

# ILLINOIS BUSINESS LAW JOURNAL

---



---

## LACK OF LEGAL DUTY TO FILL VACANCIES ON THE UNITED STATES EXPORT-IMPORT BANK'S BOARD OF DIRECTORS MAY DESTROY EX-IM BANK

---



---

### ❖ NOTE ❖

Michal Nowicki\*

#### *Abstract*

*This Note examines whether the President of the United States has a statutory duty to nominate candidates to fill vacancies on the United States Export-Import Bank's five-person Board of Directors. With only two of the five seats occupied, Ex-Im Bank's Board of Directors cannot currently approve the financing of large export credit transactions, because at least three board members must be present to establish quorum for conducting official business. As a result, the Bank's power is severely limited. Although this Note argues that President Trump is not legally obligated to fill Ex-Im Bank board vacancies, it offers an argument the Bank's supporters can use to persuade President Trump to restore the agency to its full potential.*

#### TABLE OF CONTENTS

I.	INTRODUCTION.....	104
II.	BACKGROUND.....	105
	A. Ex-Im Bank .....	105
	B. The Quorum Problem.....	106
III.	DUTY TO FILL BOARD VACANCIES .....	106
IV.	RECOMMENDATION.....	110
V.	CONCLUSION.....	110

---

\*J.D. Candidate, Class of 2018, University of Illinois College of Law.

## I. INTRODUCTION

The acquisition of airplanes and aircraft parts can be expensive. For example, the Boeing 787 Dreamliner costs \$206.80 million.<sup>1</sup> As a result, airlines and aircraft leasing companies often rely on export financing to fund aviation equipment. The United States Export-Import Bank (Ex-Im Bank) plays a prominent role in such financing. However, Ex-Im Bank's continued existence is in jeopardy due to opposition from fiscal conservatives, think tanks such as the Cato Institute and the Heritage Foundation, political advocacy organizations like the Club for Growth, and even some U.S. airlines.<sup>2</sup> Although Congress recently extended its charter through September 30, 2019,<sup>3</sup> the Bank may not issue loans and guarantees exceeding \$10 million without the approval of its board of directors.<sup>4</sup> Unfortunately for the Bank's customers, its board of directors cannot currently approve such transactions because it presently consists of only two members: one too few to satisfy the three-member quorum requirement.<sup>5</sup>

This Note examines whether the President of the United States has a statutory duty to nominate qualified candidates to fill the three vacant seats on Ex-Im Bank's five-person board of directors. Additionally, this Note attempts to answer whether legal action may be taken against the President for failing to designate a nominee with the devious purpose of hindering the Bank's operations. Part II provides historical background on Ex-Im Bank, as well as a summary of the unsatisfied quorum requirement and its impact on the financing of large export credit transactions. Part III analyzes the statutory framework for filling Board vacancies through the lens of the President's constitutional appointment power. Part IV recommends that Ex-IM supporters urge the Trump Administration to restore the Bank to its full potential by appealing to President Trump's plan to bring jobs back to the United States. This Note argues that, although there is no judicial guidance as to whether federal politicians must fill Ex-Im Bank Board vacancies when

---

<sup>1</sup> Boeing All Models, *Complete Aircraft List Price*, AIRCRAFTCOMPARE.COM, <https://www.aircraftcompare.com/manufacture-aircraft/Boeing/1> (last visited Feb. 23, 2017).

<sup>2</sup> See generally Alan N. Hernandez, *Reauthorization of the U.S. Export-Import Bank and the Role It Plays in the Aviation Industry*, 25 AIR & SPACE LAW., 4, 4–5 (summarizing the main arguments against reauthorization and describing efforts to limit the Bank's power).

<sup>3</sup> Export-Import Reform and Reauthorization Act of 2015 § 54001(a), 12 U.S.C. § 635f (2012).

<sup>4</sup> Ryan McCrimmon, *Conservative Group Wants Ryan to Block Ex-Im Bank Reset*, CQ ROLL CALL 2016 WL 44115544 (2016).

<sup>5</sup> *Id.*

Congress reauthorizes the Bank, the plain language of the Export-Import Bank Act of 1945 establishes that the President of the United States is not legally obligated to nominate candidates to fill such vacancies.

## II. BACKGROUND

### A. Ex-Im Bank

Ex-Im Bank, an independent federal agency,<sup>6</sup> is the official export credit agency of the United States.<sup>7</sup> The Bank provides direct loans, export credit and working capital guarantees, and export credit insurance, backed by the full faith and credit of the U.S. government, to finance U.S. exports.<sup>8</sup> It was established in 1934 by President Franklin D. Roosevelt as the Export-Import Bank of Washington (EIBW), pursuant to an executive order.<sup>9</sup> It was created to finance American trade with the Soviet Union.<sup>10</sup> EIBW later merged with the Second Export-Import Bank of Washington D.C, initially to finance trade with Cuba.<sup>11</sup> The combined organization became an independent federal agency upon the enactment of the Export-Import Bank Act of 1945.<sup>12</sup> Two years later, it was reincorporated under a renewable federal charter and obtained its current name in 1968.<sup>13</sup>

Ex-Im Bank has been instrumental in export financing both before and after World War II.<sup>14</sup> Its major transactions prior to WWII included a \$22 million loan to China for the Burma Road and the financing of the Pan American Highway.<sup>15</sup> After WWII, it provided \$2 billion to help rebuild Europe under the Marshall Plan, and \$100 million to the newly recognized state of Israel.<sup>16</sup>

---

<sup>6</sup> Export-Import Bank Act of 1945 § 3, 12 U.S.C. § 635a(a) (2012).

<sup>7</sup> Hernandez, *supra* note 2, at 4.

<sup>8</sup> *Id.*

<sup>9</sup> Exec. Order No. 6581, 12 C.F.R. § 401 (1934), *reprinted as amended in* 12 U.S.C. § 635 (2012).

<sup>10</sup> Hernandez, *supra* note 2, at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

## B. The Quorum Problem

As noted above, Ex-Im Bank may finance transactions exceeding \$10 million only with the approval of its Board of Directors.<sup>17</sup> When all seats are occupied, the Board consists of five members: the Bank's President, who serves as chairman, its Vice President, who serves as Vice Chairman, and three additional officers appointed by the U.S. President and confirmed by the Senate.<sup>18</sup> The Board may conduct official business only in the presence of at least three members.<sup>19</sup> Currently, however, only two of the five board seats are occupied,<sup>20</sup> making approval of large loans impossible.

The lack of quorum on the Ex-Im Bank's Board of Directors may significantly impact the American economy. Specifically, large transactions account for approximately 75% of the Bank's \$20 billion in annual loans and financial guarantees.<sup>21</sup> With such transactions on hold, major beneficiaries of the Bank's programs, such as Boeing and General Electric, might transfer some of their operations overseas.<sup>22</sup> The likely result of such a move is an increase in domestic unemployment.<sup>23</sup> According to CNBC, the Bank supported roughly 165,000 jobs in 2014 – when it still exercised full lending power – compared with only 52,000 jobs in fiscal 2016.<sup>24</sup>

## III. DUTY TO FILL BOARD VACANCIES

Although most Republican Congressmen supported the last two Ex-Im Bank reauthorizations,<sup>25</sup> then President-elect Donald Trump dismissed the agency on his campaign trail as “featherbedding’ for politicians and huge

---

<sup>17</sup> See *supra* Part I.

<sup>18</sup> 12 U.S.C. § 635a(c)(1).

<sup>19</sup> *Id.* § 635a(c)(6).

<sup>20</sup> McCrimmon, *supra* note 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See John Engler, *Business Leaders Urge House Vote to Reauthorize the Export-Import Bank of the United States*, BUS. ROUNDTABLE (Oct. 27, 2015), <http://businessroundtable.org/resources/business-leaders-urge-house-vote-reauthorize-the-export-import-bank-the-united-states> (arguing that Ex-Im Bank financing “plays a critical role in supporting the U.S. economy and jobs”).

<sup>24</sup> Clay Dillow, *Will Trump's Administration Spell Doom for the Export-Import Bank?*, CNBC.COM (Dec. 7, 2016, 1:26 PM), <http://www.cnbc.com/2016/12/07/will-trumps-administration-spell-doom-for-the-export-import-bank.html>.

<sup>25</sup> Hernandez, *supra* note 2, at 5 (2012 reauthorization); Fred P. Hochberg, *Ex-Im Bank Reauthorization Information*, EXIM.GOV (Dec. 4, 2015), <http://www.exim.gov/reauthorization> (2015 reauthorization).

companies that don't need the help."<sup>26</sup> Moreover, he already started fulfilling some of his campaign promises the first business day after his inauguration by stifling the previous Administration's efforts to enter the Trans-Pacific Partnership, ordering a hiring freeze for most federal agencies, and blocking foreign aid for organizations that perform or encourage abortions.<sup>27</sup> Thus, while public pressure often compels politicians to change their attitudes, these events suggest that President Trump embraces governmental fiscal restraint. Hence, he will likely appoint Ex-Im Board members only if he is legally obligated to do so.

Unfortunately, President Trump likely has no statutory or constitutional obligation to fill the Banks vacancies, so supporters will need to seek out alternative avenues for fulfilling their mission. The Export-Import Bank Act provides, in pertinent part, "There shall be a Board of Directors of the Bank consisting of the President of the Export-Import Bank of the United States, who shall serve as Chairman, the First Vice President who shall serve as Vice Chairman, and three additional persons appointed by the President of the United States by and with the advice and consent of the Senate."<sup>28</sup> In interpreting the meaning of a statute, courts first consider "its language, giving the words used their ordinary meaning,"<sup>29</sup> unless a "literal reading . . . would 'compel an odd result.'"<sup>30</sup> They resort to extrinsic evidence, such as legislative history, only when the statute is ambiguous.<sup>31</sup> "The plainness or ambiguity of statutory language is determined by reference to the language itself, [its] specific context . . . , and the broader context of the statute as a whole."<sup>32</sup>

While courts and legal scholars have not addressed whether politicians may be sanctioned for a bad-faith dereliction of nomination powers with respect to filling the Ex-Im Bank's Board of Directors, the U.S. Constitution provides:

---

<sup>26</sup> Tom Howell, Jr., *Donald Trump May Deal Death Blow to Ex-Im Bank*, WASH. TIMES (Dec. 26, 2016), <http://www.washingtontimes.com/news/2016/dec/26/donald-trump-may-deal-death-blow-to-ex-im-bank/#content>.

<sup>27</sup> Elise Viebeck, *Trump's First 100 Days: Delivering on Campaign Promises*, WASH. POST (Jan. 23, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/trumps-first-100-days-delivering-on-campaign-promises/?utm\\_term=.a11f3acf32e7](https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/trumps-first-100-days-delivering-on-campaign-promises/?utm_term=.a11f3acf32e7).

<sup>28</sup> 12 U.S.C. § 635a(c)(1) (2012).

<sup>29</sup> *Lawson v. FMR, L.L.C.*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

<sup>30</sup> *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) (internal citation omitted).

<sup>31</sup> *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991).

<sup>32</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

[The President] shall have *Power*, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .”<sup>33</sup>

The President’s Article II appointment power is, thus, discretionary.<sup>34</sup> The key word in Article II, Section 2, Clause 2 is “power.” While duties must be fulfilled, powers may, but need not, be utilized. The U.S. Constitution delegates specific powers to each government branch so that no single branch dominates the others.<sup>35</sup> This system of checks and balances is one of the cornerstones of American democracy.<sup>36</sup> That being said, the plain language of the Constitution conclusively establishes that the President has appointment “powers,” not “duties.”<sup>37</sup> If the framers had intended otherwise, the checks and balances system would be weaker. The lack of judicial precedent to the contrary confirms this conclusion.

Supporters of full restoration of Ex-Im Bank’s powers may raise several objections to this analysis. First, they may argue that the President is legally obligated to fill Ex-Im Board vacancies because unlike in the Constitution,<sup>38</sup> the word “power” is absent from the analogous provision of the Export-Import Bank Act.<sup>39</sup> They may further contend, based on the structure of Clause 2,<sup>40</sup> that the President’s appointment power is confined to entering into treaties on behalf of the United States, and that the Constitution creates a duty to nominate officers such as judges and ambassadors.<sup>41</sup> Finally, as a last resort,

---

<sup>33</sup> U.S. CONST. art. II, § 2, cl. 2 (emphasis added); see also Matthew Madden, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135 (2007) (consistently characterizing the presidential appointment privilege as a “power,” not a “duty”).

<sup>34</sup> *Marbury v. Madison*, 1 Cranch 137 (1803).

<sup>35</sup> See, e.g., U.S. CONST. art. II, § 2, cl. 2 (requiring Senate to confirm presidential appointments to prevent the President from acting arbitrarily).

<sup>36</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1215–17 (2015); Desirae L. Wells, *National Security Letters: Why Reform Is Necessary*, 2012 CARDOZO L. REV. DE NOVO 216, 236 (2012).

<sup>37</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>38</sup> *Id.*

<sup>39</sup> 12 U.S.C. § 635a(c)(1) (2012).

<sup>40</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>41</sup> *Id.*

they may claim that presidential inaction undermines the rule of law.<sup>42</sup> At the height of the confirmation stalemate following the 1996 presidential election, Massachusetts Senator Edward Kennedy summarized the problem as follows:

In Congress today, . . . there is increasing talk of stricter scrutiny of judicial nominees. Fair scrutiny makes sense. But it is painfully evident with each passing month that the scrutiny they have in mind is passing all reasonable bounds of service to justice - and turning into obstruction of justice . . . What we are witnessing today is a direct assault on the President's constitutional power to nominate and appoint judges. Deliberate efforts are being made in Congress to undermine the judicial independence that is at the heart of the rule of law. Advice and consent in the Senate is becoming abuse and dissent.<sup>43</sup>

All of the above counterarguments, if raised in litigation, will probably fail. The first argument is unconvincing because the statute merely authorizes the appointment of directors without even implying that such appointments are necessary.<sup>44</sup> The second potential argument is the strongest, as entry into treaties is distinguishable from filling vacant political offices in that requiring the President to enter into unfavorable treaties could trigger adverse political consequences for Americans, whereas imposing a duty to fill vacant positions promotes political stability. Nevertheless, Congress chose to limit the Bank's spending authority,<sup>45</sup> precisely to reduce government spending.<sup>46</sup> Thus, President Trump's expected failure to nominate candidates for the vacant seats is lawful consistent with likely congressional intent to block taxpayer funding for large export transactions. Lastly, the third possible argument is ineffective because while judicial vacancies must be filled to preserve our system of separation of powers and checks and balances, the Trump Administration's decision to stifle large export transactions might actually strengthen the rule of law by promoting respect for legislative intent.

---

<sup>42</sup> Cf. Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 333 (1999) (raising this argument in the context of judicial activism in the U.S. Senate).

<sup>43</sup> *Id.*

<sup>44</sup> § 635a(c)(1).

<sup>45</sup> McCrimmon, *supra* note 4.

<sup>46</sup> See Hernandez, *supra* note 2, at 5 (referring to the 2012 reauthorization bill as a "compromise bill" between the Bank's supporters and fiscally conservative opponents).

## IV. RECOMMENDATION

Since President Trump is not legally required to nominate candidates for the vacant seats on the Ex-Im Bank's Board of Directors, the Bank's defenders should urge him to act by arguing that restoration of the Bank's full powers will create more American jobs. In his seven-step plan for bringing jobs back to the United States, the President calls for, among other measures, stricter enforcement of international trade agreements and more rigorous application of tariffs against U.S. trade partners engaged in unlawful trade practices.<sup>47</sup> His ultimate goal is to provide assurances that countries like China stop taking advantage of Americans.<sup>48</sup> Reviving the Bank's Board furthers these objectives while simultaneously promoting friendly relations with foreign countries.

## V. CONCLUSION

Although Congress recently reauthorized Ex-Im Bank through September 30, 2019<sup>49</sup> despite opposition from right-wing groups and politicians,<sup>50</sup> the Bank cannot function properly because its Board of Directors has too many vacant seats to approve funding for large transactions. The fact that the U.S. President is not legally required to propose candidates for the vacant position further complicates the matter, as President Trump's hostility towards the Bank on his campaign trail<sup>51</sup> suggests that he will not support the agency. Nonetheless, there is hope for Ex-Im supporters in the argument that resurrecting the Board will advance Trump's mission of restoring U.S. jobs: an argument Ex-Im supporters should pursue vigorously.

---

<sup>47</sup> Henry Fernandez, *Trump's 7 Steps to Bring Back U.S. Jobs*, FOX BUS. (June 28, 2016), <http://www.foxbusiness.com/politics/2016/06/28/trumps-7-steps-to-bring-back-u-s-jobs.html>.

<sup>48</sup> *Id.*

<sup>49</sup> 12 U.S.C. § 635f (2012).

<sup>50</sup> See *supra* text accompanying note 2.

<sup>51</sup> Howell, *supra* note 26.