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United States General Accounting Office
Washington, DC 20548

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August 14, 2002

The Honorable Christopher J. Dodd
Chairman, Subcommittee on Western Hemisphere,
Peace Corps, and Narcotics Affairs
Committee on Foreign Relations
United States Senate

Subject: Duration of Recess Appointment

Dear Mr. Chairman:

This responds to your letter dated May 29, 2002, requesting our opinion concerning the duration of the recess appointment of Mr. Otto J. Reich to the position of Assistant Secretary of State for Western Hemisphere Affairs. For the reasons set forth below, we conclude that this recess appointment, made before the start of the second session of the 107th Congress, will expire at the end of the second session of the 107th Congress.

BACKGROUND

On January 11, 2002, the President made a recess appointment of Mr. Reich as Assistant Secretary of State for Western Hemisphere Affairs after both Houses of the Congress had adjourned sine die¹ on December 20, 2001. Since the Senate had agreed to adjourn sine die, then the date specified by the joint resolution,² December 20, 2001, marked the end of the Senate session. B-288581, Nov. 19, 2001.

On January 23, 2002, the Senate reconvened for the second session of the 107th Congress. Pub. L. No. 107-98, Dec. 21, 2001, 115 Stat. 961. Thus, Mr. Reich received

¹Adjournment sine die literally means adjournment without day, a reference to the fact that the Houses are adjourning until the next session of Congress and not to a specified date within the current session of Congress. See Black's Law Dictionary 1390 (7th ed. 1999) and Congressional Research Service, "Lame Duck Sessions, 74th-106th Congress," 98-872 GOV, at 1 (2001).

²H.R. Con. Res. 295, 107th Cong. (2001) (enacted).

his recess appointment during an intersession recess, when the last formal session of the Senate had ended and the next formal session of the Senate had not yet commenced. You asked for our opinion regarding the duration of Mr. Reich's recess appointment.

DISCUSSION

The power of the President to appoint officers during a recess of the Senate is contained in the United States Constitution, and the recess appointments clause of the Constitution states: "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." U.S. Const. art. II, § 2, cl. 3. The duration of Mr. Reich's recess appointment depends on the meaning of the term "next session" in the recess appointments clause. Courts start with the plain meaning of statutes in interpreting the law. Mallard v. United States District Court, 490 U.S. 296, 300 (1989); cf. Perpich v. Dep't of Defense, 496 U.S. 334, 339-340 (1990) (Supreme Court used plain language to interpret Article I of the Constitution).

When Mr. Reich was appointed on January 11, 2002, the Senate had not yet begun its second session of the 107th Congress. In this context, the plain meaning of the language "next session" can only be the second session of the 107th Congress. When the Senate reconvened on January 23, 2002, it began the "next session" within the meaning of the recess appointments clause. We have held that a commission issued pursuant to a recess appointment expires at the end of the Senate's next session following the adjournment sine die. B-201035, Dec. 4, 1980. Where, as here, a recess appointment was made during an intersession recess, the duration of the appointment only continues until the end of the session that was about to commence. See United States v. Woodley, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986).

Similarly, the Department of Justice has interpreted the phrase "at the End of their next Session" to mean the "adjournment sine die of the session of the Senate for the first session of Congress that begins after the designation was made." 17 Op. Off. Legal Counsel 1 (1993), citing 41 Op. Att'y Gen. 463, 469-71 (1960); 6 Op. Off. Legal Counsel 585, 586-87 (1982). The Department of State agrees that Mr. Reich's recess appointment will expire at the end of the current session of the Senate.³

Thus, for the purposes of Mr. Reich's January 11, 2002, appointment, the second session of the 107th Congress is the "next session" indicated in the recess appointments clause of the Constitution. Since Mr. Reich received a recess appointment prior to the commencement of the second session of the 107th Congress,

³ Letter from Christopher B. Burnham, Assistant Secretary for Resource Management and Chief Financial Officer, Department of State, to Susan A. Poling, Managing Associate General Counsel, GAO, July 8, 2002.

his appointment will expire when the Senate adjourns at the end of the second session. More specifically, the end of the second session will be either upon the adjournment sine die of the second session of the 107th Congress as established by concurrent resolution (irrespective of any reserved right to reconvene), or, in the absence of a concurrent resolution setting an adjournment sine die date, immediately prior to the beginning of the first session of the 108th Congress (January 3, 2003, or as otherwise provided⁴). B-288581, Nov. 19, 2001.

If you have any questions concerning this letter, please feel free to contact me at 202-512-5400 or Ms. Susan A. Poling, Managing Associate General Counsel, at 202-512-5644. We are sending a copy of this letter to the Secretary of State, the Ranking Minority Member of the Subcommittee, and interested congressional committees. The letter will be available on GAO's home page at <http://www.gao.gov>.

Sincerely yours,

signed

Anthony H. Gamboa
General Counsel

cc: The Honorable Colin L. Powell, Secretary of State

⁴ "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day." U.S. Const. Amend. XX, § 2.