Washington Law Review

Volume 38
Number 2 *Washington Case Law—1962*

7-1-1963

Constitutional Law—Federal Recess Appointments

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faith and credit" clause of the constitution. Pointing out that the Supreme Court in the *Richards case*[32] had approved Kilberg, the court said,

> We do hold, however, that a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. If, indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law.[33]

The earlier *Pearson* decision is thus removed as an impediment to the development of new choice-of-law rules. The later *Pearson* decision, in conjunction with the dicta in *Richards,* appears to clear the way for state courts to take a new approach in the conflict of law area, giving such force as may seem reasonable to public policy of the forum jurisdiction.

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CONSTITUTIONAL LAW

Federal Recess Appointments. Allocco, who had been convicted of a narcotics violation by a jury,[1] petitioned a United States District Court to grant his motion for release under 28 U.S.C. § 2255, alleging that his conviction should be set aside because the judge who sat at his trial was not properly appointed to his office so as to be able to exercise the judicial power conferred by U.S. CONST. art. III. The district court denied his motion and the court of appeals affirmed.[2] This was the first federal decision in recent times to deal directly with the recess appointment power and the first ever to approve the long-established practice of making recess appointments to the federal bench without regard to when the vacancy first occurred.

The judge who presided at petitioner's trial had been appointed by the President to fill a vacancy that had first occurred while the Senate was in session.[3] On the appeal of the denial of his motion, the petitioner attacked the mode of appointment on two main grounds. Preliminarily, he argued that it is not constitutional to appoint a judge to a court

[32] 369 U.S. at 12, n.26.

[33] U.S.L. WEEK at 2257. The court is apparently leaving open the question of what constitutes "substantial contacts."

[1] United States v. Allocco, 234 F.2d 955 (2d cir. 1956), *cert. denied,* 352 U.S. 931 (1957).

[2] United States v. Allocco, 200 F. Supp. 868 (S.D.N.Y. 1961), *aff'd.* 305 F.2d 704 (2d cir. 1962).

[3] "First occurred," when used in this note to describe when a vacancy occurred, means the point of time at which the position ceased to be filled.

created under U.S. CONST. art. III when that judge does not have life tenure.[4] The Constitution apparently gives the President the power to make temporary appointments to offices that normally can only be filled with the advice and consent of the Senate. The Constitution allows the President to exercise this temporary appointment power when the Senate is in recess.[5] A judge appointed under this provision has only limited tenure since his commission expires at the end of the next Senate session.[6] For the appointment to become permanent, the President must submit the nomination to the Senate for approval. If the nomination is confirmed by the Senate, the President may issue a permanent commission to his nominee thereby giving the judge life tenure. The petitioner argued that since article III provides that the judges sitting on the courts created thereunder are to have life tenure, a judge without such tenure therefore lacks constitutional authority to exercise the judicial powers conferred by article III.

It cannot be said that the court of appeals made any real effort to meet the reasoning of the petitioner's first argument. Recognizing that article III provides safeguards for the judiciary designed to insulate and protect that body from its more potent brothers, the Congress and the Executive, the court, nevertheless, preferred to designate as hypothetical the risks that may ensue from allowing judges with temporary tenure to sit on article III courts.[7] Policy considerations, to be examined, appear to have motivated the court's decision.

Insofar as the questions raised by the petitioner's first argument have been dealt with extensively by other writers,[8] this note will be concerned with petitioner's main argument, namely, that even if the recess appointive power is valid it is not so broad as to authorize the procedure followed in the instant case.[9]

The recess appointee was selected to fill a vacancy that had occurred while the Senate was still in session. The actual granting of the tem-

[4] United States v. Allocco, 305 F.2d 704, 708 (2d cir. 1962). The court notes that the district courts are created under U.S. CONST. art. III, and that judges of those courts, by virtue of that article, have life tenure. "The judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour. . . ." U.S. CONST. art. III, §1.

[5] "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.

[6] *Ibid.*

[7] United States v. Allocco, 305 F.2d 704, 709 (2d cir. 1962).

[8] STAFF OF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., RECESS APPOINTMENTS OF FEDERAL JUDGES (Comm. Print 1959); S. REP. No. 80, 37TH CONG., 3D SESS. (1863); Note, 10 STAN. L. REV. 124 (1957); Note, *Recess Appointments to the Supreme Court,* 17 N.Y.U. INTRA. L. REV. 157 (1962).

[9] United States v. Allocco, 305 F.2d 704, 709 (2d Cir. 1962).

porary commission took place after the Senate had adjourned. The petitioner contends that the clause granting the recess power, by its terms, applies only to those vacancies that first occur while the Senate is not in session. The argument is based on the theory that the recess power was created and designed as an auxiliary method of appointment to be used when the Senate is not available, and was not intended to supplant the ordinary mode of appointment provided in the Constitution.[10]

The court seemed to imply that the clause granting the recess power would, on a literal reading, tend to support the petitioner's argument.[11] The word "happen" as used in the clause would naturally tend to mean "occur," as the petitioner suggests, rather than "happen to exist" as the government insists. However, the court went on to say that an acceptance of the petitioner's interpretation of the word "happen" would restrict the power granted by the clause. In refusing to impose this restriction,[12] the court quoted Mr. Justice Brandeis: "The logic of words should yield to the logic of realities."[13]

In the court's view, the entire recess appointment power is a means by which the orderly functioning of the government can be maintained; through the use of the power important government posts may be kept filled.[14] It must be remembered that the recess power applies not only to judges but also to cabinet members, ambassadors, and other high officials.[15] The court was not willing to strike down a provision under which vacancies in many important positions have been filled, even though the vacancy may have first occurred during the Senate's session.

The court elaborately explained the process that is followed when a nominee is selected to fill a judicial vacancy.[16] For example, an unexpected vacancy caused by an untimely death occurring near the end of the Senate's session could not be filled under the current procedure before the Senate adjourned. The careful probing of the prospective nominee's background, qualifications, and probable acceptability would require too much time. Furthermore, as the court noted, requiring that such a vacancy be filled before the recess might unduly rush the

[10] U.S. CONST. art II, § 2, cl. 2, quoted at note 5 *supra.*
[11] United States v. Allocco, 305 F.2d 704, 710 (2d Cir. 1962).
[12] *Ibid.*
[13] *Ibid.*, quoting Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927).
[14] *Id.* at 712.
[15] U.S. CONST. art. II, § 2, cl. 3 follows immediately after the general provision for appointments and is usually considered to apply to all the offices named therein. See text accompanying notes 4-8 *supra.*
[16] United States v. Allocco, 305 F.2d 704, 710 (2d cir. 1962).

Senate's consideration of the nominee.[17] Holding the recess appointive power to be unconstitutional when applied to vacancies that first occurred during the Senate's session would mean either unduly accelerating the appointment process or leaving the post unfilled until the Senate reconvened. The court was unwilling to create a need for such alternatives.

The court's decision does, it is true, approve a mechanism whereby important government positions may be kept filled. At the same time, however, it sanctions a method by which the President could avoid the normal procedure for making appointments. The President can issue a recess commission to fill a vacancy first occurring during the Senate's session. This commission does not expire until the end of the next Senate session,[18] whereupon the President might then issue a new recess commission to fill the vacancy left by the expiration of the previous commission. If, during the Senate's session the President submitted his nomination and it was rejected, by the terms of the recess clause the rejection would not terminate the commission already issued. The issued commission expires only at the end of the Senate's session.[19]

Nevertheless, the court was unwilling to discard a useful tool on the mere supposition that it might be misused. It should be noted, however, that there has been, at least in the eyes of Congress, some abuse of this power. President Lincoln, during the Civil War, bypassed the "normal" appointment procedure in issuing commissions to government officials, thus prompting Congress to pass some restrictive legislation denying payment to appointees serving without Senate approval.[20] This statute, however, has been recently amended.[21] The court was aware of this incident, and one is left with the feeling that it was accorded its proper weight. Such isolated occurrences during deeply troubled times probably have little value in predicting future events.

Since the net effect of this decision is to give judicial sanction to a broad use of the recess appointment power, probably the greatest objection to the holding will come from those who view as unconstitutional the use of the recess power with respect to judges granted life tenure by the Constitution.

[17] *Id.* at 712.
[18] See note 5 *supra.*
[19] See *In re* Marshalship, 20 Fed. 379 (D.C. Ala. 1884).
[20] 5 U.S.C. § 56 (1958); for a summary of the legislative history of the statute, and the events leading to its enactment, see STAFF HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., RECESS APPOINTMENT OF FEDERAL JUDGES (Comm. Print 1959).
[21] See note 20, *supra.*

Although the practice of making recess appointments to the federal bench without regard to when the vacancy first occurred has long been established, this is the first time that it has received federal judicial approval. Furthermore, this is the first federal decision in recent times dealing directly with the general recess appointment power. Indeed, it may be said that there is scant authority on the point, and what authority exists may be termed conflicting.

The court cited as authority an old federal case, and noted the existence of a contrary unreported federal case.[22] However, there are other reported cases contrary to the case cited by the court.[23] Furthermore, there is a strong dictum in a Supreme Court opinion that tends to refute the position taken by the court in the principal case.[24] However, it should be noted that none of the cases referred to, other than the principal case, deals with appointments to the judiciary.

The court does not appear troubled by the fact that nearly all authority dealing with the general recess appointive power, and the power as exercised in the instant case, are concerned with appointments to executive offices. The court states: "[W]e perceive nothing in the Constitution which indicates that judicial appointments are to be treated differently from any other appointments. . . ."[25] This overlooks the major distinction between judicial and executive officers, namely, that certain of the former are to have life tenure, thus ensuring their independence. In light of this real distinction between judicial and executive officers, perhaps the court should have given greater consideration to the consequences of exempting those offices normally carrying life tenure from the exercise of the recess power.

In light of the various mechanisms available for alleviating the effects of temporary vacancies in the judiciary, such as using retired judges and transferring judges from one district to another,[26] one may well question the need for giving sanction to the expanded use of the recess power, an expansion which removes the major protection conferred on the judge by the constitution. Furthermore, if the court were primarily concerned with the effect which temporary vacancies in the

[22] United States v. Allocco, 305 F.2d 704, 714 (2d cir. 1962).

[23] Schenck v. Peay, 21 Fed. Cas. 672 (No. 12451) (C.C.E.D. Ark. 1869); *In re* District Attorney of the United States, 7 Fed. Cas. 731 (No. 3924) (D.C.E.D. Pa. 1868).

[24] United States v. Corson, 114 U.S. 619, 620 (1895).

[25] United States v. Allocco, 305 F.2d 704, 710 (2d cir. 1962).

[26] 28 U.S.C. 291 (1958) provides for temporary assignment of district or circuit judges to other districts. 28 U.S.C. 294 (1958) provides for temporary usage of retired judges.

judiciary would have on the workload of the individual judge and, consequently, on the speed, efficiency, and quality of the administration of justice, then does not the best solution to the problem lie with Congress, which can create sufficient judgeships to alleviate the burdens of untimely vacancies? Such a solution would not require judges to hear cases while knowing that their decisions might cause the Senate to withhold approval of their nominations. Nor could the Senate committee passing on the nomination of a recess appointee question him about cases then pending before him or already decided by him.[27]

Since the court based its decision primarily on considerations of policy, a fuller delineation of these considerations would have been helpful.

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[27] Note, 10 STAN. L. REV. 124 (1957).