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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

*Final  
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FILE:

**B-183012**

MATTER OF:

DATE:

**DEC 9 1976**

**The appointment of the Federal Insurance Administrator**

**DIGEST:**

1. Federal Insurance Administrator, position established under 42 U.S.C. § 3533a (1970) requires Presidential nomination and confirmation under Article II, § 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere.
2. Rejection by Conference Committee of Senate amendment to require confirmation of Federal Insurance Administrator does not constitute waiver of constitutional right and duty to advise and consent. Secretarial authority to appoint, including officers, under 42 U.S.C. § 3535(c) (1970) does not include Insurance Administrator. However, no exception will be taken to past compensation of incumbent or for reasonable period after date of this decision to allow time for presentation of his name for Senate confirmation.

By congressional request, the General Accounting Office has been asked to determine whether the incumbent Federal Insurance Administrator has been validly appointed by the Secretary of Housing and Urban Development (HUD) and if not, what legal action by this Office is necessary. We understand that the present incumbent was first appointed by the Secretary to serve in an acting capacity and that the appointment was later made permanent by the Secretary without presenting his name to the Senate for confirmation. The question is whether the Secretary had authority to complete the appointment herself or whether Presidential nomination and Senate confirmation of the position of Federal Insurance Administrator was required.

The position of Federal Insurance Administrator was established by section 1105(a) of the Housing and Urban Development Act of 1968, approved August 1, 1968, Pub. L. No. 90-448, 82 Stat. 476, 567, 42 U.S.C. § 3533a (1970). This section provides:

"There is hereby established in the Department of Housing and Urban Development the position of Federal Insurance Administrator."

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There is no specific requirement for Senate confirmation but neither is there a delegation of authority to establish the position without confirmation. Moreover, there is nothing in the legislative history of the Act which explains the silence as to the method of appointment which, in fact, may have resulted from an oversight. We note that in the Senate version of the bill (S. 3497, May 29, 1963) the Administrator's duties would be performed through a Government corporation, headed by an executive director, who would have been subject to confirmation. The House bill (H.R. 17969, June 25, 1968) vested all the insurance duties in the Secretary. The Conference substituted the present provision, but offered no particular reason for the change. H. Rept. No. 1785, 90th Cong., 2d Sess., 139 (1968). Thus, it is difficult to infer a positive intent to drop the requirement for confirmation.

In our view, Article II, sec. 2 of the United States Constitution requires all "Officers of the United States" to be nominated by the President and confirmed by the Senate unless there is an affirmative exception expressed by the Congress in "Law." The pertinent section of the Constitution reads as follows:

" \* \* \* [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors; other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

This provision was interpreted by a circuit court in Sully v. United States, 193 F. 185, 187 (C.C. Nev. 1910) as follows:

"The Constitution thus divides the officers of the United States into two classes: First, those whom the President shall nominate, and by and with the advice and consent of the Senate appoint. This class includes ambassadors, other public ministers, consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution itself, and which shall be established by law; second, inferior officers which shall be established by law, whose appointment Congress may vest in the President alone, in the courts of law, or in the heads of departments. When Congress creates an office, whether it be inferior or not, and fails to specify how the incumbent is to be appointed, it is one of that class designated in the Constitution as 'all other officers of the United States whose appointments

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the act herein otherwise provided for; and in such cases the appointment must be made by the President by and with the advice and consent of the Senate." (Emphasis added.)

In Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973), the Court stated as follows:

"The constitutional provision governing the appointment of federal officials is clear in its mandate. Unless Congress has vested the power of appointment of an officer in the President, the Courts, or a Department head, he may be appointed only with the advice and consent of the Senate, unless that body is in recess."

In other words, the Constitution presumes that all officers of the United States must be appointed with the advice and consent of the Senate. Only when it clearly delegates the full appointment power for a particular position or class of positions by law to "the President alone, in the Courts of Law, or in the Heads of Departments," can an appointment be lawfully made without such consent. It is thus not necessary that the Congress make each new position it creates subject to its advice and consent authority. It is automatically so subject unless the Congress affirmatively delegates the full appointment authority elsewhere.

It is true that in the great majority of statutes containing legislatively established positions, the Congress either specifically required the President to nominate the officer with advice and consent of the Senate, or it specifically delegated the appointment power elsewhere. See, e.g., the provisions of section 4 of Pub. L. No. 89-174, the Act which established the Department of Housing and Urban Development, in which the Under Secretary, the General Counsel and four Assistant Secretaries were required to have Senate confirmation but a fifth Assistant Secretary for Administration was authorized to be appointed by the Secretary with the approval of the President only. One exception in which the Congress established positions but was silent as to the method of appointment is in the Act of March 3, 1875, chapter 130, pertaining to Treasury Department personnel. The positions of "deputy comptroller," "deputy commissioner of customs," "deputy auditor," and "deputy register" were simply designated in the statute, and a salary set, but nothing more. There was however, a general provision authorizing the Secretary to appoint on his own "such number of clerks of the several classes recognized by law and such messengers, assistant messengers, copyists, watchmen, laborers, and other employees, and at such rates of compensation respectively as may be appropriated for by Congress from year to year." The Secretary of the Treasury asked the Attorney General the same question we are now considering. The Attorney General replied:

"My conclusion is that section 169 of the Revised Statutes does not invest the head of the Treasury Department with authority to appoint the new deputy bureau officers; and there being no other statutory provision, within my knowledge, which imparts to him this authority, it seems to me that under the Constitution their appointment can only be made by the President, with the advice and consent of the Senate; though in the recess of the Senate the President may, of course, fill them by temporary commissions.

"It is true that in regard to the two deputy commissioners of internal revenue, and to the deputy comptroller of the currency, previously established, their appointment is in the Secretary of the Treasury. But this is by force of express legislative enactment, specially applicable to these officers; and from the fact that authority to appoint has been thus conferred in certain cases, the existence of a general authority of like character, conceivable in similar cases, is not to be inferred, but rather the contrary." 15 Op. Attorney General 3, June 25, 1875. See also 18 Op. Attorney General 93, January 6, 1885, and 409, May 26, 1886.

We agree with the Attorney General that no valid inference of Congressional intent may be drawn from the fact that appointment authority is usually spelled out in most statutes establishing legislative positions but that this was not done in the statute in question.

The General Counsel of HUD, replying on the Secretary's behalf in a letter dated October 27, 1976, to our request for the Department's views on this issue, states:

"The issue of Senate confirmation was not raised from the program's inception in 1968 until November of 1975, when Senator Thomas V. Eagleton questioned the legality of the appointment without Senate confirmation.

"In order to resolve this issue an amendment to Section 1105 (a) of the Housing and Urban Development Act of 1968 was introduced on April 28, 1976. (Section 15 of S. 3295, Senate Report No. 94-749, 94th Congress, 2d Session, 1976.) The amendment reads as follows:

"Sec. 15. (a) Section 1105(a) of the Housing and Urban Development Act of 1968 is amended by adding at the end thereof the following new sentence: 'The Federal Insurance Administrator shall be appointed by the President, by and with the advice and consent of the Senate.'

"(b) The amendment made by subsection (a) becomes effective on January 1, 1977."

The General Counsel then points out that section 15 was deleted in conference, and states:

"It is significant that the Congress specifically considered an amendment requiring that the FIA Administrator be appointed by the President and confirmed by the Senate and, after full and free conference, agreed to delete the amendment."  
(Emphasis added.)

The General Counsel concludes therefore that the Secretary had the authority to appoint the Federal Insurance Administrator.

We are not privy, of course, to information about the nature and extent of Conference Committee deliberations about this issue. The Conference Committee report states only as follows:

"Configuration of the Federal Insurance Administrator  
The Senate bill contained a provision not in the House amendment requiring that the FIA Administrator be appointed by the President and confirmed by the Senate, effective January 1, 1977. The conference report does not contain this provision."

We have been informed that Senator Eagleton, one of the conferees, had made available to the Committee two advisory opinions—one from this Office and one from the Library of Congress—which concluded that confirmation was constitutionally required. We believe that the Conference Committee's action may, with equal validity, be attributed to a belief that the amendment was not necessary because confirmation was already mandated by the Constitution. In any case, we cannot interpret the Conference Committee's action, in the absence of an express statement to that effect, as evidence of the necessary affirmative intent to waive the Senate's right and duty to advise and consent on this appointment.

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The next question is whether there is in fact an affirmative delegation of authority "by law" to the Secretary to make the appointment we are considering.

The General Counsel, in his October 27 letter, supra, expresses the belief that 42 U.S.C. § 3535(c) (1970), gives the Secretary of the Department the authority to appoint the Administrator. This provision states in pertinent part:

"(c) Employment, compensation, authority, and duties of personnel.

"The Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees, including attorneys, as shall be necessary to carry out the provisions of this chapter and to prescribe their authority and duties. \* \* \*

Section 3535(c) was originally enacted as section 7(c) of the Department of Housing and Urban Development Act, approved September 9, 1965, Pub. L. No. 89-174, 79 Stat. 667, 670. There is a reference to the provisions of section 7(a) of the Act in House Report No. 337, 89th Congress, 1st Sess. 16 (1965), which speaks to the differences between H.R. 6927, a bill to establish a Department of Housing and Urban Development, and Reorganization Plan No. 1 of 1962. Included among these differences are the following:

"(3) Legislative provisions and new functions and powers.--The 1965 bill contains legislative provisions and authorizations, which could not legally be included in the plan, as follows:

\* \* \* \* \*

"(f) The Secretary would be authorized to appoint personnel, and fix compensation for heads of organizational components he establishes. \* \* \*

In view of this explanation and the general purport of section 7(a), it appears that Congress only intended to give the Secretary authority under this provision to appoint personnel for offices within the Department which the Secretary establishes, as opposed to offices which Congress itself establishes.

It is not necessarily significant that the delegation of appointment authority in 42 U.S.C. § 3535(c) was enacted several years before the Insurance Administrator's position was created if it is reasonable to conclude that the new position is in the same class with those described in 42 U.S.C. § 3535(c). However, we note that the position involves the

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administration of three congressionally mandated property insurance programs, involving large sums of money. Moreover, the Insurance Administrator is compensated at executive level IV and appears on the HUD reorganization chart at the same level as the General Counsel and the Assistant Secretaries. As noted earlier, section 4 of Pub. L. No. 89-174 makes each of the above named positions (except the Assistant Secretary for Administration) subject to Senate confirmation.

Accordingly, we believe that the position of Federal Insurance Administrator cannot be included among those subject to the Secretary's general appointment powers under section 3535(c). This is especially true in view of the highly responsible nature of the Insurance Administrator's duties and the desirability of affording the Congress an opportunity to be fully informed about the Administrator's qualifications. We therefore conclude that the incumbent has not been legally appointed and must be presented to the Senate for confirmation at the earliest opportunity.

While we disagree with the view of the HUD General Counsel that 42 U.S.C. § 3535(c) provides authority for the Secretary to appoint the Insurance Administrator, or that the rejection of an advice and consent amendment by the Conference Committee constitutes a waiver of the constitutional requirement for confirmation, we cannot say that there is no reasonable basis for his opinion. Since we had not rendered a formal opinion at the time the permanent appointment was made, we do not think it is appropriate for this Office to take an exception to the past payments of compensation to the incumbent Insurance Administrator. Moreover, since the Congress is presently not in session, we will not object to compensation paid to him for a reasonable period of time following the date of this decision in order to afford an opportunity to present the incumbent to the Senate for confirmation to the position of Federal Insurance Administrator.

SIGNED NIMMER B. STAATS

Comptroller General  
of the United States