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# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

LILA HELMS, MAJORITY STAFF DIRECTOR  
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

September 20, 2023

The Honorable Joseph R. Biden, Jr.  
President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear President Biden:

As Members of the U.S. Senate Committee on Commerce, Science, and Transportation (Commerce Committee), we write to express our deep concern with your decision to disregard the Senate’s constitutional authority on appointments by naming failed-nominee Ann Carlson to serve as the acting administrator of the National Highway Traffic Safety Administration (NHTSA). In circumvention of the Senate’s constitutional responsibility to provide advice and consent on presidential nominations, you appointed Ms. Carlson to lead the agency *after* her nomination to be NHTSA administrator failed in the face of significant Senate opposition due to her extreme policy views, radical environmentalist record, and lack of vehicle safety experience. Ms. Carlson’s appointment as acting administrator not only violates the Federal Vacancies Reform Act (Vacancies Act) but also renders the agency’s actions while she has held herself out as acting administrator invalid. We urge you to immediately replace Ms. Carlson as acting administrator and name a new nominee as soon as possible.

As you are aware, Ms. Carlson was nominated to serve as NHTSA administrator on March 27, 2023. In response to opposition from a broad array of stakeholders and every Republican on the Commerce Committee, you withdrew her nomination two months later. Then, rather than selecting a new nominee who could receive bipartisan support in the Senate and would have the qualifications needed to lead this important safety agency, you promptly attempted to place Ms. Carlson back into the head role at NHTSA in an acting capacity.

The law prohibits Ms. Carlson from serving as acting administrator of NHTSA. The Appointments Clause of the Constitution requires the President to obtain “the Advice and Consent of the Senate” to appoint “Officers of the United States,”<sup>1</sup> including the NHTSA administrator, as NHTSA’s authorizing statute makes clear.<sup>2</sup> The Supreme Court has emphasized that the Appointments Clause “is more than a matter of ‘etiquette or protocol’; it is among the significant structural safeguards of the constitutional scheme. . . . By requiring the joint

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<sup>1</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>2</sup> 49 U.S.C. § 105(b).

participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.”<sup>3</sup>

Because vacancies necessarily occur in positions that require Senate confirmation, Congress has long provided for a legal avenue through which someone may serve as a temporary, “acting” officer.<sup>4</sup> The Vacancies Act allows the President to “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 time period.<sup>5</sup> Yet the Vacancies Act expressly limits whom the President can appoint as an acting officer. It provides that the President cannot appoint a person as an acting officer if: (A) in 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.”<sup>6</sup> The Supreme Court has stated that this provision “is clear,” holding that it “addresses nominations generally, *prohibiting any person who has been nominated to fill any vacant office from performing that office’s duties in an acting capacity.*”<sup>7</sup> This prohibition, which survives a withdrawal of a nomination, makes good sense: otherwise the President could do an end run around the Senate’s constitutional advice and consent authority by appointing a person to serve in an acting capacity after the Senate has rejected her nomination or, as here, after the President has withdrawn a nomination to avoid a formal Senate vote of rejection.

Yet you sought to do exactly that by naming Ms. Carlson as acting administrator of NHTSA. You cannot appoint Ms. Carlson as acting administrator under the Vacancies Act because in the 365-day period preceding NHTSA Administrator Steven Cliff’s resignation on September 12, 2022, Ms. Carlson did not serve in the position of first assistant to the NHTSA administrator for more than 90 days<sup>8</sup> and you had previously submitted her nomination to be NHTSA administrator to the Senate.<sup>9</sup> Therefore, she cannot lawfully serve as acting administrator.

Moreover, since she cannot lawfully serve as acting administrator, the actions she has taken and will take in that position are invalid. The Vacancies Act provides a mechanism for protecting against unlawful appointments like Ms. Carlson’s. It states that the actions of a person

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<sup>3</sup> Edmond v. United States, 520 U.S. 651, 659–60 (1997) (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976)).

<sup>4</sup> See, e.g., Doolin Sec. Sav. Bank v. Off. of Thrift Supervision, 139 F.3d 203, 209–10 (D.C. Cir. 1998) (discussing vacancies legislation dating back to 1792).

<sup>5</sup> 5 U.S.C. § 3345(a)(3).

<sup>6</sup> § 3345(b)(1)(A)–(B).

<sup>7</sup> NLRB v. SW Gen., Inc., 580 U.S. 288, 305, 304 (2017) (emphasis added).

<sup>8</sup> The “first assistant” to the NHTSA Administrator is the Deputy Administrator. See 49 U.S.C. § 105(b); 49 C.F.R. § 501.4(a). During the relevant time period, Ms. Carlson served as NHTSA Chief Counsel, not as Deputy Administrator. See NHTSA Organizational Chart – UPDATE, July 2022, National Highway Traffic Safety Administration (July 22, 2022), [https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-08/NHTSA\\_OrgChart17x11\\_July2022\\_072222\\_v2-web-tag.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-08/NHTSA_OrgChart17x11_July2022_072222_v2-web-tag.pdf) (indicating Carlson was Chief Counsel and NHTSA Deputy Administrator was “vacant”).

<sup>9</sup> See note 1, *supra*.

unlawfully appointed as an acting official “shall have no force or effect.”<sup>10</sup> Moreover, such invalid actions “may not be ratified” after the fact by a subsequent administrator.<sup>11</sup> Indeed, Ms. Carlson’s actions while purportedly serving as acting administrator demonstrate why it is so important that the Senate exercise its advice and consent authority to reject a President’s “bad appointment.”<sup>12</sup> At NHTSA, Ms. Carlson has proposed radical new vehicle fuel economy standards for model years 2027 to 2032 that effectively mandate the production of electric vehicles. These standards run contrary to the law, diminish consumer choice, impose higher costs on American families, and undermine our national and energy security all while benefiting China. Because Ms. Carlson cannot legally serve as the acting administrator, these proposed standards are invalid and cannot be ratified by a subsequent Senate-confirmed NHTSA administrator.

To comply with the law, you should immediately correct your violation of the law by removing Ms. Carlson from her so-called acting administrator position. After doing so, you should nominate a serious and well-qualified person to be NHTSA administrator. We stand ready to work with your administration to confirm such a nominee to lead this important safety agency.

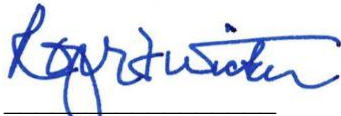
Sincerely,



Ted Cruz  
United States Senator



John Thune  
United States Senator



Roger F. Wicker  
United States Senator



Deb Fischer  
United States Senator



Jerry Moran  
United States Senator



Dan Sullivan  
United States Senator

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<sup>10</sup> 5 U.S.C. § 3348(d)(1).

<sup>11</sup> § 3348(d)(2).

<sup>12</sup> Edmond v. United States, 520 U.S. 651, 660 (1997).



Marsha Blackburn  
United States Senator



Todd Young  
United States Senator



Ted Budd  
United States Senator



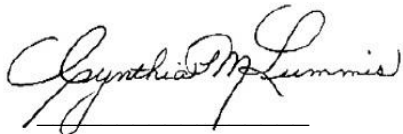
Eric Schmitt  
United States Senator



JD Vance  
United States Senator



Shelley Moore Capito  
United States Senator



Cynthia M. Lummis  
United States Senator