



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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In reply refer to:
B-202893

June 17, 1981



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The Honorable John D. Dingell
Chairman, Subcommittee
on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

By letter of February 27, 1981, you referred to your letter of the same date to the President expressing your concern that many positions at certain agencies under the oversight jurisdiction of the Committee on Energy and Commerce are being filled by persons in an "acting" capacity some of whom have served for more than the 30-day limitation provided by the Vacancies Act. You have requested our opinion as to the applicability of the Vacancies Act to the agencies and the vacant positions you refer to which are subject to appointment by the President by and with the advice and consent of the Senate. You also ask our opinion as to the effect on actions by these agencies which are taken by persons who are serving in an acting capacity for more than 30 days. The agencies named in your letter to the President are the Departments of the Interior and Transportation, certain components of the Department of Energy, the Environmental Protection Agency, and the Food and Drug Administration.

Appointment of Officers of the United States

The Appointments Clause of the Constitution, Article II, section 2, clause 2, provides as follows with regard to the appointments of officers.

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall

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appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, the Constitution provides that officers of the United States must be appointed with the advice and consent of the Senate except when the Congress clearly delegates the full appointment power for a particular position or class of positions by law to "the President alone, in the Courts of Law, or in the Heads of Departments." See Scully v. United States, 193 F. 185, 187 (Cir. Ct. Nev. 1910).

The Vacancies Act

The so-called Vacancies Act, 5 U.S.C. §§ 3345-3349, provides methods for the temporary filling of vacancies created by the death, resignation, sickness or absence of the head of an Executive department or military department or the head of a bureau thereof whose appointment is not vested in the head of the department or in the President alone. Section 3345 provides that when the head of an Executive department or military department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347 his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3346 provides that when an officer of a bureau of an Executive department or military department whose appointment is not vested in the head of the department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347, his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3347 provides that instead of a detail under section 3345 or 3346, the President may

direct the head of or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3349 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, except in the case of a vacancy occurring during a recess of the Senate.

Section 3348 of title 5, United States Code, provides that a vacancy caused by death or resignation may be filled temporarily under sections 3345, 3346, and 3347 for not more than 30 days.

The provisions of the Vacancies Act are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168. The time limit now set forth in section 3348 was originally 10 days and was increased to 30 days by the Act of February 6, 1891, ch. 113, 26 Stat. 733.

The Congressional intent in passing the 1868 act is indicated by debate recorded in the Congressional Globe of February 14, 1868.

"Mr. Trumbull. The intention of the bill was to limit the time within which the President might supply a vacancy temporarily in the case of the death or resignation of the head of any of the Departments or of any officer appointed by him by and with the advice and consent of the Senate in any of the Departments. As the law now stands, he is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the committee to be an unreasonable length of time, and hence they have limited it by this bill to thirty days." [Changed by floor amendment to 10 days.] 39 Congressional Globe 1163, February 14, 1868. (Emphasis supplied.)

It has long been held by the Attorney General that after a vacant position has been temporarily filled under the Vacancies Act the power conferred by the Act is exhausted and the President does not have the authority to appoint either the same or another officer to temporarily fill the Office for an additional period. 16 Op. Atty. Gen. 596 (1880), 18 Op. Atty. Gen. 50 (1884), Id. at 58, 20 Op. Atty. Gen. 8 (1891).

As the intent of the Vacancies Act was to preclude unreasonable delays in submitting nominations for offices subject to Senate confirmation we have adopted the view that the 30-day limitation contained in 5 U.S.C. § 3348 runs only during the period that there is no name before the Senate for confirmation by that body. See 56 Comp. Gen. 761 (1977). Also see Williams v. Phillips, 482 F. 2d 669 (D.C. Cir. 1973). But see United States v. Lucido, 373 F. Supp. 1142 (E.D. Michigan, 1974) wherein the court in effect stated that notwithstanding that a name had been submitted to the Senate for confirmation an appointment under the Vacancies Act would terminate at the end of the 30-day period set forth in 5 U.S.C. § 3348. Accord, 32 Op. Atty. Gen. 139 (1920).

The 30-day limitation placed on temporary appointments by 5 U.S.C. § 3348 applies by its express terms only to appointments or designations made under the Vacancies Act. Accordingly, the limitation contained in section 3348 is not for application where vacancies are filled pursuant to authority other than the Vacancies Act.

By its express terms the Vacancies Act is applicable to the Executive departments and military departments. Section 101 of title 5 United States Code, as amended by section 710(a) of Public Law 95-91, August 4, 1977, 91 Stat. 609 and by section 508(b), Public Law 96-88, October 17, 1979, 93 Stat. 692 sets forth the Executive departments. The Executive departments include the Departments of Energy, Health and Human Services, (of which the Food and Drug Administration is a part), the Interior, and Transportation. The listing in 5 U.S.C. § 101 does not include the Environmental Protection Agency (EPA).

The EPA was established in the executive branch as an independent agency pursuant to Reorganization Plan No. 3 of 1970, effective December 2, 1970, 84 Stat. 2086. Section 1 of that plan provides in part:

"Section 1. Establishment of Agency. (a) There is hereby established the Environmental Protection Agency, hereinafter referred to as the 'Agency.'

"(b) There shall be at the head of the Agency the Administrator of the Environmental Protection Agency, hereinafter referred to as the Administrator. The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313).

"(c) There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the Office of Administrator.

"(d) There shall be in the Agency not to exceed five Assistant Administrators of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315). Each Assistant Administrator shall perform such functions as the Administrator shall from time to time assign or delegate."

The EPA is an "independent establishment" defined in 5 U.S.C. § 104(1)(1976) as:

B-202893

"An establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment * * *"

As an independent agency, rather than an Executive or military department, the EPA would not be subject to the Vacancies Act.

As set forth above, Section 1 of the Reorganization Plan provides that the Administrator, Deputy Administrator and the Assistant Administrators of the EPA shall be appointed by the President by and with the advice and consent of the Senate. Subsection 1(c) provides in part that the Deputy Administrator shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the Office of Administrator.

Thus, a vacancy in the position of the Administrator may be filled by the deputy in accordance with the provisions of section 1(c) of the Reorganization Plan. The filling of a vacancy in the Office of Administrator in accordance with section 1(c), supra would not be subject to a time limitation. While the designation of an official to exercise the duties of an office for an indefinite period could have the effect of depriving the Senate of the opportunity to consent to the filling of a vacancy in such office, there would not appear to be any legal or constitutional objection thereto where the Congress has either allowed a Reorganization Plan to become effective or has enacted a statute which provides for the designation of an acting official in a prescribed manner without any time limitation.

In view of the inapplicability of the Vacancies Act to the EPA and since Reorganization Plan No. 3 of 1970 does not provide for the filling of vacancies in the Office of Deputy Administrator or Assistant Administrator, it would appear that there is no authority for the filling of such

vacancies when the Senate is in session except under the authority of Article II, section 2, clause 2 of the Constitution. See in this regard Williams v. Phillips, 360 F. Supp. 1363 (D.C., 1973) where the Court considered the appointment by the President without Senate confirmation of an Acting Director of the Office of Economic Opportunity (OEO), an independent establishment, where the applicable statute provided that the Director thereof was to be appointed by the President by and with the advice and consent of the Senate. The Court determined that since the OEO was an independent establishment and not an Executive Department, the Vacancies Act was not for application. In the absence of other specific legal authority providing for the appointment of an Acting Director of OEO, the Court held that the appointment by the President was void ab initio and issued an injunction restraining the appointee from taking any further action. The Court noted that an interim appointment power of the President, if it exists at all, exists only in emergency situations. In that case on appeal the Court stated that even if a court should accept an argument that the appointment of the Acting Director of OEO was not void ab initio due to the President's constitutional obligation to "take care that the laws be faithfully executed," such an appointment if upheld would be valid only for a reasonable period of time. The Court stated that the 30-day period provided in the Vacancies Act is an indication of such reasonable period of time. Williams v. Phillips, 482 F.2d. 669.

Department of Energy

Title II of the Department of Energy Organization Act, Public Law 95-91, August 4, 1977, 91 Stat. 565, 569, as set forth at 42 U.S.C. § 7131 et seq. established the Department of Energy and provides in pertinent part that the following officials of the Department of Energy shall be appointed by the President by and with the advice and consent of the Senate: the Secretary (42 U.S.C. § 7131), the Deputy Secretary (42 U.S.C. § 7132(a)), the Undersecretary and the General Counsel (42 U.S.C. § 7132(b)), the eight Assistant Secretaries (42 U.S.C. § 7133), the Administrator of the Energy Information Administration (42 U.S.C. § 7135(a)), the Administrator of the Economic Regulatory Administration (42 U.S.C. § 7136), Inspector

B-202893

General (42 U.S.C. § 7138(a)(1)), Deputy Inspector General (42 U.S.C. § 7138(a)(2)), the Director of the Office of Energy Research (42 U.S.C. § 7139), and the Director of the Office of Minority Economic Impact (42 U.S.C. § 7141). In addition, Section 220 of the Energy Security Act, Public Law 96-294, June 30, 1980, 94 Stat. 611, 696, established within the Department of Energy an Office of Alcohol Fuels to be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate.

Section 202(a) of Public Law 95-91, 91 Stat. 569, 42 U.S.C. § 7132(a) provides for exercising the functions of the Secretary of Energy when that position is vacant, as follows:

"(a) There shall be in the Department a Deputy Secretary, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of Title 5. The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices."

Thus, the Congress has seen fit to provide specific authority for an Acting Secretary of Energy when such position is vacant. The service of an individual as Acting Secretary of Energy under the authority set forth in § 202(a), and regulations properly issued thereunder would not be subject to a time limitation.

B-202893

Concerning a vacancy in the position of Inspector General, Section 208(a) of Public Law 95-91, 91 Stat. 575, 42 U.S.C. § 7138(a) provides in pertinent part as follows:

"(2) There shall also be in the Office a Deputy Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability and without regard to political affiliation. The Deputy shall assist the Inspector General in the administration of the Office and shall, during the absence or temporary incapacity of the Inspector General, or during a vacancy in that Office, act as Inspector General."

Thus, Congress has determined that when the position of Inspector General of the Department of Energy is vacant his Deputy is to serve in that Office. Such service would not be subject to time limitation.

We have been advised that the position of Deputy Inspector General has been vacant and that effective January 26, 1981, as designated by the Secretary, the Assistant Inspector General for Audits has been serving as Acting Inspector General. Section 208(a) of Public Law 95-91 would not be applicable to such service by an Assistant Inspector General since it expressly provides that in the event of such a vacancy the Deputy Inspector General shall serve as the Inspector General. Also, it would appear that there is no authority under the Vacancies Act for an Assistant Inspector General to fill a vacancy in the Office of Inspector General since the Assistant Inspector General is not the first assistant to the Inspector General.

We are aware of no other specific authority for appointment to vacancies in those offices in the Department of Energy which require Senate confirmation. We know of no general authority other than the Vacancies Act under which such vacancies may be filled. See B-150136, May 16, 1978. (copy enclosed).

Accordingly, except as otherwise provided for in Sections 202(a) and 208(a) of Public Law 95-91, for the filling of vacancies in the Offices of the Secretary and the Inspector General, those offices within the Department of Energy which require Senate confirmation are to be filled under the authority of the Vacancies Act. Thus, the 30-day limitation set forth in 5 U.S.C. § 3348 would be applicable to such appointments. In addition, we note that, from the list you furnished us of the persons acting in the various positions, several were apparently neither "the first assistant" to the office in which they are acting nor are they officers whose regular appointments were made by the President, "by and with the advice and consent of the Senate", as is required by the Vacancies Act. 5 U.S.C. §§ 3346, 3347. Therefore, it does not appear that they were eligible for appointment to the acting positions under the Vacancies Act.

Department of the Interior

Your letter to the President specifically mentions the Office of Director of the Office of Surface Mining, Reclamation, and Enforcement which is a position established in the Department of the Interior by section 201 of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, 91 Stat. 441, 449. Section 201 provides that the Director shall be appointed by and with the advice and consent of the Senate. There is no statutory provision for filling a vacancy in the Office of the Director other than the Vacancies Act. Accordingly, the filling of a vacancy in the Office of Director would be subject to the 30-day limitation set forth at 5 U.S.C. § 3348.

Among the other Officers of the Department of the Interior who are to be appointed by the President by and with the advice and consent of the Senate are the Secretary (43 U.S.C. § 1451), the Under Secretary (43 U.S.C. § 1452), the Assistant Secretaries (43 U.S.C. §§ 1453 and 1453a), the Solicitor (43 U.S.C. § 1455), the Director, Bureau of Land Management (43 U.S.C. § 1731), the Director Geological Survey (43 U.S.C. § 31), the Assistant Secretary for Fish and Wildlife (16 U.S.C. § 742b(a)), the Director, Fish and Wildlife Service (16 U.S.C. § 742b(b)), the Director, Bureau

B-202893

of Mines (30 U.S.C. § 1), and the Commissioner of Indian Affairs (25 U.S.C. § 1).

Concerning a vacancy in the Office of the Commissioner of Indian Affairs, Section 1 of the Act of June 5, 1942 ch. 336, 56 Stat. 312, as amended, 25 U.S.C. § 2a provides that the Secretary of the Interior may designate for the Bureau of Indian Affairs an assistant or deputy commissioner who shall be authorized to perform the duties of the Commissioner in case of the death, resignation, absence, or sickness of the Commissioner. The filling of a vacancy in the Office of the Commissioner of Indian Affairs in the manner set forth at 25 U.S.C. § 2a would not be subject to a time limitation.

We are not aware of any other legal authority other than the Vacancies Act, for the filling of vacancies in those offices in the Department of the Interior for which Senate confirmation is required. Accordingly, such vacancies are to be filled pursuant to the Vacancies Act and thus would be subject to a 30-day time limitation.

Department of Transportation

Among the officers in the Department of Transportation who are required to be appointed by the President by and with the advice and consent of the Senate are the following: The Secretary, the Deputy Secretary, four Assistant Secretaries, the General Counsel, the Administrator, Federal Highway Administration, the Administrator, Federal Railroad Administration and the Administrator and Deputy Administrator of the Federal Aviation Administration (49 U.S.C. § 1651). Also, the Administrator of the National Highway Traffic Safety Administration (22 U.S.C. § 401 note (1976)).

Subsection 3(b) of the Department of Transportation Act, Public Law 89-670, October 15, 1966, 80 Stat. 931, as amended, set forth at 49 U.S.C. § 1652(b) provides in part as follows concerning a vacancy in the Office of the Secretary:

"* * * The Deputy Secretary (or, during the absence or disability of the Deputy Secretary,

or in the event of a vacancy in the office of a Deputy Secretary, an Assistant Secretary or the General Counsel, determined according to such order as the Secretary shall prescribe) shall act for, and exercise the powers of the Secretary, during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary. The Deputy Secretary shall perform such functions, powers, and duties as the Secretary shall prescribe from time to time."

Accordingly, under the authority set forth at 49 U.S.C. § 1652(b) a vacancy in the Office of the Secretary may be filled in the manner set forth therein and such service as acting Secretary would not be subject to a time limitation.

We are not aware of any other specific authority by which vacancies in the other offices in the Department of Transportation which require Senate confirmation may be filled. Accordingly, vacancies in such offices are to be filled under the authority of the Vacancies Act and would be subject to the 30-day limitation set forth at 5 U.S.C. § 3348.

Food and Drug Administration

We are aware of no act of Congress which establishes the position of the Commissioner of Food and Drugs (formerly known as the Chief of the Food and Drug Administration). Section 5, Reorganization Plan No. 1 of 1953, April 11, 1953, 67 Stat. 631, 632, transferred to the Secretary of the Department of Health, Education, and Welfare (now Department of Health and Human Services) all the functions of the Federal Security Agency. These functions included those of the Food and Drug Administration which had been transferred from the Department of Agriculture to the Federal Security Administration by Section 12, Reorganization Plan No. IV of 1946, effective June 30, 1940, 54 Stat. 1234, 1237.

The authority of the Commissioner of Food and Drugs arises out of the redelegation of authority to the Assistant

Secretary of Health of all authority delegated to such Assistant Secretary by the Secretary of Health, Education, and Welfare (now Secretary of Health and Human Services). See Section 701(a) of the Federal Food, Drug and Cosmetic Act, June 25, 1938, 52 Stat. 1040, 1052 and 21 C.F.R. § 5.1(a)(1980). The position of Commissioner, Food and Drug Administration, has apparently been created administratively and is included by the Office of Personnel Management in its list of employees who occupy positions in Schedule C of the excepted service. See 5 C.F.R. § 213.3316(h)(5). As the position of the Commissioner of Food and Drugs has not been established by either the Constitution or act of Congress it is our view that the Commissioner is not an officer of the United States subject to the appointment provisions of Article II, section 2, clause 2, of the Constitution. Thus, it appears he is an employee and not an officer of the United States within the meaning of the Vacancies Act and that Act would not be for application with regard to filling a vacancy in the position of Commissioner of Food and Drugs. Similarly, we are aware of no other position in the Food and Drug Administration which would be subject to the Vacancies Act. With regard to a vacancy in the Commissioner's position, 21 C.F.R. § 5.20 provides:

"(a) Final authority of the Commissioner of Food and Drugs is redelegated as set forth in this subpart.

"(b) The Deputy Commissioner and the Associate Commissioner for Regulatory Affairs are authorized to perform all of the functions of the Commissioner of Food and Drugs.

"(c) During the absence or disability of the Commissioner or in the event of a vacancy in that position, the first official listed who is available shall act as Commissioner:

"(1) Deputy Commissioner.

"(2) Associate Commissioner for
Regulatory Affairs.

"(3) Associate Commissioner for
Health Affairs.

"(4) Associate Commissioner for
Policy Coordination.

"(5) Associate Commissioner for
Management and Operations.

"(6) Associate Commissioner for
Planning and Evaluation.

"(7) Associate Commissioner for
Legislative Affairs.

"(8) Associate Commissioner for
Public Affairs."

We see no legal objection to the above regulation providing for the filling of a vacancy in the position of the Commissioner of Food and Drugs.

Effect of Vacancies Act on Actions
Taken by Temporary Appointees

It is not clear how the 30-day limitation of the Vacancies Act would affect the status of actions taken by temporary appointees under such Act who continue to serve in an acting capacity beyond the 30-day time limitation.

To the extent that actions taken by such acting officers are within the scope of authority attendant to the regular office or position from which they have been detailed, such actions would appear to be valid. Those actions performed in the capacity as acting officer may possibly be viewed as acts performed by a de facto officer.

A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of appointment and claim to title of such office or position. When there exists an office or position to be filled and one acting under color of authority fills the office or position and performs the duties thereof his actions are those of a de facto officer or employee. Matter of William A. Keel, Jr. B-188424, March 22, 1977, (copy enclosed), and decisions cited therein. In general we have held that acts performed while a person is serving in a de facto status are as valid and effectual insofar as this concerns the public and the rights of third persons as though he were, in fact, an officer de jure. 42 Comp. Gen. 495 (1963). See also 63 Am. Jur. 2d Public Officers and Employees § 518. The authority of a de facto officer may not be attacked in a collateral manner but must be challenged in a direct proceeding to oust the individual from office. See United States v. Nussbaum, 306 F. Supp. 66 (N.D. Calif. 1969).

With regard to defective or invalid appointments, the general rule is stated in 63 Am. Jur. 2d Public Officers and Employees § 504 (1972) as follows:

"* * * the general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner."

It is not clear whether the Courts would apply the de facto doctrine where a statute specifically precluded the continued occupancy of the position and where such continued occupancy of the office would appear to violate the requirements of the Appointments Clause of the Constitution.

In 32 Op. Atty Gen. 139 (1920), the Attorney General advised the Undersecretary of State who inquired as to what action he and the officers of the Department of State should take upon the end of his 30-day period of service as Acting Secretary of State pursuant to the Vacancies Act. The Attorney General advised:

"It is probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts."

In 56 Comp. Gen. 761 (1977) we considered the effect of actions taken by the Acting Insurance Administrator, Department of Housing and Urban Development, who had continued to serve beyond the 30-day time limitation set forth at 5 U.S.C. § 3348. We stated that when it is too late to offer the advice set forth by the Attorney General in 32 Op. Atty. Gen. 139, the Secretary of the Department should consider ratification of those actions and decisions already taken which she agreed with to avoid any further confusion as to their binding effect.

We would suggest that in view of the uncertainty surrounding the validity of actions taken after 30 days of service by officers who serve in an acting capacity under the Vacancies Act, such officers should refrain from further actions in an acting capacity at the end of 30 days. We suggest that pursuant to his statutory authority to carry out the functions of his respective department that the Secretary concerned consider ratification of those actions and decisions which were taken subsequent to the expiration of the 30 days.

Delegation of Functions

Finally, we note that except where expressly prohibited or expressly otherwise provided for, the Secretaries of the named departments have broad authority to delegate any of their functions under law to such officers and employees

B-202893

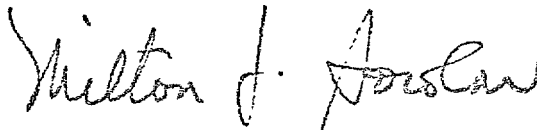
of the Department as desired. Section 642 of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 599, 42 U.S.C. § 7252, provides as follows with respect to the authority of the Secretary of Energy to delegate his functions.

"Except as otherwise expressly prohibited by law, and except as otherwise provided in this Act, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate."

For similar authority of the Secretaries of the Interior and Transportation see respectively Section 2 of Reorganization Plan No. 3 of 1950, Eff. May 24, 1950, 64 Stat. 1262, 43 U.S.C. § 1451 note, and 49 U.S.C. § 1657(e).

Thus, except for those positions for which the Congress has expressly provided shall carry-out certain functions, the Secretary concerned may, unless expressly prohibited by law, delegate his functions to any officer or employee of the department. Accordingly, it may be argued that when the 30 days in which an individual may fill a vacancy under the Vacancies Act have expired, the Secretary concerned may then redelegate the functions of the vacant office to another position. However, we believe that once certain functions have been delegated to a particular office, the Secretary may not redelegate those functions elsewhere when the acting official filling such office no longer has authority to serve in the vacant position. We believe such practice would constitute an improper circumvention of the Vacancies Act. See 56 Comp. Gen. 761.

We trust that the above information serves the purpose of your inquiry.



Acting Comptroller General
of the United States

Enclosures