

Memorandum

1157



Subject

White House inquiry concerning
recess appointments.

Date

December 28, 1982

To

FILES

From

NAME:

Herman Marcuse *HLM*

OFFICE SYMBOL:

STATEMENT:

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

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

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