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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 and Maureen Bearden; CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen Bearden; CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu; and CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead.

Information and analysis regarding recent federal court cases related to recess appointments may be found in CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter; CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey; and CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

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.[1] 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.[2] This interpretation is supported by the fact that both houses of Congress had relatively short sessions and long recesses during the early years of the Republic. In fact, until the beginning of the 20th century, the Senate was, on average, in session less than half the year.[3] Throughout the history of the republic, Presidents have also sometimes used the recess appointment power for political reasons. For example, recess appointments enable 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.[4] As of June 4, 2013, President Barack Obama had made 32 recess appointments, all to full-time positions.[5]

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[1] *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).

[2] 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).

[3] U.S. Congress, Joint Committee on Printing, *2009-2010 Official Congressional Directory 111th Congress*, S. Pub. 111-14, 111th Cong. (Washington: GPO, 2009), pp. 526-542.

[4] For more, see CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen Bearden.

[5] For more, see CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue and Maureen Bearden.

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. The Twentieth Amendment to the Constitution provides that Congress will meet annually on January 3, "unless they shall by law appoint a different day."[6] 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.[7] These adjournment resolutions today usually authorize leaders 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.[8] 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.[9]

What Is a "Recess"?

Generally, a recess is a break in House or Senate proceedings. Neither chamber may take a break of more than three days without the consent of the other.[10] 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. 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.[11] Legal opinions have also varied on this issue over time.[12] A recess appointment

[6] U.S. Constitution, XX Amend., §2.

[7] A concurrent resolution requires adoption by both houses, but does not require the President's signature.

[8] 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.

[9] 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.

[10] U.S. Constitution, Art. I, §5, cl. 4.

[11] 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.

[12] For information and analysis related to the legal aspects of recess appointments, in general, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

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 recent decades, a Department of Justice legal opinion and two federal appeals court decisions related to four controversial recess appointments made by President Barack Obama on January 4, 2012, raised questions about what a "recess" is with regard to the recess appointment power. 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.[13] (See below, "Can Congress Prevent Recess Appointments?") 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.[14] 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.[15] The long term impact on recess appointment practice of the Justice Department opinion and the appeals court decisions was not immediately clear.[16]

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 Attorneys General and Office of Legal Counsel Opinions, has expressed differing views on this question, and no settled understanding appears to exist. One view, which was discussed by Attorney General Harry M. Daugherty in a 1921 opinion, implied that a linkage might be established between the meaning of "the Recess of the Senate," for Recess Appointments Clause purposes, and the meaning of "adjourn for more than three days," for purposes of the Adjournment Clause.[17] In the opinion, Daugherty argued that the President had the authority to make a recess appointment during an intrasession recess of 29 days. He stated,

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[13] "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.

[14] Noel Canning v. Nat'l Labor Relations Bd., 705 F.3d 490, 499 (D.C. Cir. 2013). For more on *Noel Canning*, see CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter.

[15] See CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

[16] For more on the impact of the first appeals court decision, see CRS Report R43032, Practical Implications of Noel Canning on the NLRB and CFPB, by David H. Carpenter and Todd Garvey.

[17] U.S. Const. Article I, Section 5, clause 4. This clause provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days ...." In practice, the period has often extended to not more than four calendar days over a weekend. Under House precedents, "The House of Representatives in adjourning for not more than three days must take into the count either the day of adjourning or the day of the meeting, and Sunday is not taken into account in making this computation." U.S. Congress, House, *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Twelfth Congress*, 111th Cong., 2nd sess., H.Doc. 111-157 (Washington: GPO, 2011), Sec. 83. Senate practice appears to be consistent with this approach. Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd Sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 15-16, 1265.

> If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other.[18]

In 1993, a brief submitted by the Department of Justice in the case *Mackie v. Clinton* articulated this argument more fully. Arguing that the President had made the appointment at issue in the case during a recess of sufficient length, the brief stated:

> If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives.... It might be argued that this means that the Framers did not consider one, two and three day recesses to be constitutionally significant.…
>
> Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.[19]

The logic of the argument laid out in this brief appears to underlie congressional practices, intended to block recess appointments, that were first implemented during the 110th Congress. (See below, "Can Congress Prevent Recess Appointments?")

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,[20] and the shortest intrasession recess during which a President made a recess appointment was 10 days.[21]

Recess Appointments of January 2012

On January 4, 2012, during a three-day recess between two pro forma sessions of the Senate, the White House announced President Obama's intent to make four recess appointments. The appointments took place shortly after the second session of the 112th Congress convened and thus was not an intersession recess, but rather an intrasession recess. The recess and pro forma sessions had been set as part of the Senate schedule for the period of December 20, 2011, through January 23, 2012, established by unanimous consent on December 17, 2011.[22] This schedule

[18] 33 Op. A.G. 20, at 24-25 (1921).

[19] Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-26, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993), pp. 25-26.

[20] 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.)

[21] 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.

[22] 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.

provided for a series of pro forma sessions with intervening three- and four-day recesses. Pro forma sessions are short meetings of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House. Normally, it is understood that during a pro forma session no business will be conducted.[23]

Shortly after these recess appointments, the Department of Justice Office of Legal Counsel (OLC) released a related opinion. The 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.[24] It appears that such a determination was made in this instance, and that the Administration viewed the period during which these recess appointments were made as a 20-day intrasession recess beginning on January 3, 2012, and ending on January 20. The OLC memorandum pointedly did not answer the question of whether "an intrasession recess of three days or fewer constitutes a recess under the Recess Appointments Clause."[25]

Historical Examples of Recess Appointments During Brief Adjournments

As previously noted, 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, and the shortest intrasession recess during which a President made a recess appointment was 10 days. CRS data on recess appointments before this period, which were collected from publically available sources, are incomplete. Similarly, CRS data concerning the historical use of pro forma sessions by the Senate are incomplete.

From the available data, two historical occasions have been identified on which the President has made recess appointments during recesses of three days or less. In contrast to the January 2012 intrasession recess appointments by President Obama, each of these instances occurred during the period of transition between sessions.

On one of these occasions, the President made a recess appointment during an intersession recess of three days or less, where the Senate had adjourned sine die under the terms of a concurrent resolution. The adjournment began when the Senate adjourned the second session of the 80th Congress sine die on December 31, 1948, and concluded when the first session of the 81st Congress was convened on January 3, 1949. On January 1, 1949, during this three-day adjournment between sessions, official records indicate that President Harry S. Truman recess appointed Oswald Ryan to be a member of the Civil Aeronautics Board.[26] Ryan had been serving

[23] Business has sometimes been conducted during pro forma sessions, however. For example, 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).

[24] "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.

[25] Ibid., p. 23.

[26] Declaration of Ronald R. Geisler, exhibit 2, page 2, *Bowers v. Moffett,* Civil Action No. 82-0195 (D.D.C. 1982).

on the board, and President Truman appointed him to a new term. Notably, the adoption of a concurrent resolution to adjourn sine die prior to this short intersession recess distinguishes it from the short intrasession recesses resulting from practices during the 112th Congress, where no concurrent resolution had been introduced.

On the other of the two occasions, the President made recess appointments during a transition between sessions of less than a day in length, where no concurrent resolution regarding the transition between sessions had been adopted. In fact, it appears that little time elapsed between the sessions on this occasion. When the first session of the 58th Congress ended, at noon on December 7, 1903, and the second session began soon thereafter, President Theodore Roosevelt made over 160 recess appointments—mostly of military officers. President Roosevelt treated the period between these sessions as a "constructive recess."

The historical instances cited here indicate that recess appointments have, on occasion, been attempted during sine die adjournments of three days or fewer. Nevertheless, the instances cited here each have unique characteristics, and their potential applicability under current practices and conditions remains open to question.[27]

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 19th century, Attorneys General and most courts have now long supported the first, broader interpretation of the phrase.[28]

In a January 25, 2013, decision, the U.S. Court of Appeals for the D.C. Circuit held that the second, narrower interpretation is correct.[29] The long term impact on recess appointment practice of this decision was not immediately clear.

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

[27] These historical instances and their potential applicability under current practices and conditions are discussed in a June 8, 2012, Congressional Distribution Memorandum, "Recess Appointments during Short Intervals between Sessions and Historical Efforts to Prevent Recess Appointments through Congressional Scheduling," by Henry B. Hogue and Richard S. Beth. Copies of this memorandum are available to the congressional community from its authors.

[28] 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.

[29] *Noel Canning,* 705 F.3d at 507. For more on *Noel Canning*, see CRS Report RL33009, Recess Appointments: A Legal Overview, by Vivian S. Chu.

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.[30] When the provision includes a specific time limit for the holdover, such as one year, the position has also been seen as not vacant.[31]

How Long Does a Recess Appointment Last?

A recess appointment expires at the end of the Senate's next session or when an individual (either the recess appointee or someone else) is nominated, confirmed, and permanently appointed to the position, whichever occurs first.

A recess appointment expires at the sine die adjournment of the Senate's "next session." In practice, this has meant that a recess appointment could last for almost two years. 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.[32]

A comparison of two recess appointments during the 108th 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. Pryor's recess appointment would have expired after approximately 22 months, at the end of the first session of the 109th Congress.[33] 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

[30] Compare Staebler v. Carter, 464 F. Supp. 585 (1979), with Wilkinson v. L.S.C., 865 F. Supp. 891 (1994).

[31] See *Mackie v. Clinton*.

[32] As discussed under "What is a 'Recess'?" above, recent decisions by the U.S. Courts of Appeals for the D.C. Circuit and the Third Circuit held that recess appointments may be made only during intersession recesses. Under such practice, the maximum duration of a recess appointment would depend on the date of the Senate's sine die adjournment in two successive sessions. For example, if the Senate were to adjourn sine die on August 1 at the end of the first session and on December 30 at the end of the following session, a recess appointment made during the intersession between the two could last as long as approximately 17 months. The long term impact on recess appointment practice of these decisions was not immediately clear, however.

[33] Pryor was subsequently confirmed by the Senate and appointed to the position permanently.

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 Legal 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 Legal Constraints on the President's Recess Appointment Power?")

Are There any Legal 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. §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.[34] 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

[34] 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.

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.[35]

Although this provision seems designed to prevent payment to persons appointed 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."[36]

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."[37] 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 by a vote of the full Senate.

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. §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, however, provides that, "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," the prohibition would not apply.[38] 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

[35] P.L. 111-8, Div. D, Title VII, §749; 123 Stat. 693; 5 U.S.C. prec. §5501.

[36] For more on designations under the Vacancies Reform Act, see CRS Report RS21412, Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions, by Henry B. Hogue.

[37] P.L. 110-161, Div. D, §709; 121 Stat. 2021.

[38] 5 U.S.C. §5503(a)(2).

successive recess appointees."[39] 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, "if someone *other than* a prior recess appointee whose nomination was pending at the time of adjournment is appointed, § 5503(a)(2) does not bar payment."[40]

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 25 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.
- 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 108th Congress, and he retired.[41]
- 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.[42]

Can Congress Prevent Recess Appointments?

From the 110th Congress onward, new scheduling practices have arisen that appear intended to prevent the President from making recess appointments. One set of practices was implemented by the Senate alone; no unusual action or inaction by the House was necessary. A second, related set of practices, which developed in the 112th Congress, arose from the lack of a concurrent resolution of adjournment, which can result from a lack of consent by either the House or the Senate. As discussed below, these practices appear not to have prevented recess appointments by President Obama.

As previously discussed, 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 the last century, as shorter recesses have become more commonplace, the Department of Justice, through Attorneys General and Office of Legal Counsel opinions, has expressed differing views on this issue, and no settled understanding on this question appears to exist. In 1993, however, a brief submitted by the Department of Justice in the case *Mackie v. Clinton* implied that the President may make a recess

[39] 15 Op. O.L.C. 93 (1991). See also 6 Op. O.L.C. 585 (1982); 41 Op. A.G. 463 (1960).

[40] 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.

[41] Adam Liptak, "Judge Appointed by Bush After Impasse in Senate Retires," *New York Times*, December 10, 2004, p. A20.

[42] For more, see CRS Report RL32971, Judicial Recess Appointments: A Legal Overview, by T. J. Halstead.

appointment during a recess of more than three days.[43] (See above, "How Long Must the Senate Be in Recess Before a President May Make a Recess Appointment?")

I. Practices Implemented Unilaterally by the Senate

The logic of the argument laid out in the Justice Department brief appears to underlie the congressional practices that were first implemented during the 110th Congress.[44] From November 2007 through the end of the George W. Bush presidency, the Senate structured its recesses in a way that was intended, at least initially, to prevent the President from making recess appointments. The approach involved the use of pro forma sessions, which are, as noted above, short meetings of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House. Normally, it is understood that during a pro forma session no business will be conducted.[45]

On November 16, 2007, the Senate majority leader announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[46] The Senate recessed later that day and pro forma meetings were convened on November 20, 23, 27, and 29, with no business conducted. The Senate next conducted business after reconvening on December 3, 2007. During the remainder of 2007 and 2008, similar procedures were followed during most other periods that would otherwise have been Senate recesses of a week or longer in duration.[47]

The Senate pro forma session practice appeared to achieve its stated intent through the end of the Bush presidency: President Bush made no recess appointments between the initial pro forma sessions in November 2007 and the time he left office.

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[43] Department of Justice Brief, at 24-26.

[44] It appears that this practice was considered, but not implemented, during the 1980s and 1990s. In response to certain recess appointments by President William J. Clinton in 1999, one Republican Senator reportedly stated, "'What we can do—if they're appointments that he should not make—is just not go into recess .... We'll just go into pro forma. You're in session, theoretically, but there's no votes'" (Dave Boyer, "Clinton Warned Against Recess Appointments; GOP Senators May Not Adjourn," *Washington Times*, November 5, 1999, p. A1). In remarks on the Senate floor, the Senator indicated that a threat of this practice had been part of recess appointment negotiations in 1985 between Senator Robert C. Byrd and President Ronald W. Reagan: "He [Byrd] extracted from him [Reagan] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would have to give the list to the majority leader ... in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place" (Senator James M. Inhofe, "Recess Appointments," remarks in the Senate, *Congressional Record*, vol. 145, part 163 (November 17, 1999), p. 29915).

[45] As previously noted, business has sometimes been conducted during pro forma sessions, however. 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).

[46] Sen. Harry Reid, "Recess Appointments," remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (November 16, 2007), p. S14609.

[47] For further information on the use of the practice during the Bush Administration, see CRS Report RL33310, Recess Appointments Made by President George W. Bush, by Henry B. Hogue and Maureen Bearden.

These procedures were not used during the first session of the 111th Congress, but were again employed during the latter part of the second session; the Senate structured its 2010 pre-election break as a series of shorter recesses separated by pro forma sessions. President Obama made no recess appointments during this period.

The procedures used by the Senate during the 110th Congress supplemented the adjournment procedures typically used by the House and Senate. In each of the instances where the pro forma session practice was used during the 110th Congress, the two chambers also adopted a concurrent resolution of adjournment. 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.[48]

II. Senate Practices Necessitated by the Absence of House Consent to Adjourn

During the first few months of the 112th Congress, the House and Senate passed concurrent resolutions of adjournment prior to periods of absence of more than three days. Throughout this period, the Senate did not use the pro forma session practice during the resulting recesses.

During the middle of the first session of the 112th Congress, a new related practice appeared to emerge. On May 25, 2011, in a letter to Speaker of the House John Boehner, 20 Senators urged him "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term."[49] The letter stated that "President Obama has used recess appointments to fill powerful positions with individuals whose views are so outside the mainstream that they cannot be confirmed by the Senate of the United States," and it referred to the Senate practices of 2007 as "a successful attempt to thwart President Bush's recess appointment powers." The request of the Senators appeared similarly intended to block President Obama from using the recess appointment power.

In a June 15, 2011, letter to the Speaker of the House, the House majority leader, and the House majority whip, 78 Representatives requested that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress."[50]

Between May 12, 2011, and the end of that year, no concurrent resolution of adjournment was introduced in either chamber. During periods of extended absence, the Senate used pro forma sessions to avoid recesses of more than three days.[51]

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[48] For example, H.Con.Res. 259 (110th 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.

[49] U.S. Congress, Senate, Senator David Vitter, "Vitter, DeMint Urge House to Block Controversial Recess Appointments," press release, May 25, 2011, available at http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77&Region_id=&Issue_id=.

[50] U.S. Congress, House, Representative Jeff Landry, letter to the Speaker of the House John Boehner, et al., June 15, 2011, available at http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf

[51] The House has also used pro forma sessions during such periods of extended absence.

III. Appointments During a Three-day Recess Between Two Pro Forma Sessions

On January 4, 2012, during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012, the White House announced President Obama's intent to make four recess appointments—three to seats on the National Labor Relations Board (NLRB) and one to be Director of the Consumer Financial Protection Bureau. The recess and pro forma sessions had been provided for as part of the Senate schedule for the period of December 20, 2011, through January 23, 2012, established by unanimous consent on December 17, 2011.[52] This schedule, similar to those agreed to before extended Senate breaks in earlier months, provided for a series of pro forma sessions with intervening three- and four-day recesses.

Under the requirements of Section 2 of the Twentieth Amendment to the Constitution as well as the provisions of the Senate schedule agreed to on December 17, 2011, the second session of the Senate of the 112th Congress convened on January 3, 2012. President Obama's January 4, 2012, recess appointments, occurring during the first adjournment following the beginning of the session, would be considered intrasession recess appointments.

As discussed above, a Justice Department legal opinion and two federal appeals court decisions related to these four recess appointments by President Obama addressed the constitutionality of the President's actions. The Justice Department argued that the recess appointments were constitutional,[53] while the two appellate courts each found that the three recess appointments to the NLRB, which were the focus of the respective cases, were not constitutional.[54] The long term impact on recess appointment practice of the Justice Department opinion and the appeals court decisions was not immediately clear.[55]

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[52] 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.

[53] "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.

[54] *Noel Canning* and National Labor Relations Board v. New Vista Nursing and Rehabilitation, No. 11-3440, 2013 WL 2099742, at *1 (3d Cir. May 16, 2013). For more on *Noel Canning*, see CRS Report R43030, The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications, by Todd Garvey and David H. Carpenter. For more on New Vis*ta Nursing and Rehabilitation*, see CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

[55] For more on the impact of the first appeals court decision, see CRS Report R43032, Practical Implications of Noel Canning on the NLRB and CFPB, by David H. Carpenter and Todd Garvey.