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Written statement for the record prepared for  
The House Committee on Oversight and Reform

Hearing titled  
“Improving Government Accountability and Transparency”

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Chairwoman Maloney, Ranking Member Comer, and members of the Committee: thank you for the opportunity to submit a written statement for your hearing on improving government accountability and transparency. I am the Adelbert H. Sweet Professor of Law at Stanford University, an appointed senior fellow at the Administrative Conference of the United States (ACUS)—an independent agency dedicated to improving agency procedures—and a contributor to the Center on Regulation and Markets at the Brookings Institution. I hold both a law degree from Yale Law School and a Ph.D. in Political Economy and Government from Harvard University. My research has focused, in part, on political appointments (and the lack thereof) to federal agencies,<sup>1</sup> and has been cited by Congress, the Supreme Court, federal courts of appeals, and national media.

In recent years, I have examined acting officials and delegations of authority during leadership vacancies. I served as the consultant to ACUS for its project, *Acting Agency Officials and Delegations of Authority*.<sup>2</sup> My work contributed to ACUS Recommendation 2019-7.<sup>3</sup> I also wrote a comprehensive article (116 pages), *Actings*, which was published in the Columbia Law Review in April 2020;<sup>4</sup> the article was the co-winner of the 2020 Richard D. Cudahy Writing Competition on Regulatory and Administrative Law from the American Constitution Society. I have also written shorter pieces on acting officials and delegations of authority.<sup>5</sup>

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<sup>1</sup> George A. Krause & Anne Joseph O’Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUD. Q. 527 (2019), <https://onlinelibrary.wiley.com/doi/10.1111/psq.12525>; Anne Joseph O’Connell, *After One Year in Office, Trump’s Behind on Staffing but Making Steady Progress*, BROOKINGS (Jan. 23, 2018), <https://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress/>; Anne Joseph O’Connell, *Trump’s Staffing Record in the First 100 Days was Slow, but not Catastrophic*, BROOKINGS (May 1, 2017), <https://www.brookings.edu/research/trumps-staffing-record-in-the-first-100-days-was-slow-but-not-catastrophic/>; Anne Joseph O’Connell, *Staffing Federal Agencies: Lessons from 1981-2016*, BROOKINGS (Apr. 17, 2017), <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016/>; George A. Krause & Anne Joseph O’Connell, *Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. OF POL. SCI. 914 (2016), <https://onlinelibrary.wiley.com/doi/full/10.1111/ajps.12232>; 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 (2015), <https://dlj.law.duke.edu/article/shortening-agency-and-judicial-vacancies-through-filibuster-reform-an-examination-of-confirmation-rates-and-delays-from-1981-to-2014/>; ANNE JOSEPH O’CONNELL, CENTER FOR AMERICAN PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA’S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS (2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww_appointments.pdf); Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009), <https://southern.californialawreview.com/2009/07/03/vacant-offices-delays-in-staffing-top-agency-positions-article-by-anne-joseph-oconnell/>; ANNE JOSEPH O’CONNELL, CENTER FOR AMERICAN PROGRESS, LET’S GET IT STARTED: WHAT PRESIDENT-ELECT OBAMA CAN LEARN FROM PREVIOUS ADMINISTRATIONS IN MAKING POLITICAL APPOINTMENTS (2009), [https://cdn.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/presidential\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/presidential_appointments.pdf).

<sup>2</sup> ANNE JOSEPH O’CONNELL, ADMIN. CONFERENCE OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY (2019), <https://www.acus.gov/sites/default/files/documents/final-report-acting-agency-officials-12012019.pdf>.

<sup>3</sup> ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2019-7: ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY (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).

<sup>4</sup> Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020), [https://columbialawreview.org/wp-content/uploads/2020/04/OConnell\\_Actings.pdf](https://columbialawreview.org/wp-content/uploads/2020/04/OConnell_Actings.pdf).

<sup>5</sup> Anne Joseph O’Connell, *Waiting for Confirmed Leaders: President Biden’s Actings*, BROOKINGS (Feb. 4, 2021), <https://www.brookings.edu/research/president-bidens-actings/>; Anne Joseph O’Connell, *Who’s on First at the Department of Homeland Security?*, LAWFARE (Sep. 14, 2020), <https://www.lawfareblog.com/whos-first-department-homeland-security>; Anne Joseph O’Connell, *Watchdogs at Large*, BROOKINGS (Aug. 6, 2020), <https://www.brookings.edu/research/watchdogs-at-large/>; Anne Joseph O’Connell, *Acting Officials and Delegated*

In this statement, I draw directly from my research, often including direct passages from various articles I have written. The views I express in this statement are my own and not those of any institution with which I am (or was) affiliated.

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The current appointments process for filling key agency jobs churns slowly, both at the White House and in the Senate. Acting officials and delegations of authority allow the government to function while that process plays out. At times, interim leaders and delegations can also serve as more than stop-gap measures—becoming as a practical matter the dominant way of staffing agency leadership positions, and even undermining agency performance and political accountability. The goal for reform then is to balance government functioning and preventing misuse of permitted measures.

Before turning to necessary reforms, I briefly summarize the extensive presence of acting officials and delegations of authority in recent Administrations, consider some of their benefits and costs, and note several controversial uses in the Trump Administration that could be fixed by legislation. I then explain why I support the Accountability for Acting Officials Act, and note some small aspects that might be modified in the mark-up process. I also flag several additional reforms that I hope Congress will consider for acting officials and delegations of authority. Finally, I turn to my support for the Periodically Listing Updates to Management Act.

## **Prevalence of Vacancies, Acting Officials, and Delegations of Authority**

Given the importance of agency leaders, you might think that keeping top jobs in the administrative state filled at all times would be a top priority for both the President and Congress. There are, however, vast gaps in confirmed agency leadership up and down the organization charts. Critically, it is not an issue specific to the last Administration. In a study of top jobs at cabinet departments and free-standing executive agencies from 1977 to 2005, I found, on average, between 15 and 25 percent of positions did not have confirmed or recess appointed leaders.<sup>6</sup> More recently, as described in his written statement to the Subcommittee on Government Operations, David Lewis determined that the last three completed Administrations (George W. Bush, Obama, and Trump)

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*Authority*, REG. REV. (June 29, 2020), <https://www.theregreview.org/2020/06/29/oconnell-acting-officials-delegated-authority/>; Anne Joseph O’Connell, *Trump Fired a Federal Prosecutor Investigating His Allies. Can He Do That?*, WASH. POST: THE MONKEY CAGE (June 25, 2020), <https://www.washingtonpost.com/politics/2020/06/25/trump-fired-federal-prosecutor-investigating-his-allies-can-he-do-that/>; Anne Joseph O’Connell, *Acting Leaders: Recent Practices, Consequences, and Reforms*, BROOKINGS (July 22, 2019), <https://www.brookings.edu/research/acting-leaders/>.

<sup>6</sup> O’Connell, *Vacant Offices*, *supra* note 1, at 962, 965. Averaging across another study’s examination of individual jobs, the highest positions at the Departments of Commerce and Health and Human Services lacked confirmed or recess appointees more than 20 percent of the time in the 1989-2009 period. Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 PRESIDENTIAL STUD. Q. 432, 441-442, figs.3 & 4 (2009). More recently, several researchers, using agency reports of vacancies to the Government Accountability Office (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. They reported that the positions were vacant, on average, for at least 151 days during a congressional term—generating a 21 percent vacancy rate. William G. Resh, Gary Hollibaugh, Patrick S. Roberts & Matthew Dull, *Who Isn’t Running American Government: Appointee Vacancies in U.S. Executive Agencies* 26 tbl.1 (March 6, 2020), J. PUB. POL’Y (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3310806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3310806). Calculating vacancy rates is challenging because there is no centrally collected data source that is publicly available on the start and end dates of confirmed leaders.

did not submit *a single nomination in their first two years* for nearly 30 percent of Senate-confirmed agency positions that they were supposed to fill.<sup>7</sup>

What happens during these vacancies? Reliable information is very hard to come by. Using the quadrennial Plum Book and annual editions of the United States Government Manual, Christina Kinane examined all Senate-confirmed positions in cabinet departments from 1977 to 2016. She determined that in her 11,043 position-year observations, 80.5 percent had confirmed appointees, 10.6 percent had acting officials, and 8.96 percent had no one listed.<sup>8</sup> I did my own staffing “snapshot” of 301 Senate-confirmed positions in the fifteen cabinet departments as of April 15, 2019 for my ACUS project.<sup>9</sup> At that time, only 64.1 percent of those positions were filled by confirmed officials; acting officials sat in 13.3 percent of the positions; and the remaining 22.6 percent 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>10</sup>

To capture not just the number but also the tenures of acting officials, I used a wide range of sources to build a database of all confirmed, recess appointed, and acting officials (and their service dates) in a subset of federal agency positions from January 1981 (start of Reagan Administration) to January 2020 (through third year of Trump Administration): all cabinet secretaries, Environmental Protection Agency (EPA) Administrator, EPA Deputy Administrator, EPA General Counsel, and Federal Aviation Administration (FAA) Administrator.<sup>11</sup> For cabinet secretaries, Table 1 displays how the 171 confirmed, 3 recess-appointed, and 147 acting officials fell across Administrations. The number in parentheses in the acting column is the number of acting secretaries who served at least ten days.

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<sup>7</sup> *Revitalizing the Federal Workforce: Hearing Before the Subcomm. on Gov't Operations of the House Comm. on Oversight & Reform*, 117th Cong. 5 (2021) (statement of David Lewis, Professor, Vanderbilt University). President Trump had the worst record—failing to submit a nomination in his first two years for 36 percent of vacant jobs. Presidents Bush and Obama did not send nominations for 24 percent and 27 percent of the open spots, respectively, in the first half of their first terms. *Id.* President Obama also submitted fewer agency nominations in his final two years than other recent two-term Presidents. O’Connell, *Staffing Federal Agencies*, *supra* note 1.

<sup>8</sup> Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV 599, 606 (2021).

<sup>9</sup> O’Connell, *Actings*, *supra* note 4, at 655,

<sup>10</sup> *Id.*

<sup>11</sup> If someone served in two Administrations (or in two capacities), I counted that service twice, once for each Administration (or appointment type). For more information on the database, see *id.* at 641 n.158, 649 n.187, 652 n.198. I am currently confirming the data I gathered and extending the positions covered. As part of these efforts, I am submitting FOIA requests to most agencies covered by the Chief Financial Officers Act of 1990 to get official information on who has served (as a confirmed, recess appointed, acting official or through delegation) in five positions in each agency: head, deputy head, inspector general (IG), general counsel, and chief financial officer.

Table 1  
*Types of Cabinet Secretaries (January 20, 1981 to January 19, 2020)*

<b>President</b>	<b>Confirmed</b>	<b>Recess</b>	<b>Acting</b>
Reagan	33	1	25 (11)
H.W. Bush (1 term)	20	1	20 (16)
Clinton	28	1	27 (11)
W. Bush	34	0	22 (13)
Obama	32	0	23 (14)
Trump (through Yr 3)	24	0	30 (27)

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 percent of the time, respectively.<sup>12</sup> By contrast, in the first three years, acting secretaries served for 9.9 percent of the days in the Trump Administration.<sup>13</sup>

Unlike his predecessors, who had at least a few cabinet secretaries confirmed on their first day in office, President Biden had none until January 22, when the Senate cleared Lloyd Austin as Secretary of Defense. President Biden had to start with fifteen acting secretaries. Only two were holdover appointees who had been confirmed under the Trump Administration; the rest were nonconfirmed senior agency officials.<sup>14</sup>

Table 2 displays the types of officials for three top EPA officials and the head of the FAA.

Table 2  
*Types of Top EPA and FAA Officials (January 20, 1981 to January 19, 2020)*

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

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 percent and 5.5 percent, respectively, of their Administrations. Under

<sup>12</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 Federal Vacancies Reform Act's (Vacancies Act) time limit expired in 2013.

<sup>13</sup> For information on variation by agency and the type of acting official (first assistant, other confirmed official, nonconfirmed political official, nonconfirmed career official), see O'Connell, *Actings*, *supra* note 4, at 644 tbl.2, 648 tbl.5. For historical comparisons (1789-2005), see O'Connell, *ACTING AGENCY OFFICIALS*, *supra* note 2, at 25-27 (noting, among other items, that in 1841, all but one member of President Tyler's Cabinet resigned in protest, which contributed to his need to rely on many acting officials, and that President Madison also had considerable difficulties with his Cabinet, given political and geographic conflict, contributing to turnover and use of interim leaders).

<sup>14</sup> O'Connell, *Waiting for Confirmed Leaders*, *supra* note 5.

President Trump, however, an acting EPA Administrator led the agency for slightly under one quarter of his first three years. Acting Deputy Administrators cumulatively served 14.9 percent and 41.9 percent of the days under Presidents Bush and Obama, respectively, including the recess appointment under President Bush, but 66 percent under the Trump Administration when the position was occupied. Acting General Counsels racked up about one-third of the time when the job has been staffed under Presidents Bush and Trump (and 14.2 percent under President Obama).

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 percent of the time in each Administration (including 53.2 percent of the first three years of the Trump Administration).<sup>15</sup>

In sum, President Trump's expressed adoration of acting leaders exposed what had been previously unspoken: modern Presidents rely heavily on acting officials.

### **Substitute Teachers or Critical Leaders?**

Acting officials almost never receive praise. The head of the Partnership for Public Service, a nonpartisan entity devoted to effective governance, compares them to "substitute teachers," who lack the necessary authority in a classroom (or agency).<sup>16</sup> I have joined this chorus of naysayers—arguing that acting officials (and vacancies more generally) have "significant consequences for public policy."<sup>17</sup> Specifically, I (and many others) have posited that vacancies contribute to agency inaction and delays, confusion and unhappiness among nonpolitical workers, and decreased agency accountability.<sup>18</sup> In essence, a primary argument goes, even though they hold the same formal power as confirmed leaders, acting officials are less able to wield it—because of diminished buy-in from the workers below them, relevant congressional committees, and the wider public.

Notwithstanding these critiques, the traditional appointments process takes time, increasingly so in recent Administrations. As I have demonstrated, over 20 percent of agency nominations between the start of President Reagan's Administration and the end of President Obama's Administration failed to get confirmed, with most of those having been returned by the Senate (nearly one-third of President Obama's nominations were returned or withdrawn).<sup>19</sup> For those nominations that the Senate did confirm (sometimes on the second or third nomination), the confirmation process took two months under President Reagan but increased to four months under President Obama.<sup>20</sup>

Federal agencies have to operate in the meantime. As Nina Mendelson has shown, while interim officials may not push out as many agency actions as confirmed leaders, acting officials make critical policy decisions, including, for example, at the EPA "reinterpret[ing] ... the key Clean Water

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<sup>15</sup> For information on variation by presidential administration and the type of acting official, see O'Connell, *Actings*, *supra* note 4, at 650 tbl.7, 652 tbl.8, 653 tbl.9, 654 tbl.10.

<sup>16</sup> 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>.

<sup>17</sup> O'Connell, *Vacant Offices*, *supra* note 1, at 935.

<sup>18</sup> O'Connell, *Actings*, *supra* note 4, at 695-99; O'Connell, *Vacant Offices*, *supra* note 1, at 937-38.

<sup>19</sup> O'Connell, *Staffing Federal Agencies*, *supra* note 1.

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

Act jurisdictional term ‘waters of the United States,’ in response to recent Supreme Court decisions.’<sup>21</sup>

Acting leaders may bring expertise at the cost of political accountability. One criticism of acting officials is that they are unqualified for their jobs because they were not properly vetted by the Senate.<sup>22</sup> Yet, acting officials often possess the stability, knowledge, and management necessary for their positions. For instance, for ambassadorial posts, the State Department’s foreign service officers who step in to head embassies temporarily almost certainly know more than political appointees selected as a result of their campaign contributions.<sup>23</sup> For many positions, such as U.S. attorneys, inspectors general (IGs), and agency general counsels, many of their first assistants—the default for acting service under the Federal Vacancies Reform Act (Vacancies Act)—are drawn from the relevant organization’s senior nonpartisan ranks.<sup>24</sup>

But even acting leaders plucked from the short-term political corps may lead effectively. Presidents George W. Bush, Obama, and Biden all retained at least one deputy secretary from the previous Administration of a different party until the Senate confirmed the new President’s picks.<sup>25</sup> In addition, under divided government, recent Administrations have relied on skilled political acting officials to take charge of important functions, old and new.

The conventional dislike of acting officials sits in some tension with repeated calls for cuts in agency positions requiring Senate confirmation.<sup>26</sup> Commentators and scholars, myself included, who have made these calls want Congress to use its authority under the Appointments Clause to allow the President or the head of the agency to choose lower-level officials instead. Congress, however, understandably resists relinquishing its confirmation power—though it did agree to its elimination for about 160 positions in 2012 under the Presidential Appointment Efficiency and Streamlining Act.<sup>27</sup> In some sense, the frequent use of acting officials—at least in lower-level positions—accomplishes functionally what Congress refuses to do formally. But commentators do not typically think about acting officials in this light.

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<sup>21</sup> Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1589 (2015).

<sup>22</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. The Senate may also prefer that the White House take more time if that additional time would yield a better nominee.

<sup>23</sup> See Ryan M. Scoville, *Unqualified Ambassadors*, 69 DUKE L.J. 71, 118-40 (2019) (contrasting the language skills, regional experience, foreign policy experience, and organizational leadership skills of political-appointee ambassadors and confirmed ambassadors drawn from the government’s “professional diplomatic corps”).

<sup>24</sup> 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.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-270, INSPECTORS GENERAL: INFORMATION ON VACANCIES AND IG COMMUNITY VIEWS ON THEIR IMPACT 17 (2018), <https://www.gao.gov/assets/700/690855.pdf>. Almost one-quarter of employees, however, contended there was a negative impact. *Id.* The GAO also found that employees generally liked internal acting IGs. *Id.* at 19, 31. Interestingly, nearly half of the acting IGs thought their temporary status had a negative effect on employee management. *Id.* at 21.

<sup>25</sup> O’Connell, *Waiting for Confirmed Leaders*, *supra* note 5; O’Connell, *Actings*, *supra* note 4, at 648.

<sup>26</sup> See, e.g., 2 NAT’L TASK FORCE ON RULE OF LAW & DEMOCRACY, PROPOSALS FOR REFORM 20 (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) (Proposal 8).

<sup>27</sup> Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012).

## Controversies in the Trump Administration

While all recent Presidents have relied heavily on acting officials and delegations of authority, the Trump Administration's use of these workarounds to the traditional appointments process generated considerable controversy throughout its term.

Here is a brief chronology of major events:<sup>28</sup>

- President Trump did not always adore his “actings.” Within two weeks of taking office, he had fired his first acting Attorney General, Sally Yates, a holdover from the Obama Administration, after she refused to defend his first executive order barring entry into the United States from certain Muslim-majority countries. (He then picked Dana Boente, another Obama appointee, to serve until Jeff Sessions was sworn in as Attorney General in February 2017.)
- In November 2017, Richard Cordray resigned as the first confirmed Director of the Consumer Financial Protection Bureau (CFPB). Right before he departed, he named Leandra English as the agency's Deputy Director. 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 the director is absent or unavailable. A few hours after Cordray stepped down, the White House designated Mick Mulvaney, the confirmed Director of the Office of Management and Budget, as the acting Director of the CFPB under the Vacancies Act. Both English and Mulvaney turned up to work, each claiming to be the acting Director. English filed suit claiming that the President could not turn to the Vacancies Act, lost in the district court, and eventually dropped her appeal.
- In March 2018, 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. Veterans sued, claiming that the Vacancies Act does not apply to openings created by firing. Trump seemed to like what he saw of Wilkie at the VA and nominated him for the permanent job (under the intricacies of the Vacancies Act, Wilkie had to step down while his nomination was pending). The veterans voluntarily dismissed their litigation after the Senate confirmed Wilkie.
- President Trump pressed Attorney General Sessions to step down in November 2018. The President had long been angry with Sessions's recusal from the decision to appoint and oversee Special Counsel Robert Mueller to investigate Russian interference in the 2016 election. When Sessions resigned, President Trump did not intend to let Deputy Attorney General Rod Rosenstein—the acting Attorney General for appointing and overseeing Mueller—serve as the acting Attorney General for all matters. The White House again turned to the Vacancies Act to name Matthew Whitaker, Sessions's Chief of Staff (a position that is not Senate confirmed) as acting Attorney General. Likely because of the heightened attention on Mueller's investigation, the Vacancies Act suddenly was thrown into the

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<sup>28</sup> O'Connell, *Actings*, *supra* note 4, at 617-23, (providing chronology of all events except for the IG transitions with supporting materials); O'Connell, *Who's on First*, *supra* note 5 (providing chronology of DHS Secretary succession orders with supporting materials); O'Connell, *Watchdogs at Large*, *supra* note 5 (providing chronology of IG selections with supporting materials).

national spotlight. Lots of lawsuits followed, challenging the appointment under both the Constitution and the Attorney General Succession Act.<sup>29</sup> All lower courts sided with the Trump Administration.

- Right before Christmas 2018, James Mattis resigned as Secretary of Defense to protest President Trump’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.” But President Trump, upset by Mattis’s widely distributed resignation letter, pushed him out earlier. 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. 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. By the time problems surfaced during Shanahan’s vetting process for the permanent job, he had spent almost six months as acting Secretary. 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. (As with Wilkie, Esper had to leave the acting position when the Senate formally received his nomination.)
- In April 2019, President Trump pushed out Department of Homeland Security (DHS) Secretary Kirstjen Nielsen, intending to elevate Customs and Border Protection Director Kevin McAleenan to acting Secretary. 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. Nielsen delayed her exit, and Grady quickly announced her own resignation. In her final hours, Nielsen tried to get the paperwork in place for McAleenan to take over as acting Secretary. But the Government Accountability Office (GAO) and lower courts determined that she did the orders incorrectly, concluding that McAleenan and then Chad Wolf (under McAleenan’s changes to the invalid orders) were not serving properly as acting Secretaries under the Homeland Security Act.
- After pushing out Nielsen, President Trump wanted to nominate former Virginia Governor Ken Cuccinelli for the permanent DHS Secretary role. In late June 2019, after Senate Republicans expressed concern 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—so he could then take the reins as acting Director of a key department component. Democracy Forward filed a lawsuit on behalf of detained immigrants and the Refugee and Immigrant Center for Education and Legal Services. In March 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 (set to expire when a new director was confirmed) and not subordinate to any official. The court did not resolve whether the Vacancies Act permitted a first assistant to be named after a vacancy occurred.

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<sup>29</sup> The Attorney General Succession Act provides that “[i]n case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office....” 28 U.S.C. § 508.

- In the spring of his final year, President Trump turned to pushing out IGs—firing Michael Atkinson, the intelligence community’s IG who had dealt with the Ukraine whistleblower complaint that featured prominently in the President’s first impeachment. A few days later, President Trump removed Glenn Fine, who had been doing the vacant job of the Defense Department’s IG through delegation, by using the Vacancies Act to name a different acting IG after submitting a nomination to the post. More removals followed in May.<sup>30</sup> President Trump fired Steve Linick, the IG for the State Department, at Secretary Mike Pompeo’s urging. The President again turned to the Vacancies Act to go around the Deputy IG, picking Stephen Akard, the political director of the Office of Foreign Missions, as the acting IG. He also replaced the career acting IG for the Department of Transportation, Mitch Behm, with a new interim political official, Howard “Skip” Elliott.

These events thankfully grabbed Congress’s attention.

### **Accountability for Acting Officials Act**

I enthusiastically endorse the proposed Accountability for Acting Officials Act (AAOA). Among other items, the Act would accomplish the following goals:

- Resolve ambiguities in the Vacancies Act

The AAOA would resolve ambiguities in the Vacancies Act, including (1) its interaction with agency-specific succession provisions, (2) its applicability to presidential removal, and (3) the timing of naming first assistants. Clear statements on these issues would likely prevent litigation and related confusion that might ultimately put an agency’s policymaking at risk of reversal.<sup>31</sup>

First, the Vacancies Act contains confusing language regarding agency-specific succession plans. The Act is “the exclusive means for temporarily authorizing an acting official” in covered agencies unless “a statutory provision expressly” provides otherwise.<sup>32</sup> This language has contributed to sharp debates (and in some cases, litigation) over whether the White House could turn to the Vacancies Act for the heads of agencies that have succession statutes, namely the CFPB, Department of Justice, and the Office of the Director of National Intelligence.<sup>33</sup> Although lower courts have thus far sided with the White House in these disputes, finding that the Vacancies Act is nonexclusive in those cases,<sup>34</sup> the AAOA would make the Vacancies Act unavailable if there is a nondiscretionary agency succession provision.

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<sup>30</sup> At the start of May, President Trump claimed that he was getting rid of Christi Grimm, the temporary IG (through delegation) at the Department of Health and Human Services, after she reported “severe shortages” in hospital supplies during the pandemic, but she remained in place.

<sup>31</sup> For my legal assessment of these three issues (as they stand now), see O’Connell, *Actings*, *supra* note 4, at 667-71 (generally finding that the Vacancies Act is available in the face of specific agency succession provisions outside of the Homeland Security Act (in some contexts) but noting arguments on the other side), 672-75 (concluding that the Vacancies Act covers presidential removals), 675-79 (determining that the text of the Vacancies Act likely permits first assistants to be named after a vacancy but noting concerns with this outcome).

<sup>32</sup> 5 U.S.C. § 3347(a)(1).

<sup>33</sup> O’Connell, *Actings*, *supra* note 4, at 667-71.

<sup>34</sup> *Id.* at 669, 671.

Second, the Vacancies Act does not directly mention firings; rather, it permits acting service when the previous covered officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”<sup>35</sup> No court has directly ruled on whether removals fall within the last phrase.<sup>36</sup> The AAOA would explicitly allow use of the Vacancies Act after presidential removal.

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.<sup>37</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. The exclusion of firings could also create perverse incentives for outgoing administration officials after party control of the White House changes. The political process can temper overuse of the firing power as Presidents will likely face backlash for seemingly unjustified firings.

Third, the Vacancies Act specifies that the default acting official is “the first assistant to the office.”<sup>38</sup> The Act does not define who is a first assistant or clearly specify the timing of the staffing of the first assistant position. Typically, first assistants are in their positions when offices become vacant, but not always. No court has ruled on whether a first assistant named after a vacancy occurs qualifies under the Vacancies Act.<sup>39</sup> The Office of Legal Counsel initially said a post-vacancy first assistant wouldn’t qualify, but reversed its view a few years later.<sup>40</sup> Even if post-vacancy first assistants are technically permitted by the Act’s language, they often undermine the statute’s spirit.<sup>41</sup> The AAOA would restrict nonconfirmed first assistants (and first assistant positions) to those who had served at least 30 days in the year before the vacancy (and to positions in existence at least 30 days before the vacancy).

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<sup>35</sup> 5 U.S.C. § 3345(a).

<sup>36</sup> 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.” *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).

<sup>37</sup> Indeed, critics of President Trump alleged such behavior. 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> (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 NAT’L TASK FORCE ON RULE OF LAW & DEMOCRACY, *supra* note 26, at 19. I disagree with the Task Force’s recommendation here. O’Connell, *Actings*, *supra* note 4, at 709-10.

<sup>38</sup> 5 U.S.C. § 3345(a)(1).

<sup>39</sup> In striking down Cuccinelli’s acting service, the court did not resolve the question, holding instead that the new principal deputy position was not a valid first assistant job. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 26 (D.D.C. 2020).

<sup>40</sup> Designation of Acting Assoc. Att’y Gen., 25 Op. O.L.C. 177, 177 (2001) (revised position); Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63-64 (1999) (initial view).

<sup>41</sup> 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 26, 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).

- Reduce permitted time limits for acting officials in the most important agency positions

The AAOA would reduce permitted acting service without a pending nomination in the federal government’s highest positions. 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. If there is no pending nomination, acting officials generally can serve for only 210 days from the vacancy’s start date, unless the vacancy exists when a new President takes office (or comes within the next sixty days); if that is the case, acting officials can serve for an additional 90 days.<sup>42</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.<sup>43</sup> The AAOA would reduce the 210 day periods to 120 days for principal offices, but still allow for acting service during two pending nominations.<sup>44</sup>

Reducing the time periods for such acting service (without pending nominations) is a compelling reform. First, these are the very highest agency jobs, where political accountability concerns are the deepest. The traditional appointments process helps make agencies accountable to the American public, and shorter time limits will create incentives for the White House to send nominations to the Senate. Second, there are constitutional concerns with having nonconfirmed acting officials at the top of agencies—concerns that deepen with the length of tenure.<sup>45</sup>

- Ensure certain acting officials have the necessary expertise to carry out agency functions

The AAOA would improve the quality of acting officials in two ways: imposing any statutory qualification mandates on acting officials serving under § 3345(a)(2) (or in IG positions) and increasing the minimum amount of agency experience for those serving under § 3345(a)(3) from 90 days to one year.

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 or a senior agency worker. 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,

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<sup>42</sup> 5 U.S.C. §§ 3346(a)(1), 3349(a)(b).

<sup>43</sup> VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 14 fig.2 (2020), <https://crsreports.congress.gov/product/pdf/R/R44997/5>.

<sup>44</sup> The 210-day period ran out for the Secretary of Commerce position during President Obama’s Administration in 2013, leaving the cabinet department without an acting leader for over four months before the White House nominated Penny Pritzker. 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. Second, many agency nominees fail to get confirmed on their first submission; Loretta Lynch would be one example. Specifically, 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.

<sup>45</sup> While every lower court to rule on this constitutional concern upheld Whitaker’s service, they relied on the Supreme Court’s 1898 decision in *United States v. Eaton*, which seemingly treated someone serving *temporarily* in a principal office as an *inferior* officer. See *United States v. Smith*, 962 F.3d 755, 762-65 (4th Cir. 2020); O’Connell, *Actings*, *supra* note 4, at 655 nn. 255-56 (collecting other cases). I believe nonconfirmed acting officials can constitutionally serve in principal offices under these time limits. *Id.* at 660-66.

wants to turn to a Senate-confirmed official, particularly from another agency, the selected acting official should have to satisfy the position’s qualification mandates. Such a rule would prevent the White House from choosing an acting IG for political motivations, for example.<sup>46</sup> This change would also help alleviate concerns that acting officials undermine Congress’s role in the appointments process.

Increasing the amount of agency service required for acting officials chosen under § 3345(a)(3) would improve the expertise of such acting leaders. The current 90 days is too short to build meaningful agency experience. In addition, by decreasing the pool of eligible officials, this change would encourage the White House to use the traditional appointments process more.

- Protect IG offices from political meddling

The AAOA would restrict acting IGs to senior officials in the IG’s office. Because IGs don’t fare well in the appointments process, with above-average failure rates and confirmation delays compared to other agency positions, acting IGs play critical roles.<sup>47</sup> In addition, there are long delays in making nominations. As of the end of April, six of the fifteen cabinet departments currently do not have a confirmed IG—the shortest vacancy is over 300 days.<sup>48</sup>

President Trump fired a slew of IGs and used the Vacancies Act to install non-IG political appointees as acting IGs in the State and Transportation Departments.<sup>49</sup> The House of Representative’s version of the latest National Defense Authorization Act would have limited acting IGs to the principal deputy IG if there is one, or to a senior official in the IG office if there is not.<sup>50</sup> Sadly, that provision did not make it into the final bill.<sup>51</sup>

- Improve agency reporting of vacancies to the GAO

The AAOA would impose specific time limits on agency reporting of vacancies to the GAO. The Vacancies Act currently requires agencies to report vacancies “immediately upon the occurrence of the vacancy” and the names of acting officials and their start dates “immediately upon the

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<sup>46</sup> See 5 U.S.C. § 3 (IGs must be chosen “without regard to political affiliation” and “on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigation.”). It would also prevent the selection of a political ambassador with little intelligence experience as acting Director of National Intelligence. See 50 U.S.C. § 3023(a)(1) (“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>.

<sup>47</sup> Between 1981 and 2016, more than one-quarter of IG nominations were withdrawn or, more frequently, returned by the Senate. O’Connell, *Staffing Federal Agencies*, *supra* note 1. Nominations that were confirmed in that period took, on average, 104 days. These figures consider each nomination separately: if it takes two nominations (often of the same person) to get a confirmed IG, two years can easily go by. *Id.* In President Obama’s last year, Senate Republicans blocked all twelve of his IG nominees. James Hohmann, *The Daily 202: With Purges and Appointments, Trump Leaves a Lasting Mark on Inspector General System*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/06/25/daily-202-with-purges-and-appointments-trump-leaves-a-lasting-mark-on-inspector-general-system/5eca7366602ff12947e8efae/>.

<sup>48</sup> *Inspector General Vacancies*, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, <https://www.oversight.gov/ig-vacancies>.

<sup>49</sup> O’Connell, *Watchdogs at Large*, *supra* note 5.

<sup>50</sup> H.R. 6395, 116th Cong. § 1115 (2020) (as passed by House of Representatives, July 21, 2020).

<sup>51</sup> National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

designation,” among other items.<sup>52</sup> But agencies often take months to report (and then report only some information), and sometimes don’t report at all.

At the request of then Ranking Member of the Senate Finance Committee, Senator Ron Wyden, the GAO 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>53</sup> The GAO found that agencies reported many vacancies months after they began.<sup>54</sup> And some vacancies were never reported.<sup>55</sup> In the April 2019 snapshot of agency staffing described above, I determined that agencies had reported all but five of the 108 vacancies by August 15, 2019, but eight of the fifteen cabinet departments had average delays of more than 200 days (and five had average delays of more than one year).<sup>56</sup>

### Considerations for Mark-Up

I do have some minor items for the Committee to consider in marking up the AAOA, if the proposed legislation is reintroduced in Congress:

- Allow first assistants to be named after a vacancy at the start of a new administration (and if the previous holder dies or falls ill)

The AAOA would prevent using post-vacancy first assistants as a workaround to the traditional appointments process. There should be two exceptions, however. The Vacancies Act should apply to first assistants named after the vacancy arises (1) if the vacancy occurs during the first six months of a new administration, or (2) if the first assistant at the time of the vacancy dies (or falls ill) while serving. These exceptions would reduce demands on the President in the early months of a new administration and create some flexibility for emergencies.

Without the first exception, many first assistants named at the start of new administrations would not be able to serve as acting officials while the appointments process plays out.<sup>57</sup> (To be sure, they could likely carry out the nonexclusive duties of the vacant positions through delegation, without the acting title, but not all duties can be delegated down.) The second exception provides an escape valve in limited situations.<sup>58</sup>

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<sup>52</sup> 5 U.S.C. § 3349(a).

<sup>53</sup> 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>.

<sup>54</sup> *Id.* at 4-11.

<sup>55</sup> *Id.* at 11 n.2.

<sup>56</sup> O’Connell, ACTING AGENCY OFFICIALS, *supra* note 2, at 52-53. For the cabinet, EPA, and FAA vacancies, while agencies reported many (but not all) vacancies, a substantial number of those reports did not identify the acting officials occupying the vacant offices. *Id.* at 54-55.

<sup>57</sup> The Biden Administration put political allies in place in many nonconfirmed first assistant positions, allowing them to also take on the higher Senate-confirmed jobs in an acting capacity without any additional presidential action. O’Connell, *Waiting for Confirmed Leaders*, *supra* note 5. Unlike the other categories, which require presidential action to permit acting service, the Vacancies Act makes the first assistant the default acting official.

<sup>58</sup> Bob Bauer and Jack Goldsmith have endorsed these two exceptions. BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 329 (2020).

- Allow the Vacancies Act to be used if there is no one eligible to serve under a nondiscretionary agency succession provision

The AAOA would make the Vacancies Act unavailable if there is a nondiscretionary agency succession provision. But if there is no one eligible to serve under the agency provision, agency performance may suffer, especially if there are exclusive duties assigned to the vacant position, which cannot then be delegated.<sup>59</sup> There should be an exception to the AAOA's bar on the Vacancies Act in such circumstances.

- Direct the GAO to check for agency compliance with reporting mandates on a regular basis

The AAOA imposes time limits on agencies to report to the GAO on vacancies, acting officials, and nominations, but the Vacancies Act would still lack an enforcement mechanism for late, incomplete, or absent reporting. Congress should require that the GAO check agency compliance with these reporting mandates at regular intervals (for instance, once or twice a year). With better information about agency practices, the GAO presumably would report on more violations.<sup>60</sup>

- Consider imposing time limits on acting service under nondiscretionary agency succession provisions

The AAOA reduces permitted acting service in the administrative state's highest jobs under the Vacancies Act. But some agencies have specific succession provisions for these top positions, which do not have time limits. For example, under 6 U.S.C. § 113(g)(2), an acting Secretary of Homeland Security could serve for an entire presidential administration. Congress may want to consider imposing time limits on acting service under these specific agency succession provisions as well.

- Consider extending agency tenure requirements for acting service under § 3345(a)(3)

The AAOA increases the minimum agency tenure for senior agency workers to be acting officials from 90 days to one year preceding the vacancy.<sup>61</sup> This change would not have prevented Whitaker from serving as acting Attorney General, as he had been Chief of Staff to the Attorney General for over a year when President Trump chose him. Congress may want to consider increasing the amount of agency experience beyond one year, at least for the highest level positions.

With a five-year minimum service requirement, for example, any agency officials stepping into top acting roles will likely be drawn from the career ranks, and therefore will bring important expertise.<sup>62</sup> To be sure, late in a President's second term, acting leaders could be political officials who started early in the first term.

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<sup>59</sup> For example, if there is no Deputy Director of the CFPB, Congress may want the Vacancies Act to apply.

<sup>60</sup> Since 1998 (until April 30, 2021), the GAO has issued only 28 violation letters. See *Violation Letters*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>. But there have been far more violations. See O'Connell, ACTING AGENCY OFFICIALS, *supra* note 2, at 57-58.

<sup>61</sup> The current Vacancies Act allows the vacancy date essentially to restart with a new administration. 5 U.S.C. § 3349(a).

<sup>62</sup> A five-year requirement would have prevented Whitaker's service, while allowing 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.

## Other Reforms for Acting Officials and Delegations

In addition to the AAOA, I also support several other reforms: broadening which nominees can continue serving as acting officials, widening what information agencies should have to provide about acting officials, and making delegations of authority transparent.<sup>63</sup>

- Allowing certain nominees to continue serving as acting officials

While almost all calls to reform the use of acting officials and delegations of authority would pare back current practices, there is one change that would grant the White House more power: Congress should amend the Vacancies 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. Permitting acting officials to continue serving if they have already received some form of Senate approval would help minimize leadership disruptions during the traditional appointments process without unduly interfering with the Senate's authority.

In 2017, 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>64</sup> No other acting official can continue to serve in a Senate-confirmed position after being formally nominated for the job.<sup>65</sup> As noted earlier, Esper had to relinquish his acting title when the Senate formally received his nomination for Secretary of Defense as he was the Secretary of the Army (and not the Deputy Secretary)—generating a third acting Secretary after Mattis departed and contributing to the Senate expediting its procedures.<sup>66</sup>

This change would shift practices closer to what occurred before the Supreme Court weighed in, but would not allow nonconfirmed officials to continue serving while their nominations were pending unless they meet the first assistant conditions above.

- Disclosing more information about acting officials serving more than two weeks

Although not a full substitute for the vetting in the formal appointments process, Congress should expand what agencies have to disclose about acting officials. For officials serving more than two weeks, agencies should have to provide promptly (for instance, within two weeks after the two-week mark of service) important background information on the leaders 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

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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>.

<sup>63</sup> See O'Connell, *Actings*, *supra* note 4, at 707-27 (explaining all the reforms I support).

<sup>64</sup> *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

<sup>65</sup> *Id.* at 938.

<sup>66</sup> Robert Burns, *Pentagon in Its Longest-Ever Stretch of Leadership Limbo*, ASSOCIATED PRESS (July 12, 2019), <https://www.apnews.com/ce5a27679ec7442283a372d7f3b67e92>; 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>. Wilkie also had to step down as acting Secretary of Veterans Affairs when he was nominated to the top job because he had not been the Deputy Secretary, but rather had been confirmed to a Defense Department job.

the already required Office of Government Ethics (OGE) forms.<sup>67</sup> Moreover, except for information traditionally kept confidential for nominees, the GAO and OGE should publicly post these disclosures.

- Making delegations transparent (and perhaps doing more)

Acting officials and delegated authority are largely two sides of the same coin.<sup>68</sup> Restricting the former without adjusting the latter will presumably push agencies to rely more heavily on delegation. Reforming acting service, therefore, requires changing how agencies use delegated authority.

Limiting delegation would encourage reliance on the traditional appointments process.<sup>69</sup> On the other hand, too much restriction on delegation would undermine modern governance. As with acting officials, 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.

By contrast, Congress may want to promote more delegation in certain contexts—for instance, when the agency is not permitted to use acting officials. The Interim Stay Authority to Protect Whistleblowers Act would allow the Merit Systems Protection Board General Counsel “to stay questionable personnel actions brought against whistleblowers,” a function that normally rests with the Board.<sup>70</sup>

Even if the scope of delegations remains the same, delegations should be more transparent. 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 delegations of authority during staffing vacancies. Agencies should have to report any delegated authority from vacant Senate-confirmed positions. Such reporting should—at a minimum—include

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<sup>67</sup> The OGE forms also should be completed and reviewed carefully. 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>. 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.*

<sup>68</sup> 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. When the first confirmed ATF Director stepped down in April 2015, Thomas Brandon, the nonconfirmed career Deputy Director, stepped into the role of acting Director. After the 210-day clock ran out, Brandon continued to perform the duties of the Director but without the acting title. O’Connell, *Actings*, *supra* note 4, at 635. With Republicans in control of the Senate, President Obama strategically chose not to nominate someone to the job. Because of the delegability of the agency’s functions and duties, the Administration could continue to press its policies on gun violence and, according to Politico, “avoid a nasty confirmation hearing for a troubled agency.” *Id.* Brandon continued to lead in a similar manner for over two years in the Trump Administration.

<sup>69</sup> 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 . . . .” 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>.

<sup>70</sup> H.R. 2530, 116th Cong. (2019). 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>.

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.<sup>71</sup>

### Periodically Listing Updates to Management Act

I also endorse the Periodically Listing Updates to Management Act (PLUM Act). Finding information on who is leading the government and engaging in important policy work should not be as difficult as it currently is. For my ACUS project on acting officials and delegations of authority, my students and I sought to determine who (if anyone) was currently serving, either as a confirmed appointee or acting official, in 301 Senate-confirmed positions across all fifteen cabinet departments in the spring of 2019. For some agencies, the information was easy to find on their websites. For other agencies, at least some information could not be located on any government website, despite sophisticated searches.<sup>72</sup>

A related ACUS project on the public identification of agency officials “examined agency websites for the 15 cabinet departments, 15 departmental subcomponents (one significant subcomponent included in the ACUS Sourcebook of United States Executive Agencies from each department with at least one PAS/PA official listed in the Plum Book), and 59 other independent agencies.”<sup>73</sup> This survey of websites found that although “[n]early all departments, departmental subcomponents, and other independent agencies provided a prominent link on their website to thorough information about *at least some* PAS/PA/SES officials on a centralized webpage,” “[m]ost departments, departmental subcomponents, and other independent agencies did not provide clear and thorough information about vacancies among PAS/PA positions.”<sup>74</sup>

ACUS issued recommendations following both projects, which included calls for “the public availability of real-time information about high-level officials leading federal agencies.” ACUS voted to encourage “agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials” and to recommend that “the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.”<sup>75</sup>

The GAO also flagged the lack of public information on agency leaders in a 2019 report: “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.”<sup>76</sup>

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<sup>71</sup> To encourage compliance, agencies should have to provide information on delegations at least once a year. The GAO should also be required to report on agency compliance.

<sup>72</sup> O’Connell, ACTING AGENCY OFFICIALS, *supra* note 2, at 44-46 (breaking down disclosure (or lack thereof) by agency).

<sup>73</sup> BOBBY OCHOA, ADMIN. CONFERENCE OF THE U.S., PUBLIC IDENTIFICATION OF AGENCY OFFICIALS (LISTING AGENCY OFFICIALS) 17 (2019), <https://www.acus.gov/sites/default/files/documents/final-report-listing-agency-officials-dec232019.pdf>.

<sup>74</sup> *Id.* at 41 (emphasis added).

<sup>75</sup> Admin. Conference of the U.S., Adoption of Recommendations, 84 Fed. Reg. 71,354, 71,354 (Dec. 27, 2019).

<sup>76</sup> 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>.

If I want to find information on confirmed appointees, I go to nongovernment sources, most notably the Appointments Tracker from the *Washington Post* and Partnership for Public Service.<sup>77</sup> But their tracker, an amazing service to the public, does not contain all Senate-confirmed positions. In addition, I have nowhere to go but my own research to find information on acting officials; the GAO database under the Vacancies Act has many reports of vacancies but far fewer reports identifying acting officials.

The federal government should provide this information and keep it up to date. The PLUM Act would accomplish this goal. Congress should also press the Office of Personnel Management to update its list of positions in the (hard copy) Plum Book, which is missing some Senate-confirmed positions, as part of constructing the new website. For example, the IG for the Defense Department is not listed in the 2016 and 2020 Plum Books. David Lewis has found a number of other errors.<sup>78</sup> The GAO, as part of its reporting mandates under the Act, can help with this issue as well.

## Conclusion

Good governance legislation often gets neglected. Emergencies and specific policy issues typically claim scarce congressional time. Reforms centered on improving transparency of public officials and the use of workarounds to the traditional appointments process do not generally generate headlines, or even much attention outside of a few scholars and nonprofit organizations (though the last Administration's actions did bring some lawsuits and surrounding scrutiny).

Indeed, the Vacancies Act is a remarkably complex statute. In the oral argument for *National Labor Relations Board v. SW General, Inc.*, in which the Supreme Court narrowed who could be both a formal nominee and the acting official, Justice Elena Kagan questioned the lawyer representing SW General. She suggested that the company should go to the press and say that 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>79</sup> The courtroom erupted in laughter.

But this is no laughing matter. Officials, whether confirmed or acting, leading our federal agencies play critical roles in our government—through regulations, guidance, adjudications, enforcement, and spending, among other activities. Both Democrats and Republicans should want the government to function effectively, while also being politically accountable. Current institutional dynamics—with Democrats in control of Congress and the White House—hopefully can create bipartisan support to implement some needed reforms.<sup>80</sup>

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<sup>77</sup> *Biden Political Appointee Tracker*, WASH. POST, <https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/> (last visited May 1, 2021).

<sup>78</sup> Natalie Alms, *Did Trump Shrink the Government? Not According to the Plum Book*, FCW (Jan. 11, 2021), <https://fcw.com/articles/2021/01/11/plum-book-vacancies-no-shrinkage.aspx>; see also David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRESIDENTIAL STUD. Q. 51, 57 n.2 (2021), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/psq.12697> (describing need to supplement Plum Book information with CRS Reports and Congress.gov information due to missing Senate-confirmed positions in the Plum Book).

<sup>79</sup> Transcript of Oral Argument at 40, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (No. 15-1251), 2016 WL 6583480.

<sup>80</sup> See, e.g., BAUER & GOLDSMITH, *supra* note 58, at 315-32 (detailing bipartisan reforms for agency vacancies, including restricting who can serve as an acting IG, decreasing the permitted time limits for acting officials, clarifying who can serve as first assistants, and giving precedence to agency succession provisions—all of which the AAOA addresses).