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Recess Appointments

The furor generated by President Obama's recess appointments of the director of the Consumer Financial Protection Bureau and members of the National Labor Relations Board will not be resolved quickly, and the U.S. Supreme Court may eventually be called upon to resolve this constitutional question, write Denise M. Keyser and Mary Cate Gordon, labor lawyers with Ballard Spahr LLP.

President Obama's Controversial Recess Appointments: Heading to Supreme Court?

BY DENISE M. KEYSER AND MARY CATE GORDON

In a highly controversial move, on Jan. 4, 2012, President Obama named three members to the National Labor Relations Board as well as the director of the newly created Consumer Financial Protection Bureau. The president acted during an intrasession Congressional recess that was punctuated by twice weekly ''*pro forma*'' sessions of the Senate. Relying on a Department of Justice opinion, the president construed those sessions as insufficient to interrupt the holiday recess. The president's actions allow the NLRB to continue to function and permit the CFPB to begin its regulation of non-bank entities. Given that those agencies have been the subject of much recent controversy, the appointments have generated a barrage of criticism and have already been challenged in court.

Opponents contend that the Senate was not truly in ''recess'' when the appointments were made. The Department of Justice disagreed. Both sides have marshaled significant legal arguments in support of their positions and the issue is likely to be decided ultimately in the courts.

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Background

The U.S. Constitution requires that both chambers of Congress agree to any recess longer than three days. Since 2007, under Presidents George W. Bush and Obama, the House has refused to allow the Senate to take lengthy intrasession recesses, in an effort to prevent recess appointments. Thus, during every ensuing intrasession recess, the Senate has met in twice-weekly *pro forma* sessions, many of which have lasted less than a minute and have been attended by only one senator. On Dec. 17, 2011, the Senate adjourned and agreed to convene for *pro forma* sessions only, with no business conducted, until Jan. 23, 2012.

On Jan. 3, 2012, because the Senate had not yet acted on the president's pending nominations, the NLRB lost its three-member quorum with the expiration of the term of its most controversial member, Craig Becker (D), himself a recess appointment. In its 2010 decision *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court ruled that the NLRB cannot act with fewer than three members; thus, the conclusion of Becker's term without the appointment of any new members would shut down much of the agency. Because of the continuing controversy over what many perceive to be the NLRB's activist agenda, it was not anticipated that the pending nominations would be approved quickly, if at all. [1]

[1] *See* Presidential Nominations and Appointments, *available at* http://www.whitehouse.gov/briefing-room/nominations-and-appointments.

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The CFPB also has been the subject of significant controversy. Many Republican lawmakers have expressed concern about the lack of oversight provided in its enabling legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, H.R. 4173) (Dodd-Frank Law).[2]

It was against this political backdrop that the president acted. His recess appointments bring the NLRB to its full complement of five members for the first time since August 2010. The three recess appointees were Terence Flynn (R), Sharon Block (D), and Richard Griffin (D).

Richard Cordray's appointment as the first director of the CFPB permits that agency to begin regulation of non-bank financial institutions; Dodd-Frank had limited the CFPB's authority over them until a director was appointed.

Recess Appointments Clause

The opposing views on the president's appointments recognize the tension between two of the ''checks and balances'' created by the Constitution: the president's appointment power and the Senate's right to give advice and consent on those appointments. The Appointments Clause provides that the president shall ''Nominate, and By and With the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and other Officers of the United States.'' [3]

The Recess Appointments Clause grants the president ''the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting the Commissions which shall expire at the End of their next Session.'' [4]

The Constitution does not define ''recess.''

What Is a Recess?

To determine whether the appointments pass muster under the Constitution, two questions must be answered: Does an intrasession recess qualify as a recess? If so, do *pro forma* sessions break a long intrasession recess into shorter three-day recesses such that an appointment cannot be made?

Congress may recess between sessions or during a session. A recess between a *sine die* (''without day'') adjournment of one session and the convening of the next is an intersession recess. [5]

Sine die adjournments do not set a date for a future meeting, because the legislative term has come to an end, and the particular body of legislators will not meet again. Intrasession recesses are periods of time during the course of a single session when the legislature does not meet but the same legislators return on a specified date to continue the session. Initially, a recess of the Senate, for purposes of the Recess Appointments Clause, was limited to intersession breaks.[6]

But, early in the 20th century, as intrasession recesses became longer and more common, a consensus developed that permitted appointments during these periods as well.[7]

Given that the Recess Appointments Clause was intended ''to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function,'' the type of recess involved is arguably irrelevant.[8]

A groundbreaking 1921 Attorney General opinion adopted this practical approach,[9] and Department of Justice opinions issued thereafter have followed suit.[10] federal courts, [11] and the Senate itself have defined the term ''recess'' in similar, practical terms.[12]

Reflecting this consensus, more than 285 intrasession recess appointments have been made by 12 presidents. Presidents Reagan, George H. W. Bush, Clinton, and George H. Bush have all made appointments during intrasession recesses of 20 days or fewer, with some made during breaks of as little as 10 days. [13]

More recent opinions by the Justice Department have concluded that appointments may occur during any recess of more than three days. *Id.*

But, was the Senate truly in recess at the time that Obama made his Jan. 4 appointments? A 23-page opinion authored by Assistant Attorney General Virginia Seitz, who heads the Office of Legal Counsel at the Department of Justice, answered this question in the affirmative.[14]

The DOJ opinion relies on three arguments. First, ''the Framers' original understanding of the Recess Appointments Clause and the long-standing views of the executive and legislative branches support the conclusion that the president may make recess appointments when he determines that, as a practical matter, the Senate is not available to give advice and consent to the executive nominations.''[15]

Periodic *pro forma* sessions, often only lasting just seconds, should not preclude the president from determining that the Senate is unavailable during an intrasession recess.[16]

This is particularly true when ''the purpose of these sessions avowedly is not to conduct business; instead,

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[2] Raul, Alan Charles, ''CFPB Lacks Constitutional Checks and Balances,'' The Hill, Jan. 25, 2012, *available at* http://thehill.com/blogs/congress-blog/economy-a-budget/206583-alan-charles-raul-former-vice-chairman-of-the-privacy-and-civil-liberties-oversight-board.

[3] U.S.Const. art.II, sec.2, cl.2.

[4] U.S.Const. art.II, sec.2, cl.3.

[5] Hogue, Henry & Beth, Richard, *Efforts to Prevent Recess Appointments Through Congressional Scheduling and Historical Recess Appointments During Short Intervals Between Sessions* 3 n.6 (2011).

[6] 23 Op. AG 599 (1901).

[7] See, *Evans v. Stephens*, 387 F.3d 1220, 1225-26 (11th Cir. 2004); *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989).

[8] Halstead, T.J., CRS *Report For Congress*, ''Recess Appointments: A Legal Overview,'' July 26, 2005 at i.

[9] *Executive Power—Recess Appointments*, 33 Op. Atty. Gen. 20, 22 (1921) (Dougherty Opinion).

[10] *Recess Appointments*, 41 Op. Atty. Gen. 463, 472 (1960); *Intrasession Recess Appointments*, 13 Op. O.L.C. at 272 (same).

[11] *Evans*, 387 F.3d at 1224.

[12] S.Rept. 4389, 58th Cong., 3d. Sess.; 39 Cong. Rec. 3823-3824 (1905).

[13] Halstead, *supra*. at 9.

[14] *Lawfulness of Recess Appointments During the Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Memorandum Op. for the Council to the president (Jan. 6, 2012) (DOJ opinion).

[15] *Id.* at 13.

[16] *Ibid.*

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either the Senate has intended to prevent the President from making recess appointments during its absence or the House has intended to require the Senate to remain in session.''[17] Thus, during the 2011-2012 holiday recess, the Senate was not available for, and not capable of, advising and consenting to the nominations.[18]

Second, ''allowing the Senate to prevent the President from exercising his authority under the Recess Appointments Clause by holding *pro forma* sessions would be inconsistent with both the purpose of the Clause and historical practice in analogous situations.''[19]

If the *pro forma* sessions were allowed to prevent a recess, ''the Senate can preclude the President from making recess appointments even when, as a practical matter, it is unavailable to fill its constitutional role in the appointment process for a significant period of time.''[20]

Finally, the DOJ opinion reasoned that allowing the Senate to prevent recess appointments through *pro forma* sessions would raise ''constitutional separation of power concerns.''[21]

Because the Constitution allows the president to make appointments when the Senate is unable to give advice and consent due to a recess, Congress may not block the exercise of this power through the use of *pro forma* sessions, while remaining unavailable to fulfill its advice and consent function.

In short, the DOJ opinion views the *pro forma* tactic as merely elevating form over substance.

Legal Arguments Against Recess Appointments

Opponents of the recess appointments are not without legal support, although DOJ found none of it persuasive.

Any consideration of the constitutionality of the president's action must revisit the apparently settled threshold issue of whether an intrasession recess can support a recess appointment. The U.S. Supreme Court has never ruled on the issue. Although the only federal appeals court to consider the question endorsed the prevailing view, *Evans v. Stephens*, supra., former Justice John Paul Stevens did express doubt on that point.[22]

It should be noted that, in the early years of this country, intersession recesses were longer and intrasession recesses relatively rare, and so the Framers likely had only intersession recesses in mind when the Constitution was written.

There are other arguments to be marshaled against the president's appointments, even if the power to make recess appointments may be exercised during intrasession breaks.

First, the Senate has sometimes viewed *pro forma* sessions as having the same legal effect as regular sessions. For example, the Senate has used those sessions to address the requirement that neither House may adjourn for more than three days without the other's consent. *Pro forma* sessions have also been used to meet the 20th Amendment's direction that Congress convene on Jan. 3, and have been employed for parliamentary purposes such as permitting a cloture vote to ripen, or to hear an address.[23]

Second, the Constitution gives the Senate the power to determine the rules of its own proceedings. Legal commenters have suggested that this provision gives the Senate the power to decide when it is in session and when it is not.[24]

The Supreme Court, however, has recognized that the Senate's power here is not unlimited and is subject to court review when those rules impact interests outside of the legislative branch.[25]

Third, at times, the Senate has acted during *pro forma* sessions. For example, twice in 2011, the Senate passed legislation during such sessions by unanimous consent. Conceivably, the Senate could provide advice and consent on nominations during a *pro forma* session.[26]

But, the scheduling order under which the most recent *pro forma* sessions were held expressly provided that there was to be ''no business conducted.''[27]

Fourth, the U.S. Supreme Court has ruled that a short recess of the Senate did not support a ''pocket veto'' (which may only be exercised during a recess) where the Senate had designated an agent to receive the return of the bill during its absence.[28]

Thus, for purposes of the Constitution's pocket-veto clause, a short intrasession recess would not necessarily constitute a ''recess.''

Finally, the Department of Justice itself arguably took a different position on *pro forma* sessions when then-Solicitor General Elena Kagan, now a Supreme Court justice, submitted a letter in the *New Process Steel* case acknowledging that ''the Senate may act to foreclose [recess appointments] by declining to recess more than two or three days at a time over a lengthy period[.]''[29]

Challenges of Recess Appointments

Last year, the National Federation of Independent Business and the National Right to Work Foundation brought suit against the NLRB in federal court, challenging the NLRB's new rule, 29 C.F.R. Part 104, requiring employers to post workplace notices of the federally guaranteed right to organize.[30]

Those groups have now filed a motion seeking to amend their complaint and raise a constitutional challenge to the appointments. They argue that, because the

[17] *Id.* at 13-14.
[18] *Id.* at 14.
[19] *Id.* at 15.
[20] *Ibid.*
[21] *Id.* at 16.
[22] *Evans v. Stephens*, 544 U.S. 942, 942-43 (2005) (Stevens J., respecting denial of certiorari).
[23] DOJ Opinion at 18.
[24] See e.g., *Michael Herz, Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L.Rev. 443, 459 (2005).
[25] See e.g., *United States v. Smith*, 286 U.S. 6, 33 (1932); *United States v. Ballin*, 144 U.S. 1, 5 (1892).
[26] DOJ Opinion at 21.
[27] 157 Cong. Rec. S8783 (Daily Ed. December 17, 2011).
[28] *Wright v. United States*, 302 U.S. 583 (1938).
[29] Letter for William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, *supra*.
[30] Brief of Co-Plaintiffs, *National Ass'n of Manufacturers v. NLRB*, Case No. 1:11-cv-01629 – ABJ (D.D.C. Jan. 13, 2012).

NLRB is improperly constituted, it may not enforce its posting requirement.

It is unlikely that a court will find that the two groups have standing to raise this issue because no one has yet been impacted by a decision of the newly constituted board. A judicial assessment of the recess appointments, then, must wait until a case is properly presented. At that point, if a court concludes that the appointments were constitutionally unsound, a second *New Process Steel* situation would present itself for both the NLRB and the CFPB. In that case, once the Supreme Court concluded that the NLRB could not act with only two members, all decisions made by the two member board were vacated.

The House has also vigorously objected to the appointments. A House resolution was offered Jan. 17, 2012, by Rep. Diane Black (R-Tenn.), with 103 Republican co-sponsors, asserting that the president's appointments violate the Constitution, as the Senate was not in recess at the time of the appointments. Rep. Jeff Landry (R-La.) has introduced the Executive Appointments Reform Act, (H.R. 3770), with 25 Republican co-sponsors, which would prohibit payment to a recess appointee until he or she is confirmed by the Senate if the vacancy existed when the Senate was in session; prohibit volunteers in any position requiring Senate confirmation; and specify that a quorum of the NLRB may not be made up of members who were not confirmed.

Conclusion

While the DOJ opinion is well-reasoned and based on the government's long-established practical approach to recess appointments, the arguments against the NLRB and CFPB appointments cannot be characterized as insubstantial. The furor generated by those appointments ensures that the issue will not be resolved quickly, and the U.S. Supreme Court may eventually be called on to resolve this constitutional question.

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