



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

B-331536

September 15, 2020

The President
The White House

Subject: *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998:
Assistant Secretary of Defense for International Security Affairs, Department of Defense*

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 1998 (herein “the Vacancies Reform Act” or “Act”) at the Department of Defense (DOD) with respect to the Assistant Secretary of Defense (ASD) for International Security Affairs position. Pub. L. No. 105-277, div. C, title I, 112 Stat. 2681-611 (Oct. 21, 1998), *as amended*, 5 U.S.C. §§ 3345–3349d. Specifically, we are reporting that the service of Kathryn L. Wheelbarger, who used the title of Acting ASD for International Security Affairs beyond the permissible timeframe from June 4, 2019, until on or about June 19, 2019, was in violation of the Act. However, because Ms. Wheelbarger is no longer using the acting title, there is no 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 (PAS). 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. 5 U.S.C. § 3346(a)(1). 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.

Agencies are required to report to our Office when a vacancy occurs in a PAS position, when an acting official has been designated, when a nomination to the PAS position occurs, or when a nomination has been rejected, withdrawn, or returned. 5 U.S.C. § 3349(a). DOD has reported to us that the position of ASD for International Security Affairs was vacant on November 3, 2018, and that Ms. Wheelbarger became the Acting ASD for International Security Affairs on that date.¹ When we inquired about a potential violation of the permissible period of acting service based on the information reported, DOD reported that Ms. Wheelbarger’s service as

¹ Department of Defense’s report to GAO’s Executive Vacancy System. The position became vacant when the former ASD for International Security Affairs, Robert Story Karem, resigned in November 2018.

Acting ASD for International Security Affairs ended on June 1, 2019. Letter from Deputy Assistant General Counsel for Strategic Issues, GAO, to General Counsel, DOD (Nov. 13, 2019); Letter from Principal Deputy General Counsel, DOD, to Deputy Assistant General Counsel for Strategic Issues, GAO (Dec. 6, 2019).

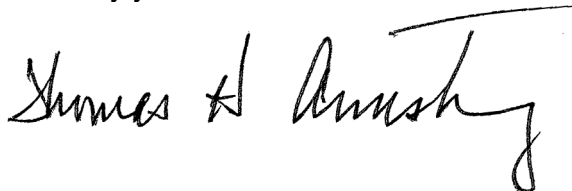
In accordance with the Vacancies Reform Act, the 210-day period began to run on November 3, 2018, when the vacancy began, and ended on June 3, 2019.² Thus, the position of Acting ASD for International Security Affairs should have been vacant beginning June 4, 2019. We have previously determined that using the acting title of a position during the period in which the position should be vacant violates the time limitations in the Vacancies Reform Act.³

Notwithstanding DOD's response that Ms. Wheelbarger's service as Acting ASD ended on June 1, we found that Ms. Wheelbarger continued to hold herself out as Acting ASD past the permissible period, as demonstrated by her listing as the "Acting Assistant Secretary for International Security Affairs" for a congressional committee briefing on June 19, 2019. 165 Cong. Rec. D702, D705 (daily ed. June 19, 2019). Consequently, Ms. Wheelbarger's use of the acting title here shows that she continued to hold herself out as Acting ASD in violation of the Vacancies Reform Act.

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 Reform; the Senate and House Committees on Appropriations; the Senate and House Committees on Armed Services; and the Acting Director of the Office of Personnel Management.

If you have any questions regarding this matter, please contact Shirley A. Jones, Managing Associate General Counsel, at (202) 512-8156 or Shari Brewster, Assistant General Counsel for Appropriations Law, at (202) 512-6398.

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

² The 210-day period ended on June 1, 2019, but since the Senate was not in session on that day, the Act extends the permissible period to the day after the Senate reconvened, which was June 3, 2019.

³ See, e.g., B-318244, June 18, 2014, at 5-6; B-287720, May 18, 2001, at 3.