/articles/48796-mark-calabria-takes-over-as-fhfa-director-begins-push-for-housing-finance-reform> [<https://perma.cc/Y7SM-GLDQ>].

408. See 12 U.S.C. § 5491(b)(5)(B) (CFPB); *id.* § 4512(f) (FHFA).

409. See *infra* section V.A.2.

410. 5 U.S.C. app. § 3(b) (2018).

411. GAO, *Inspectors General Report*, *supra* note 151, at 8.

b. *Connecting Statutory and Constitutional Issues in the CFPB and FHFA Litigation.* — The applicability of the removal restriction to an acting official has arisen in litigation over the constitutionality of both the CFPB’s and FHFA’s structure. The Fifth Circuit has given the issue the most attention thus far, in the context of a challenge to the FHFA.<sup>412</sup> The FHFA claimed, in part, that the plaintiffs lacked standing to challenge the agency’s structure—a single head with removal protection—because the challenged decision involving the restructuring of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) “was the decision of an acting director whose designation was not subject to the for-cause removal restriction.”<sup>413</sup>

The Fifth Circuit panel disagreed, devoting only a few sentences to its reasoning:

[I]f the acting Director could be removed at will, the FHFA would be an *executive* agency—not an independent agency. There is no indication that Congress sought to revoke the FHFA’s status as an independent agency when it is led by an acting, rather than appointed, Director. So an acting Director, like an appointed one, is covered by the removal restriction.<sup>414</sup>

The Fifth Circuit agreed to rehear the case en banc.<sup>415</sup> In affirming the panel on the applicability of the removal restriction to the acting director, the majority penned four paragraphs.<sup>416</sup> It too relied on the “kind of agency” Congress had created.<sup>417</sup> It distinguished *Swan v. Clinton*,<sup>418</sup> in which the D.C. Circuit allowed the President to remove a holdover National Credit Union Administration Board (NCUA) member without cause, noting that the NCUA statute did not have express removal protections for term members.<sup>419</sup> The panel also dismissed OLC’s opinion that the removal restriction for the CFPB did not apply to the acting director as it “relies principally on *Swan* for that proposition, and it doesn’t explain why the same rule cuts across different enabling statutes.”<sup>420</sup>

The Fifth Circuit’s reasoning goes against the FHFA statute’s text. The removability restriction appears in the *same* section as the appointment of a confirmed director.<sup>421</sup> The section on an acting director of the FHFA does not mention or refer to any removability restrictions.<sup>422</sup> The dissent,

412. *Collins v. Mnuchin*, 896 F.3d 640, 655 (5th Cir. 2018).

413. *Id.*

414. *Id.* at 656 (footnote omitted).

415. *Collins v. Mnuchin*, 908 F.3d 151, 152 (5th Cir. 2018).

416. *Collins v. Mnuchin*, 938 F.3d 553, 588–89 (5th Cir. 2019) (en banc).

417. *Id.*

418. 100 F.3d 973, 981, 988 (D.C. Cir. 1996).

419. *Collins*, 938 F.3d at 589.

420. *Id.*

421. See 12 U.S.C. § 4512(b) (2018).

422. *Id.* § 4512(f). The Vacancies Act also does not mention removal constraints. See *infra* section V.A.2.

in addition to relying on the text, also contended that Congress's creation of an independent agency "is no license for us to graft onto the statute a for-cause limitation on removal of Acting Directors that Congress did not include."<sup>423</sup> Other than the en banc majority, "[n]o authority has ever read in tenure protection for acting officials not subject to Senate confirmation."<sup>424</sup>

In 2018, the CFPB raised the same defense in response to a constitutional challenge to its structure (also a single head with removal protection), arguing that ratification of the confirmed director's actions by an acting director "cured any constitutional defect with the initiation of this [enforcement action]."<sup>425</sup> Unlike the FHFA case, the opposing party (here, defendants in an enforcement action) did "not contest that the President may remove Acting Director Mulvaney at will."<sup>426</sup> The defendants filed a petition for certiorari before the Fifth Circuit's panel decision, arguing that their case was a better vehicle for deciding the constitutionality of the CFPB than a similar Ninth Circuit case in which the court upheld the Bureau's structure.<sup>427</sup> The Court denied the petition but agreed to hear the Ninth Circuit case.<sup>428</sup>

Interestingly, in the statutory dispute over whether the Vacancies Act applies to the CFPB, English "assume[d] that the President may only remove the acting [d]irector for cause."<sup>429</sup> Because, under English's reading,

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423. *Collins*, 938 F.3d at 621 (Costa, J., dissenting in part).

424. *Id.* at 622. To the extent that the applicability of the removal restriction to the acting FHFA director is necessary for standing, this case seems like a poor vehicle for the Supreme Court to consider the constitutionality of the agency's structure. See Petition for Writ of Certiorari, *Collins*, 938 F.3d 553 (U.S. filed Sept. 25, 2019) (No. 19-422), 2019 WL 4858934 (omitting any discussion of the effect of removal restrictions on standing). The Government, in its opposition to the petition for certiorari, argued that "the officer who took the action that the shareholders challenge did not enjoy statutory protection from removal in the first place." Brief for the Respondents in Opposition at 15, *Collins*, 938 F.3d 553 (U.S. filed Oct. 30, 2019) (No. 19-1422), 2019 WL 5617973.

425. Brief of Plaintiff-Appellee Consumer Fin. Prot. Bureau at 8, 13–16, *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 952 F.3d 591 (5th Cir.) (No. 18-60302), 2018 WL 4522515, vacated en banc, 953 F.3d 381 (5th Cir. 2020) (mem.).

426. *Id.* at 13 n.5.

427. Petition for a Writ of Certiorari Before Judgment at 27–31, *All Am. Check Cashing*, 952 F.3d 591 (No. 19-432), 2019 WL 4879647, vacated en banc, 953 F.3d 381 (5th Cir. 2020) (mem.).

428. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 427 (mem.) (2019). Here too, there seem to be vehicle issues for the core constitutional issue about the CFPB's structure. If Mulvaney's actions did ratify earlier decisions, all sides agree that he was not subject to the removal restriction as an acting leader. The petitioner's main merits brief does not mention acting Director Mulvaney's role in the disputed enforcement actions. By contrast, the Court-appointed Amicus Curiae in Support of Judgment Below argues in its opposition brief that because Mulvaney properly ratified the earlier decisions by a confirmed director, "the connection between the removal restrictions and petitioner's Article III injury was far more attenuated from the beginning." Brief for Court-Appointed Amicus Curiae in Support of Judgment Below at 22, *Seila*, No. 19-7 (U.S. filed Jan. 15, 2020), 2020 WL 353477.

429. *English v. Trump*, 279 F. Supp. 3d 307, 327 (D.D.C. 2018).

only the director can name the deputy director and only the deputy director can be the acting director, “potentially impair[ing] the President’s ability to fulfill his obligations under the Take Care Clause,” the district court applied “the canon of constitutional avoidance . . . to confirm . . . that the FVRA is available to the [P]resident.”<sup>430</sup>

c. *Appointment Qualifications.* — There are few constitutional mandates as to who can be selected to fill top agency positions, but there are many statutory constraints.<sup>431</sup> The restrictions cover conflicts of interest and a broad range of affirmative attributes, including expertise, experience, and party affiliation. Unlike restrictions on removal, no litigation has focused yet on the application of these restrictions to acting officials.

Expertise and experience requirements apply to many positions covered by the Vacancies Act.<sup>432</sup> Some requirements apply to positions across many agencies. For example, all chief financial officers must “possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities.”<sup>433</sup> But most relevant requirements are agency specific. For example, the undersecretary for food safety at USDA must have “specialized training or significant experience in food safety or public health programs.”<sup>434</sup>

A recent controversy involving the Interior Department’s acting IG almost raised the question of whether a statutorily mandated qualification would apply to an acting official. Some statutes require the President to ignore party affiliation when nominating individuals for positions covered by the Vacancies Act. For IGs across the federal government, the President must select candidates “without regard to political affiliation and shall be on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigation.”<sup>435</sup>

430. *Id.* at 327–29.

431. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 *J. Pol.* 1095, 1095, 1098–99 (2002) (finding that 40% of agencies established by legislation have restrictions on who can serve in leadership positions). These mandates also raise constitutional questions. See, e.g., Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 *U. Pa. J. Const. L.* 745, 789 (2008) (arguing that qualifications are constitutional for “vested” appointments but unconstitutional for “confirmation” appointments); West, *supra* note 215, at 201–05 (“Despite the pedigree of [congressionally imposed] qualifications, Presidents and academics often argue that Article II precludes Congress from limiting whom the President can appoint.”).

432. See generally Anne Joseph O’Connell, *Qualifications of Agency Leaders* (March 24, 2010) (unpublished working paper) (on file with the *Columbia Law Review*) (listing many examples of such constraints in cabinet departments and executive agencies).

433. 31 U.S.C. § 901(a)(3) (2018).

434. 7 U.S.C. § 6981 (2018).

435. 50 U.S.C. § 3517(b)(1) (2018) (describing requirements for the CIA IG); see also, e.g., 22 U.S.C. § 3929(a)(1) (2018) (providing similar language for the State Department

In October 2018, it appeared that Secretary of the Interior Zinke had tried to replace the agency's acting IG, who had been investigating him, with a political appointee.<sup>436</sup> It is unclear why the reported move, which generated media attention and backlash, did not occur.<sup>437</sup> If it had, would there have been a viable legal claim against the replacement based on statutory qualifications for the confirmed position? Challenges to confirmed officials allegedly lacking mandated qualifications are rare (and generally not justiciable), so it is no surprise that challenges to acting leaders have not arisen.

Finally, some statutes rule out potential individuals for high-level positions because of perceived conflicts of interest or other concerns. The secretary of defense, for example, cannot have served as a military officer in the past seven years without a congressional waiver,<sup>438</sup> which Mattis obtained at the start of the Trump Administration.<sup>439</sup> Had Shanahan served in the military in the last seven years, would he have needed a congressional waiver to serve as acting Secretary in 2019?

In the face of silence in the Vacancies Act, without text in a qualifications mandate applying it to acting officials, such interim leaders should be able to serve legally without meeting the constraint. Part V takes up whether this legal conclusion is desirable, as a matter of policy.

#### IV. DESIRABILITY OF ACTINGS

Given the prevalence of acting officials in the highest levels of the federal government, how should we feel about them irrespective of the legal quandaries they raise? The president and CEO of the Partnership for Public Service (PPS) labels them "substitute teachers," who are not "treated super well by the class because they don't view that the substitute teacher

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IG); Paul C. Light, *Monitoring Government* 3 (1993) (discussing similar requirements for other IG positions).

436. See Juliet Eilperin & Josh Dawsey, *Zinke's Own Agency Watchdog Just Referred Him to the Justice Department*, *Wash. Post* (Oct. 31, 2018), <https://www.washingtonpost.com/energy-environment/2018/10/30/zinkes-own-agency-watchdog-just-referred-him-justice-department> (on file with the *Columbia Law Review*); Carolyn Kormann, *Did Ryan Zinke Try to Fire His Department's Inspector General for Investigating Him?*, *New Yorker* (Oct. 22, 2018), <https://www.newyorker.com/news/news-desk/did-ryan-zinke-try-to-fire-his-departments-inspector-general-for-investigating-him> [<https://perma.cc/F45V-43NB>].

437. See Kormann, *supra* note 436 (describing the conflicting messages from within the Trump Administration regarding the staffing changes at the Interior Department).

438. 10 U.S.C. § 113(a) (2018).

439. Connor O'Brien & Jeremy Herb, *House Passes Mattis Waiver 268-151*, *Politico* (Jan. 13, 2017), <https://www.politico.com/story/2017/01/james-mattis-defense-secretary-waiver-233611> [<https://perma.cc/N48R-QJU5>]. The military restrictions "reinforc[e] the tradition of civilian supremacy in the United States government." Henry B. Hogue, Cong. Research Serv., *RL33886, Statutory Qualifications for Executive Branch Positions* 9 (2015), <https://fas.org/sgp/crs/misc/RL33886.pdf> [<https://perma.cc/5GFD-ULAY>].

has real authority.”<sup>440</sup> I have also complained about “significant consequences for public policy” from the lack of confirmed leaders.<sup>441</sup> There has been some pushback to this conventional wisdom recently. Most notably, Professor Nina Mendelson has argued that confirmation delays, at least “lower down in the hierarchy” of appointees, may have some benefits for agencies by allowing career civil servants to use their expertise to develop agency policy.<sup>442</sup>

This Part briefly describes some consequences of the growing prevalence of acting officials and delegated authority.<sup>443</sup> There are many normative values at play, and the political incentives are not as straightforward as often suggested. Turning first to costs, this Part focuses on agency inaction, employee morale, uncertainty, lack of stature, and accountability—which, of course, overlap. It then presents potential flipsides to these considerations, emphasizing the tradeoff between expertise and accountability. In addition to calling for more research on agency performance, this Part suggests several factors that should shape the normative assessment, which is almost certainly context dependent. Because determining the relevant baseline is difficult, this Part focuses on how each of the political branches potentially views acting leadership as compared to other options. This Part draws from reports on the Trump and Obama Administrations to demonstrate that the concerns and advantages are not party or President specific.

#### A. *Costs*

Acting officials rarely garner praise.<sup>444</sup> Commentators worry that the lack of confirmed officials contributes to agencies progressing slowly with important initiatives and employing unhappy workers. More broadly, they lament the power grab by the White House and its effects on Congress and accountability.

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440. Russell Berman, President Trump’s ‘Substitute Teacher’ Problem, *Atlantic* (Apr. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/04/president-trumps-substitute-teacher-problem/523101> (on file with the *Columbia Law Review*).

441. See, e.g., O’Connell, *Vacant Offices*, supra note 145, at 935. The consequences “include agency inaction, confusion among nonpolitical workers, and decreased agency accountability.” *Id.* at 937–38.

442. Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 *Duke L.J.* 1571, 1571–74 (2015) [hereinafter Mendelson, *Uncertain Effects*]. Vacancies may also allow for the “ability to select better appointees, potentially better performance from frequent turnover, the need or preference for agency inaction in particular policy areas, and the advantages of temporary officials over proper appointees in certain contexts.” O’Connell, *Vacant Offices*, supra note 145, at 946.

443. See also Mendelson, *The Permissibility of Acting Officials*, supra note 105, at 49–64 (examining functional considerations surrounding acting officials and delegated authority).

444. See, e.g., Opinion, *The Mess at D.H.S.*, *N.Y. Times* (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/opinion/department-homeland-security.html> [<https://perma.cc/3QCB-GKJU>] (“[I]t is a lousy way to run a department—especially one so sprawling—fueling instability, eroding morale and draining vital agencies of experienced, competent leaders.”).

1. *Inaction.* — Commentators tend to worry that, without confirmed officials, agencies will be slow to engage in important initiatives.<sup>445</sup> The Trump Administration has struggled with desired rollbacks of regulations in the face of leadership gaps.<sup>446</sup> Similarly, the Obama Administration “bottled up [new regulations] for months” without confirmed officials.<sup>447</sup> Gaps in confirmed leadership have also “stalled pay raises for thousands of federal workers.”<sup>448</sup>

In the national security space, concerns about the capacities of acting officials extend beyond agencies’ effectiveness at regulation. Some experts believe the vacancies “wouldn’t prevent the federal government from responding to a terrorist threat[, but that] . . . ‘[t]he real problems come later, when the administration has to readjust strategy to deal with the threat . . . .’”<sup>449</sup> Specifically, a former DHS official claims that acting officials do not make “a lot of hard decisions . . . with the same level of regularity.”<sup>450</sup> Others have argued that acting leadership at DOD prevented the agency from stopping the President from freezing military aid

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445. See O’Connell, *Vacant Offices*, supra note 145, at 939 (noting that the dip in Notices of Proposed Rulemakings in the first year of an administration corresponds to gaps in confirmed leadership). In a hearing over Berryhill’s illegal acting service at the SSA, House Subcommittee on Social Security Chairman Sam Johnson lamented that the agency needed a nominee: “Acting Commissioners can keep an agency on a course that is already set, but they don’t have the same authority to lead as a Senate-confirmed Commissioner. You will hear today an Acting Commissioner just isn’t empowered to make strategic decisions regarding the long-term operation of the agency.” *Lacking a Leader*, supra note 101, at 3–4.

446. See Braden Campbell, *Vacancies Slowing Pro-Biz Shift at Trump’s DOL*, Law360 (Aug. 18, 2017), <https://www.law360.com/articles/955356/vacancies-slowing-pro-biz-shift-at-trump-s-dol> (on file with the *Columbia Law Review*); Keith Goldberg, *Agency Vacancies Threaten Trump Rollback of Energy Regs*, Law360 (Apr. 28, 2017), <https://www.law360.com/articles/918415/agency-vacancies-threaten-trump-rollback-of-energy-regs> (on file with the *Columbia Law Review*).

447. Sam Hananel, *Thomas Perez to Push Tougher Labor Regulations, Observers Say*, Wash. Post (Aug. 14, 2013), [https://www.washingtonpost.com/local/dc-politics/thomas-perez-to-push-tougher-labor-regulations-observers-say/2013/08/14/beaa6de8-0501-11e3-88d6-d5795fab4637\\_story.html](https://www.washingtonpost.com/local/dc-politics/thomas-perez-to-push-tougher-labor-regulations-observers-say/2013/08/14/beaa6de8-0501-11e3-88d6-d5795fab4637_story.html) (on file with the *Columbia Law Review*).

448. Lorraine Woellert, *The Cost of Donald Trump’s Deserted Government*, Politico (Apr. 27, 2018), <https://www.politico.com/story/2018/04/27/trump-deserted-government-552971> [https://perma.cc/7S3G-74BW].

449. Andrew Restuccia, *Trump’s Sluggish Hiring Could Hamper Anti-Terror Plans*, Politico (June 4, 2017), <https://www.politico.com/story/2017/06/04/trump-london-terror-hiring-239120> [https://perma.cc/LWG4-9SGX] (quoting a former State Department official).

450. Jerry Markon, *Ellen Nakashima & Alice Crites, Top-Level Turnover Makes It Harder for DHS to Stay on Top of Evolving Threats*, Wash. Post (Sept. 21, 2014), [https://www.washingtonpost.com/politics/top-level-turnover-makes-it-harder-for-dhs-to-stay-on-top-of-evolving-threats/2014/09/21/ca7919a6-39d7-11e4-9c9f-ebb47272e40e\\_story.html](https://www.washingtonpost.com/politics/top-level-turnover-makes-it-harder-for-dhs-to-stay-on-top-of-evolving-threats/2014/09/21/ca7919a6-39d7-11e4-9c9f-ebb47272e40e_story.html) (on file with the *Columbia Law Review*); see also Nat’l Comm’n on Terrorist Attacks upon U.S., *The 9/11 Commission Report* 198, 422–23 (2004) (calling for swifter appointments).

for Ukraine in the summer of 2019 because the acting officials lacked the “stature to quash the move.”<sup>451</sup>

2. *Morale, Uncertainty, and Stature.* — In general, having acting leaders at federal agencies for extended periods may negatively affect the performances and attitudes of the agencies’ employees. The PPS, drawing from an extensive survey of government workers, ties “lack of leadership” to “static or declining employee engagement.”<sup>452</sup> Moreover, acting officials may contribute to uncertainty within the agency as employees crave more definitive direction.<sup>453</sup> According to the PPS, “Colleagues might be less likely to trust an acting official’s decision-making, since it’s not clear how long they’ll be in office.”<sup>454</sup> Employees under acting IGs, for example, reported not knowing if the next confirmed IG “will support” the acting IGs’ decisions.<sup>455</sup> They may also lack the necessary authority for effective management.<sup>456</sup>

Acting officials may also struggle outside the agency. The confirmation process brings buy-in from Congress and the White House, which has publicly put officials forward. Acting officials drawn from career ranks therefore likely lack “access to the external network to get what they need from the White House and the other agencies.”<sup>457</sup> The ATF, which has largely been led by acting officials in the past two decades, has been unable to increase the number of its agents since 1986; according to a former agent,

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451. Wesley Morgan, Trump’s Ukraine Holdup Hit a Rudderless Pentagon, *Politico* (Sept. 25, 2019), <https://www.politico.com/news/2019/09/25/trump-ukraine-military-aid-pentagon-000679> [<https://perma.cc/MP39-7ELY>].

452. The Best Places to Work in the Federal Government: 2018 Rankings, P’ship for Pub. Serv., [https://bestplacestowork.org/wp-content/uploads/sites/2/2018/12/BPTW18\\_brochure.pdf](https://bestplacestowork.org/wp-content/uploads/sites/2/2018/12/BPTW18_brochure.pdf) [<https://perma.cc/RQ3K-FSGG>] (last visited Nov. 10, 2019).

453. See Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability* 69 (1995) [hereinafter Light, *Thickening Government*].

454. Jen Kirby, How Trump’s Overreliance on Acting Officials Could Backfire, *Vox* (Apr. 11, 2019), <https://www.vox.com/policy-and-politics/2019/4/11/18301146/trump-acting-officials-vacancies-act-dhs-nielsen> [<https://perma.cc/NU94-4RPD>].

455. GAO, *Inspectors General Report*, *supra* note 151, at 24.

456. See Nick Miroff, Acting Homeland Security Chief Frustrated and Isolated—Even as He Delivers What Trump Wants at the Border, *Wash. Post* (Oct. 1, 2019), [https://www.washingtonpost.com/immigration/acting-homeland-security-chief-frustrated-and-isolated-even-as-he-delivers-what-trump-wants-at-the-border/2019/10/01/b62e740c-e3ad-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/immigration/acting-homeland-security-chief-frustrated-and-isolated-even-as-he-delivers-what-trump-wants-at-the-border/2019/10/01/b62e740c-e3ad-11e9-b403-f738899982d2_story.html) (on file with the *Columbia Law Review*) [hereinafter Miroff, *Frustrated and Isolated*] (suggesting that McAleenan told journalists that he “lacks some of the authority he was promised when he took the job”).

457. Judith E. Michaels, *The President’s Call: Executive Leadership from FDR to George Bush 206* (1997) (quoting a Senate-confirmed official). They may also lack needed independence. See Courtney Bublé, Trump’s Anger with IG over Impeachment Role Highlights High Watchdog Vacancy Rate, *Gov’t Executive* (Nov. 15, 2019), <https://www.govexec.com/oversight/2019/11/trumps-anger-ig-over-impeachment-role-highlights-high-watchdog-vacancy-rate/161310> [<https://perma.cc/5L72-H6VD>] (quoting Michael Horowitz, IG for DOJ, as saying in a congressional hearing that acting IGs “don’t have the ability to push back when that independence issue comes up in quite the same way”).

no acting leader “had the clout to argue for it.”<sup>458</sup> Exceptional management skills do not substitute for this “seal of approval.”<sup>459</sup> External stakeholders may also desire that the agency leader have sufficient clout. Acting officials may signal that the issue area has low priority for the White House (or Congress).

Low morale and uncertainty can contribute to agency inaction and poor performance. Professor David Lewis found that “[c]areer FEMA employees, along with state and local officials, stopped and started while they waited for appointees in key positions managing federal relations, and policy,” which “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.<sup>460</sup> Out of forty-one government failures when agencies did not “design and deliver effective public policy” (as identified by news stories) between 2001 and 2014, Light determined that “vacancies and delays” in confirmed leadership contributed to eight.<sup>461</sup>

3. *Accountability.* — Acting officials represent a workaround to the traditional appointments process, which allows elected Senators to veto the President’s nominees.<sup>462</sup> To start, acting leaders are less accountable to Congress as they have not been confirmed to the jobs they are filling temporarily, even if some have been confirmed to other positions.<sup>463</sup> Presidents of both parties have placed officials in acting roles whom the Senate

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458. David Thornton, Former ATF Whistleblower Says Agency Needs Permanent Director, Accountability, Fed. News Network (May 13, 2019), <https://federalnewsnetwork.com/justice-department/2019/05/former-atf-whistleblower-says-agency-needs-permanent-director-accountability> [https://perma.cc/2NDJ-4V2Y].

459. Patricia Cohen, Vacancies Hamper Agencies for Arts, N.Y. Times (Aug. 7, 2013), <https://www.nytimes.com/2013/08/08/arts/design/vacancies-hamper-agencies-for-arts.html> [https://perma.cc/GYZ2-23LM].

460. David Lewis, Trump’s Slow Pace of Appointments is Hurting Government—and His Own Agenda, Wash. Post (Aug. 3, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/six-months-into-his-presidency-trump-continues-to-be-exceptionally-slow-at-appointing-officials-heres-why-that-matters> (on file with the *Columbia Law Review*).

461. Paul C. Light, Ctr. for Effective Pub. Mgmt., Brookings Inst., A Cascade of Failures: Why Government Fails, and How to Stop It 16–19 (2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Light\\_Cascade-of-Failures\\_Why-Govt-Fails.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Light_Cascade-of-Failures_Why-Govt-Fails.pdf) [https://perma.cc/C7D9-K5UD].

462. See Mendelson, The Permissibility of Acting Officials, *supra* note 105, at 57 (noting that “the Senate confirmation process is . . . a check on poor quality or self-serving appointments by the President . . .”).

463. Rebecca Ballhaus, Natalie Andrews & Nancy A. Youssef, Number of Acting Cabinet Heads Raises Concern on Capitol Hill, Wall St. J. (Apr. 9, 2019), <https://www.wsj.com/articles/number-of-acting-cabinet-heads-raises-concern-on-capitol-hill-11554853521> (on file with the *Columbia Law Review*).

would not confirm.<sup>464</sup> Some acting officials may also be less accountable to the White House, such as first assistants chosen by agency heads and officials exercising delegated authority.<sup>465</sup>

### B. *Countervailing Factors*

The costs of gaps in confirmed leadership may not be as dire as the conventional wisdom suggests, both within the agency and with external stakeholders.

1. *Action.* — Acting officials may not be as productive as confirmed leaders, but they still make important decisions. Interviews I conducted with former acting officials for an Administrative Conference of the United States (ACUS) study reveal that most did not hesitate to carry out the duties of their positions.<sup>466</sup> In addition, a GAO survey of acting IGs found that all but one believed “having an acting IG had no impact on the OIG’s [Office of Inspector General] ability to plan and conduct work.”<sup>467</sup>

Specific anecdotal examples from the Obama and Trump Administrations refute the notion that acting officials struggle to make key decisions quickly. Mendelson describes how acting leaders at the EPA “reinterpreted[ed] . . . the key Clean Water Act jurisdictional term ‘waters of the United States,’ in response to recent Supreme Court decisions” during the Obama Administration.<sup>468</sup> Similarly, Wheeler, as acting EPA Administrator, “sought to halt two major efforts by his predecessor” in his initial weeks in the role.<sup>469</sup> A 2017 survey of CFOs revealed that some believed that with “the slow pace of onboarding political appointees, career staff should take full advantage of the current disruptive environment to effect

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464. Victoria Guida, *Mnuchin’s Team Dwindles Amid Exodus from Treasury*, Politico (Feb. 11, 2019), <https://www.politico.com/story/2019/02/11/mnuchin-treasury-department-staffing-1159065> [<https://perma.cc/W5DT-LXX6>] (detailing efforts under Obama and Trump to name an acting undersecretary for domestic finance in light of Senate opposition); see also *supra* notes 37–40 and accompanying text (discussing Cuccinelli, whom the Senate would not confirm, according to news reports).

465. See *Freytag v. Comm’r*, 501 U.S. 868, 878, 880 (1991).

466. See O’Connell, *Acting Agency Officials*, *supra* note 125, at 47–49 (describing interviews with nineteen former acting officials and concluding that acting officials often felt that their authority was similar to that of confirmed officials).

467. GAO, *Inspectors General Report*, *supra* note 151, at 17. Almost 25% of employees, however, contended there was a negative impact. *Id.*

468. Mendelson, *Uncertain Effects*, *supra* note 442, at 1589.

469. Coral Davenport, *Pruitt’s Successor Wants Rollbacks Too. And He Wants Them to Stick.*, N.Y. Times (July 27, 2018), <https://www.nytimes.com/2018/07/27/climate/andrew-wheeler-epa.html> [<https://perma.cc/F7G8-3UD7>].

change.”<sup>470</sup> Nevertheless, active acting officials generate attention, suggesting that acting leaders typically govern more as caretakers than change agents.<sup>471</sup>

2. *Morale, Stability, and Stature.* — The connection between employee morale and temporary leadership is hard to gauge, despite surveys showing more unhappiness in agencies with more leadership turnover. Acting officials drawn from the senior career ranks may be well-liked. For example, the GAO survey on gaps in IG appointments found that employees generally liked internal acting IGs.<sup>472</sup>

While critics of acting leaders may focus on their temporary nature, one must consider the baseline for agency officials. Given that confirmed appointees do not stay long, acting leaders “may . . . provide needed continuity” within an agency.<sup>473</sup> Indeed, such officials may serve longer than their confirmed counterparts and their tenure may be more predictable than appointees’. Wheeler, for instance, served roughly 235 days as acting EPA Administrator under President Trump. And during the first three years of President Trump’s Administration, the acting FAA administrator, Elwell, served for longer than his Senate-confirmed counterparts, including through a major crisis.<sup>474</sup>

Without confirmation, acting officials and those exercising delegated authority may lack external buy-in from Congress and also perhaps the White House. Nevertheless, agencies without that buy-in still may be able to seek assistance in other ways. The MSPB has statutory authority to submit appropriations requests directly to Congress but does not typically do so.<sup>475</sup> After the White House recommended a cut to its budget in 2019, the agency—with no quorum—sent in its “bypass request.”<sup>476</sup>

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470. Joe Davidson, *Trump’s Disruption of Government Could Aid Top Federal Employees, Survey Says*, Wash. Post (Jan. 17, 2018) (internal quotation marks omitted), <https://www.washingtonpost.com/news/powerpost/wp/2018/01/16/trumps-disruption-of-government-could-aid-top-federal-employees-survey-says> (on file with the *Columbia Law Review*).

471. See, e.g., Tom Zanki, *Acting SEC Chair Signals Shift to Ease Disclosure Rules*, Law360 (Feb. 14, 2017), <https://www.law360.com/articles/891945/acting-sec-chair-signals-shift-to-ease-disclosure-rules> (on file with the *Columbia Law Review*) (“It’s unusual for an interim chairman to take an active role in shaping policy . . . but . . . the moves are consistent with the current mood in Washington, D.C.”).

472. GAO, *Inspectors General Report*, supra note 151, at 19, 31. Interestingly, nearly half of the acting IGs thought their temporary status had a negative effect on employee management. *Id.* at 21.

473. O’Connell, *Vacant Offices*, supra note 145, at 950; see also Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & Contemp. Probs. 57, 61 (1991) (arguing that confirmed officials “must trust the staff to make the ‘right’ calls on the scores of micro-issues”).

474. See supra notes 202–203 and accompanying text.

475. 5 U.S.C. § 1204(k) (2018).

476. Nicole Ogrysko, *MSPB Warns of Longer Appeals Times, More Workforce Cuts*

Buy-in may also contribute to undesirable dependence. Chuck Rosenberg, who served as acting head of the DEA for years, across two administrations, “earned a reputation as someone willing to put himself at odds with his bosses in the White House and the Justice Department.”<sup>477</sup> Acting officials also provided some needed stability early in President Trump’s Administration. After the President criticized London Mayor Sadiq Khan in the aftermath of a terrorist attack, the acting U.S. Ambassador, a career foreign service officer, tweeted some counter-messaging, offering condolences and supporting the emergency response by London officials.<sup>478</sup>

3. *Accountability and Expertise.* — On accountability, acting officials are hard to defend.<sup>479</sup> To be sure, President Trump believes that his acting

Under Trump’s Proposed Budget Cut, Fed. News Network (Apr. 17, 2019), <https://federalnewsnetwork.com/workforce-rightsgovernance/2019/04/mspb-warns-of-longer-appeals-times-more-workforce-cuts-under-trumps-proposed-budget-cut> [<https://perma.cc/DYS2-JQNN>]. It’s not clear the agency was legally permitted to do this because the term of the last remaining board member, Mark Robbins, expired on March 1, 2019, *id.*, and the bypass request occurred on March 18, 2019. Budget Reports, U.S. Merit Sys. Prot. Bd., <https://www.mspb.gov/publicaffairs/budget.htm> [<https://perma.cc/QV7A-36GG>] (last visited Nov. 8, 2019). In short, it is unclear whether the MSPB can submit a budget request without a board. See Anjali Patel, No MSPB Board Members May Affect Stays, Court Litigation, Even the Budget, cyberFEDS (Jan. 11, 2019), <https://kcnfdc.com/wp-content/uploads/2019/01/CyberFeds-1-15-19-MSPB-Eisenmann-interview.pdf> [<https://perma.cc/RH4Q-DKJS>] (describing how 5 U.S.C. § 1204(k) requires the “board” to submit the annual budget).

477. Devlin Barrett & Matt Zapotosky, DEA Administrator Plans to Step Down, Wash. Post (Sept. 26, 2017), [https://www.washingtonpost.com/world/national-security/dea-administrator-plans-to-step-down/2017/09/26/c89d7424-a2fc-11e7-ade1-76d061d56efa\\_story.html](https://www.washingtonpost.com/world/national-security/dea-administrator-plans-to-step-down/2017/09/26/c89d7424-a2fc-11e7-ade1-76d061d56efa_story.html) (on file with the *Columbia Law Review*).

478. See U.S. Embassy London (@USAinUK), Twitter (June 4, 2017), <https://twitter.com/USAinUK/status/871435629569212416?s=20> [<https://perma.cc/2RVZ-ZMUJ>] (“I commend the strong leadership of the @MayorofLondon as he leads the city forward after this heinous attack . . .”); see also Rachael Revesz, US Embassy in London Distances Itself from Donald Trump by Praising Sadiq Khan Tweets, Independent (June 5, 2017), <https://www.independent.co.uk/news/uk/home-news/us-embassy-london-attack-donald-trump-saiq-khan-tweets-praise-president-mayor-a7773516.html> [<https://perma.cc/6HLP-XECA>]. The term “acting ambassador” is not technically correct, as the top position is performed by a deputy chief of mission or charge d’affaires until an ambassador is confirmed. See 22 U.S.C. § 3982(c) (2018) (“The President may assign a career member of the [Foreign] Service to serve as charge d’affaires or otherwise as the head of a mission . . . for such period as the public interest may require.”). For convenience and consistency, this Article will refer to the nonconfirmed leader of an embassy as the “acting ambassador.”

479. One could perhaps argue that it is better that the President, rather than Congress, unilaterally select acting officials. See *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citing *Federalist No. 76* to argue that the Appointments Clause “was also designed to assure a higher quality of appointments” as “the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body”). Alternatively, more confirmed appointees at independent regulatory commissions are being drawn from congressional staff. Brian D. Feinstein & M. Todd Henderson, Congress’s Commissioners 5–16 (Univ. of Chi., Coase-Sandor Inst. for Law & Econ. Research Paper No. 875, 2020), <https://ssrn.com/abstract=3338092> (on file with the *Columbia Law Review*). Perhaps the use of acting officials counters this growing congressional influence. Judicial deference to agency action is often justified by the political accountability of agencies (and appointees). See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

picks are more accountable to him.<sup>480</sup> But the Senate presumably feels differently as it did not have a role in selecting them. Nevertheless, if acting officials are compared to recess appointees, the Senate may prefer the former.<sup>481</sup> Senator Orrin Hatch, in 1997, viewed President Clinton's acting appointment for DOJ's Civil Rights Division as "not quite the finger in the eye that a recess appointment would be."<sup>482</sup> Since the Supreme Court defined the scope of the Recess Appointments Clause in 2014,<sup>483</sup> the Senate has continued to hold pro forma sessions even into the current Trump Administration to prevent recess appointments, suggesting it prefers acting officials.<sup>484</sup>

Acting officials may also promote Senate authority in certain contexts. To start, having acting leaders allows the Senate to spend more time vetting official nominees. Additionally, acting leaders may provide the Senate more choices—if the Senate dislikes the formal nominee, it can sit on the nomination and let the acting official continue to serve.<sup>485</sup>

Accountability often trades off with expertise. If acting officials "are drawn from long-term agency employees," they may be "more competent than confirmed appointees."<sup>486</sup> As Mendelson explains, these officials "could . . . very plausibly know better the particular needs at the agency's front lines—what has worked and what has failed."<sup>487</sup> Delays in the appointments process may also yield greater expertise in confirmed officials if it takes longer to find qualified leaders.<sup>488</sup>

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480. Juliet Eilperin, Josh Dawsey & Seung Min Kim, "It's Way Too Many": As Vacancies Pile Up in Trump Administration, Senators Grow Concerned, *Wash. Post* (Feb. 4, 2019), [https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311\\_story.html](https://www.washingtonpost.com/national/health-science/its-way-too-many-as-vacancies-pile-up-in-trump-administration-senators-grow-concerned/2019/02/03/c570eb94-24b2-11e9-ad53-824486280311_story.html) (on file with the *Columbia Law Review*).

481. See Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 *Calif. L. Rev.* 235, 268–75 (2008) (providing arguments on both sides).

482. John M. Broder, *Clinton, Softening Slap at Senate, Names 'Acting' Civil Rights Chief*, *N.Y. Times* (Dec. 16, 1997), <https://www.nytimes.com/1997/12/16/us/clinton-softening-slap-at-senate-names-acting-civil-rights-chief.html> [<https://perma.cc/J3JR-86JH>]. The time limits under the 1998 Vacancies Act, however, permit longer service than a recess appointment would, if there are pending nominations. See *supra* section I.C.

483. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577–78 (2014).

484. See *supra* note 162 and accompanying text.

485. See, e.g., Scott Waldman, *1 Year Later, Why Is Trump's Pick Not Confirmed?*, *E&E News* (Oct. 29, 2018), <https://www.eenews.net/climatewire/stories/1060104565> (on file with the *Columbia Law Review*) ("There may be a lack of urgency around Myers because Gallaudet, the acting head of [the National Oceanic and Atmospheric Administration (NOAA)], has widespread bipartisan support and is running the agency capably . . .").

486. O'Connell, *Vacant Offices*, *supra* note 145, at 949–50.

487. Mendelson, *Uncertain Effects*, *supra* note 442, at 1598.

488. O'Connell, *Vacant Offices*, *supra* note 145, at 946–47.

C. *Research, Assessment Factors, and Baselines from Each Political Branch*

To gain better traction on the normative questions, we need to know more. According to a literature review in political science, the “evidence linking appointee continuity and agency performance remains largely anecdotal.”<sup>489</sup> Supreme Court Justices have taken different stances on acting officials. Justice Breyer has suggested that they “may have less authority than Presidential appointments.”<sup>490</sup> Justice Scalia questioned that assertion.<sup>491</sup>

At the least, one can focus on particular contexts in assessing whether acting officials and delegated authority are worse than confirmed leaders.<sup>492</sup> And the determination may depend on one’s normative criteria. In some sense, the previous sections largely assume a social welfare maximizer aiming for effective governance. Someone opposed to the actions that confirmed officials might take may prefer acting leaders who feel they cannot take on new initiatives.<sup>493</sup>

Certain positions may be more amenable to acting officials than others—for example, U.S. attorneys and ambassadors.<sup>494</sup> For both positions, the acting leader is almost always a senior careerist from the relevant U.S. attorney office or the foreign service. But while judges and defense attorneys likely do not distinguish among types of U.S. attorneys, foreign countries’

489. Dull & Roberts, *supra* note 45, at 445. There have been some new studies. E.g., William G. Resh, *Value Diversity, Appointed Leadership Vacancies, and Performance in US Federal Agencies 24–27* (Apr. 5, 2017) (unpublished manuscript), [https://www.researchgate.net/publication/315825567\\_Value\\_Diversity\\_Appointed\\_Leadership\\_Vacancies\\_and\\_Agency\\_Performance](https://www.researchgate.net/publication/315825567_Value_Diversity_Appointed_Leadership_Vacancies_and_Agency_Performance) (on file with the *Columbia Law Review*) (using Performance and Accountability Reports from FY 2001 to 2008 to show that the lack of confirmed leadership “seems to positively contribute to the value diversity of an organization’s goals”).

490. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2569 (2014).

491. *Id.* at 2610 (Scalia, J., concurring in the judgment).

492. See Jeff Neal, *Is the Administration’s Pace of Political Appointments a Problem or an Opportunity?*, Fed. News Network (Mar. 8, 2018), <https://federalnewsnetwork.com/commentary/2018/03/is-the-administrations-pace-of-political-appointments-a-problem-or-an-opportunity> [<https://perma.cc/CNF3-42VZ>] (presenting various views on the merits of position vacancies and noting that “all of those views are correct . . . based on the job in question”).

493. See Benjamin Freed, *Without Leadership at HUD, DC’s Anti-Homelessness Officials Have No Idea What’s Coming*, *Washingtonian* (June 29, 2017), <https://www.washingtonian.com/2017/06/29/without-leadership-hud-dcs-anti-homelessness-officials-no-idea-whats-coming> [<https://perma.cc/J7AY-M43H>] (“[T]here may be an odd silver lining to a HUD Department run by a skeleton crew: there’s no one around to implement hostile policy proposals . . .”); see also Dino Grandoni, *NASA and NOAA Are Still Talking About Climate Change. That’s Notable.*, *Wash. Post: The Energy 202* (Dec. 19, 2017), [https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/12/19/the-energy-202-nasa-and-noaa-are-still-talking-about-climate-change-that-s-notable/5a3831ab30fb0469e883fc4d](https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/12/19/the-energy-202-nasa-and-noaa-are-still-talking-about-climate-change-that-s-notable/) (on file with the *Columbia Law Review*) (explaining how “scientists at NASA and NOAA have been able to carry on with their climate research—and to talk about it freely and publicly” with the lack of confirmed leadership).

494. See Sam Brodey, *Trump Still Hasn’t Named a U.S. Attorney for Minnesota—But That Might Not Matter Much*, *MinnPost* (Oct. 6, 2017), <https://www.minnpost.com/politics-policy/2017/10/trump-still-hasn-t-named-us-attorney-minnesota-might-not-matter-much> [<https://perma.cc/F69X-ECQD>].

governments do distinguish among temporary and longer-term ambassadors, often feeling “miffed when they do not have a[] [confirmed] ambassador because they believe they’re seen as not important and that Washington does not respect them.”<sup>495</sup> Other positions—namely, IGs and agency heads—likely benefit from confirmed officials.<sup>496</sup>

No position exists in a vacuum. If confirmed officials sit in related, higher-level positions and can back up the temporary leaders, there may be little difference between an acting and confirmed person at the lower levels.<sup>497</sup> But vacancies in related positions may compound gaps further down the organizational chart.<sup>498</sup>

The attitude of the acting official toward the office may play a role as well. Temporary leaders seeking the permanent job may provide the Senate with a helpful audition.<sup>499</sup> Otherwise, if a formal nomination is pending, a less aggressive acting leader may be needed to not “overstep or seek to implement fundamental changes [at the agency] that may not [be]

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495. Nancy Cook & Nahal Toosi, *Delays Stack up for Trump in Filling Ambassador Posts*, Politico (June 27, 2017) (internal quotation marks omitted) (quoting Ronald Neumann, President of the American Academy of Diplomacy), <https://www.politico.com/story/2017/06/27/trump-ambassadors-vacancies-240024> [<https://perma.cc/57MM-UGRS>].

496. See Mendelson, *Uncertain Effects*, *supra* note 442, at 1585 (“[T]he lack of a confirmed official in certain senior agency positions may impair the agency’s function by undermining its ability to provide a person with appropriate status . . . to represent the administration on significant policy issues.”); Knight & Smith, *supra* note 369 (reporting that advocates have noted the “real consequences” of the Department of the Interior operating without a confirmed secretary). Acting IGs “often go back to their old positions within an agency,” which makes it hard for them to “call their bosses on the carpet, when they know or think they’ll be under their boss again.” Jared A. Favole, *Inspector-General Vacancies at Agencies Are Criticized*, Wall St. J. (June 19, 2013), <https://www.wsj.com/articles/SB10001424127887323300004578555491906170344> (on file with the *Columbia Law Review*). IGs also have to meet statutory mandates. See *supra* note 435 and accompanying text.

497. See Mendelson, *Uncertain Effects*, *supra* note 442, at 1586–87 (“[C]areer civil servants are likely to be competent and responsive, but may require direction and information from political appointees to develop and select policies . . .”).

498. For instance, policy positions in the State Department in Washington, D.C. provide critical guidance to ambassadors. Joshua Tucker, *Those Empty Desks at U.S. Embassies and the State Department? They’re a Big Problem.*, Wash. Post (June 12, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/12/those-empty-desks-at-u-s-embassies-and-the-state-department-its-a-big-problem> (on file with the *Columbia Law Review*).

499. Timothy R. Smith, *Panel Chides Obama for Inspector-General Vacancies*, Wash. Post (May 10, 2012), [https://www.washingtonpost.com/politics/panel-chides-obama-for-inspector-general-vacancies/2012/05/10/gIQAld6eGU\\_story.html](https://www.washingtonpost.com/politics/panel-chides-obama-for-inspector-general-vacancies/2012/05/10/gIQAld6eGU_story.html) (on file with the *Columbia Law Review*) (quoting a member of Congress who said, “I’ve always been told the proof of the pie is in the eating, and if a[n] [acting official] is doing a good job there’s nothing to suggest he or she will not continue to do so”); see also Peter L. Strauss, Todd D. Rakoff, Gillian E. Metzger, David J. Barron & Anne Joseph O’Connell, *Gellhorn and Byse’s Administrative Law: Cases and Comments* 974 (12th ed. 2018) (describing how the Senate initially refused to confirm Roger Taney to two different positions after his actions as acting Treasury Secretary). This auditioning process may create undesirable incentives for acting officials—specifically, pressing them to take actions to curry favor with senators.

aligned with the vision of the nominee.”<sup>500</sup> Finally, senior careerists may generate less concern because of their expertise; whereas, acting leaders who have been confirmed to another position may produce less worry because of their relative accountability from their previous approval by the Senate.

Finally, institutional power arrangements and timing within an administration may matter. In a 2019 committee hearing on leadership vacancies at DHS, several Republicans pointed to 2016 as a similar period, prompting Democrats to point out that “Obama was working with an adversarial Senate intent on blocking his nominees.”<sup>501</sup> The traditional appointments process does not assume that the same party controls the White House and Senate, but reliance on actings may play differently with Congress and the wider public depending on whether there is unified government.<sup>502</sup> Congress and others might also feel differently about the use of acting leaders in the initial months of a new administration than in the middle of a President’s term. In addition, reliance on acting officials in the first term could become an issue in the reelection campaign, but it would generate no potential electoral consequences in a second term.

Because it is so difficult to establish relevant baselines for acting leaders, an analysis may get more traction if it considers the interests of each of the political branches of government. For the executive branch, Presidents want leaders who can enact their policy preferences most effectively. While acting leaders chosen by the White House presumably have preferences closer to the President’s than confirmed officials who must get Senate approval, such acting leaders may not be as effective if they lack sway over those beneath them.<sup>503</sup> Presidents need to think about not just the duration of the vacancy; they must also consider that longer vacancies may shape whom they can get confirmed.<sup>504</sup>

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500. Jacob Rund, Justice’s No. 3 Slot Is Soon to Be Vacant—Once Again, *Bloomberg Law* (May 2, 2019), <https://news.bloomberglaw.com/corporate-law/justices-no-3-slot-is-soon-to-be-vacant-once-again> [<https://perma.cc/WKC7-N79Y>].

501. Eric Katz, *Lawmakers Voice Bipartisan Concern over “Chaos” at Homeland Security, Gov’t Executive* (May 1, 2019), <https://www.govexec.com/management/2019/05/lawmakers-voice-bipartisan-concern-over-chaos-homeland-security/156676> [<https://perma.cc/J6GN-VU3V>]; see also Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 56 (noting that “acting agency officials might even be seen as a democratic safeguard against an obstructionist Senate”).

502. See Jonathan Bernstein, *Opinion, How Trump Gets Away with Neglecting His Job*, *Bloomberg* (June 13, 2019), <https://www.bloomberg.com/opinion/articles/2019-06-13/next-secretary-of-defense-remains-unclear-5-months-later> [<https://perma.cc/J2EF-G3H5>] (noting that “Senate Republicans have so far at least gone along” with the Trump Administration’s reliance on acting officials).

503. See Miroff, *Frustrated and Isolated*, *supra* note 456 (describing acting DHS Secretary Kevin McAleenan’s difficulty in maintaining control over DHS appointees Mark Morgan and Ken Cuccinelli).

504. See Gary E. Hollibaugh, Jr. & Lawrence S. Rothenberg, *Appointments and Attrition: Time and Executive Disadvantage in the Appointments Process 4* (Aug. 15, 2017) (unpublished

For the legislative branch, the Senate does not want the White House to undermine its role and presumably cares more about higher-level posts than subordinate positions.<sup>505</sup> But waiting for a nominee may serve the Senate's interests. On one hand, nominees may be more likely to share the policy priorities of Senators as vacancy periods increase.<sup>506</sup> In addition, the Senate may prefer the acting leader to the nominee—either because of the acting official's background or because of the stability of keeping an acting official in office.<sup>507</sup> For example, political appointees are arguably not as qualified as career foreign service officers to serve as ambassadors.<sup>508</sup> Given that acting ambassadors are always foreign service officers,<sup>509</sup> Congress might view them as favorable alternatives to political nominees. Congress also often wants agency leaders to be effective leaders, at least with respect to addressing legislators' concerns.

Both branches must also consider that the formal appointments process can drain valuable resources. For the executive branch, investing political capital in the formal appointments process may pull White House attention from other policy priorities.<sup>510</sup> Legislators, cognizant of delays in the traditional appointments process, often will prefer acting officials to

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manuscript), <https://ssrn.com/abstract=3028404> (on file with the *Columbia Law Review*) [hereinafter Hollibaugh & Rothenberg, *Appointments and Attrition*] (finding that from 1999 to 2011, “the longer Presidents take to nominate someone post-vacancy, or within a particular Congress, the greater the ideological divergence between themselves and their nominees, suggesting that time’s passage *disadvantages* executives”). This Article does not address strategic presidential nominations to extend the Vacancies Act’s time limits. Cf. Michael Crowley, Julian E. Barnes, Nicholas Fandos & Maggie Haberman, Trump Taps John Ratcliffe for Director of National Intelligence, *N.Y. Times* (Feb. 28, 2020), <https://www.nytimes.com/2020/02/28/us/politics/john-ratcliffe-director-national-intelligence.html> [<https://perma.cc/2XMU-4EVK>] (explaining how President Trump decided to nominate “someone he considered last summer before senior Republicans in Congress deemed him unqualified for the job,” which will extend the service of the acting DNI).

505. Resh et al., *supra* note 148, at 14 n.14 (discussing the “audience costs” that the Senate might incur from delaying appointments to higher-level positions).

506. Hollibaugh & Rothenberg, *Appointments and Attrition*, *supra* note 504, at 4; Resh et al., *supra* note 148, at 14–15.

507. Resh et al., *supra* note 148, at 9–10. In a hearing that covered vacancies in agencies within the Department of Transportation, then-Transportation Secretary Anthony Foxx noted: “We do want to make sure we get the right fit for these jobs, and it is more than just trying to find somebody off the street.” Examining the Fiscal Year 2016 Budget Requests for the U.S. Department of Commerce and the U.S. Department of Transportation: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 114th Cong. 42 (2015) (statement of Anthony R. Foxx, Secretary, Department of Transportation).

508. Ryan M. Scoville, *Unqualified Ambassadors*, 69 *Duke L.J.* 71, 118–40 (2019) (examining the language skills, regional experience, foreign policy experience, and organizational leadership skills of political-appointee ambassadors).

509. See Cook & Toosi, *supra* note 495 (noting that vacancies have “left *chargés d’affaires*—essentially acting ambassadors—overseeing those embassies”).

510. See Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 55–56 (arguing that having acting officials serve longer terms could enable the President to conserve resources).

gaps in agency functioning.<sup>511</sup> Like the President, legislators face tradeoffs in using scarce resources for confirmations—especially floor time in the Senate.<sup>512</sup> But ignoring the appointments process and relying on acting officials may generate public backlash directed at either branch.

In sum, while acting officials may initially appear to be undesirable in terms of good governance and in the eyes of the Senate, and attractive to the White House, the normative and political realities are more complex.

## V. POTENTIAL REFORMS

In light of the legal and policy concerns detailed in Parts III and IV, this Part considers potential changes to the Vacancies Act.<sup>513</sup> It is critical to remember that Presidents of both parties have relied heavily on acting officials and delegated authority.<sup>514</sup> Proponents of effective and accountable public administration should want to both discourage end runs around the normal appointments process and foster governance despite high polarization.<sup>515</sup>

The first section proposes that Congress resolve ambiguities in the Vacancies Act, including (1) its interaction with agency-specific succession provisions, (2) its applicability to presidential removal, (3) the timing of naming first assistants, and (4) the materiality of qualifications and removal restrictions for acting leaders. The second section details changes to the types and tenures of acting officials, largely restricting such officials in certain contexts but expanding their use when nominations are pending in the Senate. The third section offers proposals to improve oversight of acting officials. The fourth section addresses both substantive and procedural modifications to delegation—the key complement to acting service. Like the proposals to modify the types and tenures of acting officials, this

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511. See Madonna & Ostrander, *supra* note 64, at 358.

512. *Id.* The Senate takes longer to confirm nominees to lower-level positions, on average, than to top positions. This suggests that senators are willing to accept acting officials longer in certain positions. O’Connell, *Shortening Vacancies*, *supra* note 142, at 1663 tbl.2, 1672 tbl.6 (showing the percentage of failed nominations and confirmation lengths for successful nominations by position).

513. For a brief discussion of some of these reforms, see O’Connell, *Acting Leaders*, *supra* note 141.

514. See *supra* Part II.

515. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) (noting that the Recess Appointments Clause empowers the President to “ensure the continued functioning of the Federal Government when the Senate is away”); *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 211 (D.C. Cir. 1998) (“The function of the [1988 Vacancies] Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to validate the actions of those temporarily occupying the positions.”). Minimizing workarounds to the traditional appointments process will make it harder for agencies to operate. For some, the functioning of the government does not have the same importance. See *Noel Canning*, 134 S. Ct. at 2598 (Scalia, J., concurring in the judgment) (denying the relevance of “keeping the wheels of government turning” to the Court’s interpretation of the Recess Appointments Clause).

section mostly aims to curb some current practices but does suggest one area for expansion: allowing more acting officials to serve while their nominations are pending. The final section steps back and considers interaction with the traditional appointments process.

A. *Ambiguities of the Vacancies Act*

From the start of the New Deal wave of growth in the administrative state until the 1998 Vacancies Act's major reforms, Congress modified the procedures for filling top agency positions only twice.<sup>516</sup> Over two decades later, the Act could use some adjustments to resolve ambiguities that have arisen. Congress can settle these issues more easily than the courts, which have to wait for cases to arise that satisfy Article III's mandates.

1. *Agency-Specific Succession Provisions.* — The Vacancies Act contains confusing language regarding agency-specific succession plans. The Act is “the exclusive means for temporarily authorizing an acting official” in executive agencies unless “a statutory provision expressly” provides otherwise.<sup>517</sup> This language has contributed to sharp debates over whether the White House could turn to the Vacancies Act for the heads of agencies that have succession statutes, namely the CFPB, DOJ, and the Office of National Intelligence.<sup>518</sup>

Congress should address this ambiguity in one of several ways. It could insert more precise prophylactic interpretive language into the Vacancies Act about agency specific statutes. Or it could examine all of the agency-specific succession statutes and explicitly determine which statutes displace the Vacancies Act. Congress could amend those succession statutes to look more like DHS's provisions, which detail that the Vacancies Act cannot be relied upon for the top two agency positions in certain circumstances.<sup>519</sup> Alternatively, Congress could amend the Vacancies Act itself, rather than individual agency statutes, to provide a complete list of succession statutes that take precedence over the Vacancies Act. The last two options are arguably less workable—they may devolve into fights over politicized agencies, and Congress might forget to address the issue in the future if it creates new agencies.

Finally, if Congress determines that an agency-specific statute does not displace the Vacancies Act, it could amend either that statute or the Vacancies Act to include explicit language detailing how the Act should operate in combination with the agency statute.

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516. See Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988) (setting the permissible tenure of acting officials at 120 days); S. Rep. No. 89-1380, at 20, 70–71 (1966) (noting minor changes in 1966 when it recodified and enacted Title 5 of the U.S. Code).

517. 5 U.S.C. § 3347(a) (2018).

518. See *supra* section III.B.1.

519. 6 U.S.C. § 113(g)(1) (2018).

2. *Presidential Removal.* — The Vacancies Act does not directly mention firings, which has spurred conflict and litigation.<sup>520</sup> Congress should clarify that the Act’s procedures apply when appointees are fired—at least in the first six months of a new administration when agency staffing is most in flux. Even clarifying that the Act’s procedures should not apply would improve the uncertain status quo.

This proposal strikes the appropriate balance between conflicting policy goals. On one hand, Congress may worry that allowing Presidents to turn to acting officials after firing confirmed leaders would encourage avoidance of its constitutional role in agency appointments. Indeed, critics of President Trump have alleged such behavior.<sup>521</sup>

On the other hand, if Presidents could not turn to an acting official after a firing, they may be stuck with poor leaders. Impeachment (and conviction) take time and are almost never used.<sup>522</sup> The exclusion of firings could also create perverse incentives for outgoing administration officials after party control of the White House changes.<sup>523</sup> The political process can temper overuse of the firing power as Presidents will likely face backlash for seemingly unjustified firings.<sup>524</sup>

Finally, if firings include forced resignations, courts will have to get into the weeds of presidential personnel decisions, for which they are unsuited.<sup>525</sup> Given that appointees would almost certainly resign if asked by their

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520. See 5 U.S.C. § 3345(a); see also *supra* section III.B.2.a.

521. See, e.g., David A. Graham, Ratcliffe’s Withdrawal Reveals Trump Still Doesn’t Understand Appointments, *Atlantic* (Aug. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/whom-do-political-appointees-serve/595342> (on file with the *Columbia Law Review*) (finding that President Trump’s use of acting officials is “a clever, if devious, maneuver that represents an end-run around the Constitution’s requirement that the Senate advise and consent on appointees”). The National Task Force on Rule of Law and Democracy has called for the Vacancies Act to be amended to permit only “someone serving as the first assistant to the vacant office at the time the vacancy arises, and who has served for a defined minimum period of time” to “be eligible to perform the functions of the vacant role” if the vacancy is created by presidential removal. See 2 Nat’l Task Force on Rule of Law & Democracy, *Proposals for Reform 19* (2019), [https://www.brennancenter.org/sites/default/files/2019-09/2019\\_10\\_TaskForce%20II\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForce%20II_0.pdf) [<https://perma.cc/R9A7-KA9H>].

522. Keith E. Whittington, Will Congress Revive the Authority to Impeach Executive Officers Below the President?, *Foreign Pol’y: Lawfare* (Aug. 4, 2017), <https://foreignpolicy.com/2017/08/04/will-congress-revive-the-authority-to-impeach-executive-officers-below-the-president> [<https://perma.cc/Z7MS-ZNF6>].

523. See *supra* section III.B.2.c.

524. See, e.g., Lorraine Woellert & Arthur Allen, Trump Administration Dials Back Shulkin Firing Rumors—For Now, *Politico* (Mar. 14, 2018), <https://www.politico.com/story/2018/03/14/trump-administration-dials-back-shulkin-firing-rumors-va-416442> [<https://perma.cc/TU6J-HQR9>] (“President Donald Trump may be itching to fire him, but Veterans Affairs Secretary David Shulkin has the support of GOP lawmakers and veterans, and the lack of a preferred successor may keep him at the agency’s helm at least for now.”).

525. See Anne Joseph O’Connell (@AJosephOConnell), Twitter (Sept. 24, 2018), <https://twitter.com/AJosephOConnell/status/1044258618403565568> [<https://perma.cc/6QKP-ECGH>] (arguing that “courts do not want to be in the business of figuring out if a departure came

nominating President, perhaps a middle ground would be to exclude “true” firings from the Vacancies Act—but not in the first six months of a new administration as the incoming President gets their new team in place.<sup>526</sup>

3. *First Assistants.* — Congress should specify that to qualify as a first assistant under the Vacancies Act, the official must typically be named *before* the vacancy arises. The Vacancies Act specifies that the default acting official is “the first assistant to the [vacant] office.”<sup>527</sup> Cuccinelli’s selection as acting Director of USCIS—through the creation of a new first assistant position after the director vacancy arose—raised questions about when a first assistant can be named.<sup>528</sup> Even if post-vacancy first assistants are technically permitted by the Act’s language, they undermine the statute’s spirit.<sup>529</sup>

There should be two exceptions, however. The President should be permitted to name a first assistant after the vacancy arises (1) if the vacancy occurs during the first six months of a new administration, and (2) if the first assistant at the time of the vacancy dies (or falls ill) while serving. The latter exception comports with some limited legislative history of the Vacancies Act.<sup>530</sup>

Such a change would not radically restrict the use of acting officials. First assistants are often in place after the initial six months of an administration.

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from resignation or firing”); cf. Miller-Gootnick, *supra* note 297, at 487 (arguing that courts could administer a workable standard of excluding firings from the Vacancies Act by not counting forced resignations as firings).

526. Miller-Gootnick, *supra* note 297, at 490 (recommending a ninety-day grace period after the beginning of a new administration before firings count under the Vacancies Act). I support a longer period because of the realities of the modern appointments process. See O’Connell, *Staffing Federal Agencies*, *supra* note 42.

527. 5 U.S.C. § 3345(a)(1) (2018).

528. See *supra* section III.B.3.

529. See Berry, *supra* note 251, at 170; Steve Vladeck, Ken Cuccinelli and the Federal Vacancies Reform Act of 1998, *Lawfare* (June 10, 2019), <https://www.lawfareblog.com/ken-cuccinelli-and-federal-vacancies-reform-act-1998> [<https://perma.cc/M3D3-MTLC>]. Similar concerns to Cuccinelli’s service were raised about Vanita Gupta’s service as acting Assistant Attorney General for Civil Rights during the Obama Administration. See Nat’l Task Force on Rule of Law & Democracy, *supra* note 521, at 18 (describing how President Obama “appointed someone from outside of government to serve as the principal deputy assistant attorney general for civil rights and then elevated her (as the first assistant) to the role of acting assistant attorney general for civil rights” after his nominee was rejected).

530. See 144 Cong. Rec. 27,496 (1988) (statement of Sen. Thompson) (“The term ‘first assistant to the office’ . . . is made to ‘depersonalize’ the first assistant.”); see also Berry, *supra* note 251, at 174 (arguing that Senator Thompson’s statement “suggests that when an acting officer leaves that role through death or resignation, she should be succeeded by the first assistant to the office at that moment, not by the person who was the first assistant at the time of the original vacancy” (emphasis omitted)). Partially in response to the Cuccinelli and Gupta examples, the National Task Force on Rule of Law and Democracy has proposed that “[P]residents should be required to first choose from eligible individuals within the same agency as the vacancy before selecting an official from an outside agency.” Nat’l Task Force on Rule of Law & Democracy, *supra* note 521, at 19. My proposal would produce that result, outside of the first six months of a new administration.

The Vacancies Act also allows any sufficiently senior agency official (with the requisite tenure) and any Senate-confirmed official inside or outside the agency to assume an acting position.<sup>531</sup> To be fair, the first assistant is the default acting official, and the President “alone” must choose a specific person from the remaining two categories, which creates burdens for the White House if a first assistant is unavailable.<sup>532</sup> The proposed exceptions would reduce demands on the President in the early months of a new administration and create some flexibility for emergencies, while reducing potential incentives to avoid the traditional appointments process.

4. *Qualifications and Removal Constraints.* — The Vacancies Act and specific agency statutes do not directly specify whether qualifications and removal mandates on confirmed officials apply to acting leaders.<sup>533</sup> Given the deep pool of potential acting officials, qualifications mandates, but not removal restrictions, should apply to non-first assistant acting officials.

While qualifications mandates limit presidential choice, they also presumably foster good governance by requiring some baseline competence for agency leaders. Thus, they should also apply to acting officials, at least if the acting official is not the first assistant. First assistants presumably know the most about the vacant position, and so should still take on the acting role even if they do not meet all of the mandated qualifications. If a President, however, wants to turn to the second or third Vacancies Act category to temporarily fill a vacant position, the selected acting official should have to satisfy the position’s statutory mandates.

Such a rule would prevent the White House from choosing an acting IG for political motivations, for example.<sup>534</sup> It would also prevent the selection of a political ambassador with little intelligence experience as acting DNI.<sup>535</sup> The reform would also help alleviate concerns that acting officials undermine Congress’s role in the appointments process.<sup>536</sup>

Congress also imposes removal restrictions on certain agency positions,<sup>537</sup> but those restrictions should not apply to acting officials in those positions (including at the CFPB and FHFA). Acting officials have not been

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531. See 5 U.S.C. § 3345(a)(2), (a)(3); see also *supra* notes 75–81 and accompanying text.

532. 5 U.S.C. § 3345(a)(2); see also *supra* notes 76–79 and accompanying text.

533. *Supra* section III.C.2.

534. See *supra* note 151 and accompanying text (identifying GAO data on the number and length of vacancies in IG positions).

535. See 50 U.S.C. § 3023(a)(1) (2018) (“Any individual nominated for appointment as Director of National Intelligence shall have extensive national security expertise.”); Garrett M. Graff, *How Trump Hollowed Out US National Security*, WIRED (Feb. 21, 2020), <https://www.wired.com/story/trump-hollowed-out-us-national-security-vacancies-acting> [<https://perma.cc/A982-X2CE>].

536. See *supra* notes 462–464, 512 and accompanying text.

537. See *supra* section III.C.2.

confirmed—without that vetting, it does not make sense to give them the independence that comes with confirmation.<sup>538</sup>

B. *Types and Tenures of Acting Officials*

The Vacancies Act is not ambiguous with respect to the types of officials who can serve in acting positions or the permissible durations of their tenures. The Act details who can serve as an acting official and for how long. Nevertheless, some changes are in order, given the policy and legal issues raised in Parts III and IV.

1. *Types.* — The Vacancies Act does not distinguish between principal and inferior offices in establishing who can step into Senate-confirmed positions (or for how long). Rather, officials in the three permitted categories—(1) the first assistant, (2) any Senate-confirmed official in that agency or in another one, and (3) any senior agency worker who has been in the agency for at least ninety days in the year prior to the vacancy—can serve either as acting secretary (the very top of a cabinet department) or as acting assistant secretary (a subordinate leader).

Because of concerns about acting officials in principal offices, statutory provisions for acting leaders should vary by the level of the position. For the highest position in the agency (and perhaps the next level down), the permitted pool of acting officials should be smaller. Specifically, the third Vacancies Act category should be restricted to senior officials who have served in the agency for at least five years—a big jump from the current ninety-day minimum. This modification would have prevented Whitaker from serving as acting Attorney General,<sup>539</sup> while permitting Mike Young, who had worked for USDA for over twenty-five years, to serve as acting Secretary of Agriculture at the start of the Trump Administration.<sup>540</sup>

With a five-year minimum service requirement, any staff members stepping into top acting roles will likely be drawn from the career ranks (as opposed to political appointees), and therefore will bring important expertise. To be sure, late in a President's second term, acting leaders could be political officials who started early in the first term. As noted in Part II, almost all of the nonconfirmed acting officials who served from November 1998 to January 2020 in top roles would meet this five-year constraint. This

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538. Cf. Michaela Ross, *Impeachment Spotlights Vulnerability of Acting Federal Watchdogs*, Bloomberg Gov't (Nov. 19, 2019), <https://about.bgov.com/news/impeachment-spotlights-vulnerability-of-acting-federal-watchdogs> [<https://perma.cc/X3HM-FANE>] (noting that "acting IG[s] may not want to jeopardize their job or the agency's budget by pressing for investigations disliked by the [P]resident" because of "their exposure to being instantly removed by the President"). Imposing qualifications mandates on acting IGs may help alleviate these concerns.

539. See *supra* section III.A.2.b.

540. See Jerry Hagstrom, *USDA Acting Secretary and Candidates for Deputy Secretary*, DTN: Progressive Farmer (Jan. 21, 2017), <https://www.dtnpf.com/agriculture/web/ag/blogs/ag-policy-blog/blog-post/2017/01/22/usda-acting-secretary-candidates> [<https://perma.cc/THE6-LLZQ>]; *supra* section II.B.3.

higher-tenure restriction should also make the Vacancies Act less appealing to the White House as an alternative to the normal leadership process and foster agency governance while the confirmation process plays out.

Some scholars call for the elimination of the third category for principal offices entirely,<sup>541</sup> or, more modestly, for its availability only when there are no other Senate-confirmed officials in the agency.<sup>542</sup> In part, these scholars rely on constitutional arguments discussed above, arguing that the Appointments Clause requires a Senate-confirmed official to take on the duties of a principal office.<sup>543</sup> They also raise policy arguments, positing that it would be disconcerting to have a nonconfirmed acting official supervising lower-level Senate-confirmed officials.<sup>544</sup>

The proposal to eliminate the third Vacancies Act category for principal officers should not appeal to those who believe that acting officials in principal offices are inferior officers. To be sure, the third category permits nonconfirmed acting officials to supervise Senate-confirmed inferior officers. There are, however, many Senate-confirmed inferior officers simply because Congress does not like to give up its power and so rarely chooses one of the three alternatives for appointing such officers.<sup>545</sup> Moreover, at the start of their administrations, Presidents may want to keep Senate-confirmed officials from the preceding administration in lower-level positions while they get the top leadership in place, but they may also prefer a more neutral careerist at the helm in the meantime.<sup>546</sup>

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541. E.g., Dellinger & Lederman, *supra* note 249.

542. Steve Vladeck, *Trump Is Abusing His Authority to Name “Acting Secretaries.” Here’s How Congress Can Stop Him.*, *Slate* (Apr. 9, 2019), <https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-senate-reform.html> [<https://perma.cc/XC3J-JEKH>] [hereinafter Vladeck, *Trump Is Abusing His Authority*]; cf. Dellinger & Lederman, *supra* note 249, at n.2 (arguing that the availability of Senate-confirmed leaders in an agency “may have raised questions about whether the choice of [nonconfirmed individuals as acting officials in recent cases] was a reasonable response to an exigency”).

543. See *supra* section III.A.2.

544. Dellinger & Lederman, *supra* note 249.

545. See O’Connell, *Shortening Vacancies*, *supra* note 142, at 1695–96 & n.149.

546. The civil service is in crisis. See 2 *Nat’l Acad. of Pub. Admin., No Time to Wait: Building a Public Service for the 21st Century* 29 (2017), [https://www.napawash.org/uploads/Academy\\_Studies/NTTW2\\_09192018\\_WebVersion.pdf](https://www.napawash.org/uploads/Academy_Studies/NTTW2_09192018_WebVersion.pdf) [<https://perma.cc/F7FZ-H2AW>] (“Government cannot deliver what citizens expect unless it first repairs the system that provides the human capital on which government so critically depends.”). One recent survey of members of the Senior Executive Service found that 48.3% were eligible to retire in the next year. Kathleen M. Doherty, David E. Lewis & Scott Limbocker, *Executive Control and Turnover in the Senior Executive Service*, 29 *J. Pub. Admin. Res. & Theory* 159, 167 (2018). Specifically, agencies should prepare senior employees for high-level temporary leadership, such as by investing in management training. These employees need leadership skills as well as support in negotiating relationships with colleagues, both in supervising them as an acting official and then rejoining them once a confirmed official takes over. O’Connell, *Acting Agency Officials*, *supra* note 125, at 50. In addition, agencies should reward such employees who do step into acting roles. Currently, they are not paid more for taking on added responsibilities. *Id.* at 5.

Some scholars also want to curtail the use of cross-agency confirmed officials—like Wilkie and Mulvaney—at least if there are other Senate-confirmed officials in the agency or even qualifying senior agency workers available.<sup>547</sup> Given that Congress likely values having Senate-confirmed officials serve as actings, in many contexts, cross-agency acting officials will be preferable to nonconfirmed agency officials. To be sure, for more independent positions such as the CFPB director and IGs, nonconfirmed agency officials are likely better selections than a political pick from another agency. Cross-agency acting officials can always delegate the tasks of their two positions to help with workload concerns. Although a middle ground might be to limit the use of confirmed officials from outside the agency to circumstances in which there are no confirmed officials available within the agency, the complexity of modern governance supports keeping the pool of potential acting officials wide enough for critical issue and management expertise.<sup>548</sup>

2. *Tenures.* — In addition to modifying who can serve in the very highest jobs in an acting capacity, Congress should shorten the time limits for these positions to 210 days (or 300 if the vacancy occurs in the first sixty days of an administration) and the time for two pending nominations.<sup>549</sup> This cuts out the two 210-day periods after two failed (that is, almost always, returned or withdrawn) nominations. The initial 210 (or 300) days would have to cover all the time the nominations are not pending. The White House should be able to submit the first nomination faster and should know if

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547. E.g., Vladeck, *Trump Is Abusing His Authority*, supra note 542. Alan Morrison also proposed this. See Email from Alan Morrison, Lerner Family Assoc. Dean, Pub. Interest & Pub. Service Law, George Washington Law Sch., to author (Dec. 27, 2017) (on file with the *Columbia Law Review*).

548. This issue is not pressing in practice, as there appears to have been relatively few cross-agency acting officials under the current Vacancies Act (compared to its previous version, which did not permit nonconfirmed agency officials to serve as acting leaders). See supra Part II.

549. Some scholars have suggested more radical time limits. Light calls for a return to the 120-day limit for all covered positions. Paul C. Light, *What the Senate Should Do About Acting Appointees*, Gov't Executive (Nov. 27, 2018), <https://www.govexec.com/excellence/promising-practices/2018/11/what-senate-should-do-about-acting-appointees/153085> [<https://perma.cc/73G3-YCLX>]. Mendelson favors a thirty-day limit (forty at the start of a new administration) for cabinet secretary positions “unless a nomination is pending in the Senate” (and 120 days “plus the time a nomination is pending in the Senate” for other principal offices). Mendelson, *The Permissibility of Acting Officials*, supra note 105, at 65–66. Professor Steve Vladeck has called for “60 days, subject to extension if and only if the President nominates a permanent successor during that period, and only until the Senate formally approves or rejects the nomination.” Vladeck, *Trump Is Abusing His Authority*, supra note 542. Although in favor of a 300-day limit, Bloomberg’s Editorial Board has urged Congress to adopt harsher consequences when that limit expires. Opinion, *Trump Can’t Run the Government with Temps*, Bloomberg (Dec. 29, 2017), <https://www.bloomberg.com/opinion/articles/2017-12-29/trump-can-t-run-the-government-with-temps> [<https://perma.cc/BP94-SKCF>] (“Banning acting officials from drawing a salary after 300 days, or requiring that vacant offices be filled by career civil servants after the deadline passes, might do the trick.”).

the first nominee is encountering trouble on the Hill and can prepare for a potential second nominee in advance.

Reforms to the time limits of the Vacancies Act need to acknowledge empirical realities. The appointments process takes time, including finding appropriate nominees and confirming them, particularly if the same party does not control the White House and the Senate.<sup>550</sup> Notably, the 210-day period ran out for the secretary of commerce position during President Obama's Administration in 2013, leaving a cabinet department without an acting leader.<sup>551</sup>

Permitting acting officials to serve during two nominations seems important for several reasons. First, issues arise during the vetting process, and the Senate or the White House should not feel pressured into accepting a problematic nominee. There is often a cabinet position at the start of every administration that takes several announced nominations to fill. For example, President Obama did not have a confirmed Secretary of Health and Human Services until April 28, 2009. His first nominee, Tom Daschle, withdrew after tax issues came to light.<sup>552</sup>

Second, many agency nominees fail to get confirmed on their first submission. Some vacancies occur shortly before the intersession recess. Even if the same party controls the Senate and the White House, Congress struggles to confirm nominations to top cabinet posts that are made close to the year's end. Hearings have to be scheduled and nominees have to respond to follow-up written questions. Such nominations are returned to the President unless all Senators agree to hold them over<sup>553</sup>—a rare occurrence these days. For instance, President Obama announced his intent to nominate Loretta Lynch as his second Attorney General on November 9, 2014—her first nomination was returned, and her second nomination was not confirmed until April 23, 2015.<sup>554</sup> If her predecessor could not have

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550. See O'Connell, *Trump's First Year*, supra note 142 (describing the slow pace of President Trump's appointment process); Nancy Cook, *Trump's Staffing Struggle: After 3 Years, Unfilled Jobs Across the Administration*, Politico (Jan. 20, 2020), <https://www.politico.com/news/2020/01/20/trumps-staffing-struggle-unfilled-jobs-100991> [<https://perma.cc/E8LQ-DU92>] (updating measures of confirmation delay through President Trump's third year).

551. O'Connell, *Acting Leaders*, supra note 141.

552. Jeff Zeleny & David Stout, *Daschle Withdraws as Cabinet Nominee*, N.Y. Times (Feb. 3, 2009), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9906E6DD1E31F937A35751C0A96F9C8B63.html> [<https://perma.cc/6KHF-RAQD>]. It then took about a month for President Obama to announce his second nominee, Kathleen Sebelius. Press Release, Office of the Press Sec'y, The White House, *President Obama Nominates Governor Kathleen Sebelius Secretary of HHS, Announces Release of \$155 Million of ARRA Funds for Health Clinics Across America* (Mar. 2, 2009), <https://obamawhitehouse.archives.gov/the-press-office/president-obama-nominates-governor-kathleen-sebelius-secretary-hhs-announces-releas> [<https://perma.cc/BV84-YSYV>].

553. See Standing Rules of the Senate, S. Doc. No. 113-8, Rule XXXI, at 44 (2013).

554. Barack H. Obama Cabinet Nominations, U.S. Senate, [https://www.senate.gov/legislative/nominations/Obama\\_cabinet.htm](https://www.senate.gov/legislative/nominations/Obama_cabinet.htm) [<https://perma.cc/N9BE-3Z7A>] (last visited Oct. 15, 2019).

served during that time, there would have been an acting attorney general for close to six months. Nearly 30% of President Obama's agency nominations were returned or withdrawn at least once,<sup>555</sup> though fewer nominations to principal offices have been returned than non-principal offices.<sup>556</sup>

In sum, permitting acting leaders to serve in the top and second-highest offices in agencies for no longer than 210 days and while two nominations are pending would balance delays due to vetting, gridlock, and polarization against the need to have temporary leadership of federal agencies for effective governance. The current, longer time limits would remain for lower-level positions. After all, those lower-level positions could be staffed, if Congress allowed it, without Senate confirmation.<sup>557</sup>

3. *Interaction of Types and Tenures.* — The Vacancies Act currently treats the types and tenures of acting officials independently, but Congress may want to think about their interaction. Namely, the pool of acting leaders should grow smaller as the length of the vacancy increases. For lower-level positions, if a first nominee fails to get confirmed, the acting leader should continue in the role only if they are the first assistant or a senior civil servant who has worked in the agency for at least five years. This would give Presidents a wider pool of political officials at the start of a vacancy, but it would also limit the White House to deputies or high-level careerists if the vacancy dragged on.

This proposal may also be attractive for higher-level positions and could incentivize the White House to nominate compelling individuals. If the opposing party controls the Senate, however, such a change may shift too much power to Congress for positions closest to the President.

4. *Nominees.* — Unlike the proposals in the previous three subsections, which would restrict the President's use of acting officials, this final subsection proposes more permissive conditions for allowing *nominees* to serve as acting officials. Three years ago, the Supreme Court narrowly interpreted the Vacancies Act to allow nominees to serve in an acting role only if they have been confirmed to the first assistant position or have been the first assistant (when the position is not Senate-confirmed) for at least ninety days in the year preceding the vacancy.<sup>558</sup> No other acting official can continue to serve in a Senate-confirmed position after being formally nominated for the job.<sup>559</sup> Congress should amend the Act to allow individuals who have been Senate-confirmed to other agency positions to continue serving in an acting capacity if they have been nominated to the open position.

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555. O'Connell, Acting Leaders, *supra* note 141.

556. O'Connell, Staffing Federal Agencies, *supra* note 42 (finding only a 6% failure rate of nominations for cabinet secretaries between 1981 and 2016).

557. See *infra* section V.E.3.

558. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017); see also *supra* section I.B.

559. See *SW Gen.*, 137 S. Ct. at 938.

This change would shift practices closer to what occurred before the Supreme Court weighed in,<sup>560</sup> but would not allow nonconfirmed officials to continue serving while their nominations were pending unless they meet the first assistant conditions above.<sup>561</sup> By permitting acting officials to continue serving if they have already received some form of Senate approval, this approach would help minimize leadership disruptions during the traditional appointments process without unduly interfering with the Senate's authority. For instance, with this change, Esper, who had been confirmed as Secretary of the Army, would not have had to step down as acting Secretary of Defense when the Senate formally received his nomination. If Esper had been permitted to continue as acting Secretary, the Department would not have seen its third acting secretary since Mattis's forced early departure,<sup>562</sup> and the Senate presumably would not have needed to expedite review and confirmation of Esper's nomination.<sup>563</sup>

Additionally, if the President withdraws, the Senate returns (for a second time), or the Senate votes down a nomination of any acting official, that person should have to step down as an acting official immediately, even if the time limits have not expired.<sup>564</sup> The failed nominee should also not be allowed to carry out the functions through delegation. For example, under this proposal, Susan Combs would not have been able to continue as acting Assistant Secretary for Policy, Management, and Budget at the Department of the Interior after the Senate returned her second nomination in early 2019.<sup>565</sup>

### C. *Oversight of Agency Use of Acting Officials*

Given the prevalence of acting officials, observers should be troubled by the difficulty of finding reliable information on agency practices and the scarcity of Vacancies Act violations identified by the GAO since 1998.

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560. See Guidance on Application of the Vacancies Act, *supra* note 84, at 64.

561. See *SW Gen.*, 137 S. Ct. at 937 (noting that the acting General Counsel and nominee “had spent the previous ten years in the senior position of Director of the NLRB’s Office of Representation Appeals”).

562. Robert Burns, Pentagon in Its Longest-Ever Stretch of Leadership Limbo, Associated Press (July 12, 2019), <https://www.apnews.com/ce5a27679ec7442283a372d7f3b67e92> [<https://perma.cc/AQ8X-PAZC>].

563. Daniel Wilson, Defense Secretary Nominee to Get Expedited Consideration, Law360 (July 11, 2019), <https://www.law360.com/articles/1177574/defense-secretary-nominee-to-get-expedited-consideration> (on file with the *Columbia Law Review*).

564. In California, for positions where the appointment power is “vested in the Governor and the Senate,” the governor’s nominees can serve “at the pleasure of the Governor” until the Senate confirms them. Cal. Gov’t Code § 1774(a) (2019). If the Senate refuses to confirm, the nominee must step down. *Id.* § 1774(c) (2).

565. Maria Recio, Clock Runs Out on Federal Nominations for Susan Combs, Other Texans, American-Statesman (Jan 6, 2019), <https://www.statesman.com/news/20190106/clock-runs-out-on-federal-nominations-for-susan-combs-other-texans> [<https://perma.cc/9LB7-68PU>]; see *infra* note 593.

Congress should amend the Act to improve and expand disclosure and promote enforcement.

1. *Disclosures.* — To start, Congress should improve reporting of vacancies and acting officials to itself and the GAO. Currently, the Vacancies Act relies on agency self-reports.<sup>566</sup> Yet, the statute lacks an enforcement mechanism for late, incomplete, or absent reporting.

The system is not working well. At the request of the Ranking Member of the Senate Finance Committee, Senator Ron Wyden, the GAO recently examined “compliance with the Federal Vacancies Reform Act . . . by agencies and departments with respect to positions subject to the jurisdiction of the Senate Finance Committee.”<sup>567</sup> The GAO found that agencies reported many vacancies months after they began.<sup>568</sup> And some vacancies were never reported. For this latter set, the GAO noted only: “No information has been reported to GAO. GAO continued to provide regular reminders to agencies and departments to obtain required reports.”<sup>569</sup> An earlier GAO report found 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).”<sup>570</sup>

For the positions discussed in Part II, compliance has been mixed. For the vacancies identified in the “snapshot” database in Table 11, agencies had reported all but five of the vacancies by August 15, 2019, but eight of the departments had average delays of more than 200 days (and five had average delays of more than one year).<sup>571</sup> For the cabinet, EPA, and FAA vacancies, while agencies reported many (but not all) vacancies, a substantial

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566. 5 U.S.C. § 3349(a) (2018). Specifically, the law requires that agencies shall submit to the GAO and Congress:

(1) . . . [T]he date such vacancy occurred immediately upon the occurrence of the vacancy; (2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation; (3) 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 (4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

Id.

567. U.S. Gov’t Accountability Office, B-329903, Agency Compliance with the Federal Vacancies Reform Act for Positions Subject to the Jurisdiction of Senate Finance Committee 1 (2019), <https://www.gao.gov/assets/b-329903.pdf> [<https://perma.cc/LM3J-B9DQ>].

568. Id. at 4–11.

569. Id. at 11 n.2.

570. 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), <https://www.gao.gov/assets/gao-01-701.pdf> [<https://perma.cc/5QB8-7AX9>].

571. See O’Connell, Acting Agency Officials, *supra* note 125, at 52–53.

number of those reports did not identify the acting officials occupying the vacant offices.<sup>572</sup>

Congress could mandate that the GAO collect information at regular intervals (such as twice per year). Or Congress could require the White House Office of Presidential Personnel to report the information by a certain date (for instance, within thirty days of a vacancy). Moreover, agencies should have to make annual reports detailing their use of acting officials for Senate-confirmed positions. Perhaps those annual reports could be combined with their budget submissions to OMB, or they could be made separately to the GAO and Congress.

In addition, although not a full substitute for the vetting in the formal appointments process, Congress should expand what agencies have to disclose about acting officials.<sup>573</sup> For officials serving more than two weeks, agencies should have to provide promptly (that is, within two weeks after the two-week mark of service) the officials' names and important background information to the GAO and relevant congressional committees. This background information need not be as extensive as what nominees must submit during the confirmation process, but it should be comprehensive and extend beyond the already required Office of Government Ethics (OGE) forms.<sup>574</sup> Moreover, except for information traditionally kept confidential for nominees, the GAO and OGE should publicly post these disclosures.<sup>575</sup>

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572. *Id.* at 54–55. The FAA quickly reported all five vacancies in its administrator position since 1998 to the GAO, waiting one month for one of the vacancies but mostly filing reports within days of the reported opening. For the four most recent vacancies, the agency also identified the acting official leading the agency.

573. Cf. Mendelson, *The Permissibility of Acting Officials*, *supra* note 105, at 59–60 (explaining some aspects of the White House's traditional vetting process). Recently introduced legislation calls for acting national security officials to testify regularly before Congress. H.R. 6002, 116th Cong. (2020).

574. The OGE forms also should be completed and reviewed carefully. See Gabriel Sandoval, *These Trump Staffers—Including an Ex-NRA Lobbyist—Left Their Financial Disclosure Forms Blank*, ProPublica (June 28, 2018), <https://www.propublica.org/article/these-trump-staffers-including-an-ex-nra-lobbyist-left-their-financial-disclosure-forms-blank> [<https://perma.cc/9LYT-R4R7>]; Zoe Tillman, *Matthew Whitaker's Conflict of Interest Forms Weren't Screened Until Just Before Trump Put Him in Charge of the DOJ*, BuzzFeed News (Aug. 13, 2019), <https://www.buzzfeednews.com/article/zoetillman/matthew-whitakers-conflict-interest-forms> [<https://perma.cc/Z2N8-8BAC>]. Some acting officials appear to be excluded from OGE mandates as Special Government Employees (SGEs). David Dayen, *America's Most Dangerous Temp*, Am. Prospect (May 17, 2017), <https://prospect.org/power/america-s-dangerous-temp> [<https://perma.cc/XD8E-WX7V>]. This status is tied, in part, to salary, but should not be given to anyone serving as an acting official or performing delegated functions of a Senate-confirmed position. See *id.*

575. See Derek Kravitz, *GAO Urges Federal Government to Reveal Key Information on Political Appointees*, ProPublica (Mar. 19, 2019), <https://www.propublica.org/article/gao-urges-federal-government-to-reveal-key-information-on-political-appointees> [<https://perma.cc/8NNL-GZ2L>] (noting that the GAO itself has urged the Trump Administration to make data on agency leaders publicly available).

Finally, agencies should publish succession plans for all Senate-confirmed positions that permit acting officials, in order for the public to know who is next in line.<sup>576</sup>

2. *Enforcement.* — Congress should extend oversight authority of violations of the Vacancies Act. At present, enforcement of the statute is largely left to the GAO.<sup>577</sup> If the Comptroller General finds a violation of the Act's time limits, they must notify relevant congressional committees, the President, and OPM.<sup>578</sup> The Comptroller General does not, however, have to look for violations.<sup>579</sup> From the Act's enactment in 1998 to March 1, 2020, the GAO has issued only twenty-five decisions involving time limit violations.<sup>580</sup> The GAO has noted a few violations of the Act outside of the time limits—specifically, violations of the Act's qualification requirements.<sup>581</sup>

Given the small number of violations reported by the GAO in approximately twenty-one years, Congress should encourage more oversight. Specifically, Congress could encourage more regular, detailed reporting and ask the GAO not only to collect more information but also to report twice yearly on violations.

Parties harmed by agency action can also sue under the Vacancies Act for alleged violations. The Act appears to have a powerful remedy—for almost all positions, any violation results in the relevant agency action being voided.<sup>582</sup> Litigation, however, takes time, and few parties will have

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576. ACUS Recommendation 2019-7, *supra* note 143, at 7; O'Connell, Acting Agency Officials, *supra* note 125, at 71; cf. Presidential Transition Enhancement Act of 2019, Pub. L. No. 116-121, § 2(b)(3), 134 Stat. 138, 140 (2020) (amending the Act to require that "the head of each agency shall ensure that a succession plan is in place for each senior noncareer position in the agency").

577. See *supra* note 102 and accompanying text.

578. 5 U.S.C. § 3349(b) (2018).

579. Brannon, *supra* note 59, at 20.

580. See Federal Vacancies Reform Act, U.S. Gov't Accountability Office, <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act#search> [<https://perma.cc/LEZ9-VCBC>] (last visited Mar. 1, 2020) (listing GAO decisions, with only one decision that involves multiple positions and that flagged a violation that had been previously identified). One listed letter was a response to three Senators who asked for the GAO's opinion about whether the Assistant Attorney General for OLC had served in violation of the Act. The GAO found no violation. Letter from Gary L. Kepplinger, Gen. Counsel, U.S. Gov't Accountability Office, to Richard J. Durbin, Russell D. Feingold & Edward M. Kennedy, U.S. Senators 5 (June 13, 2008), <https://www.gao.gov/assets/b-310780.pdf> [[https://perma.cc/5N\]X-JK6M](https://perma.cc/5N]X-JK6M)].

581. See, e.g., Letter from Susan A. Poling, Gen. Counsel, U.S. Gov't Accountability Office, to the U.S. President & White House 7 (June 18, 2014), <https://www.gao.gov/assets/680/670945.pdf> [<https://perma.cc/B48B-27HJ>] (determining that two acting officials were not the first assistant and "were therefore ineligible to become the Acting General Counsel").

582. 5 U.S.C. § 3348(d)(1). The agency may, however, be able to ratify some actions. See *supra* note 338.

the requisite standing to sue.<sup>583</sup> Nevertheless, provisions for expedited judicial review might help.

Given that the GAO already adjudicates certain disputes,<sup>584</sup> perhaps Congress could ask the GAO to establish procedures for resolving credible complaints of Vacancies Act violations. To be sure, in bid protests, the parties seeking GAO review typically submitted losing bids. By contrast, here it could be public interest groups, like Democracy Forward, bringing alleged violations to the GAO's attention. More feasibly than creating an adjudication system, which could also raise legal issues, the GAO could be directed to investigate any credible allegations of violations of the Vacancies Act.

#### D. *Delegation*

Acting officials and delegated authority are largely two sides of the same coin.<sup>585</sup> Restricting the former without adjusting the latter will push agencies to rely more heavily on delegation. Reforming acting service, therefore, requires changing how agencies use delegated authority.

1. *Scope of Delegation.* — Acting officials generally can carry out all functions and duties of the vacant office under the Vacancies Act and agency-specific statutes.<sup>586</sup> If those functions and duties are not assigned exclusively to the vacant position by statute or regulation, they have also most likely been delegated to other agency officials, within the constraints

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583. See Stipulation of Dismissal, *Hamel v. U.S. Dep't of Veterans Affairs*, No. 1:18-cv-1005 (D.D.C. filed Aug. 1, 2018) (noting that the parties to a Vacancies Act case stipulated to dismiss the matter in light of the confirmation of a nominee to replace the defendant acting official); Motion to Dismiss at 1–2, *Hamel*, No. 1:18-cv-01005 (D.D.C. filed July 13, 2018) (arguing that the plaintiffs lacked standing to sue under the Vacancies Act).

584. See generally Kate M. Manuel & Moshe Schwartz, Cong. Research Serv., R40228, GAO Bid Protests: An Overview of Time Frames and Procedures (2011), <https://fas.org/sgp/crs/misc/R40228.pdf> [<https://perma.cc/BCM4-QBYB>] (discussing the GAO's procedures for hearing bid protests involving federal acquisitions).

585. See *supra* section I.E.

586. See *supra* section I.A. This does not have to be the case. Corporate boards of directors, for example, sometimes restrict what interim CEOs can do. Gary A. Ballinger & Jeremy J. Mancel, The Use of an Interim CEO During Succession Episodes and Firm Performance, 31 Strategic Mgmt. J. 262, 268 (2010). In rare cases, nonstatutory devices limit the authority of acting officials. Until August 2019, OPM guidance “stipulated that agencies face a moratorium on . . . reviews for [Senior Executive Service] candidates after their top leaders announced they were stepping down or the president announced a successor.” Eric Katz, Agencies with Acting Leaders Can Now Fill Top Career Ranks, OPM Says, Gov't Executive (Aug. 20, 2019), <https://www.govexec.com/management/2019/08/agencies-acting-leaders-can-now-fill-top-career-ranks-opm-says/159315> [<https://perma.cc/EQV9-EPC7>]. Acting officials also typically do not have their photographs hung on the walls of the agency. Maria Sacchetti, No Confirmation, No Photo. CBP Says Trump's Image the Only One on Agency Walls., Wash. Post (Nov. 19, 2019), [https://www.washingtonpost.com/immigration/no-confirmation-no-photo-cbp-says-trumps-image-the-only-one-allowed-on-agency-walls/2019/11/19/c8bc06d8-0a46-11ea-bd9d-c628fd48b3a0\\_story.html](https://www.washingtonpost.com/immigration/no-confirmation-no-photo-cbp-says-trumps-image-the-only-one-allowed-on-agency-walls/2019/11/19/c8bc06d8-0a46-11ea-bd9d-c628fd48b3a0_story.html) (on file with the *Columbia Law Review*).

of the Appointments Clause.<sup>587</sup> Because statutes do not bar the delegation of many tasks,<sup>588</sup> cabining delegation currently depends on agency self-control.<sup>589</sup>

Limiting delegation would encourage reliance on the traditional appointments process. Professor Steve Vladeck has recently proposed that Congress consider “denying acting agency heads the power to, among other things, rescind regulations promulgated by Senate-confirmed predecessors, take action to apply regulations the agency has promulgated, or a host of other steps . . . .”<sup>590</sup> The same list could apply to delegations when time limits on acting service have run out. Alternatively, Congress could restrict delegations to those in place at the time the vacancy arises. On the other hand, too much restriction on delegation would undermine modern governance. If agencies were restricted to delegations in place before a vacancy arose, presumably fewer functions would be able to be assigned to lower-level officials when the time limits on acting service run out. In some cases, agencies would not be able to carry out important work.

Finding a middle ground seems critical. As one option, Congress could consider assigning more duties exclusively to positions or restricting delegation downward to only certain positions.<sup>591</sup> Congress should at least work to prevent intentional end runs around the appointments process. For example, after the Senate failed to act on three nominations for undersecretary positions in 2018, the Secretary of Agriculture named those nominees to deputy positions and then delegated to them the nonexclusive functions of the vacant positions.<sup>592</sup> Like the proposed constraint on acting officials, Congress could prevent delegation of functions to individuals for whom the Senate has returned two nominations or affirmatively rejected, or when the White House has failed to submit a nomination within a specific period of time.<sup>593</sup>

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587. See *supra* section I.E.

588. See *supra* notes 110–114.

589. See *supra* note 105.

590. See Vladeck, *Trump Is Abusing His Authority*, *supra* note 542; see also Van Orsdol, *supra* note 297, at 322 (providing a different list, including “advisory letters and general policy statements” and “private outsourcing decisions”).

591. See Brannon, *supra* note 59, at 19 & n.166 (citing 42 U.S.C. § 3535(q)(2) (2012), which states: “The Secretary may delegate authority to approve a waiver of a regulation only to an individual of Assistant Secretary or equivalent rank . . . .”); see also Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 *Va. L. Rev.* (forthcoming 2020) (manuscript at 21–25), [https://papers.ssrn.com/abstract\\_id=3361299](https://papers.ssrn.com/abstract_id=3361299) (on file with the *Columbia Law Review*) (calling for more delegation to lower-level officials outside of the vacancies context).

592. Tom Philpott, *Trump’s Ag Secretary Just Skirted the Senate to Appoint These Corporate Flacks*, *Mother Jones* (Jan. 31, 2019), <https://www.motherjones.com/food/2019/01/trumps-ag-secretary-just-skirted-the-senate-to-appoint-these-corporate-flacks> [<https://perma.cc/FJH9-HXNB>].

593. Such a bar would have prevented Combs from taking on significant duties at the Department of the Interior in 2019. President Trump nominated Combs to be Assistant

By contrast, Congress may want to promote more delegation—for instance, when the agency is not permitted to use acting officials.<sup>594</sup> The Interim Stay Authority to Protect Whistleblowers Act<sup>595</sup> would allow the general counsel of the MSPB “to stay questionable personnel actions brought against whistleblowers,” a function that normally rests with the board.<sup>596</sup>

2. *Transparency.* — Even if the scope of delegations remains the same, delegations should be more transparent.<sup>597</sup> Although compliance is mixed, the Vacancies Act at least requires agencies to notify the GAO and Congress of vacancies and acting officials. It does not mandate that agencies inform anyone of delegated authority.<sup>598</sup>

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Secretary of Policy, Management, and Budget on July 11, 2017; the Senate returned the nomination on January 3, 2018. Nomination of Susan Combs, PN 738, 115th Cong. (2017), <https://www.congress.gov/nomination/115th-congress/738> [<https://perma.cc/43J9-DVD6>]. The President renominated her on January 8, 2018. Nomination of Susan Combs, PN 1366, 115th Cong. (2018), <https://www.congress.gov/nomination/115th-congress/1366> [<https://perma.cc/6XA3-PM7J>]. On March 31, 2018, Secretary Zinke delegated to Combs the duties of the Assistant Secretary for Fish, Wildlife, and Parks. U.S. Dep’t of the Interior, Sec’y of the Interior, Order No. 3345, Amendment No. 17: Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions 2 (Mar. 31, 2018). The agency subsequently gave her different but still substantial duties several months later. Michael Doyle, Department Picks ‘Acting’ Chief for Fish, Wildlife and Parks, E&E News (Aug. 8, 2018), <https://www.eenews.net/greenwire/stories/1060093053> [<https://perma.cc/3WSL-Y8T5>]. On January 3, 2019, the Senate returned her second nomination. Nomination of Susan Combs, PN 1366, 115th Cong. (2018), <https://www.congress.gov/nomination/115th-congress/1366> [<https://perma.cc/6XA3-PM7J>]. President Trump submitted a third nomination on January 16, 2019, which the Senate confirmed on June 5, 2019. Nomination of Susan Combs, PN 74, 116th Cong. (2019), <https://www.congress.gov/nomination/116th-congress/74> [<https://perma.cc/48FL-RY3E>]. From January 3 to June 5, 2019, under this Article’s proposal, Combs should not have been able to take on important functions through delegation at the agency.

594. Independent regulatory commissions and boards, which Congress designed to have more distance from the President than cabinet departments and executive agencies, generally do not have access to acting officials. But if those independent agencies cannot operate without Senate-confirmed officials, Congress may have to choose between less independence and inaction. Allowing more delegation to senior careerists will likely be more appealing to Congress than allowing the President to have acting officials in those independent agencies. See Eric Katz, With Appeals Board Hamstrung, Congress Declines to Intervene on Behalf of Whistleblowers Facing Discipline, Gov’t Executive (Dec. 19, 2019), <https://www.govexec.com/workforce/2019/12/appeals-board-hamstrung-congress-declines-intervene-behalf-whistleblowers-facing-discipline/162039> [<https://perma.cc/LG9L-PV3Z>] (noting congressional approval and rejection of particular delegations at the MSPB once it lost its quorum).

595. H.R. 2530, 116th Cong. (2019).

596. Jessie Bur, Bill Proposes a Stopgap for Fed Appeals Board Vacancies, Fed. Times (May 8, 2019), <https://www.federaltimes.com/federal-oversight/congress/2019/05/08/bill-proposes-a-stopgap-for-fed-appeals-board-vacancies> [<https://perma.cc/36GC-CL3U>].

597. See ACUS Recommendation 2019-7, *supra* note 143, at 7 (calling for agencies to post on their websites delegations in the face of staffing vacancies); Nou, *supra* note 359, at 502–03 (contrasting the SEC’s more public practices with the EPA’s often-inaccessible delegations and arguing that “publicly memorializ[ing]” delegations will make them more “credible”).

598. See Brannon, *supra* note 59, at 17–19 (summarizing the delegability of duties under the Vacancies Act).

Agencies should have to report any delegated authority from vacant Senate-confirmed positions. Such reporting should—at a minimum—include the delegated tasks, who is performing the duties, and any time limits. Ideally, the GAO would collect these reports in one place for the public. To encourage compliance, agencies should have to provide information on delegations biannually. The GAO should also be required to report on agency compliance. This could be done by amending the Vacancies Act.

E. *Traditional Appointments Process*

In previous work, I have proposed multiple reforms to decrease lags in agency nominations and confirmations, and to increase appointee tenure.<sup>599</sup> This section turns to the interaction between acting officials and delegated authority, on one hand, and the traditional appointments process, on the other. As with other suggested reforms, the goal is encouraging formal nominations while also allowing the government to function as the lengthy appointments process churns.

1. *Incentives to Nominate by Changes to Acting Officials and Delegations.* — Shortening the permitted tenure of acting officials presumably will force the White House to increase attention on the formal nominations process. A President often sends a nomination to the Senate around the 210th day after a vacancy arises (or the 300th day in the first year of an administration).<sup>600</sup> Because delegation is a close substitute for acting service, restricting delegation is also required to incentivize nominations.

Instead of restricting what acting officials can do or how long they can serve, Congress could also change who selects them—within the constraints of the Appointments Clause. Taking power away from the President over acting officials and distributing it to other actors should spur more formal nominations. If acting officials are inferior officers, Congress can allow the head of the agency or a court of law to pick them, assuming the latter does not produce “‘incongruous’ interbranch appointments.”<sup>601</sup>

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599. See O’Connell, Shortening Vacancies, *supra* note 142, at 1691–1700 (suggesting plausible reforms to the nomination and confirmation process); O’Connell, Vacant Offices, *supra* note 145, at 987 (describing the importance of decreasing the number of vacant positions and the length of vacancies within an administration). Encouraging an outgoing official to stay until a replacement can be confirmed creates a different sort of interim leader—that of the lame duck.

600. In the summer of 2019, the White House “delivered to the Senate the nomination of Lisa Hershman to be the Pentagon’s chief management officer” soon after the Vacancies Act’s time limit passed. Aaron Mehta, Nomination for DoD’s Chief Management Officer Heads to the Senate, *Def. News* (July 23, 2019), <https://www.defensenews.com/pentagon/2019/07/23/hershman-cmo-nomination-sent-to-senate> [<https://perma.cc/BC57-6J6A>]; see also Chase Gunter, At 300 Days, Trump Faces Hundreds of Key Vacancies, *FCW* (Nov. 14, 2017), <https://fcw.com/articles/2017/11/14/vacancies-300-trump-gunter.aspx> [<https://perma.cc/NL9A-7ETK>] (noting the Trump Administration increased the pace of nominations after 200 days).

601. See U.S. Const. art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654, 677 (1988).

For instance, the attorney general currently can choose an “interim” U.S. attorney to serve for 120 days.<sup>602</sup> After that point, the relevant district court “may appoint a United States attorney to serve until the vacancy is filled.”<sup>603</sup> Perhaps the power to fill other positions on a temporary basis—such as IG vacancies—could be assigned to the courts.<sup>604</sup>

Even shifting authority from the President to agency heads to select from the second and third categories of acting officials for lower-level positions would make the Vacancies Act less of a substitute for the traditional appointments process. To be sure, under a unitary executive theory, agency heads will do the President’s bidding. While the President can fire almost all agency heads covered by the Vacancies Act without cause, removal carries political costs.<sup>605</sup> In practice, the executive branch is not unitary, and agency heads may have considerable latitude in naming lower-level acting officials.<sup>606</sup> To prevent acting agency heads from exercising this authority, Congress could restrict the change to non-acting agency leaders, or exclude only nonconfirmed acting officials.

2. *Explanations for Delay.* — Furthermore, Congress could pressure the White House for nominations. At one extreme, Seth Barrett Tillman has suggested that “[i]f in creating an office, Congress were to expressly impose on the President a mandatory duty, setting a time limit for its fulfilment, and adverse consequences or a punishment in regard to presidential inactivity, then” the President might have an obligation to submit a nomination.<sup>607</sup>

Congress should require the President to report more on vacancies and the nominations process for some set of critical positions, which would be more politically feasible and less likely to face legal challenges than Tillman’s proposal. In July 2019, the House of Representatives passed legislation that would mandate whenever a vacant IG job lacked a nominee

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602. 28 U.S.C. § 546(a), (c) (2018).

603. *Id.* § 546(d).

604. Such provisions arguably would not “impermissibly encroach on executive powers.” Cf. *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) (upholding a provision for interim U.S. attorneys).

605. See Nancy Cook, *Trump’s Cabinet Has Become Severe Headache for His White House*, Politico (July 16, 2019), <https://www.politico.com/story/2019/07/16/trump-cabinet-turnover-1416134> [<https://perma.cc/N2SS-ESW2>] (“The personnel chaos is now thwarting the [A]dministration’s ability to execute the [P]resident’s policy agenda in his final opportunities before an election year.”); Philip Rucker & Scott Clement, *Poll: 60 Percent Disapprove of Trump, While Clear Majorities Back Mueller and Sessions*, Wash. Post. (Aug. 31, 2018), [https://www.washingtonpost.com/politics/poll-60-percent-disapprove-of-trump-while-clear-majorities-back-mueller-and-sessions/2018/08/30/4cd32174-ac7c-11e8-a8d7-0f63ab8b1370\\_story.html](https://www.washingtonpost.com/politics/poll-60-percent-disapprove-of-trump-while-clear-majorities-back-mueller-and-sessions/2018/08/30/4cd32174-ac7c-11e8-a8d7-0f63ab8b1370_story.html) (on file with the *Columbia Law Review*) (finding 64% of those polled did not approve of firing Sessions).

606. See Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 Calif. L. Rev. 1375, 1378–84 (2017).

607. Seth Barrett Tillman, *On the Senate’s Purported Constitutional Duty to Meaningfully Consider Presidential Nominees to the Supreme Court of the United States: A Response to Chief Judge Peter J. Eckerstrom*, 21 U. Pa. J. Const. L. 881, 886 n.19 (2019).

for 210 days that the President “communicate, within 30 days . . . to Congress in writing—(1) the reasons why the President has not yet made a formal nomination; and (2) a target date for making a formal nomination.”<sup>608</sup>

3. *Cutting Senate-Confirmed Positions.* — The most dominant reform proposal concerning agency appointments—from national commissions, the GAO, and commentators (myself included)—calls for fewer agency positions subject to Senate confirmation.<sup>609</sup> Light has criticized the additional “layers of leaders” in agencies, noting that “[P]residents have grown increasingly distant from the front lines” of the very agencies covered by the Vacancies Act.<sup>610</sup> Specifically, he finds that the number of assistant secretaries jumped from 81 to 212 between 1960 and 1992.<sup>611</sup>

The bipartisan Presidential Appointment Efficiency and Streamlining Act of 2011 eliminated the confirmation requirement for 163 positions, many in agencies covered by the Vacancies Act.<sup>612</sup> Congress, however, generally does not like to give up its confirmation power.<sup>613</sup> Moreover, appointees like the stature (and the pay) that comes with confirmation.<sup>614</sup>

Proponents of cutting confirmed positions often fail to notice that appointment delays and acting officials achieve similar goals. Acting leaders functionally reduce the number of Senate-confirmed positions—

608. H.R. 1847, 116th Cong. § 3(a) (2019).

609. See O’Connell, *Shortening Vacancies*, supra note 142, at 1695 n.148. The National Task Force on Rule of Law and Democracy is the latest to make such a reform proposal. Nat’l Task Force on Rule of Law & Democracy, supra note 521, at 20.

610. Light, *Thickening Government*, supra note 453, at 8. This growth was not limited to new agencies. *Id.* at 11 (showing jumps in older cabinet departments).

611. *Id.* at 8.

612. Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012); see also Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress* 10, app. A (2012), <https://fas.org/sgp/crs/misc/R41872.pdf> [<https://perma.cc/3VYE-LUZN>] (listing the 163 positions for which the law eliminated the requirement for advice and consent of the Senate); Carl Hulse, *Senate Votes to Streamline the Confirmation Process*, N.Y. Times (June 30, 2011), <https://www.nytimes.com/2011/06/30/us/politics/30confirm.html> [<https://perma.cc/R7Q8-3LQ3>] (remarking on the “rare step of relinquishing power” but noting that the law passed “easily,” on a 79-20 vote).

613. See U.S. Const. art. II, § 2, cl. 2; cf. Federal Prisons Accountability Act, S. 2742, 116th Cong. (2019) (proposing that the director of the Federal Bureau of Prisons become a Senate-confirmed position after Jeffrey Epstein was found dead in a federal prison); see also *Crime and Justice News*, Michael Carvajal to Head Federal Prison Bureau, Ctr. on Media, Crime and Just. at John Jay C.: Crime Rep. (Feb. 26, 2020), <https://thecrimereport.org/2020/02/26/michael-carvajal-to-head-federal-prison-bureau> [<https://perma.cc/DYB4-L5B6>] (“Epstein[’s] . . . suicide launched three federal investigations . . . . A Federal Prisons Accountability Act sponsored by Majority Leader Mitch McConnell (R-KY) and Senators Rand Paul (R-KY), Mike Lee (R-UT), and Kyrsten Sinema (D-AZ) would ensure that future federal prison directors are subject to Senate confirmation.”).

614. See O’Connell, *Shortening Vacancies*, supra note 142, at 1696. Interestingly, some acting officials—drawn from the senior career ranks—may be paid more as a temporary leader than they would be paid if they were confirmed. See O’Connell, *Acting Agency Officials*, supra note 125, at 5.

at least for significant chunks of time. The Vacancies Act even provides default selections, removing delays that remain with positions that are to be filled by the President alone. In other words, political and practical realities—in terms of the wide use of acting officials—have achieved what Congress largely has been unable to do formally.

#### CONCLUSION

Despite agency leaders' substantial power and its consequences for governance, administrative law doctrine and scholarship largely overlook agency officials. Some attention is paid to who can select agency leaders and who can remove them (and for what reasons).<sup>615</sup> But essentially no attention is devoted to the people who are actually selected.<sup>616</sup> Even in discussions about the politicization of agencies, public law scholars have generally ignored agency personnel.<sup>617</sup> Legal scholars are more likely to dissect mechanisms such as OMB review of rulemakings than the loyalty and competence of agency leaders.<sup>618</sup> But such centralized devices arguably

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615. See, e.g., Mascott, *supra* note 224, at 447 (describing how only three separate entities are empowered to select officers, which increases accountability); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *Yale L.J.* 1836, 1880–81 (2015) (noting that there is a great deal of scholarly focus on the President's removal powers as the primary mechanism of administrative oversight). See generally Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *Ala. L. Rev.* 1205 (2014) (arguing that at-will removal power is necessary to presidential oversight over the administrative state).

616. Cf. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 *Colum. L. Rev.* 9, 39–57 (2018) (examining 578 leadership appointments to multimember commissions); Scoville, *supra* note 508, at 101–41 (analyzing over 1,900 ambassadorial nominations); Feinstein & Henderson, *supra* note 479, at 10–19 (charting the prior congressional experience of many commissioners). By contrast, legal scholars have dissected the backgrounds of federal judges, linked those backgrounds with voting behavior, and compared the qualifications and performance of appointed and elected judges. See, e.g., Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary*, at viii–iv (2006) (describing how judges' beliefs and ideologies may play a part in their decisions in the absence of binding rules of decision); Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 *J.L. Econ. & Org.* 290, 291 (2010) (using an empirical analysis to compare the performances of elected and appointed judges).

617. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095, 1104 (2008) (“[Scholars] often make passing reference to the fact that Presidents have been aggressively using their staffing authority to politicize the bureaucracy in recent times. But no sooner do they mention this fact than they typically downplay its import.”); O’Connell, *Vacant Offices*, *supra* note 145, at 921 (“[P]ublic law has largely ignored the staffing, or lack thereof, of the administrative state.” (footnotes omitted)).

618. Barron, *supra* note 617, at 1108–10 (noting the “vigorous legal debate” around OMB review). Barron posits that some scholars believe “the legal issues presented by staffing practices are neither as interesting nor substantial as those posed by presidential efforts to override autonomous agency judgments.” *Id.* at 1104.

are not as effective as staffing decisions for controlling the bureaucracy.<sup>619</sup> Even outside the politicization context, agency leaders are important to administrative law—for example, to understanding agency performance and legitimacy.

The limited attention that has been given to agency personnel has almost exclusively focused on traditional appointees. But acting leaders are everywhere in the administrative state.<sup>620</sup> The sparse discussion about acting officials has largely centered on constitutional issues. Those issues depend on empirical realities, which have not been investigated by legal scholars before now. There are also difficult statutory questions, which are starting to attract some discussion. This Article has meaningfully extended the descriptive and legal analysis of these issues.

Acting agency officials and delegated authority are part of the story of growing presidential control in administrative law as well.<sup>621</sup> Much like Congress appears to have acquiesced to massive executive branch rulemaking authority tied to old statutes,<sup>622</sup> Congress has also seemingly accepted agency reliance on interim leadership. Perhaps, current staffing practices that rely heavily on acting and delegations of functions therefore are another unorthodox, but important, element of the administrative state.

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619. Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235 (John E. Chubb & Paul E. Peterson eds., 1985); O'Connell, *Vacant Offices*, *supra* note 145, at 921–22.

620. Temporary leaders are not restricted to federal agencies. When Sessions was confirmed as Attorney General in 2017, he had to resign as a senator from Alabama. The governor then chose Luther Strange III to serve temporarily (the twenty-first senator appointed since 2000). See Amber Phillips, *Meet Luther Strange, the Man Replacing Jeff Sessions in the Senate*, *Wash. Post: The Fix* (Feb. 9, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/09/meet-luther-strange-the-man-replacing-jeff-sessions-in-the-senate> (on file with the *Columbia Law Review*); *Appointed Senators*, U.S. Senate, <https://www.senate.gov/senators/AppointedSenators.htm> [<https://perma.cc/54X2-4EF4>] (last visited Nov. 10, 2019). And then there are interim CEOs, university deans and presidents, pastors, and professional sports coaches, to name just a few. Such leadership across sectors raises interesting questions about its causes and consequences, which I am exploring in other work.

621. See generally Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001) (arguing that the presidency has accrued a greater ability to control executive agencies).

622. See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 *U. Pa. L. Rev.* 1, 64–65 (2014) (discussing how congressional paralysis leads to greater flexibility for agencies to make policy under old statutes).