

Politicization and Compliance with the Law: The Case of the Federal Vacancies Reform Act of 1998¹

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Comments Welcome

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Among the most politicized arenas of national politics is the filling of presidentially nominated and Senate confirmed positions. This has been true from before the start of the Republic. Among the many colonial grievances against King George III, the Declaration of Independence included the complaint that he “has erected a multitude of New Offices, and sent hither swarms of Officers to harrass [sic] our people, and eat out their substance.”² As Alexander Hamilton subsequently explained in Federalist 76, the Founders’ concern about this abuse of the power to create offices and appoint officers without constraint led to the Constitution’s two-stage appointment process involving presidential selection and senatorial confirmation of appointees.³ From the start of the republic, political observers understood the importance of appointed offices for the performance of public business.

Scholars, however, disagree about how the creation of appointed offices influences the performance of the public’s business. Some scholars and political officials argue that appointees, properly selected, are keys to good agency performance (see, e.g., Bok 2003; Maranto 1998, 2001, 2005; Moe 1985). Others are skeptical about whether appointees are selected primarily for competence and worry that the proliferation of appointees in the United States since Mid-Century has hurt federal management performance (Cohen 1998; Gallo and Lewis 2012; Heclo 1975, 1977; Kaufman 1965; Lewis 2008; Light 1995; National Commission on the Public Service 1989, 2003; Suleiman 2003). A number of works try to illuminate how appointees and careerists can work productively together, often suggesting that a proper balance between appointees and careerists is optimal (Dunn 1997; Golden 2000; Heclo 1977; Krause, Lewis, and

² *U.S. Declaration of Independence*, 1776.

³ Hamilton writes, “To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.”

Douglas 2006). Whether and how the appointee – careerist balance influences federal management also interacts in underappreciated ways with the structure of delegated authority, the allocation of tasks to agencies and how their priority is perceived by federal managers. Arbitrating among these competing views and determining if and when appointees help or hurt federal agency management has been difficult because of a lack of comparable measures of agency performance (Boyne 2003; Wilson 1989).

In this paper we examine agency compliance with the legal requirements of the Federal Vacancies Reform Act of 1998 (FVRA) as a way of evaluating the influence of appointees on management performance. The act requires that most federal agencies notify the Comptroller General (Government Accountability Office) and each chamber of Congress about vacancies in specified Senate confirmed positions “immediately upon occurrence.”⁴ Under FVRA federal agencies are to provide information about the date positions became vacant, the persons named to fill the position in an acting capacity, the dates the acting officials started, and details (names, dates, Senate action) about any persons nominated to fill the vacant position.⁵ As part of the act GAO collects systematic data on agency compliance or non-compliance. These data provide a rare opportunity to measure the performance of federal agencies in a way that is comparable across agencies. It is clear what good performance is—timely notification of GAO of all vacancies—and the law has broad applicability to agencies of different designs, sizes, and

⁴ The act excludes multi-member boards governing independent establishments or government corporations. The act also excludes the Federal Energy Regulatory Commission, a multi-member body located inside the Department of Energy, and ambassadors and U.S. attorneys. United States Senate, Committee on Governmental Affairs, Senate Report 105-250, Federal Vacancies Reform Act of 1998, July 15, 1998. For ambassadors and U.S. attorneys see United States General Accounting Office. 2003. *Federal Vacancies Reform Act: Key Elements for Agency Procedures for Complying with the Act*, GAO-03-806, July, 2003. In a 2001 GAO survey, 44 agencies indicated that they were covered by the act. This includes all components of the Executive Office of the President, the executive departments, and independent agencies that are not multi-member boards. United States General Accounting Office. 2001. *Presidential Appointments: Agencies’ Compliance with Provisions of the Federal Vacancies Reform Act of 1998*, GAO-01-701, May 2001.

⁵ The requirements of the act are particularly important since one way presidents have sought to circumvent the confirmation process has been to use temporary appointments to fill vacancies in Senate-confirmed positions and keeping officials in acting capacities.

missions. A careful analysis of compliance or non-compliance across agencies can shed important light on how politics and agency decision making might influence compliance with the law.

In the first section we review what we know about appointees and management performance and FVRA, highlighting how the influence of appointees or careerists might be influenced by the number and political nature of agency tasks. In the next section we examine how well agencies comply with FVRA, using descriptive data from the history of the FVRA and a new dataset of 460 cases from the GAO's vacancies database between 2003-2008. We find that agencies with general counsels that were appointed were significantly slower than other agencies. We also find that agencies with a higher number of statutorily mandated tasks were slower in reporting vacancies. The effect of appointed general counsels on FVRA compliance was largest in agencies that had a large number of statutory tasks. We conclude by highlighting the implications of these findings for this specific area of conflict between presidents and Congress as well as for bureaucratic performance generally. We note that the effect of appointees on management performance may be influenced by the composition of tasks for which the appointees are responsible, both the number and the political nature of those tasks.

Appointees and Federal Management Performance

Appointees matter because they can influence both what agencies do—who gets services or goods or where agencies direct their effort and attention—and how well they do it. For example, Wood and Waterman (1991) show that a shift in appointee ideology from one administration to another can affect agency outputs. Appointees influence agency grant and contract decisions that can benefit targeted constituencies (e.g. Gordon 2011; Hudak 2012).

Even the simple existence of appointed positions, no matter who fills them, can affect performance because of the incentive structure for the careerists that could deter entry, inhibit professional development, and encourage exit when outside options are available (Bertelli and Lewis 2012; Gailmard and Patty 2007).

Measuring Federal Management Performance

Scholars still grapple with the challenges to defining performance when different stakeholders have radically different expectations or objectives (Lewis 2007). As Boyne (2003) argued over a decade ago, “academic researchers remain largely at the stage of clarifying the questions rather than providing empirical answers” about performance—largely because of the difficulty of agreeing on definitions. And even with agreed upon definitions, outputs and outcomes are often difficult to observe and even more difficult to measure, as Wilson illustrated across agency types (1989). Then, assuming that outputs are observable, what should the unit of analysis be: the individual appointee, the position, an office or bureau, or an entire agency (Lewis 2011)? Each of the existing measures of performance has its limits whether because of perceived problems with the measure or because of questions of generalizability (see, e.g., Gilmour 2006; Metzenbaum 2009; Moynihan 2006, 2008; Posner and Fantone 2007; Radin 2005; U.S. Government Accountability Office 2004, 2005).

The virtue of examining compliance with the Federal Vacancies Reform Act of 1998 is that the act is applicable across federal agencies, good performance is defined in the act, and a potential link between appointee management and performance is easy to identify. It provides a new and unique opportunity to examine the relationship between appointees and federal management performance across agencies and over time.

Appointees and Federal Management Performance

The work connecting appointment management and agency performance has been better at showing a correlation between appointees and performance than isolating the precise mechanism by which appointee management influences agency outputs. Political science and public administration literature describes the virtue and drawbacks of appointee management and theorizes about the proper balance in management teams. For example, a number of works describe the energy and priority that appointees can bring to public management while others lament the loss of institutional knowledge and increased turnover that appointee management generates.

Of course, whether appointees or careerists are better for management performance depends importantly on the management environment what these managers are asked to do. Some tasks are “so plain and simple” as President Jackson said that all persons of intelligence could perform them without special expertise or training.⁶ Few federal management jobs are described today as President Jackson described jobs in the land offices, customs houses, and post offices, and scholars have focused increasingly on the fit between job requirements and appointed managers.

A component of the management environment of the federal executive and one that interacts with politics is the tasks assigned to executives. The number of discrete statutory requirements that define the work environment of federal managers and the extent of their perceived “politicalness” influences outputs. These “politicized” tasks are distinct from the political influence on core agency functions, one consequence of politicization described by scholars in areas such as contracting for specific goods or services (Gordon 2011), grant

⁶ “Andrew Jackson’s First Message to Congress (1829),” in Michael Nelson, ed., *The Evolving Presidency* (Washington, DC: CQ Press), 76.

allocations (Hudak 2012), or rulemaking (Nou forthcoming; Barron 2008). Politicized tasks are not intended to promote good management (such as the statutes requiring inspectors general or chief financial and operating officers) or to increase government responsiveness to the public (such as the Freedom of Information Act or other initiatives for government transparency). Politicized tasks are directly intended or perceived by agency bureaucrats as instruments for waging interbranch institutional conflicts.⁷

While in principle most appointees and careerists want to follow the law all of the time, the competing demands on their time and effort are too great to accomplish every task. So they have to distinguish between types and varying importance of tasks and prioritize accordingly; and clearly political tasks for which there are competing, and not consistently intense, pressures from the White House, Congress, or the courts are unlikely to be first on the list of priorities.

Agency performance on politicized tasks could suffer from obstacles at two separate stages. The first is the point at which agency leadership assigns responsibility for a task. When tasks are assigned to appointees, as opposed to career executives, the political nature of the task may be activated. For example, in the Department of Transportation career human resource officers in the Executive Resources Office were assigned responsibility for the FVRA with the general counsel providing guidance and follow up; in other agencies, the general counsel's office itself took on the task. The political contours of these offices and the extent to which they are tied in to the political disagreements between the branches can influence performance on the task. The Department of Justice has been persistently bad in compliance with the FVRA, partly due to their political-legal objections to the law.

⁷ Of course, ostensibly neutral management initiatives can be perceived as political by federal officials (Lavertu, Lewis, and Moynihan 2013).

The second stage is at the point of implementation. Setting aside the more substantive aspect of agency performance, it would be a challenge for every agency to comply with every statutory reporting requirement, whether included in their authorizing statutes (Selin 2013; Lewis, Selin, and Wood 2013) or subsequent legislation. And members of Congress constantly make informal requests directly or through the GAO. Agencies also have to adhere to formal procedural requirements, such as transmitting information to OMB for clearance or meeting the constraints of the Administrative Procedures Act. Time and resource constraints require prioritization; and even with the best of motives, careerists or appointees struggle to meet all the demands (Lewis, Selin, Wood 2013; Selin 2013). Perceived to be less urgent than substantive goals or important management objectives, politicized tasks could drop quickly to the bottom of agency priorities.

In other cases, putting a low priority on politicized tasks could be an example of deliberate bureaucratic shirking of political control or direction. Wilson describes this possibility by noting that

"no agency is free to ignore the views of Congress. An agency may, however, defer to the views of one part of Congress (say, one committee) instead of another, or balance the competing demands of the White House with those of some parts of Congress in ways that other parts may not like. The bureaucracy cannot evade political control nor sustain for long the view that there is a realm of 'administration' that is immune from 'politics.' But it can maneuver among its many political masters in ways that displease some of them and can define its tasks for internal reasons and not simply in response to external demands" (1989, p. 237).

Thus without political pressure from whichever actor created a certain politicized task, bureaucrats or appointees might deliberately push aside that task in favor of more rewarding or more urgent objectives.⁸

The FVRA was perceived as a politicized task by many agency officials and this should influence how federal executives responded to it. The FVRA is just one salvo in a long-running institutional conflict between the Senate, executive branch agencies, and the courts over differing interpretations of the president's appointment authority and the Senate's role of advice and consent in temporarily filling vacant positions with acting officials. Frustrated by executive branch defiance of previous vacancies legislation, Senator Robert Byrd, at a hearing of the Senate Committee on Government on Governmental Affairs on the proposed FVRA in March 1998, argued that the proposed changes to existing vacancies legislation needed to be "so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep" (Senate Committee 1998). The committee's report also claimed that a court decision in favor of a Justice Department interpretation of the existing statutes demonstrated that the court did not "understand the fundamental purpose of the Vacancies Act [which the FVRA would significantly amend]" (Senate Committee 1998). The FVRA meant to eliminate the possibility of agency misinterpretation or court misunderstandings by clearly delineating how vacancies could be filled and by requiring immediate reporting on vacancies and acting officials' status.

⁸ For FVRA compliance specifically, both members of Congress, who created the reporting requirement in the first place, and agency personnel might prefer lax compliance. As Dull and Roberts note, "from the perspective of some actors, vacancies are not always undesirable. Agency staff, congressional committees, and interest groups may prefer the stability and experience of an acting official drawn from among long-serving agency administrators" (2009, p. 449). Along with these possible preference of agency heads for extending vacancies, the Justice Department had provided guidance to agencies indicating that agency heads could make temporary appointments based on their enabling statutes and thus circumvent prior vacancies legislation (GAO 2001). Likewise, on Capitol Hill, senators of the president's party might prefer that temporary appointees fill vacancies rather than having to either compromise with an opposing majority or, if in the majority, having to fight off potential filibusters of nominations. And presidents themselves prefer less scrutiny of vacancies generally and extended tenures for certain acting officials specifically.

The FVRA thus provides a useful case not only for evaluating the relationship between appointees and federal management performance but also how appointee management interacts with accumulating and variously “political” tasks. Agencies with many tasks, forced to make choices and prioritize among them, would have an incentive to put compliance with FVRA lower on the priority list. This is particularly likely in cases where appointees were making decisions about compliance.

Data, Variables, and Methods

To evaluate whether and when appointees hinder federal management performance we examine federal agency compliance with FVRA. One of the unique features of the FVRA is that its legal requirements are clear. The law requires that agencies notify the GAO about vacancies in Senate-confirmed positions “immediately upon occurrence.”⁹ Yet, as the GAO reports suggest, compliance has been quite varied (GAO 2000, 2001, 2003).¹⁰ Since November 1998, agencies have been required to submit to GAO information regarding all vacancies in Senate

⁹ The act excludes multi-member boards governing independent establishments or government corporations. The act also excludes the Federal Energy Regulatory Commission, a multi-member body located inside the Department of Energy, and ambassadors and U.S. attorneys. United States Senate, Committee on Governmental Affairs, Senate Report 105-250, Federal Vacancies Reform Act of 1998, July 15, 1998. For ambassadors and U.S. attorneys see United States General Accounting Office. 2003. *Federal Vacancies Reform Act: Key Elements for Agency Procedures for Complying with the Act*, GAO-03-806, July, 2003. In a 2001 GAO survey, 44 agencies indicated that they were covered by the act. This includes all components of the Executive Office of the President, the executive departments, and independent agencies that are not multi-member boards. United States Government Accountability Office. 2001. *Presidential Appointments: Agencies’ Compliance with Provisions of the Federal Vacancies Reform Act of 1998*, GAO-01-701, May 2001.

¹⁰ The GAO noted two key problems in implementation with the law: 1) a lack of knowledge about the law’s requirements and 2) lack of coordination among components of agencies responsible for compliance. GAO noted an improvement in the level of familiarity with the law over time after its enactment but also noted that turnover among executives responsible for complying with the Act had hindered implementation. GAO specifically recommended that responsibility for reporting vacancies should be delegated to a career official since new appointees responsible for compliance with the law were often not aware of the law. GAO also noted that in some agencies it was not clear who was responsible for complying with the law and in larger agencies, the different components involved in compliance often did not communicate or coordinate. One factor that GAO did not note but which also must be a factor is that GAO has no enforcement authority. When agencies do not send information to GAO, GAO may not know. They have the ability to send agencies notifying them that they are not in compliance with the law and also notifying the relevant committees but GAO does not systematically gather information about appointments beyond what they receive voluntarily from agencies or seek at the request of members of Congress.

confirmed positions. GAO has dutifully recorded the date that the vacancy began and the date that the agency notified GAO. The difference between the time the vacancy occurred and the time it was reported to GAO is a unique measure of performance since reporting is supposed to happen immediately. Between 2003 and 2008, among those vacancies submitted to GAO, the average delay between the start of a vacancy and GAO being notified was 107 days, with some vacancies being submitted to GAO on the day of their occurrence and some not being submitted to GAO for 1,340 days.

Do Agencies Comply with the FVRA?

Even with the challenges to bureaucratic performance from politicization—whether in agency design, the selection and distribution of appointees, or the assignment of specific tasks—the reporting requirements of the FVRA do not appear onerous. Any vacancy in presidentially-appointed, Senate-confirmed positions already triggers a slew of standard agency paperwork related to IT equipment check-in, post-employment confidentiality agreements, and, of course, arranging for that last paycheck. So how have agencies done in complying with the simple FVRA reporting requirements since the act became effective in late November 1998? Based on GAO inquiries in 2001, 2003, and 2007, agencies neither report vacancies promptly nor report all vacancies and changes in acting officials' status.

By June 1999, just seven months after the FVRA went into effect, GAO was already concerned that agencies were not complying; GAO received only 23 reports of vacancies in that time period (GAO 2001). GAO provided a streamlined submission form and detailed guidance to agencies in July 1999 to ease compliance. Then, in 2000 and early 2001, GAO evaluated agency compliance after requests from the Senate Committee on Governmental Affairs. The

initial investigation found that agencies reported just 81 percent of vacancies occurring between November 1998 and June 2000; and of the 81 percent reported, only half were reported in less than four weeks (GAO 2001).

Following the transition from the Clinton to Bush administrations, GAO again evaluated agency compliance in 2002 and 2003; this time, they interviewed agency officials responsible for compliance and reported in more depth on management controls that should be in place across all agencies in order to improve performance (GAO 2003). GAO noted that the White House had issued guidance in March 2001 that instructed agencies to report vacancies directly to GAO and Congress without routing their submissions through PPO or OMB. In spite of this less cumbersome process and more time for familiarization with the law's requirements, GAO found that the six agencies studied in the report, though selected for examination because they had demonstrated at least relatively good compliance compared to other agencies, still did not have written procedures in place for compliance and, in at least one agency, still took an average of 150 days to notify GAO of vacancies (GAO 2003).

And what about GAO's efforts in monitoring compliance? The FVRA requires that the Comptroller General, the head of GAO, report to Congress on any acting officials breaching the statutory limitations on length of service. Yet without accurate information on vacancies and acting officials, the Comptroller cannot comply fully with the law. And just as GAO highlighted how agencies struggled to meet FVRA requirements, GAO itself, in its published reports and the online vacancies database, has not been able to fully identify compliance (or the lack thereof) with either the reporting requirements or the limitations on temporary appointments to vacancies. For example, in its 2001 and 2003 reports, GAO did not include corroboration of the overall total of vacancies occurring, relying solely on agency reports. There was no systematic identification

of the full population of positions subject to FVRA, or of changes to those positions (such as from the creation of the Department of Homeland Security or the Office of the Director of National Intelligence). GAO requested that agencies respond to a questionnaire if they had positions subject to FVRA (GAO 2001); because of this reliance on self-reports, there is still uncertainty about which agencies understand FVRA and even know if and how they should respond. Setting aside these identification issues, there are significant shortcomings in the data collected by GAO. These shortcomings could stem from either agency submission errors or data entry problems at GAO; in either situation, much of the data in the GAO tracking system is inaccurate and/or incomplete.

Neither agencies nor the GAO seem to be taking the law very seriously. This in itself is an important finding. Though legally required to comply with the law, most agencies have not fulfilled their legal obligations under FVRA. This begs the question of why there is such broad non-compliance. GAO reports indicate that the regular turnover among appointed general counsels in some agencies has meant that agency officials did not understand their obligations under FVRA. Interviews with GAO officials indicate that GAO episodically sends letters to general counsels reminding them of their responsibilities under the FVRA.¹¹ Undoubtedly, however, FVRA is one agency task among many in most large agencies and not among those that would be prioritized by the agency. Each agency has policies and programs central to the agency's mission, and FVRA has gotten little direct attention from Congress or the White House since early in the Bush Administration. Some agencies may also be reluctant to comply with the law since it is part of larger struggles between the branches over personnel.

¹¹ Telephone conversation with Robert Cramer, Government Accountability Office, February, 2013.

What Explains Variance in FVRA Compliance?

While overall compliance with the law both by agencies and GAO was irregular, some agencies did better than others during the period where compliance was most regular (2003-2008). The raw data suggest general reporting of vacancies perhaps due to changes in procedural requirements. First, as GAO noted in 2003, the reporting procedure changed in mid-2001.

Originally, agencies submitted vacancy reports to the Presidential Personnel Office (PPO--in the White House) and then the Office of Management and Budget (OMB) prior to providing them to GAO and Congress. Guidance from the White House Counsel's office in early 2001 changed this procedure, instructing agencies to submit the reports directly to GAO. Following this guidance, large batches of vacancy reports appear in the GAO database; it appears that agencies or PPO/OMB provided GAO with reports about the vacancies that PPO was trying to fill at that time. These reports are inaccurate in terms of dates, making evaluation of performance difficult if not impossible.¹² The two extensive GAO reports, in May 2001 and July 2003, also suggest that familiarity with the law and the chaos of the transition period might exaggerate underperformance. The frequency and accuracy of reports also declined significantly in the Obama administration, with the number of vacancies reported dramatically lower than other years and no new reports appearing in the GAO database after March 2012. We are unsure if this is because agency compliance dropped significantly or if there is a change in GAO's policy to reporting the data or collecting it.

Within the 2003 to 2008 period, where the data is the most reliable, we seek to evaluate whether compliance with the FVRA was influenced by the degree of politicization of the agency and its tasks. One nice feature of the FVRA is that compliance with the law rests with the

¹² Specifically, there are large batches of vacancies from the same date and there are a large number of cases where, according to GAO data, the vacancy was reported before it actually occurred.

General Counsel in each. Since the enactment of the FVRA, the GAO has regularly communicated with agency General Counsels to remind them of their obligations under the FVRA. The means of selecting general counsels varies by agency, however. Some agencies have general counsels that are themselves Senate-confirmed appointees (0,1; 89%). Other agencies have general counsels that are filled by members of the Senior Executive Service (0,1; 8%). The Senior Executive Service (SES) is a corps of managers right below Senate-confirmed appointees comprised of a mix of career members of the service drawn from the civil service and political appointees drawn from outside the service. Federal law mandates that no more than 10 percent of the entire SES and 25 percent of the SES personnel in any one agency may be appointees. Other agencies fill the general counsel position from rules defined by agency-specific personnel systems (0,1; 1%).¹³ We collected data on how agencies fill general counsels' positions from the 2008 Plum Book.¹⁴ We note both the appointment authority (SES, PAS). Our expectation is that agencies with appointees should be slowest to report vacancies and the least likely to notify GAO of vacancies.

Figure 1 provides preliminary evidence that agencies with appointed general counsels were slower in responding during this time period. The gap is largest at the beginning of the time period and narrowed over time as agencies appeared to report vacancies more quickly. This

¹³ Congress has granted to a number of agencies such as the U.S. Postal Service or the Federal Bureau of Investigation the authority to create their own personnel system outside the legal requirements of the traditional federal civil service system defined in Title 5 of the United States Code. These personnel systems often provide a greater level of flexibility in hiring and other personnel decisions but most systems look very much like a traditional civil service system. There are also two cases where the general counsel was a Schedule C appointee. Schedule C appointees are persons filling policy or confidential positions but are paid at a grade of GS-15 or lower, which is lower than SES pay.

¹⁴ U.S. Congress. Senate. Committee on Homeland Security and Governmental Affairs. 2008. *Policy and Supporting Positions*. 110th Congress, 2nd Session. We also collected data from the 2000, 2004, and 2012 Plum Books to determine whether the appointment authority for these positions changed. No position that was filled by an appointee changed to be filled by a careerist or vice versa although positions went from being filled by an appointee to being vacant and vice versa.

provides preliminary confirmation that agencies with appointee-run general counsels' offices performed worse than other agencies.

[Insert Figure 1 here.]

To measure the number of agency programs and statutory responsibilities we count the number of titles of the United States Code that include provisions specifically mentioning the agency by name.¹⁵ The 51 titles of the U.S. Code are organized by subject. The median number of titles for agencies in the data is 37 and the mean is 33. The minimum is 1 title and the maximum is 44. The executive departments such as Justice and Treasury are mentioned in more than 40 titles of the U.S. Code, while the Departments of Energy, Housing and Urban Development, and Veterans Affairs are mentioned in fewer than 30. Smaller agencies such as the Broadcasting Board of Governors and Federal Labor Relations Authority are mentioned in fewer than 6 titles. We also interact this measure with the appointment authority of the general counsel since the presence or absence of appointed general counsels may matter less in agencies with fewer competing tasks or policies to implement. When agencies have a substantial number of responsibilities they are forced to choose among them, providing them discretion in prioritizing different tasks. Our expectation is that whether or not a general counsel is appointed should matter most in agencies with a large number of tasks.

Controls

Of course, FVRA performance could also be influenced by a number of agency or position-specific factors that are correlated with the appointment authority of the general counsel

¹⁵ Source: Selin 2013. We have also estimated models that use a measure derived from the Bush Administration's Program Assessment Rating Tool. As part of this process the Bush Administration classified each agency program into a type (e.g., space, agriculture, etc.). We counted the number of different policy areas by counting the number of different policy areas covered by an agency's different programs (mean 8.2; SD 3.3; min 1, max 15). The correlation between this measure and the number of titles in the U.S. Code is 0.45.

or the number and diversity of the agency's statutory responsibilities. For example, the appointment authority of the general counsel and the number of tasks are correlated with agency size and agency type. We control for the natural log of the number of employees (85,206; SD 83009; Min 46, Max 316,480) and whether or not the agency is an independent agency (0,1; 15%). We also control for differences in workload by including a count of the number of Senate-confirmed appointees in each agency (median 20; mean 59; min 0, max 223).

The priority that agencies place on FVRA compliance differs, partly depending upon the negative attention an agency has received for its poor compliance in the past. We include an indicator for whether or not the vacancy is in an agency that was evaluated in the 2003 GAO report (0,1; 32%).¹⁶ Our expectation is that agencies publicly evaluated for FVRA compliance will be quicker to report vacancies than other agencies. Since FVRA compliance is more important to the agency, agencies should do a better job. DHS reporting time declined from an average of 105 days to 14 days after GAO reported on its performance in 2007.

Reporting behavior may also be influenced by the features of the positions themselves. To account for this we include controls for positions mentioned in the Presidential Appointment Efficiency and Streamlining Act of 2011 and Senate Resolution 116. As part of these legislative actions Senate-confirmation requirements were removed from some positions and others were targeted for expedited confirmation processes.¹⁷ Our expectation is that agencies should take

¹⁶ We have also estimated models that include an indicator for whether or not the agency was mentioned in the earlier 2001 report (two years before our time period). In these models, the agencies mentioned in the 2001 report were significantly slower than other agencies. GAO sent a letter in September, 2000 to Senator Thompson (R-TN) discussing 11 agencies and 246 PAS positions: Agriculture, Commerce, Defense (DOD), Education, Health and Human Services (HHS), Interior, Justice, Transportation (DOT), Treasury, Veterans Affairs, and the Environmental Protection Agency. A full May 2001 GAO report focused on the same 11 agencies. It also included responses to a questionnaire filled out by 44 agencies so it is unclear what agencies inferred from their interaction with GAO and how much this report distinguishes among agencies.

¹⁷ We have also estimated models that include controls for administrative, congressional or public affairs, inspector general, and general counsel positions. In these models we could not reject the null for any of the position indicators that agencies were no slower or faster in reporting vacancies in these positions.

longer to report vacancies in less important positions, such as those targeted by recent legislation intended to expedite appointment.

Finally, we include models that control for the political interaction between the agency and Congress by controlling for agency ideology and the composition of the Senate. Specifically, we include the measure of agency liberalism-conservatism from Clinton and Lewis (2008) and an indicator for Republican control of the Senate (0,1; 77%) and an interaction of these two variables.

Methods

Since the number of days to notify the GAO of a vacancy is continuous we regress the time to notify GAO on the appointment authority of the general counsel, the number of titles in the U.S. Code that mention the agency, and the agency and position-specific controls we describe above. Models are estimated with ordinary least squares (OLS). Since the observations are not independent across agencies or years we estimate some models with fixed effects for years and all models adjust standard errors to account for clustering of errors by agency. Since whether or not an agency reports a vacancy is influenced by the same factors that determine delay in reporting, the estimates below may be biased. Specifically, if agencies with appointed general counsels are less likely to report vacancies, this would lead us to underestimate the effect of appointed general counsels on delay. We address this issue more in the analysis below.

Results

In Table 1 we include OLS estimates of simple models of time to report vacancies; the results suggest that agencies with appointed general counsels are slower to report vacancies

(larger number of days) than other agencies, even when controlling for differences across agencies such as agency size, location, and the number of appointed positions to be monitored. The coefficient estimates in the first two models (without interactions) are estimated precisely and suggest that agencies with appointed general counsels are more than 70 days slower in reporting vacancies. This is *prima facie* evidence to suggest that appointee management may hurt performance of the agencies with regard to FVRA implementation. It also confirms the pattern that emerged in the raw data.

The precise reason for the correlation between appointed general counsels and agency performance is difficult to divine in these models but they are suggestive. General counsels are responsible for the agency's compliance with all federal laws and they are the recipients of communications from GAO about their obligations under FVRA. Regular turnover among appointed general counsels makes it systematically less likely that the general counsel understands their obligations under the FVRA. Their presence may also influence the amount of effort that such agencies put into FVRA compliance relative to other legal obligations.

[Insert Table 1 here.]

The model estimates also suggest that agencies with greater statutory responsibilities are slower in reporting vacancies, even when controlling for agency size and the number of Senate confirmed positions.¹⁸ The coefficients in the first two models are positive and significant. Each additional title of the U.S. Code that mentions the agency is associated with a 3-4 day lag in the average number of days it takes to report a vacancy. The estimates cannot reveal the precise reason for this correlation but the results are consistent with the fact that agencies with greater

¹⁸ When the number of agency tasks is interacted with the indicator for whether or not the agency was the subject of the 2003 GAO report, the coefficient on the interaction is negative and significant, indicating that the number of tasks does not matter for those agencies already prioritizing the FVRA for other reasons. This is additional evidence that the number of tasks does influence the prioritization of different tasks and tasks like the FVRA generally are low priorities.

statutory responsibilities must and do choose to prioritize among tasks. Some tasks receive more time, attention and resources than others. With a limited number of executives with demonstrated competence, agency leaders allocate their best people to the most important tasks (Selin 2013).

When the number of tasks is interacted with whether or not the agency's general counsel was appointed, the results are illuminating. They indicate that the effect of an appointed general counsel is largest for agencies with the largest and most diverse statutory responsibilities. For almost all agencies in the data set, having an appointed general counsel is estimated to be worse for performance and the effect of the number of tasks on performance is largest for agencies with appointed general counsels. Having an appointed general counsel is estimated to have no effect on performance or improve performance only for agencies in the fifth percentile in terms of the number of tasks. In Figure 2 we graph this interaction. While the main effect of having an appointed general counsel on FVRA performance is to hurt performance, the effect is contingent on the number of tasks. The number of tasks confronting an agency and its appointed leadership forces agency leaders to prioritize among the tasks. Among the tasks that may lose out are those that are less visible and those that are seen as politicized and the subject of little active attention.

[Insert Figure 2 here.]

Model estimates also suggest agencies targeted for attention in the 2003 GAO report were estimated to be more than 64-74 days quicker than other agencies. This suggests that agencies that prioritize compliance can be more effective. Agencies may be poor at complying simply because they either do not know about the law or because they choose not to prioritize it. Interestingly, those positions that were the subject of the 2011 legislation because of persistent vacancies were among the slowest in terms of reporting to GAO. Conservative agencies were quicker in sending information about vacancies in general. Agencies were slower during the

period when the Republicans were in control of the Senate. Whether or not an agency was liberal or conservative mattered less during the Republican control of the Senate.

Selection: What About Agencies that Did Not Notify GAO at All?

One difficulty GAO uncovered in its own review of agency compliance with the FVRA is that some agencies did not notify GAO at all of some vacancies. In the second part of the analysis we examine data from the Plum Books in 2000, 2004, and 2008 to determine what positions were vacant. Every election year the House Committee on Government Oversight and Reform or the Senate Committee on Governmental Affairs oversees the publication of *United States Government Policy and Supporting Positions*, a document that catalogues all policy making positions in the United States government, including all Senate-confirmed positions. The document includes the positions, incumbents in those positions, pay rates, and importantly, cases where those positions are vacant. The publication of the *Plum Book* in election years provides us a means of comparing actual vacancies in a given year in the short period prior to the *Plum Book's* publication against the vacancies that are reported by agencies to GAO during the same period. During the brief periods we examine, there were 27, 24, and 27 agencies with vacancies and they reported 46% (2000), 68 % (2004), and 57% (2008) of their vacancies. If we were to include 2012, the percentage would be 0 % since no vacancies occurring since March, 2012 have been reported by agencies.

We are limited in what we can infer from the percentage of vacancies reported by individual agencies since not all agencies had vacancies during the periods we examine. In addition, the number of tasks and the appointment authority under which general counsels are appointed are correlated with whether an agency had a vacancy during the windows we examine.

In Table 2 we present a cross-tab of the number of vacancies listed in the *Plum Books* in the 2000, 2004, and 2008 period and whether an agency has an appointed general counsel. What is clear is that no agency had more than 3 vacancies in a given time period and a non-appointed general counsel. Agencies with non-appointed general counsels in this data are smaller, have fewer tasks, and fewer vacancies. This makes estimating effects of tasks and appointed general counsels on percentage of vacancies reported difficult since there are few or no cases in many cells.

[Insert Table 2 about here.]

Nonetheless, we include in Figure 3 simple graphs of the estimated effects of the number of tasks and appointed general counsels on the reporting of vacancies. The figure illustrates that for smaller agencies (i.e., those with fewer appointed positions), the effect of the number of tasks on reporting is influenced by the presence or absence of an appointed general counsel.¹⁹ When agencies have an appointed general counsel, an increase in tasks is correlated with a lower percentage of vacancies being reported. When agencies have a non-appointed general counsel, a greater number of tasks is correlated with a *higher* percentage of vacancies reported. In these cases, however, there is a notable difference in the task environments of the agencies with and without appointed general counsels. Agencies without appointed general counsels have fewer tasks on average and this makes it impossible to tell if the apparent relationship between tasks and reporting of vacancies in these small agencies is caused by other factors specific to those agencies.

The bottom panel of the figure indicates that in larger agencies (which all have appointed general counsels) a higher number of tasks is correlated with fewer vacancies being reported.

¹⁹ These figures can also be produced using agency employment or other measures of agency size or number of agency tasks and the patterns are similar.

Agencies with a greater number of tasks have to prioritize and reporting vacancies under FVRA is prioritized less the greater the number of agency tasks, particularly in the largest agencies with the most statutory responsibilities.

[Insert Figure 3 about here.]

In more fully specified models of the percentage of vacancies reported the average estimated effect of appointed general counsels is indistinguishable from zero in models without the interaction with agency tasks (Table 3).²⁰ In models with the interaction, the estimated effect of having an appointed general counsel is actually estimated to be positive, indicating that appointed general counsels report a *higher* percentage of their vacancies than non-appointed general counsels. As suggested by the figure and the discussion above, however, it is difficult to estimate the effect of appointed general counsels since we only have cases with non-appointed general counsels in this data for the smallest agencies.²¹ We cannot tell from the data the effect of appointed general counsels on performance for the larger agencies and thus can only guess about the overall effect.

[Insert Table 3 about here.]

In total, the evidence from an examination of the percentage of vacancies is suggestive. The data demonstrate that, while reporting is best during the 2003-2008 period, there is still widespread non-compliance with the FVRA. As before, agencies with appointed general counsels and greater numbers of tasks generally comply less with FVRA. In agencies without appointed general counsels, increasing their tasks is estimated to *increase* the proportion of their vacancies that they report. This may suggest that smaller agencies with fewer government-wide

²⁰ We have also estimated generalized linear models with a logit link and binomial family since the simple OLS estimates can produce predicted values greater than 1 and less than 0. The substantive interpretation of such models is the same.

²¹ Agencies with non-appointed general counsels are never mentioned in more than 28 titles of the U.S. Code in the data. The average for an agency with an appointed general counsel is 31 titles.

statutory mandates may not comply with FVRA for different reasons. The overall effect of appointed general counsels on FVRA reporting was difficult to parse out because few of the larger agencies had non-appointed general counsels.

Discussion and Conclusion

This paper contributes to a growing literature exploring the relationship between appointees, careerists, and federal management performance. It uses a unique new measure of performance that identifies good performance and is applicable across agencies and years. The paper examined the influence of appointees on federal management performance in the context of compliance with the Federal Vacancies Reform Act of 1998. Like some other recent large-N research it shows a correlation between appointees and management performance (see, e.g., Suleiman 2003). The results indicate that agencies with appointed general counsels are significantly slower in notifying GAO of vacancies in their Senate-confirmed positions. This paper suggests two links between appointees and performance outcomes. The first is the regular turnover of appointees that has been shown to be harmful to performance in other contexts (Boylan 2004). GAO (2003) indicated that agencies with appointed general counsels were less likely to understand their legal responsibilities under the FVRA. Regular turnover among appointed general counsels makes it systematically less likely that agency legal officials are attuned to their legal obligations under the FVRA.

The second link is how appointee management interacts with the number and composition of tasks. The estimated effect of appointee management was estimated to be largest for agencies with many tasks and diverse statutory responsibilities. Agencies with a greater diversity of tasks with appointed general counsels were significantly slower than agencies without appointed general counsels and agencies with general counsels but a limited number of

policy responsibilities. When agencies have a number of responsibilities and limited time, attention and resources, they must prioritize. They prioritize predictably by emphasizing those tasks that are easily measured and complement activities they already perform. The distortion in the allocation of effort across tasks may be largest for appointed officials. They are most sensitive to political demands and aware of which tasks are monitored by political principals.

Appointed officials are also the most likely to recognize tasks that we call “politicized tasks” or tasks that added to agency responsibilities as part of larger political struggles. Some agencies, particularly more politicized agencies, are caught up in the larger political battles of the era. They let political judgments influence their compliance with straightforward legal requirements imposed by Congress. Others see additional tasks such as FVRA and reporting requirements as the collateral damage of ongoing political spats between the branches. Members of Congress themselves disagree about the importance of tasks such as FVRA. They also have different views about the larger debates that spawned the new requirements. Yet, agencies are legally obligated to comply.

The general problem of FVRA compliance has broad applicability. The variation in compliance with FVRA is disconcerting. Which other federal statutory mandates do agencies feel comfortable ignoring? An essential component of federal executive management is determining whether statutorily mandated tasks are politicized tasks or serious obligations worth a high priority and significant effort and many resources. Perhaps allocating few resources to FVRA compliance is the right decision given other agency legal obligations. What is problematic for democratic governance, however, is that agencies are forced to decide what laws to ignore and that they do this in different ways depending upon the number of policies they must implement and whether appointees or careerists make this decision.

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Figure 1: Average Days to Report Vacancies to GAO by General Counsel Type

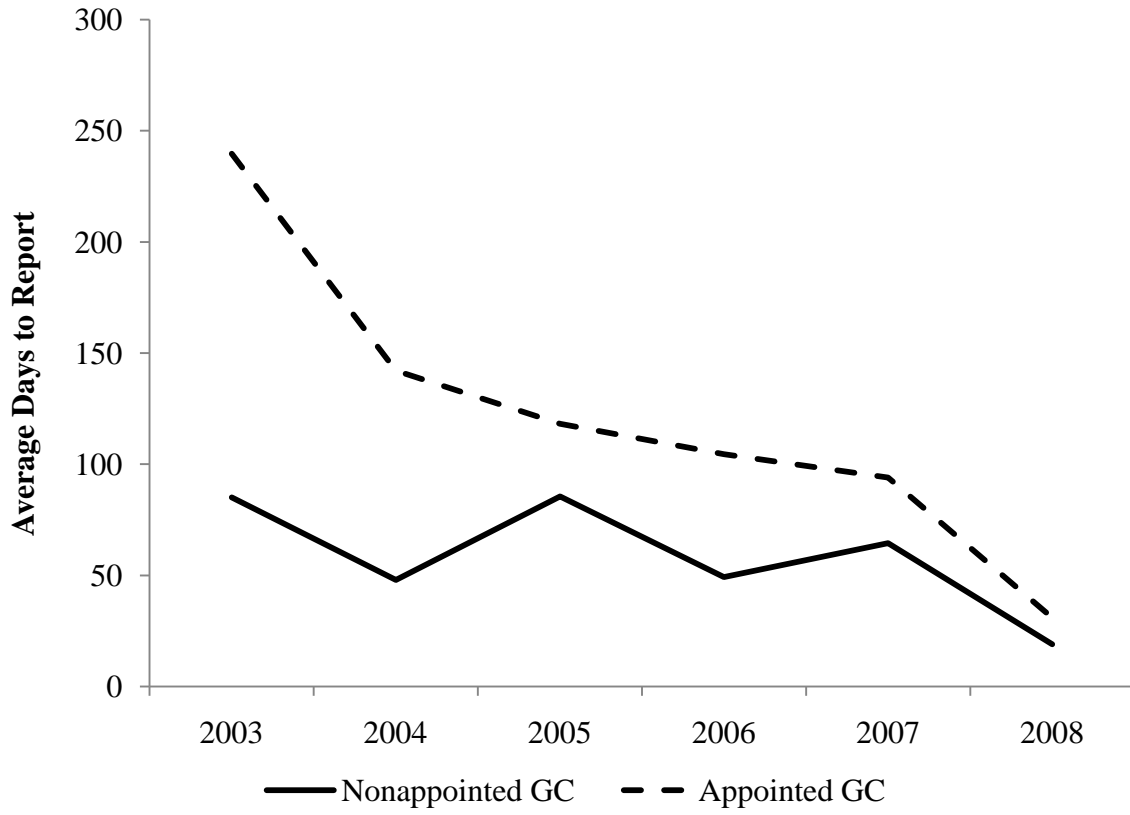


Figure 2. Estimated Influence of Number of Agency Tasks on Number of Days for Agency to Report Vacancy by Appointment Authority of General Counsel, 2003-2008

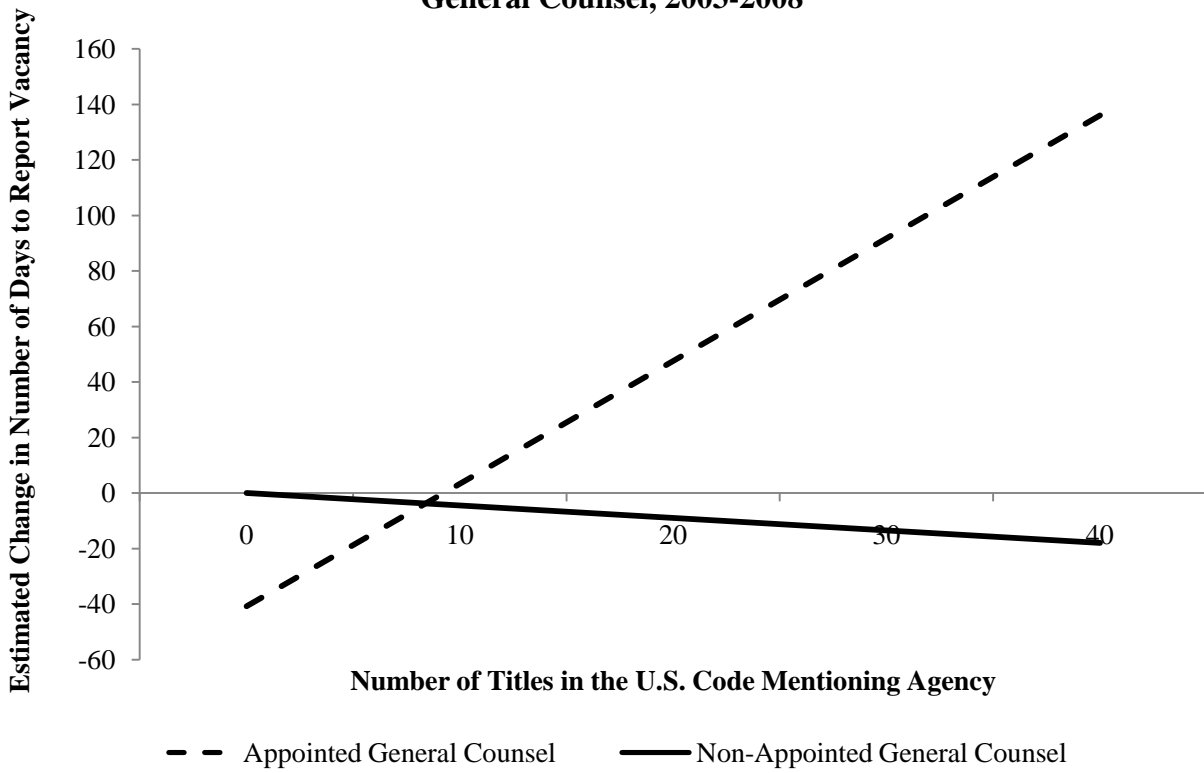
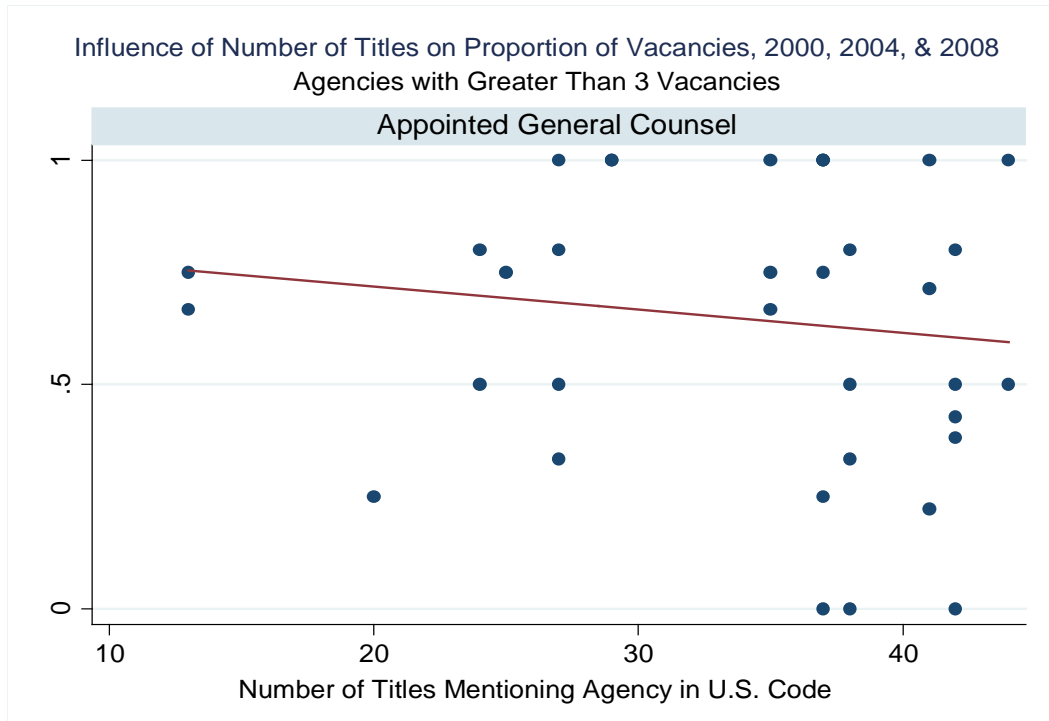
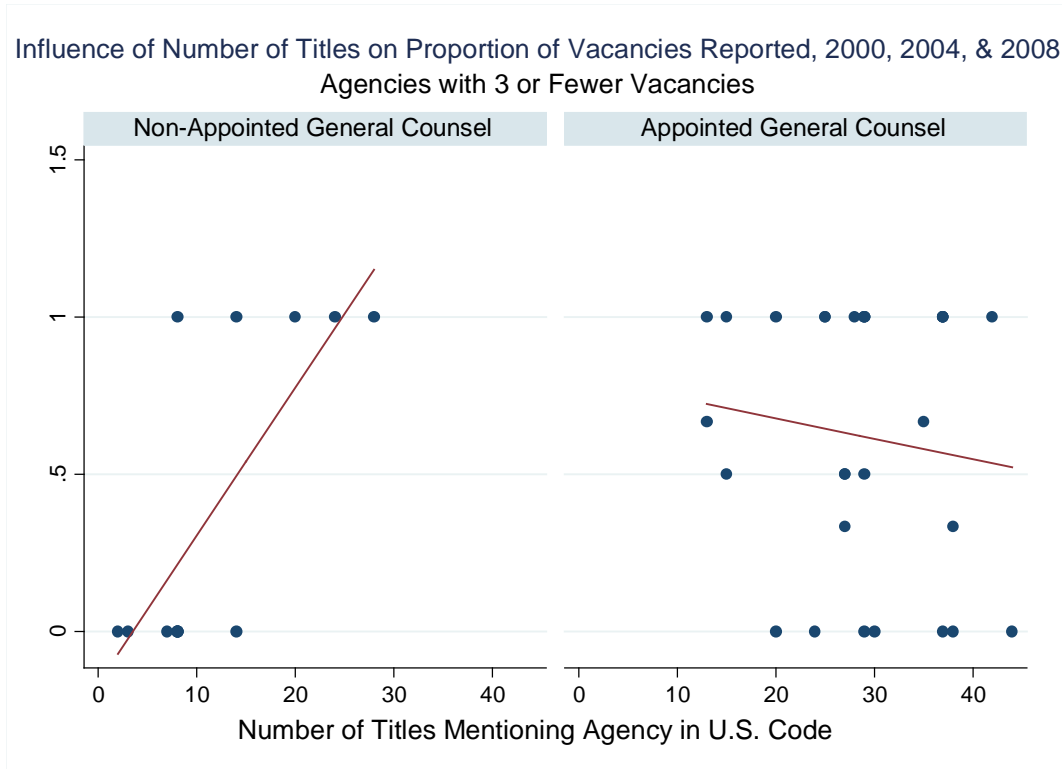


Figure 2. Influence of the Number of Titles on Proportion of Agency Vacancies Reported, 2000, 2004, 2008 by Appointed General Counsels and Number of Agency Vacancies



Note: Agencies divided by number of agency vacancies since there are no cases where an agency has an appointed general counsel and more than 3 vacancies.

Table 1: OLS Estimates of Time to Notify GAO

Covariates	(1)	(2)	(3)	(4)	(5)	(6)
<i>Key Independent Variables</i>						
Appointed General Counsel	71.03 (20.44)	73.72 (20.86)	-40.75 (43.58)	-20.89 (50.7)	-0.24 (36.85)	-77.25 (52.56)
Statutory Tasks	3.94 (1.66)	2.94 (1.51)	-0.45 (1.84)	-0.74 (1.94)	3.39 (1.74)	-0.94 (2.23)
Appointed GC*Tasks			4.87 (1.85)	4.11 (1.94)		4.86 (2.52)
<i>Controls</i>						
Agency Size	5.47 (5.99)	6.58 (5.60)	7.78 (6.09)	8.49 (5.8)	12.77 (7.68)	13.29 (7.61)
Independent Agency	52.81 (28.53)	29.07 (28.13)	53.36 (28.42)	29.61 (28.09)	37.77 (31.52)	46.09 (32.43)
Total PAS Appointees	-0.09 (0.22)	0.06 (0.21)	-0.13 (0.23)	0.02 (0.21)	-0.02 (0.22)	-0.05 (0.23)
Agency in GAO 2003 Report	-66.75 (27.22)	-69.98 (26.61)	-71.56 (28.00)	-74.18 (27.30)	-63.78 (27.52)	-64.77 (27.69)
Positions no longer PAS	108.54 (50.15)	103.03 (47.83)	103.58 (49.82)	99.28 (47.78)	103.68 (49.27)	101.93 (49.26)
Positions Expedited Confirmation	50.41 (40.82)	29.24 (36.05)	48.55 (40.71)	28.10 (36.25)	42.73 (43.99)	41.46 (43.84)
Agency Ideology					-49.03 (23.75)	-41.84 (23.98)
Republican Senate					88.44 (13.31)	82.78 (13.96)
Ideology*Rep. Senate					37.64 (23.74)	28.93 (24.42)
Constant	-128.95 (59.55)	36.05 (6.67)	-52.03 (59.63)	67.96 (70.6)	-196.45 (68.25)	-136.42 (69.23)
Year dummies included	N	Y	N	Y	N	N
R ²	0.10	0.17	0.11	0.18	0.13	0.13
N	415	415	415	415	392	392

Note: Agency size is logged total number of civilian employees in September 2011. For year dummies, 2003 is the base year. Robust standard errors in parentheses.

Table 2. Cross-tab of Number of Vacancies in the *Plum Books* by Appointment Authority of Agency General Counsel, 2000, 2004, and 2008

# of Agency Vacancies	Non-Appointed GC	Appointed GC	Total
1	9	7	16
2	3	10	13
3	1	12	13
4	0	13	13
5	0	5	5
7	0	2	2
8	0	1	1
9	0	1	1
10	0	1	1
21	0	2	2
Total	13	54	67

Table 3. Models of Percentage of Vacancies Reported, 2000, 2004, 2008

Covariates	(1)	(2)	(3)
Appointed General Counsel	0.18 (0.16)	0.93 (0.26)	1.05 (0.30)
Statutory Tasks	0.00 (0.01)	0.05 (0.01)	0.05 (0.01)
Appointed GC*Tasks		-0.05 (0.01)	-0.06 (0.02)
Agency Size			-0.04 (0.04)
Independent Agency			-0.26 (0.18)
Agency in GAO 2003 Report			-0.11 (0.13)
Total PAS Appointees			0.00 (0.00)
2004			0.12 (0.11)
2008			0.03 (0.11)
Constant	0.34 (0.13)	-0.16 (0.18)	0.26 (0.34)
R ²	0.06	0.22	0.28
N	67	67	67

Note: Agency size is logged total number of civilian employees in September 2011. Robust standard errors in parentheses.