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THE WHITE HOUSE

WASHINGTON

September 25, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: RICHARD A. HAUSER Original signed by RAH

SUBJECT: Vacancy Act Issue at HHS

According to HHS Acting General Counsel Terry Coleman, the acting officials at HHS are carrying out their responsibilities pursuant to the authority of the Secretary "from time to time [to] make such provisions as the Secretary deems appropriate authorizing the performance of any of the functions of the Secretary by any other officer, or by any agency or employee, of the Department." Reorganization Plan No. 1 of 1953, § 6, 42 U.S.C. § 3501 note. Coleman indicated that in most instances there were not explicit delegations signed by the Secretary, but that the acting officials assumed their responsibilities pursuant to their job descriptions, which embodied the delegation.

Since the officials are acting pursuant to the delegation of authority and not the Vacancy Act, 5 U.S.C. §§ 3345-3348, the 30-day time limitation of the Vacancy Act does not apply. This has been the consistent position of the Department of Justice. The equally consistent position of the Comptroller General has been that the Vacancy Act applies to all acting officials. This is a longstanding disagreement.

I provided the foregoing information to the Press Office in time for the 11:00 a.m. briefing.

RAH:JGR:aea 9/25/85

cc: RAHauser
✓JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

October 1, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: Succession at HHS

Reorganization Plan No. 1 of 1953, 42 U.S.C. § 3501 note, established the Department of Health, Education, and Welfare, and remains the enabling legislation for the Department of Health and Human Services. (Under Public Law 96-88, references to HEW are deemed to be references to HHS, except to the extent the reference is to a function transferred to the Department of Education.) Section 2 of the Reorganization Plan created the positions of Under Secretary and two Assistant Secretaries, all PAS. Section 2 further provided:

The Under Secretary (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.

Thus, in the absence of an Under Secretary, the Assistant Secretaries should succeed to act as Secretary in the order prescribed by the Secretary.

A question has arisen whether the Assistant Secretary for Administration, a PA position, 42 U.S.C. § 3502, may succeed to act as Secretary. It is my view that he may not. The provision establishing succession, Section 2 of the Reorganization Plan, refers to Assistant Secretaries confirmed by the Senate. When 42 U.S.C. § 3502, creating the Assistant Secretary for Administration, was enacted in 1960, it contained no reference to any possible role for that Assistant Secretary in succession. By contrast, when three additional PAS Assistant Secretary slots were created by 42 U.S.C. § 3501a in 1965, the statute specifically referred back to the succession scheme of Section 2: "The provisions of section 2 of the Reorganization Plan Numbered 1 of 1953 shall be applicable to such additional Assistant Secretaries to the same extent as they are applicable to the Assistant

Secretaries authorized by that section." Thus, the statute adding PAS Assistant Secretaries explicitly includes them in the succession scheme; the statute adding the PA Assistant Secretary does not.

The Secretary may, under Section 6 of the Reorganization Plan, authorize any other officer or employee of the Department to perform any of the functions of the Secretary. Given a specific succession plan in Section 2, however, I do not think the Secretary could use Section 6 to authorize someone to perform all the functions of the Secretary in her absence. Nor could the Secretary use Section 6 to fill the Under Secretary slot, and then have that person succeed when the Secretary position became vacant. This is because Section 6 does not permit the Secretary to fill vacancies, only to assign the functions of the Secretary, and one of the functions of the Secretary is not to become Secretary when that post is vacant. That leaves only the possibility of using Section 6 to assign all the functions of the Secretary to someone and, as noted, I do not think that can be done given the specific succession rules of Section 2.

If the President disagrees with the succession order drawn up by the Secretary, he can use the Vacancy Act, 5 U.S.C. § 3347, to fill the Secretary slot after her departure. The appointment would be valid only for 30 days, 5 U.S.C. § 3348, but during those 30 days the Acting Secretary could issue a new order rearranging the succession order as desired.