DEC 28 1982

THE WHITE HOUSE

WASHINGTON

December 27, 1982

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Inquiry from Ron Mann Concerning Appointment of SES Official as Acting Deputy Director, National Science Foundation

Ron Mann, Associate Director of the Office of Presidential Personnel, has inquired if there are any legal impediments that would preclude the Director of the National Science Foundation (NSF) from appointing an official of NSF in the Senior Executive Service to the post of Acting Deputy Director pending nomination and confirmation of a permanent Deputy Director. The post of Deputy Director is a PAS position.

I located in our files a January 27, 1982, Memorandum on "Acting Officers" prepared for you by Ted Olson, Assistant Attorney General, Office of Legal Counsel (Tab A). That memorandum concluded that the Attorney General could designate the Deputy Commissioner of INS as Acting Commissioner, in part because of the authority given the Attorney General in 28 U.S.C. § 510 (1976) to authorize the performance of any function of the Attorney General by any officer of the Justice Department. There is an analogous provision concerning NSF and its Director at 42 U.S.C. § 1864(c) (1976), which provides:

> The Director may from time to time make such provisions as he deems appropriate authorizing the performance by any other officer, agency, or employee of the Foundation of any of his functions under this chapter, including functions delegated to him by the Board; except that the Director may not redelegate policymaking functions delegated to him by the Board.

I also located a December 5, 1982 letter to Ed Wilson from Joseph Morris, General Counsel, Office of Personnel Management, on the question of appointing individuals with SES status (Tab B). In pertinent part, Morris concluded:

> With respect to your first question, whether a person presently in the SES who is named to hold an "acting" PAS position retains his SES status during and after his service in the PAS position,

> the answer is affirmative. Designation as "acting" does not amount to an appointment with Senate confirmation, nor does it amount to a recess appointment without Senate confirmation as provided for in 5 U.S.C. § 3349. Whereas certain statutory procedures must be followed for PAS appointments and recess appointments to PAS positions, and certain changed-status consequences flow from such appointments . . ., Congress has mandated no special changes in underlying status for persons named to hold "acting" PAS positions. I therefore conclude that such persons retain SES status during and after temporary service in PAS positions.

On the basis of these two memoranda, and the provision in 42 U.S.C. § 1864(c) (1976), I am disposed to advise Mann that the Director of NSF may appoint an SES official of NSF Acting Deputy Director, pending the nomination and confirmation of a new Deputy Director. Pursuant to the terms of 42 U.S.C. § 1864(c), the Acting Deputy Director should refrain from exercising policymaking functions delegated to the Director by the NSF Board. I discussed the question with Herman Marcuse at the Office of Legal Counsel, who agreed that the SES official could be appointed Acting Deputy Director, but could not engage in policymaking. Marcuse also pointed out that the Acting Deputy Director could not act as Director in the absence of the Director, as provided in 42 U.S.C. § 1864a (1976), because an official may not be in a position of "acting" twice.

You will recall that the above-cited OLC memorandum noted that under the Vacancy Act, 5 U.S.C. §§ 3345-3349 (1976), vacancies filled pursuant to that Act may be filled for no more than thirty days. 5 U.S.C. § 3348 (1976). As stated in the memorandum, however, it has been the consistent position of the Department of Justice that vacancies such as the one in question are filled pursuant to the delegation authority -- in this case 42 U.S.C. § 1864(c) -- and not the Vacancy Act, and therefore the limitations of the Vacancy Act are not applicable. This is contrary to the position of the Comptroller General. Out of an excess of caution, Mann should be advised that the Acting Deputy Director, after serving thirty days, should avoid, if possible, taking action which may legally only be taken by the Deputy Director. See OLC memorandum, at 4.

If you agree, I can advise Mann that the Director of NSF may appoint an SES official Acting Deputy Director, provided the Acting Deputy Director (1) avoid exercising policymaking functions, (2) avoid, after serving thirty days, taking action which specifically must be taken by the NSF Deputy Director, and (3) not act as Director in the absence of the Director.

U.S. Department of Justice
Office of Legal Counsel

JAN 30 1982

Office of the
Assistant Attorney General

Washington, D.C. 20530

27 JAN 1982

MEMORANDUM FOR RICHARD A. HAUSER
Deputy Counsel to the President

Re: Acting Officers

This responds to the oral request by Dennis Patrick of the Office of Presidential Personnel for a discussion of certain issues relating to the designation of the Deputy Commissioner of Immigration (Deputy Commissioner) to perform the duties of and act as Commissioner of Immigration and Naturalization (Commissioner).

I.

The designation would be based on 28 U.S.C. §§ 509, 510 and on § 103 of the Immigration and Nationality Act (Act) (8 U.S.C. § 1103). According to 28 U.S.C. § 510 the Attorney General may authorize the performance by any officer, employee, or agency of the Department of Justice of any function of the Attorney General. 28 U.S.C. § 509 vests in the Attorney General, with certain exceptions not here relevant, all functions of the Department of Justice, including those of the Immigration and Naturalization Service. The Attorney General thus has the authority under 28 U.S.C. § 510 to direct the Deputy Commissioner to perform the duties of and to act as the Commissioner. Similarly § 103(a) of the Act authorizes the Attorney General to delegate to any employee of the Immigration and Naturalization Service (Service) or to any officer or employee of the Department of Justice any of the duties and powers imposed upon the Attorney General in the Act. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges or duties conferred or imposed by the Act or any regulations issued thereunder upon any other employee of the Service. Section 103(b) of the Act charges the Commissioner with any and all responsibilities and authority in the administration of the Service of the Act which are conferred upon the Attorney General or which may be delegated to him or prescribed by the Attorney General. The Attorney General thus has the authority to delegate to the Deputy Commissioner, or require and authorize the Deputy Commissioner to perform or exercise, any or all the powers conferred or imposed upon the Commissioner.

The principal problems relating to the designation of acting officers, discussed below, are the legal authority of the acting officer, the duration of the designation, and the compensation to which the acting officer is entitled.

1. Authority of Acting Officers. An acting officer is vested with the full authority of the officer for whom he acts. Keyser v. Hitz, 133 U.S. 138, 145-46 (1890). Ryan v. United States, 136 U.S. 68, 81 (1890); United States v. Lucido, 373 F.Supp. 1142, 1145 (E.D. Mich. 1974); 20 Op. A.G. 483 (1892); 23 Op. A.G. 473, 474-76 (1901).

2. Duration of Designation (Relation to the Vacancy Act). The Vacancy Act, 5 U.S.C. §§ 3345-3349, provides that where an officer of a bureau, who is not appointed by the department head, dies, resigns, or is sick or absent, his first assistant shall perform the duties of the office (5 U.S.C. § 3346), unless the President directs a department head or another officer of an Executive department appointed by the President by and with the advice and consent of the Senate to perform the duties of the office. (5 U.S.C. § 3347). Vacancies caused by death or resignation, however, may be filled under these provisions for not more than thirty days. 5 U.S.C. § 3348. It has been the position of the Department of Justice for many years that, if vacancies are filled pursuant to 28 U.S.C. § 510 (the same would be true of § 103 of the Act), they are not filled pursuant to the provisions of the Vacancy Act, and that the thirty day limitation of 5 U.S.C. § 3348 consequently is inapplicable. This position was upheld by the courts in the analogous situations where the Deputy Attorney General or Solicitor General became Acting Attorney General pursuant to 28 U.S.C. § 508. United States v. Lucido, supra, 1147-51; United States v. Halmo, 386 F.Supp. 593, 595 (E.D. Wis. 1974).

The Comptroller General takes the position that the 30 day limitation of 5 U.S.C. § 3348 must be read into all statutes authorizing the temporary filling of vacancies, because otherwise the President could circumvent the power of the Senate to advise and consent to appointments. The Department of Justice has never agreed with the Comptroller General's position in this regard. As explained below, however, the Department recognizes that the existence of this controversy makes temporary designations undesirable, especially where certain functions can be exercised only by specific officers.

3. Compensation of Acting Officers. Under 5 U.S.C. § 5535(b)(2) the Acting Commissioner could receive only the salary of the Deputy Commissioner.

II.

An officer, designated by a department head under a statute such as 28 U.S.C. § 510 1/ to perform the duties of an officer appointed by the President by and with the advice and consent of the Senate, thus would have the same authority as the officer for whom he acts, and he could serve for an indefinite period, longer indeed than a recess appointee whose commission expires under Art. II, § 2, cl. 3 of the Constitution at the end of the next session of the Senate. The only direct drawback of the status of the acting officer is that while acting he is entitled only to the salary of his regular position and not to the compensation of the officer for whom he acts.

The question is occasionally raised why the President should be put to the inconvenience of having to go through the burdensome processes of selecting officers and securing the advice and consent of the Senate as to their appointment, if the same result could be obtained through an informal designation as acting officer by a department head. The answer is more practical and political than legal. Generally the Executive has recognized that the designation of acting officers should never be used as a substitute for appointment by and with the advice and consent of the Senate but only as an interim measure during the frequently difficult and time consuming processes of selecting a candidate and securing his confirmation by the Senate.

The following considerations underlie this recognition:

1. The President has the duty under the Constitution to appoint officers by and with the consent of the Senate. An attempt to circumvent the right of the Senate to participate in the appointment process is likely to result in political reprisals and repercussions. Hearings may be held on the status of the acting official which at best are time consuming and may require embarrassing explanations.

1/ Most if not all of the agencies have provisions authorizing a Department head to designate any officer in his Department to perform any function of the Department head. These provisions, which go back to the Hoover Commission Report of 1949, were first incorporated in the Reorganization Plans issued under the Reorganization Act of 1949. Since then many of these provisions have become statutory.

2. While, as indicated above, an acting officer has the same legal authority as a Presidential appointee, his stature as a practical matter is often somewhat inferior. He is frequently considered merely a caretaker without a mandate to take far reaching measures.

3. In constrast to the position of the Department of Justice that an official whose acting status is derived from a statutory base other than the Vacancy Act is not subject to the thirty day limitation of 5 U.S.C. § 3348, the Comptroller General contends that 5 U.S.C. § 3348 controls the time for which all acting officers may serve, or that a provision such as 28 U.S.C. § 510 does not apply to officers whose appointment requires the advice and consent of the Senate. The Executive generally chooses to avoid, if possible, disputes with the Comptroller General in view of his Congressional backing.

4. The courts have never conclusively decided the question whether the thirty day limitation of 5 U.S.C. § 3348 must be read into a statute which generally authorizes a Department head to authorize any officer or employee of the Department to perform any function vested in the Department head.2/ Hence in the relatively few situations where legal actions may be undertaken only by a specific officer,3/ the Department has tried to avoid the taking of such action by an acting official who served for more than thirty days.4/

2/ In United States v. Joseph, 519 F.2d 1068, 1070-71 (5th Cir. 1975) cert. denied 424 U.S. 909 (1976), 430 U.S. 905 (1977) the Court of Appeals seems to have assumed arguendo that 5 U.S.C. § 3348 limits the period during which an official designated pursuant to 28 U.S.C. § 510 may act. The court, however, avoided the issue by holding the decision involved had been made by the Attorney General himself rather than by the Acting Assistant Attorney General, who had merely transmitted it, and that in any event the de facto officer doctrine, discussed in part III infra, applied.

3/ In the Department of Justice this involves especially certain orders and authorizations within the competence of the Criminal and Tax Divisions.

4/ At times the Department of Justice was able to obviate this difficulty by having the acting official sign the document in his permanent rather than in his acting capacity, or by having it signed by his superior.

This legal uncertainty is a further reason indicating the importance of having the President make appointments by and with the advice and consent of the Senate and using acting designations only as an interim measure during the regular appointment process.

III.

In many instances the potential infirmities in the authority of the acting officers discussed in the preceeding parts of this memorandum will be cured by the de facto officer rule. Under that doctrine, a person who discharges the duties of an office under color of title is considered a de facto officer even if there are defects in that title. The public acts of a de facto officer are binding on the public; conversely, the public may safely assume that he is a rightful officer. McDowell v. United States, 159 U.S. 596, 601-602 (1895); Waite v. Santa Cruz, 184 U.S. 302, 322-324 (1902); United States v. Royer, 268 U.S. 394 (1925); United States v. Lindley, 148 F.2d 22, 23 (7th Cir. 1945), cert. den., 325 U.S. 858; Equal Employment Opportunity Commission v. Sears Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981); see also United States v. Joseph, supra at 1071 n.4. As a rule, the authority of de facto officers can be challenged only in special proceedings in the nature of quo warranto brought directly for that purpose. United States ex rel. Dorr v. Lindley, supra; United States v. Nussbaum, 306 F. Supp. 66, 68-69 (N.D. Cal., 1969); Mechem, Public Office and Officers, §§ 343, 344 (1890).

As explained in the above cited cases, the de facto officer rule rests on two basic considerations. First, when a person is openly in the occupation of a public office, the public should not be required to investigate his title; conversely, an individual should not be able to challenge the validity of official acts by alleging technical flaws in an official's title to his office. 5/

A typical case of a de facto officer is one who has been properly appointed but who continues to serve after his term of office has expired. Waite v. Santa Cruz, supra; United States v. Groupp, 333 F. Supp. 242, 245-46 (D. Maine 1971), aff'd, 459 F.2d 178, 182 n. 12 (1st Cir. 1971). This consideration is of particular importance if the status of the acting officer should be attacked on the ground that 5 U.S.C. § 3348 is applicable to designations of acting officers, so that their authority expires thirty days after their designation.

5/ Another rationale for the de facto officer rule is that a person should not be able to submit his case to an officer and accept it if it is favorable to him, but challenge the officer's authority if the latter should rule against him. Glidden Company v. Zdanok, 370 U.S. 530, 535 (1962).

I hope this general discussion proves helpful. Please contact me if you require more information or if we can be of further assistance.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

Honorable D. Edward Wilson, Jr.
Associate Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Wilson:

This responds to your communication of November 1, 1982, in which you asked three questions concerning the retention of Senior Executive Service (SES) status and/or benefits for persons named to hold "acting" PAS positions (positions requiring a Presidential appointment with Senate confirmation) and for persons given recess appointments to PAS positions.

With respect to your first question, whether a person presently in the SES who is named to hold an "acting" PAS position retains his SES status during and after his service in the PAS position, the answer is affirmative. Designation as "acting" does not amount to an appointment with Senate confirmation, nor does it amount to a recess appointment without Senate confirmation as provided for in 5 U.S.C. § 3349. Whereas certain statutory procedures must be followed for PAS appointments and recess appointments to PAS positions, and certain changed-status consequences flow from such appointments (see discussion below in question #2), Congress has mandated no special changes in underlying status for persons named to hold "acting" PAS positions. I therefore conclude that such persons retain SES status during and after temporary service in PAS positions.

With respect to your second question, whether a person presently in the SES who is given a recess appointment to a PAS position retains his career SES status during and following the term of the appointment, the answer is negative. For an SES member appointed to a PAS position with the advice and consent of the Senate, status as an SES member is not retained, although the former SES member may elect to retain certain SES benefits. Congress has specifically provided that an SES member appointed to a PAS position may elect to retain certain SES benefits "as if the career appointee remained in the Senior Executive Service position from which he was appointed," 5 U.S.C. § 3392(c)

(emphasis supplied),1/ and Congress has further provided that such a person is entitled to be reinstated in the SES after separation "if the appointee applies to the Office of Personnel Management within 90 days after separation from the Presidential appointment." Id. § 3593(b). These provisions clearly indicate, however, that persons appointed to SES positions with Senate consent do not retain their SES status while occupying such positions--they are granted only the right to elect certain SES benefits. See also 5 U.S.C. § 3132(2).

For recess appointees to PAS positions, properly appointed pursuant to 5 U.S.C. § 3349, the situation is not different: such persons may elect to retain SES benefits and may apply to be reinstated in the SES upon separation, but they do not retain SES status while serving in recess appointments. The recess appointment is simply a vehicle which permits the business of the Executive Branch to be transacted during times when executive posts are vacant and the Senate is not in session. It is not a device for evading the command of the Constitution that the President obtain the consent of the Senate to his appointments of Officers of the United States. The Constitution explicitly provides for recess appointments, and further provides that they may not survive the adjournment of the session of the Senate that next follows upon their makings. U.S. Constitution, Article II, Section 2, Clause 3.

Congress sought in 5 U.S.C. § 3392(c) to accord SES benefits to all Presidential appointees whose nominations must by law receive the consent of the Senate. A recess appointee, designated pursuant to the Constitution and 5 U.S.C. § 3349, stands for the time prescribed by the Constitution in the place of a Senate confirmee. The Constitution makes no distinction between executive officers commissioned with the advice and consent of the Senate,

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1/ 5 U.S.C. § 3392(c) provides, in pertinent part:

> If a career appointee is appointed by the President, by and with the advice nd consent of the Senate, to a civilian position in the executive branch which is not in the Senior Executive Service, ... the career appointee may elect ... to continue to have the provisions of this title relating to basic pay, performance awards, awarding of ranks, severance pay, leave, and retirement apply as if the career appointee remained in the Senior Executive Service position from which he was appointed.

and those whose appointments require the Senate's consent but who are commissioned during a recess, save that the commissions of the latter expire when the Senate rises from its next session. Recess appointees are, in other respects, fully-authorized incumbents of their executive offices. There is nothing in the legislative history of 5 U.S.C. § 3392(c) to indicate that Congress meant to exclude recess appointees from the protections of the statute.

I conclude, therefore, that the option of electing SES benefits--and the concomitant forswearing of actual SES status--apply equally to PAS appointees and recess appointees to PAS positions.

Your third question, whether a person can continue to hold an SES position (and compensation) after receiving a recess appointment to a PAS slot, is answered in the negative, for the reasons set forth in the discussion surrounding question #2. Because a recess appointee to a PAS position does not retain career SES status during the term of his appointment, but must apply to be reinstated in the SES after expiration of the appointment, see 5 U.S.C. § 3593(b), it follows that such a person does not "continue to hold an SES position" during his recess appointment but must apply for reinstatement upon separation. This being so, the restrictions on recess appointments mandated by 5 U.S.C. § 5503 would not be avoided by the recess appointment of an SES member to a PAS position.

Sincerely yours,

Joseph A. Morris

Joseph A. Morris
General Counsel

Memorandum

John Roberts

Subject	Date
Designation of Acting Deputy Director of the National Science Foundation.	December 28, 1982

To
FILES

From
NAME: Herman Marcuse
OFFICE SYMBOL:

STATEMENT:

On December 27, 1982, I received a telephone inquiry from Mr. John Roberts in the White House Counsel's Office as to whether the Director of the National Science Foundation (Director) may designate a member of the Senior Executive Service employed by his agency to be the Acting Deputy Director of the Foundation during a vacancy in the office of the Deputy Director. The Director and the Deputy Director are both appointed by the President by and with the advice and consent of the Senate. 42 U.S.C. §§ 1864(a); 1864a(a).

After having examined the pertinent statutory provisions, I advised Mr. Roberts that the Director has the authority to designate an Acting Deputy Director under his powers of delegation provided for in 42 U.S.C. § 1864(c) but that for two reasons the authority of the Acting Deputy Director would be limited to routine functions.

First, 42 U.S.C. § 1864(c) precludes the Director from redelegating policy making functions delegated to him by the National Science Board.

Second. While the last sentence of 42 U.S.C. § 1864a(a) provides that the Deputy Director shall act for and exercise the powers of the Director during the absence or disability of the Director or in the event of a vacancy in that office, this Office has consistently interpreted such provisions as being inapplicable to acting officials, hence that an acting official cannot become acting at a higher level.

The Acting Deputy Director thus could not exercise any policy making functions delegated to the Director of the National Science Board, and could not become Acting Director during the absence or disability of the Director or in the event of a vacancy.

Mr. Roberts took notice of those limitations and indicated that the Acting Deputy Director would perform only routine functions.

12/30 called Mann -
memo today

THE WHITE HOUSE
WASHINGTON

12/29/82

TO: John Roberts

FROM: Richard A. Hauser

FYI _____

Comment _____

Action ✓ as discussed

THE WHITE HOUSE

WASHINGTON

December 30, 1982

MEMORANDUM FOR RON MANN
ASSOCIATE DIRECTOR
PRESIDENTIAL PERSONNEL

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Appointment of SES Official as Acting Deputy Director by Director, National Science Foundation

This will confirm our conversation of this morning. The Director of the National Science Foundation (NSF) may designate an SES official of NSF Acting Deputy Director, pending nomination and confirmation of a permanent Deputy Director. The Acting Deputy Director (1) may not exercise policymaking functions, (2) should avoid, after serving thirty days, taking any legal action which specifically must be taken by the Deputy Director, and (3) may not serve as Acting Director in the absence of the Director.

Please do not hesitate to call if you have any questions.

Memorandum for [redacted]

From [redacted]

Subject: Designation by FEMA Director of Norman R. Hughes as Acting Associate Director for Emergency Operations

~~(TAB A)~~

In response to my memorandum of May 24, 1984, (TAB A) concerning the above-captioned matter, wherein I concluded that the FEMA Director could not appoint Mr. Hughes as Acting ~~Director~~ Associate Director for Emergency Operations for an unlimited time, you asked that we:

(1) Make sure [my advice] was consistent with advice we had given in connection with temporary staffing at EPA; and

(2) Discuss with the office of Presidential Personnel before advising Hughes.

Subsequent to receipt of your comments, I discussed this matter with Sherrie and John Rogers. Sherrie indicated that we had arrived at a different conclusion in re: the temporary assignment at EPA. She provided the attached ~~memorandum~~ recommendation for OLC which bears on the question as it related to EPA (TAB B).

As you can see from reading the OLC memorandum, my memorandum was inaccurate in that I conclude now that the Vacancy Act would not apply to FEMA, just as it does not

TAB B

Memorandum

Subject	Date
Vacancies in the EPA.	March 25, 1983

To
FILES

From
NAME: Herman Marcuse
OFFICE SYMBOL: OLC

STATEMENT:

On March 24, 1983, I received a call from Ms. Cooksey in the Office of the Counsel to the President concerning the question how the vacancies in the Office of the Administrator and Deputy Administrator, EPA, could be filled temporarily pending the appointment of Mr. Ruckelshaus by and with the advice and consent of the Senate.

Ms. Cooksey explained to me that as the result of the resignation of Mrs. Burford as Administrator of the EPA, Deputy Administrator Hernandez had become Acting Administrator by virtue of § 1(c) of Reorganization Plan No. 3 of 1970. Mr. Hernandez, however, would resign the following day (March 25, 1983). Neither the Reorganization Plan nor any statute dealing with the EPA have any provision dealing with the order of succession in the event that the offices of the Administrator and the Deputy Administrator, EPA, should both be vacant.

It was planned to fill those vacancies on a temporary basis in the following manner:

Mr. Lee Verstandig would be designated to be Acting Administrator, EPA. Mr. Verstandig was designated on February 24, 1983, to be Acting Assistant Administrator, EPA, for Legislation. At the time of that designation Mr. Verstandig was an Assistant Secretary for Transportation, an advice and consent position.

Mr. Lee M. Thomas would be designated Acting Deputy Administrator, EPA. Mr. Thomas was designated on February 24, 1983, to be Acting Assistant Administrator, EPA, for Solid Waste and Emergency Response. At the time of that designation Mr. Thomas was an Associate Director of FEMA, an advice and consent position.

Ms. Cooksey inquired whether this Office was aware of any legal objection to this plan. After discussing this inquiry with DAAG Simms, I advised Ms. Cooksey that we saw no legal infirmity in the proposal, indeed that we had advised the Office of the Counsel to the President about two years ago, that when the offices of the Administrator and Deputy Administrator, EPA, are both vacant, the President, in view of his responsibility for the continued operation of the Executive branch, had the power to designate an Acting EPA Administrator. See the attached memorandum, dated January 23, 1981.

We pointed out, however, that Mr. Verstandig and Mr. Thomas had been designated Acting Assistant EPA Administrators on February 24, 1983, and that three Senators claimed that under the Vacancy Act their authority under those designations would expire thirty days after their designation. In these circumstances, the Senators might argue that the shift of Mr. Verstandig and Mr. Thomas from Acting Assistant Administrators to Acting Administrator and Acting Deputy Administrator, respectively, was merely a strategem to avoid the operation of the thirty day limitation of the Vacancy Act. We took the position that, assuming arguendo that the February 24, 1983 designations were subject to time limitations which would run out in the near future, Mr. Verstandig and Mr. Thomas were designated to fill new vacancies governed by their own time limitations, if any. Any claim that the proposed designations constituted attempts to evade the time limitation on the original designations therefore would be unfounded.

LU:HM:dlh

cc:Marcuse(2)
Ulman
Sudol
Retrieval(not on tape)
File

23 JAN 1981

MEMORANDUM FOR T. TIMOTHY RYAN, JR.
Office of the Counsel to the President

Re: Vacancies in the Environmental Protective Agency.

This responds to your telephone inquiry of January 22, 1981, concerning the manner in which the vacancy in the office of the Administrator of the Environmental Protection Agency (EPA), established by Reorganization Plan No. 3 of 1970, 5 U.S.C. App., p. 827, (Plan) can be filled on a temporary basis.

We understand that the EPA is now headed by an Acting Administrator, an EPA employee appointed by the President by and with the advice and consent of the Senate. The Acting Administrator plans to resign on January 25, 1981. All other Presidential appointees of the EPA already have resigned. You inquire whether the President could legally designate as Acting Administrator either a person who is now an employee of another Agency, or a person who is not now an employee of the Government.

Section 1 of the Plan provides for the appointment of an Administrator, a Deputy Administrator, and not to exceed five Assistant Administrators, by the President by and with the advice and consent of the Senate. Section 1(c) provides that the Deputy Administrator shall act as Administrator in the event of a vacancy in the office of the Administrator. The Plan does not cover the situation, which will arise next Sunday, when the offices of the Administrator and Deputy Administrator will both be vacant.

The Vacancy Act is not applicable to the EPA because that Act extends only to the executive departments as defined in 5 U.S.C. § 101. The EPA is not such a department. For the reasons set forth at pp. 3-4 of the memorandum dated June 27, 1969, to Henry C. Cashen II, Deputy Counsel to the President, from then Assistant Attorney General Rehnquist (a copy of which

is attached), it is our opinion, although the matter is not entirely free of doubt, that the President has the power based on his constitutional responsibility for the continued operation of the executive branch to designate an acting agency head. In light of the opinion of the Court of Appeals in Williams v. Phillips, 482 F.2d 669, 670-671 (D.C. Cir, 1973), it would be desirable that a nomination for the position of the Administrator of EPA be submitted to the Senate within 30 days after the occurrence of the vacancy.

In the past this Office has consistently taken the position that such designation should be limited to persons who already are officers or employees of the agency concerned. Hence, a person who is not now an officer or employee of the EPA would have to be appointed to the agency before he can be designated as Acting Administrator. The present Acting Administrator should therefore prior to his resignation appoint to the EPA the person who has been selected as Acting EPA Administrator.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

APR 27 1969

MEMORANDUM FOR THE HONORABLE HENRY C. CASHEN II
Deputy Counsel to the President

This is to confirm our recent telephone conversation concerning the legal effect of the impending expiration of the term of the Director of the National Science Foundation and the resulting vacancy.

The incumbent Director of the National Science Foundation was appointed on July 1, 1963, for a term of six years. See National Science Foundation Act of 1950, section 3(a), as amended, 42 U.S.C. 1864a. His term therefore will expire on June 30, 1969. The 1968 amendments to the National Science Foundation Act also provide for the appointment by the President, by and with the advice and consent of the Senate, of a Deputy Director and of four Assistant Directors, 42 U.S.C. 1864. We have, however, been advised by the General Counsel of the National Science Foundation that these offices have not been filled as of this date.

The memorandum forwarded to you by the National Science Foundation indicates that if the President should designate an Acting Director of the National Science Foundation, the designee would have at least the status of a de facto officer. It would seem to this Office that the President has the power to designate a person to perform the functions of the Director of the National Science Foundation. The matter, however, is not free from doubt, a factor which we assume will be taken into account in deciding whether the power should be exercised. In this connection we might point out that virtually all of the effects of the proposed designation of an Acting Director can be achieved under existing delegations to the Executive Associate Director.

I.

The President's powers to appoint officers and to designate an officer charged with the performance of the duties of an Office which is vacant.

A. Regular Appointments

The regular method of filling offices in the Constitutional sense (except as to "inferior officers") is by Presidential appointment, by and with the advice and consent of the Senate. Constitution, Article II, section 2, clause 2. This method of appointing a new Director of the National Science Foundation is, of course, envisaged. Although the President has announced his intention to nominate a new Director, it appears, however, that it is not feasible to obtain the required Senatorial advice and consent prior to the expiration of the term of the incumbent Director.

B. Recess Appointments

Article II, section 2, clause 3 of the Constitution enables the President "to fill up all Vacancies that may happen during the Recess of the Senate." This method of appointment is not available now. The Senate is not in recess now and does not plan to take an extended recess in connection with Independence Day.

C. The Vacancies Act, 5 U.S.C. (Supp. IV) 3345-3349

These sections, which go back to the Vacancies Act of 1868, provide the manner in which vacancies resulting from the death, resignation, sickness or absence of a head of an Executive or military department, or of an officer of a Bureau of such departments, may be filled. They are not applicable here because the National Science Foundation is neither a military department nor an Executive department as defined in 5 U.S.C. 101.

It may also be noted that those sections provide that vacancies resulting from death or resignation may be filled for not more than thirty days.

D. The President's power to designate acting officials in the absence of a specific statutory authorization

As indicated above, the Vacancies Act does not cover all vacancies in the Executive branch of the Government. With respect to the "departments," as defined in 5 U.S.C. 101, it covers only the department heads and bureau officers, and does not apply at all to those components of the Executive branch which are not Executive departments, in particular the "independent establishments," as defined in 5 U.S.C. 104(1), of which the National Science Foundation is one.

If the Vacancies Act is the only source of the President's power to direct persons temporarily to perform the duties of an office, it would follow that his power is limited to the offices covered by it. However, if the Vacancies Act is not the sole source of the President's power in this respect, but rather is a regulation and limitation of a Presidential power derived directly from the Constitution, it follows that the Vacancies Act does not preclude the President from designating acting officers in agencies not covered by the Act.

The pertinent views of the various Attorneys General in this field have not been uniform. Compare, e.g., 27 Op. A.G. 337; 28 id. 486; 33 id. 298, with 6 id. 357, 367; 25 id. 258; 37 id. Upon further reflection and reexamination of the problem we have concluded that the second alternative is the correct one. In our view, the power to designate acting officials constitutes one of those necessary and essential Presidential powers which implement his responsibilities for the proper operation of the Executive branch. For the exercise of that power no specific statutory authorization is required. On the other hand, it cannot be exercised in violation of applicable statutes. This attribute of Presidential power would appear to fall into the penumbra between the Executive and Legislative branches, where the President can act if Congress has been silent on the subject, but where

Congress by legislation can curtail or regulate the President's power. See, e.g., United States v. McDaniel, 7 Pet. 1, 14-15; Youngstown Co. v. Sawyer, 343 U.S. 579, 637-638 (Jackson, J., concurring).

Our view, that the Vacancies Act is not the source of, but a limitation on, the Presidential power to designate acting officials also has the support of historic practice. For instance, from the establishment of the Department of the Navy in 1798 until 1863, there was no statutory provision for the appointment of an Acting Secretary of the Navy in the case of the death, resignation, illness, or absence of the Secretary. Nevertheless, there were, during that period, at least six instances in which the office of the Secretary of the Navy was held at interim, i.e., by an Acting Secretary, who was appointed neither by and with the advice and consent of the Senate, nor during the recess of the Senate, nor designated pursuant to the limited provisions of the Vacancies Act of 1795, 1 Stat. 415, which did not apply to the Secretary of the Navy. Biographical Directory of the American Congress 1774-1961, pp. 14-18. Similarly, a tabulation prepared in 1966 by the Executive Assistant to the President shows a number of instances in which Presidents have made designations of Acting Heads of Independent Establishments despite the fact that the Vacancies Act makes no provision therefor.

Our conclusion that the President has the power to designate an Acting Director of the National Science Foundation, however, does not necessarily mean that he should exercise it. It has been shown that there are Opinions of the Attorney General which would seem to deny the existence of this power. Moreover, the exercise by the President of a nonstatutory power sometimes leads to Congressional repercussions.

II.

The delegations to the Executive Associate Director of the National Science Foundation.

Section 5(c) of the National Science Foundation Act, as amended, 42 U.S.C. 1864(c), provides:

"(c) Delegation and redelegation of functions.

"The Director may from time to time make such provisions as he deems appropriate authorizing the performance by any other officer, agency, or employee of the Foundation of any of his functions under this chapter, including functions delegated to him by the Board: except that the Director may not redelegate policymaking functions delegated to him by the Board."

We have been advised by the General Counsel of the National Science Foundation that the Director of the Foundation has delegated all his powers to the extent legally possible to the Executive Associate Director of the Foundation. It is well-established that such delegations do not terminate when the principal ceases to be in office. 18 Op. A.G. 50; see also 42 id. No. 24, pp. 4-5.

Hence, after the expiration of the term of the Director, the Executive Associate Director will continue to be vested with all the powers of the Director, except the powers relating to policymaking functions delegated to the latter by the National Science Board. In these circumstances the Foundation is able to continue its day by day operation and there is no apparent occasion for the designation by the President of an Acting Director. Moreover, the President has already announced his intention to nominate Dr. McElroy as Director. His appointment therefore presumably can be effectuated within a reasonable time.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

April 3, 1981

MEMORANDUM FOR RICHARD A. HAUSER

FROM: MICHAEL LUTTIG

SUBJECT: The Vacancies Act and Its Effect on Temporary Presidential Designations

You have asked that I outline provisions of the law which relate to the temporary filling of positions within the Executive Branch by the President. Given the size of the Executive Branch of the government and the number of positions to be filled and which have already been filled therein, there are a myriad of ways in which issues concerning the scope and duration of authority of temporary or interim Presidential designations might arise. One cannot anticipate all of these, but the following can provide guidelines for thought.

I. The Vacancies Act: Temporary Succession By Operation Of Law and By Presidential Designation Within Executive And Military Departments

In the Vacancies Act, 5 U.S.C. §§ 3345-3349, the Congress vested authority in the President to make temporary designations to principal positions (defined as the heads of departments or the chiefs of bureaus therein) in the Executive and military departments of government when vacancies arise. Id. § 3347. Section 3347 reads, in relevant part, as follows:

> The President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. (emphasis added)

The scope of the terms "Executive department" and "military department" are expressly circumscribed by §§ 101 and 102 of Title 5. Section 101 enumerates those departments which are encompassed by the technical term "Executive departments." Included in the enumeration are the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, and Education. Section 102 enumerates those departments which are encompassed by the term "military departments." Included within Section 102 are the Departments of the Army, Navy, and Air Force. Any authority of the President to make temporary or interim designations to Executive branch entities other than those enumerated above, cannot emanate from provisions of the Vacancy Act. This is not to say, though, that no such authority exists (see discussion, infra).

If the President makes an appointment pursuant to Section 3347, by operation of 5 U.S.C. § 3348, it is limited to a period of 30 days. Moreover, once a vacancy is filled pursuant to the President's authority under § 3347, his authority under the statute with respect to the particular position temporarily filled, is exhausted -- he is thereafter without power either to designate again the same officer or to designate another officer to fulfill the obligations of the vacant office. 16 Op. Atty. Gen. 596 (1880); see, also, 17 Op. Atty. Gen. 530 (1883); 18 Op. Atty. Gen. 50 (1884).

The authority of the President to designate temporarily an officer to fulfill the duties of principal positions within the Executive and military departments, is but one alternative provided by the Congress for the temporary filling of such positions upon vacancy. The President need not avail himself of this authority. If he chooses not to exercise this authority, Sections 3345 and 3346 of Title 5 become operative. Both sections provide for a natural succession in the event of vacancy, and absent a Presidential directive. Section 3345 provides that, absent a Presidential directive under Section 3347, "[w]hen the head of an Executive department or military department dies, resigns, or is sick or absent, his first assistant . . . shall perform the duties of the office until a successor is appointed or the absence or sickness stops." Section 3346 provides, similarly, that absent Presidential directive, "[w]hen an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant . . . shall perform the duties of the office until a successor is appointed or the absence or sickness stops."

The 30-day limitation on temporary designations mandated by Section 3348 applies as well to a succession without Presidential action under Sections 3345 and 3346 as it does to a Presidential

designation pursuant to Section 3347. 32 Op. Atty. Gen. 139 (1920); 17 Op. Atty. Gen. 535 (1883).

There is some conflict on whether the 30-day period to which Section 3348 refers begins to run on the date that the vacancy arises or on the date that the temporary officer assumes his official duties. It is purely a matter of statutory construction and it may become important depending upon the circumstances. Section 3348 reads as follows:

> A vacancy caused by death or resignation may be filled temporarily under Section 3345, 3346, or 3347 of this title for not more than 30 days.

If the vacancy is filled as a result of statutory succession under either Section 3345 or 3346, the time between creation of the vacancy and statutory divestiture of authority should rarely exceed 30 days, since the named assistant, presumably in office at the time, will immediately assume responsibility upon the vacancy. Under these circumstances, the authority of the acting officer divests 30 days from the time of vacancy. This would be no less true where the time of vacancy and that of Presidential designation pursuant to Section 3347 are coterminous.

Were there to be a lapse of time between creation of the vacancy and succession either by operation of law pursuant to Section 3345 or 3346, or by Presidential designation under Section 3347, however, it is not clear whether the 30 days limitation would be held to have run from the date of succession or designation or from the date of vacancy. Two memoranda from the Office of Legal Counsel (OLC) of the Department of Justice suggest different interpretations of the statutory provision. But, in neither memorandum was this particular issue under consideration and in both the issue was noted only incidentally. Says one, "[u]nder 5 U.S.C. 3348, however, a person filling a vacancy by virtue of § 3345 may not do so for more than 30 days." Memorandum for the Honorable Robert J. Lipshutz regarding Status of the Acting Director of the Office of Management and Budget, December 22, 1977; says the other, "[t]he temporary filling of a vacancy under 5 U.S.C. §§ 3346 and 3347, however, is limited to a period of thirty days running from the beginning of the vacancy. 5 U.S.C. § 3348." Memorandum for Margaret McKenna regarding Vacancy in the Office of the Commissioner of Education, July 30, 1979.

A construction identical to that in the latter memorandum above was also suggested in an OLC memorandum of June 15, 1977. Memorandum from John M. Harmon for the Associate Counsel to the President regarding Power of the President to Designate Acting Member of the Federal Home Loan Bank Board. Therein,

in a footnote, the author asserts that the Attorney General has interpreted 5 U.S.C. § 3348 to mean that the power of an acting official ends on the thirtieth day following the day on which the vacancy arose. Although at first blush, this assertion would appear dispositive, the author cites as authority for this proposition the opinion of the Attorney General in a case in which the Undersecretary of State became Acting Secretary of State immediately upon the resignation of the Secretary. 32 Op. Atty. Gen. 139 (1920). The time of vacancy and that of assumption of duty by the acting official were one in the same. The issue whether the statutory time period began to run upon vacancy or upon succession, thus, was not raised by the facts.

The actual language used by the Attorney General in the 1920 Opinion cited was as follows:

> Where a vacancy occurs in the Office of Secretary of State, it can not be temporarily filled for a longer period than 30 days, either by statutory succession or by designation of the President ...

One can find within this language support for either of the interpretations of the statute given in the aforementioned memoranda. It is probably this language which permitted the different interpretations.

Nevertheless, the discrepancies seem irreconcilable. And resolution of the problem is especially important during the early days of a new Administration when authority is fluid. The problem may arise in any of several contexts. Where the time of vacancy and that of Presidential designation or succession by operation of law are contemporaneous, as noted previously, the interpretive problems are minimal. The person filling the position may do so for no more than 30 days. But suppose instead that there is a lapse of time before the President makes a temporary designation under Section 3347. The question would become whether the time between the knowledge of the vacancy and the actual designation must be subtracted from the permitted, statutory period of 30 days to yield the total number of days during which the temporary officer is vested with legal authority to act, or whether he, personally, is statutorily granted 30 days within which to conduct business with full authority. The better view probably is that articulated by the Attorney General -- in an opinion that dealt with a temporary Presidential designation -- that computation of the period must begin from the date the President designated the official to fill the temporary vacancy and not from the date the vacancy arose. 15 Op. Atty. Gen 457 (1878). This assessment is premised on both a judgment that the authors of the memoranda which take the contrary posture were not at the time addressing this narrow issue, and the fact that the Attorney General in

his 1878 opinion above did address the specific issue and reached the conclusion cited. In addition, this conclusion would comport best with a strict construction of Section 3348 itself, Congress having chosen as it did to say that positions may not be "filled" temporarily for in excess of 30 days. The term "filled" clearly implies that an officer is in position and responsible for the discharge of duties.

This conclusion, I suggest, is not one to be tested needlessly, given the authority which apparently suggests an opposite interpretation. The President would be well advised to make Section 3347 designations as quickly as possible after notification of vacancy. If the problem must be addressed in retrospect, the best solution is to ensure that nominations to such positions are made as soon as practicable so that, arguably, the burden is shifted to the Senate to perform its "advice and consent" function expeditiously.

Whether one succeeds to a position by operation of law under Sections 3345 or 3346, or assumes authority by virtue of Presidential designation under Section 3347, it appears settled that his power cannot extend beyond the 30-day limitation imposed by Section 3348 (whether the statute begins to toll upon vacancy or upon assumption of duty is immaterial at this juncture). It follows that action taken beyond the 30-day period by an official acting pursuant to the Vacancy Act provisions is without legal effect. Numerous cases note as much in dicta. See e.g., U.S. v. Guzek, 527 F.2d 552, 559 (CA 8 1975); Williams v. Phillips, 482 F.2d 669, 671 (CA D.C. 1973); U.S. v. Lucido, 373 F. Supp. 1142, 1149 (D.C. E.D. Mich. 1974). The efforts that have been made to circumvent, rather than directly challenge what is perceived as this unavoidable construction are but further evidence of its validity. In addition, in a 1920 opinion, the Attorney General adopted the same view of the Section. 32 Op. Atty. Gen. 139 (1920). In the circumstances which gave rise to that Opinion, the Undersecretary of State by operation of the Vacancy Act provisions became Acting Secretary of State upon the resignation of the Secretary of State. A nomination to be Secretary of State was submitted by the President. Subsequently, the Acting Secretary apprised the Attorney General that the 30 days permitted under Section 3348 had expired, without confirmation of the nominee, and asked the Attorney General for an opinion as to his status. The Attorney General responded that subsequent to the period of temporary occupancy and prior to confirmation by the Senate of the President's nomination, "it is probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts." This decision has not been seriously questioned in the intervening years since its rendition.

The inability of the acting officer to act beyond the statutory 30-day period, however, need not hamstring the entire department or even a unit within the department. Many of the duties of the official in question may have been assigned or delegated to subordinates. Such assignments and delegation if made in timely fashion would likely remain in effect during a period of vacancy. It would only remain to be considered whether vested in the principal position were any non-delegable duties.

II. Temporary Presidential Designations To Positions Within The Executive Branch But Outside The Reach Of The Vacancy Act

The Vacancy Act, as discussed, applies by its terms only to the heads of Executive and military departments and officers of bureaus within Executive and military departments as enumerated in 5 U.S.C. §§ 101 and 102. There are entities and organizations within the Executive branch of the government which are not included in either the statutory definition of "Executive department" or that of "military department." The Federal Reserve Board and the Office of Economic Opportunity, and the Office of Management and Budget are but several of the many excepted entities. These excepted Executive branch entities are discussed in 5 U.S.C. §§ 104, 105, and referred to as "government corporations" and "independent establishments," respectively.

The question arises whether, absent statutory authority, the President has the power to make temporary designations within these excepted organizations. The Office of Legal Counsel in the Department of Justice takes the position that the President has such authority but that to avoid challenge, the President should formally nominate a person for the position within a reasonable time after he designates the acting official. Memorandum of June 15, 1977 from John M. Harmon to the Associate Counsel to the President, regarding the Power of the President to Designate Acting Member of the Federal Home Loan Bank Board. The position taken by the Office of Legal Counsel is predicated upon a subtle but careful analysis of both the original and appellate decisions in a recent case that challenged the President's power to make an interim designation, absent statutory limitation, to an Executive agency not within the scope of the Vacancy Act provisions. Williams v. Phillips, 360 F. Supp. 1363 (D.C. D.C. 1973), motion den., 482 F.2d 669 (CA D.C. 1973).

In Williams v. Phillips, the President appointed an Acting Director of the Office of Economic Opportunity (OEO). There was no provision in the Economic Opportunity Act of 1964 for the appointment of an Acting Director. Four United States Senators brought suit to remove the defendant from his position as Acting Director because he had not been appointed by the President and confirmed by the Senate as Director of OEO as required by 42 U.S.C. § 2941(a)(1970). Plaintiffs conceded that the designation could have been made by the President pursuant to the Vacancies Act, but contended that even if it had been so made, the 30 days permitted under Section 3348 for such designations had expired 3-1/2 months prior to suit. The defendant urged that the President's Constitutional directive to "take Care that the Laws be faithfully executed," Art. II §3, carries with it the constitutional authority without restriction to appoint officers temporarily to Executive branch positions outside the Executive and military departments.

The District Court held that, absent statutory authorization, the President could not make a temporary appointment to a position with the OEO which requires Senate confirmation. The Government sought a stay in the Court of Appeals, but the request was denied. 482 F.2d 669 (1973). The denial, however, was not grounded in the theory articulated by the District Court, and it is this disparate analysis by the Court of Appeals which the Office of Legal Counsel has relied upon for its conclusion that the President does have authority to make interim designations to an Executive agency not within the scope of the Vacancy Act, absent statutory limitation, if a nomination is submitted within a reasonable time after designation. The critical language of the Court of Appeals is as follows:

> It could be argued that the intersection of the President's constitutional obligation to "take care that the laws be faithfully executed" and his obligation to appoint the director of OEO "with the Advice and Consent of the Senate" provides the President an implied power, in the absence of limiting legislation, upon the resignation of an incumbent OEO director, to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate.

482 F.2d 669, 670.

The Court went on to say that the "reasonable time" required by the President to select persons for nomination is the 30-day period in the Vacancies Act. Id. at 671. Arguably then, it was only because the acting director served for a period far in excess of the reasonable time period, as defined by the Court, before a nomination was submitted (4-1/2 months) that the stay was denied.

Although not without its potential pitfalls, the construction given the above-quoted passage by the Office of Legal Counsel permits temporary designations by the President to agencies, boards and organizations within the Executive Branch, but not within the Executive departments and military departments, absent statutory limitation, if the President submits a nomination prior to termination of a "reasonable" time following designation. Moreover, and perhaps more significantly for our purposes now, the Office of Legal Counsel, by extrapolation from Williams v. Phillips, 482 F.2d 669 (1973), concludes that if a timely nomination is made, the acting officer may legally serve for a period beyond the 30 days to which persons designated pursuant to Vacancy Act provisions are subject. Memorandum of June 15, 1977, from John M. Harmon for the Associate Counsel to the President regarding the Power of the President to Designate Acting Member of the Federal Home Loan Bank Board. This view if accepted by a tribunal would permit service, after a timely nomination, presumably until the nomination is acted upon by the Senate. The permissibility of such an extended tenure would sooner be acknowledged, note, were, by analogy to 5 U.S.C. § 3347, the acting officer prior to his designation, an official appointed after Senate confirmation. Id. The argument that the President has such authority would be bolstered even further if it could be shown that a vacancy in the position would seriously hamstring the capability of the agency or organization to discharge its responsibilities. Finally, it should be remembered that, despite the consistency with which the Office of Legal Counsel has espoused the above view of Presidential authority, the question has yet to be squarely addressed. That the judiciary has yet to address fully and directly the issue, suggests that a degree of circumspection with regard both to advice and action is well-advised.

III. Vacancies For Which Express Statutory Provision Has Been Made By Congress

The provisions of the Vacancy Act and the power of the President, absent statutory limitation, to make temporary designations to positions within the Executive branch but without the scope of the "Executive and military departments," are inapplicable where, by statute, Congress has expressly provided for a chain of succession in the case of vacancy. If an express statutory provision governing succession exists, it may or may not embody a time period beyond which the acting official may not legally act. If the statute does provide for a time limitation on his authority, it controls. If no specific statutory time limitation is imposed, it must not be concluded that the acting official, even though he holds office by operation of law, may act legally for an indefinite period. To the contrary, it has been advised that if his tenure as an "acting" official extends beyond a reasonable time, any actions beyond such

time are subject to challenge. Memorandum of December 22, 1977, from John M. Harmon for Robert J. Lipshutz regarding Status of the Acting Director of the Office of Management and Budget.

In the circumstances which gave rise to the preceding memorandum, the Deputy Director of OMB, by operation of 31 U.S.C. § 16 (1975 Supp.), became Acting Director of OMB upon a vacancy in the Office of the Director. There was no statutory limitation on the period during which the Acting Director could serve. The Vacancy Act provision did not apply because OMB was not an "Executive department" within the meaning of 5 U.S.C. § 101. The Office of Legal Counsel reasoned that although the Senate, when it considers a nomination to the position of Deputy Director, realizes concomitantly that the nominee may at some point become Acting Director, implicit in Congressional creation of two distinct positions -- Director and Deputy Director -- is that the Deputy may not properly serve indefinitely as Acting Director. The Office believed that the 30-day limitation was inapplicable, but that service should not continue beyond a reasonable time, as delimited by circumstances of the individual case. Ingredients in the determination of whether the time served was "reasonable" were to include the particular functions being performed by the acting officer; the manner in which the vacancy was created; the time when the vacancy was created; whether the President has forwarded his desired nomination to the Senate; and the President's ability to devote attention to the matter. Memorandum, December 22, 1977, supra. In the case presented to it, the Office of Legal Counsel held that three months as Acting Director of OMB was not unreasonable.

Additional authority exists in support of the conclusion drawn by the Office of Legal Counsel. In United States v. Halmo, 386 F. Supp. 593 (1974), pursuant to 28 U.S.C. § 508, and not because of 5 U.S.C. § 3345, Solicitor General Bork had become Acting Attorney General of the United States. He subsequently issued orders which authorized applications for the interception of wire and oral communications, authorizations which were not affected within 30 days after he assumed office as Acting Attorney General. Defendants urged that the authorizations were invalid in that they were issued after 30 days from the date of Mr. Bork's assumption of duties as acting Attorney General. The court summarily rejected defendants' claim stating simply that, "[t]here is no time limitation imposed on those who acquire office through § 508(b)." 386 F. Supp. 593, 595. See also, U.S. v. Pellicci, 504 F.2d 1106, 1107 (CA 1 1974), cert. den., 419 U.S. 112, 95 S. Ct. 805, 42 L. Ed 2d 821 (1975); U.S. v. Guzek, 527 F.2d 552 (CA 8 1975). Factually, the wiretap authorizations had occurred over two months after Solicitor General Bork became Acting Attorney General.

In summary, thus, no court has specifically addressed the issue of the precise time within which an acting officer, whose acting status is affected by an express statutory provision governing succession, may legally serve. It is clear that he is not subject to the 30-day limitation of 5 U.S.C. § 3348 (unless the statute so provides by coincidence). But it seems equally clear that even he may not serve beyond what might be understood to be a "reasonable" time period, lest the intent of Congress that such officers be subject to Senate confirmation be frustrated.

IV. Recess Appointments by the President

The statutory and constitutional Presidential power to appoint, designate, or assign temporarily an official to fill a vacancy during a recess of the Senate is unencumbered by the type of ambiguity that attends the Vacancy Act.

Art. II, section 2, clause 3 of the Constitution provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session

This Presidential power to make recess appointments is statutorily acknowledged by the Congress in 5 U.S.C. § 3349. It is undisputed that this power is not limited to vacancies that occur during the recess but rather, extends to all vacancies that exist during a recess. 41 Op. Atty. Gen. 463 (1960); 16 Op. Atty. Gen. 522 (1880). The precise time when the vacancy arose is immaterial.

Originally the Congress, although it acknowledged the President's authority to make recess appointments, sought to frustrate its exercise by prohibiting salary payments from the Treasury for persons who took a recess appointment if the vacancy existed while the Senate was in session. 5 U.S.C. § 56. Today, however, by virtue of amendments to the original statute, certain classes of appointments are excepted from the salary proscription. 5 U.S.C. § 5503(a). Thus, the Treasury may make salary disbursements to persons who took office under a recess appointment (1) if the vacancy arose within 30 days before the end of the session of the Senate; (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment. Id. By operation, however, of 5 U.S.C. § 5503(b), even this compensation is prohibited if the President fails to submit a nomination for the position to the Senate within 40 days after the beginning of the next session. The submission requirement would include resubmission of nominations pending but not acted upon at the time of adjournment.

The question that might well be posed with respect to a recess appointment made by the President is whether the duration of the recess is sufficient in length to engage the statute -- whether "recess" refers solely to the termination of a session of the Senate or whether a temporary adjournment will suffice. The Attorney General has determined that a temporary adjournment of a length that prevents the Senate from discharging its duty of advice and consent will suffice. 41 Op. Atty. Gen. 462 (1960). This practical standard was first articulated by the Attorney General almost forty years prior, 33 Op. Atty. Gen. 20 (1921), in an opinion which relied heavily upon early opinions of Attorneys General, 1 Op. Atty. Gen. 631 (1823); 12 Op. Atty. Gen. 32 (1866), case law, Gould v. U.S., 19 C. Cls. 593, and a Senate Committee Report in which the term "recess" as used in Art. II, section 2, clause 3 of the Constitution was construed. S. Rep. No. 4389, 58th Cong., 3d Sess. (1905).

The Senate Report interpreted the term "recess" in the following manner:

> the period of time when the Senate is not sitting in regular or extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it cannot receive communication from the President or participate as a body in making appointments.

Id.

The opinion of the Attorney General then went on to hold in consideration of this language that the adjournment of Congress from August 24 to September 21, 1922, constituted a "recess" within the meaning of Article II.

In the concluding portion of the Opinion, 33 Op. Atty. Gen. 20, 24-25 (1920), the Attorney General addressed the problems presented by a Senate adjournment of only a few days, concluding that ultimately it is,

> a matter of sound Presidential discretion to determine whether or not there was a real and genuine recess making it impossible for the Senate to give its advice and consent to executive appointments.

Id. at 25.

Although the Attorney General admitted that the line of demarcation is difficult, he did say that a recess of 5 or even 10 days cannot be said to constitute the kind of recess contemplated by the Framers. Id.; See also, 23 Op. Atty. Gen. 599 (1901).

The only issue which remains and which it might be sound judgment to address here is the period during which recess appointments are valid. Article II, section 2, clause 3 specifies that Commissions granted pursuant thereto "shall expire at the end of their [the Senate's] next session." If the Senate were to recess in the middle of a Session, and reconvene, for instance, one month later, but prior to the end of the Session which began before its recess, appointments made during the recess would not expire until the end of the Session which follows adjournment of the Session begun before the recess. It is the formal definition of a Congressional "Session" to which the Article refers. In the example above, the return of Congress following the recess is not the next session the conclusion of which would carry with it termination of recess appointments; rather, it is merely a continuation of the session that was in order prior to the recess. See, 41 Op. Atty. Gen. 463 (1960).