

Public Employees for Environmental Responsibility (PEER); Project On Government Oversight (POGO); Whistleblowers of America; ACORN8 Government Accountability Project (GAP); Jahn Research Group; National Federation of Federal Employees; Government Executives International The Data-Driven Institute; Senior Executives Association; Professional Managers Association; Citizens for Responsibility and Ethics in Washington (CREW); Center for Biological Diversity; Western Watersheds Project Union of Concerned Scientists; Constitutional Accountability Center Jacobs Institute of Women's Health; Revolving Door Project

April 14, 2020

Agriculture, Nutrition, and Forestry Committee: Sen. Pat Roberts, Chair; Sen. Debbie Stabenow, Ranking Member
Armed Services Committee: Sen. James M. Inhofe, Chair; Sen. Jack Reed, Ranking Member
Banking, Housing, and Urban Affairs Committee: Sen. Mike Crapo, Chair; Sen. Sherrod Brown, Ranking Member
Commerce, Science, and Transportation Committee: Sen. Roger Wicker, Chair; Sen. Maria Cantwell, Ranking Member
Energy and Natural Resources Committee: Sen. Lisa Murkowski, Chair; Sen. Joe Manchin, Ranking Member
Environment and Public Works Committee: Sen. John Barrasso, Chair; Sen. Thomas R. Carper, Ranking Member
Finance Committee: Sen. Chuck Grassley, Chair; Sen. Ron Wyden, Ranking Member
Foreign Relations Committee: Sen. James E. Risch, Chair; Sen. Robert Menendez, Ranking Member
Health, Education, Labor, and Pensions Committee: Sen. Lamar Alexander, Chair; Sen. Patty Murray, Ranking Member
Homeland Security and Governmental Affairs Committee: Sen. Ron Johnson, Chair; Sen. Gary C. Peters, Ranking Member
Indian Affairs Committee: Sen. John Hoeven, Chair; Sen. Tom Udall, Vice Chairman
Judiciary Committee: Sen. Lindsey Graham, Chair; Sen. Dianne Feinstein, Ranking Member
Small Business and Entrepreneurship Committee: Sen. Marco Rubio, Chair; Sen. Benjamin L. Cardin, Ranking Member
Veterans' Affairs Committee: Sen. Jerry Moran, Chair; Sen. Jon Tester, Ranking Member

Dear Senators,¹

The undersigned non-profit organizations work on a broad range of causes from immigration to public health, environmental protection, human rights, labor, education, government accountability, and other concerns that affect all Americans. We are united in that we are all

¹ Senators' addresses are omitted. Due to COVID-19 disruptions letters are being sent by email to each office's Legislative Director.

sensitive to the fact, as we are sure you also are, that the nation needs highly-effective federal agencies especially at this time of crisis. Unfortunately, we continue to witness a worsening, widespread vacancy issue across the federal government where key offices are without Senate confirmed leadership, sometimes for years on end, to the detriment of the agencies' functioning.

We therefore jointly request that you expeditiously reassert the Senate's prerogative under the Constitution's Appointments Clause to provide advice and consent to presidential nominees to offices that require them.

This "give and take" between the Executive and Legislative branches provides an essential check and balance. Confirmation ensures that federal leaders are publicly vetted by the Senate in open nomination hearings for their competency and to root out extreme views and conflicts of interest. The president is allowed to appoint "acting" officials into the positions that require presidential nomination and Senate confirmation (PAS offices), but only temporarily.² Congress has consistently and repeatedly reasserted its Advice and Consent role by placing time and eligibility limitations on temporary officers serving in vacant offices. This traces back to the founding of our nation as Congress placed the first limitation on acting service in 1795.³

The most recent iteration of this law, the Federal Vacancies Reform Act of 1998 (FVRA), was inspired largely by widespread, chronic vacancies across government. At the time of the law's passing, twenty percent of all offices requiring Senate confirmation were vacant. At the Department of Justice, it was twenty five percent.⁴

The current numbers are similarly dire: more than thirty percent of PAS offices are vacant in the Department of Defense, for example, and twenty seven percent are vacant at the Department of Homeland Security. We fear that the leadership vacuum in several federal agencies is weakening the nation's response to the coronavirus pandemic. As stated in this New York Times analysis on March 26th entitled "Job Vacancies and Inexperience Mar Federal Response to Coronavirus":⁵

Empty slots and high turnover have left parts of the federal government unprepared and ill equipped for what may be the largest public health crisis in a century, said numerous former and current federal officials and disaster experts.

The "empty slots" for many of the critical positions directly resulted from a lack of qualified nominees being presented to the Senate for the position, the lack of an appointment of a lawful "acting" official into the position under FVRA, or both.

² 5 U.S.C. § 3345 *et seq.*

³ National Labor Relations Board v. SW General, No. 15–12515, slip op. at 3. (Sup. Ct. March 21, 2017) citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. https://www.supremecourt.gov/opinions/16pdf/15-1251_ed9g.pdf.

⁴ Morton Rosenberg, Congressional Research Service, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, 98-892 A (November 2, 1998), 1. https://www.everycrsreport.com/files/19981102_98-892A_4381063a1fcd682a2c0675c661fae774ce6fb0f7.pdf

⁵ Jennifer Steinhauer and Zolan Kanno-Youngs, "Job Vacancies and Inexperience Mar Federal Response to Coronavirus," *New York Times*, March 26, 2020. <https://www.nytimes.com/2020/03/26/us/politics/coronavirus-expertise-trump.html>.

The New York Times piece vividly describes how the Department of Homeland Security (DHS) has been “hollowed out.” The effect of this hollowing is disastrous considering DHS has a central role in responding to the coronavirus. It has been nearly a year since DHS had a Senate-confirmed leader. Acting Homeland Security Secretary Chad Wolf is the fourth person to lead DHS in three years. The Deputy Secretary, Undersecretary for Management, head of Customs and Border Protection, and key roles at the Federal Emergency Management Agency — all of whom are involved in the coronavirus preparation and response — are working in temporary acting capacities.

At the Department of Health and Human Services, also at the forefront of the coronavirus response, the roles of Assistant Secretary for Planning and Evaluation and Assistant Secretary for Financial Resources are carried out by temporary acting officials.

Further, there is no confirmed head of the Occupational Safety and Health Administration, which enforces more than twenty unique whistleblowing statutes including the Occupational Safety and Health Act through its whistleblower protection program. As we’re already seeing reports of hospital workers being retaliated against for protected disclosures about unsafe working conditions and a lack of personal protective equipment, this vacancy could have a profoundly weakening impact on the agency’s already poor record on worker health and safety whistleblower retaliation.⁶

Also relevant to the COVID-19 response, four of the offices of inspectors general assigned to the Pandemic Response Accountability Committee, are vacant and led by nonconfirmed individuals. That Committee is an essential board created by the CARES Act to oversee coronavirus relief spending.⁷

Similar examples abound across the Federal government:

- The State Department’s thinned ranks have left vacant positions that could work on prevention and coordination with other countries on coronavirus. There is, for instance, no nominee for Assistant Secretary for European and Eurasian affairs. More than 25 ambassadorships remain vacant, including for key countries tackling coronavirus like Japan and Singapore.
- The Agency for International Development (AID) has no nominees for key roles in coordinating the response to the pandemic including the Assistant Administrator for Global Health; Associate Administrator for Relief, Response, and Resilience; Assistant Administrator for Asia; and Associate Administrator for Strategy and Operations.
- Two agencies vital to general government functioning, the Office of Personnel Management (OPM) and Office of Management and Budget (OMB), have new leaders who are but the latest in a long confusing line of “actings” heading both of those offices.
- Numerous other key bureaus have lower-level officials and political appointees in roles that require Senate confirmation. The largest Department of the Interior entities, the National Park Service and the Bureau of Land Management, which together control the

⁶ Nick Schwellenbach, *Can OSHA Protect Medical Whistleblowers Amid the COVID-19 Pandemic?*, Project On Government Oversight. April 2, 2020. <https://www.pogo.org/analysis/2020/04/can-osha-protect-medical-whistleblowers-amid-the-covid-19-pandemic/>.

⁷ IG offices include the Department of Defense, Health and Human Services, Education, and Treasury.

activities that occur on about one-seventh of the U.S. land area, have been run by a succession of lower-level, non-FVRA compliant, Deputies ever since President Trump's inauguration.

The chaos in DHS leadership inflicted real harm on its actions at a time when having reliable agency actions is at a premium. A recent U.S. District Court decision struck down several immigration restriction measures issued by Ken Cuccinelli who now has the improbable title: *Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services*.⁸ He has never been confirmed by the Senate. Judge Randolph Moss ruled that Mr. Cuccinelli acted illegally in his position notwithstanding title manipulations intended to give him the appearance of being FVRA-compliant when he promulgated the measures at issue. Therefore they were “without force or effect”.

This case was a victory both for the integrity of the FVRA and the Appointments Clause of the Constitution. However, judicial intervention is a very slow and burdensome path to correcting those violations. Under the FVRA, illegal actions can be struck down one-by-one, but the offending officials still remain at the agencies. The Senate's involvement is vital to achieve the needed improvements. Presidential abuse of the vacancies process is not a novel concept—yet the stakes are incredibly high as our nation is on the front lines of a massive pandemic which requires an all-hands-on-deck approach. Reforms are called for.

We request that you promptly, on a bipartisan basis:

- Reassert your constitutional Advice and Consent prerogative in a bipartisan letter to the White House seeking qualified nominees for agencies that are key to the coronavirus pandemic;
- Consider refusing to cooperate on key Administration requests before your committees unless the President offers qualified nominees for confirmation, or appoints proper “acting” officials under FVRA, for key leadership positions within your jurisdiction;
- Ask the agencies' Inspector Generals and the Government Accountability Office (GAO) to identify ongoing FVRA violations including, but not limited to, agency failures to report vacancies to GAO as required by FVRA; and,
- Pass legislation to close loopholes in the FVRA and to streamline the confirmation process in order that future Administrations will not repeatedly avoid the safeguards provided by the Senate's advice and consent process.

Thank you for your attention to these requests in this difficult period. Be assured that our goal is to enhance the legitimacy of the key federal agency leaders, including those working on the pandemic response, but also those in numerous other bureaus across the government, in order to bolster their effectiveness. Our hope is that you will increase their accountability to the Senate and, through you, to all Americans.

⁸ *L.M.-M. v. Kenneth Cuccinelli II*, D.D.C., Civil Action No. 19-2676 (RDM). Memorandum Opinion and Order, March 1, 2020. <https://www.documentcloud.org/documents/6791555-L-M-M-et-al-Plaintiffs-v-KENNETH-T-CUCCINELLI-II.html>.

Sincerely,

Public Employees for Environmental Responsibility (PEER)
Project On Government Oversight (POGO)
Whistleblowers of America
ACORN8
Government Accountability Project (GAP)
Jahn Research Group
National Federation of Federal Employees
Government Executives International
The Data-Driven Institute
Senior Executives Association
Professional Managers Association
Citizens for Responsibility and Ethics in Washington (CREW)
Center for Biological Diversity
Western Watersheds Project
Union of Concerned Scientists
Constitutional Accountability Center
Jacobs Institute of Women's Health
Revolving Door Project