

Clinton/Reno  
Dos brief

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,

Plaintiffs

v.

WILLIAM J. CLINTON, et al.,

Defendants.

Civil Action 93-0032-LFO

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT II

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intrasession recess appointments. President Reagan made at least 22 such appointments in 1981. See Exhibit 3, pp. 2-5.

Evidence of the manner in which the power has been exercised in practice is traditionally accorded considerable weight by the Supreme Court in interpreting the Constitution. See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915) (acknowledging the rule that "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of the investigation"); Accord Udall v. Tallman, 380 U.S. 1, 17 (1965). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring). The above examples establish intrasession recess appointments as a long and consistent presidential practice.

E. There Is No Lower Time Limit That A Recess Must Meet To Trigger The Recess Appointment Power

The language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time. Hence, nothing in the Clause prevented the President from making recess appointments during the 13 day recess in January 1993.

There also is a long-standing practice of making recess appointments during recesses of comparable durations. President Coolidge made a recess appointment during a 14-day recess;<sup>8</sup>

<sup>8</sup> On January 3, 1928, John Esch was appointed to the ICC during the recess lasting from December 21, 1927 until Jan. 4, 1928. See Exhibit 2, p. 6; Congressional Quarterly's Guide to (continued...)

President Franklin Roosevelt made recess appointments during a recess lasting 15 days;<sup>9</sup> President Truman made a recess appointment during a 4 day recess,<sup>10</sup> and an 18 day recess.<sup>11</sup>

President Johnson recess appointed Judge Spottswood Robinson during an 8 day recess.<sup>12</sup>

*8-day  
judicial  
recess*

Moreover, President Nixon appointed the first Board of Governors for the Postal Service under the Postal Reorganization Act during a 19 day recess from January 2, 1971 to January 21, 1971.<sup>13</sup> President Carter made seven recess appointment during a 13 day recess.<sup>14</sup> Six of these appointments were made on the morning of the day the Senate reconvened.

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<sup>8</sup>(...continued)

Congress (4th ed.) [hereinafter cited as "Cong. Quarterly"], at 116-A (listing the sessions of Congress from 1789 to 1991). For the Court's convenience, defendants have attached the relevant pages of the Cong. Quarterly at Exhibit 4.

<sup>9</sup> Paul A. Porter was appointed to the FCC on December 20, 1944, during the recess from December 19, 1944 to January 3, 1945. See Exhibit 3, p. 6; Cong. Quarterly, p. 117-A.

<sup>10</sup> On January 4, 1949, President Truman appointed Oswald Ryan to the Civil Aeronautics Board during the recess from December 31, 1948 to January 3, 1949. See Exhibit 2, p. 23; Cong. Quarterly at p. 117-A.

<sup>11</sup> John Alston Adams and William K. Divers were appointed to the Federal Home Loan Bank Board on December 20, 1947 during a recess from December 19, 1947 to January 6, 1948. Exhibit 2, p. 26; Cong. Quarterly, p. 117-A.

<sup>12</sup> See Exhibit 1. This recess lasted from December 30, 1963 until January 7, 1964. Cong. Quarterly, p. 117-A.

<sup>13</sup> See Exhibit 2, p. 7; Cong. Quarterly, p. 118-A.

<sup>14</sup> See Exhibit 2, p. 12; Cong. Quarterly, p. 119-A.

More recently, in a situation directly analogous to the present case, President Reagan made two recess appointments during the 14-day recess between the convening of Congress and the President's inauguration in 1985.<sup>15</sup> President Bush had previously made a recess appointment during an 18-day recess in January, 1992.<sup>16</sup> The January 1992 recess was approved by OLC. See 16 OLC Op. (Prelim. Print) 15 (1992).

The length of a recess is not a ground upon which the Court may distinguish between and among recesses. The Constitution provides no basis for a court to conclude, for example, that a 30 day recess is sufficiently long or that a 5 day recess is too short. Moreover, any lower limit would have to be applied to intersession and intrasession recesses alike because there is no basis for distinguishing between the two. Everyone appears to agree however that intersession recesses are subject to no restrictions. Indeed, there is a long standing presidential practice of making recess appointments within days or even hours of the end of an intersession recess. Yet, this situation is

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<sup>15</sup> During the recess from January 7, 1985 to January 21, 1985, President Reagan appointed John A. Bohn, Jr., First Vice President of the Export-Import Bank, and Richard H. Hughes Director, Export-Import Bank. See 21 Wkly Comp. Pres. Doc. 85 (1985); 131 Cong. Rec. 586 (1985).

<sup>16</sup> On January 15, 1992, President Bush appointed Daniel Evans Chairperson, and Marilyn R. Seymann, Lawrence V. Costiglio, and William C. Perkins, members of the Federal Housing Finance Board; and Albert V. Casey, Chief Executive Officer of the Resolution Trust Corp., during a recess from January 3, 1992 to January 21, 1992. 28 Wkly. Comp. Pres. Doc. 129-30 (January 15, 1992); 138 Cong. Rec. S1 (daily ed. Jan. 3, 1992).

functionally indistinguishable from making a recess appointment at anytime during a short recess.

In 1789, for example, George Washington appointed Judge William Paca to the bench 13 days before the Senate reconvened from an intersession recess lasting almost 100 days and in 1819, Judge Roger Skinner was appointed 12 days before the end of an intersession recess.<sup>17</sup> This is functionally equivalent to the situation we have here, where the recess appointment was made on the first full day of a 13 day recess. More recently, Spottswood Robinson and A. Leon Higginbotham were appointed 1 day before the end of an intersession recess in 1964 (Exhibit 1) and President Nixon appointed Donald T. Regan and others to the Securities Investor Protection Corp., on the day the intersession recess ended in 1971. Exhibit 2 at p. 7. These are just a few of the many examples that show that this practice has been consistently repeated.

These recess appointments also refute the proposition that the President's power to act during a short recess is limited to

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<sup>17</sup> See alphabetical list of judicial recess appointments attached at Exhibit 1. Evidence that this practice occurred during the time when the Framers were still active in government establishes that the practice is consistent with their understanding of how the Constitution should work. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-92 (1983). See also Mistretta v. United States, 109 S. Ct. 647, 669-70 (1989); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928). In the context of the Recess Appointments Clause itself, the Ninth Circuit relied upon the historical practice of Presidents making judicial recess appointments, to uphold President Carter's recess appointment of a district judge against a challenge based on Article III of the Constitution. United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc).

exceptional or emergency situations. As the Court recognized in Staebler, "recess appointments traditionally have not been made only in exceptional circumstances, but whenever Congress was not in session." 464 F. Supp at 597. Moreover, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment to be used only in cases of extreme necessity." Id. This construction of the clause is borne out by the historical practice regarding the recess appointment power since its first use.

F. No Further Limitations On The Recess Of The Senate Constitutionally May Be Implied

As demonstrated above, Congress plainly was in recess in January 1993, pursuant to the ordinary meaning of the term. There is no basis to provide that the recess must meet any additional requirements. Indeed, the Court in Staebler refused to impose additional restrictions on the language of the Recess Appointments Clause. Staebler v. Carter, 464 F. Supp. at 597. After reviewing the language of the Recess Appointments Clause and its sparse legislative history, the Court opined:

[T]wo limitations on the applicability of the Recess Appointments Clause are part of the Clause itself that it may be invoked only when the Senate is in recess, and that the President's recess commissions 'shall expire at the End of (the next congressional) Session. \* \* \* 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.