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United States General Accounting Office  
Washington, DC 20548

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December 7, 2001

The Honorable Joseph I. Lieberman  
Chairman  
The Honorable Fred Thompson  
Ranking Minority Member  
Committee on Governmental Affairs  
United States Senate

The Honorable Dan Burton  
Chairman  
The Honorable Henry A. Waxman  
Ranking Minority Member  
Committee on Government Reform  
House of Representatives

Subject: Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998

The Congress passed the Federal Vacancies Reform Act of 1998<sup>1</sup> (Vacancies Reform Act) to establish, among other things, new requirements for the temporary filling of vacant executive agency positions that require presidential appointment and Senate confirmation (PAS positions). The act provides that only certain classes of individuals may serve as acting officers<sup>2</sup> and that, in the absence of a designation by the President of another qualified individual, a first assistant of a vacant office shall perform the functions and duties of the office temporarily.<sup>3</sup> This letter is to inform you that the Department of Justice has recently changed its interpretation of the circumstances under which a first assistant may serve on an acting basis.

The Vacancies Reform Act provides that when PAS positions covered by the act become vacant, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations" established under the act.<sup>4</sup> The act also provides that the first assistant is not eligible to serve as the acting officer if:

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

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<sup>1</sup> 5 U.S.C. §§ 3345 – 3349d.

<sup>2</sup> 5 U.S.C. § 3345.

<sup>3</sup> 5 U.S.C. § 3345(a)(1)(2) and (3).

<sup>4</sup> 5 U.S.C. § 3345(a)(1).

- (i) did not serve in the position of first assistant to the office of such officer; or
  - (ii) served in the position of first assistant to the office of such officer for less than 90 days; and
- (B)the President submits a nomination of such person to the Senate for appointment to such office." (5 U.S.C. 3345(b)(1))

Justice's guidance to agencies on this provision of the Vacancies Reform Act, issued in March 1999, addressed the question of whether a person needed to be in the first assistant position before the vacancy occurred to qualify to become the acting officer. This initial guidance said that "while the Vacancies Reform Act does not expressly address this question, we believe that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant." Subsequently, Justice revisited this question and concluded that someone who becomes the first assistant after a vacancy in a PAS position can temporarily serve in that position on an acting basis as long as that person is not nominated for the vacant position. After considering Justice's position, we find it reasonable and concur with it.

We are informing you of the changed interpretation because, in preparing earlier reports and correspondence dealing with the Vacancies Reform Act, we used language similar to that in Justice's previous interpretation indicating that a person needed to be a first assistant before a vacancy occurred to qualify to serve as acting officer. We now take the position that a person need not have been in the first assistant position before the vacancy occurs in order to serve as acting officer, unless that person is also nominated for the position. The effect of Justice's new interpretation is that heads of agencies have greater flexibility than under the previous interpretation to designate individuals to serve on a temporary basis in PAS positions. Agency heads can name an individual to the first assistant position (if it is not itself a PAS position) after a vacancy has occurred and that person could then act temporarily in the office up to the time limits allowed for acting officers under the Vacancies Reform Act as long as the person is not nominated for the position.

We are sending copies of this letter to the Attorney General and the Counsel to the President. This letter will also be available on GAO's home page at <http://www.gao.gov>. If you have any questions, please contact me or Tom Dowdal, Assistant Director, on (202)512-6806. V. Bruce Goddard and Michael Volpe also made key contributions to this letter.



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