



441 G St. N.W.
Washington, DC 20548

B-329939

May 9, 2018

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998:
General Counsel, Department of the Air Force*

Dear Mr. President:

Pursuant to section 3349(b) of title 5 of the United States Code, we are reporting a violation of the Federal Vacancies Reform Act of 1998¹ (herein “the Vacancies Reform Act” or “Act”) at the Department of the Air Force (the Department) with respect to the General Counsel position. Specifically, we are reporting that the service of Joseph McDade as Acting General Counsel from November 17, 2017, to January 18, 2018, was in violation of the Act. Because the position has been filled, there is not a continuing violation.

The Vacancies Reform Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require Presidential appointment and Senate confirmation. The Act generally limits the period of time that such a position may be filled with an acting official to 210 days beginning on the date the vacancy occurs, not when the official began serving in the acting capacity. 5 U.S.C. § 3346(a)(1). In the year of a transitional Presidential inauguration, that time period is extended to 300 days after the vacancy occurs with respect to any vacancy that exists during the 60-day period beginning on the transitional inauguration date. 5 U.S.C. § 3349a(b). Once a nomination has been made, the acting official generally may continue to serve while the nomination is pending before the Senate. 5 U.S.C. § 3346(a)(2). Under the provisions of section 3349(b), the Comptroller General is required, upon a determination that an acting official has served longer than the allowable period of service, to report such findings to Congress, the President, and the Office of Personnel Management.

The Department has reported to us that the position of General Counsel was vacant on January 20, 2017, a transitional Presidential inauguration date, and Joseph McDade became Acting General Counsel on September 20, 2017, before the end of the permissible period of acting service.² In response to our recent inquiry to all federal departments and agencies with positions subject to the Vacancies Reform Act to update the status of any vacancies, acting officials, or nominations, the Department reported to us that Thomas Ayres was nominated to serve as the General Counsel on January 18, 2018, and was confirmed by the Senate on

¹ Pub. L. No. 105-277, Div. C, Title I, 112 Stat. 2681-611 (Oct. 21, 1998), as amended, 5 U.S.C. §§ 3345-3349d.

² Department of the Air Force’s report to GAO’s Executive Vacancy System.

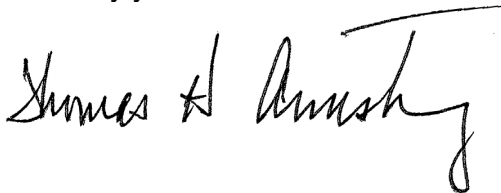
February 15, 2018.³ The Department has further reported Mr. McDade's service as Acting General Counsel ended on February 20, 2018.⁴

In accordance with the Vacancies Reform Act, the 300-day period began to run on January 20, 2017, when the vacancy began, and ended on November 16, 2017. Thus, the position of Acting General Counsel should have been vacant beginning November 17, 2017. The Department reported that Mr. McDade's service as the acting official continued until February 20, 2018. However he was not authorized to continue serving after November 16, 2017. Once a nomination was submitted to the Senate on January 18, 2018, Mr. McDade was authorized to resume the position of Acting General Counsel.

In accordance with the requirements of the Vacancies Reform Act, we are sending letters reporting this violation to the chairs and ranking members of the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Oversight and Government Reform, the Senate and House Committees on Appropriations, the Senate and House Committees on Armed Services, and the Director of Office of Personnel Management.

If you have any questions regarding this matter, please call me at 202-512-5400, or Managing Associate General Counsel Robert J. Cramer at 202-512-7227.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first name.

Thomas H. Armstrong
General Counsel

³ Memorandum from Department of the Air Force to the Government Accountability Office, Feb. 16, 2018.

⁴ Department of the Air Force's report to GAO's Executive Vacancy System.