

## ROADMAP FOR RENEWAL

### Strengthen Congress's Capacity to Fulfill its Constitutional Role

#### **III. Re-establish Congress's role of providing advice and consent over federal officer nominations**

The Constitution provides that the Senate shall provide advice and consent on nominations of certain senior executive branch officials. The Federal Vacancies Reform Act (FVRA) of 1998 was enacted to provide a process for filling vacancies, but does not involve Congress, reducing a core check it has on executive agencies. For Congress to serve its role as a co-equal branch, it must reassert its authority over this process. To do this, Congress must:

- Limit the powers of Acting officials over personnel;
- Limit the amount of time that a position can be filled under the FVRA;
- Clarify that the FVRA is not available when the President fires a confirmed official;
- Require a public statement by the President to fill a position under the FVRA; and
- Reconcile agency-specific succession statutes to address current ambiguities.

#### **The Problem**

Congress enacted the FVRA under the assumption that the President and Congress would be substantially aligned in wanting to fill vacant executive branch positions that require Senate confirmation, but that the natural process would take time. The FVRA provides a way for the President to temporarily fill a position with a political appointee rather than have the acting official be a civil servant, defined as the "first assistant" in the statute. Therefore, the FVRA was designed to bridge reasonable gaps in the appointment process.

This assumption no longer holds in today's polarized political environment.

Bypassing the Senate with acting positions. During the Obama administration, the Senate and President were unable to agree on nominees to fill a variety of vacancies from the FEC, NLRB, DOJ, and Treasury. The Senate wanted to leave some positions vacant. In a number of cases, the President tried to bypass Congress to fill open slots, including at NLRB, DOJ, Treasury, in addition to Inspector General roles across the government. Prof. Anne O'Connell has noted that the [Obama administration shifted to using acting positions in its second term](#)<sup>1</sup>, even after Congress passed the 2012 Presidential Appointment Streamlining Act, which explicitly relinquished Congressional authority over certain positions.

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<sup>1</sup> Jen Kirby, *A top official at the Justice Department is resigning. The Federal Vacancies Act has a solution for that* (Feb. 9, 2018), Vox. Available at <https://www.vox.com/2018/1/30/16924764/trump-government-appointees-vacancies-act>.

President Trump has bypassed Congress to fill vacancies across a much larger portion of the federal government (albeit for sometimes different reasons). President Trump has used the FVRA to fill positions ranging from U.S. Attorneys to independent commissions and agencies like the SEC and CFPB and the Census Bureau to more senior roles such as the Associate Attorney General. In some cases, acting officials served out the time allowed under the FVRA, only to have another acting official take their place. As of October 2018, [139 Senate-confirmed positions have no nominee](#).<sup>2</sup>

**Lack of enforcement for FVRA.** Finally, the Congressional Research Service has identified more [technical concerns](#), where clarifications could be useful.<sup>3</sup> There is currently no enforcement mechanism for the law. Congress often isn't notified when positions are filled. Some authorizing statutes have succession plans that conflict with the FVRA, creating uncertainty about what discretionary appointment authority the President has in these situations.

## Proposed Solutions

### **Limit the amount of time that a position can be filled under the FVRA**

- Amend the FVRA to clarify that a position must be filled within 210 days, and once that period comes to an end, the position should only be occupied by a career official in the agency.
- Amend the FVRA to provide that if a nomination fails, the Acting position should be occupied by a career official.

### **Clarify that the FVRA is not available when the President fires an official**

- Amend the FVRA to make explicit that in the event a Senate-confirmed official is fired, a career official should fill the vacancy until a new confirmation.

### **Require a public statement by the President to fill a position under the FVRA**

- Currently, the Comptroller General is required to report to Congress on when positions are filled under the FVRA, and the reports are not up to date. This should be changed to require the President to make a prompt public announcement.

### **Reconcile agency-specific succession statutes to address current ambiguities**

- Congress should add a provision to the FVRA clarifying that, in the event of any conflict with an agency-specific succession statute, the requirements of the FVRA control.

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<sup>2</sup> *Tracking how many key positions Trump has filled so far* (October 22, 2018), The Washington Post. Available at [https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?utm\\_term=.dc46b9a8a477](https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?utm_term=.dc46b9a8a477).

<sup>3</sup> Valerie C. Brannon, *The Vacancies Act: A Legal Overview* (July 20, 2018). Available at <https://fas.org/sgp/crs/misc/R44997.pdf>.