



PROTECT the PUBLIC'S TRUST

VIA ELECTRONICAL MAIL

November 6, 2023

Eric J. Soskin
United States Department of Transportation
Office of Inspector General
1200 New Jersey Ave SE
Washington, D.C. 20590

Re: Request for Investigation of Federal Vacancies Reform Act Violations

Dear Mr. Soskin:

Under Article II of the Constitution, presidential nominations for executive and judicial appointments take effect when confirmed by the Senate.¹ In this way, the Framers ensured that the People, through their representatives, maintained a check on which officials would be allowed to administer their government. Subsequently, Congress enacted the Federal Vacancies Reform Act (FVRA)² to further define the limits of the President's power to appoint officials to certain high-ranking government positions in an acting role. It has come to our attention that Ms. Ann Carlson may be holding the position of the Administrator of the National Highway Traffic Safety Administration ("NHTSA") in an acting role, and attempting to take official actions in that role, in violation of FVRA and the United States Constitution.

On March 27, 2023, President Joseph R. Biden, Jr. nominated Ms. Carlson to serve as Administrator of the National Highway Traffic Safety Administration ("NHTSA"). However, following close scrutiny and sharp criticism of her policy positions and lack of experience by members of the public and the Senate Committee on Commerce, Science, and Transportation, the President withdrew her nomination just two months later. Plainly, the Senate did not have confidence in her ability to execute the duties of Administrator in the best interests of the country and the President understood that she was unlikely to ever convince the Senate otherwise.

The will of the People notwithstanding, President Biden thereafter appointed Ms. Carlson to the same office – but in an “acting” capacity. In so doing, President Biden appears to have violated the FVRA and Ms. Carlson's actions taken in the guise of acting administrator “have no force or effect.”³

¹ American Bar Association, Advice and Consent of the Senate – Conversation Starters, https://www.americanbar.org/groups/public_education/programs/constitution_day/conversation-starters/advice-and-consent-of-the-senate/

² (5 U.S.C. § 3345, *et al.*)

³ 5 U.S.C. § 3348(d)(1), (2).



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We therefore request that you promptly investigate these alleged violations of Article II of the Constitution and the FVRA and immediately intervene to stop Ms. Carlson from any attempt to wield the authority of the Administrator unlawfully.

I. Who We Are

Protect the Public's Trust is a group of retired and former public servants dedicated to the idea that public service is a public trust. Too often, we have seen high level government officials, who should be acting as public servants, play fast and loose with the rules that other government officials have to live by, creating the perception of a two-tiered system. Understandably, this has resulted in an unprecedented decline in public trust in our elected officials. We believe that the American people deserve a government that is impartial, free from conflicts of interest and operates without partisan interference or favoritism. Our goal is to ensure our nation fulfills that promise.

II. Background

On January 22, 2021, Ms. Carlson, then an environmental law professor at University of California, Los Angeles ("UCLA"), was appointed to serve as NHTSA's chief counsel. Upon the subsequent resignation of the NHTSA Administrator, President Biden nominated Ms. Carlson to serve as NHTSA Administrator on March 27, 2023.

Certain committee members were outspoken about their concern over her well-known policy priorities as a climate activist and that her lack of experience with traffic safety issues rendered her ill-equipped to take on NHTSA's core mission to "save lives, prevent injuries and reduce economic costs due to road traffic crashes, through education, research, safety standards and enforcement activity."⁴ Indeed, while Ms. Carlson was a professor at UCLA, she provided legal services to Sher Edling, LLP in an attempt to create new climate policy through vehicle fuel economy standards.⁵

On May 30, 2023, President Biden withdrew her nomination, but thereafter appointed Ms. Carlson to lead NHTSA in an "acting" capacity, despite her dubious nomination failing to ever receive a floor vote. Since that time, the NHTSA "has proposed its most-aggressive-ever fuel economy standards that experts warned would substantially increase car prices and force electric vehicle purchases, but which Carlson said would

⁴ Victor Nava, *Biden withdraws Ann Carlson as nominee to lead US auto safety agency after GOP pushes back*, New York Post (May 31, 2023), <https://nypost.com/2023/05/31/biden-withdraws-ann-carlson-as-nominee-to-lead-us-auto-safety-agency-after-gop-pushes-back/>.

⁵ Sen. Cruz, *Chairman Comer Demand Answers From Law Firm Regarding Acting NHTSA Administrator's Role in Frivolous Lawsuits Aimed at Bankrupting Oil Companies*, U.S. Senate Committee on Commerce, Science, & Transportation (Sept. 25, 2023), <https://www.commerce.senate.gov/2023/9/sen-cruz-chairman-comer-demand-answers-from-law-firm-regarding-acting-nhtsa-administrator-s-role-in-frivolous-lawsuits-aimed-at-bankrupting-oil-companies>.



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‘reduce harmful emissions.’”⁶ The administration appears to be attempting to achieve its policy goals through stealth appointments when those goals were rejected by the people’s representatives. We believe this attempt runs afoul of federal law.

III. The Law

The Federal Vacancies Reform Act provides that the President may “direct an officer or employee of [an] Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity” for a prescribed period of time.⁷

But the President cannot appoint an acting officer if (A) during the 365 days prior to the vacancy arising, “such person” did *not* serve for at least 90 days “in the position of first assistant to the office of such officer” and (B) the “President submits a nomination of such person to the Senate for appointment to such office.”⁸

In *National Labor Relations Board v. SW General, Inc.*, the Supreme Court made clear that the President may not bypass the Senate’s advice and consent power by appointing a previously nominated individual to the vacant office in an “acting” capacity.⁹

The determination that the FVRA applies to preclude an individual who has been previously nominated for an office from exercising the authority of that same office in an acting capacity makes perfect sense. Under a contrary reading of the FVRA the Senate’s advice and consent authority would be undermined as the President would be free to populate offices requiring Senate confirmation with individuals in an acting capacity who had already failed to obtain Senate confirmation.¹⁰

Under the FVRA, all actions taken by a person unlawfully appointed to an “acting” capacity “have no force or effect” and “may not be ratified” by a subsequent appointee.¹¹

Additionally, although the Constitutional issue need not be reached here because the FVRA is dispositive, it also seems clear that the Appointments Clause of Article II of the Constitution requiring advice and consent of the Senate *before* an individual can

⁶ Thomas Catenacci, *Republicans aim to strip salary from Biden climate official who kept job after failed Senate confirmation*, Fox News (Sept. 29, 2023), <https://www.foxnews.com/politics/republicans-aim-strip-salary-biden-climate-official-kept-job-failed-senate-confirmation>.

⁷ 5 U.S.C. § 3345(a)(3).

⁸ *Id.* at 3345(b)(1)(A)-(B).

⁹ 580 U.S. 288, 304 (2017) (“prohibiting any person who has been nominated to fill any vacant office from performing that office’s duties in an acting capacity”).

¹⁰ The 1998 Amendments to the FVRA were in reaction, at least in part, to the appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights following his failure to receive confirmation and President Clinton’s withdrawal of his name. *SW General* at __ citing M. Rosenberg, Congressional Research Service, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 1-3 (1998).

¹¹ 5 U.S.C. § 3348(d)(1), (2).



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exercise the power of certain offices would seemingly apply to the office of Administrator of NHTSA and preclude Ms. Carlson's actions as acting Administrator.

IV. Analysis

President Biden's appointment of Ms. Carlson to serve as the acting administrator to the NHTSA and Ms. Carlson's actions taken as acting administrator to the NHTSA appear to violate the Federal Vacancies Reform Act.

Ms. Carlson was nominated to serve as NHTSA Administrator and she did not serve as the first assistant to the Administrator prior to the resignation of the former Administrator. Accordingly, Ms. Carlson's appointment as acting Administrator appears to violate the FVRA.

Because she was appointed in violation of the FVRA, any actions taken in her capacity as "acting" Administrator would properly be given no effect.

Even assuming this interpretation of the FVRA is incorrect (which we do not grant), Ms. Carlson's exercise of the authority of the Administration without the advice and consent of the Senate appears to violate the Appointments Clause of Article II of the Federal Constitution.

V. Conclusion

Presidential nominees must earn their positions through constitutionally sanctioned procedures, not through back-door attempts to thwart the separation of powers in an effort to enact an administration's preferred policy outcomes.

The Office of Inspector General should immediately investigate these violations of the Federal Vacancies Reform Act and prevent Ms. Carlson from engaging in any further *ultra vires* activities.

Sincerely,

Michael Chamberlain
Director
Protect the Public's Trust