

Holding Unelected Bureaucrats to Account

Revitalizing GAO's Power to Enforce the Federal Vacancies Reform Act

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I recognize that the 'burdens on governmental processes' that the Appointments Clause imposes may 'often seem clumsy, inefficient, even unworkable.' But the Appointments Clause is not an empty formality... [The Framers] recognized the serious risk for abuse and corruption posed by permitting one person to fill every office in the Government... We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency.

~ Justice Clarence Thomas in *NLRB v. SW General*

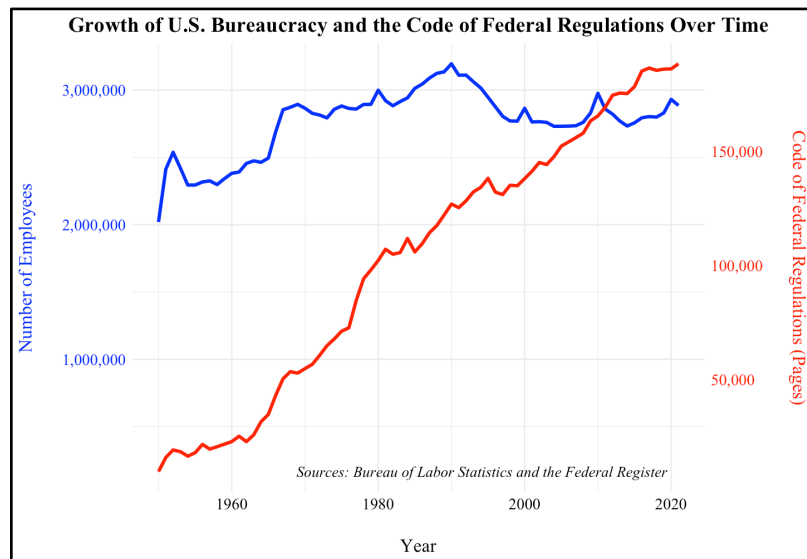
Political Appointees Manage Career Bureaucrats

The United States government is the single largest employer in the world.¹ In 2023 alone, the federal government had a workforce of over 2.95 million employees, wrote over 175,000 pages of regulation, and spent \$6.2 trillion.² The employees of the government—most of whom are career bureaucrats—are managed by political appointees who serve as the direct link between an enormous, unelected bureaucracy, and the democratically elected President.³ In total, there are 4,000 of these political appointees across all federal government agencies.⁴

Problem: Unelected Political Appointees Need to be Controlled by Elected Officials

Congress, seeking to maintain influence over the unelected policymakers within the bureaucracy, requires roughly 1,200 of these top-level political appointees to be confirmed by the Senate.⁵ This allows the legislative branch to exhibit a vital check on the Executive, and ensures the bureaucracy is not devoid of democratic oversight and accountability.⁶

This issue of accountability is not a trivial one. In the modern political context, most legislation is done through bureaucratic policymaking outside of formal legislative channels and without the direct involvement of Congress.⁷ This will only continue to grow as the bureaucracy becomes more powerful. Although the number of federal employees has steadied out in recent years, the number of regulations imposed by the bureaucracy—represented in this visualization by the length of the Code of Federal Regulations—continues to grow.⁸ Now, more than ever, accountability and transparency are needed.⁹



Compounding Problems: Vacancies and the FVRA Lead to Unaccountable Acting Appointees

Though Article II of the Constitution requires a Senate confirmation process for “Officers of the United States,” the Federal Vacancies Reform Act (FVRA) creates a loophole by which Presidents can sidestep confirmation of their appointees for as long as 720 days.¹⁰ They do this by designating acting appointees to serve in vacant offices—all of which enjoy the same privileges a confirmed appointee has except their full, formal title.¹¹ While these vacancies may seem like a niche occurrence, they are shockingly common. From President Carter to President Obama, these Presidentially-appointed, Senate-approved positions (PAS) were vacant—whether with or without an acting designee—an average of 25% of the time.¹²

The President’s power to appoint acting officials was designated by Congress through the Vacancies Act and its reforms. Knowing that confirmation delay is a real and present phenomenon, and agreeing that the government must continue to function while its top-level appointees are going through the Senate confirmation process, Congress passed the Vacancies Act of 1868, which was later amended by the current statutory regime, the Federal Vacancies Reform Act of 1988.¹³ This legislation confers interim appointment power upon the executive—allowing the President to designate acting appointees to fill vacancies of offices that require Senate confirmation.¹⁴

The FVRA does not give the President unlimited authority to appoint acting appointees. Instead, it stipulates time restrictions on how long their interim appointees can serve for. This time limit is generally 210 days, though it is paused whenever a nomination is submitted and actively pending before the

Senate.¹⁵ Should an acting officer carry out the duties of an advice-and-consent office after the 210-day period expires without the President nominating anyone for the position, any action taken under their acting title will have no legal force or effect.¹⁶

The Band-Aid: Government Accountability Office as Congress's Watchdog

The FVRA requires agencies to report their vacancies and acting officials to the Government Accountability Office (GAO). In this way, the GAO can serve as a government watchdog, ensuring that the FVRA is followed to its fullest extent.¹⁷ This, however, is not the case. Details of vacancies often go unreported by executive agencies, letters that detail violations of the FVRA are frequently not sent, and even when violation letters are sent, they are sent long after the violation has occurred.¹⁸ Furthermore, the GAO lacks the authority to enforce much of the FVRA—its only recourse is for violation letters to be acted upon by a private litigant or a congressional committee that demonstrates interest in the violation and take action.

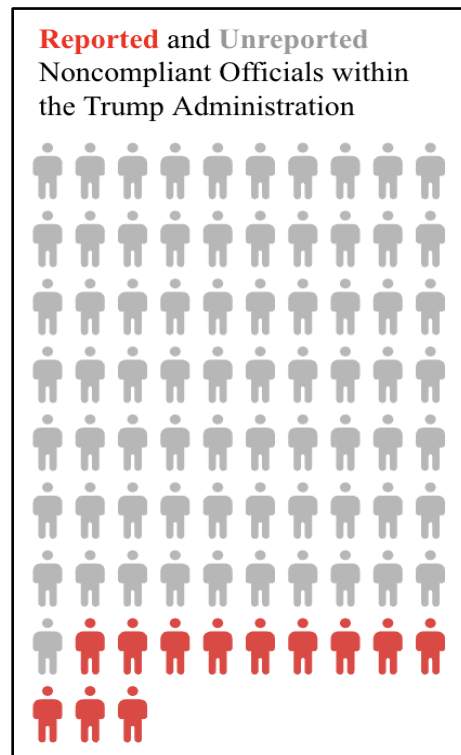
Analyzing the Effectiveness of the Government Accountability Office

To test these claims, the Trump Administration served as a case study to assess the GAO's effectiveness in enforcing the FVRA. A new continuous dataset of all presidential appointees generously provided by Professor Christina Kinane,¹⁹ originally collected data on GAO-issued violation letters,²⁰ and nominations data from the Congressional Record provided the necessary information to test effectiveness.²¹

Through a robust research design that combined information from the datasets to calculate things such as tenure limits, occurrences of tenure limit violations, the presence of a nomination to the Senate, and the proper issuance of violation letters, all reported and unreported noncompliant officials during the Trump Administration were able to be identified.²²

Across all the Trump administration’s officials, 83 individuals were noncompliant during their status as an acting appointee. Out of these 83 violations, only twelve were reported by the GAO in the form of a violation letter. Of those twelve letters, it took an average of 335 days after a violation occurred before any notice of noncompliance was made—meaning that even in the off chance that the GAO caught a violation of the FVRA, it took them almost an entire year to make the public, the Congress, and the President, aware. By every measure, the Government Accountability Office failed to effectively monitor and check the executive branch.

The data suggest that this is not isolated to the Trump Administration.²³ Across all presidential administrations from 2000-2024, it took an average of 475 days for the GAO to issue a letter of violation.²⁴ Additionally, roughly 30% of the total positions requiring Senate confirmation in the Biden Administration are currently either vacant or held by unconfirmed, acting appointees.²⁵ As the numbers demonstrate, there are clearly many reasons to have a GAO that can effectively monitor and enforce the FVRA. Furthermore, the costs of complacency are substantial. Without the prompt enactment of policy reforms that reinvigorate the powers of the GAO, potentially hundreds of people, and thousands of their regulatory decisions, will be in direct violation of the FVRA without Congress or the American people knowing.



Recommendations

To remedy all previously identified issues, the following policy reforms should be enacted:

- (1) Require that all regulations passed by the Executive Branch clearly indicate the PAS-level individual—whether in acting status or confirmed status—who oversaw its production;
- (2) Allow the Comptroller-General of the Government Accountability Office to remove noncompliant acting appointees from office immediately upon their findings of a violation of the FVRA;
- (3) Prohibit the President from designating an acting appointee to an office that has previously been held by a noncompliant acting official during the same administration; and
- (4) Require each government office to accurately report all vacancies to the GAO, with the added stipulation that acting officials are only compliant with the FVRA if the vacancy and temporary acting appointment is reported to the GAO within a specific time of the vacancy being opened.

These proposed policy reforms shift the responsibility for tracking appointments from the GAO to the Executive Agencies. Acting appointees would be deemed noncompliant if not reported to the GAO within a specific time frame, creating a strong incentive for agencies to promptly report vacancies and appointments. While agencies might theoretically try to bypass this authority, the high opportunity cost makes such actions irrational. If an agency fails to report and is later found to have a noncompliant acting PAS appointee, the GAO will have the power to remove their acting title immediately. Furthermore, any actions taken by these noncompliant officials would have no legal force, and the President would be forced to pursue a politically costly confirmation process to fill the PAS position.

Conclusion

For Congress and the American people to trust their government, to know who is managing the ever-growing set of bureaucrats making policy, and to have transparency of president's personnel decisions, the GAO must step up its enforcement game. Extensive policy reform, like those recommended here, should be implemented to ensure the GAO can do exactly that.

As Justice Harry Blackmun made clear in *United States v. Mistretta*: "In our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."²⁶ Congress may be able to decide when to declare war, but they lack the expertise to determine how many parts per million of lead in water constitutes a toxic level for human consumption.²⁷ Instead, they delegate those decisions to expert career bureaucrats and their politically appointed managers. And so at large, functioning bureaucracy is nothing short of a necessity in the American political context—but in a nation built with the fundamentals of democratic accountability, so too is transparency and accountability.²⁸

¹ World Excellence. (2023, July). *The 6 largest employers globally*. World Excellence.

<https://www.worldexcellence.com/the-6-largest-employers-globally/>

² USA Facts. (2023, June). *How many people work for the federal government?* USA Facts.

<https://usafacts.org/articles/how-many-people-work-for-the-federal-government/>

³ O'Connell, Anne Joseph. "Agency rulemaking and political transitions." *Nw. UL Rev.* 105 (2011): 471.

⁴ American Constitution Society. (n.d.). Federal executive branch appointments project. American Constitution Society. Retrieved from <https://www.acslaw.org/federal-executive-branch-appointments-project/>

⁵ Partnership for Public Service. (2020, December). Presidentially appointed positions. Partnership for Public Service. <https://presidentialtransition.org/wp-content/uploads/sites/6/2020/12/Presidentially-Appointed-Positions.pdf>

⁶ Sollenberger, M. A. (2008). *The President Shall Nominate: How Congress Trumps Executive Power*. University Press of Kansas.

⁷ LaPira, T. M., Drutman, L., & Kosar, K. R. (Eds.). (2020). *Congress overwhelmed: The decline in congressional capacity and prospects for reform*. University of Chicago Press.

⁸ U.S. Government Publishing Office. (n.d.). *Code of Federal Regulations*. U.S. Government Publishing Office. Retrieved September 10, 2024, from <https://www.govinfo.gov/app/collection/cfr>

⁹ Farber, D. A., & O’Connell, A. J. (2017). Agencies as adversaries. *California Law Review*, 105(5), 1375-1470.

¹⁰ U.S. Const. art. II, § 2, cl. 2.

¹¹ Resh, W. G., Hollibaugh, G., Roberts, P., & Dull, M. M. (2020). Who Isn’t Running American Government: Appointee Vacancies in US Executive Branch Agencies. *Journal of Public Policy*, *Forthcoming*.

¹² O’Connell, A. J. (2008). Vacant offices: Delays in staffing top agency positions. *S. Cal. L. Rev.*, 82, 913.

¹³ Kinane, C. M. (2021). Control without confirmation: The politics of vacancies in presidential appointments. *American Political Science Review*, 115(2), 599-614.

¹⁴ O’Connell, A. J. (2020). Actings. *Columbia Law Review*, 120(3), 613-728.

¹⁵ Section § 3346 of the FVRA provides that an individual may serve as an acting appointee “for no longer than 210 days beginning on the date the vacancy occurs,” or “once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.”¹⁵ If a vacancy exists on the new President’s inauguration day or arises within 60 days after the inauguration, the 210-day period begins 90 days after either the inauguration or the date the vacancy occurred, whichever comes later. When the President submits a nomination to the Senate to fill a vacancy, however, the timer is paused for the acting appointee currently serving in that role.

¹⁶ *NLRB v. SW General, Inc.*, 580 U.S. 288 (2017).

¹⁷ U.S. Government Accountability Office. (n.d.). *Federal Vacancies Reform Act*. U.S. Government Accountability Office. Retrieved from <https://www.gao.gov/legal/federal-vacancies-reform-act>

¹⁸ These conclusions are justified by independent and original data analysis explored within this report. Most of the data were gathered from the following source: U.S. Government Accountability Office. (n.d.). *Federal Vacancies Reform Act*. U.S. Government Accountability Office. Retrieved from <https://www.gao.gov/legal/federal-vacancies-reform-act>

¹⁹ Professor Christina M. Kinane is a Political Science Professor at Yale University and author of several publications, including “Control without Confirmation: The Politics of Vacancies in Presidential Appointments.” As a part of her upcoming book, *Unconfirmed Power: Unilateral Governance at the Pleasure of the President*, she collected, with the help of undergraduate research assistants, data on the status of all PAS officials across presidential administrations. It is with her gracious permission that her continuous dataset on the Trump administration’s PAS positions is used in the analysis of this policy report.

²⁰ An original dataset was created that included every single violation letter the GAO has issued, including information such as when a letter was sent to the President and relevant congressional committees, the data of an incident, and details on what position a letter was being written about. These violation letters were identified using the Government Accountability Office’s website, which publishes any violation letters it has sent to Congressional Committees and/or the President: U.S. Government Accountability Office. (n.d.). *Federal Vacancies Reform Act*. U.S. Government Accountability Office. Retrieved from <https://www.gao.gov/legal/federal-vacancies-reform-act>

²¹ The congressional record provides nominations data on when the President submits an individual for Senate confirmation, and when that nominee is approved, rejected, returned, or withdrawn: U.S. Senate. (n.d.). *Nominations*. U.S. Senate. Retrieved from https://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtten.htm

²² Each acting appointee was identified using Kinane’s continuous dataset, along with the length of time they were permitted to serve in their role as guided by the FVRA . After possible noncompliant

appointees were identified by creating a subset of those who extended their tenure limit, the nominations data was then consulted to remove individuals from the subset who were serving while a nomination was pending before the Senate—thereby making them legal acting appointees. What was then left in the subset was a list of all acting appointees who were not in compliance with the Federal Vacancies Reform Act of 1988, and who were thereby serving in an acting capacity without any legal authority to do so. The original dataset of GAO violation letters was then cross-referenced and merged into the existing subset of noncompliant acting appointees. This allowed for noncompliant officials to be coded as either properly reported violations of the FVRA or as unreported violations.

²³ Lewis, David E. 2008. *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*. Princeton University Press.

²⁴ This calculation comes from an originally created dataset which pulled information from the following source: U.S. Government Accountability Office. (n.d.). *Federal Vacancies Reform Act*. U.S. Government Accountability Office. Retrieved from <https://www.gao.gov/legal/federal-vacancies-reform-act>

²⁵ The Washington Post. (2020). *Biden appointee tracker*. The Washington Post.

<https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/>

²⁶ *United States v. Mistretta*, 488 U.S. 361 (1989).

²⁷ Beckmann, M. N. (2010). *Pushing the agenda: Presidential leadership in US lawmaking, 1953–2004*. Cambridge University Press.

²⁸ O'Connell, Marie Veronica. "A Control Test for Determining Agency Record Status under the Freedom of Information Act." *Colum. L. Rev.* 85 (1985): 611.