



Constitutionality of Temporary IG Designation upon Extended IG Vacancies

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Overview

Where there is an extended vacancy of a federal inspector general (IG) whose office requires nomination by the president with the advice and consent of the Senate, and where there is no acting officer filling the role pursuant to the Vacancies Act or another authorizing statute, the head of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) should establish a panel of three federal IGs who will designate an individual to act as a temporary IG until the president nominates and the Senate confirms a permanent officer for the role. The panel should choose this individual from a list of pre-vetted candidates that CIGIE is already required by law to maintain.¹

The Problem

Inspectors general whose appointment requires nomination by the president with advice and consent of the Senate are exempted from the provision of the Federal Vacancies Reform Act (Vacancies Act) that voids official actions taken by anyone who isn't either confirmed by the Senate or an "acting" officer under the terms of the Vacancies Act.² As a result, acting inspectors general frequently drop their "acting" title in compliance with the time limitations set by the Vacancies Act, but continue to perform the functions and duties of the office, sometimes for years, depending on how long it takes the president to nominate and the Senate to confirm a permanent IG.

Until August 2019, there was no Senate-confirmed IG at the Interior Department for over ten years. The former Deputy IG at the Interior Department, Mary Kendall, performed the duties of the IG for the vast majority of that time until her May 2019 retirement, while awaiting a permanent leader at the office. Kendall was not confirmed by the Senate for this role. In fact, the Senate rejected her for the role when she was nominated by President Obama.³

The Solution

When there is no acting official serving in an inspector general position because an acting IG stepped down in accordance with the time limits set by the Vacancies Act, a panel of three IGs, appointed by the head of CIGIE, should choose an individual from a list of pre-vetted candidates

¹ 5 U.S.C. App. § 11(c)(1)(F)

² 5 U.S.C. App. § 3348(e)(3)

³ Kevin Bogardus, "IG Pick Stalled in Senate as GOP Questions Her Independence," December 4, 2015.

<https://www.eenews.net/stories/1060028953>

(which CIGIE is already required by law to maintain) to act as a temporary IG until the president nominates and the Senate confirms a permanent IG. The goal is to encourage swift presidential nomination of qualified candidates, and to ensure the independence of the IG office while there is no permanent leader.

Constitutionality

The appointment of a temporary IG to fill a longstanding vacancy would not run afoul of the Constitution. All power to nominate a permanent IG is retained by the president, and the Constitution affords Congress the right to vest the appointment of inferior officers to heads of departments under the Excepting Clause within the Appointments Clause.⁴ According to the CATO Institute, acting officials are “inferior officers.”⁵

Article II, Section 2, Clause 2 of the Constitution requires that principal officers be appointed by the President with advice and consent of the Senate. However, Congress may vest the appointment of inferior officers in the President alone, in the Courts of Law, or in the Heads of Departments.

The Supreme Court defines an inferior officer as someone “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate’s advice and consent.”⁶ Further, section 3(a) of the Inspector General Act states that “Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment.”⁷

Because acting is a temporary designation, it arguably does not trigger the Appointments Clause. For example, under the Federal Vacancies Reform Act, a first assistant or deputy is able to become the acting officer despite not being confirmed for that role by the Senate precisely because their tenure is a temporary designation and not a permanent placement. Congress is able to make that designation through statute.

Finally, the Supreme Court’s broad definition of the head of a department qualifies the chair of CIGIE to oversee this temporary designation by appointing the panel of inspectors general. The Inspector General Act describes CIGIE as “an independent entity within the executive branch.”⁸ The Supreme Court defines departments broadly as “executive divisions like cabinet-level departments.”⁹ Justice Antonin Scalia expanded on this in his concurrence in *Freytag v. Commissioner*, noting that “all independent executive establishments” qualify as departments.¹⁰

⁴ Art II, § 2, Cl. 2

⁵ Thomas Berry, “The Illegal Tenure of Civil Rights Head Vanita Gupta,” CATO Institute. January 19, 2017. https://object.cato.org/sites/cato.org/files/pubs/pdf/legal_policy_bulletin_1.pdf

⁶ *Edmond v. U.S.*, 520 US 651, 652 (1997)

⁷ Inspector General Act of 1978, As Amended. 5 U.S.C. App. § (3)(a)

⁸ Inspector General Act, as amended. 5 U.S.C. App. § 11(a)(1)

⁹ *Freytag v. Commissioner*, 501 U.S. 868, 869 (1991)

¹⁰ *Freytag v. Commissioner*, 501 U.S. 868, 919 (1991) (Scalia, A., concurring)

Precedent

By law, if a U.S. Attorney position becomes vacant, the Attorney General can appoint someone in the short-term, pending nomination by the president and confirmation by the Senate of a four-year U.S. Attorney for that district. However, after the temporary attorney's tenure is over (120 days later), the District Court of jurisdiction may appoint an attorney to fill the role until the vacancy is filled by the president and Senate.¹¹

When challenged for constitutionality, the U.S. Attorney model was upheld by the Supreme Court in the case *United States v. Gantt*.¹² The Court also noted in another case, *Morrison v. Olson*, that the appointments clause gives Congress “significant discretion to determine whether it is ‘proper’ to vest the appointment of, for example, executive officials in the ‘courts of Law.’”¹³ By upholding the right of Congress to confer appointment authority in the courts of law, the Court is reiterating the legitimacy in the Excepting Clause within the Appointments Clause. That same clause allows Congress to bestow appointment of inferior officers in “the head of a department” if they think it appropriate.

¹¹ 28 U.S.C. § 546(d)

¹² U. S. v. Gantt, 194 F.3d 987, 999 n.5 (9th Cir. 1999)

¹³ Morrison v. Olson, 487 U.S. 654, 656 (1988)