



Subject Recess Appointments to the Export Import Bank.	Date JAN 28 1985
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To
FILES

From
NAME: Herman Marcuse
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STATEMENT:

In the afternoon of Friday, January 18, 1985, Mr. John Roberts of the Office of the Counsel to the President presented a question about the President's power to make recess appointments to the Board of Directors of the Export Import Bank. He advised me that the terms of two of the directors would expire on January 20, 1985, and inquired whether the President could make recess appointments to the Board in the morning of January 21, 1985, before the Senate would reconvene from its recess at noon. I asked Mr. Roberts when the recess began, and he stated that it began on January 3.1/

I indicated to him that the recess period of 18 days was extremely short; moreover, while we had opined that the President's power to make recess appointments lasted until the Senate actually reconvened -- hence that, if the Senate should reconvene at noon, the President could make recess appointments in the forenoon -- the making of recess appointments so close to the end of the recess did present problems, indeed this was one of the reasons for the voluntary dismissal of the quo warranto proceedings brought by the Government against a board member of the Corporation for Public Broadcasting. I therefore told Mr. Roberts that in view of the close and delicate nature of the question I would have to discuss it with DAAG Simms. Mr. Roberts indicated that our reply to this inquiry was rather urgent.

I discussed the information I had received from Mr. Roberts with Mr. Tarr and Mr. Simms. Both felt that an 18 day recess was rather short. Mr. Simms suggested that the difficulty

1/ As shown in the Addendum, we discovered, after having given our advice to Mr. Roberts, that the recess had begun on January 7, 1985. The time limitations given to us prevented us from checking independently the time of the adjournment of the Senate.

there was a strong possibility that any appointment prior to January 21st would expire on January 20th. A recess appointment prior to January 21st, therefore presented at least as much of a risk as a recess appointment in the forenoon of the day on which the Senate reconvenes. As to the recommendation to submit nominations in the very near future, Mr. Roberts advised me that the nomination of one of the prospective recess appointees already had been reported to the Senate and that the appropriate Committee had indicated that there appeared to be no objection to the appointment, but that confirmation might take a while. On the other hand, the Bank had warned the White House that extended vacancies on its Board would cause serious problems.

I advised Mr. Roberts that, in the view of this Office, these recess appointments should be avoided, if at all feasible; but, on the other hand, what had to be done, had to be done, and we could not say that they would be constitutionally invalid as a matter of law.

of making recess appointments in the morning of January 21st might be avoided by having the directors whose terms expire on January 20th resign immediately so that the President could make a recess appointment on January 19th or 20th. In any event, they recommended that the President should submit nominations as soon as possible.

I then called Mr. Roberts and gave him the substance of my discussion with Mr. Tarr and Mr. Simms. With respect to resignation of the directors so that the President could make recess appointments prior to the 21st, Mr. Roberts indicated that in view of the obscure language of 12 U.S.C. § 635a(c)(8) 2/

2/ Section 635a(c)(8) provides:

(8)(A). The terms of the directors, including the President and the First Vice President of the Bank, appointed under this section shall be four years, except that --

(i) during their terms of office, the directors shall serve at the pleasure of the President of the United States;

(ii) the term of any director appointed after the date of enactment of this paragraph to serve before January 20, 1985, shall expire on January 20, 1985;

(iii) of the directors first appointed to serve beginning on or after January 21, 1985, two directors (other than the President and First Vice President of the Bank) shall be appointed for terms of two years, as designated by the President of the United States at the time of their appointment; and

(iv) any director first appointed to serve for a term beginning on any date after January 21, 1985, shall serve only for the remainder of the period for which such director would have been appointed if such director's term had begun on January 21, 1985. If such term would have expired before the date on which such director's term actually begins, the term of such director shall be the four-year period, or remainder thereof, as if such director had been preceded by a director whose term had begun on January 21, 1985.