Calendar No. 469

105TH CONGRESS, 2d Session | SENATE | REPORT 105–250

FEDERAL VACANCIES REFORM ACT OF 1998

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 2176

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

JULY 15, 1998.—Ordered to be printed

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JULY 15, 1998.—Ordered to be printed

Mr. THOMPSON, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 2176]

The Committee on Governmental Affairs, to which was referred the bill (S. 2176) to provide a mechanism for the temporary filling of positions that are legally appointed by the President, by and with the advice and consent of the Senate, and having considered the same, reports favorably on the bill as amended and recommends that the bill as amended do pass.

I. PURPOSE

The purpose of S. 2176, the Federal Vacancies Reform Act, is to create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office.

II. SUMMARY OF S. 2176

S. 2176 provides that upon the death, resignation, or inability to serve of an officer of an executive agency (including the Executive Office of the President), the first assistant to the officer becomes the acting officer, subject to the bills time limits. If the President so directs, a person who has already received Senate confirmation can be made the acting officer in lieu of the first assistant. The bill

also requires that a first assistant who has not received Senate confirmation, but who is nominated to fill the office permanently, can be made the acting officer only if he has been the first assistant for at least 180 days in the year preceding the vacancy. The acting officer may serve for 150 days beginning on the date the vacancy occurs. In the event a first or second nominee is withdrawn, rejected or returned, the person may serve as the acting official until 150 days after the withdrawal, rejection, or return.

The bill applies to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions. First, those laws that expressly provide that they supersede the Vacancies Act will do so. Second, current laws (there are approximately 41) that provide for the President or the head of an executive department to designate an officer to perform the functions and duties of a specified office in an acting capacity are maintained, as are those statutes that themselves stipulate who shall serve in a specific office in an acting capacity. Statutes that generally permit agency heads to delegate or reassign duties within their agencies are specified not to constitute statutes that provide for the temporary filling of particular offices.

The bill's enforcement mechanism is to make an office vacant if, 150 days after the vacancy arises, no presidential nominee has been submitted to the Senate for the office. For offices other than the heads of agencies, the functions and duties specifically to be performed by the vacant officer are to be performed only by the head of the agency. Such duties include duties established by regulation for the officer during any part of the 180 days before the vacancy occurred, notwithstanding subsequent regulations that purported to limit those duties. The sanction can be ended if the President submits a nominee after the 150-day period, whereupon the acting officer can resume service. Actions taken in violation of the vacant officer provisions are of no effect and are not permitted to be ratified by anyone else. The shifting of duties to the agency head does not apply to vacancies in the positions of general counsel to the National Labor Relations Board and Federal Labor Relations Authority or to Senate-confirmed inspectors general, given the specific goal Congress established for those positions of independence from the agency heads.

The bill also requires heads of agencies to report to the General Accounting Office on the existence of vacancies, persons serving in an acting capacity, the names of any nominees, and dates of disposition of such nominees. The Comptroller General then reports to the Congress, the President, and the Office of Personnel Management of the existence of any violations of the Vacancies Act.

The 150-day period for submitting nominations is extended for an additional 90 days for vacancies that exist when the President changes or that arise in the 60 days thereafter. And the bill maintains holdover provisions in current law that apply to single-member independent agencies, and exempts members of multi-member independent agencies altogether, as does the present Vacancies Act.

The bill applies to any office that becomes vacant after the date of enactment, as well as to offices that are vacant on the date of

enactment, except that the bill shall apply to those offices as though they first became vacant on the date of enactment.

III. Need for Legislation

The need for legislation to govern the performance of the functions and duties of vacant offices ultimately derives from Article II, Section 2 of the Constitution, which, *inter alia,* vests the President with the authority to appoint all officers of the United States, subject to the advice and consent of the Senate, but that Congress, by law, may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. Congress has passed legislation since the Washington Administration to provide for temporary officials to perform the functions and duties of vacant positions requiring the advice and consent of the Senate. Over the years, the time of temporary service has been lengthened, but Congress has always placed time limits on such acting officials.

In recent decades, the Department of Justice has argued that its advise and consent positions are not covered by the Vacancies Act. It construes its enabling legislation, and now the enabling legislation of other departments, as exempting its compliance with the Vacancies Act. Specifically, the Department of Justice maintains that where a department's organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Act's restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period, even without submitting a nomination to the Senate to fill the position on a permanent basis. This interpretation of the law is wholly lacking in logic, history, or language, as evidenced by repeated opinions of the Comptroller General. Opinion B–150136, Feb. 19, 1976; 65 Op. Comp. Gen. 626, 631–33 (1986); Opinion B–220522.2, Oct. 17, 1986. By May, 1997, seven statutory offices in the Justice Department requiring presidential nomination and Senate confirmation were vacant. One vacancy had existed for twenty-one months, three were vacant for more than 120 days, and three positions were unfilled for less than 120 days. In at least four instances, positions were filled by an order of the Attorney General designating a person to act in the vacant position. For example, the Solicitor General's position was occupied by an acting officer for more than one year without a nomination ever being submitted to the Senate.

Despite attempts to do so through 1988 amendments to the Vacancies Act, described below, Congress was not successful in gaining the Justice Department's agreement that its advice and consent positions are subject to the Vacancies Act. Given the growing number of federal departments and agencies that now claim exemption from the Vacancies Act, Congress must explicitly reject the position that general organic statutes for various agencies and departments, such as 28 U.S.C. §§ 509 and 510, trump the specific provisions of the Vacancies Act. Otherwise, the Vacancies Act will be of no practical effect, thwarting the constitutional mandate that persons

serving in advice and consent positions do so through the Senate's approval of such service.

THE 1988 AMENDMENTS

The Justice Department's aggressive claims of exemption from the Vacancies Act led Congress in 1988 to make the first significant changes in the Vacancies Act since 1868. The 1988 amendments changed the law's coverage to apply to all executive departments and agencies, overruling a 1973 court decision that had limited the applicability of the Act to executive and military departments. The length of time that an acting official was permitted to serve was extended to 120 days, rather than the previous 30, and the acting officer could serve more than 120 days if the President submitted a nominee. An additional 120 days of acting service was provided if the Senate rejected the nomination or if it was withdrawn. Through this mechanism, Congress created an incentive for the President to submit nominations in a timely manner, and allowed temporary officials to serve until the Senate completed its advice and consent function. This Committee's report accompanying the Senate bill stated, "The Committee also believes that the present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation. The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies." S. Rep. No. 100-–317, 100th Cong., 2d Sess. 14 (1988). In 1989, the Justice Department's Office of Legal Counsel recognized the Senate's view, but continued to interpret the Vacancies Act as not precluding the Attorney General's authority to appoint temporary officials under the Department's organic statute, characterizing the Senate report as an improper and ineffective effort to "alter the proper construction of a statute through subsequent legislative history." 13 O.L.C. 173, 175 (1989). If the Vacancies Act is to function as it is designed—to uphold the Senate's prerogative to advise and consent to nominations through placing a limit on presidential power to appoint temporary officials—the Justice Department's interpretation of the existing statute must be ended. Legislation is needed to ensure this result, a primary reason for the Committee's reporting of S. 2176.

THE CONSTITUTIONAL NEED FOR LEGISLATION

The selection of officers is not a presidential power. The President may choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office. The Appointments Clause "is more than a matter of 'etiquette or protocol;' it is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States,* 117 S. Ct. 1573, 1579 (1997). The Appointments Clause was adopted against a historical background: "The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power because 'the power of appointment to offices'" was deemed "the most insidious and powerful weapon of eighteenth century despotism." *Freytag* v.

Commissioner of Internal Revenue, 501 U.S. 868, 883 (1991) (citations omitted).

Nonetheless, vacancies occur in such positions, and since the President lacks any inherent appointment authority for government officers, legislation authorizing some non-Senate confirmed persons to perform the functions and duties of vacant offices is necessary if the government's operations are to be performed. The president's duty is to submit nominees for offices to the Senate, not to fill those offices himself. The President's power to take care that the laws shall be enforced is a duty, and not a source of power, since the President takes care that the laws be executed, and has no right to enforce the laws himself where Congress vests such responsibility in an inferior officer. *See, e.g., Kendall ex rel. Stokes* v. *United States,* 12 Pet. (37 U.S.) 522, 612–613 (1838); *George* v. Ishimaru, 849 F. Supp. 68 (D.D.C. 1994). In the absence of affirmative statutory authority to fill a vacancy, the office must remain vacant. The Vacancies Act limits presidential authority to make acting appointments, while preserving the Senate's power to advise and consent. Therefore, its scope must be government-wide unless Congress chooses clearly and specifically to exempt specifically identified officers from its reach when countervailing considerations apply.

Because the Justice Department maintains that it is exempt for the Vacancies Act, it has permitted positions to be held by acting officers for years without the submission to the Senate of a nominee. Its contentions are broadly applicable to virtually all other departments given the broad language of vesting and delegation contained in those departments' organic statutes. By early in 1998, 64 of 320 advise and consent positions in the executive branch were held by acting officials, 43 of whom had served more than 120 days without a nominee. Acting officials served in each of the 14 Cabinet departments. If the Constitution's separation of powers is to be maintained, and officers of the government subjected to the scrutiny of the Senate for the benefit of the liberty of the people, legislation to address the deficiencies in the operation of the current Vacancies Act is necessary. The 1988 legislation unfortunately has not succeeded in encouraging presidents to submit nominees in a timely fashion, and it has not resulted in the Justice Department's agreement that is covered by the Act. Indeed, given the number of acting officials and the growing number of departments that claim not to be covered by the Vacancies Act, the Senate's confirmation power is being undermined as never before.

THE "DOOLIN" DECISION

Most recently, the need for new legislation was underscored by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Doolin Security Savings Bank, F.S.B.* v. *Office of Thrift Supervision,* 139 F.3d 203 (D.C. Cir. 1998). In that case, the validity of an Office of Thrift Supervision administrative enforcement action was challenged by a bank subject to the order on the ground that the absence of a lawfully appointed director of the agency rendered the enforcement action void. The Senate-confirmed director of OTS resigned in December, 1992, and purported to delegate all his authority to OTS's Deputy Director for Washing-

ton Operations. That individual, who was neither the first assistant nor a Senate-confirmed individual, served as the acting director until October, 1996. Two days later, the President invoked the Vacancies Act to designate a Senate-confirmed official from the Department of Housing and Urban Development to serve as acting director. Within 120 days of the second acting director's appointment, the President submitted a permanent nominee to the Senate. The new acting director issued the final order against the bank in March, 1997.

The bank maintained that the 120-day limitation on acting service contained in the Vacancies Act lapsed long before the second acting director was ever named. The court agreed that the Vacancies Act may be used only when there is a vacancy caused by the departure of an officer appointed in compliance with Article II, and that the departure of an appointed acting official does not trigger the Vacancies Act. The court found that merely because a person temporarily performs the functions of an office does not make that individual an "officer" for purposes of the Vacancies Act. "Otherwise, § 3348's time limitation could be easily avoided by a series of temporary resignations, with each resignation triggering a new 120-day period." 139 F.3d at 208. Thus, the departure of the Senate-confirmed Director triggered the president's authority under § 3347 to designate an acting official, not the departure of the acting official. The Committee accepts this reaffirmation of the longstanding operation of the Vacancies Act.

Notwithstanding its recognition that the President's designation of the second acting official took place approximately four years after the vacancy in the position arose, however, the court upheld the second acting director's 1997 final order. The court agreed with the Justice Department that the 120-day time limit contained in § 3348 does not begin to run until someone actually takes office pursuant to the Vacancies Act, either by detail or by presidential directive. Under that interpretation of the statute, the second acting director served lawfully at the time the order was issued against the bank. The court rejected the bank's position that the 120-day period begins immediately upon the death or resignation of a constitutionally appointed officer.

According to the court, "Nothing in the Act expressly deals with the amount of time that may transpire before the President exercises his § 3347 authority to designate a temporary replacement." 139 F.3d at 209. In its view, the Vacancies Act governs how long a position may be temporarily filled, but does not specify when the President must undertake the filling of the position. "The time limit is placed not on Presidential action, but on the tenure of the President's designee." *Id*. The 120-day period will commence with the vacancy when the first assistant assumes the office or the President under § 3347 immediately designates an acting official. But if there is no first assistant and the President does not immediately act, the vacancy has not been "filled" and the 120-day period does not run. *Id.*

The Committee believes that this portion of the court's opinion necessitates legislative action. Whether or not the court properly interpreted the existing law, the Committee believes that the 120-day time limit must run from the date of the vacancy caused by

the death or resignation of the Senate-confirmed official, and not from the date that the President designates an acting official. A limit must be placed on the President's time to act to fill a position. If the purpose of the Vacancies Act is to limit the President's power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides. Such a scheme obliterates the constitutional requirement that the officer serve only after the Senate confirms the nominee. If there is no first assistant, the President must designate another Senate-confirmed official. By contrast, the *Doolin* court would allow the President to accept a resignation on the second day of his term, allow an acting person to assume the functions and duties of the office (in this case, an acting officer not appointed by the President), and then, so long as there is no first assistant, by unilaterally not invoking the Vacancies Act, allow that position to be filled by an "acting" official who has never received Senate confirmation for so long as the president holds office. The Committee finds this state of affairs to be unacceptable and constitutionally suspect. Nor does it believe that the vacancy has not been "filled" when an acting person has been performing the functions and duties of the office for four years.

Notwithstanding the 1988 Vacancies Act amendments that provide for a tolling of the 120-day period when the President submits a nomination to the Senate to fill the vacant position, the court stated, "The Vacancies Act was never meant to give the President an "incentive" to fill vacant positions with appointees confirmed by the Senate. The function of the Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to validate the actions of those temporarily occupying the positions." *Id.* at 211. The Committee believes that the reason why in 1988, for the first time, the period of acting service was extended beyond 120 days if the President submitted a nominee is that, in light of the frequent noncompliance with the Vacancies Act by presidents who allowed acting officials to serve more than 120 days, Congress wanted to encourage the President to submit a nominee within the Vacancies Act period. If an acting person served beyond 120 days, the Senate at that point would bear the responsibility for the fact that a Senate-confirmed person for that office was not in place.

The court recognized that under its interpretation of the statute, if no one is detailed or directed to fill the position, or the 120 days expires without a nomination, the position will be vacant or occupied by someone not constitutionally entitled to perform the duties of the office. But in its view, that situation will create an incentive for the President to submit a nomination, for fear that the actions of part of his administration will be declared void. The Committee believes that this part of the court's opinion also shows the need for Congressional corrective action. Under the Justice Department's interpretation of the many vesting and delegation provisions in the organic statutes of various departments, few positions would remain vacant. This fact, combined with the lack of an effective enforcement process, would give the President no reason to comply with the Vacancies Act. The court seems not to understand the fundamental purpose of the Vacancies Act, which is not to ensure the

legality of the actions of acting officials, but rather to limit the power of the President to name acting officials, as well as the length of service of those officials.

If the Constitution or Congress requires that an office be held only by a person appointed by the President by and with the advice and consent of the Senate, then unless legislation provides to the contrary, only a person the President has nominated for that position and who has received Senate confirmation may fill the position. The President has the duty to take care that the law be faithfully executed, and that duty includes adherence to Article II. He does not have the power to execute the law himself when Congress has given statutory duties to lower-level officials in the executive branch. Nor can he name temporary officers of his unfettered choice. That is why the Vacancies Act or other statutes providing for the temporary filling of a specific position are the exclusive authority setting forth the procedures by which acting officials can serve, with the exception only of the President's power to make appointments during the recess of the Senate. The court's opinion overlooks this central concept. The Vacancies Act does recognize that when vacancies arise in those positions, it may be necessary, due to time constraints on the nomination and confirmation processes, for someone who has not received Senate confirmation for that particular post to serve temporarily to keep the government functioning. But the Vacancies Act requires that those acting officers be either (1) first assistants or (2) persons who have already received Senate confirmation for some other post and are selected by the President to be the acting officer.

The court did not reach the question whether the OTS Director's designation of the first acting director satisfied the Vacancies Act. For the court, any error was harmless in light of the legality of the second acting director's appointment under the Vacancies Act, and the ratification by the second acting officer of any actions taken by the first acting director. The Committee also finds that this portion of the court's position demands legislative response. First, it is constitutionally unacceptable for any acting official to serve for four years, especially an officer "appointed" not by the President, nor by a department head, but a mere agency head. The Appointments Clause limits appointing powers to hold individuals accountable for their selections. Second, if any subsequent acting official or anyone else can ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent.

In short, in light of various administrations' noncompliance with the Vacancies Act and a recent court decision undermining its operation, it is imperative that Congress enact legislation to restore constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation. The issue is not simply the prerogative of the Senate. Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people. Although the President has the sole power to nominate, as a single officer may feel a greater sense of duty in selecting an individual for consideration to a particular post, the "the necessity of [the Senate's]

concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration." Federalist LXXVI (Hamilton). Legislation is needed to restore these goals of the Founders.

IV. Legislative History of S. 2176

The Federal Vacancies Reform Act of 1998 was introduced as S. 2176 in the Senate on June 16, 1998 by Senators Fred Thompson, Robert C. Byrd, Strom Thurmond, Trent Lott, and William Roth. Introduction of S. 2176 followed the March 16, 1998 introductions of S. 1761, the Federal Vacancies Compliance Act, by Senator Byrd and S. 1764, the Vacancies Clarification Act, by Senators Thurmond and Lott. The latter two bills sought to enforce the Vacancies Act through withholding the pay of any acting officer who exceeded the time period provided by the Vacancies Act, and S. 1764 specifically provided that the time period for acting service ran from the date of the vacancy. In addition, both bills made the Vacancies Act supersede other laws governing the temporary service of non-confirmed officials, ending the argument that statutes vesting in department heads the general authority to delegate powers to other officials provided an alternative method of empowering acting officials apart from the Vacancies Act. Both bills also created a reporting mechanism to the President, the General Accounting Office, and the Congress on the length of time that each acting official had served.

A hearing was held at the Governmental Affairs Committee on oversight of compliance with the Vacancies Act on March 18, 1998. Senator Thompson chaired the hearing, which addressed the general issues of noncompliance with the law, as well as the legislative proposals that had by then been introduced. The following witnesses provided testimony: Senator Robert C. Byrd, State of West Virginia; Joseph N. Onek, Principal Deputy Associate Attorney General, Department of Justice, accompanied by Daniel Koffsky, Special Counsel, Office of Legal Counsel, Department of Justice; Joan M. Hollenback, Associate General Counsel, General Accounting Office; Senator Strom Thurmond, State of South Carolina; Michael J. Gerhardt, Professor of Law, Case Western Reserve University; Morton Rosenberg, Specialist in American Public Law, Congressional Research Service; and Paul C. Light, Director, Public Policy Program, The Pew Charitable Trusts.

All of the witnesses but Messrs. Onek and Koffsky supported legislation that would overturn the Justice Department's arguments of exemption from the Vacancies Act and that would create an enforcement mechanism. Senator Byrd also pointed out the Senate's responsibility to demand strict compliance with the Vacancies Act from the Administration. He expressed his hope that the Senate would make the Vacancies Act "so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep." He expressed his view that the Committee could draft legislation to address the problem other than S. 1761. Ms. Hollenbeck

provided reasons why the Justice Department's interpretation of the Vacancies Act is contrary to the language and legislative history of both the Vacancies Act and the Justice Department's organic statute, and pointed out that Congress' passage of statutes governing temporary officers in particular governmental positions shows that Congress knew how to create specific exceptions to the application of the Vacancies Act. She offered GAO's recommendation that legislation be passed to explicitly provide that the Vacancies Act can be superseded only by a statute providing an alternative means for filling a particular vacancy. GAO also recommended reporting provisions and the withholding of pay of acting officials who served in violation of the Vacancies Act. Mr. Koffsky noted that there are no statutory duties that are to be performed by assistant attorneys general.

Senator Thurmond testified to the need to rewrite, not simply amend, the Vacancies Act. He demonstrated that the 1988 amendments had not solved the problem of excessive service by acting officials. He also stressed the need to prevent the Justice Department from arguing that it is exempt from the Vacancies Act, which he would accomplish by requiring statutes exempting particular positions from the Vacancies Act to specifically cite the Vacancies Act. Prof. Gerhardt testified to the need to change some of the terms of art used in the Vacancies Act, and suggested lengthening the 120-day time period. Mr. Rosenberg testified to the errors in the Justice Department's exemption argument in light of the language of the Vacancies Act, the Department's organic statute, and its legislative history. He also spoke of the problem of transferring assistant secretaries from one position to another without their undergoing Senate reconfirmation. He recommended adding an enforcement mechanism to freeze the duties of the office as they existed on the date of the vacancy after the 120-day period has expired. Mr. Light testified that one of the problems with noncompliance with the Vacancies Act is the unnecessary proliferation of political appointees in the government at a time when total federal employment was declining.

Following the hearing, Senator Thompson considered whether to introduce his own legislative proposal. After careful consideration, he determined to address only the Vacancies Act issues involved in the Senate's advise and consent powers. The Committee believes that authorizing committees may wish to consider whether statutory duties should be given to assistant secretaries and assistant attorneys general in those departments in which the only current statutory duty of such officials is to assist the secretary or the attorney general. Staff from both parties tried to resolve as many issues as possible. Staff also attempted to respond to the suggestions of the Justice Department and the White House. S. 2176 reflects these discussions. The Committee was told informally that the Justice Department recognizes that the legislation offered effectively prevents it from arguing that departments with vesting and delegation statutes are exempt from the Vacancies Act.

V. Committee Action

On June 17, 1998, the Committee held a business meeting at which S. 2176, the Federal Vacancies Reform Act of 1998, was con-

sidered. Senator Lieberman offered an amendment to retain existing statutes that by their own terms provide a process for the filling of specific advice and consent positions, as well as the statues referenced in S. 2176 as introduced, which preserved existing statutes that allow the heads of departments to designate an acting official. That amendment was agreed to by voice vote.

Senator Glenn offered two amendments. The first amendment would have reduced the length of time that a first assistant need serve to be both the acting officer and eligible to be nominated permanently to the position from 180 of the 365 days preceding the vacancy to 30 days prior to the vacancy. The amendment failed on a roll call vote of 6 Yeas (Glenn, Levin, Lieberman, Akaka by proxy, Durbin, and Cleland) and 8 Nays (Roth by proxy, Stevens, Collins, Brownback by proxy, Domenici, Cochran, Nickles by proxy, and Thompson).

Senator Glenn's second amendment would permit the acting officer to serve even after the 150-day period following the rejection, withdrawal, or return of the first nomination, once a second nomination was made. The amendment was agreed to by voice vote.

Senator Levin offered an amendment to begin the time limit on the service of acting officers in vacant positions arising on or in the 60 days after a transitional inauguration day 120 days after the transitional inauguration or the arising of the vacancy, whichever is later. After Senator Levin agreed to shorten the additional period to 90 days, the amendment was agreed to by voice vote.

With no other amendments being offered, Chairman Thompson moved adoption of S. 2176 as amended. The bill was ordered favorably reported by a vote of 9 Yeas (Stevens, Collins, Domenici, Cochran, Glenn, Levin, Lieberman, Cleland, Thompson) and 1 Nay (Durbin). Senators Roth, Brownback, and Nickles voted Aye by proxy.

VI. Section-by-Section Analysis

Section 1 states the short title of the legislation—the "Federal Vacancies Reform Act of 1998."

Section 2 strikes sections 3345 through 3349 of Title 5 and replaces the existing law with a reformed version of the Vacancies Act. The Committee believes that amending existing legislation, given the ineffectiveness of the 1988 amendments, may again fail to ensure the exclusivity of the applicability of the Vacancies Act. To ensure an effective enforcement mechanism and to overturn the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Doolin Security Savings Bank* v. *Office of Thrift Supervision,* 139 F.3d 203 (D.C. Cir. 1998), the Committee believes that replacement of the existing Vacancies Act is necessary.

Under current law, section 3345 covers heads of executive agencies, and section 3346 affects "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department * * *" Section 2 creates a new section 3345, applicable to all officers of executive agencies whose appointment to office is required to be made by the President by and with the advice and consent of the Senate. References to the term of art "bureau" have been eliminated. The purpose of

this change is to clearly make the Vacancies Act applicable to all officers of executive agencies whose appointments require Senate confirmation. The Vacancies Act would now apply to such officers in all departments, regardless of the department or agency's organic statute.

"Executive agency" is defined at 5 U.S.C. § 105. Because the Department of Defense is a department within the meaning of 5 U.S.C. § 101, the military departments, which are located in the Department of Defense, are also covered by this Act, notwithstanding the omission of the term "military department" from current sections 3345 and 3346.

The section applies when an officer in an executive agency whose appointment is made by the President by and with the advice and consent of the Senate dies, resigns, or is otherwise unable to perform the functions and duties of the office. The law applies when any of those factual situations arises, regardless of how the situation is characterized. For instance, the Vacancies Act would apply in situations such as *Doolin,* when the first acting director of the Office of Thrift Supervision was purportedly designated by virtue of the departing confirmed director's invocation of a statute providing for his duties to be temporarily delegated in the director's "absence." Under this legislation, when an acting officer is to be designated, as opposed to automatically gaining acting status as a first assistant, only the President may designate an acting officer in a position that requires Senate confirmation.

When a vacancy arises, the bill provides an exclusive set of procedures that may be followed. If the vacant officer has a first assistant, the first assistant performs the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346. The Committee does not establish a definition of "first assistant." That term has a long history of use in the Vacancies Act. As under current law, the term "first assistant" is used to refer to the first assistant to the "officer." However, the practice under current law, which would be continued by this bill, is that the first assistant is actually the first assistant to the vacant office. Certain officers have first assistants designated by statute. See, e.g., 28 U.S.C. § 508(a) ("for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.") Other departments and agencies have established first assistants by regulation. The Vacancies Act provides for the automatic performance of the functions and duties of the vacant office by the first assistant because such person is often a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time by that one person. The provision therefore emphasizes the limit on presidential power to select an acting officer without that individual having received Senate confirmation, while permitting flexibility in the performance of governmental operations since, if a first assistant exists, the President need not take any action for an acting official to serve.

If there is no first assistant, or if the President following the assumption of acting status by the first assistant, but within the time limits prescribed by section 3346 so chooses, the President (and

only the President) may direct a person who has already received Senate confirmation for another position to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limits of section 3346. This provision allows the President limited flexibility in appointing temporary officers, restricting the pool to persons who have already received Senate confirmation for their current position. If there is no first assistant, no one is permitted by law to become an acting officer until the President designates a Senate-confirmed individual to be the acting officer.

In either case, the acting officer's service is limited to the time period specified in section 3346. This marks a repeal of the current statutory provision in both sections 3345 and 3346 that the acting officer "shall perform the duties of the office until a successor is appointed or the absence or sickness stops," language that has been a part of each Vacancies Act since 1792.

Notwithstanding a first assistant on the day of the vacancy's automatic functioning as the acting officer, such first assistant who has not served as first assistant for 180 days of the 365 days prior to the vacancy may not serve as the acting officer if the President nominates that person for appointment to that position. If the President nominates the former first assistant, who served for less than 180 of the 365 days preceding the vacancy, to the permanent position, the first assistant must cease performing the functions and duties of the office. In that instance, for an acting person to continue to perform those duties, the President would be required to designate as the acting officer a person who has received Senate confirmation to another post, who can serve as the acting officer for the remainder of the time period established under section 3346 that was not consumed by the first assistant.

A first assistant who is a career person will ordinarily have served more than 180 days as first assistant at the time the vacancy arises. Such a person will be able to serve both as the acting officer and as the permanent nominee. The 180-day requirement is not confined to the 180 days immediately preceding the vacancy, as, for instance, the first assistant may have been ill for part of that period. The President's power to nominate is not disturbed in any way; however, if he chooses to nominate a brief-serving first assistant, that person may no longer serve as the acting officer. The President would retain his existing power to designate first assistants to those officers where he currently enjoys such power. The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials.

With respect to a vacancy in the office of Attorney General, 28 U.S.C. § 508 will remain applicable. That section ensures that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General.

The new section 3346 limits the length of the acting officer's service to 150 days, beginning on the date the vacancy occurs. The Committee believes that while the background check process takes no longer today than in 1988, when the Vacancies Act limitation was set at 120 days, the vagaries of the vetting and nomination process now make 150 days a more realistic time limit. Even if

there is no first assistant, and the President declines to designate a Senate-confirmed person to be the acting person, the 150-day period begins to run. Thus, the designated person would serve for 150 days less the time that elapsed between the vacancy and the designation. If the vacancy arises while the Senate is in adjournment sine die, and thus the acting officer begins to serve during such period, the 150-day period is to begin on the date that the Senate first reconvenes. The only time this provision is relevant is when the Senate-confirmed person dies, resigns, or becomes ineligible to serve when the Senate is in adjournment sine die.

The 150 days is a maximum period, but an acting officer need not serve the full 150 days. Besides the obvious ending of service within 150 days if a nominee is confirmed in that time, the Vacancies Act also applies to the beginning of an inability of the applicable officer to serve. When that officer is again eligible to resume service, he or she may return to the office, thus ending the service of the acting officer.

The 150 days runs from the vacancy, "vacancy" referring to the death, resignation, or beginning of inability to serve of the Senate-confirmed officer. This meaning of "vacancy" applies each time it is used in the legislation. When the acting person's 150 days expires, the position again becomes vacant, but there is no "vacancy" that permits another person to serve as acting for another 150 days. Otherwise, a string of acting officials could serve for 150 days. That has never been the understanding of the functioning of the Vacancies Act, and the Committee reaffirms that there is only one vacancy that triggers the 150 days.

An acting officer may die or resign. In that event, the first assistant, if there is one, or a new presidential designee of a Senate-confirmed officer may become the acting officer, limited in service as acting officer to 150 days less the time of service of the first acting officer. No one else may serve as acting officer. Once again, that means that if there is no first assistant, and no presidential designation, no one may serve as acting officer. The prohibition on an acting officer who was first assistant for less than 180 days of the 365 days prior to the vacancy becoming the nominee for the position would still be applicable, since the original vacancy, not the subsequent departure of the acting officer, is the measuring event.

Under new section 3346(a)(2), and subject to section 3346(b), an acting officer may serve more than 150 days if a first or second nomination is submitted to the Senate, and may serve while that nomination is pending from the date the nomination is submitted. The acting officer may serve even if the nomination is submitted after the 150 days has passed although, as discussed below, the acting officer may not serve between the 151st day and the day the nomination is submitted. The Committee extends the time period for acting service so as to create an incentive for the President to submit a nomination. The submission of nominations also will lead to a reduction in the number of acting officials, a goal the Committee finds highly desirable.

The statutory language refers to "[t]he person serving as an acting officer as described under section 3345." The Committee chose this wording deliberately. That is the only person eligible to be the acting officer, whether during the 150 days or upon submission of

a nomination. The same considerations apply to the bill's references to "the person" in subsections (b) and (c).

If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return. "Return" refers to Senate Rule XXXI, which provides that, "[I]f the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." This provision allows the office to be temporarily filled by "the person" who was originally eligible to be the acting officer at the time the vacancy arose while the President is provided 150 days to submit a second nomination.

Notwithstanding the 150-day limit on service of an acting officer following the rejection, withdrawal, or return of a first nomination, "the person serving as the acting officer" may serve longer than 150 days if, in the cases of rejection or withdrawal of the first nominee, a second nomination of a different individual for the office is submitted to the Senate. If the second nomination is submitted after more than 150 days after the rejection, withdrawal or return of the first nomination, the provisions of revised section 3348 will apply until the second nomination is submitted. If the second nominee is confirmed within 150 days of the nomination, the term of the acting officer ceases. In the case of a return, the second nomination could be of the same individual first nominated. The "person serving as the acting officer" may serve for 150 days following the rejection, withdrawal, or rejection of the second nomination. However, after that 150-day period has elapsed, if no permanent nominee has been confirmed, the provisions of revised section 3348 apply.

The revised section 3347 provides that the Vacancies Reform Act applies to any office of an executive agency (including the Executive Office of the President) for which appointment is required to be made by the President by and with the advice and consent of the Senate. The section does allow temporary appointments to be made other than through the Vacancies Reform Act in three narrowly delineated exceptions. First, where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act.

Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is

aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill:

1. Administrator, Drug Enforcement Administration (5 U.S.C. Reorg. Plan No. 2 of 1973) (two alternatives);
2. Administrator, Environmental Protection Agency (5 U.S.C. Appendix 1);
3. Administrator, Federal Aviation Administration (49 U.S.C. § 106(I));
4. Administrator, General Services Administration (40 U.S.C. § 751(c));
5. Administrator, National Oceanic and Atmospheric Administration (5 U.S.C. Appendix 1);
6. Administrator, Small Business Administration (15 U.S.C. § 633(b)(1));
7. Archivist, National Archives and Records Administration (44 U.S.C. § 2103(c));
8. Attorney General (28 U.S.C. § 508(a));
9. Attorney General (28 U.S.C. § 508(b));
10. Chairman, Joint Chiefs of Staff (10 U.S.C. § 154(d));
11. Chairman, Joint Chiefs of Staff (10 U.S.C. § 154(e));
12. Chief Judge, Court of Veterans Appeals (38 U.S.C. § 7254(d));
13. Chief of Naval Operations (10 U.S.C. § 5035(d)(2));
14. Chief of Staff of the Air Force (10 U.S.C. § 8034(d)(2));
15. Chief of Staff of the Army (10 U.S.C. § 3034(d)(2));
16. Commandant of the Marine Corps (10 U.S.C. § 5044(d)(2));
17. Commissioner, Social Security Administration (42 U.S.C. § 902(b)(4));
18. Comptroller General (31 U.S.C. § 703(c));
19. Director, Office of Management and Budget (31 U.S.C. § 502(f));
20. Director, U.S. Arms Control and Disarmament Agency (22 U.S.C. § 2563);
21. Director, U.S. Information Agency (5 U.S.C. Appendix 1);
22. Director, U.S. International Development Cooperation Agency (5 U.S.C. Appendix 1);
23. General Counsel, Department of the Treasury (31 U.S.C. § 301(f)(1));
24. General Counsel, National Labor Relations Board (29 U.S.C. § 153(d));
25. President, Export-Import Bank (12 U.S.C. § 635a(b));
28. Public Printer, Government Printing Office (44 U.S.C. § 304);
29. Secretary of Defense (10 U.S.C. § 132(b));
30. Secretary of Education (20 U.S.C. § 3412(a)(1) (two alternatives);
31. Secretary of Energy (42 U.S.C. § 7132(a)) (two alternatives);
32. Secretary of Health and Human Services (5 U.S.C. Appendix 1) (two alternatives);
33. Secretary of Labor (29 U.S.C. § 552);
34. Secretary of Transportation (49 U.S.C. § 102(c)(2));
35. Secretary of Transportation (49 U.S.C. § 102(e));

36. Secretary of the Treasury (31 U.S.C. § 301(c)(2));
37. Secretary of Veterans Affairs (38 U.S.C. § 304);
38. Special Counsel, Immigration-Related Unfair Employment Practices (8 U.S.C. § 1324b(c)(1));
39. United States Attorney (28 U.S.C. § 546(a)–(d)); and
40. United States Marshal (28 U.S.C. § 562(a)–(b)).

A statute, 42 U.S.C. § 206(a), provides that the Surgeon General shall assign one commissioned officer from the Regular Corps to act as Surgeon General in the event of disability or vacancy in that office. The language of this bill does not retain this statutory means for filling a vacancy in a specific position.

Most of these retained statutes do not place time restrictions on the length of an acting officer. The various authorizing committees may choose in the future to reexamine whether these positions should continue to be filled through the existing procedure, or whether it would be advisable to repeal those statutes in favor of the procedures contained in the Vacancies Reform Act. The Committee believes that some of these statutes may have been passed without knowledge of the Vacancies Act. In any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.

The third exception to the applicability of the Vacancies Reform Act to all executive agency offices that are appointed by the President by and with the advice and consent of the Senate is the President's constitutional power under Article II, sec. 2, cl. 3 to make appointments during the recess of the Senate.

The bill provides that any statutory provision providing general authority to the head of an executive agency to delegate or reassign duties within that executive agency is not a statutory provision that qualifies within the exception contained in section 3347(a)(2) for existing statutes that provide for the filling of a vacancy in a specific office. This provision forecloses the argument raised by the Justice Department that sections 28 U.S.C. §§ 509 and 510, rather than the Vacancies Act, apply to vacancies in that department. This provision also forecloses the argument that similar language of vesting and delegation contained in the organic statutes of other departments, rather than the Vacancies Act, applies to those departments.

New section 3348 provides an enforcement mechanism for the legislation. If the President does not submit a nominee for a vacant executive agency position requiring the advice and consent of the Senate within 150 days of the vacancy caused by the departure of the last Senate-confirmed officer, the functions and duties of the office can be performed only by the head of that agency until a nomination is forwarded to the Senate.

The bill defines "function or duty" of the office as those functions or duties that (1) are established by statute and are required to be performed only by the applicable officer; (2) are established by regulation and are required to be performed only by the applicable officer; (3) were established by regulation and were required to be performed only by the applicable officer at any time in the 180 days preceding the vacancy, notwithstanding any regulation issued

more recently than 180 days before the vacancy occurred that limits or eliminates any function or duty required to be performed only by the applicable officer. The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer as they existed at any point during the 180 days prior to the death, resignation, or inability to serve of the last Senate-confirmed person to hold the applicable office, less any such duties subsequently limited by statute, but including duties subsequently limited or repealed by regulation, and including any such duties subsequently imposed by statute or regulation. Since so many executive agency positions filled with the advice and consent of the Senate lack any meaningful statutory duties, and because internal departmental regulations such as those providing duties for specific officers can be changed at will without undergoing the notice and comment process, 5 U.S.C. § 553(b)(3)(A), the Committee defined the functions and duties of a particular office to be those that existed at any point in the 180 days prior to the vacancy and those subsequently added, but not subtracted. Otherwise, agencies and departments could avoid the enforcement mechanism of making the office vacant by simply issuing regulations providing that the office has no non-delegable duties. The Committee believes that the duties as established 180 days before the vacancy is the appropriate period for freezing the duties because in many instances, the administration will know of an upcoming vacancy. The bill does not include as duties or functions of the office those duties that are limited or eliminated by statute after the date 180 days preceding the vacancy. When Congress shifts statutory duties from one agency to another, or changes the statutory underpinnings of a regulation affecting the duties of an officer, this bill does not extend the life of those affected regulations. Functions and duties of the office added by statute or regulation on or after 180 days preceding the vacancy are defined as functions and duties of the office, and thus, cannot be performed except by the head of the department or agency if the vacant office provisions apply.

Subject to section 3347 and a special rule discussed below when the 150th day is one on which the Senate is not in session, if 150 days elapses from a vacancy to which this legislation applies without the President having submitted a nomination for the vacant office to the Senate, the office shall remain vacant until the President submits a nomination to the Senate. After the 151st day until the date the nomination was made, neither the acting officer nor anyone else could fill the vacant office. In addition, except in the case of the head of an executive agency, only the head of that agency himself or herself could perform any function or duty of the office as defined in the legislation. Delegable functions of the office could still be performed by other officers or employees, but the functions and duties to be performed only by the officer whose appointment is by the President by and with the advice and consent of the Senate could be performed solely by the head of the executive agency. For any such office located within a department, that would mean that only the head of the department could perform those functions. All the normal functions of government thus could still be performed. The legislation only limits the person who may

perform them. The goal is not to punish or to obstruct, nor to inconvenience for the purpose of inconveniencing, but, rather, to encourage that a nomination be forwarded to the Senate after more than sufficient time for doing so has elapsed. Any inconvenience to the executive branch can be eliminated instantly by the President's unilateral decision to make a nomination, for once such a nomination is made, the acting officer can resume service, including performing the non-delegable duties of the office.

If the head of the agency position is vacant for more than 150 days without a nomination being sent to the Senate, the office is to remain vacant.

If the President does not submit a second nomination to the Senate within 150 days after the rejection, withdrawal, or return of the first nomination, the office will remain vacant, and the non-delegable functions and duties of the office can be performed only by the head of the executive agency as described above. If an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination, then the office shall remain vacant until a person is appointed by the President by and with the advice and consent of the Senate, and only the head of the executive agency may perform any function or duty of such office until the Senate has confirmed a nominee for the office, as described above. This provision tracks other provisions in the bill that allow the acting officer to serve once a first or second nomination is made, even if more than 150 days have elapsed, but do not permit an additional opportunity for the acting officer to serve in the event of exceeding the bill's time limits after disposition of the second nomination.

If the 150th day following the vacancy, following disposition of a first nomination other than by confirmation, or following disposition of a second nomination other than by confirmation falls on a date the Senate is not in session, then the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

To enforce section 3348's vacant office and performance of duties and functions of the office only by the agency head provisions be enforced, any function or duty of the office taken by a person who fills that vacancy despite the vacant office provision or who, not being the agency head, performs such a function duty without filling the office, shall be of no force or effect. Such actions cannot be made to have force or effect through ratification. For example, the successor in the office by virtue of his appointment by the President by and with the advice and the consent of the Senate may not ratify the actions of a person who filled the office in violation of the legislation's provisions or who, not being the agency head, performed nondelegable duties of the office. A lawfully serving acting officer cannot ratify the actions of a temporary officer whose service does not comply with the Vacancies Reform Act. The agency head may not ratify an action that is of no force or effect under this legislation that was performed by another official. Nor under well-established principles of constitutional law may the President ratify actions taken by officials that the law has provided shall be performed solely by lower-level executive branch officials. The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-

compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action. It is concerned that the ratification approach taken by the court in *Doolin* would render enforcement of the Vacancies Reform Act a nullity in many instances.

Section 3348 does not apply to the General Counsel of the National Labor Relations Board, the General Counsel of the Federal Labor Relations Authority or any inspector general appointed by the President, by and with the advice and consent of the Senate. Although the Committee believes that it has retained the specific statute that governs vacancies in the office of general counsel of the National Labor Relations Board, the Committee desires to make certain that the vacant office provisions do not apply to that position or its equivalent at the Federal Labor Relations Authority. These are two unusual positions that require appointment by the President by and with the advice and consent of the Senate. The positions are within multimember commissions but are not members of those commissions. Congress provided for Senate confirmation for these positions because it demands that these officials be independent of the commissioners. Specifically, it wanted to separate the official who would investigate and charge potential violations of the underlying regulatory statute from the officials who would determine whether that statute had actually been violated. If the non-delegable duties of these general counsel were somehow to be performed by the commissioners, that policy would be obliterated. Thus, section 3345 applies to all advice and consent positions, but section 3347 retains the existing statutory procedure for filling a vacancy in the general counsel of the NLRB. Section 3348 states clearly its inapplicability to the general counsel of the NLRB.

Under current law, the general counsel of the FLRA is not covered by the Vacancies Act because of the peculiarity that the position requires the advice and consent of the Senate but is not the head of an agency. Whereas the Justice Department has argued that its non-coverage under the Vacancies Act means that other provisions govern acting appointments for its offices, the Department has concluded that no statute permits an acting general counsel at the FLRA. Accordingly, in recent years, when that position has become vacant, no one has performed its duties until a permanent successor has been confirmed by the Senate. Since one of the duties of that position is to institute proceedings, this has resulted essentially in the cessation of the agency's functions. S. 2176 covers the general counsel of the FLRA under sections 3345 and 3346, permitting an acting officer to serve in case of a vacancy, but excludes the position from the enforcement mechanisms of section 3348 to preserve the independence of the position.

Similarly, agency inspectors general are to be independent of the agencies to which they are assigned. Inspectors general are to investigate mismanagement in their agency, and often may be critical of the agency head. If an inspector general whose appointment was made by the President by and with the advice and consent of the Senate were to have his functions performed by the agency head, the agency head might be delighted not to perform them vigilantly. Thus, section 3348 will not apply to this class of inspectors general.

Revised section 3349 of the bill requires the head of each executive agency to submit to the Comptroller General and to each house of Congress notification of vacancies in positions in their agencies requiring Senate confirmation, the name of any person serving in an acting capacity and the date such service began as soon as such service began, the name of any person nominated to the Senate to fill the vacancy as soon as such nomination is submitted, and the date of a rejection, withdrawal, or return of any nomination as soon as such rejection, withdrawal, or return occurs. If the Comptroller General makes a determination that an officer is serving longer than the 150-day period, including the applicable exceptions to such period in the legislation, the Comptroller General is to report such determination to the relevant committees listed in the legislation, the President, and the Office of Personnel Management. This function is informational only and does not provide the Comptroller General with any function properly to be performed only by an executive branch official. The Committee designated the recipients of the report so that appropriate action can be taken by the individuals who are informed of possible violations of the law.

New section 3349a extends the 150-day period in sections 3346 and 3348 for vacancies that exist on or that arise within 60 days after a presidential inaugural transition. In effect, the 150-day period becomes 240 days in this circumstance, running from the later of the date the vacancy arose or the transitional inauguration day. The bill defines a presidential inaugural transition as a date on which any person swears or affirms the oath of office as President, if such person was not the President on the date preceding the date of the swearing or affirming such oath of office. The time limit is extended in this circumstance because a new president will have essentially all positions in the executive branch requiring Senate confirmation to fill when he assumes office and may require additional time to nominate individuals to fill them. By the time the 240 days has run, the President would have confirmed sufficient of his own Senate-confirmed officials to designate as acting officers if he chose to exercise his power under section 3346, and that could continue to serve as the acting officer if a permanent nominee were submitted to the Senate. The provision covers vacancies in positions requiring Senate confirmation that arise in the 60 days following the presidential inauguration transition because each department keeps a Senate-confirmed person into a new administration for a short time in case vacancies in that department are not able to be filled as quickly as anticipated. The filling of those holdover offices should also be subject to the 90-day tolling of the 150-day period.

New section 3349b retains existing statutes that provide, with respect to any independent establishment headed by a single officer, that that officer can serve after the expiration of his term and until a successor is appointed or a specified period of time has elapsed. Whereas section 3347 retains those statutes that provide a means of succession for an acting person to perform the duties of a specified office, section 3349b retains statutes affecting specific independent establishments headed by a single officer that do not provide for an acting officer, but which instead permit the officer to serve until his successor is appointed or for a specified period of

time. These statutes govern the Chairman of the National Endowment for the Arts (20 U.S.C. § 954(b)(2)), the Chairman of the National Endowment for the Humanities (20 U.S.C. § 956(b)(2)), the Special Counsel of the Office of Special Counsel (5 U.S.C. § 1211(b)), and the Commissioner of the Social Security Administration (42 U.S.C. § 901(a)(3)). Independent establishments headed by a single officer previously covered by the Vacancies Act continue to be so covered under this legislation.

New section 3349c provides that the Vacancies Reform Act shall not apply to any member appointed by the President by and with the advice and consent of the Senate to a board, commission, or similar entity that is composed of multiple members, and governs an independent establishment or Government corporation. The Committee believes that this has always been the case with the respect to the Vacancies Act and wishes to avoid any confusion that might result from the enactment of a replacement statute on this point. Thus, vacancies in these positions are not covered by this legislation. Section 3349c excludes commissioners of the Federal Energy Regulatory Commission from the Vacancies Act as well, since it is an anomaly: the only multi-member independent agency that Congress has not placed in an independent establishment but in a department. Subsection (b) of section 3349c makes technical and confirming changes.

Section 3 of the legislation specifies its effective date. The legislation takes effect on the date of enactment, and shall apply to any office that becomes vacant after the date of enactment of this legislation or that is vacant on that date, although, as to the latter, its provisions shall apply as though such office first became vacant on that date. Thus, the 150-day period for those offices that are vacant on the date the legislation is enacted begins on the date the legislation is enacted, rather than the date the vacancy arose.

VII. Regulatory Impact Statement

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out this bill."

The enactment of this legislation will not have significant regulatory impact.

VIII. Cost Estimate of the Legislation

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 1, 1998.

Hon. Fred D. Thompson,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2176, the Federal Vacancies Reform Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely,

June E. O'Neill, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2176—Federal Vacancies Reform Act of 1998

S. 2176 would amend the Vacancies Act to clarify requirements relating to vacancies in and appointments to executive branch positions, including limitations on the amount of time that unconfirmed appointees can remain in office. It also would require the head of each executive branch agency to submit certain information regarding vacancies and appointments to the General Accounting Office. CBO estimates that enacting S. 2176 would have no significant impact on the federal budget.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 2176 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on state, local, or tribal governments.

Estimate prepared by: John R. Righter.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law with no change proposed is shown in roman):

UNITED STATES CODE

TITLE 5, GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

Subpart B—Employment and Retention

CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

[Subchapter III—Details]

Subchapter III—Details, Vacancies, and Appointments

[§ 3345. Details; to office of head of Executive agency or military department

[When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.]

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant of such officer shall perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346; or

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346.

(b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if—

(1) on the date of the death, resignation, or beginning of inability to server of the applicable officer, such person serves in the position of first assistant to such officer;

(2) during the 365-day period preceding such date, such person served in the position of first assistant to such officer for less than 180 days; and

(3) the President submits a nomination of such person to the Senate for appointment to such office.

(c) With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.

[§ 3346. Details; to subordinate offices

[When 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, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.**]**

§ 3346. Time limitation

(a) The person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 150 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate from the date of such nomination, for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office (of a different person than first nominated in the case of a rejection or withdrawal) is submitted to the Senate after the rejection,

withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 150 days after the second nomination is rejected, withdrawn, or returned.

(c) If a person begins serving as an acting officer during an adjournment of the Congress sine die, the 150-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

[§ 3347. Details; Presidential authority

[Instead of a detail under section 3345 or 3346 of this title, 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. This section does not apply to a vacancy in the office of Attorney General.**]**

§ 3347. Application.

(a) Sections 3345 and 3346 are applicable to any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) another statutory provision expressly provides that the such provision supersedes sections 3345 and 3346;

(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties to, or to reassign duties among, officers or employees of such Federal agency, is not a statutory provision to which subsection (a)(2) applies.

[§ 3348. Details; limited in time

[(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that—

[(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title—

[(A) until the Senate confirms the nomination; or

[(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

[(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

[(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.]

§ 3348. Vacant office

(a) In this section—

(1) the term "action" includes any agency actions as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (I) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs, notwithstanding any regulation that—

(I) is issued on or after the date occurring 180 days before the date on which the vacancy occurs; and

(II) limits any function or duty required to be performed by the applicable officer (and only that officer).

(b) Subject to section 3347 and subsection (c)—

(1) if the President does not submit a first nomination to the Senate to fill a vacant office within 150 days after the date on which a vacancy occurs—

(A) the office shall remain vacant until the President submits a first nomination to the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until a nomination is made in accordance with subparagraph (A);

(2) if the President does not submit a second nomination to the Senate within 150 days after the date of the rejection, withdrawal, or return of the first nomination—

(A) the office shall remain vacant until the President submits a second nomination to the Senate; and

(B) in the case of any office other than the office of the head of an Executive agency (including the Executive Office

of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such officer, until a nomination is made in accordance with subparagraph (A); and

(3) if an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination—

(A) the office shall remain vacant until a person is appointed by the President, by and with the advice and consent of the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until an appointment is made in accordance with subparagraph (A).

(c) If the last day of any 150-day period under subsection (b) is a day on which the Senate is not in session, the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) Except as provided under paragraphs (1)(B), (2)(B), and (3)(B) of subsection (b), an action shall have no force or effect if such action—

(A)(i) is taken by any person who fills a vacancy in violation of subsection (b); and

(ii) is the performance of a function or duty of such vacant office; or

(B)(i) is taken by a person who is not filling a vacant office; and

(ii) is the performance of a function or duty of such vacant office.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) this section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority; or

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate.

[§ 3349. Details; to fill vacancies; restrictions

[A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.**]**

§ 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress—

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

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 150-day period including the applicable exceptions to such period under section 3346, the Comptroller General shall report such determination to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

§ 3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 150-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

§ 3349b. Holdover provisions relating to certain independent establishments

With respect to any independent establishment for which a single officer is the head of the establishment, sections 3345 through 3349a 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.

§ 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to—

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation; or

(2) any commissioner of the Federal Energy Regulatory Commission.

ADDITIONAL VIEWS

The Committee on Governmental Affairs has a long list of legislative accomplishments that have enhanced the efficiency and effectiveness of the Federal government. These milestones were achieved with bipartisan support in both Democratic and Republican controlled Administrations and Congresses. The Vacancies Act should be no exception. As the Majority's Report well explains, the Vacancies Act is in need of reform. For too long, the Executive Branch's interpretation and implementation of that law have stripped it of its original intent and, on occasion, effectively deprived the Senate of its constitutional right to partake in the appointment of a number of Federal officers. Nevertheless, although we share the Majority's desire to amend the Vacancies Act—and agree with many, if not most, of the policy choices contained in S. 2176—we write separately to emphasize a number of concerns we have about the current draft of the bill. Although these concerns were not sufficient to prevent us from voting to report the bill out of Committee, they are nonetheless serious and, we believe, need to be addressed before the bill is ready for final action on the Senate floor.

Some of our reservations about the bill are largely technical, reflecting our concern that the bill, in fact, could be misinterpreted and fail to do what the Committee intends it to do. Others are more substantive in nature and rest on our fear that the Committee's understandable desire to protect the Senate's constitutional prerogatives may have led it to create a situation that could prevent the Executive Branch from efficiently and effectively fulfilling its constitutional duties to execute the Congress' laws. We discuss these concerns in detail below. We remain hopeful that, in the bipartisan spirit in which this legislation has thus far progressed, we can work out all of them before moving this bill further in the legislative process.

We are pleased that the Majority included us in the discussions leading up to the introduction and markup of S. 2176, and we believe that, due to those discussions, agreement was reached in four significant areas: (1) the time period of 150 days for service by an acting official absent a nomination, (2) the need for a "cure" in the case of a nomination made subsequent to the expiration of such period to allow an acting official to resume the functions and duties of the vacant office, (3) the exclusivity of the Act except in cases in which Congress makes clear it is specifying an alternative or supplemental means for filling vacancies, and (4) the necessity of an enforcement mechanism to encourage nominations to be made in a timely manner.

While these four areas are addressed in the bill, we remain concerned that § 3348, the enforcement mechanism, as drafted, may not operate to achieve our goals. We must be sure that the oper-

ation of this provision does not cause an unintended shutdown of the Federal agency within which the vacancy exists due to administrative paralysis and that the provision is drafted clearly so that its scope, mainly the extent of government functions and duties it would affect, is well understood. We must be clear that the non-delegable duties we intend to have performed only by the agency head in the event of a vacancy beyond the 150 days without a nomination are only those expressly vested by law or regulation exclusively in the vacant position. In this regard, we acknowledge and appreciate the Majority's statement that "all the normal functions of government thus could still be performed." For example, where a statute or regulation specifies that an Assistant Secretary for Policy Development is responsible for overseeing policy development, the development of policy would continue, but if a non-delegable approval is necessary to implement the policy, that approval must be performed by the agency head during a vacancy.

One other concept in § 3348 bears emphasis. The non-delegable duties of an agency head are not addressed in this legislation because the Committee expects that there will never be a case where a nomination for these positions is not timely submitted.

We would like to see serious consideration given to who, other than the first assistant or another Presidentially-appointed, Senate confirmed official designated by the President, as a qualifying acting official. We recognize the policy of maintaining the continuity and regularity of the vacated office by allowing a first assistant to automatically succeed to the position and the policy of allowing any individual nominated by the President and confirmed by the Senate to fill any "advice and consent" position. However, we believe that more flexibility is advisable and that our ultimate goal should be to ensure that the most qualified individual available fills the position. One possible alternative would be to allow a third category of individuals to temporarily fill positions, such as a qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level.

On related point, we believe the length of service requirement for first assistants who are nominees should be reevaluated. Senator Glenn offered an amendment at the Committee's June 17, 1998 markup to shorten the period required for an acting official who was a first assistant to be a nominee. As Senator Glenn noted at markup, this requirement would preclude service by a first assistant who naturally ascends to that position from within the agency, who might be a logical choice to fill the vacancy on a permanent basis. In considering shortening this requirement, we should strive to ensure the smooth flow of government activity, not penalize the individual, the agency or the taxpayers. We reiterate our preference for shortening this requirement.

We would also like to see a "safety valve" provision considered which would extend the 150-day period for a temporary appointment for an additional period of time if the President certifies that it is in the national interest to suspend or lengthen the period. Such "interests" could include reasons relating to national security, public health and safety, or financial stability. We recommend that

information be gathered to determine which critical functions affect such interests.

We believe that special consideration should be given to a situation in which a new president is being inaugurated. In such a case, especially when there is a change in the political party of the new president, there is unlikely, in many cases, to be a first assistant who, according to the bill's length of service requirement, would be eligible to both serve as the acting official and be the nominee. This limits a new Administration which may want to put its qualified people in acting positions and nominate them as well. The Senate should consider whether it is advisable to prohibit this type of service categorically or whether a more narrow compromise would be possible. In addition, we should ensure that the extended time period for temporary appointments at the beginning of a new Administration [1] accurately reflects the reality of the nomination process when a new President assumes office. We would not want to hamper future Administrations' ability to become operational as quickly as possible.

At markup, the Committee also discussed whether nominations could be sent up during a recess of the Senate. Specifically, we believe it is still unclear whether the bill, as written, would allow the Administration to cure a violation by making a nomination during recesses of the Senate. While it is clear that the Senate regularly authorizes itself to accept Presidential messages during its recesses,[2] and the President is permitted to submit nominations to the Senate at any time,[3] in practice, nominations are not sent up during recesses. We are concerned with assuring the smooth functioning of Government. One of our overriding concerns in reforming the Vacancies Act should be to ensure that we are not overburdening an agency head with the non-delegable responsibilities of other positions where such a situation can be avoided. We urge the Senate to consider remedying this situation by allowing the President to effectively notice the Senate with a letter of intent including the name of a nominee and a statement that he intends to nominate that person when the Senate reconvenes. By allowing such letter, the Senate would allow the President to exercise good faith where he wants to avoid using a recess appointment.[4]

Finally, we would hope that consideration will be given to increasing the one-day requirement of § 3348(c). While we are pleased that a recess will toll the temporary appointment period, to guard against an Administration's inadvertently missing the one-day window and certain functions and duties unnecessarily being delegated to the agency head, we recommend adding two days to the requirement that the President submit a nomination the day the Senate reconvenes.

As mentioned above, there are several other issues of concern to us which we believe are of a technical nature. While they are im-

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[1] The extended time periods provided in § 3349b total 240 days as the period for temporary appointments in a new Administration. This time period is applicable to all vacancies that arise from the date of the inauguration of the new President and for the subsequent 60 days.

[2] See 139 CR 8 (1993), 141 CR S9 (daily ed. Jan. 4, 1995), 143 CR S8 (daily ed. Jan. 7, 1997).

[3] See Floyd M. Riddick and Alan S. Frumin, Riddick's Senate Procedure, p. 949 (Rev. Ed. 1992).

[4] President Clinton has exercised his Constitutionally mandated recess appointment power 45 times in five years, President Bush made 78 recess appointments in four years and President Reagan made 239 in eight years.

portant issues in that their resolution affects the way a new law could be interpreted, because there is agreement between Majority and Minority staffs to aim to address these issues in a Managers' Amendment as the bill is considered by the full Senate, such issues will not be enumerated here. It is our hope that all of our concerns will be addressed in future discussions before S. 2176 is presented for debate on the Senate floor.

We cannot leave the topic of the process by which the President nominates federal officials without touching on the process by which the Senate confirms them. It is getting increasingly difficult to attract the best and brightest to government service, and those who serve in Presidentially-appointed, Senate confirmed positions are doing so for an average of less than two and a half years. And because the time period from vacancy through confirmation has become increasingly lengthy, we must go through this arduous process often multiple times within a single Administration. We agree that the Executive Branch too often takes too long to submit nominations to the Senate and that this delay not only intrudes upon the Senate's constitutional prerogatives but also impedes the good functioning of government. At the same time, however, we would be truly remiss if we failed to acknowledge that blame in this area does not rest in the Executive Branch alone; the Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often, nominations die in Committee, languish on the Executive Calendar, or simply take months or years to move through this Chamber. While the Senate remains free to reject the President's nominees when appropriate, it owes it to both the Executive, and more importantly, the American people, to discharge its constitutional duty to offer—and not withhold—its advice and, where appropriate, timely consent. We hope that in the future the Senate is willing to commit itself to act to reform its confirmation process in the same bi-partisan spirit we expect it to exhibit in enacting this legislation.

JOHN GLENN.
CARL LEVIN.
JOE LIEBERMAN.
MAX CLELAND.
ROBERT TORRICELLI.

MINORITY VIEWS

While we associate ourselves with the concerns outlined in the Additional Views of Senator John Glenn, our serious reservations abut the bill prevents us from supporting this legislation in its present form. Revisions to the Vacancies Act must reflect the realities of the nomination and confirmation process as it have evolved over the last several years. Furthermore, it is important to recognize the implication of imposing unrealistic expectations or restrictions on the process which could force the President to expand the use of recess appointment authority.

We recognize the need to safeguard the Senate's constitutional prerogative to advise and consent to nominations of executive officers, and do not oppose efforts to clarify and bolster the Vacancies Act as the executive mechanism (with limited and explicit exception) for the President to designate officials to temporarily fill vacancies in positions requiring Senate confirmation. Unfortunately, this bill goes well beyond that justifiable but limited goals.

We are concerned that this bill would impede the functioning of the Executive Branch. Concerns about the inability of Presidents to promptly submit nominees to fill positions requiring Senate confirmation has been a driving force prompting periodic reevaluation of Vacancies Act provisions throughout the last two centuries, including the present instance. Yet merely adding 30 days to the time permitted under current law for positions to be temporarily filled by an acting official is, in our opinion, wholly inadequate and impractical.

While the White House certainly bears some responsibility for the time it takes to select and advance nominees, it is a responsibility that is shared by the Senate. Given that the protracted, arduous, and unduly politicized Senate confirmation process contributes to making it increasingly more difficult to identify, recruit, and screen candidates for Federal appointments, it is imprudent to impose rigid statutory deadlines and to limit the persons eligible to serve temporarily as acting officers in vacant positions. Within substantial changes, we cannot support this bill.

First, this legislation too narrowly restricts who can function in an "acting" capacity. Section 3345(a)(1) of the bill can be read to provide that, aside from another Senate-confirmed Presidential appointee designated by the President, only the "first assistant" to the particular Senate confirmed officer who dies, resigns or is other unable to perform the functions and duties of the position, can be an acting officer. Early in the Administration of a newly-inaugurated President, virtually the only person who could serve as acting officers would be the first assistants from the prior Administration, since transferring another PAS person would merely create a new vacancy elsewhere. Moreover, the Senate could prolong the tenure of those holdover officers simply by delaying or failing to confirm

the President's nominee. No President should have to accept such a state of affairs.

Moreover, mandating that only first assistant or Senate-confirmed officials are eligible to serve as acting officers promotes no legitimate public policy. Indeed, this limitation prevents a President from naming an experienced career employee as an acting official, in favor of a person lacking broad experience who was brought into Department by the departing official. Consequently, the bill could preclude the President from naming the most qualified person to serve as an acting officer. In addition, the lack of a first assistant to a particular office that becomes vacant would leave the position vacant until such time as the President designates a previously Senate-confirmed official to temporarily fill that vacancy as an acting official. Given the tight time period of the Act, we fail to see why this provision should be so narrowly drawn. Without any justification based on its institutional interests, the Senate would do a great disservice by adopting such a restrictive measure. Therefore, we endorse Senator Glenn's suggestion that serious consideration be given to establishing a third category of individuals eligible to temporarily fill vacant positions.

Second, the unalterable 150 day time limit on service by acting officers is far too rigid. Indeed, it could impair the national interest. Circumstances may arise under which the President is unable to nominate an individual for a particular office within 150 days of a vacancy. Under this bill, the office would have to remain vacant even if that vacancy would undermine national security, impede public health and safety, threaten financial stability, or interfere with law enforcement. We believe there should be a flexible "safety valve" available for exceptional situations, whereby the President could certify to the Senate that a reasonable amount of additional time is needed to designate the appropriate nominee and that it is essential for the acting officer to continue to perform these critical tasks in the interim without interruption.

Third, while it would not affect this President, experience has shown that at the beginning of a new Administration, filling positions in the government requires time far longer than that specified in this bill. At the outset of a new Administration, a President must nominate individuals to at least 320 positions in the 14 executive departments in addition to appointing hundreds of other employees who do not require confirmation. The new President cannot possibly make all required nominations within the 240 days allowed by the bill. In 1993, when the nominations process was, if anything, simpler than it is today, the new Administration was able to forward only 68% of nominations within the first 240 days, leaving 32% of positions unfilled. Unless this time period is changed, the next Administration could effectively be facing departmental shutdowns before the new President can even begin to accomplish what he was elected to do.

Finally, our concern about these time limitations and the constraints on who can be appointed is magnified many times by the enforcement mechanism the bill establishes. It is essentially a sanction of administrative immobilization. Section 3348 of the bill specifies that if the President fails to forward a nomination within the 150-day span following the occurrence of a vacancy or the with-

drawal, rejection, or return of a first nomination, the office in question must remain vacant until a nomination is made. No one—apart from the head of the agency—can perform the functions and duties of the office. It is imperative that the bill unequivocally ensure that the affected functions and duties of the office are only those that are expressly deemed nondelegable by statute or regulation. Absent that clarity, whole components of federal agencies would have to stop their work. The potential bottleneck created by this provision would prevent the Executive Branch from doing its job. The Senate has tried before to enforce its policy preferences by shutting down the federal government. It was a bad idea then, and its still is now.

As we noted, the Senate bears partial responsibility for the time it takes to nominate officials from Senate confirmed positions. To further amplify, this Congress has subjected the Administration's nominees to unprecedented scrutiny, using almost any prior alleged indiscretion—no matter how trivial—by a nominee as an excuse to delay or prevent a vote. Senators have also interjected themselves into the President's nominations process to an unparalleled degree. As a result, that process—the selection, recruitment, and vetting of candidates—takes longer than ever before. While the Administration may well bear some responsibility for the slow pace of nominations, we find it troublesome that the Senate would so severely restrict the ability to fill vacant positions temporarily and to conduct the people's business while at the same time impeding the nominations process and confirming nominees at a snail's pace.

This President has made every effort to accommodate Senators' views about particular positions and nominees. Moreover, this President has used his power to make recess appointments far less than his predecessors. President Reagan made 239 recess appointments in eight years; President Bush made 78 recess appointments in four years. President Clinton has made only 45 recess appointments in his first five years in office. If this bill passes, we anticipate that the President will have no alternative but to make more recess appointments. That will hardly vindicate the Senate's advise and consent function.

We are anxious to craft a bill that fully protects the Senate's advise and consent function, while affording the Executive Branch the flexibility it needs to faithfully discharge the laws. In its current form, this bill does not do that. Without changes to address the problems identified above, we cannot support it.

RICHARD DURBIN.
DANIEL K. AKAKA.

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