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THE SENATE'S CONSTITUTIONAL AUTHORITY TO ADVISE AND CONSENT TO THE APPOINTMENT OF FEDERAL OFFICERS (Senate - July 01, 1993)

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Mr. MITCHELL. Mr. President, I had hoped today to offer a resolution to direct the Senate Legal Counsel to appear as amicus curiae in the name of the Senate in a case pending in the U.S. District Court for the District of Columbia on a matter of considerable importance to the responsibilities of the Senate under the Constitution. I had hoped that the resolution would receive bipartisan support because it concerns the Senate as an institution. Unfortunately, the resolution has been blocked by Republican opposition. I will briefly describe the matter involved.

The United States District Court for the District of Columbia is considering the constitutionality of a recess appointment to the Board of Governors of the U.S. Postal Service that President Bush made less than 2 weeks before leaving office. On January 8, 1993, while the Senate was recessed for 12 days between organizing and the inauguration of President Clinton, President Bush attempted to confer a recess appointment on Thomas Ludlow Ashley to replace Crocker Nevin, a Governor who had been appointed by President Reagan by and with the advice and consent of the Senate for a term ending on December 8, 1992. In accordance with the holdover provision of the postal law, Mr. Nevin's appointment by President Reagan would have enabled him to remain as a Governor until no later than December 8, 1993.

The Constitution provides, in Article II, section 2, clause 3, 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.' In 1901, Attorney General Knox advised President Roosevelt that it is 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. Any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term.' 23 Op. Att'y Gen. 599, 601 (1901).

Beginning in 1921, however, the Department of Justice has departed from Attorney General Knox's sound counsel, and has sought to justify recess appointments during intrasession adjournments. At first, the Department justified the exercise of the recess power during an intrasession adjournment that lasted nearly a month. Now the Department is supporting a recess appointment during an intrasession adjournment of less than 2 weeks. The Department's brief in the district court goes further, beyond any previous assertion of Presidential recess appointment authority, by arguing not only that the President may make intrasession recess appointments, but that the Constitution contains, to quote the Department's brief, `no lower time limit' on the length

of recess during which the President may make those appointments.

The logical consequence of the Department's argument is that a President may unilaterally appoint an officer, without Senate confirmation, any time that the Senate is in adjournment or recess, even for a 1-week break or over a long weekend. In a footnote, the Department says that it could be argued that the constitutional requirement that both Houses consent to adjournments of more than three days might place 1, 2, or 3 day intrasession adjournments off limits to the recess appointment power. Nevertheless, the Department cites in support of its argument that there is no lower time limit to the recess power an 1828 dictionary, which, in defining the word `recess,' uses as one illustration the recess of a House of Congress for `half an hour.' In his 1901 opinion, Attorney General Knox carefully distinguished between the several ordinary meanings of a recess, as one might find in a dictionary, and the meaning of the recess in the Constitution's limited exception to appointment through advice and consent.

Mr. President, the issue before us is not a personal dispute between the Senate and President Bush or President Clinton. Nor does it involve any reflection on the relative qualifications of Mr. Nevin or Mr. Ashley to be Postal Governors. It certainly should not be an issue which divides Democrats and Republicans in the Senate. Rather, the question is the design of the Framers of our Constitution. The joint participation of the President and the Senate in the process of appointing high officials of the Government is fundamental to our system of checks and balances. To aid in preserving the balance struck by the Framers, which has served the Nation well for more than 200 years, the resolution which I had hoped to offer would have directed the Senate Legal Counsel to appear as amicus curiae in the name of the Senate to defend against an unjustified expansion of the recess appointment power.

The Senate Legal Counsel had been prepared to file a brief tomorrow. As the draft brief presents views which I believe merit the support of the Senate, I would now like to share that draft with the Senate by asking unanimous consent that it be printed in the Record.

There being no objection, the draft was ordered to be printed in the **Record,** as follows:

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U.S. District Court for the District of Columbia

versus

WILLIAM J. CLINTON, et al., Defendants.

C.A. No. 93-0032-LFO

Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs' Motion, and in Opposition to Defendants' Motions, for Summary Judgment on Count Two

INTEREST OF AMICUS

The recess appointment of Thomas Ludlow Ashley to be a Governor of the United States Postal Service, without obtaining the advice and consent of the Senate, raises fundamental questions about the roles of the President and the Senate under the constitutional separation of powers. 1

Footnotes at end of article.

The basic interest of the Senate in this matter is in protecting the Framers' determination, through the instrument of advice and consent, to divide between the President and the Senate the power to appoint the principal officers of the national government. This check and balance is especially critical in regard to the officials of boards and agencies who, once appointed, act independently of the political branches. Before vesting extraordinary authority in those officials, it is highly important, whenever possible, that their qualifications and probity be examined by both the President and the Senate.

As a competing interest the Executive advances the need to keep offices filled in order to avoid a hiatus in the administration of the government. That is not an interest of the Executive alone, however, but a mutual interest that the Senate shares with the Executive and with the House. The Congress, which has the power to make necessary and proper laws to carry into execution all powers vested in any department or officer, has provided for continuity in administration through vacancy legislation and through holdover provisions for boards and agencies, including for the Postal Service Board of Governors. Plaintiffs describe how that holdover provision furnishes a nonconstitutional ground for deciding this case. The holdover provision also demonstrates that this case offers no warrant for expanding unilateral Executive power beyond the Framers' intent.

Finally, the Senate has an interest in assuring that stability, including reasonable predictability, in executive and legislative relations is not jeopardized by the Executive's assertions in this case. For a substantial time, the Senate had sought to coexist with the Executive through an understanding that, if the recess power were ever to be used outside of intersession recesses, it would be utilized only, and rarely, during substantial intrasession breaks. The disruption of that understanding by the Executive's argument that there is no lower time limit to the recess power threatens to produce a high level of uncertainty, with regard to appointments, into the relationship between the branches. Unless the Executive's argument is rejected, no Senate will ever be able to know if it recesses for a weekend or a week, or perhaps even an evening, whether a President will use that break as an opportunity to place an individual into office, without the Senate's advice and consent, for the remainder of the year and the duration of its session the succeeding year. While watchfulness among the branches serves useful purposes, the Framers could not have intended to require that the Senate remain in perpetual meeting during a session in order to preserve the responsibilities vested in it by the Constitution.

STATEMENT OF FACTS

Only public record facts are relevant to the constitutional question posed by the President's appointment of defendant Thomas Ludlow Ashley as a Governor of the Postal Service without complying with the requirement of 39 U.S.C. 202(a) (1988) that Governors `shall be appointed by the President, by and with the advice and consent of the Senate.' The term of the incumbent Governor, plaintiff Crocker Nevin, expired on December 8, 1992, after the final adjournment of the 102d Congress. 2 Upon the expiration of his statutory term, Nevin remained in office pursuant to 39 U.S.C. Sec. 202(b) (1988), which authorizes a Governor to `continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.'

The 103d Congress convened on January 5, 1993 at noon, in accordance with Pub. L. No. 102-

475, 106 Stat. 2296 (1992). In the Senate, credentials were presented and the oath was administered to newly elected Members. 139 Cong. Rec. S1-7 (daily ed. Jan. 5, 1993). The Senate appointed a committee composed of its Leaders to join a like committee of the House of Representatives, `to wait upon the President of the United States and inform him that a quorum of each House is assembled and that the Congress is ready to receive any communication he may be pleased to make.' S. Res. 1, 103d Cong. (1993), 139 Cong. Rec. S8 (daily ed. Jan. 5, 1993). The Senate also authorized the Secretary of the Senate, at any time during the 103d Congress when the Senate is in recess or adjournment, to receive messages from the President and to refer them to the appropriate committees. *Id.* at S9.

On the same day, January 5, the Senate addressed an appointment issue when it approved legislation reducing the salary of the Secretary of the Treasury, to establish eligibility, consistently with Article I, section 6, clause 2 of the Constitution, for then-Senator Lloyd Bentsen, whom President-elect Clinton had expressed his intention to nominate, to serve in that office. 3

That day, President Bush sent to the Senate for confirmation scores of nominations to civilian and military offices, including members of the Defense Base Closure and Realignment Commission and the Copyright Royalty Tribunal, members of the Boards of Directors of the Corporation for Public Broadcasting and the Legal Services Corporation, and an Assistant Secretary of Transportation. 4 The President sent no nomination to succeed Postal Governor Nevin.

On January 6, 1993, the Senate met in joint session with the House of Representatives to count the electoral ballots for the election of the President and Vice President. 139 Cong. Rec. S43 (daily ed. Jan. 6, 1993). President Bush sent further nominations to the Senate for confirmation on January 6. 139 Cong. Res. S49, S53 (daily ed. Jan. 7, 1993). 5

The Senate met on January 7 to continue organizing for the new Congress. The Majority Leader explained that there would be no roll call votes that day on the Senate floor because the Senate was primarily engaged in its constitutional duty to consider presidential nominations:

`Senate committees are meeting in hearings to consider nominees by the President-elect, and I am grateful to the Senate chairmen and ranking Republican Members for their cooperation in organizing these hearings in the period between the swearing in of the new Senate and the inauguration of the next President.'
139 Cong. Rec. S45. Indeed, the Senate Commerce Committee had held a hearing on the nomination of the Secretary-designate of Commerce on January 6, see 139 Cong. Rec. D38 (daily ed. Jan. 6, 1993), and, on January 7, Senate committees conducted hearings on the nominations of the Secretary-designates of Defense, Transportation, Labor, and Veterans' Affairs. 139 Cong. Rec. D42 (daily ed. Jan. 7, 1993).

President Bush sent additional nominations to the Senate on January 7, but not including a successor to Governor Nevin. Id. at S49, S53-54.

On Thursday, January 7, at 8:10 p.m., pursuant to concurrent resolution, the Senate recessed until Wednesday, January 20, at 3 p.m., following the inauguration of President Clinton. Id. at S53; S. Con. Res. 3, 103d Cong. (1993); 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993).

During the recess, Senate committees continued to conduct executive appointment business. On Monday, January 11, the Governmental Affairs Committee and the Environment Committee held hearings on the prospective nominations of the Director of the Office of Management and Budget and Administrator of the Environmental Protection Agency, respectively. 139 Cong. Rec. D47

(daily ed. Jan. 20, 1993). Throughout the balance of that week, those committees were joined by the Committees on Agriculture, Banking, Energy, Finance, Foreign Relations, and Labor, all of which held hearings on prospective presidential nominees. Id. at D46-48.

On Tuesday, January 19, seven committees met to report for confirmation by the Senate prospective nominees of President Clinton, and three committees held confirmation hearings. Id. On that same day, the Labor Committee favorably reported to the full Senate the nominations for promotion in the Public Health Service that the Senate had received from President Bush on January 5. Id. at D48. The Senate confirmed these nominations, along with other nominations that President Bush had sent to the Senate on January 5 and 6, on January 28, 1993. 139 Cong. Rec. S887.

Thus, through its committees, the Senate conducted executive appointment business on six of the seven work days during the 12-day January recess. (January 9 and 10 and January 16 and 17 were weekends, and January 18 was a federal holiday.) The only weekday on which no formal appointment business was conducted was the first day of the recess, Friday, January 8.

President Bush nominated additional officials for appointment during the January recess, sending scores of military nominations to the Senate on January 19. 139 Cong. Rec. S79-80 (daily ed. Jan. 20, 1993).

President Bush did not, however, send to the Senate for confirmation a nomination to succeed Governor Nevin. Rather, on January 8, 1993, the President acted to replace Governor Nevin, by conferring on Thomas Ludlow Ashley, without the advice and consent of the Senate, a recess appointment, lasting through the end of the second session of the 103d Congress in late 1994.

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ARGUMENT

the recess appointments clause did not empower the president to make appointments during the brief january 1993 adjournment

Plaintiffs have made two constitutionally based arguments challenging the President's use of the recess appointment power during Congress' brief adjournment in January 1993. They argue that the Recess Appointments Clause applies only during the recess between the annual sessions of Congress and, alternatively, that if the recess power may be used in some intrasession adjournments, it was not available under circumstances prevailing during the brief adjournment in January 1993.

Although we join their alternative argument, this memorandum focuses on plaintiffs' principal constitutional challenge. As we describe, the text and purpose of the Recess Appointments Clause both demonstrate that the recess power is limited to Congress' annual recess between sessions. This understanding is supported by the subsequent interpretation of, and historical practice under, the Recess Appointments Clause.

A. THE TEXT OF THE RECESS APPOINTMENTS CLAUSE MANIFESTS THAT IT APPLIES ONLY TO CONGRESS' ANNUAL BREAK BETWEEN SESSIONS

The starting point for constitutional interpretation is the text of the Constitution. The Recess Appointments Clause states, `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.' U.S. Const. art. II, 2, cl. 3. The text of the Clause manifests in three ways that the recess power exists only during the break between Congress' annual sessions, which is referred to as the `intersession' recess or adjournment, not to the more numerous, and typically more abbreviated, `intrasession' recesses or adjournments that occur over the course of each congressional session. 6

The first manifestation that the Recess Appointments Clause applies only to the break between Congress' annual sessions is that in the phrase `the Recess of the Senate,' the word `recess' is worded in the singular, not the plural. Although they expressly anticipated Congress' taking additional shorter breaks within an annual session, 7 the Framers chose not to draft the Recess Appointments Clause to permit the President to make appointments to fill Vacancies `during the Recesses and Adjournments of the Senate,' as they easily could have, and logically would have, if that were their intent. Instead, the Framers drafted the Clause in the singular to refer to `the Recess of the Senate,' which strongly suggests that they were referring only to the single break between Congress annual sessions. 8

Further, it is telling that, although in the immediately preceding grammatical clause of the Recess Appointments Clause the Framers specified that the Clause applies to `all Vacancies,' the Framers chose not to state similarly that the Clause applies `during all Recesses.' The logical inference from their conspicuous avoidance of the word `all' is that the Framers did not intend the recess appointment power to apply during each and every possible adjournment of the Senate, but only during the anticipated major break between annual sessions. 9

Third, this construction of the word `recess' is compelled by the Clause's provision that recess appointments `shall expire at the End of their next Session.' Ever since President Washington's initial use of the recess power during the adjournment between sessions of the First Congress, it has been consistently understood that the word `session' in the Clause refers to Congress' annual meetings. 10 Thus, a recess appointment made in the interval between the first and second sessions of a Congress expires at the conclusion of the second session, and an appointment after the final adjournment of a Congress lasts until the end of the first session of the succeeding Congress.

Consistent interpretation of the Clause, which is a single sentence that must be read as an integrated whole, requires that the words `recess' and `session' be given parallel and equivalent constructions. *Cf. Virginia* v. *Tennessee,* 148 U.S. 503, 519 (1893) (words in Constitution should be interpreted `by reference to associated words). If `session' refers to the entire period of a Congress' annual meeting, as all (including defendants) agree, then logic dictates that `recess' similarly means the interval between those two annual meetings. If, on the other hand, `recess' were construed to encompass every 10- or 12-day break, then `session' would need to be interpreted consistently as referring to only the reciprocal period, when the Senate is continuously sitting, before taking its next brief `recess.' 11

In this case, for example, if the President could unilaterally appoint Mr. Ashley to office during the `recess' between January 7 and January 20, 1993, then Mr. Ashley's recess commission necessarily `expire[d] at the End of the [Senate's] next Session,' namely, on February 4, 1993, when the Senate adjourned until February 16, for Presidents' Day, 12 or, depending upon how brief a `recess' defendants believe to be constitutionally cognizable, on January 22, 1993, when the Senate adjourned until January 26, 13 or, if defendants truly believe that the Clause

contemplates recesses of `half an hour,' 14 then on January 21, 1993, when the Senate recessed for 85 minutes for Members to attend party conference luncheons. 15

The use of the recess power during brief adjournments within a session, each appointment lasting only through the period while the Senate meets before taking its next break, has never been understood to be contemplated by the Constitution and should not be indulged now. Adherence to the sensible historical understanding that recess appointments last until the end of Congress' next annual meeting requires a parallel construction of the word `recess' as referring to the break between those annual meetings. 16

B. THE PURPOSE OF THE CLAUSE REQUIRES THAT THE RECESS APPOINTMENT POWER BE RETURNED TO ITS ORIGINAL INTENDED USE DURING CONGRESS' ANNUAL BREAK

The President's claimed power to make unilateral appointments, of almost two years' duration, during brief, interim adjournments like the mid-January recess, is irreconcilable with the purpose of the Recess Appointments Clause. The assertion of the recess power in this instance slights the Framers' deliberate and considered decision to share the appointing power between the Executive and the President, which they recorded in the Appointments Clause, immediately preceding the Recess Appointments Clause.

1. The Framers Determined To Divide the Appointment Power Between the President and the Senate

The Appointments Clause 17 is central among `the checks and balances' that the Framers `built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' *Buckley* v. *Valeo,* 424 U.S. 1, 122 (1976) (per curiam). Designed to `ensure that those who wielded [the appointment power] were accountable to political force and the will of the people, . . . the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches.' *Freytag* v. *Commissioner,* 111 S.Ct. 2631, 2641-42 (1991).

The development of the Appointments Clause at the Convention reflects this principle. `An interim version of the draft Constitution had vested in the Senate the authority to appoint Ambassadors, public Ministers, and Judges of the Supreme Court,' while empowering the President to `appoint officers in all cases not otherwise provided for by the Constitution.' 18 However, this proposal did not meet with the Convention's approval. `Roger Sherman objected to the draft language of Sec. 2 because it conferred too much power on the President,' *Buckley,* 424 U.S. at 130, and could enable him to `set up an absolute government.' 2 Farrand at 405.

When the Committee of Eleven reported back to the Convention the language that became the Appointments Clause, `[i]t would seem a fair surmise that a compromise had been made.' *Buckley,* 424 U.S. at 131. One change, to be sure, was that `the Senate is shorn of its power to appoint Ambassadors and Judges of the Supreme Court.' Id. In return, however, `[t]he President is given, not the power to *appoint* public officers of the United States, but only the right to *nominate* them, and a provision is inserted by virtue of which Congress may require Senate confirmation of his nominees.' Id. (emphasis in original).

Responding to objections against this blending of the appointing power, Gouverneur Morris explained that the benefit of the shared authority was `that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.' 2 Farrand at 539. The delegates approved the proposed compromise. Id. at 539-40. The Convention

then agreed, without discussion or opposition, to add the Recess Appointments Clause following the Appointments Clause. Id. at 540.

Alexander Hamilton described in the Federalist Papers why the Convention had withdrawn from the President `the absolute power of appointment.' 19 Under the constitutional plan,
`the necessity of [the Senate's] concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.'
The Federalist No. 76, at 483. `The possibility of rejection would be a strong motive to care in proposing' and would deter the

President from naming `candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.' Id.

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