



Recess Appointments*

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In light of the significant number of vacant positions in the Executive Branch, and the fact that Senate confirmation of controversial nominees may be blocked, the President may desire to use his power to make “recess appointments” to fill vacancies. This paper will explain how this process works, and the implications of making such a recess appointment.

The authority for the President to make recess appointments is found in Article II of the Constitution, which states that the President “shall have the 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.”

Definition of Vacancy

The Constitution limits the power to make recess appoints to “vacancies that *may happen*” during the recess of the Senate. The most obvious reading of this Constitutional provision is that it empowers the President to fill a vacancy that occurs during a recess. In other words, a recess appointment could not be made if the recess occurs while the Senate is in session, even if the recess continues after the Senate adjourns. In fact, this was the interpretation given to this provision by the Justice Department until 1823. However, in 1823 the Attorney General reversed this traditional view, and determined that the President can fill any vacancy that exists during a recess, including vacancies that pre-dated the beginning of the recess. This view was judicially affirmed in 1880. Thus, as presently interpreted, the President can make a recess appointment for a position such as the Director of the Bureau of Consumer Financial Protection, even though the vacancy began while the Senate was meeting.

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Definition of Recess

The next question to be resolved is what is meant by a “recess of the Senate?” The first opinion on this question was issued in 1901, when Attorney General Knox stated that the term “recess” only referred to adjournments between sessions of Congress. A Senate recess during a Congressional session, for example, adjournment during the month of August, was not sufficient for a recess appointment under this opinion. However, this view was modified in 1921, when the Attorney General determined that a recess appointment could be made during a 29-day break in the session. Following opinions have narrowed the necessary length of the recess, and at the present time, the Department of Justice has taken the position that any recess in excess of three days is sufficient for a recess appointment.

While there is no precedent for a recess appointment during a four-day adjournment, there is precedent for appointments as short as 10 days. For example, on February 20, 2004, President Bush appointed William Pryor to a judgeship during a 10-day recess, and when challenged, the Court of Appeals upheld the appointment. President Clinton made five recess appointments during an 11-day recess in January 1996. Therefore, as presently interpreted, the President could make an appointment during a short Senate recess, possibly as short as three days, but certainly as short as 10 days.

Concurrence of House Needed for Senate Recess

The Constitution provides that neither the House nor the Senate may adjourn for more than three days without the consent of the other body. Thus, periods of recess are typically authorized through a concurrent resolution agreed to by both Houses. The Senate also goes into “intersession recess” during the period between sessions of Congress. Recess appointments may be made either during a recess during a session or in the intersession period.

In order to prevent recess appointments, the Senate or House may meet in “pro forma” session during which no actual business is conducted. As long as either body is meeting, the Senate could not adjourn for more than 3 days.

Length of a Recess Appointment

A person who has received a recess appointment may serve until the end of the next session of the Senate. For example, a recess appointment given in January 2011 would expire at the end of the second session of the Senate in late 2012. A recess appointment made in 2012 will expire at the end of the next session of the Senate in late 2013. Thus, a recess appointment may span more than one Congress.

A recess appointment will terminate earlier if someone (including the recess appointee) is confirmed by the Senate for the position in question.

Limitations on Compensation

By statute, Congress has provided that if a recess appointment is made with respect to a vacancy that exists during a period in which the Senate is in session, the appointee may not be compensated with Treasury funds until confirmed by the Senate. However, the limitation on pay does not apply if the position became vacant within 30 days of the end of the session. A recess appointee may also be paid with Treasury funds if a nomination for the office was pending when the Senate went into recess, and the nominee had not received a recess appointment during the prior recess. Finally, a recess appointee may be paid with Treasury funds if the Senate had rejected another person for the position within 30 days of the end of the session. If any of these three exceptions apply, the President must submit a nomination for the position within 40 days after the beginning of the next session, or the compensation will end. This restriction does not apply with respect to officers who are not compensated with Treasury funds, such as the Comptroller of the Currency, the Chair of the FDIC, and the Director of the Bureau of Consumer Financial Protection.

If a person receives a recess appointment and is also nominated for the position, and the nomination is rejected by the Senate, the appointee may continue to serve until the end of the next session of the Senate, but compensation is not permitted through appropriated funds. However, neither of these limitations apply to officers who are compensated through funds that are non-appropriated funds, such as the Comptroller of the Currency, the Chair of the FDIC, and the Director of the Bureau of Consumer Financial Protection.

Readers who would like more detailed information about recess appointments may want to consult two C.R.S. reports on this subject, RS21308 (March 12, 2008) and RL33009 (July 26, 2005).

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