RECESS APPOINTMENTS

Brief by Frank W. Hunger (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

July 2, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Respectfully submitted,

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[*Editors' note*: A superfluous heading has been omitted.]

[*1] INTRODUCTION

This suit challenges the validity of the recess appointment of Thomas Ludlow Ashley to the Postal Service Board of Governors.[1] Mr. Ashley was appointed to succeed Crocker Nevin who at the time was serving temporarily, after his term had expired, pursuant to the holdover provision of the Postal Reorganization Act ("Postal Act" or "The Act").

Three elements trigger the recess appointment power: a 1) "vacancy" must 2) "happen," during 3) a Senate "recess." Only the first and third elements are at issue in this case. Plaintiff's challenge to these elements fails for the following reasons.

[*2] First, the decision in Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979), proves that a vacancy existed in Mr. Nevin's position on the date his statutory term of office ended. Plaintiff contends that the holdover provision of the Postal Act creates not a present vacancy that can be filled by recess appointment, but a prospective one to be filled by presidential appointment after Senate confirmation.[2] However, the Postal Act originally defined a vacancy as occurring upon the expiration of a Governor's term and there is no evidence that the holdover provision was intended to change this definition. Moreover, even if the vacancy were to be considered a prospective one, plaintiff cannot prevail unless he also proves that the vacancy can only be filled by an appointee who has been confirmed by the Senate. Because the Postal Act contains no such restriction, plaintiff's prospective vacancy theory fails.

Second, the plaintiff does not contend that the Senate was not in recess on January 8, 1993, when Mr. Ashley was recess appointed. Instead, plaintiff asserts that this recess was not the "type of recess" contemplated by the recess clause. While plaintiff suggests that "recess" is confined to those occurring between sessions of Congress,

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[1] As noted in their opening brief, defendants challenge the standing of all plaintiffs other than Crocker Nevin, whom defendants refer to as the plaintiff herein.

[2] President Clinton has announced his intention to nominate Einar Dyhrkopp to the Postal Service Board of Governors. See Star Tribune, June 29, 1993 (State ed.), available in LEXIS, Nexis Library, Majpap File. If Mr. Dyhrkopp is confirmed and appointed, plaintiff's recess appointment challenge would be moot.

the terms of the Constitution impose no such limitation. Furthermore, plaintiff's [*3] interpretation is contrary to the purpose of the recess clause and would upset the balance of power allocated under the Constitution. Plaintiff argues, alternatively, that even if intrasession recesses generally are accepted, this particular intrasession recess was too brief to count. As demonstrated in defendants' opening brief, as well as below, there is no basis in the Constitution for the Court to draw such distinctions.

ARGUMENT

[*Editors' note*: Part I of the Argument has been omitted.]

[*17] II. THE PRESIDENT PROPERLY EXERCISED HIS RECESS APPOINTMENT POWERS DURING THE SENATE'S JANUARY 1993 RECESS

Plaintiff here does not argue that Congress was not in "recess" from January 7, to January 20, 1993. Instead, plaintiff contends that the January recess was not the "type" of recess contemplated by the Recess Appointments Clause. Plaintiff's Brief at 23. According to plaintiff, only an intersession recess is the right kind of recess. Plaintiff's implied limitation on the unqualified language of the Constitution would thwart the purposes of the recess clause and upset the balance of power between the branches. Accordingly, interpreting "recess" to include both intersession and intrasession recesses is more reasonable.

A. The Terms Of The Recess Appointments Clause Permit A Finding That "Recess" Means Both Intersession And Intrasession Recesses

The recess clause provides that:

> 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.

Art. II, § 2, cl. 3.

Plaintiff contends that use of the term "the Recess" in the singular evidences the Framers' intent to limit use of the recess power to intersession recesses because the general practice has been for each Congress to have two sessions. Plaintiff's Brief at 25-26. Plaintiff asserts that "the Recess" therefore logically refers to the interval between these two sessions. The problem with such logic, as we have pointed out, is that nothing [*18] in the Constitution limits the number of sessions that a Congress may have. Congress often has held three sessions, as did the First, Fifth and Eleventh Congresses; indeed, a fourth session was held by the 67th Congress.[15]

Plaintiff relies on the language providing that a recess commission will "expire at the End of [Congress'] Next session" as further evidence that the Recess refers to intersession recesses only. Plaintiff asserts that extending the recess to intrasession recesses could make a recess appointment valid for nearly two years.[16] History shows that recess appointees have been granted commissions that would allow them to serve in that capacity for similar periods. For example, William Allen (S. D. Ill.) was recess appointed on April 18, 1887 for a term that would not have expired pursuant to the recess clause until October 20, 1888 – a period of 18 months. See Defendants' Brief, Exh. 1 at p. Al. Similarly, in 1849, Henry Boice was recess appointed on May 9, 1849 for a term that would have expired on September 30, 1850, almost 17 months later. Id. at p. A3. Indeed, the record indicates that Judge Boice would have actually served most of that period because he was not confirmed until August 2, 1850. Thus, the fact that Mr. Ashley's [*19] appointment conceivably could last for an extended period of time is no basis for disapproving his recess appointment.

Plaintiff contends that the Framers could not have intended to allow persons appointed at the beginning or middle of an intrasession recess "when the Senate's resumed availability for advice and con-

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[15] In fact, of the 103 Congresses, 25 have had three or more sessions.

[16] Last year, Congress adjourned sine die on October 8, 1992. Assuming a similar schedule next year, the maximum time the recess appointment could last is approximately 20 months. Obviously, if it adjourned earlier than October, the time would be less.

sent is imminent" to serve longer than those appointed during prolonged intersession recesses. Plaintiff's Brief at p. 28. This argument proceeds on the faulty premise that recess appointments made close to the time when the Senate will be resuming its session are somehow inappropriate or that some penalty should attach. However, as defendants have shown, many individuals have been recess appointed over the years during the last days of an intersession recess. Defendants' Brief at 17 and Exhs. 1, 2 & 4. Because such appointments were likewise made when the Senate's return to business was imminent, the situations are functionally equivalent. Application of the "end of their next session" language can produce the same results, whether the recess appointment is made during an intersession or an intrasession recess. Thus, this language is no evidence that "the Recess" refers only to intersession recesses.[17] [*20]

B. Limiting "The Recess" To Intersession Recesses Would Nullify The Purpose Of The Recess Clause

The "substantial purpose" of the Recess Appointments Clause was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823); United States v. Woodley, 751 F.2d 1008, 1013 (9th Cir. 1985) (en banc). The latter part of this century has seen intrasession recesses become lengthier and more frequent. To prohibit the President from exercising his recess appointment power during these periods necessarily would mean that vacancies would go unfilled, contrary to the clause's purpose.

Ironically, plaintiff's interpretation would inhibit the President from filling vacancies even when the need to act without delay is

[17] Moreover, the fact that frequent intrasession recesses were uncommon in the early days of the Republic does not mean that Congress did not anticipate them. The Constitution provides no limitation on the Senate's ability to recess, apart from the requirement that the House consent to adjournments lasting more than three days. Surely, the Framers did not provide the Senate with expansive power to recess during its sessions without appreciating that intrasession recesses could occur with greater frequency in the future. The fact that early intrasession recesses were infrequent is no reason to assume that the Framers' only concern was keeping vacancies filled during intercession recesses.

plainly present. On August 10, 1991, for example, President Bush issued a recess appointment to reappoint Alan Greenspan as Chairman of the Federal Reserve Bank during an intrasession recess. 27 Wkly Comp. Pres. Doc. 1126 (1991). President Bush had nominated Mr. Greenspan on July 19, 1991; however, the Senate recessed on August 9, 1991 without acting on the nomination. See 27 Wkly Comp. Pres. Doc. 1051 (1991). Under plaintiff's view of the recess clause, the President would have been without authority to fill this important vacancy. The President has also appointed members of his cabinet by recess appointment. Neil Goldschmidt was first appointed Secretary of Transportation by recess appointment. See Defendants' Brief, [*21] Exh. 2 at p. 11. Donald P. Hodel also was recess appointed Secretary of Energy in November 1982, when the President accepted the resignation of Secretary James B. Edwards. See 18 Wkly Comp. Pres. Doc. 1438, 1508 (1982). The Court should reject any interpretation that would prevent the President from filling important vacancies that need to filled without delay.

C. Limiting "The Recess" To Intersession Recesses Would Upset The Balance Of Power Between The Branches

The Constitution must be interpreted in light of its underlying principle of checks and balances. Buckley v. Valeo, 424 U.S. at 120; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) (The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). As the Court in Staebler recognized, "if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation." 464 F. Supp. at 599-600.

If the recess clause is interpreted as applying only during intersession recesses, Congress could easily eliminate the President's ability to make any recess appointments, even though Congress could still recess for substantial periods of time. In 1903, for exam-

ple, the 58th Congress convened an extraordinary session on November 9, 1903, that lasted until noon of December 7, 1903, the same day and hour fixed by law for the [*22] opening of the first regular session of the 58th Congress. See 37 Cong. Rec. 544; 38 Cong. Rec. 1. The Senate also eliminated the intersession recess when, on January 3, 1941, the third session of the 76th Congress ended at noon and the first session of 77th Congress began, see 86 Cong. Rec. 14059; and on December 2, 1867, when there was no gap between the first and second sessions of the 40th Congress, see 77 Cong. Globe 817; 78 Cong. Globe 1. Nothing prevents Congress from taking as many intrasession recesses as it chooses during the year. And, so long as its sine die adjournment was immediately followed by the beginning of the subsequent session, the President would be unable to make any recess appointments. On the other hand, if "the Recess" is construed to include intrasession recesses, this would simply acknowledge the manner in which Presidents have been exercising the recess appointment power since at least 1867.[18]

Plaintiff argues that recognition of intrasession recesses would allow the President to make recess appointments the primary method of filling offices by simply renewing the recess appointees' commissions at the end of every succeeding session [*23] of Congress. Plaintiff's Brief at 24. While such action by the President would be unlikely, the Senate is not without means to protect its prerogatives.[19]

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[18] Plaintiff disputes that there is a "consistent" historical practice because, notwithstanding the early intrasession appointments, this power has only been exercised regularly over the past 20-30 years. Plaintiff's Brief at 29. Plaintiff answers his own argument, however, by pointing out that the frequency at which Congress recesses during its session has dramatically increased in recent years. Obviously, intrasession recess appointments cannot be made regularly when intrasession recesses are infrequent. As we have noted above, the fact that Congress chose infrequently to recess during its sessions in the early days of the Republic does not evidence any intent to allow offices to remain unfilled during these periods.

[19] It also is significant that for scores of years Presidents have construed the clause as permitting recess appointments during intrasession recesses without "leveraging" it into the "primary method of filling federal offices" as plaintiff suggests.

For example, 5 U.S.C. § 5503 provides that if the President makes a recess appointment to fill a vacancy which existed while the Senate was in session and which can be filled permanently only with the advice and consent of the Senate such as Mr. Nevin's seat, payment for services rendered by the recess appointee may not be made from Treasury funds until the appointee is confirmed, unless one of three conditions are met: (1) the vacancy arose within 30 days before the end of the session; (2) a nomination to fill the vacancy was pending in the Senate at the time it went into recess; or (3) a nomination to fill the vacancy was rejected by the Senate within 30 days before the end of the session, and a different individual receives the recess appointment. 5 U.S.C. 5503(a). A nomination to fill a vacancy as described in (1), (2), or (3) above must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. Id. at 5503(b).

The Senate also could refuse to confirm the recess appointee, should the President submit his nomination, or refuse to confirm nominees for other offices, or refuse to pass key legislation proposed by the President. The prospect that the [*24] Senate could take such actions serves to discourage the President from exercising his recess appointment powers to the extreme. By contrast, should intrasession recesses be excluded, and should the Senate recess in such a way as to eliminate the President's recess appointment powers, there are no comparable ways for the President to protect himself. Thus, plaintiff's proposed limitation on "the Recess" would upset the balance in the allocation of power between the branches far more than would defendants' construction. Accordingly, plaintiff's construction should be rejected.

D. The Constitution Provides No Basis For Imposing Additional Requirements On Recess Appointments Made During Intrasession Recesses

1. Duration Of The Recess

Defendants have shown that the language of the recess clause does not require that the Recess of the Senate last for any minimum

time, and have shown that there is a long-standing practice of making recess appointments during recesses of comparable durations. See Defendants' Brief, at 14-18. Plaintiff apparently concedes that there are no time limits or other implied restrictions on intersession recesses. Plaintiff contends, however, that recess appointments made during intrasession recesses should be subjected to different treatment. Plaintiff's Brief at 29-34.

Plaintiff asserts that the recess was of insufficient duration to trigger the recess appointment powers, relying on several Attorneys General opinions that have cautioned against [*25] use of the power during short intrasession recesses. Plaintiff's Brief at 30. None of these opinions concluded that the President lacked the power to make appointments during a recess like the one here. Of course, the question of whether the recess appointment power exists is much different from the question of whether it should be used.

If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4. It might be argued that this means that the Framers did not consider one, two and three day recesses to be constitutionally significant. But that situation is not presented here because the recess lasted 13 days.[20] Moreover, no Attorney General or court has found that the President lacks the power to make recess appointments during 13-day recesses.[21]

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[20] In our brief, defendants have characterized the recess as lasting 13 days, because the Senate did not reconvene until 3:00 p.m. on January 20, 1993, and because the President could have exercised his recess appointment power up until the moment the Senate reconvened. Accordingly, there were 13 separate days between January 7, 1993 at 8:00 p.m. when the Senate recessed, and 3:00 p.m. on January 20, during which the President could have made recess appointments. Plaintiff has counted the recess as 12 days. Because none of defendants.' arguments turn on whether the recess is considered to have lasted 12 or 13 days, plaintiff's calculation of the length of the recess makes no difference.

[21] While one Attorney General did opine that the President could not make recess appointments during a Christmas recess, this was based on his view that the power could not be exercised during an intrasession recess and was not based on the

[*26] As the Court in Staebler held, "there is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language." Staebler, 464 F. Supp. at 597. Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.

2. Practical Considerations

Plaintiff argues that intrasession recess appointments should be confined by practical considerations. Plaintiff's Brief at 30-34. Insofar as this requires adding restrictions on the recess power not found in the Constitution, the Court has no authority to do so. Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993).[22] Plaintiff argues that Attorneys General [*27] have analyzed the validity of proposed recess appointments based on whether "in a practical sense, the Senate is in session that its advice and consent can be obtained," 33 Op. Att'y Gen. at 21-22. Even applying this standard, however, the recess appointment was valid because the Senate was

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length of the recess. See 23 Op. Att'y Gen. at 604. This view was repudiated by the Attorney General in 1921, in an opinion expressly approving intrasession recess appointments. 33 Op. Att'y Gen. 20 (1921). This latter interpretation has been followed by all subsequent Attorneys General and by Presidents through their practice. See Defendants' Brief at 11-14.

[22] The pocket veto decisions plaintiff relies upon are distinguishable. The constitutional provision at issue in those cases allows a bill passed by Congress to become law without the President's signature if the President does not return it to the originating house within ten days after presentment, "unless the Congress by their Adjournment prevent its Return . . . ." U.S. CONST., § art. I, § 7, cl. 2. That language was read as not prohibiting Congress from acting to lift the obstacles to returning the bill that an adjournment may have imposed. See Wright v. United States, 302 U.S. 583, 589 (1938). Thus, the courts have looked at the circumstances surrounding the adjournment to determine whether there were any obstacles that prevented the bill's return and, if so, whether Congress had satisfactorily removed them. See Barnes v. Kline, 759 F.2d 21, 32-35 (D.C. Cir. 1985). The language of the Recess Appointments Clause, however, is not comparable. There is no way for the Senate to advise and consent to a nomination unless it is in session.

not in a position to act on Mr. Ashley's nomination during the January recess.

The Senate was not sitting in a regular or extraordinary session from January 7 to January 20 and its members owed no duty of attendance. This is plain from the resolution providing for the Senate recess. Sen. Con. Res. 3, 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). In addition to specifying the dates of the recess, the resolution further provided for the leaders of the Senate and House to notify their members "to reassemble whenever, in their opinions, the public interest shall warrant it." Id. Obviously, such a provision in the resolution would be unnecessary if the members already were obligated to be present to conduct business as a legislative body. Because there was no opportunity for the Senate to consider and act on nominations during the January recess, the Senate's advice and consent to defendant Ashley's appointment could not be obtained.[23]

[*28] CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

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[23] The fact that Senate committees might have met to conduct business during the recess does not alter this conclusion. A Senate committee cannot "advice and consent" to a presidential nomination on behalf of the full Senate body. Nor does the ceremonial submission of numerous nominations to the Senate by President Bush on his last day in office require a different result. Just because there is a recess does not mean that the President must make recess appointments. Rather, the President remains free to determine which offices, if any, should be filled by recess appointment and the offices for which a nomination should be sent forward.

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