

Memorandum

Garrett



159

Subject Pay Act -- 5 U.S.C. § 5503.	Date DEC 21 1984
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To
FILES

From Herman Marcuse
NAME:
OFFICE SYMBOL: OLC

STATEMENT:

On December 14, 1984, I received a call from Mr. Garrett, of the Office of the Counsel to the President, involving the interpretation of the Pay Act, 5 U.S.C. § 5503. A member of the Postal Rate Commission had been given a recess appointment during the recess of the Senate between the first and second sessions of the 98th Congress. His nomination had been submitted to the Senate and was pending before it when the 98th Congress adjourned sine die without having taken action on the nomination. Mr. Garrett stated that the President intends to give a recess appointment to another person during the recess of the Senate between the 98th and 99th Congress. He inquired whether that person could be paid prior to confirmation in view of the Pay Act, 5 U.S.C. § 5503.

The Pay act provides in substance that a recess appointee may not be paid out of the Treasury prior to his confirmation, if the vacancy existed while the Senate was in session. This prohibition, however, does not apply (1) . . .

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

Mr. Garrett pointed out that the situation described by him fell literally within the exception to paragraph (2), viz., that the nomination of a person appointed during the preceding recess of the Senate was pending before the Senate at the time of the adjournment.

I pointed out to Mr. Garrett that the Comptroller General, the officer primarily charged with the interpretation of the

Pay Act (see 41 Op. Att'y Gen. 463, 469 (1961)), has construed 5 U.S.C. § 5503(2) in analogy to 5 U.S.C. § 5503(a)(3) */ as if it read:

"If a nomination for the office was pending before the Senate at the end of the session, and a person other than the one who had received a recess appointment to the office during the preceding recess of the Senate receives a recess appointment."

36 Comp. Gen. 444. In the situation described by Mr. Garrett, a nomination was pending before the Senate at the time of its recess, and the recess appointment would go to a person other than a person who had served under a previous recess appointment. The new recess appointee thus could be paid under the interpretation placed by the Comptroller General on the Pay Act.

Mr. Garrett inquired further whether the Pay Act which in terms prohibits payment for services from the Treasury is applicable to the Postal Rate Commission, since the latter is not funded from the Treasury but from postal receipts. On that issue I referred Mr. Garrett to our memorandum dated August 24, 1984, to Mr. Fielding, re: Possible Recess Appointments to the Federal Deposit Insurance Corporation.

*/ Section 5503(a)(3) provides:

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