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The Honorable Christopher J. Dodd
The Honorable John F. Kerry
The Honorable Robert P. Casey, Jr.
United States Senate

Subject: *Recess Appointment of Sam Fox*

This responds to your request of April 5, 2007, for our legal opinion on the recess appointment of Sam Fox to serve as Ambassador to Belgium. Specifically, you asked us to address the application of section 5503 of title 5, United States Code, as well as the voluntary services prohibition of the Antideficiency Act, to Mr. Fox's appointment.

Our practice when rendering legal opinions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter.¹ In this case, we wrote to the Legal Adviser of the Department of State to solicit the Department's views.² The State Department responded to our letter and confirmed that, pursuant to section 5503, Mr. Fox would not be paid.³ The Department also asserted that such an arrangement does not violate the voluntary services prohibition because Mr. Fox is not "volunteering" his services; rather a statutory prohibition restricts him from receiving a salary.

As we explain below, we agree with the Department that, under section 5503, Mr. Fox cannot receive a salary for his recess appointment. Likewise, we do not interpret the voluntary services prohibition to apply to this situation because the statutory bar of section 5503 eliminates the possibility of a coercive deficiency or a subsequent claim against the government, which was the original justification behind the prohibition.

¹ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/congress.html.

² Letter from Gary L. Kepplinger, General Counsel, GAO, to John Bellinger, III, Legal Adviser, Department of State, April 19, 2007.

³ Letter from John B. Bellinger, III, Legal Adviser, Department of State, to Gary L. Kepplinger, General Counsel, GAO, May 9, 2007 (Bellinger Letter).

Furthermore, an alternative interpretation that would preclude Mr. Fox from serving in a recess appointment would raise serious constitutional questions.

BACKGROUND

On January 9, 2007, the President nominated Sam Fox to serve as Ambassador of the United States to Belgium. On February 27, 2007, the Senate Foreign Relations Committee held a hearing on Mr. Fox's nomination. 153 Cong. Rec. D220 (daily ed. Feb. 27, 2007). The Committee scheduled a vote on Mr. Fox's nomination for March 28, 2007. However, before the hearing began, the President announced the withdrawal of Mr. Fox's nomination. 153 Cong. Rec. S4079 (daily ed. Mar. 28, 2007). On March 29, 2007, the House and Senate adjourned for an intrasession recess. 153 Cong. Rec. S4223 (daily ed. Mar. 29, 2007). On April 4, 2007, the President gave Mr. Fox a recess appointment to serve as Ambassador to Belgium. Bellinger Letter, at 1.

DISCUSSION

The Constitution grants the President the 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. The federal courts have interpreted this authority broadly and have read the clause as applying to "vacancies that may happen *to exist* during the recess of the Senate." *Evans v. Stephens*, 387 F.3d 1220, 1225 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1013 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 710-12 (2nd Cir. 1962).

However, section 5503 of title 5, United States Code, prohibits payment for services "to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate." Long-standing decisions of both the Comptroller General (and his predecessor, the Comptroller of the Treasury) and the Attorney General have interpreted the operation of section 5503 and agreed that Congress has the right under its appropriation power⁴ to prohibit salary payments to certain recess appointees. *See, e.g.*, 26 Comp. Dec. 1072 (1920); 28 Comp. Gen. 30 (1948); 16 Op. Att'y Gen. 522 (1880); 17 Op. Att'y Gen. 521 (1883); 32 Op. Att'y Gen. 271 (1920); 3 Op. Off. Legal Counsel 314 (1979).

The vacancy in the position of Ambassador to Belgium existed prior to the March 29 recess. Ambassador positions are required by the Constitution to be appointed by the President by and with the advice and consent of the Senate. U.S. Const. art. II, § 2. Therefore, the prohibition of section 5503 would apply to Mr. Fox.

⁴ The Constitution mandates that "No money shall be drawn from the treasury, but in consequence of appropriations made by law..." U.S. Const. art. I, § 9.

While there are three exceptions to the prohibition in section 5503, none of them apply to Mr. Fox. The bar on salary payments of section 5503 is not applicable: (1) if the vacancy arose within 30 days before the end of the session of the Senate; (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; and (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual, other than the one whose nomination was rejected, receives a recess appointment.⁵ 5 U.S.C. § 5503(a). These exceptions do not apply to Mr. Fox because the vacancy arose prior to 30 days from the March recess, his nomination was not pending when the recess began because the President had already withdrawn his nomination, and the Senate had not rejected a nomination for the office. Thus, under the clear language of section 5503, the State Department's appropriation, which would otherwise be available to pay Mr. Fox's salary, is not available to pay his salary. In its response to our development letter, the State Department agreed with this conclusion and stated that Mr. Fox "intends to serve without pay." Bellinger Letter, at 2.

The State Department's appropriation remains unavailable for paying Mr. Fox's salary until he is confirmed by the Senate. 5 U.S.C. § 5503(a). The President has not decided whether to renominate Mr. Fox. Bellinger Letter, at 2. Even if he were to be renominated, his salary could not be paid until he was confirmed by the Senate because his recess appointment does not fall within any of the exceptions in section 5503.⁶

The fact that Mr. Fox cannot be paid raises the question of whether the State Department can accept his uncompensated services. Section 1342 of title 31, United States Code, prohibits an officer or employee of the government from accepting voluntary services, except in cases of "emergencies involving the safety of human life or the protection of property." This prohibition is part of the Antideficiency Act and a violation of the prohibition could subject the officer or employee who accepts such services to administrative discipline or criminal penalties. 31 U.S.C. §§ 1349, 1350.

The voluntary services prohibition dates back to a provision in an appropriations law in 1884. Act of May 1, 1884, ch. 37. 23 Stat. 17. Congress enacted this provision after it was faced with claims "presented for extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours." 15 Cong. Rec.

⁵ Under these exceptions, the President is required to submit a nomination for the office within 40 days of the beginning of the next session of the Senate in order for the appointee to continue to receive a salary. 5 U.S.C. § 5503(b).

⁶ If the President did renominate Mr. Fox and the full Senate rejected his nomination, the prohibition of section 5503, as well as a separate prohibition on the payment of salary to any appointee whose nomination has been rejected by the Senate, would apply; this latter prohibition is annually included in an appropriations bill. *See, e.g.*, Pub. L. No. 109-115, § 809, 119 Stat. 2396, 2497 (Nov. 30, 2005) (incorporated into Pub. L. No. 110-5, § 104, 121 Stat. 8, 9 (Feb. 15, 2007)).

3411 (1884) (statement of Rep. Randall). In 1905, Congress reenacted a version of the Antideficiency Act that included the voluntary services prohibition. Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257. In enacting this statute, members of Congress emphasized that “[w]e give to Departments what we think is ample, but they come back with a deficiency. Under the law they can [not] make these deficiencies and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them . . . we seek by this amendment to in some respect, at least, cure that abuse.” 39 Cong. Rec. 3687 (1905) (statement of Rep. Hemenway).

In other words, Congress enacted the voluntary services prohibition because agencies would coerce their employees to “volunteer” their services in order to stay within their annual appropriation. However, these employees would later come to Congress and seek additional appropriations to pay their salaries for the “volunteered” time, and Congress would often feel a moral obligation to pass an appropriation. The voluntary services prohibition, as well as the other provisions in the Antideficiency Act, was enacted to prevent these “coercive deficiencies.” See GAO, *Principles of Federal Appropriations Law*, vol. 2, 3rd ed., GAO-06-382SP (Washington, D.C.: Feb. 2006), at 6-34–38.

With this rationale in mind, early opinions of the Attorney General, the Comptroller of the Treasury, and the Comptroller General distinguished voluntary services from “gratuitous services,” in which the government receives the uncompensated services of an individual through an advance agreement or contract in which the individual agrees to serve without compensation. 30 Op. Att’y Gen. 51 (1913); 27 Comp. Dec. 131 (1920); 7 Comp. Gen. 810 (1928). These decisions agreed that “an appointment to serve without compensation which is accepted and properly recorded, is not a violation of the statutory prohibition against the acceptance of voluntary service.” 27 Comp. Dec. at 133. Such an arrangement was not “the evil at which Congress was aiming,” because Congress would feel no moral obligation to pass an appropriation to pay an individual who knowingly waived his salary in advance. 30 Op. Att’y Gen. at 55. Gratuitous services are unlikely to form the basis of future claims against the government. B-204326, July 26, 1982. Agencies, therefore, can accept the uncompensated services of an individual who has validly waived his compensation in advance.

However, the Supreme Court has stated that employees whose salary is specified in statute cannot waive their compensation. *Glavey v. United States*, 182 U.S. 595, 609 (1901) (stating that “it was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and his appointee that the latter should not demand the compensation fixed by statute”). See also *Goldsborough v. United States*, 10 Fed. Cas. 560, 562 (C.C.D. Md. 1840) (stating that “where an act of [C]ongress declares that an officer of the government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished . . . unless the power to do so is given by act of [C]ongress”). Indeed, the courts have allowed claims for compensation to proceed even when it appeared that an employee had waived a salary specified in statute.

See, e.g., United States v. Jones, 100 F.2d 65, 68 (8th Cir. 1938) (holding that “the pay of this officer was fixed by statute; his compensation rested not upon contract, but upon an act of Congress, and his acceptance of less than the full statutory compensation did not estop him nor his beneficiary from claiming the entire amount due from the government”).

Because employees whose salary is specified in statute could bring a future claim against the government, even if they waived their salary in advance, both the Comptroller General and the Department of Justice have refused to allow such arrangements and have applied the voluntary services prohibition to such cases. 26 Comp. Gen. 956 (1947); 19 Op. Off. Legal Counsel 235 (1995); 6 Op. Off. Legal Counsel 160 (1982). These opinions have held that “in the absence of statutory authority . . . there are no circumstances under which an original appointee to a position in the Federal service properly may legally waive his ordinary right to the compensation fixed by or pursuant to law for the position. . . .” 26 Comp. Gen. at 961.

Later decisions applied this principle and allowed a waiver of compensation only in instances in which the statute did not specify a rate of pay or in which the statute specified only a maximum rate of pay. 58 Comp. Gen. 383 (1979); 27 Comp. Gen. 194 (1947). For example, the statute setting the pay of members of the United States Metric Board stated that they were “entitled to receive compensation at a rate not to exceed the daily rate currently being paid grade 18 of the General Schedule;” members thus could waive their salary in advance because only a maximum rate was specified. 58 Comp. Gen. at 384.

The salary of an ambassador to a nation is set by statute. Each ambassador who is chief of mission “shall receive a salary, as determined by the President, at one of the annual rates payable for levels II through V of the Executive Schedule under sections 5313 through 5316 of title 5, United States Code.” 22 U.S.C. § 3961(a). The Executive Schedule is a five-tier annual salary schedule for most of the federal government’s highest officials, and the rates are adjusted on an annual basis. In 2007, the annual rate of pay for Executive Level II is \$168,000, and the annual rate of pay for Executive Level V is \$136,200. Exec. Order No. 13420, *Adjustments of Certain Rates of Pay*, 71 Fed. Reg. 77571 (Dec. 26, 2006). Thus, by statute, the minimum rate of pay for the Ambassador to Belgium is currently \$136,200. Under normal circumstances, the voluntary services prohibition would forbid the State Department from accepting the uncompensated services of the Ambassador to Belgium, because of the statutory minimum salary. 58 Comp. Gen. at 383.

As noted above, the voluntary services prohibition was enacted to prevent coercive deficiencies and future equitable claims against the government. Thus, Mr. Fox could not volunteer his services as Ambassador to Belgium. However, as the State Department notes, Mr. Fox is not “volunteering” his services; rather, there is a statutory prohibition that bars him from being paid. Bellinger Letter, at 2. This is not a situation in which a coercive deficiency might occur. Like an employee who signs a gratuitous waiver of salary, Mr. Fox took the position of Ambassador knowing that he

would not receive compensation for his services. *Id.* Similarly, Mr. Fox could not file a claim against the government for compensation, because there is a statutory prohibition on his receipt of compensation. 5 U.S.C. § 5503.

A similar situation arises in the application of the dual compensation prohibition. Under this prohibition, “an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.” 5 U.S.C. § 5533(a). Nonetheless, circumstances have arisen in which individuals have sought to serve in two positions, each with a statutory salary. In these cases, the Department of Justice has opined that the individual may serve in both positions, but may only receive the salary for one position. *See, e.g.*, 2 Op. Off. Legal Counsel 368 (1977); Memorandum for Honorable Larry Eugene Temple, Special Counsel to the President, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Dual Service as Head of an Executive Department and Director of the Office of Economic Opportunity*, OLC Opinion, Feb. 16, 1968 (Wozencraft Memo). The voluntary services prohibition will not block the employee from serving in the second position because the dual compensation statute “inferentially recognizes the legality of dual office-holding.” 2 Op. Off. Legal Counsel at 368. Furthermore, the employee is not waiving the second salary or volunteering in the second position which would be barred by the voluntary services prohibition. Rather, his uncompensated service is “compelled by a provision of law.” Wozencraft Memo, at n.4.

Likewise, section 5503 implicitly recognizes that the President has the constitutional authority to make a recess appointment, but restricts certain appointees from receiving a salary.⁷ As one of the supporters of the original version of section 5503 stated, “It may not be in [Congress’s] power to prevent the appointment, but it is in our power to prevent the payment.” Cong. Globe, 37th Cong, 3rd Sess. 565 (1862) (statement of Rep. Fessenden). Therefore, we agree with the State Department that the voluntary services prohibition does not restrict the Department from allowing Mr. Fox to serve as Ambassador without compensation. The original justification for the prohibition was the possibility of a coercive deficiency or a future claim against the government. However, the statutory prohibition of section 5503 precludes such possibilities in Mr. Fox’s case.

We are also led to this interpretation by the fact that serious constitutional issues would arise if section 5503, in conjunction with the voluntary services prohibition, were read to directly restrict the President from making a recess appointment. Like the courts, we will interpret a statute to avoid constitutional issues. B-302911, Sept. 7, 2004. *See also Crowell v. Benson*, 285 U.S. 22, 62 (1932).

⁷ An early opinion of the Attorney General recognized this implication: “In postponing the payment of salary of the appointee until the Senate has given its assent to the appointment, [the statute] concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous.” 16 Op. Att’y Gen. at 531.

In interpreting statutory holdover provisions, in which a member of a federal board or commission is authorized to continue to serve until his successor is appointed, the federal courts have construed these provisions to avoid restricting the President's authority to make a recess appointment after a member's term has expired. *Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996); *Staebler v. Carter*, 464 F. Supp. 585, 591 (D.D.C. 1979); *Nippon Steel Corp. v. International Trade Commission*, 26 C.I.T. 1025, 1037 (2002). In the *Staebler* case, which involved the holdover provision for members of the Federal Election Commission, the court stated that "to construe the statute to prohibit all recess appointments . . . would be unreasonably broad and probably unconstitutional." *Staebler*, 464 F. Supp. at 591. The court therefore narrowly interpreted the statute to avoid this constitutional question. *Id.* See also B-201035, Dec. 4, 1980.

Like the President's recess appointment authority, another exclusive enumerated power of the President is the authority to grant pardons. U.S. Const. art. II, § 2. With regard to the pardon power, the Supreme Court has held that Congress may not use its appropriations power to restrict the President's authority to grant pardons. *United States v. Klein*, 80 U.S. 128, 147 (1872). Reasoning by analogy from *Klein*, serious constitutional issues would arise if Congress attempted to use the power of the purse to directly restrict the President from making a recess appointment, just as the courts have prevented Congress from restricting the President's pardon authority.⁸

Accordingly, we will not interpret the voluntary services prohibition to bar Mr. Fox from serving as Ambassador to Belgium, even though he may not receive a salary under section 5503 until he is confirmed by the Senate. In fact, we have reached the same result, albeit without reference to the voluntary services prohibition, in several of our prior decisions interpreting section 5503. For example, in a decision involving the recess appointment of a member of the former Interstate Commerce Commission, whose salary was specified in statute, we stated that "he may continue to function as a member of the Commission but without pay until he is nominated by the President to the full term and that nomination is confirmed by the Senate . . ." 52 Comp. Gen. 556 (1973). See also 28 Comp. Gen. 121 (1948) (involving the recess appointment of a federal district judge with a statutorily specified salary); 7 Comp. Gen. 10 (1927) (involving the recess appointment of an ambassador with a statutorily specified salary).

CONCLUSION

Under 5 U.S.C. § 5503, Mr. Fox is prohibited from receiving compensation for his recess appointment as Ambassador to Belgium until his nomination is approved by the Senate. The Department of State may allow him to serve without compensation, despite the voluntary services prohibition of the Antideficiency Act, because

⁸ Likewise, the Department of Justice has opined that the Antideficiency Act must be narrowly interpreted to avoid a construction that would "with respect to certain of the President's [constitutionally enumerated] functions . . . raise grave constitutional questions." 5 Op. Off. Legal Counsel 1, 6 (1981).

Mr. Fox's service would not result in a coercive deficiency or a subsequent claim against the government, which was the original justification behind the prohibition. Mr. Fox could not make such a claim because of the statutory bar of section 5503. Similar to the situation in which an employee gratuitously waives his compensation in advance, which is an exception to the voluntary services prohibition, Mr. Fox accepted the ambassadorial appointment with full knowledge that he would not be entitled to compensation. Furthermore, an alternative interpretation that would directly curtail the President's power to make a recess appointment to Mr. Fox would raise serious constitutional concerns.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel