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United States General Accounting Office  
Washington, DC 20548

B-289367

March 18, 2002

The President  
The White House

Subject: Violation of the 210-Day Limit Imposed by the Vacancies Reform Act

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 (Vacancies Reform Act).<sup>1</sup> We have found that the senior Associate General Counsel of the Department of Agriculture has been serving and continues to serve as acting General Counsel for a period longer than allowed for such acting service under the Act. In addition, information we have received from the senior Associate General Counsel indicates that he was not entitled to serve as acting General Counsel under the provisions of the Vacancies Reform Act.

### **The Vacancies Reform Act**

The Vacancies Reform Act established new requirements for the temporary filling of vacant executive agency positions that require Presidential appointment and Senate confirmation (PAS positions). The Act generally limits the period of time a person may serve as an acting officer to 210 days from the date of the vacancy with adjustments extending that time period in certain circumstances, such as when the President submits a nomination for the position to the Senate.<sup>2</sup> In addition, the Act provides a further extension of time, when, as here, the Presidential inaugural transition provision applies.<sup>3</sup> The Act also sets out certain classes of individuals who may serve as acting officers.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. §§ 3345-3349d.

<sup>2</sup> 5 U.S.C. § 3346(a)(1) and (2).

<sup>3</sup> 5 U.S.C. § 3349a. The Presidential inaugural transition provision applies to any vacancy that exists during the 60-day period beginning on the date a non-incumbent President takes the oath of office as President.

<sup>4</sup> 5 U.S.C. § 3345.

The Vacancies Reform Act requires executive agencies to report to each House of Congress and the Comptroller General specific information relating to covered vacancies.<sup>5</sup> Of particular relevance here is that agencies are to report a vacancy, the date such vacancy occurred, the name of any person serving in an acting capacity, and the date such service began.<sup>6</sup> The Act further provides that the Comptroller General is to report to specified congressional committees, the President, and the Office of Personnel Management if the Comptroller General determines that an acting officer in a covered position is serving longer than the 210 days permitted by the Act.<sup>7</sup>

### **Acting General Counsel of the Department of Agriculture**

As required by the Vacancies Reform Act, the Department of Agriculture reported to us that James Michael Kelly has been serving as acting General Counsel since January 22, 2001. The position of General Counsel is a PAS position subject to the Act. In response to our inquiry concerning the status of Mr. Kelly's acting service, Mr. Kelly informed us that he was still serving as acting General Counsel up to the present time.

The office of the General Counsel became vacant on January 20, 2001. Since the vacancy occurred on that date, the Presidential inaugural transition provision in the Vacancies Reform Act allowed the acting officer to serve through November 15, 2001. Thus, Mr. Kelly's continuing service, beginning November 16, 2001, is in violation of the time limitation in the Vacancies Reform Act.<sup>8</sup>

Additionally, Mr. Kelly was not entitled to serve as acting General Counsel even for the limited time period allowed for acting service in the vacant office of General Counsel. In this regard, there are three classes of individuals who are permitted to serve as acting officers under the Vacancies Reform Act.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 3349(a).

<sup>6</sup> 5 U.S.C. § 3349(a)(1) and (2). Agencies are required to report the name of persons nominated to the Senate to fill a vacancy and the date such nomination is submitted and the date of rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return. 5 U.S.C. § 3349(a)(3) and (4).

<sup>7</sup> 5 U.S.C. § 3349(b).

<sup>8</sup> 5 U.S.C. §§ 3346(a)(1) and 3349a(b)(1). We are unaware of any statute that expressly authorizes an exception to this requirement. 5 U.S.C. § 3347(a)(1). See 7 U.S.C. § 2214, which requires appointment of the General Counsel by the President with the advice and consent of the Senate.

<sup>9</sup> 5 U.S.C. § 3345(a) and (b).

First, the Vacancies Reform Act prescribes that in the event of a vacancy, the first assistant to the office of the officer who has left the office vacant shall perform the functions and duties of the office temporarily in an acting capacity.<sup>10</sup> Mr. Kelly states that he was not the first assistant to the General Counsel. Therefore, he does not qualify to serve as an acting officer under this provision.

Second, the President, and only the President, may direct a PAS official to perform the functions and duties of the vacant office temporarily.<sup>11</sup> Mr. Kelly is not a PAS official and thus does not meet this criterion under the Vacancies Reform Act to serve as an acting official.

Third, the Vacancies Reform Act allows the President, and only the President, to direct an officer or employee of the same department to perform the functions and duties of the vacant office temporarily if certain service and rate of pay requirements are met.<sup>12</sup> Although Mr. Kelly is a senior employee of the department who would meet the service and rate of pay requirements in the Act, he was not designated by the President to serve in the vacant position in an acting capacity. Mr. Kelly has advised us that the Secretary of Agriculture asked him to serve as acting General Counsel on January 22, 2001; however, the President did not designate him to serve as acting General Counsel. Thus, Mr. Kelly did not meet any of the relevant conditions of the Vacancies Reform Act allowing specified classes of individuals to serve as acting officials on a temporary basis.<sup>13</sup>

The Vacancies Reform Act states that actions taken by acting officials in the performance of the functions and duties of the vacant office that are not delegable and that can only be performed by the holder of that office shall have no force or effect if they are not taken in accordance with the provisions of the Act.<sup>14</sup> This would include actions taken by an acting officer after the statutory time limit has been reached.<sup>15</sup> Mr. Kelly informs us, however, that there are no non-delegable duties that by law or regulation are required to be performed by the General Counsel of the department. Thus, although Mr. Kelly could not legally serve as acting General Counsel, since he performed no non-delegable functions or duties, this provision of the Vacancies Reform Act has no effect on his actions while he was holding himself out as acting General Counsel.

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<sup>10</sup> 5 U.S.C. § 3345(a)(1).

<sup>11</sup> 5 U.S.C. § 3345(a)(2).

<sup>12</sup> 5 U.S.C. § 3345(a)(3).

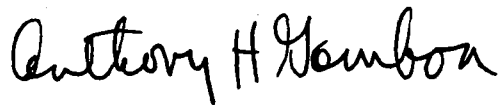
<sup>13</sup> 5 U.S.C. §§ 3345(a)(1), (2) and (3) and 3347(a).

<sup>14</sup> 5 U.S.C. § 3348(a) and (d)(1).

<sup>15</sup> 5 U.S.C. §§ 3346(a)(1) and 3348(d)(1); B-286265, Sept. 15, 2000.

In our opinion, Mr. Kelly should not hold himself out as acting General Counsel any longer. As discussed above, the President could designate a qualified individual to serve temporarily on an acting basis. In this regard, since Mr. Kelly would appear to meet the other criteria for a senior agency employee to serve as an acting official, the President, and only the President, could designate Mr. Kelly to serve as acting General Counsel during the period the nomination of Nancy Southard Bryson to be General Counsel is pending before the Senate.

Respectfully yours,

A handwritten signature in black ink that reads "Anthony H Gamboa". The signature is written in a cursive, slightly slanted style.

Anthony H. Gamboa  
General Counsel