UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAR - 3 1982

JAMES F. DAVEY, Clerk

LEGAL SERVICES CORPORATION, et al.,

Plaintiffs,

v.

HOWARD H. DANA, JR., et al.,

Defendants.

Civil Action No. 82-0542

MEMORANDUM OPINION

A temporary restraining order enjoining defendants from meeting as Directors and conducting the business of the Legal Services Corporation (LSC) on March 4-5, 1982, is the relief sought by plaintiffs in their application presently before the Court. Plaintiffs, ten individuals and LSC, filed a complaint for declaratory judgment and injunctive relief on February 25, 1982, together with applications for preliminary injunctive relief. All of the individual plaintiffs have served as Directors of LSC for more than three years.* Defendants are ten individuals appointed by the President of the United States as Directors of LSC on December 30, 1981, and January 22, 1982, pursuant to his recess appointment power.** See U.S. CONST. art. II, § 2, cl. 3. The central contention posited by plaintiffs is that since the Legal Services Corporation Act of 1974 (LSC Act) specifies that Directors of the LSC "shall not . . . be deemed officers or employees of the United States," 42 U.S.C. § 2996c(c) (1976), the

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* Although the three-year term of each individual plaintiff has expired, the LSC Act provides that such Director shall remain in office until a successor has been appointed and qualified. Id. § 2996c(b).

** On March 1, 1982, the President formally nominated all of the defendants for statutory terms on the LSC Board of Directors, with the exception of defendant Annie L. Slaughter. The names of these recess appointees have accordingly been sent to the Senate for confirmation.

President could not utilize his recess appointment power which concededly applies only to officers of the United States. As a result, plaintiffs seek this extraordinary relief.

Upon careful consideration of the application for a temporary restraining order, the memoranda of law, the arguments of counsel, and the record, the Court finds that plaintiffs have failed to meet their burden of proof with respect to the relief presently sought. In order to prevail on an application for injunctive relief, plaintiffs must demonstrate 1) that they are likely to succeed on the merits of their claim; 2) that they will suffer irreparable harm if the requested relief is denied; 3) that there will be no substantial harm to other parties of interest if the requested relief is granted; and 4) that the public interest favors the issuance of a temporary restraining order. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 125 (1958)*

I. CONTENTIONS OF THE PARTIES

Plaintiffs contend that the disputed issue can be resolved simply by citing the express language of the LSC Act which declares that Directors of the LSC "shall not . . . be deemed officers or employees of the United States." 42 U.S.C. § 2996c(c) (1976). Plaintiffs maintain that this provision is fully dispositive, since it reflects an unequivocal congressional determination to classify the Directors of the LSC as non-Article II officials whose legal authority emanates directly from the exercise of

* Although plaintiffs maintain that the alleged violation of a federal statute may somewhat lessen their burden of proof in an application for a temporary restraining order, see, e.g., National Wildlife Federation v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977), this argument should not obscure the fact that granting a temporary restraining order is an extraordinary measure for which plaintiffs must at least demonstrate a likelihood of success on the merits of the legal issues that they raise.

congressional power under the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18. Thus, plaintiffs assert that the President's recess appointment power is in fact wholly inapplicable here, and that their successors cannot lawfully exercise official authority absent previous compliance with the prescribed statutory procedure governing appointments to the LSC Board of Directors. Since the President did not conform to the contemplated statutory procedure, but rather chose to rely upon his Article II appointment power, plaintiffs assert that the resulting appointments lack operative legal effect and are void ab initio. For this reason, plaintiffs urge that preliminary relief is necessary to prevent defendants from performing as the lawfully constituted Board of Directors when they have not been confirmed by the Senate in accordance with the "controlling" procedure set forth in 42 U.S.C. § 2996c(a).

In opposing plaintiffs' motion for preliminary injunctive relief, defendants vigorously maintain that there is absolutely no evidence to suggest that Congress meant to limit the President's appointment power over LSC Board members when it adopted the LSC Act. According to defendants, it would be entirely anomalous for Congress to have created these supervisory and administrative positions to be filled by the President with the advice and consent of the Senate, while at the same time to have divested the President of his established authority* to make interim

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* Presidents have frequently made recess appointments to congressionally-created corporations ranging from the Communication Satellite Corporation to the Corporation for Public Broadcasting. See Defendants' Opposition, at 4. In fact, four of the plaintiffs in this action were recess appointees of President Carter in 1978, while two other plaintiffs were members of the Board in 1978 when the recess appointees assumed their positions and began performing their functions prior to their confirmation by the Senate. Id. at 2. While this widespread administrative practice does not eliminate the need for independent judicial scrutiny of its most recent manifestation, the apparent acceptance or tacit embrace of this practice in diverse contexts must be accorded some weight in arriving at a preliminary assessment of the likelihood that plaintiffs will prevail on the merits of their claim for relief.

appointments during a Senate recess. Moreover, they contend that any legislation which so nullified the President's independent appointment power would transgress constitutional limitations on Congress' power to legislate under the Necessary and Proper Clause, which is bounded by the express language of Article II, § 2, cl. 2.

The central premise underlying all of the arguments advanced by defendants is that the nature of the discretionary administrative functions performed by LSC Directors in implementing the provisions of a federal statute effectively establishes the Directors as "Officers of the United States" within the purview of Article II, § 2, cl. 2. In support of their contention that an official's function and not his formal title is the determinative factor in assessing the scope of the Presidential appointment power, defendants rely upon Buckley v. Valeo, 424 U.S. 1, 124-143 (1976), which utilized the AppointmentsClause to invalidate the statutory procedure for appointing members to the Federal Election Commission (FEC) on the ground that it did not provide for nomination by the President with the advice and consent of the Senate. Determining that members of the FEC were "Officers of the United States" whose appointments were governed by Article II, § 2, cl. 2, the Supreme Court adopted a functional analysis which focused upon the nature of the duties performed by members of the FEC. Pursuant to this analysis, the Court noted that FEC members exercised an array of administrative powers that included rulemaking, the rendition of advisory opinions, determinations of eligibility for federal funds, and other functions representing "the performance of a significant governmental duty exercised pursuant to a public law." Id. at 141. Since "none" of these functions was "sufficiently removed from the administration and enforcement of public law" to allow it to be performed by non-Article II officials, the Court concluded that these administrative functions could be performed only by persons who were "Officers of the United States." Id. (emphasis added).

Defendants maintain that the constitutional reasoning of Buckley is applicable to the funding eligibility determinations that are made by LSC Directors pursuant to similarly broad statutory standards. See 42 U.S.C. § 2996f (1976). They would distinguish the express language of 42 U.S.C. § 2996c(c) by asserting that Congress' power to declare that holders of statutory offices charged with the performance of significant administrative functions are not to be regarded as officers of the United States is limited to the familiar congressional task of defining entitlements, obligations, and liabilities under various federal statutes and regulations. Such statutory designations, they argue, have no constitutional significance, and do not purport to alter an official's independent constitutional status as an "Officer of the United States."* Thus, whether a government official is indeed an "Officer" under Article II would be solely contingent upon whether the functions assigned to his office involved "the performance of a significant governmental duty exercised pursuant to public law." Buckley v. Valeo, 424 U.S. at 141. Whatever the ultimate merits of this position may be, defendants maintain that it is sufficiently compelling at this incipient stage of the litigation to preclude plaintiffs from making the threshhold demonstration that they are substantially likely to succeed on the merits of their position.

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* According to this analytical approach, the statutory proviso that LSC Directors "shall not . . . be deemed officers or employees of the United States" was not designed to constrict the scope of the Article II, § 2 definition of "Officer of the United States" - nor could it be so intended.

II. DISCUSSION

Although plaintiffs' statutory assault on the recess appointments of defendants possesses a beguiling simplicity, at this phase of the litigation it fails to meet the required burden of demonstrating a likelihood of success on the merits of the contention that the exclusion of LSC Directors from the status of officers of the United States by Congress bars the President from making recess appointments of Board members. Neither party has been able to discover any legislative history which would shed light on the scope of the § 2996c(c) exclusion. Given that Congress in the LSC Act followed the Article II format of Presidential appointment with the advice and consent of the Senate, plaintiffs have not shown that Congress intended to bar the President from exercising his Article II recess appointment power. It is equally plausible that the exclusionary language of § 2996c(c) was inserted by Congress as an aid in delineating the official entitlements and obligations of LSC Directors and not as an intrusive limitation on the scope of the President's Article II power. Moreover, plaintiffs have not explained why it would not be prudent for this Court to read § 2996c(c) in a more restrictive manner in order to avoid a possible constitutional conflict between the parameters of congressional authority under the Necessary and Proper Clause and the functional breadth of the Article II appointment power recognized in Buckley. Assuming, arguendo, that plaintiffs have demonstrated a likelihood of success on the merits of their statutory argument, they still have failed to confine the reach of the Buckley opinion which demarcates the scope of the Article II appointment power. In Buckley, the Supreme Court took an expansive, functional approach to the definition of "Officers of the United States" in the context of the Article II appointment power. The Court explained:

> We think that the term "Officers of the United States," as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, [99 U.S. 508, 509-510 (1879)] is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article. (emphasis added.)

Buckley v. Valeo, 424 U.S. at 125-26. After the Court outlined the varied administrative functions of the FEC, which included discretionary determinations of eligibility for public funds, see id. at 140, the Court concluded that "each of these functions also represents the performance of a significant public duty exercised pursuant to a public law." Id. at 141. None of these functions, the Court reasoned, could operate merely in aid of congressional authority to legislate, and none could be sufficiently removed from the adminstration and enforcement of the public law to allow it to be performed by a Commission composed of non-Article II officials. Accordingly, those administrative functions could lawfully "be exercised only by persons who are 'Officers of the United States'." Id. Since the Board of Directors of the LSC is charged with a similar discretionary task in arriving at determinations of funding eligibility pursuant to broad statutory standards, see 42 U.S.C. § 2996f (1976), plaintiffs have not sufficiently explained why the functional analysis in Buckley of the Article II appointment power does not compel the conclusion that LSC Directors are "Officers of the United States" within the purview of Article II, § 2, cl. 2.

During oral argument, plaintiffs' counsel made strenuous attempts to distinguish the Buckley decision from the instant action. The Court finds these purported distinctions unpersuasive at this stage of the lawsuit. First, plaintiffs maintain that the Supreme Court's principal focus in Buckley was on the FEC's "core function" of enforcing the federal election laws through the

initiation of civil actions in Article III courts. The diverse administrative functions that were performed by the FEC in addition to its civil enforcement authority are then classified by plaintiffs as ancillary or subsidiary to the claimed "core" enforcement function. Since the exercise of civil enforcement power by the FEC is plainly executive and could thus be performed only by "Officers of the United States" under Article II, § 2, cl. 2, plaintiffs contend that all of the FEC's ancillary functions, including the determination of eligibility for federal funds, could likewise be performed only by Article II officials. In contrast, plaintiffs assert that LSC Directors, who do not exercise statutory enforcement powers, may lawfully engage in functionally analogous determinations of eligibility for public funds even though they are not "Officers of the United States" within the meaning of Article II, § 2, cl. 2.

The broad language of Buckley provides no support for this "core function" theory. Not only did the Court make no mention of a "core" or "primary" function in the Buckley opinion, but it expressly outlined three broad categories of administrative functions that are performed by the FEC.* See id. at 109-113, 137. In addition, the Court indicated that each of these functions, including the determination of funding eligibility, involved the performance of a significant governmental duty exercised pursuant to public law. See id. at 140-141.

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* Even if this Court were to subscribe to plaintiffs' "core function" theory, the LSC's core function arguably is the nationwide determination of eligibility for congressional appropriations to finance the provision of legal services to the poor. Such discretionary determinations of eligibility for public funds, performed under the auspices of a legal standard established by Congress, should be made by Article II officials under the reasoning enunciated in Buckley. If there are any circumstances which would render the Buckley approach inapplicable to the functions of LSC Directors, they are not apparent to the Court at this preliminary phase of the lawsuit.

Second, plaintiffs cite Buckley to support the proposition that when an agency or corporate function is sufficiently removed from the administration of public law, it may be performed lawfully by non-Article II officials. They contend that the type of funding eligibility determinations that are made by the LSC pursant to 42 U.S.C. § 2996f are in fact removed from the administration of the public law. While this argument may be appealing in the abstract, it ignores the Supreme Court's explicit conclusion that the administrative function of determining eligibility for federal funds under congressionally imposed standards is not sufficiently removed from the administration of public law to be conducted by officials who are not appointed under the auspices of Article II, § 2, cl. 2. See id. at 140-41.

Finally, plaintiffs suggest that the Buckley language concerning the determination of funding is so unnecessarily broad that it would require Directors of the American Red Cross or Smithsonian Institute to be classified as Officers of the United States. Even if there were no distinctions between the functions of these organizations and those of the LSC, plaintiffs have failed to articulate a principled basis for limiting the scope of the Buckley opinion.*

Plaintiffs lastly have relied upon the cautionary principle that ascribes presumptive validity to Acts of Congress. Assuming, arguendo, that the Court ultimately accepted the merits of defendants' position that LSC Directors are Officers of the United States, there is nothing in either Buckley or 42 U.S.C. § 2996c(c) which would logically compel the Court to grapple with the constitutional confrontation that plaintiffs see on the horizon.

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* In any event, the Court is unwilling at this point to consign apparently controlling guidance from the Supreme Court in Buckley to the realm of reductio ad absurdum.

III. CONCLUSION

Because of the Court's conclusion that plaintiffs have failed to demonstrate a sufficient likelihood of success on the merits of their legal contentions to warrant the issuance of a temporary restraining order, it is unnecessary to devote extensive discussion to the remaining factors that must be considered in ascertaining the appropriateness of preliminary injunctive relief. Suffice it to say, however, that plaintiffs' claims of irreparable harm are plausible only if the Court is willing to embrace at least temporarily the merits of plaintiffs' position that they remain as the lawfully constituted Board of Directors until the Senate has confirmed the President's Appointees pursuant to 42 U.S.C. § 2996c(a)(1976). As the Court has already noted, however, plaintiffs have not shown that they are likely to succeed on the merits of that argument.

Plaintiffs' failure to demonstrate a sufficient likelihood of success on the merits also compels the conclusion that they have failed to indicate any irreparable injury. This Court agrees with defendants' contention that if plaintiffs are not correct on the merits of their position but nonetheless are granted a temporary restraining order, defendants will thereby suffer the identical irreparable injury to their own legally cognizable interests that plaintiffs are currently alleging as the immediate basis for this action. In other words, similar corporate and personal interests are conceivably threatened on both sides of the ledger here. Therefore, the inquiry into irreparable injury is necessarily subsumed by the determination of plaintiffs' likelihood of success on the merits. This same reasoning compels the conclusion that plaintiffs have failed to demonstrate that the balance of equities is in their favor or that the public interest would be served by granting a temporary restraining order.

Since plaintiffs have failed to meet their burden on any of the four prerequisites necessary to grant a temporary restraining order, the Court must deny their application for a temporary restraining order. An Order consistent with this Memorandum Opinion will be issued on this date.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: March 3, 1982

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Defendants. :

ORDER

Upon consideration of the application for a temporary restraining order filed by the plaintiffs, the memoranda of points and authorities in support and opposition thereto, the affidavits and other supporting documentation submitted by the parties, the arguments of counsel, and the entire record of this action, it is by the Court this 3rd day of March, 1982,

ORDERED that plaintiffs' application for a temporary restraining order be, and hereby is, denied.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE