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Federal Recess Judges

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Summary

Under Article II of the Constitution, the President is empowered “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.” Presidents have used the recess appointment power on more than 300 occasions to place judges on the district, appellate, and U.S. Supreme Court level. This practice slowed after the 1950s, but recent recess appointments to federal appellate courts (the Fourth, Fifth, and Eleventh Circuits) have revived a number of constitutional issues. For a detailed analysis, see CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher.

Recess Clause

Under the Constitution the President shall nominate, “and by and with the Advice and Consent of the Senate,” shall appoint ambassadors, other public ministers and consuls, Justices of the Supreme Court, and “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” The President also has 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.”¹

The framers recognized that the Senate would not always be in session to give advice and consent to presidential nominations. To cover those periods, the President has authority to make recess appointments that are needed to keep government operating effectively. The framers adopted this provision at the Constitutional Convention without a dissenting vote and with virtually no record to fix its intent and scope.² The President’s recess appointment power is stated in general terms, with no distinction between judges and non-judges. Nevertheless, there remains a constitutional tension between the

¹ U.S. Const., art. II, § 2, cl. 2-3.

² 2 *The Records of the Federal Convention of 1787*, at 540, 574, 600, 660 (New Haven: Yale University Press, 1937, Max Farrand, ed.) (hereafter “Farrand”); 3 Farrand 421. See also the treatment by Alexander Hamilton in *Federalist* No. 67 and No. 76.

appointment of recess judges — serving on a temporary basis — and the general principle of judicial independence that is secured by lifetime tenure.

Interpreting the Clause

Several words and phrases in the Recess Clause require interpretation. What does the Constitution mean when it refers to vacancies “that may happen during the Recess of the Senate”? Does *happen* mean “happen to take place” *during* the recess? A long list of opinions by Attorneys General has interpreted the language more broadly to mean “happen to exist” at the time of a recess, including vacancies that occurred while the Senate was in session and available to give advice and consent. For example, Attorney General William Wirt in 1823 concluded that the second and broader meaning satisfied the reason, scope, and purpose of the Constitution, which to Wirt meant keeping offices filled.³ Other Attorneys General have reached the same judgment.

The word “recess” also calls for interpretation. In 1901, an Attorney General opinion distinguished between the meaning of “adjournment” and “recess” in such a way as to limit *adjournment* to brief periods in the middle of a session, whereas *recess* referred to the period when Congress adjourned at the end of a session. Both words meant the suspension of legislative business, but adjournment implied “a less prolonged intermission than ‘recess.’” Recess referred to “the period after the final adjournment of Congress for the session, and before the next session begins.” It was the period following “the final adjournment for the session which is *the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session.”⁴

Subsequent opinions by Attorneys General broadened the meaning of “recess.” An opinion in 1921 concluded that an adjournment in the middle of a session, from August 24 to September 21, was of sufficient duration to permit recess appointments by the President. As to whether the Senate had adjourned or recessed, the question was whether “in a *practical* sense the Senate is in session” to give its advice and consent.⁵

Could the President make recess appointments during a short adjournment, say of two days? The opinion concluded: “I unhesitatingly answer this by saying no.”⁶ Nor would an adjournment “for 5 or even 10 days” constitute the recess intended by the Constitution.⁷ Later opinions also agreed that significant interruptions in the middle of a session could justify the President’s use of the recess appointment power. The Senate’s adjournment from July 3 to August 8 in 1960 constituted a “Recess of the Senate.”⁸ A

³ 1 Op. Att’y Gen. 631 (1823).

⁴ 23 Op. Att’y Gen. 599, 601 (1901) (emphasis in original).

⁵ 33 Op. Att’y Gen. 20, 21-22 (1921) (emphasis in original).

⁶ *Id.* at 24.

⁷ *Id.* at 25.

⁸ 41 Op. Att’y Gen. 463, 466 (1960). In 1979, an opinion by the Office of Legal Counsel in the Justice Department held that a recess from August 2 until September 4, 1979 was of sufficient
(continued...)

Justice Department brief in 1993 suggested that recess appointments might be justified for recesses in excess of three days, but the litigation that prompted that analysis was not decided on that ground.⁹

Funding Limitations

The Comptroller General of the General Accounting Office (now the Government Accountability Office) has issued rulings regarding the right of payment of congressional funds to federal judges appointed on a recess basis. In one dispute, he held that a judge was not entitled to payment of salary because a statutory provision prohibited payment of salary to an individual who had received a recess appointment during a previous recess of the Senate.¹⁰ Beginning in 1863, Congress has adopted statutory language to prohibit the use of funds to pay the salary of anyone appointed during a Senate recess, with certain exceptions provided.¹¹ Congress revised that language in 1940 to make it less burdensome on officeholders, offering three exceptions to the general rule of withholding payment from recess appointees.¹² In addition, a provision in the annual Treasury-Postal Service appropriations bill withholds funds to pay the salary of any official whose nomination has been voted down by the Senate.¹³

Article III Judges

There has been controversy in recent decades about the President's power to make recess appointments to federal courts. Over the years, Presidents have used that power to make recess appointments to federal district courts, appellate courts, and the U.S. Supreme Court. In 1983, as an appendix to a brief filed in the case of *United States v. Woodley*, the Justice Department prepared a list of 309 individuals who had received recess appointments to Article III courts.¹⁴

⁸ (...continued)

length to entitle the President to make recess appointments. 3 Op. Off. Legal Counsel 314 (1979).

⁹ Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-26, *Mackie v. Clinton*, Civ. Action No. 93-0032-LFO (D.D.C.).

¹⁰ 28 Comp. Gen. 30, 34-37 (1948).

¹¹ 12 Stat. 646 (1863); see S. Rept. No. 80, 37th Cong., 3rd sess. 5-6 (1863).

¹² 54 Stat. 751 (1940); 5 U.S.C. § 5503 (2000).

¹³ E.g., 115 Stat. 547, § 609 (2001).

¹⁴ Second Supplemental Brief for the United States, *United States v. Woodley*, No. 82-1028, Ninth Circuit, at A1-A25. Article III judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1. Congress can also, by statute, create Article I judges that lack protection under the No-Diminution Clause. At times the President has created Article II judges, also not protected by that Clause. Article I and II judges serve for fixed terms, rather than the lifetime appointment of an Article III judge.

Recess appointments attracted national attention when President Dwight D. Eisenhower, from 1953 to 1958, placed three men on the Supreme Court after recesses by the Senate: Earl Warren, William J. Brennan, Jr., and Potter Stewart. They joined the Court and decided cases before the Senate had an opportunity to review their credentials and vote on a lifetime appointment. In each case the Senate later gave its advice and consent, but the experience convinced a number of Senators that the procedure was defective for the Senate, the Court, and litigants. A law review article in 1957 discussed the problem of a recess judge participating and deciding a case while having “one eye over his shoulder on Congress,” possibly depriving the litigants of a fair hearing.¹⁵ A recess judge might also have to keep one eye out for the reaction of the White House, which would review decisions issued during the recess period to determine whether they justified nomination of the judge to a lifetime appointment. In 1959, the House Judiciary Committee released a 40-page report, expressing concern about the loss of independence of individuals placed on the courts on a recess basis.¹⁶

Senate Resolution in 1960

In 1960, the Senate passed a resolution (S.Res. 334) to discourage Presidents from using recess appointments for Justices of the Supreme Court. The resolution stated that it was the sense of the Senate that this type of recess appointment may not be “wholly consistent” with the best interests of the Court, the nominee, litigants, “nor indeed the people of the United States.” Such appointments should be avoided “except under unusual and urgent circumstances.”¹⁷ The accompanying report prepared by the Senate Judiciary Committee explained why recess appointments to the federal judiciary interfered with its “solemn constitutional tasks” of advice and consent. Inevitably, there would be public speculation about the independence of a Justice who served on a recess basis.¹⁸

Opponents of the resolution maintained that the President needs to make recess appointments because of the Court’s heavy workload, and that the Senate should not attempt to meddle with a constitutional power that is expressly lodged in the President.¹⁹ The Senate passed the resolution 48 to 37, voting largely along party lines.²⁰ Democrats supported it 48-4, with Republicans opposed 33 to 0.²¹

¹⁵ “Recess Appointments to the Supreme Court—Constitutional But Unwise?,” 10 *Stan. L. Rev.* 124, 144 (1957).

¹⁶ *Recess Appointments of Federal Judges*, House Committee on the Judiciary, 86th Cong., 1st sess. iii (Comm. Print, Jan. 1959).

¹⁷ 106 Cong. Rec. 12761 (1960).

¹⁸ S. Rept. No. 1893, 86th Cong., 2nd sess. 1-2 (1960).

¹⁹ 106 Cong. Rec. 18133 (Senator Hruska), 18134 (Senator Wiley).

²⁰ *Id.* at 18145.

²¹ 1960 CQ Almanac 517.

Judicial Decisions

The constitutionality of recess appointments to the federal bench has been decided in several cases by federal circuit courts. The Supreme Court has not ruled on the issue. In two cases that reached the Court for review, it denied certiorari. The first case involved a recess appointment by President Eisenhower to fill a vacancy for a district judge. A criminal defendant found guilty and sentenced to 10 years imprisonment by the recess judge argued in court that the sentence should be set aside because the judge was not constitutionally empowered to preside over the trial. The defendant maintained that the President has no power to appoint “temporary” judges, but the Second Circuit ruled that the recess judge was constitutionally empowered to preside over the trial.²² It noted that the recess appointment power contains no exceptions for judges, and that a recess judge may exercise the power granted to Article III courts, including criminal trials. The effort to prohibit recess appointments to fill vacancies that arise while the Senate is in session “would create Executive paralysis and do violence to the orderly functioning of our complex government.”²³

A recess appointment by President Carter applied to another district judgeship. When an individual challenged the judge’s authority to decide the case, the Ninth Circuit analyzed the inherent tension between the President’s Article II recess appointment power and the attributes of judicial independence incorporated into Article III. It held that “only those judges enjoying article III protections may exercise the judicial power of the United States.”²⁴ The court’s review of the records and writings of the constitutional period highlighted the importance of judicial independence to the framers.²⁵

A majority of the Ninth Circuit voted to rehear the case en banc. In 1985, an en banc court held that the President may constitutionally confer temporary federal judicial commissions during a recess of the Senate. The court, divided 7 to 4, decided that there is “no reason to favor one Article over the other.”²⁶ Article II explicitly gave the President the power to fill “all” vacancies during a Senate recess, and there was “no basis upon which to carve out an exception from the recess power for federal judges.”²⁷

However one analyzes the decisions by the Second and Ninth Circuits, they stand only for the proposition that a recess appointment to the federal courts is likely to be constitutionally valid to the courts. The decisions do not mean that the President or the Senate are forced to accept those appointments as the preferred or even acceptable course. The two political branches could decide, on either political or constitutional grounds, that the recess appointment power should not be applied to the judiciary.

²² *United States v. Alocco*, 305 F.2d 704, 706 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

²³ *Id.* at 712.

²⁴ *United States v. Woodley*, 726 F.2d 1328, 1330 (9th Cir. 1983).

²⁵ *Id.* at 1331-32.

²⁶ *United States v. Woodley*, 751 F.2d 1008, 1010 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986).

²⁷ *Id.*

Gregory, Pickering, and Pryor

On December 27, 2000, President Bill Clinton selected Roger L. Gregory as a recess appointee to the Fourth Circuit, the first time since 1980 that a President had named an Article III judge as a recess appointee. On March 19, 2001, President George W. Bush withdrew the names of 10 nominees for federal judgeships, including Gregory, but on May 9 he included Gregory's name along with 10 other nominations for the federal judiciary, and on July 20 the Senate approved Gregory 93 to 1 for a lifetime appointment to the Fourth Circuit.

President Bush made two recess appointments in early 2004. On January 16, he selected Charles W. Pickering to serve on the Fifth Circuit as a recess appointee. His nomination had been before the Senate for several years, without final floor action. On December 10, after his recess appointment had expired, Pickering announced that he would not seek a lifetime position. The Pickering appointment came between the first and second sessions of the 108th Congress, and was thus an *intersession* appointment.

On February 20, 2004, President Bush made a recess appointment of William H. Pryor to the Eleventh Circuit. This appointment was especially controversial because it was *intrasession*, and the Senate recess was short (February 12 to February 23). Of the more than 300 recess appointments to Article III courts, only 14 have been intrasession. The Senate was in recess 145 days for one appointee, 112 days for two, 79 days for two, 73 days for one, 64 days for three, 35 days for four, and 10 days for Pryor.²⁸ The seemingly technical distinction between inter- and intrasession recess appointments has a practical effect. Someone who receives an intersession appointment serves until the end of the next session, or less than a year. An individual with an intrasession appointment, received in the early months of the first session, serves close to two years.

Several individuals, bringing a civil rights action against a police officer, had their case appealed to the Eleventh Circuit, which decided the case and then voted to rehear the case en banc. Prior to rehearing, the plaintiffs moved to disqualify Judge Pryor. The Eleventh Circuit held that Pryor's appointment was valid under the Recess Clause.²⁹ On January 10, 2005, the Supreme Court denied the motion of petitioners to expedite consideration of the petition for a writ of certiorari (Case No. 04-828).

After the two recess appointments of Pickering and Pryor, the White House and Senate Democrats announced an agreement on May 18, 2004, that assured floor votes on 25 judicial nominees in return for a pledge by President Bush not to make any additional recess appointments for the remainder of the 108th Congress. Senate action would be blocked on seven candidates considered by the Democrats as too ideological.³⁰

²⁸ Henry B. Hogue, "Recess Appointments to Article III Courts," 34 *Pres. Stud. Q.* 656, 670 (2004).

²⁹ *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

³⁰ Neil A. Lewis, "Deal Ends Impasse Over Judicial Nominees," *New York Times*, May 19, 2004, p. A17.