

105TH CONGRESS
2D SESSION

S. 1764

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the “Vacancies Act”) to clarify statutory requirements relating to vacancies in certain Federal offices, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 16, 1998

Mr. THURMOND (for himself and Mr. LOTT) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the “Vacancies Act”) to clarify statutory requirements relating to vacancies in certain Federal offices, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Vacancies Clarification
5 Act of 1998”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

1 (1) Congress enacted the Act entitled “An Act
2 to authorize the temporary supplying of vacancies in
3 the executive departments”, approved July 23, 1868
4 (commonly referred to as the “Vacancies Act”), to—

5 (A) preclude the extended filling of a va-
6 cancy in an office of an executive or military
7 department subject to Senate confirmation,
8 without the submission of a Presidential nomi-
9 nation;

10 (B) provide an exclusive means to tempo-
11 rarily fill such a vacancy; and

12 (C) clarify the role of the Senate in the ex-
13 ercise of the Senate’s constitutional advice and
14 consent powers in the Presidential appointment
15 of certain officers;

16 (2) subchapter III of chapter 33 of title 5,
17 United States Code, includes a codification of the
18 Vacancies Act, and (pursuant to an amendment on
19 August 17, 1988, to section 3345 of such title) spe-
20 cifically applies such vacancy provisions to all Execu-
21 tive agencies, including the Department of Justice;

22 (3) the legislative history accompanying the
23 1988 amendment makes clear in the controlling
24 committee report that the general administrative au-
25 thorizing provisions for the Executive agencies,

1 which include sections 509 and 510 of title 28,
2 United States Code, regarding the Department of
3 Justice, do not supersede the specific vacancy provi-
4 sions in title 5, United States Code;

5 (4) there are statutory provisions of general ad-
6 ministrative authority applicable to every Executive
7 department and other Executive agencies that are
8 similar to sections 509 and 510 of title 28, United
9 States Code, relating to the Department of Justice;

10 (5) despite the clear intent of Congress, the At-
11 torney General of the United States has continued
12 to interpret the provisions granting general adminis-
13 trative authority to the Attorney General under sec-
14 tions 509 and 510 of title 28, United States Code,
15 to supersede the specific vacancy provisions in title
16 5, United States Code;

17 (6) the interpretation of the Attorney General
18 would—

19 (A) virtually nullify the vacancy provisions
20 under subchapter III of chapter 33 of title 5,
21 United States Code;

22 (B) circumvent the clear intention of Con-
23 gress to preclude the extended filling of certain
24 vacancies and provide for the temporary filling
25 of such vacancies; and

1 (C) subvert the constitutional authority
2 and responsibility of the Senate to advise and
3 consent in certain appointments;

4 (7) it is necessary to further clarify the inten-
5 tion of Congress to reject the interpretation of the
6 Attorney General by modernizing the intricate lan-
7 guage of the long-standing Vacancies Act; and

8 (8) to ensure compliance by the executive
9 branch with the Vacancies Act, the Act needs an ex-
10 press enforcement mechanism.

11 **SEC. 3. FEDERAL VACANCIES.**

12 (a) IN GENERAL.—Chapter 33 of title 5, United
13 States Code, is amended by striking sections 3345 through
14 3349 and inserting the following:

15 **“§ 3345. Acting officer**

16 “(a)(1) If an officer of an Executive agency (other
17 than the General Accounting Office) whose appointment
18 to office is by the President, by and with the advice and
19 consent of the Senate, dies, resigns, or is otherwise unable
20 to perform the functions of the office, the President may
21 direct a person described under paragraph (2) to perform
22 the functions and duties of the office temporarily in an
23 acting capacity, subject to the time limitations of section
24 3346.

1 “(2) The person referred to under paragraph (1) is
2 any person who on the date of death, resignation, or the
3 beginning of inability to perform serves—

4 “(A) in the position of first assistant to the of-
5 ficer who dies, resigns, or is otherwise unable to per-
6 form; or

7 “(B) in an office for which appointment by the
8 President, by and with the advice and consent of the
9 Senate is required.

10 “(b) With respect to the office of the Attorney Gen-
11 eral of the United States, the provisions of section 508
12 of title 28 shall be applicable.

13 **“§ 3346. Time limitation**

14 “(a) The person serving as an acting officer as de-
15 scribed under section 3345 may serve in the office—

16 “(1) for no longer than 120 days; or

17 “(2) if any nomination for the office is submit-
18 ted to the Senate within the 120-day period begin-
19 ning on the date the vacancy occurs, for the period
20 that the nomination is pending in the Senate.

21 “(b)(1) If the nomination for the office is rejected
22 by the Senate or withdrawn, the person may continue to
23 serve as the acting officer for no more than 120 days after
24 the date of such rejection or withdrawal.

1 “(2) Notwithstanding paragraph (1), if a second
2 nomination for the office is submitted to the Senate during
3 the 120-day period after the rejection or withdrawal of the
4 first nomination, the person serving as the acting officer
5 may continue to serve—

6 “(A) until the second nomination is confirmed;

7 or

8 “(B) for no more than 120 days after the sec-
9 ond nomination is rejected or withdrawn.

10 “(c) If a person begins serving as an acting officer
11 during an adjournment of the Congress sine die, the 120-
12 day period under subsection (a) shall begin on the date
13 that the Senate first reconvenes.

14 **“§ 3347. Application**

15 “Sections 3345 and 3346 are applicable to any office
16 of an Executive agency (other than the General Account-
17 ing Office) for which appointment by the President, by
18 and with the advice and consent of the Senate, is required,
19 unless—

20 “(1) another statutory provision expressly pro-
21 vides that such provision supersedes sections 3345
22 and 3346; or

23 “(2) the President makes an appointment to fill
24 a vacancy in such office during a recess of the Sen-
25 ate.

1 **“§ 3348. Vacant office**

2 “Subject to section 3347, if an office is not tempo-
3 rarily filled under sections 3345 and 3346 within 120 days
4 after the date on which a vacancy occurs, the office shall
5 remain vacant until a person is appointed by the Presi-
6 dent, by and with the advice and consent of the Senate.

7 **“§ 3349. Enforcement**

8 “(a)(1) An acting officer who serves in a position in
9 violation of section 3345 or 3346 may not receive pay for
10 any day of service in violation of section 3345 or 3346.

11 “(2) Pay not received under paragraph (1) shall be
12 forfeited and may not be paid as backpay.

13 “(3) Notwithstanding section 1342 of title 31, para-
14 graph (1) shall apply regardless of whether such acting
15 officer is performing the duties of another office or posi-
16 tion in addition to performing the duties of the vacant of-
17 fice.

18 “(b) The head of an affected Executive agency (other
19 than the General Accounting Office) shall submit to the
20 Comptroller General of the United States and to each
21 House of Congress—

22 “(1) notification of a vacancy and the date such
23 vacancy occurred immediately upon the occurrence
24 of the vacancy;

1 “(2) the name of any person serving in an act-
2 ing capacity and the date such service began imme-
3 diately upon the designation;

4 “(3) the name of any person nominated to the
5 Senate to fill the vacancy and the date such nomina-
6 tion is submitted immediately upon the submission
7 of the nomination; and

8 “(4) the date of a rejection or withdrawal of
9 any nomination immediately upon such rejection or
10 withdrawal.

11 “(c) If the Comptroller General of the United States
12 makes a determination that an officer is serving longer
13 than the 120-day period including the applicable excep-
14 tions to such period as provided under section 3346, the
15 Comptroller General shall report such determination to
16 each House of Congress, the President, the Secretary of
17 the Treasury, and the Office of Personnel Management.”.

18 (b) TECHNICAL AND CONFORMING AMENDMENT.—
19 The table of sections for chapter 33 of title 5, United
20 States Code, is amended by striking the items relating to
21 sections 3345 through 3349 and inserting the following:

“3345. Acting officer.

“3346. Time limitation.

“3347. Application.

“3348. Vacant office.

“3349. Enforcement.”.

1 **SEC. 4. EFFECTIVE DATE AND APPLICATION.**

2 This Act shall take effect on the date of enactment
3 of this Act and shall apply to any office that—

4 (1) becomes vacant after such date; and

5 (2) is vacant on such date, except sections 3345
6 through 3349 of title 5, United States Code (as
7 amended by this Act), shall apply as though such of-
8 fice first became vacant on such date.

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