



## Trump's abuse of 'acting' officials is ripe for change by Biden

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On January 20, President-elect Joe Biden will inherit hundreds of vacant positions in the federal government that can only be filled via presidential nomination and Senate confirmation.

To allow a new President time to vet potential nominees for these vacancies, the "Federal Vacancies Reform Act of 1998" (commonly called the Vacancies Act) provides a generous 300-day window during which the President can decide who to nominate. In the meantime, the President can temporarily and unilaterally fill these positions with "acting" officers. For vacancies that arise later in a President's term, that time limit is slightly shortened to 210 days.

Acting officers help keep the gears of federal government in motion, but they're not ideal because they haven't been scrutinized by the Senate. As Alexander Hamilton explained in the Federalist Papers, the Senate can be an "excellent check upon a spirit of favoritism in the President" and tends "to prevent the appointment of unfit characters."

That's why the Vacancies Act sets a deadline on the tenure of acting officers; they're supposed to serve as a bridge to Senate-confirmed officials, not as a replacement.

Unfortunately, that deadline has too often failed to provide incentives to Presidents to send nominations to the Senate. When Trump's 300-day deadline came and went in November 2017, his administration had failed to nominate anyone to hundreds of positions.

When that deadline arrived, every one of those positions became officially "vacant," with no acting officer allowed to fill the position. Why was the Trump Administration so blasé about letting these positions fall "vacant?" Because a loophole in the Vacancies Act allows even "vacant" positions to be filled by de facto acting officers. After the Vacancies Act deadline has passed, the "nonexclusive duties" of a vacant position may still be performed (so long as the person performing them avoids using the title "acting").

That's why, as the Constitutional Accountability Center has documented, dozens of Trump Administration officials now have unwieldy titles like "Performing the nonexclusive functions and duties of the Assistant Secretary for Export Enforcement" and "senior official performing the duties of the Director, US Citizenship and Immigration Services."

Those who drafted the most recent version of the Vacancies Act never intended for this loophole to become what it is today. They assumed that while the routine duties of a position would generally be nonexclusive -- which would allow a subordinate to perform them in the event of a

vacancy -- the more critical duties would be exclusive and require someone with an official title to carry them out.

This expectation was upended in 2004, when the DC Circuit ruled that all of an office's duties are presumptively nonexclusive, unless there's explicit language to the contrary (which there almost never is). That means under most circumstances, the entire scope of a position can be performed by a subordinate without an official title.

This presumption of non-exclusivity is why some former acting officials interviewed by Stanford Law Professor Anne Joseph O'Connell "reported that nothing is exclusive to any position in their agencies" and why they "often noted the lack of difference (in their minds) between the acting title and performing the functions through delegation." As a federal judge recently observed, the switch in title from "acting" to "performing the nonexclusive duties" has become "a distinction without a difference."

Trump isn't the first President to exploit this loophole; George W. Bush and Barack Obama did as well, especially when the Senate was controlled by the opposite party. Before Trump, DOJ's Office of Civil Rights and Office of Legal Counsel and Interior's Bureau of Indian Affairs had all been led at various points by officials "performing the duties of" the top job. And evasions of the deadlines in the Vacancies Act extend even further back than 1998; before then, the executive branch argued, based on an ambiguity in prior versions of the Vacancies Act, that the organizational statutes of each department could be used to extend acting officers' tenures indefinitely.

In the long run, Congress should respond to the expanded scope of the "nonexclusive duties" exception by amending the Vacancies Act to cabin it. But Joe Biden shouldn't wait for that to happen. He can go a long way toward restoring the Senate's role in vetting appointments by making a simple pledge: no more officials "performing the duties of" an office.

To that end, Biden should circle the middle of November 2021 on his calendar -- when the 300-day deadline is slated to fall. He doesn't even have to get all of his nominees confirmed by then; he just has to nominate someone. Once there's a nominee, the Vacancies Act allows acting officers to continue serving as long as the nomination is pending -- and for seven more months if the nomination fails. That's more than fair to the President.

Joe Biden has pledged to make a clean break from the Trump era. One way he can do that is by using unconfirmed officers only for the limited durations that the Vacancies Act intended.

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