



Agency Vacancy ‘Loophole’ Ruling Could Echo Across Government

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A statutory “loophole” for keeping temporary government leaders in place was validated last week, as a federal appeals court ruled the application of a law intended to limit the time a temporary official can serve in a Senate-confirmed position is “vanishingly small.”

The ruling, which stemmed from a surgical device patent dispute involving Arthrex Inc., confirmed the power of interim agency directors, with the US Court of Appeals for the Federal Circuit saying the scope of the 1998 Federal Vacancies Reform Act is extremely limited. The Federal Circuit accepted a workaround the government often uses to keep agencies running with temporary officials, restricting the impact of the law designed to ensure leaders are confirmed by the Senate, professors and legal researchers said.

Nina A. Mendelson, an administrative law professor at the University of Michigan, said the decision undercuts incentives for presidents to seek Senate confirmation for powerful officials across agencies. The application of the law is “dramatically shrunk,” she said.

“There is language in the FVRA that makes it very clear that the FVRA is supposed to be the only way to authorize an acting official,” Mendelson said. “Accepting the delegation strategy would effectively create a whole class of shadow acting officials.”

‘Disquieting’

Inferior officers can temporarily perform certain functions and duties of an agency director, the Federal Circuit found, even if they aren’t the official designated to serve as acting director under the FVRA. That limitation doesn’t apply to director review of administrative patent tribunal decisions at the US Patent and Trademark Office, according to the opinion, because the review authority can be delegated to other officers.

The FVRA dictates who is elevated to fill open positions in an acting capacity. An official who isn’t prescribed to move up into the role can serve either for 210 days starting when the vacancy occurs or while a nomination is pending Senate confirmation. To get around the time limit, temporary officials are sometimes assigned to “perform the functions and duties” of the role, rather than serving as an actual acting leader. That was the case for Drew Hirshfeld, who was

performing the duties of the then-vacant position of PTO director when he denied Arthrex's petition for director review.

The FVRA is relevant only to those functions or duties that a statute or regulation carves out for a Senate confirmed leader alone, the Federal Circuit ruled, adding that the law's scope is "vanishingly small."

The government argued that the FVRA didn't limit the patent office at all because all of the director's duties can be delegated, a position that provoked skepticism from some of the Federal Circuit panel.

"We find it disquieting that the government views the FVRA as impacting such a 'very small subset of duties' and not impacting the PTO at all," Chief Judge Kimberly A. Moore wrote in the opinion. "That does not, however, justify departing from the plain language of the statute."

Administrative Shortcut

The new ruling may also blunt the previous US Supreme Court ruling in *U.S. v. Arthrex*, which granted the director the power to review an administrative patent tribunal's decisions.

In the 2021 opinion, the justices said the Patent Trial and Appeal Board's decisions must "at some level" be subject to the review by the presidentially appointed, Senate-confirmed director. This ensures the constitutionality of the tribunal's use of administrative judges who aren't Senate confirmed, the high court said.

The Federal Circuit's ruling undermines the notion that the individual making director review decisions should be confirmed by the Senate, said Thomas Berry, a research fellow at the Cato Institute, a conservative think tank.

"In my view, the core constitutional holding of the Supreme Court's *Arthrex* decision from last term no longer has teeth," Berry said, "because all the duties of the PTO director can now be performed by an unconfirmed acting officer."

The government was wrong in saying all functions and duties of the patent office director are delegable, said Ron D. Katznelson, the president of a signal processing technology startup Bi-Level Technologies, who has written a paper on the interim PTO director's power.

There isn't a reason that a properly appointed acting director wasn't in place, Katznelson said.

"The practice of not having an acting director installed needs to end, needs to stop," he said, calling it "essentially a bypass" of the FVRA. "It's an administrative convenience shortcut."

More Litigation Expected

The issue of whether an official performing the functions and duties of a permanent agency head is in line with the FVRA will likely continue to be litigated, Berry said..

Some courts have signaled skepticism about the scope of the loophole, but there have been few appeals court rulings, he said.

“This is, in my view, the biggest disputed legal issue about the FVRA, and it’s really one the executive branch has been arguing and attempting to get more favorable interpretations for its view since the FVRA was passed, but litigation has picked up,” Berry said. “I don’t think Congress expected that the executive branch would argue that so many duties are nonexclusive.”