



PARTNERSHIP FOR PUBLIC SERVICE

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Written statement prepared for

The House Committee on Oversight and Reform

Hearing entitled,

“Improving Government Accountability and Transparency”

May 3, 2021

Introduction

Chairwoman Maloney, Ranking Member Comer, and members of the Committee on Oversight and Reform, thank you for the opportunity to participate in today's hearing on legislative proposals to promote efficiency, transparency, accountability and modernization. I am James-Christian Blockwood, Executive Vice President of the Partnership for Public Service, a nonpartisan nonprofit organization dedicated to inspiring public service and increasing the efficiency and effectiveness of the federal government.

Our work at the Partnership includes many different efforts to make government work better, develop capable government leaders, strengthen employee engagement and celebrate exceptional service within the federal government. The Partnership's Center for Presidential Transition serves as the premier nonpartisan source of information and resources for presidential candidates and their teams to lay the groundwork for a new administration or for a president's second term. The Partnership also works to strengthen Congress as an institution and promote strong and objective government oversight.

My testimony today will focus on the Accountability for Acting Officials Act (H.R. 6689 in the 116th Congress) and the Periodically Listing Updates to Management (PLUM) Act (H.R. 2043 and S.857). I welcome the opportunity today to discuss how these pieces of legislation will help promote government effectiveness, transparency, accountability, and congressional oversight.

The Accountability for Acting Officials Act

The Partnership believes that our government is most effective when senior positions are filled with highly qualified individuals who have the skills and resources to succeed and are accountable to Congress. Vacancies in politically appointed, Senate confirmed positions are inevitable given the high number of positions that must be filled, the arduous confirmation process and competing priorities. The Accountability for Acting Officials Act makes important improvements to the law that governs how these vacancies are filled when temporary leadership is needed. This is just one piece of a larger challenge to improve and streamline the processes involved in staffing our government with the best and brightest. We want and need talented people of integrity, from all sectors, to serve our government when called.

Background on the Federal Vacancies Reform Act

In considering the Accountability for Acting Officials Act, the Committee is taking on a much-needed revisiting of the rules that govern when an official may temporarily serve in a position subject to Senate confirmation when the position becomes vacant. The increasing prevalence of vacancies and acting officials in these positions risk making the Senate confirmation process obsolete and undermine the authority of these positions. The net result is that the American people are not served by senior executive branch leadership in the manner the founders and the U.S. Constitution envisioned.

Article II of the Constitution provides that "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."¹ The Senate's advice and consent role is a fundamental component of the founder's vision of a system of checks and balances.

¹ U.S. Const. art. II, § 2.

The House of Representatives also has a key role related to Article II in working with the Senate to decide which positions, by law, are subject to advice and consent. Thus, the executive and legislative branches share responsibility for creating and filling positions subject to Senate confirmation, as well as the process for temporarily filling vacant positions.

Since the first term of President George Washington, Congress has given the President limited authority to appoint acting officials to perform the duties temporarily – without Senate approval – to a vacant office that is required to be filled with the advice and consent of the Senate.² The most recent reiteration of the law, the Federal Vacancies Reform Act of 1998 (“Vacancies Act”),³ spells out the procedures used to appoint acting officials. The Act aims to encourage the president to fill critical leadership positions by limiting the number of days an acting official can serve in positions subject to Senate confirmation.

The Vacancies Act provides that when a position subject to advice and consent becomes vacant, there are three categories of officials who may serve in acting capacity without Senate confirmation.⁴ The default rule is that the “first assistant” becomes the acting officer unless the president designates another individual from the other two eligible classes of acting officials. The Vacancies Act does not define the term “first assistant” but the term has generally been interpreted to mean the top deputy to the position. The other two categories of eligible officials that the president may turn to are: an individual who serves in another position subject to Senate confirmation anywhere in the government; and a senior employee of the agency (paid at the GS-15 level or above) who has been an employee of the agency for at least 90 days during the 365 days preceding the vacancy.

Generally, the Vacancies Act imposes a 210-day limit on the period during which someone can serve in an acting capacity. The time limit begins to run on the date the vacancy occurs.⁵ Years in which a first-term president is inaugurated, however, are treated differently. Positions that are vacant during the 60-day period beginning on inauguration day may be filled for up to 300 days (in other words, 90 days longer than the general 210-day cap).⁶ Also, subject to some limitations in the case of returned or failed nominations, the time limit on acting service is paused when the president puts forward a nomination for the position.

Frequency of Vacancies and Their Impact

Enactment of the Federal Vacancies Reform Act in 1998 was spurred by bipartisan concerns over the high rate of long-term vacancies in Senate-confirmed positions across the government, claims by some agencies that their organic statutes exempted them from the Vacancies Act, and a court case that had narrowly construed the Act. In particular, President Clinton’s appointment of an acting assistant

² For a history of laws governing vacancies, see the Supreme Court’s decision in *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 2017.

³ Pub. L. No. 105-277, Div. C., tit. 1, §151, 112 Stat. 2681-611-16, codified at 5 U.S.C. §3345-3349d.

⁴ 5 U.S.C. § 3345(a).

⁵ 5 U.S.C. § 3346.

⁶ 5 U.S.C. § 3349a.

attorney general for civil rights in perceived evasion of the Vacancies Act was a catalyst for the 1998 legislation to protect the advice and consent role of the Senate.⁷

The time limits on acting officials under the Vacancies Act do not always fulfill their purpose of encouraging timely nominations by the White House. For example, almost a year passed before President Obama nominated a new Commerce secretary after the resignation of Secretary John Bryson in 2012, and there have been numerous long-term vacancies in inspector general positions across multiple administrations. The position of inspector general at the Department of Interior was vacant for 2,770 days between 2011 and 2019 in the Obama administration. The inspector general position at the State Department has had long vacancies under Presidents Bush, Obama, and Trump, now stretching into the new administration: 725 days from 2003 to 2005, 2,072 days from 2008 to 2013 and almost a year from the date of vacancy in 2020.

Among the key positions that were without a confirmed official for all four years of the Trump administration were the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives at the Justice Department, the director of the Bureau of Land Management at the Department of the Interior and the chief financial officer at the State Department.

Long-term vacancies in these senior positions in government have real-world consequences for the management of the executive branch:

- Acting officials are often senior career officials – and sometimes the leading experts in their field – but may not view themselves as having the right to make decisions with long-term impact. This could undermine and delay needed decision-making within agencies.
- Many acting officials are asked to perform multiple jobs at the same time, dividing their attention and becoming “dual-hatted” or even “triple-hatted.”
- Vacancies in critical positions create potential disruptions in national security, as the 9/11 Commission found in examining vacancies that existed on 9/11,⁸ and can similarly undermine the government’s response to health and economic crises or other urgent challenges.
- Use of temporary officials can invite legal challenges to government action, which, even if ultimately dismissed, tie up agency legal resources in the defense of the temporary officials and complicate agency decision-making.
- Lack of Senate-confirmed leaders make it difficult for Congress and the public to know who is making decisions within an agency and hold them accountable, let alone contact them for critical information or assistance.

Reasons for Frequent and Long-Term Vacancies and the Need to Revisit the Vacancies Act

An understanding of the different reasons that long-term vacancies in Senate-confirmed positions can occur will be helpful to Congress as it considers updates to the Vacancies Act and other ways to address vacancies. The Partnership’s research has found that the Senate confirmation process took twice as long

⁷ For a history of the 1998 Federal Vacancies Reform Act, see Senate Report 105-250, Federal Vacancies Reform Act of 1998, Report of the Committee on Governmental Affairs, United States Senate, to accompany S.2176 (105th Congress) and Congressional Research Service, “The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative,” updated Nov. 2, 1998.

⁸ Thomas Kean et al., *The 9/11 Commission Report*, National Commission on Terrorist Attacks upon the United States, 2004, p. 422.

during most of the Trump administration as it did during the Reagan administration,⁹ leading to a real-world necessity for any president to rely on acting officials. Many other reasons drive the trend to reliance on acting officials. In “The Replacements,” a report issued last year, the Partnership examined trends in vacancies, detrimental impacts of vacancies, and the risk of making the Senate confirmation process obsolete.¹⁰ The report, along with the Partnership’s ongoing monitoring of vacancies, has identified numerous reasons to revisit the Vacancies Act:

The laws governing the use of temporary officials are ambiguous: One reason Congress needs to revisit the Vacancies Act is that ambiguities in the text have called into question who may serve as an acting official. For example, the law is not explicit on whether it applies when a vacancy is created by the firing of a Senate-confirmed official. This led to questions surrounding the legality of President Donald Trump’s decision to name Robert Willkie as acting secretary of the Department of Veterans Affairs after removing David Shulkin as secretary.¹¹

Litigation over one unclear part of the Vacancies Act even rose to the Supreme Court, which in 2017 issued an opinion interpreting the law to greatly limit the ability of a President to have an individual serve as an acting official while also nominating the person for the position.¹² While certain tightly-defined exceptions under the Act still allow a person to be acting official and nominee at the same time, the Supreme Court’s decision upended the interpretation of the Act by the Department of Justice under presidents of both parties following passage of the Federal Vacancies Reform Act of 1998.

Additionally, application of the Vacancies Act in relation to other statutes governing the agency order of succession often is unclear, including when President Trump asked Jeff Sessions to resign as attorney general and then named the former attorney general’s chief of staff, Matthew Whitaker, as acting attorney general. This led to legal disputes challenging Whitaker’s legitimacy as the acting official, based on arguments that the Vacancies Act does not apply because another statute provides that the deputy attorney general serves as the acting attorney general in the event of a vacancy.¹³

Even when Congress has laid out a specific order of succession for vacancies, questions may linger on whether the time limits of the Vacancies Act apply to acting officials. For example, in 2020, the Government Accountability Office reviewed the legitimacy of acting service in the positions of secretary and deputy secretary at the Department of Homeland Security. GAO found that the Homeland Security Act, and not the Vacancies Act, governs the order of succession at DHS.¹⁴ Under the statutory analysis of

⁹ Partnership for Public Service, “Senate Confirmation Process Slows to a Crawl,” Jan. 2020, available at <https://presidentialtransition.org/publications/senate-confirmation-process-slows-to-a-crawl/>

¹⁰ Partnership for Public Service, “The Replacements: Why and How ‘Acting’ Officials are Making Senate Confirmation Obsolete,” September 2020, available at <https://ourpublicservice.org/publications/the-replacements/>. The Partnership was joined in writing this report by Kathryn Dunn Tenpas, PhD, Senior Fellow, Miller Center, UVA and Nonresident Senior Fellow, The Brookings Institution.

¹¹ See, e.g., Nicole Ogrysko, “Facing a lawsuit, VA now a new victim of Vacancy Act’s ambiguous language,” Federal News Network, May 1, 2018.

¹² *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 2017.

¹³ See, e.g., Valerie C. Brannon and Jared P. Cole, “Legal Sidebar: Who Can Serve as Acting Attorney General,” Congressional Research Service, November 15, 2018, discussing the relationship between the FVRA and the Department of Justice order of succession laid out in 5 U.S.C. § 508.

¹⁴ Government Accountability Office, Matter of: Department of Homeland Security – Legality of Service of Acting Secretary of Homeland Security and Service of Senior Officials Performing the Duties of Homeland Security, B-

the Homeland Security Act, GAO found that individuals were serving improperly in the roles of secretary and deputy secretary of the Department. This case raises a related question of whether Congress should clarify whether the time limits of the Vacancies Act apply to these positions, even when Congress has laid out a specific order of succession.

Filling vacancies outside the construct of the Vacancies Act may have little or no legal ramifications, or consequences that are hard to enforce: A finding that an individual has served in an acting position in violation of the Vacancies Act does not necessarily lead to the invalidation of any actions by the agency. The Vacancies Act provides that if the time limit on acting service runs its course without a nomination, the specific functions and duties assigned by law or regulation to that position are to be performed by the head of the agency. But with respect to vacancies at the head of the agency the law does not articulate any “remedy” if the vacancy exceeds the time limit or is otherwise inconsistent with the Act. For example, in 2016, the Inspector General of the Office of Personnel Management found (in a precursor to the Supreme Court’s ruling in 2017 in *NLRB v. SW General, Inc.*) that Beth Cobert’s acting service as director of the OPM was in violation of the Vacancies Act once President Obama nominated her for the position, despite long-standing interpretation by the Department of Justice that such a nomination was permissible.¹⁵ The Partnership is unaware of any OPM action or policy being ultimately invalidated based on the IG’s opinion.

The Vacancies Act requires agencies to report on vacancies to the Government Accountability Office, and also requires GAO to report to the President and Congress when it determines that there has been a violation of the Vacancies Act.¹⁶ Since passage of the 1998 updates to the Vacancies Act, GAO has identified over 30 positions that have been filled by one or more individuals in violation of the Vacancies Act.¹⁷ Agencies may be slow to report vacancies, though, and it would require considerable resources to determine the legal consequences of a Vacancies Act violation. In many of its decisions, GAO says that once the illegitimate acting official ceases to use the term “acting,” there is no continuing violation, without engaging in further discussion of whether the illegitimate acting official took actions that have no force or effect due to the violation.¹⁸

331650 (Aug. 14, 2020); request by DHS for GAO to rescind its opinion denied, B-332451 (Aug. 21, 2020). Specifically, GAO found that Upon Secretary Kirstjen Nielsen’s resignation on April 10, 2019, the official who assumed the title of acting secretary had not been designated in the order of succession to serve upon the Secretary’s resignation. Because the incorrect official assumed the title of acting secretary at that time, subsequent amendments to the order of succession made by that official were invalid and officials who assumed their positions under such amendments, including Chad Wolf and Kenneth Cuccinelli, were named by reference to an invalid order of succession. The DHS positions also have been the subject of litigation: *Casa de Maryland, Inc. v. Chad F. Wolf*, Case No. 8:20-cv-022118-PX (D. Md. Sept. 11, 2020) (invalidating the appointment of acting secretary of Homeland Security Chad F. Wolf); *L.M.-M. v. Kenneth T. Cuccinelli II*, Case No. 1:19-cv-02676-RDM (D.D.C. Mar. 1, 2020) (invalidating the appointment of acting director of the United States Citizenship and Immigration Services Kenneth Cuccinelli II).

¹⁵ Memorandum for Beth F. Cobert, Acting Director, Office of Personnel Management, from Patrick E. McFarland, Inspector General, “Violation of the Federal Vacancies Reform Act,” Feb. 10, 2016.

¹⁶ 5 U.S.C. § 3349.

¹⁷ GAO’s database of vacancies and its letters to the President and Congress on Vacancies Act violations can be found at <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>

¹⁸ See, e.g., Government Accountability Office, Subject: Violation of the Time Limit of the Federal Vacancies Reform Act of 1998: Assistant Secretary of Defense for International Security Affairs, Department of Defense, B-331536 (Sept. 15, 2020). GAO found that an individual used the title: “Acting Assistant Secretary” for this position beyond the 210-day time limit but also found that because the individual was no longer using the acting title, there was no continuing violation.

Enforcement of the Vacancies Act, ultimately, may lie in court challenges to the legitimacy of an acting official. For example, in September, the U.S. District Court for the District of Montana ruled that William Perry Pendley had served unlawfully as acting director of the Bureau of Land Management, a position that had been vacant since the beginning of the Trump administration.¹⁹ The court found that at the time of its ruling, Mr. Pendleton had served for 424 days unlawfully in the position, beginning in July of 2019, well after the 210-day limit of the Vacancies Act. The Court further found that the unlawful service included the period dating from President Trump's nomination of Mr. Pendleton to the position on July 30, 2020 to the withdrawal of the nomination on September 8, 2020.

These types of court challenges may ultimately determine the legitimacy of an acting official's service. However, they may take years to resolve and come at a cost to plaintiffs and government.

Some vacancies reflect an administration's priorities: In some cases, a president may leave a position vacant to reflect priorities or pursue the objectives of the position through other means.²⁰ The special envoy for North Korean human rights at the State Department, for instance, was without a nominee for the entirety of the Trump administration as a matter of policy, despite concerns raised by both sides of the aisle on the Senate Foreign Relations Committee. The restructuring of the Department of State by Secretary Rex Tillerson added the duties of the North Korean human rights envoy to a different position – the undersecretary of State for civilian security, democracy and human rights.²¹ Another example spanning multiple administrations is the position of the administrator of the Drug Enforcement Agency. The position of DEA administrator has been filled with a confirmed official for only two years since November 2007.²² Both the Obama and Trump administrations declared an executive order by President Richard Nixon creating the agency superseded the vacancies law, and therefore acting administrators could serve without the limits placed on other acting officials.

Some positions require unique, hard-to-find qualifications, and agencies may operate effectively with career leaders in these positions in lieu of political appointees: Some agencies and bureaus may operate effectively without a Senate-confirmed official. The assistant attorney general for the Tax Division of the Justice Department has been held only by acting officials since June 2014. Observers and former officials stated the vacancy had little impact and the Tax Division functioned well under the guidance of a career official.²³

The time and cost for a potential nominee of going through the vetting and confirmation process can discourage some good candidates from wanting to serve: For instance, Raymond David Vela, a 30-year veteran Park Service employee, was nominated to serve as director of the National Park Service in 2018 – a position that had been vacant since the beginning of the Trump Administration. The Senate Committee on Energy and Natural Resources voted to advance the nomination -- by voice vote without any controversy. However, the full Senate never proceeded to a vote on the nomination, and pursuant to Senate rules his nomination was returned to the President at the end of the 115th Congress. Instead of renominating him, the Trump administration gave Mr. Vela the temporary title of "exercising the

¹⁹ *Bullock vs. United States Bureau of Land Management*, Case No. 4:20-cv-0062-BMM (D. Mont., Sept. 25, 2020).

²⁰ See, e.g., Amanda Becker, "Trump says acting Cabinet members give him 'more flexibility,'" Reuters, Jan. 6, 2019.

²¹ *The Replacements*, *supra* note 10.

²² On April 21, 2021, President Biden announced his intent to nominate Anne Milgram as Administrator of DEA.

²³ *The Replacements*, *supra* note 10.

authority of the director” for almost a year – much longer than the time allotted for acting officials to serve according to the vacancies law. It appears to have been easier to designate him to serve in the role than to go through the effort to renominate him.²⁴ As with Mr. Pendleton’s service at the helm of BLM, Mr. Vela’s leadership at the Park Service has been challenged in lawsuits.

Solutions to Reduce Vacancies and Improve the Federal Vacancies Reform Act

The Accountability for Acting Officials Act is common-sense legislation that takes a number of steps to clarify and improve the Vacancies Act, including:

- Clarifying that the Vacancies Act applies when an official is fired.
- Reducing the ability of agencies to create new “first assistant” positions suddenly to maneuver individuals into acting roles who otherwise would be unqualified to serve under the Vacancies Act.
- Mandating timely reporting on vacancies and acting officials.
- Requiring that acting inspector generals be drawn from the IG community to preserve IG independence.
- Aiming to clarify when the Vacancies Act is superseded by other statutes.
- Reducing the Act’s time limitation on acting service as the head of major agencies from 210 days to 120 days.

In addition, as the Committee and Congress consider this legislation, we recommend that you:

- Amend the law to allow an individual to serve as an acting official while being the nominee for the same position. This would overturn the Supreme Court’s 2017 decision on the vacancies law, which generally prohibits an individual from simultaneously being an acting official and the nominee for the same position.²⁵ The 2017 decision reversed bipartisan interpretation of the Vacancies Act since its passage, limiting the pool of potential acting officials and causing unnecessary turnover in a position. For example, in 2019, Mark Esper, who was serving as acting secretary at the time, had to be replaced as acting secretary while his nomination was pending, causing unnecessary turnover in the department’s leadership.
- Consider adopting a construct proposed by the Brennan Center’s National Task Force on Rule of Law & Democracy, which would limit who can be acting until a nomination has been made, then allow a president greater leeway in selecting an acting official once the nomination has been made. This would serve as additional incentive for the president to make nominations.²⁶
- Prohibit officials from being “dual-hatted” in Senate-confirmed positions – in other words, from performing the duties of two or more Senate-confirmed positions at once.
- Take further steps to prevent agency schemes to reshuffle succession plans to circumvent the law’s rules. For example, the law could specify that the designation of first assistants align with agency succession plans required by the Presidential Transition Enhancement Act of 2019.²⁷
- Go on record that the law cannot be evaded by giving someone a title such as “performing the duties of” the Senate-confirmed position. This is intrinsic to the Act already, as it provides that

²⁴ *Ibid.*

²⁵ NLRB v. SW General, 127 S. Ct. 929, 2017.

²⁶ Brennan Center for Justice, National Task Force on Rule of Law and Democracy, Proposals for Reform Volume II, Oct. 3, 2019.

²⁷ P.L. 116-121.

functions or duties of an office not filled in accordance with the Vacancies Act are to be filled by the head of the agency.²⁸

Beyond these types of updates to the Vacancies Act, Congress and the executive branch can address the prevalence of vacancies by reducing the number of presidential appointments subject to advice and consent, as well as the overall number of political appointees. An incoming president is responsible for filling over 4,000 political appointees, including about 1,200 requiring Senate confirmation – a number of political appointments higher than in any other modern democracy.²⁹

Since the middle of the 20th century, the number of presidential appointees in the federal government has more than doubled,³⁰ and the confirmation process for those who require Senate approval has become more arduous, lengthy, and politicized. These factors have contributed to the significant rise in leadership vacancies. The number of positions to fill is daunting for any transition team or presidential personnel office, and the confirmation process can overburden the Senate, diverting time and attention from important legislative work.

Congress reduced the overall number of Senate-confirmed positions by about 160 with passage of the Presidential Appointment Efficiency and Streamlining Act of 2011 – a good step but not enough.³¹ With the same bipartisan cooperation that produced this law, Congress should again reduce the number of positions subject to advice and consent. Many positions could be converted from Senate-confirmed positions to political positions not requiring confirmation. Other technical positions can be filled ably by career officials and Congress should convert them to career positions. Additionally, Congress should establish caps on the number of Schedule C political appointees in the same way it has already established caps on political members of the Senior Executive Service.

The Senate should also revisit the “privileged calendar” it adopted in 2012, which was intended to provide a streamlined confirmation process for nearly 300 positions subject to confirmation.³² This process, which provides a bypass of committee procedures for this set of nominees, appears to have fallen short of its goal, since the nominees still have to contend with full Senate floor procedures. These are just two examples of how reforms to procedures could improve the confirmation process while still safeguarding the Senate’s constitutional role of advice and consent.

The Periodically Listing Updates to Management (PLUM) Act

The PLUM Act would advance transparency and accountability by providing up-to-date information on thousands of other positions filled by political appointees or top career officials in the federal government.

The publication that has become known as the Plum Book is the most comprehensive source of information published by the government about officials serving in the federal government. It contains

²⁸ 5 U.S.C. § 3348(b).

²⁹ The Economist, “Why is it so hard for Joe Biden to hire people? Nobody seems ready to reform Washington’s agonisingly slow appointments process,” May 25, 2021.

³⁰ David E. Lewis, “The Politics of Presidential Appointments: Political Control and Bureaucratic Performance,” Princeton University Press, 2008.

³¹ P.L. 112-166.

³² See Congressional Research Service, “Consideration of Privileged Nominations in the Senate,” R46273 (Mar. 16, 2020).

information on more than 4,000 political appointees – about 1,200 of which are subject to Senate confirmation. In addition, the Plum Book contains thousands of “general” positions in the Senior Executive Service, which are positions that may be filled by either career or political appointment.

In 2016, the Partnership launched a Political Appointee Tracker to provide information on the status of about 800 positions requiring Senate confirmation.³³ Our work has revealed the need for more complete and accurate, real-time data about political appointments, and the limitations of the Plum Book as a reliable database.

The Partnership is not alone in finding the Plum Book limited in its usefulness. The Government Accountability Office recommends that Congress create a comprehensive and timely database of appointees,³⁴ the likes of which would be created by the PLUM Act.

The production of the Plum Book happens only every four years – in an election year – and has been produced largely the same way it was produced in the administration of Dwight Eisenhower in 1952, who asked for a list of “plum” positions that he could fill in his new administration. The next version was produced in 1960 and has been produced every four years, and by tradition the publication has a plum-colored cover.

Each election year, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs alternate in publishing the Plum Book through the Government Printing Office. The Plum Book data is based on a data call that the Office of Personnel Management issues to agencies (typically in early summer).

Unfortunately, the manual data call on which the Plum Book is based means that the database is only a snapshot in time towards the end of a presidential term. The information is out of date by the time it is published – which in recent election cycles has been late November or sometime in December of the election year. The late publication therefore makes the Plum Book of diminished use to transition teams, those who might be seeking a federal appointment, and those seeking to know who holds decision-making authority in the federal government. GPO did not release the on-line version of the 2020 Plum Book to the public until December 30.³⁵ The late publication meant that the transition team had to rely on the 2016 Plum Book, which was a snapshot of positions in the summer of 2016 – information then four and a half years old.

The once-every-four-year publication also means that errors – including missing terms, mislabeled appointment types, and incorrect or outdated titles and offices -- cannot be corrected readily. For example, the Federal Housing Finance Board was listed in the 2016 Plum Book even though it was dissolved in 2008. The 2016 Plum Book also misclassified some positions that were changed to presidential appointments from presidential appointments requiring Senate confirmation by the Presidential Appointment Efficiency and Streamlining Act of 2011.

³³ The Partnership maintains the tracker in collaboration with the Washington Post. The current version of the tracker, the Biden Political Appointee Tracker, may be accessed at <https://ourpublicservice.org/political-appointee-tracker/>.

³⁴ Government Accountability Office, “Federal Ethics Programs: Government-wide Political Appointee Database and Some Ethics Oversight Procedures at Interior and SBA Could Be Improved,” GAO-19-249 (March 2019).

³⁵ <https://www.gpo.gov/who-we-are/news-media/news-and-press-releases/gpo-releases-plum-book---dec-2020>

The most recent version, the 2020 Plum Book, contains numerous errors and shortcomings:

- The book lacks information on at least 10 offices and organizations, such as the Department of Agriculture Inspector General Office and the Kennedy Center. This means that more than two dozen positions in these offices and organizations requiring Senate confirmation were not included in the book.
- Unlike prior editions, the 2020 Plum Book counted only filled, not vacant, positions in the Senior Executive Service totals. Compared to the 2016 Plum Book, this reduced the number of SES positions listed from 3,646 to 2,150.
- The book does not contain any information on the position of National Cyber Director in the Executive Office of the President, which was created by Congress in the National Defense Authorization Act for 2021, which became law on January 1, 2021.
- The appendix that provides a summary of the number of positions in each agency subject to noncompetitive appointment is missing at least seven agencies or offices that appear in the Plum Book. For example, the summary of positions in the White House is missing, thus making total positions in the Executive Office of the President appear to be smaller than in 2016.

These are the types of errors, omissions or updates that will not be addressed until 2024 unless the Plum Book is modernized.

There are three fundamental improvements to the Plum Book that would make the Plum Book more useful.³⁶ First, the information should be updated as close to real-time as possible. Second, errors should be fixed as soon as they are caught. Third, while the Plum Book is available online as a PDF and a few other file types, it should be available in a more downloadable and machine-readable format. The PLUM Act would accomplish all these objectives.

These improvements would bring increased transparency and accountability to the federal government by helping ensure the American people know who is serving in top decision-making positions. It will provide public access to information on senior federal leaders that is available through subscription to private vendors who research appointments. In addition, the PLUM Act would provide timely information on Senate-confirmed positions and whether they are vacant or filled by an acting official, providing transparency and reinforcing accountability under the Vacancies Act.

Conclusion

Thank you again for holding this hearing, and thank you, Chairwoman Maloney and Representative Porter for your leadership on these bills. We look forward to working with all members of the committee to see that these two important legislative measures can move forward with bipartisan support. The ground rules for how vacancies are filled and the transparency into political and other top federal positions should be concepts that advance good government and better serve Congress, the executive branch and American people.

The Partnership for Public Service also looks forward to working on other important legislative considerations this committee will have before this Congress, including legislation to implement the recommendations of the National Commission on Military, National and Public Service and the Federal

³⁶ Amanda Patarino and Troy Cribb, "Improving the Plum Book: The Need to Modernize Information about Federal Leadership," Partnership for Public Service Center for Presidential Transition blog (Sept. 17, 2020).

Agency Customer Experience Act. Also, as we have done after past presidential transitions, the Partnership is gathering lessons learned from the 2020-2021 presidential transition which will inform recommendations for improvement. Over the past two decades, improvements to the Presidential Transition Act have been enacted with bipartisan support, and we are committed to making sure the next round of improvements has the same broad support.

On these and many other issues you are considering, we stand ready to help find nonpartisan, common-sense solutions to the major management challenges facing the federal government.