

VACANT OFFICES: DELAYS IN STAFFING TOP AGENCY POSITIONS

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ABSTRACT

Federal agencies make an astounding number of policy decisions, engaging in more lawmaking and adjudication than Congress and the federal courts. These policy judgments range from the seemingly trivial, such as the size of holes in swiss cheese, to matters of life-and-death importance, such as how to limit power plant emissions of sulfur dioxide, nitrogen oxides, and mercury. According to the statute books, over 1100 Senate-confirmed presidential appointees are supposed to run these agencies and direct these policy decisions, comprising a small but critically

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important component of a federal workforce of over 2.5 million employees. Yet filling these top-level positions in the federal administrative state is cumbersome, inconsistent, and at times controversial. New administrations are often quick to select the cabinet but take much longer to staff the next few layers. Appointee tenure is short, leading to many new openings a year or two later. Then agency officials flee government service near the end of an administration. Vacancies, particularly if frequent and lengthy, may have detrimental consequences for the modern administrative state. They contribute to agency inaction, foster confusion among nonpolitical employees, and undermine agency legitimacy. More surprising is that vacancies also can have beneficial repercussions for agency performance.

Using new data from the Office of Personnel Management (“OPM”), this Article provides a systematic study of executive agency vacancies from President Carter to President George W. Bush. By one measure, Senate-confirmed positions were empty (or filled by acting officials), on average, one-quarter of the time over these administrations. These extensive vacancies have potentially far-reaching implications for constitutional and administrative law. Participants in debates over the unitary theory of the executive might want to spend less time analyzing the legitimacy of restrictions on the president’s removal power and pay more attention to the absence of presidential appointments at the front end of the process. Commentators interested in congressional delegation of authority to agencies might consider how agency staffing affects adherence to congressional priorities and may limit broad delegations of authority. And scholars and courts interested in agency deference might contemplate how underlying theories of expertise and political accountability could incorporate empirical realities of political leadership in the federal bureaucracy. Changing legal doctrine may provide one mechanism for improving the staffing of executive agencies. Policy reforms outside of the courts targeted at reducing the number and length of vacancies—including appointee commitments to serve for two to four years, better training for new officials, and advance personnel planning by the White House—will, however, likely be more effective.

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I. INTRODUCTION

In the weeks after the November 2008 election, it seemed that President-elect Barack Obama was on a tear in naming members of his administration. He started with his White House staff, selecting, for example, Rahm Emanuel as chief of staff on November 6, and Robert Gibbs as press secretary on November 22. He also quickly announced his picks for some important agency positions that require Senate

confirmation. He began the week of Thanksgiving with his economic team—Timothy Geithner for Secretary of the Treasury, Christina Romer for Chair of the Council of Economic Advisers, and Peter Orszag for Director of the Office of Management and Budget, among others—and moved the next week to his national security team, including his former rival Hillary Clinton for Secretary of State. Commentators were abuzz. The first week of December, the *New York Times* declared that “Mr. Obama is moving more quickly to fill his administration’s top ranks than any newly elected president in modern times.”¹

A month later, however, Governor Bill Richardson, previously picked for Secretary of Commerce, withdrew in light of allegations that his state administration improperly awarded contracts to a campaign contributor.² Soon thereafter, Timothy Geithner and then Tom Daschle, President Obama’s first choice for Secretary of Health and Human Services, publicly disclosed that they had not paid certain taxes.³ Daschle pulled out several days later.⁴ In mid-February, the next designee for Commerce, Senator Judd Gregg, Republican of New Hampshire, abandoned the appointments process, citing “irresolvable conflicts” with the president’s economic stimulus proposal and with how the census would be taken—conflicts that allegedly arose in the ten days after he was nominated.⁵ It took until the end of April to get all fifteen cabinet secretaries confirmed.⁶

Filling the cabinet is just the tip of vacancies in a new administration.

1. Peter Baker & Helene Cooper, *Issues Pressing, Obama Fills Top Posts at a Sprint*, N.Y. TIMES, Dec. 5, 2008, at A28.

2. See Sheryl Gay Stolberg, *Richardson Won't Pursue Cabinet Post*, N.Y. TIMES, Jan. 5, 2009, at A1.

3. See David D. Kirkpatrick, *In Daschle's Tax Woes, a Peek into How Washington Works*, N.Y. TIMES, Feb. 2, 2009, at A1; Noam N. Levey, *Daschle Failed to Pay \$128,000 in Taxes: Obama's Choice to Lead Health and Human Services Is the Second Cabinet Pick to Run Into Tax Problems, Jeopardizing His Confirmation*, L.A. TIMES, Jan. 31, 2009, at A1.

4. See Jeff Zeleny, *Daschle Ends Bid for Post: Obama Concedes Mistake*, N.Y. TIMES, Feb. 4, 2009, at A1.

5. See Jeff Zeleny, *Gregg Ends Bid for Commerce Job*, N.Y. TIMES, Feb. 13, 2009, at A1. There were clearly at least some longstanding, fundamental policy conflicts. See Jim Rutenberg, *A New Member Joins the President's Team, Though He's Not in Lockstep with It*, N.Y. TIMES, Feb. 4, 2009, at A16.

6. White House, *The Cabinet*, <http://www.whitehouse.gov/administration/cabinet/> (last visited May 28, 2009). Kansas governor Kathleen Sebelius was the last to be confirmed, as Secretary of the Department of Health and Human Services, which occurred as public attention to the H1N1 flu mounted. See Robert Pear, *Senate Confirms Kansas Governor as Health Secretary*, N.Y. TIMES, Apr. 29, 2009, at A11. The fourteenth secretary, former governor of Washington Gary Locke, was confirmed as Secretary of Commerce a month earlier. See Peter Baker, *Official Says Ex-Governor Is New Commerce Choice*, N.Y. TIMES, Feb. 24, 2009, at A15; *Commerce Secretary Is Confirmed*, ASSOCIATED PRESS, Mar. 25, 2009.

There are also deputy secretaries. Four months into President Obama's administration, one-third of the deputy secretaries had not been confirmed (or in some cases nominated).⁷ Then there are the under secretaries, assistant secretaries, and general counsels, to name just a few.⁸ The federal bureaucracy contains not only fifteen cabinet departments but also dozens of other agencies, from the Central Intelligence Agency ("CIA") to the Federal Communications Commission ("FCC").⁹ Over 1100 full- and part-time Senate-confirmed presidential appointees, along with other executive appointees, career civil servants, and other nonpolitical government workers, run these government agencies, comprising a workforce of over 2.5 million employees.¹⁰

These vacancies affect important areas of public policy. Despite the worst economic crisis in decades, Treasury Secretary Geithner worked without a main deputy for almost four months.¹¹ It was not until March 8 that President Obama even announced nominations for any of the nearly two dozen Senate-confirmed positions underneath Geithner, and those nominations covered only three positions.¹² A handful of other nominations

7. Washington Post, Head Count: Tracking Obama's Appointments, <http://projects.washingtonpost.com/2009/federal-appointments/> (last visited Aug. 31, 2009) (online database) (search of all cabinet departments). Three were confirmed on May 20 or 21, 2009 (see entries for the Interior, Labor, and Transportation Departments). It was not until August 7, 2009, when Dennis Hightower was confirmed as Deputy Secretary of Commerce, that all departments had confirmed deputy secretaries (see entries for the Commerce Department).

8. See *Need a Job? Contact Obama*, CAPITAL TIMES, Feb. 12, 2009, available at <http://www.madison.com/archives/read.php?ref=/tct/2009/02/12/0902120230.php> (reporting that the administration is "looking to fill several thousand politically appointed positions").

9. ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 338 fig.11-1 (11th ed. 2008); USA.gov, Federal Executive Branch, <http://www.usa.gov/Agencies/Federal/Executive.shtml> (last visited July 1, 2009).

10. This 2005 workforce total includes post office employees (770,000 employees) but excludes uniformed military personnel (approximately 1.44 million employees), government contractors (7.6 million), and government grantees (2.9 million). PAUL C. LIGHT, THE NEW TRUE SIZE OF GOVERNMENT 8 (2006), available at http://wagner.nyu.edu/performance/files/True_Size.pdf (2005 figures). See also DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 20, 22 (2008); U.S. Department of Labor, Bureau of Labor Statistics, Federal Government, Excluding the Postal Service, <http://www.bls.gov/oco/cg/cgs041.htm> (last visited Feb. 8, 2009); U.S. Department of Labor, Bureau of Labor Statistics, Postal Service Workers, <http://www.bls.gov/oco/ocos141.htm> (last visited Feb. 8, 2009).

11. See Edmund L. Andrews & Stephen Labaton, *Geithner, With Few Aides, Is Scrambling*, N.Y. TIMES, Mar. 9, 2009, at B1. Geithner's pick for Deputy Secretary, Annette Nazareth, withdrew from consideration on March 5, 2009. See Daniel Wagner, *Treasury Secretary's Choice for Deputy Withdraws*, ASSOCIATED PRESS, Mar. 5, 2009. Neal S. Wolin was confirmed as Deputy Secretary on May 18, 2009. See U.S. Department of the Treasury, Treasury Officials, <http://www.ustreas.gov/organization/bios/wolin-e.html> (last visited July 1, 2009).

12. See *Obama Nominates 3 to Key Treasury Posts*, ASSOCIATED PRESS, Mar. 8, 2009, <http://www.msnbc.msn.com/id/29579093/>; Daniel Wagner, *Understaffed Geithner Can't Keep Up*,

followed.¹³ But at the end of August, Geithner had only ten confirmed officials underneath him.¹⁴ Although Geithner has temporary advisors, those advisors lack meaningful authority. Thus, at a recent Senate oversight hearing on the bailout of American International Group, Inc., no one was available from the new administration's Treasury Department to testify.¹⁵

In addition, although President Obama successfully pressed a \$787 billion stimulus package through Congress in February, there were not many appointees then in place to oversee the spending of those funds.¹⁶ For instance, at the Department of Energy, Secretary Steven Chu was having difficulty dispersing \$39 billion in stimulus funding in the spring.¹⁷ Part of the problem, according to reports, is that many top jobs were empty.¹⁸ In short, President Obama may be more like recent presidents when it comes to appointments than early reports predicted.¹⁹ Simply put, it takes time for presidents to staff the administrative state.

Focusing just on executive agencies, over which the president has more control,²⁰ it generally takes many months to get the first wave of

Critics Say, ASSOCIATED PRESS, Mar. 4, 2009, <http://www.foxnews.com/wires/2009Mar04/0,4670,UnderstaffedTreasury,00.html>. President Obama did decide to keep one Treasury official from the Bush administration in early February. See Neil Irwin, *Obama Makes Senior Picks at Treasury Dept.*, WASH. POST, Mar. 24, 2009, at A11.

13. In late March, President Obama made five more picks. See Irwin, *supra* note 12; Posting of Philip Rucker to 44: The Obama Presidency, http://voices.washingtonpost.com/44/2009/03/28/obama_settles_on_3_more_senior.html (Mar. 28, 2009, 16:51 EST) ("Obama Settles on 3 More Senior Officials for Treasury").

14. Washington Post, *supra* note 7 (search on Aug. 31, 2009, of the Treasury Department) (showing confirmed officials in the following positions: Deputy Secretary, Under Secretary for Terrorism and Financial Intelligence, Assistant Secretary for Financial Institutions, Assistant Secretary for Terrorist Financing, Assistant Secretary for Legislative Affairs, Assistant Secretary for Economic Policy, Assistant Secretary for Management and Chief Financial Officer, Assistant Secretary for Financial Stability, Treasurer of the United States, and Chief Counsel of the Internal Revenue Service).

15. See Wagner, *supra* note 12.

16. Peter Baker, *Obama Team Has Billions to Spend, but Few Ready to Do It*, N.Y. TIMES, Feb. 18, 2009, at A17.

17. John M. Broder, *Energy Secretary Serves Under a Microscope*, N.Y. TIMES, Mar. 23, 2009, at A1.

18. *Id.* (noting appointment vacancies and the "glacial pace" of the Energy Department). See also Washington Post, *supra* note 7 (search on July 1, 2009, of the Energy Department) (showing that as of June 1, 2009, fourteen of twenty-two Senate-confirmed positions lacked confirmed officials, and eleven of those fourteen did not even have nominees).

19. Baker, *supra* note 16 (noting that Obama had announced more nominations than recent presidents but that formal nominations and confirmations were close to historical trends). Cf. Posting of Marc Ambinder to The Atlantic: Politics with Marc Ambinder, http://politics.theatlantic.com/2009/02/obamas_ahead_on_nominees.php (Feb. 9, 2009, 17:46 EST) ("Obama's Ahead on Nominees") (noting that Obama formally nominated forty-one officials in January, more than each of the past four presidents).

20. Staffing agency positions is challenging, whether in executive agencies such as the CIA or in

appointees into place.²¹ Then, once filled, these positions do not stay occupied for long, as appointees often seek jobs in the private sector or move up in the appointments hierarchy. As one staff member from President Eisenhower's administration quipped, agency leaders seem to stay for "a social season and a half and then leave."²² This observation seems to fit more recent presidents especially well.²³ Therefore, a year or two after the start of an administration, presidents are often looking to fill critical agency jobs a second time. And near the end of an administration, these political positions empty out yet again. As Ed Rollins, a White House

independent regulatory commissions such as the FCC. Because presidents are more constrained in their hiring and firing decisions at independent regulatory commissions, this Article examines only executive agencies where the president can often freely select, with Senate confirmation, and remove agency leaders. Likewise, the Article also does not address vacancies in lower-level appointments that do not require Senate confirmation. *See, e.g.,* Stephen Labaton, *Offices Go Vacant at Fannie and Freddie*, N.Y. TIMES, Apr. 15, 2009, at B4. It also does not cover openings in the civil service. *See* Zachary A. Goldfarb & Christopher Lee, *Civil Service Steps Up Recruitment*, WASH. POST, May 2, 2006, at A19 (noting the approaching "retirement tsunami").

21. *See* PAUL C. LIGHT, A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 87 (2008) (noting that delays in staffing positions are "particularly noticeable . . . at the start of a new administration").

22. Patricia W. Ingraham, *Building Bridges or Burning Them? The President, the Appointees, and the Bureaucracy*, 47 PUB. ADMIN. REV. 425, 428 (1987).

23. Looking at all Senate-confirmed agency appointees from October 1981 to September 1991, the U.S. General Accounting Office ("GAO") found that the median appointee tenure was 2.1 years. GAO, GAO/GGD-94-115FS, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION 4 tbl.1 (1994), available at <http://archive.gao.gov/t2pbat3/151789.pdf>. The RAND Corporation determined that from 1947 to 1999 most top-level appointees in the Defense Department served only 11 to 20 months. CHERYL Y. MARCUM ET AL., RAND, DEPARTMENT OF DEFENSE POLITICAL APPOINTMENTS: POSITIONS AND PROCESS 15 (2001). *See also* Carl Brauer, *Tenure, Turnover, and Postgovernment Employment Trends of Presidential Appointees*, in THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON 174, 175 (G. Calvin Mackenzie ed., 1987) (noting that President Johnson's appointees served an average of 2.8 years and that by the end of President Reagan's first term, appointees were serving an average of only 2 years); DAVID T. STANLEY, DEAN E. MANN & JAMESON W. DOIG, MEN WHO GOVERN: A BIOGRAPHICAL PROFILE OF FEDERAL POLITICAL EXECUTIVES 62 tbl.4.4 (1967) (reporting that Roosevelt appointees had a median tenure of 38 months, Truman appointees had a median tenure of 22 months, Eisenhower appointees had a median tenure of 28 months, and Kennedy appointees—who had left government service by April 30, 1965—had a median tenure of 23 months); Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRES. STUD. Q. 432, 436 (2009) (finding a median tenure of 2.5 years for appointees who served under President George H. W. Bush or President Clinton); Anne M. Joseph, *Called to Testify: Congressional Oversight of Presidential Appointees and the Administrative State* 94 tbl.7 (Feb. 7, 2003) (unpublished manuscript, on file with author) (finding a mean tenure of 881.6 days among the set of appointees under President Reagan and President George H. W. Bush). *Cf.* Matthew J. Dickinson & Kathryn Dunn Tenpas, *Explaining Increasing Turnover Rates Among Presidential Advisers, 1929–1997*, 64 J. POL. 434 (2002) (examining the relationship between turnover and the election cycle); Jeff Gill & Richard W. Waterman, *Solidary and Functional Costs: Explaining the Presidential Appointment Contradiction*, 14 J. PUB. ADMIN. RES. & THEORY 547 (2004) (analyzing the relationship between stress and appointee tenure).

political director under President Reagan, explained: “In the last year you have the phenomenon of a lot of assistant secretaries out looking for jobs . . . and it’s a difficult time to be recruiting.”²⁴

This cycle of agency appointments—from the start through the end of a presidential administration—produces a considerable number of vacant offices in federal agencies.²⁵ Sometimes these top positions are completely empty. For example, for half of 2005, there was no deputy administrator (the second most senior position) of the Environmental Protection Agency.²⁶ There also was no national archivist for over two years early in the Clinton administration.²⁷ At other times, important jobs are filled temporarily by acting officials. For instance, in the last full month of President George W. Bush’s administration, acting officials were heading the Department of Justice’s Criminal and Civil Rights Divisions, among many other positions.²⁸

Vacancies, particularly if they occur often or last a long time, likely have detrimental consequences for the modern administrative state and therefore for public policy.²⁹ Most critically, vacancies promote agency inaction. Agencies without confirmed officials in key roles will be less likely to address important problems and less equipped to handle crises.³⁰ Also, without political leaders or with only acting officials lacking sufficient authority, nonpolitical workers will have insufficient direction. In this context, careerists may not know what to do or may be unmotivated to

24. Mary Thornton, *Running the Bureaucracy in the Lame-Duck Days*, WASH. POST, Nov. 6, 1987, at A19.

25. In this Article, “office” refers to any position in an executive agency requiring presidential nomination and Senate confirmation. This is a narrower definition of office than described in the Constitution. An office is considered “vacant” if there is no Senate-confirmed presidential appointee or formal recess appointee serving in the position. In other words, if there is an “acting” official who is named under neither the Appointments Clause nor the Recess Appointments Clause, or no one at all in an office, that office is vacant for purposes of this Article. This broader definition of vacancy is used to capture a distinction between positions filled as the Constitution specifies and positions left empty or filled temporarily by statute. *See infra* Part II.

26. Environmental Protection Agency, History, Deputy Administrator, <http://www.epa.gov/history/admin/deputy/index.htm> (last visited July 1, 2009).

27. *See Neglect at the Archives*, WASH. POST, May 8, 1995, at A20.

28. *See U.S. Department of Justice: Member of Afghan Taliban Sentenced to Life in Prison in Nation’s First Conviction on Narco-Terror Charges*, BIOTERRORISM WK., Jan. 5 2009, at 16 (referring to Matthew Friedrich as acting Assistant Attorney General of the Criminal Division); Press Release, Dep’t of Justice, Justice Department Sues New Mexico Community College for Sexual Harassment of Former Employee (Jan. 9, 2009), available at <http://www.usdoj.gov/opa/pr/2009/January/09-crt-022.html> (referring to Grace Chung Becker as acting Assistant Attorney General of the Civil Rights Division).

29. *See infra* Part III.

30. *See infra* Part III.A.1.

invest needed effort, which contributes to bureaucratic inactivity.³¹ Finally, vacancies undercut agency accountability and legitimacy. The public's trust in the administrative state rests, to a large degree, on agency accountability to the president and to Congress, which in turn depends in part on the selection and oversight of agency leaders. Frequent and lengthy vacancies may make agencies less responsive to the elected branches of government and to the public.³² It should be noted, however, that vacancies can have beneficial repercussions for agency performance.³³

Despite these often severe consequences, we know relatively little about vacant offices in executive agencies across recent administrations.³⁴ Using new data from the Office of Personnel Management ("OPM"), this Article provides a systematic nonsurvey study of executive agency vacancies from President Carter to President George W. Bush. The extent of federal agency vacancies is staggering. By one measure, Senate-confirmed positions were empty (or filled by acting officials), on average, one-quarter of the time over these administrations.

These empirical realities potentially have significant repercussions for constitutional and administrative law. Participants in debates over the unitary theory of the executive might want to spend less time assessing the legitimacy of restrictions on the president's removal power and instead pay more attention to analyzing the absence of presidential appointments at the front end of the process. Commentators interested in congressional delegation of authority to agencies might consider how agency staffing affects adherence to congressional priorities. And scholars and courts wrestling with questions of agency deference might contemplate how underlying theories of expertise and political accountability could incorporate the empirical realities of political leadership in the federal bureaucracy.

In short, public law has largely ignored the staffing, or lack thereof, of the administrative state.³⁵ David Barron argues that scholars are more interested in presidential efforts to centralize administrative decisionmaking through such devices as Office of Management and Budget review of rulemaking than in efforts to politicize the bureaucracy through personnel decisions, even though it is much harder for the president to gain

31. See *infra* Part III.A.2.

32. See *infra* Part III.A.3.

33. See *infra* Part III.B.

34. See *infra* notes 197–98 and accompanying text.

35. See David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1104 (2008).

meaningful control through the former than the latter.³⁶ Barron suggests that this differential emphasis may derive, at least in part, from the perception that “the legal issues presented by staffing practices are neither as interesting nor substantial as those posed by presidential efforts to override autonomous agency judgments.”³⁷ This Article aims to dispel such a perception, by examining some of the important legal implications of agency vacancies. Even if key doctrines change, however, improvements in staffing federal agencies are likely to be modest. Policy reforms targeted at reducing the number and length of vacancies—including appointee commitments to serve for two to four years, better training for new officials, and advance personnel planning by the White House—will likely be more effective.

This Article therefore reflects both immediate and longer-term goals. Most critically, it documents the extent of vacancies and situates them in current scholarly debates. It leaves for other projects more detailed empirical analysis of vacancies and more extensive examination of some of their legal and normative implications. The Article proceeds as follows. Part II provides some background on agency appointments, including which positions in federal agencies are assigned to the political process and what constitutional and statutory constraints exist for filling Senate-confirmed appointed positions (and leaving them empty). Part III considers important consequences, both negative and positive, of vacant offices for public policy. Part IV surveys the scope of vacant offices from 1977 to 2005, looking at the various components of the appointments cycle—initial vacancies, end-of-administration vacancies, and across-administration vacancies—as well as at several potential explanations for these vacancies. Part V examines the legal implications of the empirical findings for the unitary theory of the executive, for congressional delegation of authority to agencies, and for judicial review of agency action taken (or not taken) when offices are vacant. Part VI makes a series of proposals, some to decrease the number and others to cut the length of vacancies in federal agencies. Part VII concludes.

II. STAFFING FEDERAL AGENCIES

The modern administrative state looks markedly different than the

36. *Id.* Barron draws heavily on Terry Moe’s important work on centralization and politicization. See Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985).

37. Barron, *supra* note 35, at 1104.

bureaucracy that existed around the time of the founding of the United States. The country essentially started with Departments of War, Navy, State, and Treasury, the Attorney General, and the postal service.³⁸ There are now fifteen cabinet departments and dozens of other agencies, including the National Security Agency (“NSA”), the Environmental Protection Agency (“EPA”), and the Securities and Exchange Commission (“SEC”). The current federal workforce—excluding government contractors, government grantees, and military personnel—has more than 2.5 million employees.³⁹

This part examines staffing within executive agencies⁴⁰—how positions are assigned to the political process, as opposed to the civil service or some other merit system, what constraints exist on filling Senate-confirmed positions, and what constraints exist on leaving them empty. The EPA is used as an example in the sections that follow. This material provides the necessary background to consider the consequences of vacancies, the scope of vacancies across recent administrations, and their legal implications.

A. DIVISION OF POSITIONS

The Constitution establishes minimal divisions among agency staff. It explicitly creates agency “officers,” therefore implicitly generating nonofficer positions.⁴¹ In *United States v. Hartwell*, the Supreme Court defined an office as a “public station, or employment, conferred by the appointment of government.”⁴² “The term,” the Court explained, “embraces the ideas of tenure, duration, emolument, and duties.”⁴³ The Department of Justice’s Office of Legal Counsel, under President Clinton, concluded that this constitutional category had at minimum three necessary

38. PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 129 (2d ed. 2002). *See generally* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995) (describing the development of the postal service during the first seventy years after it was established).

39. *See supra* note 10 and accompanying text.

40. Executive agencies include cabinet departments, agencies within cabinet departments, such as the Food and Drug Administration, which is a bureau of the Department of Health and Human Services, and other stand-alone agencies such as the EPA—all of which generally are under the direct control of the president and headed by a single official. *See* STRAUSS, *supra* note 38, at 127–33. They do not, however, include independent regulatory commissions such as the SEC, which make decisions by a majority vote of a slate of commissioners who typically are appointed to fixed terms and can be removed only for cause. *See id.* at 133–35.

41. U.S. CONST. art. II, § 2, cl. 2.

42. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867).

43. *Id.*

and independent components: “An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an ‘Officer of the United States.’”⁴⁴ Thus, contractors, state employees, and low-level staffers are not officers.⁴⁵ The third component—“exercising significant authority pursuant to the laws of the United States”⁴⁶—is the most important and the focus of Supreme Court case law.

The Constitution then divides officers into two types: principal and inferior.⁴⁷ The division determines how individuals can be selected for the jobs. Principal officers must be nominated by the president and confirmed by the Senate; inferior officers, if Congress so chooses, can be appointed instead by “the President alone,” “the Courts of Law,” or by “the Heads of Departments.”⁴⁸ The Supreme Court has remarked that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.”⁴⁹ The Court, in a subsequent case, explained that inferior officers “are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”⁵⁰ The application of this direction and supervision test, however, has yielded contrasting conclusions.⁵¹

44. The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996), reprinted as *The Constitutional Separation of Powers Between the President and Congress*, LAW & CONTEMP. PROBS., Winter/Spring 2000, app. at 513, 538 [hereinafter Dellinger Memorandum] (known as the “Dellinger Memorandum”).

45. See *id.* at 530–38.

46. Freytag v. Comm’r, 501 U.S. 868, 881 (1991) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

47. U.S. CONST. art. II, § 2, cl. 2.

48. *Id.*

49. Morrison v. Olson, 487 U.S. 654, 671 (1988). The Court cites 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1536, at 397–99 (3d ed. 1858) (“In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate.”).

50. Edmond v. United States, 520 U.S. 651, 663 (1997).

51. See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 676 (D.C. Cir. 2008) (“Because the Board’s exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission, we hold that Board members are inferior officers.”), cert. granted, 129 S. Ct. 2378 (2009); *id.* at 687 (Kavanaugh, J., dissenting) (“[Members of the Board] are not inferior officers because they are not ‘directed and supervised’ by the SEC: The [Board] members are not removable at will by the SEC; the SEC does not have statutory authority to remove them for failure to follow substantive SEC direction or supervision; and the SEC does not have statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, Board inspections, Board investigations, and Board enforcement actions.” (internal citation omitted)).

In practice, moreover, staffing federal agencies has become far more complex than these binary constitutional distinctions (officer/nonofficer and principal officer/inferior officer).⁵² Every nonmilitary job in an executive agency has two defining (and often overlapping) components: its payment classification and its appointment process.⁵³ There are three major payment categories: “blue-collar, white-collar, and top-level management positions.” As David Lewis explains,

The Federal Wage System (FWS) covers trade, craft, skilled, and unskilled laborers. The General Schedule (GS) defines the pay rates for administrative, technical, and professional jobs, while the Senior Level and Scientific and Professional (SL/ST) system does the same for high-level, but nonmanagerial, positions. Top-level management and professional jobs are covered under the Senior Executive Service (SES) pay schedule or the Executive Schedule (EX).⁵⁴

The appointments process differs from the payment classification, but the two dimensions do overlap. For instance, the EX generally includes only Senate-confirmed presidential appointments.⁵⁵

The appointments process has two primary categories: civil service positions filled by a merit process and positions “excepted” from the traditional merit system.⁵⁶ The 2.5 million federal workers are split roughly equally between these two categories.⁵⁷ Not all excepted positions are political appointments, however.⁵⁸ There are four types of excepted positions: “positions requiring presidential nomination and Senate confirmation (PAS); jobs filled by persons in the SES; positions in what are known as Schedules A, B, and C; and positions in agency-specific personnel systems.”⁵⁹

The first type is familiar; the others, less so. The SES, established by the Civil Service Reform Act of 1978, contains career employees as well as political officials, but political appointees can make up no more than 10

52. See Colin Campbell, *The Complex Organization of the Executive Branch: The Legacies of Competing Approaches to Administration*, in *THE EXECUTIVE BRANCH* 243, 243–69 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (describing the complexity of the executive branch as a result of scientific management, policy management, and public choice principles).

53. See LEWIS, *supra* note 10, at 20.

54. *Id.* at 20–21.

55. See *id.* at 21.

56. See *id.*

57. See *id.*

58. This Article often refers to political appointees (typically referring to Senate-confirmed positions) and careerists (including civil servants and nonpolitical excepted positions).

59. LEWIS, *supra* note 10, at 22.

percent of the whole SES (or one-quarter of the SES slots in any one agency).⁶⁰ The three Schedules, A, B, and C, were created for positions “for which it is not feasible to hold exams, even in agencies where the merit system is otherwise entirely appropriate.”⁶¹ Schedule A covers particular occupations such as attorneys; Schedule B permits examinations but does not use examinations to compare job seekers and is typically used for new agencies, among other examples; Schedule C is “for positions of a confidential or policy-determining nature.”⁶² Finally, some agencies, such as the Department of Homeland Security, have separate merit-based personnel systems.⁶³

Although about half of the federal workforce technically sits in excepted positions, many of these workers are in some form of merit system. There are remarkably few excepted positions with considerable policy discretion. In 2008, there were 1141 Senate-confirmed positions; 314 positions appointed by the president alone; 665 general SES positions filled by noncareer appointment at that time; 121 general SES positions staffed by limited emergency or limited term appointment at that time; 1559 Schedule C excepted slots; and 473 excepted policy and supporting positions by statute.⁶⁴ The SES positions are only a fraction of the entire SES.⁶⁵ Some of these policy positions cannot move, such as when a statute creates particular top-level jobs within a particular agency.⁶⁶ The president, however, has some discretion over the allocation of other political appointments, such as Schedule C and appointed SES slots, across federal agencies.⁶⁷ Not only do administrations shift some political positions from one agency to another (to reward campaign workers and to better control

60. *See id.* at 23.

61. *Id.*

62. *Id.* at 23–24.

63. *See id.* at 24–25.

64. *See* S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 110TH CONG., POLICY AND SUPPORTING POSITIONS app. 1, at 199 (Comm. Print 2008) (quadrennial report commonly referred to as the “Plum Book”). Many of the positions appointed by the president alone are White House staff jobs. Over one hundred of the 314 positions are in the White House. *See id.* app. 1, at 197 (see the row labeled “Executive Office of the President”).

65. The SES has two types of positions: career reserved and general. The figures above focus on the general slots. In total, the SES had 8328 positions as of the 2008 Plum Book. *Id.* app. 2, at 200. Noncareer appointees can take no more than 10 percent of these slots. *Id.*

66. *See, e.g.,* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 102(a), 103(a), 116 Stat. 2135, 2142–43, 2144 (codified at 6 U.S.C. §§ 112(a), 113(a) (2006)) (establishing the following offices, among others: Secretary, Deputy Secretary, and Under Secretary for Science and Technology for the Department of Homeland Security).

67. *See* LEWIS, *supra* note 10, at 23.

agencies with different preferences, among other reasons),⁶⁸ but recent administrations have also created additional political slots overall.⁶⁹ Of the 1141 Senate-confirmed positions, 726 are in executive agencies. Excluding U.S. Marshals, U.S. Attorneys, and Ambassadors, the number drops to 375.⁷⁰

This Article focuses on vacancies in Senate-confirmed positions. Some of the positions are principal offices, but some are also inferior offices where Congress has not chosen an alternative appointments process. To get some sense as to what positions are Senate-confirmed (besides the head of an agency), consider the EPA. The following positions in the EPA are filled by Senate-confirmed presidential appointments: the Administrator; the Deputy Administrator; the Chief Financial Officer; the Assistant Administrator for Environmental Information; the Assistant Administrator for Administration and Resources Management; the Assistant Administrator for Enforcement and Compliance Assurance; the General Counsel; the Assistant Administrator for International Activities; the Inspector General; the Assistant Administrator for Water; the Assistant Administrator for Solid Waste and Emergency Response; the Assistant Administrator for Air and Radiation; the Assistant Administrator for Prevention, Pesticides, and Toxic Substances; and the Assistant Administrator for Research and Development.⁷¹ These officials have significant policy authority. For instance, the Assistant Administrator for Air and Radiation “develops national programs, technical policies, and regulations for controlling air pollution and radiation exposure.”⁷²

B. CONSTRAINTS ON FILLING SENATE-CONFIRMED POSITIONS

Various constitutional and statutory provisions impose mandatory duties on the president and often the Senate in filling top positions in the

68. *Id.* at 60–66.

69. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 47–60 (1995).

70. To reach the 726 figure, I counted all Senate-confirmed positions in the 2008 Plum Book for the fifteen cabinet departments, the Executive Office of the President, the CIA, the EPA, the General Services Administration, the National Aeronautics and Space Administration (“NASA”), the National Archives and Records Administration, the OPM, the Small Business Administration, the U.S. Agency for International Development, the National Foundation on the Arts and Humanities, the National Science Foundation, and the Peace Corps. Offices with a fixed term were excluded. U.S. Marshal, U.S. Attorney, and Ambassador positions make up 351 of the 726 slots.

71. S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 64, at 148–52.

72. Environmental Protection Agency, Office of Air and Radiation, <http://www.epa.gov/air/> (last visited July 1, 2009).

administrative state. The Constitution places more restraints on who can select agency leaders than on who can be selected. The Appointments Clause specifies that the president

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁷³

The constitutional structure is therefore a simple one in theory: for all principal offices and inferior offices where Congress has not chosen an alternative appointment structure, the president nominates someone to fill the position and the Senate confirms the nominee.

The Appointments Clause serves separation of powers principles. As the Supreme Court explained in *Freytag v. Commissioner*,

The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment, but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.⁷⁴

Thus, the selection mechanisms for agency leaders simultaneously prevent aggrandizement *and* diffusion of constitutional authority.

The Constitution does restrict members of Congress from becoming agency leaders in two sets of circumstances. The Ineligibility Clause (also known as the Emoluments Clause) excludes members of Congress “during the Time for which [they were] elected,” from serving in “any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.”⁷⁵ Because of this restriction, Congress had to pass legislation cutting Secretary of State Clinton’s salary before she was sworn into President Obama’s cabinet. The Incompatibility Clause prevents current members of Congress from also “holding any Office under the United States.”⁷⁶ Interestingly, the Constitution does not restrict Article III judges from also

73. U.S. CONST. art II, § 2, cl. 2.

74. *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991) (citation omitted).

75. U.S. CONST. art. I, § 6, cl. 2.

76. *Id.*

serving as executive officers. Indeed, John Marshall had partially overlapping terms as Chief Justice and as Secretary of State.

Although the Constitution places few limits on who can be selected as agency leaders, many statutes shape the top layer of the administrative state. According to William Howell and David Lewis, over 40 percent of agencies created by legislation between 1946 and 1995 (seventy-four agencies) have restrictions placed on the qualifications of agency officials, though only eight percent of agencies created unilaterally by the White House (twenty agencies) have restrictions.⁷⁷ Thus, many agencies face statutory constraints on appointments. The mandates range widely in content, including restrictions on demographic characteristics, party affiliations, expertise, experience, and conflicts of interest.⁷⁸ Although prevalent in practice, these mandates have generated considerable criticism, particularly from the White House.⁷⁹

In practice, filling top positions in executive agencies is a complex enterprise. Both the nomination and confirmation process have multiple components. Before the president nominates someone to a high-level agency job, the White House has to figure out the job's requirements (including any statutory qualifications), look for and evaluate potential candidates, and then select a nominee.⁸⁰ Before the Senate confirms the nominee, the nomination gets referred to the relevant committee(s),

77. See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1098–99 & tbl.1 (2002).

78. See HENRY B. HOGUE, CONG. RESEARCH SERV., REPORT NO. RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS (2008) (discussing a range of qualification requirements imposed by Congress on agency officials); Anne Joseph O'Connell, Qualifications 14–22 (Oct. 2007) (unpublished manuscript, on file with author).

79. See HOGUE, *supra* note 78, at 1–2, 4–5; O'Connell, *supra* note 78, at 1. For example, after Hurricane Katrina, Congress passed legislation requiring that the head of the Federal Emergency Management Agency (“FEMA”) “be appointed from among individuals who have . . . a demonstrated ability in and knowledge of emergency management and homeland security; and . . . not less than 5 years of executive leadership and management experience in the public or private sector.” Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 503(c), 120 Stat. 1355, 1397 (codified at 6 U.S.C. § 313 (2006)). When President George W. Bush signed the bill, he issued the following signing statement:

[The Post-Katrina Act] vests in the President authority to appoint the Administrator [of FEMA], by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe [this legislation] in a manner consistent with the Appointments Clause of the Constitution.

President George W. Bush, Statement upon Signing H.R. 5441, Department of Homeland Security Appropriations Act, 2007, 2006 U.S.C.C.A.N. S49, S52 (Oct. 4, 2006).

80. See G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS*, at xv fig.I-1 (1981).

congressional staff members perform some investigation of the nominee, the committee likely holds a hearing, and then the whole Senate deliberates on the nomination.⁸¹

The only constitutionally recognized exception to this process for formal appointments to important executive agency positions is if the Senate is in recess. Under the Recess Appointments Clause, the president has the “power to fill up all vacancies that may happen during the Recess of the Senate, by granting commissions which shall expire at the end of their next session.”⁸² Commentators have debated the scope of this exception, including whether it applies only to vacancies that occur during a recess or also to vacancies that exist during a recess and whether the president’s recess power can be used only during an intersession recess or also during a break within a congressional session.⁸³ The president’s use of recess appointments, even if legal, often generates considerable controversy.⁸⁴ Temporary staffing of agency positions outside the constitutional appointments process is discussed in the next section.

Another exception, increasingly visible in practice though not recognized by the Constitution, is the use of high-level White House staff to shape important decisions.⁸⁵ President Obama, for instance, has named several policy czars, including Carol Browner for energy and environmental issues and Larry Summers for economics and recovery issues. To the extent that these White House assistants make decisions that otherwise would be left to agency officials, they may be functioning as

81. See *id.* Most confirmation hearings are not prolonged affairs covered by national media (for instance, like the confirmation hearing for Hillary Clinton for Secretary of State). Often, one hearing will cover multiple appointments in an agency. Even if a hearing does not include multiple appointees, the Senate frequently batches appointments for voting purposes. See, e.g., Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 27–29* (Feb. 12, 2007) (unpublished manuscript, on file with author) (noting the grouping of confirmation votes for independent regulatory commissioners).

82. U.S. CONST. art. II, §2, cl. 3.

83. See Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 238–40 (2008) (summarizing debates and providing citations).

84. See *id.* at 235–36. The Senate can also stay in session to prevent recess appointments. See Carl Hulse, *Democrats Move to Block Bush Appointments*, N.Y. TIMES, Nov. 21, 2007, at A16.

85. See Matthew J. Dickinson, *The Executive Office of the President: The Paradox of Politicization*, in THE EXECUTIVE BRANCH, *supra* note 52, at 135, 137; Paul C. Light, Op-Ed, *Nominate and Wait*, N.Y. TIMES, Mar. 24, 2009, at A27. See generally ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT’S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION* (2002) (referring to this process as “centralization” and examining it within the context of presidential efforts to further legislative programs).

officers and thereby violating the Appointments Clause.⁸⁶ In addition, to the extent that these White House czars implement policy delegated by Congress to a specific agency, they may be undermining the president's duty to "faithfully execut[e]" the laws.⁸⁷

In sum, constitutional and statutory requirements govern top-level appointments to executive agencies, consuming time and resources. The fourteen Senate-confirmed positions in the EPA illustrate some of these requirements. Most important, appointments to these positions require nomination and confirmation, unless the president can make a recess appointment. The Senate Committee on Environment and Public Works has jurisdiction over EPA nominations, performing investigations and holding any hearings.⁸⁸ Some of these positions also have statutory qualifications. Like other inspectors general ("IGs"), the EPA's IG must be appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."⁸⁹ And like other chief financial officers ("CFOs"), the EPA's CFO must have "extensive practical experience in financial management practices in large governmental or business entities."⁹⁰

By the end of August, nine of these fourteen positions in the EPA had been filled.⁹¹ Lisa Jackson was confirmed as EPA Administrator on January 22.⁹² The first nominee for Deputy Administrator, Jon Cannon, pulled out in late March;⁹³ in mid-May, President Obama announced his

86. See Bruce Ackerman, Op-Ed, *A Role for Congress to Reclaim*, WASH. POST, Mar. 11, 2009, at A15 (contending that certain White House policy czars under President Obama are "likely to overshadow the Cabinet secretaries in their respective domains"); Amy Harder, *Obama's "Czars": An Executive Power-Grab?*, GOV'T EXECUTIVE, Mar. 13, 2009, available at http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0309/031309nj2.htm&oref=search (noting that Senator Robert Byrd had sent a letter to President Obama, in which he warned that "the rapid and easy accumulation of power by the White House staff can threaten the constitutional system of checks and balances").

87. U.S. CONST. art II, § 3.

88. See U.S. Senate Committee on Environment and Public Works, Nominations, <http://epw.senate.gov/public/index.cfm?FuseAction=Nominations.List> (last visited July 1, 2009).

89. Inspector General Act of 1978, Pub. L. No. 95-452, § 3(a), 92 Stat. 1101, 1101 (codified at 5 U.S.C. app. § 3(a) (2006)).

90. 31 U.S.C. § 504(b)(2) (2006).

91. Washington Post, *supra* note 7 (search on Aug. 31, 2009, of the EPA) (showing confirmed officials in the following positions: Administrator, Assistant Administrator for Administration and Resources Management, General Counsel, Assistant Administrator for Enforcement and Compliance Assurance, Assistant Administrator for International Activities, Assistant Administrator for Water, Assistant Administrator for Solid Waste and Emergency Response, Assistant Administrator for Air and Radiation, and Assistant Administrator for Prevention, Pesticides and Toxic Substances).

92. See *Senate Confirms Lisa Jackson as EPA Administrator*, STAR-LEDGER, Jan. 24, 2009.

93. See Darren Samuelsohn, *Obama's Pick for EPA Deputy Administrator Withdraws*, N.Y.

intent to nominate Robert Perciasepe instead.⁹⁴ But Carol Browner was in place as Assistant to the President for Energy and Climate Change on December 15, 2008, before Obama even took office.⁹⁵

C. CONSTRAINTS ON LEAVING SENATE-CONFIRMED POSITIONS EMPTY OR FILLING POSITIONS TEMPORARILY

Just as there are constitutional and statutory constraints governing the filling of top-level agency jobs, there are also such constraints shaping the leaving of those jobs empty or staffed with temporary, nonrecess officials. Under the Appointments Clause, the president appears to have a mandatory duty to make nominations for at least principal officer positions: he “*shall* nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States.”⁹⁶ But that constitutional duty has little content—and virtually no time limits—from case law.⁹⁷

Statutes provide more specific directions for the White House when important agency jobs become empty. To start, there are congressional notification requirements. When a current agency officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office,” the head of the agency must notify the Comptroller General of the United States and each chamber of Congress of the vacancy.⁹⁸ Then there are information requirements. For instance,

[w]hen a vacancy occurs in an office within the Department of Defense and the office is to be filled by a person appointed from civilian life by the President, by and with the advice and consent of the Senate, the Secretary of Defense shall inform the President of the qualifications needed by a person serving in that office to carry out effectively the duties and responsibilities of that office.⁹⁹

TIMES, Mar. 25, 2009, <http://www.nytimes.com/gwire/2009/03/25/25greenwire-obamas-pick-for-deputy-administrator-withdraws-10304.html>.

94. Washington Post, *supra* note 7 (search for Robert Perciasepe).

95. *Id.* (search for Carol Browner).

96. U.S. CONST. art II, § 2, cl. 2 (emphasis added). Part V.D *infra* examines the limited extent to which the courts can be used to force the president to fill these positions.

97. *See infra* Part V.D.

98. 5 U.S.C. §§ 3345(a), 3349(a) (2006). These provisions are part of the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349.

99. 10 U.S.C. § 113(f) (2006). *See also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, sec. 1014, § 106, 118 Stat. 3638, 3663–64 (codified as amended at 50 U.S.C. § 403-6 (2006)) (requiring the Director of National Intelligence to “recommend to the President an individual for nomination to fill” particular vacancies in the intelligence community, including for the head of the CIA).

Finally, the Federal Vacancies Reform Act of 1998 or specific agency statutes provide for other officials to take over important executive agency positions on a temporary basis in many contexts.¹⁰⁰ Since 1795, Congress has limited who can serve in an “acting” capacity in positions normally filled by Senate-confirmed or recess presidential appointees.¹⁰¹ These limits have often been widely disregarded.¹⁰² Frustrated by President Clinton’s reliance on temporary appointees, including Bill Lann Lee as head of the Department of Justice’s Civil Rights Division, congressional Republicans pushed through the Federal Vacancies Reform Act of 1998.¹⁰³

For the most critical positions, there is a default acting official. Generally, under the Act, the “first assistant” to an executive agency office that has become vacant automatically “perform[s] the functions and duties of the office temporarily in an acting capacity subject to the time limitations of [the Act].”¹⁰⁴ Some agencies have specific statutes that

100. The 1998 Act has several large exceptions. It does not cover “any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that . . . is composed of multiple members; and . . . governs an independent establishment or Government corporation;” “any commissioner of the Federal Energy Regulatory Commission;” “any member of the Surface Transportation Board;” or “any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.” 5 U.S.C. § 3349c. In addition, some sections do not apply to “the General Counsel of the National Labor Relations Board;” “the General Counsel of the Federal Labor Relations Authority;” “any Inspector General appointed by the President, by and with the advice and consent of the Senate;” “any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate;” or “an[y] office of an Executive agency (including the Executive Office of the President, and other than the GAO) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.” *Id.* § 3348(e).

101. Joshua L. Stayn, Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1516 (2001) (citing the Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, which limited temporary officials’ tenure to six months).

102. See *id.* at 1518 (citing “[t]he refusal of the Nixon administration and subsequent presidential administrations to comply with the Vacancies Act”). See also Sean Scully, *Bid to Reform Vacancies Act Up in Air*, WASH. TIMES, Sept. 29, 1998, at A6 (noting that Vacancies Act supporters “say President Clinton and his recent predecessors have ignored the law that limits their power to name ‘acting’ officials” and that the Clinton administration, with past administrations, argued “that language in other statutes gives Cabinet-level agencies the power to install acting officials without time limits” despite various Vacancies Acts); Robert Shepard, *Administration Seen Evading Vacancies Law*, WASH. POST, July 7, 1986, at A9 (summarizing a GAO study that found “a clearly discernable trend by the executive branch to ignore [the 1982 Vacancies Act]”).

103. Brannon P. Denning, *Article II, The Vacancies Act and the Appointment of “Acting” Executive Branch Officials*, 76 WASH. U. L.Q. 1039, 1046 (1998); Stayn, *supra* note 101, at 1519–20. President Clinton had argued that agency-enabling statutes superseded the Vacancy Act previously in effect. Stayn, *supra* note 101, at 1519–20. The Act does not apply to independent agencies, such as the FCC. 5 U.S.C. § 3349c.

104. 5 U.S.C. § 3345(a)(1). There are some exceptions. If the president then nominates the first assistant for the vacant position, the first assistant may serve in an acting capacity for the position only if he or she has served as the first assistant for at least ninety days during the year that preceded the start

govern vacancies instead, often producing similar outcomes. For instance, “the Deputy Administrator shall be Acting Administrator of the [Small Business] Administration . . . in the event of a vacancy in the office of the Administrator.”¹⁰⁵ The White House can, however, make alternative arrangements for acting officials, in particular circumstances. Specifically, if there is no governing agency statute, the president can name someone who has already been confirmed by the Senate to another position to serve temporarily in a vacant position.¹⁰⁶ Or the president can select a senior civil servant, who is paid at least at the GS-15 level and who has worked in that agency for at least ninety days of the past year.¹⁰⁷

Despite these arrangements, when top executive agency officials resign, there is not always a first assistant to step in, and the president does not always choose an alternate acting official. In addition, even if there is a first assistant or if the president selects an alternate official, acting officials can serve for only a limited time. The length of service of an acting official depends on the timing of the vacancy within an administration. New presidents can use acting officials for longer, 300 days from a vacancy that occurs in the first two months of their administration.¹⁰⁸ After that period, acting officials can serve for only 210 days from the date an office becomes vacant unless they fall into one of the narrow exceptions.¹⁰⁹

Any decision made by an acting official not serving in compliance with the Federal Vacancies Reform Act cannot take effect, unless Congress later passes necessary legislation, which is costly to do.¹¹⁰ The agency head can, however, make decisions assigned to a lower-level vacant office.¹¹¹ Although the 1998 Act tightened constraints on temporary appointments to top agency positions, commentators note that the “limits are difficult to enforce and are often violated.”¹¹²

The Constitution and statutes therefore permit vacancies in important

of the vacancy, or if the first assistant is a Senate-confirmed presidential appointee. *Id.* § 3345(b). The term “first assistant” is not defined in the statute, but agency statutes and regulations often define who is the first assistant to leadership positions. *See* S. REP. NO. 105-250, at 12 (1998).

105. 15 U.S.C. § 633(b) (2006). There are forty such statutes. *See* S. REP. NO. 105-250, at 16–17.

106. 5 U.S.C. § 3345(a)(2).

107. *Id.* § 3345(a)(3).

108. *Id.* § 3349a(a)–(b).

109. *Id.* § 3346(a)–(b) (allowing an acting official to serve 210 days after the Senate rejects or returns his or her nomination, or the president withdraws it).

110. *Id.* § 3348(d).

111. *Id.* § 3348(b)(2).

112. G. Calvin Mackenzie, *The State of the Presidential Appointments Process*, in INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 1, 35 (G. Calvin Mackenzie ed., 2001).

agency positions. Sometimes, these positions are entirely empty; other times, they are filled by acting officials who can serve only limited terms. Both types of vacancies—completely empty offices and temporary staffing—occur at the EPA, for example. From 1981 until now, the EPA has had nine administrators confirmed by the Senate and ten acting administrators (two of whom were later confirmed).¹¹³ The position was never left empty during that period.¹¹⁴ By contrast, since the creation of the CFO position in 1997, there have been four CFOs confirmed by the Senate, four acting CFOs (three of whom were the same person, serving at different times), and one recess appointment (who was later confirmed); the office also sat completely empty from August 31, 2000, to February 24, 2002.¹¹⁵

With this background, the Article next considers the consequences of vacancies for public policy before surveying the scope of empty offices and temporary officials in the modern administrative state, and then considering the legal implications of such vacancies for administrative and constitutional law and advancing potential policy reforms.

III. CONSEQUENCES OF VACANT OFFICES

At first glance, it may not be obvious why vacancies in political jobs in federal agencies would have significant consequences for public policy. After all, in sheer numbers, the layer of political personnel in the federal workforce is thin. Senate-confirmed presidential appointees, non-civil service individuals placed in senior executive service positions, and politically selected Schedule C employees hold approximately 3000 jobs, far less than one percent of the federal workforce.¹¹⁶ There are, however, far more political jobs in the American administrative state than in other developed countries.¹¹⁷ In addition, that layer perches, for the most part, at

113. Environmental Protection Agency, History, Agency Administrators, <http://www.epa.gov/history/admin/agency/index.htm> (last visited July 1, 2009).

114. *Id.*

115. Environmental Protection Agency, History, Office of the Chief Financial Officer, <http://www.epa.gov/history/admin/ocfo/index.htm> (last visited July 1, 2009).

116. LEWIS, *supra* note 10, at 56. These figures include officials at executive agencies, as well as at independent regulatory commissions and boards. *See supra* note 40.

117. *See* James W. Fesler, *The Higher Civil Service in Europe and the United States*, in *THE HIGHER CIVIL SERVICE IN EUROPE AND CANADA: LESSONS FOR THE UNITED STATES* 87, 88 (Bruce L. R. Smith ed., 1984) (“New administrations in Britain and France make 100 top political appointments; a new group in power in Germany makes about 80; a change in the White House, however, can result in 1,400 new political appointments.”); LEWIS, *supra* note 10, at 3 (noting that France, Germany, and Britain each have between 100 and 200 political appointees). *See also* DELMER D. DUNN, *POLITICS AND ADMINISTRATION AT THE TOP: LESSONS FROM DOWN UNDER* 10, 74 (1997) (tracking increased politicization of bureaucratic appointments in Australia, though noting that the scope is still dwarfed by

the top of a wide-ranging administrative state.

Because of their positions, Senate-confirmed presidential appointees in particular wield considerable authority. The agencies they run arguably do more “lawmaking” and “judging” than Congress and the federal courts combined.¹¹⁸ In 2007, Congress enacted 138 public laws.¹¹⁹ By contrast, in that same year, federal agencies finalized 2926 rules, of which 61 were labeled as major regulations.¹²⁰ In a similar period, Article III and bankruptcy judges conducted about 95,000 adversarial proceedings, including trials, while federal agencies completed over 939,000 such proceedings, including immigration and social security disputes.¹²¹

the American system). Cf. Hans-Ulrich Derlien, *The Politicization of Bureaucracies in Historical and Comparative Perspective*, in AGENDA FOR EXCELLENCE 2: ADMINISTERING THE STATE 149, 154 (B. Guy Peters & Bert A. Rockman eds., 1996) (“From a bird’s eye view, the U.S. practice of having political appointees far down the administrative hierarchy is not so completely different from the European practice of party-politicizing the executive bureaucracy.”). Comparing vacancies among developed countries is quite difficult. Countries that have shadow governments presumably have shorter initial vacancy periods when party control changes. See David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 NW. U. L. REV. COLLOQUY 393, 395–96 (2009). There is some evidence, however, that other countries have high turnover in their political positions (even compared to the United States). See Fesler, *supra*, at 89 (citing short tenures in Britain and France); Salvador Parrado Díez, Spanish Civil Service: A Career System without Career Perspectives 11 (2001) (unpublished manuscript, on file with author) (finding high turnover due to mistrust when the conservative party followed the socialist party in ruling Spain); Rudy Lewanski, Executive Civil Servants and Politicians in Italian Administration: Some Empirical Evidence from Large Municipalities 3 (May 2001) (unpublished manuscript, on file with author) (noting tenures of under a year).

118. These figures include executive agencies as well as independent regulatory commissions and boards.

119. 110 CONG. REC. D80 (daily ed. Feb. 4, 2008) (Résumé of Congressional Activity: First Session of the 110th Congress).

120. GAO Federal Rules Database, <http://www.gao.gov/fedrules/> (search for all agencies between January 2007 and December 2007, specifying either “All” or “Major” as the Rule Type). Major rules have at least an annual \$100 million or other considerable adverse effect on the economy.

121. The federal court figure tries to capture adversarial proceedings; it therefore excludes criminal pleas and early disposition of civil cases. In fiscal year 2007, federal courts processed 12,116 criminal trials, 23,429 civil cases during pretrial or trial proceedings, and 59,504 adversarial bankruptcy proceedings. JAMES C. DUFF, ADMIN. OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007, at 169 tbl.C-4, 301 tbl.F-8, 390 tbl.T-1 (2007). The agency figure is a floor, including only agency immigration cases in which an agency lawyer participated and actual hearings reported by the Social Security Administration (“SSA”), the Equal Employment Opportunity Commission (“EEOC”), and the Board of Veterans Appeals (“BVA”). In fiscal year 2007, there were 365,851 such immigration cases. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ANNUAL REPORT (2007), available at http://www.ice.gov/pi/reports/annual_report/2007/ar_2007_page12.htm. In fiscal year 2006, the last year posted by the SSA, the SSA issued dispositions in 563,220 hearings. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2007, at 2.68 (2008). In fiscal year 2007, the EEOC reported it had closed 920 cases after a hearing (and closed an additional 2067 cases on the record). U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ANNUAL REPORT ON THE FEDERAL WORK FORCE § 1.E.2 tbl.22 (2007). In the same year, the BVA reported

Therefore, when these positions are not filled by confirmed (or recess) appointees, we should expect to see at least some effect on agency policymaking. This part explores these policy repercussions in more detail, examining the costs and benefits of agency vacancies. Three items should be noted. First, as with the rest of the Article, this examination focuses on vacancies in executive agencies.¹²² Vacancies in multimember commissions present additional complications and are not addressed here.¹²³ Second, this analysis considers positions that are left completely empty as well as positions that are staffed temporarily with acting officials. The difference, the discussion will show, is often one of degree, not of kind. After all, acting officials can serve for only short periods of time, and many of these positions have steep learning curves. Third, this discussion often treats vacancies at all levels in agencies similarly, such as the Administrator of the EPA and the Assistant Administrator of the EPA for Air and Radiation. I note, at times, how the level of a vacancy may differentially influence particular consequences. Nevertheless, all vacancies discussed here refer to Senate-confirmed positions that wield considerable discretion. Fourth, out of necessity, this examination often dissects factors in isolation, taking other factors as fixed.¹²⁴ I try where possible to note dynamics among the factors, but the optimal analysis would be a more complex endeavor.

A. COSTS OF VACANCIES

Vacancies in key executive agency positions have several deleterious consequences for policymaking. These effects include agency inaction, confusion among nonpolitical workers, and decreased agency

40,401 decisions, of which 9971 included a hearing. *BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN 21* (2007). This method of calculating adversarial proceedings is adapted from Judith Resnik's work. See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 783, 798–99 (2004) (calculating the number of adversarial proceedings in 2001). See generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 *DUKE L.J.* 1477 (2009) (examining decisions made by administrative law judges).

122. See *supra* note 40.

123. For instance, independent regulatory commissions and boards typically need a certain number of properly appointed members to make decisions. See 15 U.S.C. § 2053(d) (2006); Daniel Altman, *So Few Agencies, So Many Official Seats Unfilled*, *N.Y. TIMES*, July 27, 2002, at C1; Cindy Skrzycki, *The Consumer Safety Agency, Stalled by Room at the Top*, *WASH. POST*, Feb. 20, 2007, at D1. It may be that vacancies affect multimember agencies less severely than single-headed departments. So long as there is a quorum, multimember agencies can make decisions. Whether they do so in practice at the same rate as when they are fully staffed is an open question. More comparative research would help clarify these consequences of vacancies.

124. In economics terms, this part engages in partial equilibrium analysis.

accountability.¹²⁵

1. Agency Inaction

The absence of appointed agency leaders fosters agency inaction. If agencies are missing important managers, they will make fewer policy decisions.¹²⁶ For instance, agencies will undertake fewer rulemaking proceedings; they will also launch fewer controversial enforcement actions. Even if there are acting officials in place, such officials often lack sufficient stature to implement significant new programs or regulations. For instance, careerists drawn into acting positions have no or less “access to the external network to get what they need from the White House and the other agencies.”¹²⁷ Temporary political picks have less political capital to spend externally and internally. Even proper appointees have to get up to speed at the start of their government service;¹²⁸ therefore, frequent turnover among confirmed appointees also fosters agency inaction.

To be certain, agency work will not grind to a complete halt because of vacancies. If an agency is headed by a single administrator, with four primary divisions (each led by a division chief), where all five positions are supposed to be filled by Senate-confirmed presidential appointees, it would be quite unusual for all five positions to be vacant simultaneously.¹²⁹ But in the case of an open office at the division level, policymaking would presumably suffer in that area, mitigated somewhat if the top administrator is particularly strong and knowledgeable about the open division’s issues, and if there were no top administrator, it would decrease across the board.¹³⁰

The 9/11 Commission picked up on this inaction point.¹³¹ It is linked

125. This ordering is not meant to imply a ranking of decreasing severity.

126. See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AM. J. POL. SCI. 1122, 1141 (1999).

127. See JUDITH E. MICHAELS, *THE PRESIDENT’S CALL: EXECUTIVE LEADERSHIP FROM FDR TO GEORGE BUSH* 206 (1997) (quoting an agency official).

128. See Ingraham, *supra* note 22, at 425 (concluding that “very short tenure in one position and frequent lack of preparation for government management create a cadre of political executives which is constantly moving and constantly ‘learning the ropes’”).

129. *But see* Naftali Bendavid, *Vacancies Cripple Sentencing Agency: U.S. Panel Has Staff, Budget but No Bosses*, CHIC. TRIB., Feb. 23, 1999, at 1 (noting that all seven spots on the U.S. Sentencing Commission were empty).

130. *But see* Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN’S L. REV. 757, 775–78 (1993) (finding no relationship between judicial vacancies and delays on the civil docket).

131. See NAT’L COMM’N ON TERRORIST ATTACKS UPON U.S., *THE 9/11 COMMISSION REPORT* 198, 422–23 (2004) (recommending mechanisms for implementing more swift appointments during

to arguments that frequent turnover in positions, which shapes the number but not necessarily the length of vacancies, hurts agency performance.¹³² It is possible, of course, that certain patterns of vacancies within an agency may actually produce quicker action. The idea is that agency leadership would be more streamlined; with fewer potential veto points, agency decisions could be made more quickly.¹³³ Even if certain decisions can be made more quickly at the top, a senior government official notes, “after that there are tons of detail and nuances that have to get worked out without clear chains of command.”¹³⁴

Consider two examples, one general and one specific, of agency inaction linked to vacancies. First, agencies typically begin fewer rulemakings in the first year of a presidential administration, as judged by the number of Notices of Proposed Rulemakings (“NPRMs”) published in the *Federal Register* and announced in the *Unified Agenda of Federal Regulatory and Deregulatory Activities*, from 1983 to 2008.¹³⁵ This delay in initiating new regulatory (or deregulatory) programs parallels the delay in filling key agency positions at the start of an administration.¹³⁶

Second, agency inaction from leadership vacancies may add to the impact of natural (and man-made) disasters. When Hurricane Hugo struck South Carolina and other coastal areas in September 1989, causing eighty-two deaths and leaving tens of thousands without homes, only one of eight top positions at the Federal Emergency Management Agency (“FEMA”) was filled by a Senate-confirmed appointee.¹³⁷ In addition, less than a year

transitions in administrations and noting the increased delay caused by the debate over the outcome of the 2000 presidential election).

132. See, e.g., Elliot L. Richardson & James P. Pfiffner, *Politics and Performance: Strengthening the Executive Leadership System*, in *THE MANAGERIAL PRESIDENCY* 175, 177 (James P. Pfiffner ed., 1999) (noting the damage to agency performance caused by increased turnover); Richard T. Boylan, *Salaries, Turnover, and Performance in the Federal Criminal Justice System*, 47 *J.L. & ECON.* 75 (2004) (examining how salaries for U.S. Attorneys can increase turnover and thus reduce output).

133. See Farah Stockman & Bryan Bender, *Vacancies Abound in Crucial U.S. Posts: Obama’s Vetting Policy Slows Appointments*, *BOSTON GLOBE*, Feb. 27, 2009, at A1 (“You can get bolder policy initiatives acted on because there are fewer people to second-guess them.” (quoting transition expert John Kamensky)).

134. David Cho, *At Geithner’s Treasury, Key Decisions on Hold: Many Advisers’ Roles Are Undefined and Others Are Still Awaiting Confirmation*, *WASH. POST*, May 18, 2009, at A1.

135. See ANNE JOSEPH O’CONNELL, *CTR. FOR AM. PROGRESS, CLEANING UP AND LAUNCHING AHEAD: WHAT PRESIDENT OBAMA CAN LEARN FROM PREVIOUS ADMINISTRATIONS IN ESTABLISHING HIS REGULATORY AGENDA* 9–10 (2009), available at http://www.americanprogress.org/issues/2009/01/pdf/regulatory_agenda.pdf [hereinafter O’CONNELL, *CLEANING UP*]; Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *VA. L. REV.* 889, 937–46 (2008) [hereinafter O’Connell, *Political Cycles*].

136. See *infra* Part IV.A.

137. See LEWIS, *supra* note 10, at 151.

before Hurricane Katrina slammed the Gulf Coast in August 2005, more than one-third of FEMA's important policy positions were vacant.¹³⁸ FEMA's performance in both disasters was roundly criticized, deriving in part from the personnel vacancies.¹³⁹ David Lewis, a political scientist who has studied the effects of appointee turnover at FEMA, concludes:

If you told people on Wall Street that every four years or eight years, you were going to lop off the top of a Fortune 500 company and say the company would operate normally, you'd be called crazy. There is no question that it matters. Turnover and vacancies in politically appointed positions hurts performance.¹⁴⁰

To some extent, this inaction effect of agency vacancies can be overcome by other factors. Strong White House involvement in a specific policy area may produce agency action. Alternatively, to the extent that an agency's work is uncontroversial or repetitive, much of that work will be done by civil servants. In addition, deadlines may compel agency decisions despite leadership holes. Congressional or judicial deadlines, for example, may spur agencies to enact policies.¹⁴¹ The end date of an administration may also contribute to agency decisions. A flurry of midnight regulatory activity occurs during each presidential transition despite a corresponding trend of Senate-confirmed political appointees rushing out the door.¹⁴² Even if an agency with vacant offices does not take action, such inaction can be countered in other ways. For example, the overlap in agency jurisdictions may allow an agency with sufficient staffing to perform necessary work when another agency suffering from personnel losses is unable to.¹⁴³ Although effects can be mitigated to some degree, there will

138. See *id.* at 164–65. The vacant positions included “the Chief of Operations in the Response Division, Chief of Individual Assistance in the Recovery Division, Chief of Public Assistance in the Recovery Division, and Deputy Director of Preparedness.” *Id.* at 165. Not all of the vacant positions required Senate confirmation.

139. See PEW RESEARCH CTR. FOR PEOPLE & PRESS, TWO-IN-THREE CRITICAL OF BUSH'S RELIEF EFFORTS (2005), available at <http://people-press.org/report/255/two-in-three-critical-of-bushs-relief-efforts> (surveying public reactions to the government's response to Katrina); James Gerstenzang, *Bush Tours S. Carolina Storm Wreckage, Defends Federal Emergency Aid Efforts*, L.A. TIMES, Sept. 30, 1989, at 12.

140. Dan Eggen & Christopher Lee, *Late in the Term, an Exodus of Senior Officials: Scores of High-Level Political Positions Are Vacant or Are Being Filled by Temporary Appointees*, WASH. POST, May 28, 2008, at A11 (quoting Lewis).

141. See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 945, 988 tpls.11–12 (2008).

142. See O'CONNELL, CLEANING UP, *supra* note 135, at 6–8; O'Connell, *Political Cycles*, *supra* note 135, at 952–59; *infra* Part III.B. To be certain, vacancies at the end of an administration may curtail midnight regulations. With fewer vacancies, we may see much more rulemaking in the final months, suggesting a potential benefit to such vacancies at least at the end of an administration.

143. See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and*

generally be less important agency action being performed overall when there are fewer confirmed leaders.¹⁴⁴

2. Agency Confusion

Vacancies in high-level agency positions also create confusion within the agency, particularly for careerists.¹⁴⁵ Nonpolitical employees make up almost the entire federal workforce, save for the several thousand slots reserved for political appointments. Without political leaders, careerists may not know what they should do. It is not that careerists do not have the necessary expertise to act or that they are wandering the agency's halls perplexed. Rather, they may have the requisite skills but lack the needed direction that results from policy decisions at higher levels.¹⁴⁶ Or, more likely, with frequently changing leaders, careerists may find their assignments constantly shifting. Consequently, they may undertake tasks with less effort, anticipating that new leaders will ignore or reverse their earlier work. They may feel that they can wait out political directives if appointee tenure is short.¹⁴⁷ In both scenarios, vacancies prevent sufficient finality in the decisionmaking process needed by nonpolitical employees. As Paul Light explains, "The resulting decapitation of agencies [from vacancies] often leaves career executives without direction, direction that they both need and want."¹⁴⁸ Nominations are often insufficient in

Overseeing Agencies in the Post-9/11 World, 94 CAL. L. REV. 1655, 1678–79 (2006) (discussing reliability advantages of redundancy).

144. Efforts to reduce vacancies will also help counter problems resulting from agency inaction. See, e.g., L. ELAINE HALCHIN, CONGR. RESEARCH SERV., REPORT NO. RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 18 (2008) (explaining how the Intelligence Reform and Terrorism Prevention Act of 2004 encourages "expedited consideration" of nominees to national security positions). Part VI *infra* advances several policy recommendations to reduce vacancies.

145. This Article uses the term "careerists" to refer to nonpolitical workers, including civil servants and individuals employed in nonpolitical excepted positions. See *supra* notes 58–59 and accompanying text.

146. This can be quite disheartening for careerists. See Carol D. Leonnig, *Widespread Complaints About a Rudderless Government*, WASH. POST, Nov. 6, 2008 ("The administration checked out early. I am hearing people [civil servants] are demoralized and waiting for some leadership." (quoting transition expert John Kamensky)).

147. See LEWIS, *supra* note 10, at 4 ("Appointed managers have a hard time committing to long-term plans or policy reforms and career professionals are slow to respond and grow cynical after multiple experiences with these 'birds of passage.'").

148. LIGHT, *supra* note 69, at 69. Of course, careerists may disagree with this direction, when provided. See Joel D. Aberbach, *The Executive Branch in Red and Blue*, in A REPUBLIC DIVIDED 157, 179 (The Annenberg Democracy Project ed., 2007) (concluding that career SES employees saw decisions by Clinton appointees as more likely to be based on a comprehensive review of information and less likely to come from ideological preferences than those by George W. Bush appointees).

providing needed direction as nominees are often instructed to stay away from their agencies until they are confirmed.¹⁴⁹

Confusion still exists with acting officials, though it may be less pronounced. Acting officials will generally lack sufficient authority to direct careerists beyond the most basic agency functions.¹⁵⁰ Take one example. There has been no permanent Surgeon General for over three years.¹⁵¹ Two men have served in an acting capacity during that time. The most recent official is a well-respected career official, but the leader of a nonprofit organization representing many U.S. Public Health Service officers laments that because the official is “the acting guy, he doesn’t have the heft, the authority, that a permanent appointee would have.”¹⁵² Even if acting officials can motivate the careerists to operate smoothly, and even if they have considerable agency experience, they will not be as powerful as permanent appointees in dealing with the agency’s major outside constituencies—the White House, Congress, interest groups, and the media.

Leadership vacuums may also produce more conflict between careerists and political appointees as nonpolitical employees may become unaccustomed to political direction and react more sharply to such

149. See Mark A. Abramson et al., *Getting It Done: Advice for Government Executives*, BUS. OF GOV'T, Fall/Winter 2008, at 45, 45.

150. See Philip Shenon, *Interim Leaders Increasingly Run Federal Agencies*, N.Y. TIMES, Oct. 15, 2007, at A1 (noting that acting officials “do not have the clout to make decisions that comes with a permanent appointment endorsed by the Senate, scholars say”); Roberto Suro, *Vacancies at Highest Levels Force Reno to Be Hands-On at Justice Dept.*, WASH. POST, May 18, 1997, at A9 (“The career people . . . are the best and the brightest, but there is good reason why sensitive decision-making jobs are supposed to be held by appointees [and not careerists as acting officials]. [Political appointees] can exercise more discretion, and they speak with greater authority.” (quoting William C. Banks, professor at Syracuse University Law School)). Important decisions can be passed up the chain of command to confirmed appointees. But that places immense pressure on top-level officials. See *id.* Sometimes, acting officials are also juggling multiple jobs, making it even harder to be effective in a temporary position. See *Turmoil at the Drug Agency*, N.Y. TIMES, Sept. 27, 2005, at A24 (criticizing the Bush administration’s decision to appoint the Director of the National Cancer Institute as acting Commissioner of the Food and Drug Administration).

151. U.S. Department of Health and Human Services, Office of the Surgeon General, Previous Surgeons General, <http://www.surgeongeneral.gov/about/previous/index.html> (last visited July 1, 2009). President Obama had been expected to nominate CNN medical correspondent Sanjay Gupta for surgeon general. See Al Kamen, *Opposition to Gupta*, WASH. POST, Jan. 9, 2009, at A15. But Gupta withdrew from consideration. See Michael D. Shear & Howard Kurtz, *CNN’s Gupta Decides Against Surgeon General Position, Cites “Timing,”* WASH. POST, Mar. 6, 2009, at A2. In mid-July, President Obama announced that he would nominate Dr. Regina Benjamin, a family practice specialist, to be Surgeon General. See Alexi Mostrous & Michael D. Shear, *Obama Names Surgeon General*, WASH. POST, July 14, 2009, at A4.

152. Eggen & Lee, *supra* note 140 (quoting Jerry Farrell, Executive Director of the Commissioned Officers Association).

direction when it is provided. This could create a vicious cycle, with contentious relations with careerists contributing to shorter appointee tenure, and so on.¹⁵³ This could mean, however, that periods of vacancies could be beneficial as there is less hostility if there are no appointees to anger careerists.

Public administration scholars see productive interactions between careerists and political appointees as critical for strong agency performance.¹⁵⁴ To generate such interactions, both groups need to respect and understand the other.¹⁵⁵ That respect and understanding come most easily from shared time in the agency,¹⁵⁶ though goodwill could also be generated from more extensive training and orientation of new appointees.¹⁵⁷ In sum, the effect of vacancies in a few political positions extends far into the civil service and other nonpolitical agency jobs, and therefore likely into the functioning of the administrative state.

3. Agency Accountability

Gaps in agency leadership also ultimately undermine agency accountability and public trust in the administrative state.¹⁵⁸ The legitimacy of modern agencies derives, in significant part, from their accountability to the president and to Congress, the two branches elected by the public.¹⁵⁹

153. See Philip G. Joyce, *An Analysis of the Factors Affecting the Employment Tenure of Federal Political Executives*, 22 ADMIN. & SOC'Y 127, 127 (1990) (finding that "poor relations with the career bureaucracy" negatively impact tenure). Cf. *id.* at 141 (finding that confidence in careerists could promote longer tenures among agency officials, but also that longer tenures could lead to increased confidence).

154. See Paul C. Light, *When Worlds Collide: The Political-Career Nexus*, in THE IN-AND-OUTERS, *supra* note 23, at 156, 159.

155. See Carolyn Ban & Patricia W. Ingraham, *Short-Timers: Political Appointee Mobility and Its Impact on Political-Career Relations in the Reagan Administration*, 22 ADMIN. & SOC'Y 106, 117-19 (1990) (noting that that process takes time).

156. See LIGHT, *supra* note 69, at 69 ("[T]he sheer number of appointees coupled with the vacancy rates 'makes it almost impossible to build the connections central to positive working relationships between appointees and careerists.'" (quoting Light, *supra* note 154, at 157)); Joyce, *supra* note 153, at 141 (finding that "longer tenures could breed increased confidence" in careerists).

157. See ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS: HOW CAREER EXECUTIVES AND POLITICAL APPOINTEES CAN TURN CONFLICT TO COOPERATION 95 (2005) ("For career officials, a solid job orienting a new appointee can result in a trusting long-term relationship with that and other appointees. Since appointees often consult with their predecessors, such relationships can pay long-term dividends.").

158. The Article takes up the legal ramifications of agency vacancies in Part V *infra*. This section discusses legitimacy from a broader perspective.

159. Cf. Jerry L. Mashaw, Lecture, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 21 (2001) (pointing out possible agency "connections to the electorate" but emphasizing that agencies cannot rely too heavily on those

This accountability takes different forms.¹⁶⁰ The president uses appointments, removal, directives, centralized regulatory review, and information requests to control agencies, among other items; Congress employs delegation, statutory controls, the appropriations process, confirmations, hearings, investigations, and other tools to keep agencies in line.¹⁶¹ Relevant here, both the president and the Senate play explicit roles in the traditional appointments process for high-level positions. Agency claims of public representation that derive from the nomination and confirmation process are far less convincing if there are large periods of time when there are few officials who have gone through that process.

Vacancies also undermine accountability deriving from the checks and balances among the branches of government.¹⁶² In theory, Congress delegates policy authority to an administrative agency that exercises that authority within constraints prescribed by Congress and other sources, including the Constitution. By fostering agency inaction, vacancies permit congressional delegation to be ignored by the executive branch. For instance, President Reagan refused to make important appointments to agencies whose policies or existing leaders he disliked.¹⁶³

Temporary officials also create imbalances in our multibranch government. Acting agency leaders generally are less accountable to both the White House and Congress than traditional appointees. The president has less ability to remove an acting official, as he presumably chose an acting official to be a placeholder until he could find a permanent replacement. And although he can remove a senior civil servant from the acting position, he generally cannot remove the civil servant from the agency. Congress has less ability to direct acting officials, who can always claim they are just temporary officeholders. But acting officials may, in certain circumstances, be much more accountable to the White House (as

connections to justify their actions).

160. See O'Connell, *Political Cycles*, *supra* note 135, at 910, 918, 920 (summarizing forms of presidential and congressional oversight over agency actions).

161. This argument does suggest that acting officials who are Senate-confirmed appointees to other positions may be more legitimate than recess appointees. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1515–16 (2005). On the other hand, such acting officials “were not hand-selected by the President for the position, as is the case with recess appointees, but instead briefly fill the post while the President searches for a permanent replacement.” Hein, *supra* note 83, at 274.

162. Relatedly, vacancies may also affect the influence of interest groups. On one hand, vacancies may permit interest groups to work more closely with the civil servants with whom they have long-term relationships. On the other hand, vacancies may undermine interest group pressure as there are fewer appointees seeking post-government jobs.

163. See MICHAELS, *supra* note 127, at 102.

opposed to Congress) than traditional appointees are. For instance, the president may place a current political appointee in a more senior acting position. That appointee was not confirmed for the higher-level position and may escape congressional oversight that would fall on a confirmed appointee. In other contexts, acting officials may be more accountable to Congress than to the White House. A careerist may feel more pressure from Congress than an appointee and have fewer connections in the White House to counter that pressure.¹⁶⁴

There has been considerable discussion as to whether the president should closely control administrative agencies. Some scholars contend that the president should wield primary authority over agencies.¹⁶⁵ At the extreme, proponents of a unitary theory of the executive argue that the Constitution compels such an institutional arrangement.¹⁶⁶ Other scholars conclude that the president should not exercise such significant control or should share control with Congress.¹⁶⁷ The debate need not be resolved to make the following points. To the extent that, as a normative matter, both the White House and Congress should exercise at least some control over the administrative state, agency vacancies typically weaken both institutions' control. Furthermore, vacancies and acting officials may upset the balance between the two branches.¹⁶⁸

To be certain, agency vacancies do not eliminate presidential and

164. These imbalances may be less problematic in certain contexts, for instance if acting officials in agencies engaged in foreign affairs shift the accountability balance more in favor of the White House, or if acting officials in agencies dedicated to domestic policy push that balance more toward congressional control. For one description of categories of agency officers, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 117–18 (1994).

165. See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (defending actions by the Reagan White House); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending actions by the Clinton White House).

166. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1994). See also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (examining the debates over Congress's power to restrict both executive distribution of power and federal court jurisdiction, as well as how those debates interrelate).

167. See, e.g., Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227 (1998); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1 (2007); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

168. See *infra* Part V.A–B.

congressional influence. For instance, leaderless agencies or agencies with acting officials still have to submit proposed and final regulations to the Office of Management and Budget for review before issuing them. In addition, members of Congress still have the budget, oversight hearings, and other tools to oversee agencies. But agency legitimacy, as tied to political accountability, suffers when there are gaps in agency leadership.¹⁶⁹ Furthermore, vacancies may be the result of extensive vetting of possible nominees by the White House and Senate, which could promote agency accountability.

This undermining of agency legitimacy may have real effects on the making and implementation of public policy. On the front end, without key leaders, agencies may be unable to get needed regulations through White House review. On the back end, regulated entities may skirt compliance with agency mandates issued by acting officials (or with any requirement if the agency lacks officials in important enforcement positions).

B. BENEFITS OF VACANCIES

Agency vacancies are not always costly. They may actually be desirable for policymaking in at least four circumstances. These circumstances include the ability to select better appointees, potentially better performance from frequent turnover, the need or preference for agency inaction in particular policy areas, and the advantages of temporary officials over proper appointees in certain contexts.

1. Selection of Better Appointees

Vacancies may allow the president to select more qualified people. It may be possible to fill a top agency position in two months with someone who campaigned for the president but who lacks significant relevant expertise.¹⁷⁰ But it may take six months to find someone who has more

169. On the other hand, agency legitimacy can derive from agency expertise instead. Indeed, vacancies in political positions may foster agency accountability based on expertise. *Cf.* PAUL C. LIGHT & JUDITH M. LABINER, A VOTE OF RENEWED CONFIDENCE: HOW AMERICANS VIEW PRESIDENTIAL APPOINTEES AND GOVERNMENT IN THE WAKE OF THE SEPTEMBER 11 TERRORIST ATTACKS (2001), available at http://www.brookings.edu/~media/Files/rc/papers/2001/1019governance_labiner/20011910renewed.pdf (finding renewed confidence in agency leaders after September 11, 2001). *But see* JUDITH M. LABINER, BROOKINGS INST., A VOTE OF NO CONFIDENCE: HOW AMERICANS VIEW PRESIDENTIAL APPOINTEES 4–7 (2001), available at http://www.brookings.edu/~media/Files/rc/papers/2001/0906governance_labiner/20010601.pdf (finding that the public has little confidence in agency leaders because the public views them as too political and motivated by personal ambition).

170. *See* LEWIS, *supra* note 10, at 63–64.

experience and is willing to take the job but is unknown to the White House. Similarly, finding underrepresented minorities or women to staff leadership positions also often takes more time.¹⁷¹ Some positions, such as the Director of the National Institutes of Health or the Director of National Intelligence, may require more qualified officials than other jobs. The difference in qualifications or diversity between immediate and more prolonged hiring may not, however, outweigh the costs of delay.

In addition, there may be a tradeoff between the time needed to fill a position and how long that position stays filled. After all, the scope of vacancies at an agency is a function both of the number of openings and the length of openings.¹⁷² The less qualified leader who could step in immediately may stay for a much shorter period than a more qualified leader who may take more time to find. On the other hand, more qualified leaders may have better outside options, resulting in shorter government service.¹⁷³

2. Better Performance

Frequent turnover may foster creative solutions to complex policy problems.¹⁷⁴ New leaders bring new ideas and fresh connections with certain relevant outside groups, forcing needed change and improving agency performance. Shorter tenures also may permit political appointees to work harder during their stints than long-term employees likely can. As Derek Bok has argued:

In sum, the practice of having each new administration appoint several thousand officials from outside the government, bizarre as it may seem on first impression, turns out to have some marked advantages. It counteracts inertia, ensures an influx of new ideas, and keeps the government in touch with a variety of interested groups and constituencies. It also allows a steady infusion of talent that is possibly greater, and certainly more diverse, than a country such as ours could hope to achieve by trying to create an elite form of career civil

171. See David C. Nixon, *Appointment Delay for Vacancies on the Federal Communications Commission*, 61 PUB. ADMIN. REV. 483 (2001) (finding delays for minorities but not for women); David C. Nixon & David L. Goss, *Confirmation Delay for Vacancies on the Circuit Courts of Appeals*, 29 AM. POL. RES. 246 (2001) (finding delays for minorities and women).

172. See *infra* Part IV.C.

173. See DEAN E. MANN WITH JAMESON W. DOIG, *THE ASSISTANT SECRETARIES: PROBLEMS AND PROCESSES OF APPOINTMENT* 7 (1965) (finding negative correlation between qualifications and tenure because of outside options).

174. See generally Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008) (arguing that when policies can be reversed in the future, variation in policy outcomes is beneficial).

service.¹⁷⁵

Bok was comparing political appointees to careerists, but his argument could also extend to frequent turnover among political appointees.¹⁷⁶

This argument has many critics, however. Conventional wisdom in public administration holds that longer appointee tenure produces better performance.¹⁷⁷ Frequent turnover typically creates instability within an agency and prevents coherence across the administrative state.¹⁷⁸ It also has political costs for the White House and Congress, undermining their control over executive agencies.¹⁷⁹

3. Need for Agency Inaction

In the previous section, agency inaction was described as a negative consequence of agency vacancies.¹⁸⁰ The inaction fostered by leadership vacancies may, however, be desirable in particular circumstances. If there is no agreement on what the agency should be doing, agency inaction may be better than agency action. This conflict over agency priorities could derive from differences in political preferences or from uncertainty surrounding what would be the most effective regulatory policy in an issue area. If agency policies cannot be easily reversed, vacancies may prevent premature decisions or costly reversals by forcing agencies to wait before acting or to make incremental decisions.¹⁸¹ For example, if it is not clear how to dispose of a particular type of dangerous waste, it might be worth waiting to learn more before starting to dispose of the waste in a particular manner that may have to be reversed later.

If agency policies can be easily reversed, however, action in the face

175. See Derek Bok, *Government Personnel Policy in Comparative Perspective*, in FOR THE PEOPLE: CAN WE FIX PUBLIC SERVICE? 255, 265 (John D. Donahue & Joseph S. Nye, Jr. eds., 2003).

176. See Kenneth J. Meier & Alisa Hicklin, *Employee Turnover and Organizational Performance: Testing a Hypothesis from Classical Public Administration*, 18 J. PUB. ADMIN. RES. & THEORY 573, 574 (2008) (noting that employee turnover can generate better performance, both by “serv[ing] as a motivational signal to others remaining in the organization” and by “provid[ing] a source of new ideas for innovation and reform”).

177. For a seminal study, see HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* (1977). See also David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1086 (2007).

178. See Brauer, *supra* note 23, at 178.

179. See *id.*

180. See *supra* Part III.A.1.

181. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 590–93 (2003) (describing legislative rulemaking as “probably the most durable” and “perhaps the most ‘entrenched’ variety of policy decision” and outlining the various costs that accompany subsequent administrative policy revisions).

of policy uncertainty should be preferred to inaction.¹⁸² As Yair Listokin explains:

Reversibility means that the downside risk of high-variance policies is limited; policies with unexpectedly bad outcomes can be changed in the next period. The upside of high-variance policies, by contrast, may last indefinitely, since policies with unexpectedly good outcomes will be retained.¹⁸³

The cost of reversing policies likely varies by issue, making the net costs of vacancies nonuniform as well.

Vacancies may also prevent undesirable action as a matter of social welfare. It may be better to have no action than to have action that benefits a few at the cost of many. Political appointees are likely quite skilled at pushing through policies that benefit particular interest groups that have supported the administration. Sometimes, those policies serve the public interest.¹⁸⁴ At other times, they sacrifice the public interest for more narrow goals.¹⁸⁵ In addition, vacancies may foster symbolic inaction that generates political benefits. For example, when President Reagan left vacancies at more liberal agencies,¹⁸⁶ he generated support from his conservative base. Likewise, when Michael Brown resigned under criticism as head of FEMA after Hurricane Katrina struck, the creation of the vacancy signaled that the president preferred a temporary official to a roundly lambasted appointee.¹⁸⁷

4. Temporary Officials

Finally, vacancies in Senate-confirmed appointed positions may result in temporary officials who are more competent than confirmed appointees

182. See Listokin, *supra* note 174, at 480.

183. *Id.*

184. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 157–236 (2008) (surveying examples of regulatory decisionmaking purportedly designed to serve the public interest).

185. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (arguing that regulation generally benefits the regulated industry rather than the public at large).

186. See MICHAELS, *supra* note 127, at 40; Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 538 (1987). President Reagan did not fill the EPA's Assistant Administrator for Enforcement for over a year. See Houck, *supra*, at 538 n.13.

187. See Eric Lipton, *FEMA Calls, but Top Job Is Tough Sell*, N.Y. TIMES, Apr. 2, 2006, at 1 (describing the Bush administration's difficulty in filling Brown's vacancy and the concern about the qualifications of his acting replacement, R. David Paulison). Paulison was eventually nominated as Brown's permanent replacement after serving in an acting capacity following Brown's departure. See Robert Block, *Politics & Economics: FEMA's Acting Chief Remains on Board—Paulison Accepts Job After Others Turn It Down amid Criticism of Agency's Restructuring*, WALL ST. J., Apr. 7, 2006, at A4.

subsuming important agency duties. This is more likely if acting officials are drawn from long-term agency employees. Measuring competence is a complex task. Regarding education, political appointees are extremely well educated, if compared to all career federal workers.¹⁸⁸ But if political appointees are compared to senior careerists, they do not appear to have an edge.¹⁸⁹ Studies show, however, little connection between education and performance.¹⁹⁰

Regarding government experience, although many confirmed appointees have some prior government experience, a considerable number do not.¹⁹¹ Temporary officials, if drawn from career workers, have more agency work history.¹⁹² Unlike education, many consider government experience to be important for agency performance.¹⁹³ Acting officials, if drawn from long-term agency officials, may also provide needed continuity. Political appointees, who often have short tenures, break this continuity. The short tenure permits mistakes but not the opportunity to learn from those mistakes.¹⁹⁴

This greater government experience and continuity of temporary officials drawn from senior careerists has to be measured against the diminished authority wielded by careerists as acting officials. In some cases, temporary officials may produce better policymaking.

C. NET EFFECT OF VACANCIES

These costs and benefits of agency vacancies largely rely on empirical claims. Some of the claims are backed by systematic data, others by anecdote. To weigh the costs and benefits precisely, we would need to learn more. For instance, we would want to have additional information on

188. See Lewis, *supra* note 177, at 1078.

189. See Aberbach, *supra* note 148, at 160; JOSEPH A. FERRARA & LYNN C. ROSS, IBM CTR. FOR BUS. OF GOV'T, GETTING TO KNOW YOU: RULES OF ENGAGEMENT FOR POLITICAL APPOINTEES AND CAREER EXECUTIVES 8, 9 tbls.3-4 (2005). *But see* Lewis, *supra* note 177, at 1078.

190. See, e.g., MANN, *supra* note 173, at 250.

191. See Brauer, *supra* note 23, at 187 tbl.9.9 (commenting that 40 percent of appointees from 1964 to 1984 worked for the federal government immediately before taking their positions); HECLLO, *supra* note 177, at 101-02 (noting that 29 percent of senior appointees held previous political positions in the same agency and that 11 percent held positions in other agencies); James P. Pfiffner, *Strangers in a Strange Land: Orienting New Presidential Appointees*, in THE IN-AND-OUTERS, *supra* note 23, at 141, 141 (noting that 60 percent of appointees "are not currently in the same line of work as the [agency], and 20 percent have never been in that line of work before").

192. See FERRARA ET AL., *supra* note 189, at 8.

193. See, e.g., STANLEY ET AL., *supra* note 23, at 81.

194. Hugh Hecllo, *The In-and-Out System: A Critical Assessment*, in THE IN-AND-OUTERS, *supra* note 23, at 195, 208.

how agency performance is affected by vacancies. How much do vacancies affect agency action? What kind of action is most affected? Do agencies do better with temporary officials than with appointees? How do careerists react to vacancies? Do they work as hard for acting officials? In addition, we would want to determine how agency vacancies affect regulatory compliance and perceptions of agency legitimacy. Are businesses less likely to comply with regulations if the agency is missing top leaders? Do voters prefer agencies run by political appointees or acting officials? Are agencies more or less responsive to the White House, Congress, and interest groups when important positions are vacant?¹⁹⁵

Even without complex surveys of careerists, regulated entities, and the public that might provide some of this information, we may still be able to roughly assess the costs and benefits of agency vacancies.¹⁹⁶ Perhaps we can argue that public attention targeting the negative consequences of agency vacancies reveals that the costs are greater than the benefits. But that observation is likely unsatisfying, on its own. If the choice were between fewer political vacancies and empowered careerists—in other words, between politicization and professionalization—the benefits may outweigh the costs. But the choice is typically between fewer political vacancies and weakened careerists.

On net, although more research needs to be done, the risks of agency inaction, confusion or lack of motivation among careerists, and decreased legitimacy likely outweigh the potential benefits of keeping critical agency jobs empty or staffed with acting officials. And many of the benefits may be obtainable without fostering delays in the appointments process. Steps can be taken to improve the quality of appointees, for instance, by the presidential personnel office. In addition, appointees can choose to postpone decisions or make incremental policy calls in issue areas with high uncertainty and high reversibility costs. In short, just as any private company would not want to operate without permanent corporate officers,

195. We also should explore potentially helpful analogous issues. For example, inadequate resources may cause agency inaction or may make it harder for an agency to carry out delegated mandates. A tight budget may, however, also help in controlling agency policy decisions. To be certain, there are some important differences between vacancies and inadequate resources. For instance, the supply of potential appointees varies in particular ways across an administration that financial resources do not.

196. I do not want to suggest that such work is unimportant. I am interested in exploring the consequences of vacancies more systematically. For example, how do vacancies affect measurable agency performance (such as the processing of Freedom of Information Act requests)? Although the discussion here is a general one, the consequences likely vary by agency, with agencies more reliant on appointees (such as the EPA) presumably carrying heavier costs.

no public agency should desire numerous gaps in appointed leadership.

IV. APPOINTMENT GAPS IN RECENT ADMINISTRATIONS

Despite the often deleterious consequences of gaps in leadership, the modern administrative state seems plagued by vacancies. This part examines the extent to which important positions in executive agencies were not filled by Senate-confirmed presidential appointees (or by formal recess appointees) between 1977 and 2005. As far as I can tell, there has been no systematic examination of the length of *all* vacancies in top positions in executive agencies across recent administrations.¹⁹⁷ There have been interesting related studies, which generally rely on surveys of appointees and do not cover the last administration.¹⁹⁸ Several important

197. Other research has looked at subsections of this enterprise. See GAO, *supra* note 23, at 7–9 (examining vacancies in eight executive agencies from 1981 to 1991); HENRY B. HOGUE, CONG. RESEARCH SERV., REPORT NO. RL31677, FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS IN THE DEPARTMENT OF HOMELAND SECURITY (2004) [hereinafter HOGUE, DHS] (reporting initial vacancies in a series of new agencies); MARCUM ET AL., *supra* note 23, at 5–18 (2001) (analyzing vacancy data for all Senate-confirmed positions in the Department of Defense and military departments from 1947 to 1999); Nolan McCarty & Rose Razaghian, *Hitting the Ground Running: The Politics of Presidential Appointments in Transition*, in PRESIDENTIAL POWER: FORGING THE PRESIDENCY FOR THE TWENTY-FIRST CENTURY 339, 346–47 (Robert Y. Shapiro, Martha Joynt Kumar & Lawrence R. Jacobs eds., 2000) (examining nomination and confirmation lags for 987 appointees in executive branch agencies at the start of administrations from 1961 to 1993); Dull & Roberts, *supra* note 23, at 440–44 (examining vacancies in Senate-confirmed positions in the Departments of Commerce and Health and Human Services from 1989 to 2009). The Congressional Research Service tracks the number of agency vacancies but not their duration, stating (incorrectly) that such information is unavailable. See, e.g., ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 98-137 GOV, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 105TH CONGRESS 2 (1998). By contrast, there has been some systematic study of vacancies in independent regulatory commissions and the courts. See Elliot E. Slotnik & Sheldon Goldman, *Congress and the Courts: A Case of Casting*, in GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S, at 197 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998); Dayton, *supra* note 130; Tajuana D. Massie, Thomas G. Hansford & Donald R. Songer, *The Timing of Presidential Nominations to the Lower Federal Courts*, 57 POL. RES. Q. 145 (2004); David C. Nixon & Roisin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 ADMIN. & SOC'Y 679 (2006); Nixon, *supra* note 171; Nixon & Goss, *supra* note 171. There also has been some examination of the use of recess appointments. See generally Ryan C. Black et al., *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, 60 POL. RES. Q. 645 (2007) (surveying civilian recess appointments from 1987 to 2004).

198. Surveys of political appointees, which have limited response rates, do not permit comparison of individual positions (for instance, the Assistant Secretary for Environmental Management at the Energy Department) across time. The limited nonsurvey work generally focuses on the confirmation lag (not the entire vacancy period). See ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. RL30564, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 106TH CONGRESS, 1999–2000 (2001); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. RL30124, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 105TH CONGRESS, 1997–1998 (1999); ROGELIO GARCIA, CONG. RESEARCH SERV.,

insights have emerged from this previous work on vacancies in appointed positions at executive agencies, including that it takes new presidents many months to staff these positions,¹⁹⁹ that these delays have been increasing over time,²⁰⁰ that presidents fill higher-level positions before lower-level positions,²⁰¹ that presidents delay making nominations that are likely to generate more Senate scrutiny,²⁰² and that the Senate takes longer to

REPORT NO. 96-985 GOV, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 104TH CONGRESS (1996); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 94-473 GOV, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES, 103RD CONGRESS (1994); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. RL30476, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 106TH CONGRESS (2001); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 96-271 GOV, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 104TH CONGRESS (1996); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 94-628 GOV, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 103RD CONGRESS (1994); ROGELIO GARCIA, CONG. RESEARCH SERV., REPORT NO. 93-464 GOV, SENATE ACTION ON NOMINATIONS TO POLICY POSITIONS IN THE EXECUTIVE BRANCH, 1981-1992 (1993); HENRY B. HOGUE, CONG. RESEARCH SERV., REPORT NO. RL31346, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN EXECUTIVE DEPARTMENTS DURING THE 107TH CONGRESS, 2001-2002 (2003); HENRY B. HOGUE, CONG. RESEARCH SERV., REPORT NO. RL30910, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER COLLEGIAL BOARDS AND COMMISSIONS, 107TH CONGRESS (2003) [hereinafter HOGUE, REGULATORY APPOINTMENTS]; Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zoë Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871 (1998); McCarty & Razaghian, *supra* note 126. Only the GAO's examination of eight executive agencies in the 1980s, the Congressional Research Service's summary of initial vacancies in new agencies, Cheryl Marcum and her coauthors' work on the Department of Defense from 1947 to 1999, Nolan McCarty and Rose Razaghian's study of vacancies at the start of administrations from 1961 to 1993, Matthew Dull and Patrick Roberts's study of vacancies in presidentially appointed, Senate-confirmed positions in two cabinet departments from 1989 to 2009, and David Nixon's work on two independent regulatory commissions from their inception to 2000 consider the entire vacancy period from nonsurvey data. *See* GAO, *supra* note 23 (vacancies from 1981 to 1991); HOGUE, DHS, *supra* note 197; MARCUM ET AL., *supra* note 23; McCarty & Razaghian, *supra* note 197; Dull & Roberts, *supra* note 23, at 440-44; Nixon & Bentley, *supra* note 197, at 684 (vacancies from Dec. 31, 1967, to Dec. 31, 2000); Nixon, *supra* note 171, at 486 (vacancies from 1935 to January 1, 1999). This Article uses similar information for a different agency set (all major executive agencies) and a more recent time period (1977-2005).

199. LIGHT, *supra* note 21, at 87-88; MACKENZIE, *supra* note 80; Judith M. Labiner & Paul C. Light, *Appointments Past and Future: How Presidential Appointees View the Call to Service*, in INNOCENT UNTIL NOMINATED, *supra* note 112, at 231, 240-41; Mackenzie, *supra* note 112, at 38-44; James P. Pfiffner, *Presidential Appointments: Recruiting Executive Branch Leaders*, in INNOCENT UNTIL NOMINATED, *supra* note 112, at 50, 56-60.

200. *See* LIGHT, *supra* note 21, at 87-88; PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., THE MERIT AND REPUTATION OF AN ADMINISTRATION: PRESIDENTIAL APPOINTEES ON THE APPOINTMENT PROCESS 3-4 (2000). *Cf.* Christopher J. Deering, *Damned If You Do and Damned If You Don't: The Senate's Role in the Appointments Process*, in THE IN-AND-OUTERS, *supra* note 23, at 100, 112 (confirmation lags).

201. Labiner & Light, *supra* note 199, at 240-41; LIGHT, *supra* note 21, 83-84; MACKENZIE, *supra* note 80; Mackenzie, *supra* note 112, at 38-44; Pfiffner, *supra* note 199, at 56-60.

202. *See* McCarty & Razaghian, *supra* note 197, at 341.

confirm appointees in divided government.²⁰³

This part builds on and extends this research by analyzing comprehensive new data on all Senate-confirmed and recess appointees in executive agencies from 1977 to 2005. Specifically, the analysis examines (1) how long it takes to fill important agency positions at the start of an administration; (2) how long these positions are left empty at the end of an administration; (3) how much time over an entire administration these jobs are not staffed with proper appointees; and (4) possible explanations for vacancies, including the confirmation process and the type of issues handled by the position, among others.²⁰⁴ Special attention is given to five important agencies—the Department of Defense (“DOD”), the EPA, FEMA, the Department of Justice (“DOJ”), and the Department of the Treasury (“Treasury”).²⁰⁵ The Data Appendix provides more details.

One definition is important to clarify. A vacancy runs from the date of

203. Burdett Loomis, *The Senate: An “Obstacle Course” for Executive Appointments?*, in INNOCENT UNTIL NOMINATED, *supra* note 112, at 160; McCarty & Razaghian, *supra* note 126, at 1136–38. The Senate also is more likely to fail to confirm nominations during divided government. *See, e.g.*, Krutz et al., *supra* note 198, at 874. There is a related literature on judicial confirmations. *See* DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., REPORT NO. 98-510, JUDICIAL NOMINATIONS BY PRESIDENT CLINTON DURING THE 103RD–106TH CONGRESSES (2006); Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8 (1996); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190 (2002); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274 (1997); P. S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793 (1993).

204. This Article does not consider who fills these positions in any depth. There is political science literature (theoretical and empirical) on appointee characteristics and qualifications. *See, e.g.*, JOEL D. ABERBACH & BERT D. ROCKMAN, IN THE WEB OF POLITICS: THREE DECADES OF THE U.S. FEDERAL EXECUTIVE (2000); Henry W. Chappell, Jr., Thomas M. Havrilesky & Rob Roy McGregor, *Partisan Monetary Policies: Presidential Influence Through the Power of Appointment*, 108 Q.J. ECON. 185 (1993); Thomas H. Hammond & Jeffrey S. Hill, *Deference or Preference?: Explaining Senate Confirmation of Presidential Nominees to Administrative Agencies*, 5 J. THEORETICAL POL. 23 (1993); George A. Krause, *Federal Reserve Policy Decision Making: Political and Bureaucratic Influences*, 38 AM. J. POL. SCI. 124 (1994); Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J. THEORETICAL POL. 91 (2000); O’Connell, *supra* note 78; Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L. ECON. & ORG. 269 (2000); Christopher J. Waller, *A Bargaining Model of Partisan Appointments to the Central Bank*, 29 J. MONETARY ECON. 411 (1992). Future research should consider how better to connect study of types of appointees with information on vacancies. *See* Andrew R. Tomlinson & William D. Anderson, *The In-and-Outers Revisited: Duration Analysis and Presidential Appointee Tenure* (Nov. 2, 1999) (unpublished manuscript, on file with author) (using a comparative risks duration model to analyze appointee tenure); *supra* Part III.B.1.

205. Except for the DOD, all Senate-confirmed positions in each agency are used in any analysis of that agency. For the DOD, Senate-confirmed positions in the Departments of the Air Force, Army, and Navy are excluded; in other words, the positions used fall under the Office of the Secretary of Defense and include positions such as the Comptroller of Defense.

departure of a preceding official to the starting date of a new formal appointee.²⁰⁶ Putting recess appointees to the side, the vacancy period between proper appointees has three components. There is the period between the departure of the former appointee and the president's nomination of the new appointee—the “nomination lag.”²⁰⁷ There is the period between the president's nomination and the Senate's confirmation of the appointee—the “confirmation lag.”²⁰⁸ And there is the period between the Senate's confirmation and the appointee's first day in the office.²⁰⁹

A. VACANCIES AT THE START OF AN ADMINISTRATION

Tracking (or at least counting) initial top-level appointments is a sport at the start of each administration.²¹⁰ The media tend to focus on the most senior positions, such as cabinet secretaries and heads of agencies.²¹¹ But many other Senate-confirmed positions must be staffed when a new president moves into the White House.²¹² Using data on a comprehensive set of Senate-confirmed positions in executive agencies, this section provides additional evidence that four recent presidents have taken many months to fill Senate-confirmed positions in executive agencies at the start of their administrations and shows more detailed breakdowns of these delays by position than earlier studies.²¹³

Table 1 displays the average number of days it took for each of the

206. Others use this same definition. *See, e.g.,* MARCUM ET AL., *supra* note 23, at 13 n.13; Nixon & Bentley, *supra* note 197, at 683–84; Nixon, *supra* note 171, at 486; Nixon & Goss, *supra* note 171, at 251.

207. Technically, the nomination date is the day the Senate receives the president's nomination, not the date the president announces his intent to nominate someone. In practice, the difference is typically a matter of days, though it can be much longer for initial high-level appointments for a new president. In the analysis here, if a president nominated an appointee more than once for a position (typically because an earlier nomination was returned by the Senate), the first nomination date is used.

208. The Senate's confirmation is the date of the vote, not the date of any confirmation hearing. *See also supra* note 149 and accompanying text.

209. Confirmed appointees often start several days after being confirmed. But sometimes appointees have waited to move to Washington, DC until they are confirmed and do not start their jobs for several weeks. *Cf.* CAROLE M. PLOWFIELD & PAUL C. LIGHT, BROOKINGS INST., PROBLEMS ON THE POTOMAC: HOW RELOCATION POLICIES FOR PRESIDENTIAL APPOINTEES CAN HELP WIN THE TALENT WAR 6 (2002) (finding an increase in percentage of appointees from the DC area).

210. *See, e.g.,* Al Kamen, *About 60 % of Top Posts in Government Are Filled*, WASH. POST, July 21, 1993, at A17; Al Kamen, *Clinton, Bush Neck and Neck on Vacancies*, WASH. POST, Apr. 14, 1993, at A19.

211. *See* Karen Yourish & Laura Stanton, *Week One and Counting*, WASH. POST, Nov. 8, 2008, at A15.

212. *See supra* Part II.A.

213. *Cf. supra* note 199.

past four former presidents to staff one of these positions.²¹⁴ The more recent presidents took longer than the earlier presidents.²¹⁵ President Clinton was the slowest, at an average of 267 days to fill Senate-confirmed agency positions. Many commentators have noted the chaotic nature of appointments at the start of the Clinton administration.²¹⁶ President George H. W. Bush, the only occupant of the White House that shared the same party with his predecessor, was the fastest, at 163 days.²¹⁷

TABLE 1. Initial Vacancy Periods for Senate-Confirmed Agency Positions: All Positions

<i>President</i>	<i>Average Number of Days</i>
Reagan	194 (270 positions)
George H. W. Bush (Bush 41)	163 (294 positions)
Clinton	267 (348 positions)
George W. Bush (Bush 43)	242 (324 positions)

These averages mask the considerable variation in delays by level of

214. Table 1 measures the average number of days from the president's inauguration to the start date of a non-acting official (either Senate-confirmed or a recess appointee) in a Senate-confirmed position in the agencies listed in the Data Appendix. If there was a proper official in the position at the time of inauguration, the initial vacancy period for that position was calculated from the departure of that official to the start date of the first official under the new president. In addition, some positions, such as U.S. Attorneys at the DOJ and Ambassadors at the Department of State, are excluded. *See infra* app. The exclusion of U.S. Attorneys and Ambassadors explains most of the difference between the number of Senate-confirmed positions in executive agencies listed in the 2008 Plum Book (726), *see supra* note 70 and accompanying text, and the number of positions included in table 1; the remainder derives from the creation and deletion of particular positions and other factors. If a president never appointed anyone to a particular open position during his administration, that "delay" (that is, four or eight years) is not included in the figures displayed in table 1. Table 1 thus underestimates the average time it takes a new president to fill a Senate-confirmed position in an executive agency with his own appointee. New positions in a particular administration were not included; in other words, if a position was created in January 1987, there would be no six-year initial vacancy period included in President Reagan's figure. Given the time period of the data, there was not sufficient information to calculate these delays for President Carter. Table 2 breaks this measure down by type of position, as described in the Data Appendix.

215. *See supra* note 200.

216. *See, e.g.*, Shailagh Murray, *Early Transition Decisions to Shape Obama Presidency*, WASH. POST, Nov. 5, 2008, at A30; *infra* note 390 and accompanying text.

217. Recall that in tables 1 and 2, if there was an appointee in the position at the time of inauguration, the initial vacancy period for that position was the difference between the departure of that official and the start date of the first official under the new president. *See supra* note 214. Because President Bush kept over one-third of Reagan's appointees, he had fewer positions to fill immediately when he took office. *See* MARANTO, *supra* note 157, at 98.

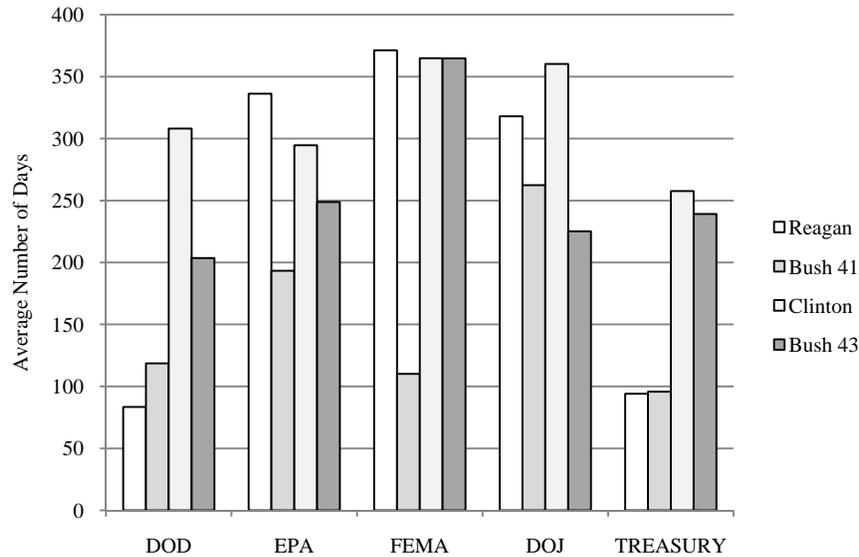
position. Recent presidents have filled the highest positions in cabinet departments relatively quickly when they took office, but have staffed lower-level positions in cabinet departments and other executive agencies much more slowly. Table 2 breaks down the initial vacancy period by position type for each of the four administrations. On average, cabinet secretaries were put in place first, followed by deputy cabinet secretaries. It took longest to fill the second-highest position in noncabinet agencies, lower-level positions such as directors of individual offices, IGs, and in the latest two administrations technical positions. It took President Clinton an average of 457 days to fill deputy agency head positions, for example, while it took President George W. Bush an average of 422 days to fill technical positions.

TABLE 2. Initial Vacancy Periods for Senate-Confirmed Agency Positions: Positions by Level

<i>Position</i>	<i>Average Number of Days</i>			
	<i>Reagan</i>	<i>Bush 41</i>	<i>Clinton</i>	<i>Bush 43</i>
Cabinet Secretary	13	36	5	5
Deputy Cabinet Secretary	76	67	154	133
Agency Head	166	155	200	238
Deputy Agency Head	271	151	457	347
Assistant Secretary	189	141	250	235
Under Secretary	102	145	209	184
Inspector General	224	337	453	280
General Counsel	121	181	233	214
Technical Position	168	160	335	422
Low-Level Position	420	283	365	317
Other	201	163	226	177

Figure 1 shows the average delay in initial appointments for the DOD, EPA, FEMA, DOJ, and Treasury by administration. Generally the patterns are similar. Presidents Reagan and George H. W. Bush, however, filled Treasury and DOD positions much more quickly than Presidents Clinton and George W. Bush. And President George H. W. Bush filled the EPA and FEMA more quickly than the other three presidents.

FIGURE 1. Initial Vacancy Periods for Senate-Confirmed Agency Positions: By Agency



It is still too early to compare President Obama's initial appointments against the previous four administrations. But if his first seven months are any guide, he too will take many months to fill Senate-confirmed positions in executive agencies.²¹⁸ He has started at the highest level with his cabinet secretaries but must continue making staffing decisions at least several more layers down.²¹⁹ By the end of August, President Obama had confirmed officials in only 180 of 349 slots in his 15 cabinet departments, and in 13 of 26 positions in the Executive Office of the President.²²⁰

B. VACANCIES AT THE CLOSE OF AN ADMINISTRATION

Given short tenures of agency appointees, empty offices often reappear at several times during an administration.²²¹ These offices are

218. See *supra* Part I.

219. As his hundred-day mark, no cabinet department had more than one-third of its top staff members in place. See Posting of Peter Baker to The Caucus, <http://thecaucus.blogs.nytimes.com/2009/04/28/many-hires-in-the-administration-have-yet-to-start/> (Apr. 28, 2009, 19:23 EST) ("Many in Administration Have Yet to Start Working").

220. Washington Post, *supra* note 7 (search on Aug. 31, 2009, of cabinet departments and the Executive Office of President).

221. See *supra* notes 22–23 and accompanying text.

particularly hard to fill at the end of an administration, when it is hard to convince individuals to come into government for a few months or a year.²²² The White House can try to promote from within the current crop of political appointees, but then these internal recruits leave lower-level positions empty. The White House can also work to stem end-of-term departures. Such efforts generally are only credible if the president is running for reelection.²²³ At such a time, appointees want to appear loyal to the president. For example, by staying, they signal that they have faith in the president's ability to win a second term and position themselves for a better appointed slot.

Recent presidents have frequently left Senate-confirmed positions in executive agencies empty or filled with an acting official for many months at the end of their administrations. End-of-administration vacancies, as discussed here, differ from the burrowing of agency appointees into nonpolitical positions that also occurs at the end of an administration, though in much smaller numbers.²²⁴ Table 3 displays the average number of days Senate-confirmed positions were not filled by a permanent appointee before the next transition for Presidents Carter, Reagan, George H. W. Bush, and Clinton.²²⁵ This problem is pronounced in two-term presidencies. At the end of the Clinton and Reagan administrations, positions had been left vacant for an average of 231 days and 159 days, respectively. By contrast, it appears that many appointees stayed in their positions while Presidents Carter and Bush ran for reelection. The data do not include the end of President George W. Bush's administration, but

222. See *supra* note 24 and accompanying text.

223. See David Kirkpatrick, *For Lobbyists, No Downturn, Just a Turnover*, N.Y. TIMES, Nov. 25, 2008, at A1 (quoting a recruiting firm chairman as telling government officials at the end of President George W. Bush's administration, "Don't be the last guy off the train").

224. See Mendelson, *supra* note 181; Juliet Eilperin & Carol D. Leonnig, *Administration Moves to Protect Key Appointees: Political Positions Shifted to Career Civil Service Jobs*, WASH. POST, Nov. 18, 2008, at A1; Carol D. Leonnig & R. Jeffrey Smith, *Senators Urge Bush to Halt Job Shifts: Officials Deny Sheltering Appointees*, WASH. POST, Nov. 19, 2008, at A4. It appears that there was less burrowing in the final months of President George W. Bush's administration than during a similar period under President Clinton.

225. Table 3 measures the average number of days from the departure date of the last person in a Senate-confirmed position for each administration to the inauguration date of the next president. If the last person was still serving in the position at the time of the inauguration, the end vacancy period was coded as zero for that position. If a position was filled at least once in an administration, table 3 includes the time between the last occupant and the start of the next administration. In other words, if President Reagan appointed someone to a position who then departed in 1982, and never appointed a replacement, table 3 would include the difference between that 1982 departure and President George H. W. Bush's inauguration. Table 3 thus may overestimate vacancies at the end of an administration because some positions may have been eliminated during an administration. Table 4 breaks this measure down by type of position, as described in the Data Appendix.

many reports indicated that he found it hard to recruit officials in his final two years.²²⁶

TABLE 3. End-of-Administration Vacancy Periods for Senate-Confirmed Agency Positions: All Positions

<i>President</i>	<i>Average Number of Days</i>
Carter	32 (299 positions)
Reagan	159 (356 positions)
Bush 41	62 (352 positions)
Clinton	231 (397 positions)

TABLE 4. End-of-Administration Vacancy Periods for Senate-Confirmed Agency Positions: Positions by Level

<i>Position</i>	<i>Average Number of Days</i>			
	<i>Carter</i>	<i>Reagan</i>	<i>Bush 41</i>	<i>Clinton</i>
Cabinet Secretary	0	0	9	13
Deputy Cabinet Secretary	10	1	94	3
Agency Head	35	143	24	205
Deputy Agency Head	1	95	115	240
Assistant Secretary	15	100	70	256
Under Secretary	55	358	82	341
Inspector General	19	226	49	84
General Counsel	13	13	37	114
Technical Position	32	77	24	347
Low-Level Position	75	340	64	260
Other	76	294	158	241

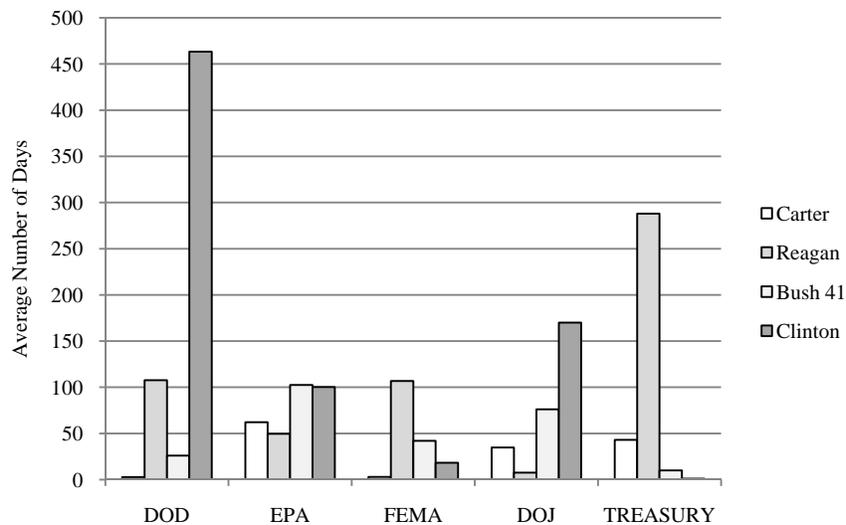
Table 4 breaks down this final vacancy period by position type for each of the four administrations. Lower-level jobs have far more vacancies at the end of presidential administrations than those at the cabinet secretary and deputy cabinet secretary levels, where long vacancies are rare.

226. See Michael Abramowitz & Carrie Johnson, *Bush Fills Key Posts in Homeland Security*, WASH. POST, Mar. 20, 2008, at A13 (noting recruitment difficulties).

Positions for under secretaries, for example, were vacant an average of 358 days at the end of the Reagan administration; 341 days at the end of the Clinton administration; 82 days at the end of the George H. W. Bush administration; and 55 days at the end of the Carter administration. As with the initial vacancy periods in table 2, cabinet secretaries on average had the shortest vacancies at the end of an administration.

Figure 2 shows the average length of end-of-administration vacancies for the DOD, EPA, FEMA, DOJ, and Treasury by administration.²²⁷ There is considerable variation, except at the EPA. For Presidents Carter and George H. W. Bush, the longest vacancies at the end of their administrations were, on average, at the EPA. The longest vacancy period for each of the agencies (except the EPA) was under one of the two-term presidents, Reagan or Clinton. For President Reagan, the longest gaps were at Treasury; for President Clinton, they were at the DOD.

FIGURE 2. End-of-Administration Vacancy Periods for Senate-Confirmed Agency Positions: By Agency



Although not included in the data analyzed here, President George W. Bush reportedly “left whole agencies of the executive branch to be run largely by acting or interim appointees.”²²⁸ By extending the data to cover

227. The columns that appear to be missing reflect a very short vacancy period (that is, several days).

228. Shenon, *supra* note 150. *But cf.* Dan Eggen, *Bush Faithful Rewarded with Jobs: On the Way Out, He Placed Aides and Big-Money GOP Donors*, WASH. POST, Feb. 10, 2009, at A2 (noting how

the end of the Bush administration, it would be possible to provide more “exact comparisons” that appear lacking in media coverage.²²⁹

C. VACANCIES OVER THE COURSE OF AN ADMINISTRATION

The scope of vacancies in the federal bureaucracy is a combination of how long it takes to fill positions and how long officials stay once those positions are filled. If it takes a year to staff an assistant secretary position, policy observers might be less worried if the official then stays for several years than if he or she serves for only six months. Yet if long vacancy periods are coupled with short tenures, vacant offices will be more extensive throughout federal agencies.²³⁰

Figure 3 displays one possible, though imperfect, measure of the overall scope of vacancies in top agency positions—the percentage of time positions are vacant by year, using the average vacancy period (classified by the year when the previous official departed) and the average tenure period (classified by the year when the new official started).²³¹ In other words, if it takes, on average, 60 days to fill an empty position in a given year and if the average tenure for someone starting in that year is 120 days, the measure in figure 3 for that year is $60 / (60+120) = 0.33$, or 33 percent.

Using this measure, executive agency positions were vacant an average of 25 percent of the time over the past five administrations. The percentage of time that Senate-confirmed positions were not filled with appointees from 1979 to 2003 ranged from nearly 12 percent in 1990 and 1994 to approximately 50 percent in 1992 and 2000. The percentage of time a position was vacant was highest in the final year of each administration,²³² and was greater when party control of the White House

Bush made appointments to presidential boards and panels such as the U.S.-Russia Polar Bear Commission).

229. Shenon, *supra* note 150 (noting that such comparisons “are difficult to come by”).

230. There is a considerable political science literature on appointee tenure. *See supra* note 23. But that literature does not generally consider the relationship between how long it takes to fill a position and the tenure of the appointee once a position is filled. Using the database here, I examined the correlation between these two measures. The correlation is barely positive but is not significant under any standard measures. It may be that there is too much aggregation in this bivariate correlation. Controlling for position type and for agency, the significance level dramatically improves but the positive correlation still is not statistically significant.

231. *See infra* app. To be included in the tenure measure, an appointee’s start and end dates must both appear in the database. In other words, appointees who were still serving in 2005, the cutoff point for the OPM data, are not included in the tenure calculation, which means that figures for President George W. Bush’s administration may underestimate average tenure and thus overstate the vacancy period.

232. At first glance, this may seem at odds with the low average vacancy periods at the end of

changed. It was also highest in the final year of each four-year term. Finally, total vacancies were largest under President Clinton.²³³

FIGURE 3. Average Percentage of Time a Senate-Confirmed Position Was Vacant: All Positions

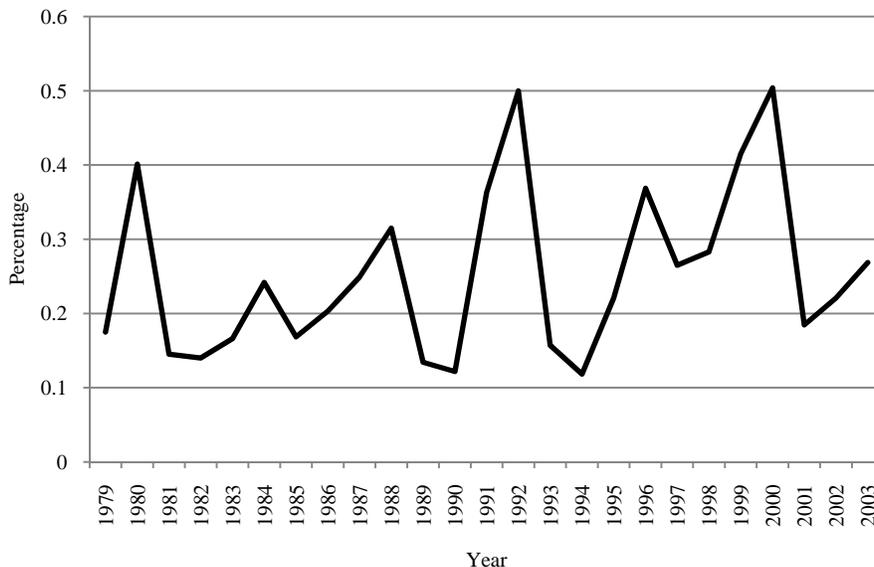


Figure 4 displays the same measure as figure 3 for three positions with sufficient data for each year—heads of noncabinet agencies, assistant secretaries, and deputy secretaries.

President Carter's and President George H. W. Bush's administrations. But the measure in figure 3 for final years of administrations is calculated from the average vacancy period in the final year of an administration *and* the average tenure of new appointees who fill those positions. This later figure is often quite short because new administrations typically choose new appointees.

233. Contemporaneous media accounts suggest that President Clinton's administration was plagued by agency vacancies. *See, e.g.,* Suro, *supra* note 150. Divided government after the 1994 election and impeachment proceedings are two possible explanations.

FIGURE 4. Average Percentage of Time a Senate-Confirmed Position Was Vacant: By Position

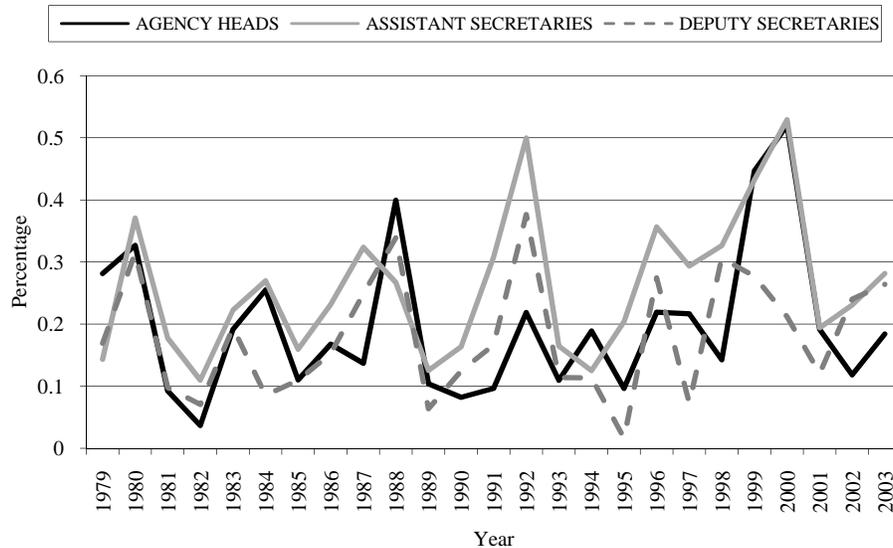


Table 5 provides an alternative measure to figures 3 and 4 of agency vacancies. Table 5 lists the total number of days that Senate-confirmed positions in the DOD, EPA, FEMA, DOJ, and Treasury were filled by confirmed or recess appointees during three recent administrations, the total number of days those positions were empty or filled with acting officials, and the percentage of vacant days of the total.²³⁴ Under Presidents George H. W. Bush and Clinton, the DOJ had the highest percentage of days with acting officials or no officials at all. During President Reagan's administration, the EPA had the largest percentage of such days. Interestingly, overall vacancy patterns are nearly identical for Presidents Reagan and Clinton. President Bush had significantly lower vacancy gaps in the DOD, Treasury, and FEMA.

234. Table 5 required some additional calculations at the start and end of a presidential administration. Time spent in a new administration by a previous administration's appointee had to be assigned to the new president. Time vacant in a position that spanned two administrations had to be divided between two presidents. The figures vary across administrations because of the varying lengths of the administrations (one term versus two) and because of changing numbers of political positions within these agencies.

TABLE 5. Total Number of Days Senate-Confirmed Positions Were Filled and Vacant: By Agency

<i>Agency</i>	<i>Reagan</i>	<i>Bush 41</i>	<i>Clinton</i>
DOD (vacant)	7866	3793	14,860
DOD (filled)	39,967	28,456	52,690
Percent Vacant	16.44%	11.76%	22.00%
EPA (vacant)	7040	3611	8350
EPA (filled)	26,477	15,467	29,099
Percent Vacant	21.00%	18.93%	22.30%
FEMA (vacant)	3407	795	3821
FEMA (filled)	15,607	10,180	15,618
Percent Vacant	17.92%	7.24%	19.66%
DOJ (vacant)	12,400	8991	21,281
DOJ (filled)	50,376	25,555	56,708
Percent Vacant	19.75%	26.03%	27.29%
Treasury (vacant)	7383	2910	10,643
Treasury (filled)	38,700	24,266	49,630
Percent Vacant	16.02%	10.71%	17.66%

In sum, there are considerable vacancies in the modern administrative state. From figure 4 and table 5, it appears positions are not filled with appointees between 15 and 25 percent of the time, on average. In other words, in one four-year term, positions are empty or staffed with acting officials between 219 days and an entire year.

D. REASONS FOR VACANCIES

Until now, the information about vacancies in executive agencies has been purely descriptive. This section explores several factors as potential explanations for these extensive vacancies, including the role of the confirmation process and the level of interest in or conflict over specific

positions.

1. The Senate

Vacancies encompass several components of delay—nomination, confirmation, and the period between confirmation and starting work. Presidents like to complain about the length of the confirmation process for their nominees.²³⁵ In February 2008, President George W. Bush stated at a press conference on pending presidential nominations to agencies and to the courts: “The confirmation process has turned into a never ending political game, where everyone loses.”²³⁶ Presidents are not the only ones to complain. Commentators often lament the length of the confirmation process, but they often include background checks as part of that process.²³⁷ Although confirmation battles do prolong staffing of federal agencies, such battles appear to be remarkably rare for top positions and infrequent for lower-level jobs.²³⁸

Table 6 displays the average nomination and confirmation lags, by type of position, from 1987 to 2005.²³⁹ The nomination process actually accounts for considerably more delay in filling positions than the confirmation process, except in the case of cabinet secretaries where both

235. See, e.g., *Clinton Worries About Attacks on Nominees*, S.F. CHRON., Jan. 21, 1994, at A3 (quoting Clinton as saying, “The [confirmation] process takes too long”).

236. White House, Office of the Press Secretary, *President Bush Discusses Pending Presidential Nominations, Urges Senate Confirmation* (Feb. 7, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-8.html>.

237. See, e.g., Light, *supra* note 85; Norman Ornstein, *Confirmation Process Leaves Government in Serious Gridlock*, ROLL CALL, Mar. 25, 2009, http://www.rollcall.com/issues/54_108/ornstein/33458-1.html.

238. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 164, 279 (2000). Indeed, the Senate sometimes skips holding a confirmation hearing for lower-level Senate-confirmed appointees. See O’Connell, *supra* note 78, at 25–26. Instead of refusing to confirm a nominee, however, the Senate can push the president or the nominee to withdraw the nomination. See, e.g., GERHARDT, *supra*, at 166. Senators do of course use the confirmation process to slow down appointments in particular circumstances, most often by placing holds on particular nominees. See Ira R. Allen, *White House Asks End to Appointee “Backlog,”* WASH. POST, Oct. 9, 1985, at A17 (noting that Senator Byrd had placed a hold on “thousands” of nominees to protest President Reagan’s use of recess appointments); Editorial, *Call It Obstructionism*, N.Y. TIMES, June 28, 2009, at WK7 (pointing out delays in agency appointments even in united government “mainly because of holds, often anonymous and unexplained, by Republican Senators”).

239. Unlike table 2, which examines vacancies at the start of an administration, table 6 includes all vacancies for these positions in the given time period. Nomination and confirmation dates were easily obtainable only starting in 1987, the first year covered by the Library of Congress’s Presidential Nominations Database. See *infra* app. I am currently collecting nomination and confirmation dates from the CONGRESSIONAL RECORD for earlier appointees. For the confirmation lag, time within a congressional recess is counted since Congress largely determines its own recesses. Thus, confirmation lags are in some sense overstated.

confirmation and nomination delays are minimal.²⁴⁰ For example, from 1987 to 2005, it took presidents an average of 173 days to nominate noncabinet agency heads, and it took the Senate an average of 63 days to confirm these nominations. An even greater difference exists for deputy noncabinet agency heads—it took presidents an average of 301 days to nominate and the Senate 82 days to confirm.

TABLE 6. Delay in Nominations and Confirmations, 1987–2005: By Position

<i>Position</i>	<i>Average Number of Days</i>	
	<i>Nomination Lag</i>	<i>Confirmation Lag</i>
Cabinet Secretary	17	16
Deputy Cabinet Secretary	95	62
Agency Head	173	63
Deputy Agency Head	301	82
Assistant Secretary	206	77
Under Secretary	198	86
Inspector General	290	120
General Counsel	156	71
Technical Position	284	94
Low-Level Position	348	88
Other	249	82

Table 7 shows the average nomination and confirmation lags for the four most recent administrations (not including the current one) in the DOD, EPA, FEMA, DOJ, and Treasury. It is hard to compare the presidents as there is only data for the entire administrations of Presidents George H. W. Bush and Clinton, and their administrations differed in length. The most striking pattern is that the Senate confirmation process consumed a larger percentage of the vacancy period for Treasury positions than any other agency, except under President George H. W. Bush.²⁴¹

240. See U.S. SENATE, REPORT OF THE TASK FORCE ON THE CONFIRMATION PROCESS (1991), reprinted in 138 CONG. REC. 1348, 1349 (1992); HOGUE, REGULATORY APPOINTMENTS, *supra* note 198, at 4 (“The selection and vetting stage is often the longest part of the appointment process.”).

241. Tables 6 and 7 exclude nominations that were not confirmed. This raises some concerns. See HOGUE, REGULATORY APPOINTMENTS, *supra* note 198, at 5 (noting that between 1981 and 1992 the

TABLE 7. Delay in Nominations and Confirmations, 1987–2005: By Agency

Agency	Average Number of Days			
	Reagan (after 1987)	Bush 41	Clinton	Bush 43 (before 2005)
DOD: nomination	123	210	190	329
DOD: confirmation	62	46	56	59
EPA: nomination	187	209	337	198
EPA: confirmation	45	39	70	115
FEMA: nomination	375	79	379	253
FEMA: confirmation	95	89	97	72
DOJ: nomination	139	179	354	255
DOJ: confirmation	99	76	110	89
Treasury: nomination	39	161	134	143
Treasury: confirmation	56	37	145	99

The nomination and confirmation periods are of course related. The president makes nominations in the shadow of the confirmation process.²⁴² For example, the president may take more time to nominate an official if he is worried about the Senate confirmation process. After all, the president typically does not want his nominations to fail. Future research is needed to explore the interdependencies between these periods, as well to examine how these periods for one position depend on other positions.

2. Issue Area

Not all vacancies are alike, even at the same level. Presidents will care

Senate did not confirm 22 percent of nominations to boards and commissions, 11 percent of nominations to independent agencies such as the EPA, and 9 percent of nominations to cabinet departments).

242. See Massie et al., *supra* note 197, at 152–53.

more about some issues than others and will try to fill agencies handling those issues before other agencies.²⁴³ Republican presidents may work to avoid long vacancies in the DOD, Treasury, and Departments of Commerce and Energy, for instance, because those agencies are considered to be more conservative. By contrast, Democratic presidents may pay more attention to the Departments of Education, Health and Human Services, and Labor and the EPA, which are more liberal agencies.²⁴⁴ The perceived ideology of the agency is of course not the sole determinant of a new president's staffing priorities. President Obama's first announced cabinet pick was for Secretary of the Treasury, an understandable priority given the economic crisis.²⁴⁵

Staffing priorities also depend on the outgoing administration. Given the same priority on two issues by a new president, appointments may be more pressing in an agency that is currently further from the president's preferences than an agency that is much closer to those preferences. For instance, an incoming Democratic president may care equally about the environment and national defense. If the previous Republican president left a defense department with policies that are somewhat close to the incoming president's and an environmental agency with policies that are very far from the incoming president's, the incoming president likely will find appointments decisions for the environmental agency more pressing.

Some positions also deal with more controversial issues than others; relatedly, some positions are followed more closely by interest groups than others. Either way, these positions likely take longer to fill.²⁴⁶ This variation in issues by controversy or interest group attention differs from variation in issues by presidential preference. Table 8 provides one cut at the former category. It provides the average and median vacancy periods across eight important positions at the DOJ, including heads of the main Divisions (Civil, Criminal, Environment and Natural Resources, Tax, Antitrust, and Civil Rights) and the two most prominent other positions (other than the Attorney General and Deputy Attorney General), the

243. See, e.g., LEWIS, *supra* note 10, at 52.

244. See Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3 (2008) (using a survey of experts to estimate ideal points on a liberal-conservative scale of federal agencies).

245. See *supra* note 1.

246. See Michael J. Gerhardt, Essay, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1693 (2001) ("Confirmation skirmishes have tended to focus on nominations to offices in particular areas—civil rights, environmental protection, and national security—which deal with sensitive issues of significant interest to much of the public and special interest groups.").

Solicitor General and the head of the Office of Legal Counsel (“OLC”).

Where the Division involves the most polarizing issues among organized interest groups (civil rights and environmental policy), Division chiefs have longer vacancy periods. Divisions involving less polarizing, more technical issues with fewer opposing organized interest groups (antitrust, civil, and criminal issues) have shorter vacancy periods. The vacancy period for the head of the Tax Division is somewhere in between. It may be difficult to find tax lawyers willing to leave private practice or academia for DOJ positions. For the non-Division positions, the vacancy period for the head of the OLC is more than 50 percent longer than for the Solicitor General, which accords with perceptions of their polarization levels. The Solicitor General is the government’s lawyer at the Supreme Court and is perceived to have some independence from the president,²⁴⁷ whereas the head of the OLC is considered to be a much more political position.²⁴⁸

TABLE 8. Mean and Median Vacancy Periods, 1977–2005: DOJ Positions

<i>Position</i>	<i>Number of Days</i>	
	<i>Mean</i>	<i>Median</i>
Solicitor General	180	135
OLC (Head)	277	230
Antitrust (Head)	164	181
Civil (Head)	253	211
Civil Rights (Head)	441	331
Criminal (Head)	207	91
Environment and Natural Resources (Head)	364	221
Tax (Head)	342	260
All Other DOJ Positions	319	183

To be certain, the DOJ is just one agency. What is needed in future

247. Cf. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 2, 6 (1992); John Yow, *A Clash of Power and Prudence: The Solicitors General of Bill Clinton and George W. Bush* (2008) (unpublished manuscript, on file with author).

248. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 *CARDOZO L. REV.* 437, 495–97 (1993) (comparing the Solicitor General and the OLC and stating that “the behavior of OLC is determined primarily by its relationship with the White House”).

research is a plausible measure of polarization by agency position. One possibility is the amount of media coverage a particular position receives. Many of these positions, although filled by Senate-confirmed presidential appointees, generate little attention.²⁴⁹ Another possibility is the amount of congressional oversight given to specific positions, such as hearing days where officials are called to testify.²⁵⁰ This measure, which would require considerable data collection to construct, may also be endogenous to agency vacancies, complicating what inferences can be made.

3. Future Research Agenda for Comprehensive Study of Vacancies

This Article is the start of a much larger project. Ultimately, researchers care about facts, explanations, and consequences. The Article, thus far, has presented largely descriptive views of the extent of vacancies in the modern administrative state. For example, what vacancies exist in the modern administrative state and where? In other work, I plan to move beyond the descriptive work here to consider more predictive and causal questions. For instance, why do vacancies exist and what explains differences in vacancies across agencies and administrations? In this section, I sketch out some of these remaining questions. The next two parts will take up some of the legal and normative implications of the descriptive and predictive work.

To assess potential explanations for vacancies in executive agencies, my other research examines the variation in the length of the period between a previous official's departure and the next official's start of service. That period serves as the dependent variable in a regression analysis—in other words, as the item to be explained by potential independent or explanatory variables.²⁵¹ Several theories—organizational, institutional, political, and legal—can then be explored.

Organizationally, aspects of White House personnel operations may influence how quickly vacancies are filled. The size of the White House

249. See Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, HARV. INT'L J. PRESS/POL., Summer 1998, at 39, 42 & n.5 (reporting that in 1993 the EPA received more press coverage than seven other regulatory agencies—the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the FCC, the Federal Trade Commission, the National Highway Traffic Safety Administration (“NHTSA”), the Nuclear Regulatory Commission, and the Occupational Safety and Health Administration).

250. See Joseph, *supra* note 23 (analyzing the relationship between congressional hearings and appointee tenure).

251. This work follows the methods used in research on vacancies in independent regulatory commissions and the courts, which have not yet been applied to executive agencies. See Nixon & Bentley, *supra* note 197, at 684; Nixon, *supra* note 171, at 486; Nixon & Goss, *supra* note 171, at 251.

personnel office, controlling for the number of appointed positions, should be negatively correlated with vacancy length.²⁵² More important, perhaps, is the tone of a particular administration. Some presidents, such as Presidents Reagan and George H. W. Bush, exercised tight control over appointments. Others did not. President Carter initially delegated considerable power over subcabinet appointments to his cabinet secretaries.²⁵³ His personnel office also spent considerable time looking for agency heads.²⁵⁴ President Clinton's personnel office was exceptionally disorganized, especially at the start, because key people were themselves under consideration for agency positions.²⁵⁵ In any event, the White House should focus on the highest-level positions first.²⁵⁶ In addition, the size of White House staff may substitute for appointed positions. If there are White House senior staff in particular areas, the president should take longer to fill agency positions in those areas.

Institutional attributes across the branches, within the executive branch, and among interest groups may constrain how fast new appointees join agencies. In periods of divided government, vacancies should take longer to fill as the president and Senate must come to agreement on appointments.²⁵⁷ In the last year of a president's administration, it should be harder to fill agency positions because such jobs are less desirable to potential appointees and because less attention will be paid to agency appointments by the president and the Senate.²⁵⁸ On the other hand, the end of the administration serves generally as an outer bound on the vacancy period since the new administration will typically fill the position. In the first year of an administration, once the White House personnel operations are running effectively, positions should be easier to fill, since many will be seeking jobs.²⁵⁹ Finally, interest group configurations may also shape vacancies. In policy areas with one-sided, well-organized interest groups, vacancies should be shorter as those interest groups will bring attention to

252. The subjunctive tense is being used in this section to convey predictions, as opposed to normative judgments. Parts V and VI *infra* take up legal and normative implications.

253. See *infra* note 381 and accompanying text.

254. See *infra* note **Error! Bookmark not defined.** and accompanying text.

255. See *infra* note 390 and accompanying text.

256. See *supra* note 201 and accompanying text.

257. See *supra* note 203.

258. See *supra* note 24 and accompanying text; *supra* Part IV.B.

259. One possible analogy is to cycles of unemployment in the labor economics literature. See Michael W. L. Elsby, Ryan Michaels & Gary Solon, *The Ins and Outs of Cyclical Unemployment* (unpublished manuscript, on file with author) (examining in-flows and out-flows to explain unemployment). Here, we have a large flow in and a large flow out at the beginning of an administration, and a small flow in and a large flow out at the end of an administration.

those positions and provide a supply of qualified appointees. In areas with conflicting interest groups, vacancies should be longer, except to the extent that it is clear that the administration favors a particular side.²⁶⁰ In areas with no concentrated interest groups, vacancies should take longer to fill because there is little demand to fill the jobs and no ready source of job seekers.

Policy preferences of the president should also shape appointments priorities. Presidents should fill positions they care more about sooner than positions they care less about.²⁶¹ Specifically, Democrats should make appointments to more liberal agencies before more conservative agencies; conversely, Republicans should make appointments to more conservative agencies before more liberal agencies.²⁶² For example, President Reagan strategically refused to fill vacancies in more liberal agencies to weaken them in budget battles with Congress.²⁶³ Presidents should also fill higher-level positions before lower-level positions.

Legal restrictions on agency appointments, including qualification requirements for certain positions and background checks, should affect vacancy lengths. Presidents had long flouted statutory restrictions on temporary appointments to top agency positions. Angered at President Clinton's lack of compliance with vacancy statutes, congressional Republicans pushed through the Federal Vacancies Reform Act of 1998, which restricted who could serve as an acting official and prescribed strict time limits for how long acting officials could serve.²⁶⁴ To the extent that presidents have complied with the new statute,²⁶⁵ vacancies should be shorter after 1998. On the other hand, appointees face increasing disclosure requirements now, including of their personal finances.²⁶⁶ In addition, Congress has enacted statutory requirements for many positions in the administrative state, ranging from demographic characteristics to prior experience.²⁶⁷ To the extent that presidents have followed their mandates

260. See *supra* Part IV.D.2.

261. See Kenneth Chang, *On Cusp of Big Transition, NASA Lacks Permanent Leader*, N.Y. TIMES, May 4, 2009, at A15 ("The delay in naming a top administrator has revived speculation that NASA and space exploration are low priorities for Mr. Obama.").

262. Particular events will, of course alter this order. For instance, President Obama named his economic team first. See *supra* Part I.

263. See MICHAELS, *supra* note 127, at 142; *supra* Part IV.D.2.

264. See *supra* Part II.C.

265. Cf. MACKENZIE, *supra* note 80, at 3 (noting constraints on the amount of time a president may take to nominate officials).

266. See, e.g., Ethics on Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

267. O'Connell, *supra* note 78, at 14–22.

(and that these mandates require more intensive searching for qualified appointees), positions with statutory requirements should take longer to staff.

V. LEGAL IMPLICATIONS

Although there has been some discussion of the effects of vacancies on policymaking,²⁶⁸ there has been no sustained examination of the legal implications of empty offices in the administrative state.²⁶⁹ This lack of discussion complements the inattention in the legal literature to agency staffing, more generally.²⁷⁰ Vacant offices in executive agencies have potentially considerable implications for constitutional and administrative law. This part considers four legal dimensions of agency vacancies.

First, agency vacancies have consequences for the unitary theory of the executive and for separation of powers doctrine more generally. Typically, commentators on those subjects in the context of agency appointments examine the legitimacy of restrictions on the president's removal power. But the front end of the appointments process also is relevant to those discussions. Second, gaps in agency leadership constrain how delegated authority can be carried out. Vacancies may therefore operate to enforce nondelegation principles. Third, agency staffing decisions have potential repercussions for judicial review of agency action and inaction. Specifically, agency vacancies might reshape judicial reluctance to probe the mental processes of an agency decisionmaker, judicial deference to agency interpretations of ambiguous statutes and other actions, and the general unavailability of judicial review for agency inaction. Fourth, although the incorporation of agency vacancies into legal doctrine might improve staffing of executive agencies, litigation over vacancies faces numerous obstacles. Part VI thus considers policy reforms outside of the courts targeted at reducing the number and length of vacancies.

A. THE UNITARY EXECUTIVE AND SEPARATION OF POWERS

Agency appointments have sparked heated discussion and complex case law about the proper roles of the president and Congress. Although

268. See *supra* Part III.

269. Cf. Denning, *supra* note 103 (examining the legitimacy of acting officials in the DOJ but not of vacancies); Stayn, *supra* note 101 (examining the constitutionality of the Federal Vacancies Reform Act of 1998 but not analyzing the effects of vacancies for constitutional or administrative law).

270. But see Barron, *supra* note 35; O'Connell, *supra* note 78.

several key cases primarily address the selection of officers,²⁷¹ almost all of the conflict surrounding officers focuses on issues related to removal of officers.²⁷² Conflict centers on what limitations can be placed (usually by Congress) on the president's ability to remove appointees. Thus, the conflict is a core dispute about separation of powers. On one hand, proponents of a unitary theory of the executive view restrictions on removal as interfering unconstitutionally with the president's constitutional duty to "take care" that the laws are "faithfully executed."²⁷³ On the other hand, critics argue that many such restrictions are permissible, and even important, to building legitimacy of the modern administrative state.²⁷⁴

The front end of appointments, as seen through agency vacancies, raises similarly important issues about the proper roles of the president and Congress. Constitutional selection mechanisms for agency leaders work to prevent aggrandizement of one branch "at the expense of another" and to preclude "the diffusion of the appointment power."²⁷⁵ At first, the front end may appear far less complicated than removal at the back end. After all, the Constitution prescribes how officers are to be appointed.²⁷⁶ Except for recess appointments, the Senate is given an explicit role in the confirmation process, at least for principal offices, and in practice has also played a part in the nominations process.²⁷⁷ But Part IV demonstrates that many positions go empty or are filled by acting officials. These vacancies raise important questions for the unitary theory of the executive and separation of powers.

To start, assuming no Senate recess, how much inherent power does the president possess to place temporary officials in positions covered by the Appointments Clause?²⁷⁸ Early Attorneys General consistently argued that the president retained power to make temporary appointments outside of the Appointments Clause.²⁷⁹ This power derived, in their view, from the Take Care Clause. Once Congress enacted legislation to govern agency

271. See, e.g., *Freytag v. Comm'r*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976).

272. Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 843 (1993).

273. See *supra* note 166.

274. See *supra* note 167.

275. *Freytag*, 501 U.S. at 878.

276. See *supra* Part II.A–B.

277. See MITCHEL A. SOLLENBERGER, *THE PRESIDENT SHALL NOMINATE: HOW CONGRESS TRUMPS EXECUTIVE POWER* 4 (2008); Denning, *supra* note 269, at 1041.

278. Furthermore, how much power does the president have to use White House staff as substitutes for missing agency officials? See *supra* note 86 and accompanying text.

279. See Dellinger Memorandum, *supra* note 44, at 552.

vacancies, the DOJ initially contended that the legislation did not “supplant[] the President’s preexisting constitutional authority.”²⁸⁰ The limited case law on the topic, however, suggests that the president does not have such inherent authority.

In *Williams v. Phillips*, a district court considered whether the president could name someone as acting Director of the Office of Economic Opportunity (“OEO”), a position not covered by the governing Vacancies Act.²⁸¹ The Court rejected the government’s defense that the temporary appointment was authorized by the Take Care Clause.²⁸² The Court determined that “the failure of the Congress to provide legislation for an Acting Director must be regarded as intentional” and therefore that the Appointments Clause must be followed.²⁸³

On appeal, the D.C. Circuit denied the government’s motion for a stay. On the appointments question, the Court held:

It could be argued that the intersection of the President’s constitutional obligation to “take care that the laws be faithfully executed” and his obligation to appoint the director of OEO “with the Advice and Consent of the Senate” provides the President an implied power, in the absence of limiting legislation, upon the resignation of an incumbent OEO director, to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate. Even if the court should sustain such a view, in its disposition on the merits, that would not establish that the President was entitled, for a period of four and a half months from the date the President obtained the resignation of the incumbent director, to continue the designation of Phillips as acting director without any nomination submitted for Senate consideration.²⁸⁴

Although no Court of Appeals has ruled on the issue, several district courts have rejected the argument that the president can use the Take Care Clause

280. *Id.*

281. *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), *motion for stay denied*, 482 F.2d 669 (D.C. Cir. 1973) (per curiam).

282. *Williams*, 360 F. Supp. at 1369 (“Whatever the merits of the argument finding an interim appointment power in the President may be, it is clear from the defendant’s own citation of authority that that power, if it exists at all, exists only in emergency situations. No claim has been made that the appointment of Phillips was necessitated by any emergency situation and the Court finds that there was none, and thus expresses no view on the existence or scope of such a power.”).

283. *Id.* at 1371.

284. *Williams*, 482 F.2d at 670–71. Under current doctrine, the plaintiffs (members of Congress) would not have standing to bring the case. *See Raines v. Byrd*, 521 U.S. 811 (1997); Hein, *supra* note 83, at 250.

to circumvent the requirements of the Appointments Clause.²⁸⁵

Assuming then that the president's ability to use acting officials rests on statutory arrangements, how do those arrangements shift power between the White House and Congress? These statutory arrangements comport with the Appointments Clause, to varying degrees of satisfaction. For inferior offices, statutes governing vacancies function as Congress choosing an acceptable alternate means of appointment—in the president alone.²⁸⁶ For principal offices, these arrangements have a long history and build on the idea, as Justice Holmes articulated it, that “the machinery of government would not work if it were not allowed a little play in its joints.”²⁸⁷ The Second Congress enacted the first explicit plans for agency vacancies.²⁸⁸ Temporary appointments are now governed by the Federal Vacancies Reform Act of 1998.²⁸⁹ That Act has implications for the unitary theory of the executive and for separation of powers.

On the one hand, the Act limits who can be placed in an acting position and for how long. These limits, particularly those on whom the president can choose, are arguably far more restrictive on the president's authority than restrictions on removal. Congress, therefore, gains power. In Terry Moe's framework, vacancies would undermine presidential attempts at politicization of the administrative state.²⁹⁰ On the other hand, the Act permits temporary appointments without Senate confirmation. This exemption from Senate review provides the president more power than traditional appointments, assuming the president would place the same person in the position in either context. Congress, however, often has less power to oversee these temporary officials; for instance, it has not extracted the promise it asks of formal nominees to testify any time they are asked.

This discussion has focused on the president's use of temporary officials. The president, however, could refuse to fill high-level positions, even with acting officials, (or could name nominees that he knows would not be confirmed) for long periods of time. At first glance, such refusal appears to enfeeble presidential power.²⁹¹ But refusal to staff federal

285. Denning, *supra* note 269, at 1042 & n.20 (citing cases).

286. *See Williams*, 360 F. Supp. at 1371.

287. *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 209 (D.C. Cir. 1998) (quoting *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931)).

288. *See id.* at 209–10.

289. *See supra* Part II.C.

290. *See Barron, supra* note 35, at 1102 (“Politicization [in Moe's work] referred . . . to White House efforts to populate the bureaucracy with politically responsive actors.”).

291. *See id.*

agencies may actually bolster the unitary executive theory. For example, a deregulatory president may prefer vacancies to appointees, forcing lack of regulation and enforcement because there are no senior officials in place.

In sum, temporary appointments (or the lack of appointments altogether) shift the balance between the White House and Congress; like a seesaw, the balance shifts in both directions, sometimes toward the White House and sometimes toward Congress. Those concerned with that balance at the back end (that is, at the removal stage) would do well also to consider implications from the front end.

B. CONGRESSIONAL DELEGATION TO AGENCIES

Vacancies also have implications for the legitimacy of congressional delegation to executive agencies.²⁹² Under the nondelegation doctrine, Congress may not delegate its Article I “legislative power” to an administrative agency.²⁹³ Congress may, however, grant lawmaking authority to an administrative agency so long as it provides an “intelligible principle” to guide agency action.²⁹⁴ In *Whitman v. American Trucking Ass’ns*, the Supreme Court reiterated that most any statutory restriction qualifies as an intelligible principle, having found in its history

the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.”²⁹⁵

The nondelegation doctrine, in its straightforward form, may be dead as a constitutional matter, but the desirability of extensive delegation is still contested.²⁹⁶ Indeed, the nondelegation doctrine has been transformed into what William Eskridge and Philip Frickey name a “presumption against

292. Both this section and the previous section consider *legal* implications of vacancies for Congress. Vacancies also raise interesting *strategic* issues for Congress.

293. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001). *See also* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

294. *See Whitman*, 531 U.S. at 472.

295. *Id.* at 474 (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

296. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Thomas R. McCarthy & Richard W. Roberts, Jr., *American Trucking Associations v. Environmental Protection Agency: In Search and In Support of a Strong Nondelegation Doctrine*, 23 WHITTIER L. REV. 137 (2001).

excessive delegation of legislative powers,”²⁹⁷ what Adam Cox calls a “nondelegation norm”²⁹⁸ or what Cass Sunstein labels “nondelegation canons.”²⁹⁹ Sunstein explains:

Congress must affirmatively authorize the extraterritorial application of federal law; agencies cannot exercise their ordinary discretion, under an ambiguous statutory provision, so as to apply national law outside of American borders. A clear congressional statement to this effect is required. Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions; if the constitutional question is substantial, Congress must clearly assert its desire to venture into the disputed terrain. When treaties and statutes are ambiguous, they must be construed favorably to Native American tribes; the agency’s own judgment, if it is an exercise of discretion, is irrelevant.³⁰⁰

These nondelegation canons (or presumptions or norms) of statutory interpretation thus place limitations on agency discretion.

Similarly, vacancies may also foster nondelegation principles outside of the classic doctrine in that agencies have a harder time implementing broad delegated authority without appointed leaders.³⁰¹ Those who worry about extensive congressional delegation to agencies may be pleased that vacancies prevent agencies from wielding fully their delegated authority. As constitutional law scholarship has become more nuanced in discussing nondelegation concerns, an analysis of vacancies in terms of nondelegation seems out of place. Vacancies are an awfully blunt instrument to further these concerns. Patterns of vacancies likely have little connection to congressional statutory intent. They also prevent the implementation of narrowly delegated authority.

In addition, vacancies may also serve nondelegation concerns by permitting careerists to implement Congress’s intent, such as it is, more faithfully. This of course raises internal nondelegation concerns.³⁰² Vacancies in both contexts—preventing action and having action performed by careerists—also bring additional costs. Agencies with acting

297. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 606 (1992).

298. Adam B. Cox, Essay, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1674 (2007).

299. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

300. *Id.* at 316 (footnotes omitted).

301. I am grateful to the University of Chicago Law and Politics Workshop for discussion on this point.

302. See Barron & Kagan, *supra* note 293, at 237–40.

officials or no officials in particular positions are less accountable to the president and to Congress.³⁰³

C. DEFERENCE DOCTRINES FOR AGENCY ACTION

Given the extent of vacancies in top agency positions, it is surprising that there has not been more discussion about their implications for administrative law more widely. This section tries to be somewhat provocative, without coming to any conclusions about how constitutional and administrative law doctrines should be reformulated. Rather, its aim is to begin a conversation about the legal implications of vacancies in the administrative state.

Agency vacancies have possible implications for judicial review of agency action and inaction. Courts and scholars might want to reconsider the reluctance to probe the mental processes of an agency decisionmaker, judicial deference to agency interpretations of ambiguous statutes and other actions, and the general unavailability of judicial review for agency inaction.

Courts generally presume that agency leaders have acted in good faith. In particular, courts are hesitant to probe the mind of an agency decisionmaker.³⁰⁴ Justice Frankfurter stressed this point, comparing administrators to judges.³⁰⁵ The courts also have concluded that the presumption holds for agencies experiencing turnover in the middle of a complicated decisionmaking process. In *National Nutritional Foods Ass'n v. FDA*, the Second Circuit upheld a complex rule issued just thirteen days after a new commissioner of the Food and Drug Administration took office.³⁰⁶ Despite the recent start of the administrator, the court held that it would not scrutinize his mental processes.³⁰⁷ The presumption may have little bite in that context as courts can still strike down action based on rushed decisionmaking processes on arbitrary and capricious grounds.

The presumption relies on the existence of a legitimate agency decisionmaker, even if that official is new to the job. Perhaps it should be weakened when the critical decisionmaker is an acting official. Admittedly, the limited case law on the issue does not seem promising. Generally,

303. See *supra* Part III.A.3.

304. See *Morgan v. United States*, 304 U.S. 1, 18 (1938).

305. *United States v. Morgan*, 313 U.S. 409, 422 (1941).

306. *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141 (2d Cir. 1974).

307. *Id.* at 1145–46. To be certain, the agency had been working on the rulemaking for an extensive period.

courts treat acting officials as equivalent to proper appointees, but with no discussion of their temporary status.³⁰⁸ Further discussion, at least, seems warranted. Acting officials, at least for principal offices, are not standard appointees. They have not been fully vetted by the Senate for the positions they are filling; they serve for a limited period. Such differences likely do not justify de novo review of their actions, but they may permit some additional scrutiny.

Agency vacancies also call into question the rationales behind two core administrative law doctrines: deference to agency interpretations of ambiguous statutes and reviewability of agency inaction.

The courts recently seem to be switching back and forth between political accountability and expertise theories to justify deference to agency actions. Under the former theory, best exemplified by *Chevron v. Natural Resources Defense Council*, courts defer to agency interpretations of ambiguous statutes because agencies are more accountable (to the national electorate through the president) than the courts.³⁰⁹ Under the latter theory, best exemplified by *Skidmore v. Swift*, courts defer to agency interpretations because agencies have more expertise than courts.³¹⁰ In *United States v. Mead Corp.*,³¹¹ the Supreme Court emphasized political accountability, at least for particular types of agency decisions.³¹²

308. See, e.g., *Process Gas Consumers Group v. Dep't of Agric.*, 657 F.2d 459 (D.C. Cir. 1981) (considering the powers of the Secretary of Agriculture to define terms in issuing proposed rules and containing no discussion of whether the Secretary's status as an acting official affected his authority); *Anderson v. P.W. Madsen Inv. Co.*, 72 F.2d 768 (10th Cir. 1934) (finding that the acting Commissioner of Internal Revenue could sign a closing agreement required by law to be signed by the Commissioner because Congress could not have intended for there to be times when such duties could not be performed due to vacancies).

309. See *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”). But see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1266 (2006).

310. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–38 (1944) (“Pursuit of [the agency official's] duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution.”).

311. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

312. See O'Connell, *Political Cycles*, *supra* note 135, at 979 (“The easy categories of *Mead*—explicit delegation of authority to enact legislative rules and agency interpretation of an ambiguous statute through notice-and-comment rulemaking—fit well with the political accountability theory. Congress has delegated explicit authority to an agency run by someone chosen by and responsible to the President. In addition, the agency has used procedures that solicit feedback from voters in making

Deference for actions where there has been no explicit delegation of authority and for agency interpretations through informal adjudication or interpretative rulemaking appears, however, to depend on the expertise theory, according to *Barnhart v. Walton*.³¹³

The point here is not to argue in favor of one theory or another, as a positive or normative matter.³¹⁴ Rather, it is to suggest that these accountability and expertise theories underlying judicial deference to agency action could better take into account empirical realities.³¹⁵ As applicable here, agency decisions made under acting officials might garner less deference based on political accountability justifications that those made by properly appointed officials, all else being equal. The reasoning would go as follows: acting officials are less accountable to the White House and Congress than normal appointees, thus to the extent that courts defer to agencies because agencies are more accountable than courts, courts should review decisions by acting officials more carefully.³¹⁶ This diminished deference would also operate to encourage presidents to appoint officials more quickly. To the extent that those decisions derive more from the expertise of civil servants and other nonpolitical employees, however, courts might give more deference if they rely on an expertise justification. The rationale here would be: acting officials drawn from senior careerists at the agency have more relevant expertise than traditional appointees, therefore to the extent that courts defer to agencies because agencies have more expertise than courts, courts should give decisions by experienced

policy decisions.”).

313. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (“In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate lens through which to view the legality of the Agency interpretation here at issue.”).

314. Cf. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (noting that the Supreme Court in *Massachusetts v. EPA* seemed to be moving away from the political accountability theory).

315. See O’Connell, *Political Cycles*, *supra* note 135, at 895–97.

316. See Barron & Kagan, *supra* note 293, at 235–36 (“Our approach to *Chevron* would shift the inquiry by focusing on who within an agency has made a decision. Under this approach, *Chevron*’s question of institutional choice (should a judge or agency exercise interpretive power in areas of statutory ambiguity?) would turn on a question of institutional design (to whom has the agency assigned decision-making functions?). The agency would wrest primary interpretive authority from the courts if but only if a particular agency official—the official Congress named in the relevant delegation—personally assumed responsibility for the decision prior to issuance. The courts would retain primary interpretive authority (subject only to *Skidmore*-style deference) if, alternatively, this named person passed her decision-making authority to lower-level officials. In short, decisions that statutory delegates make their own would receive *Chevron* deference, and decisions they delegate would not.” (footnotes omitted)).

temporary officials considerable deference.

To be certain, this approach has considerable obstacles in practice. The rulemaking process is not short. One recent study examined the length of rulemakings between 1988 and 2003 for rules with statutory or judicial deadlines and rules without deadlines. Rulemakings without deadlines took an average of 528 days to complete after an NPRM was issued, and rulemakings with deadlines took an average of 427 days.³¹⁷ The judicial review process also takes time. Over the total period, an agency will have some vacancies. Are particular moments—such as the issuance of the NPRM or the final rule—critical? Does the overall duration of leadership gaps matter?

This attention to *Chevron* and *Skidmore* deference may also be misplaced. To the extent that agency vacancies discourage agency action at all or bold action in particular,³¹⁸ it may be more important to consider doctrines governing judicial reviewability of inaction. Under present case law, it is extremely difficult to get courts to “compel agency action unlawfully withheld or unreasonably delayed” under § 706(1) of the Administrative Procedure Act (“APA”).³¹⁹ In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court held that “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take *discrete* agency action that it is *required to take*.”³²⁰ Statutory deadlines “stand out as one of the few areas where courts will compel agencies to act

317. Gersen & O’Connell, *supra* note 141, at 945. As lengthy as this is, these measures do not account for the time needed to develop the NPRM. Isolating significant rulemakings, moreover, would show even longer average durations. *See id.* at 949. *See also* GAO, GAO-01-821, AVIATION RULEMAKING: FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS 14–15 (2001) (examining average duration of significant rulemaking from fiscal year 1995 through fiscal year 2000 by the Animal and Plant Health Inspection Service (“APHIS”), the EPA, the Federal Drug Administration, and the NHTSA and finding that “[e]xcept for APHIS, which finalized all of its significant rules within 2 years of the close of the public comment period, agencies generally finalized between three-quarters and two-thirds of their significant rules within 24 months of the close of the public comment period”); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?*, J. PUB. ADMIN. RES. & THEORY (forthcoming 2009) (manuscript at 8–18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371588) (analyzing the duration of notice-and-comment rulemaking from 1983 to 2006).

318. *See supra* Part III.A.

319. 5 U.S.C. § 706(1) (2006). *See also* William D. Araiza, *In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 993 (2004); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 8–9 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658, 1663 (2004).

320. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

despite multiple demands on their resources.”³²¹ Could vast vacancies in top agency posts become another area where courts will compel agency action? With vacancies, courts would presumably worry less about interfering with agency resource decisions. After all, the idea is that leaderless agencies do not have too much to do; rather, they do too little. To be certain, agency vacancies are harder to assess than statutory deadlines. In addition, courts may be understandably leery of pushing agency action in the absence of politically accountable leaders; even temporary officials lack the authority of formal appointees.³²²

In short, vacancies have implications for a variety of administrative law doctrines. The practicality of using such doctrines to improve staffing of agencies is, however, questionable.

D. LITIGATION STRATEGIES

This final section considers how the courts, under current doctrine, might be used to fill agency vacancies, assuming that it is better to fill those vacancies than to leave them empty or staffed with temporary officials.

Assume that the president has not appointed someone to fill a Senate-confirmed position, creating a vacancy. That choice could be intentional, trying to weaken a particular agency, or could be the result of resource or other constraints, making it hard to find an appropriate person. Can the president be compelled to fill the position?³²³

Although he seems to have a mandatory duty to fill it, no court has ever held that the president must staff vacant offices. One federal district court did permit a lawsuit seeking such relief to survive a motion to dismiss.³²⁴ In June 1972, Congress created the National Advisory Council on Indian Education to help with the administration of the Indian Education Act. By April 1973, the president had made no appointments to the Council; he also had not delegated his appointment power to anyone else. The Minnesota Chippewa Tribe sued, asking for appointments to the Council. The District Court of the District of Columbia refused to dismiss the case, concluding that the plaintiff had standing to sue.³²⁵ The case then

321. Gersen & O’Connell, *supra* note 141, at 952.

322. *See supra* Part III.A.2.

323. *See* HAROLD J. KRENT, PRESIDENTIAL POWERS 34 (2005) (noting that delay in appointing “at some point becomes tantamount to a failure to nominate”). *Cf. supra* notes 278–85 and accompanying text (noting the litigation surrounding the president’s power to appoint temporary officials).

324. *Minn. Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973).

325. *Id.* at 975.

became moot when the president made appointments to the Council.

Similar cases are rare.³²⁶ This paucity of cases stems from the difficulty in getting courts to see challenges to agency vacancies as reviewable. To start, plaintiffs must establish that they have standing to sue. The *Minnesota Chippewa Tribe* decision predates the tightening of standing doctrine.³²⁷ Plaintiffs now must demonstrate requisite injury in fact, traceability of their injury to the defendant's conduct, and likelihood that the court can provide redress.³²⁸ What is the injury? Presumably plaintiffs would argue that the lack of agency leaders causes agency action (or inaction) that harms their interests. How is the injury connected to the vacancy? Plaintiffs likely would suggest that if there were a properly appointed official, agency decisions would be different. At the least, litigants will have to demonstrate "that they have been 'directly subject to the authority of the agency.'" ³²⁹ Finally is there redressability? If courts can order the appointment of an official, plaintiffs would argue, the courts can provide redress. Each of these prongs seems quite difficult to show.³³⁰

To the extent that plaintiffs are challenging agency action by officials selected in violation of the Appointments Clause, those challenges may be easier to bring.³³¹ For example, John Duffy has noted that judges on the Board of Patent Appeals and Interferences ("BPAI") were not appointed properly.³³² Between 2000 and 2008, the Director of the Patent and

326. See, e.g., *Aharonian v. Gutierrez*, 524 F. Supp. 2d 54, 55 (D.D.C. 2007) (dismissing a case challenging the Commerce Secretary's appointment of the Deputy Director of the Patent and Trademark Office on the ground that the Deputy Director lacked the required "professional background and experience in patent or trademark law" because the appointment decision was "committed to agency discretion by law" and thus was "unreviewable under Administrative Procedure Act (APA)"). Moreover, the president is not subject to the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

327. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 230–31 (1988).

328. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

329. *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (quoting *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985)).

330. See, e.g., *Nat'l Comm. of Reform Party of the United States v. Democratic Nat'l Comm.*, 168 F.3d 360, 365 (9th Cir. 1999) (finding the plaintiffs had not shown redressability in challenging the partisan requirements of the Federal Election Commission). The Supreme Court's 2007 decision in *Massachusetts v. EPA* may make such challenges easier on the margin if state interests are affected. See *Massachusetts v. EPA*, 549 U.S. 497 (2007). Senators would have a better likelihood of having standing to sue over temporary appointments that did not go through the Senate confirmation process. See *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973); Hein, *supra* note 83, at 250–51.

331. See, e.g., *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (referring to "structural" errors or injuries); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (finding standing because plaintiffs could allege that they were "directly subject to the authority of the agency" (quoting *Comm. for Monetary Reform*, 766 F.2d at 543)).

332. See John F. Duffy, *Are Administrative Patent Judges Unconstitutional?* (George Washington

Trademark Office had selected all administrative patent judges who, because they exercise significant authority, are considered “inferior Officers” under the Appointments Clause.³³³ Because the director is not the president, a court of law, or a head of a department, the director cannot appoint inferior officers.³³⁴ Duffy concludes that “[a] constitutional challenge is, however, almost certainly available to parties litigating before BPAI panels having at least one administrative patent judge who was appointed on or after March 29, 2000.”³³⁵

In short, litigation under current doctrine is a difficult and clunky mechanism for trying to reduce agency vacancies. Even if legal doctrines shift to reflect empirical realities of agency vacancies, court challenges seem an unlikely mechanism for curtailing these vacancies. Policy reforms outside the courts targeted at reducing the number and length of vacancies—including appointee commitments to serve for two to four years, better training for new officials, and advance personnel planning by the White House—will, however, likely be more effective. The next part takes up these and other proposals.

VI. POLICY PROPOSALS

When it comes to agency leaders, public attention targets the very top spots, namely the cabinet and cabinet-rank officials. But a full cabinet often masks vacancies in the lower layers of executive agencies. This Article has shown that in recent administrations many critical agency positions took months to staff with Senate-confirmed presidential appointees and that many of these positions did not stay filled for long.

Assuming that the consequences of such vacancies are deleterious on

Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 419, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128311.

333. *Id.* at 1, 6; 35 U.S.C. § 6(a) (2006).

334. Duffy, *supra* note 332, at 5–6.

335. *Id.* at 7. *See also* *Nguyen v. United States*, 539 U.S. 69 (2003) (ruling that the inclusion of a non-Article III judge on a three-judge federal appellate panel was unconstitutional even though the appellate panel’s ruling was unanimous against the criminal defendant who later challenged the composition); *Ryder v. United States*, 515 U.S. 177 (1995) (holding that civilian judges were unconstitutionally appointed to the Court of Military Review and that an enlisted member of the Coast Guard convicted of drug offenses was entitled to a hearing before a properly appointed panel of that Court). In August 2008, President Bush signed a law giving the Secretary of Commerce, a head of a department, the authority to appoint patent judges, including retroactively. *See* Adam Liptak, *Fix to Patent Judge Appointment Procedure*, N.Y. TIMES, Aug. 14, 2008, at A19. It is unclear whether the retroactive provision will protect previous decisions by BPAI panels with at least one judge who was unconstitutionally appointed in the first instance. *Id.*

net—contributing to agency inaction, confusion among nonpolitical government employees, and decreased legitimacy of the administrative state—this part explores proposals to decrease the time during which important agency positions are not filled by Senate-confirmed presidential appointees. Normative work in this and related areas can be tricky; the dynamics of reform have to be considered. For example, President Obama’s ethics requirements (including bans on both pre- and post-government service lobbying) take qualified people out of the pool of potential nominees.³³⁶

This part describes three proposals to decrease the number of vacancies, by increasing appointee tenure, and four proposals to shorten the nomination lag for vacancies that do exist. The suggested reforms recognize that we live in a constrained world; they are simple and feasible and are, with one meaningful exception, within the direct control of the White House.

The proposals do raise a puzzle. If vacancies are harmful, on balance, and if these reforms are within the control of the White House, why have the past presidents not adopted them? To some degree, the puzzle is misphrased. Why haven’t past presidents corrected problems stemming from agency vacancies that hurt their interests? They have tried—and as this part will describe, sometimes succeeded. In essence, this part aims to propose some best practices and to push reforms that are politically feasible but may not be adopted by the White House on its own initiative.

Some preliminary comments are in order. Many commissions and commentators have called for more radical changes than those proposed here—most notably, cutting a large number of political appointments in the bureaucracy³³⁷ and significantly decreasing the confirmation lag.³³⁸ This

336. Peter Baker, *Groups to Push for Exceptions to Lobby Rule*, N.Y. TIMES, Apr. 21, 2009, at A1 (“It’s painful . . . There are a lot of good people out there who are philosophically simpatico with us and are very skilled and would be very valuable to us.” (quoting senior presidential adviser David Axelrod)).

337. See, e.g., DUNN, *supra* note 117, at 153; GERHARDT, *supra* note 238, at 266; HECLO, *supra* note 177, at 260; LIGHT, *supra* note 21, at 91; H. COMM. ON POST OFFICE & CIVIL SERV., REPORT AND RECOMMENDATIONS OF THE NATIONAL COMMISSION ON THE PUBLIC SERVICE 17–19 (Comm. Print 1989) [hereinafter VOLCKER]; NAT’L COMM’N ON PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 19–20 (2003); David M. Cohen, *Amateur Government*, 8 J. PUB. ADMIN. RES. & THEORY 450, 494–95 (1998); James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 63 (1987). By contrast, political appointees generally favor the creation of more political positions. See Ban & Ingraham, *supra* note 155, at 118–19. Others, including the GAO, have recommended that some Senate-confirmed positions be converted to positions requiring only presidential appointment. See GAO, GAO-07-235R, SUGGESTED AREAS FOR OVERSIGHT FOR THE

Article does not take a position on the merits of eliminating many political positions or, alternatively, making the appointment of more inferior officers rest in the president alone rather than defaulting to the Senate-confirmation process. In some sense, such proposals seem the most straightforward solutions to vacancies, though they may have detrimental effects on the quality of agency leaders. Whether desirable or not, such changes would be politically impossible to implement.³³⁹ Paperwork should surely be streamlined and for some positions curtailed among the White House, Senate, and agencies conducting background checks during the appointments process,³⁴⁰ but the substance of the Senate confirmation process should not be abbreviated, particularly in times of united government.³⁴¹ If a primary concern about agency vacancies is the lack of accountability for agency action (or inaction),³⁴² compressing the Senate's role compounds that concern.

A. NUMBER OF VACANCIES

To decrease the number of vacant positions within an administration, agency appointees must serve for longer.³⁴³ The following three reforms could meet that objective.

First, the president should require executive agency officials to

110TH CONGRESS 40 (2006).

338. See, e.g., Sarah A. Binder, *The Senate as a Black Hole? Lessons Learned from the Judicial Appointments Experience*, in INNOCENT UNTIL NOMINATED, *supra* note 112, at 173; Deering, *supra* note 200; G. Calvin Mackenzie, *Nasty & Brutish Without Being Short: The State of the Presidential Appointment Process*, BROOKINGS REV., Spring 2001, http://www.brookings.edu/articles/2001/spring_governance_mackenzie.aspx. Appointees naturally support this proposal. See, e.g., GAO, GAO/GGD-93-28FS, POLITICAL APPOINTEES: SELECTED APPOINTEES' VIEWS OF THEIR FEDERAL WORK ENVIRONMENT 5 (1992).

339. See Robert Maranto, *Why the President Should Ignore Calls to Reduce the Number of Political Appointees*, HERITAGE FOUND. BACKGROUNDERS, Feb. 27, 2001, at 9 ("Any President who slashed the number of executive branch political appointees would be committing unilateral disarmament in the inter-branch conflict." (emphasis omitted)). See also Barron *supra* note 35, at 1136 ("Political reform of the appointments process is . . . not something one should count on in the near term, even if one were convinced that it would be desirable.").

340. See LIGHT, *supra* note 21, at 90, 230; Terry Sullivan, *Repetitiveness, Redundancy, and Reform: Rationalizing the Inquiry of Presidential Appointees*, in INNOCENT UNTIL NOMINATED, *supra* note 112, at 196, 196-97; VOLKER I, *supra* note 337, at 15-16; G. Calvin Mackenzie, *The Real Invisible Hand: Presidential Appointees in the Administration of George W. Bush*, 35 PS: POL. SCI. & POL. 27, 29 (2002).

341. See William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1204-14, 1219-21 (1998).

342. See *supra* Part III.A.3.

343. See JOHN W. MACY, BRUCE ADAMS & J. JACKSON WALTER, AMERICA'S UNELECTED GOVERNMENT: APPOINTING THE PRESIDENT'S TEAM 70, 111 (1983).

commit to serve for a full presidential term.³⁴⁴ In Australia, high-level officials sign such performance contracts.³⁴⁵ If a four-year commitment is not feasible, the president should obtain a two-year promise.³⁴⁶ Such commitments are not legally binding.³⁴⁷ Nevertheless, they may discourage potential appointees from using government service as a quick stepping stone to more lucrative jobs in the private sector.³⁴⁸ The president could still ask any official serving at his pleasure to step down at any time.

Both Presidents Carter and George H. W. Bush asked their appointees to stay for a full term.³⁴⁹ Although the performance of these presidents was mixed—indeed, neither was reelected—both devoted energy to trying to improve the quality and tenure of agency appointees. President Carter created a “talent bank” of individuals to draw from for key positions. President Carter emphasized that he wanted to “identify the very best possible candidates” for each position.³⁵⁰ In line with this goal, he instituted a Talent Inventory Process (“TIP”). For each top government job, TIP identified the qualifications and asked a network of several hundred people for recommendations. President George H. W. Bush, the only recent president with significant prior federal agency experience,³⁵¹ had firm ideas about improving the performance of the bureaucracy. He actually fired many Republican appointees who were serving at the end of President Reagan’s administration.³⁵²

This reform is easy to implement. Many questions are asked of potential appointees. President Obama’s vetting form asks government job seekers about tax payments for domestic workers and even embarrassing blog posts.³⁵³ It would be easy—and at least as important—to ask how long

344. See Karen M. Hult, *Strengthening Presidential Decision-Making Capacity*, 31 *PRESIDENTIAL STUD. Q.* 27, 38 (2000).

345. See *id.*

346. The disadvantage is that time commitments may discourage highly qualified people from taking a political appointment. For those people, two-year commitments may not be prohibitive. Indeed, academics can often take a two-year leave of absence from a tenured university position. Less than two years, and the qualifications would have to be so impressive as to outweigh the costs to policymaking from short tenures.

347. MACKENZIE, *supra* note 80, at 253.

348. Cf. Joyce, *supra* note 153, at 132.

349. See MICHAELS, *supra* note 127, at 206.

350. Joel Havemann, *Carter Is Taking Pains in Picking His Plums*, *NAT’L J.*, Nov. 20, 1976, at 1650.

351. He served as Director of the CIA under President Ford from November 1975 to January 1977.

352. See MARANTO, *supra* note 157, at 58.

353. Jackie Calmes, *For a Washington Job, Be Prepared to Tell All*, *N.Y. TIMES*, Nov. 13, 2008, at A1.

such applicants plan to stay in the agency and if they would promise to commit to a two- or four-year stint in government service. A survey of potential appointees found that individuals see government service as attractive and helpful to their career.³⁵⁴ To the extent that these individuals think long-term, many should make such a commitment.

Second, every agency leader should receive comprehensive and institutionalized training.³⁵⁵ Training should cover the incoming leader's agency, the wider administrative state, congressional appropriations and oversight, and the White House regulatory review process, as well as media relations, management, interactions with the civil service and other nonpolitical agency workers, and other executive skills.³⁵⁶ If agency officials perform better and face less hostile oversight from within and outside their agency, they will be more likely to serve longer.³⁵⁷

New members of Congress have an intensive orientation at the Capitol; they can also attend a supplemental week-long training at Harvard University. Agency leaders generally have received nothing comparable, despite their similarly critical responsibilities.³⁵⁸ Appointee training in recent administrations has varied widely.³⁵⁹ Indeed, there was no branch-wide orientation for agency leaders during President Clinton's first term. Although Congress appropriated funding for the first time in 2000 (but not again in 2004) for appointee training, there is still no standard orientation for agency leaders.³⁶⁰ A 2008 survey of agency appointees by the IBM Center for the Business of Government and the National Academy of Public Administration found that 45 percent of respondents had no orientation; 33 percent said the orientation was only somewhat effective, not very effective, or poor; and most wanted additional training.³⁶¹

354. PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., *POSTS OF HONOR: HOW AMERICA'S CORPORATE AND CIVIC LEADERS VIEW PRESIDENTIAL APPOINTMENTS* 4-5 (2001).

355. See Pfiffner, *supra* note 191, at 143, 149.

356. See generally G. EDWARD DESEVE, IBM CTR. FOR BUS. OF GOV'T, *SPEEDING UP THE LEARNING CURVE: OBSERVATIONS FROM A SURVEY OF SEASONED POLITICAL APPOINTEES* 4-6 (2009) (describing elements of management, policy and operations, and managing relationships that former appointees indicate are important topics to know about).

357. Cf. VOLCKER, *supra* note 337, at 20-22 (recommending appointee training in order to facilitate more constructive relationships with careerists).

358. See DUNN, *supra* note 117, at 173; Pfiffner, *supra* note 191, at 141.

359. Compare PRESIDENTIAL APPOINTEE PROJECT, *LEADERSHIP IN JEOPARDY: THE FRAYING OF THE PRESIDENTIAL APPOINTMENTS SYSTEM* 20 (1985) (noting that 79 percent of appointees from 1964 to 1984 received no orientation), with GAO, *supra* note 338, at 4 (finding that 76 percent of appointees surveyed in 1992 attended some form of orientation).

360. COUNCIL FOR EXCELLENCE IN GOV'T, *PREPARING PRESIDENTIAL APPOINTEES FOR LEADERSHIP: A HISTORY* 16-17 (2008).

361. DESEVE, *supra* note 356, at 6.

This proposal is relatively straightforward to implement. Part of the difficulty is timing. Congressional turnover almost always occurs at regular intervals, but agency officials are constantly coming and going. There could, however, be an intensive training for agency officials in the first few months of each presidential term, which could be recorded for later appointees to access electronically.³⁶² Some funding would have to be devoted to the initial training, but the training could be done with minimal expense, using mostly current government officials.

Third, Congress should increase the salary and benefits of agency leaders, if feasible.³⁶³ Congress can decrease the opportunity cost for entering public service for several years by making government service more financially attractive.³⁶⁴ This is not to say that government service should pay these officials what they could earn in the private sector. But political appointees should earn sufficient income and benefits such that taking on critical public service is not a financial burden, especially for those with college or other family expenses.³⁶⁵

The National Commission on the Public Service recommended in its 1989 report, for instance, that agency leaders should be able to qualify for “up to three months of severance pay with full benefits as a bridge to outside employment.”³⁶⁶ If severance pay were available, appointees would spend less time looking for their next job while they should be working for the public.

This last proposal is the hardest to adopt. It requires legislative action that may be impossible in the current economy. Nevertheless, small increases in benefits may be financially obtainable.³⁶⁷ Even if small, they

362. In 2002, a website (www.results.gov) was established to provide appointees electronic access to recent trainings as well as other items. See COUNCIL FOR EXCELLENCE IN GOV'T, *supra* note 360, at 16.

363. See GARY BURTLESS, HOW MUCH IS ENOUGH? SETTING PAY FOR PRESIDENTIAL APPOINTEES 22–23 (2002). But see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEG. ANALYSIS 47, 50 (2009) (theorizing and finding empirical support that “salary increases can improve judicial performance only when judges face a serious risk of termination or other punishment if they perform inadequately”).

364. Labiner & Light, *supra* note 199, at 250 tbl.8-12; MACY ET AL., *supra* note 343, at 76–83.

365. See BURTLESS, *supra* note 363, at 9 (noting that most appointees have reached early middle age when many are shouldering the ever-increasing cost of putting children through college).

366. VOLCKER, *supra* note 337, at 16.

367. An alternative to increased payment for government service might be to provide appointees increased policy discretion. See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007) (using a theoretical model to show that job protection and discretion will motivate “zealots” to develop necessary expertise). This alternative also faces obstacles in getting enacted.

can make a difference, at the least, on the margins.

B. LENGTH OF VACANCIES

To decrease the length of vacancies in critical agency positions, the president should announce his nominations more quickly, both at the start of his administration and after an appointee in a position departs.³⁶⁸ Four proposals could meet that goal.

First, the president should be making more staffing decisions earlier, as a presidential candidate and as president-elect. Presidential candidates already vet some individuals for the very top positions in an administration.³⁶⁹ But such vetting is generally kept quiet as candidates do not want to appear arrogant in the run-up to the election.³⁷⁰ That norm could shift if candidates were expected to announce publicly lists of individuals they would consider hiring for agency positions before the election. In their third debate, moderator Tom Brokaw asked Senators Obama and McCain whom they would nominate as Treasury Secretary. Neither candidate provided a list of realistic nominees; both mentioned only investor Warren Buffet.

Stuart Benjamin and Mitu Gulati recently suggested that candidates behind in the polls should use preelection announcements of potential Supreme Court and cabinet picks to gain a strategic advantage.³⁷¹ Their argument is primarily a positive or predictive one, but it also has normative consequences for the staffing of the administrative state. If preelection appointments announcements were more typical, at least for the highest positions, agency positions could be filled more quickly. Even though candidates may have limited time to devote to such decisions before the election, the top leaders could then get to work in helping to select lower-level officials in their agencies.³⁷² If candidates prefer a bold choice for a

368. Initial and mid-administration vacancies are arguably more important to fill than end-of-administration openings, except for positions related to public health and national security, which seem pressing to fill at all times.

369. See, e.g., Peter Baker & Jackie Calmes, *Building a White House Team Before the Election is Decided*, N.Y. TIMES, Oct. 25, 2008, at A12.

370. See Jackie Calmes, *Bush, Gore Began Planning Transitions Early*, WALL ST. J., Nov. 15, 2000, at A28 (citing Democrats as criticizing Bush in the 2000 election for appearing “arrogant and presumptuous” by publicly planning his presidency but noting that “for at least four decades presidential candidates have planned their transitions months before the election” although such planning “should be done behind closed doors”).

371. Stuart Minor Benjamin & Mitu Gulati, “Mr. Presidential Candidate: Whom Would You Nominate?”, 42 LOY. L.A. L. REV. 293 (2009).

372. To be certain, preelection announcements may produce problematic selection effects;

particular position that they fear would not be received well before the election, they could hold off on making an announcement for that job until after the election.

Similarly, the president-elect should devote more resources during the transition to agency appointments. Since 1963, Congress has given funding to the incoming president “to establish a transition team and to bring potential appointees to Washington for interviews and general vetting.”³⁷³ Despite this funding, recent presidents still have done most of their agency hiring after inauguration.³⁷⁴ The one recent exception, at least for vetting purposes, appears to be national security.³⁷⁵ In the aftermath of September 11, 2001, there is some pressure to fill key national security spots early.³⁷⁶ In October 2008, President Bush issued an Executive Order establishing a Presidential Transition Coordinating Council to “assist the major party candidates and the President-elect by making every reasonable effort to facilitate the transition between administrations.”³⁷⁷

Ideally, Congress would provide additional funding for appointments during the transition, but that might not be feasible. At the least, the president-elect and the transition team should seek advice on appointments from outside the White House, including from Congress, agency officials

candidates may pick different officials depending on the time of the announcement. Before the election, candidates may choose individuals who will help them gain votes; after the election, a president-elect may choose individuals who will be best at carrying out his policy agenda. *See id.* at 301 (noting that presidents, once elected, may have a tendency to “forget their implicit preelection commitments to marginal voters and instead use the appointments to satisfy their core support groups”). Benjamin and Gulati advocate for preelection announcements of potential nominees to counteract this tendency, among other reasons. Perhaps major newspapers could provide score cards on announced appointments.

373. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1264 (2006).

374. *See* JOHN KAMENSKY & MARTHA JOYNT KUMAR, P’SHIP FOR PUB. SERV., SURVIVING THE PRESIDENTIAL TRANSITION 2 (2008) (explaining that it can be difficult for incoming administrations to “get senior leadership in place quickly, and only a select few offices can receive immediate attention” and noting that by September 11, 2001, President George W. Bush had “filled less than half of its 508 top political appointments”). *See also* STEPHEN HESS, FIRST IMPRESSIONS: PRESIDENTS, APPOINTMENTS, AND THE TRANSITION (2000) (detailing the presidential transitions of the Nixon through George H. W. Bush presidencies and generally documenting the fact that presidents make only “high-profile appointments” prior to Inauguration, usually including top White House staff, cabinet members, and a handful of subcabinet appointments).

375. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., REPORT NO. RL33742, 9/11 COMMISSION RECOMMENDATIONS: IMPLEMENTATION STATUS 7 (2006).

376. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7601(a), 118 Stat. 3638, 3856–57; NAT’L COMM’N ON TERRORIST ATTACKS UPON U.S., *supra* note 131, at 422 (reporting 9/11 Commission recommendations).

377. Exec. Order No. 13,476, 73 Fed. Reg. 60,605 (Oct. 9, 2008).

(especially for lower-level positions), and professional organizations.³⁷⁸ Such consultation already occurs but could be more systematic across transitions. Outside organizations such as think-tanks may provide considerable assistance in agency appointments during the transition period, including researching and evaluating potential nominees, especially if congressional funding were limited.

Second, the president should pay more attention to lower-level appointments in executive agencies. Although public attention tracks only the highest appointments, the president should also tend to positions that will not grab headlines yet will be instrumental in implementing his policies. Such focus does not mean sustained participation by the president in hiring decisions for all of the approximately 700 Senate-confirmed executive agency jobs. But it does require the president to retain considerable control over the appointments process and treat lower-level agency appointments as a presidential priority. One easy way for the president, constrained by time and resources, to staff lower-level jobs more quickly is to consider seriously naming agency careerists to such positions.³⁷⁹

Presidents Carter and Reagan are two opposing examples.³⁸⁰ President Carter, at the start of his administration, delegated considerable authority to his cabinet secretaries to fill lower-level positions in their agencies. This delegation left President Carter relatively powerless against his own cabinet, at least in the first years of his administration.³⁸¹ By contrast, President Reagan wielded his appointment power carefully to maintain close control over the federal bureaucracy.³⁸² He and his staff tried to choose individuals loyal first to him, rather than to agency clients.³⁸³

Incoming presidents obviously have competing demands for their attention. President Obama, for example, faces a severe economic crisis

378. See MACY ET AL., *supra* note 343, at 110–11; VOLCKER, *supra* note 337, at 22.

379. See Richardson & Pfiffner, *supra* note 132, at 182–83, 192.

380. President George H. W. Bush was somewhere in between. See Joel D. Aberbach & Bert A. Rockman, *The Political Views of U.S. Senior Federal Executives, 1970–1992*, 57 J. POL. 838, 841 (1995).

381. By the middle of his administration, however, President Carter had taken back much of that authority. See THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994*, at 68–76 (1995).

382. MICHAELS, *supra* note 127, at 32. At first, this centralized vetting system created delays, but those delays were then reduced. Howell Raines, *White House Headhunter Feels the Heat*, N.Y. TIMES, May 3, 1981, at D3.

383. MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 6 (2000); WEKO, *supra* note 381, at 90–99.

and two wars abroad, not to mention demands for wider health care coverage and cleaner energy sources, to name just a few. When it comes to the federal bureaucracy, a new president needs to act quickly to staff important agencies while still juggling many other tasks. By clustering appointments by issue area, the president can work more effectively.³⁸⁴ This proposal should be simple to adopt; it serves the interests of the president in that he needs appointees in agencies to implement his policy agenda.

Third, the presidential personnel office should plan for future appointments after initial appointees take their positions.³⁸⁵ Specifically, the office should anticipate that a particular Senate-confirmed executive agency position will be filled, on average, by at least two people during a presidential term.³⁸⁶ In addition, when a cabinet secretary departs, many officials often follow.³⁸⁷ The personnel office should be prepared for a wave of vacancies in an agency when the top official resigns. The office could construct a team that draws members from across the administration and, much like in disaster response, would spring into action if certain jobs became vacant—for example, critical positions at the Treasury, Office of the Director of National Intelligence, the DOD, and FEMA.

This preparation for filling agency vacancies requires low turnover in the presidential personnel office itself. President George H. W. Bush benefitted from such stability in his personnel operations. He had tasked Chase Untermeyer—an unlikely appointee for key White House or cabinet jobs—to plan the transition before his election and then named him to head his personnel office.³⁸⁸ By contrast, President Clinton's transition was far more chaotic.³⁸⁹ Richard Riley, whom President Clinton put in charge of subcabinet appointments, soon turned to preparing for his own nomination as Secretary of Education. Warren Christopher, President Clinton's

384. See STEPHEN HESS, BROOKINGS INST., FIRST IMPRESSIONS: A LOOK BACK AT FIVE PRESIDENTIAL TRANSITIONS, available at http://www.brookings.edu/articles/2001/spring_governance_hess.aspx.

385. Because of the importance of the personnel office in staffing federal agencies and because cuts to the personnel office have repercussions throughout the administrative state, its budget should be at least preserved and ideally increased. Its budget was cut under President Clinton as part of efforts to downsize government. See WEKO, *supra* note 381, at 125.

386. It might think about publicly announcing picks to fill a position in advance, as is done sometimes for sports coaches.

387. See MACKENZIE, *supra* note 80, at 251 (“Departures from appointive positions in the executive branch often have these elongated ripple effects.”).

388. JOHN P. BURKE, PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE 191–92, 196 (2000).

389. LIGHT & THOMAS, *supra* note 200, at 16.

transition director, was selected as Secretary of State. As one scholar of presidential transitions noted, “[p]erhaps the worst danger is the one Clinton faced: a personnel operation and a transition whose principals end up with cabinet positions to the detriment of the personnel office.”³⁹⁰

Creating a stable personnel operation is no easy task. Additional resources for the presidential personnel office would help of course. But careful selection of office staff and increased use of computer technology to search and store applications can contribute significantly to smoother appointments practices throughout an administration.

Finally, the president should ask political appointees in federal agencies to provide four weeks notice of resignation. Under the Federal Vacancies Reform Act of 1998, the agency must notify Congress and the Comptroller (the head of the GAO) of any vacancy when it occurs.³⁹¹ This proposed reform would require advance notice from the departing appointee to at least the White House. Four weeks notice would allow the presidential personnel office to start actively vetting other individuals for appointment before the presiding office holder departs. Indeed, the departing and incoming appointee might be more likely to meet, which would provide more training to the new official, thereby promoting longer tenure. The departing official could also provide recommendations for his or her replacement. The president would still retain his authority to fire many appointees at will and to remove other appointees for cause at any time.

In the private sector, employees often have a legal duty to give reasonable notice of resignation so that their employer can find a replacement in time to prevent damage to its business.³⁹² Nonpolitical government workers also often face similar requirements. For instance, assistant U.S. attorneys for the District of Columbia must agree to not only stay four years but also provide at least sixty days’ notice before resigning.³⁹³ This proposal is therefore relatively simple and costless to

390. *Id.* at 406.

391. 5 U.S.C. § 3349 (a) (2006). By amending the Vacancies Act, Congress could add recommendation requirements to the notice requirements. For example, Congress could require interested parties (such as agency leaders in related areas) to provide nonbinding recommendations to the president of individuals to fill vacant positions. *See, e.g.*, 10 U.S.C. § 113(f) (2006) (providing similar requirements for vacancies in the DOD).

392. 27 AM. JUR. 2D *Employment Relationship* § 41 (West 2009) (absent a contractual or statutory requirement, employers are not entitled to notice, but employment contracts often require prior notice of resignation).

393. U.S. Attorney’s Office for the District of Columbia, AUSA Application Requirements and Hiring Process, http://www.usdoj.gov/usao/dc/Employment/AUSA/AUSA_App_Requirements.html

implement. The presidential personnel operation would then need to use the advance notice productively.

In sum, although our theory and law generally assume that there are political appointees in important offices in the administrative state, we need to confront the fact that these offices are often empty. All of these policy reforms, except perhaps increased salaries and benefits, are politically feasible. Moreover, all, except perhaps commitments to serve two to four years, are attractive to potential appointees.

VII. CONCLUSION

The federal administrative state has tremendous power to shape a range of public policies, from environmental protection to disaster preparation and response. Despite its immense size and scope, there are only about 700 Senate-confirmed presidential positions in executive agencies. As this Article shows, however, these positions are often empty—particularly when presidents first come into the White House, as well as after a few years due to short tenures and before presidents leave office. These extensive vacancies have potentially far-reaching implications for constitutional and administrative law, including for how we think about the unitary executive theory, separation of powers, the nondelegation doctrine, and agency deference. Because the consequences for such vacancies are profound for public policy and democratic legitimacy, some simple, feasible reforms should be implemented to improve the appointments process by increasing the tenure of agency officials in important positions and decreasing the time needed to select individuals for these positions.

DATA APPENDIX

The information on agency vacancies in this Article comes from a new database that I constructed. The OPM provided the start and end dates of service of all Senate-confirmed and recess presidential appointees who worked in the federal bureaucracy sometime between January 1977 and January 2005, along with information on the position in which they served. This Article excludes data on appointees in independent regulatory commissions, boards, government-chartered corporations, and similar institutions.

The database includes information on Senate-confirmed and recess

presidential appointees at the following agencies: CIA, Council of Economic Advisors, Council on Environmental Quality, Department of Agriculture, Department of Commerce, DOD, Department of Education, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, DOJ (excluding U.S. Attorneys and Marshals), Department of Labor, Department of State (excluding Ambassadors), Department of Transportation, Department of Veterans Affairs, EPA, FEMA, Federal Mediation and Conciliation Service, General Services Administration, NASA, Office of Management and Budget, Office of National Drug Control Policy, OPM, Office of Science and Technology Policy, Office of the United States Trade Representative, Peace Corps, Selective Service Administration, Treasury, United States Arms Control and Disarmament Agency, and the United States Agency for International Development.³⁹⁴

For these agencies, the database includes start dates for 2862 individuals.³⁹⁵ Because some appointees were still serving when the OPM provided the data, the database has end dates for only 2724 officials. Nomination and confirmation dates were obtained from the Library of Congress's presidential nominations database, which contains such dates for the 100th (1987–1988) and later Congresses. The appointments database used in this Article has nomination and confirmation dates for 1762 appointees who served between 1987 and 2005.

These dates—start of service, end of service, nomination date (as received by the Senate, if available), and confirmation date (if available)—were used to calculate various measures of vacancy length for each unique position in the data (for example, the Secretary of Commerce and the Assistant Administrator for Water at the EPA). First, the number of days between the last day of service of an appointee in a position and the first day of service of the next appointee in that position was determined.³⁹⁶

394. The database excludes appointees at the Department of Homeland Security (“DHS”). Because the DHS was created in 2003, there was typically only one person listed for each position in the OPM data. Appointees at FEMA, however, were folded into the FEMA data.

395. I spent considerable time cleaning the data, including, for example, merging separate observations when it was clear, from news searches or other items, that they represented one person's tenure in the same position. Upon request, I can explain what changes I made to the OPM data.

396. This period cannot be determined for the earliest person in each position (as there is no departure date for the previous person), resulting in information on 2327 officials. Because the dataset starts in 1977, vacancy measures for President Carter's administration were excluded from much of the analysis because they were not available for the first set of Carter appointees. This period also cannot be determined if an official departed and no new official had started within the timeframe of the data. Because individuals who started in a position after January 2005 are not in the dataset, measures of appointment delay (separate from appointee tenure) for President George W. Bush's administration may

Second, for recent appointees, the nomination lag (from the last day of service of an appointee to the nomination of a new appointee) and confirmation lag (from nomination to confirmation) were also calculated. Third, for appointees with both start and end dates, tenure in a particular position was calculated.

Position types were coded as follows: The “Cabinet Secretary” category contains cabinet secretaries for all current cabinet departments except the DHS, including administrators of the Veterans Administration before it became a cabinet department in 1989. The “Deputy Secretary” category contains the second most senior person for all departments contained in the cabinet secretary group. This position was often an under secretary in earlier administrations but is now a deputy secretary. The “Agency Head” category contains leaders of stand-alone agencies—for example, the Administrator of the EPA and the United States Trade Representative—and agencies within cabinet departments such as the Secretary of the Army and the Commissioner of Food and Drugs. The “Deputy Agency Head” category contains the second most senior person for all agencies contained in the agency head group. The “Assistant Secretary” category contains all assistant secretary positions and Assistant Attorney General positions, except for those classified as technical below. The “Under Secretary” category contains all specific under secretary positions and Associate Attorney General positions. The “Inspector General” category contains all IGs. The “General Counsel” category contains all General Counsel and similar positions such as Solicitor of Labor, Solicitor General, and Legal Advisor. The “Technical Position” category contains technical positions, including CFOs, Controllers, Comptrollers, Chief Scientists, Science Advisors, members of the Council of Economic Advisors and the Council on Environmental Quality, and the Chief of Protocol. The “Low-Level Position” category contains low-level positions, including deputy assistant secretaries, administrators or directors of offices, deputy administrators or deputy directors of offices, special assistants, deputy undersecretaries, associate deputy secretaries, counselors, deputy advisors, and special trustees. The “Other” category contains appointees in positions not identified by title in the OPM data.

be understated. In other words, if an assistant secretary departed in January 2003 but the replacement started in January 2006, that three-year vacancy period would not be included in the average vacancy period for President Bush’s administration. Finally, in a handful of cases, when this period was negative (the official last day of the previous official was after the start date of the next official), it was recoded to be zero.

