

# Recess Appointments: Frequently Asked Questions

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## Summary

Under the Constitution (Article II, §2, clause 2), the President and the Senate share the power to make appointments to high-level policy-making positions in federal departments, agencies, boards, and commissions. Generally, the President nominates individuals to these positions, and the Senate must confirm them before he can appoint them to office. The Constitution also provides an exception to this process. When the Senate is in recess, the President may make a temporary appointment, called a recess appointment, to any such position without Senate approval (Article II, §2, clause 3). This report supplies brief answers to some frequently asked questions regarding recess appointments.

Additional information on recess appointments may be found in other CRS reports: CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue; CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request); and CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden.

This report will be updated as events warrant.

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## What Is the Purpose of a Recess Appointment?

The Constitution states that “[t]he 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” (Article II, §2, clause 3). The records of debate at the Constitutional Convention do not provide much evidence of the framers’ intentions in the Recess Appointment Clause. A discussion of the clause by Alexander Hamilton, in *The Federalist Papers*, suggests that its purpose was to provide an alternative method of appointment that would allow the filling of vacancies “without delay” during periods of Senate absence.<sup>1</sup> Opinions by later Attorneys General also supported this general notion, suggesting that the purpose of the clause was to allow the President to maintain the continuity of administrative government through the temporary filling of offices during periods when the Senate was not in session, at which time his nominees could not be considered or confirmed.<sup>2</sup> This interpretation is supported by the fact that both houses of Congress had relatively short sessions and long recesses during the country’s early years. In fact, until the beginning of the 20<sup>th</sup> century, the Senate was, on average, in session less than half the year.<sup>3</sup> Throughout the history of the republic, Presidents have also sometimes used the recess appointment power for political reasons. For example, recess appointments have sometimes enabled the President to temporarily install an appointee who probably would not be confirmed by the Senate.

## How Often Have Recent Presidents Made Recess Appointments?

President William J. Clinton made 139 recess appointments, 95 to full-time positions. President George W. Bush made 171 recess appointments, of which 99 were to full-time positions.<sup>4</sup> As of February 1, 2015, President Barack Obama had made 32 recess appointments, all to full-time positions.<sup>5</sup>

## What Is a “Session”?

For the purposes of the Recess Appointment Clause, the word “Session” refers to the period between the reconvening of the Senate after a sine die adjournment and the next sine die adjournment.<sup>6</sup> The Twentieth Amendment to the Constitution provides that Congress will meet

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<sup>1</sup> *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961). Hamilton described the Recess Appointment Clause as a “supplement to the [Appointments Clause] for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.” He went on to write that the “ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in *their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments ‘during the recess of the Senate, by granting commissions which shall expire at the end of their next session’” (pp. 409-410) (emphasis in the original).

<sup>2</sup> An opinion by Attorney General William Wirt in 1823 concerning the meaning of the word “happen” in the clause provides one example. In part, he stated, “The substantial purpose of the constitution was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed.” 1 Op. A.G. 631, 632 (1823).

<sup>3</sup> U.S. Congress, Joint Committee on Printing, *2013-2014 Official Congressional Directory 113<sup>th</sup> Congress*, S. Pub. 113-12, 113<sup>th</sup> Cong. (Washington: GPO, 2013), pp. 524-542.

<sup>4</sup> For more, see CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden.

<sup>5</sup> For more, see CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

<sup>6</sup> For more on congressional sessions and related concepts, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

annually on January 3, “unless they shall by law appoint a different day.”<sup>7</sup> Generally, a session of the Senate begins on that day and continues until sine die adjournment, usually in the fall. Congress normally adjourns sine die by adopting a concurrent resolution through which each house grants permission to the other to adjourn sine die.<sup>8</sup> These adjournment resolutions today usually authorize the leader of each chamber to call it back into session after the sine die adjournment. If this power is exercised, the previous session resumes and continues until the actual sine die adjournment is determined, usually pursuant to another concurrent resolution of adjournment.<sup>9</sup> In practice, nonetheless, an initial sine die adjournment is generally considered to be the end of the Senate’s session for purposes of the expiration of a recess appointment.<sup>10</sup>

## What Is a “Recess”?

Generally, a recess is a break in House or Senate proceedings.<sup>11</sup> Neither chamber may take a break of more than three days without the consent of the other.<sup>12</sup> Such consent is usually provided through a concurrent resolution. A recess within a session is referred to as an *intrasession* recess. In recent decades, Congress has typically had 5-11 intrasession recesses of more than three days, usually in conjunction with national holidays.<sup>13</sup> The break between the sine die adjournment of one session and the convening of the next is referred to as an *intersession* recess. In recent decades, each Congress has consisted of two 9-12 month sessions separated by an intersession recess. The period between the second session of one Congress and the first session of the following Congress is also an intersession recess.

Recent Presidents have made both intersession and intrasession recess appointments. Intrasession recess appointments were unusual, however, prior to the 1940s, in part because intrasession recesses were less common at that time. Intrasession recess appointments have sometimes provoked controversy in the Senate, and some academic literature also has called their legitimacy into question.<sup>14</sup> Legal opinions have also varied on this issue over time.<sup>15</sup> A recess appointment made during an intrasession recess is usually of longer duration than a recess appointment made during an intersession recess. (See below, “How Long Does a Recess Appointment Last?”)

Notwithstanding the legal opinions and practices of the preceding decades, a Department of Justice legal opinion and two federal appeals court decisions related to four controversial recess

<sup>7</sup> U.S. Constitution, XX Amend., §2.

<sup>8</sup> A concurrent resolution requires adoption by both houses, but does not require the President’s signature.

<sup>9</sup> In the absence of a concurrent resolution, adjournment sine die is determined by the arrival of the constitutionally mandated convening of a new session on January 3.

<sup>10</sup> See, e.g., 41 Op. A.G. 463 (1960), which, in the context of a discussion of the expiration of recess appointments, refers to sine die adjournment at the end of a Senate session.

<sup>11</sup> For more on congressional recesses and related concepts, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

<sup>12</sup> U.S. Constitution, Art. I, §5, cl. 4.

<sup>13</sup> Notable exceptions to this pattern in recent years that involved extended breaks in House and Senate activity punctuated by pro forma sessions are discussed below, under “Can Congress Prevent Recess Appointments?”

<sup>14</sup> Regarding Senate controversy, see Sen. George Mitchell, “The Senate’s Constitutional Authority to Advise and Consent to the Appointment of Federal Officers,” *Congressional Record*, vol. 139, July 1, 1993, p. 15266; and Senate Legal Counsel, “Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs’ Motion, and in Opposition to Defendants’ Motions, for Summary Judgment on Count Two,” (draft pertaining to U.S. District Court for the District of Columbia, *Mackie v. Clinton*, Civ. Action No. 93-0032-LFO), *Congressional Record*, vol. 139, July 1, 1993, pp. 15267-15274. For academic literature, see, e.g., Michael A. Carrier, “When Is the Senate in Recess for Purposes of the Recess Appointments Clause?” *Michigan Law Review*, vol. 92, June 1994.

<sup>15</sup> For information and analysis related to the legal aspects of recess appointments, in general, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

appointments made by President Barack Obama on January 4, 2012, raised questions about what a “recess” is with regard to the recess appointment power.<sup>16</sup> In a June 26, 2014, opinion, the U.S. Supreme Court addressed these questions. It held that the President’s recess appointment power extends to both intersession and intrasession recesses. The Court also held that the President may use the recess appointment power essentially only during a recess of 10 days or longer. A Senate recess of 3 days “is not long enough to trigger the President’s recess appointment power,” and a recess of more than 3 days but less than 10 is “presumptively too short to fall within the Clause” but “leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break.” The opinion gave as an example of an unusual circumstance an instance such as “a national catastrophe ... that renders the Senate unavailable but calls for an urgent response.” The Court noted that “political opposition in the Senate would not qualify as an unusual circumstance.”<sup>17</sup>

Furthermore, the Court concluded that, for purposes of the Recess Appointments Clause, “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”<sup>18</sup> This implies that the Senate would also determine if and when it will adjourn for a recess of 10 days or longer and thus allow for the possibility of recess appointments. Under the Adjournments Clause of the Constitution, however, such a determination requires the consent of the House.<sup>19</sup> Consequently, either the Senate or the House can unilaterally prevent a Senate adjournment of 10 days or longer that would permit the President to exercise his recess appointment authority.

## How Long Must the Senate Be in Recess Before a President May Make a Recess Appointment?

The Constitution does not specify the length of time that the Senate must be in recess before the President may make a recess appointment. Over time, the Department of Justice, through opinions of Attorneys General and the Office of Legal Counsel, has expressed differing views on this question. Prior to 2014, no settled understanding appeared to exist. As noted above, however, in a June 26, 2014, opinion, the U.S. Supreme Court held that the President’s recess appointment power extends to both intersession and intrasession recesses, but that essentially the recess must be 10 days or longer in duration.<sup>20</sup>

<sup>16</sup> The Justice Department argued that the determination of whether a “recess” is underway is not merely a matter of observing formal Senate scheduling. Rather, the President may also determine whether a recess is underway by assessing whether the Senate is available to participate in the advice and consent process. (“Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions,” Memorandum Opinion for the Counsel to the President, January 6, 2012, available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.) In a January 25, 2013, decision, the U.S. Court of Appeals for the D.C. Circuit held that, for purposes of the Recess Appointments Clause, “the Recess” means only intersession recesses. (*Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, 499 (D.C. Cir. 2013).) A May 16, 2013, decision of the U.S. Court of Appeals for the Third Circuit also held that the President’s recess appointment power extends only to intersession recesses. See CRS Report WSLG521, *3<sup>rd</sup> Circuit: President’s Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter (available to congressional clients upon request).

<sup>17</sup> *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>18</sup> *Noel Canning*, 134 S. Ct. at 2574. For more information and analysis regarding this case, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

<sup>19</sup> Article I, § 5, clause 4 of the Constitution provides: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”

<sup>20</sup> *Noel Canning*, 134 S. Ct. 2550 (2014).

This determination appears to be consistent with predominant recess appointment practice in recent decades. Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a President made a recess appointment was 11 days,<sup>21</sup> and the shortest intrasession recess during which a President made a recess appointment was 10 days.<sup>22</sup>

## What Constitutes a “Vacancy”?

Historically, questions have arisen about the meaning of the constitutional phrase “Vacancies that may happen during the Recess of the Senate.” Does “happen” mean “exist” or “occur”? The first interpretation would allow the President to make recess appointments to any position that became vacant prior to the recess and continued to be vacant during the recess, as well as positions that became vacant during the recess. The second interpretation would allow recess appointments only to positions that became vacant during the recess. Although this question was a source of controversy in the early 19<sup>th</sup> century, Attorneys General and most courts, including, in 2014, the U.S. Supreme Court,<sup>23</sup> have now supported the first, broader interpretation of the phrase.<sup>24</sup>

A second question regarding the meaning of “Vacancies” arises in connection with recess appointments to fixed-term positions, such as those often associated with regulatory boards and commissions. In order to promote continuity of operations, Congress has often included “holdover” provisions in the statutory language creating such positions. The question then arises whether or not a position is vacant, for the purposes of a recess appointment, if an individual is continuing to serve, under a holdover provision, past the end of his or her term. The courts have varied in their rulings on this matter, and it has not been settled definitively by an appellate court. Based on decisions to date, however, the answer appears to hinge on the specific language of the holdover provision. For example, if the language is mandatory (the officeholder “*shall* continue to serve after the expiration of his term”), rather than permissive (“*may* continue to serve”), the position has been seen by the courts as not vacant, and therefore not available for a recess appointment.<sup>25</sup> When the provision includes a specific time limit for the holdover, such as one year, the position has also been seen as not vacant.<sup>26</sup>

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<sup>21</sup> President Ronald W. Reagan recess appointed John C. Miller to be a member of the National Labor Relations Board on December 23, 1982, during a recess that began that day and lasted until the Senate reconvened on January 3, 1983. (U.S. President (Reagan), “Digest of Other White House Announcements,” *Weekly Compilation of Presidential Documents*, vol. 18 (December 23, 1982), p. 1662.)

<sup>22</sup> On May 31, 1996, President William J. Clinton recess appointed Johnny H. Hayes to be a member of the Tennessee Valley Authority. (U.S. President (Clinton), “Digest of Other White House Announcements,” *Weekly Compilation of Presidential Documents*, vol. 32 (May 31, 1996), p. 980.) The Senate had adjourned on May 24, 1996, and reconvened on June 3.

<sup>23</sup> *Noel Canning*, 134 S. Ct. 2550 (2014). In 2014, the U.S. Supreme Court held that the first, broader interpretation of the phrase is correct. The conclusion of the majority in this regard was contrary to the 2013 opinion of the U.S. Court of Appeals for the D.C. Circuit, where the majority held that the second, narrower interpretation is correct. *Noel Canning v. NLRB*, 705 F.3d at 507. For more on *Noel Canning*, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

<sup>24</sup> For a further discussion of this controversy and a list of related opinions, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

<sup>25</sup> Compare *Staebler v. Carter*, 464 F. Supp. 585 (1979), with *Wilkinson v. L.S.C.*, 865 F. Supp. 891 (1994).

<sup>26</sup> See *Mackie v. Clinton*, 827 F.Supp. 56 (D.D.C. 1993) vacated as moot 10 F.3d 13 (D.C. Cir. 1993).

## **How Long Does a Recess Appointment Last?**

A recess appointment expires at the sine die adjournment of the Senate's "next session." Where the President has made a recess appointment between sessions of the same or successive Congresses, this appointment has expired at the end of the session that next convened. Where he has made the appointment during an intrasession recess, however, the duration of the appointment has included the rest of the session in progress plus the full length of the session that followed. At any point in a year, as a result, by making a recess appointment during an intrasession recess, a President could fill a position not just for the rest of that year, but until near the end of the following year. In practice, this has meant that a recess appointment could last for almost two years.

A comparison of two recess appointments during the 108<sup>th</sup> Congress illustrates the difference in recess appointment duration that results from the timing of appointments. During the recess between the first and second sessions, President George W. Bush appointed Charles W. Pickering to a federal court of appeals judgeship. Several weeks later, during the first recess of the second session, President Bush appointed William H. Pryor to a judgeship on another federal court of appeals. Pickering's appointment expired after less than 11 months, at the end of the second session. In contrast, Pryor's recess appointment would have expired after approximately 22 months, at the end of the first session of the 109<sup>th</sup> Congress.<sup>27</sup> Although the Pickering and Pryor recess appointments were only several weeks apart, Pryor could have served nearly twice as long because his appointment was made during an intrasession recess.

## **Must a Recess Appointee Be Nominated to the Position as Well?**

The Constitution does not require that the President submit a nomination of a recess appointee or anyone else to the appointed position, though he may do so. Alternatively, the President sometimes will use a recess appointment to fill a position while a different nominee to the same position is going through the Senate confirmation process. Under certain conditions, a provision of law may prevent a recess appointee from being paid from the Treasury if the President has not submitted a nomination to the position. (See below, "Are There any Statutory Constraints on the President's Recess Appointment Power?")

## **What Is the Difference Between the Authority and Pay of a Confirmed Appointee and Those of a Recess Appointee?**

A confirmed appointee and a recess appointee have the same legal authority and receive the same rate of pay. However, two provisions of law may, under certain circumstances, prevent a recess appointee from being paid. (See below, "Are There any Statutory Constraints on the President's Recess Appointment Power?")

## **Are There any Statutory Constraints on the President's Recess Appointment Power?**

There is no qualification on the President's "Power to fill up all Vacancies" in the constitutional provision. Neither is there a statutory constraint on this power. There are, however, several provisions of law that may prevent a recess appointee from being paid, and this could discourage the President from making a recess appointment under certain circumstances. Under 5 U.S.C.

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<sup>27</sup> Pryor was subsequently confirmed by the Senate and appointed to the position permanently.

Section 5503(a), if the position to which the President makes a recess appointment became vacant while the Senate was in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. The salary prohibition does not apply if (1) the vacancy arose within 30 days of the end of the session; (2) a nomination for the office (other than the nomination of someone given a recess appointment during the preceding recess) was pending when the Senate recessed; or (3) a nomination was rejected within 30 days of the end of the session and another individual was given the recess appointment. A recess appointment falling under any one of these three exceptions must be followed by a nomination to the position not later than 40 days after the beginning of the next session of the Senate.<sup>28</sup> For this reason, when a recess appointment is made, the President generally submits a new nomination to the position even when an old nomination is pending.

In addition, although a recess appointee whose nomination to a full term is subsequently rejected by the Senate may continue to serve until the end of the recess appointment, a provision routinely included in an appropriations act may prevent him or her from being paid after the rejection. (See below, “What Happens If the Nomination of a Recess Appointee Is Rejected?”)

Lastly, an individual serving under a recess appointment might not be paid for his or her services if he or she has been nominated to the position twice and the second nomination has been withdrawn or returned. A provision of the FY2009 Financial Services and General Government Appropriations Act states,

Effective January 20, 2009, and for each fiscal year thereafter, no part of any appropriation contained in this or any other Act may be used for the payment of services to any individual carrying out the responsibilities of any position requiring Senate advice and consent in an acting or temporary capacity after the second submission of a nomination for that individual to that position has been withdrawn or returned to the President.<sup>29</sup>

Although this provision seems designed to prevent payment to persons who are serving in an acting capacity in accordance with the Vacancies Reform Act, a question may arise as to whether this prohibition could extend to recess appointees, given that they are arguably acting in a “temporary capacity.”<sup>30</sup>

## **What Happens If the Nomination of a Recess Appointee Is Rejected?**

Rejection by the Senate does not end the recess appointment. However, a provision of the FY2008 Financial Services and General Government Appropriations Act might prevent an appointee from being paid after his or her rejection. The provision reads, “Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.”<sup>31</sup> Similar provisions had been included in annual funding measures for most of, if not all of, the prior 50 years. As a practical matter, nominations are rarely rejected

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<sup>28</sup> Congress placed limits on payments to recess appointees as far back as 1863. The current provisions date from 1940 (ch. 580, 54 Stat. 751, 5 U.S.C. 56, revised, and recodified at 5 U.S.C. 5503, by P.L. 89-554, 80 Stat. 475). For discussion of potential constitutional issues related to statutory pay restrictions for recess appointees, see “Do Pay Restrictions Raise Constitutional Concerns?” in CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

<sup>29</sup> P.L. 111-8, Div. D, Title VII, §749; 123 Stat. 693; 5 U.S.C. prec. §5501.

<sup>30</sup> For more on designations under the Vacancies Reform Act, see CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue.

<sup>31</sup> P.L. 110-161, Div. D, §709; 121 Stat. 2021.

by a vote of the full Senate. Rather, some nominations that are not ultimately confirmed are never reported by, or discharged from, committee; some are reported to, but never taken up by, the full Senate; and some are taken up by the Senate but never subject to a vote on confirmation.<sup>32</sup>

## Can the President Make Successive Recess Appointments to the Same Position?

The President may make successive recess appointments of the same or a different individual to a position. Payment from the Treasury to the appointee may be limited, however, under 5 U.S.C. Section 5503. As discussed above, this statute provides that if the position to which the President makes a recess appointment fell vacant while the Senate was in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. Of the three exemptions to this pay prohibition, the first and third would not apply here. The second exemption, though, allows payment “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.”<sup>33</sup> However, in effect, the clause “other than the nomination of an individual appointed during the preceding recess of the Senate” probably would prevent payment in the case of most successive recess appointments. This interpretation has been supported by the Department of Justice, which stated in 1991, “Although its language is far from clear, Section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees.”<sup>34</sup> While this provision implicitly bars payments to successive recess appointees, however, some legal interpretations have suggested that the prohibition does not apply to all successive recess appointments. Under such interpretations, the second exemption permits payment to “someone *other than* a prior recess appointee whose nomination was pending at the time of adjournment is appointed.”<sup>35</sup>

## Can a Recess Appointment Be Used to Fill a Vacancy on the Federal Bench?

Presidents have long made recess appointments to the federal judiciary. In recent years, however, recess appointments of federal judges have been unusual and controversial. Over the past 30 years, there have been only three recess appointments to fill Article III judgeships:

- President William J. Clinton recess appointed Roger L. Gregory to the U.S. Court of Appeals for the Fourth Circuit on December 27, 2000, a step that met some opposition in the Senate. Ultimately, Gregory was renominated by President George W. Bush and confirmed by the Senate.

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<sup>32</sup> For more, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki. Some nominations that have been considered by the full Senate but not ultimately confirmed have been the subject of unsuccessful cloture attempts. See CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene.

<sup>33</sup> 5 U.S.C. §5503(a)(2).

<sup>34</sup> 15 Op. O.L.C. 93 (1991). See also 6 Op. O.L.C. 585 (1982); 41 Op. A.G. 463 (1960).

<sup>35</sup> 6 Op. O.L.C. 585, 586 (1982) (emphasis added). See also “Modern Statutory Pay Restriction (5 U.S.C. §5503)” in CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

- On January 16, 2004, President Bush recess appointed Charles W. Pickering to the U.S. Court of Appeals for the Fifth Circuit. Pickering's appointment expired at the end of the second session of the 108<sup>th</sup> Congress, and he retired.<sup>36</sup>
- On February 20, 2004, President Bush named William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Pryor was subsequently confirmed by the Senate.<sup>37</sup>

## Can Congress Prevent Recess Appointments?

From the 110<sup>th</sup> Congress onward, it has become common for the Senate and House to use certain scheduling practices as a means of precluding the President from making recess appointments.<sup>38</sup> The practices do this by preventing the occurrence of a Senate recess of sufficient length for the President to be able to use his recess appointment authority. As previously discussed ("What Is a 'Recess'?" ), in a June 26, 2014, opinion, the U.S. Supreme Court held that the President's recess appointment power may be used essentially only during a recess of 10 days or longer.<sup>39</sup>

Under the Adjournments Clause of the Constitution, neither house can adjourn for more than three days without the consent of the other chamber.<sup>40</sup> Typically this mutual consent is established through the passage of a concurrent resolution of adjournment. Consequently, either chamber could unilaterally prevent the occurrence of a Senate recess of more than 10 days, during which the President could exercise his recess appointment authority, by withholding consent to adjourn for such a period.

During periods when most Members of the House and Senate have otherwise been absent from the Capitol for more than three days, and the two chambers have not agreed to adjourn for such period, each house has typically met in pro forma session every few days to satisfy Adjournments Clause requirements.<sup>41</sup> In this context, pro forma sessions are short meetings of the Senate or the House which are held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other chamber. Normally, it is understood that during a pro forma session no business will be conducted. However, on occasion business has been conducted by one or both houses during such sessions.<sup>42</sup>

<sup>36</sup> Adam Liptak, "Judge Appointed by Bush After Impasse in Senate Retires," *New York Times*, December 10, 2004, p. A20.

<sup>37</sup> For more, see CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead (available to congressional clients upon request).

<sup>38</sup> The evolution of this use of scheduling practices is discussed in greater detail in CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

<sup>39</sup> *Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>40</sup> Article I, §5, clause 4 of the Constitution provides: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

<sup>41</sup> See CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

<sup>42</sup> For example, by unanimous consent, the Senate agreed, on December 17, 2011, that it would "adjourn and convene for pro forma sessions only, with no business conducted" on a number of dates in December 2011 and January 2012, including December 23, 2011 (Sen. Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, *Congressional Record*, vol. 157, part 195 (December 17, 2011), pp. S8783-S8784.). On December 23, 2011, during the period under discussion here, the Senate convened as scheduled and, by unanimous consent, agreed to a process for passage of the Temporary Payroll Tax Cut Continuation Act of 2011 (Sen. Harry Reid, "Unanimous Consent Agreement" remarks in the Senate, *Congressional Record*, daily edition, vol. 157 (December 23, 2011), p. S8789).

Even in cases where the House and Senate have adopted a concurrent resolution of adjournment prior to a recess of 10 days or longer, the Senate has sometimes scheduled pro forma sessions every few days as a means of preventing recess appointments. In each case, the schedule of pro forma sessions was established in the Senate by unanimous consent within the terms provided for in the concurrent resolution.<sup>43</sup>

In January 2012, President Obama made four recess appointments during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012. This recess was part of a period of Senate absence that would otherwise have constituted an adjournment of 10 days or longer. In an opinion regarding the lawfulness of these appointments, the Office of Legal Counsel at the Department of Justice argued that “the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause.”<sup>44</sup>

The U.S. Supreme Court later concluded otherwise, finding that, for purposes of the Clause, “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”<sup>45</sup> Seemingly, the Senate, or the Senate and the House together, as discussed above, would also determine if and when it will adjourn for a recess of 10 days or longer and thus allow for the possibility of recess appointments.

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<sup>43</sup> For example, H.Con.Res. 259 (110<sup>th</sup> Congress) provided that, “when the Senate recesses or adjourns on any day from Thursday, November 15, 2007, through Thursday, November 29, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand recessed or adjourned until noon on Monday, December 3, 2007, or such other time on that day as may be specified by its Majority Leader or his designee in the motion to recess or adjourn....” The series of pro forma sessions established by the Senate prior to its period of absence around this time concluded with a pro forma session on November 29, 2007, the last date upon which the Senate could adjourn under the resolution.

<sup>44</sup> “Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions,” Memorandum Opinion for the Counsel to the President, January 6, 2012, available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

<sup>45</sup> *Noel Canning*, 134 S. Ct. at 2574. For more information and analysis regarding this case, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu (available to congressional clients upon request).

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