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VACANCIES ACT

Executive Branch
Noncompliance

Statement of
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Mr. Chairman, Senator Glenn, and Members of the Committee: I am pleased to appear before you today to discuss the General Accounting Office's views on the application of the Vacancies Act to positions that require Senate confirmation. As you know, GAO has long maintained that except in limited circumstances, the Vacancies Act is the exclusive authority for temporarily filling vacant positions that require Senate confirmation. Provisions in general enabling statutes that give the head of the department or agency the authority to exercise the functions of the department and to delegate these functions to others are insufficient to preclude application of the Act.

The Vacancies Act sets forth methods for temporarily filling vacant positions in Executive agencies and military departments that require Presidential appointment with the advice and consent of the Senate. The vacancies must have been created by the death, resignation, sickness or absence of the incumbent and cannot arise because of the creation of a new office or position. The Act provides two methods for the temporary filling of vacant positions. According to 5 U.S.C. §§ 3345 and 3346, the first assistant of the office may fill the position on a temporary basis. If the first assistant does not fill the position, then according to section 3347, any officer, including the head of another Executive or military department, whose regular appointment was made by the President with Senate confirmation, may serve in the office on a temporary basis. Significantly, section 3349 makes these methods the sole means for temporarily filling the vacancies covered by the Act, except when a vacancy occurs during a Senate recess. Once a vacancy is temporarily filled, special rules apply to the length of time an official may serve in an "acting" capacity. Section 3348 provides that as a general rule the position may not be filled temporarily for more than 120 days. There are, however, exceptions to the rule if a nomination has been made to the Senate, the vacancy occurs during an adjournment of Congress sine die or the vacancy is filled during a recess of the Congress. In these circumstances, a person may generally continue in the office past the 120 days.

Over the years we have often been called upon by Members of Congress to issue opinions concerning officials who are serving in "acting" capacities in various Executive departments or agencies without Senate confirmation. In a long line of cases beginning in 1973, the Comptroller General has maintained that the Vacancies Act is the exclusive authority for the temporary filling of vacant positions that require presidential appointment and Senate confirmation. We believe that the application of the Vacancies Act can be superseded only if there is specific statutory

language providing another means for filling the particular vacancy in question. For example, in a 1988 case we were asked whether the position of Acting Administrator at GSA was subject to the Vacancies Act. Because Congress had specifically provided in GSA's enabling statute that the President could appoint any officer of the government to serve in that capacity, we held that the position was not subject to the Vacancies Act if it was filled in the manner prescribed by the statute. Similarly, in a 1981 decision we noted that a provision in the enabling statute of the Department of Energy provides that the Deputy Secretary shall act for the Secretary when that office is vacant. Accordingly, we concluded that the Vacancies Act did not apply to the Acting Secretary position if this provision were followed in filling the vacancy. In an earlier decision in 1976, we reached a similar conclusion with respect to a vacancy in the position of Deputy Administrator of the Drug Enforcement Agency. In each of these cases, Congress provided independent statutory authority to fill a specific vacancy and therefore the time limitations of the Vacancies Act do not apply.

The Justice Department and other Executive departments have taken exception to our opinion. They maintain that the Vacancies Act can be overcome by provisions in their enabling statutes that vest the functions of the department in the agency head and give general authority to this official to assign functions and delegate authority within the department. We fundamentally disagree with these arguments. The position of Justice and the other departments is not supported by the language of the Vacancies Act or the enabling statutes which are cited. Moreover, the legislative history of the Vacancies Act, including the 1988 amendments thereto, as well as the Department of Justice Act of 1870 and various reorganization plans do not support their position. By passing legislation providing for an alternative means for filling specific vacancies in some cases, Congress has shown that it knows how to provide for independent statutory authority separate and apart from the Vacancies Act. If the position of the Justice Department and other departments is accepted, these specific provisions would be redundant and need not have been enacted.

The Vacancies Act is an important means to safeguard the delicate balance established by the Appropriations Clause of the Constitution between the President and the Senate in the appointments process. Since many Executive departments have provisions in their enabling statutes vesting authority in the agency head and permitting delegations of authority, the position of Justice and the other Executive departments would, in effect,

virtually nullify the prohibitions contained in the Vacancies Act. We do not believe Congress could have intended this to occur.

The Administration's continued disregard of the Vacancies Act in the face of congressional intent, numerous Comptroller General opinions, and heightened congressional and public scrutiny, suggests that the Congress consider additional action to assure compliance. We believe that the Congress should consider amending the Vacancies Act to:

- explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific, identified vacancy. This would remove any doubt that the basic authorizing statutes of the Justice Department and others do not preclude application of the Vacancies Act.
- prohibit salary payments to those who occupy positions in violation of the Vacancies Act, regardless of whether that individual is also simultaneously, lawfully occupying another position. This would provide an incentive for the President and those filling the vacancies to comply with the Act.
- include a reporting mechanism, such as requiring agencies to advise this Committee or the Comptroller General about vacancies, their duration, and nominations. This would provide oversight to help assure that vacancies in the government's most responsible positions are timely filled.

Although we believe that the Vacancies Act is clear, amendment of the Act to clarify congressional intent could help insure that the Act is followed and that the President acts in a judicious manner to make appointments which are subject to Senate scrutiny.

This concludes my prepared statement Mr. Chairman, and I would welcome any question you or other Members of the Committee may have.

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