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White House Torpedoes Bipartisan Tradition at Independent Agencies

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The Trump administration and Senate Republicans are forgoing a long-standing tradition that has sought to keep a set of independent federal agencies fully staffed and insulated from partisanship.

For decades, presidents have tapped Republican and Democratic nominees in tandem to fill open slots on the Federal Energy Regulatory Commission, the Federal Communications Commission, and many other independent bodies.

But this week, senators are preparing to confirm Republican Robert Duncan to another term as chairman at one of those agencies, the United States Postal Service Board of Governors, without a Democratic companion.

“The fact that nobody’s being nominated is problematic but is kind of par for the course in this administration, where they’re not appointing people to key positions,” said Sen. Gary Peters, the top Democrat on the Senate Homeland Security and Governmental Affairs Committee. “It’s really irresponsible management, in my opinion.”

And in the coming weeks, Senate Majority Leader Mitch McConnell may tee up a confirmation vote on a Republican nominee, James Danly, for FERC. That move will put the agency at the center of climate policy in a 3-1 Republican majority.

McConnell shortly before the Thanksgiving break filed cloture on Duncan’s renomination to lead the Postal Service Board of Governors, which controls the mail service’s budget and long-term plan and selects the postmaster general. In doing so, the Republican leader signaled the Senate will vote to confirm the current chairman in the days ahead for another term ending in 2025.

Time is of the essence. Duncan’s term formally ended last December, and he can legally stay in the job only until Sunday without Senate approval.

"That’s what we need to be concerned about. We have to have a functioning board of governors," said Homeland Security Chairman Ron Johnson. "I think it’ll be pretty easy to get a Democrat through in the future. So maybe one step at a time."

Duncan’s nomination moved out of the Senate Homeland Security Committee by voice vote in July. But Peters at the time protested that a Democratic nominee like Postal Service Governor David Williams wasn’t moving in tandem with Duncan to preserve the board’s bipartisan nature.

The Senate confirmed Duncan and Williams by voice vote in August 2018. The term held by Williams, who serves as the vice chairman of the Postal Service board, technically expires Sunday, but he can serve for another “holdover” year.

The Senate successfully confirmed Republicans Roman Martinez and John Barger as well as Democrat Ron Bloom to the board by voice vote shortly before this year’s August recess, giving the panel the members necessary to formally conduct business for the first time since 2014.

That reinstated quorum, and the expiring terms of his leadership, come as the Postal Service continues to struggle to remain profitable and suffers President Trump’s attacks on Twitter for its reportedly preferential treatment for Amazon, the online retailer run by billionaire Jeff Bezos.

“I’m concerned. We should be appointing folks there,” Peters said. “The Postal Service has got a lot of challenges right now.”

The Federal Election Commission, meanwhile, is one commissioner short of a quorum, preventing it from weighing in on a host of legal matters ahead of the 2020 elections.

And the Export-Import Bank, whose authorization will expire this month absent congressional action, is now operating with three directors, the minimum for a quorum. That agency, a favorite punching bag for conservative Republicans, lacked a quorum for nearly four years until the Senate approved the directors earlier this year.

“There are certain things you don’t want politics impacting for all sorts of reasons,” said Tony Clark, a Republican FERC commissioner under President Obama. “I think on the whole they’ve served the country very well in insulating some of these really important decisions about essential services like energy—insulating them from political machinations.”

Democratic Senate Majority Leader Harry Reid’s decision in 2013 to deploy the nuclear option, a legislative tool that allows senators to confirm executive-branch appointees with only a simple majority, likely helped pave the way for more partisanship on the commissions, according to Clark. The party in control of the Senate can now easily muscle executive nominations past minority opposition.

The quasi-independent boards also face existential threats, however unlikely, from the judiciary. The Supreme Court is slated to hear oral arguments in March in a separation-of-powers case, *Seila Law LLC v. Consumer Financial Protection Bureau*, that could address the legal underpinning of regulatory boards with members allowed some protection from dismissal by the president.

At the center of *Seila Law*, which considers the legality of the consumer-finance watchdog’s leadership structure, is a unanimous Great Depression-era Supreme Court ruling that President Franklin Roosevelt unjustly dismissed a member of the Federal Trade Commission because they philosophically disagreed on his New Deal policy agenda.

Lawyers watching the case in amicus briefs have distinguished between the CFPB’s single director and multimember commissions that pose less of a threat to a president’s power. But

some have argued before the Court that the 1935 underlying decision, *Humphrey's Executor v. United States*, was constitutionally dubious.

“I think *Humphrey's Executor* isn't defensible,” said Ilya Shapiro, the director of the Cato Institute's Robert A. Levy Center for Constitutional Studies, “but there's definitely a way to hold the CFPB unconstitutional without overruling that case and thereby inviting challenges FERC or FTC.”

In the meantime, most of the agencies are moving ahead. The FERC is rendering judgment on a long list of critical energy-related regulations, from pipeline approvals to electricity-grid cybersecurity. And the confirmation of Danly, who is currently serving as general counsel at the agency, will give Republicans a dramatically outsized role on the commission.

“I'd like to have all the positions filled and fully functioning,” said Sen. John Barrasso, a Republican who sits on the Energy and Natural Resources Committee.

Sen. Joe Manchin, the top Democrat on that panel, voted to approve Danly in mid-November, defying the opposition of Minority Leader Chuck Schumer. Most Democrats are lining up to vote “no” on the Senate floor.

“I'm not going to vote for him unless there's a matching Democratic nominee,” said Sen. Angus King, a Maine independent who caucuses with Democrats but sometimes bucks the party on energy policy. “It's nothing about him. It's just that's the way it's usually done. That's the way it should be done. And I don't think we should establish a precedent of dividing these nominations like this.”

Manchin, meanwhile, is pushing the White House to nominate Allison Clements, a program director at the clean-energy advocacy group Energy Foundation, to fill the fifth and last commissioner slot at FERC. But Manchin is less than bullish on her prospects.

“It's a shame. She's a wonderful, bright person, and they seem to be scared to death of someone that smart,” Manchin said. “I don't know how we find anybody on the Democrats' side that would be secured. I don't know. I just don't know what the criteria is.”