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-

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[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 8, 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 corrnpting 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.