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THE VACANCIES ACT: FREQUENTLY ASKED QUESTIONS

WHAT IS THE VACANCIES ACT?

The [Federal Vacancies Reform Act of 1998](#) aims to encourage the president to fill the critical leadership positions requiring Senate confirmation (so-called PAS positions) by limiting the number of days someone can serve in those roles in an acting capacity without Senate confirmation.

If qualifying PAS positions are not filled by a Senate-confirmed official by the statutory cut-off dates prescribed in the act and described below, the office “shall remain vacant,” and only the head of the affected agency (for example, the Secretary of the Treasury or the Administrator of the Environmental Protection Agency) may perform the specific duties and functions assigned by statute or regulation to that position. The Act provides that actions taken by anyone acting in a PAS position in a way that does not comply with the provision of the Act “shall have no force or effect.”

WHO CAN FILL A VACANT PAS POSITION?

When a PAS position becomes vacant, there are [three types of officials who may carry out the duties of the office in an acting capacity](#), without Senate confirmation.

1. The “first assistant” becomes the acting officer unless the president designates another individual from the other two eligible classes of officials. The Vacancies Act does not define “first assistant,” but the term has generally been interpreted to mean the top deputy to the position.
2. The president may designate as the acting official an individual who serves in another PAS position anywhere in the federal government.
3. The president may designate as the acting official an agency employee who is paid at the GS-15 rate or above and who has been an employee of the agency for at least 90 of the past 365 days preceding the vacancy.

In March 2017, the Supreme Court ruled in [National Labor Relations Board v. SW General, Inc.](#) that the Vacancies Act generally prohibits a person from serving in an acting capacity while concurrently the nominee for the position, though there are some exceptions. The court’s analysis was similar to that of the Office of Personnel Management’s inspector general, who in February 2016 issued a [memorandum](#) finding that Beth Cobert’s service as acting OPM director was in violation of the Vacancies Act once President Obama nominated her for the position.

HOW LONG DOES THE VACANCIES ACT ALLOW AN ACTING OFFICIAL TO SERVE IN A PAS POSITION?

Generally, the Vacancies Act imposes a [210-day cap](#) on the period during which someone can execute the functions of a PAS position on a temporary basis. The time limit begins to run on the date the vacancy occurs. Years in which a first-term president is inaugurated, however, are treated differently. Positions that are vacant during the 60-day period beginning on Inauguration Day [may be filled in an acting capacity for up to 300 days](#) (in

other words, 90 days longer than the general 210-day cap). For example, the 300-day limit for a vacancy that existed on inauguration day on January 20, 2017 ran through November 16, 2017.

The [time limit for an acting official is suspended](#), however, if the president nominates someone to the PAS position. For example, if someone is serving as acting deputy secretary at a cabinet agency and another individual is nominated to that position, the 210- or 300-day countdown (whichever is applicable) would effectively stop while the nomination is pending before the Senate. If the nominee for that deputy secretary position is rejected, returned or withdrawn, the president is provided an additional 210 days in which an individual may serve in that role in an acting capacity. If a second nominee is submitted for the deputy secretary position, the 210-day countdown is again suspended while the nomination is pending. If this second nomination fails, the acting official may serve another 210 days after the failure of the nomination. Once that 210-day cap is reached, the position is considered vacant.

WHAT HAPPENS AFTER THE VACANCIES ACT CAP IS REACHED?

As noted above, [once the Vacancies Act cap is reached](#), the PAS position is vacant and the functions or duties vested in the vacant position by statute or regulation are delegated to the head of the agency. The Vacancies Act also [requires the head of the agency to report the vacancy](#) to both the Government Accountability Office and to Congress. The act [requires GAO to report Vacancies Act violations](#) to Congress, the president and the Office of Personnel Management.

Since passage of the Act, GAO has identified [32 positions](#) that had been filled by one or more acting officials in violation of the Vacancies Act. For each case it examines, GAO lays out its reasoning why a violation has (or has not) occurred. In 2019, GAO also reviewed appointments of the acting secretary and acting deputy secretary of the Department of Homeland Security and [concluded](#) that their service was inconsistent with the Department's succession statute, which lays out specific rules for DHS vacancies outside the framework of the Vacancies Act.

Additionally, as illustrated by *National Labor Relations Board v. SW General, Inc.*, parties with standing may take legal action to challenge decisions made by officials acting inconsistently with the Vacancies Act. For example, plaintiffs [successfully challenged](#) Ken Cuccinelli's leadership at the United States Citizenship and Immigration Services as inconsistent with the Vacancies Act. And in another case, the U.S. District Court for the District of Montana issued a [decision](#) in September 2020 finding that William Perry Pendley had served unlawfully as acting director of the Bureau of Land Management, a position that had been vacant for the entirety of the Trump Administration.

Interestingly, the law does not account for circumstances in which the vacancy in question is that of the agency head and the Vacancies Act cap has been reached. In short, the law delegates the authorities of vacant positions to the agency head, but does not articulate what happens when the vacancy itself is the top position at the agency. [The Senate report accompanying the legislation](#) stated that the authorities of a vacant agency head are not addressed in the act "because the Committee expects that there will never be a case where a nomination for these positions is not timely submitted."

ARE ANY POSITIONS EXEMPTED FROM THE VACANCIES ACT?

The Vacancies Act specifically exempts particular agencies from some or all of its provisions. Congress [exempted the following positions](#) from all Vacancies Act provisions:

- Anyone who is a member of a board, commission or similar multi-headed agency that governs an independent federal establishment or government corporation who is appointed by the president with the advice and consent of the Senate.
- Any commissioner of the Federal Energy Regulatory Commission.
- Any member of the Surface Transportation Board.
- Any judge appointed by the president with the advice and consent of the Senate to an Article I court (such as administrative law judges, certain military judges, U.S. Tax Court judges).

Furthermore, Congress [exempted some positions](#) from particular provisions of the act because executing the functions and duties of those positions requires independence from the agency head. Congress did not want to create a circumstance in which these [independent duties of these positions could be delegated](#) to the agency head. These positions are:

- The general counsel of the National Labor Relations Board.
- The general counsel of the Federal Labor Relations Board.
- Any inspector general appointed by the president with the advice and consent of the Senate.
- Any chief financial officer appointed by the president with the advice and consent of the Senate.
- Any office in which a statutory provision prohibits the agency head from performing its duties.

Vacancies in some PAS positions may be governed by a separate statute (as GAO found in examining the positions of Secretary and Deputy Secretary at DHS). The Senate report accompanying the 1998 updates to the Vacancies Act discussed [40 separate positions](#) with unique statutory language that address the functions and duties of those positions should a vacancy arise.