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Deputy Assistant Attorney General

Washington, D.C. 20530

J. C. J. 11381

MEMORANDUM FOR TIMOTHY RYAN, ESQ.
Reagan Transition GroupRe: Designation of Acting Heads for Action Agency,
Federal Emergency Management Agency, and Small
Business Administration.

This responds to your telephone request for our advice concerning the manner in which provision can be made for the designation of certain employees to be acting heads of the Action Agency, the Federal Emergency Management Agency, and the Small Business Administration.

Action Agency - 42 U.S.C. §§ 5041-5046.

The statute governing the establishment and organization of the Action Agency does not contain a provision for an Acting Director in the event of a vacancy in the office of the Director. Pursuant to 42 U.S.C. § 5041, the Deputy Director is to act as Director during the absence or disability of the Director. Such clauses have been construed as covering only a temporary absence or disability but not a vacancy caused by resignation, retirement, or death. The Vacancy Act is not applicable because it extends only to Executive departments as defined in 5 U.S.C. § 101; Action is not such a department.

For the reasons set forth at pp. 3-4 of the memorandum dated June 27, 1969, to Henry C. Cashen II, Deputy Counsel to the President, from then Assistant Attorney General Rehnquist (a copy of which is attached), it is our opinion, although the matter is not entirely free of doubt, that the President has the power based on his constitutional responsibility for the continued operation of the Executive branch to designate an acting agency head. In light of the opinion of the Court of Appeals in Williams v. Phillips, 482 F.2d 669, 670-671 (D.C. Cir, 1973), it would be desirable that a nomination for the position of the

Director of Action be submitted to the Senate within 30 days after the occurrence of the vacancy.

Federal Emergency Management Agency-Reorganization Plan No. 3 of 1978, 5 U.S.C., Appendix.

Section 102 of the Plan provides for the appointment of a Director by the President by and with the advice and consent of the Senate. Section 103 provides for the appointment of a Deputy Director in the same manner. The Deputy Director is to act as Director in the event of a vacancy in the office of the Director. The Plan, however, does not cover the situation where the offices of the Director and Deputy Director are both vacant.

Pursuant to section 106 of the Plan, the Director, however, is authorized to "make provision for the performance of any function of the Director by any officer, employee or unit of the Agency." Accordingly, the incumbent Director can provide for the performance of all his functions by an appropriate employee of the agency. Since this would be based on the Director's authority under the Reorganization Plan and not on the Vacancy Act or a related non-statutory Presidential responsibility, the thirty-day period of 5 U.S.C. § 3348 would not be applicable directly or by analogy. Nevertheless, the early nomination of a Director is desirable.

If the above process is not possible, so that the Administration is left without a Director and Deputy Director, it is our view, for the reasons set forth earlier in this memorandum, that the President has the power to designate an Acting Administrator.

Small Business Administration - 15 U.S.C. §§ 631-642.

Section 633(b) of title 15, United States Code, provides for the appointment of an Administrator by the President by and with the advice and consent of the Senate. The Administrator is authorized to appoint a Deputy Administrator who becomes Acting Administrator in the event of a vacancy in the office of the Administrator. The Administrator can appoint an employee of SBA to be Deputy Administrator. This would have the effect of removing the present Deputy Administrator and make that employee Acting Administrator upon the resignation of the Administrator.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel