

105TH CONGRESS
2D SESSION

S. 2176

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, and Mr. ROTH) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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”.

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

2 (a) IN GENERAL.—Chapter 33 of title 5, United
3 States Code, is amended by striking sections 3345 through
4 3349 and inserting the following:

5 **“§ 3345. Acting officer**

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

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

17 “(2) notwithstanding paragraph (1), the Presi-
18 dent (and only the President) may direct a person
19 who serves in an office for which appointment is re-
20 quired to be made by the President, by and with the
21 advice and consent of the Senate, to perform the
22 functions and duties of the office temporarily in an
23 acting capacity, subject to the time limitations of
24 section 3346.

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

4 “(1) on the date of the death, resignation, or
5 beginning of inability to serve of the applicable offi-
6 cer, such person serves in the position of first assist-
7 ant to such officer;

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

11 “(3) the President submits a nomination of
12 such person to the Senate for appointment to such
13 office.

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

17 **“§ 3346. Time limitation**

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

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

22 “(2) subject to subsection (b), once a first or
23 second nomination for the office is submitted to the
24 Senate, for the period that the nomination is pend-
25 ing in the Senate.

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

6 “(2) If a second nomination for the office (of a dif-
7 ferent person than first nominated in the case of a rejec-
8 tion or withdrawal) is submitted to the Senate during the
9 150-day period after the rejection, withdrawal, or return
10 of the first nomination, the person serving as the acting
11 officer may continue to serve—

12 “(A) until the second nomination is confirmed;

13 or

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

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

20 **“§ 3347. Application**

21 “(a) Sections 3345 and 3346 are applicable to any
22 office of an Executive agency (including the Executive Of-
23 fice of the President, and other than the General Account-
24 ing Office) for which appointment is required to be made

1 by the President, by and with the advice and consent of
2 the Senate, unless—

3 “(1) another statutory provision expressly pro-
4 vides that such provision supersedes sections 3345
5 and 3346;

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

12 “(3) the President makes an appointment to fill
13 a vacancy in such office during the recess of the
14 Senate pursuant to clause 3 of section 2 of article
15 II of the United States Constitution.

16 “(b) Any statutory provision providing general au-
17 thority to the head of an Executive agency (including the
18 Executive Office of the President, and other than the Gen-
19 eral Accounting Office) to delegate duties to, or to reas-
20 sign duties among, officers or employees of such Executive
21 agency, is not a statutory provision to which subsection
22 (a)(2) applies.

23 **“§ 3348. Vacant office**

24 “(a) In this section—

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

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

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

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

8 or

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

10 “(II) is required by such regulation to be
11 performed by the applicable officer (and only
12 that officer); and

13 “(ii) includes a function or duty to which
14 clause (i) (I) and (II) applies, and the applica-
15 ble regulation is in effect at any time during
16 the 180-day period preceding the date on which
17 the vacancy occurs, notwithstanding any regula-
18 tion that—

19 “(I) is issued on or after the date oc-
20 curring 180 days before the date on which
21 the vacancy occurs; and

22 “(II) limits any function or duty re-
23 quired to be performed by the applicable
24 officer (and only that officer).

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

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

5 “(A) the office shall remain vacant until
6 the President submits a first nomination to the
7 Senate; and

8 “(B) in the case of an office other than the
9 office of the head of an Executive agency (in-
10 cluding the Executive Office of the President,
11 and other than the General Accounting Office),
12 only the head of such Executive agency may
13 perform any function or duty of such office,
14 until a nomination is made in accordance with
15 subparagraph (A);

16 “(2) if the President does not submit a second
17 nomination to the Senate within 150 days after the
18 date of the rejection, withdrawal, or return of the
19 first nomination—

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

23 “(B) in the case of an office other than the
24 office of the head of an Executive agency (in-
25 cluding the Executive Office of the President,

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

6 “(3) if an office is vacant after 150 days after
7 the rejection, withdrawal, or return of the second
8 nomination—

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

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

20 “(c) If the last day of any 150-day period under sub-
21 section (b) is a day on which the Senate is not in session,
22 the first day the Senate is next in session and receiving
23 nominations shall be deemed to be the last day of such
24 period.

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

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

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

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

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

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

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

15 “(1) the General Counsel of the National Labor
16 Relations Board;

17 “(2) the General Counsel of the Federal Labor
18 Relations Authority; or

19 “(3) any Inspector General appointed by the
20 President, by and with the advice and consent of the
21 Senate.

22 **“§ 3349. Reporting of vacancies**

23 “(a) The head of each Executive agency (including
24 the Executive Office of the President, and other than the
25 General Accounting Office) shall submit to the Comptrol-

1 ler General of the United States and to each House of
2 Congress—

3 “(1) notification of a vacancy and the date such
4 vacancy occurred immediately upon the occurrence
5 of the vacancy;

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

9 “(3) the name of any person nominated to the
10 Senate to fill the vacancy and the date such nomina-
11 tion is submitted immediately upon the submission
12 of the nomination; and

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

16 “(b) If the Comptroller General of the United States
17 makes a determination that an officer is serving longer
18 than the 150-day period including the applicable excep-
19 tions to such period under section 3346, the Comptroller
20 General shall report such determination to—

21 “(1) the Committee on Governmental Affairs of
22 the Senate;

23 “(2) the Committee on Government Reform and
24 Oversight of the House of Representatives;

1 “(3) the Committees on Appropriations of the
2 Senate and House of Representatives;

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

5 “(5) the President; and

6 “(6) the Office of Personnel Management.

7 **“§ 3349a. Presidential inaugural transitions**

8 “(a) In this section, the term ‘transitional inaugura-
9 tion day’ means the date on which any person swears or
10 affirms the oath of office as President, if such person is
11 not the President on the date preceding the date of swear-
12 ing or affirming such oath of office.

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—

17 “(1) begin on the later of—

18 “(A) the date following such transitional
19 inauguration day; or

20 “(B) the date the vacancy occurs; and

21 “(2) be a period of 180 days.

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

24 “With respect to any independent establishment for
25 which a single officer is the head of the establishment,

1 sections 3345 through 3349a shall not be construed to af-
 2 fect any statute that authorizes a person to continue to
 3 serve in any office—

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

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

8 **“§ 3349c. Exclusion of certain officers**

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

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

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

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

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

19 (b) TECHNICAL AND CONFORMING AMENDMENT.—

20 (1) TABLE OF SECTIONS.—The table of sections
 21 for chapter 33 of title 5, United States Code, is
 22 amended by striking the matter relating to sub-
 23 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.

