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Recess Appointments: Frequently Asked Questions

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Summary

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

What Is the Purpose of a Recess Appointment?

The Constitution states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session" (Article 2, Section 2, Clause 3). The records of debate at the Constitutional Convention and the Federalist Papers provide little evidence of the framers' intentions in the recess appointment clause. Opinions by later Attorneys General, however, suggested that the clause was meant to allow the President to maintain the continuity of administrative government through the temporary filling of offices during periods when the Senate was not in session, at which time his nominees could not be considered or confirmed.[1] This interpretation is bolstered by the fact that both Houses of Congress had relatively short sessions and long recesses during the early years of the Republic. In fact, until the beginning of the 20th century, Congress was, on average, in session less than half the year. Throughout the history of the republic, Presidents have also sometimes used the recess appointment power for political reasons. For example,

[1] An opinion by Attorney General William Wirt in 1823 concerning the meaning of the word "happen" in the clause. In part, he stated, "The substantial purpose of the constitution was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed." 1 Op. A.G. at 632.

recess appointments enable the President to temporarily install an appointee who probably would not be confirmed by the Senate.

How Often Have Recent Presidents Made Recess Appointments?

President William J. Clinton made 139 recess appointments during his eight years in office, 95 to full-time positions. During his first six years in office, President George W. Bush made 167 recess appointments, of which 101 were to full-time positions.[2]

How Long Does a Recess Appointment Last?

A recess appointment expires at the end of the Senate's next session or when an individual (either the recess appointee or someone else) is nominated, confirmed, and permanently appointed to the position, whichever occurs first. In practice, this means that a recess appointment may last for up to nearly two years. If the President makes a recess appointment between sessions or between Congresses, that appointment will expire at the end of the following session. If he makes the appointment during a recess in the middle of a session, that appointment also will expire at the end of the following session. In this case, the duration of the appointment will include the balance of the session in progress plus the full length of the session that follows.

A comparison of two recess appointments by President George W. Bush illustrates the difference in recess appointment duration that results from the timing of an appointment. On January 16, 2004, during the recess between the first and second sessions of the 108th Congress, President Bush recess-appointed Charles W. Pickering to the U.S. Court of Appeals for the Fifth Circuit. Pickering's appointment expired on December 8, 2004, at the end of the second session of the 108th Congress. Several weeks after the Pickering appointment, on February 20, 2004, President Bush recess-appointed William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit. This recess appointment took place during a 10-day adjournment of the Senate within the second session of the 108th Congress. Consequently, Pryor's recess appointment would have expired at the end of the first session of the 109th Congress, on December 21, 2005.[3] Although the Pickering and Pryor recess appointments were only several weeks apart, Pryor could have served a year longer because his appointment was made during an intrasession recess.

The meaning of the phrase "End of their [the Senate's] next session" in the Constitution's recess appointment clause is not precisely defined. A Senate session is usually considered to end at the time of *sine die* adjournment. The Senate could, however, be called back into session after *sine die* adjournment if certain conditions have been included in the adjournment resolution. Nonetheless, *sine die* adjournment is

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[2] For more, see CRS Report RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-January 4, 2007*, by Henry B. Hogue and Maureen Bearden.

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

generally considered to be the end of the Senate's session for purposes of the expiration of a recess appointment.[4]

For the Purposes of Recess Appointments, What Constitutes a Vacancy?

The wording of the constitutional provision allowing recess appointments leads to a question about which positions could actually be filled that way. The question revolves around the phrase "Vacancies that may happen during the Recess of the Senate." Does "happen" mean "happen to exist" or "happen to occur"? The first meaning would allow the President to make recess appointments to any position that becomes vacant prior to the recess and continues to be vacant during the recess, as well as positions that become vacant during the recess. The second meaning would allow recess appointments only to positions that become vacant during the recess. Although this question was a source of controversy in the early nineteenth century, Attorneys General and courts have now long supported the first, broader interpretation of the phrase.

A second question regarding the meaning of "Vacancies" arises in connection with recess appointments to fixed term positions, such as those often associated with regulatory boards and commissions. In order to promote continuity of operations, Congress has often included "holdover" provisions in the statutory language creating such positions. The question then arises whether or not a position is vacant, for the purposes of a recess appointment, if an individual is continuing to serve, under a holdover provision, past the end of his or her term. The courts have varied in their rulings on this matter, and it has not been settled definitively by an appellate court. Based on decisions to date, however, the answer appears to hinge on the specific language of the holdover provision. For example, if the language is mandatory (the officeholder "*shall* continue to serve after the expiration of his term"), rather than permissive ("*may* continue to serve"), the position has been seen by the courts as not vacant, and therefore not available for a recess appointment.[5] When the provision includes a specific time limit for the holdover, such as one year, the position has also been seen as not vacant.[6]

What Is the Difference Between the Authority of a Confirmed Appointee and That of a Recess Appointee?

Both carry the same legal authority. The principal difference is the potential length of the appointment. The recess appointment is temporary (see above) and the confirmed appointment continues until the end of the term or at the pleasure of the President, depending on the statutory provisions creating the position.

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[4] See, for example, 41 Op. A.G. 463 (1960), which, in the context of a discussion of the expiration of recess appointments, refers to *sine die* adjournment as the end of the Senate's session.

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

[6] See *Mackie v. Clinton*, 827 F. Supp. 56 (1993).

Does the Recess Appointee Receive the Same Rate of Pay as the Person Vacating the Position?

Yes. However, two provisions of law may prevent a recess appointee from being paid under certain circumstances. (See below, "Are there any legal constraints on the President's recess appointment power?")

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

The Constitution does not specify the length of time that the Senate must be in recess before the President may make a recess appointment. Over the last century, as shorter recesses have become more commonplace, Attorneys General and the Office of Legal Counsel have offered differing views on this issue. Most recently, in 1993, a Department of Justice brief implied that the President may make a recess appointment during a recess of more than three days.[7] Appointments made during short recesses (less than 30 days), however, have sometimes aroused controversy, and they may involve a political cost for the President. Controversy has been particularly acute in instances where Senators perceive that the President is using the recess appointment process to circumvent the confirmation process for a nominee who is opposed in the Senate.

Are There Any Legal Constraints on the President's Recess Appointment Power?

There is no qualification to the President's "Power to fill up all Vacancies..." in the constitutional provision. Neither is there a statutory constraint on this power. There are, however, two provisions of law that may prevent a recess appointee from being paid. Under 5 U.S.C. 5503(a), if the position to which the President makes a recess appointment fell vacant while the Senate was in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. The salary prohibition does not apply: (1) if the vacancy arose within 30 days before the end of the session; (2) if a nomination for the office (other than the nomination of someone given a recess appointment during the preceding recess) was pending when the Senate recessed; or (3) if a nomination was rejected within 30 days before the end of the session and another individual was given the recess appointment. A recess appointment falling under any one of these three exceptions must be followed by a nomination to the position not later than 40 days after the beginning of the next session of the Senate.[8] For this reason, when a recess appointment is made, the President generally submits a new nomination to the position even when an old nomination is pending. In addition, although recess appointees whose nominations to a full term are subsequently rejected by the Senate may continue to serve until the end of their recess appointment, a provision routinely included in an appropriations act may prevent them from being paid after their rejection. (See below,

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[7] *Mackie v. Clinton*, Civil Action 93-0032-LFO, July 2, 1993.

[8] Congress placed limits on payments to recess appointees as far back as 1863. The current provisions date from 1940 (ch. 580, 54 Stat. 751, 5 U.S.C. 56, revised, and recodified at 5 U.S.C. 5503, by P.L. 89-554, 80 Stat. 475). For a legal history and overview of recess appointments, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by T.J. Halstead.

"What happens if the nomination of someone holding a recess appointment is rejected by the Senate?")

Is There Any Difference Between Recess Appointments Made Between Sessions and Those Made During a Recess Within a Session?

Recent Presidents have made both *intersession* (between sessions or Congresses) and *intrasession* (during a recess within a session) recess appointments. Intrasession recess appointments were unusual, however, prior to the 1940s. Intrasession recess appointments have sometimes provoked controversy in the Senate, and there is also an academic literature that has drawn their legitimacy into question.[9] Intrasession recess appointments are usually of longer duration than intersession recess appointments. (See above, "How long does a recess appointment last?")

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

The President is not required to nominate the recess appointee to the appointed position. The President will sometimes use a recess appointment to fill a position while a different nominee to the same position is going through the confirmation process in the Senate. Under certain conditions, however, a provision of law may prevent a recess appointee from being paid from the Treasury if he or she has not been nominated to the position. (See above, "Are there any legal constraints on the President's recess appointment power?")

What Happens If the Nomination of Someone Holding a Recess Appointment Is Rejected by the Senate?

Rejection by the Senate does not end the recess appointment. Payment to the appointee may be prevented, however, by a recurring provision of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act. The provision reads, "No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person."[10] This provision has been part of this annual funding activity for at least 50 years. As a practical matter, nominations are rarely rejected by a vote of the full Senate.

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[9] Regarding Senate controversy, see Sen. George Mitchell, "The Senate's Constitutional Authority to Advise and Consent to the Appointment of Federal Officers," *Congressional Record*, vol. 139, July 1, 1993, p. 15266; and Senate Legal Council, "Memorandum of United States Senate as Amicus Curiae in Support of Plantiffs' Motion, and in Opposition to Defendants' Motions, for Summary Judgment on Count Two," U.S. District Court for the District of Columbia, *Mackie v. Clinton*, C.A. No. 93-0032-LFO, *Congressional Record*, vol. 139, July 1, 1993, pp. 15267-15274. For academic literature, see, for example, Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?" *Michigan Law Review*, vol. 92, June 1994.

[10] P.L. 109-115, Div. A, Sec. 809; 119 Stat. 2497.

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

The President may make successive recess appointments of the same or a different individual to a position. Payment from the Treasury to the appointee may be limited, however, under 5 U.S.C. 5503. (See also above, "Are there any legal constraints on the President's recess appointment power?") Subsection 5503(a) provides, in part, that:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, 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, until the appointee has been confirmed by the Senate.

The provision allows three exemptions to this pay prohibition, two of which would not apply in this situation. Under the remaining exemption, "if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent," the prohibition would not apply.[11] The clause "other than the nomination of an individual appointed during the preceding recess of the Senate" probably would prevent payment in the case of most successive recess appointments. This interpretation has been supported by the Office of Legal Counsel (OLC), Department of Justice, which stated in 1991, "Although its language is far from clear, section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees."[12]

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

Presidents have long made recess appointments to the federal judiciary. In recent years, however, recess appointments of federal judges have been unusual and controversial. Over the past 20 years, there have been only three recess appointments to fill Article III judgeships. President William J. Clinton named Roger L. Gregory to the Fourth Circuit on December 27, 2000, as a recess appointment, a step that was met by some opposition in the Senate. Ultimately, Gregory was re-nominated by President George W. Bush and confirmed by the Senate. On January 16, 2004, President George W. Bush recess-appointed Charles W. Pickering to the U.S. Court of Appeals for the Fifth Circuit. Pickering's appointment expired on December 8, 2004, at the end of the second session of the 108th Congress, and he retired.[13] On February 20, 2004, President Bush named William H. Pryor to the Eleventh Circuit Court of Appeals. Pryor was subsequently confirmed by the Senate.[14]

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[11] 5 U.S.C. 5503(a)(2).

[12] 15 Op. O.L.C. 93 (1991). See also 6 Op. O.L.C. 585 (1982); 41 Op. A.G. 463 (1960).

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

[14] For more, see CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher; and CRS Report RS22039, *Federal Recess Judges*, by Louis Fisher.