

Calendar No. 469

105TH CONGRESS
2D SESSION

S. 2176

[Report No. 105-250]

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the “Vacancies Act”) to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16, 1998

Mr. THOMPSON (for himself, Mr. BYRD, Mr. THURMOND, Mr. LOTT, Mr. ROTH, Mr. COCHRAN, and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

JULY 15, 1998

Reported by Mr. THOMPSON, with amendments

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the “Vacancies Act”) to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Vacancies Re-
5 form Act of 1998”.

6 **SEC. 2. FEDERAL VACANCIES AND APPOINTMENTS.**

7 (a) IN GENERAL.—Chapter 33 of title 5, United
8 States Code, is amended by striking sections 3345 through
9 3349 and inserting the following:

10 **“§ 3345. Acting officer**

11 “(a) If an officer of an Executive agency (including
12 the Executive Office of the President, and other than the
13 General Accounting Office) whose appointment to office
14 is required to be made by the President, by and with the
15 advice and consent of the Senate, dies, resigns, or is other-
16 wise unable to perform the functions and duties of the of-
17 fice—

18 “(1) the first assistant of such officer shall per-
19 form the functions and duties of the office tempo-
20 rarily in an acting capacity, subject to the time limi-
21 tations of section 3346; or

22 “(2) notwithstanding paragraph (1), the Presi-
23 dent (and only the President) may direct a person
24 who serves in an office for which appointment is re-
25 quired to be made by the President, by and with the

1 advice and consent of the Senate, to perform the
2 functions and duties of the office temporarily in an
3 acting capacity, subject to the time limitations of
4 section 3346.

5 “(b) Notwithstanding section 3346(a)(2), a person
6 may not serve as an acting officer for an office under this
7 section, if—

8 “(1) on the date of the death, resignation, or
9 beginning of inability to serve of the applicable offi-
10 cer, such person serves in the position of first assist-
11 ant to such officer;

12 “(2) during the 365-day period preceding such
13 date, such person served in the position of first as-
14 sistant to such officer for less than 180 days; and

15 “(3) the President submits a nomination of
16 such person to the Senate for appointment to such
17 office.

18 “(c) With respect to the office of the Attorney Gen-
19 eral of the United States, the provisions of section 508
20 of title 28 shall be applicable.

21 **“§ 3346. Time limitation**

22 “(a) The person serving as an acting officer as de-
23 scribed under section 3345 may serve in the office—

24 “(1) for no longer than 150 days beginning on
25 the date the vacancy occurs; or

1 “(2) subject to subsection (b), once a first or
2 second nomination for the office is submitted to the
3 Senate, *from the date of such nomination* for the pe-
4 riod that the nomination is pending in the Senate.

5 “(b)(1) If the first nomination for the office is re-
6 jected by the Senate, withdrawn, or returned to the Presi-
7 dent by the Senate, the person may continue to serve as
8 the acting officer for no more than 150 days after the
9 date of such rejection, withdrawal, or return.

10 “(2) ~~¶~~ *Notwithstanding paragraph (1), if* a second
11 nomination for the office (of a different person than first
12 nominated in the case of a rejection or withdrawal) is sub-
13 mitted to the Senate ~~during the 150-day period~~ after the
14 rejection, withdrawal, or return of the first nomination,
15 the person serving as the acting officer may continue to
16 serve—

17 “(A) until the second nomination is confirmed;
18 or

19 “(B) for no more than 150 days after the sec-
20 ond nomination is rejected, withdrawn, or returned.

21 “(c) If a person begins serving as an acting officer
22 during an adjournment of the Congress sine die, the 150-
23 day period under subsection (a) shall begin on the date
24 that the Senate first reconvenes.

1 **“§ 3347. Application**

2 “(a) Sections 3345 and 3346 are applicable to any
3 office of an Executive agency (including the Executive Of-
4 fice of the President, and other than the General Account-
5 ing Office) for which appointment is required to be made
6 by the President, by and with the advice and consent of
7 the Senate, unless—

8 “(1) another statutory provision expressly pro-
9 vides that such provision supersedes sections 3345
10 and 3346;

11 ~~“(2) a statutory provision in effect on the date~~
12 ~~of enactment of the Federal Vacancies Reform Act~~
13 ~~of 1998 expressly authorizes the President, or the~~
14 ~~head of an Executive department, to designate an~~
15 ~~officer to perform the functions and duties of a spec-~~
16 ~~ified office temporarily in an acting capacity; or~~

17 *“(2) a statutory provision in effect on the date*
18 *of enactment of the Federal Vacancies Reform Act of*
19 *1998 expressly—*

20 *“(A) authorizes the President, a court, or*
21 *the head of an Executive department, to des-*
22 *ignate an officer or employee to perform the*
23 *functions and duties of a specified office tempo-*
24 *rarily in an acting capacity; or*

1 “(B) designates an officer or employee to
 2 perform the functions and duties of a specified
 3 office temporarily in an acting capacity; or

4 “(3) the President makes an appointment to fill
 5 a vacancy in such office during the recess of the
 6 Senate pursuant to clause 3 of section 2 of article
 7 II of the United States Constitution.

8 “(b) Any statutory provision providing general au-
 9 thority to the head of an Executive agency (including the
 10 Executive Office of the President, and other than the Gen-
 11 eral Accounting Office) to delegate duties to, or to reas-
 12 sign duties among, officers or employees of such Executive
 13 agency, is not a statutory provision to which subsection
 14 (a)(2) applies.

15 **“§ 3348. Vacant office**

16 “(a) In this section—

17 “(1) the term ‘action’ includes any agency ac-
 18 tion as defined under section 551(13); and

19 “(2) the term ‘function or duty’ means any
 20 function or duty of the applicable office that—

21 “(A)(i) is established by statute; and

22 “(ii) is required by statute to be performed
 23 by the applicable officer (and only that officer);

24 or

25 “(B)(i)(I) is established by regulation; and

1 “(II) is required by such regulation to be
2 performed by the applicable officer (and only
3 that officer); and

4 “(ii) includes a function or duty to which
5 clause (i) (I) and (II) applies, and the applica-
6 ble regulation is in effect at any time during
7 the 180-day period preceding the date on which
8 the vacancy occurs, notwithstanding any regula-
9 tion that—

10 “(I) is issued on or after the date oc-
11 ccurring 180 days before the date on which
12 the vacancy occurs; and

13 “(II) limits any function or duty re-
14 quired to be performed by the applicable
15 officer (and only that officer).

16 “(b) Subject to section 3347 and subsection (c)—

17 “(1) if the President does not submit a first
18 nomination to the Senate to fill a vacant office with-
19 in 150 days after the date on which a vacancy oc-
20 curs—

21 “(A) the office shall remain vacant until
22 the President submits a first nomination to the
23 Senate; and

24 “(B) in the case of an office other than the
25 office of the head of an Executive agency (in-

1 including the Executive Office of the President,
2 and other than the General Accounting Office),
3 only the head of such Executive agency may
4 perform any function or duty of such office,
5 until a nomination is made in accordance with
6 subparagraph (A);

7 “(2) if the President does not submit a second
8 nomination to the Senate within 150 days after the
9 date of the rejection, withdrawal, or return of the
10 first nomination—

11 “(A) the office shall remain vacant until
12 the President submits a second nomination to
13 the Senate; and

14 “(B) in the case of an office other than the
15 office of the head of an Executive agency (in-
16 cluding the Executive Office of the President,
17 and other than the General Accounting Office),
18 only the head of such Executive agency may
19 perform any function or duty of such office,
20 until a nomination is made in accordance with
21 subparagraph (A); and

22 “(3) if an office is vacant after 150 days after
23 the rejection, withdrawal, or return of the second
24 nomination—

1 “(A) the office shall remain vacant until a
2 person is appointed by the President, by and
3 with the advice and consent of the Senate; and

4 “(B) in the case of an office other than the
5 office of the head of an Executive agency (in-
6 cluding the Executive Office of the President,
7 and other than the General Accounting Office),
8 only the head of such Executive agency may
9 perform any function or duty of such office,
10 until an appointment is made in accordance
11 with subparagraph (A).

12 “(c) If the last day of any 150-day period under sub-
13 section (b) is a day on which the Senate is not in session,
14 the first day the Senate is next in session and receiving
15 nominations shall be deemed to be the last day of such
16 period.

17 “(d)(1) Except as provided under paragraphs (1)(B),
18 (2)(B), and (3)(B) of subsection (b), an action shall have
19 no force or effect if such action—

20 “(A)(i) is taken by any person who fills a va-
21 cancy in violation of subsection (b); and

22 “(ii) is the performance of a function or duty
23 of such vacant office; or

24 “(B)(i) is taken by a person who is not filling
25 a vacant office; and

1 “(ii) is the performance of a function or duty
2 of such vacant office.

3 “(2) An action that has no force or effect under para-
4 graph (1) may not be ratified.

5 “(d) This section shall not apply to—

6 “(1) the General Counsel of the National Labor
7 Relations Board;

8 “(2) the General Counsel of the Federal Labor
9 Relations Authority; or

10 “(3) any Inspector General appointed by the
11 President, by and with the advice and consent of the
12 Senate.

13 **“§ 3349. Reporting of vacancies**

14 “(a) The head of each Executive agency (including
15 the Executive Office of the President, and other than the
16 General Accounting Office) shall submit to the Comptrol-
17 ler General of the United States and to each House of
18 Congress—

19 “(1) notification of a vacancy and the date such
20 vacancy occurred immediately upon the occurrence
21 of the vacancy;

22 “(2) the name of any person serving in an act-
23 ing capacity and the date such service began imme-
24 diately upon the designation;

1 “(3) the name of any person nominated to the
2 Senate to fill the vacancy and the date such nomina-
3 tion is submitted immediately upon the submission
4 of the nomination; and

5 “(4) the date of a rejection, withdrawal, or re-
6 turn of any nomination immediately upon such rejec-
7 tion, withdrawal, or return.

8 “(b) If the Comptroller General of the United States
9 makes a determination that an officer is serving longer
10 than the 150-day period including the applicable excep-
11 tions to such period under section 3346, the Comptroller
12 General shall report such determination to—

13 “(1) the Committee on Governmental Affairs of
14 the Senate;

15 “(2) the Committee on Government Reform and
16 Oversight of the House of Representatives;

17 “(3) the Committees on Appropriations of the
18 Senate and House of Representatives;

19 “(4) the appropriate committees of jurisdiction
20 of the Senate and House of Representatives;

21 “(5) the President; and

22 “(6) the Office of Personnel Management.

23 **“§ 3349a. Presidential inaugural transitions**

24 “(a) In this section, the term ‘transitional inaugura-
25 tion day’ means the date on which any person swears or

1 affirms the oath of office as President, if such person is
 2 not the President on the date preceding the date of swear-
 3 ing or affirming such oath of office.

4 ~~“(b) With respect to any vacancy that exists during~~
 5 ~~the 60-day period beginning on a transitional inauguration~~
 6 ~~day, the 150-day period under section 3346 or 3348 shall~~
 7 ~~be deemed to—~~

8 ~~“(1) begin on the later of—~~

9 ~~“(A) the date following such transitional~~
 10 ~~inauguration day; or~~

11 ~~“(B) the date the vacancy occurs; and~~

12 ~~“(2) be a period of 180 days.~~

13 *“(b) With respect to any vacancy that exists during*
 14 *the 60-day period beginning on a transitional inauguration*
 15 *day, the 150-day period under section 3346 or 3348 shall*
 16 *be deemed to begin on the later of the date occurring—*

17 *“(1) 90 days after such transitional inaugura-*
 18 *tion day; or*

19 *“(2) 90 days after the date on which the vacancy*
 20 *occurs.*

21 **“§ 3349b. Holdover provisions relating to certain**
 22 **independent establishments**

23 “With respect to any independent establishment for
 24 which a single officer is the head of the establishment,
 25 sections 3345 through 3349a shall not be construed to af-

1 fect any statute that authorizes a person to continue to
 2 serve in any office—

3 “(1) after the expiration of the term for which
 4 such person is appointed; and

5 “(2) until a successor is appointed or a speci-
 6 fied period of time has expired.

7 **“§ 3349c. Exclusion of certain officers**

8 “Sections 3345 through 3349b shall not apply to—

9 “(1) any member who is appointed by the
 10 President, by and with the advice and consent of the
 11 Senate to any board, commission, or similar entity
 12 that—

13 “(A) is composed of multiple members; and

14 “(B) governs an independent establishment
 15 or Government corporation; or

16 “(2) any commissioner of the Federal Energy
 17 Regulatory Commission.”.

18 (b) TECHNICAL AND CONFORMING AMENDMENT.—

19 (1) TABLE OF SECTIONS.—The table of sections
 20 for chapter 33 of title 5, United States Code, is
 21 amended by striking the matter relating to sub-
 22 chapter III and inserting the following:

“SUBCHAPTER III—DETAILS, VACANCIES, AND APPOINTMENTS

“3341. Details; within Executive or military departments.

“[3342. Repealed.]

“3343. Details; to international organizations.

“3344. Details; administrative law judges.

“3345. Acting officer.

“3346. Time limitation.

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