

NO. 11-1271

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In Re: AIKEN COUNTY, SOUTH CAROLINA; ROBERT L.
FERGUSON; WILLIAM LAMPSON; GARY PETERSEN; STATE
OF SOUTH CAROLINA; STATE OF WASHINGTON; NATIONAL
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS;
NYE COUNTY, NEVADA, Petitioners.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
and GREGORY B. JACZKO, Chairman of the United States Nuclear
Regulatory Commission, Respondents.

PETITIONERS' SUPPLEMENTAL STATUS REPORT IN REPLY

On October 9, 2012, Respondent United States Nuclear Regulatory Commission (“NRC”) and Intervenor State of Nevada each filed a Reply to Petitioner’s September 28, 2012 Status Report (“NRC’s Reply” and “Nevada’s Reply,” respectively). NRC’s Reply concedes that the continuing resolution was enacted and that it “fails to provide the ‘clarity’ that Judge Kavanaugh spoke of” in his concurrence to the Order. *See* Order, Kavanaugh, J. concurring. The NRC, however, suggests that the continuing resolution is not an appropriations act, but rather is “only” a “Band-aid” that lasts for six months. NRC’s Reply at 5. It then speculates that the “lame duck” Congress might take some other actions – some appropriations related and some not – between now and December 14 that could address this subject because Congress has the issue “on its radar.” NRC’s Reply at 3. Nevada’s Reply does not suggest that clarity was provided, but seems to suggest that the continuing resolution leaves the matter confused. Nevada’s Reply at 2-3. Both claim that the court should wait until December 14, 2012 for further status reports.

Neither NRC nor Nevada have offered legitimate reasons to delay further. First, nothing in the Court’s Order requires that the case be delayed until December 14. Rather, the Order simply required the parties to report on the status of Fiscal Year 2013 appropriations *no later than* December 14. *See* Order at 1. A

continuing resolution is an act of Congress that is an “appropriations decision.” It is, in fact, an appropriations law:

The Congress enacts continuing resolutions as joint resolutions making continuing appropriations for part or all of a certain fiscal year. Although enacted in this form rather than as an act, once passed by both houses of the Congress and approved by the President, a continuing resolution is a public law and has the same force and effect as any other law. Like all other bills, if the President vetoes a joint resolution, only a two-thirds vote of both houses, voting separately, can override it.

GAO, Continuing Resolutions and an Assessment of Automatic Funding Approaches, GAO/AFMD-86-16 (Jan. 1986) at 10.¹ As a result, now that

¹ For better or worse, continuing resolutions have become the *modus operandi* for Congressional appropriations in recent years. Since 2009, when the Administration began its plan to abandon and shut down the Yucca Mountain project, Congress has made appropriations decisions by continuing appropriations approximately a dozen times. See Pub. L. No. 111-6, 123 Stat. 522 (Mar. 6, 2009); Pub. L. No. 111-68, 123 Stat. 2023, Div. B (Oct. 1, 2009); Pub. L. No. 111-88, 123 Stat. 2904, Div. B (Oct. 30, 2009); Pub. L. No. 111-242, 124 Stat. 2607 (Sept. 30, 2010); Pub. L. No. 111-290, 124 Stat. 3063 (Dec. 4, 2010); Pub. L. No. 111-317, 124 Stat. 3454 (Dec. 18, 2010); Pub. L. No. 111-322, 124 Stat. 3518, Div. A (Dec. 22, 2010); Pub. L. No. 112-4, 125 Stat. 6 (Mar. 2, 2011); Pub. L. No. 112-6, 125 Stat. 23 (Mar. 18, 2011); Pub. L. No. 112-8, 125 Stat. 34 (Apr. 9, 2011); Pub. L. No. 112-10, 125 Stat. 38, Div. B (Apr. 15, 2011).

In that same period, Congress passed two omnibus budgets, neither lasting an entire fiscal year. See Pub. L. No. 111-8, 123 Stat. 524 (Mar. 11, 2009); Pub. L. No. 112-74, 125 Stat. 786 (Dec. 23, 2011).

This controversy has been on its ‘radar screen’ the whole time. At no point during this time - or in the history of the program - has Congress failed to provide funding for an *active* Yucca Mountain licensing proceeding. Nor at any point has Congress enacted statutory text prohibiting NRC from using available appropriated funds for continuing the Yucca Mountain licensing process or otherwise excused the NRC from its clear statutory obligations.

Congress had made an appropriations decision, the time has come to report back to the Court.

Second, while NRC agrees that Congress failed to provide the clarity that Judge Kavanaugh spoke of, it does not acknowledge Judge Kavanaugh's next sentence: "In that circumstance, I believe mandamus likely would have to be granted." *See* Order, Kavanaugh, J. concurring at 1. With an appropriations decision having been made, and with no additional "clarity" having been provided, this circumstance is met.

Third, both NRC and Nevada speculate that because this matter is on Congress' radar screen, Congress may take some other (non-appropriations) action before December 14 that could address this controversy. As noted *supra*, Congress has had 3 years to act to change the law and excuse the NRC from proceeding. It has not done so. Congress has made no less than 12 appropriations decisions in which it could have barred the expenditure of funds on this project. It did not. It has now made its appropriations decision for the near future, and waiting for this decision was the sole announced basis for holding this case in abeyance. Again, Congress provided no statutory text specific to the matter before this Court.

The NRC's position advocates kicking this can down the road yet again, based upon speculation about future Congressional action – exactly the position

that was in effect rejected by both Judge Kavanaugh and Judge Randolph. No doubt if this case is held in abeyance until December 14, NRC would find yet another excuse for further delay – that the continuing resolution has just a few months left to run and the Court should refrain from ruling, or that a new Congress will be sworn in early January and the Court should delay for that reason. These excuses can be extended indefinitely, and they are nothing more than a pretext to continue to engage in what Judge Randolph aptly described as “a transparent violation of law.” *See* Order, Randolph, J. dissenting at 1.

It is time for the law to be enforced and mandamus issued. If Congress wishes to excuse the NRC from acting and believes that its prior decision and appropriations are not being spent prudently, the Constitution gives it the power to decide that. Issuing the order now will show greater deference to separations of power principles - it will compel the NRC to carry out a duly enacted statutory mandate, and at the same time Congress, if it believes that is inappropriate, retains the power to enact legislation to stop funds from being expended.

Mandamus should issue immediately.

RESPECTFULLY SUBMITTED this 12th day of October 2012.

s/ Thomas R. Gottshall

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October 2012, a copy of the foregoing was filed using the CM/ECF system which will serve the same on all parties of record as follows:

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DATED this 12th day of October 2012, in Columbia, South Carolina.

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