ACTING JUSTICE

THE WHITE HOUSE

WASHINGTON

December 27, 1982

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: Inquiry from Ron Mann Concerning Appointment of SES Official as Acting Deputy Director, National Science Foundation

Ron Mann, Associate Director of the Office of Presidential Personnel, has inquired if there are any legal impediments that would preclude the Director of the National Science Foundation (NSF) from appointing an official of NSF in the Senior Executive Service to the post of Acting Deputy Director pending nomination and confirmation of a permanent Deputy Director. The post of Deputy Director is a PAS position.

I located in our files a January 27, 1982, Memorandum on "Acting Officers" prepared for you by Ted Olson, Assistant Attorney General, Office of Legal Counsel (Tab A). That memorandum concluded that the Attorney General could designate the Deputy Commissioner of INS as Acting Commissioner, in part because of the authority given the Attorney General in 28 U.S.C. § 510 (1976) to authorize the performance of any function of the Attorney General by any officer of the Justice Department. There is an analogous provision concerning NSF and its Director at 42 U.S.C. § 1864(c) (1976), which provides:

> The Director may from time to time make such provisions as he deems appropriate authorizing the performance by any other officer, agency, or employee of the Foundation of any of his functions under this chapter, including functions delegated to him by the Board; except that the Director may not redelegate policymaking functions delegated to him by the Board.

I also located a December 5, 1982 letter to Ed Wilson from Joseph Morris, General Counsel, Office of Personnel Management, on the question of appointing individuals with SES status (Tab B). In pertinent part, Morris concluded:

> With respect to your first question, whether a person presently in the SES who is named to hold an "acting" PAS position retains his SES status during and after his service in the PAS position,

> the answer is affirmative. Designation as "acting" does not amount to an appointment with Senate confirmation, nor does it amount to a recess appointment without Senate confirmation as provided for in 5 U.S.C. § 3349. Whereas certain statutory procedures must be followed for PAS appointments and recess appointments to PAS positions, and certain changed-status consequences flow from such appointments . . ., Congress has mandated no special changes in underlying status for persons named to hold "acting" PAS positions. I therefore conclude that such persons retain SES status during and after temporary service in PAS positions.

On the basis of these two memoranda, and the provision in 42 U.S.C. § 1864(c) (1976), I am disposed to advise Mann that the Director of NSF may appoint an SES official of NSF Acting Deputy Director, pending the nomination and confirmation of a new Deputy Director. Pursuant to the terms of 42 U.S.C. § 1864(c), the Acting Deputy Director should refrain from exercising policymaking functions delegated to the Director by the NSF Board. I discussed the question with Herman Marcuse at the Office of Legal Counsel, who agreed that the SES official could be appointed Acting Deputy Director, but could not engage in policymaking. Marcuse also pointed out that the Acting Deputy Director could not act as Director in the absence of the Director, as provided in 42 U.S.C. § 1864a (1976), because an official may not be in a position of "acting" twice.

You will recall that the above-cited OLC memorandum noted that under the Vacancy Act, 5 U.S.C. §§ 3345-3349 (1976), vacancies filled pursuant to that Act may be filled for no more than thirty days. 5 U.S.C. § 3348 (1976). As stated in the memorandum, however, it has been the consistent position of the Department of Justice that vacancies such as the one in question are filled pursuant to the delegation authority -- in this case 42 U.S.C. § 1864(c) -- and not the Vacancy Act, and therefore the limitations of the Vacancy Act are not applicable. This is contrary to the position of the Comptroller General. Out of an excess of caution, Mann should be advised that the Acting Deputy Director, after serving thirty days, should avoid, if possible, taking action which may legally only be taken by the Deputy Director. See OLC memorandum, at 4.

If you agree, I can advise Mann that the Director of NSF may appoint an SES official Acting Deputy Director, provided the Acting Deputy Director (1) avoid exercising policymaking functions, (2) avoid, after serving thirty days, taking action which specifically must be taken by the NSF Deputy Director, and (3) not act as Director in the absence of the Director.

U.S. Department of Justice
Office of Legal Counsel

JAN 30 1982

Office of the
Assistant Attorney General

Washington, D.C. 20530

27 JAN 1982

MEMORANDUM FOR RICHARD A. HAUSER
Deputy Counsel to the President

Re: Acting Officers

This responds to the oral request by Dennis Patrick of the Office of Presidential Personnel for a discussion of certain issues relating to the designation of the Deputy Commissioner of Immigration (Deputy Commissioner) to perform the duties of and act as Commissioner of Immigration and Naturalization (Commissioner).

I.

The designation would be based on 28 U.S.C. §§ 509, 510 and on § 103 of the Immigration and Nationality Act (Act) (8 U.S.C. § 1103). According to 28 U.S.C. § 510 the Attorney General may authorize the performance by any officer, employee, or agency of the Department of Justice of any function of the Attorney General. 28 U.S.C. § 509 vests in the Attorney General, with certain exceptions not here relevant, all functions of the Department of Justice, including those of the Immigration and Naturalization Service. The Attorney General thus has the authority under 28 U.S.C. § 510 to direct the Deputy Commissioner to perform the duties of and to act as the Commissioner. Similarly § 103(a) of the Act authorizes the Attorney General to delegate to any employee of the Immigration and Naturalization Service (Service) or to any officer or employee of the Department of Justice any of the duties and powers imposed upon the Attorney General in the Act. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges or duties conferred or imposed by the Act or any regulations issued thereunder upon any other employee of the Service. Section 103(b) of the Act charges the Commissioner with any and all responsibilities and authority in the administration of the Service of the Act which are conferred upon the Attorney General or which may be delegated to him or prescribed by the Attorney General. The Attorney General thus has the authority to delegate to the Deputy Commissioner, or require and authorize the Deputy Commissioner to perform or exercise, any or all the powers conferred or imposed upon the Commissioner.

The principal problems relating to the designation of acting officers, discussed below, are the legal authority of the acting officer, the duration of the designation, and the compensation to which the acting officer is entitled.

1. Authority of Acting Officers. An acting officer is vested with the full authority of the officer for whom he acts. Keyser v. Hitz, 133 U.S. 138, 145-46 (1890). Ryan v. United States, 136 U.S. 68, 81 (1890); United States v. Lucido, 373 F.Supp. 1142, 1145 (E.D. Mich. 1974); 20 Op. A.G. 483 (1892); 23 Op. A.G. 473, 474-76 (1901).

2. Duration of Designation (Relation to the Vacancy Act). The Vacancy Act, 5 U.S.C. §§ 3345-3349, provides that where an officer of a bureau, who is not appointed by the department head, dies, resigns, or is sick or absent, his first assistant shall perform the duties of the office (5 U.S.C. § 3346), unless the President directs a department head or another officer of an Executive department appointed by the President by and with the advice and consent of the Senate to perform the duties of the office. (5 U.S.C. § 3347). Vacancies caused by death or resignation, however, may be filled under these provisions for not more than thirty days. 5 U.S.C. § 3348. It has been the position of the Department of Justice for many years that, if vacancies are filled pursuant to 28 U.S.C. § 510 (the same would be true of § 103 of the Act), they are not filled pursuant to the provisions of the Vacancy Act, and that the thirty day limitation of 5 U.S.C. § 3348 consequently is inapplicable. This position was upheld by the courts in the analogous situations where the Deputy Attorney General or Solicitor General became Acting Attorney General pursuant to 28 U.S.C. § 508. United States v. Lucido, supra, 1147-51; United States v. Halmo, 386 F.Supp. 593, 595 (E.D. Wis. 1974).

The Comptroller General takes the position that the 30 day limitation of 5 U.S.C. § 3348 must be read into all statutes authorizing the temporary filling of vacancies, because otherwise the President could circumvent the power of the Senate to advise and consent to appointments. The Department of Justice has never agreed with the Comptroller General's position in this regard. As explained below, however, the Department recognizes that the existence of this controversy makes temporary designations undesirable, especially where certain functions can be exercised only by specific officers.

3. Compensation of Acting Officers. Under 5 U.S.C. § 5535(b)(2) the Acting Commissioner could receive only the salary of the Deputy Commissioner.

II.

An officer, designated by a department head under a statute such as 28 U.S.C. § 510 1/ to perform the duties of an officer appointed by the President by and with the advice and consent of the Senate, thus would have the same authority as the officer for whom he acts, and he could serve for an indefinite period, longer indeed than a recess appointee whose commission expires under Art. II, § 2, cl. 3 of the Constitution at the end of the next session of the Senate. The only direct drawback of the status of the acting officer is that while acting he is entitled only to the salary of his regular position and not to the compensation of the officer for whom he acts.

The question is occasionally raised why the President should be put to the inconvenience of having to go through the burdensome processes of selecting officers and securing the advice and consent of the Senate as to their appointment, if the same result could be obtained through an informal designation as acting officer by a department head. The answer is more practical and political than legal. Generally the Executive has recognized that the designation of acting officers should never be used as a substitute for appointment by and with the advice and consent of the Senate but only as an interim measure during the frequently difficult and time consuming processes of selecting a candidate and securing his confirmation by the Senate.

The following considerations underlie this recognition:

1. The President has the duty under the Constitution to appoint officers by and with the consent of the Senate. An attempt to circumvent the right of the Senate to participate in the appointment process is likely to result in political reprisals and repercussions. Hearings may be held on the status of the acting official which at best are time consuming and may require embarrassing explanations.

1/ Most if not all of the agencies have provisions authorizing a Department head to designate any officer in his Department to perform any function of the Department head. These provisions, which go back to the Hoover Commission Report of 1949, were first incorporated in the Reorganization Plans issued under the Reorganization Act of 1949. Since then many of these provisions have become statutory.

2. While, as indicated above, an acting officer has the same legal authority as a Presidential appointee, his stature as a practical matter is often somewhat inferior. He is frequently considered merely a caretaker without a mandate to take far reaching measures.

3. In constrast to the position of the Department of Justice that an official whose acting status is derived from a statutory base other than the Vacancy Act is not subject to the thirty day limitation of 5 U.S.C. § 3348, the Comptroller General contends that 5 U.S.C. § 3348 controls the time for which all acting officers may serve, or that a provision such as 28 U.S.C. § 510 does not apply to officers whose appointment requires the advice and consent of the Senate. The Executive generally chooses to avoid, if possible, disputes with the Comptroller General in view of his Congressional backing.

4. The courts have never conclusively decided the question whether the thirty day limitation of 5 U.S.C. § 3348 must be read into a statute which generally authorizes a Department head to authorize any officer or employee of the Department to perform any function vested in the Department head.2/ Hence in the relatively few situations where legal actions may be undertaken only by a specific officer,3/ the Department has tried to avoid the taking of such action by an acting official who served for more than thirty days.4/

2/ In United States v. Joseph, 519 F.2d 1068, 1070-71 (5th Cir. 1975) cert. denied 424 U.S. 909 (1976), 430 U.S. 905 (1977) the Court of Appeals seems to have assumed arguendo that 5 U.S.C. § 3348 limits the period during which an official designated pursuant to 28 U.S.C. § 510 may act. The court, however, avoided the issue by holding the decision involved had been made by the Attorney General himself rather than by the Acting Assistant Attorney General, who had merely transmitted it, and that in any event the de facto officer doctrine, discussed in part III infra, applied.

3/ In the Department of Justice this involves especially certain orders and authorizations within the competence of the Criminal and Tax Divisions.

4/ At times the Department of Justice was able to obviate this difficulty by having the acting official sign the document in his permanent rather than in his acting capacity, or by having it signed by his superior.

This legal uncertainty is a further reason indicating the importance of having the President make appointments by and with the advice and consent of the Senate and using acting designations only as an interim measure during the regular appointment process.

III.

In many instances the potential infirmities in the authority of the acting officers discussed in the preceeding parts of this memorandum will be cured by the de facto officer rule. Under that doctrine, a person who discharges the duties of an office under color of title is considered a de facto officer even if there are defects in that title. The public acts of a de facto officer are binding on the public; conversely, the public may safely assume that he is a rightful officer. McDowell v. United States, 159 U.S. 596, 601-602 (1895); Waite v. Santa Cruz, 184 U.S. 302, 322-324 (1902); United States v. Royer, 268 U.S. 394 (1925); United States v. Lindley, 148 F.2d 22, 23 (7th Cir. 1945), cert. den., 325 U.S. 858; Equal Employment Opportunity Commission v. Sears Roebuck and Co., 650 F.2d 14, 17 (2d Cir. 1981); see also United States v. Joseph, supra at 1071 n.4. As a rule, the authority of de facto officers can be challenged only in special proceedings in the nature of quo warranto brought directly for that purpose. United States ex rel. Dorr v. Lindley, supra; United States v. Nussbaum, 306 F. Supp. 66, 68-69 (N.D. Cal., 1969); Mechem, Public Office and Officers, §§ 343, 344 (1890).

As explained in the above cited cases, the de facto officer rule rests on two basic considerations. First, when a person is openly in the occupation of a public office, the public should not be required to investigate his title; conversely, an individual should not be able to challenge the validity of official acts by alleging technical flaws in an official's title to his office. 5/

A typical case of a de facto officer is one who has been properly appointed but who continues to serve after his term of office has expired. Waite v. Santa Cruz, supra; United States v. Groupp, 333 F. Supp. 242, 245-46 (D. Maine 1971), aff'd, 459 F.2d 178, 182 n. 12 (1st Cir. 1971). This consideration is of particular importance if the status of the acting officer should be attacked on the ground that 5 U.S.C. § 3348 is applicable to designations of acting officers, so that their authority expires thirty days after their designation.

5/ Another rationale for the de facto officer rule is that a person should not be able to submit his case to an officer and accept it if it is favorable to him, but challenge the officer's authority if the latter should rule against him. Glidden Company v. Zdanok, 370 U.S. 530, 535 (1962).

I hope this general discussion proves helpful. Please contact me if you require more information or if we can be of further assistance.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

Honorable D. Edward Wilson, Jr.
Associate Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Wilson:

This responds to your communication of November 1, 1982, in which you asked three questions concerning the retention of Senior Executive Service (SES) status and/or benefits for persons named to hold "acting" PAS positions (positions requiring a Presidential appointment with Senate confirmation) and for persons given recess appointments to PAS positions.

With respect to your first question, whether a person presently in the SES who is named to hold an "acting" PAS position retains his SES status during and after his service in the PAS position, the answer is affirmative. Designation as "acting" does not amount to an appointment with Senate confirmation, nor does it amount to a recess appointment without Senate confirmation as provided for in 5 U.S.C. § 3349. Whereas certain statutory procedures must be followed for PAS appointments and recess appointments to PAS positions, and certain changed-status consequences flow from such appointments (see discussion below in question #2), Congress has mandated no special changes in underlying status for persons named to hold "acting" PAS positions. I therefore conclude that such persons retain SES status during and after temporary service in PAS positions.

With respect to your second question, whether a person presently in the SES who is given a recess appointment to a PAS position retains his career SES status during and following the term of the appointment, the answer is negative. For an SES member appointed to a PAS position with the advice and consent of the Senate, status as an SES member is not retained, although the former SES member may elect to retain certain SES benefits. Congress has specifically provided that an SES member appointed to a PAS position may elect to retain certain SES benefits "as if the career appointee remained in the Senior Executive Service position from which he was appointed," 5 U.S.C. § 3392(c)

(emphasis supplied),1/ and Congress has further provided that such a person is entitled to be reinstated in the SES after separation "if the appointee applies to the Office of Personnel Management within 90 days after separation from the Presidential appointment." Id. § 3593(b). These provisions clearly indicate, however, that persons appointed to SES positions with Senate consent do not retain their SES status while occupying such positions--they are granted only the right to elect certain SES benefits. See also 5 U.S.C. § 3132(2).

For recess appointees to PAS positions, properly appointed pursuant to 5 U.S.C. § 3349, the situation is not different: such persons may elect to retain SES benefits and may apply to be reinstated in the SES upon separation, but they do not retain SES status while serving in recess appointments. The recess appointment is simply a vehicle which permits the business of the Executive Branch to be transacted during times when executive posts are vacant and the Senate is not in session. It is not a device for evading the command of the Constitution that the President obtain the consent of the Senate to his appointments of Officers of the United States. The Constitution explicitly provides for recess appointments, and further provides that they may not survive the adjournment of the session of the Senate that next follows upon their makings. U.S. Constitution, Article II, Section 2, Clause 3.

Congress sought in 5 U.S.C. § 3392(c) to accord SES benefits to all Presidential appointees whose nominations must by law receive the consent of the Senate. A recess appointee, designated pursuant to the Constitution and 5 U.S.C. § 3349, stands for the time prescribed by the Constitution in the place of a Senate confirmee. The Constitution makes no distinction between executive officers commissioned with the advice and consent of the Senate,

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1/ 5 U.S.C. § 3392(c) provides, in pertinent part:

> If a career appointee is appointed by the President, by and with the advice nd consent of the Senate, to a civilian position in the executive branch which is not in the Senior Executive Service, ... the career appointee may elect ... to continue to have the provisions of this title relating to basic pay, performance awards, awarding of ranks, severance pay, leave, and retirement apply as if the career appointee remained in the Senior Executive Service position from which he was appointed.

and those whose appointments require the Senate's consent but who are commissioned during a recess, save that the commissions of the latter expire when the Senate rises from its next session. Recess appointees are, in other respects, fully-authorized incumbents of their executive offices. There is nothing in the legislative history of 5 U.S.C. § 3392(c) to indicate that Congress meant to exclude recess appointees from the protections of the statute.

I conclude, therefore, that the option of electing SES benefits--and the concomitant forswearing of actual SES status--apply equally to PAS appointees and recess appointees to PAS positions.

Your third question, whether a person can continue to hold an SES position (and compensation) after receiving a recess appointment to a PAS slot, is answered in the negative, for the reasons set forth in the discussion surrounding question #2. Because a recess appointee to a PAS position does not retain career SES status during the term of his appointment, but must apply to be reinstated in the SES after expiration of the appointment, see 5 U.S.C. § 3593(b), it follows that such a person does not "continue to hold an SES position" during his recess appointment but must apply for reinstatement upon separation. This being so, the restrictions on recess appointments mandated by 5 U.S.C. § 5503 would not be avoided by the recess appointment of an SES member to a PAS position.

Sincerely yours,

Joseph A. Morris

Joseph A. Morris
General Counsel

THE WHITE HOUSE

WASHINGTON

March 28, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS /s/

SUBJECT: Length of Time an Official May Serve in an Acting Capacity

There is no definite limit on the length of time an official may serve in an acting capacity pursuant to a statutory succession provision. There is a case directly on point. In United States v. Halmo, 386 F. Supp. 593 (D. Wis. 1974), defendants challenged the validity of a wiretap order signed by Acting Attorney General Bork. The defendants alleged that the order was invalid since more than 30 days had elapsed since Bork became Acting Attorney General, and that therefore Bork's authority had expired under the terms of the Vacancy Act, 5 U.S.C. § 3348. The court rejected this argument, reasoning that Bork became Acting Attorney General pursuant to 28 U.S.C. § 508(b), the Justice Department succession statute, rather than the Vacancy Act. As the court concluded: "There is no time limitation imposed on those who acquire office through § 508(b)." 386 F. Supp., at 595. If the Attorney General were to leave office, Lowell Jensen would become Acting Attorney General pursuant to 28 U.S.C. § 508(b) -- the same succession provision, though slightly revised, considered in United States v. Halmo. Accordingly, under Halmo, there would be no limit on Jensen's possible tenure as Acting Attorney General.

Despite this clear judicial precedent, the Office of Legal Counsel muddied the waters somewhat in an opinion issued on December 22, 1977. The opinion considered whether the Deputy Director of OMB could continue to serve as Acting Director of OMB. OLC concluded that while there was "no specific limit" on the tenure of an Acting Director, "a Deputy Director may not properly serve indefinitely as Acting Director...[T]he tenure of an Acting Director should not continue beyond a reasonable time." The opinion helpfully added: "What period is reasonable depends upon the particular circumstances." 1 OLC Ops. 287, 289-90. One fact the OLC opinion stressed was the pendency of a nomination to fill the vacant post. If a nomination is pending, it is difficult to see how the tenure of the acting official can be argued to be unreasonably prolonged.