

Administrative Policymaking Amid Vacancies and Actings

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Abstract

As the appointments process has broken down, presidents have hand-selected acting officials to fill vacancies in agency leadership and ensure the completion of their administrative agendas. Efforts to estimate the effect of vacancies and acting officials on presidential policymaking remain limited. We theorize that vacancies impede presidential success in administrative policymaking but acting officials moderate this effect. We explore two possible mechanisms by which acting officials may alleviate the effects of vacancies: managerial competence and presidential loyalty. Using rulemaking data, we estimate the effect of acting officials on the ability of agencies to complete rules prioritized by the president. We find that strategic acting officials have a much stronger moderating effect than default acting officials, which is more consistent with a mechanism of presidential loyalty than managerial competence.

Comments welcome.

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In April 2018, President Donald Trump took to Twitter to complain about Senate delays in the confirmation of presidentially-appointed agency leaders: “Democrats are obstructing good (hopefully great) people wanting to give up a big portion of their life to work for our Government, hence, the American People. They are ‘slow walking’ all of my nominations — hundreds of people. At this rate it would take 9 years for all approvals!”¹ For any president, the frustration is justified. Presidents use appointees to control the federal bureaucracy and direct administrative policymaking toward their agendas (Bertelli and Feldmann 2007; Lewis 2008). Nomination delays by the president and confirmation delays in the Senate have left many leadership positions vacant across the administrative state (O’Connell 2009; Dull and Roberts 2009; O’Connell 2020; Resh, Hollibaugh, Roberts and Dull 2021), and scholars generally agree that vacancies are detrimental to the President’s ability to influence administrative policy (Bolton, Potter and Thrower 2015; Lewis 2018; O’Connell 2009; Piper 2022).

Despite this frustration, President Trump learned to cope with dysfunction by selecting acting officials who would lead the agency while his nominees awaited confirmation. As President Trump remarked, “I like acting because I can move so quickly. It gives me more flexibility.” Indeed, in an era where confirmation hearings are no longer perfunctory events, the Senate’s influence tempers the ability of presidents to appoint individuals closer to their ideological leanings (Bertelli and Grose 2011; Hollibaugh and Rothenberg 2018). Actings (momentarily) evade the confirmation process and may offer presidents even tighter control over administrative policymaking. Although an emerging literature considers when presidents use actings (Kinane 2021; O’Connell 2020; Piper 2021), whether these actings behave as effective substitutes for presidential appointees remains unanswered.

The rising prevalence of vacancies and acting officials raises three questions about the relationship between presidential appointees and administrative policymaking. First, do

¹Kessler, Glenn. 2018. “Trump’s Complaint that It Will Take 9 Years to Get All His Nominations Approved.” *Washington Post*. 23 April. <https://www.washingtonpost.com/news/fact-checker/wp/2018/04/23/trumps-complaint-that-it-will-take-9-years-to-get-all-his-nominations-approved>.

vacancies affect the ability of presidents to implement their priorities through administrative policymaking? Second, do actings moderate the effect of vacancies? And third, are default acting officials less effective relative to a president's strategically chosen actings?² These questions are particularly salient in the rulemaking context—the most prolific form of federal lawmaking in the United States, and a major tool for the president to implement their priorities without congressional interference.

In this study, we argue that vacancies hinder the ability of presidents to use administrative policymaking to further their agendas. However, the presence of an acting official moderates this effect by providing the agency with leadership while it awaits an appointee. Leadership is particularly important in the rulemaking context because civil servants hesitate to begin the notice-and-comment process unless they believe that the current administration supports the proposal (Bolton, Potter and Thrower 2015; Potter 2019). We theorize that two competing mechanisms may explain the moderating effect of acting officials. If actings behave as effective managers of the agency's policymaking activities during a vacancy, then both strategic actings and default acting officials should have a moderating effect on vacancies. In contrast, if actings induce civil servants to implement policies aligned with the president's agenda, then strategic actings should have a greater moderating effect than default actings.

We test our hypotheses on rulemakings proposed during the first terms of the Obama and Trump administrations. Our findings address the three questions related to vacancies, actings, and administrative policymaking. First, we find that vacancies have a negative effect on rulemaking completion and that a rulemaking begun by an agency with a prolonged vacancy is 10 percentage points less likely to be completed before the end of the President's first term in office. Second, we find that the presence of an acting moderates the deleterious

²According to the Federal Vacancies Reform Act of 1998 (5 U.S.C. § 3345), presidents can either allow the individual serving in the “first deputy” position below the PAS position to become the acting official by default or the president can select a previously confirmed PAS official or a senior “officer or employee” within the agency to serve in an acting capacity (Brannon 2020). We categorize the former category as “default” acting officials and the later category as “strategic” acting officials (Piper 2021)

effects of a vacancy. Third and finally, we find that this moderating effect is far stronger for strategic acting officials and negligible for default actings. Our findings point toward presidential loyalty as the primary mechanism for an acting's influence over administrative policymaking rather than managerial competence. Our findings justify the use of strategic actings by presidents during confirmation delays, and even as substitutes for their confirmed counterparts, and raise further questions about whether these delays hurt the Senate more than the president.

Appointees in the Policymaking Process

In January 2007, President Bush ordered agencies not to commence a rulemaking “unless specifically authorized by the head of the agency” (EO 13,422). Members of Congress and the media raised concerns that Executive Order 13,422 represented an immense intrusion into the regulatory process. But career officials within the Office of Management and Budget testified before Congress that the amended order simply codified a pre-existing norm.³ Acting Director Steven Aitkin of the Office of Information and Regulatory Affairs stated, “[I]t is ultimately the presidential appointees who have to decide what regulatory activities the agency wants to engage in. This is not a new principle for the executive branch. . . [I]t matters who is elected President, and in the executive branch, it is not solely the career employees who have the authority to issue regulations or decide how governmental power will be organized.” According to the Acting Director, presidential appointees would direct the policymaking activities of bureaucratic agencies—with or without Executive Order 13,422.

Perhaps to Congress’s dismay, the testimony of Acting Director Aitkin reflects the presidency literature’s long held beliefs about the role of political appointees in the administrative-

³“As explained above, most if not all of the Regulatory Policy Officers will be—as they generally have been over the years—Presidential appointees who are subject to Senate confirmation. In practice, then, this will mean that, in most if not all cases, an agency’s commencement of a rule-making will be authorized or approved by an agency official who is appointed by the President and subject to Senate confirmation” (155). Hearing Before the Subcommittee on Investigations and Oversight of the House of Representatives. 2007. “Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part I and Part II.” No. 110-4. 26 April. <https://www.congress.gov/110/chrg/CHRG-110hhrg33105/CHRG-110hhrg33105.pdf>

policymaking process (Mendelson 2014). Presidents assert control over the internal policymaking processes of the administrative state by appointing “their people” to leadership position within executive agencies (Moe 1985; Lewis 2008). By all theoretical accounts, these appointees play a fundamental role in directing administrative-policymaking activities, such as rulemaking, toward presidents’ agendas (Devins and Lewis 2008; Lewis 2008; Mendelson 2014; Moe 1985). In deciding which positions first receive nominations, presidents focus on key policymaking positions over management positions and take less time to nominate individuals to leadership positions in agencies closely related to their policymaking priorities (Bednar and Lewis 2022).

The president cannot unilaterally appoint agency leaders. The Constitution requires the president to seek the “advice and consent” of the Senate when appointing the head of an agency. In recent administrations, the confirmation process has slowed for political appointees requiring Senate confirmation (“PAS appointees”), interfering with this traditional mechanism of presidential control. For example, President Biden has faced average confirmation delays about thirty percent longer than the Obama administration, twice as long as the Clinton administration, and three times as long as the Reagan administration (Partnership for Public Service 2022). As the confirmation process has become more demanding and less fruitful, presidents must behave strategically in deciding which positions receive nominations in the days following their inaugurations. In their first year in office, presidents seek confirmation only for the positions most important to their own priorities (Lewis and Richardson 2021; O’Connell 2009). Accordingly, presidents have increasingly left the large number of remaining PAS positions vacant for extended periods of time (Dull and Roberts 2009; Hollibaugh 2018; Lewis and Richardson 2021; O’Connell 2009). For example, during the first two years of the last three administrations, presidents on average have only made nominations to approximately 70% of PAS positions, with the average time to nomination taking well over one year for each administration (Lewis and Richardson 2021).

Scholars generally conclude that vacancies are detrimental to the president’s ability to

control administrative policymaking (Bolton, Potter and Thrower 2015; Lewis, Bernhard and You 2018; O’Connell 2009; Resh et al. 2021; Piper 2022). This literature explains the effect of vacancies through a combination of two mechanisms. First, vacancies slow down agency activity, making it more difficult for presidents to accomplish their policy initiatives (Bolton, Potter and Thrower 2015; Kinane 2021; Mendelberg 2018; O’Connell 2009). Second, vacancies elevate the importance of career civil servants that might not share the president’s policy views (Bolton, Potter and Thrower 2015; O’Connell 2009; Mendelson 2014). During a vacancy, civil servants make policy decisions without the input or influence of leadership who would otherwise speak for the president (Lewis, Bernhard and You 2018, 431). The lack of a connection between the White House and the agency may make civil servants hesitant to begin the arduous rulemaking process for fear that their efforts will be unsupported by the current administration (Bressman and Vandenbergh 2006; Potter 2019). In some cases, vacancies may allow civil servants to resist the directives of the current administration (Chang, Lewis and McCarty 2001).

While scholars have given greater attention to the occurrence of vacancies since the collapse of the confirmation process during the Obama Administration (Kinane 2021; O’Connell 2009; Piper 2021; Piper 2022), empirical assessments regarding the claimed effects of vacancies remain unsatisfactory. Most studies rely on evidence from individual agencies rather than exploring the effect across a task common to the many agencies within the administrative state, such as rulemaking. For example, Wood and Waterman (1991) demonstrate in seven case studies that appointees have influence over agency outputs. Likewise, Bolton, Thrower, and Potter (2015) show that the absence of an appointed official in the Office of Information and Regulatory Affairs slows the regulatory-review process and leads to outcomes less tied to presidential priorities.

Our study strengthens this literature by considering the effect of vacancies on a single policymaking task that is conducted by a large swath of the administrative state: rulemaking. Most studies linking mechanisms of presidential control to rulemaking focus on the

centralized review process of the Office of Information and Regulatory Affairs rather than the internal role of presidential appointees in shaping proposed policies (Bolton, Potter and Thrower 2015). One notable exception, Mendelson (2014) notes that, while confirmation delays do not halt regulatory work altogether, “White House officials, including those in OIRA, might repose less trust in an agency office’s decision when the office is headed by an acting civil servant rather than duly confirmed political appointee” (1590). Yet few have attempted to estimate the effect of vacancies and acting officials on the rulemaking process.

Moreover, scholars have been slow to theorize beyond the average effects of vacancies and consider alternate leadership arrangements that emerge during a vacancy. Leadership positions within an agency are never truly ”empty.” Instead, acting officials often perform the functions of the vacant office. This gives presidents the ability to unilaterally assert control over vacant positions without Senate advice and consent (Kinane 2021; O’Connell 2020; Piper 2021). Yet, despite knowing that presidents use these tools strategically and that their use has increased in recent presidential administrations, we know little about the substantive consequences of these strategic decisions. Understanding the context-dependent effects of vacancies may help to explain the rising prevalence of vacancies and the dearth of presidential nominations.

Vacancies, Actings, and Administrative Policymaking

All presidents enter office intent on using the powers delegated to the administrative state to implement their own policy priorities (Kagan 2001). The Constitution endows presidents with the authority to appoint individuals to leadership positions within federal agencies, providing a central tool by which all presidents exert control over administrative policymaking (Devins and Lewis 2008; Lewis 2008; Moe 1985). Agency leaders serve two separate functions for presidential administration of the administrative state: control over administrative policymaking and management of agency’s day-to-day activities. While some leaders display

greater loyalty and responsiveness to the president and others exhibit greater managerial competence (Krause and O’Connell 2019), all appointees play a critical role in presidential administration of the administrative state (Kagan 2001; Moe 1985).

Appointees behave as the conduits through which presidents’ priorities are implemented within the agency (Heclo 1977; Lewis 2008). During the rulemaking process, appointees impart the voice of the president throughout the formative stages of policy development by aligning the agency’s rulemaking agenda with the priorities of the president. Formally or informally, civil servants must consult with these appointees before beginning a new rulemaking. This internal review of the agency’s proposed policies ensures the current rulemaking agenda aligns with the president’s priorities (Mendelson 2014). Therefore, if Presidents hope to use the rulemaking process to complete their agendas, presidents need individuals aligned with their preferences in leadership positions within the agency.

Appointees also manage the day-to-day activities of agencies and ensure the agency continues to run smoothly during the president’s administration (Lewis 2008). In particular, appointees are essential for monitoring and communicating with civil servants during the policymaking process (Moe 1985; Lewis 2008). Rulemaking is a complicated form of policymaking that requires agencies to draft sound regulations, respond to the public’s concerns, and adhere to a complex set of procedures (McGarity 1991; Yackee 2006). Appointees can help to keep the necessary political principals informed, communicate a unified vision to agency personnel, and resolve conflicts between the White House and the agency (Mendelson 2014; Piper 2022; Sunstein 2013).

A “true” vacancy—one in which no one occupies the leadership position within the agency—leaves the president without someone to monitor the agency’s pursuit of presidential priorities and leaves the agency without an effective manager to direct day-to-day activities. Rulemaking requires significant resources and investment from civil servants. While agencies still pursue rulemaking in the presence of vacancies, careerists express greater hesitation to adopt new policies when they are uncertain whether those policies will receive

White House support (Potter 2019). Likewise, the White House may express skepticism toward proposed rulemakings submitted by career officials and subject these rulemakings to greater regulatory review (Mendelson 2014). Appointees are better equipped and connected to negotiate the competing demands of political principals and the agency (Bressman and Vandenbergh 2006; O’Connell 2009).

Further, absent an appointed leader, senior careerists take on a larger role within the agency (Potter 2019). These careerists have their own policy preferences and, with decreased monitoring and sanctioning, civil servants opposed to the presidents’ agenda may ”slow-roll” the president’s regulatory agenda (Brehm and Gates 1999; Potter 2019). All said, vacancies slow the regulatory process in ways that may prevent agencies from delivering policy change that furthers the president’s agenda.

Vacancy Hypothesis: Agencies experiencing a vacancy after the first year of a president’s term will be less likely to complete their policymaking activities before the end of the president’s first term.

However, presidents have opportunities to unilaterally fill vacant positions on an interim basis (Kinane 2021; O’Connell 2020; Piper 2021). The Federal Vacancies Reform Act of 1998 (5 U.S.C. § 3345; FVRA) provides two means of filling vacant positions (Piper 2021). Under the default provisions of the FVRA, an individual serving in the “first deputy” or “first assistant” position becomes the acting official when the superior PAS position becomes vacant. Alternatively, the president may hand select a previously confirmed PAS official or a senior “officer or employee” within the agency to serve in an acting capacity (Brannon 2020).⁴ We refer to acting officials who assume power by default as “default actings” and acting officials selected by the White House as “strategic actings.”

Despite the presence of a vacancy or confirmation delays in the Senate, the FVRA provides presidents with the ability to assert control over agency leadership (Kinane 2021). Acting officials fill these vacancies and ensure that the agency continues to function regu-

⁴When the president selects a senior officer or employee within the agency, the FVRA requires the president to select an employee paid at the equivalent of the GS-15 pay level or above.

larly while awaiting a confirmed appointee (O’Connell 2009). Depending on their method of selection, these actings may better connect the agency to the White House and manage the agency’s day-to-day activities. Therefore, we should expect on average that vacancies should have a smaller effect on rulemaking when acting officials are in place for longer portions of the vacant period.

Actings Hypothesis: The marginal effect of a vacancy will decrease as the time with an acting official increases.

We expect the effect of an acting official’s service varies depending on how they were selected. In general, the default provisions of the FVRA select for competent managers while presidents strategically select actings loyal to their agendas (Piper 2021). This sets up two competing mechanisms that explain the importance of acting officials to presidential administration: managerial competence and presidential loyalty.

When default actings occupy vacant positions, senior career civil servants who are in line for the position will work to keep the agency functioning as usual. These individuals have extensive experience and subject area expertise, are ingrained in the culture and procedures of the agency, and command the respect of their civil servant peers. Further, they are plugged in to the agency’s long-term projects and key inter-agency operations and cognizant of emerging problems facing the agency. For example, David G. Huizenga, a career civil servant in the Department of Energy that served as a default acting at the beginning of the Trump administration, is representative of the wealth of expertise, knowledge, and experience that the typical default acting brings to their position.⁵ Huizenga became the

⁵While the principal default acting official is in some cases a political appointee (e.g., Deputy Secretaries and most Principal Deputy Assistant Attorney Generals), at the beginning of the administration, the president often faces a choice between allowing a holdover from the previous administration to serve in the position on an acting basis (e.g., Lisa Disbrow, Elaine Duke, Thomas Shannon Jr., Sally Yates, etc.) or selecting an alternative acting. Like a career civil servant, these holdovers have experience in the agency and are less responsive to the incoming administration. These cases, however, represent only a small fraction of default acting officials that serve at the start of an administration. Among the default acting officials that served during the first year of the Trump administration, 90% were career civil servants, 7% were holdover Obama appointees, and 3% were Trump appointees. In the vast majority of cases where a politically appointed position is first in-line to be the default acting, the position is vacant at the beginning of the administration, making the careerist next in-line the default acting.

acting Deputy Administrator for Defense Nuclear Nonproliferation in the National Nuclear Security Administration after serving as the Principal Assistant Deputy Administrator, a position he had held since 2014.⁶ At the time of becoming the acting Deputy Administrator, Huizenga's career in the Department of Energy had already spanned over twenty years, with stints in a number of high-level positions.⁷

However, the experience and stability of default actings comes at a cost to a president who expects loyalty and who desires a drastic change in the course of agency policymaking (O'Connell 2009; O'Connell 2020; Mendelson 2014; McCarty and Razaghjan 1999). As career civil servants, default actings may view the current administration's agenda as detrimental to the agency's core values and mission. Using their managerial prowess, these officials may slow down the rulemaking process and inhibit the ability of presidents to change regulatory policy within the agency (Potter 2019).

In contrast, strategic actings exhibit stronger loyalty to the president. The FVRA provides presidents tremendous leeway in who they select,⁸ allowing them to choose an acting official who exhibits strong loyalty to the president's agenda. Empirically, presidents tend to pick less qualified and more ideologically extreme individuals as non-default acting officials (Piper 2021). For example, President Trump selected Joseph Maguire and, later, Ambassador Richard Grenell to serve as the acting Director of National Intelligence (DNI) over the Principal Deputy DNI, Susan Gordon, a career intelligence official with over four decades of experience.⁹ Even though Gordon was directly in line to serve in the position, Trump found her "disloyal[ty]" to be a disqualifying factor.¹⁰ Grenell, on the other hand, despite having no intelligence experience, was known for his "fierce loyalty" to the president.¹¹

⁶Leadership Connect. 2021. "Leadership Connect." <https://www.leadershipconnect.io/profiles/people/461253>.

⁷Ibid.

⁸Among non-default acting officials that served during the first year of the Trump administration, only 40% were career civil servants, less than half the percentage among default actings.

⁹Welna, David. 2020. "Exclusive: After Quitting Last Year, Senior U.S. Intelligence Official Now Talks." NPR.Org. 13 August 13. <https://www.npr.org/2020/08/13/902345240/exclusive-after-quitting-last-year-senior-u-s-intelligence-official-now-talks>.

¹⁰Ibid.

¹¹Neuman, Scott. 2020. "White House Appoints Outspoken Ambassador As New Acting Head Of Intelligence." NPR.Org. 20 February. <https://www.npr.org/2020/02/20/807644469/white-house-appoints>

Variation in the selection of acting officials provides a means to test the mechanism by which acting officials moderate the effect of vacancies in the administrative-policymaking process. If managerial competence plays the most significant role, then default acting officials should have a greater moderating effect relative to strategic acting officials. If presidential loyalty plays the most significant role, then strategic acting officials should have a greater moderating effect relative to strategic acting officials. With each type of acting official more strongly representing one characteristic, we present two competing hypotheses regarding the relative benefit of each acting type.

Managerial Competence Hypothesis: The marginal effect of a vacancy will decrease more as the time with a default acting official increases, compared to time with a non-default acting official.

Presidential Loyalty Hypothesis: The marginal effect of a vacancy will decrease more as the time with a non-default acting official increases, compared to time with a default acting official.

Data and Methods

Broadly, we theorize that vacancies affect the successful completion of administrative policymaking within a presidency. We test our theory in the rulemaking context using data on individual rulemakings begun during the first terms of the Obama and Trump Administrations ($N = 4,356$). Our unit of analysis is an individual rulemaking. Our primary dependent variable of interest is whether the agency completed the rulemaking prior to the end of the president's first term in office. The end of the first term marks an important deadline for agencies because presidents want to tout regulatory change as an accomplishment on the campaign trail (Bednar 2022).

All agencies engaged in rulemaking, including independent agencies, must report their planned and ongoing regulatory activities in the *Unified Agenda*. Using the *Unified Agenda*,

outspoken-ambassador-as-new-acting-head-of-intelligence.

we collect data on all rulemakings begun during this period.¹² Every rulemaking has a unique identifier, which makes it possible to track rulemakings over time. Machine-readable files make it possible to assemble a dataset of every reported rulemaking from January 2009 to January 2021. To enter the data set, the rulemaking must (1) have first appeared in the *Unified Agenda* during the first term of the Administration and (2) had its first Notice of Proposed Rulemaking published during this term. These restrictions help to ensure that the subset of rulemakings reflects the current administration’s priorities rather than the priorities of a past administration. Although the *Unified Agenda* offers the most comprehensive source of rulemaking data, it often contains typographical errors and inconsistencies (Nou and Stiglitz 2016; O’Connell 2011). Accordingly, we have checked all rulemakings against their original publications in the *Federal Register* and made corrections where necessary.

Our dependent variable is a binary indicator of whether the agency completes its rulemaking during the first term of the presidency. We classify a rule as completed if (1) the agency publishes a final rule before the end of the Administration’s first term or (2) the agency submits its final rule to OIRA prior to the end of the Administration’s first term. We use the date of submission to OIRA because this marks the completion of the rulemaking process for the agency and, therefore, this measure excludes delays or mismanagement in OIRA that may otherwise affect the completion of the rule (Bolton, Potter and Thrower 2015; Potter 2019).

Vacancies

We hypothesize that agencies experiencing a vacancy will be less likely to complete their rulemakings before the end of the president’s first term. As many agencies have multiple presidential appointees, we focus on the position that most proximately heads the agency. For a cabinet department, this position is the secretary. For a sub-cabinet bureau, this position is the head of the bureau. For the Obama Administration, we use vacancy data collected by Resh et al. (2021). We then supplemented their data with information on

¹²Office of Information and Regulatory Affairs. “RegInfo.gov” <https://www.reginfo.gov/public>.

confirmation dates from Senate.gov and exit dates from agency websites and other external sources (e.g., news sources, Leadership Connect). For the Trump administration, we used the Partnership for Public Service and Washington Post’s “Political Appointee Tracker” (Washington Post 2020) to gather confirmation and exit dates. Data for the positions not listed on their tracker was similarly gathered from Senate.gov for confirmation dates and from agency websites and other external sources (e.g., news sources, Leadership Connect) for exit dates. We use this data to create an indicator variable of whether the vacancy extended before the administration’s first year. We focus on prolonged vacancies because we observe a high level of clustering on the final day of the first year of the administration. Because our vacancies data only extends to the end of the first year, measuring the length of the vacancy may violate linearity assumptions for positions with vacancies longer than one year.

Within the rulemaking dataset, 1122 rulemakings (40.8%) were begun by agencies experiencing prolonged vacancies. The other 1627 rulemakings (59.2%) for which we have data received a confirmed head within one year of the President’s inauguration.

Actings

We hypothesize that acting officials moderate the effect of vacancies. We measure the length of time that an acting official served as the agency’s head during the five quarters of the Obama and Trump Administrations. Additionally, we categorize whether the acting officials was a default acting or a strategic acting to test our *Managerial Competence* and *Presidential Loyalty* hypotheses. The data on acting officials comes from Piper (2021). For each agency head, Piper identified the current occupant using the *Federal Yellow Book*, which is published quarterly. Our measure, therefore, ranges from 0 to 5, where 0 indicates that an acting official never occupied the head position during the first year of the Administration and 5 indicates that an acting official occupied the head position for all four quarters of the first year and one additional quarter.

Piper (2021) then categorized each acting official as either a default acting or a strategic acting using the employment history of each official. He categorized an official as a default acting if they served as the deputy or assistant to the head position immediately prior to their serve as an acting official. He categorized all other officials as strategic actings. He also measured the number of empty quarters in which neither an acting official nor appointee occupied the position.¹³

We measure the number of quarters that an agency had a default acting (Mean: 1.11, SD: 1.47, Min: 0, Max: 5), strategic acting (Mean: 0.81, SD: 1.37, Min: 0, Max: 5), or no individual filling the leadership position (Mean: 0.96, SD: 1.34, Min: 0, Max: 5). These categories are not mutually exclusive within the first year. Many agencies that experience a prolonged vacancy experience a mix of default and strategic actings during the first year of a new administration. Controlling for the number of empty quarters ensures that the baseline in any model is a rulemaking begun by an agency that receives a confirmed leader in the first quarter of the administration.

Controls

The relationship between vacancies and rulemaking outputs raises endogeneity concerns that an omitted variable may explain both vacancies and rulemaking outputs. We address these concerns by accounting for six possible confounders: (1) presidential priorities, (2) politicization, (3) agency ideology, (4) bureaucratic capacity, (5) agency independence, and (6) rulemaking workload.

Presidents are quicker to pursue nominations in agencies that align with their priorities, and the Office of Information and Regulatory Review prioritizes review of rulemakings that align with the president's agenda (Bednar and Lewis 2022; Bolton, Potter and Thrower

¹³Of course, few agencies experience a complete lack of leadership. Even when there is no acting or appointed official occupying the head position of the agency, a career official performs the duties of the vacancy position. Nevertheless, our interest is in whether the formal presence of an acting official moderates the effects of vacancies. The fact that some, unobserved career official may perform the duties of the agency head only makes it more difficult to find a significant moderating effect.

2015). We therefore include department level measures of presidential priorities. To measure priority, we code each agency for whether the president mentioned a policy related to the agency's jurisdiction in their first speech before Congress (Proportion: 0.70).¹⁴ This first speech occurs shortly after the inauguration and reflects the priorities presidents discuss on the campaign trail (Krause and O'Connell 2019).

In addition to appointing leaders, presidents politicize agencies by increasing the number of Senior Executive Service appointees within an agency (Lewis 2008). Presidents may take longer to nominate individuals in agencies with higher levels of politicization and may exercise even greater control over the rulemaking process in these agencies. We measure politicization as the ratio between appointees and agency supervisors (Mean: 0.03, SD: 0.11, Min: 0, Max: 2).¹⁵ When the ratio exceeds one, the number of appointees exceeds the number of career supervisors.

All agencies have distinct cultures and ideological leanings that shape presidents' nomination strategies, priorities, and rulemaking agendas (Bolton, Potter and Thrower 2015; Lewis 2008; Potter 2019; Richardson, Clinton and Lewis 2017). Specifically, presidents may experience greater resistance from civil servants whose ideological leanings sharply diverge from the president's (Brehm and Gates 1999). We control for agency ideology using an indicator for whether agency has an ideological leaning opposite of the president. We create this indicator using measures developed by Richardson, Clinton, and Lewis (2018), who use a survey of federal executives to estimate the stable ideological leanings of federal agencies. Consistently conservative (liberal) agencies are coded as opposed in the Obama (Trump)

¹⁴We code priority agencies at the department level. As the speech hews so closely to the priorities mentioned during the campaign, the risk of post-treatment bias seems minimal.

¹⁵This data is extracted from Fedscope. I classify any executive pay, non-career SES, or Schedule C position as an appointee. I divide this by the number of supervisors in the agency. This method has been adopted by a number of scholars (Dahlström, Fazekas and Lewis 2021; Lowande 2019; Potter 2020; Wood and Lewis 2017). However, poor data on political appointees makes any measure of politicization prone to error. Government Accountability Office. 2019. *Government-Wide Political Appointee Data and Some Ethics Oversight Procedures at Interior and BA Could Be Improved*. <https://www.gao.gov/assets/gao-19-249.pdf>. Scholars employing this method attain similar results when using alternative (but still imperfect) measures (Dahlström, Fazekas and Lewis 2021; Potter 2020).

administration (Proportion: 0.37).¹⁶

Agency capacity may affect both the likelihood of a vacancy and rulemaking outcomes. Presidents nominate individuals to low-capacity agencies sooner to prevent government failures (Bednar and Lewis 2022). Likewise, high-capacity agencies have an easier time accomplishing rulemakings (Bednar 2022). We control for an agency's policymaking capacity using measures developed by Bednar (N.d.) (Mean: 0.26, SD: 0.65, Min: -1.85, Max: 2.01). These measures use individual-level civil servant data to estimate the ability of the agency's workforce to engage in policymaking (Bednar N.d.). When *Capacity* is negative, the rulemaking is begun by a relatively low-capacity agency. When *Capacity* is positive, the rulemaking is begun by a relatively high-capacity agency. To avoid post-treatment bias, we measure agency capacity in the fall before the incoming President's inauguration.

Presidents exercise less control in the appointment of some agency leaders. These same agencies tend to be subjected to fewer procedural requirements in the rulemaking process. Accordingly, we control for decisionmaker independence using measures developed by Selin (2015) (Mean: 2.30, SD: 0.91). Selin uses a Bayesian item-rater model to aggregate various structural features of agencies to estimate the agency's independence from the President and Congress (Selin 2015). We adjust the measure so that 0 represents an agency over which the President has little control and 3.17 represents the agency over which the President has the most control.

Finally, agencies have varying levels of rulemaking authority and, presidents may be quicker to nominate individuals to positions with more policymaking authority. Accordingly, we control for rulemaking workload to account for this possibility. We measure workload using the number of rulemakings reported in the *Unified Agenda* in the fall before the inauguration (Mean: 17.65; SD: 37.75).

One shortcoming of the chosen research design is that it prevents the inclusion of rule-level characteristics, such as economic significance. The treatment conditions—vacancies

¹⁶We code an agency as liberal if its score is one standard deviation below the mean, and we code an agency as conservative if its score is one standard deviation above the mean.

and presence of acting officials—affects rule-level characteristics and the inclusion of these characteristics results in post-treatment bias (Rosenbaum 1984). Therefore, we exclude traditional rule-level controls to avoid biasing our estimates.

Do Vacancies and Actings Matter?

We begin with a simple question: Do vacancies and actings matter for the rulemaking process? We theorize that appointees serve agencies during the policymaking process by ensuring proposed rules comport with the president’s expectations and managing the agencies day-to-day activities. Civil servants, especially those in agencies ideologically distant from the president, rely on appointees and their connections with the White House to know which rules will receive favorable reviews from OIRA. Additionally, appointees manage personnel, distribute the agency’s resources among tasks for productivity, and limit shirking that may derail the policymaking process. Vacancies, however, sever agencies’ connections to the White House and leave them without managers. However, few positions experience “true vacancies.” We hypothesize that agencies experiencing prolonged vacancies are less likely to complete their rulemakings before the end of the president’s term but that the marginal effect of vacancies decreases the longer the agency is lead by an acting official.

We test whether acting officials mitigate the effect of vacancies by interacting *Vacancy* with *Acting Quarters*. We estimate the hypothesized relationships using OLS and logistic regressions. Because the model includes interaction terms, we use joint-hypothesis tests to estimate the statistical significance of *Vacancy* and *Acting Quarters*. The measure of *Acting Quarters* includes quarters where either a default acting or a strategic acting heads the agency. Therefore, the baseline category is a rulemaking begun by an agency that receives a confirmed appointee in the first quarter of the new administration.

Table 1 reports the results. Model 1 is the preferred model. In both models, *Vacancy* is negative and statistically significant. All else equal, a rulemaking begun by an agency with a vacancy lasting a year or longer is 10.4 percentage points less likely to be finalized before the

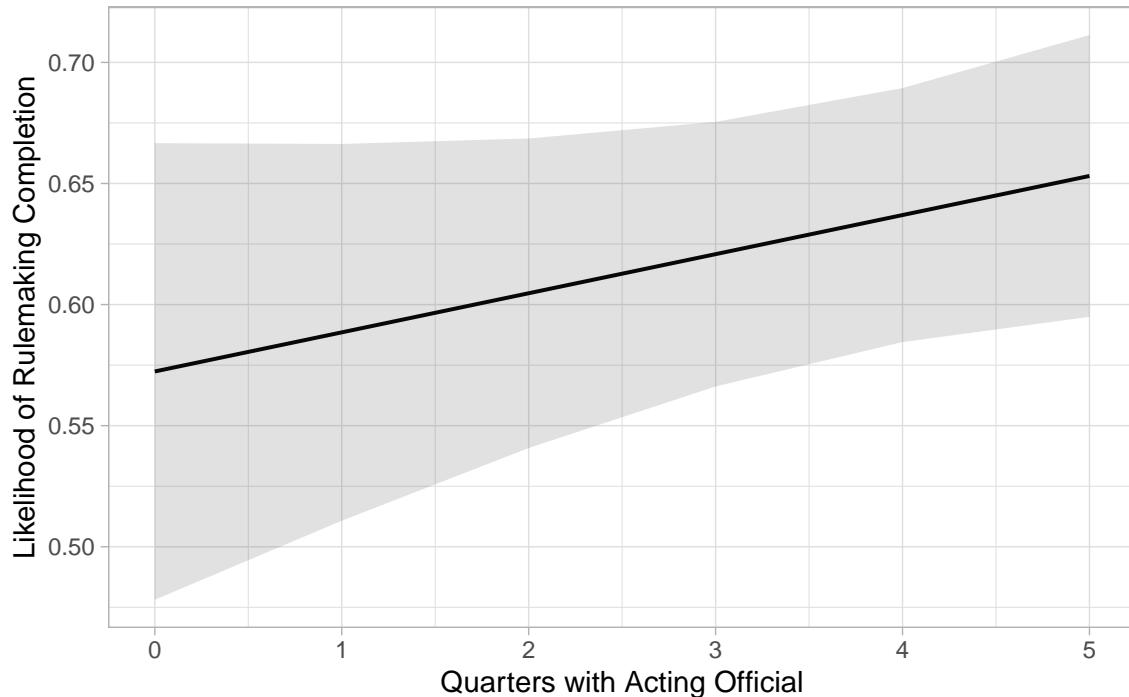
Table 1: Model Estimates of the Effect of Vacancies and Actings on Rulemaking Completion:
Obama and Trump Administrations

	Rulemaking Completion	
	Model 1	Model 2
Vacancy	-0.104 (0.068)	-0.439 (0.304)
Acting Quarters	-0.029** (0.014)	-0.130** (0.064)
Vacancy × Acting Quarters	0.045** (0.020)	0.198** (0.092)
Empty Quarters	0.018 (0.022)	0.079 (0.098)
Priority	0.165*** (0.055)	0.745*** (0.244)
Politicization	0.219 (1.062)	0.931 (5.197)
Opposed Agency	0.049 (0.040)	0.239 (0.191)
Capacity	0.054 (0.045)	0.240 (0.206)
Independence	0.041 (0.074)	0.193 (0.363)
Workload	0.000 (0.000)	0.001 (0.001)
Trump	0.107** (0.045)	0.488** (0.205)
Constant	0.329 (0.234)	-0.834 (1.134)
Vacancy Wald P-Value	0.008**	0.007**
Acting Quarters Wald P-Value	0.007**	0.006**
Estimator	OLS	Logit
N	2523	2523
Adj. R-squared	0.035	
Log Likelihood		-1566.769
AIC		3157.538

***p < .01; **p < .05; *p < .1

Note: HC1-type heteroskedastic-consistent standard errors clustered at the department level.

Figure 1: Predicted Effect of Vacancy on Likelihood of Rulemaking Completion



end of the president's first term in office. This is a sizeable impact, suggesting that vacancies hinder the president's ability to implement their priorities through the rulemaking process.

As predicted, the marginal effect of *Vacancy* decreases the longer an acting official served as head of the agency during the first year of the administration. Figure 1 illustrates the predicted effect of *Vacancy* conditional on *Acting Quarters*. If the agency has no acting official during any quarters of the first year, then a prolonged vacancy reduces its likelihood of completing a given rulemaking by 10.4 percentage points. In contrast, if the same agency has an acting official for the entirety of the first year, then the vacancy only reduces the likelihood of completion by 2.4 percentage points. Accordingly, the presence of an acting official effectively moderates the deleterious effects of vacancies.

Our results comport with conventional wisdom. On average, agencies experiencing vacancies have a harder time completing rulemakings before the end of the president's first term in office. However, the presence of an acting official alleviates some of the harm caused

by vacancies. Among agencies experiencing prolonged vacancies, agencies led by acting officials are more likely to finalize rulemakings. Yet these results do not distinguish between default actings and strategic actings. We consider whether presidential loyalty or managerial competence drives the moderating effect in the next section.

Strategic Actings versus Default Actings

We hypothesize that two possible mechanisms explain the importance of actings to moderating the effects of vacancies. First, presidents may appoint strategic acting officials who maintain strong connections with the White House and help steer agency policymaking through the agency and the OIRA review process. Hand-selected by the White House, strategic acting officials share the preferences of the president and have strong incentives to push policy in the direction of these preferences. By comparison, default actings may feel indifferent toward or actively oppose the president’s agenda. Even when default actings favor a proposed policy, the lack of connection to the White House may impede the rulemaking process. Second, agencies may inherently need leadership to accomplish any task. Both types of acting officials fulfill that role but default actings may have a greater sense of the agency’s capabilities and be better prepared to direct rulemaking.

We probe these two possibilities by examining the differences between default acting officials and strategic acting officials. If acting officials mitigate the effect of vacancies through presidential loyalty, then strategic actings should have a greater, positive effect size than default actings. Alternatively, if acting officials mitigate the effect of vacancies through managerial competence, then default actings should have a greater effect size.¹⁷ Again, the baseline category is a rulemaking begun by an agency that receives a confirmed appointee in the first quarter of the new administration.

Table 2 reports the results. Again, we find significant support for the *Vacancy Hypothesis*. In both models, *Vacancy* has a significant and negative effect on the likelihood that the

¹⁷If one believes that both strategic and default actings are competent managers, then the two types of actings should have equal effect sizes.

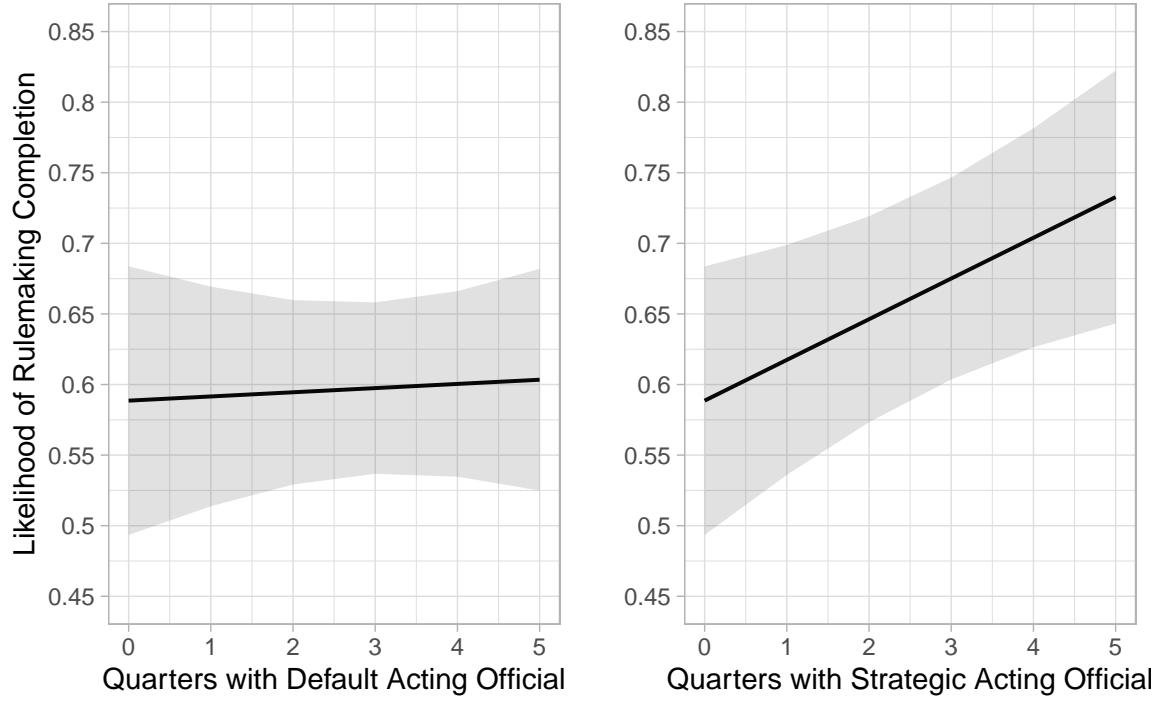
Table 2: Model Estimates of the Effect of Strategic Actings and Default Actings on Rulemaking Completion: Obama and Trump Administrations

	Rulemaking Completion	
	Model 1	Model 2
Vacancy	-0.102 (0.073)	-0.432 (0.326)
Default Acting Quarters	-0.040** (0.018)	-0.177** (0.079)
Vacancy × Default Acting Quarters	0.043** (0.021)	0.188** (0.092)
Strategic Acting Quarters	-0.021 (0.015)	-0.094 (0.071)
Vacancy × Strategic Acting Quarters	0.050* (0.030)	0.218 (0.142)
Empty Quarters	0.016 (0.021)	0.073 (0.094)
Priority	0.165*** (0.057)	0.743*** (0.254)
Politicization	0.066 (0.983)	0.352 (4.826)
Opposed Agency	0.062* (0.036)	0.296* (0.174)
Capacity	0.050 (0.048)	0.221 (0.221)
Independence	0.044 (0.072)	0.205 (0.352)
Workload	0.000 (0.000)	0.000 (0.001)
Trump	0.107*** (0.040)	0.483*** (0.186)
Constant	0.326 (0.228)	-0.843 (1.104)
Vacancy Wald P-Value	0.015*	0.015*
Default Acting Quarters Wald P-Value	0.012*	0.008**
Strategic Acting Quarters Wald P-Value	0.012*	0.017*
Estimator	OLS	Logit
N	2523	2523
Adj. R-squared	0.037	
Log Likelihood		-1563.676
AIC		3155.351

***p < .01; **p < .05; *p < .1

Note: HC1-type heteroskedastic-consistent standard errors clustered at the department level.

Figure 2: Predicted Effects of a Prolonged Vacancy on Likelihood of Rulemaking Completion, Conditional on the Presence of an Acting Official During the First Year of the Administration



agency completes a rulemaking. All else equal, a rulemaking begun by an agency with a vacancy lasting a year or longer is 10.2 percentage points less likely to be finalized before the end of the president's first term in office. This estimated effect is consistent with the estimated effect reported in Table 1.

However, we find strong differences between the two types of acting officials. Figure 2 plots these differences. Among agencies experiencing prolonged vacancies, those led by default actings are less likely to finalize their rulemakings than agencies led by strategic actings. We observe these effects despite controlling for presidential priorities, rulemaking workload, agency ideology, and a host of other factors that may otherwise confound the relationship. All else equal, a rulemaking begun by an agency experiencing a prolonged vacancy is 8.7 percentage points less likely to complete a rulemaking if led by a default acting for the entirety of the first year. Accordingly, the presence of a default acting reduces the effect of *Vacancy* by less than two percentage points. In contrast, a rulemaking begun by

an agency experiencing a prolonged vacancy is 4.3 percentage points more likely to complete a rulemaking if led by a strategic acting for the entirety of the first year.

Of course, we must temper these effects. While some agencies experiencing prolonged vacancies do have a default acting or a strategic acting for the first five quarters of the new administration, many agencies experience a mix of default and strategic actings. The average agency with a prolonged vacancy has a default acting for 1.6 quarters and a strategic acting for 1.15 quarters. A rulemaking begun by an agency experiencing the average mix of acting officials is 6.4 percentage points less likely to be completed relative to the baseline.

Overall, our results suggest that presidential loyalty—not managerial competence—behaves as the primary mechanism by which actings ensure completion of the President’s regulatory agenda. In fact, at the extremes, strategic acting officials outperform confirmed officials. We speculate why that may be the case in the discussion.

Discussion

The results presented here demonstrate the complex effects of different agency-leadership arrangements. While vacancies hurt the ability of presidents to complete their agendas before the end of their terms in office, acting officials effectively moderate the damage caused by vacancies. Yet the selection method for the acting official matters a lot for presidential priorities.

One implication of our results is that presidents are more successful at achieving their policy goals by selecting strategic acting officials. While default actings often have more experience within the agency and existing relationships with agency personnel, they have limited ties, if any, to the president. Aligning with the findings of Piper (2021), our findings suggest that presidents should select strategic acting officials more frequently in agencies connected to their priorities. Further, this result highlights the need to distinguish between types of acting officials based on how they entered their position.

Another implication of our findings is that strategic acting officials outperform confirmed officials when it comes to shepherding rules to completion. One plausible explanation for this finding is that the confirmation process forces presidents to cater to the preferences of the Senate. This requires presidents to select more ideologically moderate nominees and may require nominees to make commitments to gain the support of a Senate majority. Presidents can attain greater ideological congruence and select officials more personally loyal to them by selecting strategic acting officials that do not need Senate confirmation. This increased alignment with and fealty to the president will make the acting official more ardently pursue the president's policy agenda.

Therefore, under certain circumstances, presidents benefit from the use of prolonged vacancies. Once a vacancy occurs, rather than attempting to fill the vacancy with a nominee capable of appeasing a Senate majority, presidents can unilaterally fill positions with a strategic acting official. This helps to explain the rising prevalence of vacancies and puts presidents at a greater advantage in our separation of powers system, allowing presidents to act unilaterally without Senate input. Further, the Senate's own delays and amenability to presidential nominees may only further incentive presidents to use non-Senate confirmed appointees.

Conclusion

In light of the broken appointments process, presidents have turned to strategic acting officials to fill positions traditionally occupied by senate-confirmed appointees. Presidents have good reason to express frustration with the status quo. On average, vacancies prevent presidents from completing their policy priorities, and the default acting officials who fill these positions in the event of a vacancy are less effective—for whatever reason—at implementing presidents' policy agendas. Yet strategic acting officials prove effective at managing the agency's policy agenda in the event of a vacancy. So long as the Senate fails to confirm

presidents' nominees, presidents have great incentives to select their preferred acting officials in the event of a vacancy.

The results of our study raises normative questions about the role of the appointments process in a democracy where policymaking occurs through separate branches of government. From the standpoint of democratic legitimacy, now-Justice Kagan (2001) has argued that agency careerists "have neither the democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative standpoint" (2353). The Appointments Clause exists to provide the Senate with influence over the administrative-policymaking activities of the executive branch and maintain a democratic check on administrative policymaking. When the Senate lacks the time or willingness to confirm the presidents' nominees, this key source of influence is diminished. Ordinarily, agency vacancies would diminish the ability of presidents to use the administrative state to implement their preferred policies. Yet the exploitation of strategic acting officials has provided presidents an alternative to the appointments process. By using strategic acting officials, presidents select an agency leader more closely aligned to their preferences who is equally capable of implementing the president's agenda through administrative policymaking.

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