



## **Fact Sheet: Amend the Federal Vacancies Reform Act**

When a presidentially appointed and Senate-confirmed position becomes vacant through retirement, death, illness, or some other inability to act, the president is allowed to temporarily fill that position with an acting official. The Federal Vacancies Reform Act of 1998 (Vacancies Act) sets the rules for who is allowed to perform the functions and duties of a vacant office as an “acting” official and how long they can perform them.

By giving presidents the ability to quickly fill vacancies in the roughly 1,200-1,400<sup>1</sup> presidentially nominated, Senate-confirmed positions (also known as “advice-and-consent” or “PAS” positions), the Vacancies Act is intended to ensure stability and continuity in the government. And while it was and is an essential stop gap, the Vacancies Act’s limitations, ambiguities, and lack of enforcement over the 25 years since its passage have allowed presidents of both parties to manipulate it in ways that undermine its purpose.<sup>2</sup>

### **The Problem**

There are numerous problems with relying on acting officials to lead agencies. Acting officials often lack the authority and independence of their Senate-confirmed counterparts. They may be reluctant to make the big decisions necessary to carry out their agencies’ missions. Some acting officials may hold multiple positions simultaneously, dividing their attention and diminishing their effectiveness, and even if an official had been vetted and confirmed by the Senate for one position, that doesn’t mean they’re qualified to perform the duties of the vacant position. And overuse of acting officials could invite legal challenges to agency actions, which could impair executive branch operations. The flaws in the Vacancies Act only exacerbate these problems.

First, the time limit provisions of the Vacancies Act flout the concept of “temporary.” An acting official may serve for up to 210 days beginning on the date of the vacancy, or over the course of two pending nominations for the position (each of which can take more than a year). If the vacancy exists within the first two months of a president’s term, the acting official can serve for 300 days. Depending on the scenario, it’s possible for a president to keep an acting official in a PAS position for over two and a half years. And while the Vacancies Act requires acting officials to return to their previous position after their temporary tenure expires, they can evade this provision by simply dropping the word “acting” from their title and continuing to perform the functions and duties of the vacant office — an end run around the intent of the law.

Second, it is unclear if the Vacancies Act applies to a position when another law sets the requirements for temporarily filling that position. Many PAS positions are covered by laws that might conflict with

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<sup>1</sup> Maeve P. Carey, Congressional Research Service, Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress, R41872 (October 9, 2012), 2, <https://crsreports.congress.gov/product/pdf/R/R41872>.

<sup>2</sup> Rebecca Jones, “The Dangers of Chronic Federal Vacancies,” Project On Government Oversight, August 6, 2019, <https://www.pogo.org/analysis/the-dangers-of-chronic-federal-vacancies>.

the Vacancies Act, while others are either expressly exempt from the act or from some of its requirements.

Third, the Vacancies Act lacks a meaningful enforcement mechanism. The law states that any action taken by an acting official serving in violation of the law “shall have no force or effect.” But the provision has been interpreted to apply only to nondelegable functions and duties (work that cannot legally be given to another person), and presidents and agency heads have considerable discretion in deciding what work can legally be given to an acting official. Even in a clear-cut case where the function or duty should not have been delegated to the acting official, someone with legal standing must file a lawsuit and persuade the court to invalidate the action. This takes both time and resources.

Last, the act requires agencies to report vacancies, nominations, and any acting officials to the Government Accountability Office (GAO), which is charged with tracking the dates of vacancies and monitoring acting officials’ service time, but there are no penalties for failing to report. Moreover, when the GAO finds a Vacancies Act violation, all it can do is send a letter notifying the agency, the president, and Congress.

## **The Solution**

Congress should amend the Vacancies Act by passing the Accountability for Acting Officials Act (H.R. 4434) or similar legislation, which would reduce the amount of time acting officials can serve as agency heads, require acting officials to testify before Congress at least once every 60 days, and prevent presidents from appointing acting officials who lack the necessary experience and qualifications to lead an agency. Congress should also pass the Improving Senate Confirmation and Vacancy Oversight Act (S. 5133) or similar legislation, which would require the GAO to create a publicly accessible “data dashboard,” updated at least weekly, that tracks Senate-confirmed executive branch positions that have been filled, the names of officials serving in them, and the status of nominees.

In addition to these bills, there is a menu of legislative options POGO supports that would help address loopholes in the Vacancies Act. We encourage Congress to consider

- mandating that an agency-specific succession statute takes precedence over the Vacancies Act to ensure clarity;
- creating a task force that builds on past efforts, including the 2012 Presidential Appointment Efficiency and Streamlining Act, to reduce the roughly 1,200-1,400 political appointees that are subject to Senate confirmation;
- addressing the 2017 Supreme Court decision in *NLRB v. SW General, Inc.* by allowing more nominees to serve in an acting capacity while their nominations are pending; and
- clarifying whether the Vacancies Act applies if a president fires an official.

## **Contact**

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