

1978

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Louis Fisher

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RECESS APPOINTMENTS BY THE PRESIDENT

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Louis Fisher
Specialist in American National Government
Government Division
October 26, 1978

Sharon Gessle
287-8688



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Washington, D.C. 20540

RECESS APPOINTMENTS BY THE PRESIDENT

The Framers of the Constitution recognized that the Senate would not always be in session to give its advice and consent to nominations submitted by the President. To cover such contingencies, the Constitution authorizes the President to make recess appointments: "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." 1/

1. Constitutional Issues

This provision was adopted at the Constitutional Convention without a dissenting vote. 2/ A number of controversies, however, have involved this clause of the Constitution. Two words that have been in dispute are "happen" and "recess."

Attorneys General have offered two possible meanings of "happen." It might mean "happen to take place" during the recess of the Senate or "happen to exist" at the time of a recess, including vacancies that occurred during the recess as well as those that occurred prior to the

1/ Art. II, Sec. 2, Cl. 3

2/ Max Farrand, ed., The Records of the Federal Convention of 1787, II, 540.

recess. A long list of opinions by Attorney General uniformly hold to the second and broader meaning: "The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act." 3/

The meaning of "recess" is not confined to final adjournment. A temporary recess of the Senate, "protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations," would permit the President to make recess appointments. 4/ A recess of the Senate from July 3, 1960, to August 8, 1960, constituted a "Recess of the Senate" within the meaning of the Constitution. 5/

The same interpretation has been adopted by the Comptroller General. A recess is not restricted to the interval between the final adjournment of one session of Congress and the commencement of the next succeeding session. A recess may refer to the period following an adjournment (within a session) to a specified day. When Congress adjourned on June 20, 1948, to stand adjourned until December 31, 1948, the interval represented

3/ 1 Ops. Att'y Gen. 631, 633 (1823).

4/ 41 Ops. Att'y Gen. 463, 466 (1960).

5/ Id.

a recess of the second session of the 80th Congress, which would not terminate until an adjournment sine die between December 31, 1948 and January 3, 1949. 6/

2. Statutory Constraints

Although the President is authorized to make recess appointments, Congress has acted to deny him funds to carry out that power. Legislation in 1863 provided this restriction on recess appointments:

...no money shall be paid from the Treasury of the United States to any person acting or assuming to act as an officer, civil, military, or naval, as salary in any office, which office is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law, nor shall any money be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate. 7/

This statute fixed two constraints upon the President: appropriated funds could not be used for unauthorized offices; appropriated funds could not be used for recess appointments for vacancies that existed while the Senate was in session that required the advice and consent of the Senate.

During the legislative revolt against the Presidency of Andrew Johnson, Congress passed a number of other statutes restricting the appointment power. The Tenure of Office Act of 1867 stipulated that every person

6/ 28 Comp. Gen. 30, 34 (1948).

7/ 12 Stat. 646 (1863).

holding any civil office to which he had been appointed subject to the advice and consent of the Senate would be entitled to hold such office until a successor had been appointed in like manner. 8/ Furthermore, if there were charges that an officer appointed with the advice and consent of the Senate (excepting Federal judges) was guilty of misconduct during a recess of the Senate, the President could suspend the officer and designate a temporary replacement. But if the Senate returned from its recess and refused to concur in the suspension, the suspended officer would resume the functions of his office. 9/ Thirdly, the President would have power to fill all vacancies that might happen during the recess of the Senate, by reason of death or resignation, and the commissions would expire at the end of the Senate's next session. 10/ These provisions were repealed in 1887. 11/

➤ Recess appointments are presently governed by a statute passed in 1940. Payments for services may not be made from the Treasury to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session

8/ 14 Stat. 430, sec. 1 (1867).

9/ Id., sec. 2.

10/ Id., sec. 3.

11/ 24 Stat. 500 (1887). For other early statutes on recess appointments, see 15 Stat. 168 (1868) and 16 Stat. 6 (1869).

and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.

This restriction does not apply:

- (1) if the vacancy arose within 30 days before the end of the session of the Senate;
- (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
- (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

A nomination to fill a vacancy referred to in these three exceptions shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. 12/

While the legislative history of this statute is of little assistance in construing the measure, the Comptroller General has said that "its primary purpose was to relieve 'recess appointees' of the burden of serving without compensation during periods when the Senate is not actually

12/ 54 Stat. 751 (1940); 5 U.S.C. 5503 (1970).

sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment sine die or to an adjournment to a specific date." 13/

3. Political Controversies

Although recess appointments are specifically authorized by the Constitution, the actual use of this authority has generated numerous disputes. Gouverneur Morris penned this complaint in 1815: "The Constitution, I think, intended that certain officers should be held at the President's pleasure. It is unquestionably an abuse to create a vacancy in the recess of the Senate, by turning a man out of office, and then filling it as a vacancy that had happened." 14/ It was during this period that President Madison, with the Senate in recess, appointed a commission of three persons to negotiate a peace treaty with England. Senator Gore later introduced a resolution to the effect that the appointments were not authorized by the Constitution, but the resolution did not come to a vote. 15/

Another type of issue surfaced in 1925 when President Coolidge announced that if the Senate failed to confirm his nomination of Charles E. Warren to be Attorney General, he would give Warren a recess appointment

13/ 28 Comp. Gen. 30, 37 (1948).

14/ Gouverneur Morris to W.H. Wells, Feb. 24, 1815, placed in Max Farrand, ed., The Records of the Federal Convention of 1787, III, 421. Emphasis in original.

15/ Joseph P. Harris, The Advice and Consent of the Senate 256 (1953).

after the adjournment of the Senate. When the constitutionality of this procedure was challenged, Senator Butler cited in the Congressional Record an instance where an individual, initially given a recess appointment, was later turned down by the Senate in acting on the regular nomination. The President nonetheless resubmitted the name. After the Senate adjourned without any further action on the nomination, the President again gave the individual a recess appointment. 16/ In the case of Warren's nomination, the Senate voted 39-46 to reject it. 17/

Recess appointments to the Supreme Court have also led to legislative objections. President Eisenhower placed three men on the Court after recesses by the Senate: Earl Warren, William J. Brennan, Jr., and Potter Stewart. All three joined the Court and participated in decisions before the Senate had an opportunity to review their credentials. In each case the Senate gave its advice and consent, but the experience convinced a number of Senators that the procedure was defective for the Senate as well as for the Court.

In 1960, Senator Philip A. Hart introduced a resolution to discourage this practice. As a Senate resolution it could have no legally binding effect, but was meant to express the view of the Senate and to guide executive actions. Senator Hart referred to the difficulty under which the

16/ 67 Cong. Rec. 263 (1925). Case of Samuel Gwin (1831-1832) under President Jackson.

17/ Id. at 275.

Senate operated when asked to pass upon the nomination of a man who has taken his seat as a Justice of the Supreme Court: "it operates to a very great disadvantage upon the Members of the Senate, and I suggest that if this should develop as a traditional practice, as what should be done always, rather than under unusual circumstances, it would adversely affect the Court." 18/

Jefferson B. Fordham, dean of the University of Pennsylvania Law School, noted that a recess appointee "is serving under the overhang of Senate consideration of the nomination, which is not in harmony with the constitutional policy of judicial independence." 19/ Senator Hart added that disappointed litigants might wonder whether the outcome of their case was influenced by a recess appointee. Judicial independence could be affected by several factors: "Either to take a position during his period of probation which would please the President who had appointed him and who could withdraw his name; or to please the Senate, which sooner or later, would either approve or disapprove; or, at the other extreme, conscious of the fact that there would be public scrutiny and interpretation of his action in light of whether he was bending to the Senate or to the President, he could rear back and bend the other way in order to prove that he was subservient to neither branch." 20/

18/ 106 Cong. Rec. 18131 (1960).

19/ Id. at 18132.

20/ Id. at 18134.

Opponents of the resolution argued that the President needed to make recess appointments because of the heavy workload of the Court; 21/ the filling of vacancies on the Supreme Court during recess is a definite power lodged in the President and the Senate should not meddle with it; 22/ the power of the Senate is limited to the time after a Justice is nominated, not prior to it; 23/ the language of the resolution was phrased in ambiguous fashion; 24/ and the resolution had never been referred to the Department of Justice or the Judicial Conference for comment, nor were there any hearings on the resolution. 25/

The Senate passed the resolution 48 to 37, voting essentially along party lines. 26/ The resolution, including the preamble, is as follows:

Whereas one of the solemn constitutional tasks enjoined upon the Senate is to give or withhold its advice and consent with respect to nominations made to the Supreme Court of the United States, doing so, if possible, in an atmosphere free from pressures inimical to due deliberation; and

Whereas the nomination of a person to the office of Justice of the Supreme Court should be considered only in the light of the qualifications the person brings to threshold of the office; and

21/ Id. at 18133 (Senator Hruska).

22/ Id. at 18134 (Senator Wiley).

23/ Id. at 18135 (Senator Wiley).

24/ Id.

25/ Id. at 18137 (Senator Hruska).

26/ Id. at 18145.

Whereas Presidents of the United States have from time to time made recess appointments to the Supreme Court, which actions were unquestionably taken in good faith and with a desire to promote the public interest, but without a full appreciation of the difficulties thereby caused the Members of this body; and

Whereas there is inevitably public speculation on the independence of a Justice serving by recess appointment who sits in judgment upon cases prior to his confirmation by this body, which speculation, however, ill founded, is distressing to the Court, to the Justice, to the litigants, and to the Senate of the United States: Now, therefore be it

Resolved, That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business.

Also in 1960, Acting Attorney General Lawrence E. Walsh wrote an opinion concerning recess appointments made during the temporary adjournment of the Senate from July 3 to August 8, 1960. He concluded that the President had the power to make the appointments and the commissions of the persons so appointed would expire at the end of the session of the Senate following the adjournment sine die of the second session of the 86th Congress (i.e., the end of the first session of the 87th Congress). However, he

said that it would be "advisable" to submit to the Senate, when it reconvened at the end of the adjournment, nominations for all persons who received appointments during July 3 and August 8, 1960. 27/

27/ 41 Op. Att'y Gen. 463, 465 (1960).

Louis Fisher
Specialist in American National Government
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