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June 13, 2008

The Honorable Richard J. Durbin
United States Senate

The Honorable Russell D. Feingold
United States Senate

The Honorable Edward M. Kennedy
United States Senate

Subject: *Federal Vacancies Reform Act of 1998 - Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice*

By letter dated April 16, 2008, you requested our opinion whether the service of Steven G. Bradbury as the senior official in the Office of Legal Counsel, U.S. Department of Justice, is in violation of the Federal Vacancies Reform Act of 1998.¹ For the reasons stated below, we conclude that Mr. Bradbury's service has not violated the Federal Vacancies Reform Act of 1998.

BACKGROUND

The Federal Vacancies Reform Act (hereinafter "Vacancies Act"), enacted on October 21, 1998, provides the exclusive means for temporarily authorizing an acting official to perform the duties of certain vacant positions that require Presidential appointment and Senate confirmation.² Under the Vacancies Act, an acting official in

¹ As discussed below in footnote 6, we had already solicited and received the views of the Department of Justice concerning Mr. Bradbury's service pursuant to our responsibilities under the Federal Vacancies Reform Act. *See* 5 U.S.C. § 3349. Upon receipt of your request, however, we provided the Department with an additional opportunity to comment. The Department provided a supplemental response on April 29, 2008.

² Pub. L. No. 105-277, Div. C, Title I, Oct 21, 1998, as amended, 5 U.S.C. §§ 3345-3349d. The Vacancies Act applies to all Presidentially-appointed, Senate-confirmed nominees, except for the Comptroller and Deputy Comptroller General (GAO), Article I judges, members of the Federal Energy Regulatory Commission and the Surface Transportation Board, and any appointment to a multimember board or commission that governs an independent establishment or a government corporation. 5 U.S.C. §§ 3345(a) and 3349c.

a covered position may serve in a vacant position for a period no longer than 210 days from the date of the vacancy. 5 U.S.C. § 3346(a). An acting official may continue (or resume) performing the duties of the office once the official's first or second nomination is submitted to the Senate. If a first or second nomination is returned to the President, the Act also permits the official to continue to serve up to 210 days from the date the nomination is returned. 5 U.S.C. § 3346(b). After the expiration of an acting official's allowed period of duty under the Vacancies Act, the position is to remain vacant; the functions and duties of that position can only be performed by the head of the agency; and actions taken by the acting official in performance of these duties and functions have no force or effect.³ 5 U.S.C. § 3348.

The Vacancies Act requires executive departments and agencies to immediately report to the Congress and the Comptroller General when a vacancy occurs, the name of any person serving in an acting capacity, the name of any person nominated to fill the position, and the date of a rejection, withdrawal, or return of any nomination. 5 U.S.C. § 3349(a). The Comptroller General is also to report to the Congress, the President, and the Office of Personnel Management if the Comptroller General determines that an acting official is serving longer than the 210-day period (including applicable extensions) established by the Vacancies Act. 5 U.S.C. § 3349(b).

A vacancy in the position of Assistant Attorney General, Office of Legal Counsel (OLC), U.S. Department of Justice began on July 18, 2004. The Department reported that Daniel Levin initially served as Acting Assistant Attorney General and that Steven G. Bradbury (as the first assistant to the Assistant Attorney General for OLC) automatically assumed this title upon Mr. Levin's departure on February 4, 2005. Mr. Bradbury had been serving since April 2004 as the Principal Deputy Assistant Attorney General, a position which under Department regulations is the first assistant to the Assistant Attorney General for purposes of the Federal Vacancies Act. 28 C.F.R. § 0.137(b). Mr. Bradbury was nominated by the President on June 23, 2005, and this nomination was returned on December 21, 2005.⁴ The President submitted Mr. Bradbury's nomination a second time on January 25, 2006, which was returned on September 29, 2006. Since that time, the President has nominated Mr. Bradbury on two subsequent occasions.⁵

³ Under the Vacancies Act, "actions" include the whole or a part of an agency rule, order, license, sanction, relief (or the equivalent or denial thereof, or failure to act). 5 U.S.C. § 3348(a)(1) (defining "action" to include "any agency action as defined under [5 U.S.C.] section 551(13)").

⁴ A nomination which has not been confirmed or rejected can be returned to the President pursuant to paragraph 6 of Rule XXXI of the Standing Rules of the Senate.

⁵ The President's third nomination of Mr. Bradbury on January 9, 2007, was returned on December 19, 2007, and the President's fourth nomination of Mr. Bradbury was made on January 23, 2008.

In response to our request for their views,⁶ the Department of Justice advises that Mr. Bradbury did not serve as the Acting Assistant Attorney General during the period from February 15, 2005 (the expiration of 210 days after the vacancy began) to June 23, 2005 (prior to his first nomination) and has not served as the Acting Assistant Attorney General since April 27, 2007. In fact, the Department advises that no one (Mr. Bradbury or anyone else) may serve as the Acting Assistant Attorney General for the Office of Legal Counsel for the remainder of this Administration. Letter of April 29, 2008. Rather, Mr. Bradbury is serving as the Principal Deputy Assistant Attorney General, a position he has held continuously since April 2004. The Department advises that this is the position Mr. Bradbury occupied under the previous Assistant Attorney General, Jack L. Goldsmith, and under the Acting Assistant Attorney General, Daniel Levin. The Department concludes that Mr. Bradbury is performing the duties of his position and that there are no duties that only the Assistant Attorney General for OLC may perform.

DISCUSSION

Pursuant to the Vacancies Act, the office of the Assistant Attorney General for OLC should have been vacant between February 15, 2005 (the end of the 210-day period) and June 23, 2005 (when the President submitted Mr. Bradbury's nomination to the Senate) and since April 27, 2007 (which was the end of the 210-day period following the return of Mr. Bradbury's second nomination). As noted above, in its response to our inquiry concerning Mr. Bradbury's service as Acting Assistant Attorney General, the Department states that Mr. Bradbury has not served as Acting Assistant Attorney General for OLC during these periods. Rather, during these periods, Mr. Bradbury served (and continues to serve) in his regular position as Principal Deputy Assistant Attorney General, the senior administratively appointed official in OLC. As such the Department contends that the office has been vacant, in accordance with the Vacancies Act. To date we have found no evidence to suggest that Mr. Bradbury has used the title of Acting Assistant Attorney General for OLC during any period of time in which the position was to be vacant.⁷ Therefore, in this sense, we consider the Department to be in compliance with the requirement under the Vacancies Act that the office remain vacant during these periods.⁸

The issue remaining is whether Mr. Bradbury, as Principal Deputy Assistant Attorney General during the timeframe in which the office has been vacant, performed any

⁶ Based on information reported to us by the Department, we began a review of whether Mr. Bradbury's service as Acting Assistant Attorney General for OLC was in accordance with the Vacancies Act. As is our practice, GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html, we solicited the views and comments of the Department, and received their response by letter dated March 6, 2008. As noted above in footnote 1, we received a supplemental response by letter dated April 29, 2008. Both letters were signed by Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, Department of Justice.

⁷ For example, Mr. Bradbury recently testified before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, using the title of Principal Deputy Assistant Attorney General, Office of Legal Counsel (February 14, 2008).

⁸ In accordance with the Vacancies Act, the office should continue to remain vacant until a nominee is confirmed by the Senate (or a recess appointment is made). 5 U.S.C. § 3348(b)(1).

functions or duties which under the Vacancies Act may be performed only by the Attorney General as head of the Department. According to the Department, Mr. Bradbury's service during the relevant time period has been in accordance with the Vacancies Act, since the position of Assistant Attorney General for OLC does not have any duties or functions which are exclusive to the position.

Under the Vacancies Act, the functions and duties of a position are defined as those functions or duties "established by statute . . . and . . . required by statute to be performed by the applicable officer (and only that officer) . . . or . . . established by regulation . . . and . . . required by such regulation to be performed by the applicable officer (and only that officer) . . ." 5 U.S.C. § 3348(a)(2). These functions and duties are described as non-delegable.⁹ Non-delegable functions and duties may only be performed by an agency head during those times when an office is vacant. 5 U.S.C. § 3348(b)(2).

In the first instance, there are no statutory functions or duties for the position of Assistant Attorney General for OLC, either non-delegable or delegable. Statutory authority for this and all the Assistant Attorney General positions is found at 28 U.S.C. § 506 which authorizes the appointment of a specified number of Assistant Attorneys General "to assist the Attorney General in the performance of his duties." Other than this general reference, there are no statutory references to the functions or duties of the Assistant Attorney General for OLC.¹⁰

The position does have functions and duties established by Department regulations that set forth the general functions of the Office of Legal Counsel. 28 C.F.R. § 0.25. These regulations provide a listing of matters which "are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Office of Legal Counsel." *Id.* This listing includes the preparation of formal Attorney General opinions, rendering legal advice to agencies and internally on departmental administrative matters, assisting the Attorney General in his function as legal advisor to the President, and preparing, reviewing, or revising proposed Executive Orders, proclamations, regulations and other similar matters which require the approval of the President or the Attorney General.¹¹ *Id.* In its response, the Department describes these as delegable regulatory functions and duties. The Department adds that since becoming the Principal Deputy Assistant Attorney General for OLC prior to the occurrence of the vacancy, Mr. Bradbury has at all times supervised all OLC staff.

⁹ S. Rep. No. 105-250, at 18 (1998).

¹⁰ During the deliberation over the proposed Federal Vacancies Reform Act, the Senate Committee on Governmental Affairs acknowledged that many agency positions, including Assistant Attorneys General, lack specified statutory duties. The Committee suggested that authorizing committees consider whether specific statutory duties should be given to assistant secretaries and assistant attorneys general. S. Rep. No. 105-250, at 10.

¹¹ Under the Vacancies Act, functions and duties "established by regulation" refer to applicable regulations in effect at any time during the 180-day period preceding the date on which the vacancy occurs. 5 U.S.C. § 3348(a)(2)(B)(ii). This provision was to prevent agencies from re-issuing regulations providing that an office has no exclusive duties. Senate Report No. 105-250 (to accompany S. 2176), 105th Cong. 2nd Sess., July 15, 1998, p. 18. The Department's regulatory provision was last modified in 1988.

Moreover, the Department states that Deputy Assistant Attorneys General in OLC are responsible for supervising their staff and, as demonstrated by published opinions of the Attorney General, can sign and have signed opinions of the office.

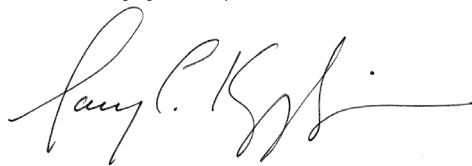
We find that the Department regulations are not sufficiently prescriptive for us to conclude that they assign non-delegable duties to the Assistant Attorney General for OLC. While the regulations clearly assign a variety of matters to the Assistant Attorney General for OLC, the Assistant Attorney General's duty is to conduct, handle, or supervise the enumerated matters. As we read the departmental regulations, the Assistant Attorney General may personally and exclusively conduct a matter, personally handle a matter with the assistance of staff, or supervise others in the conduct of a matter. The regulation's general vesting of supervisory responsibility, however, cannot be considered a non-delegable duty.

In limiting the performance of certain duties to an agency head during a vacancy, the Vacancies Act focus is on specified duties and functions which under statutory or regulatory language must be performed exclusively by the incumbent of the office. *See*, 5 U.S.C. § 3348(a)(2) (“ . . . required . . . to be performed by the applicable officer (and only that officer) . . .”). This requires language that clearly signals duties or functions that cannot be delegated, such as providing final approval or final decisionmaking authority in a particular position.¹²

In contrast, the departmental regulations at issue here provide for supervisory responsibility of the Assistant Attorney General but contain no language indicating that this responsibility (or any of the other enumerated responsibilities) may not be delegated. Moreover, the Department's practice of delegating various duties assigned to the Assistant Attorney General, including the supervision of OLC by the Principal Deputy Assistant Attorney General and the signing of opinions by lower level OLC officials, indicates that the Department's interpretation of this regulatory provision has permitted such delegation in the regular course, not simply under the circumstance of a vacant office. Accordingly, we do not interpret the vesting of supervisory responsibility with the Assistant Attorney General in the Department's regulations to be the assignment of a non-delegable duty.

Therefore, since the position of Assistant Attorney General for OLC has no non-delegable duties or functions, we do not find Mr. Bradbury's service as Principal Deputy Assistant Attorney General for OLC to be a violation of the Vacancies Act.

Sincerely yours,



Gary L. Keplinger
General Counsel

¹² *See, e.g.*, 38 C.F.R. § 2.6(e)(4)(iv) relating to the Department of Veterans Affairs administration of the Federal Claims Collection Act of 1966, which specifies that certain cases “will be considered by the General Counsel, who will make the determination in all instances as to whether the case warrants referral to the Department of Justice.”