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United States General Accounting Office
Washington, DC 20548

September 6, 2001

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate

The Honorable Fred Thompson
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

Subject: Presidential Appointments: Qualifications of Acting Officials at the
Department of Justice Under the Federal Vacancies Reform Act of 1998

Because of your interest in how the management transition at the Department of Justice was progressing under the provisions of the Federal Vacancies Reform Act of 1998 (Vacancies Reform Act), you asked us on March 7, 2001, for an accounting of the vacancies for positions which require Presidential appointment and Senate confirmation (PAS positions). This request follows the first presidential transition subject to the Vacancies Reform Act. This act, which took effect on November 21, 1998, established new requirements for the temporary filling of vacant executive agency PAS positions and is intended to create a clear process and a time limit for the temporary filling of PAS positions. The act provides specific criteria that must be met by individuals who temporarily fill vacant positions.

For the PAS positions as of March 7, 2001, at the Department of Justice, we agreed to provide you: (1) the date each position became vacant, (2) the date each acting official was appointed, (3) the names of the individuals serving in these positions, and (4) an assessment of whether the acting officials were eligible to serve in that role under the Vacancies Reform Act.¹

In summary, as of March 7, 2001, of the 35 PAS positions at the headquarters of the Department of Justice, 19 positions were filled with acting officials, 13 were filled with individuals confirmed before the start of the Bush administration, and one – the Attorney General – was confirmed in the new administration. The remaining two positions, the Associate Attorney General of the Department of Justice and a Regional Commissioner of the United States Parole Commission were vacant and not filled with anyone serving in an acting capacity. Of the 19 acting officials, 3 were acting officials because they were first assistants as defined under the Vacancies

¹ As agreed with your offices, we did not review the status of the U.S. Attorneys or the U.S. Marshals, which are PAS positions excepted by the Vacancies Reform Act, 5 U.S.C. § 3347(a)(1).

Reform Act. The remaining 16 were designated by the President² to serve in an acting capacity as prescribed by the act. All 19 acting officials met the qualifications to serve in an acting capacity as prescribed by the Vacancies Reform Act. Enclosure I lists the PAS positions and the individuals serving in them as of March 7, 2001 and the status of the positions on August 3, 2001, the day the Senate went into recess. The Department of Justice had no comments on this letter.

Background

Under the Vacancies Reform Act, a vacancy occurs if a presidential appointee covered by the act dies, resigns, or is otherwise unable to perform the functions and duties of the office. The Vacancies Reform Act, for covered PAS positions, among other things

- specifies who may serve as an acting officer;
- imposes a time limit on how long vacancies can be filled by acting officers; and
- requires agencies to immediately report to the Senate, the House of Representatives, and the Comptroller General of the United States (1) any vacancy and the date it occurs, (2) the name of any person serving in an acting capacity and the date such service began, (3) the name of any person nominated to fill a vacancy and the date such nomination is submitted to the Senate, and (4) the date of any rejection, withdrawal, or return of a nomination.

The Vacancies Reform Act also requires the Comptroller General of the United States to inform specified congressional committees, the President, and the Office of Personnel Management if an acting officer serves longer than 210 days, a period which may be extended through various provisions of the act.

Generally, the Vacancies Reform Act applies to any office within an executive agency to which appointment is required to be made by the President, by and with the advice and consent of the Senate. The Vacancies Reform Act, however, excludes from its coverage certain officers. It does not apply, for example, to any PAS position on a multimember board, commission, or similar entity that governs an independent establishment or government corporation. The Vacancies Reform Act also recognizes that a number of PAS positions are covered by other statutes that specifically address how those offices are to be filled temporarily.

In a previous letter to Senator Thompson,³ we provided details on the four ways that an individual can be eligible to serve as an acting official and types of documentation that would verify an official's eligibility to serve in an acting capacity. The two ways⁴ that applied to the acting officials at the time of our review at the Department of Justice were (1) eligibility based on service as a first assistant to the vacant position

² Of these 16, President Clinton designated 4 individuals as acting officials. Two of these designations—for Assistant Attorney General for the Office of Justice Programs and Director, National Institute of Justice—were made in 2000. The other two—Deputy Attorney General and Solicitor General—were effective on January 20, 2001.

³ *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998* (GAO-01-468R, February 23, 2001).

⁴ The other two ways that an individual may be eligible to serve as an acting official are (1) eligibility based on service in a presidentially appointed, Senate confirmed position and (2) eligibility based on reappointment to a term-limited position.

and (2) eligibility based on service as a senior agency official designated by the President to serve temporarily.

How We Assessed Eligibility of Acting Officials

Regarding eligibility to serve on an acting basis due to being a “first assistant,” the Vacancies Reform Act provides that the first assistant to the officer who had vacated the position may temporarily perform the functions and duties of the PAS position in an acting capacity subject to the act’s time limitations. Although the act does not define the term “first assistant,” the legislative history indicates that first assistant positions may be designated by statute or regulation. Agencies have also designated first assistants in agency orders, agency directives, and position descriptions.

The following documents are relevant to showing whether a person may serve in an acting capacity because he or she was a first assistant.

- The statute, regulation, or other dated documents that designate the individual’s position as first assistant to the vacant position.
- Standard Form(s) (SF) 50-Notification of Personnel Action. These forms, along with other documents, are useful to demonstrate that an individual held the first assistant position and the time period an individual served in the first assistant position.

For each of the three acting officials whose eligibility was supposed to be as first assistants, we checked these documents and confirmed that they actually met the criteria.

Regarding eligibility to serve in an acting capacity due to service as a senior agency official designated by the President, the Vacancies Reform Act places a number of limitations on which agency employees qualify to be designated as senior agency officials. First, the senior agency official must be from the same agency in which the vacancy occurs. Second, the senior agency official must have served within the agency for not less than 90 days during the 365 days preceding the vacancy. Third, the senior agency official must have served at the rate of pay of the GS-15, step 1 level or above.

The following documents are relevant to showing whether a person may serve in an acting capacity as a senior agency official designated by the President:

- The President’s signed designation of the senior agency official to serve in the vacant position in an acting capacity.
- SF-50’s-Notification of Personnel Action to demonstrate that the senior agency official’s rate of pay is at the GS-15, step 1 level or above, and that the official served in the agency for 90 days or more at that level or higher during the 365 days preceding the vacancy.

For the 16 acting officials who were cited as being designated by the President to serve, we checked these documents and found that all of them were eligible under the Vacancies Reform Act.

Agency Comments

We asked the Department of Justice for comments on this letter. The department said it had no comment.

Scope and Methodology

To identify individuals serving in PAS positions as of March 7, 2001, we obtained from the Assistant Attorney General for Administration a list of the PAS positions in the Department and the individuals in those positions on that date. We compared the positions on that list with positions listed in the book entitled, *United States Government Policy and Supporting Positions*, published in November 2000, by the Senate Committee on Governmental Affairs. We requested the official personnel files of each acting official identified and reviewed the files to obtain the most recent copies of SF-50's going back to 1998, so that we could determine if the eligibility requirements were met under the Vacancies Reform Act. In cases where the acting official was directed by the President to serve as an acting official, we also obtained a memorandum signed by the President designating the individual as such. In the case where the acting official was serving as a first assistant, we obtained agency documents showing that the acting official was serving as the first assistant to the position.

We did our work in Washington, D.C., from March 2001 through August 2001 in accordance with generally accepted government auditing standards.

We are sending copies of this letter to the Chairman, Senate Committee on Governmental Affairs; the Ranking Minority Member, Senate Committee on the Judiciary; the Chairman and Ranking Minority Member, House Committee on Government Reform; the Chairman and Ranking Minority Member, House Committee on the Judiciary; the Attorney General; and the Counsel to the President. This letter will also be available on GAO's home page at <http://www.gao.gov>. If you have questions, please contact me or Mr. Thomas Dowdal, Assistant Director, on (202) 512-6806.

In addition, Terry Draver, Jeffrey Dawson, V. Bruce Goddard, and Michael Volpe made key contributions to this letter.

Sincerely yours,



Victor S. Rezendes
Managing Director, Strategic Issues

Status of Individuals in PAS Positions in the Department of Justice as of March 7 and August 3, 2001

PAS position	Date position became vacant	March 7			August 3	
		Date official began service	Name of official	Status	Name of official	Status
Attorney General	1/20/2001	2/1/2001	John Ashcroft	Confirmed	John Ashcroft	Confirmed
Deputy Attorney General	1/20/2001	1/20/2001	Robert S. Mueller III	Acting	Larry D. Thompson	Confirmed
Associate Attorney General	1/20/2001	—	—	Vacant	—	Vacant
Solicitor General	1/20/2001	1/20/2001	Barbara Underwood	Acting	Theodore B. Olson	Confirmed
Inspector General	—	—	Glenn A. Fine	Confirmed ^a	Glenn A. Fine	Confirmed
Assistant Attorney General (Legal Policy)	1/20/2001	2/9/2001	Kevin R. Jones	Acting	Viet D. Dinh	Confirmed
Assistant Attorney General (Legal Counsel)	1/20/2001	2/9/2001	Daniel L. Koffsky	Acting	Daniel L. Koffsky	Acting
Assistant Attorney General (Legislative Affairs)	1/20/2001	2/9/2001	Sheryl L. Walter	Acting	Daniel J. Bryant	Confirmed
Assistant Attorney General (Antitrust Division)	1/20/2001	2/9/2001	John Nannes	Acting	Charles A. James	Confirmed
Assistant Attorney General (Criminal Division)	1/20/2001	1/20/2001	John C. Keeney	Acting	Michael Chertoff	Confirmed
Assistant Attorney General (Civil Division)	1/20/2001	1/20/2001	Stuart E. Schiffer	Acting	Robert D. McCallum	Confirmed
Assistant Attorney General (Civil Rights Division)	1/20/2001	2/9/2001	William R. Yeomans	Acting	Ralph F. Boyd	Confirmed
Assistant Attorney General (Tax Division)	1/20/2001	2/9/2001	Claire Fallon	Acting	Eileen O'Conner	Confirmed
Assistant Attorney General (Environment & Natural Resources Division)	1/20/2001	2/9/2001	John C. Cruden	Acting	John C. Cruden	Acting
Assistant Attorney General (Office of Justice Programs)	2/25/2000	2/26/2000	Mary Lou Leary	Acting	Mary Lou Leary	Acting
Special Counsel (Civil Division-Immigration-Related Unfair Employment Practices)	—	—	John D. Trasvina	Confirmed ^b	John D. Trasvina	Confirmed
Director, Federal Bureau of Investigation	—	—	Louis J. Freeh	Confirmed ^c	Robert S. Mueller III	Confirmed
Director, U.S. Marshals Service	1/20/2001	2/9/2001	Louis T. McKinney	Acting	Louis T. McKinney	Acting
Administrator, Drug Enforcement Administration	—	—	Donnie R. Marshall	Confirmed ^a	Asa Hutchinson	Confirmed
Deputy Administrator, Drug Enforcement Administration	1/20/2001	2/22/2001	William B. Simpkins	Acting ^d	William B. Simpkins	Acting
Director, Bureau of Justice Assistance	1/20/2001	2/9/2001	Richard H. Ward, III	Acting	Richard H. Ward, III	Acting
Director, Bureau of Justice Statistics	1/20/2001	2/9/2001	Lawrence H. Greenfield	Acting	Lawrence H. Greenfield	Acting
Director, National Institute of Justice	4/21/2000	12/15/2000	Julie Samuels	Acting	Sarah V. Hart	Confirmed

**Status of Individuals in PAS Positions in the
Department of Justice as of March 7 and
August 3, 2001**

PAS position	Date position became vacant	March 7			August 3	
		Date official began service	Name of official	Status	Name of official	Status
Director, Office for Victims of Crime	1/20/2001	4/6/2001	Kathryn Turman	Confirmed ^a	Kathryn Turman	Confirmed
Administrator, Office of Juvenile Justice and Delinquency Prevention	2/28/2000	3/1/2000	John J. Wilson	Acting ^d	John J. Wilson	Acting
Commissioner, Immigration & Naturalization Service	11/19/2000	11/20/2000	Mary Ann Wyrsh	Acting ^d	James W. Ziglar	Confirmed
Director, Community Relations Service	—	—	Rose Ochi	Confirmed ^e	Jonathan Chace	Acting
Chairman, U.S. Parole Commission	—	—	Michael J. Gaines	Confirmed ^f	Edward F. Reilly	Confirmed ^g
Vice Chairman, U.S. Parole Commission	—	—	Timothy E. Jones, Sr.	Recess Appointment ^h	Timothy E. Jones, Sr.	Recess Appointment
National Commissioner, U.S. Parole Commission	—	—	Edward F. Reilly	Confirmed ^f	Michael J. Gaines	Confirmed
Regional Commissioner, U.S. Parole Commission	—	—	John R. Simpson	Confirmed ^f	John R. Simpson	Confirmed
Regional Commissioner, U.S. Parole Commission	12/15/2000	—	—	Vacant	—	Vacant
Chairman, Foreign Claims Settlement Commission	—	—	John R. Lacey	Recess Appointment ^h	John R. Lacey	Recess Appointment
Commissioner, Foreign Claims Settlement Commission	—	—	Laramie McNamara	Recess Appointment ^h	Laramie McNamara	Recess Appointment
Commissioner, Foreign Claims Settlement Commission	—	—	Richard T. White	Confirmed ^f	Richard T. White	Confirmed

^aConfirmed in previous session of Congress and retained by Bush administration.

^bConfirmed in previous session of Congress in position subject to a 4-year appointment.

^cConfirmed in previous session of Congress in position subject to a 10-year appointment.

^dEligibility based on service as first assistant.

^eConfirmed in previous session of Congress in position subject to a 4-year appointment which expired in March 2001.

^fConfirmed in previous session of Congress subject to a term appointment which has expired, but subject to holdover provisions of the Vacancies Reform Act. The holdover provisions state that the Vacancies Reform Act shall not be construed to affect any statute that authorizes a person to continue to serve in any office (1) after the expiration of the term for which such person is appointed; and (2) until a successor is appointed or a specified period of time has expired. 5 U.S.C. § 3349b.

^gConfirmed in previous session of Congress; designated by President Bush to be Chairman.

^hRecess appointment made by President Clinton.

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