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The U.S. Senate Committee on Homeland Security and Governmental Affairs

Hearing titled  
“Examining the Senate Confirmation Process and Federal Vacancies”

March 3, 2022

*This statement was originally submitted on February 28, before the Senate confirmed two members of the Merit Systems Protection Board on March 1. I have corrected my references to the MSPB to account for these confirmations.*

Chairman Peters, Ranking Member Portman, and members of the Committee: thank you for the opportunity to participate in today's important hearing on agency vacancies and the Senate confirmation process. I am the Adelbert H. Sweet Professor of Law at Stanford University, an appointed senior fellow at the Administrative Conference of the United States (ACUS)—an independent agency dedicated to improving agency procedures—and a contributor to the Center on Regulation and Markets at the Brookings Institution.

I have both a law degree from Yale Law School and a Ph.D. in Political Economy and Government from Harvard University. My research has focused, in part, on political appointments (and the lack thereof) to federal agencies<sup>1</sup> and has been cited by Congress,<sup>2</sup> the Supreme Court,<sup>3</sup> federal courts of appeals,<sup>4</sup> and national media. I was one of the outside experts consulted by the Working Group on Streamlining Paperwork for Executive Nominations, which was established by

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<sup>1</sup> Anne Joseph O'Connell, *End of Year Appointments Press*, BROOKINGS (Dec. 29, 2021), <https://www.brookings.edu/blog/up-front/2021/12/29/end-of-year-appointments-press/> [hereinafter O'Connell, *End of Year Appointments*]; Anne Joseph O'Connell, *The Biden Administration Still Has a Lot of Vacant Positions. It's a Growing Problem*, WASH. POST: THE MONKEY CAGE (Oct. 28, 2021), <https://www.washingtonpost.com/politics/2021/10/28/biden-administration-still-has-lot-vacant-positions-its-growing-problem/>; George A. Krause & Anne Joseph O'Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUD. Q. 527 (2019), <https://onlinelibrary.wiley.com/doi/10.1111/psq.12525>; Anne Joseph O'Connell, *After One Year in Office, Trump's Behind on Staffing but Making Steady Progress*, BROOKINGS (Jan. 23, 2018), <https://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress/> [hereinafter O'Connell, *After One Year in Office*]; Anne Joseph O'Connell, *Trump's Staffing Record in the First 100 Days Was Slow, but Not Catastrophic*, BROOKINGS (May 1, 2017), <https://www.brookings.edu/research/trumps-staffing-record-in-the-first-100-days-was-slow-but-not-catastrophic/>; Anne Joseph O'Connell, *Staffing Federal Agencies: Lessons from 1981-2016*, BROOKINGS (Apr. 17, 2017), <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016/> [O'Connell, *Staffing Federal Agencies*]; George A. Krause & Anne Joseph O'Connell, *Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. POL. SCI. 914 (2016), <https://onlinelibrary.wiley.com/doi/full/10.1111/ajps.12232>; Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645 (2015), <https://dlj.law.duke.edu/article/shortening-agency-and-judicial-vacancies-through-filibuster-reform-an-examination-of-confirmation-rates-and-delays-from-1981-to-2014/>; ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS (2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww_appointments.pdf) [hereinafter O'CONNELL, WAITING FOR LEADERSHIP]; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009), <https://southern.californialawreview.com/2009/07/03/vacant-offices-delays-in-staffing-top-agency-positions-article-by-anne-joseph-oconnell/> [hereinafter O'Connell, *Vacant Offices*]; ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, LET'S GET IT STARTED: WHAT PRESIDENT-ELECT OBAMA CAN LEARN FROM PREVIOUS ADMINISTRATIONS IN MAKING POLITICAL APPOINTMENTS (2009), [https://cdn.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/presidential\\_appointments.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/presidential_appointments.pdf).

<sup>2</sup> My article *Vacant Offices* was cited in the Senate Committee on Homeland Security and Governmental Affairs report on the Presidential Appointment Efficiency and Streamlining Act of 2011. See S. Rep. No. 112-24, at 3-4 (2011) (citing O'Connell, *Vacant Offices*, *supra* note 1).

<sup>3</sup> NLRB v. Noel Canning, 573 U.S. 513, 534 (2014) (citing O'Connell, *Vacant Offices*, *supra* note 1, at 967).

<sup>4</sup> E.g., NRDC v. Perry, 940 F.3d 1072, 1077 (9th Cir. 2019) (citing Anne Joseph O'Connell, *Agency Rulemakings and Political Transitions*, 105 NW. U. L. REV. 471, 529 (2011)); *Lucaj v. FBI*, 852 F.3d 541, 547 (6th Cir. 2017) (citing Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014)).

the Presidential Appointment and Streamlining Act of 2011.<sup>5</sup> I am a proud former federal government employee.<sup>6</sup>

In recent years, I have examined acting officials and delegations of authority during leadership vacancies. I served as the consultant to ACUS for its project, Acting Agency Officials and Delegations of Authority.<sup>7</sup> My work contributed to ACUS Recommendation 2019-7, which called on agencies to provide more information about confirmed and acting leaders to the public.<sup>8</sup> I also wrote a comprehensive article, *Actings*, which was published in the *Columbia Law Review* in April 2020,<sup>9</sup> and have penned shorter pieces on acting leaders and delegations of authority.<sup>10</sup>

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

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The current appointments process for filling key federal agency jobs is not working effectively—not at the White House and not in the Senate. Acting officials and delegations of authority do permit large parts of the government to function, at least on some level, while that process plays out. But, at times, interim leaders and delegation serve as more than stop-gap measures—becoming, as a practical matter, the dominant way of staffing agency leadership

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<sup>5</sup> WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, REPORT TO THE PRESIDENT AND THE CHAIRS AND RANKING MEMBERS OF THE SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENT AFFAIRS AND THE SENATE COMMITTEE ON RULES & ADMINISTRATION 52 (2021), [https://www.oge.gov/Web/OGEnsf/0/018B7C7EC03481F5852585B6005A1306/\\$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf](https://www.oge.gov/Web/OGEnsf/0/018B7C7EC03481F5852585B6005A1306/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf).

<sup>6</sup> I served as an Honors Program attorney at the Department of Justice's Federal Programs Branch from 2001 to 2003, where I received special commendation from the Attorney General for my anti-terrorism work. As a Harry S. Truman Scholar, I briefly served in the Department of Defense (Offices of the General Counsel and Inspector General), the Federal Trade Commission (Bureau of Competition), and the Department of Justice (Office of Legal Counsel). In addition, I worked many summers in high school and college for the U.S. Army at Ft. Belvoir's Research, Development, and Engineering Center.

<sup>7</sup> ANNE JOSEPH O'CONNELL, ADMIN. CONF. OF THE U.S., ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY (2019), <https://www.acus.gov/sites/default/files/documents/final-report-acting-agency-officials-12012019.pdf> [hereinafter O'CONNELL, ACTING AGENCY OFFICIALS].

<sup>8</sup> ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2019-7: ACTING AGENCY OFFICIALS AND DELEGATIONS OF AUTHORITY 6-8 (2019), [https://www.acus.gov/sites/default/files/documents/12122019-adopted-recommendation-post-plenary-actings-dec272019\\_0.pdf](https://www.acus.gov/sites/default/files/documents/12122019-adopted-recommendation-post-plenary-actings-dec272019_0.pdf).

<sup>9</sup> Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020), [https://columbialawreview.org/wp-content/uploads/2020/04/OConnell\\_Actings.pdf](https://columbialawreview.org/wp-content/uploads/2020/04/OConnell_Actings.pdf) [hereinafter O'Connell, *Actings*].

<sup>10</sup> Anne Joseph O'Connell, *Waiting for Confirmed Leaders: President Biden's Actings*, BROOKINGS (Feb. 4, 2021), <https://www.brookings.edu/research/president-bidens-actings/> [hereinafter O'Connell, *Waiting for Confirmed Leaders*]; Anne Joseph O'Connell, *Who's on First at the Department of Homeland Security?*, LAWFARE (Sept. 14, 2020), <https://www.lawfareblog.com/whos-first-department-homeland-security>; Anne Joseph O'Connell, *Watchdogs at Large*, BROOKINGS (Aug. 6, 2020), <https://www.brookings.edu/research/watchdogs-at-large/> [hereinafter O'Connell, *Watchdogs at Large*]; Anne Joseph O'Connell, *Acting Officials and Delegated Authority*, REG. REV. (June 29, 2020), <https://www.theregview.org/2020/06/29/occonnell-acting-officials-delegated-authority/>; Anne Joseph O'Connell, *Trump Fired a Federal Prosecutor Investigating His Allies. Can He Do That?*, WASH. POST: THE MONKEY CAGE (June 25, 2020), <https://www.washingtonpost.com/politics/2020/06/25/trump-fired-federal-prosecutor-investigating-his-allies-can-he-do-that>; Anne Joseph O'Connell, *Acting Leaders: Recent Practices, Consequences, and Reforms*, BROOKINGS (July 22, 2019), <https://www.brookings.edu/research/acting-leaders/>.

positions, and, along the way, often undermining agency performance and political accountability. In addition, some agencies—such as the Merit Systems Protection Board (MSPB), which lacked a quorum from January 2017 to March 2022—are entirely precluded from using acting leaders, meaning that they cannot carry out their statutory obligations while they wait on confirmed board members.

Before turning to plausible, bipartisan reforms, I briefly summarize the scope of vacancies in federal agency leadership positions, focusing on delays by the White House and the Senate. While some delay may be necessary (and even desirable) to find qualified leaders, the norm has fundamentally shifted in recent decades. Some positions never see nominees. And for nominees that make it to the Senate, the process has become longer and more contentious. Unanimous consent votes are gone; recorded votes are up. I also discuss the consequences of these delays—worse agency performance and lower morale of agency workers, the undermining of agency legitimacy and constitutional safeguards, the discouraging effect on potential nominees, and the heavy reliance on acting officials and delegations of authority. Any reform must properly balance the Senate’s constitutional role, the needs of the federal government, and the potential for misuse of temporary leadership measures.

### Scope of Vacancies, Nomination Lags, Confirmation Delays, and Acting Officials

Given the importance of agency leaders, one might think that keeping top jobs in the administrative state filled would be a priority for both the President and Congress. Instead, there are vast gaps in confirmed agency leadership up and down the organization charts. At the 13-month mark (February 19, 2022), for the 799 positions being tracked by the Partnership for Public Service and the *Washington Post*, the Biden Administration had only 292 confirmed leaders (and 190 term appointees or holdovers). Almost 180 nominations were sitting with the Senate, but over 130 jobs lacked a formal or announced nominee.<sup>11</sup>

Vacancies are not unique to the Biden Administration or even to the previous Administration. In a study of most Senate-confirmed jobs at cabinet departments and free-standing executive agencies from 1977 to 2005, I found, on average, between 15% and 25% of positions did not have confirmed or recess appointed leaders.<sup>12</sup> Things have gotten worse since 2005, and both the White House and the Senate are to blame. I first discuss lags in nominations before turning to confirmation delays. I then summarize the use of acting officials in recent Administrations.

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<sup>11</sup> *Biden Political Appointee Tracker*, WASH. POST, <https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/> (last visited Feb. 28, 2022).

<sup>12</sup> O’Connell, *Vacant Offices*, *supra* note 1, at 962, 965. Averaging across another study’s examination of individual jobs, the highest positions at the Departments of Commerce and Health and Human Services lacked confirmed or recess appointees more than 20% of the time in the 1989-2009 period. Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-confirmed Agency Appointees, 1989-2009*, 39 PRESIDENTIAL STUD. Q. 432, 441-442, figs.3 & 4 (2009), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1741-5705.2009.03699.x>. More recently, several researchers, using agency reports of vacancies to the Government Accountability Office (GAO) and other sources, constructed a database of vacancies in 416 Senate-confirmed positions in cabinet departments and single-headed agencies from January 1989 to January 2013. They reported that the positions were vacant for, on average, at least 151 days during a congressional term—generating a 21% vacancy rate. William G. Resh et al., *Who Isn’t Running American Government: Appointee Vacancies in U.S. Executive Agencies*, J. PUB. POL’Y (forthcoming) (manuscript at 26 tbl.1) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3310806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3310806)). Calculating vacancy rates is challenging because there is no publicly available, centrally collected data on the start and end dates of confirmed leaders.

## *Nomination Lags*

According to research by Professor David Lewis and Mark Richardson, the last three completed Administrations (George W. Bush, Barack Obama, and Donald Trump) did not submit a single nomination in their first two years for, on average, nearly 30% of vacant Senate-confirmed agency positions.<sup>13</sup> While President Trump had the worst record, failing to submit a nomination in his first two years for 36% of posts, the figure was over one-quarter for President Obama. President Obama also submitted far fewer agency nominations in his final two years than other recent two-term Presidents.<sup>14</sup>

At the end of December, compared to the past four Administrations, President Biden had submitted fewer agency nominations (counting concurrent nominations separately) than all of his predecessors but President Trump.<sup>15</sup> President George W. Bush, who also had a slow start to transition planning, had submitted about a hundred more agency nominations to the Senate than his successor by the end of 2001.

At the 13-month mark (February 19, 2022),<sup>16</sup> President Biden had submitted 761 separate agency nominations, but around two-thirds of the 149 nominations received since January 3 are renominations (the Senate returned over 100 agency nominations at the start of 2022). By contrast, at that same point in his presidency, President Obama had sent the Senate 715 agency nominations, only four of which were nominations that had been previously returned. President Biden is thus still behind. And President Obama should not be the bellwether for nominations pace.<sup>17</sup>

There are various potential reasons for the current Administration's nomination delays. To begin, it did take three weeks after the election for the General Services Administration to provide crucial resources (including background checks) to the Biden-Harris transition team.<sup>18</sup> Some Administration officials cited this delay as the primary reason for Biden's slow progress on nominations early on in his tenure.<sup>19</sup> But selections were not just three weeks behind. Others pointed to the Presidential Personnel Office (PPO).<sup>20</sup> The Director left in December, lasting longer

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<sup>13</sup> David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRESIDENTIAL STUD. Q. 57, tbl.1 (2021), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/psq.12697>.

<sup>14</sup> O'Connell, *Staffing Federal Agencies*, *supra* note 1.

<sup>15</sup> O'Connell, *End of Year Appointments*, *supra* note 1.

<sup>16</sup> With the wonderful help of the Stanford Law School reference librarians, I am drawing information from the nominations page of Congress's website:

<https://www.congress.gov/search?q=%7B%22source%3A%22nominations%27D>. I am counting only civilian agency nominations (thus I exclude judicial nominations to the Article III courts (but include nominations to non-Article III adjudicative bodies), military nominations, and routine nominations to the Foreign Service (but include career and political ambassadors), the National Oceanic and Atmospheric Administration, and the Public Health Service (but include the Surgeon General)). As the Library of Congress does, I treat concurrent nominations of the same individual separately.

<sup>17</sup> See O'CONNELL, WAITING FOR LEADERSHIP, *supra* note 1, at 2.

<sup>18</sup> P'SHIP FOR PUB. SERV. & BOS. CONSULTING GRP., THE 2020-21 PRESIDENTIAL TRANSITION: LESSONS LEARNED AND RECOMMENDATIONS (2022), <https://presidentialtransition.org/publications/2020-21-lessons-learned/>.

<sup>19</sup> Robbie Gramer, *Officials Blame Election Drama for Biden's Slow Staffing*, FOREIGN POLY (Mar. 11, 2021), <https://foreignpolicy.com/2021/03/11/biden-state-department-foreign-policy-nominations-appointments-republicans-trump/>.

<sup>20</sup> Alex Thompson, *Joe Biden's Head of Personnel Is Eyeing the Exits*, POLITICO: WEST WING PLAYBOOK (July 26, 2021), <https://www.politico.com/newsletters/west-wing-playbook/2021/07/26/cathy-russell-eyes-exit-493717>.

than President Obama’s first PPO Director, who moved on from staffing plum agency jobs to taking one as ambassador to South Africa six months after President Obama took office.<sup>21</sup>

The Biden Administration has made significant strides in diversifying agency leadership—but that takes time.<sup>22</sup> According to research by Kathryn Dunn Tenpas, at the 300-day mark, women made up half of the 140 confirmed appointees to the 15 cabinet departments, and nearly 40% were persons of color.<sup>23</sup> These are marked increases from previous Administrations, including President Obama’s, which itself improved on its predecessors’ records. Finding leaders outside the largely white and male pool of former appointees (the “in-and-outers”) may take longer, as does the processing of vetting potential nominees with limited or no government paper trails.

Finally, the sluggishness in nominations is, in part, the result of the Federal Vacancies Reform Act of 1998 (Vacancies Act) and specific agency succession provisions, along with delegations of authority—all of which provide the White House with an easy alternative to the traditional appointments process. When it began, the Biden Administration smartly filled lower-level positions that did not require Senate confirmation—getting default acting officials in place while the formal appointments process churned. But those acting officials (and, when the Act’s time limits ran out, delegations of authority) made staffing higher-level Senate-confirmed jobs less urgent.

### ***Confirmation Delays and Votes***

Official nominations are just the start of the appointments process. As I have found, over 20% of agency nominations between the start of President Reagan’s Administration and the end of President Obama’s failed to get confirmed, with most being returned by the Senate (nearly one-third of President Obama’s nominations were returned or withdrawn).<sup>24</sup> For those nominations that the Senate *did* confirm (sometimes on the second or third nomination), the confirmation process took two months under President Reagan but increased to four months under President Obama.<sup>25</sup> Returns and delays did not improve under President Trump.

Comparing confirmations, at the end of December, the Senate had approved fewer agency nominees under President Biden than Presidents Clinton, Bush, and Obama. President Biden just beat out President Trump. In percentage terms of submitted nominations, President Biden fell last (just 53% of his agency picks were confirmed by the end of 2021).<sup>26</sup>

Looking again at the 13-month mark of the Biden presidency,<sup>27</sup> the Senate had confirmed 370 agency nominations—241 by voice vote, 129 by recorded vote, and none by unanimous

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<sup>21</sup> O’CONNELL, *WAITING FOR LEADERSHIP*, *supra* note 1, at 16.

<sup>22</sup> Mariel Padilla, *Biden Promised the Most Diverse Administration Ever. Here’s How He’s Doing*, THE 19TH (Apr. 30, 2021), <https://19thnews.org/2021/04/biden-promised-the-most-diverse-administration-ever-heres-how-hes-doing/> (noting the first Black secretary of defense, first woman as secretary of the treasury, the first Native American cabinet secretary, first openly transgender person confirmed by the Senate, among many others).

<sup>23</sup> Kathryn Dunn Tenpas, *Biden’s Confirmations Progress at the 300-day Mark*, BROOKINGS (Nov. 24, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/24/bidens-confirmations-progress-at-the-300-day-mark/>.

<sup>24</sup> O’Connell, *Staffing Federal Agencies*, *supra* note 1.

<sup>25</sup> *Id.*

<sup>26</sup> O’Connell, *End of Year Appointments*, *supra* note 1. Presidents Trump, Obama, Bush, and Clinton saw 60, 69, 66, and 73%, respectively, of their agency nominations confirmed by the end of December of their first years.

<sup>27</sup> *See supra* note 16.

consent. At the same point in President Trump’s term, the Senate had confirmed 348 agency nominations, 266 by voice vote and the remainder by recorded vote. For President Obama, the Senate had confirmed over 100 more nominees than President Biden by the close of month 13—488 nominations, 462 by voice vote and the rest by recorded vote. But the Senate’s performance under President Obama, as with the Obama White House’s performance on nominations, should not be held up as a benchmark. Presidents George H.W. Bush and Clinton had 378 and 194 agency nominations approved by unanimous consent, respectively, in their first year (ending January 19).<sup>28</sup>

A major chokepoint in staffing agency positions at the start of the Biden Administration was the Senate. To be sure, time is scarce for all of us, including the Senate, and agency picks often lost out to legislation and judicial nominees. Indeed, Democrats set records on judicial confirmations to the lower courts last year.<sup>29</sup> The delays in agency confirmations since President Biden took office do not rest entirely, however, on the legislative and judicial priorities of the White House and the Senate. Despite changes to Senate rules in 2013 that decreased the number of votes required to move a nomination to a confirmation vote and in 2019, to cut the length of debate time, other mechanisms remain to draw out the process. While not unique to last year or to Republicans, Republican senators targeted a number of agency picks in 2021.<sup>30</sup>

### ***Acting Officials***

During nomination lags and confirmation delays, acting officials operate as stand-in leaders in many agencies, with the exception of top positions in independent regulatory commissions and boards. Reliable information on acting leaders is very hard to come by for a wide set of Senate-confirmed positions, however. In a 2019 “staffing snapshot” of 301 Senate-confirmed positions in cabinet departments, I determined that confirmed officials filled 64.1% of these positions, while acting leaders sat in 13.3%.<sup>31</sup> The functions of the remaining 22.6% were presumably being carried out through delegation orders, or not at all. Another study by Professor Christina Kinane examined all Senate-confirmed positions in cabinet departments annually from 1977 to 2016: in approximately 11,000 position-year observations, just over 80% were filled by confirmed appointees, nearly 11% were filled by acting officials, and about 9% had no one listed.<sup>32</sup>

Using data I collected on the highest agency positions, under Presidents Obama and George W. Bush, acting cabinet secretaries served (or a complete vacancy existed), as a fraction of the total days of an Administration, 2.7 and 1.6% of the time, respectively. By contrast, in the first three years

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<sup>28</sup> O’Connell, *After One Year in Office*, *supra* note 1.

<sup>29</sup> O’Connell, *End of Year Appointments*, *supra* note 1.

<sup>30</sup> Michael Crowley, *Empty Desks at the State Department, Courtesy of Ted Cruz*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/10/02/us/politics/senate-confirmation-cruz-nominations.html>; Morgan Keith, *Sen. Tom Cotton Refused to Confirm U.S. Attorney Nominees in Blue States Until Sen. Dick Durbin Apologized for Interrupting Him 9 Months Ago*, BUS. INSIDER (Dec. 12, 2021), <https://www.businessinsider.com/tom-cotton-confirm-us-attorney-nominees-dick-durbin-interrupted-2021-12>; Kevin Freking, *Sluggish Pace of Confirmations Vexes Biden White House*, ASSOCIATED PRESS (Oct. 24, 2021), <https://apnews.com/article/joe-biden-donald-trump-barack-obama-ted-cruz-george-w-bush-ec0045ca948d4c2862e9c9a855631b51>.

<sup>31</sup> O’Connell, *Actings*, *supra* note 9, at 655.

<sup>32</sup> Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599, 606 (2021), <https://www.cambridge.org/core/journals/american-political-science-review/article/control-without-confirmation-the-politics-of-vacancies-in-presidential-appointments/0993030400C450B424D8284CF780B1F3>.

of the Trump Administration, acting secretaries served for 9.9% of the days.<sup>33</sup> President Trump, for example, had no confirmed secretary of homeland security after he pushed out Kirstjen Nielsen in April 2019 through to the end of his term.

The leadership of the Environmental Protection Agency (EPA) (its two highest positions and general counsel) is illustrative. Until President Trump took office, the EPA's head was much more likely to be a confirmed official than an acting one. Under Presidents George W. Bush and Obama, acting administrators served for just 8.1% and 5.5%, respectively, of their Administrations. Under President Trump, however, an acting EPA administrator led the agency for slightly under one quarter of his first three years. Acting deputy administrators cumulatively served for 14.9% and 41.9% of the Bush and Obama Administrations, respectively, including a recess appointment under President Bush, and for a staggering 66% of the time that the position was occupied under President Trump. Acting general counsels accounted for about one-third of the time that the job was staffed under Presidents Bush and Trump (and 14.2% under President Obama).<sup>34</sup>

Nor have acting Federal Aviation Administration (FAA) administrators served significantly shorter stints, on average, outside of President Reagan's Administration. Since President George H.W. Bush held office, acting FAA administrators have led the agency for at least 16% of the time in each administration (including 53.2% of the first three years of the Trump Administration).<sup>35</sup>

In sum, President Trump's expressed adoration of acting leaders<sup>36</sup> named what had been previously unspoken: modern Presidents have relied heavily on acting officials.

### **Consequences of Vacancies and Delays in the Appointments Process**

Vacancies in federal agency leadership, particularly if frequent and lengthy, have detrimental consequences for our government. Vacancies contribute to agency inaction (especially in agencies where acting officials are not permitted), foster confusion and lower morale among nonpolitical employees, and undermine both agency legitimacy and constitutional safeguards. Appointment and confirmation delays also deter potential nominees from pursuing government service at the highest levels. In many agencies, acting officials and delegations of authority can help fill gaps, but not without exacting costs of their own.

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<sup>33</sup> O'Connell, *Actings*, *supra* note 9, at 646. Only the Department of Commerce lacked any kind of secretary during the relevant time period, because President Obama had not formally submitted his nomination of Penny Pritzker when the Vacancies Act's time limit expired in 2013. For information on variation by agency and the type of acting official (first assistant, other confirmed official, nonconfirmed political official, nonconfirmed career official), see *id.* at 644 tbl.2, 648 tbl.5. For historical comparisons (1789-2005), see O'CONNELL, ACTING AGENCY OFFICIALS, *supra* note 7, at 25-27 (noting, among other items, that in 1841, all but one member of President Tyler's Cabinet resigned in protest, which contributed to his need to rely on many acting officials, and that President Madison also had considerable difficulties with his Cabinet, given political and geographic conflict, contributing to turnover and use of interim leaders).

<sup>34</sup> O'Connell, *Actings*, *supra* note 9, at 651.

<sup>35</sup> *Id.* at 653.

<sup>36</sup> John T. Bennett, *Frustrated by 'My Generals,' Trump Turns to 'My Actings,'* ROLL CALL (Jan. 14, 2019), <https://www.rollcall.com/news/whitehouse/frustrated-generals-trump-turns-actings>. Early in his Administration, President Trump claimed that "in many cases, we don't want to fill [Senate-confirmed] jobs." Cody Derespina, *Trump: No Plans to Fill 'Unnecessary' Appointed Positions*, FOX NEWS (Feb. 28, 2017), <https://www.foxnews.com/politics/trump-no-plans-to-fill-unnecessary-appointed-positions>.



## *Agency Performance*

Without confirmed leaders, agencies act more slowly, in normal times and in crises. For example, in the first year of a new Administration as top teams get selected and approved, we see fewer rulemakings (which can include deregulatory actions).<sup>37</sup> Even when there are acting leaders in place, such officials often lack sufficient stature and buy-in from permanent staff to effectively implement significant new programs or regulations.<sup>38</sup> And sometimes vacancies can even prevent agencies from doing their jobs at all. The MSPB, for example, had been practically unable to function from January 2017, when it lost its quorum, to March 2022, when the Senate confirmed two members.<sup>39</sup> Before the confirmations, its backlog stood at around 3,600 cases involving, among other matters, challenges to disciplinary actions against federal workers, including whistleblowers.<sup>40</sup>

As for emergencies, the 9/11 Commission criticized vacancies in intelligence agencies as especially dangerous to national security.<sup>41</sup> More recently, experts have noted that while vacancies “wouldn’t prevent the federal government from responding to a terrorist threat, . . . [t]he real problems come later, when the administration has to readjust strategy to deal with the threat . . . .”<sup>42</sup> Out of 41 government failures when agencies did not “design and deliver effective public policy” (as identified by news stories) between 2001 and 2014, Professor Paul Light determined that “vacancies and delays” in confirmed leadership contributed to eight.<sup>43</sup>

Russia and Ukraine are now at war. Since President Trump’s 2019 removal of Marie Yovanovitch, who later became a central figure in his first impeachment trial, there has not been a confirmed U.S. Ambassador to Ukraine. There has not even been a formal nominee, though the Executive Branch did send a name one year into the Biden Administration for “customary review and approval of the host government.”<sup>44</sup> In the prelude to war, having a confirmed ambassador may have lessened the conflict between Ukrainian and American “talking points” on the situation, among other actions. Although the current *chargé d’affaires* (a senior foreign service officer charged with temporarily taking the place of an ambassador) is “highly regarded,” she “lacks the stature of a White House-appointed and Senate-confirmed emissary.”<sup>45</sup>

Vacancies also foster unhappiness among career employees who lack adequate direction. Nonpolitical employees make up almost the entire federal workforce, save for the several thousand

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<sup>37</sup> O’Connell, *Vacant Offices*, *supra* note 1, at 939.

<sup>38</sup> BOB COHEN, P’SHP FOR PUB. SERV., THE REPLACEMENTS: WHY AND HOW “ACTING” OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE 3-4 (2020), <https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf>.

<sup>39</sup> See Stephanie Rapp-Tully, *Five Years Without a Quorum: Revisiting the Record-setting Case Backlog at the MSPB*, FEDWEEK LEGAL (Feb. 17, 2022), <https://www.fedweek.com/fedweek-legal/five-years-without-a-quorum-revisiting-the-record-setting-case-backlog-at-the-mspb/>. President Biden submitted three nominees in his first year. Two were held over into 2022 (and then confirmed); the third, Cathy Harris, was renominated in January.

<sup>40</sup> *Id.*

<sup>41</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON U.S., THE 9/11 COMMISSION REPORT 198, 422-23 (2004).

<sup>42</sup> Andrew Restuccia, *Trump’s Sluggish Hiring Could Hamper Anti-Terror Plans*, POLITICO (June 4, 2017), <https://www.politico.com/story/2017/06/04/trump-london-terror-hiring-239120>.

<sup>43</sup> PAUL C. LIGHT, BROOKINGS INST., A CASCADE OF FAILURES: WHY GOVERNMENT FAILS, AND HOW TO STOP IT 16-19 (2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Light\\_Cascade-of-Failures\\_Why-Govt-Fails.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Light_Cascade-of-Failures_Why-Govt-Fails.pdf).

<sup>44</sup> Michael Crowley, *Puzzle in Ukraine Crisis: Where’s the U.S. Ambassador?*, N.Y. TIMES (Feb. 11, 2022), <https://www.nytimes.com/2022/02/11/us/politics/ukraine-ambassador-biden.html>.

<sup>45</sup> *Id.*

slots reserved for political appointees. In ranking the best places to work in the federal government based on an extensive survey of government workers, the Partnership for Public Service has tied a lack of “committed leaders” to “static or declining employee engagement” within an agency.<sup>46</sup> As Light explains: “The resulting decapitation of agencies [from vacancies] often leaves career executives without direction, direction that they both need and want.”<sup>47</sup> Low morale and uncertainty can further contribute to agency inaction and poor performance.<sup>48</sup>

Although this hearing focuses on vacancies in Senate-confirmed positions, the effects of those vacancies are magnified when they are combined with hiring freezes for lower-level agency employees. The 2011 Budget Control Act placed yearly limits on discretionary defense and nondefense spending through FY 2021.<sup>49</sup> The Act enforced these caps through sequestration (that is, automatic spending cuts).<sup>50</sup> Sequestration, which drove downsizing and froze hiring in some entities, is likewise linked to lower agency morale.<sup>51</sup> These measures also hurt agency performance. According to the *Wall Street Journal*, between 2010 and 2020, the Internal Revenue Service’s (IRS) workforce dropped 15%, “including thousands [of employees] who pursued tax avoidance and answered taxpayers’ queries.”<sup>52</sup> The agency now “opens about half as many criminal investigations as in 2010. In fiscal 2019, the percentage of individuals audited reached its lowest level in at least 40 years.”<sup>53</sup> In that same decade, there was an acting head of the IRS for about 17 months, close to 15% of the time.<sup>54</sup>

### ***Nominee Pool***

In the face of a dysfunctional appointments process, talented individuals may turn down the White House’s invitation to consider serving in important agency positions. Surveys of elites in the private sector indicate that potential nominees are leery of the confirmation process.<sup>55</sup> This leads to little “new blood” in the government.<sup>56</sup> Looking at the first year of Administrations from President

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<sup>46</sup> P’SHP FOR PUB. SERV. & BOS. CONSULTING GRP., *THE BEST PLACES TO WORK IN THE FEDERAL GOVERNMENT* 3 (2018), [https://bestplacestowork.org/wp-content/uploads/sites/11/2021/04/BPTW18\\_brochure.pdf-page=3](https://bestplacestowork.org/wp-content/uploads/sites/11/2021/04/BPTW18_brochure.pdf-page=3).

<sup>47</sup> PAUL C. LIGHT, *THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY* 69 (1995).

<sup>48</sup> David Lewis, *Trump’s Slow Pace of Appointments is Hurting Government—and His Own Agenda*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/six-months-into-his-presidency-trump-continues-to-be-exceptionally-slow-at-appointing-officials-heres-why-that-matters/>.

<sup>49</sup> Budget Control Act of 2011, Pub. L. No. 112-25, 12 Stat. 240 (codified as amended in scattered sections of 2 U.S.C., 20 U.S.C., 31 U.S.C., 42 U.S.C., and 43 U.S.C.).

<sup>50</sup> CONG. RSCH. SERV., R44874, *THE BUDGET CONTROL ACT: FREQUENTLY ASKED QUESTIONS* 1 (Oct. 1, 2019), <https://sgp.fas.org/crs/misc/R44874.pdf>.

<sup>51</sup> P’SHP FOR PUB. SERV., *GOVERNMENT DISSERVICE: OVERCOMING WASHINGTON DYSFUNCTION TO IMPROVE CONGRESSIONAL STEWARDSHIP OF THE EXECUTIVE BRANCH* 21 (2015), <https://ourpublicservice.org/wp-content/uploads/2019/02/Government-Disservice.pdf>.

<sup>52</sup> Richard Rubin, *Biden’s Big Agenda Relies on a Shrunken, Strained Agency: The IRS*, WALL ST. J. (Apr. 20, 2021), <https://www.wsj.com/articles/biden-agenda-relies-on-shrunken-strained-irs-11618928830>.

<sup>53</sup> *Id.*

<sup>54</sup> *Previous IRS Commissioners*, IRS, <https://www.irs.gov/newsroom/previous-irs-commissioners> (last updated Feb. 24, 2022).

<sup>55</sup> PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., *POSTS OF HONOR: HOW AMERICA’S CORPORATE AND CIVIC LEADERS VIEW PRESIDENTIAL APPOINTMENTS* 10 (2001), <https://www.brookings.edu/research/posts-of-honor-how-americas-corporate-and-civic-leaders-view-presidential-appointments/>.

<sup>56</sup> See G. Calvin Mackenzie, *Hung Out to Dry*, WASH. POST (Apr. 1, 2001), <https://www.washingtonpost.com/archive/opinions/2001/04/01/hung-out-to-dry/49cc11bd-a11e-4493-9cd0-a15dd6672e5b/> (claiming that “our government is now largely run by a governing class”).

George H.W. Bush to Trump, the percentage of all agency nominees who hailed from Washington, D.C., Virginia, or Maryland ranged from 23.2% (Clinton) to 38.9% (George H.W. Bush).<sup>57</sup> Such individuals are more likely to have government work experience. Instead of top officials being drawn from a wide range of states and career paths (and potentially returning to those jobs after their government service ends), Presidents may be increasingly relying on a D.C. elite that cycles in and out of appointed positions and private and think tank jobs inside the Beltway.

Individuals who agree to be nominated may also be affected by the appointments process. Some withdraw, such as Anthony Lake who was nominated to head the CIA by President Clinton.<sup>58</sup> Many who are not confirmed understandably harbor resentment. And even those who are confirmed to agency posts may be less willing to engage cooperatively with Congress in their positions or to go through the process again.<sup>59</sup> As Department of Health and Human Services Secretary Tommy Thompson explained in a 2001 interview: “It’s not a partisan thing . . . it’s just a terrible ordeal, and good people, especially in the future, are just going to say—I’d never go through it again.”<sup>60</sup>

Even nominees to lower-level positions face hardships and uncertainty. Imagine getting nominated in the middle of a President’s first year. In addition to having filled out considerable paperwork and undergone background checks, depending on your profession, you may also have to stop engaging in profitable activities while you wait to be confirmed.<sup>61</sup> You may wait months for a confirmation hearing—and then you may wait months after your hearing is over. If your nomination gets returned at the end of the year because a vote was not scheduled and one Senator objected to holding it over, in order to be re-nominated by the White House, you will have to update much of your original paperwork, which can get especially complicated if you have particular investments. And then you will wait some more.

### ***Acting Officials***

Under the Vacancies Act and specific agency succession provisions, acting officials can help fill positions at cabinet departments and executive agencies (but typically not at independent regulatory commissions and boards). But many think of acting leaders as “substitute teachers,” who lack the necessary authority in a classroom (or agency).<sup>62</sup> Even though they have the same formal authority as confirmed leaders, acting officials are less able to wield it because they get less buy-in from the employees who work beneath them, relevant congressional committees, and the public.

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<sup>57</sup> O’Connell, *After One Year in Office*, *supra* note 1.

<sup>58</sup> Mackenzie, *supra* note 56 (quoting Lake as describing the confirmation process as “nasty and brutish without being short”).

<sup>59</sup> See LIGHT & THOMAS, *supra* note 55, at 4, 10-11 (finding through a survey that “confusion and embarrassment are . . . increasing”).

<sup>60</sup> *Government in Molasses*, WASH. POST (June 12, 2001), <https://www.washingtonpost.com/archive/opinions/2001/06/12/government-in-molasses/799ba283-1ab9-4daa-bb32-ee750783d5dc/>.

<sup>61</sup> See U.S. OFF. OF GOV’T ETHICS, NOMINEE GUIDE 11, [https://www.oge.gov/web/OGE.nsf/0/77E34818F9A59979852585B6005A24BB/\\$FILE/Guide for Nominees 2020 accessible.pdf](https://www.oge.gov/web/OGE.nsf/0/77E34818F9A59979852585B6005A24BB/$FILE/Guide%20for%20Nominees%202020%20accessible.pdf) (last visited Feb. 28, 2022) (detailing “common actions nominees should take to mitigate potential conflicts of interest,” including “resign[ing] from all paid positions and most unpaid positions”).

<sup>62</sup> Russell Berman, *President Trump’s ‘Substitute Teacher’ Problem*, ATLANTIC (Apr. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/04/president-trumps-substitute-teacher-problem/523101>.

In addition, decisions made by acting leaders may face increased legal risks. Some legal challenges are constitutional—namely, whether non-Senate-confirmed officials can temporarily serve in top agency positions.<sup>63</sup> This is not a trivial matter: President Biden entered the White House with thirteen acting cabinet secretaries who had not been confirmed to another post, while President Donald Trump had nine such officials on his first day.<sup>64</sup> Since President Biden fired Andrew Saul as head of the Social Security Administration, Kilolo Kijakazi has been serving as the acting Commissioner, arguably a principal office under the Appointments Clause.<sup>65</sup> In addition to acting Commissioner, Kijakazi is the Deputy Commissioner for Retirement and Disability Policy—an unconfirmed job. While all the lower courts to rule on the question found, correctly in my view, Matthew Whitaker’s service as acting Attorney General under President Trump constitutional,<sup>66</sup> questions persist because those courts relied on a Supreme Court case from 1898 that seems to be in tension with more recent decisions.<sup>67</sup>

Other legal questions are statutory. Among the disputes, there is controversy over whether agencies can name first assistants (who are default acting leaders under the Vacancies Act) after a vacancy occurs.<sup>68</sup>

### ***Consequences in Context***

Some delay is necessary, even good; it takes time to find compelling, qualified leaders and to properly vet them. We should all want competent, talented, and ethical leaders managing federal agencies, but federal agencies also need to operate in the meantime.

In addition to their potentially uncertain legal footing and the effect they can have on agency morale, acting leaders have been critiqued as especially political unaccountable. While acting officials often possess the stability, knowledge, and management experience necessary for their positions, a common criticism is that they are unqualified because they have not been vetted by the Senate.<sup>69</sup> Consider ambassadorial posts: The State Department’s foreign service officers who step in to

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<sup>63</sup> O’Connell, *Actings*, *supra* note 9, at 658-67.

<sup>64</sup> O’Connell, *Waiting for Confirmed Leaders*, *supra* note 10.

<sup>65</sup> *Acting Commissioner: Dr. Kilolo Kijakazi*, SOCIAL SECURITY, <https://www.ssa.gov/agency/commissioner/> (last visited Feb. 28, 2022).

<sup>66</sup> O’Connell, *Actings*, *supra* note 9, at 665 n.255.

<sup>67</sup> Thomas A. Berry, *Are 13 Current Cabinet Members Unconstitutional?*, CATO INSTITUTE: CATO AT LIBERTY (Jan. 21, 2021), <https://www.cato.org/blog/are-13-current-cabinet-members-unconstitutional>. The Court did recently cite that 1898 case favorably. *See* *United States v. Arthrex*, 141 S. Ct. 1970, 1985 (2021) (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)). For more on my views on this legal issue, see O’Connell, *Actings*, *supra* note 9, at 660-66.

<sup>68</sup> O’Connell, *Actings*, *supra* note 9, at 675-79. The Vacancies Act specifies that “the first assistant to the office of [the officer who left] shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of [the Act].” 5 U.S.C. § 3345(a)(1). The Act does not define first assistant or clearly specify the timing of the staffing of the first assistant position. *See id.* § 3345(a)–(b). The Office of Legal Counsel initially believed that first assistants had to be in place before the vacancy but changed its mind two years later. O’Connell, *supra*, at 676. In the litigation over Ken Cuccinelli as the Principal Deputy Director of U.S. Citizenship and Immigration Services during the Trump Administration, the district court found his service as acting Director invalid because the new principal deputy position was not a legitimate first assistant role in 2019, but did not rule on whether the Vacancies Act permitted a first assistant to be named after a vacancy occurred. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 15-16 (D.D.C. 2020).

<sup>69</sup> In certain contexts, acting officials may also promote Senate authority. To start, having acting leaders allows the Senate to spend more time vetting official nominees. Additionally, acting leaders may provide the Senate more choices—if the Senate dislikes the formal nominee, it can sit on the nomination and let the acting official continue to serve. The Senate may also prefer that the White House take more time if that additional time might yield a better nominee.

temporarily run embassies almost certainly know more than political appointees selected as a result of their campaign contributions.<sup>70</sup> Similarly, the first assistants—the default for acting service under the Vacancies Act—for many agency positions are drawn from the relevant organization’s senior nonpartisan ranks.<sup>71</sup>

The conventional dislike of acting officials sits in some tension with repeated calls for cuts to the number of agency positions requiring Senate confirmation. In some sense, the frequent use of acting officials—at least in lower-level positions—functionally accomplishes what Congress often fails to do formally. But commentators rarely think about acting officials in that light.

## Potential Bipartisan Reforms

The appointments process for federal agencies is not working well. Improvements need to both respect the political branches’ constitutional roles and permit federal agencies to function. I propose five sets of reforms that should be attractive to both parties: (1) decreasing the number of Senate-confirmed positions, (2) streamlining the vetting of nominees, (3) speeding up the Senate process for certain nominations, (4) incentivizing quicker nominations from the White House, *and* (5) providing greater transparency around agency staffing.

### *Cutting Senate-Confirmed Positions*

The most significant action Congress could take to improve vacancies is to cut the number of Senate-confirmed jobs—a move supported by good government organizations and commentators.<sup>72</sup> Instead of allowing the White House to choose which positions should be staffed with acting officials (and later through delegations of authority when the Vacancies Act’s time limits expire), functionally eliminating confirmation, Congress should assert its constitutional role under the Appointments Clause and make these important decisions in a deliberate fashion.

The number of Senate-confirmed positions has remained relatively stable across recent Administrations, despite Congress eliminating confirmation for about 170 positions under the

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<sup>70</sup> See Ryan M. Scoville, *Unqualified Ambassadors*, 69 DUKE L.J. 71, 118-40 (2019) (contrasting the language skills, regional experience, foreign policy experience, and organizational leadership skills of political-appointee ambassadors and confirmed ambassadors drawn from the government’s “professional diplomatic corps”), <https://dlj.law.duke.edu/article/unqualified-ambassadors-scoville-vol69-iss1/>.

<sup>71</sup> A GAO survey of acting inspectors general (IGs) found that all but one believed “having an acting IG had no impact on the OIG’s [Office of Inspector General] ability to plan and conduct work.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-270, INSPECTORS GENERAL: INFORMATION ON VACANCIES AND IG COMMUNITY VIEWS ON THEIR IMPACT 17 (2018), <https://www.gao.gov/assets/700/690855.pdf>. Almost one-quarter of employees, however, contended there was a negative impact. *Id.* The GAO also found that employees generally liked internal acting IGs. *Id.* at 19, 31. Interestingly, nearly half of the acting IGs thought their temporary status had a negative effect on employee management. *Id.* at 21.

<sup>72</sup> See, e.g., 2 NAT’L TASK FORCE ON RULE OF LAW & DEMOCRACY, PROPOSALS FOR REFORM 20 (2019), [https://www.brennancenter.org/sites/default/files/2019-09/2019\\_10\\_TaskForceII\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForceII_0.pdf) (Proposal 8); P’SHIP FOR PUB. SERV., UNCONFIRMED: WHY REDUCING THE NUMBER OF SENATE-CONFIRMED POSITIONS CAN MAKE GOVERNMENT MORE EFFECTIVE (2021), [https://presidentialtransition.org/publications/unconfirmed-reducing-number-senate-confirmed-positions/?\\_ga=2.34096546.2006254104.1645908200-1297994127.1621886461](https://presidentialtransition.org/publications/unconfirmed-reducing-number-senate-confirmed-positions/?_ga=2.34096546.2006254104.1645908200-1297994127.1621886461); O’Connell, *End of Year Appointments*, *supra* note 1; Editorial, *The U.S. Doesn’t Need So Many Political Appointees*, WASH. POST. (Oct. 5, 2021), [https://www.washingtonpost.com/business/the-us-doesnt-need-so-many-political-appointees/2021/10/05/a943e370-25dd-11ec-8739-5cb6aba30a30\\_story.html](https://www.washingtonpost.com/business/the-us-doesnt-need-so-many-political-appointees/2021/10/05/a943e370-25dd-11ec-8739-5cb6aba30a30_story.html).

Presidential Appointment Efficiency and Streamlining Act of 2011, enacted in 2012.<sup>73</sup> After correcting for errors in the Plum Book, Lewis and Richardson determined that, at the start of last three completed Administrations (Bush, Obama, and Trump), there were 1,358; 1,416; and 1,317 Senate-confirmed positions, respectively.<sup>74</sup>

The easiest place to cut the requirement of Senate confirmation is likely for part-time positions. According to the Working Group on Streamlining Paperwork for Executive Nominations, approximately 30% of the Senate-confirmed positions that remained after the 2012 Act require under 60 days of service a year.<sup>75</sup> In the big batch of confirmations pushed through in mid-December 2021, the Senate approved seven nominees to various boards of directors, endowments, and councils, including two to the board of directors of the Barry Goldwater Scholarship and Excellence in Education Foundation and two to the board of directors of the Corporation for National and Community Service.<sup>76</sup>

But many of these boards and councils almost certainly do not need Senate-confirmed leaders (they could, for example, be moved into cabinet departments where the secretary picks members without Senate involvement to meet any Appointments Clause concerns). Looking back to last December, it would have been better to confirm seven pending nominees to more critical agency positions, such as the IG of the Department of Health and Human Services, the State Department's legal advisor, and various assistant secretary spots across the cabinet departments.

The next place to look would be positions that have not received nominees in the first half of a presidential term in both recent Democratic and Republican Administrations. Some of those positions should presumably be filled without Senate confirmation. The Partnership for Public Service has additional compelling proposals.<sup>77</sup>

Congress's choice in 2012 was to make positions filled by the President alone. If the goal is to decrease vacancies, it might be better to permit agency heads to select leaders (at least for some jobs) instead of the President—more choosers, less time.<sup>78</sup>

### ***Streamlining the Vetting of Nominees***

The dysfunction of the appointments process is not new. The Presidential Appointment Efficiency and Streamlining Act of 2011 created the Working Group on Streamlining Paperwork for Executive Nominations. In the decade since the Group was convened, most of its recommendations have not been implemented.<sup>79</sup> The Senate and the White House should commit to revisiting the

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<sup>73</sup> Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012) (codified as amended in scattered titles of the U.S.C.).

<sup>74</sup> Lewis & Richardson, *supra* note 13, at 51, 57.

<sup>75</sup> WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, *supra* note 5, at 11.

<sup>76</sup> O'Connell, *End of Year Appointments*, *supra* note 1.

<sup>77</sup> See generally P'SHIP FOR PUB. SERV., *supra* note 72.

<sup>78</sup> Interestingly, the Vacancies Act's structure cuts down on choice for acting officials. As mentioned, the default acting official is the first assistant to the vacant position. 5 U.S.C. § 3345(a)(1). No action has to be taken for the first assistant to become the acting leader (assuming the Act's time limits have not expired). Only if the President wants to choose a Senate-confirmed official or a senior agency official does affirmative action need to be taken. *Id.* § 3345(a)(2)-(3).

<sup>79</sup> See 2 NAT'L TASK FORCE ON RULE OF LAW & DEMOCRACY, *supra* note 72, at 20-21. The PPO and Office of Government Ethics do have new online systems for gathering information from potential leaders. P'SHIP FOR PUB.

recommendations of the bipartisan Group. I agree with Max Stier, the head of the Partnership for Public Service, that, in addition, “Congress should consider establishing a new working group to develop fresh recommendations.”<sup>80</sup>

The Group’s proposals, which preserve the political branches’ roles in vetting potential agency leaders, “would reduce the time it takes nominees to complete their paperwork and for the paperwork to be submitted to the White House and the Senate.”<sup>81</sup> Specifically, the Group made four sets of recommendations to the White House and Congress: (1) “eliminate repetition and reduce overlapping questions;” (2) “review all the forms, and where appropriate, revise questions to reduce unnecessary burden on nominees;” (3) “vary the paperwork required for candidates for part-time PAS [Senate-confirmed] positions depending upon the nature of the position for which they are being considered;” and (4) “build an electronic system with a ‘smart form.’”<sup>82</sup>

As for duplication and inefficiency in the vetting process, the Group found “only minimal overlap between the various executive branch forms” but called for the White House to abandon the “White House Personal Data Statement,” which “has typically contained questions that are duplicative of questions” in other forms.<sup>83</sup> The Obama Administration discontinued its version of the form, but the Trump Administration used one. The Biden Administration does not appear to be asking for a personal data statement.<sup>84</sup> Overall, the White House could require less vetting of potential nominees, particularly for part-time positions.<sup>85</sup>

By contrast, the Group saw “considerable overlap between information requested by the Senate . . . [and] by the executive branch,” and provided particular examples.<sup>86</sup> Analogizing to the common application that many colleges and universities have adopted for undergraduate admissions, the Group recommended the development of a “standard set of core questions across executive and legislative forms,” and helpfully suggested a question for criminal convictions.<sup>87</sup> Critically, these core questions would not be “a comprehensive set” as the Group recognized that the White House and the Senate “each need certain information that is unique to their inquiries.”<sup>88</sup> But the Group did call

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SERV. & BOS. CONSULTING GRP., PRESIDENTIAL TRANSITION GUIDE 226 (2020),  
<https://presidentialtransition.org/wp-content/uploads/sites/6/2018/01/Presidential-Transition-Guide-2020.pdf>.

<sup>80</sup> *The Elements of Presidential Transitions: Hearing Before the Subcomm. on Gov’t Operations of the House Comm. on Oversight & Reform*, 117th Cong. 9 (2020) (statement of Max Stier, President & CEO, Partnership for Public Service),  
<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Stier%20Testimony.pdf>.

<sup>81</sup> Letter from Lisa Brown, Chair of Working Group on Streamlining Paperwork for Executive Nominations, to the President, Chairman Lieberman, Chairman Schumer, Ranking Member Collins, and Ranking Member Alexander (Nov. 5, 2012)  
([https://www.oge.gov/web/OGE.nsf/0/018B7C7EC03481F5852585B6005A1306/\\$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf - page=2](https://www.oge.gov/web/OGE.nsf/0/018B7C7EC03481F5852585B6005A1306/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf?page=2)).

<sup>82</sup> WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, *supra* note 5, at 2-5.

<sup>83</sup> *Id.* at 3, 13.

<sup>84</sup> See CONG. RSCH. SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 3 (Mar. 17, 2021), <https://crsreports.congress.gov/product/pdf/R/R44083>.

<sup>85</sup> The Obama Administration asked for more limited background checks for certain part-time jobs in its last year. MARTHA KINSELLA ET AL., BRENNAN CTR. FOR JUST., EXECUTIVE ACTIONS TO RESTORE INTEGRITY AND ACCOUNTABILITY IN GOVERNMENT 17 (2020), <https://www.brennancenter.org/sites/default/files/2020-10/ExecutiveActionsReport.pdf>.

<sup>86</sup> WORKING GRP. ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, *supra* note 5, at 14-17.

<sup>87</sup> *Id.* at 16, 20.

<sup>88</sup> *Id.* at 19.

for the White House and the Senate to “agree on a common set of financial questions”<sup>89</sup> among other topics. This work has yet to be done. Some of it is easy—agreeing on wording for certain questions, for example. Some of it is harder—seeing if there is consensus on cutting back on foreign travel information, for instance.

### ***Speeding up the Senate Process for Certain Nominations***

I hesitate to make recommendations on how the Senate should conduct its business, including the processing of agency nominations. Instead, I offer several observations.

First, the Senate has to balance its oversight duties with the need for federal agencies to operate effectively. Holds on nominees, by Democrats and Republicans, can both be important tools in shaping public policy and undermine needed agency operations. Perhaps, prior to the next presidential election (so without knowing who will be in the White House), the Senate could consider selecting certain critical Senate-confirmed positions to be placed on an expedited timeline for consideration that would still allow questions to be raised but would impose a deadline on the confirmation vote. Here, I am not thinking of the non or less controversial positions that are supposedly already privileged.<sup>90</sup> Rather, I would hope the Senate might consider key jobs in the national security space or in other areas, where delays are more damaging to government performance and potentially the public. These positions typically would *not* avoid the committee process as part of their expedited consideration.

Second, the Senate’s norms on vote types for agency nominations have shifted. Despite changes to Senate rules in 2013 and 2019 to decrease the number of votes required to move a nomination to a confirmation vote and then to cut debate time, Senators can refuse to provide unanimous consent at various steps in the process. As noted above, Presidents George H.W. Bush and Clinton had 378 and 194 agency nominations approved by unanimous consent, respectively, in their first year (ending January 19); Presidents George W. Bush, Obama, Trump, and Biden had none.<sup>91</sup>

It is not just the end of unanimous consent. Voice votes are the next step up. But voice votes are still easier than recorded votes. In early December 2021, for the first time in over 40 years, the Senate had to take a recorded vote to confirm a U.S. attorney (Rachael Rollins for the District of Massachusetts); Vice President Harris’s tiebreaking vote pulled her over the line.<sup>92</sup> The voting on Rollins’s nomination may have been rare for U.S. attorney jobs, but I fear it will only become more common in coming years. We are already starting to see the replacement of voice votes by recorded votes. Confirmation votes for agency positions are also more contested than they have ever been. Now, a vote against an assistant secretary is a way to show party fealty, both for the left and the right.

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<sup>89</sup> *Id.* at 49.

<sup>90</sup> See MICHAEL GREENE, CONG. RSCH. SERV., R46273, CONSIDERATION OF PRIVILEGED NOMINATIONS IN THE SENATE 1 (Mar. 16, 2020), <https://crsreports.congress.gov/product/pdf/R/R46273/5>.

<sup>91</sup> O’Connell, *End of Year Appointments*, *supra* note 1.

<sup>92</sup> Nate Raymond, *U.S. Senate Narrowly Confirms Biden’s Progressive Pick for Massachusetts Prosecutor*, REUTERS (Dec. 8, 2021), <https://www.reuters.com/legal/government/us-senate-narrowly-confirms-bidens-progressive-pick-massachusetts-prosecutor-2021-12-08/>.



Finally, these changes in vote preferences are linked to increasing returns of agency nominations, as Senate rules allow nominations to be held over into a new session only by unanimous consent. Only five of President Obama’s agency nominations were returned his first year. President Trump saw 64 of his agency nominations returned in his first year—13% of his submissions. Senate Majority Leader Chuck Schumer got consent for many nominations to “remain in status quo” before the Senate adjourned on December 18, 2021. But the Senate did not agree to protect 104 separate agency nominations from return (including five individuals with concurrent nominations).<sup>93</sup>

The agency nominations that failed to get consent in December 2021 included many key assistant secretary (and assistant administrator) positions, the chair of the MSPB (which, until early March, had lacked a quorum for over five years, though two other MSPB nominees did get held over), the chair and vice chair of the Federal Reserve, and the heads of the Food and Drug Administration (in a pandemic, though the Senate eventually confirmed Robert Califf), Fish & Wildlife Service, and National Highway Traffic Safety Administration.<sup>94</sup> While many returned nominations get resubmitted (and eventually confirmed), nominees have to update their filings. Might it be possible for the Senate to agree not to return any agency nominations in a President’s first year if they are submitted by a certain date as the needs for staffing agencies are greatest then? The protection could also be limited to high-level jobs (such as at the assistant secretary level or above). Returns would be possible in other years and for lower-level positions in the first year.

### ***Incentivizing Nominations and Limiting Certain Acting Officials***

I endorsed the Accountability for Acting Officials Act (AAOA) when it was first introduced in the House of Representatives.<sup>95</sup> The AAOA would nearly halve the permitted time limits (from 210 days to 120 days) for acting officials (outside of pending nominations) in the most important agency positions; impose statutory qualification mandates on acting officials serving under 5 U.S.C. § 3345(a)(2); restrict acting inspectors general to senior staff in IG offices; and resolve ambiguities (mostly to limit presidential choice) in the Vacancies Act that generated litigation in the Trump Administration.<sup>96</sup> The House passed the AAOA as part of the Protecting Our Democracy Act in early December 2021.<sup>97</sup>

While the Senate is unlikely to approve the Protecting Our Democracy Act in its entirety, there should be bipartisan support for many of the provisions governing acting officials that would incentivize White House nominations, in particular by restricting acting service in the most important positions.<sup>98</sup>

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<sup>93</sup> CONGRES.GOV, <https://www.congress.gov/search?q=%7B%22source%3Anominations%22%2C%22congress%3A117%22%2C%22nomination-type%3ACivilian%22%2C%22nomination-status%3AReturned+to+President%7D> (last visited Feb. 28, 2022) (showing the results of a search for “nominations,” “117 (2021-2022),” “civilian,” and “returned to President”). I removed Article III nominations.

<sup>94</sup> O’Connell, *End of Year Appointments*, *supra* note 1.

<sup>95</sup> Press Release, U.S. Representative Katie Porter, Rep. Porter, Joined by House Committee Chairs, Introduces Bill to Crack Down on Unconfirmed Agency Officials (May 1, 2020) (<https://porter.house.gov/news/documentsingle.aspx?DocumentID=130>).

<sup>96</sup> Accountability for Acting Officials Act, H.R. 2994, 117th Cong. (2021).

<sup>97</sup> Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021) (as passed by House, Dec. 9, 2021).

<sup>98</sup> For my written testimony on the AAOA, see: *Improving Government Accountability and Transparency: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (statement of Anne Joseph O’Connell, Professor, Stanford Law

In addition, the AAOA would protect congressional oversight interests by limiting who can serve as an acting IG. President Trump pushed out a slew of IGs and used the Vacancies Act to install non-IG political appointees as acting IGs in the State and Transportation Departments.<sup>99</sup> The AAOA would restrict acting IGs to senior officials in the IG’s office. I would also permit confirmed IGs to serve as acting IGs in other agencies. After all, under the IG statutes, the President must select a nominee “without regard to political affiliation” and “on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigation” for the permanent role.<sup>100</sup>

Because IGs do not fare well in the appointments process, with above-average failure rates and confirmation delays compared to other agency positions, acting IGs play especially critical roles.<sup>101</sup> In addition, there are long delays in making IG nominations. As of the end of February, three of the 15 cabinet departments do not have a confirmed IG—the shortest vacancy is over 650 days long.<sup>102</sup>

While these proposals restrict the use of acting officials, there is one change that would grant the White House more power and help minimize leadership transitions during the traditional appointments process. Specifically, more nominees should be able to serve in an acting capacity while their nominations are pending. In 2017, the Supreme Court interpreted the Vacancies Act narrowly to allow a nominee to simultaneously serve as the acting official only if she has been confirmed to the first assistant position or has been the first assistant (where the position is not Senate-confirmed) for at least 90 days.<sup>103</sup>

Robert Wilkie had to step down as acting Secretary of the Department of Veterans Affairs when he was nominated to the top job in 2018 because he had not been the deputy secretary—but rather was Senate-confirmed to a Defense Department job. Mark Esper also had to relinquish his acting title when the Senate formally received his nomination for Secretary of Defense in 2019—generating a third acting secretary since James Mattis departed and contributing to the Senate expediting its procedures.<sup>104</sup> Allowing Senate-confirmed officials, like Wilkie and Esper, to continue

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<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/AJO%20Written%20Statement%20for%20May%2023%202021%20House%20Oversight%20Hearing.pdf>.

<sup>99</sup> O’Connell, *Watchdogs at Large*, *supra* note 10.

<sup>100</sup> 50 U.S.C. § 3517(b)(1).

<sup>101</sup> Between 1981 and 2016, more than one-quarter of IG nominations were withdrawn or, more frequently, returned by the Senate. O’Connell, *Staffing Federal Agencies*, *supra* note 1. Nominations that were confirmed during that period took, on average, 104 days. These figures consider each nomination separately: if it takes two nominations (often of the same person) to get a confirmed IG, two years can easily go by. *Id.* In President Obama’s last year, Senate Republicans blocked all 12 of his IG nominees. James Hohmann, *The Daily 202: With Purges and Appointments, Trump Leaves a Lasting Mark on Inspector General System*, WASH. POST (June 25, 2020),

<https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/06/25/daily-202-with-purges-and-appointments-trump-leaves-a-lasting-mark-on-inspector-general-system/5cea7366602ff12947e8efae/>.

<sup>102</sup> *Inspector General Vacancies*, COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, <https://www.oversight.gov/ig-vacancies>.

<sup>103</sup> *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

<sup>104</sup> Robert Burns, *Pentagon in Its Longest-ever Stretch of Leadership Limbo*, ASSOCIATED PRESS (July 12, 2019), <https://www.apnews.com/ce5a27679ec7442283a372d7f3b67e92>; Daniel Wilson, *Defense Secretary Nominee to Get Expedited Consideration*, LAW360 (July 11, 2019), <https://www.law360.com/articles/1177574/defense-secretary-nominee-to-get-expedited-consideration>.

serving in an acting capacity if they are nominated to the open position would bring practice closer to the norm before the Supreme Court’s ruling a few years ago, but it would not allow nonconfirmed officials to continue serving while their nominations are pending unless they meet the first assistant conditions described above.

### ***Providing Greater Transparency***

Finding information on who is leading the government and engaging in important policy work should not be as difficult as it currently is. If I want to find information on confirmed appointees, I often turn to nongovernment sources, most notably the Appointments Tracker from the Partnership for Public Service and the *Washington Post*.<sup>105</sup> Although their tracker is an amazing public service, it does not contain all Senate-confirmed positions. For nomination data and the Senate process, I depend entirely on Congress.gov—which provides easy access to comprehensive information.

Although the Vacancies Act requires agencies to report vacancies “immediately upon the occurrence of the vacancy” and the names of acting officials and their start dates “immediately upon the designation,”<sup>106</sup> agencies often take months to report (and then report only some of the required information).<sup>107</sup> Indeed, sometimes agencies do not report at all.<sup>108</sup> The AAOA would impose specific time limits on agency reporting of vacancies to the Government Accountability Office (GAO). Vacancies aside, if I want information on acting leaders, often I have nowhere to look but my own research (the GAO reports far less frequently name the acting officials serving during the identified vacancies).

ACUS recently called for “the public availability of real-time information about high-level officials leading federal agencies.” ACUS voted to encourage “agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials” and to recommend that “the Office of Personnel Management [OPM] regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.”<sup>109</sup>

I also support the Periodically Listing Updates to Management Act (PLUM Act).<sup>110</sup> The PLUM Act would require the federal government to provide information on agency leaders to the public in a timely fashion. Congress should also press OPM to update its list of positions in the (hard copy) Plum Book, which is missing some Senate-confirmed positions (like the IG for the Defense Department), as part of constructing the agency’s new website. Professor Lewis has found

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<sup>105</sup> *Biden Political Appointee Tracker*, *supra* note 11.

<sup>106</sup> 5 U.S.C. § 3349(a).

<sup>107</sup> Letter from Thomas H. Armstrong, General Counsel, U.S. Gov’t. Accountability Off., to Ron Wyden, Ranking Member, U.S. Sen. Comm. on Finance, Agency Compliance with the Federal Vacancies Reform Act for Positions Subject to the Jurisdiction of Senate Finance Committee, GAO-B-329903, at 4-11 (Feb. 7, 2019) (<https://www.gao.gov/assets/b-329903.pdf>); *see also* O’CONNELL, ACTING AGENCY OFFICIALS, *supra* note 7, at 52-53.

<sup>108</sup> Letter from Thomas H. Armstrong, *supra* note 107, at 11 n.2.

<sup>109</sup> Admin. Conference of the U.S., Adoption of Recommendations, 84 Fed. Reg. 71,354, 71,354 (Dec. 27, 2019).

<sup>110</sup> PLUM Act, S. 857, 117th Cong. (2021).

other errors in the Plum Book.<sup>111</sup> The GAO, as part of its reporting mandates under the Act, can help with this issue as well.

Acting officials and delegated authority are largely two sides of the same coin.<sup>112</sup> Simply put, acting officials function as an (often necessary) alternative to the traditional appointments process. When the Vacancies Act's limits expire, agencies can usually use delegations of non-exclusive duties—without time constraints—as a workaround to the workaround. Although compliance is mixed, the Vacancies Act, at least in theory, requires agencies to notify the GAO and Congress of vacancies and acting officials. It does not, however, mandate that agencies inform anyone of delegations of authority during staffing vacancies. Agencies should be required to report any delegated authority in operation during vacant Senate-confirmed positions. And that reporting should—at a minimum—include the delegated tasks, who is performing the duties, and any relevant time limits. Ideally, the GAO would collect these reports in one place for the public.<sup>113</sup>

## Conclusion

Vast vacancies in federal agencies are not new. I write about them with each Administration. The media coverage too follows patterns. There is the first-year attention, and the last-year attention, and sometimes concern in between. In the merry-go-round of interest, it should be possible to create bipartisan reforms that preserve the political branches' interests and serve the needs of our modern government.

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<sup>111</sup> Natalie Alms, *Did Trump Shrink the Government? Not According to the Plum Book*, FCW (Jan. 11, 2021), <https://fcw.com/workforce/2021/01/did-trump-shrink-the-government-not-according-to-the-plum-book/258737/>; see also Lewis & Richardson, *supra* note 13, at 57 n.2 (describing the need to supplement Plum Book information with CRS Reports and Congress.gov information due to missing Senate-confirmed positions in the Plum Book).

<sup>112</sup> For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) had no confirmed or recess-appointed leader from early 2006 (when Congress began to require Senate confirmation for the job) to July 2013. When the first confirmed ATF Director stepped down in April 2015, Thomas Brandon, the nonconfirmed career Deputy Director, stepped into the role of acting Director. After the 210-day clock ran out, Brandon continued to perform the duties of the Director but without the acting title. O'Connell, *Actings*, *supra* note 9, at 635. With Republicans in control of the Senate, President Obama strategically chose not to nominate someone to the job. Because of the delegability of the agency's functions and duties, the Administration could continue to press its policies on gun violence and, according to Politico, "avoid a nasty confirmation hearing for a troubled agency." Sarah Wheaton, *White House to Demote ATF Chief—To Keep Him on the Job*, Politico (Oct. 8, 2015), <https://www.politico.com/story/2015/10/atf-thomas-brandon-acting-head-demotion-214542>. Brandon continued to lead in a similar manner for over two years in the Trump Administration.

<sup>113</sup> To encourage compliance, agencies should have to provide information on delegations at least once a year. The GAO should also be required to report on agency compliance.