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IN FOCUS

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Recess Appointments: A Legal Overview

The Constitution provides two methods by which the President can appoint officers. One is through the Appointments Clause; the other is through the Recess Appointments Clause. This In Focus provides a legal overview of appointment authority, recess appointments, and potential issues for Congress.

Appointment Authority

The President's primary appointment power comes from the Appointments Clause, which grants the President authority to nominate, with the advice and consent of the Senate, "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." This is the default method of appointment for officers of the United States, but inferior officers may, at Congress's direction through statute, be appointed by the President alone, by the courts, or by the "Heads of Departments."

In addition, the Recess Appointments Clause vests the President with the authority 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." That is, in certain circumstances when the Senate stands in recess, the President can unilaterally appoint individuals to temporarily fill positions that would otherwise require Senate confirmation.

What Counts as a Recess Appointment?

In the 2014 case *NLRB v. Noel Canning*, the Supreme Court ruled that, under the Recess Appointments Clause, the term "recess" refers to both inter-session and intra-session breaks. The Court also ruled that a Senate adjournment of three days or fewer does not count as a recess because such a break "is not a significant interruption of legislative business." The Court supported this conclusion by citing the Constitution's requirement that both chambers of Congress must agree to adjournments longer than three days. The Court further concluded that a Senate break lasting between three and ten days "is presumptively too short to fall within the Clause." This presumption, however, could be overcome in "some very unusual circumstance," like "a national catastrophe ... that renders the Senate unavailable but calls for an urgent response." The Court rejected the notion that "political opposition" in the Senate would constitute the type of "unusual circumstance" that would permit a recess appointment during a recess between three and ten days.

The Supreme Court also ruled that a vacancy does not need to arise during a recess for that vacancy to be filled with a recess appointment. Based on pragmatic concerns and historical practice, the Court concluded that the President can fill a vacancy during a recess irrespective of when the vacancy arose.

Finally, the Court concluded, for purposes of the Recess Appointments Clause, that the Senate is in session when it convenes for *pro forma* sessions, even if no business is conducted, because the body still retains the "capacity to transact Senate business." Accordingly, a President may not make recess appointments during an adjournment if the Senate holds *pro forma* sessions that result in an adjournment lasting fewer than ten days.

Recess Appointee Pay

Congress has enacted limitations on recess appointee pay. Under 5 U.S.C. § 5503, if the position to which a recess appointee was appointed became vacant while the Senate was in session, the recess appointee cannot be paid until they are confirmed by the Senate. There are three exceptions to this restriction: (1) when the vacancy arose within 30 days before the session ended; (2) when a nomination to the position was pending when the Senate recessed and the recess appointee is not the individual nominated; or (3) when the Senate rejected the nomination of someone other than the recess appointee to the position within 30 days of the session's end. If an exception applies to a recess appointee, the President must make a nomination to the position within 40 days of the beginning of the Senate's next session for the recess appointee to be paid.

Congress has also placed restrictions in various appropriations acts that could impact the pay of recess appointees who hold positions to which they were nominated but rejected by the Senate. The Consolidated Appropriations Act, 2008, provides that, "hereafter, no appropriation contained in this or any other Act" can be paid to individuals whose nominations to positions they hold have been rejected by the Senate. In addition, the Omnibus Appropriations Act, 2009, mandates that "no part of any appropriation contained in this or any other Act" can be paid to an individual holding an acting or temporary position whose nomination for that position has been withdrawn or returned to the President for a second time. That restriction extends to each subsequent fiscal year until otherwise changed by Congress.

Authority and Tenure

A recess appointee possesses the same legal authority as a Senate-confirmed appointee. A recess appointee's commission, however, expires "at the End of [the Senate's] next Session," whereas the service of a confirmed appointee is not so limited.

In practice, this limitation means that a recess appointment could last for up to two years. An individual who receives an *inter-session* recess appointment—that is, an appointment between sessions of the same or successive Congresses—could serve until the end of the following session, a period of less than a year under present

congressional scheduling practices. On the other hand, if the President makes an *intra-session* recess appointment at the beginning of a new Congress—for example, an appointment during a February recess of the Senate of ten days or more—the appointment would expire at the end of the subsequent session. Consequently, the duration of an intra-session recess appointment is usually between one and two years under present scheduling practices.

The President may remove a recess appointee before the expiration of their term, either by having another nominee confirmed by the Senate or, at least in some cases, by outright removal. For positions that enjoy statutory for-cause removal protections, the President's power to remove recess appointees unilaterally is not clear; precedent suggests the President's removal authority may depend on the specific statutes establishing the office and providing such protections.

Comparison to Acting Officials

At times, vacancies in an advice and consent office may be filled by an official operating on an "acting" basis. Acting officials differ from recess appointees in that their appointment to a specific role is typically authorized by statute, rather than by the President through the power vested in him under the Constitution. An acting officer typically performs the duties of the vacant position while retaining his position of record, but the acting officer generally will be "vested with the same authority that could be exercised by the officer for whom he acts." Further, statutes authorizing acting service ordinarily allow only certain categories of federal officials to serve, whereas the President may select his candidate of choice for a recess appointment. Statutes authorizing a federal official to temporarily perform the duties of a vacant office may provide for time limitations that differ from those of recess appointments or they may provide no time limitations at all.

Fixed Terms

A question may arise as to how long an individual can serve if recess appointed to a position with a statutorily fixed term and later confirmed by the Senate to that same office. The tenure of such an official appears to depend on the particular statutory language regarding the terms of office and filling of vacancies, rather than any constitutional limitations. Attorneys General have taken different positions on the issue. In 1933, for example, the Attorney General opined that a commission for a full, four-year statutory term related back to the date on which the person first assumed office by means of the recess appointment, meaning the individual could not serve beyond a period of four years, despite his service being "partly under one [recess] appointment and partly under another."

On the other hand, some Attorneys General have concluded that a term of office for an appointee restarts upon Senate confirmation, irrespective of how long the appointee has been serving in a recess-appointed role. These opinions stem from an 1824 Supreme Court decision that new appointments made by the President and confirmed by the Senate constitute "a virtual superseding and surrender of the former commission." That decision, however, was made with respect to a recess appointment authorized by a statute, as opposed to the President's constitutional recess appointment power, and the Court has not ruled on its applicability in the latter situation.

If a recess appointee who is also the President's nominee is rejected by the Senate, the rejection does not constitute a removal. The rejected nominee may still hold office pursuant to his recess appointment until it terminates under the Constitution.

Holdover Positions

A statutory "holdover" provision could complicate the issue of what constitutes a "vacancy" under the Recess Appointments Clause. For example, does a vacancy exist when an individual's fixed term expires but a statutory authority exists that extends his appointment until the position is filled? Judicial interpretations of this question vary depending on the language of the statute establishing the office. For example, where an office's holdover provision provided that an individual "may serve . . . after the expiration of his own term until his successor has taken office," a court ruled that the expiration of that term amounted to an immediate and ongoing vacancy. Where a statute provided for a more definite period—that an individual "may continue to serve after the expiration of his term until his successor has qualified [i.e., been confirmed by the Senate], but not to exceed one year"—a court held that the expiration of the term creates a "prospective vacancy" that could only be filled upon the incumbent's death, resignation, or lawful removal, or confirmation of a successor. Thus, whether a holdover provision constitutes a vacancy for recess appointment purposes may depend upon the language of the holdover provision.

Considerations for Congress

The Senate has affected the President's ability to make recess appointments by convening for *pro forma* sessions during a recess. Congress may continue to employ this method to ensure that it can execute its constitutional advice-and-consent authority under the Appointments Clause. Congress may also choose not to convene pro forma sessions, thereby adjourning for at least ten days, to allow the President to make recess appointments, subject to the constitutional requirement that the chambers agree to any adjournments longer than three days.

Congress could amend the pay restrictions it has placed on recess appointees. For example, Congress could adjust, add, or remove exceptions to 5 U.S.C. § 5503's bar on payments to recess appointees appointed to positions that became vacant while the Senate was in session. Congress could also eliminate the aforementioned bar on payments to recess appointees. Additionally, Congress could further restrict the recess appointment power by codifying additional limitations on a recess appointee's pay in circumstances where the President fails to submit a nominee to the Senate within a certain period after the body reconvenes.

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