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U.S. GOVERNMENT
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118TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
118–282

ENSURING ACCOUNTABILITY IN AGENCY RULEMAKING ACT

NOVEMBER 29, 2023.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JORDAN, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 357]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 357) to require the head of an agency to issue and sign any rule issued by that agency, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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49–006

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ensuring Accountability in Agency Rulemaking Act".

SEC. 2. RULEMAKING REQUIREMENTS.

(a) APPROVAL REQUIRED.—

(1) RULES PROMULGATED BY SENATE CONFIRMED APPOINTEE.—Except as provided in paragraph (3), any rule promulgated under section 553 of title 5, United States Code, shall be issued and signed by an individual appointed by the President, by and with the advice and consent of the Senate.

(2) INITIATION OF RULEMAKING AND REGULATORY AGENDA.—Except as provided in paragraph (3), any rule initiated under section 553 of title 5, United States Code, shall be initiated by a senior appointee.

(3) EXCEPTION.—Paragraph (1) or (2) does not apply if the head of an agency—

(A) determines, on a nondelegable basis, that compliance with the relevant paragraph would impede public safety or security;

(B) submits to the Administrator a notification disclosing the reasons for the exemption; and

(C) publishes such notification, consistent with public safety, security, and privacy interests, in the Federal Register.

(b) OVERSIGHT.—

(1) AGENCY COMPLIANCE.—The head of each agency shall ensure that the issuance of any agency rule promulgated under section 553 of title 5, United States Code, adheres to the requirements of this section.

(2) OIRA GUIDANCE AND COMPLIANCE.—The Administrator shall provide guidance on the implementation of and shall monitor agency compliance with this section.

(c) RULES OF CONSTRUCTION.—This section may not be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(d) DEFINITIONS.—In this section:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

(2) AGENCY.—The term "agency" has the meaning given that term under section 551 of title 5, United States Code.

(3) RULE.—The term "rule" has the meaning given that term in section 551 of title 5, United States Code, and does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

(4) SENIOR APPOINTEE.—The term "senior appointee" means an individual appointed by the President, or performing the functions and duties of an office that requires appointment by the President, or a non-career member of the Senior Executive Service (or equivalent agency system).

Purpose and Summary

H.R. 357, the Ensuring Accountability in Agency Rulemaking Act, introduced by Rep. Ben Cline (R–VA), requires presidentially nominated and Senate-confirmed appointees to issue and sign agency rules, and codifies a limitation on agency rulemaking authority established in Executive Order 13,979.

Background and Need for the Legislation

The Administrative Procedure Act and the Office of Information and Regulatory Affairs

The Administrative Procedure Act (APA) provides standards for agency rulemaking.[1] Typically, agencies issue rules through "informal" or notice-and-comment rulemaking by publishing a "notice of proposed rulemaking in the Federal Register," providing an opportunity for public feedback (normally through the submission of written comments), and publishing the final rule at least thirty days before its effective date.[2]

Congress established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) in 1980,[3] and, in 1981, then-President Reagan issued an executive order requiring federal agencies to submit "major rules" (including those with an annual effect on the economy of at least $100 million) to OIRA for review.[4] In 1993, then-President Clinton issued an executive order that revoked President Reagan's executive order, but which continued OIRA review of "significant regulatory actions" (including those with an annual effect on the economy of at least $100 million).[5] Subsequent presidential administrations have retained OIRA regulatory review,[6] which "helps ensure that agencies' rules reflect the President's policies and priorities."[7]

The Administrative State and the Ensuring Accountability in Agency Rulemaking Act

The administrative state exercises the legislative, executive, and judicial powers of the federal government by issuing rules carrying the force of law, enforcing those same rules, and adjudicating disputes that arise under them.[8] By consolidating these constitutionally separate powers and making rules through a process that is much less rigorous than what the Constitution requires for legislation, while hiding behind a lack of electoral accountability, the administrative state has imposed a quantity and quality of policies that never could have been passed into law by the House, the Senate, and the President.[9] For example, in 2021, Congress passed 143 laws while federal agencies issued 3,257 rules.[10] Such agency rules bring with them an estimated annual cost of $1.927 trillion, the equivalent of $14,684 per U.S. household each year.[11]

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[1] *See, e.g.*, 5 U.S.C. § 553.

[2] Administrative Conference of the United States & ABA Section of Administrative Law and Regulatory Practice, *Administrative Procedure Act*, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (May 25, 2022) (cleaned up); *see* 5 U.S.C. § 553.

[3] 44 U.S.C. § 3503(a).

[4] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); *see* Jim Tozzi, The Center for Regulatory Effectiveness, *The Iconic Executive Order 12291: The Precedent for the Preservation of Critical Executive Orders and Centralized Regulatory Review* (Aug. 2018) ("Executive Order 12291's landmark achievement was to require that regulatory agencies perform benefit/cost analyses of regulations and to submit them to OMB for review.").

[5] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[6] *See, e.g.*, Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (Apr. 6, 2023).

[7] Maeve P. Carey & Curtis W. Copeland, Congressional Research Service, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs* 1 (Mar. 21, 2011).

[8] Michael Uhlmann, *A Note on Administrative Agencies*, THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2014).

[9] *See* U.S. CONST. art. I § 7.

[10] CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 7 (Oct. 26, 2022).

[11] *Id.* at 6.

The problem of the administrative state usurping Congress's constitutional legislative power has been exacerbated by some agencies allowing career bureaucrats—rather than presidential appointees—"to authorize, approve, and serve as the final word on regulations."[12] For example, career employees and inferior officials who were not confirmed by the Senate issued 2,094 of the 2,952 rules (more than 70%) issued by the Department of Health and Human Services (HHS) from 2001 through 2017.[13] Similarly, career employees issued 1,860 of the 1,891 rules (more than 98%) issued by the Food and Drug Administration, an agency within HHS, during this same period—and 385 of these rules (more than 20%) were signed by a single career employee.[14] In one particularly egregious example, a "tenure-protected civil servant" at the National Highway Traffic Safety Administration "grant[ed] exemptions to automakers from a theft prevention regulation; issued notices of proposed rulemakings concerning fuel economy calculations and safety standards; and delayed, for a year or more, the effective date of more rigorous safety regulations concerning many auto parts."[15]

As then-President Trump explained, the practice of "allowing career officials to authorize, approve, and serve as the final word on regulations . . . transfers the power to set rules governing Americans' daily lives from the President, acting through his executive subordinates, to officials insulated from the accountability that national elections bring," which "undermines the power of the American people to choose who governs them."[16] Accordingly, on January 18, 2021, then-President Trump issued Executive Order 13,979 to address the problem of career bureaucrats imposing rules of behalf of federal agencies.[17] Specifically, Executive Order 13,979 required informal notice-and-comment rules to be initiated and signed by senior appointees, subject to exceptions for "public safety or security."[18] The executive order also provided for review of existing rules by agency heads and the OIRA Administrator.[19] However, President Biden revoked this executive order on February 24, 2021, within weeks of taking office.[20]

The Ensuring Accountability in Agency Rulemaking Act would help to remedy the problem of career bureaucrats issuing agency rules without electoral accountability. The bill would codify the requirement of Executive Order 13,979 that only senior appointees (presidential appointees, persons performing the duties and functions of offices requiring presidential appointment, and non-career members of the Senior Executive Service and equivalent agency systems) initiate and sign informal notice-and-comment rules, subject to exceptions for "public safety or security."[21] The bill also would provide for oversight of agency compliance with its requirements by the head of each agency and by the OIRA Adminis-

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[12] Exec. Order No. 13,979, 86 Fed. Reg. 6,813 § 1 (Jan. 18, 2021) [hereinafter EO 13,979].

[13] Angela C. Erickson & Thomas Berry, Pacific Legal Foundation, *But Who Rules The Rulemakers?: A Study of Illegally Issued Regulations at HHS* 18, 35 (Apr. 29, 2019).

[14] *Id.* at 3, 25, 35.

[15] Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 950 (Apr. 2023) (footnotes omitted).

[16] EO 13,979, *supra* note 12, § 1.

[17] *See id.*

[18] *Id.* § 2.

[19] *Id.* § 4.

[20] Exec. Order No. 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021).

[21] *Compare* Ensuring Accountability in Agency Rulemaking Act, H.R. 357, 118th Cong. § 2(a) (2023), *with* EO 13,979, *supra* note 12, § 2.

trator.[22] These reforms would lessen the power of career bureaucrats within the administrative state. They also would enhance political accountability by ensuring that only agency officials who are more directly accountable to the President may issue rules carrying the force of law.

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the following hearing was used to develop H.R. 357: "Reining in the Administrative State: Reclaiming Congress's Legislative Power," a hearing held on March 10, 2023, before the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust. The Committee heard testimony from the following witnesses:

- Allyson N. Ho, Partner and Co-Chair of Appellate and Constitutional Law, Gibson, Dunn & Crutcher LLP;
- Jonathan Wolfson, Chief Legal Officer and Policy Director, Cicero Institute;
- Ryan Cleckner, Co-Founder, Gun University LLC and Owner, Law office of Ryan M. Cleckner; and
- Emily Hammond, Professor, George Washington University Law School.

The hearing addressed the growth of the administrative state and how it has consolidated the legislative, executive, and judicial powers of the federal government.

Committee Consideration

On May 24, 2023, the Committee met in open session and ordered the bill, H.R. 357, favorably reported with an amendment in the nature of a substitute by a roll call vote of 17 to 9, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House rule XIII, the following roll call votes occurred during the Committee's consideration of H.R. 357:

1. Vote on Amendment #1 to H.R. 357 ANS, offered by Ms. Scanlon, failed 8–17
2. Vote on favorably reporting H.R. 357, as amended, passed 17 ayes to 9 nays.

[22] Ensuring Accountability in Agency Rulemaking Act, H.R. 357, 118th Cong. § 2(b) (2023).

COMMITTEE ON THE JUDICIARY

Date: 5/24/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Scanlon Amdt #1 to HR 357 ANS

Roll Call #: 9

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*		✓		MR. NADLER (NY) *Ranking Member*	✓		
MR. ISSA (CA)		✓		MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)		✓		MR. COHEN (TN)			
MR. JOHNSON (LA)		✓		MR. JOHNSON (GA)	✓		
MR. BIGGS (AZ)		✓		MR. SCHIFF (CA)	✓		
MR. McCLINTOCK (CA)		✓		MR. CICILLINE (RI)			
MR. TIFFANY (WI)				MR. SWALWELL (CA)			
MR. MASSIE (KY)		✓		MR. LIEU (CA)			
MR. ROY (TX)				MS. JAYAPAL (WA)			
MR. BISHOP (NC)		✓		MR. CORREA (CA)			
MS. SPARTZ (IN)		✓		MS. SCANLON (PA)	✓		
MR. FITZGERALD (WI)		✓		MR. NEGUSE (CO)			
MR. BENTZ (OR)				MS. McBATH (GA)			
MR. CLINE (VA)		✓		MS. DEAN (PA)	✓		
MR. GOODEN (TX)				MS. ESCOBAR (TX)			
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)	✓		
MR. NEHLS (TX)		✓		MS. BUSH (MO)	✓		
MR. MOORE (AL)		✓		MR. IVEY (MD)	✓		
MR. KILEY (CA)		✓					
MS. HAGEMAN (WY)							
MR. MORAN (TX)							
MS. LEE (FL)		✓					
MR. HUNT (TX)							
MR. FRY (SC)		✓					

Roll Call Totals: Ayes: 8 Nays: 17 Present:

Passed: _____ Failed: X

COMMITTEE ON THE JUDICIARY

Date: 5/24/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Final passage of HR 357 as amended

Roll Call #: 5

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*	✓			MR. NADLER (NY) *Ranking Member*		✓	
MR. ISSA (CA)	✓			MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)	✓			MR. COHEN (TN)			
MR. JOHNSON (LA)	✓			MR. JOHNSON (GA)		✓	
MR. BIGGS (AZ)	✓			MR. SCHIFF (CA)		✓	
MR. McCLINTOCK (CA)	✓			MR. CICILLINE (RI)			
MR. TIFFANY (WI)				MR. SWALWELL (CA)			
MR. MASSIE (KY)	✓			MR. LIEU (CA)			
MR. ROY (TX)				MS. JAYAPAL (WA)			
MR. BISHOP (NC)	✓			MR. CORREA (CA)			
MS. SPARTZ (IN)	✓			MS. SCANLON (PA)		✓	
MR. FITZGERALD (WI)	✓			MR. NEGUSE (CO)			
MR. BENTZ (OR)				MS. McBATH (GA)		✓	
MR. CLINE (VA)	✓			MS. DEAN (PA)		✓	
MR. GOODEN (TX)				MS. ESCOBAR (TX)			
MR. VAN DREW (NJ)	✓			MS. ROSS (NC)		✓	
MR. NEHLS (TX)	✓			MS. BUSH (MO)		✓	
MR. MOORE (AL)	✓			MR. IVEY (MD)		✓	
MR. KILEY (CA)	✓						
MS. HAGEMAN (WY)							
MR. MORAN (TX)							
MS. LEE (FL)	✓						
MR. HUNT (TX)							
MR. FRY (SC)	✓						

Roll Call Totals: Ayes: 17 Nays: 9 Present:

Passed: X Failed:

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act of 1974* has been timely submitted prior to filing of the report and is included in the report. Such a cost estimate is included in this report.

Congressional Budget Office Cost Estimate

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the enclosed cost estimate for H.R. 357 from the Director of the Congressional Budget Office:

H.R. 357, Ensuring Accountability in Agency Rulemaking Act
As ordered reported by the House Committee on the Judiciary on May 24, 2023

By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	0	10	not estimated

Increases *net direct spending* in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases *on-budget deficits* in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between zero and $500,000.

H.R. 357 would require nearly all rules issued by federal agencies to be initiated by a senior appointee and signed by a person appointed by the President and confirmed by the Senate. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget would issue guidance for agencies to implement the new procedures.

Using information about the current regulatory processes provided by the Congressional Research Service and selected agencies, CBO estimates that the executive branch issues between 3,000 and 4,000 final rules annually. CBO expects that implementing the bill would increase administrative costs at OIRA and for federal agencies to initiate and finalize regulations. CBO estimates that costs for the government as a whole would total about $2 million annu-

ally and $10 million over the 2023–2028 period; any spending would be subject to the availability of appropriated funds.

Enacting H.R. 357 could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

CBO also expects that enacting H.R. 357 could delay the issuance of some rules and therefore their effective dates. However, because of the number and variety of federal rules issued each year, CBO cannot determine whether such delays would result in costs or savings for the government. Thus, CBO has no basis on which to estimate the budgetary effects of those changes.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

Committee Estimate of Budgetary Effects

With respect to the requirements of clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the *Congressional Budget Act of 1974*.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 357 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 357 would require presidentially nominated and Senate-confirmed appointees to issue and sign agency rules, and codifies a limitation on agency rulemaking authority established in Executive Order 13,979.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 357 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of House Rule XXI.

Federal Mandates Statement

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the *Unfunded Mandates Reform Act*.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the *Federal Advisory Committee Act* were created by this legislation.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the *Congressional Accountability Act* (Pub. L. 104–1).

Section-by-Section Analysis

Section 1. Short title. The "Ensuring Accountability in Agency Rulemaking Act."

Section 2. Rulemaking requirements. The Act:

- Requires informal notice-and-comment rules to be initiated by senior appointees (presidential appointees, persons performing the duties and functions of offices requiring presidential appointment, and non-career members of the Senior Executive Service and equivalent agency systems) and to be issued and signed by presidentially nominated and Senate-confirmed appointees.
- Contains an exception to these requirements if the head of an agency determines that compliance with them "would impede public safety or security," submits "a notification disclosing the reasons for the exemption" to the OIRA Administrator, and publishes this notification in the Federal Register.
- Provides for oversight of agency compliance with these requirements by the head of each agency and by the OIRA Administrator, who also is required to provide guidance on implementing them.

Dissenting Views

I. INTRODUCTION

Like the Separation of Powers Restoration Act and the REINS Act before it, H.R. 357, the so-called "Ensuring Accountability in Agency Rulemaking Act," is another effort by the Majority to undermine agency rulemaking and grind modern government to a halt.

This legislation would dramatically alter the Administrative Procedure Act's notice and comment process by requiring any rule promulgated under this process to be issued and signed by someone who was appointed to their position by the President and confirmed by the Senate. There is an exception for rules that would "impede public safety or security" from this requirement if the head of the agency determines that the rule would impede safety or security, provides notice, and publishes the notice in the Federal Register, but this term is left vague and undefined.

By requiring a Senate-confirmed agency head to initiate and sign any rules promulgated by the agency under the statutes Congress entrusted them to execute, this bill would also serve to further politicize the Senate confirmation process—a process that is already plagued by division. Many agencies operate without a Senate-confirmed agency head for months and years at a time due to the already politicized confirmation process. Furthermore, the bill uses vague and undefined language that will only be clarified through burdensome litigation that will clog the courts for years to come. If passed, this bill would put Americans' health and safety at risk

by stalling and blocking necessary rules and would pose a significant cost to the federal government by requiring agencies to defend agency rulemaking processes in unnecessary litigation.

II. CONCERNS

This bill, like the REINS Act, is another attempt by the Majority to gum up the work of government. By requiring that any rulemaking must be issued by and signed by a PAS official (PAS serving as an acronym for Presidential Appointment with Senate confirmation), the Majority is ensuring that the rulemaking process will be slowed for many agencies, especially during long appointment processes or presidential transitions. In some cases, this bill would bar any rulemaking at all due to the standing vacancy at the top.

While this bill, on its face, appears to insert more political accountability into the rulemaking process, it is unnecessary because Congress has many ways to exert control over the rulemaking process. Furthermore, given the already slow and torturous process that nominees are subject to, the passage of this bill would likely only exacerbate the problem, making political appointments even more contentious while barring civil servants from continuing the work of the agency in the absence of a confirmed head.

A. H.R. 357 Would Further Politicize and Delay Executive Branch Appointments

1. Background on the Nomination and Senate Confirmation Process

The Constitution grants the President and the Senate joint responsibility for populating the highest positions in executive branch agencies. The appointments clause (Article II, Section 2) gives the President the power to nominate and, with the advice and consent of the Senate, to appoint the principal officers ("Officers of the United States") in the executive branch, as well as some lower-level ones. The Constitution authorizes Congress to vest the appointment of "inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments. Therefore, some high-ranking positions in the government can be filled through means beside the appointment and confirmation process, and Congress has created many positions that can be filled through this manner in statute.[1]

Officers of the United States are those individuals who are "exercising significant authority pursuant to the laws of the United States" in a "'continuing' position established by law."[2] There are approximately 1,200–1,400 positions[3] that require Presidential

[1] For instance, several thousand folks in Senior Executive Service are appointed by agency heads, as provided by law. *Appointment and Confirmation of Executive Branch Leadership: An Overview*, CONG. REVIEW SERV. (Mar. 17, 2021), https://crsreports.congress.gov/product/pdf/R/R44083.

[2] *Lucia v.* SEC, 138 S. Ct. 2044, 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511–12 (1878)) (2018).

[3] "In response to an increasing perception among many Senators that processing and confirming nominations to over 1,000 positions in the executive branch was becoming too burdensome, a bipartisan effort was undertaken in 2011 to address how the Senate processes nominations. In August 2011, the Senate agreed to S. Res. 116, a resolution "to provide for expedited Senate consideration of certain nominees subject to advice and consent. The procedure allows

Continued

nomination and Senate confirmation, also known as "advice and consent positions" or "PAS positions".[4]

Presidents can influence agency priorities and actions through their power to appoint heads for those bodies. However, such power is constrained by the need for those nominees to have the support of the Senate, which can influence the President's choices for these positions or mean that their picks will fail to get sufficient support to be confirmed. Many appointees are confirmed routinely, while others are given significant attention through hearings, investigations, and floor debate. Most of the confirmation process occurs at the Committee level, with Committees of jurisdiction voting on nominees to the agencies they oversee.

Although the Senate has historically confirmed most nominees to the executive branch, politics often intervenes, resulting in a tumultuous and often stymied confirmation process, especially when the President's party is in the minority or holds only a slight majority in the Senate. If the Senate fails to act on a nomination, the nominee must be re-nominated by the President in the following session to be considered.

Although the Constitution gives the President the power to make limited-term appointments to fill a vacancy without Senate confirmation when the Senate is in recess, this power is used rarely in recent years. Recognizing the need to give agencies leadership during possibly lengthy confirmation processes, Congress has provided limited statutory authority to fill vacant PAS positions on a temporary basis under the Vacancies Act.[5] Under this law, when an executive agency position requiring confirmation becomes vacant, it may be filled temporarily in one of three ways:

(a) The first assistant to the PAS position may automatically assume the functions and duties of the office;

(b) The President may direct any officer who is occupying a position requiring Senate confirmation to perform those tasks; or

(c) The President may select any officer or employee of the subject agency who is occupying a position for which the rate of pay is equal to or greater than the rate of pay at the GS–15 level and who has been in that position for at least 90 of the preceding 365 days.[6]

The temporary appointments made under the Vacancies Act is limited to a 210 period from the date of the vacancy, but the time periods for service are extended if the President submits a nomination for the position.

When the limitations of the Vacancies Act have been exhausted, past Administrations have arranged for the role of the vacant position to be carried out indefinitely or for a defined period by another individual in the agency, usually the first assistant, pursuant to a delegation of authority by the agency head. In these cases, the offi-

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certain nominees to be eligible for consideration by the full Senate without formal committee action (unless any Senator requests committee referral)," *Appointment and Confirmation of Executive Branch Leadership: An Overview,* CONG. REVIEW SERV. (Mar. 17, 2021), https://crsreports.congress.gov/product/pdf/R/R44083.

[4] Maeve P. Carey, *Presidential Appointments, the Senate's Confirmation process, and Changes Made in the 112th Congress,* CONG. RESEARCH SERV. (Oct. 9, 2012), https://sgp.fas.org/crs/misc/R41872.pdf.

[5] 5 U.S.C. §§3345–3349d.

[6] *Appointment and Confirmation of Executive Branch Leadership: An Overview,* CONG. REVIEW SERV. (Mar. 17, 2021), https://crsreports.congress.gov/product/pdf/R/R44083.

cial carries out the functions of the vacant position without assuming the full role of the office (i.e., they can do most everything the office requires except for a few duties that are statutorily vested in the office, "non-delegable duties").[7]

2. Delays in Executive Branch Appointments

As noted above, agency appointments are often stalled when the President's party holds a slim majority in the Senate or when the Senate is controlled by a different party than the President's. Even outside of these issues, the Senate confirmation process is a long and challenging one (a process that has lengthened over time). For some agency appointments, the process of confirmation can be so political that the role remains unconfirmed for some time. A good example of this is the Bureau of Alcohol, Tobacco, Firearms, and Explosives, which was without a Senate-confirmed Director for many years.[8]

Presidents can also leave positions vacant for policy reasons. For example, President Trump expressed a preference for temporary appointees because of his perception that he had more flexibility to move or reassign them.[9] A recent study on executive branch vacancies found that presidents are more likely to use interim heads when the agency has a high capacity of influencing public policy, thus allowing the Administration to pursue its priorities while not involving the Senate. The researcher, Christina Kinane, notes: "My analysis shows that temporary appointments don't happen by chance or as the byproduct of an elaborate confirmation process. They are the result of strategic decisions intended to advance a president's policy agenda while circumventing the Senate's constitutional prerogative of advice and consent." [10]

The Trump Administration was criticized for relying on interim heads and leaving key positions vacant. By late in Trump's term (August 2020), 30% of the 757 key Senate-confirmed positions were either vacant or filled by acting officials.[11] As of the time of this writing, 11.1% of the 811 key-Senate-confirmed positions in the Biden Administration are either vacant or filled by an acting official.[12]

3. H.R. 357 Would Make the Senate Confirmation Process More Political and Time Consuming

As mentioned, the Administrative Procedure Act and agency authorizing statutes do not require a Senate confirmed agency head to issue or sign any agency rules. If H.R. 357 were passed, the Senate confirmation process would be more politicized and make the process more time consuming—thus gumming up the Senate's legislative calendar and delaying necessary agency work.

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[7] *Id.*

[8] *See* Josiah Bates, *Why the Federal Firearms Agency Can't Find a Permanent Director*, TIME (Sept. 16, 2021), https://time.com/6097891/aft-director-david-chipman-gun-control/.

[9] Amanda Becker, *Trump says acting Cabinet members give him 'more flexibility,'* REUTERS (Jan. 6, 2019), https://reut.rs/2VyaoAY.

[10] Mike Cummings, *How presidents sidestep the Senate's 'advice and consent' on nominees*, YALENEWS (May 4, 2021), https://news.yale.edu/2021/05/04/how-presidents-sidestep-senates-advice-and-consent-nominees.

[11] *The Replacements*, PARTNERSHIP FOR PUB. SERV. (Sept. 2020), https://ourpublicservice.org/wp-content/uploads/2020/09/The-Replacements-1.pdf.

[12] Biden Political Appointee Tracker, WASH. POST, https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/ (visited May 22nd, 2023).

B. H.R. 357 Is Based on a False Premise that Congress Needs More Ways of Exercising Oversight of Agency Rulemaking

While H.R. 357 is unnecessary and vague, its most harmful effect would be to delay and undermine the critical work of agencies. Congress has entrusted agencies, which are made up of mostly career experts and a handful of political staffers, to execute statutes in an objective and apolitical fashion. If Congress wishes to rein in Senate-confirmed heads of agencies or disagrees with the rules promulgated by those agencies, they can conduct oversight via hearings and investigations, pass new laws changing the mission of those agencies, or use the blunt tool of the Congressional Review Act to reverse any agency rules recently issued.

Congress may also impose restrictions on agency rulemaking through the appropriations process. These restrictions can take a variety of forms, including restrictions on the finalization of particular proposed rules, restrictions on regulatory activity within certain areas, restrictions on implementation or enforcement of certain rules, and conditional restrictions that prevent a rule from taking effect until an agency takes certain steps.[13]

III. CONCLUSION

H.R. 357 is an unnecessary and fatally vague bill that is designed to undermine the critical work of agencies by requiring a Senate-confirmed agency head to "issue" and "sign" any rules promulgated by the agency. The bill would further politicize the Senate confirmation process, thus gumming up the Senate legislative calendar and allow for more corporate influence on the process. The Administrative Procedure Act and executing statutes do not require an agency head to be a critical part of the rulemaking process. And indeed, many agencies operate without a confirmed head thanks to the already political nature of the Senate's advice and consent process. The bill is also poorly and vaguely written and would therefore likely require agencies to spend precious resources defending rules in court. Congress already has a range of ways to exercise oversight and control over the administrative state and rulemaking. If Republicans were actually concerned about our administrative state, they would join with Democrats to help ensure that the rulemaking process cannot be gamed by corporate interests and allow for additional ways for public feedback to influence the process.

For all of these reasons, I dissent and urge all of my colleagues to oppose this legislation.

JERROLD NADLER,
Ranking Member.

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[13] *See* CURTIS W. COPELAND, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (Aug. 5, 2008).