

# Recess Appointments: A Legal Overview

**Vivian S. Chu**  
Legislative Attorney

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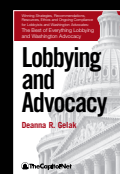
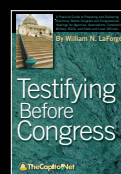


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## Summary

The U.S. Constitution explicitly provides the President with two methods of appointing officers of the United States. First, the Appointments Clause provides the President with the authority to make appointments with the advice and consent of the Senate. Specifically, Article II, Section 2, clause 2 states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law.” Second, the Recess Appointments Clause authorizes the President to make temporary appointments unilaterally during periods when the Senate is not in session. Article II, Section 2, clause 3 provides: “The 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.”

While the Recess Appointments Clause enables the continuity of government operations, Presidents, on occasion, have exercised authority under the Clause for political purposes, appointing officials who might otherwise have difficulty securing Senate confirmation. This constitutional provision is not without its ambiguities, and the President’s use of his recess appointment power in light of these ambiguities has given rise to significant political and legal controversy since the beginning of the republic. President’s Obama’s three recess appointments to the National Labor Relations Board (NLRB) on January 4, 2012, once again raised questions regarding the scope of the Recess Appointments Clause as well as the significance of the Senate’s *pro forma* sessions in relation to the President’s ability to exercise his recess appointment authority. The constitutionality of these recess appointments was challenged, and for the first time, the Supreme Court examined the scope of the Recess Appointments Clause and how it should be interpreted.

This report provides an overview of the Recess Appointments Clause, by first exploring its historical application and legal interpretation by the executive, legislative, and judicial branches. It then reviews the Supreme Court’s decision in *Nat’l Labor Relations Board v. Noel Canning* in which all nine Justices affirmed the constitutional invalidity of these recess appointments. The Justices, however, were divided with respect to the proper interpretation of the Clause and the basis upon which the NLRB recess appointments would be ruled invalid. Also examined in this report is congressional legislation designed to prevent the President’s overuse or misuse of the Clause, as well as the authority and tenure of recess appointees.

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## Introduction

The U.S. Constitution allocates specific roles to both the President and the Senate with respect to the appointment of certain government officials. The Constitution provides two methods by which the President may make appointments. First, the Appointments Clause establishes that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by law.<sup>1</sup>

Under the Appointments Clause, a nominee cannot assume the powers of the office for which he or she has been nominated until confirmed by the Senate.<sup>2</sup> The second method for appointing certain government officials is provided under the Recess Appointments Clause. This Clause establishes that

the 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.<sup>3</sup>

It has generally been opined that the Recess Appointments Clause was designed to enable the President to ensure the operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function. Several declarations were made during the founding era regarding the purpose of the Clause; however, these declarations do not definitively indicate how the recess appointment power should be interpreted. For example, Alexander Hamilton referred to the recess appointment power as “nothing more than a supplement ... for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.”<sup>4</sup> Similarly, Thomas McKean, a prominent figure of the American Revolution, stated during the ratification debates in Pennsylvania that the Senate need not “be under any necessity of sitting constantly, as has been alleged, for there is an express provision made to enable the President fill up all vacancies that may happen during their recess; the commissions, to expires at the end of the next session.”<sup>5</sup>

<sup>1</sup> U.S. Const., art. II, §2, cl. 2. The appointment of other, so-called “inferior officers,” may be vested by Congress in the President alone, courts, or the heads of departments. *Id.*

<sup>2</sup> Once confirmed by the Senate, an officer is not formally appointed until his commission is signed by the President.

<sup>3</sup> U.S. Const., art II, §2 cl. 3.

<sup>4</sup> *The Federalist*, No. 67, at 409-410 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

<sup>5</sup> 2 *The Documentary History of the Ratification of the Constitution*, 537 (Merrill Jensen, ed. 1976). Similarly, Archibald Maclaine, a member of the Hillsborough convention during the ratification debates in North Carolina, stated:

Congress are not to be sitting at all times they will only sit from time to time, as the public business may render it necessary. Therefore, the executive ought to make temporary appointments.... This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet during the recess, the President must do business, or else it will be neglected; and such neglect may occasion public inconveniences.

See also Edward A. Hartnett, “Recess Appointments of Article III Judges: Three Constitutional Questions,” 26 *Cardozo L. Rev.* 377, 380-381 (2005) (quoting 4 *The Founders’ Constitution* 37, 102-103 (P. Kurland ed., 1787)).

The ambiguities of the Recess Appointments Clause and how it should be interpreted have been further complicated by the fact that the congressional schedule and travel limitations it appears to have been designed to address have undergone tremendous change since the founding period. Until the Civil War, Congress consistently met for relatively short sessions followed by long recesses, or breaks, of six to nine months. Congress largely adhered to this practice during and after the Civil War, but began to schedule habitually an “intra-session recess”<sup>6</sup> of approximately two weeks from the end of December until the beginning of January.<sup>7</sup> The recess practice of Congress further changed in the mid-20<sup>th</sup> century, and has been characterized by more frequent intra-session recesses of shorter durations. Additionally, the length of an “inter-session recesses,” that is, the adjournment between sessions of Congress, has also become shorter.<sup>8</sup>

Interpretations of the Clause have been further complicated by the evolution of its use by successive Presidents. Though used to foster administrative continuity, Presidents also have exercised their recess appointment power for political purposes throughout the history of the republic, giving rise to significant political and legal controversy. For instance, President Madison’s recess appointments of Albert Gallatin, John Quincy Adams, and James A. Bayard as envoys to negotiate a peace treaty with Great Britain in 1813 prompted heated debate in the Senate.<sup>9</sup> Presidents Jackson, Taylor, and Lincoln also made hundreds of recess appointments during their terms.<sup>10</sup> Recess appointments to the judiciary were also common during the early years of the republic, with the first five Presidents making 31 such appointments, including 5 to the Supreme Court.<sup>11</sup> In total, 12 Justices have received recess appointments to the Supreme Court, and many of these Justices participated in Court business prior to Senate action on their nominations.<sup>12</sup> With the mid-19<sup>th</sup> century phenomena of long congressional adjournments, frequent resort to recess appointments, and the rise of the spoils system<sup>13</sup> in the federal government, Congress responded by imposing statutory restrictions on the President’s

<sup>6</sup> An intra-session recess refers to a break of the Senate during an annual session of the Senate.

<sup>7</sup> See Michael A. Carrier, “When is the Senate in Recess for Purposes of the Recess Appointments Clause?,” 92 Mich. L. Rev. 2204, 2212 (1994). Before the passage of the Twentieth Amendment in 1933, “the term of each Congress began on March 4<sup>th</sup> of each odd numbered year. ... The Congress ... convened regularly on the first Monday in December. ... So, prior to 1934, a new Congress typically would not convene for regular business until 13 months after being elected.” *Congressional Directory* at 526 (2009). For example, the second session of the 69<sup>th</sup> Congress adjourned sine die on March 4, 1927. Although the midterm election had occurred four months before that adjournment, on November 2, 1926, the first session of the 70<sup>th</sup> Congress did not convene until December 5, 1927.

<sup>8</sup> See Michael Rappaport, “The Original Meaning of the Recess Appointments Clause,” 52 UCLA L. Rev. 1487, 1500-1501 (2005).

<sup>9</sup> See Nomination of Sitting Member of Congress to Ambassador to Vietnam, 20 Op. Off. Legal Counsel 284, 289 (1996).

<sup>10</sup> See Carl R. Fish, “Removal of Officials by the Presidents of the United States,” Annual Report of the American Historical Association of the Year 1899. Vol. 1. Washington D.C. Government Printing Office (1900).

<sup>11</sup> Thomas A. Curtis, “Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation,” 84 Colum. L. Rev. 1758, 1775 (1984). Among these, President Washington’s recess appointment of John Rutledge as Chief Justice generated significant controversy, ultimately factoring in his rejection by the Senate. Interestingly, there is no recorded challenge to the constitutionality of his recess appointment. *Id.* at 1775-1776.

<sup>12</sup> Henry B. Hogue, “The Law: Recess Appointments to Article III Courts,” Presidential Studies Quarterly 34, No. 3 at 661 (2001).

<sup>13</sup> A spoils system refers to a system of patronage, in which the winning political party will give government jobs to its supporters who worked toward the victory as opposed to awarding offices on the basis of some measure of merit, independent from any political activity.

appointment and removal power, including restrictions on paying certain classes of recess appointees.<sup>14</sup>

Accordingly, the circumstances that give rise to the President’s ability to rely on the Recess Appointments Clause have been a matter of debate.<sup>15</sup> There have been numerous contrary opinions from Attorneys General, legislators, and scholars, each promoting opposing interpretations particularly with regard to the meaning of the phrases—“the Recess of the Senate” and “Vacancies that may happen.” Some have argued that these phrases should be interpreted narrowly, such that only very limited circumstances trigger use of the recess appointment power, while others have argued that these phrases should be interpreted broadly, such that various circumstances trigger use of the Clause. For the past several decades, these questions of interpretation had been deemed to be settled by the executive branch as the President applied, and the Senate generally accepted, a broad interpretation of the Recess Appointments Clause. However, with evolving legislative responses meant to curb the President’s use of his recess appointment power, the Supreme Court had occasion to address the scope of this Clause and the meaning of these phrases for the first time. In 2014, the Court in *Nat’l Labor Relations Bd. v. Noel Canning* (*NLRB v. Noel Canning*)<sup>16</sup> addressed three questions:

1. Whether the President’s recess appointment power may be exercised during a recess that occurs within a session of the Senate (*i.e.*, intra-session recess), or is instead limited to recesses that occur between enumerated sessions of the Senate (*i.e.*, inter-session recess);
2. Whether the President’s recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and
3. Whether the President’s recess appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.

In addition to reviewing the Court’s analysis regarding these key interpretive questions, this report subsequently discusses statutory pay restrictions as a congressionally devised method to curb potentially politically motivated utilization of the recess appointment power, and concludes with a discussion on the authority and tenure of recess appointees.

<sup>14</sup> Additionally, the Tenure of Office Act of 1867, 14 Stat. 430 (1867), which figured prominently in the impeachment effort against President Andrew Johnson, included several provisions purporting to limit the recess appointment power of the President.

<sup>15</sup> Aspects of the recess appointment power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19<sup>th</sup> century on recess appointments, the earliest being in 1823.

<sup>16</sup> 134 S. Ct. 2550 (2014).

## Scope of the Recess Appointments Clause

The 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 (emphasis added). ~ Art. II, §2, cl. 3

As mentioned above, a functionalist interpretation of the phrases “the Recess of the Senate” and “Vacancies that may happen” has traditionally prevailed,<sup>17</sup> permitting the President to exercise his recess appointment power during either an inter- or intra-session recess of the Senate and to fill any vacancy that exists regardless of when it arose. However, in 2013, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Noel Canning v. NLRB* resurrected a formalist interpretation of these phrases that would have significantly curbed the President’s authority under the Clause.<sup>18</sup> In its decision, the D.C. Circuit declared that the President could only make recess appointments when the Senate entered into an inter-session recess at the end of Congress, and only to vacancies that arose during that inter-session recess.<sup>19</sup> Because neither of those conditions were met in the facts underlying the *Noel Canning* appointments, the D.C. Circuit declared the three recess appointments made by President Barack Obama to the NLRB constitutionally invalid. Upon review, the Supreme Court unanimously affirmed that the recess appointments were invalid. However, the majority, in an opinion authored by Justice Breyer, rejected the D.C. Circuit’s interpretation of these key phrases, while four Justices, concurring in judgment only, issued an opinion authored by Justice Scalia agreeing with the D.C. Circuit’s formalist interpretation. Before delving into the Supreme Court’s opinion in *Noel Canning*, this section first provides an overview of the historical interpretations of the phrases “the Recess of the Senate” and “Vacancies that may happen.”

### Historical Interpretations of “the Recess of the Senate”

With respect to chronology, the question of what constituted a recess, for purposes of the Clause, arose substantially later than the vacancy issue due to the fact that adjournments within Senate sessions were infrequent and of short duration in the early days of the republic.<sup>20</sup> As congressional scheduling evolved and such intra-session recesses became longer and more frequent, the opportunity for such appointments increased. As such, the first formal Attorney General opinion on the subject was issued in 1901 by Attorney General Philander C. Knox. He concluded that the phrase applied only to adjournments between sessions of Congress, *i.e.*, inter-session recesses.<sup>21</sup> The 1901 opinion placed significant weight on the use of the definite article “the,” emphasizing that “[i]t will be observed that the phrase is ‘the recess.’”<sup>22</sup> The opinion

<sup>17</sup> See, e.g., Intra-session Recess Appointments, 13 Op. Off. Legal Counsel 271 (1989) Recess Appointments Issues, 6 Op. Off. Legal Counsel 585 (1982); see also *Evans v. Stephens*, 387 F.3d 1220 (11<sup>th</sup> Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9<sup>th</sup> Cir. 1985).

<sup>18</sup> 705 F.3d 490 (D.C. Cir. 2013).

<sup>19</sup> *Id.* at 506-507.

<sup>20</sup> See Carrier, *supra* note 7, at 2212-2213.

<sup>21</sup> President-Appointment of Officers-Holiday Recess, 23 Op. Att’y Gen. 599 (1901).

<sup>22</sup> *Id.* at 600 (emphasis in original). The D.C. Circuit in its *Noel Canning* decision also placed much emphasis on the Framer’s choice of the phrase “the Recess,” as opposed to “a recess,” the plural “recesses” or the even broader term “adjournment.” *Noel Canning*, 705 F.3d at 500. Looking to the “natural meaning of text as it would have been (continued...) ”

further highlighted that if the phrase were read broadly, nothing would prevent an appointment from being made “during any adjournment, as from Thursday or Friday until the following Monday.”<sup>23</sup>

This position was abandoned 20 years later. An opinion issued by Attorney General Harry M. Daugherty in 1921 declared that an appointment made during a 29-day intra-session recess was constitutional.<sup>24</sup> The Daugherty opinion focused on the practical aspects of the recess appointment dynamic, stating that “[i]f the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”<sup>25</sup> Even though he emphasized this functional approach, Attorney General Daugherty limited the scope of his opinion by declaring that “an adjournment for 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”<sup>26</sup> The opinion concluded by emphasizing that while “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take ..., there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.”<sup>27</sup> Subsequent opinions of the Attorneys General and the Department of Justice’s Office of Legal Counsel (OLC) continued to support the constitutionality of intra-session recess appointments<sup>28</sup> and that the Clause encompasses all recesses in excess of three days.<sup>29</sup>

Prior to *Noel Canning*, it appears that the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) was the only court to examine the meaning of “the Recess of the Senate.”<sup>30</sup> In *Evans v. Stephens*, the court concluded that the Clause applied to intra-session recesses and upheld President George W. Bush’s recess appointment of William H. Pryor Jr. to the federal

(...continued)

understood at the time of the ratification of the Constitution,” the court concluded that the use of “the Recess,” “points to the inescapable conclusion” that the Framers must have intended the Clause to mean something other than a “generic break in proceedings.” *Id.*

<sup>23</sup> 23 Op. Att’y Gen., *supra* note 21, at 603. The Knox opinion specifically rejected a U.S. Court of Claims decision that upheld paying the salary of an Army paymaster appointed during a temporary (intra-session) recess in 1867, which had extended from July 20 to November 21, 1867. *See* Gould v. United States, 19 Ct. Cl. 593 (1884) (holding “we have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned, from July 20 to November 21, 1867, could be legally filled by appointment of the President alone ...” *Id.* at 595-596.).

<sup>24</sup> Executive Power-Recess Appointments, 33 Op. Att’y Gen. 20, 23 (1921).

<sup>25</sup> *Id.* at 23.

<sup>26</sup> 33 Op. Att’y Gen., *supra* note 24, at 25.

<sup>27</sup> *Id.* at 25.

<sup>28</sup> *See, e.g.*, Recess Appointments During an Intra-session Recess, 16 Op. Off. Legal Counsel 15 (1992) (explaining that Attorney General Daugherty noted that the “line of demarcation cannot be accurately drawn,” and “[t]he longstanding view of the Attorneys General has been that the term ‘recess’ includes intra-session recesses if they are substantial in length” *Id.* at 15-16.); Intra-session Recess Appointments, 13 Op. Off. Legal Counsel 271 (1989); Recess Appointments Issues, 6 Op. Off. Legal Counsel 585 (1982); Recess Appointments, 41 Op. Att’y Gen. 463 (1960).

<sup>29</sup> *See, e.g.*, 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) [hereinafter DOJ Brief] (arguing that the President may be able to make a recess appointment during a recess of more than three days because constitutionally, neither chamber can adjourn for more than three days without the consent of the other pursuant to the Adjournments Clause, implying that the Framers did not consider one, two, or three day recesses to be constitutionally significant); Brief for the United States in Opposition to Petition for *Writ of Certiorari*, at 11, *Evans v. Stephens*, 387 F.3d 1220 (11<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); and Transcript of Oral Argument at 50, *New Process Steele v. Nat’l Labor Relations Bd.*, 130 S. Ct. 2635 (2010).

<sup>30</sup> *Evans v. Stephens*, 387 F.3d 1220 (11<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 942 (2005).



court of appeals during a 10-day intra-session recess. The court focused on historical practice and stated that the purpose of the Clause is “to enable the President to fill vacancies to assure the proper functioning of our government.”<sup>31</sup> It rejected the argument that the definite article “the” limited the opportunity to make an appointment to one particular recess.<sup>32</sup> The court also addressed arguments that an intra-session recess must be a minimum number of days but declined to set that limit. Nevertheless, the court found the appointment of the judge at issue to be within an acceptable time frame of 10 days, given that “appointments to other offices—offices ordinarily requiring Senate confirmation—have been made during an intra-session recess of about this length or shorter.”<sup>33</sup> Though consistent with the traditionally prevailing interpretations of the executive branch, the Eleventh Circuit was the first appellate court to hold that “the Recess” includes an intra-session recess. No other court that had examined the Recess Appointments Clause prior to the Eleventh Circuit questioned the broad interpretation of the phrase.

In contrast, the D.C. Circuit in *Noel Canning* held that “the Recess” is limited to inter-session recesses.<sup>34</sup> Based on a textual analysis, the D.C. Circuit found the definite article “the” significant because its use indicates a particular recess, not any adjournment or “generic break in proceedings.”<sup>35</sup> In examining historical practice, the D.C. Circuit determined that the absence of intra-session recess appointments within the first 80 years after the Constitution’s ratification suggested “an assumed absence of [the] power” to make such appointments.<sup>36</sup> Most notably, the D.C. Circuit rejected Attorney General Daugherty’s functionalist interpretation from 1921, “in favor of the clarity of the inter-session interpretation.”<sup>37</sup> The court also rejected the interpretation that “the Recess” means “any adjournment of more than three days pursuant to the Adjournments Clause.”<sup>38</sup> Moreover, the D.C. Circuit concluded that the Senate only enters “the Recess,” or inter-session recess, for purposes of the Clause when it adjourns *sine die*.<sup>39</sup>

<sup>31</sup> *Evans*, 387 F.3d at 1226-1227.

<sup>32</sup> *Id.* at 1224-25. (“We do not agree that the Framers’ use of the term ‘the’ unambiguously points to the single recess that comes at the end of a Session. Instead we accept that ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intra-session or inter-session—of the Senate’s acts of recessing, that is taking a break.” *Id.*).

<sup>33</sup> *Id.* at 1225. The Eleventh Circuit also stated that “several times in the past, fairly short intra-session recesses have given rise to presidential appointments to Article III courts.” For this point, the court referred to President Nixon’s appointment of three judges to the D.C. Circuit during an intra-session recess of 32 days. *See id.* at 1225 n.9.

<sup>34</sup> *Noel Canning*, 705 F.3d at 506.

<sup>35</sup> *Id.* at 500. According to the D.C. Circuit’s analysis, “[t]he natural interpretation of the Clause is that the Constitution is noting a difference between ‘the Recess’ and the ‘Session.’ Either the Senate is in session or it is in the recess.” *Id.*

<sup>36</sup> *Id.* at 502 (emphasizing that the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983), also considered the increasing frequency of legislative vetoes but ultimately concluded that “the practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.” *Id.*).

<sup>37</sup> *Id.* at 504. The D.C. Circuit in *Noel Canning* rejected the vagueness of the Daugherty interpretation, finding that “when interpreting ‘major features’ of the Constitution’s separation of power, we must ‘establish[] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.” *Id.* (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211(1995)).

<sup>38</sup> *Id.* at 504. Emphasizing that the word “adjournment” is not used in the Recess Appointments Clause, and finding no historical evidence to suggest a link between the two Clauses, the D.C. Circuit concluded it could not “read one as governing the other,” and would not “ignor[e] the Framers’ choice of words.” *Id.*

<sup>39</sup> *Id.* at 512-513. The D.C. Circuit’s requirement that the Senate adjourn *sine die* in order for it to have entered an inter-session recess for purposes of the Clause would have had the interesting effect of permitting recess appointments during very short inter-session recesses when the Senate adjourns *sine die*, but not permitting appointments during long inter-session recesses if the Senate does not adjourn *sine die*. For example, the D.C. Circuit found that the Senate did not enter “the Recess” between the first and second sessions of the 112<sup>th</sup> Congress even though it adjourned on (continued...)

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# Citizen's Handbook

## To Influencing Elected Officials

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## Historical Interpretations of “Vacancies that may happen”

From early on, the phrase requiring interpretation was “Vacancies that may happen” during the recess of the Senate—that is, must a vacancy to which the Recess Appointments Clause applies come into existence during the recess, or may it be a vacancy that is already in existence when the recess occurs? Early opinions favored a narrow interpretation of the term “happen,” such that it referred only to vacancies that arose after a recess of the Senate commences. In 1792, the first Attorney General, Edmund J. Randolph, concluded that a newly created vacant office could not be filled with a recess appointment because the vacancy existed prior to the Senate’s recess.<sup>40</sup> He based his opinion on the text of the Clause and on the “spirit of the Constitution,” declaring that the Recess Appointments Clause must be “interpreted strictly” because it serves as “an exception to the general participation of the Senate.”<sup>41</sup> In 1799, Alexander Hamilton, then serving as Major General of the Army, similarly stated that “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy [pursuant to the Recess Appointments Clause] which happens during a session of the Senate.”<sup>42</sup>

Later Attorneys General, however, construed “happen” more broadly. In 1823, Attorney General William Wirt, without mentioning the Randolph opinion, concluded that the phrase encompassed all vacancies that happen to exist before and during “the Recess.”<sup>43</sup> Although Attorney General Wirt acknowledged that a narrower interpretation “is, perhaps, more strictly consonant with the mere letter” of the Clause, he opted for, in his view, “the only construction of the Constitution which is compatible with its spirit, reason, and purpose.”<sup>44</sup> Subsequent opinions of the Attorneys General in 1832 and 1841 endorsed Wirt’s interpretation.<sup>45</sup> For a brief period, however, Attorneys

(...continued)

December 30, 2011. Because the Senate declined to adjourn *sine die*, the first session of the 112<sup>th</sup> Congress expired simultaneously with the beginning of the second session when the hour of 12 o’clock arrived based on the constitutional limitation. Under this scenario, a recess appointment would not be permissible. In contrast, the Senate entered “the Recess” between the first and second sessions of the 104<sup>th</sup> Congress when it adjourned *sine die* on January 3, 1996 and subsequently entered into the second session on the same day. *Id.* at 512 n.2. Under the D.C. Circuit’s reasoning, a vacancy that arose during this inter-session of only a few moments could have been filled with a recess appointment.

<sup>40</sup> Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 The Papers of Thomas Jefferson, at 165-67 (John Catanzariti et al. ed., 1990) (Attorney General Randolph was responding to an inquiry from Thomas Jefferson, then serving as Secretary of Foreign Affairs, as to whether a recess appointment could be made to the position of Chief Coiner of the Mint, a newly created position for which no nomination had been made before the Senate recessed). See also, Hartnett, *supra* note 5, at 384-86; Rappaport, *supra* note 8, at 1518-1519.

<sup>41</sup> Randolph, *supra* note 40, at 165-167.

<sup>42</sup> Rappaport, *supra* note 8, at 1519. The “special law” to which Hamilton refers is a law that would vest the appointment of an “inferior Officer” in the President alone. Under such a law, Congress could allow the President alone to make “a permanent appointment of an inferior officer, or a temporary appointment extending till the end of the next session, irrespective of when the vacancy arose.” *Id.* at n.92.

<sup>43</sup> Executive Authority to Fill Vacancies, 1 Op. Att’y Gen. 631, 633-634 (1823).

<sup>44</sup> *Id.* He further stated, “The substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be sacrificed to a dubious construction of its letter.” *Id.* at 632.

<sup>45</sup> See Power of the President to Fill Vacancies, 2 Op. Att’y Gen. 525, 526-528 (1832) (stating that the Constitution “was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one. It was the intention ... that the offices created by law, and necessary to carry on the operations of the government, should always be full, or that all events, that the vacancies should not be a protracted one.”); see also Power of President to Fill Vacancies, 3 Op. Att’y Gen. 673, 676 (1841) (“My opinion is, that the same overruling (continued...)”).

General reverted back to the narrow interpretation<sup>46</sup> and several Senators raised questions as to the proper interpretation of the word “happen” in the Recess Appointments Clause.<sup>47</sup> Differing interpretations, such as those of Attorneys General Randolph and Wirt, are reflective of the early controversies between the Senate and the President on the meaning of this phrase.<sup>48</sup>

Despite this brief departure from the broader interpretation of Attorney General Wirt, Attorneys General opinions returned to the Wirt interpretation beginning in 1855.<sup>49</sup> These opinions further concluded that the phrase “Vacancies that may happen” included newly created offices that had never been filled.<sup>50</sup> Attorney General William M. Evarts, in an 1868 opinion, declared the matter so settled by his predecessors that it was “hardly useful to express an opinion as upon an original question.”<sup>51</sup> Later Attorneys General opinions consistently interpreted “happen” to mean “happen to exist” and acknowledged recess appointments to offices that became vacant while the Senate was in session.<sup>52</sup>

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necessity which applied to the original vacancy applies to the second one, created by an omission of the Senate to act on a nomination.”).

<sup>46</sup> See Navy Agents- Appointments During Recess, 2 Op. Att’y Gen. 333, 334 (“If the vacancy exists during the session of the Senate ... the President cannot appoint during the recess ...”); Appointment of Judges, &c (etc.), for Iowa and Florida, 4 Op. Att’y Gen. 361, 363 (1845) (Attorney General John Y. Mason concluding “[i]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate.”). But see Case of the Collectorship of Customs in Alaska, 12 Op. Att’y Gen. 455, 456 (1868) (indicating that a later opinion issued by Attorney General Mason regarding “his views of the President’s power to grant temporary commissions, in the recess of the Senate, were subsequently quite different from those indicated in the [aforementioned] opinion ...; for in the later opinion, he expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors.”).

<sup>47</sup> See George H. Haynes, *The Senate of the United States*, Vol. 2 at 772-75 (Russell and Russell ed., 1960). In 1814, Senator Christopher Gore insisted “[i]f a vacancy happens in an office, the office must have been before full.... If a vacancy exists prior to, it does not happen in the recess of the Senate.” 26 Annals of Congress 654 (Mar. 7, 1814). In contrast, Senator George Bibb, “den[ie]d that the word ‘vacancy,’ in its usual application or in its application to office, implies a previous filling.... A vacant office is ‘an office unoccupied,’ ‘an office not filled.’” 26 Annals of Congress 697-698 (Mar. 30, 1814); see *id.* at 742-759 (Apr. 2, 1814). In 1863, Senator Jacob Howard issued a report from the Senate Committee on the Judiciary examining recess appointments. He agreed with Senator Gore from 40 years earlier, that a “President might not appoint to fill vacancies which ‘have not occurred within the recess of the Senate.’” Other Members, however, noted that contrary opinions existed on the subject. S. Rept. 37-80, at 3 (37<sup>th</sup> Cong., 3d Sess. 1863).

<sup>48</sup> Other notable scholars such as Joseph Story, in his *Commentaries on the Constitution*, seemed to adopt a construction different from Wirt’s, at least with respect to newly created offices to which nominations had not been named (akin to the Randolph position). 3 *Joseph Story, Commentaries on the Constitution of the United States*, §1553 (Boston, Hillard, Gray & Co. 1833). Senator Littleton Tazewell made speeches where he repeatedly argued that “the President alone has no authority to make an original appointment to a statutory office.” 7 Reg. Deb. 225 (Feb. 22, 1831); see also 2 Reg. Deb. 607 (Apr. 20, 1826) (“In relation to statutory offices of every kind, however, it has never been pretended by anyone ... that the President might make an original appointment to them. They have always been filled, for the first time, by and with the advice and consent of the Senate ...”).

<sup>49</sup> Ambassadors and Other Public Ministers of the United States Opinion, 7 Op. Att’y Gen. 186 (1855). See also President’s Appointing Power, 10 Op. Att’y Gen. 356 (1862) (stating that the question of when a vacancy may happen “is settled ... as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned as far as I know or believe, by the unbroken acquiescence of the Senate.”); President’s Power to Fill Vacancies in Recess of the Senate, 12 Op. Att’y Gen. 32 (1866).

<sup>50</sup> Filling Vacancies in Office, 18 Op. Att’y Gen. 28 (1884); Vacancy in Office, 19 Op. Att’y Gen. 261 (1889).

<sup>51</sup> Case of the Collectorship of New Orleans, 12 Op. Att’y Gen. 449, 452 (1868). Attorney General Evarts also considered the merits of the opposing interpretation ... but ultimately conclud[ed] that he could not but concur with “the views of [his] learned predecessors.” *Id.* at 452.

<sup>52</sup> See Temporary Appointments in the Army, 14 Op. Att’y Gen. 562 (1875); Temporary Appointments by the President, 15 Op. Att’y Gen. 207 (1877); Appointments During Recess of the Senate, 16 Op. Att’y Gen. 522 (1880); District (continued...)

The broader interpretation of “Vacanc[y] that may happen” was first adopted by a federal court in the 1880 decision *In re Farrow*.<sup>53</sup> In *Farrow*, Circuit Justice Woods adopted the reasoning of the aforementioned Attorneys General opinions, stating that “[t]hese opinions exhaust all that can be said on the subject.”<sup>54</sup> He observed that “the practice of the executive department for nearly 60 years, the acquiescence of the [S]enate therein, and the recognition of the power claimed by both [H]ouses of [C]ongress” supported arguments for the broader interpretation of the phrase.<sup>55</sup> The holding in *Farrow* was also echoed in the 1886 decision *In re Yancey*.<sup>56</sup>

In the modern era, three federal courts of appeals adhered to the broader interpretation. In *United States v. Allocco*,<sup>57</sup> *United States v. Woodley*,<sup>58</sup> and *Evans v. Stephens*,<sup>59</sup> each court stressed practical problems that could result should a narrow interpretation be adopted.<sup>60</sup> These decisions also concentrated on evaluating historical precedent and practice, including the “long and continuous line of [Attorneys General] opinions” and the “widespread acceptance of the practice followed since the earliest days of the Republic.”<sup>61</sup> The D.C. Circuit in *Noel Canning*, diverging from these established interpretations, held that a “vacancy,” for purposes of the Clause, must be one that arises after the Senate enters “the Recess,” which, in the court’s view, occurs when the

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Attorney-Temporary Appointment, 16 Op. Att’y Gen. 538 (1880); Appointments to Office, 17 Op. Att’y Gen. 521 (1883); Vacancies in Office, 18 Op. Att’y Gen. 29 (1884); Vacancy in Office, 19 Op. Att’y Gen. 261 (1889); President-Recess Appointment-Naval Officer, 26 Op. Att’y Gen. 234 (1907); President-Recess Appointment-Post Master, 30 Op. Att’y Gen. 314 (1914); Executive Power-Recess Appointments, 33 Op. Att’y Gen. 20 (1921); Recess Appointments, 41 Op. Att’y Gen. 463 (1960); Recess Appointments Issues, 6 Op. Off. Legal Counsel 585 (1982).

<sup>53</sup> *In re Farrow*, 3 Fed. 112, 116 (C.C.N.D. Ga. 1880) (stating that the President has the power to make appointments “notwithstanding the fact that the vacancy filled by his appointment first happened when the [S]enate was in session”).

<sup>54</sup> *Id.* at 115.

<sup>55</sup> *Id.* at 115 (rejecting the holding in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (No. 3,924, E.D. Pa. 1868)); *see also*, contrary opinion in *Schenck v. Peay*, 21 Fed. Cas. 672 (No. 12,451 E.D. Ark. 1869).

<sup>56</sup> *In re Yancey*, 28 Fed. 445, 450 (C.C.W.D. Tenn. 1886) (holding the recess appointment of a marshal by the President to be lawful, and that there was no need to turn to other legal mechanisms to qualify the appointment).

<sup>57</sup> *United States v. Allocco*, 305 F.3d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963) (holding President Eisenhower’s appointment of John M. Cashin to a federal judgeship during an inter-session recess valid).

<sup>58</sup> *United States v. Woodley*, 751 F.2d 1008 (9<sup>th</sup> Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (holding President Carter’s appointment of Walter Heen to a federal judgeship during an inter-session recess valid).

<sup>59</sup> *Evans v. Stephens*, 387 F.3d 1220, 1226-27 (11<sup>th</sup> Cir. 2004). The decisions in *Allocco*, *Woodley*, and *Evans* are additionally significant, in that all three held that the President’s power under the Recess Appointments Clause extends to filling judicial vacancies on Article III courts. However, denying the petition for *writ of certiorari* in *Evans*, Justice Stevens commented that “it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession ‘recesses.’” *Evans v. Stephens*, 544 U.S. 942, 943 (2004) (order denying petition for *writ of certiorari*).

<sup>60</sup> *See Allocco*, 305 F.3d at 712 (stating that a contrary interpretation “would create executive paralysis and do violence to the orderly functioning of our complex government.”); *Woodley*, 751 F.2d at 1012 (stating that a narrow interpretation would “lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes.”); *Evans*, 387 F.3d at 1226-27 (stating that “interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning.”).

<sup>61</sup> *See, e.g., Allocco*, 305 F.3d at 713 (citing *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952), the court concluded that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ... may be treated as a gloss on the ‘Executive Power’ vested in the President.” *Id.*).



Senate adjourns *sine die*.<sup>62</sup> Based on a textual analysis, it reasoned that the term “happen” cannot encompass all vacancies in existence; otherwise “the operative phrase ‘that may happen’ would be wholly unnecessary.”<sup>63</sup> Furthermore, the court interpreted early historical commentary by Attorney General Randolph and Alexander Hamilton, discussed above, as supporting the principle that the recess appointment power provided to the President is primarily a “secondary method” that, if read broadly, would eviscerate “the primary mode of appointments set forth in [the Appointments Clause].”<sup>64</sup> Whereas the other courts had stressed historical practice, the D.C. Circuit rejected these arguments, finding that one branch’s assent to a practice does not preclude it from judicial review.<sup>65</sup>

## Supreme Court Interpretation of the Recess Appointments Clause

In *NLRB v. Noel Canning*, the Supreme Court ruled that the three recess appointments to the NLRB were constitutionally invalid because the Senate was in an intra-session recess of only three days, a time period it considered too short to trigger the President’s recess appointment power.<sup>66</sup> As discussed below, the reasoning upon which the appointments were found invalid was subscribed to by five Justices, who rejected the D.C. Circuit’s narrow interpretation of the Clause.<sup>67</sup> In contrast, the other four Justices believed the recess appointments to be invalid on grounds articulated by the D.C. Circuit and critiqued the majority’s interpretation of the Clause in a concurring opinion.

Writing for the majority, Justice Breyer first expressed two background considerations that would guide its approach in interpreting the Clause. First, the Court stated its aim to “interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority to routinely avoid the need for Senate confirmation.”<sup>68</sup> Second, the majority emphasized that it would place “significant weight upon historical practice,” citing several precedents where the “Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even where that practice began after the founding era.”<sup>69</sup>

Justice Scalia, who authored the concurrence, began by disputing the majority’s deference to the other branches’ historical practice because “political branches cannot by agreement alter the

<sup>62</sup> *Noel Canning*, 705 F.3d at 507, 512.

<sup>63</sup> *Id.* at 507. It criticized its sister circuits for relying on modern dictionaries to define “happen,” rather than contemporary 18<sup>th</sup> century dictionaries that defined the term as understood during the time of ratification. *Id.* (“Dictionaries at the time of the Constitution defined “happen” as “[t]o fall out; to chance; to come to pass. [citations omitted]” *Id.*).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 510 (citing *United States v. Chadha*, 462 U.S. 919, 942, n.13 (1983), “The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.”).

<sup>66</sup> *Noel Canning*, 134 S. Ct. at 2573-2578.

<sup>67</sup> Interestingly, it was noted that the “that “the tenor of the oral argument suggested widespread skepticism” amongst Justices about recess appointments. Norman J. Ornstein, “Disarming the White House,” *N.Y. Times*, Jan. 22, 2014, at A21.

<sup>68</sup> *Noel Canning*, 134 S. Ct. at 2559 (Breyer, J., majority).

<sup>69</sup> *Id.* at 2559-60 (citing *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); and Letter to Spencer Roane from James Madison (Sept. 2, 1819) in 8 *Writings of James Madison* 450 (G. Hunt 3d. 1908)).

constitutional structure.”<sup>70</sup> The Court, he stated, is not “relieve[d] of [its] duty to interpret the Constitution in light of its text, structure, and original understanding” merely because one branch has adopted “a self-aggrandizing practice ... well after the founding, often challenged, and never before blessed by the [C]ourt.”<sup>71</sup> He cited the Court’s decision in *INS v. Chadha*<sup>72</sup> as a prime example of where it “did not hesitate to hold the legislative veto unconstitutional even though Congress had enacted, and the President had signed, nearly 300 similar provisions over the course of 50 years.”<sup>73</sup> At the end of his concurrence, he lamented “the damage done to [the Court’s] separation-of-powers jurisprudence,” believing that the majority’s “embrace of adverse-possession theory of executive power ... will be cited in diverse contexts ... and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining the respect for the separation of powers.”<sup>74</sup>

### “the Recess of the Senate”

In *Noel Canning*, the Court held that “the Recess of the Senate” encompasses both inter- and intra-session recesses. In its analysis, the majority cited founding-era dictionaries and documents where the term “recess” referenced both inter- and intra-session breaks.<sup>75</sup> It dismissed the emphasis on the definite article “the,” finding that it “can also refer ‘to a term used generically or universally’”; and, the court noted other founding-era clauses where the use of “the” did not refer to a particular thing or event.<sup>76</sup> Despite finding sufficient textual support for a broad interpretation, the Court nonetheless declared the text ambiguous and turned to historical practice. It pointed out the many Attorneys General opinions, discussed above, that underscored the functionalist purpose of the Recess Appointments Clause ever since Congress began taking shorter inter-session breaks and more frequent intra-session breaks after World War II.<sup>77</sup> Moreover, the Court found that the Senate has not, as a whole or via a committee, expressed opposition to the practice of intra-session recess appointments.<sup>78</sup> In fact, the Court pointed to a 1905 Senate Committee on the Judiciary report (1905 Senate Report) that appears to favor a functional definition of “the recess,” and that contains no discussion to distinguish inter- and intra-session recesses.<sup>79</sup> According to the Court, the Senate has not, as a body, challenged this

<sup>70</sup> *Id.* at 2594 (Scalia, J., concurring).

<sup>71</sup> *Id.*

<sup>72</sup> 462 U.S. 919 (1983).

<sup>73</sup> *Noel Canning*, 134 S. Ct. at 2593-94 (Scalia, J., concurring).

<sup>74</sup> *Id.* at 2617-18. The majority believed that its discussion of the Recess Appointments Clause “should refute Justice Scalia’s claim that we have ‘embrace[d] an ‘adverse-possession theory of executive power.’ ... Instead, as in all cases, we interpret the Constitution in light of its text, purposes, and ‘our whole experience’ as a Nation. [citation omitted] And we look to the actual practice of Government to inform our interpretation.” *Id.* at 2578 (Breyer, J., majority).

<sup>75</sup> *Id.* at 2561 (Breyer, J., majority).

<sup>76</sup> *Id.* (referring to U.S. Const. art. I, §3, cl. 5 where “[t]he Constitution, for example, directs the Senate to choose a President *pro tempore* ‘in the Absence of the Vice-President’ and noting that “the” used in this Clause does not refer to a particular Vice President).

<sup>77</sup> *Id.* at 2562.

<sup>78</sup> *Id.* at 2563. Only individual Senators have stated differing views on the scope of the Clause. *See, e.g.*, 130 Cong. Rec. 23234 (1984) (resolution introduced by Senator Byrd urging limits on the length of applicable intra-session recesses); Brief for Senator Mitch McConnell et al. as *Amici Curiae* 26 (an intra-session adjournment does not count as “the recess”). However, the majority did not appear to include these statements as being part of “any formal action” by the Senate to “call into question the broad and functional definition of ‘recess.’” *Id.* at 2554.

<sup>79</sup> S. Rep. 58-4389, at 2 (58<sup>th</sup> Cong., 3d Sess., 1905) (“[T]he period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress...; when its members owe no duty of attendance; when its Chamber (continued...)”).

functional definition for at least three-quarters of a century nor the countless recess appointments made during intra-session recesses, which therefore entitles this “settled practice to ‘great weight in a proper interpretation of the constitutional provision.’”<sup>80</sup>

Having established that the Clause applies to both inter- and intra-session recesses, the Court next came to the conclusion that a recess of “more than 3 days but less than 10 days is presumptively too short to fall within the Clause.”<sup>81</sup> Although the Clause does not explicitly address length of time, the Court stated this was because the Framers probably did not anticipate that intra-session breaks would become more frequent and lengthier than inter-session breaks.<sup>82</sup> The Court settled on the 3-day minimum, determining that a “Senate recess that is so short that it does not require the consent of the House [pursuant to the Adjournments Clause] is not long enough to trigger the President’s recess appointment power.”<sup>83</sup> While it acknowledged there are scattered examples of inter-session recess appointments of less than 10 days, the Court found no similar examples of recess appointments made during an intra-session break of less than 10 days. This, in addition to an OLC opinion advising against an appointment during a 6-day intra-session recess, suggested to the Court that the “recess appointment power is not needed in that context.”<sup>84</sup> However, the Court said that a recess of less than 10 days is “presumptively” too short in order to leave open the possibility for exigent circumstances that might require the President to exercise his power during a shorter break.<sup>85</sup>

Writing to the contrary, Justice Scalia agreed with the D.C. Circuit’s narrower interpretation that “the Recess” only applies to inter-session breaks. To support his conclusion, he looked to the Clause’s use of the term “recess” in contrast to the term “session.” Each of these terms had “well-understood meanings [during the founding era] in the marking-out of legislative time.”<sup>86</sup> He critiqued the majority’s interpretation by stating that it is linguistically unsound to read “recess” colloquially so that it encompasses any recess but then to read “session” formally so that a recess appointment concludes at the end of the next formal session of Congress rather than its next daily session.<sup>87</sup> Additionally, another principal issue with using “recess” in a colloquial manner is that it “leaves the recess-appointment power without a textually grounded principle limiting the time of its exercise” and forces the majority to create a time limitation that is not grounded in text.<sup>88</sup>

(...continued)

is empty; when, because of its absence, it can not [sic] receive communications from the President or participate as a body in making appointments.”).

<sup>80</sup> *Noel Canning*, 134 S. Ct. at 2563-4 (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

<sup>81</sup> *Id.* at 2567.

<sup>82</sup> *Id.* at 2566.

<sup>83</sup> *Id.* at 2566. The Adjournments Clause provides: “Neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days ...” U.S. Const., art. I, §5, cl. 4.

<sup>84</sup> *Id.* (citing Constitutional Law-Article II, Section 2, Clause 3- Recess Appointments- Compensation (5 U.S.C. §5503), 3 Op. Off. Legal Counsel 314, 315-316 (1979)).

<sup>85</sup> *Id.* at 2567. The Court stated, however, that “political opposition in the Senate would not qualify as an unusual circumstance.” *Id.*

<sup>86</sup> *Id.* at 2595 (Scalia, J., concurring). The Court also highlighted the use of the verb “adjourn,” rather than “recess,” in the Constitution to refer to “the commencement of breaks *during* a formal legislative session.” *Id.* at 2595-2596.

<sup>87</sup> *Id.* at 2597. Justice Scalia believed that the majority’s interpretation seriously undercuts “another self-evident purpose of the Clause: to preserve the Senate’s role in the appointment process ... by clearly delineating the times when the President can appoint officers without the Senate’s consent.” *Id.*

<sup>88</sup> *Id.* at 2596-2597. The concurrence strongly disagreed with the majority latching on to the Adjournments Clause to presume that 3 days is too short, finding the connection between the two clauses to be both “arbitrary and mistaken.” It (continued...)

Justice Scalia indicated that it is judicial overreach for the majority to invent court-crafted limitations with no textual basis.<sup>89</sup>

The concurring opinion also conducted an exhaustive review of the historical practice relied on by the majority and concluded that practice does not support a broad interpretation. Justice Scalia focused on the lack of intra-session recesses for nearly 80 years, as well as the lack of intra-session recess appointments even when there were such breaks that lasted longer than 10 days. This early history, together with the 1901 opinion by Attorney General Knox first interpreting “the Recess” narrowly, strongly indicates that “neither the Executive nor the Senate believed such a power existed.”<sup>90</sup> He further critiqued the majority’s reliance on the 1905 Senate Report, stating that it was only meant to clarify that “the Recess” was “limited to (actual, not constructive) breaks *between sessions*,” not to “suggest that the Senate’s absence is enough to create a recess.”<sup>91</sup> In the end, Justice Scalia objected to the majority’s methodology, *i.e.*, its deference to the executive branch and insistence that the Senate acquiesced because it did not object “as a body” to prevent such appointments, because he believed that this “all but guarantees the continuing aggrandizement of the Executive Branch.”<sup>92</sup>

### “Vacancies that may happen”

For the second phrase, the majority concluded that it encompasses both vacancies that initially occur during a recess as well as those which arise when the Senate is in session. Starting with the text, the Court conceded that while “the most natural meaning of ‘happens’ as applied to ‘vacancy’ ... is that the vacancy ‘happens’ when it initially occurs,” the language of the Clause “read literally permits ... our broader interpretation” though it may not “naturally favor it.”<sup>93</sup> Because it is ambiguous whether the Clause must be read more narrowly, the Court turned to the purpose of the Clause. It acknowledged that a broad interpretation could allow the President to routinely avoid Senate confirmations, however, the majority declared that “the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before the

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also determined that the majority’s pronouncement that a break of 4 to 9 days is “presumptively too short” a time period creates further complications because it would not be clear to the President who seeks to make a recess appointment, or the litigant who wishes to challenge it, as to what “unusual” or “urgent” circumstances might rebut this presumption. *Id.* at 2599.

<sup>89</sup> *Id.* at 2600 (noting that if the Clause meant to use “recess” in a colloquial manner, then “there would be no ‘judicially discoverable and manageable standard for resolving’ whether a particular break was long enough to trigger the recess-appointment power, making it a non-justiciable political question” [citations omitted]).

<sup>90</sup> *Id.* at 2601. In contrast, the majority stated that the lack of intra-session recesses for the first half century does not mean the question is whether the Founders thought about applying the Clause to intra-session recesses, but rather “[d]id the Founders intend to restrict the scope of the Clause to the form of congressional recesses prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate to somewhat changed circumstances?” The majority thought it likely that the Framers intended the Clause to apply to new circumstances that fall within its essential purposes. *Id.* at 2564-2565 (Breyer, J., majority).

<sup>91</sup> *Id.* at 2603 (Scalia, J., concurring). In the 58<sup>th</sup> Congress, the first session ended at noon—December 7, 1903—and the second session began immediately thereafter. 37 Cong. Rec. 544 (Dec. 7, 1903) During this brief moment when the first session was required to end and the second begin, President Roosevelt construed this period as a “constructive recess” and announced the recess appointment of over 160 officers, mostly military. The 1905 Senate Report was issued 14 months afterwards and emphatically rejected the President’s actions.

<sup>92</sup> *Id.* at 2606.

<sup>93</sup> *Id.* at 2567 (Breyer, J., majority).

recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”<sup>94</sup>

The Court also turned to historical practice from the past 200 years, and it determined that “the tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.”<sup>95</sup> Furthermore, the Senate appears not to have countered this practice for most of the last century, despite sporadic disagreement in the early 19<sup>th</sup> century with the broad interpretation. Notably, the Senate Committee on the Judiciary issued a report in 1863 disagreeing with the broad interpretation of “vacancy,”<sup>96</sup> but the Court pointed out that no Senator referred to this report when debating the Pay Act of 1863, a law that prohibited payment to any person appointed during the recess of the Senate to fill a pre-recess vacancy.<sup>97</sup> The Court noted the Senate later “abandoned its hostility” when it issued the 1905 Senate Report, which supported a functionalist interpretation of the Clause,<sup>98</sup> and when Congress subsequently enacted amendment of the Pay Act in 1940, which carved out exceptions to allow payment to recess appointees filling certain kinds of pre-recess vacancies.<sup>99</sup> The executive branch’s historical practice for nearly 200 years combined with the Senate’s support of the President’s interpretation for nearly three-quarters of a century led the Court to pronounce that these traditions are entitled to “great regard in determining the true construction of the constitutional provision.”<sup>100</sup> Moreover, the Court acknowledged that it was “reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.”<sup>101</sup>

Again, the concurring opinion diverged from the majority in its interpretation of “Vacancies that may happen,” agreeing with the D.C. Circuit’s conclusion that the plain meaning and natural reading of the word “happen” as applied to a “vacancy” is one that initially occurs during the recess.<sup>102</sup> As with “the Recess,” Justice Scalia opined that the majority’s reading is at odds with the purpose of the Clause, which is meant to be a subordinate, not primary, way of appointing

<sup>94</sup> *Id.* at 2569-2570. The Court also reiterated the opinions of early Attorneys General, who had “clearly described how the narrower interpretation would undermine” the purpose of the Clause, which is to “permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.” *Id.* at 2568 (relying on 1823 opinion of Attorney General Wirt, discussed above).

<sup>95</sup> *Id.* at 2570. The Court addressed Justice Scalia’s argument that President Madison’s “own beliefs” demonstrate that the Clause does not apply to pre-recess vacancies. However, the Court stated “there is no such direct evidence” only the fact that President Madison declined once to make an appointment to a pre-recess vacancy after receiving advice from his Secretary of War that he lacked the power. Yet, President Madison made at least five other appointments to pre-recess vacancies, which Justice Scalia did not dispute. *Id.*

<sup>96</sup> See *supra* note 47 for discussion of S. Rpt. 37-80 (37<sup>th</sup> Cong., 3d Sess., 1863).

<sup>97</sup> *Id.* at 2572 (citing Act of Feb. 9, 1863, §2; 12 Stat. 646 (1863)).

<sup>98</sup> *Id.* According to the Court, Senator Tillman—chair of the Senate Judiciary Committee that issued the 1905 Senate Report—stated that “the Senate has acquiesced” in the President’s “power to fill” pre-recess vacancies. This statement was in response to another Senator who stated: “Whatever the report may have said in 1863, I do not think that has been the view the Senate has taken” of the issue.” 38 Cong. Rec. 1606 (1904).

<sup>99</sup> Act of July 11, 1940, 54 Stat. 751 (1940).

<sup>100</sup> *Noel Canning*, 134 S. Ct. at 2573 (internal quotations omitted).

<sup>101</sup> *Id.*

<sup>102</sup> Justice Scalia also notes a number of alternative phrases an “intelligent drafter” would have used to convey the meaning that the majority attempts to give the phrase “Vacancies that may happen.” Other alternatives include “all Vacancies that may exist during the Recess” or simply the President has authority to “fill up all Vacancies during the Recess.” *Id.* at 2606 (Scalia, J., concurring).



officials.<sup>103</sup> Though eventually superseded by the opinion of Attorney General Wirt from 1823, the concurrence found the opinion by the first Attorney General, Edmund Randolph, and actions of early Congresses supportive of the narrower interpretation. For example, a statute from 1791 empowered the President to grant commissions to customs inspectors during the recess of the Senate, if the appointment was not made during the present session of Congress.<sup>104</sup> This statutory authorization demonstrates an understanding that the Recess Appointments Clause could not be used to fill pre-existing vacancies, because otherwise the “authorization would have been superfluous if the Recess Appointments Clause had been understood to apply to pre-existing vacancies.”<sup>105</sup> According to Justice Scalia, the 1823 Wirt opinion and the majority are fundamentally mistaken in stating that the “Constitution’s ‘substantial purpose’ is to ‘keep ... offices filled.’”<sup>106</sup> Even though the Constitution addresses the operation of the government, it is not a “road map for maximally efficient government.”<sup>107</sup>

Justice Scalia also disputed the majority’s reliance on historical practice to support its broad interpretation. The majority’s sampling of recess appointments made to pre-recess vacancies in the modern era,<sup>108</sup> he said, is not sufficient to assume that this is “at all typical of practices that prevailed throughout the ‘history of the Nation.’”<sup>109</sup> He contended that the majority “ignore[d] two salient facts: First, from the founding until the mid-19<sup>th</sup> century, the President’s authority to make such appointments was far from settled even within the Executive Branch. Second, from 1863 until 1940 [under the Pay Act of 1863], it was *illegal* to pay *any* recess appointee who filled a pre-recess vacancy, which surely discouraged Presidents from making, and nominees from accepting, such appointments.”<sup>110</sup> Due to the inconsistency of historical evidence available, Justice Scalia opined that he could not “conceive of any sane constitutional theory under which

<sup>103</sup> *Id.* at 2607. A broad interpretation would make it “impossible to regard [the Clause]—as the Framers plainly did—as a mere codicil to the Constitution’s principal, power-sharing scheme for filling federal offices.” *Id.*

<sup>104</sup> Act of Mar. 3, 1791, § 4, 1 Stat. 200 (1791).

<sup>105</sup> *Noel Canning*, 134 S. Ct. at 2608 (Scalia, J., concurring). Justice Scalia also highlighted the Third Congresses interpretation of the Constitution’s Senate Vacancies Clause, which has language similar to the Recess Appointments Clause. Prior to the 17<sup>th</sup> Amendment, the Constitution provided that “if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State the Executive thereof may make temporary Appointments until the next Meeting of the Legislature.” U.S. Const., art. I, § 3, cl. 2. In application of this Clause by the Senate in 1794 showed that the phrase “happen ... during the Recess” was understood to refer to vacancies that *arose*, not merely existed, during the recess in which the appointment was made. *Id.* at 2609.

<sup>106</sup> *Id.* at 2610.

<sup>107</sup> *Id.* Rather, the framework of the Constitution is a reflection of “hard choices ... consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.” *Id.*

<sup>108</sup> *See id.* at 2571 (Breyer, J., majority) The majority examined a list submitted by the Solicitor General of 102 recess appointments dating back to the founding era. It also cited a Congressional Research Service study that examined the vacancy dates associated with a random sample of 24 inter-session recess appointments since 1981, and which concluded that in most cases the “preponderance of the evidence” suggested that the vacancy arose prior to the recess. Furthermore, in the Court’s own sample of 21 recess appointments, it found 18 filled pre-recess vacancies while 1 filled a vacancy that arose during the recess, and the dates of the other 2 vacancies could not be ascertained. *Id.* “Taken together, we think it is a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies.” *Id.*

<sup>109</sup> *Id.* at 2616 (Scalia, J. concurring). Justice Scalia also chastised the majority for imposing an “excessive burden ... on the Legislative branch in contests with the Executive over the separation of powers.” *Id.* at 2614 He observed that the majority gave little weight to the statements of individual Senators who have opposed executive branch practice and instead looked for Senate action “‘as a body’ in order to prevent the Executive from acquiring power by adverse possession.” This imposition on the Legislative Branch “will systematically favor the expansion of executive power at the expense of Congress.” *Id.* at 2594.

<sup>110</sup> *Id.* at 2616.



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this evidence of ‘historical practice’—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.”<sup>111</sup>

## Significance of *Pro Forma* Sessions

The last question presented to the Court in *Noel Canning* was whether the President’s recess appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.<sup>112</sup> This question was especially relevant in this challenge due to the unique facts underlying President Obama’s recess appointments to the NLRB.<sup>113</sup>

The NLRB consists of a board of five officials appointed by the President with the advice and consent of the Senate, but requires at least three members to sustain a quorum.<sup>114</sup> In 2011, the NLRB only had three board members with one of the three scheduled to vacate his seat by the end of the first session of the 112<sup>th</sup> Congress. In an effort to prevent membership from dropping below the number required to sustain a quorum, President Obama nominated Terrence F. Flynn to be a member on January 5, 2011.<sup>115</sup> The President also formally nominated Sharon Block and Richard F. Griffin, Jr., to be members of the NLRB on December 15, 2011.<sup>116</sup> By December 17, 2011, the Senate had not acted on any of these nominations. On this date, the Senate adopted a unanimous consent agreement in which the body adjourned but scheduled a series of *pro forma* sessions every three to four days to occur from December 20, 2011, until January 23, 2012. The unanimous consent agreement established that “no business” would be conducted during the *pro forma* sessions and that the second session of the 112<sup>th</sup> Congress would begin at 12:00pm on January 3, 2012, as required by the Constitution.<sup>117</sup> As none of the three nominees were confirmed, the President, citing Senate inaction and asserting that the Senate was in recess despite

<sup>111</sup> *Id.* at 2617. In its conclusion, the majority reiterated that the Recess Appointment Clause’s text alone is ambiguous, and that “the broader reading better serves the Clause’s structural function ...[which]... is reinforced by centuries of history [the Court] is hesitant to disturb.” *Id.* at 2577 (Breyer, J., majority). Notably, they stated Justice Scalia’s interpretation would basically “read [the Clause] out of the Constitution,” and excise it “in the name of liberty,” which goes against preserving the “vigour of government [that] is essential to liberty,” as observed by Alexander Hamilton in *The Federalist* No. 1. *See id.* at 2577.

<sup>112</sup> *Pro forma* sessions are brief meetings (sometimes only several seconds or a few minutes in duration) of the Senate in which no business is conducted. They are usually held to satisfy the constitutional obligation that neither chamber can adjourn for more than three days without consent of the other. *See also* CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Richard S. Beth and Jessica Tollestrup.

<sup>113</sup> The modern use of *pro forma* sessions by the Senate to avoid a sustained recess with the apparent intent of preventing the President from exercising his recess appointment powers was initially instituted in 2007. Senator Harry Reid, on November 16, 2007, announced that the Senate would “be coming into *pro forma* sessions during the Thanksgiving holiday to prevent recess appointments.” *See* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (Senator Harry Reid, “Recess Appointments,” remarks in the Senate). Similar procedures were followed during the remainder of President George W. Bush’s term, and many perceived that this limited the ability of the President to make recess appointments during those periods.

<sup>114</sup> 29 U.S.C. §153. In 2010, the Supreme Court ruled that the National Labor Relations Act prevents the NLRB from exercising rulemaking powers without having three or more acting members. *New Process Steel v. Nat’l Labor Relations Bd.*, 130 S. Ct. 2635 (2010).

<sup>115</sup> 157 Cong. Rec. S68 (daily ed. Jan. 5, 2011).

<sup>116</sup> 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

<sup>117</sup> 157 Cong. Rec. S8783-S8784 (daily ed. Dec. 17, 2011). The unanimous consent agreement stated that the Senate would “adjourn and convene for *pro forma* sessions only, with no business conducted” on December 20, 23, 27, and 30; that the second session of the 112<sup>th</sup> Congress would convene on January 3 at noon “for a *pro forma* session only, with no business conducted;” and that the Senate would then convene for *pro forma* sessions “with no business conducted” on January 6, 10, 13, 17, and 20, 2012.

the *pro forma* sessions, exercised his recess appointment power to appoint Mr. Flynn, Ms. Block, and Mr. Griffins Jr., to the NLRB on January 4, 2012—the date between the January 3 and January 6 *pro forma* sessions.

Given that the majority’s interpretation of the Recess Appointments Clause thus far would not have invalidated these appointments, its conclusion that the NLRB recess appointments are constitutionally invalid hinged on this last question. The last question required the Court to determine “the significance of these [*pro forma*] sessions—that is, whether, for purposes of the Clause, [the Court] should treat them as periods when the Senate was in session or as periods when it was in recess.”<sup>118</sup> On the one hand, if the Court found that the Senate was in session on January 3 and 6 when it held its *pro forma* sessions, then this three-day period<sup>119</sup> would have constituted a three-day recess, which the Court considered too short to trigger the recess appointment power. On the other hand, if the Court found that the Senate was not in session despite holding its *pro forma* sessions, then the three-day period would have been part of a much longer recess during which the President could have wielded his recess appointment power.

The Court concluded that the *pro forma* sessions count as sessions of the Senate because, 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>120</sup> With respect to the *pro forma* sessions at issue, the Court was satisfied that this standard was met because the Senate said it was in session, and despite a resolution that it would conduct no business, the Senate still retained the capacity to do so. The Senate, in fact, passed a bill by unanimous consent during the December 20<sup>th</sup> *pro forma* session, and this bill became law.<sup>121</sup>

The Court also found that even if it examined the functional definition of recess from the 1905 Senate Report, the Senate would still be in a session and not in a recess during its *pro forma* sessions.<sup>122</sup> Running through the 1905 Senate Report’s factors, the Court determined (1) that the Senate could “participate as a body in making appointments” by confirming nominees by unanimous consent; (2) that the Senate could and did “receive communications from the President”; (3) that the Senate, under its official rules, was not empty because it “operates under the presumption that a quorum is present until a present Senator suggests the absence of a quorum”; and (4) the Senators, despite being away, owed a duty of attendance during these *pro*

<sup>118</sup> *Noel Canning*, 134 S. Ct. 2574 (Breyer, J., majority).

<sup>119</sup> The three-day period could be counted as either January 3-5 or January 4-6. According to the practice of the Senate, the three days must include either the day on which the recess begins or the day on which it ends, but Sunday is excluded from the count. See *Riddick’s Senate Procedure: Precedents and Practices*, by Floyd M. Riddick, Parliamentarian Emeritus, and Alan S. Frumin, Parliamentarian, rev. and ed. by Alan S. Frumin, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992) at 71 (“Day”).

<sup>120</sup> *Noel Canning*, 134 S. Ct. 2574 (emphasis added). The Court declared that the Senate’s own precedents “should merit great respect,” because the Constitution provides the Senate with much control over its own schedule. The Court has traditionally taken “at face value the Senate’s own report of its actions” and thus gives “great weight to the Senate’s own determination of when it is and when it is not in session.” *Id.* at 2575. However, the Court’s deference to the Senate is not absolute, for when the Senate, under its own rules, does not have the *capacity* to act or is *unable* to do so, then the Senate “is not in session even if it so declares.” *Id.* This statement may likely raise the future question of how a President is supposed to determine if the Senate no longer has capacity to act, or if it is unable to act, when it is declaring that it is still in session.

<sup>121</sup> *Id.* at 2575 (citing P.L. 112-78, 125 Stat. 1280 (2011)).

<sup>122</sup> *Id.* The Court examined this criteria at the government’s urging, who argued that the *pro forma* sessions should be treated as periods of recess because the Senate was in recess as “*functional matter*,” consistent with the definition set forth in the 1905 Senate Report. See *supra* note 79.

*forma* sessions.<sup>123</sup> Finally, the Court rejected the government’s argument that the Court should examine what the Senate actually did during the *pro forma* session, rather than what the Senate had the capacity to do.<sup>124</sup> The Court stated a factual appraisal would be both legally and practically inappropriate for the Court to engage in such an examination.<sup>125</sup> Thus, the Court concluded that the President’s NLRB recess appointments were invalid on grounds that the Senate was only in a short intra-session recess of three days, a period of insufficient length to trigger the President’s recess appointment power.

Under the majority’s ruling, it is possible for the Senate to effectively prevent a future President from making any recess appointments by simply holding *pro forma* sessions, depending on the parties that control the presidency and the Senate. The possibility of this occurring spurred the government to warn in its argument that this kind of ruling could “disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>126</sup> However, the Court stated that its opinion could not “significantly alter the constitutional balance,” as it opined that most appointments are not controversial and that the Senate and President have other methods available when political controversy is serious.<sup>127</sup> Moreover, the Court concluded that “the Recess Appointments Clause is not designed to overcome serious institutional friction.... [F]riction between the branches is an inevitable consequence of our constitutional structure [which] foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.”<sup>128</sup>

Because the NLRB recess appointments are invalid under the minority’s interpretation of the Recess Appointments Clause alone, Justice Scalia did not examine the significance of *pro forma* sessions. Though he disapproved overall of the majority’s approach to interpreting the Clause, as discussed above, he opined that it is unclear how the majority’s judge-made limitation will work in practice.

## Summary of Supreme Court *Noel Canning* Decision

The Justices in *Noel Canning* were unanimous in concluding that the three recess appointments to the NLRB were constitutionally invalid. However, the Court was sharply divided when it came to the reasoning for why the appointments were infirm. Despite adopting a broad reading of the Recess Appointments Clause such that President can make appointments during an inter- or intra-session recess of longer than 10 days to any vacancy, the majority of the Court ruled the appointments invalid because it determined that the Senate was only in an intra-session recess of

<sup>123</sup> *Noel Canning*, 134 S. Ct. at 2575 (Breyer, J., majority).

<sup>124</sup> *Id.* at 2576. The Solicitor General argued that during the relevant *pro forma* sessions the Senate conducted no business, could not receive messages from the President in any meaningful way, and that the Senate Chamber was virtually empty because, in practice, no attendance was required. *Id.* at 2576.

<sup>125</sup> *Id.* at 2576 (“From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.” *Id.*).

<sup>126</sup> *Id.* at 2576-77 (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)).

<sup>127</sup> *Id.* at 2577. The Court suggested that the Senate could hold a “series of twice-a-week *ordinary* (not *pro forma*) sessions” where the business conducted at those sessions would be for the Senate to decide. Or, the President could rely on his Article II, §3 power to force an adjournment of Congress in order to make a recess appointment. That constitutional provision provides: “[I]n the Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper.”

<sup>128</sup> *Id.* at 2577.



three days, a period of time insufficient to trigger the President's recess appointment power. A minority of Justices, in contrast, ruled the appointments invalid based on a narrow interpretation of the Clause as articulated by the D.C. Circuit. Under their view, the President lacked authority to make recess appointments because intra-session recesses do not fall within the scope of the Clause, and the vacancies for the NLRB did not arise during the inter-session recess of the Senate because no inter-session recess occurred as the Senate did not adjourn *sine die*.

Pursuant to the prevailing interpretation of the Recess Appointments Clause, the President is authorized to exercise his recess appointment power when there is any recess of the Senate that is 10 days or longer. However, the Court's ruling also allows the Senate to effectively prevent the President from making recess appointments if it holds *pro forma* sessions. Moving forward, it remains to be seen what impact the recognition of *pro forma* sessions as sessions of the Senate may have on the prevalence of recess appointments.<sup>129</sup>

## Statutory Pay Restriction On Recess Appointees

Congress, in an attempt to check the President's use of the Recess Appointment Clause and preserve its role in the appointments process, has enacted legislation that would restrict the pay of recess appointees under certain circumstances.<sup>130</sup>

### Early Statutory Pay Restriction

Pay restrictions on recess appointees have a long history, dating back to the mid-19<sup>th</sup> century. The forerunner to the current statutory provision was an appropriations rider that Congress attached to the FY1864 Army Appropriations Act. Among other conditions, the rider prohibited the payment of money from the Treasury "as a salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate."<sup>131</sup>

<sup>129</sup> On November 21, 2013, the Senate established a new precedent reinterpreting the Senate rules. Whereas three-fifths of the full Senate had been necessary to invoke cloture, the reinterpretation provides that only a simple majority of those voting (a quorum being present) is required to invoke cloture on executive and judicial branch nominees, other than for the Supreme Court. With this change, it has been observed that there may be less of a need for the President to use his recess appointment power. However, the President's ability to make recess appointments may become a significant issue once more if different parties control the White House and the Senate.

<sup>130</sup> The Vacancies Act, 5 U.S.C. §§3345-3349d, is another statutory framework designed to protect the Senate's constitutional role in the confirmation process. The act explicitly states that it is the exclusive means for authorizing the temporary filling of advice and consent positions unless otherwise expressly provided in law, or unless the President exercises his authority under the Recess Appointments Clause. It establishes which individuals may be designated by the President to temporarily perform the duties and functions of a vacant office and the length of time a designee may serve. The Vacancies Act, which was most recently amended in 1998, has legislative roots dating back to 1795. The original version of the act was enacted in 1868, 15 Stat. 168 (1868), and its time limitations that limited the duration of a temporary assignee to six months also date back to 1795. 1 Stat. 415 (1795).

<sup>131</sup> Act of Feb 9, 1863, §2; 12 Stat. 642, 646 (1863) (This was called the Pay Act by the Court in *Noel Canning*). The appropriations rider also provided that no money was to be paid from the Treasury "to any person acting or assuming to act as an officer, civil, military, or naval, as salary in any office, which is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law." *Id.*

Under this language, an officer might have to serve without pay, until such time as the Senate consented to the nomination. These pay restrictions were enacted in response to President Lincoln's recess appointments of hundreds of military officers in violation of statutory authorization.<sup>132</sup> Although some Senators still questioned the interpretation of "Vacancies that may happen,"<sup>133</sup> as discussed above, Senator William P. Fessenden, elaborating on the intent of the appropriations rider, stated: "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments."<sup>134</sup>

Further restrictions were placed on the President's appointment and removal powers with the passage of the Tenure of Office Act in 1867.<sup>135</sup>

- Section 2 of the act purported to limit the President's power to suspend officers during a recess to instances where it was determined to the satisfaction of the President that an officer was guilty of misconduct in office, crime, or was incapable or legally disqualified to hold office. Removals made during recesses were to be reported to the Senate after it reconvened; and, if the Senate did not concur with the suspension, the suspended officer was to "resume the functions of his office."<sup>136</sup>
- Section 3 of the act purported to limit the President's authority to make recess appointments, providing that such an appointment could be made only if the vacancy occurred by death or resignation. If a recess appointee's nomination was not thereafter confirmed in the next session of the Senate, the office was to "remain in abeyance."<sup>137</sup>

The act also delineated criminal penalties and cut-off of salary for violations of its provisions. President Andrew Johnson, who believed the act to unconstitutionally infringe upon the power of the executive, ignored the provisions of the act when he removed Secretary of War Edwin Stanton from office.<sup>138</sup> Congress repealed part of the act in 1869<sup>139</sup> and then entirely in 1887.<sup>140</sup> Though the act was not challenged in the courts, similar limits on the President's removal power were struck down as unconstitutional in the 1926 decision of *Myers v. United States*.<sup>141</sup>

<sup>132</sup> See 33 Cong. Globe 564-565 (1863). According to Senator Wilson, Congress had passed a law limiting the number of major generals and brigadiers. After Congress adjourned however, it appears that the President made appointments (and sent up nominations to the Senate) for a couple hundred military officers for which there was no law supporting their appointment. *Id.* at 565.

<sup>133</sup> For instance, although the executive branch had returned to the broad interpretation of the "Vacancies that may happen" by 1863, Senator Lyman Trumbull stated, during the debate on the pay restriction, his view that the President "may [only] make temporary appointments to fill vacancies which occur during the recess of the Senate." Although this was his view of the Constitution, he further stated "but all persons do not take the same view." *Id.*

<sup>134</sup> *Id.* at 565.

<sup>135</sup> Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (1867).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 431.

<sup>138</sup> Not long after, President Johnson was impeached. See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 40 Duke L.J. 1, 87-88 (1999).

<sup>139</sup> 16 Stat. 6 (1869).

<sup>140</sup> 24 Stat. 500 (1887).

<sup>141</sup> 272 U.S. 52 (1926) (finding unconstitutional a provision that required the President to receive the Senate's consent before removing an officer). In *Myers*, the Supreme Court stated: "we have no hesitation in holding that ... the Tenure (continued...)"

## Modern Statutory Pay Restriction

Even though congressional restrictions on the President's removal powers have been held unconstitutional, the pay restriction for recess appointees that was originally enacted in 1863 remained intact until it was amended in 1940 to provide exceptions to the flat prohibition, making it less burdensome on officeholders. The pay restriction on recess appointees is currently codified at 5 U.S.C. §5503.<sup>142</sup>

### Description of 5 U.S.C. §5503(a)

This statute generally provides that an individual who is given a recess appointment to fill a vacancy in an existing office *may not* receive payment from the Treasury of the United States<sup>143</sup> if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate.

Once the Senate confirms the individual, he or she may receive pay. However, there are three exceptions under which a recess appointee *may be paid*:

- (a)(1)- if the vacancy arose within 30 days before the end of the session;
- (a)(2)- if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess, [is] pending before the Senate for its advice and consent; or
- (a)(3)- if a pending nomination was rejected 30 days before the session ended and an individual, other than the one whose nomination was rejected, is given the recess appointment.

The second exception—(a)(2)—which allows a recess appointee to be paid, so long as there is a pending nomination before the Senate that is not of a person who had been appointed during the preceding recess, has implied preclusive effect. Generally, subsection (a)(2) has been interpreted as prohibiting the payment of compensation to successive recess appointees.<sup>144</sup> However, looking more closely at the text, it has also been observed that (a)(2) prohibits payment to a successive recess appointee “*only* where the person receiving the recess appointment was already serving under a prior recess appointment. ... Thus, 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.”<sup>145</sup> Given this observation, it is conceivable that the same individual could be recess appointed a second time and paid under (a)(2), so long as there is a different individual whose nomination is pending for the position.<sup>146</sup> Overall, while §5503(a)(2) impliedly bars payments to

(...continued)

of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.” *Id.* at 176. *But see* *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935) (upholding a statutory restriction on the President’s ability to remove the head of an independent agency and distinguishing its holding from *Meyers* by stating that *Meyers* was limited to “purely executive officers”).

<sup>142</sup> It had been previously codified as Rev. Stat. §1761 ch. 580, 54 Stat. 751 (1940).

<sup>143</sup> This pay restriction to recess appointees applies to those positions that receive pay from the Treasury of the United States. *See, e.g.*, Permissibility of Recess Appointments of Directors of the Federal Housing Finance Board, 15 Op. Off. Legal Counsel 91, 93 (1991) (concluding that because none of the payment for the Directors came from the Treasury that the pay restriction of 5 U.S.C. §5503 did not apply to the recess appointees).

<sup>144</sup> *See id.* at 93 (“Although its language is far from clear, section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees.”).

<sup>145</sup> Recess Appointments Issues, 6 Op. Off. Legal Counsel 585, 586 (1982) (emphasis added); Recess Appointments, 41 Op. Att’y Gen. 463, 472-473 n.13 (1960) (citing 52 Comp. Gen. 556, 557 (1973); 36 Comp. Gen. 444 (1956)).

<sup>146</sup> *See* 28 Comp. Gen. 238, 240-241 (1948) (“The use of the general or indefinite term ‘a,’ as opposed to the specific or definite article ‘the,’ reasonably may be regarded as contemplating that the requirements of the [subsection (a)(2)] are (continued...)”).

successive recess appointees, a closer reading of the text could suggest the prohibition to be narrow, and in fact allow payment to a successive recess appointee, depending on the individuals who are recess appointed and nominated to the position.<sup>147</sup>

If a recess appointee is paid under one of the three exceptions, then §5503(b) provides that a nomination to fill a vacancy must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. 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. Although an individual whose nomination has been rejected may continue to serve until the commission expires, the exception under §5503(a)(3) only allows payment if the person serving is *not* the rejected nominee. There is another appropriations rider that also likely demonstrates Congress's desire to prevent rejected nominees from serving in office. This provision, enacted in 2007, bars payment to an individual serving in a position "for which he or she has been nominated after the Senate has voted not to approve the nomination of said person."<sup>148</sup>

The three exceptions under §5503 which would allow payment were designed, as stated in a House report, "to render the existing prohibition on the payment of salaries more flexible."<sup>149</sup> The report further explained that

[f]rom a practical standpoint it frequently creates difficulties especially in those cases in which a vacancy arose shortly before the close of a congressional session, leaving insufficient time to fill the vacancy by nomination and confirmation. Difficulties also arise in cases in which a session terminates before the Senate acts on pending nominations, as has at times happened.<sup>150</sup>

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(...continued)

satisfied if any nomination for the office is pending before the Senate for its consideration, rather than the nomination of the particular individual who receives the recess appointment. ... [I]t would seem that the right [to be paid] is unaffected by the fact that the one subsequently given the recess appointment is not the same person whose nomination was submitted to the Senate."

<sup>147</sup> Oftentimes the same individual is both the nominee and the recess appointee. If such is the case, then it seems clear that such an individual who is recess appointed a second time would not be paid under §5503(a)(2). However, if individual A was the recess appointee and had a pending nomination to the position and then individual B is later recess appointed upon the expiration of individual A's commission, then based on Department of Justice and Comptroller General interpretations, it seems possible that individual B could be paid under §5503(a)(2). Alternatively, if individual A continues to be the nominee while individual B is given a first and second recess appointment, an argument could be forwarded that individual B could be paid under the express terms of §5503(a)(2).

<sup>148</sup> 5 U.S.C. note preceding §5501; P.L. 110-161, 121 Stat. 2021 (2007). *See, e.g.*, P.L. 108-447, Div. H, §609; 118 Stat. 3274. It is also worth noting that for FY2009, Congress enacted another permanent appropriations rider that would prohibit payment "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." P.L. 111-8; 123 Stat. 693 (2009). Though 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."

<sup>149</sup> H. Rept. 76-2646 (76<sup>th</sup> Cong., 3d sess. 1940).

<sup>150</sup> *Id.*

Exceptions (a)(1) and (a)(3), respectively, allow for payment if the vacancy arose, or the pending nomination was rejected, within 30 days “before the end of the session.” The term “session” for purposes of §5503 refers to any time the Senate convenes.<sup>151</sup>

## Anti-Deficiency and Voluntary Services

Sometimes it has been argued that a recess appointee, who is generally barred from receiving pay unless one of the three exceptions applies, would be then barred from serving because of a provision of the Anti-Deficiency Act, namely 31 U.S.C. §1342.<sup>152</sup> This provision states: “An officer or employee of the United States government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”<sup>153</sup>

The voluntary services prohibition is designed to prevent federal agencies from seeking additional appropriations.<sup>154</sup> However, interpretations of 31 U.S.C. §1342 have concluded that although the section prohibits federal entities from accepting *voluntary* services, it does not prohibit acceptance of *gratuitous* services for which no future claim for compensation will be made.<sup>155</sup> Pursuant to this distinction, the Government Accountability Office (GAO) has ruled that compensation that is *not fixed* by statute *may* be waived, so long as the waiver renders any service gratuitous. Conversely, GAO has ruled that compensation that *is fixed* by statute *may not* be waived and deemed gratuitous without specific statutory authority.<sup>156</sup>

While 31 U.S.C. §1342 may be controlling with regard to prohibiting officers and employees from accepting voluntary services, there does not appear to be any basis for its application to recess appointees, who are statutorily barred from receiving pay under 5 U.S.C. §5503, regardless of whether the position at issue carries a discretionary or fixed rate of pay. In other words, it does not seem that §1342, which prevents the government from accepting voluntary services from officers and employees, would also prevent recess appointees, who are already statutorily barred from receiving pay, from serving in government. Because the President’s appointment power, including the power to make recess appointments, arises from the Constitution, it is difficult to formulate a rationale that would support the conclusion that a congressional enactment may prevent the service of a recess appointee who is already prevented from receiving pay, as the pay

<sup>151</sup> The version of this law preceding §5503 used the phrase “termination of the session” as opposed to the phrase “end of the session.” This revision was not intended as a substantive change, however. The “termination” phrase was interpreted by the Comptroller General to encompass “any adjournment, whether final or not, in contemplation of a recess covering a substantial period of time.” 28 Comp. Gen. 30, 37 (1948); *see also* Recess Appointments, 41 Op. Att’y Gen. 463, 473-475 (1960).

<sup>152</sup> *See* Trish Turner, “Democrats Fight Sam Fox Nomination, Charge He Cannot Serve Without Pay,” Fox News Corp., April 5, 2007, *available at* <http://www.foxnews.com/story/0,2933,264420,00.html>.

<sup>153</sup> 31 U.S.C. §1342.

<sup>154</sup> The prohibition codified 31 U.S.C. §1342 was enacted in response to a practice common late in the 19<sup>th</sup> century under which lower grade government employees were asked to “volunteer” their services for overtime work and agencies subsequently requested additional appropriations from Congress to pay them. Government Accountability Office (GAO), Office of the General Counsel, *II Principles of Federal Appropriations Law*, 6-95, 3d Ed. (Feb. 2006).

<sup>155</sup> *Id.* at 95-96.

<sup>156</sup> *Id.* at 102.



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proscription itself clearly contemplates that recess appointees falling within its purview would continue to serve, further obviating the application of §1342.<sup>157</sup>

## Do Pay Restrictions Raise Constitutional Concerns?

These pay limitations are designed to protect the Senate's advice and consent function. By targeting the compensation of appointees, as opposed to the President's recess appointment power itself, the limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. However, the federal district court in *Staebler v. Carter* commented that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. §5503 ... might also be invalid."<sup>158</sup> Additional constitutional concerns might arise from the application of these statutory restrictions to judicial recess appointees,<sup>159</sup> though Attorneys General have consistently advised Presidents of the applicability of the pay restriction statutes without raising constitutional concerns.<sup>160</sup>

The concerns raised in *Staebler*, which questioned the constitutionality of the restrictions with regard to recess appointments, coupled with the broad interpretation of the Recess Appointments Clause in *Noel Canning*, could be seen as arguably giving rise to an expansive interpretation of the President's recess appointment power. As discussed above, the Court in *Noel Canning* held that the President may make a recess appointment during any inter- or intra-session recess of "sufficient length," that is generally 10 days or longer.<sup>161</sup> Upholding the broader interpretation of recess appointments, together with the potential constitutional invalidity of the statutory restrictions, could lead to a dynamic whereby the President would have a legal and constitutional basis upon which to bypass the Senate confirmation process in practice. Under these circumstances, the President could be empowered to make successive recess appointments with the practical effect of enabling an appointee to serve throughout the course of an Administration without submitting to the Senate confirmation process.<sup>162</sup> Nonetheless, the recognition that the Senate's *pro forma* sessions are sessions for purposes of the Clause may likely provide an

<sup>157</sup> The GAO has relied upon this dynamic in determining that the voluntary services prohibition does not preclude the service of a recess appointee falling within the pay proscriptions codified at 5 U.S.C. §5503, even in instances where the compensation of the position in question is fixed by statute. Addressing the recess appointment of Sam Fox to serve as Ambassador to Belgium under circumstances triggering a §5503 payment prohibition, the GAO noted that while the rate of compensation for such a position is set by statute, "[t]he Department of State may allow him to serve without compensation, despite the voluntary services prohibition of the Antideficiency Act, because Mr. Fox's service would not result in a coercive deficiency or a subsequent claim against the Government, which was the original justification behind the prohibition. Mr. Fox could not make such a claim because of the statutory bar of section 5503." GAO, *Recess Appointment of Sam Fox*, B-309301 at 7-8 (Jun. 8, 2007). The GAO further stated that "an alternative interpretation that would directly curtail the President's power to make a recess appointment to Mr. Fox would raise serious constitutional concerns." *Id.* at 8.

<sup>158</sup> 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

<sup>159</sup> See CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead at 11.

<sup>160</sup> See, e.g., Constitutional Law-Article II, Section 2, Clause 3- Recess Appointments- Compensation (5 U.S.C. §5503), 3 Op. Off. Legal Counsel 314 (1979); Reimbursement of Expenses Under 5 U.S.C. §5503(a), 22 Op. Off. Legal Counsel 29 (1998).

<sup>161</sup> *Noel Canning*, 134 S. Ct. at 2577.

<sup>162</sup> For example, if the President, in his first year of office, could make a recess appointment during an intra-session recess of the Senate that occurs early in the year, such appointment would not expire until the end of the Senate's next annual session. Under this scenario, a recess appointee would serve nearly two years in office. If the President makes a successive recess appointment under the same circumstances, the appointee could end up serving another two years without ever undergoing Senate confirmation.

effective counterweight against the possibility that the President would be able to engage in such conduct.

## Authority and Tenure of Recess Appointees

As a fundamental matter, a recess appointee possesses the same legal authority as a confirmed appointee.<sup>163</sup> The commission of a recess appointee expires “at the End of [the Senate’s] next Session,” whereas the service of a confirmed appointee continues until the end of the statutory term or at the pleasure of the President, subject to the requirements laid out by Congress in creating the position.<sup>164</sup> When the Senate reconvenes after a recess during the same session, this is considered a continuation of the session and is not regarded as the “next Session” within the meaning of the Clause.<sup>165</sup> The Supreme Court’s decision in *Noel Canning* did not alter this understanding of the Clause.<sup>166</sup>

### Comparison of Length of Recess Appointments

A comparison of two recess appointments during the 108<sup>th</sup> Congress provides an illustration of an arguably extreme duration that can result from the timing of appointments. During the inter-session recess between the first and second sessions of the 108<sup>th</sup> Congress, President George W. Bush appointed Charles W. Pickering to a court of appeals judgeship. Several weeks later, during the first intra-session recess of the second session of the 108<sup>th</sup> Congress, President Bush appointed William H. Pryor Jr. to a judgeship on another court of appeals. Pickering’s commission expired after less than 11 months, at the end of the second session of the 108<sup>th</sup> Congress, whereas Pryor’s commission would have expired after approximately 22 months, at the end of the first session of the 109<sup>th</sup> Congress. Ultimately, Pryor was confirmed by the Senate before the end of his recess appointment commission. In this instance, it is noteworthy that although the Pickering and Pryor recess appointments were only several weeks apart, Pryor would be able to serve nearly twice as long because his appointment was made during an intra-session recess.

In practice, this means that a recess appointment could last for almost two years. (See textbox.) On the one hand, if an individual receives an intersession recess appointment—that is, an appointment between sessions of the same or successive Congresses—such individual could serve until the end of the following session. On the other hand, if the President makes an intrasession recess appointment—that is, an appointment during a recess of the Senate in the

<sup>163</sup> See, e.g., *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996) (recess appointment is not an “inferior” procedure to appointment with Senate confirmation); Designation of Acting Solicitor Labor, 2002 WL 34461082 (2002) (distinguishing between an temporary designation under the Vacancies Reform Act and a recess appointment—“An acting official does not hold the office, but only ‘perform[s] the functions and duties of the office.’ [citation omitted] He is not ‘appointed’ to the office but only ‘direct[ed]’ or authorized to discharge its functions and duties, and thus he receives the pay of his permanent position, not of the office in which he acts. [citation omitted] A recess appointee, on the other hand, is appointed by one of the methods specified in the Constitution itself, [citation omitted]; he holds the office; and he receives the pay.”). See also CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue at 4.

<sup>164</sup> For an exchange on the issue of whether the Senate could alter its recess practices to bring about earlier termination of recess appointments, see Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 Nw. U. L. Rev. Colloquy 82 (2007); Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 Nw. U. L. Rev. Colloquy 88 (2007); Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 101 Nw. U. L. Rev. Colloquy 94 (2007); Brian C. Kalt, *Keeping Tillman Adjournments in their Place: A Rejoinder to Seth Barrett Tillman*, 101 Nw. U. L. Rev. Colloquy 108 (2007).

<sup>165</sup> *Recess Appointments*, 41 Op. Att’y Gen. 463, 470-471 (1960). See also 28 Comp. Gen. 121 (1948).

<sup>166</sup> Justice Scalia, in his concurring opinion, pointed to this text in his critique of the majority’s interpretation of the phrase “the Recess of the Senate.” See *Noel Canning*, 134 S. Ct. at 2597 (Scalia, J., concurring) and *supra* note 87 and accompanying text.

middle of a session, like the traditional August recess—that appointment would expire at the end of the second session. In the latter case, the duration of the appointment will include the rest of the session in progress plus the full length of the session that follows. The President may remove a recess appointee before the expiration of his term, either by outright removal (assuming he otherwise has discretionary removal authority with respect to the office) or by having another nominee confirmed by the Senate.<sup>167</sup>

## What Is the Tenure of a Recess Appointee Who is Also the Nominee?

Oftentimes an individual given a recess appointment is also the President’s nominee to the office. A question may arise as to how long a recess appointee may serve after being confirmed by the Senate to an office that has a fixed statutory term. Such tenure would appear to depend on the particular statutory language regarding the terms of office and filling of vacancies, rather than any constitutional limitations. For example, Attorney General Homer Cummings in 1933 opined that the new commission for the full statutory term relates back to the date on which the person first assumed office by means of the recess appointment.<sup>168</sup> In this instance, the nomination submitted by the President and confirmed by the Senate stated that the individual was being nominated to serve as Surgeon General “for the period of four years beginning June 1, 1931,” which was the date the recess appointment commenced.<sup>169</sup> While recognizing that earlier Attorneys General opinions (discussed below) had concluded the opposite, Attorney General Cummings remarked that the “substantial question” is “what did Congress intend?” The Attorney General concluded that his interpretation for this position was supported by the fact that the “War Department, the President, and the Senate have ... acted upon a view that the prescribed ‘period of four years’ is four years of service, notwithstanding that a particular appointee may serve his four years partly under one appointment and partly under another,” as well as evidence of this interpretation with respect to other appointments.<sup>170</sup>

On the other hand, other Attorneys General legal opinions have concluded that the term of office for a confirmed appointee should not include any previous period of service under a recess appointment. These conclusions relied on the Supreme Court’s 1824 decision in *United States v. Kirkpatrick*, where the Court held that a new appointment made by the President, by and with the advice and consent of the Senate, once accepted by the individual “was a virtual superseding and surrender of the former commission,” which was a recess appointment made pursuant to the statute at issue (as opposed to the President’s constitutional recess appointment power).<sup>171</sup>

<sup>167</sup> Recess Appointment, 41 Op. Att’y Gen. 463, 471 (1960) (“... the recess commissions granted during the present recess of the Senate will terminate at the end of the first session of the 87<sup>th</sup> Congress. Officers who serve at your pleasure, of course, may be removed by you at any time.”).

<sup>168</sup> Term of Office of Major General Patterson as Surgeon General - Recess Appointment, 37 Op. Att’y Gen. 282 (1933). See also 9 Comp. Gen. 190 (1929).

<sup>169</sup> *Id.* at 284. The Senate had confirmed and a regular commission was issued to the individual on December 22, 1931.

<sup>170</sup> *Id.* at 284, 287. Other appointments where the individual’s term of office related back to the date on which he was recess appointed rather than confirmed include: “A member of the Tariff Commission, ‘for a term of twelve years from September 8, 1928, to which office he was appointed during the last recess of the Senate’; a member of the Public Utilities Commission of the District of Columbia, ‘for a term of three years from July 1, 1928, to which office he was appointed during the last recess of the Senate,’; a member of the Federal Farm Loan Board, ‘for a term of eight years, expiring August 6, 1936 (reappointment).’” See also 12 Comp. Gen. 641, 645 (1933).

<sup>171</sup> *United States v. Kirkpatrick*, 22 U.S. 720, 734 (1824).

According to the Court, “the commissions are not only different in date, and given under different authorities ..., but they are of different natures. The first is limited in its duration to a specified period [i.e., to the end of the Senate’s next session]; the second is unlimited in duration, and during the pleasure of the President.”<sup>172</sup>

Attorney General John Berrien in 1830 later applied this rationale to other officers who had been appointed during a recess and subsequently confirmed by the Senate. He stated:

[I]t seems very clear that an appointment of a navy agent, made in the case of a vacancy occurring during the recess, is in the exercise of the *constitutional* power of the President ...; and that the constitutional limitation of such appointment is to the end of the succeeding session of Congress, unless it be sooner determined by the acceptance of a new commission under an appointment made by and with the advice and consent of the Senate. In such a case, therefore, I apprehend that the four years prescribed by law as the official term of the appointee, must commence to run from the date of the new commission...” (emphasis in the original)<sup>173</sup>

Moreover, even if a recess appointee who is also the President’s nominee is rejected by the Senate, this does not constitute a removal. The rejected nominee may still hold office pursuant to his recess appointment under the Constitution until the termination of the session.<sup>174</sup>

## May the President Make Successive Recess Appointments?

Upon the expiration of the constitutional term of a recess appointee, a new recess appointment, either of the same or another individual, may be made.<sup>175</sup> Successive recess appointments of the same person, however, may implicate certain statutory pay restrictions, discussed above. While there are no constitutional limits on how many times the President may exercise the recess appointment authority with a particular individual, notably, the court in *Staebler v. Carter* stated that a President “could probably not consistently with the principle of checks and balances grant a recess appointment to one rejected for the particular position by a vote of the Senate.”<sup>176</sup>

<sup>172</sup> *Id.*

<sup>173</sup> Navy Agents- Appointments During Recess, 2 Op. Att’y Gen. 333, 335 (1830). See also Commissions Granted During Recess of the Senate, 2 Op. Att’y Gen. 336, 337 (1830); Case of Chief Constructor Easby, 16 Op. Att’y Gen. 656 (1880) (the Solicitor General, on behalf of the Attorney General, concluded that “[t]he term during which [the Chief Constructor] served under the temporary [recess] appointment was, by law, a different term from that which commenced in April [15,] 1878 [the date of the Senate’s confirmation].”).

<sup>174</sup> See *In re: Marshalship*, 20 Fed. 379 (D. Ala. 1884); Commissions Granted During the Recess of the Senate, 2 Op. Att’y Gen. 336 (1830); 21 Comp. Gen. 789 (1915) (Comptroller of the Treasury). Also, note that a pay restriction may be triggered if the rejected nominee were appointed presumably to a successive recess appointment. It is unclear if this provision affects incumbent recess appointees whose nominations are rejected. As discussed above, the appropriations rider would prevent payment to an individual who is in a position “for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.” 5 U.S.C. note preceding §5501. See *supra* note 87 and accompanying text.

<sup>175</sup> Power of the President to Fill Vacancies, 2 Op. Att’y Gen. 525 (1832); Power of the President to Fill Vacancies, 3 Op. Att’y Gen. 673 (1841); Power of the President to Appoint to Office During Recess of the Senate, 4 Op. Att’y Gen. 523 (1846); President’s Power to Appoint to Office, 11 Op. Att’y Gen. 179 (1865). See also 28 Comp. Gen. 30, 38 (1948); 28 Comp. Gen. 121, 129 (1948).

<sup>176</sup> 464 F. Supp. at 601, n.41. The various statutory provisions, discussed above, that either prevent payment to a person serving in a position for which he has already been rejected by the Senate, or alternatively, permit payment to a person serving in a position so long as he has not been rejected by the Senate seem to be indicative of Congress’s intent that the President should not grant a recess appointment to one who has been rejected by the Senate, as such action may be (continued...)



## When Is There a Vacancy If There is A Statutory Holdover Provision?

A vacancy must exist before the President can exercise his recess appointment authority.<sup>177</sup> While this observation may seem self-evident, what constitutes a “vacancy” for the purposes of the Recess Appointments Clause may be complicated by the presence of a “holdover” provision that regularly accompanies fixed term positions.<sup>178</sup> The Department of Justice has generally held the view that as a matter of constitutional law, a vacancy for purposes of the Recess Appointments Clause arises when an appointment for a fixed term expires and the officer continues serving under a holdover provision.<sup>179</sup> Judicial interpretation of whether a vacancy exists in light of a holdover provision has been uneven depending on the statute’s language.

### Judicial Interpretations

In *Staebler v. Carter*, the district court held that there was a vacancy for purposes of the Recess Appointments Clause when an incumbent commissioner at the Federal Election Commission (FEC) continued to exercise his authority pursuant to a holdover provision.<sup>180</sup> The Federal Election Campaign Act’s holdover provision stated: “A member of the Commission may serve ... after the expiration of his own term until his successor has taken office.”<sup>181</sup> As such, a member could continue to serve indefinitely until replaced by a successor. The court in *Staebler* upheld a recess appointment to the FEC that was still occupied by a holdover FEC commissioner, based on a determination that the expiration of the holdover commissioner’s formal term created an immediate and ongoing vacancy.<sup>182</sup> The plaintiff argued that the Recess Appointments Clause was designed to operate only when no person is available to occupy a particular office. Rejecting this argument, the court stated that it was not persuaded this was the intention of the Framers because under such an interpretation, “the President would be prohibited from making a recess

(...continued)

constitutionally suspect.

<sup>177</sup> See 3 Op. Off. Legal Counsel, *supra* note footnote 160, at 317 (“A recess appointment presupposes the existence of a vacancy. If there is an incumbent in the office the recess appointment in itself does not effect a removal of the incumbent so as to create a vacancy. Before the President can exercise his recess appointment power in such a case he must exercise his constitutional removal power to the extent it is available, or, if not available, the incumbent must resign” (citations omitted)).

<sup>178</sup> A statutory holdover provision provides for an officer appointed to a fixed term to continue to serve in the office at the expiration of the term for which he or she was appointed. Sometimes this period is opened ended, defined as continuing until a successor is appointed. Other times, this period is limited and continues until either a successor is appointed or a specific period of time has expired.

<sup>179</sup> See, e.g., Appointments to the Board of the Legal Services Corporation, 2005 WL 6086110 (2005); The Inapplicability of the Federal Vacancies Reform Act’s Reporting Obligations for PAS Officers Serving Under Statutory Holdover Provisions, 1999 WL 33232455 (1999); Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute, 18 Op. Off. Legal Counsel 123 (1994); Legal Services Corporation—Effect of Statutory Holdover Provisions, 2 Op. Off. Legal Counsel 398 (1978).

<sup>180</sup> *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979).

<sup>181</sup> *Id.* at 588 (citing FEC statute 2 U.S.C. §437(a)(2) (1976)).

<sup>182</sup> *Id.* at 589. “The plain implication of that language is that a vacancy does indeed occur as a result of and contemporaneously with the expiration of the term of office not some subsequent time.” *Id.* at 589-90. Furthermore, the court found that the term “vacancy” was somewhat defined by the statute, which mandates that “a ‘vacancy occurring other than by expiration of a term of office’ shall be filled only for the remainder of the unexpired term.” *Id.*

appointment when a term of office has expired, as long as someone with a permissive claim to the office is still serving.”<sup>183</sup> As part of its reasoning for finding that a vacancy existed once the statutory term of office expired, the court stated: “In the absence of clearly-expressed legislative intent, the [c]ourt will not speculate that the Congress sought to achieve a result which would be both unusual and probably beyond its constitutional power.”<sup>184</sup>

Conversely, the district court, 14 years later, in *Mackie v. Clinton* held that there was no vacancy for purposes of the Recess Appointments Clause when interpreting the holdover provision for a member of the Board of Governors of the United States Postal Service.<sup>185</sup> The court declared that whether a vacancy exists for purposes of the Clause depends on the wording and structure of the particular holdover provision. Here, the relevant holdover provision states that a “Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.”<sup>186</sup> In the court’s view, this holdover provision, unlike that in *Staebler*, creates a “prospective vacancy,”<sup>187</sup> rather than an immediate vacancy, such that the Governor holding over would continue to occupy the office for one year past the end of his term unless he died, resigned, was lawfully removed, or some other successor qualified.<sup>188</sup> The *Mackie* court further emphasized that unlike the indefinite holdover period in the Federal Election Campaign Act, the one-year holdover period prevented this board from being susceptible to the concerns expressed by the court in *Staebler*.

Shortly after the decision in *Mackie*, the court reached a similar conclusion in *Wilkinson v. Legal Servs. Corp.*<sup>189</sup> It held that there was no vacancy upon the expiration of a term of office of one of the Directors at the Legal Services Corporation (LSC). Rather, a vacancy is created upon the “resignation, death or removal of one of the sitting Directors.”<sup>190</sup> However, *Wilkinson* distinguished itself from *Staebler* and *Mackie* in finding the holdover provision in the LSC Act mandatory: “Each member of the Board *shall* continue to serve until the successor to such member has been appointed and qualified” (emphasis added). Although the court found that the LSC Act provided no definition of “vacancy” as in *Staebler* (see note 182), nor any time limit that a holdover may remain in office as in *Mackie*, it held that “the plain meaning of this [holdover] language is that each member of the Board remains a Director after that person’s term has expired until the new Director has been ‘appointed’ by the President and ‘qualified.’”<sup>191</sup> The *Wilkinson* court concluded that the holdover provision did not infringe upon the President’s recess appointment power; “it merely defined when ‘vacancies’ exist on the LSC Board sufficient to trigger application of the Recess Appointments Clause.”<sup>192</sup> The decisions in *Staebler*, *Mackie*, and *Wilkinson* demonstrate that the issue of whether a holdover provision constitutes a vacancy for recess appointment purposes may depend upon the specific language contained therein.

<sup>183</sup> *Id.* at 597.

<sup>184</sup> *Id.* at 591. See also *McCalpin v. Dana*, No. 82-542 (D.D.C. October 5, 1982) (the President could displace holdover Directors by making recess appointment), *appeal dismissed as moot*, *McCalpin v. Durant*, 766 F.2d 535 (D.D.C. 1994).

<sup>185</sup> *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993).

<sup>186</sup> 39 U.S.C. §202(b).

<sup>187</sup> *Mackie*, 827 F. Supp. at 58.

<sup>188</sup> *Id.*

<sup>189</sup> 865 F. Supp. 891 (D.D.C. 1994), *rev’d on other grounds*, *Wilkinson v. Legal Servs. Corp.*, 80 F.3d 535 (D.C. Cir. 1996).

<sup>190</sup> *Id.* at 902.

<sup>191</sup> *Id.* at 900-01.

<sup>192</sup> *Id.* at 902.

## Conclusion

While generally perceived as a straightforward, pragmatic provision designed to foster administrative continuity, the history of the Recess Appointments Clause shows that it has been the source of recurrent controversy, beginning with the Administration of George Washington, and continuing to the current Administration of Barack Obama. The application of the Recess Appointments Clause had been left to the interpretations of the executive and legislative branches, with differing and inconsistent opinions regarding the scope of the Clause for almost 100 years before an apparent general acceptance of a broad interpretation.

In 2014, the Supreme Court examined the scope of the recess appointment power for the first time in *NLRB v. Noel Canning*. The Court held that the President may make recess appointments to any existing vacancy during an inter- or intra-session recess of the Senate of “sufficient length.” The Court held that a recess of the Senate must be 10 days or longer because a recess between 3 and 9 days is “presumptively too short.” The use of the word “presumptively” left open the possibility for exigent circumstances, not including political disagreement between the branches, during which the President may have need to make a recess appointment when the Senate has been in recess for less than 10 days. The decision does not appear to have affected other judicial interpretations of provisions that are related to recess appointees. However, the future impact of the *Noel Canning* decision on the actions of both the President and the Senate remains to be seen and may very well be dependent upon the political parties that control the executive and legislative branches.

## Author Contact Information

Vivian S. Chu  
Legislative Attorney  
vchu@crs.loc.gov, 7-4576

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