Judicial Recess Appointments: A Survey of the Arguments

An Addendum

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In 2004, the Federalist Society released a paper surveying the arguments regarding the President's power to make recess appointments to the federal judiciary. Recess appointments to the federal bench continue to be a live topic, and recent developments have brought to the fore an additional issue not specifically discussed in that paper. That issue is the President's power to make recess appointments during a brief intersession recess. (An *inter*session recess is the break between each formal session of Congress, while an *intra*session recess is a temporary adjournment within a session of Congress.) This addendum to the 2004 paper discusses that issue.

As explained in the 2004 paper, the President's general power to make intersession and intrasession recess appointments pursuant to Article II of the U.S. Constitution is now well established both as a matter of historical practice and legal authority.[1] Recognizing this, the Senate leadership has recently refused to take an official recess, even over the holidays, holding instead very brief "pro forma" sessions every four business days with the goal of denying the President the opportunity to make recess appointments.[2] But if the President desires to make recess appointments, as a practical matter this effort may only delay them until the end of this session of the Senate.[3] The President's power to make recess appointments during that period between

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1 *See* Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments* 2-6 (Federalist Society Paper 2004), *available at* http://www.fed-soc.org/publications/pubID.87/ pub_detail.asp. *See also Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding against challenge the intrasession recess appointment of Judge William H. Pryor to the Eleventh Circuit Court of Appeals). As discussed in the 2004 paper, the precise contours of the President's recess appointment power, especially with regard to intrasession recess appointments, continues to be a subject of some disagreement.

2 The Official Congressional Directory defines a "recess" as "any period of three or more complete days – excluding Sundays – when either the House of Representatives or the Senate is not in session." Government Printing Office, 2007-2008 Official Congressional Directory, 110th Cong., at 531 n.2 [hereinafter Congressional Directory]. The Senate leadership, by deliberately limiting adjournments to three days or less, appears to be relying on that definition. It is worth noting, however, that this interpretation is at odds with a prior interpretation of "recess" proposed by the Senate Judiciary Committee in 1905. There, the Committee in a resolution expressed its view that the Framers used the word "Recess"

> as the mass of mankind then understood it and now understand it. It seems, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

S. Rep. No. 58-4389 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (1905). It could be argued that pro forma sessions taking place under a unanimous consent resolution that forbids the conduct of any business are actually "recesses" under this functional understanding of a recess. This paper does not consider or take a position on this question.

3 A session of the Senate ends upon sine die adjournment of the Senate. According to the Congressional Directory, every Congress has started at least one new session every year since 1789. *See* Congressional Directory at 516-531. While currently the House has already adjourned sine die, Senate Concurrent Resolution 61, adopted December 19, 2007, leaves open whether the Senate plans to adjourn sine die before January 3. Some believe it must do so, because the Twentieth Amendment of the U.S. Constitution provides that: "The Congress shall assemble at least once in every year, and such meeting

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two different sessions of the Senate has been recognized and accepted since President Washington. Moreover, Presidents have repeatedly made recess appointments during brief intersession recesses, with many of those appointments made just before the start of the new session.

The authority of the President to make recess appointments during short intrasession recesses has been a source of enduring discussion. As noted in the 2004 paper, such appointments are relatively common as a matter of Executive Branch practice.[4] Moreover, in 1993 the U.S. Department of Justice expressed the view that such intrasession recess appointments are plainly within the power of the President, and that the "language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time."[5] Additionally, a federal court of appeals as recently as 2004 rejected the argument that a judicial recess appointment made during a ten day intrasession recess was impermissible.[6]

But whatever the extent of the President's power to make recess appointments during intrasession recesses, there is essentially uniform consensus that such power exists during intersession recesses. Indeed, Presidents since George Washington have routinely made intersession recess appointments without controversy.[7] Every Attorney General and Office of Legal Counsel opinion that has addressed the subject has recognized the President's power to make intersession recess appointments.[8] In fact, critics of intrasession recess appointments have routinely argued that *only* intersession recess appointments are authorized by the Constitution. For example, Senator Edward Kennedy has "contend[ed] that 'the Recess' refers to the legislative break that the Senate takes *between* its 'Session[s].'"[9]

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shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. CONST. amend. XX, § 2. And there is no law appointing a different day. It may be argued, however, that "assemble" does not necessarily mean "begin a new session." *But see* 23 Op. Att'y Gen. 599, *9-10 (1901) (stating that "the Constitution (Art. I, sec. 2) requires Congress to assemble at least once every year. This assembling or sitting is also called in the same article a session, wherein it provides that neither House during the session shall adjourn for more than three days without the consent of the other House"). Also potentially relevant, 2 U.S.C. § 198 provides that "Unless otherwise provided by the Congress, the two Houses shall . . . adjourn sine die not later than July 31 of each year." In any event, it should be noted that if the Senate may continue its current session, and does so, the effect will be to keep in place the current recess appointees whose appointment would otherwise have expired under Article II at the conclusion of this session of Congress. *See* U.S. CONST. art II., § 2, cl. 3.

4 *See* Buck et al., *supra* note 1, at 8-10.

5 Defendants' Motion for Summary Judgment on Count II of the Amended Complaint at 14, 16, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993) (No. 93-0032) [hereinafter "DOJ *Mackie* Brief"].

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

7 *See* Buck et al., *supra* note 1, at 2-4.

8 *See id.* at 7-8.

9 Brief of Amicus Curiae Senator Edward M. Kennedy in Support of Petitioner at 5, *Franklin v. United States*, 544 U.S. 923 (2005) (No. 04-5858) (petition for writ of certiorari denied); *see also* Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2247 (1994).

The President has never been constrained by the duration of an intersession recess in making recess appointments. As the U.S. Department of Justice explained in 1993, "[t]he language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time."[10] Noting examples of Presidents making recess appointments during brief intersession recesses, and the "long standing presidential practice of making recess appointments within days or even hours of the end of an intersession recess," the Department of Justice concluded that "[e]veryone appears to agree" that appointments made during "intersession recesses are subject to no restrictions."[11] More recently, the Department of Justice has reiterated that "it is undisputed that the Recess Appointments Clause would permit appointments during even an extremely short inter-session recess."[12]

Practice confirms the Department of Justice's conclusion. Presidents have repeatedly made recess appointments during brief intersession recesses. On December 7, 1903, for example, the Senate ended a special session and immediately commenced a regular session of the 58th Congress with "one fall of the gavel."[13] In the "infinitesimal period" between the two sessions, President Theodore Roosevelt made 160 recess appointments.[14] The Senate Judiciary Committee responded with a report concluding that the recess appointment power should be used only "when [the Senate's] Chamber is empty" and the Senate is not "in a position to receive a nomination by the President."[15] Later Presidents continued to make recess appointments during short intersession recesses, however – sometimes on the same day that the Senate began its new session. For example, President Harry Truman made a recess appointment at the end of a four day intersession recess, on the same day the 81st Congress convened its first session.[16] President Lyndon B. Johnson recess appointed four judges during an eight day intersession recess – two of them on the same day the 88th Congress started its second session.[17] Similarly, President Jimmy Carter made six recess appointments on the day the Senate reconvened.[18]

Perhaps because of this established practice, some commentators who interpret the Recess Appointments Clause narrowly have conceded that the permissibility of intersession recess appointments cannot be constrained by the duration of the recess. Senator Edward Kennedy, for example, has recognized that "recess appointments during

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10 DOJ *Mackie* Brief at 14.

11 *Id.* at 16.

12 Brief of the Intervenor United States at 28, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424).

13 Carrier, *supra* note 9, at 2212 (quoting *Special Session Is Merged Into Regular*, N.Y. TIMES, Dec. 8, 1903, at 1).

14 *Id.* at 2211-12 (quotation marks omitted) (quoting *The Infinitesimal Recess*, N.Y. TIMES, Dec. 8, 1903, at 8 (editorial)); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 416 (2005).

15 S. Rep. No. 58-4389 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (1905).

16 *See* DOJ *Mackie* Brief at 15; Congressional Directory at 523.

17 *See* Buck et al., *supra* note 1, at 17; Congressional Directory at 523.

18 *See* DOJ *Mackie* Brief at 15.

a one-day inter-session recess" are permitted.[19] Other commentators have reached the same conclusion, noting, for example, that the Constitution "refers only to *the Recess*," not "*the lengthy recess*, or . . . *a recess preventing Senate confirmation*."[20]

In sum, reasonable minds can certainly differ over whether, as a prudential matter, a President should routinely exercise the full extent of the constitutional authority of the Executive Branch, or if instead a President should engage in Congressional consultation even where the Constitution does not strictly require it. But as a purely legal matter, there is substantial authority that Article II of the U.S. Constitution permits a President to make a recess appointment during the period of time between two different sessions of the Senate, regardless of the length of time that elapses between the two sessions.

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19 Response Brief of Plaintiffs-Appellees and *Amicus Curiae*, United States Senator Edward M. Kennedy at 25, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424). Senator Kennedy was responding to the argument that it would be "'capricious' to permit recess appointments during a one-day inter-session recess, but not during a three-month intra-session break." *Id.* Notably, he did not argue in response that a one-day intersession recess appointment is not allowed. Rather, Senator Kennedy argued that:

> Because of the typical differences in length of intra- and inter-session recesses, such anomalies will likely be rare. But there is no denying that there might be *some* cases in which the distinction does not reflect the Framers' purposes for drawing the line where they did. This is not unusual, however: That is the cost of *any* bright line rule . . . .

Id. (footnote omitted).

20 Carrier, *supra* note 9, at 2236; *see also* Hartnett, *supra* note 13, at 426-27 (explaining that if Congress "attempt[ed] to eliminate intersession recesses – and the recess appointment power – by declining to adjourn a session until immediately before the start of a new session . . . . the President might respond, as President Theodore Roosevelt did, by making intersession recess appointments during that intersession recess, however brief").