RESTORING DEMOCRATIC ACCOUNTABILITY IN THE EXECUTIVE BRANCH

Congress should

- amend the Vacancies Act to require that all acting cabinet members be confirmed by the Senate;
- establish Senate-confirmed civil service positions to serve as acting cabinet members during presidential transitions;
- eliminate the delegable duties loophole in the Vacancies Act, which allows the president to bypass the act's time limits and other limitations;
- amend the Administrative Procedure Act to require that all final rules be signed by a Senate-confirmed officer; and
- amend the Administrative Procedure Act to forbid ratification of actions that violate the Appointments Clause.

The Constitution's Appointments Clause requires, as a default rule, that officers of the United States be nominated by the president and confirmed by the Senate. In *Federalist* no. 76, Alexander Hamilton predicted that the Senate's confirmation power "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters." Hamilton warned against the danger of unilateral presidential appointments, arguing that "a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body."

In *Edmond v. United States*, the Supreme Court similarly recognized that the Appointments Clause "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." In *Ryder v. United States*, the Court explained that the Senate's duty to vet nominees "is a bulwark against one branch aggrandizing its power at the expense of another branch." Thus, as the Court put it in *Freytag v. Commis-*

sioner, "the principle of separation of powers is embedded in the Appointments Clause." If the Senate improperly abdicates its duty to check the executive, it is ultimately *the people* who suffer. As the Court added in *Freytag*, the "structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic."

Unfortunately, presidents of both parties have exploited several loopholes to frequently bypass Senate consent with impunity. Presidents have filled important offices for years at a time with officials who were never confirmed by the Senate. Final decisions affecting millions of citizens have been made by government employees who lack the democratic accountability that Senate confirmation provides: enforcement actions brought by a Department of Justice official whose policy priorities were never examined in a Senate hearing; sweeping environmental rules issued by an official who could not have won Senate confirmation; and cabinet departments led by officials whose basic competence to take on such weighty responsibilities was never endorsed by the Senate.

The people, through their elected senators, have lost an important voice in the functioning of the executive branch. To address these harms, Congress can and should take several measures to restore the proper role of the Senate in the federal appointments process.

Amendments to the Federal Vacancies Reform Act of 1998

Limiting Acting Cabinet Members to Senate-Confirmed Officers

Obtaining Senate consent takes time. That means that when an office becomes vacant—especially when that vacancy is unexpected—the office can remain vacant for a lengthy period. For that reason, Congress has created a procedure for the president to temporarily fill vacancies without Senate consent. This procedure for appointing "acting officers" has been implemented via a series of statutes known as Vacancies Acts, the most recent of which was enacted in 1998.

But if the Constitution requires that officers must be confirmed by the Senate, how can unconfirmed acting officers be constitutional? The answer is that *some* acting officers are constitutionally permissible, due to an exception to the Constitution's default rule. The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Thus, it is permissible for a statute (like the Vacancies Act) to exempt particular "inferior officers" from Senate consent.

Who are inferior officers? The Supreme Court held in *Edmond* that they are "officers whose work is directed and supervised at some level by others

who were appointed by Presidential nomination with the advice and consent of the Senate." As the Court explained, this definition makes sense "in the context of a Clause designed to preserve political accountability." Limiting inferior officers to only those with direct supervision ensures that senators remain accountable for every officer's performance. It guarantees that even if the Senate did not vet and confirm a particular inferior officer, it at least vetted and confirmed that officer's supervisor.

Unfortunately, the Vacancies Act likely exceeds the permissible scope of this "inferior officers" exception. The Vacancies Act allows acting officers to serve without Senate consent not only in inferior offices but also in cabinet-level positions. These top-level positions have no superior but the president and are indisputably *not* inferior. And although acting officers have time limits on their service, they otherwise possess all the authority of any other occupant of their office.

Thus far, lower courts have declined to hold that the service of acting cabinet members is unconstitutional, relying on the 1898 Supreme Court precedent in *United States v. Eaton*. In that thinly reasoned decision, the Supreme Court seemingly endorsed the constitutionality of serving without Senate consent in noninferior offices, as long as the service is "for a limited time, and under special and temporary conditions." Yet in the century since *Eaton* was decided, courts have declined to put any upper limit on just how long this "special and temporary" service can last. And *Eaton* is in major tension with the Supreme Court's modern approach to the Appointments Clause, since the duration of an officer's service has nothing to do with whether that officer is "directed and supervised."

But Congress need not wait for the Supreme Court to reconcile *Eaton* with modern doctrine. Congress can and should end this practice itself by amending the Vacancies Act. Specifically, Congress should limit eligibility to serve as an acting cabinet-level officer to those who have *already* been confirmed by the Senate to another position within that same department. This action would ensure that the Senate has vetted and approved everyone serving at the top level of government. Of course, such acting officers would not have been confirmed *to the cabinet-level position* itself. But the Supreme Court explained in *Weiss v. United States* that the temporary promotion of Senate-confirmed officers to a higher position is constitutionally permissible. And ensuring that all acting cabinet members have been confirmed by the Senate to *some* position would go a long way toward preventing the elevation of "unfit characters" that the Appointments Clause was designed to guard against.

Such an amendment would mean that presidents could no longer use the Vacancies Act to appoint unconfirmed, unaccountable political loyalists to lead federal departments. To give a concrete example, it would mean that presidents

could no longer do what President Donald Trump did in 2018, when he elevated Matthew Whitaker to be acting attorney general. That move was widely criticized precisely because Whitaker had not been serving in a Senate-confirmed position. Having not had the opportunity to review Whitaker's fitness to serve in the Department of Justice *at all*, the Senate was thus powerless to serve as the "check upon a spirit of favoritism in the President" that the Framers envisioned.

The most common argument against such an amendment is that it would create difficulties in finding acting cabinet secretaries during presidential transitions, especially when the White House is changing parties. It is customary for most Senate-confirmed officials to resign at the end of a presidential administration, thus potentially leaving a new president few Senate-confirmed options to serve as acting secretaries. For example, only 2 of the 15 acting cabinet secretaries at the start of the Biden administration were Senate-confirmed holdovers from the Trump administration; the rest were non-Senate-confirmed career civil servants.

But this problem is not insurmountable. There is no reason that the Senate cannot vet and confirm some already-serving career civil servants for the specific purpose of granting them eligibility to serve as acting cabinet members. Congress can and should create new Senate-confirmed titles that allow presidents to nominate career civil servants to be confirmed for this additional eligibility. This action would ensure that vetted and accountable caretaker acting secretaries are always available.

Eliminating the "Delegable Duties" Loophole in the Vacancies Act

The Vacancies Act places limits on both who can serve and how long they can serve as acting officers. If it did not place such limits, the president would have little incentive to ever nominate anyone for Senate confirmation. The president could simply use indefinite unconfirmed acting officers to fill every position instead.

In 1998, Congress recognized the importance of these limits and added an enforcement mechanism to the Vacancies Act, which mandated that actions taken by invalid acting officers "shall have no force or effect." The intention was that if a purported acting officer stayed in office past the deadline or lacked the required qualifications, that officer's actions could be challenged in court and invalidated.

Unfortunately, this enforcement mechanism has not encouraged compliance as effectively as its drafters expected. That is because under the current text of the Vacancies Act, only actions that qualify as the performance of a "function or duty" of an office can be invalidated, and the act adopts an exceedingly

narrow definition of "function or duty," limited to those functions or duties required "to be performed by the applicable officer (and only that officer)." Crucially, courts have interpreted the parenthetical phrase "and only that officer" to mean that if a duty is delegable, it doesn't qualify as a "function or duty."

In 2004, the D.C. Circuit held that when a statute sets out an officer's authorities, "subdelegation to a subordinate federal officer . . . is presumptively permissible absent affirmative evidence of a contrary congressional intent." Relying on this presumption, the executive branch has consistently argued in court that nearly every power held by nearly every federal official is subdelegable and thus exempt from the Vacancies Act. And when a power of a vacant office is exempt from the act, that power can be performed by *anyone for any length of time* via a delegation of authority, without fear of invalidation.

As law professor Nina Mendelson has explained, the executive branch has exploited this loophole and "effectively created a new class of pseudo-acting officials subject to neither time nor qualifications limits." These pseudo-acting officials are delegated all the functions and duties of a vacant office, but they are not given the "acting officer" title. Thus, as Anne Joseph O'Connell of Stanford Law School notes: "In the first year of an Administration, one sees a lot of 'acting' titles on agency websites. After the Act's time limits run out, one sees 'performing the functions of [a particular vacant office]' language instead." And in many cases, these delegatees are the very same people whose time limit had just run out as acting officers.

Closing this loophole is more important than any other potential reform to the Vacancies Act's time limits or qualification requirements. That is because so long as delegation is available as an alternative to the Vacancies Act, the act's time limits and eligibility requirements can simply be ignored.

The solution is to amend the definition of a "function or duty" in the Vacancies Act to eliminate the parenthetical "(and only that officer)." A function or duty should instead be defined as simply any function or duty assigned to an office by statute or regulation.

During the 1998 Vacancies Act drafting process, some Senate offices feared that this approach would cause too drastic a disruption to government operations in the event that an acting officer's time limit ran out. But those fears were misplaced, because the enforcement mechanism would still only apply to agency "actions" (as defined by the Administrative Procedure Act) that can be challenged in court. That is still a relatively narrow category, one that leaves routine day-to-day duties outside the scope of invalidation.

Further, the Vacancies Act also allows agency actions to be performed by the agency head, ensuring that they can still be performed by *someone* even after its time limits expire. And the act can and should be amended to clarify

that other officers who were assigned some of the same powers as a vacant office can also continue exercising them.

What should *not* be allowed is for *all* the powers of a vacant office to be performed indefinitely by a delegatee, including the power to take final agency actions. Such a loophole allows the executive branch to effectively exempt offices from the Senate confirmation requirement at its choosing.

Amendments to the Administrative Procedure Act

Forbidding Subdelegation of Final Rulemaking Power to Non-Senate-Confirmed Officials

The decision to issue a final rule is among the most consequential that an officer can make. Such decisions can directly affect millions of citizens. And when policy decisions are made by the executive branch rather than Congress, the people cannot directly praise or blame their own elected representatives. Preserving some democratic accountability in the form of Senate advice and consent, then, is particularly important for officers with rulemaking power.

Yet the executive branch has frequently thwarted such democratic accountability by subdelegating final rulemaking authority to officers who have not been confirmed by the Senate. In a study of all Department of Health and Human Services rules issued during a 17-year period, 2,094 of 2,952 total rules (71 percent) were issued by non-Senate-confirmed officials. Looking only at rules deemed "significant" by the Office of Management and Budget during that time, non-Senate-confirmed employees issued 254 of 755 significant rules (34 percent).

When rules are issued by non-Senate-confirmed agency employees, it is usually because rulemaking power has been subdelegated from a Senate-confirmed position, *not* because Congress chose to assign rulemaking power to an officer exempt from Senate consent. Such subdelegations thwart democratic accountability for the same reasons that officials indefinitely "performing the functions" of an office via delegation thwart democratic accountability. In both cases, consequential policy decisions are made by officials whose character and judgment has never been examined by the Senate. And if an unpopular decision is made, the citizens who are affected cannot hold their elected senators accountable for confirming the officer who made that decision.

One approach to solving this problem would be to amend the statutes defining the powers of particular offices to clarify that their final rulemaking authority cannot be subdelegated to an employee who has not been confirmed by the Senate. But with so many positions in the federal government, this approach would require hundreds of separate amendments.

A simpler, more straightforward, and more universal approach would be to amend the Administrative Procedure Act (APA), which defines the requirements for agency rulemaking. Congress could amend the APA to require that a final rule must be signed by a Senate-confirmed officer to be valid. With this one change, all subdelegations of rulemaking authority to non-Senate-confirmed officials would become inconsequential. Those officials would no longer be able to use that subdelegated authority to issue final rules on their own. Instead, a vetted and confirmed officer would be required to take accountability for every rule. And if Congress is unwilling to go that far, it could at least require the sign-off of a Senate-confirmed officer for some *subset* of particularly important rules, such as those that Office of Management and Budget has deemed "significant."

Forbidding Ratification of Actions Taken in Violation of the Appointments Clause

Non-Senate-confirmed acting cabinet members and non-Senate-confirmed issuers of final rules are both on shaky constitutional footing. Yet a pernicious legal doctrine currently insulates both types of officials from any consequence for potentially violating the Appointments Clause. Not only that, but the doctrine also prevents courts from even *deciding* the legal question of whether such officials have violated the Appointments Clause. This is the doctrine of "ratification."

The D.C. Circuit has explained that "ratification occurs when a principal sanctions the prior actions of its purported agent." And the D.C. Circuit has extended this doctrine to cover not just purported *agents* but also purported *predecessors*. The court has held that "a properly appointed official's ratification of an allegedly improper official's prior action . . . resolves the claim on the merits by remedying the defect (if any) from the initial appointment." When a rule issued by acting attorney general Matthew Whitaker was challenged in court, the D.C. Circuit in *Guedes v. BATF* upheld the rule solely on the grounds that it had since been ratified by Whitaker's Senate-confirmed successor William Barr. And challenges to a rule issued by a non-Senate-confirmed employee were similarly thwarted by the ratification of the rule by the employee's Senate-confirmed superior.

Because ratification was treated as resolving these cases on the merits, the courts *never decided* the constitutional questions at issue. Ratification thus stands in the way of the development of the law, giving the executive branch the security to continue to engage in questionable exercises of power and evade review by ratifying only those particular actions that are challenged in court.

Congress recognized precisely these problems in 1998, when the D.C. Circuit had recently accepted the ratification of an action taken in violation of the Vacancies Act. To remedy that problem, Congress made clear in the updated Vacancies Act that actions taken in violation of the act "may not be ratified." And in the 1998 Senate report for the act, the committee noted that the ban on ratification was included as a direct response to the D.C. Circuit's ratification decision. "If any subsequent acting official or anyone else can ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent."

Exactly the same reasoning explains why ratification should not be allowed for actions taken in violation of the Appointments Clause. Congress took the correct approach in 1998, and it should follow that model to stop the ratification of actions taken in violation of the Appointments Clause. This modification can be achieved by the addition of a single sentence to the APA, modeled on the language in the Vacancies Act: "An action taken in violation of the Appointments Clause may not be ratified."

It is ironic that under current law, violations of a provision of the *Constitution* (the Appointments Clause) are more insulated from consequence and review than violations of a provision of a *statute* (the Vacancies Act). This proposed amendment to the APA would end that imbalance and finally allow the courts to fully interpret and enforce the limitations of the Appointments Clause.

Suggested Readings

Berry, Thomas. "Closing the Vacancies Act's Biggest Loophole." Cato Institute Briefing Paper no. 131, January 25, 2022.

———. "Is Matthew Whitaker's Appointment Constitutional? An Examination of the Early Vacancies Acts." *Yale Journal on Regulation Notice & Comment* (blog), November 26, 2018.

———. "*S.W. General*: The Court Reins In Unilateral Appointments." In *Cato Supreme Court Review: 2016–2017*, edited by Ilya Shapiro. Washington: Cato Institute, 2017, pp. 151–80.

———. Testimony on Federally Incurred Cost of Regulatory Changes and How Such Changes Are Made Before the Senate Homeland Security and Governmental Affairs Committee, 116 Cong., 1st sess., July 17, 2019.

Erickson, Angela C., and Thomas Berry. "But Who Rules the Rulemakers? A Study of Illegally Issued Regulations at HHS." Pacific Legal Foundation, April 29, 2019.

Hamilton, Alexander. *Federalist* Nos. 76 and 77.

Mendelson, Nina A. "The Permissibility of Acting Officials: May the President Work around Senate Confirmation?" *Administrative Law Review* 72, no. 4 (2020): 533–606.

O'Connell, Anne Joseph. *Acting Agency Officials and Delegations of Authority*. Administrative Conference of the United States (2019).

———. "Actings." *Columbia Law Review* 120, no. 3 (2020): 613–728.

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