

**Congress of the United States**  
Washington, DC 20515

August 24, 2021

The Honorable Gene Dodaro  
Comptroller General  
U.S. Government Accountability Office (GAO)  
441 G Street, NW  
Washington, DC 20548

Dear Comptroller Dodaro:

On July 9, President Biden took the unprecedented and unlawful step of firing the Social Security Administration's (SSA's) Commissioner, Andrew Saul, in an unfortunate choice of politics over people. Commissioner Saul was confirmed by a wide bipartisan margin of 77-16 in the Senate.<sup>1</sup>

Unfortunately, the President chose to politicize an agency that administers benefits to roughly 70 million Americans from across the political spectrum. Politicizing the agency is especially concerning given that doing so violates the letter and spirit of the Social Security Independence and Program Improvements Act of 1994 [P.L. 103-296].<sup>2</sup>

In place of Commissioner Saul, President Biden designated Dr. Kilolo Kijakazi as Acting Commissioner.<sup>3</sup> Clarity over the authorities and the term of an Acting Commissioner will be useful for Congress and Social Security beneficiaries to receive from GAO.

Upon taking office, on January 20, President Biden incorrectly listed Commissioner Saul as Acting Commissioner—an erroneous identification that the White House refused to correct after press inquiries and congressional expressions of concern.<sup>4</sup> That incorrect identification, unfortunately, was a stealth indicator of the President's politicized firing of the Commissioner and Deputy Commissioner of Social Security.

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<sup>1</sup> Commissioner Saul was confirmed on June 4, 2019, for a term expiring January 19, 2025.

<sup>2</sup> Indeed, SSA's website (see <https://www.ssa.gov/history/ssa/ssa2000chapter2.html>), recalls that "Senator Daniel Patrick Moynihan (D, NY), Senate Committee on Finance Chairman, 103rd Congress (1993-1994), was a strong proponent of SSA as an Independent Agency. He argued that such a move would help insulate the program from partisan politics." The law that made Social Security insulated as such was the 1994 Social Security Independence and Program Improvement Act of 1994."

<sup>3</sup> Dr. Kijakazi has served as the Social Security Administration's Deputy Commissioner of the Office of Retirement and Disability Policy.

<sup>4</sup> See "President Joe Biden Announces Acting Federal Agency Leadership," January 20, 2021—Statements and Releases, at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/president-joe-biden-announces-acting-federal-agency-leadership/>

President Biden removed the Commissioner in violation of the conditions set forward in Sec. 702(a)(3) of the Social Security Act (Act) [42 U.S.C. 902]. To date, neither the President nor the White House has provided the public with any findings of neglect of duty or malfeasance in office with respect to Commissioner Saul, which the Act requires. The only public announcement of the firing has been quotes appearing in the press from an unnamed White House source who put forward baseless allegations, expression of possible policy disagreement, and innuendo.

Commissioner Saul, given his management expertise, was remarkably successful in managing service delivery to beneficiaries during the biggest management challenge SSA has faced. Now, as SSA must ensure beneficiary service as we face a choppy road of recovery from the pandemic, Social Security employees and beneficiaries have been thrown into an unfortunate state of uncertainty and discontinuity driven by politics.

There has been no public announcement of the change in leadership assignments at SSA from either the White House or SSA. White House officials have suggested to Congress that beneficiaries could find out by looking at a revised organization chart that was evidently changed during the stealth firing process and is buried somewhere in SSA's website.

The only notification of the President's unlawful firing of Commissioner Saul provided to the Senate Finance and House Ways and Means Committees came in the form of an email sent by legislative affairs officials at SSA to committee staff on Friday, July 9, 2021 at 4:30 p.m. with a message "FYI," followed by a copy of a "Commissioner Broadcast" from Dr. Kijakazi reproduced below:

From: ^Commissioner Broadcast <[Commissioner.Broadcast@ssa.gov](mailto:Commissioner.Broadcast@ssa.gov)>  
Sent: Friday, July 9, 2021 4:30 PM  
Subject: Change in Leadership  
A Message to All SSA and DDS Employees  
Subject: Change in Leadership

Today, President Biden made the decision to change agency leadership and has asked me to serve as the Acting Commissioner. Over the past several months, I have gained great appreciation for SSA and I have witnessed the commitment you bring to public service each day.

I thank former Commissioner Saul and Deputy Commissioner Black for their service to the public. I am a strong believer in collaboration and Scott Frey and I look forward to working with all of you. This is a pivotal time for the agency and the nation and I know we can overcome any challenge when we confront it together.

Kilolo Kijakazi  
Acting Commissioner

SSA officials waited six weeks to begin to initiate any direct outreach from the Acting Commissioner to Republican offices in Congress—offices that represent significant numbers of constituents whose benefits are administered by SSA.

The Federal Vacancies Reform Act (Vacancies Act) was signed into law in 1998 to provide the means by which a government employee may temporarily perform functions and duties of a vacant advice-and-consent position in an executive agency.<sup>5</sup> The Vacancies Act provides three classes of people who may serve temporarily, including: the first assistant to the office of such officer; someone the President has directed to serve to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations in section 3346 of the Vacancies Act; or, if there is no first assistant, the President may direct an officer or employee of the executive agency to perform the functions and duties, subject to the time limitations.

Additionally, section 3346 of the Vacancies Act provides that a person may serve “for no longer than 210 days beginning on the date the vacancy occurs,” or “once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.”

Finally, the Vacancies Act limits an officer or employee’s ability to perform “the functions and duties” of a vacant advice-and-consent office. Section 3348 contains a definition providing that a “function or duty” must be (1) established either by statute or regulation and (2) “required” by that statute or regulation “to be performed by the applicable office (and only that officer).”

Given the Vacancies Act and designation of Dr. Kijakazi as Acting Commissioner, there are several questions that must be considered and answered:

1. Dr. Kijakazi previously served as the Social Security Administration’s Deputy Commissioner of the Office of Retirement and Disability Policy.
  - a. Please confirm that Dr. Kijakazi serves in compliance with the Vacancies Act, including having served in a Deputy Commissioner role for at least 90 days prior to the unlawful firing of Commissioner Saul.
  - b. Please confirm that Dr. Kijakazi is paid at a rate equivalent to at least a GS-15 on the federal pay scale.
2. Section 3346 of the Vacancies Act states that the Acting Commissioner cannot serve for “longer than 210 days beginning on the date the vacancy occurs.”
  - a. Please provide the exact date and time for when Dr. Kijakazi’s start-time clock began.
  - b. Please identify the possibilities where the term clock could re-start (e.g., if the President makes a nomination for the position of Commissioner).
  - c. Under what conditions could there be pauses and re-starts of the clock?

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<sup>5</sup> 5 U.S.C. §§ 3345 – 3349c.

- d. If no nominee is put forward by the President, and 210 days elapse from the time the President unlawfully appointed Dr. Kijakazi as Acting Commissioner, who serves as the ensuing Acting Commissioner or chief administrator of Social Security?
3. The Vacancies Act limits an officer or employee’s ability to perform “the functions and duties” of a vacant advice-and-consent office. Section 3348 of the Vacancies Act contains a definition providing that a “function or duty” must be (1) established either by statute or regulation and (2) “required” by that statute or regulation.
    - a. Please define “functions and duties” for the purposes of the Social Security Commissioner.
    - b. Please define what are, and are not, nondelegable duties of the Commissioner of the Social Security Administration.
    - c. Please define what are, and are not, delegable duties of the Commissioner of the Social Security Administration.
    - d. Who has authority to delegate duties upon the Commissioner’s departure?
    - e. If the duties are deemed delegable duties, do the duties have to be delegated by someone with the authority to do so?
    - f. What “functions and duties,” if carried out by an Acting Commissioner of the Social Security Administration, constitute violations of the Vacancies Act?

We appreciate, in advance, the needed clarity that your informed responses can help provide, especially during these times of pandemic-induced uncertainty of Social Security service delivery to beneficiaries—uncertainty that has, unfortunately, been amplified by politically driven decisions by the administration. Please provide responses by September 15.

We remain concerned that administration of Social Security benefits that touch the lives of constituents from across the political spectrum now faces discontinuity, heightened uncertainty, and politicization. Retirees, disabled American workers, and deserving low-income Americans from across the political spectrum deserve better.

Sincerely,



Mike Crapo  
United States Senator



Kevin Brady  
Member of Congress



Todd Young  
United States Senator



Tom Reed  
Member of Congress



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Tim Scott  
United States Senator