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WITHDRAWAL SHEET

Ronald Reagan Library

Collection Name

Withdrawer

SMF 8/30/2005

File Folder

JGR/GAO (GENERAL ACCOUNTING OFFICE) (2 OF 2)

FOIA

F05-139/01

Box Number

26

COOK

SF-8

DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FIELDING	1	4/4/1985	B6	882
2	LETTER	FIELDING TO GARY CARBONE	1	4/4/1985	B6	883
3	LETTER	DUPLICATE OF DOCUMENT #2	1	4/4/1985	B6	884
4	NOTE	RE ALLEGATION	1	3/22/1985	B6	885
5	LETTER	ROBERTS TO CARBONE (PARTIAL)	1	4/11/1985	B6	886
6	FORM	AUTHORIZATION (PARTIAL)	1	1/24/1985	B6	887
7	NOTE	RE ALLEGATION (PARTIAL)	1	ND	B6	888
8	MEMO	FROM JOHN WEST (PARTIAL)	1	2/1/1985	B6	889

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]

B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]

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B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]

B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

E.O. 13233

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COPY - Reagan Presidential Record

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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
9	MEMO	ROBERTS TO FIELDING (PARTIAL)	1	9/5/1985	B6	890
10	MEMO	ROBERTS TO FIELDING (PARTIAL)	2	7/24/1985	B6	891
11	LETTER	FIELDING TO CARBONE (PARTIAL)	2	9/5/1985	B6	892
12	LETTER	DUPLICATE OF DOCUMENT #11 (PARTIAL)	2	9/5/1985	B6	894
13	LETTER	FIELDING TO CARBONE (PARTIAL)	2	7/24/1985	B6	895
14	MEMO	RE ALLEGATION (PARTIAL)	1	7/10/1985	B6	897

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ROBERTS, JOHN: FILES

Withdrawer

SMF 8/6/2005

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Doc Date

Restric-

NO Document Description

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tions

1 MEMO

1 4/4/1985 B6

882

ROBERTS TO FIELDING

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ROBERTS, JOHN: FILES

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FOIA

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Box Number

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SF-8

DOC Document Type

NO Document Description

No of Doc Date Restriction
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2 LETTER

1 4/4/1985 B6

883

FIELDING TO GARY CARBONE

Freedom of Information Act - [5 U.S.C. 552(b)]

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pages tions

NO Document Description

3 LETTER

1 4/4/1985 B6

884

DUPLICATE OF DOCUMENT #2

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file w/ —
FFF response
(also dtd
4/3 ?)



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

APR 03 1985

ACCOUNTING AND FINANCIAL
MANAGEMENT DIVISION

Mr. John Roberts
Associate Counsel to the President
Executive Office of the President
The White House
Room 105 OEOB
Washington, D.C. 20500

Dear Mr. Roberts:

The enclosed case summary is being carried on our records as referred to you for your follow up on the alleged impropriety.

We would like to have your initial disposition of this case within 30 days and a final disposition when your inquiry is completed.

To enable us to keep track of this referral, we have assigned control number 31605 to it and request that this number be used in future correspondence with our office concerning this matter.

If you have any questions, please call me at 275-9342.

Sincerely yours,

A handwritten signature in cursive script that reads "Gary W. Carbone".

Gary W. Carbone
Director
Fraud Referral and
Investigations Group

Enclosure

WITHDRAWAL SHEET

Ronald Reagan Library

Collection Name

ROBERTS, JOHN: FILES

Withdrawer

SMF 8/6/2005

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Doc Date

Restric-

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4 NOTE

1 3/22/1985 B6

885

RE ALLEGATION

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THE WHITE HOUSE
WASHINGTON

April 11, 1985

COPY - Reagan Presidential Record

Dear Mr. Carbone:

Thank you for your letter of April 5, enclosing additional information on control number 31605. The additional information consisted of an allegation that [REDACTED] b6

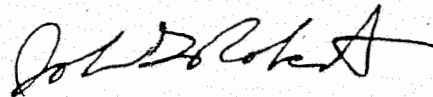
[REDACTED] uses a fake medical certificate to justify first class air travel."

Attached for your information is a copy of the authorization for use of first-class travel accommodations filed by [REDACTED] and approved by [REDACTED] b6

We have no reason to doubt the validity of the form.

Thank you for raising this matter with us. Please do not hesitate to contact this office if we may be of any further assistance.

Sincerely,



John G. Roberts
Associate Counsel to the President

Mr. Gary W. Carbone
United States General
Accounting Office
Washington, D.C. 20548

AUTHORIZATION FOR USE OF FIRST-CLASS TRAVEL ACCOMMODATIONS

BY PERMANENTLY HANDICAPPED EMPLOYEES

COPY - Reagan Presidential Record

NAME OF EMPLOYEE:

ORGANIZATION:

NATURE OF HANDICAP:

CERTIFICATION: I CERTIFY THAT I AM SO HANDICAPPED OR OTHER-WISE PHYSICALLY
IMPAIRED THAT OTHER
USED.

SIGNATURE OF COMPETENT MEDICAL AUTHORITY:

AUTHORIZED BY:

TITLE:

RETURN TO:



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

APR 05 1985

ACCOUNTING AND FINANCIAL
MANAGEMENT DIVISION

Mr. John Roberts
Associate Counsel to the President
Executive Office of the President
The White House
Room 105 OEOB
Washington, D.C. 20500

Dear Mr. Roberts:

As discussed with you on April 5, 1985, the enclosed is additional information on control number 31605, which was referred to your office on April 3, 1985.

Sincerely yours,

Gary W. Carbone

Gary W. Carbone
Director
Fraud Referral and
Investigations Group

Enclosure

According to the caller, [REDACTED]
[REDACTED] uses a fake medical
certificate to justify first class air travel, at all times,
between [REDACTED] home in California and Washington, D.C.

b6



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Memorandum

Copy - Reagan Presidential Record

Date FEB 1 1985

From Director
Division of Financial Management, ORM/OM

Subject Approval of First-Class Air Accommodations

To

[REDACTED]

b6

The attached request for use of first-class air accommodations by [REDACTED] has been approved by the Assistant Secretary for Management and Budget, OS.

b6

John C. West
John C. West

Attachment

THE WHITE HOUSE
WASHINGTON

September 5, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: GAO Hotline Referral

You indicated that we should have [redacted] reimburse for long distance telephone calls [redacted] made in connection with [redacted] private business if they can be ascertained. According to Al Nagy, no record of individual long distance calls is available if the caller dials "8" and then the number, thereby using the FTS system. If the caller dials "9-1" and the number, using an outside line, a bill would be received identifying the specific call. *b6*

I called [redacted] who advised that [redacted] routinely used the FTS system, and would have done so for the occasional calls in question. I have incorporated this information into a re-dated draft of our reply to GAO. *b6*

Attachment

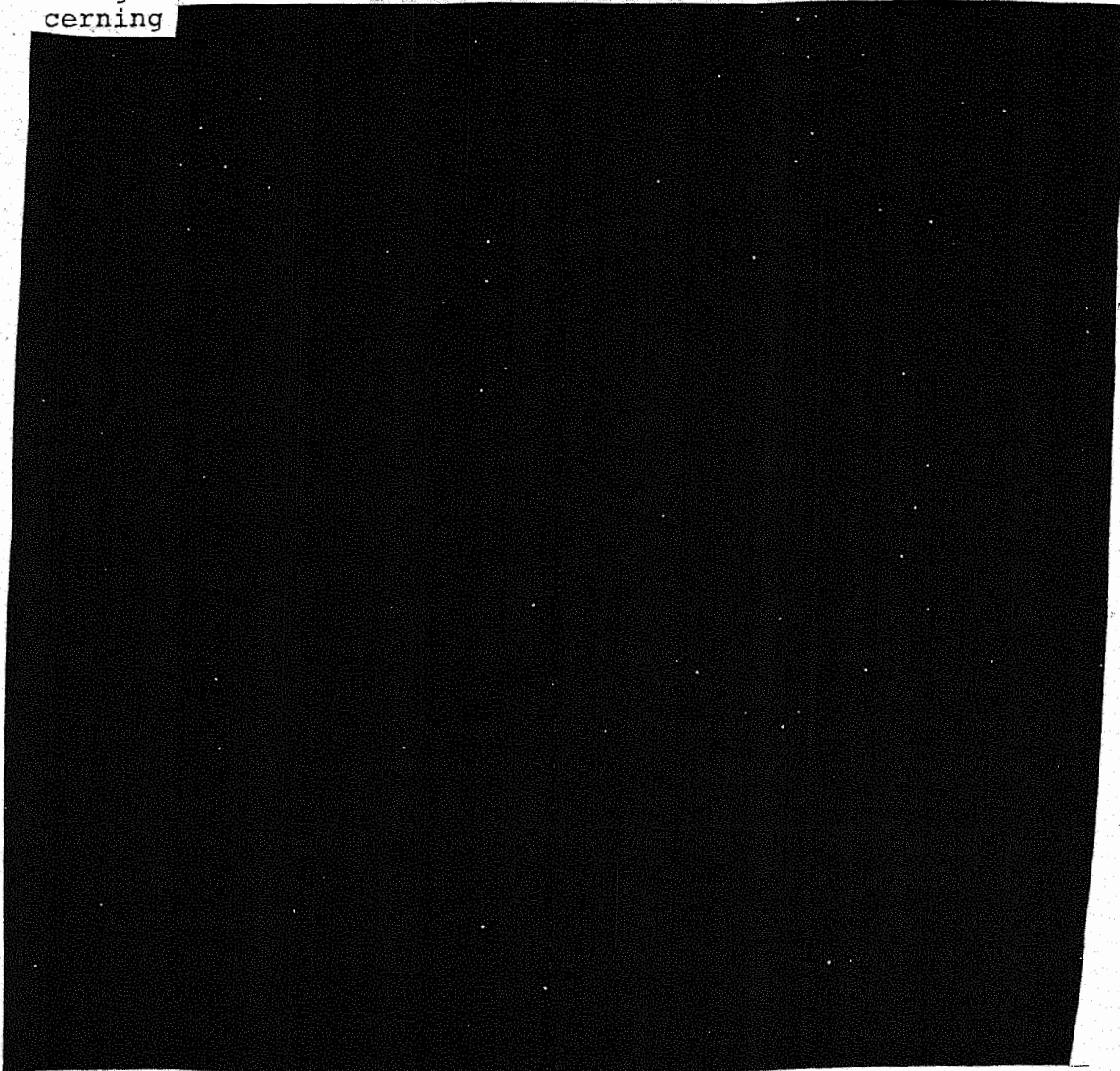
THE WHITE HOUSE
WASHINGTON

July 24, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*
SUBJECT: GAO Hotline Referral

On July 11 the Director of the GAO Fraud Referral and Investigations Group transmitted to our office an anonymous allegation received over the fraud and abuse hotline concerning



COPY - Reagan Presidential Record

b6

I told [REDACTED] (1) to cease using the photocopier for non-official purposes, (2) to cease making long distance personal calls chargeable to the Government, and (3) to try to conduct any [REDACTED] business away from the [REDACTED] [REDACTED]. I did not think it necessary to assert that [REDACTED] could make no local calls concerning [REDACTED] from [REDACTED] office.

[REDACTED]

On balance, I see only minor transgressions by [REDACTED] and no need for additional remedial action. The attached draft reply to GAO embodies the foregoing.

Attachment

THE WHITE HOUSE
WASHINGTON

September 5, 1985

Dear Mr. Carbone:

You received an anonymous allegation [REDACTED]
[REDACTED] to the effect that [REDACTED]

"is managing a retail business from his office on government time." You referred the allegation to this office for appropriate disposition.

b6

b6

- 2 -

This office has admonished [REDACTED] not to make private long distance telephone calls on the Government system. [REDACTED] advised that [REDACTED] used the FTS system for the few such calls, so no record of the calls exists for reimbursement purposes. This office has also directed [REDACTED] not to use the photocopier for private purposes. Aside from these transgressions, it does not appear that [REDACTED] is violating any laws, regulations, or policies. [REDACTED] outside business does not present a conflict of interest, and, based on [REDACTED] representations to us, [REDACTED] cannot be said to be running the business on Government time. In addition to the specific admonitions referred to above, this office reminded [REDACTED] of the need to keep [REDACTED] outside business interests fully separate from [REDACTED] Government employment. We believe that [REDACTED] is sensitive to the need to do so. b6

Thank you for referring this matter to us.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Mr. Gary W. Carbone
Director, Fraud Referral and
Investigations Group
U.S. General Accounting Office
Washington, D.C. 20548

FFF:JGR:aea 9/5/85
bcc: FFFfielding
JGRoberts
Subj
Chron

THE WHITE HOUSE
WASHINGTON

September 5, 1985

Dear Mr. Carbone:

You received an anonymous allegation [REDACTED]
[REDACTED] to the effect that [REDACTED]

"is managing a retail
business from his office on government time." You referred
the allegation to this office for appropriate disposition.

b6

COPY - Reagan Presidential Record

b6

This office has admonished [REDACTED] not to make private long distance telephone calls on the Government system. [REDACTED] advised that [REDACTED] used the FTS system for the few such calls, so no record of the calls exists for reimbursement purposes. This office has also directed [REDACTED] not to use the photocopier for private purposes. Aside from these transgressions, it does not appear that [REDACTED] is violating any laws, regulations, or policies. [REDACTED] outside business does not present a conflict of interest, and, based on [REDACTED] representations to us, [REDACTED] cannot be said to be running the business on Government time. In addition to the specific admonitions referred to above, this office reminded [REDACTED] of the need to keep [REDACTED] outside business interests fully separate from [REDACTED] Government employment. We believe that [REDACTED] is sensitive to the need to do so. b6

Thank you for referring this matter to us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Gary W. Carbone
Director, Fraud Referral and
Investigations Group
U.S. General Accounting Office
Washington, D.C. 20548

FFF:JGR:aea 9/5/85
bcc: FFFfielding
JGRoberts
Subj
Chron

THE WHITE HOUSE
WASHINGTON

July 24, 1985

Dear Mr. Carbone:

You received an anonymous allegation [REDACTED] to the effect that [REDACTED] "is managing a retail business from his office on government time." You referred the allegation to this office for appropriate disposition.

[REDACTED]

This office has admonished [REDACTED] not to make private long distance telephone calls on the Government system, and

bb

bb

- 2 -

not to use the photocopier for private purposes. Aside from these transgressions, it does not appear that [REDACTED] is violating any laws, regulations, or policies. [REDACTED] outside business does not present a conflict of interest, and, based on [REDACTED] representations to us, [REDACTED] cannot be said to be running the business on Government time. In addition to the specific admonitions referred to above, this office reminded [REDACTED] of the need to keep [REDACTED] outside business interests fully separate from his Government employment. We believe that [REDACTED] is sensitive to the need to do so. b6

Thank you for referring this matter to us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Gary W. Carbone
Director, Fraud Referral and
Investigations Group
U.S. General Accounting Office
Washington, D.C. 20548

FFF:JGR:aea 7/24/85

bcc: FFFfielding
JGRoberts
Subj
Chron



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

JUL 11 1985

ACCOUNTING AND FINANCIAL
MANAGEMENT DIVISION

Mr. John Roberts
Associate Counsel to the President
Executive Office of the President
The White House
Room 105 OEOB
Washington, D.C. 20500

Dear Mr. Roberts:

The enclosed case summary (case number 32037) is being carried on our records as referred to you for your follow up on the alleged impropriety.

We would like to have your initial disposition of this case within 30 days and a final disposition when your inquiry is completed.

To enable us to keep track of this referral, we have assigned control number 32037 to it and request that this number be used in future correspondence with our office concerning this matter.

If you have any questions, please call me at 275-9342.

Sincerely yours,

Gary W. Carbone

Gary W. Carbone
Director
Fraud Referral and
Investigations Group

Enclosure

CONTROL NUMBER
32027

DATE
071085

CONTACT FOR FURTHER INFORMATION
None

BRIEF OF ALLEGATION: WORK HOUR ABUSE

An anonymous caller alleges that [REDACTED] in the Old Executive Building is managing a retail business from [REDACTED] office on government time.

[REDACTED] makes local calls and long distance calls from [REDACTED] photocopies business documents on government machines, and in general spends about two hours a day on [REDACTED] personal business. This has been going on since [REDACTED] took the position.

Note: A phone call to [REDACTED] confirmed that there is a [REDACTED] associated with the business and [REDACTED] does "drop by" occasionally during the day. Based on a phone call to the D.C. Department of Taxation, [REDACTED]


b6

THE WHITE HOUSE

WASHINGTON

November 14, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS 
SUBJECT: Response to GAO Inquiry About
HHS Interim Appointments

Since the attached proposed reply raises a very basic objection to Coleman's proposed response, I thought I should run it by you. Any comments?

Attachment

THE WHITE HOUSE

WASHINGTON

November 14, 1985

*Handled orally
JGR - Dec
11/24/85*

MEMORANDUM FOR TERRY COLEMAN
DEPUTY GENERAL COUNSEL FOR REGULATIONS
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Response to GAO Inquiry About
HHS Interim Appointments

Counsel's Office has reviewed your proposed reply to the General Accounting Office inquiry concerning interim appointments at the Department of Health and Human Services. I am not convinced that it is desirable to emphasize the argument that the Vacancy Act does not apply to vacancies occurring during a recess of the Senate. The Vacancy Act does not expressly provide that it is inapplicable to vacancies arising during a Senate recess. What 5 U.S.C. § 3349 does provide is that temporary appointments may be made otherwise than as provided by 5 U.S.C. §§ 3345 and 3346 if the vacancy occurs during a Senate recess. The exception language was clearly intended to cover the President's constitutional power to make recess appointments, the terms of which are set by the Constitution. Art. II, § 2, cl. 3. None of the temporary appointments at issue, however, were Presidential recess appointments.

If a Presidential recess appointment is not made, and the vacancy which occurred during the recess is filled by automatic succession of the next assistant (as happened in six of the eight subject cases), it can be persuasively argued that the appointment was not made "otherwise than as provided" by 5 U.S.C. § 3346. That section, after all, simply provides for the succession of the first assistant.

The response that the interim appointments here were made not pursuant to 5 U.S.C. § 3346 but pursuant to other, independent legislative authority is a response that should not be limited to vacancies arising during a Senate recess. The most troubling aspect of the argument that the Vacancy Act does not apply to vacancies occurring during a Senate recess is the negative implication that it does apply -- that interim appointments cannot be made "otherwise than as provided" by 5 U.S.C. § 3346 -- while the Senate is in session. It so happens in this case that all of the

vacancies occurred during a Senate recess, but that is of course not true of all interim appointments throughout the Administration, which we may be called upon to defend.

If the language of footnote two is retained in your response to GAO, I would delete the discussion of the pocket veto cases. The D.C. Circuit's recent decision in Barnes v. Kline, petition for certiorari pending sub nom. Burke v. Barnes (No. 85-781), has thrown into question previously accepted precedent in this area, and certainly rejected the parallel to the President's recess appointment power.

I would also delete the argument in the first paragraph on page six to the effect that Congress has relied on the Pay Act and not the Vacancy Act as the primary limitation on Executive authority to make interim appointments. The Pay Act only applies to Presidential recess appointments, and so cannot be cited as a limitation on the sort of interim appointments at issue here. In addition, we have never conceded the constitutionality of the Pay Act, which can be argued to be an unconstitutional restriction on the President's authority to make recess appointments.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1Name of Correspondent: Terry Coleman☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Response to GAO inquiry about HHS interim appointments.**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUHOLL</u>	<u>ORIGINATOR</u>	<u>85/11/108</u>			<u>1/1</u>
<u>CUAT 18</u>	<u>R</u>	<u>85/11/112</u>		<u>S 85/11/112</u>	<u>COB</u>
	<u>Referral Note:</u>	<u>1/1</u>			<u>1/1</u>
	<u>Referral Note:</u>	<u>1/1</u>			<u>1/1</u>
	<u>Referral Note:</u>	<u>1/1</u>			<u>1/1</u>
	<u>Referral Note:</u>	<u>1/1</u>			<u>1/1</u>

ACTION CODES:

A - Appropriate Action
 C - Comment/Recommendation
 D - Draft Response
 F - Furnish Fact Sheet
 to be used as Enclosure

I - Info Copy Only/No Action Necessary
 R - Direct Reply w/Copy
 S - For Signature
 X - Interim Reply

DISPOSITION CODES:

A - Answered
 B - Non-Special Referral
 C - Completed
 S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
 Code = "A"
 Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.

Send all routing updates to Central Reference (Room 75, OEOB).

Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.



The General Counsel
Washington, D.C. 20201

November 7, 1985

NOTE TO DICK HAUSER

Bob Charrow said that you wanted to see our response to the GAO inquiry about the Department's interim appointments. Attached is a memo that Tom McFee will forward to GAO. If you have any objections, please let me know by November 12.

Terry Coleman
Terry Coleman



The General Counsel
Washington, D.C. 20201

MEMORANDUM:

TO : Thomas S. McFee
Assistant Secretary for Personnel Administration

FROM : Terry Coleman
Acting General Counsel

SUBJECT: Interim Appointments

This memorandum discusses the request from Robert L. Higgins, Assistant General Counsel, General Accounting Office, seeking specific information concerning nine vacancies in the Department of Health and Human Services ("Department") in positions requiring appointment by the President with the advice and consent of the Senate. The information was requested because of a possible violation of the Vacancies Act, 5 U.S.C. §§3345-3349, which limits ad interim appointments to thirty days. We conclude that none of the nine vacancies has been filled in violation of the Vacancies Act.

The information requested in Mr. Higgins' items #1-3 and #5-6 is contained in Exhibit I, attached. As you will note, in eight of the nine cases, the Secretary, pursuant to her powers of delegation set forth in the Reorganization Plan No. 1 of 1953, has named individuals to serve in acting capacities until the respective vacancies have been filled. In the remaining instance--Deputy Inspector General--no ad interim appointment has been made, and the position remains unoccupied.

In Mr. Higgins' item #4, he asked for the "authority for the temporary appointment of each individual referred to in #1 and whether the Vacancies Act is applicable to these appointments." In no case was a temporary appointment made under the authority of the Vacancies Act. Instead, in each case, the temporary appointment was made by the Secretary pursuant to the organic legislation that established the Department. That legislation explicitly empowers the Secretary to "make such provisions as the Secretary deems appropriate authorizing the performance of any of the functions of the Secretary by any other officer, or by any agency or employee, of the Department." Section 6, Reorganization Plan No. 1 of 1953, 42 U.S.C. §3501.

The authority granted the Secretary in the Reorganization Plan traditionally has been used to fill vacancies on a temporary basis even in positions governed by the Appointments Clause (U. S. Const., art. II, §2, cl. 2). This has typically been accomplished in one of two ways. First, the Secretary has promulgated a series of organizational plans and position descriptions that normally provide that if a vacancy occurs, the officer's first assistant (or other designated deputy) will act for the principal until the vacancy is filled. Here, as noted in Exhibit I, six of the eight ad interim appointees

are currently so-called first assistants (e.g., Deputy Commissioner, Social Security Administration) and assumed their ad interim status by virtue of the Department's organizational plan, authority vested in such deputies by virtue of those deputies' position descriptions, or designation from among multiple deputies. Second, in certain instances where it was not feasible for the first assistant to assume the duties of the officer, the Secretary has made a special delegation of authority to a particular individual to carry out the functions of the vacant office. As indicated in Exhibit I, this method was used in two instances: Acting Assistant Secretary for Health and Acting Commissioner on Aging. In both cases, the ad interim appointee had occupied a significant position within the programmatic unit prior to the ad interim appointment.

In no instance was an appointment made pursuant to the provisions of the Vacancies Act of 1868, as amended. The proscriptive provisions of that Act, most notably the 30 days limitation on the tenure of ad interim appointees, are clearly not applicable to any of the eight vacancies referenced above for at least two reasons. First, the proscriptive provisions of the Act do not and cannot apply where, as here, each of the vacancies in question occurred during a Senate recess. ^{1/} And second, even if the Act were arguably applicable, it cannot be read to restrict the authority of the Secretary to make ad interim designations where, as here, the Secretary is vested with independent statutory authority to fill vacancies on an ad interim basis.

A. The Vacancies Act Does Not Apply With Respect to Vacancies Occurring During a Senate Recess.

It is by now axiomatic that the plain language of a statute governs "[a]bsent a clearly expressed legislative history to the contrary." Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). The provisions of the Vacancies Act are unmistakable and unambiguous; namely, the proscriptive provisions of the Act, including the thirty-day limitation imposed by Section

^{1/} The positions of Under Secretary and Administrator of the Health Care Financing Administration fell vacant during the Senate's August 1985 recess, which commenced on August 1, 1985, and ended on September 9, 1985. See 131 Cong. Rec. S 11022 (daily ed., August 1, 1985). The positions of Assistant Secretary for Health, Assistant Secretary for Legislation, General Counsel, and Commissioner on Aging fell vacant after the 98th Congress had adjourned sine die (October 12, 1984) and before the 99th Congress had convened (January 3, 1985). See 1985-1986 Official Congressional Directory, S. Print 99-39 at 425. The position of Assistant Secretary for Planning and Evaluation fell vacant during the Senate's Spring 1984 recess, which commenced on April 12, 1984, and ended on April 24, 1984, *id.* at 427 n.77. Finally, the position of Commissioner of Social Security fell vacant during the Senate's August 1983 recess, which commenced on August 4, 1983, and ended on September 12, 1983. *Id.* at 427 n.76.

3348, simply do not apply where, as here, the vacancies in question arose while the Senate was in recess. ^{2/} Specifically, 5 U.S.C. §3349 provides as follows:

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate. [Emphasis supplied]

Thus, since each of the eight vacancies occurred during a Senate recess, the proscriptive language of the Act does not apply to any of the eight positions in the Department that is currently held on an acting basis.

The legislative history underlying the Vacancies Act supports the proposition that its scope was limited. It only applies to vacancies that arise while the Senate is in session and, even with respect to those vacancies, originally was not intended to apply to vacancies filled in the natural course by the first assistants. The Vacancies Act, in its current format, ^{3/} was initially enacted during Reconstruction to limit the power of the Executive and to make

^{2/} It has been consistently held that a Senate recess, for purposes of Art. II, §2, cl. 3, is not restricted to the interval between the final adjournment of one session and the commencement of the next session. See Gould v. United States, 19 Ct. Cl. 593, 595 (1884). A temporary adjournment, for a period longer than a few days, is sufficient to trigger the President's recess powers. See 33 Op. A.G. 20, 33 (1921); 28 Comp. Gen. 30 (1948). As the Senate Committee on the Judiciary noted: "[A] recess [is] the period of time when the Senate is not sitting in regular or extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communication from the President or participate as a body in making appointments." S. Rept. No. 4389, 58th Cong., 3d Sess.; 39 Cong. Rec. 3823-3824 (1905). The pocket veto cases are in accord with this view. See The Pocket Veto Case, 279 U.S. 655 (1929) (holding that a Senate adjournment for four months was an adjournment for purposes of Art I, §7, cl. 2); Wright v. United States, 302 U.S. 583 (1938) (holding that a three day adjournment of the Senate while the House was in session did not amount to an adjournment for purposes of Art. I, §7, cl. 2).

^{3/} Legislation empowering the President to fill vacancies in the Executive Branch dates from the Second Congress. In 1792 Congress enacted legislation which authorized the President to fill vacancies in the Departments of State, Treasury and War "at his discretion." Act of May 8, 1792, 2d Cong., 1st Sess., Ch.37., §8, 1 Stat. 218. Three years thereafter Congress amended that legislation to limit to six months the tenure of interim appointees in those Departments. Act of February 13, 1795, 3rd Cong., 2d Sess., Ch 21, 1 Stat. 415.

certain that the limitations on presidential authority that were imposed by the Tenure in Office Act of 1867, 14 Stat. 430, could not be easily circumvented. The Tenure in Office Act attempted to restrict the authority of then-President Andrew Johnson to dismiss certain members of Lincoln's cabinet. It not only forbade presidential removal of designated cabinet officers without the consent of the Senate, but also severely limited the ability of the President to dismiss other officers. Moreover, the Act limited the authority of the President to fill vacancies in positions that would require the advice and consent of the Senate.

Although the Act attempted to be all-inclusive, Congress inadvertently failed to provide for an obvious contingency: death of an incumbent officer. Under the then-existing legislation, the President was specifically authorized to temporarily fill for up to six months vacancies that occurred while the Senate was in session. Consequently, in an effort to further restrict presidential authority, Congress enacted the Vacancies Act, which limited ad interim appointments to 10 days. ^{4/} 15 Stat. 168 (1868). However, as originally adopted, the 10 day (now 30 day) limitation did not extend to vacancies, such as the ones here, that were filled by the first assistants without the intervention of the President. ^{5/} The 10 day limitation only applied if the President intervened and named someone other than the first

^{4/} Although the Tenure in Office Act was repealed in 1887 and subsequent related legislation was declared unconstitutional in Myers v. United States, 272 U.S. 52 (1926), the Vacancies Act, as amended, and related legislation, remains.

^{5/} As originally enacted, the 10 day limitation on ad interim appointments was set forth in section 3 of the Vacancies Act of 1868, which specifically empowered the President to designate someone other than the first officer to act on a temporary basis. That section provided as follows:

Sec. 3 And be it further enacted. That in any of the cases ⁷ hereinbefore mentioned it shall be lawful for the President of the United States, in his discretion, to authorize and direct the head of any other executive Department or other officer in either of those Departments whose appointment is, by and with the advice and consent of the Senate, vested in the President, to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent shall cease: Provided, That nothing in this act shall authorize the supplying as aforesaid a vacancy for a period longer than ten days when such vacancy shall be occasioned by death or resignation....

assistant to temporarily fill the vacancy. ^{6/} However, when the federal statutes were compiled into the so-called "Revised Statutes," 19 Stat. 268 (1867), the compilers erroneously broadened the limitation to encompass all temporary office holders, even the first assistants. ^{7/} See Revised Statutes §180. In 1891, Congress, in the course of amending the Vacancies Act to accommodate an emergency occasioned by the death of the Secretary of the Treasury, recognized the error, but had insufficient time in which to fully consider the matter. Instead, Congress merely amended the Act by extending the 10 day period to 30 days. See 22 Cong. Rec. 2077-79 (1891).

^{6/} The fact that the Vacancies Act of 1868 did not extend to limit the tenure of an individual who became an acting officer as a result of having been a first assistant is illustrated by both the legislative history of the Act and by the complementary provisions of the Tenure in Office Act. During debate on the Act much attention focused on the somewhat anomalous situation that had prevailed in the Patent Office. Under then-existing legislation enacted in 1836 the Chief Clerk of the Patent Office was empowered to act as Commissioner in the Commissioner's absence. 39 Cong. Globe 4134 (1868). Indeed, at the time of the debate, the Chief Clerk had been serving as Acting Commissioner in excess of eight months. Members of Congress, though, doubted that the Chief Clerk, as contrasted with one of the Patent Examiners, had the requisite scientific background to adequately discharge the responsibilities of Acting Commissioner. 39 Cong. Globe 4259 (1868). Clearly, congressional concern with respect to the competence of the Chief Clerk would have been meaningless had the ten day limitation been intended to apply to all ad interim appointees, even those who had assumed authority by virtue of their status as first assistants. Had the 10 day limitation been applicable to the Chief Clerk, it would have eliminated the problem in the Patent Office.

The provisions of the Tenure in Office Act provide equally compelling evidence that Congress, while intending to limit the power of the President, did not intend to compromise the efficiency of government. With respect to recess appointments that extended beyond the next session, the Tenure in Office Act stated: "[D]uring such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office." 14 Stat. 431, §3 (1867). In short, the Tenure in Office act recognized that the mantle of authority could not be permitted to lapse if the government were to continue functioning.

^{7/} It is recognized that the Revised Statutes, being an Act of Congress, have the force of law. However, in the case of ambiguity or uncertainty, the previous statutes may be referred to. Wright v. United States, 6 Ct. Cl. 80, 87 (1879).

Given the Act's shallow purpose, i.e., to limit the authority of President Andrew Johnson, and ambiguous scope, Congress has consistently construed the Act narrowly. Indeed, contemporary Congresses have never viewed the act as the primary limitation on the Executive's authority to temporarily fill vacancies, even those that occurred while the Senate was in session. Instead, Congress has consistently recognized that the President and his subordinates have broad plenary authority to fill vacancies that arise while the Senate is in session. In order to curb such authority, Congress has relied, not on the Vacancies Act, but rather on 5 U.S.C. §56 [now 5 U.S.C. §5503]. That act originally prohibited the payment of appropriated funds as salary to a person who received an appointment during a recess of the Senate if the vacancy existed while the Senate was in session. Thus, Congress implicitly assumed that the power to appoint existed, but sought to render it ineffective by prohibiting the payment of the salary to the person so appointed. See Memorandum submitted by Senator Butler on March 16, 1925, 67 Cong. Rec. 263, 265 (1925).

B. Interim Appointments Within the Department of Health and Human Services Were Made Pursuant to the Department's Organic Legislation and, Therefore, Are Not Limited by the Proscriptions of the Vacancies Act.

As noted above, the eight ad interim appointments were made by the Secretary pursuant to the authority granted to her by the organic legislation that created the Department of Health and Human Services. The Vacancies Act neither restricts this authority nor limits the tenure of such interim appointees to 30 days. Given the fact that the Vacancies Act can jeopardize executive action and impede the efficient administration of the Executive Branch, the courts, whenever possible, have interpreted the Act narrowly to avoid conflict with executive prerogatives. Consequently, courts have consistently refused to apply the restrictive provisions of the Act, where the propriety of an interim appointment can be sustained by virtue of another statute.

For instance, in United States v. Halmo, 386 F. Supp. 593 (E.D. Wis. 1974), defendants in a criminal action sought to suppress certain evidence resulting from an interception of wire and oral communications. Under 18 U.S.C. §2516, a wiretap can only be authorized by the Attorney General or by any assistant attorney general who had been specially delegated the authority by the Attorney General. At the time of the intercept the Solicitor General had been acting as Attorney General for more than thirty days and, consequently, the defendants argued that at the time of the delegation the Solicitor General's authority to act as Attorney General had expired under the terms of the Vacancies Act. The court, however, in overruling defendants' motion to suppress, noted that the Solicitor General had assumed office as Acting Attorney General under the provisions of 28 U.S.C. §508(b) and, therefore, that the limitations imposed by the Vacancies Act were not applicable. See United States v. Lucido, 373 F. Supp. 1142 (E.D. Mich. 1974), aff'd, 517 F.2d 1 (6th Cir. 1976) (holding that in light of 28 U.S.C. § 508, the Vacancies Act does not apply to limit the tenure of the Deputy Attorney General to act as the Attorney General).

In both Halmo and Lucido the courts held that the specialized statute governing the Department of Justice controlled and, consequently, that the restrictions imposed by the Vacancies Act did not apply. In so holding, both courts refused to give effect to the apparently plain language of the Vacancies Act, which states:

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate. [Emphasis supplied]

5 U.S.C. §3349.

In short, while the Vacancies Act on its face appears to restrict the scope of other independent statutory authority respecting interim appointments, the courts have not given effect to that language. Rather, they have uniformly refused to invalidate appointments that have been made pursuant to such independent authority.

Here, as in Halmo and Lucido, there is an independent statutory basis to support the eight ad interim appointments, namely Reorganization Plan No. 1 of 1953. Moreover, here, unlike in Halmo and Lucido, the putative restriction imposed by the Vacancies Act on the use of the other legislation, clearly does not apply. The restriction contained in 5 U.S.C. §3349 applies, if at all, only if the vacancy did not arise during a Senate recess. Here, since all eight of the vacancies arose during Senate recesses, any possible argument that the Vacancies Act governs to the exclusion of the Reorganization Plan must be rejected out of hand. 8/

8/ Even if the vacancies had arisen while the Senate was in session, the provisions of the Reorganization Plan would control notwithstanding the fact that the Vacancies Act was re-enacted 13 years after the Reorganization Plan. The Vacancies Act could only control if it were read to have impliedly repealed Section 6 of the Reorganization Plan. However, "repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974), quoting Posades v. National City Bank, 296 U.S. 497, 503 (1936). Such repeals are only permitted if the intention of the legislature to repeal is clear and manifest. Watt v. Alaska, 451 U.S. 259, 267 (1981); United States v. Will, 449 U.S. 200, 221-222 (1980); TVA v. Hill, 437 U.S. 153, 190 (1978). Here, of course, there is no evidence in the record to indicate that Congress intended to repeal or otherwise modify the provisions of Reorganization Plan at the time that it re-enacted the Vacancies Act of 1966. In such a setting, a court "must read the statutes to give effect to each . . . while preserving their sense and purpose." Watt v. Alaska, 451 U.S. at 267.

In conclusion, the eight ad interim appointees, named in Exhibit I, are serving pursuant to the provisions of the Reorganization Plan No. 1 of 1953 and are not serving pursuant to the provisions of the Vacancies Act of 1868, as amended. Further, the provisions of the Vacancies Act that limit executive prerogatives are inapplicable where, as here, each of the vacancies arose during a Senate recess. Thus, the 30 day limitation on the tenure of interim appointees contained in the Vacancies Act does not pertain with respect to the individuals named in Exhibit I.

Attachment

EXHIBIT I

Position (GAO ITEM #1)	Date of Vacancy	Name of Ad Interim Appointee (GAO ITEM #1)	Position of Interim Appointee Prior to Appointment (GAO ITEM #5)	Date of Ad Interim Appointment (GAO ITEM #2)
1. Under Secretary	8/19/85	John O'Shaughnessy	Principal Deputy Under Secretary	09/25/85
2. Assistant Secretary, for Planning and Evaluation	04/16/84	Robert B. Helms	Deputy Assistant Secretary for Planning and Evaluation (Health)	04/23/84
3. Assistant Secretary, for Legislation	12/31/84	Lawrence J. DeNardis	Deputy Assistant Secretary for Legislation	01/29/85
4. Assistant Secretary for Health	12/31/84	James O. Mason	Director, Centers for Disease Control	02/19/85
5. General Counsel	11/09/84	Terry S. Coleman	Deputy General Counsel, Regulations	11/21/84
6. Commissioner of Social Security	09/10/83	Martha A. McSteen	Deputy Commissioner of Social Security	09/14/83
7. Administrator, Health Care Financing Administration	08/09/85	C. McLain Haddow	Deputy Administrator, Health Care Financing Administration	08/09/85
8. Commissioner on Aging	12/17/84	Carol Fraser Fisk	Special Assistant to Assistant Secretary, for Human Development Services	12/18/84
9. Deputy Inspector	01/22/81	No appointee named	Not applicable	Not applicable

GAO ITEM #7: The appointing official in each case was the Secretary.

GAO ITEM #6: Ronald E. Robertson has been nominated for the position of General Counsel.



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-220522

October 17, 1985

Mr. Thomas S. McFee
Assistant Secretary for
Personnel Administration
Department of Health and
Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. McFee:

We have received a congressional request for a report concerning the use of extended temporary appointments to positions requiring Senate advice and consent in the Department of Health and Human Services. It is reported that nine (9) occupants of positions in your Department requiring Senate advice and consent have not been confirmed by the Senate and that eight (8) of these nine (9) occupants have not been nominated for the positions in which they are presently serving. The service of these individuals is questioned as a possible violation of the Vacancies Act, 5 U.S.C. §§ 3345-3349 (1982). Section 3348 limits the filling of a vacancy under sections 3345-3347 to a period not to exceed 30 days.

Accordingly, in accordance with informal advice given to you on October 10, 1985, by Mr. Paul J. O'Neill of our Office, we request that you provide the following information together with any comments you deem appropriate:

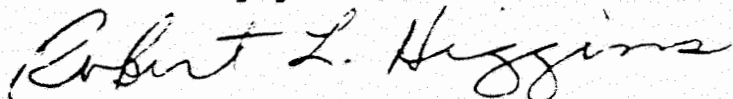
1. Names of any persons occupying positions requiring Senate advice and consent who have not been confirmed for such positions and the titles of such positions.
2. Date that each individual referred to in #1 above was appointed to such a position.
3. The official who appointed each of the individuals referred to in #1 above to their present positions.

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4. The authority for the temporary appointment of each individual referred to in #1 and whether the Vacancies Act is applicable to these appointments.
5. Were any of the individuals named in #1 above serving in an office which required Senate confirmation immediately prior to their present temporary position and, if so, was he or she in fact confirmed by the Senate to serve in the prior position?
6. Has anyone been nominated for Senate confirmation by the President to any of the positions which have been identified in #1 above?

In view of the congressional interest in this matter we would appreciate receiving your reply at your earliest convenience.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert L. Higgins".

Robert L. Higgins
Assistant General Counsel