



# THE REPLACEMENTS

WHY AND HOW “ACTING” OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE

SEPTEMBER 2020



PARTNERSHIP FOR PUBLIC SERVICE

# Case Studies in Congressional Oversight

This report is part of the Partnership for Public Service's ongoing work to promote and inform regular oversight that ensures our government is effectively serving the public. Oversight is the means by which Congress, the media and outside stakeholders can identify what is working in our government, surface problems, find solutions and hold agencies and their leaders accountable. When done well, oversight fulfills an important and legitimate role in American democracy.

For more information, visit [ourpublicservice.org/congressional-oversight](https://ourpublicservice.org/congressional-oversight)

**The Partnership for Public Service** is a nonpartisan, nonprofit organization that works to revitalize the federal government by inspiring a new generation to serve and by transforming the way government works. The Partnership teams up with federal agencies and other stakeholders to make our government more effective and efficient. We pursue this goal by:

- Providing assistance to federal agencies to improve their management and operations, and to strengthen their leadership capacity.
- Conducting outreach to college campuses and job seekers to promote public service.
- Identifying and celebrating government's successes so they can be replicated across government.
- Advocating for needed legislative and regulatory reforms to strengthen the civil service.
- Generating research on, and effective responses to, the workforce challenges facing our federal government.
- Enhancing public understanding of the valuable work civil servants perform.

# EXECUTIVE SUMMARY

The Constitution vests responsibility for filling federal leadership positions in both the president and the Senate — the president nominates officials for key posts, and the Senate provides “advice and consent.” But in recent years, presidents have found it increasingly easy to sidestep this process altogether and to install temporary, “acting” officials in place of Senate-confirmed leaders.

All presidents have used acting officials on a temporary basis to fill some of the more than 1200 positions subject to Senate confirmation, but the executive’s use of acting officials has increased in recent years. The Trump administration has utilized more acting officials than other recent presidents and found numerous ways around the Federal Vacancies Reform Act and other laws intended to constrain the use of temporary appointees. Ambiguities in the laws governing the use of acting officials, processes based on norms rather than rules, lack of transparency into personnel decisions and political pitfalls risk making the Senate irrelevant in filling positions across government.

This report examines the prevalence of vacancies and temporary officials in Senate-confirmed positions, the use of acting officials and the reasons the nomination and confirmation process has broken down. Through five case studies of positions that have recently been without Senate-confirmed officials, the report offers key insights:

- There is little downside or consequence for an administration to sidestep the Senate with a temporary appointment.
- The laws governing the use of temporary officials are ambiguous and hard to enforce.
- Some vacancies are intended to reflect an administration’s policies.
- The Senate often contributes to, or even causes, vacancies in key positions in order to achieve political objectives.
- Some agencies operate effectively with career leaders in lieu of political appointees.

The report includes specific recommendations to address the prevalence of temporary officials, fix broken processes and improve accountability:

- The Senate must reassert its constitutional authority to provide advice and consent on executive branch nominations.
- Congress should require more transparency around vacant positions subject to advice and consent.
- The Senate should reduce the number of presidential appointments subject to Senate confirmation and should revisit the “privileged nominations” process.
- The executive and legislative branches should invest the time, resources and processes necessary to support the nomination and confirmation of well-qualified nominees.

The extensive use of acting officials and the ease with which a president can sidestep the confirmation process should serve as a wake-up call to senators of both parties. For the government to be fully accountable to the people it serves, the laws and processes that guide the use and disclosure of temporary and acting officials need to be reconsidered.

# INTRODUCTION

One of the most important tasks for any president is to fill more than 1,200 politically appointed government positions needing Senate confirmation. Presidents use temporary officials — often referred to as “acting” officials — on an interim basis pending the selection, nomination and confirmation of a Senate-confirmed appointee. This reliance on acting officials has become more prevalent in recent years, and in some positions, an acting official is now the norm rather than the exception.

President Donald Trump has expressed a preference for temporary appointees because of the perceived flexibility to move or reassign them, a perspective not expressed by his predecessors.<sup>1</sup> Even Trump’s third White House chief of staff, Mick Mulvaney — though not in a Senate-confirmed position — carried the “acting” qualifier for his entire 15-month tenure. Presidential preference, however, is far from the only reason many key federal positions remain vacant or are filled by a temporary official. The Senate’s confirmation process is challenging and takes twice as long today as it did during President Ronald Reagan’s administration.<sup>2</sup> Increased partisanship and a difficult vetting process are also contributing factors. Some positions are left vacant for policy reasons while others have been a challenge to fill for multiple presidents.

So how do presidents fill positions in the absence of Senate-confirmed appointees?

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 — of a vacant office that is required to be filled with the advice and consent of the Senate.<sup>3</sup> The most recent iteration of the law, the Federal Vacancies Reform Act of 1998,<sup>4</sup> spells out the procedures used to appoint acting officials, although ambiguities in

the law and competing statutes enable presidents to find alternative and sometimes creative methods.

Even identifying who is acting in the role of a Senate-confirmed appointee can be difficult. While some people are given the official title of “acting,” others are declared to be “performing the duties of” or given some other moniker. The reasons for the various titles are not always clear, but a change in terminology often signals an individual is continuing to perform an acting role after the time limits of the vacancies act have expired, thereby circumventing specific provisions in the law that define who may serve as an acting leader and for how long. (For the purposes of this report, all temporary officials are referred to as acting officials even when some of them have varying titles.)

A recent finding by the Government Accountability Office has challenged the Trump administration’s application of current law in designating acting leaders and concluded that the appointments of Chad Wolf, acting secretary of the Department of Homeland Security, and Ken Cuccinelli, his acting deputy, did not follow the process as defined in the Homeland Security Act of 2002, which establishes the DHS line of succession.<sup>5</sup> Although the impact of GAO’s finding on the current and future administrations is unclear, it may have caught the attention of the president. On Aug. 25, 2020, Trump announced via Twitter that he would nominate Wolf to be the secretary of DHS.

While many acting and unconfirmed leaders are experienced and capable, their temporary nature can limit long-term planning and erode employee morale. For some agencies, the lack of a Senate-confirmed person in a leadership role may have little negative impact on the day-to-day operations. Yet extended management by those who are not Senate-confirmed can decrease transparency in how decisions are made.

Some critics charge that presidents also use temporary officials to circumvent the Senate’s advice-and-consent role and appoint individuals who might not otherwise be confirmed.

1 Amanda Becker, “Trump says acting Cabinet members give him ‘more flexibility,’” Reuters, Jan. 6, 2019. Retrieved from <https://reut.rs/2VyaoAY>

2 Partnership for Public Service, “Senate Confirmation Process Slows to a Crawl,” January 2020. Retrieved from <https://bit.ly/3b2vEFS>

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

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

5 Randolph Walerius and Tanvi Misra, “GAO says Wolf, Cuccinelli appointments at HS invalid,” Roll Call, Aug. 14, 2020. Retrieved from <https://bit.ly/3kSI1u5>

# WHY VACANCIES MATTER

In June 2020, for example, Trump nominated retired general officer Anthony Tata to serve as the undersecretary of defense for policy. Tata was a controversial nominee due in part to findings of misconduct while in uniform and for controversial public comments he made after his service. When it was clear by August that Tata's nomination would not be approved by the Senate Armed Services Committee due to concerns on both sides of the aisle, the White House withdrew his nomination and designated him as "the official performing the duties of the deputy undersecretary of defense for policy." That role effectively made him the first assistant to Acting Undersecretary of Defense for Policy James Anderson and thus eligible to replace Anderson if the administration so chooses. The move drew furious criticism from Senate Democrats, including the senior Democrat on the Armed Services Committee, Sen. Jack Reed, D-R.I., who called it, "a flagrant end run around the confirmation process."<sup>6</sup>

This report offers insights into the use of temporary officials, the consequences and the need for reform. In addition to quantifying the extent of their use, the report includes five case studies that illustrate unique and complex circumstances that surround specific positions. The report concludes by offering recommendations to clarify the rules governing acting officials, reduce the frequency of temporary leaders and promote a government that is well-served by committed appointees working on behalf of the American people.

<sup>6</sup> Aaron Mehta, "Controversial nominee Tata appointed to a top defense job, bypassing Congress," *Defense News*, Aug. 2, 2020. Retrieved from <https://bit.ly/32wG6mq>

## **Acting officials — even if they are seasoned and highly regarded individuals — often lack the perceived authority that accompanies Senate confirmation.**

Many acting officials do not feel like it is their place to make long-term policy or operational and management decisions that will bind their successors.

Thad Allen, former commandant of the Coast Guard, said, "People who are in an acting capacity feel they do not have the power to make long-term changes and do what they need to do."<sup>7</sup>

In some ways, acting officials are like substitute teachers — they may be skilled professionals who have much to offer the students, but they are not perceived by those around them as having the full authority of the teacher, and they do not view themselves as having the right to make decisions with long-term impact.

"To effectively lead an agency, you need as much authority and gravitas as you can muster," Robert Bonner told *The Wall Street Journal*.<sup>8</sup> Bonner, who was confirmed by the Senate to lead both the Drug Enforcement Administration and the U.S. Customs and Border Protection agency, added, "If you're not a confirmed head of an agency ... you're not going to be able to command as much respect and attention from your own people and from other agencies whose cooperation is important."

Observers have posited the Trump administration, frustrated by historic and unremitting delays in the Senate's consideration of its nominees, has pursued a strategy of relying on acting officials. Ken Cuccinelli, who has served in multiple senior positions under Trump, told *Fox News*, "The Trump administration has been somewhat frustrated with how long it takes to get people through the Senate ... So they've had to use ... these alternatives that are legal, they're just less preferential to getting a full Senate appointment."<sup>9</sup>

<sup>7</sup> Partnership for Public Service, "Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch," September 2015. Retrieved from <https://bit.ly/2ypo1vS>

<sup>8</sup> Byron Tau, "Half of 10 Biggest Federal Law Agencies Lack Permanent Chiefs," *The Wall Street Journal*, May 16, 2019. Retrieved from <https://on.wsj.com/2Wwzkua>

<sup>9</sup> "Ken Cuccinelli reacts to judge ruling he was unlawfully appointed

Members of Congress from both parties have decried the lack of Senate-confirmed appointees and resulting reliance on temporary officials. “It’s a lot. It’s way too many,” said Sen. James Lankford, R-Okla., about the number of acting officials in Cabinet agencies in 2019.<sup>10</sup> “You want to have confirmed individuals there because they have a lot more authority to be able to make decisions and implement policy when you have a confirmed person in that spot.” Sen. Amy Klobuchar, D-Minn., speaking on the Senate floor, said, “The American people deserve qualified nominees, and it is our job to ensure we take the time and care necessary to confirm people who will serve their country with distinction.”<sup>11</sup>

“Make no mistake — the ongoing vacancies and lack of steady leadership have consequences, especially at a time like this,” stated Rep. Bennie Thompson, D-Miss., this past March.<sup>12</sup> “For example, since 9/11, the federal government has invested heavily in developing doctrine to define roles and responsibilities for incident response. But no one in the administration seems to be familiar with them. As Americans face a potential coronavirus pandemic, the administration appears to be caught flat-footed, scrambling to figure out who is in charge.”

But the political parties diverge on the reason for the slow pace of confirmations. Lankford successfully championed a change to reduce the hours of debate required for most nominations, limiting the ability of senators to slow the confirmation of nominees.<sup>13</sup> Klobuchar and other Senate Democrats opposed the change; Klobuchar said it would “remove important checks and balances” at a time when “we also know that we are getting a slew of unqualified nominees.”<sup>14</sup> Nominations continue to be a partisan flashpoint, leaving acting officials in charge for extended periods despite the changes intended to advance nominees through the process more quickly.

---

to lead U.S. immigration agency,” Fox News, March 2, 2020. Retrieved from <https://bit.ly/3d5Q6Xa>

10 Juliet Eilperin, Josh Dawsey and Seung Min Kim, “‘It’s way too many’: As vacancies pile up in Trump administration, senators grow concerned,” The Washington Post, Feb. 4, 2019. Retrieved from <https://wapo.st/2Ztytgu>

11 Sen. Amy Klobuchar, “On the Senate Floor, Klobuchar Fights to Ensure Nominees to Federal Bench and Executive Branch Are Fully Vetted,” April 2, 2019. Retrieved from <https://bit.ly/3g8s2p4>

12 “Statement of Rep. Bennie Thompson.” Hearing on “A Review of the Fiscal Year 2021 Budget Request for the Department of Homeland Security,” House Committee on Homeland Security, March 3, 2020. Retrieved from <https://bit.ly/3gzyqFV>

13 Sen. James Lankford, “Senator Lankford Discusses His Nominations Rules Change Proposal on Senate Floor,” April 2, 2019. Retrieved from <https://bit.ly/3g4lvj>

14 Sen. Amy Klobuchar, “On the Senate Floor, Klobuchar Fights to Ensure Nominees to Federal Bench and Executive Branch Are Fully Vetted,” April 2, 2019. Retrieved from <https://bit.ly/3g8s2p4>

### **Many acting officials are asked to perform multiple jobs at the same time, dividing their attention and increasing their responsibilities.**

Leadership positions are demanding jobs that require a great amount of time and attention. Yet when a person is given the responsibilities of multiple positions, it becomes more difficult to effectively perform the full duties of each role. This “dual-hatting” has occurred numerous times in recent years. For example, in June 2019, Gail Ennis was appointed to serve temporarily as the inspector general for the Department of the Interior while serving simultaneously as the inspector general for the Social Security Administration.<sup>15</sup> This meant that for about two months, Ennis was the inspector general for two agencies at the same time. Margaret Weichert, already the deputy director for management at the Office of Management and Budget, was simultaneously dual-hatted as the acting director of the Office of Personnel Management, a role she filled from October 2018 until September 2019.<sup>16</sup>

In a few instances, officials have performed three jobs simultaneously. William Todd was named acting undersecretary for management at the Department of State in February 2018. For about a year, Todd also served as acting director general of the foreign service/director of human resources in addition to maintaining his official position of deputy undersecretary for management.<sup>17</sup>

### **The use of temporary officials can complicate and even invite legal challenges to government action.**

When a person or group sues the federal government, the fact that an acting official was involved in the decision can be used as a legal objection. For example, in November 2018, the state of Maryland questioned the method by which Matthew Whitaker was appointed acting attorney general.<sup>18</sup> A month later, the issue was raised again as Whitaker contemplated a rule change to ban the use of bump stocks in semiautomatic rifles. Senior Justice Department lawyers advised Whitaker against signing such a change because a legal challenge to how he was appointed might be used in court.<sup>19</sup> In fact, at least five federal lawsuits were filed and a central argument to

---

15 Miranda Green, “Trump appoints Social Security Administration watchdog to also oversee Interior,” The Hill, June 10, 2019. Retrieved from <https://bit.ly/32kSrf7>

16 Tajha Chappellet-Lanier, “Dale Cabaniss confirmed as OPM director,” fedscoop, Sept. 11, 2019. Retrieved from <https://bit.ly/30OUzJD>

17 U.S. Department of State, “William E. Todd.” Retrieved June 25, 2020, from <https://bit.ly/3dpI4sF>

18 Ann E. Marimow, “Maryland challenges legality of Whitaker’s appointment as acting U.S. attorney general,” The Washington Post, Nov. 13, 2018. Retrieved from <https://wapo.st/3acUofr>

19 Devlin Barrett, “Senior Justice Dept. officials told Whitaker signing gun regulation might prompt successful challenge to his appointment,” The Washington Post, Dec. 21, 2018. Retrieved from <https://wapo.st/2E4XhDn>

several cases involved objections to Whitaker's status.<sup>20</sup> Although the legal challenges were eventually dismissed, the fact that such a rule change was made by an official who was not confirmed by the Senate provided additional obstacles for the government to defend its actions.

In another instance of legal uncertainty, the Office of Personnel Management's inspector general found in 2016 Beth Cobert could no longer serve as OPM acting director after she was formally nominated for the same position, and thus her decisions since the date of her nomination were void. The inspector general disagreed with the Justice Department's view that her acting status was permissible under the vacancies act.<sup>21</sup>

Similarly, the Government Accountability Office decision in August 2020 that the Trump administration improperly appointed two top officials at the Department of Homeland Security might contribute to future legal challenges. Immigrant advocacy groups have challenged the White House's policies by arguing the officials who

implemented such initiatives lacked proper legal authority to do so.<sup>22</sup> The GAO ruling will likely lead to more litigation on the subject.

The use of temporary officials in ways that are not clearly explained in the vacancies law can create a set of legal complications and complicate the government's defense against lawsuits. "The Senate confirmation process puts that issue to rest," said Bob Rizzi, a lawyer who has guided political appointees through the confirmation process. Having a permanent official "blesses the legitimacy of the person in that office."

---

20 Nick Penzenstadler, "Judge says ban on rapid-fire 'bump stocks' can go forward, rejects challenge to new rules," USA Today, Feb. 26, 2019. Retrieved from <https://bit.ly/2ZKsGmL>

21 Eric Yoder and Joe Davidson, "OPM director nominee can't serve as acting agency head, inspector general says," The Washington Post, Feb. 17, 2016. Retrieved from <https://wapo.st/2DD8Pxd>

---

22 Erica Werner and Nick Miroff, "Top DHS officials Wolf and Cuccinelli are not legally eligible to serve in their current roles, GAO finds," The Washington Post, Aug. 14, 2020. Retrieved from <https://wapo.st/314etBZ>

## LAWS GOVERNING THE USE OF ACTING OFFICIALS: THE FEDERAL VACANCIES REFORM ACT

The Federal Vacancies Reform Act of 1998 updated the law specifying how a government employee may temporarily perform the duties of a vacant position in an executive agency that is subject to Senate confirmation.<sup>23</sup> While the legislative history acknowledges that some positions are subject to separate statutes regarding succession, the act is intended to provide the general framework for the vast majority of Senate-confirmed positions and creates a time limit for service of acting officials.<sup>24</sup> The cap is generally 210 days, although it increases to 300 days for vacancies at the beginning of a president's first term. The time limits are paused while a nomination for the position is pending in the Senate. The legislation was intended to encourage administrations to nominate qualified people in a timely manner without undermining the Senate's advice-and-consent role.

The law provides for three classes of people who may carry out the duties of the office without Senate confirmation: the first assistant to the vacant position, an official in any other Senate-confirmed position or a senior officer within that agency.

Once the time limit for a temporary official is reached, the law states the position is vacated and the duties vested in that position are delegated to the head of the agency. However, the law is not specific on who performs the duties of the agency head when that position is vacant and the act's time limit on an acting official is reached.

The law is intended to give presidents considerable flexibility in filling vacant positions. Yet, the gray areas of the law and difficulties enforcing time limits have given presidents considerable latitude in filling positions.

---

23 Partnership for Public Service, "The Vacancies Act: Frequently Asked Questions," Nov. 1, 2017. Retrieved from <https://bit.ly/3bJyocY>

24 "Federal Vacancies Reform Act of 1998," 5 U.S.C. § 3345 et seq.

# THE PREVALENCE OF VACANCIES IN SENATE-CONFIRMED POSITIONS AND THE APPROACHES TO FILLING THEM

From the earliest days of the republic, presidents have used acting officials to fill important federal positions and vacancies. In the two terms of the most recent presidents, Barack Obama had 14 acting officials serve as Cabinet secretaries while George W. Bush had 13 and Bill Clinton 11.<sup>25</sup>

Trump has used many more acting officials. In his Cabinet, Trump had more acting officials in his first three years (27) than each of the previous five presidents had during their entire presidencies.<sup>26</sup> The preceding five administrations used an average of about seven acting Cabinet officials per four-year term.

Like previous administrations, Trump has used many different methods to fill vacancies and even challenged well-established assumptions around the importance

of Senate-confirmed appointees. Filling open positions, particularly those requiring congressional approval, is a multistep process that has been governed by norms, requirements and laws.

The prevalence of temporary officials in the Trump administration goes beyond the Cabinet and exists throughout the executive branch. As of Aug. 17, 2020, only 70% of 757 key Senate-confirmed positions tracked by the Partnership for Public Service and The Washington Post were filled with confirmed officials. The remaining 30% were either vacant or filled by an acting official.<sup>27</sup>

Vacancies have been evident throughout many key departments. As of Aug. 17, eight of the 15 Cabinet-level agencies were without Senate-confirmed appointees for

25 This number excludes acting officials who served fewer than 10 days; Anne Joseph O’Connell, “Actings,” *Columbia Law Review* 120(3), April 2020, 613–728. Retrieved from <https://bit.ly/2YEMw2L>

26 Ibid.

27 Current data is available at the database maintained by the Partnership for Public Service and The Washington Post located at <https://wapo.st/3fygtr6>

Number of Senate-confirmed positions without a confirmed appointee in Cabinet-level departments as of Aug. 17, 2020					
	Number of Senate-confirmed positions	Currently vacant positions		Continuously vacant positions under Trump	
		No.	%	No.	%
Agriculture	13	4	31%	1	8%
Commerce	21	9	43	1	5
Defense	59	21	36	0	N/A
Education	16	7	44	2	13
Energy	23	3	13	0	N/A
Health and Human Services	18	3	17	3	17
Homeland Security	17	11	65	2	12
Housing and Urban Development	13	2	15	1	8
Interior	18	5	28	2	11
Justice*	29	16	55	9	31
Labor	14	4	29	2	14
State**	59	24	41	7	12
Transportation	22	10	45	3	14
Treasury	26	9	35	5	19
Veterans Affairs	12	3	25	1	8

\*Does not include United States attorneys and United States marshals \*\*Does not include ambassadors

Note: Data includes full-time, civilian positions that are Senate-confirmed.

Source: The Partnership for Public Service and The Washington Post

**Positions without a Senate-confirmed appointee since the beginning of the Trump administration  
in the Departments of Justice, Interior and State  
Jan. 20, 2017–Aug. 17, 2020**

<b>Vacant Position</b>	<b>Name of Official Performing Duties</b>	<b>Title Given</b>
<b>Department of Justice</b>		
Assistant Attorney General for the Justice Programs Division	Katharine Sullivan	Principal Deputy Assistant Attorney General of the Office of Justice Programs
Assistant Attorney General for the Tax Division	Richard E. Zuckerman	Principal Deputy Assistant Attorney General
Administrator, Drug Enforcement Administration*	Timothy Shea	Acting Administrator
Deputy Administrator, Drug Enforcement Administration	Preston L. Grubbs	Principal Deputy Administrator
Chairman, Foreign Claims Settlement Commission	Vacant	
Chairman, U.S. Parole Commission	Patricia K. Cushwa	Vice Chairman and Acting Chairman
Special Counsel for Immigration-Related Unfair Employment Practices*	Vacant	
Director, Bureau of Alcohol, Tobacco, Firearms and Explosives	Regina Lombardo	Acting Deputy Director
Director, Community Relations Service	Gerri Ratliff	Deputy Director
Director, Office on Violence Against Women	Laura L. Rogers	Acting Director of the U.S. Department of Justice's Office on Violence Against Women
<b>Department of the Interior</b>		
Director, Bureau of Land Management	William Perry Pendley	Deputy Director, Policy and Programs, Bureau of Land Management, Exercising Authority of the Director
Director, National Park Service	David Vela**	Deputy Director, Exercising the Authority of Director for the National Park Service
Special Trustee for American Indians	Jerold Gidner	Acting Special Trustee and Principal Deputy Special Trustee
<b>Department of State</b>		
Chief Financial Officer	Vacant	
Undersecretary for Civilian Security, Democracy and Human Rights	Nathan A. Sales	Acting Undersecretary for Civilian Security, Democracy and Human Rights
Assistant Secretary for Oceans and International, Environmental and Scientific Affairs	Jonathan Moore	Principal Deputy Assistant Secretary
Assistant Secretary for Population, Refugees and Migration	Carol Thompson O'Connell	Acting Assistant Secretary
Assistant Secretary for South Asian Affairs	Dean Thompson	Principal Deputy Assistant Secretary
Coordinator for Threat Reduction Programs	Ryan Taugher	Acting Office Director
Representative of the United States to the Association of Southeast Asian Nations	Melissa A. Brown	Chargé d'Affaires ad interim
Representative of the United States to the Organization for Economic Cooperation and Development	Andrew Haviland	Chargé d'Affaires ad interim and Acting Permanent Representative
Special Envoy for North Korea Human Rights Issues	Vacant	
Alternate Representative of the United States of America for Special Political Affairs in the United Nations, with the Rank of Ambassador	Vacant	

\* Position is exempted from the Federal Vacancies Reform Act of 1998. \*\* Vela announced he will retire in September 2020. He will be replaced by Margaret Everson, principal deputy director of the U.S. Fish and Wildlife Service.<sup>28</sup>

Note: Several of the vacant positions have nominations pending in the Senate as of August 2020.

Source: Partnership for Public Service

28 Benjamin J. Hulac, "Park Service head retires; successor quickly named," Roll Call, Aug. 7, 2020. Retrieved from <https://bit.ly/2DNUjmn>

more than a third of their top positions. Almost two-thirds (65%) of the key positions in the Department of Homeland Security were either vacant or filled with an acting official, as were slightly more than half of the top 29 positions at the Department of Justice, 44% at the Department of Education and 45% at the Department of Transportation.

When a Senate-confirmed position is vacant, who fills in? The answer is that there is no single method for how these leadership positions are filled. Instead, the administration has used a complex array of temporary titles and assumed authority with limited opportunity for public scrutiny.

To demonstrate the various methods used to fill positions, the table above shows examples of the wide array of titles from three of the largest agencies — departments of Interior, State and Justice. The table includes positions that have not had a confirmed official for more than three and a half years — from Trump’s inauguration, Jan. 20, 2017, through Aug. 17, 2020.

For some of these positions, simply identifying the individuals performing the duties is a challenge. Agency websites show a collection of acting officials, principal deputies, acting assistant secretaries and those “exercising authority of the director.” In short, there is no uniform set of titles either within or across the three departments.

In some instances, the Trump administration has temporarily filled a position by clearly labeling an individual as the acting official. For example, at the Department of Justice, Regina Lombardo, a longtime law enforcement official at the Bureau of Alcohol, Tobacco, Firearms and Explosives, has been serving as acting director since October 2019, while the administration has nominated another person to become the permanent director.<sup>29</sup>

By contrast, no one has been appointed to be the acting director of the Community Relations Service within DOJ. The top official there is Gerri Ratliff, the deputy director since January 2017.<sup>30</sup> The agency website refers to Ratliff as the deputy director and does not have an easily identifiable page associated with the director position. The office has become a subject of controversy during the current focus on civil rights and community policing. The Trump administration proposed eliminating the agency and shifting its responsibilities to the Civil Rights Division in each of its budget requests to Congress.<sup>31</sup> Supporters claim the CRS is meant to address the very conflicts

and issues of racism affecting communities around the country.<sup>32</sup>

At the Department of the Interior, the responsibilities of the director of the Bureau of Land Management have been fulfilled since July 2019 by William Perry Pendley, the deputy director of policy and programs. But Pendley does not have the official title of acting director. Instead, the bureau’s website lists Pendley as the deputy director “exercising the authority of the director.”<sup>33</sup> Press reports sometimes incorrectly refer to Pendley as the acting director even though that is not his official title.<sup>34</sup>

At the Department of State, some top officials are listed with yet other titles. For instance, there is no confirmed appointee for the assistant secretary for South Asian affairs. The Department of State’s website does not include a clear reference to that position, but instead lists Dean Thompson as the top official with the title of principal deputy assistant secretary.<sup>35</sup> As for ambassadorial vacancies abroad, the vacancies law does not apply, according to former Undersecretary of State for Management Patrick Kennedy. Someone does not become the “acting ambassador”; one becomes the “chargé d’affaires” in accordance with international diplomatic practice.

The multitude of approaches makes it difficult for Congress, citizens and other interested parties to hold temporary leaders accountable, let alone contact them for critical information or assistance. In order to dig deeper into how the Trump administration has filled high-level vacancies in the absence of Senate-confirmed leaders, the following section provides five examples, highlights the particular circumstances that have contributed to each situation and shows how the vacancy law has been applied or in some cases circumvented.

29 Alex Leary, “Trump to Name President of National Police Officers Group to Lead ATF,” *The Wall Street Journal*, May 24, 2019. Retrieved from <https://on.wsj.com/2Oo3njU>

30 The United States Department of Justice, “Meet the Deputy Director.” Retrieved Aug. 28, 2020, from <https://bit.ly/2Wx5tBR>

31 Gabriel T. Rubin, “Democrats Push to Block Trump-Requested Cuts to Community Policing Programs,” *The Wall Street Journal*, June 5, 2020. Retrieved from <https://on.wsj.com/3eu5zBQ>

32 A.C. Thompson and Robert Faturechi, “How a Key Federal Civil Rights Agency Was Sidelined as Historic Protests Erupted,” *ProPublica*, July 9, 2020. Retrieved from <https://bit.ly/2Wmdo5r>

33 Bureau of Land Management, “Leadership.” Retrieved May 27, 2020, from <https://on.doi.gov/2AhmvMU>

34 Associated Press, “Bureau of Land Management director to continue through April,” April 6, 2020. Retrieved from <https://bit.ly/3cb8wFo>

35 U.S. Department of State, “Bureau of South and Central Asian Affairs.” Retrieved Aug. 26, 2020, from <https://bit.ly/3ek6zb7>

# INSIGHTS AND CASE STUDIES

**Insight 1: There is little downside for an administration to designate a temporary leader in order to sidestep the complicated Senate confirmation process.**

**Case study: Director, National Park Service**

Why does this position lack a Senate-confirmed appointee?

The National Park Service has been without a Senate-confirmed director since the beginning of the Trump presidency. Instead, the administration has given the duties of the job to multiple people on a temporary basis. One recent appointee, Raymond David Vela, had been exercising the authority of the director from October 2019 to September 2020 — much longer than the time allotted for acting officials to serve according to the vacancies law. Vela was nominated in 2018 to become the permanent director and would have been the first Hispanic American to hold the position. But Vela never received a vote from the full Senate. His pending nomination was returned to the president at the end of the 115th Congress, per Senate rules. Instead of renominating him, the administration gave Vela the temporary title and the responsibilities of the job.

The reasons this position has been filled with temporary officials appear to be a combination of timing and priority — not necessarily because of significant opposition or controversy regarding Vela or other nominees. It appears to have been easier for the Trump administration to designate Vela to serve in an acting capacity than to go through the effort to renominate him — and there is relatively little pressure to alter that situation.

Who was filling this position in the absence of a Senate-confirmed leader and what was their title?

Following Vela’s retirement in September, Margaret Everson, the principal deputy director of the U.S. Fish and Wildlife Service, was given the authority of the director position.<sup>36</sup>

<sup>36</sup> Benjamin J. Hulac, “Park Service head retires; successor quickly named,” Roll Call, Aug. 7, 2020. Retrieved from <https://bit.ly/2DNUjmn>

Most recent officials National Park Service Director			
Pres.	Name	Start	End
Obama	Jonathan Jarvis	Oct. 2009	Jan. 2017
Trump	Michael T. Reynolds (acting)	Jan. 2017	Jan. 2018
	Daniel Smith (acting)	Jan. 2018	Sept. 2019
	Raymond David Vela (acting)	Oct. 2019	Sept. 2020
	Margaret Everson (acting)	Sept. 2020	

Background

The job of director had been held by Jonathan Jarvis for seven years until the end of Obama’s term. Michael T. Reynolds, a 34-year veteran of the park service,<sup>37</sup> exercised the authority of the position for the first year of the Trump administration, followed by Daniel Smith, who was named acting director in January 2018. Smith came out of retirement to accept the role after serving as superintendent of Colonial National Historical Park in Virginia for a decade.<sup>38</sup>

While Smith was serving as acting director, the Trump administration formally nominated veteran park service employee Vela to become the full-time director.<sup>39</sup> Vela spent 30 years with the agency and four years as the superintendent of Grand Teton National Park.<sup>40</sup> The Senate Committee on Energy and Natural Resources held a hearing for Vela two months after his September 2018 nomination and reported him favorably to the full

<sup>37</sup> National Park Service, “Mike Reynolds Named NPS Regional Director of Department of the Interior Lower Colorado Basin, Upper Colorado Basin, and Arkansas-Rio Grande-Texas-Gulf Regions,” Oct. 23, 2019. Retrieved from <https://bit.ly/39WohAz>

<sup>38</sup> Miranda Green, “Acting National Park Service director gets new role overseeing 2026 Independence Day celebration,” The Hill, Sept. 30, 2019. Retrieved from <https://bit.ly/3k9qYUg>

<sup>39</sup> Congress.gov, “PN2477 — Raymond David Vela — Department of the Interior.” Retrieved Aug. 28, 2020, from <https://bit.ly/3fptsvg>

<sup>40</sup> Jenni Gritters, “Vela to Serve as Acting Director of the NPS, Effective Immediately,” REI Co-op Journal, Oct. 1, 2019. Retrieved from <https://bit.ly/3dnZJRC>

Senate with little opposition.<sup>41</sup> However, Vela's nomination never received a Senate vote and was returned to the president on Jan. 3, 2019 at the end of the 115th Congress. No public reason was given for why Vela did not receive a vote, although Senate staff suggested Senate Majority Leader Mitch McConnell, R-Ky., could not get bipartisan agreement to include Vela in a package of nominees at the end of the year.

Vela's nomination was not resubmitted to the Senate at the beginning of the new Congress. Although the committee would likely have moved his nomination forward again, Secretary of the Interior David Bernhardt issued an order to have Vela exercise the authority of director to replace Smith on Oct. 1, 2019.<sup>42</sup> Vela was not given the official title of "acting" director even though he was given the authority of that position. Bernhardt's order stated Vela would serve until at least Jan. 3, 2020. Subsequent orders extended Vela's role through at least June 5, 2020.<sup>43</sup> Since then, Vela and other temporary leaders in the Interior Department had their authority extended through a series of (legally questionable) reappointments and succession orders that have been the subject of a lawsuit filed by two environmental groups.<sup>44</sup>

#### Why the lack of a Senate-confirmed official matters

Vela stated he believed his title had little impact on his effectiveness. "For the most part, and as it pertained to the daily operations of the NPS, I felt I did have the authority to do the job," he said. However, Vela added that the agency and its workforce would have benefitted from a Senate-confirmed official at the top. "For the first time in its history, the Park Service didn't have a permanent director ... The NPS workforce as well as our partners and park visitors need to know and have confidence in the direction the agency will follow in a second century of service."

Some advocacy organizations expressed additional dissatisfaction with the lack of a confirmed director. Most of those concerns reflected unhappiness with the process and the disregard for the formal confirmation

role of the Senate, and not opposition to the individual serving in the position.

For example, Theresa Pierno, president and CEO for National Parks Conservation Association, noted her organization supported Vela's nomination, but objected to how he was placed into that role without being renominated. Pierno wrote, "Despite the Trump administration having every opportunity to formally advance a National Park Service director nomination, thousands of National Park Service employees have gone more than two and a half years without an empowered leader. Park superintendents aren't getting support to fulfill their stewardship responsibilities and the public is shut out of one decision after another."<sup>45</sup>

---

41 Rob Hotakainen, "Smith out, Vela in as NPS acting director," E&E News, Sept. 27, 2019. Retrieved from <https://bit.ly/3ceHmhV>

42 National Park Service, "Secretary Bernhardt Announces New National Park Leadership," Sept. 30, 2019. Retrieved from <https://bit.ly/2YV72vV>

43 The Secretary of the Interior, "Order No. 3345 Amendment No. 30," Jan. 2, 2020. Retrieved from <https://on.doi.gov/3cbnHi>; The Secretary of the Interior, "Order No. 3345 Amendment No. 32," May 5, 2020. Retrieved from <https://on.doi.gov/3fAgYRA>

44 Kelsey Tamborrino and Anthony Adragna, "Trump's 'unforced error' puts Western Senate Republicans in an election jam," Politico, July 17, 2020. Retrieved from <https://politi.co/2PueKav>; Public Employees for Environmental Responsibility, "Press Release: Lawsuit Seeks Ouster of Park Service and BLM Leaders," May 11, 2020. Retrieved from <https://bit.ly/3kgEEg5>

---

45 National Parks Conservation Association, "Press Release: Trump Administration Continues to Ignore Park Service Director Nomination," Oct. 1, 2019. Retrieved from <https://bit.ly/2yBiX7y>

## Insight 2: Statutes governing vacancies are difficult to enforce.

### Case Study: Administrator, Drug Enforcement Administration

Why does this position lack a Senate-confirmed appointee?

While the administrator of the Drug Enforcement Administration requires Senate confirmation, the position has been filled by an acting official for eight of the last 12 years.

In the legislative history of the Federal Vacancies Reform Act, the Senate noted that officials in this position were subject to other authority.<sup>46</sup> Both the Obama and Trump administrations agreed, finding that an executive order by President Richard Nixon creating the agency superseded the vacancies law.<sup>47</sup> Under Nixon’s order, a top vacancy can be filled by a Justice Department official chosen by the attorney general for longer than the time period allowed by the vacancies law. The alternative appointment scheme, like the vacancies law, gives the Senate little recourse in forcing a nomination.

Who is filling this position in the absence of a Senate-confirmed leader, and what is the title?

Timothy Shea was named acting administrator in May 2020.<sup>48</sup> He is the fourth-consecutive acting official in that role and replaced Uttam Dhillon, who was the acting administrator for more than two years.

#### Background

The DEA is part of the Department of Justice and has a \$2 billion budget and 5,000 special agents in 68 countries.<sup>49</sup> The agency’s primary role is to enforce laws regarding controlled substances and combat the country’s opioid crisis.

Over the past five years, neither Presidents Obama nor Trump formally nominated anyone to this position. In 2015, Obama replaced confirmed appointee Michele Marie Leonhart with former U.S. Attorney Charles

Most recent officials Drug Enforcement Administration Administrator			
Pres.	Name	Start	End
Bush/ Obama	Michele Marie Leonhart (acting)	Nov. 2007	Dec. 2010
	Michele Marie Leonhart	Dec. 2010	May 2015
Obama/ Trump	Chuck Rosenberg (acting)	May 2015	Oct. 2017
Trump	Robert W. Patterson (acting)	Oct. 2017	June 2018
	Uttam Dhillon (acting)	July 2018	May 2020
	Timothy Shea (acting)	May 2020	Current

Rosenberg in an acting capacity. Rosenberg held that position until resigning in October 2017.<sup>50</sup>

Robert Patterson was the department’s principal deputy administrator and replaced Rosenberg as the acting administrator for nine months beginning in 2017.<sup>51</sup> Patterson served until June 2018 when the Trump administration named Dhillon as acting administrator. Dhillon had played a role in vetting other candidates for the job before accepting the position himself.<sup>52</sup> Shea was named the acting administrator in May 2020 to replace Dhillon.

Why the lack of a Senate-confirmed official matters

The lack of a Senate-confirmed administrator since 2015 has hindered crisis management and long-term planning for the agency. In a January 2018 letter, 10 Democratic senators wrote to the president to urge him to fill positions at DEA, the Office of National Drug Control Policy and other agencies essential to combating opioid abuse.<sup>53</sup> The senators declared, “We appreciate the work of the civil servants who are serving as the acting heads of ONDCP and DEA, but acting leaders cannot enact the

46 “Federal Vacancies Reform Act of 1998,” S. Rep. 105-250, accompanying S. 2176, 105th Congress, 2d Session, 1998.

47 Michael C. Bender, “Trump’s DEA Chief Vetted Candidates and Then Took the Job Himself, Riling Police Groups,” *The Wall Street Journal*, Oct. 25, 2018. Retrieved from <https://on.wsj.com/2zgOFXF>

48 The Drug Enforcement Administration, “Attorney General Barr announces Timothy J. Shea as new Acting Administrator of Drug Enforcement Administration,” May 19, 2020. Retrieved from <https://bit.ly/37B3lhA>

49 The Drug Enforcement Administration, “Staffing and Budget.” Retrieved May 7, 2020, from <https://bit.ly/3du4NnD>; The Drug Enforcement Administration, “Foreign Office Locations.” Retrieved May 7, 2020, from <https://bit.ly/2SMI8uR>

50 Devlin Barrett and Matt Zapotosky, “DEA administrator plans to step down,” *The Washington Post*, Sept. 26, 2017. Retrieved from <https://wapo.st/2A2JhYt>

51 Devlin Barrett, “DEA chief steps down, citing increasing challenges of temporary role,” *The Washington Post*, June 18, 2018. Retrieved from <https://wapo.st/2WEtHKx>

52 Michael C. Bender, “Trump’s DEA Chief Vetted Candidates and Then Took the Job Himself, Riling Police Groups,” *The Wall Street Journal*, Oct. 25, 2018. Retrieved from <https://on.wsj.com/2zgOFXF>

53 Sen. Margaret Wood Hassan et al., *United States Senate*, Jan. 17, 2018. Retrieved from <https://bit.ly/3g62Ijc>

kind of robust response to the ongoing fentanyl, heroin and opioid epidemic that the crisis demands.”

Assistant Attorney General for Administration Lee Lofthus said individuals serving in an acting capacity “need to keep the trains running, but sometimes are limited in the ability to make major changes on their own — not because of any rule precluding them from doing so, but because they may not have sufficient support. A confirmed appointee usually gives more certainty to the workforce, and to external contacts such as Congress.”

In a farewell email to staff, Patterson wrote, “The administrator of the DEA needs to decide and address priorities for years into the future — something which has become increasingly challenging in an acting capacity.”<sup>54</sup>

---

<sup>54</sup> Devlin Barrett, “DEA chief steps down, citing increasing challenges of temporary role,” The Washington Post, June 18, 2018. Retrieved from <https://wapo.st/3ceEyBp>

### Insight 3: Administrations choose to leave some positions unfilled as a reflection of their policies.

#### Case study: Special Envoy for North Korean Human Rights, Department of State

Why does this position lack a Senate-confirmed appointee?

The special envoy for North Korean human rights position has been without a nominee since the beginning of the Trump administration as a matter of policy.

Who is filling this position in the absence of a Senate-confirmed leader and what is their title?

This position has not been filled since President Trump took office in January 2017, although the responsibilities were assumed by the undersecretary for civilian security, democracy and human rights — a position currently filled in an acting capacity by Nathan A. Sales. Sales also serves in the Senate-confirmed role of coordinator for counterterrorism.<sup>55</sup>

#### Background

In 2004, Congress approved the North Korean Human Rights Act and established a special envoy position that would “coordinate and promote efforts to improve respect for the fundamental human rights of the people of North Korea.”<sup>56</sup> The job was filled almost continuously until early 2017.

Since then, the post has remained vacant as the current administration, the Senate and the State Department have debated priorities and approach regarding North Korea.

When the 2004 law expired in mid-2017, Secretary of State Rex Tillerson proposed a restructuring plan that included the removal or reorganization of dozens of special envoys.<sup>57</sup> Tillerson added the duties of the North Korean human rights envoy to those of the undersecretary of state for civilian security, democracy and human rights.

55 U.S. Department of State, “Nathan A. Sales.” Retrieved July 16, 2020, from <https://bit.ly/32uvLri>; U.S. Department of State, “Under Secretary for Civilian Security, Democracy, and Human Rights.” Retrieved July 16, 2020, from <https://bit.ly/30k7kLV>

56 Congress.gov, “H.R.4011 — North Korean Human Rights Act of 2004.” Retrieved Aug. 28, 2020, from <https://bit.ly/2SJNZku>

57 Josh Rogin, “Tillerson scraps full-time North Korean human rights envoy,” *The Washington Post*, Aug. 31, 2017. Retrieved from <https://wapo.st/2SKOPNV>

Most recent officials Department of State Special envoy for North Korean human rights			
Pres.	Name	Start	End
Obama	Robert R. King	Nov. 2009	Jan. 2017
Trump	Vacant*	Jan. 2017	Current

\* The responsibilities of the position have been assumed by the undersecretary of state for civilian security, democracy, and human rights — a position filled by Nathan A. Sales since Sept. 2017.

In August 2018, the Trump administration created a separate new position that does not need Senate confirmation called the special representative to North Korea and appointed Stephen Biegun to the role. In December 2019, Biegun was confirmed to be deputy secretary of state and continued to be involved with North Korean issues along with the other duties associated with that position.

Senators on both sides of the aisle have objected to the reorganization that left the North Korea envoy position vacant. Sen. Marco Rubio, R-Fla., told *The Washington Post*, “We need a dedicated special envoy focused specifically on the North Korean government’s systematic and horrific human rights abuses against its own people.”<sup>58</sup> Sen. Ben Cardin, D-Md., said, “We need to empower the State Department to expose and seek accountability for North Korea’s abusive human rights practices, and I am concerned this proposal [for reorganization of the envoy’s responsibilities] would fall far short of that goal.”<sup>59</sup>

Shortly thereafter, Congress and the president reauthorized the North Korean Human Rights Act, which required that a special envoy would be confirmed in time to submit a report to Congress in January 2019.<sup>60</sup> Nevertheless, as of August 2020, the administration had yet to nominate a special envoy for North Korean human rights or appoint an acting special envoy.

Why the lack of a Senate-confirmed official matters

The impact of not having a Senate-confirmed special envoy for North Korean human rights is in the eye of the beholder. The Trump administration appears to have made a policy decision not to fill the position out of concern such a move might derail diplomatic efforts. However,

58 Ibid.

59 Ibid.

60 Congress.gov, “H.R.2061 — North Korean Human Rights Reauthorization Act of 2017.” Retrieved Aug. 28, 2020, from <https://bit.ly/3fDfmyy>

some experts have called on Trump to appoint an envoy and place more focus on North Korean human rights violations.

“[The special envoy on North Korean human rights] is the central figure for policy and would have direct access to the president in carrying out his or her job to address the atrocious human rights abuses in North Korea,” wrote Victor Cha of the George W. Bush Institute.<sup>61</sup> “The Trump administration should nominate a candidate.”

---

<sup>61</sup> Victor Cha, “Policy Recommendations: North Korean Human Rights Critical to Denuclearization,” George W. Bush Presidential Center, Nov. 26, 2018. Retrieved from <https://bit.ly/3fx3gip>

**Insight 4: The Senate will tolerate, and even cause, extended vacancies in leadership roles to accomplish political objectives.**

**Case Study: Undersecretary of State for Management**

The undersecretary of state for management plays a key role in the operations of the State Department. The job has been filled with a Senate-confirmed official since May 2019, but was without one for the previous 28 months. One of the primary reasons for the lengthy vacancy was because the nomination of the current undersecretary, Brian Bulatao, became a bargaining chip in negotiations between Senate Democrats and the secretary of state regarding a separate issue.

Other reasons contributed to the vacancy. The exit of senior administrative officials at the State Department soon after President Trump’s inauguration created a gap that rarely occurred in previous transitions.<sup>62</sup> In addition, a failed nominee preceded Bulatao at a time when the job was vacant, and this added to the length of time without a Senate-confirmed appointee.

Who was filling this position in the absence of a Senate-confirmed leader?

Prior to Bulatao’s confirmation in May 2019, the position did not have a Senate-confirmed official for the first two years of the Trump administration. From January to June 2017, the position was vacant with no one designated to fill the role. From June 2017 through May 2019, William E. Todd served as the acting undersecretary.

**Background**

In 2017, the National Academy of Public Administration cited the State Department position as one of the toughest management jobs to fill.<sup>63</sup> “Department expertise in security, management, administrative and consular positions in particular are very difficult to replicate and particularly difficult to find in the private sector,” noted David Wade, the chief of staff to former Secretary of State John Kerry.<sup>64</sup>

62 Barbara Plett Usher, “Top U.S. diplomats leave State Department,” BBC News, Jan. 27, 2017. Retrieved from <https://bbc.in/39W8kdU>

63 National Academy of Public Administration, “Prune Book 2017: The 40 Toughest Management Positions in Government.” Retrieved from <https://bit.ly/35I2rP3>

64 Josh Rogin, “The State Department’s entire senior administrative team just resigned,” The Washington Post, Jan. 26, 2017. Retrieved from <https://wapo.st/3ccqVml>

Most recent officials Department of State Undersecretary of state for management			
Pres.	Name	Start	End
Bush/ Obama	Patrick Kennedy	Nov. 2007	Jan. 2017
Trump	Vacant	Jan. 2017	June 2017
	William E. Todd (acting)	June 2017	May 2019
	Brian Bulatao	May 2019	Current

For the first five months of the Trump administration, no one was assigned the duties of the office. At that point, Todd was named the acting undersecretary and served for almost two years, far surpassing the vacancy law’s 210-day limitation.<sup>65</sup> Not only was Todd serving as undersecretary, but for about half of that time he was filling two additional positions concurrently: acting director general of the foreign service/director of human resources, and his official position of deputy undersecretary for management.

The process for getting a confirmed official took several tries. About six months into his presidency, Trump nominated Eric Ueland for the job. Though he was voted on favorably by the Senate Foreign Relations Committee, Ueland never received a full Senate vote and Trump officially withdrew his nomination in June 2018.<sup>66</sup>

Following Ueland’s withdrawal, the administration nominated Bulatao, the former chief operating officer and third ranking official at the CIA. Though Bulatao was well-received by the Senate Foreign Relations Committee, he faced a nearly yearlong wait due to a power struggle between senators and the administration. Sen. Robert Menendez, D-N.J., the ranking member on the committee, held up dozens of State Department nominations due to a host of issues, including the administration’s perceived lack of responsiveness to questions about interactions with foreign leaders and potential political retribution against career State employees.<sup>67</sup> After several months, Secretary of State Mike Pompeo agreed to produce documents and Menendez lifted his hold on the

65 U.S. Department of State, “William E. Todd.” Retrieved June 11, 2020, from <https://bit.ly/3dpI4sF>

66 Congress.gov, “PN1387 – Eric M. Ueland – Department of State.” Retrieved May 7, 2020, from <https://bit.ly/2YJaJ8c>

67 Rachel Oswald, “Menendez, Pompeo Feud Over Diplomatic Nominees,” Roll Call, Oct. 16, 2018. Retrieved from <https://bit.ly/39uVrXY>

nomination in May 2019.<sup>68</sup> Bulatao was confirmed shortly thereafter with a 92-5 senate vote.<sup>69</sup>

Why the lack of a Senate-confirmed official matters

Former Undersecretary of State Patrick Kennedy, who held the position under Presidents George W. Bush and Obama, said the long-term vacancy had a “significant negative impact across the entire management spectrum.” He suspects that a permanent undersecretary would have kept leadership from maintaining a long hiring freeze, which he said damaged the department. A confirmed official also would have been able to point out the effects — like lowered morale and increased wait times for getting passports — to the secretary, Kennedy said.

Kennedy added that the undersecretary’s role is especially crucial now because of constant security threats to embassies around the world. The undersecretary plays a central role in consular services for Americans abroad, such as when American medical volunteers had to be evacuated during the Ebola crisis in Western Africa and more recently during the COVID-19 pandemic.

Retired ambassador Ronald Neumann, who currently heads the American Academy of Diplomacy, considered the undersecretary of state for management vacancy the most important of the many State Department vacancies during the Trump administration.<sup>70</sup>

Since taking office as a Senate-confirmed undersecretary, Bulatao initiated a reform strategy focused on talent management, security infrastructure, technology and other key work streams. He is also overseeing efforts to improve employee diversity and equity and inclusion, a long-standing challenge for the workforce.

---

68 Nick Wadhams and Daniel Flatley, “Menendez Drops Hold on Pompeo Friend for State Department Post,” Bloomberg, May 2, 2019. Retrieved from <https://bloom.bg/3cguTKG>

69 Congress.gov, “PN111 — Brian J. Bulatao — Department of State.” Retrieved May 7, 2020, from <https://bit.ly/3du6D81>

70 Charles S. Clark, “State Department Under Pompeo Still Coping with Vacancies,” Government Executive, Dec. 17, 2018. Retrieved from <https://bit.ly/35ExkUJ>

**Insight 5: Some agencies and bureaus may operate effectively with a seasoned career official in charge.**

**Case Study: Assistant Attorney General, Tax Division, U.S. Department of Justice**

Why does this position lack a Senate-confirmed appointee?

It is unclear why the Justice Department’s assistant attorney general in charge of the Tax Division has not had a Senate-confirmed appointee for nine of the last 11 years. Former DOJ officials and outside observers cited a variety of reasons apart from the rigor of the confirmation process, including the difficulty of finding qualified lawyers with tax law expertise, post-employment restrictions and the effect on one’s career path. Others suggested the Tax Division does not have a high profile and many of the most important tax-related investigations are carried out by other parts of the federal government or local prosecutors. Consequently, placing a Senate-confirmed leader atop the Tax Division may not be a top priority.

Who is filling this position in the absence of a Senate-confirmed leader, and what is their title?

No one is in the role of assistant attorney general. The Tax Division website lists Richard Zuckerman, the principal deputy assistant attorney general, as the top official.<sup>71</sup>

**Background**

The Tax Division and its roughly 370 attorneys are charged with enforcing the nation’s tax laws by supporting IRS investigations and representing the U.S. in tax litigation. In a single year, they process almost 6,700 civil cases and approximately 625 appeals, and authorize between 1,300 and 1,800 criminal tax investigations.<sup>72</sup>

The top position at the Tax Division is the assistant attorney general. A temporary official in this role is not a new phenomenon. The position has been filled by an acting or temporary official for nine of the last 11 years spanning two administrations, including six of Obama’s eight years.

President Trump did not nominate anyone for the job during his first three years. On Feb. 12, 2020, Trump formally nominated Zuckerman, who was the principal deputy assistant attorney general for the division. According to the Justice Department website, Zuckerman

Most recent officials U.S. Department of Justice Assistant attorney general, Tax Division			
Pres.	Name	Start	End
Obama	Kathryn Keneally	April 2012	June 2014
	Tamara W. Ashford (acting)	June 2014	Dec. 2014
	Caroline D. Ciralo* (acting)	Jan. 2015	Jan. 2017
Trump	David Hubbert (acting)	Jan. 2017	Nov. 2017
	Richard Zuckerman (acting)**	Dec. 2017	Current

\*Principal deputy Caroline Ciralo filled the role in an acting capacity from Feb. 2015 through July 2016 when her role expired under the Federal Vacancies Reform Act. From that point, she headed the Tax Division as principal deputy assistant attorney general.

\*\*Zuckerman has been the head of the Tax Division even though he is listed on the website as the principal deputy assistant attorney general. Zuckerman was formally nominated for the assistant attorney general position in Feb. 2020.

Note: Periods of two months or less when there was no clear temporary official are not listed.

is serving as the “head of the Tax Division.”<sup>73</sup> Essentially, Zuckerman has been formally nominated to do the job he is currently doing in a temporary capacity. His nomination was pending as of August 2020<sup>74</sup>

Why the lack of a Senate-confirmed official matters

The impact of this vacancy may be limited. Former officials suggested that an acting leader of the Tax Division — along with the career officials — can accomplish the agency’s goals even without a Senate confirmation. In fact, surveys of government employees show that job satisfaction and engagement for the division have been consistently higher in recent years than scores for the Justice Department as a whole and the entire government.<sup>75</sup> Since the division tends to prosecute mostly low-profile cases, there is little pressure to nominate a permanent official.

Former Deputy Assistant Attorney General of Policy and Planning of the Tax Division Caroline Ciralo,

71 United States Department of Justice, “Tax Division.” Retrieved Aug. 4, 2020, from <https://bit.ly/2XtNrlf>

72 Tax Division, United States Department of Justice, “FY 2019 Congressional Budget.” Retrieved from <https://bit.ly/2SHT64w>

73 The United States Department of Justice, “Deputy Assistant Attorney General.” Retrieved May 7, 2020, from <https://bit.ly/35JhJmL>

74 Congress.gov, “PN1512 — Richard E. Zuckerman — Department of Justice.” Retrieved Aug. 5, 2020, from <https://bit.ly/3icspiY>

75 Partnership for Public Service and Boston Consulting Group, “Best Places to Work in the Federal Government: Tax Division,” 2019. Retrieved from <https://bit.ly/3gd9aEF>

who served in an acting capacity under Obama, said that when she was the acting assistant attorney general, she was not limited. “Serving in an acting capacity doesn’t mean you can’t get a tremendous amount of work done,” Ciruolo told Bloomberg Law.<sup>76</sup> “To the extent there was any hesitation in the acting role, it was out of respect for the pending nominee ... This did not impede our ability to operate the division. It was simply in recognition of my role as acting assistant AG.”

Not everyone agrees. Matt Axelrod, an official in the Obama Justice Department, discussed the broad issue of acting DOJ officials with The Washington Post. While those in acting roles often perform admirably, he said, “Everyone knows they’re temporary, and that means that they don’t have the same heft internally or externally as the Senate-confirmed heads will.”<sup>77</sup>

---

<sup>76</sup> Jacob Rund, “Justice’s No. 3 Slot Is Soon to Be Vacant — Once Again,” Bloomberg Law, May 2, 2019. Retrieved from <https://bit.ly/3ccxSDT>

<sup>77</sup> Matt Zapotosky, “The Justice Department lacks key leaders, and a Republican senator is threatening to keep it that way,” The Washington Post, Jan. 6, 2018. Retrieved from <https://wapo.st/2LxoLBO>

# FACTORS THAT EXPLAIN THE PREVALENCE OF ACTING OFFICIALS AND VACANCIES

It is often difficult to pinpoint specific causes for individual positions, but there are several contributing factors. President Trump's choices and processes are major causes, for example, but they are far from the only reasons that so many vacancies and temporary officials in politically appointed jobs persist across the government.

The following major factors have contributed to vacancies during the Trump administration and, in some instances, prior administrations.

## 1. Senate rules

The Senate bears partial responsibility for the large number of unfilled positions. While the Senate can move quickly with unanimous consent, the complexity of Senate rules and procedures can allow even one senator to slow the pace of nominations even if a nominee faces minimal opposition. With the COVID-19 pandemic, the Senate faces further obstacles that have slowed down the process.

The delay for many nominees is complicated by the Senate requirement that nominations not confirmed or rejected at the end of a session, or when the Senate adjourns or recesses for more than 30 days, are automatically returned to the president.<sup>78</sup> The president must resubmit those individuals for nominees to get another chance for Senate confirmation.

Because of the limited Senate schedule and other priorities, many nominations are returned to the president accordingly, especially at the end of the calendar year and always at the end of a Congress. At the end of the 115th Congress in January 2019, about 300 civilian nominations were returned to Trump while about 85 were returned in January 2020. In some instances, the same people are renominated the following year. But others are not resubmitted and lose their chance at confirmation.

In practice, Senate leaders usually agree on certain priority confirmations as the end of the year approaches. Yet the Senate does not necessarily have the time or interest to vote on all nominees. In some instances, such as

the nomination of Raymond David Vela to be the director of the National Park Service, nominations are returned to the president with no clear reason other than they did not make the list of top Senate priorities as a session comes to an end.

In recent months, Senate activity has been further challenged by the COVID-19 pandemic. Some of the Senate's business has been conducted remotely and only a few hearing rooms — large enough to accommodate social distancing — are available for committee business meetings. The Senate is known for being a deliberative body, but the new issues raised by current health concerns will add to the difficulties in managing the Senate calendar for the foreseeable future.

Even nominees who are uncontroversial, well-qualified and widely supported may endure a long road to confirmation. Because rules and procedures govern how and when the Senate considers nominations, the majority leader spends the chamber's limited time on the positions that matter most, while nominees for other positions wait. Coupled with the rigorous, expensive and time-consuming process of resolving financial conflicts of interest, submitting to a background investigation and answering hundreds of policy questions, some talented people decide that the price of public service is too high.

## 2. Senate polarization

Political polarization, characterized by ongoing stalemates on a wide range of issues, is by many measures the highest it has been in decades. The average Senate confirmation process for presidential appointments took more than twice as long during Trump's first three years (115 days) as it did during President Reagan's time in office (56.4 days).<sup>79</sup>

One of the major reasons the average confirmation time has grown is the increased use of Senate filibusters to delay nominations. Cloture votes, the Senate's procedural motion used to limit debate and overcome filibusters, have increased dramatically as a result of the increased use or threatened use of the filibuster. During

78 Congressional Research Service, "Senate Consideration of Presidential Nominations: Committee and Floor Procedure," RL31980, April 11, 2017. Retrieved from <https://bit.ly/2Q8bxyc>

79 Partnership for Public Service, "Senate Confirmation Process Slows to a Crawl," January 2020. Retrieved from <https://bit.ly/3b2vEFS>

the first terms of Presidents Clinton, George W. Bush and Obama combined, there were only about 30 cloture votes on judicial and executive nominees. However, there were approximately 150 cloture votes on judicial and executive nominees in the first two years of Obama's second term. And in Trump's first two years in office, the Senate also held about 150 cloture votes on such nominees.<sup>80</sup>

In April 2019, the Senate changed the rules related to cloture and cut debate for lower-level nominees from 30 hours to two hours in an attempt to speed up the confirmation process.<sup>81</sup> The change, referred to as the "nuclear option" since it changed longstanding Senate procedures, was adopted mostly along party lines with all but two Republicans in favor and all Democrats opposed.

### 3. Too many Senate-confirmed positions

Congress reduced the overall number of Senate-confirmed positions by about 160 with the passage of the Presidential Appointment Efficiency and Streamlining Act of 2011.<sup>82</sup> However, there are still more than 4,000 presidential appointments to make, with over 1,200 requiring Senate confirmation. The small size of the Office of Presidential Personnel,<sup>83</sup> the limited number of legislative days available in the Senate, partisan delays and the process itself make it impossible for a new president to nominate, and the Senate to confirm, a full complement of appointees early in an administration when the confirmation success rate is historically highest.<sup>84</sup>

### 4. Difficult positions to fill

Some jobs have been vacant for years because they are tough to fill. Many positions require a unique skill set and the most qualified candidates may be in high demand in other sectors. Other positions must be filled according to a unique and lengthy process established in statute.

The director of the Indian Health Service is one such position. Prior to the confirmation of Rear Adm. Michael D. Weahkee in April 2020, the job had not been filled with a Senate-approved official since 2015. The obstacles were numerous: management challenges, low pay

compared with private sector jobs, a difficult selection process and a lack of resources. Furthermore, the Indian Health Service faced funding shortages and accusations of hiding misconduct by physicians.<sup>85</sup> In August 2019, the Department of Health and Human Services Office of Inspector General published a report stating, "IHS is at a crossroads. The agency has had longstanding problems providing consistent high-quality hospital care ... However, to make meaningful and lasting improvements, IHS needs to overcome underlying organizational problems that have hampered its success."<sup>86</sup>

Finding a qualified individual to take on the challenge of improving the agency was a difficult process. One former Trump administration official said HHS contacted nearly a dozen executives who had overhauled large private hospital systems, but none was willing to be considered.<sup>87</sup> The process was further complicated when the previous nominee, Robert Weaver, withdrew his nomination after reports surfaced alleging that he had exaggerated his work experience.<sup>88</sup>

### 5. Recruitment

The opportunity to serve as a presidential appointee is, for many, a career highlight — but it requires personal commitment and sacrifice.<sup>89</sup> When the honor of an appointment collides with the reality of the process, some prospective nominees think twice before moving forward. In many instances, people can earn higher pay in the private sector for a similar job they would have in the federal government. The time and costs associated with going through the vetting and confirmation process can be extensive — nominees may wait months with no guarantee of confirmation, and those with complicated financial holdings often spend tens of thousands of dollars on accounting and legal help completing their paperwork. And for some high-profile roles, the Senate confirmation process has become a risk to their reputation as senators use them as weapons in political warfare.

"The confirmation process must be thorough enough for the Senate to fulfill its constitutional duty, but it should not be so onerous as to deter qualified people from public

80 Partnership for Public Service analysis of data from Congress.gov and Senate.gov; David B. Rivkin Jr. and John Shu, "The Senate's Unprecedented Obstruction," *The Wall Street Journal*, Aug. 2, 2018. Retrieved from <https://on.wsj.com/3cbuAjX>; Drew DeSilver, "Trump's nominees have already faced a large number of cloture votes," Pew Research Center, June 1, 2017. Retrieved from <https://pewrsr.ch/3cbU5BW>

81 Kelsey Snell, "Senate Rewrites Rules to Speed Confirmations for Some Trump Nominees," *National Public Radio*, April 3, 2019. Retrieved from <https://n.pr/2WtXG7I>

82 "Presidential Appointment Efficiency and Streamlining Act of 2011," P.L. 112-166; James Pfiffner, "Smoothing the Peaceful Transfer of Democratic Power," *The White House Transition Project*, 2017. Retrieved from <https://bit.ly/3loPfGg>

83 Congressional Directory, "Cong. Dir. 115th — Executive Branch." Retrieved May 6, 2020, from <https://bit.ly/2YF58Q5>

84 Anne Joseph O'Connell, "Staffing federal agencies: Lessons from 1981-2016," *Brookings Institution*, April 17, 2017. Retrieved from <https://brook.gs/2zlyk3R>

85 Anna Wilde Mathews and Christopher Weaver, "Six CEOs and No Operating Room: The Impossible Job of Fixing the Indian Health Service," *Frontline*, Dec. 10, 2019. Retrieved from <https://to.pbs.org/3hBBsui>

86 U.S. Department of Health and Human Services Office of Inspector General, "Organizational Challenges to Improving Quality of Care in Indian Health Service Hospitals," August 2019. Retrieved from <https://bit.ly/3hJ1f3V>

87 Anna Wilde Mathews and Christopher Weaver, "Six CEOs and No Operating Room: The Impossible Job of Fixing the Indian Health Service," *Frontline*, Dec. 10, 2019. Retrieved from <https://to.pbs.org/3hBBsui>

88 Dan Frosch and Christopher Weaver, "Trump's Nominee for Indian Health Post Withdraws," *The Wall Street Journal*, Feb. 22, 2018. Retrieved from <https://on.wsj.com/2YInjmj>

89 Partnership for Public Service, "Ready to Serve." Retrieved from <https://bit.ly/3aWkmV>

service,” said Sen. Susan Collins, R-Maine, during a 2011 Senate hearing on streamlining the nominations process.<sup>90</sup>

“We drag some unsuspecting citizen through this gauntlet of investigations and questioning,” added Sen. Lamar Alexander, R-Tenn., later that year. “They are very fortunate if they get all the way through without being made to appear a criminal.”<sup>91</sup>

## 6. Presidential preference

President Trump has declared his preference for using “acting” officials. In 2019, he told reporters, “I like acting. It gives me more flexibility.”<sup>92</sup> This approach circumvents the Senate’s advice-and-consent role, enabling the president to appoint, reassign or remove people from specific roles without congressional approval. At times, presidents place individuals in an acting role to serve as an audition to see whether they are worthy of an official nomination. All presidents have found it necessary to use acting officials in certain situations, but the Trump administration has made a conscious choice to use acting officials far more often.

Leaving a position vacant is one strategy for mitigating the highly politicized confirmation process. With so many executive branch nominations to fill and the slow pace of the nomination process, an administration may forgo nominating people for some positions in order to focus valuable yet limited Senate floor time on other priorities. In the case of the Trump administration, this has included judicial nominations, which have generally been prioritized over executive branch nominees.<sup>93</sup>

## 7. Reflection of policy priorities

In some cases, such as the special envoy for North Korean human rights, the preference for the White House is to leave a position unfilled altogether. Congress may create a new position in statute, but it has limited recourse if a president does not nominate anyone to fill it.

Each presidential administration proposes to eliminate, create or consolidate federal agencies or offices. This may reflect an effort to reduce duplication, improve efficiency or emphasize a policy priority. Positions or agencies that are low priority for presidents or proposed for elimination are unlikely to see a nominee. For example, the Trump administration has not filled the Justice Department’s director of the Community Relations Service in large part due to the administration’s desired policy to

consolidate it with other offices within the Department of Justice. This reflects an administration’s goals and governing philosophy. By choosing not to fill a position, an administration can essentially limit the capacity of the entity to function or send a message about its priorities.

## 8. Sequencing

Some vacancies may endure because higher profile, more important vacancies — including at the head of the agency or department — have yet to be filled. For example, the Department of Homeland Security is unlikely to put forth a nominee for deputy secretary when there is also a vacancy in the secretary position. Typically, administrations afford agency leaders an opportunity to participate in selecting their deputies.

## 9. Lack of proper vetting and preparation for candidates

Nominations can fail for many different reasons, and the problem is exacerbated when appointees do not understand the process and potential pitfalls. Nominees must fill out extensive paperwork, disclose their finances and deal with press attention while navigating interactions with Senate committees and outside interests. Many appointees — especially those who are not familiar with the inner workings of the federal government — do not have the knowledge or resources to do so successfully. Mistakes, omissions or delays in paperwork — even when unintentional — can delay and even derail a nomination.

Most administrations do preliminary vetting on prospective nominees before they are formally nominated, and also work with the nominees to ensure that they are prepared for a public service position that may require them to divest from financial holdings to avoid the appearance of a conflict. The Trump administration learned this lesson the hard way, as some of the president’s earliest nominations were announced via Twitter without much of the advance work that would lead to a smoother process. Vincent Viola, for example, was nominated for secretary of the Army on Inauguration Day, but reluctantly withdrew from consideration in early February when it became clear that he could not disentangle himself from his business interests.<sup>94</sup>

When nominees withdraw from consideration, it delays filling important jobs. This issue has been more pronounced under Trump than the previous presidents. By April 2019, slightly more than two years into his term, Trump had withdrawn 40 announced or forwarded nominations for Senate-confirmed positions, 74% more than either Presidents Obama or George W. Bush.<sup>95</sup>

90 “Opening Statement of Senator Collins.” Hearing on “Eliminating the Bottlenecks: Streamlining the Nominations Process,” Senate Committee on Homeland Security and Governmental Affairs, March 2, 2011. Retrieved from <https://bit.ly/33luyoj>

91 Carl Hulse, “Lawmakers Seek to Unclog Road to Confirmation,” *The New York Times*, April 24, 2011. Retrieved from <https://nyti.ms/2Wzzz7v>

92 Amanda Becker, “Trump says acting Cabinet members give him ‘more flexibility,’” *Reuters*, Jan. 6, 2019. Retrieved from <https://reut.rs/2VyaoAY>

93 Cori Petersen and CJ Szafir, “Trump Is Remaking the Federal Judiciary at a Historic Rate,” *RealClearPolitics*, Jan. 4, 2020. Retrieved from <https://bit.ly/31vFSNe>

94 Susanne Craig, “Vincent Viola, Nominee for Army Secretary, Drops Out,” *The New York Times*, Feb. 3, 2017. Retrieved from <https://nyti.ms/3f4nbUr>

95 Heather Ba and Terry Sullivan, “Why does it take so long to confirm Trump’s appointments?” *The Washington Post*, April 24, 2019. Retrieved from <https://wapo.st/39YKbmG>

# RECOMMENDATIONS

Appointees to Senate-confirmed positions fill big, complicated and consequential jobs. Our nation’s founders envisioned a system by which the president and the Senate would work cooperatively to ensure that the American people are served by capable and qualified appointees, but that system is badly broken. How can Congress and the executive branch decrease the reliance on temporary officials in important leadership positions?

## **1. The Senate must reassert its constitutional authority to advise and consent on executive branch nominations.**

Article II, Section 2 of the United States Constitution states that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” In other words, filling senior appointments in the executive branch is a responsibility shared by the president and Senate. The Senate’s advice-and-consent role is a fundamental component of the founders’ vision of a system of checks and balances, a system so successful that the Constitution is the world’s longest surviving written charter of government.<sup>96</sup> The Senate should guard this responsibility closely.

Senators of both parties should defend the Senate’s prerogatives and object vociferously when a president skirts its advice-and-consent authorities.<sup>97</sup> And, as it has in the past, Congress should update the laws under which executive branch officials temporarily may fulfill the duties of the offices subject to Senate confirmation.

In 1998, Senate Democrats joined Republicans to take issue with what they saw as President Clinton’s attempts to circumvent the Senate’s advice-and-consent

role — setting aside partisan solidarity with the sitting president to preserve the institutional role of the Senate. That effort resulted in the Federal Vacancies Reform Act, the law that governs how a president may temporarily fill a position subject to Senate confirmation.

Congress should again update the law to address ambiguities that have arisen since the last update. For example, Congress could:

- Clarify that the vacancies law applies when an official is fired.
- Prevent agency schemes to reshuffle succession orders to circumvent law’s rules.
- Require that an acting inspector general be selected from within the IG community to preserve IG independence.
- 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.
- Mandate timely reporting on vacancies and acting officials.
- Pass legislation 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 position.<sup>98</sup> The 2017 decision reversed bipartisan interpretation of the law since its passage, limits the pool of potential acting officials and can cause unnecessary turnover in a position. For example, when nominated as secretary of defense 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 as a result of the Supreme Court decision — causing unnecessary turnover in the department’s leadership.
- Conduct a bipartisan, bicameral effort to review and update the vacancies law and relevant statutes to ensure that the constitutional role of the Senate is preserved. One effort of note is legislation introduced in May 2020 by Rep. Katie Porter, D-Calif., which would address many of the reforms discussed here.<sup>99</sup>

96 United States Senate, “Constitution of the United States.” Retrieved from <https://bit.ly/2YEVD05>

97 The House of Representatives can be an important ally as well. For example, in 2018, the House Ways and Means Subcommittee on Social Security held a hearing to examine the impact of over five years of acting leadership at the Social Security Administration. (Hearing on “Lacking a Leader: Challenges Facing the SSA After Over Five Years of Acting Commissioners,” House Committee on Ways and Means, March 7, 2018.) In November 2019, two House committee chairs requested that the Government Accountability Office examine the legality of acting officials at the Department of Homeland Security. (U.S. Government Accountability Office, “Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security,” Aug. 14, 2020.)

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

99 “Accountability for Acting Officials Act,” H.R. 6689, 116th Congress, 2020.

## **2. Congress should require more transparency into vacant positions subject to advice and consent.**

The Federal Vacancies Reform Act requires agencies to report to Congress and the Government Accountability Office on vacancies in Senate-confirmed positions and the names of acting officials.<sup>100</sup> Compliance with this reporting requirement is sluggish and spotty. As noted above, Congress could update the vacancies law to require real-time reporting of vacancies and acting officials.

Another way Congress should improve transparency into appointments would be to pass legislation to create a real-time, online “Plum Book,” which is the government’s publication of federal political appointees and top career positions in the civil service. Under current practice, the Plum Book is updated only every four years through a data call to agencies by the Office of Personnel Management. The publication, therefore, provides only a snapshot in time that is out of date by the time it is made public (through publication traditionally done by Congress).

An online resource, updated regularly and easily searchable, would bring increased transparency and accountability to the federal government and let the American people know who is making decisions that affect them as a political appointee or a senior career official. It also would provide valuable information to individuals interested in serving in a political appointment. Congress should also insist on more timely reporting of the identity of acting officials. Bills that would achieve these goals are pending in both the Senate and the House.<sup>101</sup>

## **3. The Senate should reduce the number of presidential appointments subject to Senate confirmation and should revisit the “privileged nominations” process.**

More than 1,200 executive branch positions require confirmation — more than the Senate can consider during the roughly 190 days it is in session each year. Executive branch nominees compete with judicial nominees, leg-

islative priorities and other business for scarce Senate committee and floor time. In 2011, Congress reduced the number of positions that require Senate confirmation, but has since created new ones.<sup>102</sup> Congress and the president should revisit which positions should be subject to Senate confirmation, with the same bipartisan cooperation that resulted in the 2011 reduction.

On a separate track in 2011, the Senate also created the executive calendar, which includes “privileged nominations” for some positions that typically are not controversial, allowing a nominee to bypass committee consideration unless any senator objects. While helpful in speeding confirmation for some nominees, the privileged nominations process still leaves many nominees waiting behind higher-priority nominees — such as nominated judges — before consideration by the full Senate.

## **4. The executive and legislative branches should invest the time, resources and processes necessary to support the nomination and confirmation of well-qualified nominees.**

A president should maintain a well-functioning Office of Presidential Personnel to build a talent pipeline and prepare nominees for public service. Nominees should submit timely, accurate and complete paperwork to the Senate to minimize the delay caused by revisions. Personnel should also be a top priority for presidential transition teams, which should identify and select well-qualified candidates for the most important Senate-confirmed positions before the presidential election. Selecting nominees early, ensuring they are fully vetted and educating them on the confirmation process will increase the likelihood that a president’s nominees are confirmed with bipartisan Senate support.

Congress and the incumbent administration should ensure that agencies responsible for selecting, vetting and processing nominees are prepared for a surge in nominations in the first and fifth years of a presidency. The House Committee on Appropriations passed legislation in July 2020 in support of additional resources for the Office of Government Ethics and the Office of Presidential Personnel to process a high number of nominees during the transition to a first or second term. The Senate should follow suit.<sup>103</sup>

<sup>100</sup> “Reporting of Vacancies,” 5 U.S.C. 3349.

<sup>101</sup> On July 22, 2020, the Senate Committee on Homeland Security and Governmental Affairs favorably reported S. 3896, Periodically Listing Updates to Management Act of 2020 or the PLUM Act of 2020. As originally introduced, the bill (sponsored by Sen. Tom Carper, D-Del.) would have required agencies to update information on positions at least monthly. During the committee business meeting, though, the committee adopted an amendment reducing the frequency of the reporting requirement by requiring an update at least every two years, not monthly. In the House of Representatives, Rep. Carolyn Maloney, D-N.Y., has introduced a bill, H.R. 7107, whose text is identical to S. 3896 as originally introduced and contains the monthly reporting requirement.

<sup>102</sup> Congressional Research Service, “Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations,” RL30959, May 2017. Retrieved from <https://bit.ly/32rk5pf>

<sup>103</sup> “Financial Services and General Government Appropriations Bill, 2021,” H.R. 7768, 116th Congress, 2020. Retrieved from <https://bit.ly/3165HCj>

# CONCLUSION

The use of acting officials to fill vacant Senate-confirmed positions is not a new phenomenon. The Trump administration, though, has taken an unconventional approach to staffing and used more acting officials than previous administrations. While Trump's preference for acting officials and the rate of turnover in his administration are important factors behind many vacancies and temporary officials, these factors alone do not tell the whole story. Many other issues contribute, including the confirmation process, the Senate's use of nominations as a negotiation tool and policy preferences. Some jobs have not been filled for multiple presidencies, while other vacancies may have little impact on the functioning of the government.

Our government works best when it has a full team of capable and committed individuals serving in career positions and political appointments. A long-term reliance on temporary officials without Senate confirmation may hinder long-term planning, erode employee morale and reduce accountability. A presidential administration and Congress share responsibility for filling critical roles, but the current process is fraught with challenges. More can and should be done to ensure that the American people are well-served by a fully staffed and fully accountable government — and to reassert the Senate's constitutional authority to provide advice and consent on senior government appointments.

# METHODOLOGY

The Partnership for Public Service conducted interviews with many public officials, Senate staff and domain experts throughout 2019 and 2020 to complete this report. Information about staffing, appointments and vacancies is current as of Aug. 17, 2020, unless otherwise noted.

To find up-to-date information, refer to the database maintained by the Partnership and The Washington Post. The database tracks more than 700 key positions and shows the number of appointees confirmed by the Senate, the progress of candidates as they go through the nomination and confirmation process, and the jobs for which there is a vacancy and no nominee. The appointee database is located at [wapo.st/2JUQP2](http://wapo.st/2JUQP2)

# PROJECT TEAM

## **PARTNERSHIP FOR PUBLIC SERVICE**

**Bob Cohen**  
Senior Writer and Editor

**Christina Condreay**  
Research Associate

**Troy Cribb**  
Director of Policy

**Samantha Donaldson**  
Vice President, Communications

**Paul Hitlin**  
Senior Research Manager

**Tim Markatos**  
Associate Design Manager

**Audrey Pfund**  
Senior Design and Web Manager

**Monica Scigliano**  
Government Affairs Associate

**Kristine Simmons**  
Vice President, Government Affairs

## **BROOKINGS INSTITUTION**

**Kathryn Dunn Tenpas, PhD**  
Senior Fellow, Miller Center, UVA  
Nonresident Senior Fellow, The Brookings Institution

*Additional thanks to the following Partnership staff for their contributions: Jaqlyn Aldrete, Dan Blair, Katie Bryan, Shannon Carroll, Drew Flanagan, Diane Hill, John Kelley, David Marchick, Loren DeJonge Schulman, Kayla Shanahan, Tina Sung and Alexander Tippet.*



**PARTNERSHIP  
FOR PUBLIC SERVICE**

1100 New York Avenue NW  
Suite 200 East  
Washington, DC 20005

(202) 775-9111  
[ourpublicservice.org](http://ourpublicservice.org)  
CFC# 12110

 [partnershipforpublicservice](https://www.facebook.com/partnershipforpublicservice)

 [@RPublicService](https://twitter.com/RPublicService)

 [rpublicservice](https://www.instagram.com/rpublicservice)