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File Folder JGR/LEGAL SERVICES CORPORATION (4 OF 4)

FOIA F05-139/01 COOK

Box Number 41LOJ

Doc No	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FRED F. FIELDING, RE JAMES E. STEIGLITZ (WITH NOTATIONS) (P.1 PARTIAL, P.2 RELEASED)	2	1/12/1984	B6	1130

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

E.O. 13233

C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

January 11, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Request for OLC Opinion on Legal Services Appropriations Bill

Attached, as you requested, is a memorandum for your signature, requesting an OLC opinion on the "Weicker Amendment" to the Legal Services Corporation appropriations bill.

Attachment

THE WHITE HOUSE

WASHINGTON

January 11, 1984

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

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

SUBJECT: Restriction in Legal Services Corporation Appropriations Bill

When the President signed Public Law 98-166, the Department of Justice and Related Agencies Appropriation Act, he expressed reservations concerning the provision freezing the level of grants from the Legal Services Corporation in the absence of action taken by directors confirmed by the Senate. As you know, the President stated that this provision:

> raises troubling constitutional issues with respect to my recess appointments power. The Attorney General has been looking into this matter at my request and will advise me on how to interpret this potentially restrictive condition.

We understand that your office has been examining this question, and we would now like to request your opinion on it.

FFF:JGR:aea 1/11/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

January 11, 1984

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

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> raises troubling constitutional issues with respect to my recess appointments power. The Attorney General has been looking into this matter at my request and will advise me on how to interpret this potentially restrictive condition.

We understand that your office has been examining this question, and we would now like to request your opinion on it.

FFF:JGR:aea 1/11/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

January 9, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Inquiry From Legal Services Corporation on the Constitutionality of Restrictions in Legal Services Corporation Appropriations Bill

Steve Galebach, who works for Mike Uhlmann, contacted me concerning an inquiry he had received from Dan Bogard, President of the Legal Services Corporation (LSC). (Bogard contacted Galebach because they know each other.) Bogard was interested in determining what support, if any, he could expect from the White House and the Justice Department if LSC were to challenge the so-called "Weicker Amendment" to its appropriations bill. This provision requires LSC to fund grantees in fiscal year 1984 at the same proportionate level as they were funded in fiscal year 1983, "unless action is taken by directors of the Corporation prior to January 1, 1984, who have been confirmed in accordance with section 1004(a) of the Legal Services Corporation Act." Department of Justice and Related Agencies Appropriation Act, 1984; Public Law 98-166, Title II (see attachment).

When he signed this law the President stated:

> To the extent that this provision may be intended to disable persons appointed under the Constitution's provision governing Presidential appointments during congressional recesses from performing functions that directors who have been confirmed by the Senate are authorized to perform, it raises troubling constitutional issues with respect to my recess appointments power. The Attorney General has been looking into this matter at my request and will advise me on how to interpret this potentially restrictive condition. 19 Weekly Compilation of Presidential Documents 1619 (November 28, 1983).

and looking and looking and looking...

LSC attorneys are examining whether LSC is bound by the Weicker Amendment or if it may be ignored as unconstitutional, and Bogard is interested in obtaining the Administration's views.

Ted Olson advised me that his office had been examining the question for over a year on a "back burner" basis. He indicated that there was a sharp difference of views within his office and that he personally found the issues very difficult. Olson stated that he would respond to a request for an opinion from Bogard, but that he would prefer the request to come from our office, primarily because such a course afforded more flexibility in deciding what to do with the opinion once we find out what it will say.

On the merits, I do not share Olson's view that the issues are particularly difficult, at least with respect to the position we should take. As guardian of the legal prerogatives of the Presidency, we should resist any Congressional effort to demean the recess appointment power by distinguishing between the powers of confirmed and recess-appointed nominees. Olson views the difficulty as arising from the fact that Congress in this instance exercised authority in an appropriations bill, but Congress cannot accomplish through the budgetary process that which it is constitutionally prohibited from doing directly. Congress can decide not to fund LSC, and thereby deprive our recess-appointed directors of authority, but if LSC is funded at all, Congress cannot condition decisions with respect to those funds on whether the directors are confirmed or recess-appointed. This position is consistent with the fact that we have never conceded the constitutionality of the Pay Act -- also an exercise of Congress' budget authority -- which purports to limit the circumstances under which recess appointees may be paid.

Since Bogard wants to know what LSC may do, and since the issue directly affects the constitutional authority of the President, I recommend requesting a formal opinion from Olson. We can decide what to do with it once we see what it says.

pls prepare memo

Attachment

THE WHITE HOUSE

WASHINGTON

January 18, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: William J. Olson

The answer to the question you posed on my memorandum of January 12 is "yes" -- the William J. Olson representing James E. Steiglitz is the William J. Olson we recess appointed to the Legal Services Corporation Board of Directors.

For your information, at FFF's instruction I have referred the whole Steiglitz matter to Paul Thompson of NSC.

Attachment

THE WHITE HOUSE

WASHINGTON

January 12, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: James E. Steiglitz

James E. Steiglitz is a former Special Forces medic, son of a famous New York photographer, and a free-lance photographer himself. In a private capacity Steiglitz used his medical background to gain access to areas in Nicaragua where Miskito Indians were being held, taking photographs not only of their deplorable conditions but also of significant strategic locations such as military installations and oil refineries. Steiglitz, through his attorney William J. Olson, maintains that two NSC staff members, Oliver North and Alfonso Sapia-Bosch, and two unidentified CIA agents, ordered him to obtain professional quality enlargements of some of the photographs. Steiglitz did so, allegedly at a cost of $10,970.17, and now wants reimbursement. [redacted] and threatened litigation if the matter is not resolved quickly, warning that during such litigation it may be necessary to disclose sensitive and embarrassing security-related information.

FOIA(b)(6)

I discussed the matter with Bob Kimmitt, Paul Thompson, North, and Sapia-Bosch. North and Sapia-Bosch provided statements to Thompson, which are attached. According to North, Steiglitz came to him with the photographs in early July. North ascertained from DIA that the photographs lacked intelligence value, but he did tell Steiglitz that a larger copy of one of the photographs, of a malnourished Miskito child, would be useful. Steiglitz returned with an enlargement, which he provided to North along with several other photographs, on the condition that North not publish the prints and give Steiglitz credit whenever they were used. North gave Steiglitz a signed note embodying these conditions, without retaining a copy. North has used the photograph in briefings, always giving Steiglitz credit. North asserts that he never discussed paying Steiglitz for anything, and did not imply in any way that Steiglitz would be paid.

According to Sapia-Bosch, Steiglitz approached him when North was away from the office. Sapia-Bosch reviewed the

photographs and told Steiglitz that they were of bad quality. Steiglitz asked if Sapia-Bosch would be interested if he could get better copies, to which Sapia-Bosch replied that he would. Sapia-Bosch was later given some 30 photographs by Steiglitz, which he has retained but never used. In response to Steiglitz's repeated inquiries, Sapia-Bosch told him he would try to help him obtain money from private sources. Sapia-Bosch did so, unsuccessfully. Sapia-Bosch asserts that he never promised Steiglitz payment.

Steiglitz's version of the facts is different from the foregoing. In Steiglitz's version North and Sapia-Bosch "order" enlargements of various prints, saying such things as that expenses "will be taken care of" and that "two guys will be calling with the money." Assuming the accuracy of the North/Sapia-Bosch version, it seems that the case comes down to Steiglitz interpreting North's and Sapia-Bosch's statements that something would be "useful" as an order for that to be done, with reimbursement for expenses to follow. This may have been naive on Steiglitz's part, but it also strikes me as disingenuous for North and Sapia-Bosch to claim they never implied they would cover Steiglitz's costs when they did tell him that they would "like" certain things and that certain things would be "useful." My impression is that anyone dealing with Steiglitz would know that he could easily misinterpret such remarks. In the case of the photograph of the Miskito child, Steiglitz at least has something of a quantum meruit claim, since that enlargement has been used extensively by the Administration. I would not be averse to offering Steiglitz his expenses associated with that enlargement and, pending more precise information on what photographs were given to Sapia-Bosch after he said he would like better copies, perhaps the expenses associated with those as well. This would be far less than the $11,000 demanded by Steiglitz, but may be enough to settle the claim, particularly since Steiglitz would have great difficulty prevailing in court on a theory of implied contract with the Government.

Paul Thompson is checking to determine if NSC has authority to provide any money to Steiglitz. If such authority exists, I would recommend telling NSC that we think it advisable to try and settle the claim for an amount equal to or less than the documented expenses Steiglitz incurred to obtain items North and Sapia-Bosch indicated they would "like" to have, and then retained. Presumably actual negotiations would be handled by NSC and/or OA rather than our office.

THE WHITE HOUSE
WASHINGTON
June 28, 1984

NOTE FOR JOHN ROBERTS

I have attached the relevant portions concerning Legal Services from:

1) the FY 1985 State/Justice/ Commerce Appropriation Bill.

2) the corresponding FY 1984 act, which is incorporated by reference into the 1985 bill.

3) Committee Report on 1985 bill.

Steve Galebach

of the Civil Rights Act, as amended, and sections 6 and 14 of the Age Discrimination in Employment Act; $161,155,000, of which not less than $10,500,000 shall be for systemic programs.

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $297,550,000: Provided, That the funds appropriated in this paragraph shall be expended in accordance with the provisions under the heading "Legal Services Corporation, Payment to the Legal Services Corporation" contained in Public Law 98–166 except that "fiscal year 1984", wherever it appears in such provisions, shall be construed as "fiscal year 1985"; "fiscal year 1983", wherever it appears in such provisions, shall be construed as "fiscal year 1984"; "January 1, 1984" shall be construed as "January 1, 1985"; "$6.50" shall be construed as "$7.61"; and "$13" shall be construed as "$13.57": Provided further, That notwithstanding the preceding proviso, no more than $1,158,000 shall be expended for the budget category entitled "Program Improvement and Training", no more than $1,829,000 shall be expended for the budget category entitled "Delivery Research and Experimentation", and no more than $11,283,000 shall be expended for the budget category enti-

tled "Support for the Provision of Legal Assistance": Provided further, That none of the funds appropriated in this Act for the Corporation shall be used, directly or indirectly, by the Corporation to promulgate new regulations or to enforce, implement, or operate in accordance with regulations effective after April 27, 1984 unless the Appropriations Committees of both Houses of Congress have been notified fifteen days prior to such use of funds as provided for in section 509 of this Act: Provided further, That none of the funds appropriated by this paragraph shall be used to pay for travel by directors of the Corporation (except as necessary to travel to Washington to attend meetings of the Board of Directors), the President of the Corporation, or employees of the Corporation who work in Washington, D.C.

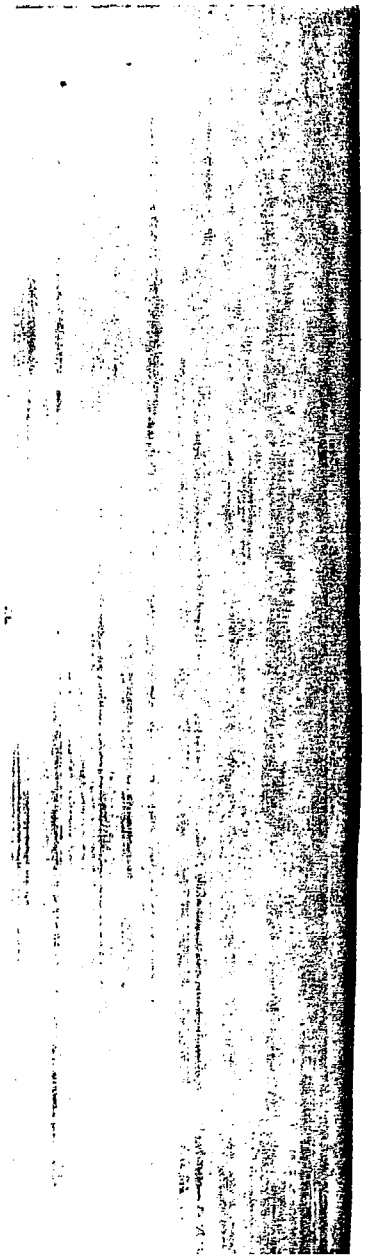
This title may be cited as the "Department of Justice *and Related Agencies* Appropriation Act, 1985".

TITLE III—DEPARTMENT OF STATE

ADMINISTRATION OF FOREIGN AFFAIRS

SALARIES AND EXPENSES

For necessary expenses of the Department of State and the Foreign Service, not otherwise provided for, including obligations of the United States abroad pursuant to treaties, international agreements, and binational contracts (including obligations assumed in Germany on or after June 5, 1945) expenses authorized by section 9 of the Act of August 31,



DELETION OF HOUSE LANGUAGE

The Committee recommends deletion of the allocations inserted in the bill by the House for the Office of the Chairman, the Office of the Commissioners, congressional affairs, public affairs, and special projects. These specific allocations are not conducive to good management, and the reduced amounts provided in the allocations are not warranted. However, the Commission is advised to first look to these areas to absorb any unforeseen cuts in its operations.

The Committee finds that the budget justifications do not adequately present the Commission's resource requirements. The Commission staff should consult the Committee's staff to assure that the fiscal 1986 justifications fully set forth the program, workload, and resource requirements of the EEOC.

LEGAL SERVICES CORPORATION

PAYMENTS TO THE LEGAL SERVICES CORPORATION

1984 appropriations to date	$275,000,000
1985 budget estimate	325,253,000
House allowance	
Committee recommendation	297,550,000

The Committee recommends $297,550,000 for the Legal Services Corporation for fiscal year 1985, $27,703,000 less than the amount requested by the Corporation. This amount is $22,550,000 more than was appropriated in fiscal year 1984 but is $23,450,000 less than was appropriated in fiscal year 1981. The Legal Services Corporation Act provides that the Corporation submit its request directly to Congress. No funding was requested for the Legal Services Corporation in the President's proposed fiscal year 1985 budget.

This appropriation provides an 8.2-percent increase for all noncensus based field positions (field programs, or components thereof, whose funding levels are not based on the poverty population within the geographical area they serve), national support (including the clearinghouse), State support, special programs, and the regional training centers. Other components of the Corporation's budget, specifically program improvement and training, delivery research and experimentation, and support for the provision of legal assistance, are frozen at the fiscal year 1984 levels. In determining the exact dollars to be expended in each of the Corporation's budget categories, the Corporation shall not include funds carried over from prior fiscal years but expended in fiscal year 1984. Only fiscal year 1984 appropriations spent in fiscal year 1984, as indicated in the Corporation's fiscal year 1985 budget submission to Congress, shall be counted in the base amount off which adjustment are made. The only exception to this policy is for the regional training centers which, inexplicably, the Corporation funded in fiscal year 1984 entirely out of funds carried over from fiscal year 1983.

The remaining funds, about $245,000,000 of the total appropriation, shall be spent for the basic field programs, those programs, or components thereof, whose funding level is based on the number of poor people within the geographical area they serve and is set by the allocation formula incorporated in this act.

The Committee has denied funding for the three new initiatives proposed by the Corporation due to its failure to provide the Committee with any supporting material for them, even such basic information as how the new programs will operate and what criteria will be used in selecting grantees. The denied initiatives are $20,000,000 for a program entitled "New directions for the private bar," $7,200,000 for a program targeted toward the institutionalized elderly and handicapped, and $2,000,000 for a reserve for emergency needs.

BILL LANGUAGE EXPLANATION

The Committee recommendation continues the fiscal year 1984 statutory language without alteration except for technical changes and an updating of the allocation formula. Under the revised allocation formula, the minimum grant for the basic field programs is raised from $6.50 per poor person within the geographical area they serve to $7.61. The effect of this change is to provide an increase of about 17 percent to those basic field programs (just over one-third of the total) who are receiving the lowest per capital funding levels, and continues the progress, started last year, toward the goal of equalizing funding for all basic field programs throughout the country.

Three new provisions have been added. One of the provisions sets statutory ceilings for certain of the Corporation's activities. The Committee believes this provision is necessary in light of the Corporation's failure to acknowledge that it is covered by the reprograming provisions of this act. This issue is discussed further below.

The Committee has also added a new provision which subjects all regulations adopted by the Corporation since April 27, 1984, including those amending the Corporation's bylaws, and all new regulations proposed by the Corporation during fiscal year 1985 to the reprograming provisions contained in section 509 of this act. This provision is necessary for several reasons.

First, the Committee does not believe that the regulations approved on April 28, 1984, regarding legislative and administrative advocacy are an accurate reflection of the Legal Service Corporation Act, other applicable provisions of law including appropriations acts, and congressional intent. With regard to the statutory appropriations riders, the Corporation has stood standard rules of statutory construction on its head. Instead of determining that the appropriations riders were exceptions to the Legal Services Corporation Act, and thus to be construed narrowly, it has determined that the riders were to be interpreted expansively and exceptions to the riders narrowly. Some of the requirements in the regulations, such as the one limiting responses to Federal, State, or local officials to only those instances where the officials are willing to put their requests in writing, clearly have no statutory underpinning. In addition to those cases where the regulations are clearly invalid, there are a number of cases where they may be invalid. However, the Cor-

Appr. Comm. Report on S/J/C Appr. Bill

poration has failed to respond to this Committee's request for clarification on the issue, a failure which is totally inexcusable.

Second, the Committee does not believe that the Corporation has complied with the intent of the mandatory refunding provision, first enacted for fiscal year 1983 as part of Public Law 97-377 and continued in fiscal year 1984. The Committee notes that the conference report on Public Law 97-377 clearly indicated that the provision applied to the terms and conditions of grants and contracts, as well as dollar levels, when it stated "[t]he conferees intend that such funding shall be provided under grants and contracts *containing the same terms and conditions now in effect* for each said grantee and contractor * * *" (House Report 97-780, p. 171) [emphasis added]. Obviously such changes in the terms and conditions of grants as are necessary to enforce changes in the Legal Services Corporation Act and other applicable statutes must be made. Since the Corporation has also failed to respond to the Committee's questions on this issue, the Committee feels it has no choice but to respond accordingly.

Finally, the Committee is concerned about a consistent pattern which has developed at the Corporation, in which regulations are issued with minimum opportunity for public comment, and instructions making significant changes in grant conditions are issued without such opportunity. The most recent example of this occurred when the Corporation issued a regulation proposing changes in its bylaws on April 19, 1984, allowed the minimum 30 days opportunity for public comment required by law, and adopted the bylaws one day after the comment period closed. Clearly, the Corporation in this instance did not have the time to review the public comments that were submitted. The Committee's proposed language will slow down the Corporation's regulatory process and allow adequate time for public input on proposed policy changes.

The third provision added by the Committee limits travel by Directors of the Corporation to such travel as is necessary to come to Washington to attend meetings of the Corporation's Board and prohibits travel by the President and Washington employees of the Corporation. This provision is necessary in light of the repeated failure of the Corporation to respond to questions from and provide information to the Committee. By keeping the President and Washington employees of the Corporation in Washington, it is hoped that the Corporation will be able to respond in a better fashion. The Committee's amendment does not limit travel by the Corporation's regional office employees, since it understands that these employees need to be able to inspect and audit the Corporation's grantees and contractors throughout the country.

CLARIFICATION OF PRIOR YEAR BILL LANGUAGE

Since the Committee has been besieged with questions from the Corporation itself, many of its grantees, and others concerning the precise meaning of some of the statutory language contained in the fiscal year 1984 appropriations act, and since this language is being continued

without change in fiscal year 1985, some clarification of certain provisions is required.

The Committee's intent has been, and continues to be, for those provisions where only directors of the Corporation who have been confirmed by the Senate can take certain actions, that each director voting in connection therewith be confirmed. Action taken by the Corporation, should some directors be confirmed and others not, would not be valid solely because a quorum could be established with confirmed directors.

Neither the mandatory refunding provision (absent a confirmed Board) nor the allocation formula for the basic field programs precludes the Corporation from denying funding to a grantee or contractor who has failed to substantially comply with the Legal Services Corporation Act or applicable appropriations provisions. However, the Corporation must take steps to insure that the funds that would have gone to the defunded program go to a new or existing grantee or contractor to be used for the same basic purposes. In the case of the basic field programs, this means that the funds must be used to serve the geographical area covered by the defunded program. In addition, the basic field program allocation formula is applicable for the entire year, whether or not there is a confirmed Board of Directors, since it is critical that those programs, for planning purposes, know how much money they are going to get.

PAPERWORK

The Committee is greatly concerned over the dramatic increase in administrative and paperwork requirements the Corporation has placed on its grantees. This problem is exacerbated by the funding reductions the programs have sustained over the last few years. Once again, the Corporation has failed to respond to the Committee's inquiries in this area. The Corporation is directed to review all its administrative and paperwork requirements, eliminate those not necessary to implement the LSC Act and other statutory provisions, otherwise attempt to reduce the paperwork burden on the grantees, and to include a report in its fiscal year 1986 budget submission on the progress made in this area.

QUALITY OF BUDGET JUSTIFICATION AND CONGRESSIONAL RESPONSES

The Committee is not satisfied with the information provided in the Corporation's fiscal year 1985 budget submission or with the timeliness or adequacy of the Corporation's responses to requests for information. The Committee does not know what the problem is. The Corporation, in its own interest, would be well advised to address it. Should a reprograming be necessary to deal with this problem, it will be sympathetically entertained.

REPROGRAMING

Based on information provided to the Committee by the Corporation during its budget presentation, the Committee concludes that the Corporation has undertaken certain reprogramings with fiscal 1983 funds

and, possibly, fiscal year 1984 funds without complying with the requirements governing reprogramings. Although the Committee recognizes the need for managerial flexibility, the Committee must be kept informed of all changes in the approved budget of the Corporation before such changes occur, and will not condone further failure to comply with reprograming requirements. Therefore, the Committee wishes to reemphasize that the reprograming policy, which is contained in section 509 of this act and explained on page 87 of this report, is applicable to the Legal Services Corporation and that the Committee expects the Corporation to comply fully with this policy.

TITLE III—THE DEPARTMENT OF STATE AND RELATED AGENCIES

DEPARTMENT OF STATE

The Committee recommends a total of $2,249,782,000 for fiscal year 1985 for the Department of State. This amount is $89,169,000 less than the total requested for fiscal year 1985 but is an increase of $179,873,000 over appropriations enacted to date for fiscal year 1984. The amount recommended includes $1,269,901,000 for administration of foreign affairs, $579,970,000 for international organizations and conferences, $27,620,000 for international commissions, and $9,900,000 for the Asia Foundation.

Administration of Foreign Affairs

SALARIES AND EXPENSES

1984 appropriations to date	$1,114,810,000
1985 budget estimate	1,311,300,000
House allowance	1,229,790,720
Committee recommendation	1,269,901,000

The Committee recommends an appropriation of $1,269,901,000. This amount is $41,399,000 less than the budget request, but an increase of $155,091,000 over the 1984 appropriations to date. The recommendation reflects the inclusion of $1,851,840 for the ongoing operation of certain overseas consulates previously funded in a separate account.

This appropriation provides the funds necessary for the formulation and execution of the foreign policy of the United States, including the conduct of diplomatic and consular relations with foreign countries, diplomatic relations with international organizations, and related activities.

Regarding adjustments to base, the amount recommended will provide for all the requested increases for wage and price increases and for the annualization of all the 1984 increases allowed by the Committee. In addition, the amount recommended provides $2,000,000 for workload increases. The Committee intends that these increases be directed first toward ongoing security programs. Finally, the amount recommended will provide for all other built-in increases, except for a reduction of $1,000,000 for other support programs.

Regarding program increases, the recommendation provides resources to continue the Department's efforts to enhance its reporting and analysis functions. The Committee intends to fund 49 positions in the fiscal year 1984 supplemental bill. Resources are available for another 46 in

(I) the gross receipts (excluding interest earned) exceed $50,000, or

(II) expenditures (other than expenditures for salaries of employees) exceed $150,000, and

(ii) which is exempt from section 3302 or 9102 of title 31 of the United States Code, except that clauses (i) and (ii) shall not apply with respect to the report required under subparagraph (B) of such paragraph.

RELATED AGENCIES

COMMISSION ON CIVIL RIGHTS

SALARIES AND EXPENSES

For expenses necessary for the Commission on Civil Rights, including hire of passenger motor vehicles, $11,887,000.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Equal Employment Opportunity Commission as authorized by title VII of the Civil Rights Act of 1964, as amended, 29 U.S.C. 206(d) and 621-634, including services as authorized by 5 U.S.C. 3109; hire of passenger motor vehicles; and not to exceed $19,000,000 for payments to State and local enforcement agencies for services to the Commission pursuant to title VII of the Civil Rights Act, as amended and sections 6 and 14 of the Age Discrimination in Employment Act; $151,399,000.

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $275,000,000: *Provided,* That notwithstanding any regulation, guideline, or rule of the Corporation, the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts under section 1006(a)(1) and (3) so as to insure that total annual funding for each such current grantee and contractor is maintained in fiscal year 1984 in the same proportion which total appropriations to the Corporation in fiscal year 1984 bear to the total appropriations to the Corporation in fiscal year 1983, unless action is taken by directors of the Corporation prior to January 1, 1984, who have been confirmed in accordance with section 1004(a) of the Legal Services Corporation Act: *Provided further,* That, notwithstanding the above proviso, the funds distributed to each grantee funded in fiscal year 1983 pursuant to the number of poor people determined by the Bureau of the Census to be within its geographical area be distributed in the following order:

(1) first, grants from the Legal Services Corporation and contracts entered into with the Legal Services Corporation under section 1006(a)(1) of the Legal Services Corporation Act shall be maintained in fiscal year 1984 at not less than 5 per centum more than the annual level at which each grantee and contractor was funded in fiscal year 1983 or $6.50 per poor person within its geographical area under the 1980 Census, whichever is greater;

(2) second, each such grantee funded in fiscal year 1983, by which the grantee's funding, including the increase under the first priority above, falls below $13 per poor person within its geographical area under the the 1980 Census:

Provided further, That none of the funds appropriated in this Act for the Legal Services Corporation shall be used to bring a class action suit against the Federal Government or any State or local government unless—

Class action suits, restriction.

(1) the project director of a recipient has expressly approved the filing of such an action in accordance with policies established by the governing body of such recipient;

(2) the class relief which is the subject of such an action is sought for the primary benefit of individuals who are eligible for legal assistance; and

(3) that prior to filing such an action, the recipient project director has determined that the government entity is not likely to change the policy or practice in question, that the policy or practice will continue to adversely affect eligible clients, that the recipient has given notice of its intention to seek class relief and that responsible efforts to resolve without litigation the adverse effects of the policy or practice have not been successful or would be adverse to the interest of the clients:

except that this proviso may be superseded by regulations governing the bringing of class action suits promulgated by a majority of the Board of Directors of the Corporation who have been confirmed in accordance with section 1004(a) of the Legal Services Corporation Act: *Provided further,* That none of the funds appropriated in this Act made available by the Legal Services Corporation may be used—

42 USC 2996c. Lobbying restrictions.

(1) to pay for any publicity or propaganda intended or designed to support or defeat legislation pending before Congress or State or local legislative bodies or intended or designed to influence any decision by a Federal, State, or local agency;

(2) to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or other device, intended or designed to influence any decision by a Federal, State, or local agency, except when legal assistance is provided by an employee of a recipient to an eligible client on a particular application, claim, or case, which directly involves the client's legal rights or responsibilities;

(3) to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or any other device intended or designed to influence any Member of Congress or any other Federal, State, or local elected official—

(A) to favor or oppose any referendum, initiative, constitutional amendment, or any similar procedure of the Congress, any State legislature, any local council or any similar governing body acting in a legislative capacity,

(B) to favor or oppose an authorization or appropriation directly affecting the authority, function, or funding of the recipient or the Corporation, or

(C) to influence the conduct of oversight proceedings of the recipient or the Corporation;

(4) to pay for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, or any other device intended or designed to influence any Member of Congress or any other Federal, State, or local elected official

to favor or oppose any Act, bill, resolution, or similar legislation, except that this proviso shall not preclude funds from being used to provide communication directly to a Federal, State, or local elected official on a specific and distinct matter where the purpose of such communication is to bring the matter to the official's attention if—

(A) the project director of a recipient has expressly approved in writing the undertaking of such communication to be made on behalf of a client or class of clients in accordance with policy established by the governing body of the recipient; and

(B) the project director of a recipient has determined prior to the undertaking of such communication, that—

(i) the client and each such client is in need of relief which can be provided by the legislative body involved;

(ii) appropriate judicial and administrative relief have been exhausted; and

(iii) documentation has been secured from each eligible client that includes a statement of the specific legal interests of the client, except that such communication may not be the result of participation in a coordinated effort to provide such communications under this proviso; and

(C) the project director of a recipient maintains documentation of the expense and time spent under this proviso as part of the records of the recipient; or

(D) the project director of a recipient has approved the submission of a communication to a legislator requesting introduction of a private relief bill:

except that nothing in this proviso shall prohibit communications made in response to a request from a Federal, State, or local official: *Provided further,* That none of the funds appropriated in this Act made available by the Legal Services Corporation may be used to pay for any administrative or related costs associated with an activity prohibited in clause (1), (2), (3), or (4) of the previous proviso:

Alien assistance.

Provided further, That none of the funds appropriated under this Act for the Legal Services Corporation will be expended to provide legal assistance for or on behalf of any alien unless the alien is present in the United States and is—

(1) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(2) an alien who is either married to a United States citizen or is a parent or an unmarried child under the age of twenty-one years of such a citizen and who has filed an application for adjustment of status to permanent resident under the Immigration and Nationality Act, and such application has not been rejected;

8 USC 1101 note.

(3) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157, relating to refugee admissions) or who has been granted asylum by the Attorney General under such Act; or

(4) an alien who is lawfully present in the United States as a result of the Attorney General's withholding of deportation pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)):

Provided further, That an alien who is lawfully present in the United States as a result of being granted conditional entry pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)) before April 1, 1980, because of persecution or fear of persecution on account of race, religion, or political opinion or because of being uprooted by catastrophic natural calamity shall be deemed, for purposes of the previous proviso, to be an alien described in clause (3) of the previous proviso: *Provided further,* That none of the funds appropriated for the Legal Services Corporation may be used to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations, including the dissemination of information about such policies or activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients or to advise any eligible client as to the nature of the legislative process or inform any eligible client of his rights under statute, order, or regulation: *Provided further,* That none of the funds appropriated in this Act for the Legal Services Corporation may be used to carry out the procedures established pursuant to section 1011(2) of the Legal Services Corporation Act unless the Corporation prescribes procedures to insure that financial assistance under this title shall not be terminated, and a suspension of financial assistance shall not be continued for more than thirty days, unless the grantee, contractor, or person or entity receiving financial assistance under this title has been afforded reasonable notice and opportunity for a timely, full, and fair hearing and, when requested, such hearing shall be conducted by an independent hearing examiner, subject to the following conditions—

Hearing.

42 USC 2996j.

(1) such request for a hearing shall be made to the Corporation within thirty days after receipt of notice to terminate financial assistance, deny an application for refunding, or suspend financial assistance and such hearing shall be conducted within thirty days of receipt of such request for a hearing;

(2) the Corporation shall make such final decision within thirty days after completion of such hearing; and

(3) hearing examiners shall be appointed by the Corporation in accordance with procedures established in regulations promulgated by the Corporation:

Provided further, Than none of the funds appropriated in this Act for the Legal Services Corporation may be used to carry out the procedures established pursuant to section 1011(2) of the Legal Services Corporation Act unless the Corporation prescribes procedures to ensure that an application for refunding shall not be denied unless the grantee, contractor, or person or entity receiving assistance under this title has been afforded reasonable notice and opportunity for a timely, full, and fair hearing to show cause why such action should not be taken and subject to all other conditions of the previous proviso: *Provided further,* That none of the funds appropriated in this Act for the Legal Services Corporation shall be used by the Corporation in making grants or entering into contracts for legal assistance unless the Corporation insures that the recipient is either (1) a private attorney or attorneys (for the sole purpose of furnishing legal assistance to eligible clients) or (2) a qualified nonprofit organization chartered under the laws of one of the States,

Hearing.

42 USC 2996j.

a purpose of which is furnishing legal assistance to eligible clients, the majority of the board of directors or other governing body of which organization is comprised of attorneys who are admitted to practice in one of the States and who are appointed to terms of office on such board or body by the governing bodies of State, county, or municipal bar associations the membership of which represents a majority of the attorneys practicing law in the locality in which the organization is to provide legal assistance: *Provided further,* That no member of the Board of Directors of the Legal Services Corporation shall be compensated for his services to the Corporation except for the payment of an attendance fee at meetings of the Board at a rate not to exceed the highest daily rate for grade fifteen (15) of the General Schedule and necessary travel expenses to attend Board meetings in accordance with the Standard Government Travel Regulations: *Provided further,* That no officer or employee of the Legal Services Corporation or a recipient program shall be reimbursed for membership in a private club, or be paid severance pay in excess of what would be paid a Federal employee for comparable service: *Provided further,* That none of the funds appropriated in this Act shall be expended by the Legal Services Corporation to participate in litigation unless the Corporation or a recipient of the Corporation is a party, or a recipient is representing an eligible client in litigation in which the interpretation of this title or a regulation promulgated under this title is an issue, and shall not participate on behalf of any client other than itself.

Compensation of Board members.

Short title.

This title may be cited as the "Department of Justice and Related Agencies Appropriation Act, 1984".

Department of State and Related Agencies Appropriation Act, 1984.

TITLE III—DEPARTMENT OF STATE AND RELATED AGENCIES

DEPARTMENT OF STATE

Administration of Foreign Affairs

SALARIES AND EXPENSES

For necessary expenses of the Department of State and the Foreign Service, not otherwise provided for, including obligations of the United States abroad pursuant to treaties, international agreements, and binational contracts (including obligations assumed in Germany on or after June 5, 1945); expenses authorized by section 9 of the Act of August 31, 1964, as amended (31 U.S.C. 3721), and section 2 of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 2669); telecommunications; expenses necessary to provide maximum physical security in Government-owned and leased properties and vehicles abroad; permanent representation to certain international organizations in which the United States participates pursuant to treaties, conventions, or specific Acts of Congress; expenses of the United States-Japan Advisory Group; acquisition by exchange or purchase of vehicles as authorized by law, except that special requirement vehicles may be purchased without regard to any price limitation otherwise established by law; $1,114,810,000, of which $17,500,000 shall remain available until September 30, 1985. Of the amounts available for expenditure pursuant to the International Center Act of 1968, not to exceed $925,000 may be made available until expended from proceeds of lease, sale, or exchange for purposes authorized in section 5 thereof as amended by Public Law 97-186.

80 Stat. 973.

82 Stat. 959.
96 Stat. 101.

REOPENING CONSULATES

For necessary expenses of the Department of State and the Foreign Service for reopening and operating certain United States consulates as specified in section 103 of the Department of State Authorization Act, fiscal years 1982 and 1983, $2,500,000.

96 Stat. 273.

REPRESENTATION ALLOWANCES

For representation allowances as authorized by section 905 of the Foreign Service Act of 1980, as amended (22 U.S.C. 4085), and for representation by United States missions to the United Nations and the Organization of American States, $4,148,000.

ACQUISITION, OPERATION, AND MAINTENANCE OF BUILDINGS ABROAD

For necessary expenses for carrying out the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 292-300), $160,000,000, to remain available until expended, of which $1,100,000 shall be available for an air conditioning project at the United States Embassy in Mexico City; and of which not to exceed $2,800,000 shall be available for purchase of a site adjacent to the United States Embassy in Mexico City; and of which $1,500,000 shall be available for design and development of a new chancery building for the United States Embassy in Seoul, Korea; and, in addition there shall be available subject to the approval of the Committees on Appropriations of the House and Senate under said Committees' policies concerning the reprogramming of funds, the sum of $30,000,000, to remain available until expended, for overseas housing requirements.

22 USC 299.

ACQUISITION, OPERATION, AND MAINTENANCE OF BUILDINGS ABROAD (SPECIAL FOREIGN CURRENCY PROGRAM)

For payments in foreign currencies which the Treasury Department determines to be excess to the normal requirements of the United States for the purposes authorized by section 4 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 295), $10,012,000, to remain available until expended.

EMERGENCIES IN THE DIPLOMATIC AND CONSULAR SERVICE

For expenses necessary to enable the Secretary of State to meet unforeseen emergencies arising in the Diplomatic and Consular Service, to be expended pursuant to the requirement of 31 U.S.C. 3526(e), $4,356,000.

96 Stat. 964.

PAYMENT TO THE AMERICAN INSTITUTE IN TAIWAN

For necessary expenses to carry out the Taiwan Relations Act, Public Law 96-8 (93 Stat. 14), $9,380,000.

22 USC 3301 note.

PAYMENT TO THE FOREIGN SERVICE RETIREMENT AND DISABILITY FUND

For payment to the Foreign Service Retirement and Disability Fund, as authorized by law, $103,791,000.

Current Status of the Legal Services Corporation
Board of Directors

Seat	Name (Party)	Term Expires	Status	Paid?
1	Daniel M. Rathbun (I)	7/13/83	Recess Appointee (10/22/82) Expires: 98th, 1st	Not under § 5503(a)
2	Frank J. Donatelli (R)	7/13/83	Recess Appointee (10/22/82) Expires: 98th, 1st	Not under § 5503(a)
3	Howard H. Dana (R)	7/13/84	Statutory Holdover After Recess Appointment (12/30/81) expired (12/23/82) [Appointment of E. Donald Shapiro did not take]	Not under § 5503(a
4	William F. Harvey (R)	7/13/84	Statutory Holdover after Recess Appointment (12/30/81) expired (12/23/82)	Not under § 5503(a
5	William J. Olson (R)	7/13/84	Statutory Holdover after Recess Appointment (12/30/81) expired (12/23/82)	Not under § 5503(a
6	George E. Paras (D)	7/13/84	Statutory Holdover After Recess Appointment (12/30/81) expired (12/23/82)	Not under § 5503(a
7	Robert Sherwood Stubbs, II (D)	7/13/84	Statutory Holdover After Recess Appointment (12/30/81) expired 12/23/82	Not under § 5503
8	Milton M. Masson, Jr. (R)	7/13/83	Recess Appointee (1/21/83) Expires: 98th, 2d	?
9	Robert E. McCarthy (R)	7/13/83	Recess Appointee (1/21/83) Expires: 98th, 2d	?

Seat	Name (Party)	Term Expires	Status
10	Donald Eugene Santarelli (R)	7/13/83	Recess Appointee (1/21/83) Expires: 98th, 2d
11	Vacant		

?

in the circumstances here present, Mr. Flegenheimer should not be compelled to resort to the courts. This conclusion takes into account not only the element of fairness but also the fact that the legal error asserted is itself a doubtful matter.

The Immigration and Naturalization Service defends its determination as correct. The Department of State takes a contrary position. Which of the opposing positions is correct presents complex issues. I am by no means convinced that the Service is in error. Absent that conviction it does not seem that a cancellation proceeding should be instituted, even should the power exist. It is my decision that such a proceeding should not be instituted in this case, and you are advised accordingly.

Sincerely,

WILLIAM P. ROGERS.

RECESS APPOINTMENTS

The President is authorized to make recess appointments to fill vacancies which occurred while the Senate was in session.

The President is authorized to make recess appointments during the temporary adjournment of the Senate from July 3 to August 8, 1960.

The reconvening of the Senate on August 8, 1960, is not to be regarded as the "next Session" of the Senate within the meaning of Article II, section 2, clause 3 of the Constitution, but as the continuation of the second session of the 86th Congress. The commissions of the officers appointed during this adjournment therefore will continue until the end of that session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress.

The adjournment of the Senate on July 3, 1960, constituted the "termination of the session of the Senate" within the meaning of 5 U.S.C. 56, so that persons whose nominations were pending before the Senate on that day and who receive recess appointments during the period of adjournment are entitled to the salaries attached to their offices, provided that the other conditions of 5 U.S.C. 56 are met; and this right will not be terminated by any temporary or final adjournment of the second session of the 86th Congress.

The terminal proviso of 5 U.S.C. 56 may require that the President submit to the Senate not later than forty days after it reconvenes on August 8, 1960, the nominations of those officers who, during the recess of the Senate, received appointments to fill vacancies which existed while the Senate was in session.

JULY 14, 1960.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to comply with

your oral request for my opinion on several questions relating to your power under the Constitution to make what are commonly designated as recess appointments.

On July 3, 1960, the Senate adopted Senate Concurrent Resolution 112, 86th Cong., 2d sess., which reads:

"That when the two Houses shall adjourn on Sunday, July 3, 1960, the Senate shall stand adjourned until 12 o'clock noon on Monday, August 8, 1960, and the House of Representatives shall stand adjourned until 12 o'clock noon on Monday, August 15, 1960." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

At the same time, the Senate agreed to a resolution providing:

"* * * That notwithstanding the adjournment of the Senate under Senate Concurrent Resolution 112, as amended, and the provisions of rule XXXVIII of the Standing Rules of the Senate, the status quo of nominations now pending and not finally acted upon at the time of taking such adjournment shall be preserved." [1]

The questions now presented are, first, whether you are authorized to make appointments pursuant to Article II, section 2, clause 3 of the Constitution, during the adjournment of the Senate from July 3 to August 8, 1960, in particular whether you may appoint to vacancies, existing at the time when the Senate was in session, those persons whom you had nominated and whose nominations were pending and not finally acted upon at the time when the Senate adjourned; second, when the commissions granted pursuant to such appointments will expire; third, whether you should submit to the Senate—when it reconvenes on August 8, 1960, or at some later time—for its advice and consent, the nominations of those persons who had received appointments during the adjournment of the Senate, especially of those whose nominations were pending and not finally acted upon at the time of the adjournment on July 3, 1960; and, finally, whether and how long the persons receiving such appointments may be paid pursuant to the provisions of 5 U.S.C.

[1] Rule XXXVIII of the Standing Rules of the Senate provides in pertinent part: "6. * * * 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."

56. For the reasons set forth in detail, I conclude, first, that you have the power to make appointments during this adjournment of the Senate, and that this power extends to vacancies which existed at the time the Senate was in session and to persons whose nominations were pending but not finally acted upon when the Senate adjourned on July 3, 1960; second, that the commissions of the persons so appointed will expire at the end of the session of the Senate following the adjournment *sine die* of the second session of the 86th Congress, presumably, the end of the first session of the 87th Congress; third, that it would be advisable to submit to the Senate, when it reconvenes at the end of the adjournment, nominations for all persons who received appointments between July 3 and August 8, 1960; and, finally, that, provided compliance is made with the provisions of 5 U.S.C. 56, any such appointee can be paid out of the Treasury for the duration of his constitutional term or until the Senate has voted not to confirm his nomination.

I

Article II, section 2, clause 3 of the Constitution 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 has been settled by a long and unanimous line of opinions of the Attorneys General concurred in by the courts that the President's power to make such appointments is not limited to those which "happen to occur" during the recess of the Senate but that it extends to those which "happen to exist" during that period; hence, that the President has the constitutional power to fill vacancies regardless of the time when they first arose. 1 Op. 631 (1823); 2 Op. 525 (1832); 3 Op. 673 (1841); 7 Op. 186 (1855); 10 Op. 356 (1862); 12 Op. 32 (1866); 12 Op. 455 (1868); 14 Op. 562 (1875); 15 Op. 207 (1877); 16 Op. 522 (1880); 16 Op. 538 (1880); 17 Op. 530 (1883); 18 Op. 28 (1884); 18 Op. 29 (1884); 19 Op. 261 (1889); 26 Op. 234 (1907); 30 Op. 314 (1914); 33 Op. 20, 22–23 (1921); see also *In Re Farrow*, 3 Fed. 112 (C.C.N.D. Ga., 1880), and the opinion of Mr. Justice Woods, sitting as Circuit Justice, in *In Re Yancey*, 28 Fed. 445, 450 (C.C.W.D. Tenn., 1886).

The Congress, too, recognizes the President's power to make appointments during a recess of the Senate to fill a vacancy which existed while the Senate was in session.[2] R.S. 1761, 5 U.S.C. 56, which originally prohibited the payment of appropriated funds as salary to a person who received a recess appointment if the vacancy existed while the Senate was in session implicitly assumed that the power existed, but sought to render it ineffective by prohibiting the payment of the salary to the person so appointed.[3] In 1940, however, the Congress amended R.S. 1761, 5 U.S.C. 56 (act of July 11, 1940, c. 580, 54 Stat. 751), and permitted the payment of salaries to certain classes of recess appointees even where the vacancies occurred while the Senate was in session.[4] In view of this congressional acquiescence, you have, without any doubt, the constitutional power to make recess appointments to fill any vacancies which existed while the Senate was in session.

Next, I reach the question of whether the adjournment of the Senate, pursuant to Senate Concurrent Resolution 112 of July 3, 1960, from that day to August 8, 1960, is a "recess of the Senate" within the meaning of Article II, section 2, clause 3 of the Constitution. In other words, does the word "recess" relate only to a formal termination of a session of the Senate, or does it refer as well to a temporary adjournment of the Senate, protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations? It is my opinion, which finds its support in executive as well as in legislative and judicial authority, that the latter interpretation is the correct one.

In 1921, the Attorney General ruled that the President has the power to make recess appointments during an adjournment of the Senate for four weeks. 33 Op. 20 (1921). In his opinion, the test for the determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e.,

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[2] See, *e.g.*, 52 Cong. Rec. 1369–1370 (1915); 67 Cong. Rec. 262–264 (1925).

[3] Cf. the memorandum submitted by Senator Butler on March 16, 1925, 67 Cong. Rec. 263, 264 (1925).

[4] For an analysis of 5 U.S.C. 56, see II, *infra*. The legislative history of the 1940 amendment of 5 U.S.C. 56 does not contain any suggestion that the President lacks the power under the Constitution to make recess appointments when the vacancies existed while the Senate was in session. Cf. S. Rept. 1079, 76th Cong., 1st sess., and H. Rept. 2646, 76th Cong., 3d sess.

whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations. Relying on the classic expositions of Attorneys General Wirt and Stanbery in 1 Op. 631(1823) and 12 Op. 32(1866), the Attorney General explained the purposes the President's recess appointment power is designed to serve: *viz.*, to enable the President, at a time when the advice and consent of the Senate cannot be obtained immediately, to fill those vacancies which, in the public interest, may not be left open for any protracted period. He pointed out that the existence of a vacancy is no less adverse to the public interest because it occurs after a temporary rather than after a final adjournment of a session of the Congress, and "could not bring himself to believe that the framers of the Constitution ever intended" that the President's essential power to make recess appointments could be nullified because the Senate chose to adjourn to a specified day, rather than *sine die* (33 Op. 20, 23 (1921)).

The opinion, however, relied not only on earlier opinions of the Attorneys General; it was amply supported by judicial and legislative authority. In *Gould* v. *United States*, 19 C. Cls. 593, 595 (1884), the Court of Claims had held that the President possessed the power to make recess appointments during a temporary adjournment of the Senate lasting from July 20 to November 21, 1867. The Attorney General, furthermore, relied heavily on a "most significant" report of the Senate Committee on the Judiciary, dated March 2, 1905 (S. Rept. 4389, 58th Cong., 3d sess.; 39 Cong. Rec. 3823–3824 (1905)). This report, construing the very constitutional clause here involved, interprets the term "recess" as "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in 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 communications from the President or participate as a body in making appointments."

The opinion therefore concluded that the adjournment of the Congress from August 24 to September 21, 1921, a period shorter than the present recess, constituted a recess

of the Senate during which the President could fill vacancies under Article II, section 2, clause 3 of the Constitution.[5]

I fully agree with the reasoning and with the conclusions reached in that opinion. Moreover, this ruling since has been buttressed by a decision of the Comptroller General, and by the judgment of the Supreme Court in an analogous field. The decision of the Comptroller General (28 Comp. Gen. 30 (1948)) arose in the following circumstances:

In 1948, during the second session of the 80th Congress, President Truman submitted to the Senate the nominations of three judges. When the Senate, on June 20, 1948, adjourned to December 31, 1948, unless sooner called back into session by the congressional leadership, it had not acted on those nominations. On June 22, 1948, the President issued recess appointments to the three judges.[6] Upon inquiry from the Director of the Administrative Office of the United States Courts as to whether these judges could be paid, the Comptroller General ruled, largely in reliance on 33 Op. A. G. 20,[7] that an extended adjournment of the Senate is a "recess" in the constitutional sense, during which the President may fill vacancies. Specifically, the Comptroller General said (28 Comp. Gen. 30, at 34 (1948)):

"What is a 'recess' within the meaning of that provision [Art II, section 2, clause 3 of the Constitution]? Is it restricted to the interval between the final adjournment of one session of Congress and the commencement of the next succeeding session; or does it refer also to the period following an adjournment, within a session, to a specified date as here? It appears to be the accepted view—at least since an opinion of the Attorney General dated August 27, 1921, reported in 33 Op. Atty. Gen. 20—that a period such as last referred to is a recess during which an appointment properly may be made."

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[5] In its final part (33 Op. 20, 24–25 (1921)), the opinion discussed the problems presented by the adjournment of the Senate for a few days, or for a short holiday. It concluded that the outcome hinged on the practical question of whether the Senate was present to receive communications from the President and that it was largely a matter of sound Presidential discretion to determine whether or not there was a real recess making it impossible for the Senate to give its advice and consent to executive appointments.

[6] These appointments, of course, would not have been made had not the Attorney General adhered to 33 Op. 20.

[7] The Comptroller General considered that opinion of the Attorney General so important that he incorporated it in its entirety as a part of his decision.

Considering that the Comptroller General is an officer in the legislative branch, and charged with the protection of the fiscal prerogatives of the Congress, his full concurrence in the position taken by the Attorney General in 33 Op. 20 is of signal significance.

Of equal importance is the decision of the Supreme Court in the *Pocket Veto* case, 279 U.S. 655 (1929), which, in a related field, uses the same argument as the Attorney General in 33 Op. 20: *viz.*, that the Presidential powers arising in the event of an adjournment of the Congress are to be determined, not by the form of the adjournment, but by the ability of the legislature to perform its functions. Article I, section 7, clause 2 of the Constitution provides:

"If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

The issue presented in the *Pocket Veto* case, *supra*, was whether an adjournment of the Senate from July 3 to November 10, 1926, was an adjournment of the Senate "preventing" the return of a bill which had originated in that body.

The Supreme Court, in analogy to the Attorney General in 33 Op. 20, ruled that the test is not whether an adjournment is a final one terminating a session, but "whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[8] Applying the reasoning of the *Pocket Veto* case, *supra*, to the situation at hand, it follows that you have the power to grant recess appointments during the present recess of the Senate, because that recess "prevents" it from advising and consenting to Executive nominations.

The commissions issued by you pursuant to Article II, section 2, clause 3 of the Constitution expire "at the End of their [the Senate's] next session." This "End of their next Ses-

[8] 279 U.S. 655, 680 (1929). *Wright* v. *United States*, 302 U.S. 583 (1938), held that a three-day adjournment of the Senate while the House of Representatives was in session, and during which a veto message of the President was accepted by the Secretary of the Senate, did not amount to an adjournment preventing the return of the bill. For a discussion of the Pocket Veto problem, see also 40 Op. A.G. 274 (1943).

sion" is not the end of the meeting of the Senate, beginning when the Senate returns from its adjournment on August 8, 1960, but the end of the session following the final adjournment of the second session of the 86th Congress, presumably, the first session of the 87th Congress.

The adjournment of the Congress on July 3, 1960, pursuant to Senate Concurrent Resolution 112 was not *sine die.* Hence, it merely had the effect of a temporary "dispersion" of the Congress. 20 Op. A.G. 503, 507 (1892). It did not, however, terminate the second session of the 86th Congress. 5 Hinds' *Precedents of the House of Representatives,* secs. 6676, 6677; 28 Comp. Gen. 30, 33–34 (1948); *Ashley* v. *Keith Oil Corporation*, 7 F.R.D. 589 (D.C. Mass., 1947). Hence, when the Congress reconvenes in August it will not begin a new session but merely continue the session which began on January 6, 1960. *Ashley* v. *Keith Oil Corporation*, *supra;* 28 Comp. Gen. 121, 123–126 (1948); see also *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary*, dated November 5, 1947, 93 Cong. Rec. 10576–77. It follows that the "next session" referred to in Article II, section 2, clause 3 of the Constitution is the session following the adjournment *sine die* of the second session of the 86th Congress, i.e., either the first session of the 87th Congress or a special session called by the President following the final adjournment of the second session of the 86th Congress.[9]

This conclusion is fully supported by a ruling of the Comptroller General relating to the previously discussed recess appointments made by President Truman on June 22, 1948. After the second session of the 80th Congress had adjourned from June 20 to December 30, 1948, and a number of recess appointments had been granted, the President notified the Congress on July 15, 1948, to convene on July 26, 1948. Proclamation No. 2796, 13 F.R. 4057; 28 Comp. Gen. 121, 124 (1948). The Congress met accordingly, and again adjourned on August 7, 1948, until December 31, 1948

[9] A special session called by the President during a temporary adjournment of the second session of the 86th Congress would merely constitute a continuation of that session. *Ashley* v. *Keith Oil Corporation,* 7 F.R.D. 589, 591–592 (D.C. Mass., 1947) and the authorities there cited; *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary,* dated November 5, 1947, 93 Cong. Rec. 10576–77 (1947); 28 Comp. Gen. 121, 125–126.

(28 Comp. Gen. 121, 122). The Comptroller General ruled "that the reconvening of the 80th Congress on July 26, 1948, pursuant to the President's proclamation of July 15, 1948 * * * merely constituted a continuation of the second session" (28 Comp. Gen., at 126); hence, that "the convening of the Congress during the period July 26 to August 7, 1948 * * * was not the 'next session of the Senate' within the meaning of Article II, section 2, clause 3 of the Constitution, and that Judge Tamm's commission to office did not expire on August 7, 1948, when the second session of the 80th Congress adjourned * * *" (28 Comp. Gen., at 127).[10]

This year the Congress will reconvene, not pursuant to your call, but according to its own adjournment resolution. In these circumstances, the return of the Congress in August clearly is a continuation of the second session of the 86th Congress and not the next session, the termination of which would cause the recess appointments to expire. Barring an adjournment *sine die* of the 86th Congress and the calling of a special session, the recess commissions granted during the present recess of the Senate will terminate at the end of the first session of the 87th Congress. Officers who serve at your pleasure, of course, may be removed by you at any time.

You also have inquired whether you should submit to the Senate, when it reconvenes in August, nominations for those persons to whom you have given recess appointments during this adjournment of the Senate, although their nominations were pending but not finally acted upon at the time the Senate adjourned. This question is so intimately tied up with the pay status of the recess appointees that I shall answer it in that context.

II

The circumstance that you have the power to make appointments during this adjournment of the Senate and that the commissions so granted—barring unforeseen circumstances—will last until the adjournment *sine die* of the first session of the 87th Congress, however, does not mean

[10] The Attorney General did not publish a formal opinion in connection with this incident. A press release issued by Attorney General Clark on August 11, 1948, and the files of this Department, however, indicate that he was in full agreement with that ruling.

necessarily that your appointees can be paid out of appropriated funds.[11] The Congress has limited severely the use of such moneys for the payment of the salaries of certain classes of recess appointees.

R.S. 1761, as amended by the act of July 11, 1940, c. 580, 54 Stat. 751, 5 U.S.C. 56,[12] provides:

"No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) of this section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate."

The import of this complicated provision, briefly, is as follows: If the President makes a recess appointment to fill a vacancy which existed while the Senate was in session, the appointee may be paid prior to his confirmation by the Senate in three contingencies:

a. If the vacancy arose within thirty days prior to the termination of the session of the Senate;

b. If at the time of the termination of the session of the Senate a nomination for this office was pending before the Senate, except where the nominee is a person appointed during the preceding recess of the Senate;[13] or

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[11] In this opinion I shall use the term "paid" in the sense of being paid out of appropriated funds in the regular course of business, i.e., prior to confirmation by the Senate, and without recourse to the Court of Claims.

[12] Hereafter usually referred to as 5 U.S.C. 56.

[13] 36 Comp. Gen. 444 (1956) interprets clause (b), in analogy to clause (c), as if it read: If at the time of the termination of the session of the Senate

c. If a nomination for the office was rejected by the Senate within thirty days prior to the termination of the session, except where the person who receives the recess appointment is the person whose nomination was rejected.

The terminal proviso of 5 U.S.C. 56 requires in addition that a nomination to fill a vacancy in those three contingencies must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute thus permits the payment of salaries to persons receiving recess appointments to vacancies, which existed while the Senate was in session, in three situations, all of which are predicated on "the termination of the session of the Senate." Here again, the question arises whether this term must be interpreted technically—limited to the final adjournment of a session—or whether it permits the payment of salaries to those who receive a recess appointment after a temporary adjournment of the Senate.

The Comptroller General has ruled that "the term 'termination of the session' [has] * * * been used by the Congress in the sense of *any adjournment*,[14] whether final or not, in contemplation of a recess covering a substantial period of time" (28 Comp. Gen. 30, 37). Considering that the Comptroller General is the officer primarily charged with the administration and enforcement of 5 U.S.C. 56, his interpretation of that statute is of great weight. Independent reexamination of the subject matter, moreover, causes me to concur fully in his conclusions based largely on the purposes which the act of July 11, 1940, 54 Stat. 751, amending 5 U.S.C. 56, was designed to accomplish.

Prior to the enactment of the 1940 amendment, 5 U.S.C. 56 provided that if a vacancy existed while the Senate was in session a person receiving a recess appointment to fill that vacancy could not be paid from the Treasury until he had been confirmed by the Senate. This statute caused serious hardship, especially when a vacancy occurred shortly before the Senate adjourned, or where a session terminated before the Senate had acted on nominations pending before it (H.

a nomination for this office was pending before the Senate, except where the person who receives the recess appointment is a person appointed during the preceding recess of the Senate.

[14] Emphasis supplied.

Rept. 2646, 76th Cong., 3d sess.; see also letter from Attorney General Murphy to Senator Ashurst, dated July 14, 1939, S. Rept. 1079, 76th Cong., 1st sess., p. 2). The inability to pay recess appointees in those circumstances had the effect of either compelling the President to leave the vacancy unfilled until the next session of the Senate, or causing the appointee to undergo the financial sacrifice of having to serve, possibly for a considerable period of time, without knowing whether he could be paid (see letter of Attorney General Murphy to Senator Ashurst, *supra*).

The purpose of the 1940 amendment was "to render the existing prohibition on the payment of salaries more flexible" (H. Rept. 2646, 76th Cong., 3d sess., p. 1) and to alleviate the "serious injustice" caused by the law as it then stood (S. Rept. 1079, 76th Cong., 1st sess., p. 2). Thus, 5 U.S.C. 56, as it stands now, is a remedial statute designed to permit the immediate payment of recess appointees, provided the President complies in good faith with the statutory conditions.[15]

The "serious injustice" caused by the inability to pay a recess appointee, of course, is just as great and undesirable in the case where the appointment was made after a temporary recess of the Senate as where the commission had been granted after a final adjournment. To restrict the words "termination of the session" to a final adjournment, therefore, would be "inconsistent with the obvious purpose of the law" 28 Comp. Gen. 30, 37.

It follows that a person receiving a recess appointment during a prolonged adjournment of the Senate may be paid, if the conditions of 5 U.S.C. 56 initially have been met, i.e., if the vacancy arose within thirty days of the adjournment; or if a nomination was pending before the Senate at the time of the adjournment, except where the recess appointee has served under an earlier recess appointment;[16] or if the Senate had rejected a nomination within thirty days prior to its adjournment, except where the recess appointee is the person whose nomination had been rejected.

The recess appointee's right to be paid will continue throughout the constitutional term of his office, except for two contingencies: First, if the Senate should vote not to confirm

[15] For that reason, the Comptroller General consistently has interpreted the statute liberally; see, *e.g.*, 28 Comp. Gen. 30, 36–37; 238, 240–241; 36 Comp. Gen. 444, 446.

[16] Cf. n. 13, *supra*.

him, section 204 of the annual General Government Matters Appropriation Act, 1960 (July 8, 1959, 73 Stat. 166) would preclude the further payment of salary out of appropriated funds; second, the appointee's pay status may be cut off as the result of noncompliance with the terminal proviso of 5 U.S.C. 56, i.e., in the case of a failure to submit to the Senate a nomination to fill the vacancy within forty days after "the commencement of the next succeeding session of the Senate." The adjournment of the Senate after it reconvenes in August, however, will not jeopardize the recess appointee's right to be paid.[17]

III

When the Senate reconvenes in August 1960, you should submit to it nominations for all persons who received appointments during the adjournment of the Senate, including those whose nominations were pending but not finally acted upon when the Congress adjourned. This resubmission is desirable in order to advise the Senate of the fact that recess appointments have been made, and is probably required in order to protect the pay status of the recess appointees.

Ordinarily, when the Senate adjourns for more than thirty days all nominations pending and not finally acted upon at the time of the adjournment are returned to the President and may not be considered again unless resubmitted by the President (Rule XXXVIII(6) of the Standing Rules of the Senate). However, when the Senate adjourned on July 3, 1960, it resolved that—

"* * * the status quo of nominations now pending and not finally acted upon at the time of * * * adjournment shall be preserved." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

The Senate thus has waived Rule XXXVIII(6), with the result that nominations pending before it on July 3, 1960, but not finally acted upon at that time, will not be returned to you. And, when the Senate reconvenes in August, those nominations will be before it, and may be considered in the stage in which they were at the time of adjournment. The resolution thus avoids much duplication of effort, especially in those instances where hearings already have been held on a nomination.

I do not read the resolution, in particular the statement

[17] These two points will be discussed in Part III, *infra*.

that the *status quo* of all pending nominations not finally acted upon shall be preserved, as purporting to freeze those nominations, and to prevent the President from giving recess appointments to those whose nominations were pending but not finally acted upon at the time of the adjournment of the Senate. Any attempt of the Senate to curtail the President's constitutional power to make recess appointments would raise the most serious constitutional questions. And where, as here, the resolution not only fails to reveal any such purpose, but rather obviously was designed to obviate needless work, I refuse to attribute to the Senate any intent to interfere with the President's constitutional powers and responsibilities.[18]

In spite of the suspension of Rule XXXVIII(6) of the Standing Rules of the Senate, I recommend strongly that when the Senate reconvenes in August you should submit to it new nominations for those persons whose nominations were pending on July 3, 1960, and who have received appointments during the adjournment of the Senate. The submission of the new nominations would not constitute a meaningless duplication of effort, nor jeopardize the pay status of the recess appointees. The failure to do so, however, may constitute a violation of the terminal proviso of 5 U.S.C. 56 and delay, if not entirely prevent, the payment of salaries to the appointees.

First. Nominations submitted to the Senate customarily indicate the circumstance, where applicable, that a nominee is serving under a recess appointment. The preadjournment nominations of those who thereafter received recess appointments, of course, do not contain that information. The Senate has a substantial interest in being advised of the fact that a nominee is serving under such an appointment. Such appointment fills the position temporarily, and confirmation

[18] The circumstance that the nominations remain pending before the Senate during its recess does not affect the pay status of the recess appointees. 5 U.S.C. 56 does not contain any prohibition against the payment of the salaries to appointees whose nominations are pending before the Senate after its adjournment. Clause (b), it is true, refers to the situation that a nomination *is pending* before the Senate at the time of the termination of the session of the Senate. There is, however, nothing in the spirit and the language of 5 U.S.C. 56 to the effect that clause (b) is inapplicable where this nomination *remains pending* following the termination of the session. Moreover, 5 U.S.C. 56 has been interpreted to the effect that the question of whether a person may be paid is to be determined as of the time of the adjournment of the Senate preceding the recess appointment and not as of a later time (28 Comp. Gen. 121, 127–129, and see the discussion of that part of the Comptroller General's ruling, *infra*).

therefore is no longer urgent. This may be an important consideration to the Senate when it returns for what is hoped to be a short session. On the other hand, if the Senate is strongly opposed to an appointee it may vote to deny confirmation, and thus, for all practical purposes force him to resign by cutting off his pay. The submission of a new nomination for a recess appointee after the return of the Senate, accordingly, serves a distinct purpose.

Second. The terminal proviso of 5 U.S.C. 56 requires the submission of the nomination of a person who received a recess appointment "to the Senate not later than forty days after the commencement of the next succeeding session of the Senate." Failure to comply with this proviso presumably results in the suspension of the appointee's right to be paid out of appropriated funds. While the reconvening of the Senate after a temporary adjournment is not the commencement of the next session of the Senate in the ordinary sense of that term, we have seen that 5 U.S.C. 56 uses those words in a nontechnical way. If the words "termination of a session" in clauses (a), (b), and (c) have been interpreted as including a temporary adjournment which does not terminate a session, it is likely that the words "commencement of the next succeeding session of the Senate" correspondingly refer to the reconvening of the Senate after any adjournment, regardless of whether, technically, it begins a new session. In these circumstances, prudence suggests that I base my advice on the assumption that 5 U.S.C. 56 may require the submission of new nominations when the Senate reconvenes in August.[19]

I do not believe that noncompliance with the terminal proviso of 5 U.S.C. 56 can be rested safely on the ground that nominations made prior to adjournment but not finally acted upon at that time are still pending before the Senate as the result of the suspension of Senate Rule XXXVIII(6). The statute does not contain an exception covering that con-

[19] Arguments, of course, can be made that the words "commencement of the next succeeding session of the Senate" should be given their traditional meaning. The circumstance that the terminal proviso gives the President forty days within which to submit the nomination to the Senate might support the conclusion that the proviso refers to the next regular session of the Senate because, as a matter of experience, adjourned sessions of the Senate rarely last forty days. If the Senate should adjourn within forty days after its return on August 8, 1960, and before the President has submitted the nomination, it could be argued, in analogy to Article I, section 7, clause 2 of the Constitution, that compliance with 5 U.S.C. 56 has been waived because it has been "prevented" by the adjournment of the Senate.

tingency.[20] It could be argued, of course, that a statute should not be construed so as to require the performance of a redundant ceremony. However, as we have shown, the information that a nominee is serving under a recess appointment may be of considerable interest to the Senate. In any event, I should hesitate to recommend for quasi-equitable reasons the omission of an express statutory requirement in an area as technical as the appointment and pay of Federal officers.

In weighing these conflicting considerations, it appears to me, on the one hand, that the submission of new nominations to the Senate does not constitute an intolerably heavy burden. Moreover, as I shall show presently, rulings of the Comptroller General—with which I fully agree—have established that compliance with the letter of the statute will not jeopardize the recess appointee's pay status. On the other hand, the failure to resubmit a nomination conceivably may result in the suspension of the appointee's pay. In these circumstances, I recommend that when the Senate reconvenes in August nominations should be submitted for all officials who received appointments during the adjournment of the Senate, including those whose nominations were pending before the Senate at the time of its adjournment on July 3, 1960.[21] As a matter of precaution, I urge that nominations be submitted again when the Senate commences a new session in the technical sense.

The recess appointees' pay status will not come to an end when the Senate adjourns after its August sitting. When the Senate concludes its session after reconvening in August, a situation will be presented which appears to fall within the exception to 5 U.S.C. 56, clause (b): The Senate then will have terminated a session, and at that time there will be pending before it the nomination of a person who had received an appointment during the preceding recess of the Senate. This raises the question of whether the pay rights of a recess appointee, whose appointment originally

[20] The terminal proviso to 5 U.S.C. 56 was inserted by the Senate Committee on the Judiciary in order to insure that the nomination "will be submitted in ample time for adequate consideration by any incoming session of the Senate." S. Rept. 1079, 76th Cong., 1st sess., p. 2.

[21] Considering that it is desirable to obtain the advice and consent of the Senate to a nomination at the earliest possible moment, my recommendation includes the submission of nominations for those who received recess appointments to vacancies which occurred after the adjournment of the Senate, although 5 U.S.C. 56 does not cover those appointments.

complied with the requirements of 5 U.S.C. 56, can be cut off by the circumstances existing at the time of the subsequent termination of a session of the Senate. The opinion of the Comptroller General in 28 Comp. Gen. 121 cogently demonstrates that this is not the case because the words "termination of the session of the Senate" in 5 U.S.C. 56 uniformly refer to the session immediately preceding the recess when the appointment was made, and not to any subsequent termination.

An analysis of 5 U.S.C. 56 shows that in clauses (a) and (c) the words "termination of the session of the Senate" unquestionably relate to the session immediately preceding the recess of the Senate during which the appointment was made and not to a later one. The Comptroller General inferred from this that "it would be wholly inconsistent to say that the phrase 'termination of the session' as used therein [clause (b)] had reference to other than the session preceding the recess when the appointment was made.[22] * * * In other words, the entire statute speaks as of the date of the recess appointment under which the claim to compensation arises." (28 Comp. Gen. 121, 128 (1948)) The Comptroller General, therefore, concluded that the right to compensation, once vested, does not become defeated by a subsequent adjournment. He realized that under his interpretation the words "termination of the session of the Senate" in 5 U.S.C. 56 refer to a different session than the words "End of their next Session" in Article II, section 2, clause 3 of the Constitution. He attributed this "apparent inconsistency" to the circumstance that the recess appointment provisions of the Constitution and of 5 U.S.C. 56 serve different purposes (28 Comp. Gen. 121, 129).

I fully agree with the conclusions of the Comptroller General reached on the basis of the statutory language. I believe, however, that this result may be supported by two additional, broader considerations. First, the purpose of the 1940 act amending 5 U.S.C. 56 was to eliminate the hardship and injustice resulting from the inability to pay recess appointees appointed to vacancies which existed while the Senate was in session, where the vacancies arose shortly be-

[22] The Comptroller General also explained that the statute uses the words "termination of *the* session" in the specific sense, hence, that it refers to the termination of a particular session, i.e., the one preceding the recess appointment "rather than to just any session" 28 Comp. Gen. 121, 128.

fore an adjournment of the Senate, or where a nomination was pending before the Senate, but where the Senate adjourned before acting on it. The purpose of the 1940 statute was to permit the payment of salaries out of appropriated funds in those cases. It would create a new instance of the very hardship which the statute was intended to alleviate, if the right to compensation, once accrued, could be cut off by subsequent events, such as the reconvening and subsequent adjournment of the Senate, and if a recess appointee thereafter were required to work without pay for the rest of his constitutional term, or until the Senate should confirm him. An interpretation of the statute, which gives rise to results so inconsistent with the purposes it is designed to serve, must be rejected.

Second, it is the basic policy of the United States that a person shall not work gratuitously for the Government, or be paid for such work by anyone other than the Government (31 U.S.C. 665(b); 18 U.S.C. 1914). It is well recognized that a person who is not paid cannot be expected to perform his work zealously, and that he may be subjected to a host of corrupting influences. A statute which provides that a person cannot be paid by the Treasury until the happening of a future event, therefore, must be strictly construed. Even less favored is an interpretation which would result in the defeasance of a right to be paid, once it has accrued. In the case of any ambiguity, a statute should be read so as to permit the current compensation for work performed for the United States.

I therefore conclude that an adjournment of the Senate during, or terminating, the second session of the 86th Congress will not affect the pay status of a person appointed during the current recess of the Senate, and whose appointment originally complied with the requirements of 5 U.S.C. 56.[23]

Respectfully,

LAWRENCE E. WALSH,
Acting Attorney General.

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[23] A final caveat: A recess appointee filling a vacancy which existed while the Senate was in session, and who is not confirmed, when the Senate adjourns after it reconvenes in August, may not be given, out of a superabundance of caution, a second recess appointment. Such second appointment is unnecessary because his term runs until the end of the first session following the final adjournment of the second session of the 86th Congress; moreover, it might bring the appointee within the exception to 5 U.S.C. 56, clause (b) and, conceivably, result in the suspension of his salary. Cf. 28 Comp. Gen. 30, 37–38.

plus such additions thereto as may be authorized from time to time. On the other hand, the 10 per centum additional compensation in lieu of overtime, as authorized by section 502 of the Federal Employees Pay Act of 1945, as amended, is a part of basic compensation and does not affect subsequent additions thereto. Thus, the salary computation in example (A) in your letter is correct. Question 3 is answered accordingly.

[B-77963]

Appointments—Recess Appointments

The adjournment of the Senate on June 20, 1948, pursuant to House concurrent Resolution 218, until December 31, 1948, is to be regarded as a "termination of the session," within the meaning of the exception expressed in clause (b) of section 1761, Revised Statutes, as amended, so that persons who had been previously nominated to the office of Federal judge during the session adjourned on June 20, 1948, and whose nominations were pending in the Senate when it adjourned, are entitled to the salary attached to such offices under recess appointments given subsequent to the adjournment date.

A person who received a recess appointment from the President as a Federal judge during a recess of the Senate previous to its adjournment on June 20, 1948, pursuant to House Concurrent Resolution 218, and whose nomination as Federal judge was pending in the Senate when it adjourned on June 20, 1948, is not entitled, in view of section 1761, Revised Statutes, as amended, precluding the payment of salary in the case of the nomination of a person appointed during a preceding recess of the Senate, to the salary attached to his office under another interim appointment made subsequent to the adjournment date.

Comptroller General Warren to the Director, Administrative Office of the United States Courts, July 16, 1948:

I have your letter of June 30, 1948, as follows:

A question upon which I respectfully request your advice concerns the right to payment of salary of four judges of United States courts who have received from the President recess appointments since the recent adjournment of the present session of the Congress. They are as follows:

Honorable Paul P. Rao, appointed as Judge of the United States Customs Court.

Honorable Edward Allen Tamm, appointed as United States District Judge for the District of Columbia.

Honorable Samuel Hamilton Kaufman, appointed as United States District Judge for the Southern District of New York.

Honorable Roy W. Harper, appointed as United States District Judge for the Eastern and Western Districts of Missouri.

All of the appointments above mentioned were dated June 22, 1948. Each of the persons appointed had previously been nominated during the present Congress for the respective positions for which they have now been given interim appointments, and their nominations were pending in the Senate when that body recessed on June 20, 1948, but it had not acted on them. Further facts in the individual cases are as follows:

The nomination of Mr. Rao as Judge of the United States Customs Court was sent to the Senate on May 3, 1948.

The nomination of Mr. Tamm as United States District Judge for the District of Columbia was sent to the Senate on February 3, 1948. Judge Tamm took the oath of office and entered on duty June 28, 1948.

The nomination of Mr. Kaufman as United States District Judge for the Southern District of New York was sent to the Senate on May 17, 1948.

None of the three persons last mentioned had functioned as a judge prior to receiving the present interim appointments. I am informed that Judge Rao intends to qualify and enter on duty July 2, 1948, and Judge Kaufman is doing so today.

The fourth person receiving one of the recent interim appointments, Honorable Roy W. Harper, has functioned under prior interim appointments. His nomination was sent to the Senate at the first session of the present Congress on July 8, 1947. The Senate had taken no action on the nomination when the Congress recessed pursuant to Senate Concurrent Resolution 33 as amended on July 27, 1947. On August 11, 1947 Judge Harper received an interim appointment, and on the same day took the oath of office and entered on duty. The Senate had not acted on his nomination when the first session of the present Congress was finally adjourned on December 19, 1947. On December 20, 1947 Judge Harper received a second interim appointment, and on the same day he took a new oath and again entered on duty. As stated above, the Senate took no action on his nomination prior to recessing on June 20, 1948. Judge Harper on June 22, 1948 received a third interim appointment as stated above. He has been serving continuously as a district judge for the Eastern and Western Districts of Missouri since he qualified under the first interim appointment on August 11, 1947 and is continuing to do so. He has been paid the statutory compensation attaching to the office of district judge from the time that he first entered on duty August 11, 1947 continuously until the present month.

The provisions of law bearing upon the pending question are as follows:

The Constitution provides in Article II, Section 2, the third paragraph, that,

"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."

Section 1761 of the Revised Statutes as amended (54 Stat. 751, 5 U. S. C. 56) prohibits the payment of salary to any person appointed during the recess of the Senate to fill a vacancy in an office if the vacancy existed while the Senate was in session and confirmation by that body was requisite until confirmation has been had. To this there are three exceptions, one of which expressed in clause (b) of the section, is as follows:

"If, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent."

The question of the right to payment of the four judges receiving the interim appointments, would seem to turn on the meaning of the words "termination of the session" in the exception quoted. If the recent recess of the Senate was a "termination of the session" in the sense there used, then the appointments of Judges Rao, Tamm, and Kaufman, would seem to come within it. If on the other hand the recess was not a "termination of the session" as those words are used in the statute, then the prohibition would apply, and they are not entitled to be paid.

In the case of Judge Harper there is the additional fact that he received a recess appointment during the previous recess of the Senate beginning on December 20, 1947. If the recent recess of that body on June 20, 1948 was a "termination of the session" the question arises whether he is barred from payment by his previous recess appointment. If on the other hand the recent adjournment was not a "termination of the session" it may be that he has a continuing right to receive compensation under his recess appointment of December 20, 1947.

The adjournment of the Senate on June 20, 1948 was pursuant to House Concurrent Resolution 218 reading as follows:

"*Resolved*, That when the two Houses adjourn on Sunday June 20, 1948, they stand adjourned until 12 o'clock meridian on Friday, December 31, 1948, or until 12 o'clock meridian on the third day after the respective Members are notified to reassemble in accordance with section 2 of this resolution, whichever event first occurs.

"SEC. 2. The President pro tempore of the Senate, the Speaker of the House of Representatives, the acting majority leader of the Senate, and the majority

leader of the House of Representatives, all acting jointly, shall notify the Members of the Senate and the House respectively, to reassemble whenever, in their opinion, the public interest shall warrant it."

The adjournment of the previous session on July 26, 1947 was under Senate Concurrent Resolution No. 33 which was similar except that the specific date to which adjournment was taken in the absence of an earlier reassembling under Section 2 corresponding with Section 2 of the resolution adjourning the present session, was January 2, 1948.

The prohibition against payment of salary to a person appointed during a recess of the Senate to fill a vacancy in an office requiring Senatorial confirmation, if the vacancy existed while the Senate was in session, which is the original part of the statute under consideration, was derived from a statute enacted February 9, 1863. The exception in clause (b) of cases in which at the time of the termination of a session of the Senate, a nomination for the office in question other than the nomination of a person appointed during the preceding recess of the Senate, was pending confirmation, with two other exceptions which are not applicable in the instant cases, is a part of an amendment of the earlier statute approved July 11, 1940 (54 Stat. 751).

The report of the Committee on the Judiciary of the Senate recommending the bill (Senate Report No. 1079 of the 76th Congress) sets out a letter of Honorable Frank Murphy, then Attorney General, to the Chairman of the Committee, Honorable Henry F. Ashurst, dated July 14, 1939, explaining the reasons of the Attorney General for favoring its enactment. In the letter the Attorney General pointed out that frequently there were circumstances in reference to nominations not confirmed by the Senate which made it advisable to fill the vacancies temporarily during the following recess. One of these referred to in the letter was "At times nominations are left pending without action by the Senate at the time the session terminates". This is the situation covered by clause (b) of the statute now under consideration. The Attorney General went on to say that "It seems highly undesirable that under such circumstances a recess appointee should be precluded from receiving a salary during the recess. The result may be that on occasion the vacancy must remain unfilled until sometime during the following session of the Congress."

The letter stated that the bill, which became the present law, "would meet these objections by rendering the existing prohibition as to payment of salaries to recess appointees inapplicable" in certain specified cases, including "cases in which a nomination remains pending when the Congress adjourns."

The resolution of adjournment of the previous session of the present Congress on July 26, 1947 which was in all essentials similar to the resolution of adjournment of the present session on June 20, 1948, except for the difference in dates, received extensive consideration in many quarters in respect to the date of taking effect of the recent amendments of the Federal Rules of Civil Procedure. Rule 86 (b) as amended provided that the amendments should take effect "on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress." It was almost uniformly the conclusion of those who considered the matter prior to the final adjournment of the first session on December 19, 1947, that that day rather than the prior day of adjournment on July 26, 1947, was the day from which the three months specified in Rule 86 (b) should be measured. The amendments are regarded as becoming effective only on March 19, 1948, which was three months after the day of final adjournment. The Department of Justice advised United States Attorneys and attorneys in the Department to this effect in a circular, entitled Supplement No. 1 to Circular No. 4013 issued January 28, 1948.

Honorable Alexander Wiley, Chairman of the Committee on the Judiciary of the Senate, had inserted in the Congressional Record of Monday, November 17, 1947, a memorandum prepared by the Federal Law Section of the Library of Congress, the conclusion of which was that the day of adjournment of the first session of the Congress for the purpose of the taking effect of the amendments of the Federal Rules of Civil Procedure, would be the day of its final adjournment which later became December 19, 1947, rather than the day of earlier adjournment on July 27, 1947, and that meantime the Congress was "simply in recess." The Congress acquiesced in the view expressed in the memorandum that when it reconvened in November 1947 and until it adjourned on December 19 it was merely continuing the session begun in the preceding January. Also the recent session beginning in January 1948 is treated by the Congress as the Second Session of the 80th Congress and is so referred to in the Congressional

Record. If the present situation is considered analogous, and the words "termination of the session" in the statute are taken to mean the final adjournment of the present session of the Congress, then the session has not been terminated within the meaning of clause (b), and the exception to the prohibition of payment of salary to interim appointees does not apply.

There is a counter consideration, namely that it seems to have been the purpose of clause (b) to permit the payment of persons appointed to fill offices requiring Senatorial confirmation during periods while the Senate was not in session, if nominations had been submitted during the session of the Senate and not acted upon. Although the statute expressly bars the payment of salary under an interim appointment to a person whose nomination was rejected by the Senate, the bar does not appear to apply to a person whose nomination was submitted but not acted upon. Under the resolution of adjournment on June 20, 1948 the Senate will not be in session and in a position to act upon the nominations to the four judicial positions here involved until December 31, 1948, unless in the manner provided a call is issued for an earlier reassembling or the President recalls the Congress. Thus there may be a period of six months before the Senate can again act upon nominations. There is reason in the view that this is one of the contingencies which was contemplated by the statute providing for the payment of interim appointees, and that the purpose of the legislation would to a degree be defeated by a construction of the words "termination of the session," which for this purpose would limit them to the final adjournment.

As far as I have been able to ascertain, there are no direct precedents for the determination of the question of the right to payment of the four judges above named under their interim appointments of June 22, 1948. I therefore respectfully ask your opinion in reference to each one individually, whether the compensation attached to the office to which he has been appointed may be paid to him. Inasmuch as all of the four judges are either now serving or will be beginning their service within the week, I shall appreciate receiving your answer as soon as due consideration of the matter will permit.

As pointed out in your letter, the question as to the propriety of paying salary to the judges involved seems to depend upon whether or not the adjournment of the Senate on June 20, 1948, was a "termination of the session" within the meaning of section 1761, Revised Statutes, as amended.

It is required by the Constitution (20th amendment) that the Congress assemble at least once in each year, and that such meeting shall begin at noon on the third day of January unless the Congress should by law appoint a different day. This assembling of the Congress is referred to as a session in article I, section 4, wherein it is provided that neither House "during the session" of the Congress shall, without the consent of the other, adjourn for more than three days. Thus, there clearly is contemplated the continuance of a session notwithstanding the adjournment. Generally speaking, and in the absence of a special or extraordinary session, there are two sessions or assemblings of each Congress, commencing—since the 20th amendment to the Constitution—on January 3, unless a different day is specified by the Congress. Pursuant to Senate Joint Resolution 156 (Public Law 358, approved August 4, 1947, 61 Stat. 768) the second session of the 80th Congress began on January 6, 1948. As pointed out in your letter, the adjournment of the Congress on June 20, 1948, was to a specific date, namely, Friday, December 31, 1948.

It has been established that when the two Houses adjourn for more than three days and not to or beyond a day fixed by the Constitution

or law for the next regular session to begin, the session is not thereby necessarily terminated. Fifth Hinds' Precedents of the House of Representatives (1907), secs. 6676, 6677. Further, an adjournment other than *sine die* amounts only to a recess or dispersion of Congress for a certain period, 20 Op. Atty. Gen. 503; or, to state it differently, a final adjournment of a session of Congress does not occur until there is an adjournment *sine die*.

It follows from the foregoing that the adjournment of the Congress on June 20, 1948, having been to a specified day, said adjournment has resulted merely in a recess of the second session of the 80th Congress, which will not finally terminate until an adjournment *sine die*, presumably at some time between December 31, 1948, and January 3, 1949.

Thus, in a strict technical sense, the recent adjournment of the Senate was not a "termination of the session." So, the real question is whether a technical construction of the term would tend to defeat the purposes of the 1940 amendment to section 1761, Revised Statutes.

The authority for appointments such as here involved—commonly designated as recess appointments—derives from the power vested in the President by the Constitution (article II, section 2, clause 3) to make appointments to vacancies "during the recess" of the Senate. What is a "recess" within the meaning of that provision? Is it restricted to the interval between the final adjournment of one session of Congress and the commencement of the next succeeding session; or does it refer also to the period following an adjournment, within a session, to a specified date as here? It appears to be the accepted view—at least since an opinion of the Attorney General dated August 27, 1921, reported in 33 Op. Atty. Gen. 20—that a period such as last referred to is a recess during which an appointment properly may be made. Because of the relevance of the discussion contained therein to the present matter, the cited opinion of the Attorney General is quoted at length as follows:

> On August 24, 1921, the Senate passed a concurrent resolution which reads:
>
> "*Resolved by the Senate (The House of Representatives concurring)*, That when the two Houses adjourn on Wednesday, the 24th day of August, 1921, they stand adjourned until twelve o'clock meridian on Wednesday the 21st day of September 1921."
>
> The question now presented is whether during this adjournment you are authorized to make recess appointments or, to use the language of the Constitution itself, whether you 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."
>
> In my investigation of this subject I was confronted at the outset with an opinion rendered by Attorney General Knox to the President on December 24, 1901. (23 Op. 599.) On December 19, 1901, Congress adjourned to January 6, 1902. The question arose whether during this interval the President was empowered to appoint, under the constitutional provision now under consideration, an appraiser of merchandise in the District of New York. The high esteem I entertain for the distinguished author of this opinion has led me to examine

it with more than ordinary care. As will presently appear, I think there is no real inconsistency between the conclusion I am about to announce and the conclusion he arrived at on the particular point then under consideration. I am nevertheless constrained to dissent, not however without great reluctance, from some of the observations which that opinion contains.

It seems to me that the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained. Regardless of whether the Senate has adjourned or recessed, the real question, as I view it, is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained. To give the word "recess" a technical and not a practical construction, is to disregard substance for form.

In this connection it is interesting to note that at an early date the question arose whether the President's power of appointment is limited to filling only those vacancies actually occurring during the recess of the Senate; or whether it extends to vacancies happening while the Senate is in session and still remaining unfilled when the session is closed. In advising the President that his power is broad enough to cover the latter, Attorney General Wirt in 1823 (1 Op. 632, 633) used this language:

"The substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be so sacrificed to a dubious construction of its letter. * * *

"Looking to the reason of the case, why should not the President have the power to fill it? In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate or during their recess, it equally requires to be filled. The Constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission. * * *

"The opposite construction is, perhaps, more strictly consonant with the mere letter. But it overlooks the spirit, reason, and purpose; and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument and to produce the most embarrassing inconveniences."

This opinion (1 Op. 631) has been followed with practically unbroken unanimity. (2 Op. 525; 3 Op. 673; 7 Op. 186; 10 Op. 356; 12 Op. 32; 12 Op. 455; 14 Op. 562; 15 Op. 207; 16 Op. 522; 16 Op. 538; 17 Op. 530; 19 Op. 261; 18 Op. 28; 18 Op. 29; 30 Op. 314.)

The reasoning of Attorney General Stanbery in 12 Op. 32, 35, is illuminating and significant:

"There are, or may be, periods when there is no legislature in session to pass laws, and no court in session to administer laws, and this without public detriment; but always and everywhere the power to execute the laws is, or ought to be, in full exercise. The President must take care at all times that the laws be faithfully executed. There is no point of time in which the power to enforce or execute the laws may not be required, and there should not be any point of time or interval in which that power is dormant or incapable of acting. * * *

"If any one purpose is manifest in the Constitution, if any one policy is clearly apparent, it is, that in so far as the chief or fountain of Executive power is concerned, there shall be no cessation, no interval of time when there may be an incapacity of action. * * *

"The true theory of the Constitution in this particular seems to me to be this: That as the Executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief Executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone."

I think the language quoted is applicable to the present situation. I need not point out the disastrous consequences a contrary construction may lead to. If the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be

measurably to prevent the exercise of governmental functions. I can not bring myself to believe that the framers of the Constitution ever intended such a catastrophe to happen.

Nor are my conclusions without authority to support them. *Gould* v. *United States*, 19 Ct. Cls. 593, is in accordance with my views. But most significant of all is the report of the Senate Judiciary Committee presented on March 2, 1905, in response to a resolution calling upon it to construe the very clause of the Constitution now under consideration:

"It was evidently intended by the framers of the Constitution that it [Art. II, sec. 2] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It seems, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in 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 can not receive communications from the President or participate as a body in making appointments. * * *

"This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof." (Third session Fifty-eighth Congress, Senate Report No. 4389; 39 Cong. Record, pp. 3823, 3824.)

I now pass to the most difficult question of all. In one sense its discussion at the present time is unnecessary, but I nevertheless deem an expression of my views advisable so as to avoid any misconception as to the scope of this opinion. The inquiry at once presents itself: If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term "recess" must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution. In the very nature of things the line of demarcation can not be accurately drawn. To paraphrase the very language of the Senate Judiciary Committee Report, the essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor of the validity of whatever action he may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.

I accordingly have the honor to advise you that in my opinion you have the power during the present adjournment to make appointments under the constitutional provision I have been discussing.

The general prohibition contained in section 1761, Revised Statutes, against the payment of salary is applicable to persons appointed "during the recess" of the Senate. And, it is noted from the referred-to letter of the Attorney General set forth in Senate Report 1079 that, in recommending the enactment of the legislation providing exceptions to said prohibition, the Attorney General clearly indicated that the purpose of the bill was to authorize the payment of salary to "recess

appointees," there being pointed out, as indicated in your letter, the undesirability of denying salary to such appointees during the recess. While there is nothing otherwise in the legislative history of the said bill of any helpful assistance in construing the measure, I think it is clear that its primary purpose was to relieve "recess appointees" of the burden of serving without compensation during periods when the Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date. Certainly, the denial of salary to a recess appointee would be just as "undesirable" or as much a burden upon the individual in the one instance as in the other. Under the circumstances, and since to restrict, by interpretation, the meaning of the language in question to a final adjournment of a session would be inconsistent with the obvious purpose of the law, I think it only reasonable to regard the term "termination of the session" as having been used by the Congress in the sense of any adjournment, whether final or not, in contemplation of a recess covering a substantial period of time. Of course, what might be deemed a substantial period of time necessarily would depend upon the facts of the particular case. In respect to the possible inquiry as to whether a recess of less than six months as here—say 2, 5 or 10 days—is a termination of a session within the meaning of the law, the statements of the Attorney General on that point contained in the third from the last paragraph of the opinion above quoted would appear to be appropriate.

In view of the foregoing, it may be held that the adjournment of the Senate on June 20, 1948, pursuant to House Concurrent Resolution 218, was a "termination of the session" within the meaning of the exception expressed in clause (b) of section 1761, Revised Statutes, as amended. Judges Rao, Tamm, and Kaufman having been previously nominated during the session adjourned on June 20, 1948, for the positions for which they were given interim appointments on June 22, 1948, and their nominations having been pending in the Senate when it recessed on June 20, 1948, without action by that body on said nominations, it follows that their cases fall within the terms of the exception involved and that the salary attached to the offices properly may be paid to them. However, so far as the case of Judge Harper is concerned, a different result must be reached. By its plain terms the exception to the salary payment prohibition is not applicable in the case of the "nomination of a person appointed during the preceding recess of the Senate." In respect to this language it was stated in Senate Report 1079 that—

> The purpose of this amendment is to preclude payment of salary to a person nominated to fill a vacancy during the time when the Congress had adjourned or was in recess but whose nomination was not sent to the Senate for confirma-

tion during the session of Congress which followed the recess during which the nomination was made, or having been submitted to the Senate, was not acted upon.

Since your letter indicates that Judge Harper received a recess appointment during the previous recess of the Senate there is compelled the conclusion that he is not entitled to salary under his interim appointment of June 22, 1948.

[B-78055]

Sale of Excess Electricity to Non-Government Activities—Disposition of Proceeds

Federal agencies may not make use of appropriated funds to manufacture products or materials for, or otherwise supply services to, private parties, in the absence of specific authority therefor; however, where a Government agency in the course of its operations produces electric current in excess of its needs, disposition of the surplus by sale to a non-Government activity is not legally objectionable.

If it be administratively determined by the Bureau of Mines that it would be in the Government's interests to operate a Government-owned electric generating plant at its capacity, any surplus electricity resulting therefrom may be disposed of by sale to a private activity; however, under section 3618, Revised Statutes, the credits accruing to the Bureau through payment by the purchaser of invoices for materials, supplies, etc., used in the plant's operation—as distinguished from direct money payments—may not be used without making corresponding transfers from the Bureau's appropriated funds into the Treasury as miscellaneous receipts.

Acting Comptroller General Yates to the Secretary of the Interior, July 22, 1948:

I have your letter of July 1, 1948, stating that the Bureau of Mines, in the performance of its functions under the Synthetic Liquid Fuels Act of April 5, 1944, 58 Stat. 190, 30 U. S. C. 321–325, has taken over from the Department of National Defense a former ordnance plant located at Louisiana, Missouri, and that this plant is now being adapted for use in connection with a plant for the experimental production of synthetic liquid fuel now under construction.

You state that one of the facilities of the former ordnance plant is a steam-electric generating plant with three generating units rated at 7,500 kilowatts each, and that it is intended to use the generating plant to furnish steam and electric energy for the operation of the synthetic liquid fuels plant. It is stated further that the capacity of the generating plant is in excess of the Bureau's requirements for the operation of the synthetic liquid fuel plant, but as the operation of the generating plant approaches its capacity the unit cost of the steam and electric energy produced will be proportionately reduced; in other words, that economy and efficiency of operation will be served

THE WHITE HOUSE

WASHINGTON

July 19, 1985

Dear Mr. Keller:

Thank you for your letter of June 14 to the President, concerning the provision of legal services. We appreciate your sharing your views on this subject with us. Please be assured that they will receive every appropriate consideration.

Thank you again for writing, and congratulations on the recognition for your efforts to discharge the obligation of the bar to ensure that those who need legal services receive them.

Sincerely,

John G. Roberts
Associate Counsel to the President

Alex S. Keller, Esquire
President, Colorado Bar
Association
1900 Grant Street
Suite 950
Denver, CO 80203

ID# 316405

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: JUNE 18, 1985

NAME OF CORRESPONDENT: MR. ALEX S. KELLER

JR-Ltr

SUBJECT: WRITES CONCERNING THE BUDGET CUTS FOR THE LEGAL SERVICES CORPORATION

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION ACT CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED YY/MM/DD
FRED FIELDING	ORG	85/06/18			
REFERRAL NOTE:					
FREDERICK RYAN	RSI	85/06/18		C	85/06/18
REFERRAL NOTE:					
CWAT18	R	85/06/19	TR	S	85/06/25 TR
REFERRAL NOTE:					
REFERRAL NOTE:					
REFERRAL NOTE:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: ____ ____ ____

MI MAIL USER CODES: (A)_____ (B)_____ (C)_____

*ACTION CODES:	*DISPOSITION	*OUTGOING CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS OF SIGNER
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
*D-DRAFT RESPONSE	*C-COMPLETED	*COMPLETED = DATE OF OUTGOING
*F-FURNISH FACT SHEET	*S-SUSPENDED	
*I-INFO COPY/NO ACT NEC		
*R-DIRECT REPLY W/COPY		
*S-FOR-SIGNATURE		
*X-INTERIM REPLY		

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE (ROOM 75,OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

5

#316405

THE COLORADO BAR ASSOCIATION

1900 GRANT STREET / SUITE 950 / DENVER, COLORADO 80203-4309 / (303) 860-1112 / WATS 1-800-332-6736

Fred Fielding
cc: Fred Ryan

June 14, 1985

President Ronald Reagan
The White House
Washington D.C. 20510

Dear Mr. President:

I want to thank you for honoring the Colorado Bar Association by awarding us a Private Sector Initiative Citation for the effort our 9,000 members are making in Colorado to help provide free legal services for poor people. I appreciated receiving the Citation personally in the Rose Garden ceremonies on June 14 on behalf of our 25 local bar associations, and I want to assure you that our voluntary efforts will continue and increase.

At the same time, Mr. President, I feel obliged to point out to you and to the public that private initiative and voluntary service will not meet the needs of poor people for legal services, despite the best efforts of lawyers. Private lawyers in Colorado have expanded their efforts and improved the quality of their program, but thousands of poor people who need legal help are still being turned away without receiving it.

The problem has grown worse in Colorado partly because Congress, at your bidding, has reduced the budget of the Legal Services Corporation and forced the dismissal of more than 20 staff lawyers who were helping the poor in the state's five publicly-supported legal aid programs. Since those cuts began, the private bar has been accepting many more cases for poor people at no charge in what the White House has correctly identified as a private sector initiative. But the private initiative cannot compensate for decline in public support.

The five public programs in 1984 received only about 73 percent of their funding from the federal government through the Legal Services Corporation. The other 27 per cent ($1,024,545) came from bar-supported activities, from the United Way and from federal Title III programs for senior citizens. Private initiative, including bar initiative, thus made a significant contribution to the operation of public programs, in addition to financing and providing voluntary services for the private programs.

Through the five public programs, legal assistance was provided for 25,000 persons who met the low income guidelines (at 125 per cent of the poverty level) in 1984. The private programs, developed with the voluntary particiation of private

attorneys, provided legal services to less than 4,000 persons. Yet, a survey completed this spring indicates that about 90,000 of the 150,000 households in Colorado with incomes of less than 125 per cent of the poverty level reported that household members faced legal problems in 1984. Even if some of those problems did not require the services of lawyers, the need for legal services for the poor in Colorado plainly exceeded the availability of such services.

My point, Mr. President, is that private initiative , as important as it is, cannot replace public programs. Private initiative can and should supplement government efforts, not relieve government of its responsibility. As pleased as the Colorado Bar Association is to have its private initiative recognized, the Association would not like to have its private effort used as a justification for further retrenchment in the government's legal services program.

The only way poor people can continue to receive adequate legal services in civil cases is by the continuation of the long-standing partnership between government and the bar. It makes no more sense to ask the private bar to carry the entire load than it would to ask the medical profession and hospitals to take care of all the health needs of poor people free of charge or to ask Safeway and King Soopers to feed all the hungry for nothing.

We intend to continue to press for more funding for the Legal Services Corporation. We will also be seeking public funds from state and local governments. We believe that the public and private sectors should work together to make sure that Americans are not deprived of access to legal remedies and legal advice because of their income levels. We intend to take on more responsibility and we hope that governments at all levels can be persuaded to do the same.

Again, let me thank you for recognizing our efforts.

Sincerely,

Alex S. Keller

Alex S. Keller
President, Colorado Bar Association

ASK:jd