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• ARTICLE •

# ACTINGS

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*Temporary leaders in federal agencies—commonly known as “actings”—are a fixture of the modern administrative state. These acting officials have recently come under fire, particularly after President Trump ousted Jeff Sessions and installed Matthew Whitaker as acting Attorney General in November 2018. Yet despite their ubiquity and the fervent criticism we know almost nothing about them.*

*This Article examines open questions about acting officials through empirical, legal, and normative frameworks. Empirically, it provides new data on acting department heads from the Reagan Administration through President Trump’s third year. The data show that President Trump has turned to significantly more acting cabinet secretaries than prior Presidents. Using two agencies as case studies, this Article also examines acting officials outside the cabinet and discovers similar trends. But the data also reveal that previous administrations relied considerably on temporary leaders, particularly at the start and end of presidential terms.*

*These empirical findings inform the analyses of a slew of tricky constitutional and statutory questions. This Article addresses open constitutional questions about who can serve in the federal government’s highest positions and for how long. It also examines undecided statutory issues, such as how the Federal Vacancies Reform Act of 1998 (Vacancies Act) interacts with agency-specific statutes, whether the Vacancies Act covers vacancies created by firings, and whether a “first assistant” can be named after the vacancy and then serve in an acting role. Finally, this Article highlights two thorny areas that have both constitutional and statutory components—the delegation of authority to lower-level agency officials and the applicability of removal restrictions to acting heads at the Consumer Financial Protection Bureau and the Federal Housing Finance Agency.*

*The new data raise additional questions about the conventional criticisms of acting officials as “substitute teachers,” or worse, “workarounds,” to the Senate confirmation process. This Article examines these criticisms and suggests that, while the concerns have some merit, acting officials provide needed expertise and stability—in some contexts the Senate may prefer them to the President’s nominees*

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*In light of its empirical, legal, and normative findings, this Article then proposes several statutory fixes to change how the executive branch employs acting officials and delegations of authority in the face of staffing vacancies—balancing concerns over accountability and the need for the government to function.*

*Ultimately, this Article calls for thinking about actings and traditional appointees together. So many commentators have called for Congress to reduce the number of Senate-confirmed lower-level positions, mostly in agencies covered by the Vacancies Act. By largely ignoring temporary agency leaders, the forest may have been missed for the trees. Practically, by their prevalence, Presidents' extensive use of acting officials has achieved what Congress largely refuses to do.*

*The full text of this Article can be found by clicking the PDF link to the left.*

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\* Adelbert H. Sweet Professor of Law, Stanford Law School. This Article is dedicated to the loving memory of Elena Górriz, a friend and colleague, who died on November 1, 2019, at the age of forty-six. This project has benefitted tremendously from student and faculty feedback at the University of Pennsylvania Law School Public Law Workshop and the Berkeley Law Public Law Workshop and from faculty talks at Stanford Law School, William & Mary Law School, and the University of Virginia School of Law. I am thankful as well for the opportunities to present connected research to the Government Accountability Office and the Department of Justice's Federal Programs Branch. I am particularly grateful for detailed feedback from Daniel Ho, Aziz Huq, Ronald Levin, Nina Mendelson, Stephen Migala, Jennifer Nou, Daphna Renan, Bijal Shah, and Peter Strauss and for Twitter, email, or in person conversations with Thomas Berry, Eric Columbus, Walter Dellinger, Daniel Farber, Jill Fisch, Michael Herz, Christina Kinane, Marty Lederman, and Steven Vladeck. These interactions have shaped my interest in temporary leaders and this specific Article in fundamental ways. Mendelson is writing separately on these issues; her earlier scholarship on the potential benefits to acting leaders helped motivate this and ongoing research, and our many conversations about these topics have been critical to my thinking. Arielle Mourrain, Natalie Peelish, and the reference librarians at University of California, Berkeley, School of Law and Stanford Law School provided stellar research contributions, from tiny details to important substance. Amanda Chuzi and the editors of the Columbia Law Review rendered significant editorial assistance. In 2019, I was the lead consultant for an Administrative Conference of the United States project on acting officials and delegated authority. This Article has been written independently of that work, except where the ACUS Report (and related Recommendation) are referenced. The Report and this Article do not necessarily reflect the opinions, views, and recommendations of members of ACUS or its committees, except where formal recommendations of ACUS are cited.

## INTRODUCTION

President Trump has expressed deep affection for his nonconfirmed agency leaders. He came into the White House relying on “my generals.” He now calls part of his leadership team “my actings.” As he once explained to reporters: “I have ‘acting’ [sic]. And my ‘actings’ are doing really great . . . . I sort of like ‘acting.’ It gives me more flexibility.”<sup>1</sup>

This Article examines temporary leaders in federal agencies—known colloquially as “actings.” They are everywhere in the administrative state, and not just in the Trump Administration. We are quick to judge them harshly, although we know nothing about many of them. These stand-ins also raise a slew

judge them harshly, although we know nothing about many of them. These stand-ins also raise a slew of tricky constitutional and statutory questions, including some that have not been bandied about in the opinion pages of national newspapers.

President Trump did not always like his “actings.” At the start of the Trump Administration, President Obama’s Deputy Attorney General Sally Yates stayed on as acting Attorney General, intending to remain in the position until Jeff Sessions was confirmed.<sup>2</sup> President Trump, however, fired Yates after she refused to defend his first executive order that barred entry into the United States from certain Muslim-majority countries.<sup>3</sup> He then picked Dana Boente, another Obama appointee, to serve until Sessions was sworn in as Attorney General in February 2017.<sup>4</sup>

Just twenty-one months later, President Trump pressed Sessions to step down.<sup>5</sup> The President had long been angry with Sessions’s recusal from the decision to appoint and oversee Special Counsel Robert Mueller to investigate Russian interference in the 2016 election.<sup>6</sup> Because of Sessions’s recusal, confirmed Deputy Attorney General Rod Rosenstein assumed the role of acting Attorney General with respect to appointing and overseeing Mueller.<sup>7</sup> But when Sessions resigned, President Trump did not intend to let Rosenstein serve as the acting Attorney General for all matters.<sup>8</sup> Instead, he turned to the Federal Vacancies Reform Act of 1998 (Vacancies Act) and named Matthew Whitaker, Sessions’s Chief of Staff (a non-Senate-confirmed position) as acting Attorney General.<sup>9</sup>

Likely because of the heightened attention on Mueller’s investigation of President Trump’s 2016 campaign, the Vacancies Act suddenly was thrown into the national spotlight.<sup>10</sup> Could there be an acting Attorney General who was not Senate-confirmed? (Here came the dueling op-eds.<sup>11</sup>) The Vacancies Act permits it—under certain conditions—but some argued that the Act did not apply in light of the Attorney General Succession Act, and, even if the Vacancies Act did apply, the Constitution prohibits putting officials in cabinet-level positions without Senate confirmation.<sup>12</sup> Interestingly, Whitaker was not unique in his appointment. As this Article shows, acting cabinet secretaries have been drawn from non-Senate-confirmed ranks at least fifteen times since the start of President Reagan’s Administration in 1981.<sup>13</sup>

Controversies over President Trump’s use of acting officials have involved multiple agencies. About a year before Whitaker’s selection, Richard Cordray resigned from his position as the first confirmed Director of the Consumer Financial Protection Bureau (CFPB).<sup>14</sup> Right before he left, Cordray named Leandra English as the agency’s Deputy Director.<sup>15</sup> Under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, the deputy director “shall . . . serve” as the acting director of the Bureau if the director is absent or unavailable.<sup>16</sup> A few hours after Cordray stepped down, the White House designated Mick Mulvaney, the confirmed Director of the Office of Management and Budget (OMB), as the acting Director of the CFPB under the Vacancies Act.<sup>17</sup> Both English and Mulvaney turned up to work, each claiming to be the acting Director.<sup>18</sup> Mulvaney even brought donuts for the staff.<sup>19</sup> English filed suit, but eventually dropped the litigation.<sup>20</sup>

A few months later, President Trump fired Secretary of Veterans Affairs David Shulkin, naming Robert

Wilkie, a Senate-confirmed Assistant Secretary in the Department of Defense (DOD), as acting Secretary.<sup>21</sup> Veterans sued, claiming that the Vacancies Act does not apply to openings created by firing.<sup>22</sup> That suit was also voluntarily dismissed.<sup>23</sup> President Trump seemed to like what he saw of Wilkie and nominated him for the permanent job.<sup>24</sup> Under the intricacies of the Vacancies Act, as recently interpreted by the Supreme Court,<sup>25</sup> Wilkie had to step down from his acting role while his nomination was pending.<sup>26</sup> Peter O'Rourke, a political appointee who, like Whitaker, had not been confirmed to any position, took over as acting Secretary until the Senate confirmed Wilkie.<sup>27</sup> (There were no op-eds on O'Rourke.)

More recently, James Mattis resigned as Secretary of Defense to protest the President's foreign policy decisions. In announcing his resignation, Mattis promised to stay until the end of February 2019—"a date that should allow sufficient time for a successor to be nominated and confirmed."<sup>28</sup> But President Trump, upset by Mattis's "stinging rebuke" in his widely distributed resignation letter, pushed him out earlier.<sup>29</sup> Under DOD's succession provision and the Vacancies Act, Deputy Secretary Patrick Shanahan—a former Boeing executive with no prior government or military experience—became the default acting Secretary.<sup>30</sup>

Shanahan's tenure marked the first time that DOD had an acting defense secretary for more than one day since the start of President George H.W. Bush's Administration when the Senate voted down John Tower's nomination.<sup>31</sup> By the time details of family violence surfaced during Shanahan's vetting process for the permanent job,<sup>32</sup> he had spent almost six months as acting Secretary, nearly three times William Howard Taft IV's service in 1989.<sup>33</sup> President Trump named Army Secretary Mark Esper to take Shanahan's place as acting Secretary of Defense and announced his intention to nominate Esper for the permanent role three days later.<sup>34</sup> As with Wilkie, Esper had to leave the acting position when the Senate formally received his nomination, bringing the third acting Defense Secretary that year and prompting expedited confirmation proceedings.<sup>35</sup>

When President Trump pushed out Department of Homeland Security (DHS) Secretary Kirstjen Nielsen in the spring of 2019, he intended to elevate Customs and Border Protection Director Kevin McAleenan to acting Secretary.<sup>36</sup> But President Trump failed to realize he had to also fire Undersecretary Claire Grady, who was next in line for acting Secretary under the agency's mandatory succession statute, which explicitly preempts the Vacancies Act.<sup>37</sup> Moreover, President Trump wanted to nominate former Virginia Governor Ken Cuccinelli for the permanent DHS Secretary role.<sup>38</sup> In late June, after Senate Republicans expressed concern about Cuccinelli's confirmation prospects, President Trump had Cuccinelli named to a new "first assistant" position—that of Principal Deputy Director of U.S. Citizenship and Immigration Services (USCIS)—so he could then take the reins as acting Director.<sup>39</sup> But it is not clear if someone named as first assistant after the vacancy occurs qualifies to serve under the Vacancies Act.<sup>40</sup>

The leadership changes continue apace.<sup>41</sup> In some sense, President Trump's expressed adoration of

acting leaders exposed what had been previously unspoken: Modern Presidents rely heavily on acting officials. President Obama, for example, submitted far fewer agency nominations in his final two years than other recent two-term Presidents, turning instead to acting leaders and delegated authority in many important agency positions.<sup>42</sup> But President Trump's use of such temporary leaders has been far more extensive and controversial than his predecessors'.

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Given the prevalence of acting officials (and delegations of authority when time limits on acting officials run out) in modern presidential administrations, it is necessary to take a comprehensive look at these acting officials (and those exercising delegated functions) and the infrastructure through which they serve. To that end, this Article has several goals.

First, *descriptively*, in Part I, this Article explains the intricacies of the 1998 Vacancies Act and how that Act interacts with both agency-specific succession statutes and internal agency delegation. Notably, acting officials and delegation function as near substitutes. Not all agencies can take advantage of the Vacancies Act or other statutory provisions for acting officials, however. Specifically, independent regulatory commissions and boards may be paralyzed if they lose their mandated quorum as they typically both lack access to acting officials and cannot rely on delegation.

Second, *empirically*, in Part II, this Article provides much-needed grounding of the prevalence of acting officials in federal agencies. Using new data, it shows that the use of acting officials for the federal government's most senior positions—in the cabinet and for heads of the Environmental Protection Agency (EPA) and Federal Aviation Administration (FAA)—has increased significantly under the Trump Administration. But this empirical study also demonstrates that previous administrations relied considerably on temporary leaders for these important jobs, particularly at the start and end of presidential terms. Moreover, it shows that these positions were sometimes not filled with anyone—for instance, when the generous time limits of the Vacancies Act ran out (as happened for the secretary of commerce role for several months during President Obama's Administration). It also provides some information on acting officials and delegated authority in lower-level Senate-confirmed positions, across administrations in the EPA and at one point in 2019 (a “snapshot”) across all the cabinet departments.

Third, *legally*, in Part III, this Article considers a host of constitutional and statutory questions about temporary agency leadership. There are remarkably few cases addressing acting agency leaders or delegations of authority in the absence of acting or confirmed officials. There are open constitutional questions about who can serve in the federal government's highest positions (principal offices) and for how long—questions that the new data can speak to, in part. As noted above, there are also unresolved statutory issues about how the Vacancies Act interacts with agency-specific statutes, whether the Vacancies Act covers firings, and whether a “first assistant” can be named after a vacancy arises and

then serve in an acting role.

Some issues have both constitutional and statutory dimensions. Delegations of authority from vacant positions to lower-level actors, which often fully substitute for acting officials, can raise both Appointments Clause and statutory authority concerns. In addition, acting officials made key decisions that underlie high-profile separation of powers challenges to the CFPB and the Federal Housing Finance Agency (FHFA), including one case the Supreme Court heard in March 2020. Those structural challenges target the removal protections on the agencies' leaders, which likely do not apply to acting officials. The presence of acting officials in those cases may therefore prevent resolution of the agencies' constitutionality.

Fourth, *normatively*, in Part IV, this Article challenges the conventional concern about acting officials: that acting leaders function as “substitute teachers,” or worse, as “workarounds,” to the political accountability embedded in the Senate confirmation process. In some contexts, acting officials provide needed expertise and stability. This Article tries to flesh out both the attractions and costs of acting leadership in the administrative state (compared to other options, such as recess appointments), from each political branch's perspective. The competing values and complex political incentives at stake preclude simple conclusions.

Finally, *prospectively*, in Part V, this Article tries to address some of the problems with acting leaders discussed in Parts III and IV by proposing politically feasible reforms to our current system that try to balance accountability and workability concerns. These reforms target, among other issues, the permissible types and tenures of acting officials, the interaction of relevant agency statutes and the Vacancies Act, and the scope and transparency of delegated authority in the absence of acting officials. In short, the reforms aim to reduce the legal ambiguity of the current Vacancies Act, restrict certain uses of acting officials and delegated authority while expanding others when formal nominations are pending, and improve public access to important information about these practices.

This Article concludes by calling on administrative law to pay attention not only to agency procedures but also to agency staffing, including temporary officials. These acting officials and delegations of authority are another key example of “unorthodox” practices and the President's growing role in the administrative state. <sup>43</sup>

One preliminary definitional issue seems in order. This Article distinguishes acting agency leaders from both confirmed and recess appointees. Even confirmed agency leaders, by nature of presidential elections or term limits, are temporary. These “in-and-outers,” as Hugh Heclo called them, <sup>44</sup> serve, on average, only two-and-a-half years. <sup>45</sup> Recess appointees are temporary too, limited by the length of the relevant congressional session. <sup>46</sup> Some of the distinction is formalistic. The former have the “acting” title; the latter do not. More importantly, acting leaders have not gone through an appointments process delineated in the Constitution. Some of their similarities (and differences) are

taken up below.

Ultimately, we have to think about actings and traditional appointees together. By largely ignoring actings, we may have missed the forest for the trees in prior scholarly treatments of political appointments. Specifically, so many—commission after commission, scholar after scholar (myself included)—have called for Congress to reduce the number of Senate-confirmed lower-level positions across the federal bureaucracy. Practically, by their prevalence, Presidents' extensive use of acting officials has done just that.

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