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MEMORANDUM FOR T. TIMOTHY RYAN, JR.
Office of the Counsel to the President

Re: Vacancies in the Environmental Protective Agency

This responds to your telephone inquiry of January 22, 1981, concerning the manner in which the vacancy in the office of the Administrator of the Environmental Protection Agency (EPA), established by Reorganization Plan No. 3 of 1970, 5 U.S.C. App., p. 827, (Plan) can be filled on a temporary basis.

We understand that the EPA is now headed by an Acting Administrator, an EPA employee appointed by the President by and with the advice and consent of the Senate. The Acting Administrator plans to resign on January 25, 1981. All other Presidential appointees of the EPA already have resigned. You inquire whether the President could legally designate as Acting Administrator either a person who is now an employee of another Agency, or a person who is not now an employee of the Government.

Section 1 of the Plan provides for the appointment of an Administrator, a Deputy Administrator, and not to exceed five Assistant Administrators, by the President by and with the advice and consent of the Senate. Section 1(c) provides that the Deputy Administrator shall act as Administrator in the event of a vacancy in the office of the Administrator. The Plan does not cover the situation, which will arise next Sunday, when the offices of the Administrator and Deputy Administrator will both be vacant.

The Vacancy Act is not applicable to the EPA because that Act extends only to the executive departments as defined in 5 U.S.C. § 101. The EPA 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 Administrator of EPA be submitted to the Senate within 30 days after the occurrence of the vacancy.

In the past this Office has consistently taken the position that such designation should be limited to persons who already are officers or employees of the agency concerned. Hence, a person who is not now an officer or employee of the EPA would have to be appointed to the agency before he can be designated as Acting Administrator. The present Acting Administrator should therefore prior to his resignation appoint to the EPA the person who has been selected as Acting EPA Administrator.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel