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United States General Accounting Office
Washington, DC 20548

B-287720

May 18, 2001

The Honorable Fred Thompson
Chairman
Committee on Governmental Affairs
United States Senate

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

Dear Mr. Chairman:

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).¹ We have found that, during the last administration, the acting Director of the Institute of Museum and Library Services (Institute) had served longer than the 210-day period allowed under the Act. However, with the recent Presidential transition and the application of the Presidential inaugural transition provision² of the Vacancies Reform Act, it is our view that an acting Director may, as of January 20, 2001, once again temporarily serve at the Institute for the time period allowed³ under the Presidential inaugural transition provision. Therefore, no action need be taken at this time since there is no current violation of the Act. We understand that on April 18, 2001, President Bush announced his intention to nominate Robert S. Martin to be the Director of the Institute, but a formal nomination has not been made to date.

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 such a position may be temporarily filled to 210 days with adjustments extending that time period in certain circumstances, such as when the President submits a nomination for

¹ 5 U.S.C. §§ 3345-3349d.

² 5 U.S.C. § 3349a.

³ 5 U.S.C. § 3349a(b).

the position to the Senate.⁴ The Act also requires executive agencies to report to the Congress and the Comptroller General specific information relating to covered vacancies.⁵ Of particular relevance here is that agencies are to report a vacancy and the date such vacancy occurred and the name of any person serving in an acting capacity and the date such service began.⁶ The Act also 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.⁷

Acting Director of the Institute

During our review of the Vacancies Reform Act's implementation, we sent to 62 federal agencies including the Institute a questionnaire requesting information on the status of PAS positions. The Institute responded that the position of Director became vacant on April 1, 1999, and that the Deputy Director of the Office of Museum Services became the acting Director on the same day and was acting in the Director's position until the time the questionnaire was returned to GAO. Since this information indicated that the acting Director had exceeded the 210-day limit, and since we had not received from the Institute a report of a vacancy in the Director's position or a report of the presence of an acting official temporarily filling the Director's position, we made further inquiries at the Institute.

In response to our query as to why we had not received a report on the vacancy and the acting official, the Institute informed us that it had reported the fact of the vacancy and the presence of the acting official by sending notification to the White House. At the time the vacancy at the Institute occurred, the prior administration required agencies to report vacancies; persons serving in acting capacities; nominations; and rejections, withdrawals, or returns of nominations to the White House rather than directly to the Congress and GAO. As stated, however, we never received notification of the vacancy or the acting official's service.⁸ (The prior

⁴ 5 U.S.C. § 3346(a)(1) and (2).

⁵ 5 U.S.C. § 3349(a).

⁶ 5 U.S.C. § 3349(a)(1) and (2). Agencies are also 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).

⁷ 5 U.S.C. § 3349(b).

⁸ The Senate Parliamentarian's Office also has no record of receipt of notices of the vacancy or the acting official's service.

administration's practice has since been changed by the present administration, which has directed agencies to report these matters directly to the Congress and to GAO.)

The Institute has one PAS official, the Director, and it has two Deputy Directors, one for the Office of Museum Services and one for the Office of Library Services, neither of which are PAS positions. On March 5, 1999, the Director of the Institute, knowing that she would be leaving her position in the near future, designated the Deputy Director of the Office of Museum Services of the Institute as first assistant to the office of Director and communicated this information to the Director of the Office of Presidential Personnel at the White House. As stated above, on April 1, 1999, the Deputy Director of the Office of Museum Services began serving as acting Director when the prior Director vacated the office.

We were informed by the Institute that on October 27, 1999, Institute officials, knowing that the 210-day time limit for acting service would soon expire, met with the Department of Justice and subsequently delegated the functions and duties of the Director of the Institute to the Deputy Director of the Office of Museum Services until a Presidential appointment with Senate confirmation was made. The Institute states that this delegation was an effort to keep it in compliance with the provisions of the Vacancies Reform Act.

The Institute informs us that the Deputy Director ceased serving as acting Director at the expiration of the 210-day time limit. Although the Institute stated that the Deputy Director of the Office of Museum Services did not serve as acting Director of the Institute past the 210-day limit, we have found evidence to the contrary. For example, on April 4, 2000, the Deputy Director introduced herself to a subcommittee of the House Appropriations Committee at the Institute's annual appropriations hearing as follows:

“For the past year, I have had the privilege of serving as the acting director of the Institute of Museum and Library Services.”⁹

We have also found other references to the Deputy Director being introduced as the acting Director. Thus the Deputy Director of the Office of Museum Services, who became acting Director on April 1, 1999, was still holding herself out as acting Director of the Institute more than one year later, well past the 210-day time limit imposed by the Vacancies Reform Act. It is our view that the Deputy Director of the

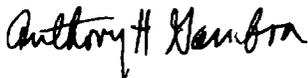
⁹ *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2001: Hearings Before the Subcomm. on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Comm. on Appropriations, 106th Cong. 1 (2000) (Testimony of Acting Director).*

Office of Museum Services should not have served in the position of acting Director of the Institute past October 27, 1999. Accordingly, her service in that capacity after October 27, 1999, exceeded the 210-day time limit in violation of the Vacancies Reform Act.

The Vacancies Reform Act also states that actions taken by acting officials in the performance of the functions and duties of the vacant office which are not delegable and which 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.¹⁰ This would include actions taken by an acting officer after the 210-day limit has been reached.¹¹ Although the acting Director of the Institute improperly exceeded the time limit for serving in that position, we have been advised by Institute officials that the acting Director performed no nondelegable functions or duties during the time period after the 210-day limit expired.

Should you have any questions concerning this matter, please call me on 202-512-5400 or Kathleen E. Wannisky, Managing Associate General Counsel, on 202-512-5207.

Sincerely yours,



Anthony H. Gamboa
General Counsel

¹⁰ 5 U.S.C. § 3348(d)(1).

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