

## SENATE RESOLUTION 128—RELATIVE TO THE VACANCIES ACT

Mr. THURMOND (for himself, Mr. HATCH, Mr. GRASSLEY, Mr. KYL, Mr. SESSIONS, and Mr. DEWINE) submitted the following resolution; which was referred to the Committee on Governmental Affairs:

S. RES. 128

Whereas Congress enacted the Act entitled "An Act to authorize the temporary supplying of vacancies in the executive departments", approved July 23, 1868 (commonly referred to as the "Vacancies Act"), to—

(1) preclude the extended filling of a vacancy in an office of an executive or military department subject to Senate confirmation, without the submission of a Presidential nomination;

(2) provide an exclusive means to temporarily fill such a vacancy; and

(3) clarify the role of the Senate in the exercise of the Senate's constitutional advice and consent powers in the Presidential appointment of certain officers;

Whereas subchapter III of chapter 33 of title 5, United States Code, includes a codification of the Vacancies Act, and (pursuant to an amendment on August 17, 1988, to section 3345 of such title) specifically applies such vacancy provisions to all Executive agencies, including the Department of Justice;

Whereas the legislative history accompanying the 1988 amendment makes clear in the controlling committee report that the general administrative authorizing provisions for the Executive agencies, which include sections 509 and 510 of title 28, United States Code, regarding the Department of Justice, do not supersede the specific vacancy provisions in title 5, United States Code;

Whereas there are statutory provisions of general administrative authority applicable to every Executive department and other Executive agencies that are similar to sections 509 and 510 of title 28, United States Code, relating to the Department of Justice;

Whereas despite the clear intent of Congress, the Attorney General of the United States has continued to interpret the provisions granting general administrative authority to the Attorney General under sections 509 and 510 of title 28, United States Code, to supersede the specific vacancy provisions in title 5, United States Code; and

Whereas the interpretation of the Attorney General would—

(1) virtually nullify the vacancy provisions under subchapter III of chapter 33 of title 5, United States Code;

(2) circumvent the clear intention of Congress to preclude the extended filling of certain vacancies and provide for the temporary filling of such vacancies; and

(3) subvert the constitutional authority and responsibility of the Senate to advise and consent to certain appointments: Now, therefore, be it

*Resolved*, That it is the sense of the Senate that—

(1) sections 3345, 3346, 3347, 3348, and 3349 of title 5, United States Code (relating to the filling of vacancies in certain offices), apply to all Executive agencies, including the Department of Justice.

(2) the general administrative authorizing statutes of Executive agencies, including sections 509 and 510 of title 28, United States Code, relating to the Department of Justice, do not supersede the specific vacancy provisions applicable to Executive agencies in title 5, United States Code; and

(3) the Attorney General of the United States should—

(A) take such necessary actions to ensure that the Department of Justice is in compliance with the statutory requirements of such sections; and

(B) inform other Executive agencies to comply with the vacancy provisions in title 5, United States Code.

Mr. THURMOND. Mr. President, today, I am submitting a sense-of-the-Senate resolution regarding the Vacancies Act. I am pleased to do so on my behalf, and the distinguished chairman of the Senate Judiciary Committee, and other members of the Judiciary Committee. Our purpose is to clarify for the Attorney General that the Vacancies Act applies to all executive departments and agencies, including the Department of Justice.

The Vacancies Act provides that, except for recess periods, when an official serving in an advise and consent position in an executive agency leaves, the President may appoint certain individuals to serve in that position in an acting capacity for no more than 120 days before the nomination of a permanent replacement is forwarded for Senate confirmation. The Vacancies Act, which is codified in sections 3345 through 3349 of title 5 of the United States Code, has existed in some form since at least 1868.

This act is central to the advise and consent role of the Senate. By limiting the time that the President may temporarily fill a vacant advise and consent position, the act strongly encourages the President to quickly nominate a permanent replacement.

I have become increasingly alarmed at the Clinton administration's failure to nominate officials to fill the vacancies that have occurred in executive branch positions, and particularly in the Department of Justice. When we held a Justice Department oversight hearing in the Judiciary Committee at the end of April, vacancies existed for the Associate Attorney General, Solicitor General, Assistant Attorney General for Civil Rights, Assistant Attorney General for the Criminal Division, and Assistant Attorney General for the Office of Legal Counsel.

I asked Attorney General Reno at the oversight hearing whether she was concerned that a failure to nominate individuals for these positions within the 120-day deadline would violate the Vacancies Act. She responded in writing that the Justice Department was not bound by the Vacancies Act. The letter indicated that she could fill these vacancies pursuant to the Department's general administrative authorizing statutes without regard to the Vacancies Act.

In my opinion, the Attorney General is simply wrong. Her interpretation of the vacancies law in this area is nothing more than an attempt to get around the law.

First, the plain language of the Vacancies Act since it was amended in 1988 states that it applies to all executive departments and agencies. By law, the Department of Justice is an executive department, so Justice obviously

is included. In fact, the original sponsor of the act, Representative Trumbull, stated on the Senate floor in 1868 that the act applied to, quote, "any of the Departments."

Also, the Congress flatly rejected the Attorney General's interpretation when it amended the Vacancies Act in 1988. As explained in the report of the Committee on Governmental Affairs, Congress made a choice in 1988 of whether to repeal or revive the Vacancies Act, and it chose the latter. The report stated that it was time "to revitalize" the Vacancies Act and "make it relevant to the modern Presidential appointments process." One method of accomplishing this was to assist the President by expanding the number of days he had to submit a nominee from 30 to 120 days after the vacancy was created. That way, the President would have more time to submit a qualified replacement.

The committee report expressly rejected the Attorney General's flawed interpretation. It stated that the Vacancies Act was the exclusive authority for these appointments, and noted that the authorizing statutes of an executive department or agency do not provide an alternative means to fill vacancies. The amendment was made at the recommendation of the Comptroller General, who has battled with the Attorney General for many years over this flawed interpretation of vacancies law.

Mr. President, this is a matter of great constitutional significance. If the view of the Attorney General were correct, the President could routinely ignore the advise and consent role of the Senate. In the Justice Department, the President would never be obligated to nominate any official below the Attorney General for Senate confirmation after his first appointee left, as long as the President was content for the person to serve in an acting capacity.

In fact, based on the Attorney General's reasoning, the President apparently would not be bound by the Vacancies Act for officials in any department. Every Federal department from Agriculture to Veterans Affairs has authorizing statutes similar to Justice. Many Federal agencies do, too. Therefore, based on the Attorney General's reasoning, these departments and agencies can all claim to be exempt from the Vacancies Act. In fact, when faced with the Vacancies Act, many make the Attorney General's argument, and claim they aren't bound by it either. Obviously, the Congress would never have intended for its confirmation power to be circumvented in this manner.

The Framers of the Constitution surely would not be pleased. The advise and consent role of the Senate is one of the fundamental checks and balances included within our great system of Government. Under the appointments clause of article II, section 2, of the Constitution, the President has the exclusive power to nominate principal officers of the United States, but the

Senate must give its advise and consent. As Justice Scalia stated for the Supreme Court earlier this year, "[T]he Appointments Clause \* \* \* is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme."

The involvement of the Senate is designed to promote a high quality of appointments and curb executive abuses. In the words of Alexander Hamilton in Federalist No. 76, "The possibility of rejection [is] a strong motive to care in processing."

This resolution is designed to affirm the Senate's role by insisting that the Attorney General stop interpreting the act out of existence. It expressly states what should already be obvious from the plain language of the Vacancies Act and its legislative history: that the Vacancies Act applies to all executive departments and agencies, including the Department of Justice. The resolution also states that the Attorney General should ensure that the Department of Justice complies with the act, and that she should inform other executive agencies to abide by it, as well.

This is not just a technical issue. It is not an idle problem. At some point this year, six advise and consent positions in the Justice Department have been in violation of the Vacancies Act. The position of the Assistant Attorney General for the Criminal Division has been vacant for over 2 years. This is an excellent example of the problem the Vacancies Act was designed to prevent. The Nation's chief law enforcement agency has been without a confirmed chief for crime since August 31, 1995. No name has been forwarded in the 9 months that this Congress has been in session. Mr. President, what message does that send about the Clinton administration's commitment to fighting crime?

In the meantime, the Attorney General has been in the middle of a tremendous controversy surrounding her reluctance to seek the appointment of an independent counsel to investigate apparently illegal campaign fundraising practices. Would not having a politically accountable chief of the Criminal Division be helpful to her in analyzing whether crimes were committed?

Also, consider the Office of Legal Counsel. Walter Dellinger was confirmed to head OLC in 1993, but he was very controversial. Many members of this body could not support him. Nevertheless, effective July 1, 1996, the Attorney General made Mr. Dellinger acting Solicitor General. The Senate may not have confirmed him to be Solicitor General. Of course, we will never know because by simply naming him acting Solicitor General, the administration avoided a fight over his appointment. For an entire year, for a full term of the Supreme Court, the United States was represented by a Solicitor General who was acting in violation of the Vacancies Act, in violation of the law.

The President has just officially nominated someone else for the vacancy.

Moreover, Mr. Dellinger's appointment caused another violation of the Vacancies Act. When the Attorney General moved Mr. Dellinger, she appointed an acting chief of OLC, who served over 120 days without a permanent nomination being submitted. Not only did this appointment exceed 120 days, it wasn't even legal in the first place. The Vacancies Act not only limits the amount of time someone can serve in an acting capacity, it also limits who can serve. Only someone who was the first assistant, which refers to the principal deputy, or someone who was earlier confirmed to a different advise and consent position can serve in the acting position. Mr. Dellinger's replacement did not meet either of these requirements. Thus, the chief of OLC was serving in violation of the Vacancies Act, in violation of the law, from the first day Mr. Dellinger left.

Mr. President, the vacancies problem is not limited to the Department of Justice. It can be found throughout the executive branch. The Washington Post reported on August 29, 1997, that 30 percent of the top 470 political jobs in the administration remain unfilled. When confronted with the Vacancies Act, many departments and agencies use the Attorney General's argument and also claim not to be bound by the act.

It is time to put the Attorney General's flawed interpretation of the Vacancies Act to rest. Her reading of the Vacancies Act is a threat to the advise and consent role of the Senate. I am hopeful that my colleagues will join me and my cosponsors in supporting this simple but significant resolution. Let us adopt this important resolution, and reaffirm our constitutional duty of advise and consent.

#### AMENDMENTS SUBMITTED

#### THE VISA WAIVER PILOT PROGRAM REAUTHORIZATION ACT OF 1997

##### KYL (AND OTHERS) AMENDMENT NO. 1254

Mr. McCONNELL (for Mr. KYL for himself, Mr. LEAHY, and Mr. JEFFORDS) proposed an amendment to the bill (S. 1178) to amend the Immigration and Nationality Act to extend the visa waiver pilot program, and for other purposes; as follows:

At the end of the bill insert the following section:

##### SEC. 3. REPORT ON AUTOMATED ENTRY-EXIT CONTROL SYSTEM.

(a) Within six months after the date of enactment of this Act, the Attorney General shall report to the Committees on the Judiciary of the Senate and the House of Representatives on her plans for and the feasibility of developing an automated entry-exit control system that would operate at the land borders of the United States and that would—

(1) collect a record of departure for every alien departing the United States and match the records of departure with the record of the alien's arrival in the United States; and

(2) enable the Attorney General to identify, through on-line searching procedures, lawfully admitted nonimmigrants who remain in the United States beyond the period authorized by the Attorney General.

(b) Such report shall assess the costs and feasibility of various means of operating such an automated entry-exit control system; shall evaluate how such a system could be implemented without increasing border traffic congestion and border crossing delays and, if any such system would increase border crossing delays, evaluate to what extent such congestion or delays would increase; and shall estimate the length of time that would be required for any such system to be developed and implemented at the land borders.

#### HUTCHISON AMENDMENT NO. 1255

Mr. McCONNELL (for Mrs. HUTCHISON) proposed an amendment to the bill, S. 1178, supra; as follows:

On page 8, after line 6, insert the following:

(C) REPORTING REQUIREMENTS FOR OTHER COUNTRIES.—For every country from which nonimmigrants seek entry into the United States, the Attorney General shall make a precise numerical estimate of the figures under clauses (A)(i)(I) and (A)(i)(II) and report those figures to the Committees on the Judiciary of the Senate and the House of Representatives within 30 days after the end of the fiscal year.

#### ABRAHAM (AND KENNEDY) AMENDMENT NO. 1256

Mr. McCONNELL (for Mr. ABRAHAM, for himself and Mr. KENNEDY) proposed an amendment to the bill, S. 1178, supra; as follows:

On page 8, between lines 6 and 7, insert the following new clause:

"(ii) COMMENCEMENT OF AUTHORIZED PERIOD FOR QUALIFYING COUNTRIES.—No country qualifying under the criteria in clauses (i) and (ii) may be newly designated as a pilot program country prior to October 1, 1998.

On page 8, line 6, strike "2002" and insert "2000".

#### THE PUBLIC HOUSING REFORM AND RESPONSIBILITY ACT OF 1997

##### MACK AMENDMENT NO. 1257

Mr. McCONNELL (for Mr. MACK) proposed an amendment to the bill (S. 462). A bill to reform and consolidate the public and assisted housing programs of the United States, and to redirect primary responsibility for these programs from the Federal Government to States and localities, and for other purposes; as follows:

Strike all after the enacting clause and insert the following:

##### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Public Housing Reform and Responsibility Act of 1997".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Definitions.