114 Box 47 - JGR/Recess Appointments (1) – Roberts, John G.: Files SERIES I: Subject File

PJR Copy

THE WHITE HOUSE

WASHINGTON

September 27, 1982

MEMORANDUM FOR THE HONORABLE THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Recent Appointment Issues

In connection with the anticipated recess of the Senate from early October to late November, our office has reviewed some of the issues that might arise under Art. II, § 2, cl. 3 of the Constitution, which gives the President authority to make recess appointments, and 5 U.S.C. § 5503, which sets the limits on the circumstances under which recess appointees may be paid.

The attached appendix summarizes our views on these issues. As you will note, in large measure we are relying on a fairly comprehensive opinion that Attorney General William Rogers prepared for President Eisenhower in 1960 (41 Op. A.G. 463). In checking obvious sources (e.g., relevant U.S.C.A. annotations) for later developments, we have found none that appears to undermine any of Attorney General Rogers' conclusions. The two significant post-1960 cases do not address the major issues covered in the attached appendix, but are not inconsistent with either Attorney General Rogers' opinion or our summary. See United States v. Allocco, 305 F.2d 704 (2d Cir. 1962) (Article III judges may be recess appointed; vacancies that existed while the Senate was in session may be filled by recess appointment); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979) (independent agency commissioners may be recess appointed, despite statutory "holdover" provision.)

However, since many of the relevant issues here have not been judicially addressed, I would appreciate it if your Office could (a) confirm that there have been no developments that would call into question the validity of the 1960 opinion, and (b) advise whether you see any problems with our summary. I would not expect that any formal legal memorandum will need to be prepared; however, since the Senate may well recess very early in October, it would be very helpful to know where we stand on this just as soon as possible.

Thanks for your help.

Attachment

cc: The Honorable Edward C. Schmults

FFF:PJR 9/24/82 ✓
cc: FFFielding/PJRusthoven/Subject/Chron.

APPENDIX

Legal Issues re: Recess Appointments

This will summarize the legal issues involving recess appointments that may arise in connection with the anticipated recess of the Senate from early October until late November of 1982.

The key legal provisions dealing with recess appointments are Art. II, § 2, cl. 3 of the Constitution, which authorizes such appointments, and 5 U.S.C. § 5503, which sets limits on paying the salaries of such appointees.

The constitutional clause provides:

> "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

It is well settled that this power includes authority to fill vacancies that existed while the Senate was in session, but as to which a nomination either was not made or was not confirmed before the Senate adjourned. However, 5 U.S.C. § 5503(a) prohibits paying the salaries of persons who were recess appointed to vacancies that existed prior to the recess, unless:

(1) the vacancy arose in the last 30 days before the recess;

(2) at the end of the session, a nomination to fill the vacancy was pending in the Senate (other than a nomination of an individual who was appointed during the preceeding recess); or

(3) a nomination for the office was rejected during the last 30 days of the session and the person appointed during the recess is someone other than the rejected nominee.

In addition, 5 U.S.C. § 5503(b) requires that, with respect to these three categories of recess appointees who may be paid, a nomination to fill the vacancy must be submitted to the Senate "not later than 40 days after the beginning of the next session of the Senate."

There is little doubt that a recess of the length anticipated here -- i.e., well over thirty days -- is long enough to permit exercise of the recess appointment power. However, questions could arise as to the meaning of the term "next session" -- in the context both of the constitutional provision that recess

appointments "shall expire at the End of [the Senate's] next Session," and the statutory requirment that a nomination for any post filled by recess appointment be submitted within 40 days of "the beginning of the next session of the Senate."

Neither of these issues appears to have been definitively addressed by the courts. However, as to the first, the general view appears to be that the phrase "next Session" in the constitutional provision for expiration of the terms of recess appointees refers to the next full session after the adjournment sine die of the present session, and does not mean the next time the Senate convenes following a recess to a certain date during the present session. In other words, if the Senate adjourns during the present session from October 2 until November 28, the constitutional term of persons appointed during that recess would not expire until the end of the next regular session -- i.e., the first session of the 98th Congress.

This conclusion was expressed in a 1960 opinion of Attorney General William Rogers for President Eisenhower (41 Op. A.G. 463), and is consistent with cases and other authorities cited in that opinion concerning the difference between a sine die ajournment and a recess within a session. In addition, as also noted in that opinion, the Comptroller General followed this view in determining the pay status of persons who were (a) appointed in 1948 during the recess between the adjournment of the second session of the 80th Congress and the reconvening of that session at the call of President Truman, but (b) not confirmed prior to the sine die adjournment of that session.

Obviously, the manner in which the Senate adjourns is critical in this context. Were the Senate to adjourn sine die in early October and then be called into special session by the President (pursuant to Art. II, § 3 of the Constitution), the sine die adjournment would probably be viewed as terminating the second session of the 97th Congress, and the special session convened by the President might well be considered the "next Session" at the end of which the terms of recess appointees would expire, absent confirmation. 1/ Hence, it is important that the Senate in fact adjourn, as it is anticipated it will, to a specific date for reconvening within the present session.

The interpretation of the phrase "next session" may be different, however, in the context of the statutory requirement involving

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1/ It should be noted that when the second session of the 80th Congress was reconvened at the call of President Truman under Art. II, § 3, that session had not adjourned sine die. Rather, prior to the President's call it had adjourned from June 20 to December 30, 1948.

payment of recess appointees that a nomination for any post filled by recess appointment be submitted "not later than 40 days after the beginning of the next session of the Senate." Attorney General Rogers' 1960 opinion concluded, in essence, that this issue was unclear, but advised that the safer course was to submit nominations of recess appointees within 40 days of the post-recess reconvening of the Senate during the present session of the Congress, rather than awaiting the start of the next full session -- a practice that would avoid any subsequent issue arising as to the pay status of such recess appointees. Indeed, the opinion recommended renominating recess appointees whose nominations had been pending before the recess, with the renomination noting that a recess appointment had now been made -- even though the Senate had provided in its 1960 recess resolution that pending nominations would lay over until the Senate reconvened. 2/

In the present case, of course, this may well have little if any legal significance. If the Senate reconvenes in late November, as expected, it will likely complete its business and adjourn sine die in less than 40 days. Conceivably, though, it could be argued that, even if this "next session" lasts less than 40 days before the full session is adjourned sine die, the statute requires that nominations be submitted during that "next session." Moreover, as a practical matter it should be simple, when the Senate reconvenes in November, to submit formal nominations of persons appointed during the recess (including renominations of pending nominees whose nominations were held over in status quo during the recess). In addition, following this practice (a) will err on the safe side as to the pay status of recess appointees; (b) should not change the fact that their terms will not expire until the end of the next full session of the Senate; and (c) would probably be the wise course to follow from a Senate relations standpoint.

Although the discussion above has focused on recess appointments that might be made during the upcoming recess, the legal issues

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2/ Senate Standing Rule 38.6 provides that if the Senate adjourns for more than 30 days, pending nominations not finally acted upon at the time the recess commences shall be returned to the President. However, it is common to seek unanimous consent to suspend the rule and hold nominations in status quo when the Senate takes a recess during the session. While it is possible that unanimous consent will not be obtained as to particular nominees, it is probable that such consent will be sought and obtained with respect to a number of pending nominees when the Senate recesses this October. Obviously, however, this is a matter that should be discussed with the Senate leadership.

in question also affect the status of persons who were recess appointed prior to the second session of the 97th Congress but are not confirmed when the Senate recesses this October. Specifically, if the Senate recesses in October to a date certain within this session rather than adjourning sine die, the constitutional terms of such present recess appointees should not expire when the Senate recesses in October, but should continue until sine die adjournment of the current full session.

In the case of present recess appointees, however, there should be no need to resubmit their nominations when the Senate reconvenes later in the session (assuming, of course, that their nominations are not returned when the recess begins, as discussed in footnote 2, supra). Unlike nominees who might be appointed during the upcoming recess, nothing about the status of these previously recess appointed nominees will have changed, and there will be no new facts about which the Senate either must or would want to be informed.

THE WHITE HOUSE

WASHINGTON

September 27, 1982

MEMORANDUM FOR EDWIN MEESE, III
JAMES A. BAKER, III
MICHAEL K. DEAVER
KENNETH M. DUBERSTEIN
HELENE A. VON DAMM

FROM: FRED F. FIELDING

SUBJECT: Recess Appointment Issues

In connection with the anticipated recess of the Senate from early October to late November, our office has reviewed some of the issues that might arise under Art. II, § 2, cl. 3 of the Constitution, which gives the President authority to make recess appointments, and 5 U.S.C. § 5503, which sets limits on the circumstances under which recess appointees may be paid.

These issues are discussed in more detail in the attached appendix. In summary form, however, our conclusions are:

- If, as seems highly probable, the Senate adjourns to a date certain later this year, rather than adjourning sine die, the constitutional terms of persons appointed during this recess should not expire when the Senate adjourns sine die following its return in November. Instead, those terms should continue to the end of the next full session of the Senate -- i.e., the end of the first session of the 98th Congress.

- With respect to persons recess appointed prior to the this session who may not be confirmed when the Senate starts its recess in October (e.g., John Van de Water at NLRB), their constitutional terms should not expire when the recess commences, but only after the Senate adjourns sine die at the conclusion of the second session of the 97th Congress.

- In both of the above instances, salaries for the recess appointees should continue until the expiration of their respective terms, assuming other statutory requirements have been or will be met.

- One of those statutory requirements is submitting to the Senate nominations of recess appointees within 40 days "after the beginning of the next session of the Senate." Although the law is not clear on this point, the safer course as to all persons appointed during this next recess would be to submit nominations when the Senate returns in November, rather than waiting till the start of

the first session of the 98th Congress. Even though the Senate is unlikely to remain in session for 40 days after its return, submitting such nominations should be easy to do, will avoid any issue about compliance with the statute (and hence, the pay status of such appointees), and is probably preferable from a Senate relations standpoint.

The same course should probably be followed even for recess appointments of persons whose nominations are already pending before the Senate -- i.e., renominations should probably be submitted when the Senate returns in November, with the renominations noting that a recess appointment has now been made. The fact of recess appointment is often considered relevant by the Senate in considering a nomination, and renomination again seems the safer path from both a legal and a Senate relations standpoint.

As to persons previously recess appointed, however, no renomination or other steps should be necessary upon the Senate's return in November. Nothing about the status of such previously appointed nominees will have changed, and they will simply continue in office until the sine die adjournment of the Senate at the end of the session, unless they are confirmed.

The last two points have assumed that the Senate will provide for pending nominations to lay over in status quo for the recess. Senate rules state that, for adjournments of more than 30 days, all pending nominations are returned to the President; but this is often waived by unanimous consent (at least for some nominees). If the Senate fails to provide that some or all nominations will lay over during the recess, then all nominees not held over (whether previously recess appointed, appointed during the upcoming recess or not appointed at all) will need to be resubmitted to the Senate -- and the safer course would be to submit the renominations when the Senate reconvenes in November, rather than waiting till the next Congress.

Obviously, the Senate leadership's intentions as to seeking consent to have nominations lay over, and whether it anticipates problems in obtaining such consent for particular nominees, need to be determined.

All of the foregoing depends on the Senate recessing in October to a date certain rather than adjourning sine die at that time. A sine die adjournment in October would be considered the end of the Senate's second session of the 97th Congress (thereby ending the terms of persons recess appointed before the session but not yet confirmed); and if the President called the Senate back this year, this

"special session" could be deemed the "next session" of the Congress within the meaning of the Recess Appointments Clause (such that the terms of persons appointed during the upcoming recess would expire at the end of the special session, rather than at the end of the next full session).

As noted earlier, it seems highly probable that the Senate intends to adjourn in October to a date in November; but we need to be certain of Senate plans on this point.

You should know that few of the legal issues discussed above have been definitively resolved by the courts. Instead, these conclusions are based in large part on historical practice and the formal advice Attorneys General have given to Presidents -- including in particular a comprehensive opinion of Attorney General William Rogers for President Eisenhower in 1960. Although I agree with Attorney General Rogers' conclusions, and we have checked cases since that date to confirm that no new developments have undermined those conclusions, I have also asked the Office of Legal Counsel at Justice to confirm that the Rogers opinion still reflects the views of the Department.

Let me know if you have any questions about any of the foregoing; thank you.

Attachment

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The constitutional clause provides:

> "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

It is well settled that this power includes authority to fill vacancies that existed while the Senate was in session, but as to which a nomination either was not made or was not confirmed before the Senate adjourned. However, 5 U.S.C. § 5503(a) prohibits paying the salaries of persons who were recess appointed to vacancies that existed prior to the recess, unless:

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In addition, 5 U.S.C. § 5503(b) requires that, with respect to these three categories of recess appointees who may be paid, a nomination to fill the vacancy must be submitted to the Senate "not later than 40 days after the beginning of the next session of the Senate."

There is little doubt that a recess of the length anticipated here -- i.e., well over thirty days -- is long enough to permit exercise of the recess appointment power. However, questions could arise as to the meaning of the term "next session" -- in the context both of the constitutional provision that recess

appointments "shall expire at the End of [the Senate's] next Session," and the statutory requirment that a nomination for any post filled by recess appointment be submitted within 40 days of "the beginning of the next session of the Senate."

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This conclusion was expressed in a 1960 opinion of Attorney General William Rogers for President Eisenhower (41 Op. A.G. 463), and is consistent with cases and other authorities cited in that opinion concerning the difference between a sine die ajournment and a recess within a session. In addition, as also noted in that opinion, the Comptroller General followed this view in determining the pay status of persons who were (a) appointed in 1948 during the recess between the adjournment of the second session of the 80th Congress and the reconvening of that session at the call of President Truman, but (b) not confirmed prior to the sine die adjournment of that session.

Obviously, the manner in which the Senate adjourns is critical in this context. Were the Senate to adjourn sine die in early October and then be called into special session by the President (pursuant to Art. II, § 3 of the Constitution), the sine die adjournment would probably be viewed as terminating the second session of the 97th Congress, and the special session convened by the President might well be considered the "next Session" at the end of which the terms of recess appointees would expire, absent confirmation. 1/ Hence, it is important that the Senate in fact adjourn, as it is anticipated it will, to a specific date for reconvening within the present session.

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In the present case, of course, this may well have little if any legal significance. If the Senate reconvenes in late November, as expected, it will likely complete its business and adjourn sine die in less than 40 days. Conceivably, though, it could be argued that, even if this "next session" lasts less than 40 days before the full session is adjourned sine die, the statute requires that nominations be submitted during that "next session." Moreover, as a practical matter it should be simple, when the Senate reconvenes in November, to submit formal nominations of persons appointed during the recess (including renominations of pending nominees whose nominations were held over in status quo during the recess). In addition, following this practice (a) will err on the safe side as to the pay status of recess appointees; (b) should not change the fact that their terms will not expire until the end of the next full session of the Senate; and (c) would probably be the wise course to follow from a Senate relations standpoint.

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in question also affect the status of persons who were recess appointed prior to the second session of the 97th Congress but are not confirmed when the Senate recesses this October. Specifically, if the Senate recesses in October to a date certain within this session rather than adjourning sine die, the constitutional terms of such present recess appointees should not expire when the Senate recesses in October, but should continue until sine die adjournment of the current full session.

In the case of present recess appointees, however, there should be no need to resubmit their nominations when the Senate reconvenes later in the session (assuming, of course, that their nominations are not returned when the recess begins, as discussed in footnote 2, supra). Unlike nominees who might be appointed during the upcoming recess, nothing about the status of these previously recess appointed nominees will have changed, and there will be no new facts about which the Senate either must or would want to be informed.

THE WHITE HOUSE

WASHINGTON

July 16, 1984

MEMORANDUM FOR JOHN S. HERRINGTON
BECKY NORTON DUNLOP

FROM: ROBERT C. MacKICHAN, JR.

SUBJECT: RECESS APPOINTMENTS PRIOR TO SINE DIE ADJOURNMENT OF SENATE

ISSUE: If the Senate eliminates its scheduled session (August 31 - September 5) will this create a recess of sufficient duration to exercise the presidential recess appointment authority?

DISCUSSION: The original Senate calendar provided for a recess for the GOP Convention August 10 - August 27 and a Labor Day recess between August 31 - September 5. If this schedule is maintained, the recess for the GOP Convention, a total of 17 days, would not arguably be of sufficient duration to allow the President to exercise the constitutional recess appointment authority.

Alternatively, should the schedule be changed, eliminating the session between August 31 - September 5, this would then create a recess between August 10 - September 5, a total of 24 days. As discussed in the attached memorandum dated February 20, 1984, prior review of the President's recess authority, particularly by opinions of the Attorney General, have left unanswered whether any recess less than 28 days will be of sufficient duration to allow the President to exercise recess appointment authority. A recess of 24 days would arguably be sufficient to exercise the presidential recess appointment authority, but there are no opinions, either judicial or by the Attorney General which would support this position.

CONCLUSION: A Senate recess between August 10 - September 5 would probably be of sufficient duration to allow the President to exercise recess appointment authority, but uncertainty would make it a more prudent decision to defer any recess appointments until after the sine die adjournment of the Senate.

THE WHITE HOUSE

WASHINGTON

February 20, 1984

MEMORANDUM FOR: JOHN HERRINGTON
BECKY NORTON DUNLOP
ASSOCIATE DIRECTORS

FROM: ROBERT MACKICHAN

SUBJECT: Recess Appointments in 1984

ISSUES

1. Are any of the Senate recesses in 1984 of sufficient duration to exercise the Constitutional Presidential recess authority?

2. What would be the term for a recess appointment made during a recess in 1984 prior to the adjournment sine die (October 4) of the second session of the 98th Congress?

3. What constraints, if any, would apply to recess appointments made during a recess in 1984?

CONCLUSIONS

1. The Senate recess for Independence Day (June 29-July 23) would be the most appropriate for the exercise of the Presidential recess appointment authority. The recess for the GOP Convention (August 10-August 27), a recess of only 17 days, would be of questionable duration to justify the exercise of the recess appointment authority.

2. An individual recess appointed prior to the adjournment of Congress sine die on October 4, 1984 would serve until the adjournment sine die of the first session of the 99th Congress (November or December of 1985).

3. The usual constraints of 5 U.S.C. 5503(b) would apply to a recess appointment in 1984.

AUTHORITY

The Constitutional Presidential power to appoint, designate or assign temporarily an official to fill a vacancy during a recess of the Senate is enumerated in Article II, §2, Clause 3 of the U.S. Constitution wherein it provides:

> The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session.

It is undisputed that this power is not limited to vacancies that occurred during the recess but rather, extends to all vacancies that exist during a recess. In an apparent attempt to frustrate the President's power to exercise this authority, Congress enacted 5 U.S.C. §56, prohibiting salary payments from the Treasury for persons who took a recess appointment if the vacancy existed while the Senate was in session. However, amendments to this original statute have now exempted certain classes of appointments from the salary proscription. These exemptions are found in 5 U.S.C. §5503(a) and allow the Treasury to make salary payments to persons who took office under recess appointment in any of the following circumstances:

(1) If the vacancy arose within 30 days before the end of the session of the Senate;

(2) If, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent;

(3) If a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

However, 5 U.S.C. §5503(b) further prohibits the compensation if the President fails to submit a nomination to the Senate withing forty days after the beginning of the next session. The term next session as used in the statutory context probably has a different meaning than as it is used in the Article II constitutional provision.

The legislative history for §15 U.S.C. 5503(a)-(b) fails to address this issue although historical practice would dictate that "next session" refers to the post-recess reconvening of the Senate during the present session of the Congress.

The term "next session," as found within the Constitution, Article II provision has been interpreted to be the next full session after the adjournment sine die of the present session (eg. the current session is the 2nd session of the 98th Congress and if someone is recessed before adjournment sine die on October 4, they would serve until the end of the 1st session of the 99th Congress).

The first practical standard pertaining to the necessary duration of a recess was articulated in an Opinion of the Attorney General, 33 Op. Atty. Gen. 20 (1921), which relied heavily upon earlier opinions of the Attorneys General, 1 Op. Atty. Gen. 631 (1823); 12 Op. Atty. Gen. 32 (1866), case law, Gould v. U.S., 19 C. Cls. 593 and a report of the Senate Judiciary Committee, S. Rep. No. 4389, 58th Cong. 3rd Sess. (1905). A more recent opinion of the Attorney General, 41 Op. 80 (1960), only peripherally discussed the necessary duration of a recess to invoke the constitutional recess appointment authority.

The language used in the Senate Judiciary Committee report appears to have been uniformly adopted as the criteria for ascertaining what constitutes a recess. The report interpreted the term "recess" as follows:

> The period of time when the Senate is not sitting in a regular or extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it cannot receive communication from the President or participate as a body in making appointments.

The opinion of the Attorney General 33 Op. 20 (1920) contains the most pertinent language relating to the necessary duration of a recess. Within that opinion the Attorney General opined that a recess of 28 days would be a recess within the meeting of Article II of the Constitution. However, the Attorney General also added the following:

> "Nor do I think an adjournment for 5, or even 10 days can be said to constitute a recess intended by the Constitution. In the very nature of things a line of demarcation cannot be accurately drawn." Id. at 25.

The Attorney General then quoted the language of the Senate Judiciary Committee report to define the term recess. It is apparent that a gray area exists between ten and twenty-eight days. The Independence Day recess is twenty-six and probably adequate for exercising the recess authority.

ID # 250658

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

P6057

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84/08/07

Name of Correspondent: Robert C. Byrd

☐ MI Mail Report User Codes: (A) PRES (B) _____ (C) _____

Subject: Expresses "deep concern about the number of recent recess appointments and urges you to refrain from making similar appointments when the Senate is fully capable of exercising its constitutional function of advising and consenting." Goes on to say that "resort to recess appointments in questionable circumstances serves neither the Constitution nor the appointee ... it fuels cynicism and builds disrespect for law."

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
LAGGLE	ORIGINATOR	84/08/09	MD	A	84/08/17
VP Rhoe	Referral Note: R	84/08/20			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /

DISPOSITION

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590

August 17, 1984

Dear Senator Byrd:

Thank you for your August 6 letter to the President in which you detailed your concerns regarding recess appointments in general and specifically the appointment of Dr. Martha Seger to the Board of Governors of the Federal Reserve System.

Please know that your thoughts and recommendations in this regard have been transmitted to John Herrington, Assistant to the President for Presidential Personnel. I am sure that he will review your statement of concern.

With best wishes,

Sincerely,

M. B. Oglesby, Jr.
Assistant to the President

The Honorable Robert C. Byrd
Minority Leader
United States Senate
Washington, D.C. 20510

MBO/RRJ/tjr

cc: w/copy of inc to John Herrington - for DIRECT response
cc: w/copy of inc to Kathie Regan - FYI
cc: w/copy of inc to Nancy Kennedy - FYI

United States Senate
Democratic Policy Committee

August 6, 1984

The President
The White House
Washington, D.C. 20500

250652

Dear Mr. President:

I am writing to express my deep concern about the number of recent recess appointments and to urge you to refrain from making similar appointments when the Senate is fully capable of exercising its constitutional function of advising and consenting to executive nominations.

The latest in a series of recess appointments was made on July 20, scarcely 72 hours before the Senate reconvened following the July 4 and Democratic Convention recess. At the beginning of the same recess, sixteen recess appointments were made to a number of different federal bodies. In my view, none of the most recent recess appointments were made in the circumstances that induced the Framers to allow for appointments "that may happen during the Recess of the Senate". As indicated in a long line of opinions by Attorneys General, presidential powers arising in the event of an adjournment of the Congress are to be determined by the ability of the Senate to perform its functions. In overturning an exercise of the presidential pocket veto power during an abbreviated congressional recess, the Court of Appeals for the District of Columbia Circuit in 1974 observed that "(t)he modern practice of Congress with respect to intra-session adjournments creates neither...the hazards (of) long delays (nor) public uncertainty...." At no time has the Senate been out of session long enough to prevent the filling of vacancies which, in the public interest, may not be left open for any protracted period.

In brief, the appointments of Dr. Martha Seger to the Federal Reserve Board, Vice Admiral Lando N. Zech, Jr., to the Nuclear Regulatory Commission, six members of the National Council on the Humanities, and other recent appointments could and should have followed the constitutionally prescribed manner. In the words of the Supreme Court:

> The Appointments Clause could, of course, be read as merely dealing with the etiquette or protocol in describing "Officers of the United

> States," but the drafters had a less frivolous purpose in mind. .... We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by S 2, cl. 2, of ... Article (II).

Over the course of the last three and one-half years, some 80 recess appointments have been made to a wide variety of agencies and commissions. The Senate has demonstrated its willingness to support these selections by subsequently confirming the bulk of the recess appointments.

In the early days of the Republic, a recess was interpreted to mean the period between the first and the second sessions of a Congress. More recently, recess appointments have been made during intra-session recesses of several weeks duration. But the unstated rationale has remained the same. Recess appointments should be made when the Senate is recessed for a protracted period and where the lack of an appointee will seriously hamper the operations of the government.

The line between what is and what is not an extended recess during which an appointment can be made has not been clearly delineated by the courts. Most of the doctrine on the matter has emerged from historical practice and infrequent opinions from the Justice Department. No doubt, that line should be more carefully defined at some point in the future.

The occasion for making a recess appointment can be questioned on practical as well as constitutional grounds. Both grounds are involved when a recess appointment is made to evade the proper role of the Senate or to avoid controversy surrounding a nominee.

I am especially concerned about the appointment of Dr. Martha Seger whose nomination is a case in point. At stake is a fourteen-year appointment to what many consider the country's most influential economic body, the insititution that controls the money supply, and plays a lead role in regulating the nation's financial system. A July 2, 1984

recess appointment to the Board of Governors of the Federal Reserve System, Dr. Seger's nomination was sent forward only a month earlier on June 2, 1984. The Senate Banking, Housing and Urban Affairs Committee held four days of hearings and favorably reported her nomination on June 28. The Senate then recessed for twenty-three days. The recess appointment was made the following Monday.

I know of no compelling reasons that justify Dr. Seger's appointment on that basis. There are six other sitting Governors on the Federal Reserve Board. Her presence was not required at the July Federal Open Market Committee meeting to make a quorum or to debate policy. Because of doubts regarding her qualifications, Dr. Seger's nomination was highly controversial. All the Democratic Committee members opposed her nomination and several indicated they would oppose her nomination on the floor. A recess appointment sidesteps a full and timely airing of such controversies in a manner that does not, in my view, serve the nation's best interests. And, as you may know, there have been similar objections raised to several of the recess appointments to the National Council on the Humanities.

Because a recess appointee can be removed by a subsequent, differing nomination by the President or rejected by the Senate, there is a real danger that the independence of the appointee could be undermined by his or her recess status. It is just this kind of objection that has been raised to a recent recess appointment to the Nuclear Regulatory Commission. According to press reports, "...both officials and critics of the ... nuclear industry questioned the appointment ... saying the Commission's ruling would be more credible if its members were confirmed normally." The appointment to the Nuclear Regulatory Commission is rendered all the more questionable because the committee of jurisdiction was not even given an opportunity to hold hearings on the nominee.

I must again emphasize my objection to the excessive use of the recess appointment power, and urge that no recess appointment be made to circumvent the constitutional function of the Senate. Instead, I urge that recess appointments be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a

vitally needed public officer. Existing law gives the Executive more than ample authority to shift personnel about to fill vacancies for temporary periods. Resort to recess appointments in questionable circumstances serves neither the Constitution nor the appointee. It fuels cynicism and builds disrespect for law and deprives the appointee of the national perspective that inheres in senatorial confirmation.

Sincerely yours,

Robert C. Byrd

RCB/khh

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Recess Appointments Issues

This is in response to your memorandum of September 27, 1982 regarding the recess appointments issues. That memorandum's appendix, entitled "Legal Issues re: Recess Appointments," addresses a number of questions which may arise with respect to appointments during the current Senate recess. The current recess is an intrasession recess of the 2d Session of the 97th Congress of almost two months' duration. The Senate adjourned on October 2, 1982 to a date certain, November 29, 1982. See H. Con. Res. 421, 128 Cong. Rec. S13410, and 128 Cong. Rec. D1325 (daily ed. Oct. 1, 1982). You have asked us to (a) confirm that there have been no developments that would call into question the validity of the (Acting) Attorney General's 1960 opinion on recess appointments (41 Op. A.G. 463), and (b) advise whether we see any problem with the appendix's summary of the pertinent legal rules governing the exercise of recess appointment authority under Art. II, § 2, cl. 3 of the Constitution, and of the effects of the provisions of 5 U.S.C. § 5503, setting limits on the circumstances under which recess appointees may be paid.

With respect to your second question, we believe that the legal summary contained in the appendix to your memorandum, in general, correctly states the applicable legal principles. As you note, the key provisions governing recess appointments are Art. II, § 2, cl. 3 of the Constitution 1/ and 5 U.S.C.

1/ Article II, § 2, cl. 3 provides:

> "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

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2/ Section 5503(a) prohibits paying the salary of a recess appointee to an office required by law to be filled by and with the advice and consent of the Senate, where the vacancy in the office existed while the Senate was still in session, unless one of three conditions is met:

> (1) the vacancy arose within 30 days before the end of the session of the Senate;
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> (2) at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
>
> (3) a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

Section 5503(b) requires a nomination to fill the office of a recess appointee who has been paid under one of these three exceptions to be submitted to the Senate within 40 days after the beginning of its next session.

Present 5 U.S.C. § 5503 is the 1966 codification of former 5 U.S.C. § 56, 54 Stat. 751 (1940). See P. L. 89-554, 80 Stat. 475 (1966). The Senate and House Reports both state simply that "[s]tandard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report." H. Rept. No. 901, 89th Cong., 1st Sess. 85 (1965); S. Rept. No. 1380, 89th Cong., 2d Session 105 (1966). Thus, any changes in wording since the times of the 1960 Attorney General Opinion and the post-1940 Comptroller General's opinions would appear to have been made without any intention to make substantive changes.

by recess appointments both when the vacancies occur during the recess and when they existed prior to the recess but had not been filled, either because a nomination had not been made or because a nominee had not been confirmed prior to the adjournment. 41 Op. A.G. at 465. However, as you note, § 5503(a) prohibits payment of recess appointees if the vacancies to which they are appointed existed while the Senate was in session, unless one of three conditions contained in that subsection is satisfied.

We agree that:

(1) Recess appointments may be made during extended intra-session recesses of the Senate, like the present recess of well over 30 days duration, and such appointees may be paid under § 5503 where that section's conditions are satisfied. See 41 Op. A.G. at 466-67, and the authorities cited therein. In this connection, it is perhaps worth repeating a point made in the 1960 Attorney General's opinion. 41 Op. A.G. at 472 n.13. The Comptroller General has interpreted § 5503(a)(2) as prohibiting payment only where the person receiving the recess appointment was already serving under a prior recess appointment. 52 Comp. Gen. 556, 557 (1973); 36 Comp. Gen. 444 (1956). Thus, if someone other than a prior recess appointee whose nomination was pending at the time of adjournment is appointed, § 5503(a)(2) does not bar payment.

(2) The prevailing view is that the language "next Session" in Art. II, § 2, cl. 3 refers to the session following the adjournment sine die of the current one. Thus, a recess appointment made during an intrasession recess expires upon the adjournment sine die of the session of Congress which follows the adjournment sine die of the session during which the intrasession recess occurs. It follows that, at least in the absence of a special session, recess appointments made during the current recess (or prior recesses of the current Session) would expire when the 1st Session of the 98th Congress adjourned sine die. 41 Op. A.G. at 465. The Comptroller General has ruled that recess appointees may be paid consistently with § 5503 for the same period. 28 Comp. Gen. 30 (1948).

(3) In the event the 97th Congress were recalled for a special session after the adjournment sine die of its 2nd Session, an unsettled question might arise whether appointments made during the present election recess would expire at the end of the special session, or at the end of the 1st Session of the 98th Congress, i.e., whether the "next Session" under

Art. II, § 2, cl. 3 was the special session or the 1st Session of the 98th Congress. A parallel unsettled question might arise with respect to their pay under § 5503(a). We agree that a special session should probably be viewed as the "next Session" for purposes both of the constitutional provision and § 5503(a).

(4) Section 5503(b) requires the submission of a nomination to Congress for any post filled by a recess appointment covered by § 5503(a) "not later than 40 days after the beginning of the next session of Congress." The effect of a violation of § 5503(b) is to terminate the pay of the recess appointee. 52 Comp. Gen. at 557-58. It remains unsettled whether the language "next session" in § 5503(b) refers to a post-recess reconvening of the same Congress, or to the beginning of the session of Congress which succeeds the adjournment sine die of the current one. We agree that the safer course is to adhere to the advice of the 1960 Attorney General Opinion and submit nominations of recess appointees to the Senate when it reconvenes after its intrasession election recess. See 41 Op. A.G. at 477. 3/ We believe this is the safer course even though the post-recess session of the Senate is likely to last less than 40 days, and it might plausibly be argued that compliance with § 5503(b) is unnecessary where the Senate adjourns before the President is required to submit a nomination. If a nomination is submitted, no question can arise whether the recess appointee is entitled to be paid under § 5503(b). If § 5503(b) is violated, of course, a recess appointee may continue to serve, but cannot be paid after the 40th day following the beginning of the next session until he is nominated and confirmed by the Senate, though his right to pay would relate back to the 41st day if he were so nominated and confirmed. 52 Comp. Gen. at 558. As noted in the 1960 Opinion, 41 Op. A.G. at 478-479, the Comptroller General has interpreted § 5503(a)(2) as not terminating the pay of such subsequently-nominated recess appointees prior to the time they would otherwise have terminated. 28 Comp. Gen. 121 (1948). I.e., § 5503 (b)(2) will not operate to terminate the pay of recess appointees when the Senate next adjourns after reconvening on November 29 as a result of submitting their nominations.

3/ The 1960 Attorney General's Opinion recommends the submission of nominations for those who received recess appointments to vacancies which opened after the adjournment of the Senate, even though § 5503 does not cover those appointments. 41 Op. A.G. at 478 n.25.

(5) Since the Senate adjourned to a date certain and not sine die, existing recess appointments made prior to the current recess will continue to be valid through the current recess. The adjournment sine die of the 97th Congress after it reconvenes on November 29, 1982 will terminate those existing recess appointments which were made prior to the beginning of the 2d Session of the 97th Congress.

(6) When the Senate reconvenes on November 29, 1982, questions may arise with respect to resubmission of the nominations of persons holding recess appointments. We agree that the better course is to submit the nominations of prior as well as current recess appointees after the Senate reconvenes in November unless there has been unanimous consent to suspend Standing Rule XXXl(6) of the Senate with respect to their nominations. Standing Rule XXXl(6) provides:

> "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." 4/

Our search of the Congressional Record indicates that there was unanimous consent to suspend the operation of that Rule with

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4/ Senate Manual 1981, at pp. 58-59 (Senate Doc. No. 97-1).

respect to all but eight pending nominations. 5/ Resubmission of the one recess nomination would avoid the risk that § 5503(b) might be interpreted to terminate his pay. Section 5503(a)(2) has been interpreted as not risking premature termination of the pay of recess appointees as a result of such submissions. See paragraph (5) supra and 41 Op. A.G. at 478-79, citing 28 Comp. Gen. 121 (1948).

With respect to your first question, we agree that there have been no developments which call into question the validity of the pertinent conclusions in the 1960 Opinion of Acting Attorney General Walsh. As your memorandum notes, the two intervening reported cases involving recess appointments are not inconsistent with either the 1960 Opinion or your appendix's summary. 6/ Also, two recent cases challenging recess appointments

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5/ 128 Cong. Rec. S13269 (daily ed. Oct. 1, 1982). Those eight nominations were:

> Harvey J. Staszewski, Jr., to be a member of the U.S. Metric Board; Frederic V. Malek, to be Governor, U.S. Postal Service; John Van de Water, to be Chairman of the NLRB; Wendy Borcherdt, to be Deputy Undersecretary for Intergovernmental and Interagency Affairs, Department of Education; and Robert A. Destro, Constantine Nicholas Dombalis, and Guadalupe Quintanilla, to be Members of the Commission on Civil Rights.

Only Mr. Van de Water was a recess appointment. 17 Weekly Comp. Pres. Doc. 883 (August 13, 1981).

6/ United States v. Allocco, 305 F.2d 704 (2d Cir 1962); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

In the Staebler case, the District Court rejected a challenge to the recess appointment of his successor by a holdover member of the Federal Election Commission. The Court stated, inter alia:

> There is nothing to suggest that the Recess Appointments Clause was designed as some

(Continued)

made by President Reagan do not cast any doubt on the conclusions of your summary. 7/

6/ (Continued from p. 6)

> sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity.
>
> . . . There is no justification for implying additional restrictions not supported by the constitutional language.
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> Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session . . . . 464 F. Supp. at 597.

In Allocco, the criminal defendant unsuccessfully challenged the recess appointment of his trial judge. The Second Circuit held that President Eisenhower had authority under the Recess Appointments Clause to fill the district court vacancy which occurred two days before the Congress adjourned sine die on August 2, 1955. The Court rejected the argument that the Recess Appointments Clause covers only vacancies which open during a recess. 305 F.2d at 709-15.

7/ Bowers v. Moffet, Civil Action No. 82-0195 (D.D.C. 1982), was dismissed voluntarily without opinion after Judge Hart indicated that he intended to dismiss the case. It involved, inter alia, a challenge to President Reagan's recess appointment of Kenneth E. Moffet to be Federal Mediation and Conciliation Service Director on January 11, 1982 during the intersession recess of the 97th Congress.

McCalpin v. Dana, No. 82-0542 (D.D.C. 1982), which was decided on cross motions for summary judgment in the District Court on October 5, 1982, involved a challenge to President Reagan's appointments of seven Members of the Board of the Legal Services Corporation, also during the intersession recess of the 97th Congress in December and January of 1981. Although

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We also do not believe that the two recent pocket veto cases cast any doubt on our conclusions. These two cases, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), and

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7/ (Continued from p. 7)

the President nominated nine of the appointees after the Senate convened for the 2d Session, none of them has been confirmed. The Legal Services Corporation Act provides for appointment of the Board members by the President with the advice and consent of the Senate. However, the Act contains no express provision for recess appointments, and also provides that the Board members are not Officers of the United States. The Court concluded that the legislative history of the "Act reflects Congress' intent that the President should have no restraint imposed upon his power to make recess appointments to the LSC Board of Directors." Neither the statute's declaration that the LSC Board members are not Officers of the United States nor congressional concern with the Board's political independence suggests a contrary conclusion:

> "The ability to make recess appointments is a very important tool in ensuring that there is a minimum of disruption in governmental operations due to vacancies in office, . . . and there is no reason to believe that the President's recess appointment power is less important than the Senate's power to subject nominees to the confirmation process. In fact, the presence of both powers in the Constitution demonstrates that the Framers of the Constitution concluded that these powers should coexist. The system of checks and balances crafted by the Framers remains binding and strongly supports the retention of the President's power to make recess appointments."

The Court went on to say that had such a restraint on the President's recess appointments power been intended it would have been of doubtful constitutionality under the functional analysis of Buckley v. Valeo, 424 U.S. 1, 124-43 (1976) (per curiam).

Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), 8/ even if we agreed with the legal conclusions contained in them, which we do not, 9/ would not call into question the conclusion in the 1960 Attorney General's opinion with respect to recess appointments. While the Pocket Veto and Recess Appointments Clauses deal with similar situations, that is, the President's powers while Congress or the Senate is not in session, their language, effects and purposes are by no means identical. First, the language of the two clauses differs significantly. The Pocket Veto Clause speaks of an adjournment of the Congress which prevents the return of a bill; the Recess Appointments Clause speaks of filling all vacancies during a recess of the Senate. Had the two clauses been intended to cover the same situation, it is reasonable to assume that they would have been worded more similarly. Even if "recess" and "adjournment" do not have clearly distinguishable meanings in the Constitution, an adjournment which prevents the return of a bill appears to be addressed to a different situation than is "a recess." Second, the effects of a pocket veto and of a recess appointment

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8/ Kennedy v. Sampson stated broadly that the Pocket Veto Clause of Article I, § 7, cl. 2 of the Constitution does not apply to intrasession adjournments; however, the case involved a pocket veto made during an intrasession adjournment of only six days' duration. In Kennedy v. Jones the government entered into a consent judgment for the plaintiff in a case challenging the validity of two pocket vetoes: one, an intersession pocket veto; the other an intrasession pocket veto during an election recess of 31 days. President Ford, at the time judgment was entered in the Kennedy v. Jones case, announced publicly he would not invoke his pocket veto powers during intrasession or intersession recesses where the originating House of Congress had specifically authorized an officer or other agent to receive return vetoes during such periods. Department of Justice Press Release, April 13, 1976. President Reagan has not made any similar announcement.

9/ Lifetime Communities, Inc. is seeking to litigate the validity of President Reagan's intersession pocket veto of H.R. 4353 on rehearing in its New York bankruptcy proceeding now pending before the Second Circuit, No. 82-5505. Appellee, The Administrative Office of the U.S. Courts, represented by the Civil Division of the Department of Justice, filed a response on September 27, 1982 agreeing that the newly-raised pocket veto issue should be reheard on the merits by the panel.

are different. Legislation which is pocket vetoed can be revived only by resuming the legislative process from the beginning. A recess appointment, on the other hand, results only in the temporary filling of a position for a period prescribed by the Clause itself. Finally, the purposes of the clauses are different. The Pocket Veto Clause ensures that the President will not be deprived of his constitutional power to veto a bill by reason of an adjournment of Congress. The Recess Appointments Clause enables the President to fill vacancies which exist while the Senate is unable to give its advice and consent because it is in recess. In light of the different wording, effects, and purposes of the two clauses, we do not believe the pocket veto cases should be read as having any significant bearing on the proper interpretation of the Recess Appointments Clause.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

U.S. Department of Justice

Office of Legal Counsel

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Office of the
Assistant Attorney General

Washington, D.C. 20530

25 OCT 1982

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Recess Appointments Issues

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(3) In the event the 97th Congress were recalled for a special session after the adjournment sine die of its 2nd Session, an unsettled question might arise whether appointments made during the present election recess would expire at the end of the special session, or at the end of the 1st Session of the 98th Congress, i.e., whether the "next Session" under

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(5) Since the Senate adjourned to a date certain and not sine die, existing recess appointments made prior to the current recess will continue to be valid through the current recess. The adjournment sine die of the 97th Congress after it reconvenes on November 29, 1982 will terminate those existing recess appointments which were made prior to the beginning of the 2d Session of the 97th Congress.

(6) When the Senate reconvenes on November 29, 1982, questions may arise with respect to resubmission of the nominations of persons holding recess appointments. We agree that the better course is to submit the nominations of prior as well as current recess appointees after the Senate reconvenes in November unless there has been unanimous consent to suspend Standing Rule XXXI(6) of the Senate with respect to their nominations. Standing Rule XXXI(6) provides:

> "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." 4/

Our search of the Congressional Record indicates that there was unanimous consent to suspend the operation of that Rule with

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4/ Senate Manual 1981, at pp. 58-59 (Senate Doc. No. 97-1).

respect to all but eight pending nominations. 5/ Resubmission of the one recess nomination would avoid the risk that § 5503(b) might be interpreted to terminate his pay. Section 5503(a)(2) has been interpreted as not risking premature termination of the pay of recess appointees as a result of such submissions. See paragraph (5) supra and 41 Op. A.G. at 478-79, citing 28 Comp. Gen. 121 (1948).

With respect to your first question, we agree that there have been no developments which call into question the validity of the pertinent conclusions in the 1960 Opinion of Acting Attorney General Walsh. As your memorandum notes, the two intervening reported cases involving recess appointments are not inconsistent with either the 1960 Opinion or your appendix's summary. 6/ Also, two recent cases challenging recess appointments

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5/ 128 Cong. Rec. S13269 (daily ed. Oct. 1, 1982). Those eight nominations were:

> Harvey J. Staszewski, Jr., to be a member of the U.S. Metric Board; Frederic V. Malek, to be Governor, U.S. Postal Service; John Van de Water, to be Chairman of the NLRB; Wendy Borcherdt, to be Deputy Undersecretary for Intergovernmental and Interagency Affairs, Department of Education; and Robert A. Destro, Constantine Nicholas Dombalis, and Guadalupe Quintanilla, to be Members of the Commission on Civil Rights.

Only Mr. Van de Water was a recess appointment. 17 Weekly Comp. Pres. Doc. 883 (August 13, 1981).

6/ United States v. Allocco, 305 F.2d 704 (2d Cir 1962); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

In the Staebler case, the District Court rejected a challenge to the recess appointment of his successor by a holdover member of the Federal Election Commission. The Court stated, inter alia:

> "There is nothing to suggest that the Recess Appointments Clause was designed as some

(Continued)

made by President Reagan do not cast any doubt on the conclusions of your summary. 7/

6/ (Continued from p. 6)

> sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity.
>
> . . . There is no justification for implying additional restrictions not supported by the constitutional language.
>
> Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session . . . . 464 F. Supp. at 597.

In Allocco, the criminal defendant unsuccessfully challenged the recess appointment of his trial judge. The Second Circuit held that President Eisenhower had authority under the Recess Appointments Clause to fill the district court vacancy which occurred two days before the Congress adjourned sine die on August 2, 1955. The Court rejected the argument that the Recess Appointments Clause covers only vacancies which open during a recess. 305 F.2d at 709-15.

7/ Bowers v. Moffet, Civil Action No. 82-0195 (D.D.C. 1982), was dismissed voluntarily without opinion after Judge Hart indicated that he intended to dismiss the case. It involved, inter alia, a challenge to President Reagan's recess appointment of Kenneth E. Moffet to be Federal Mediation and Conciliation Service Director on January 11, 1982 during the intersession recess of the 97th Congress.

McCalpin v. Dana, No. 82-0542 (D.D.C. 1982), which was decided on cross motions for summary judgment in the District Court on October 5, 1982, involved a challenge to President Reagan's appointments of seven Members of the Board of the Legal Services Corporation, also during the intersession recess of the 97th Congress in December and January of 1981. Although

(Continued)

We also do not believe that the two recent pocket veto cases cast any doubt on our conclusions. These two cases, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), and

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7/ (Continued from p. 7)

the President nominated nine of the appointees after the Senate convened for the 2d Session, none of them has been confirmed. The Legal Services Corporation Act provides for appointment of the Board members by the President with the advice and consent of the Senate. However, the Act contains no express provision for recess appointments, and also provides that the Board members are not Officers of the United States. The Court concluded that the legislative history of the "Act reflects Congress' intent that the President should have no restraint imposed upon his power to make recess appointments to the LSC Board of Directors." Neither the statute's declaration that the LSC Board members are not Officers of the United States nor congressional concern with the Board's political independence suggests a contrary conclusion:

> "The ability to make recess appointments is a very important tool in ensuring that there is a minimum of disruption in governmental operations due to vacancies in office, . . . and there is no reason to believe that the President's recess appointment power is less important than the Senate's power to subject nominees to the confirmation process. In fact, the presence of both powers in the Constitution demonstrates that the Framers of the Constitution concluded that these powers should coexist. The system of checks and balances crafted by the Framers remains binding and strongly supports the retention of the President's power to make recess appointments."

The Court went on to say that had such a restraint on the President's recess appointments power been intended it would have been of doubtful constitutionality under the functional analysis of Buckley v. Valeo, 424 U.S. 1, 124-43 (1976) (per curiam).

Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), 8/ even if we agreed with the legal conclusions contained in them, which we do not, 9/ would not call into question the conclusion in the 1960 Attorney General's opinion with respect to recess appointments. While the Pocket Veto and Recess Appointments Clauses deal with similar situations, that is, the President's powers while Congress or the Senate is not in session, their language, effects and purposes are by no means identical. First, the language of the two clauses differs significantly. The Pocket Veto Clause speaks of an adjournment of the Congress which prevents the return of a bill; the Recess Appointments Clause speaks of filling all vacancies during a recess of the Senate. Had the two clauses been intended to cover the same situation, it is reasonable to assume that they would have been worded more similarly. Even if "recess" and "adjournment" do not have clearly distinguishable meanings in the Constitution, an adjournment which prevents the return of a bill appears to be addressed to a different situation than is "a recess." Second, the effects of a pocket veto and of a recess appointment

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8/ Kennedy v. Sampson stated broadly that the Pocket Veto Clause of Article I, § 7, cl. 2 of the Constitution does not apply to intrasession adjournments; however, the case involved a pocket veto made during an intrasession adjournment of only six days' duration. In Kennedy v. Jones the government entered into a consent judgment for the plaintiff in a case challenging the validity of two pocket vetoes: one, an intersession pocket veto; the other an intrasession pocket veto during an election recess of 31 days. President Ford, at the time judgment was entered in the Kennedy v. Jones case, announced publicly he would not invoke his pocket veto powers during intrasession or intersession recesses where the originating House of Congress had specifically authorized an officer or other agent to receive return vetoes during such periods. Department of Justice Press Release, April 13, 1976. President Reagan has not made any similar announcement.

9/ Lifetime Communities, Inc. is seeking to litigate the validity of President Reagan's intersession pocket veto of H.R. 4353 on rehearing in its New York bankruptcy proceeding now pending before the Second Circuit, No. 82-5505. Appellee, The Administrative Office of the U.S. Courts, represented by the Civil Division of the Department of Justice, filed a response on September 27, 1982 agreeing that the newly-raised pocket veto issue should be reheard on the merits by the panel.

are different. Legislation which is pocket vetoed can be revived only by resuming the legislative process from the beginning. A recess appointment, on the other hand, results only in the temporary filling of a position for a period prescribed by the Clause itself. Finally, the purposes of the clauses are different. The Pocket Veto Clause ensures that the President will not be deprived of his constitutional power to veto a bill by reason of an adjournment of Congress. The Recess Appointments Clause enables the President to fill vacancies which exist while the Senate is unable to give its advice and consent because it is in recess. In light of the different wording, effects, and purposes of the two clauses, we do not believe the pocket veto cases should be read as having any significant bearing on the proper interpretation of the Recess Appointments Clause.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

MRS

THE WHITE HOUSE

WASHINGTON

December 22, 1982

MEMORANDUM FOR EDWIN MEESE, III
JAMES A. BAKER, III
MICHAEL K. DEAVER
KENNETH M. DUBERSTEIN
HELENE A. VON DAMM

FROM: FRED F. FIELDING Orig. Signed by FFF

SUBJECT: Recess Appointment Issues

This will summarize some of the general rules applicable to recess appointments that may be relevant in connection with the recess of the Senate between the final adjournment of the 97th Congress and convening of the first session of the 98th Congress:

° The terms of appointees who were recess appointed prior to the second session of the 97th Congress but who have not been confirmed will expire when the Senate adjourns the present session sine die.

° The terms of any persons who were recess appointed during intra-session recesses of this session of the Senate (e.g., the election recess from early October to late November), but who are not yet confirmed, will not expire until the sine die adjournment of the first session of the 98th Congress, i.e., presumably some time in late 1983. Also, such persons may continue to be paid under the Pay Act, 5 U.S.C. § 5503, assuming:

(a) they are presently eligible to be paid;

(b) their nominations have not been actually rejected by the Senate; and

(c) their nominations are resubmitted with 40 days of the reconvening of the Senate.

° Since the upcoming recess is a recess between Congresses, the President will have authority to make recess appointments to fill vacant positions, even though the period of recess will be relatively brief.

° The terms of persons appointed during that recess will expire on the sine die adjournment of the first session of the 98th Congress. Their pay status will depend on

satisfaction of the conditions of the Pay Act, one of which is submission of nominations within 40 days after the Senate reconvenes.

- Conceivably, one could secure a longer term in office for a recess appointee by not appointing him until an intra-session recess during the first session of the 98th Congress, which would mean the appointee's Constitutional term would not expire until the sine die adjournment of the second session of the 98th Congress, i.e., presumably sometime in late 1984.

  However, this would be "gambling" that there will be an intra-session recess of sufficient length (circa 21 days) relatively early during the next session of the Senate, since the office will remain vacant until that time (unless, of course, a nominee is confirmed by the Senate).

The foregoing is meant to provide general guidance. In particular, questions on specific prospective recess appointees and their pay status should be reviewed individually by this office.

FFF:PJR 12/22/82
cc: FFFielding
PJRusthoven✓
Subject
Chron.

THE WHITE HOUSE

WASHINGTON

December 22, 1982

MEMORANDUM FOR EDWIN MEESE, III
JAMES A. BAKER, III
MICHAEL K. DEAVER
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The foregoing is meant to provide general guidance. In particular, questions on specific prospective recess appointees and their pay status should be reviewed individually by this office.

FFF:PJR 12/22/82
cc: FFFielding
PJRusthoven
Subject
Chron.✓

Memorandum

1157

Subject	Date
White House inquiry concerning recess appointments.	December 28, 1982

To	From
FILES	NAME: Herman Marcuse HM OFFICE SYMBOL:

STATEMENT:

On December 22, 1982 I received a phone call from Mr. Rusthoven in the Office of the Counsel to the President. He asked me two questions relating to recess appointments.

The first question was whether the President could make recess appointments even if there would be only a short recess between the last session of the 97th Congress and the first session of the 98th Congress. I replied that recess appointments have been made in the past even where the recess between two sessions of the same Congress or between two Congresses amounted only to three days or even a single day, but that there might be a problem if the last session of the Senate of the 97th Senate were followed immediately, without any interval or dispersal, by the first session of the 98th Congress. This problem has since been obviated.

The second question was whether a person who had received a recess appointment during the 1982 election recess of the Senate, and whose term will expire pursuant to the Constitution at the end of the first session of the 98th Congress could be paid during that session. That situation appears to come within the exception to 5 U.S.C. § 5503(2), which usually permits the payment of the salary to recess appointees at the end of a session if a nomination for the office was then pending before the Senate "except where the nominee is a person appointed during the preceding recess of the Senate." I referred Mr. Rusthoven to the Attorney General's opinion of July 14, 1960, 41 Op. A.G. 463, 471-475 (1960). That opinion had concluded in accordance with an earlier ruling of the Comptroller General that, if at the time when a recess appointment was made during an intra-session adjournment of the Senate the conditions of 5 U.S.C. § 5503 had been met, and the recess appointee could be paid, his right to receive his salary would not be defeated by a subsequent adjournment of the same session of the Congress.