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Recess Appointments: A Legal Overview

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Recess Appointments: A Legal Overview

Summary

Article II of the Constitution provides that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, 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.” As a supplement to this authority, the Constitution further provides 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.” The Recess Appointments Clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function.

In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might have difficulty securing Senate confirmation. Coupled with the ambiguities inherent in interpreting the Clause, the President’s use of the recess appointment power in such a fashion has given rise to significant political and legal controversy since the beginning of the Republic. This report provides an overview of the Clause, with a focus on its historical application and interpretation. This report is a companion piece to CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T.J. Halstead (2005), which focuses specifically on the application and interpretation of the Clause in the judicial context.

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Recess Appointments: A Legal Overview

Introduction

The Constitution establishes that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, 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.”¹ As a corollary to this general maxim, the Constitution provides further 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.”² The Recess Appointments Clause was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms.³ In Federalist No. 67, Alexander Hamilton refers 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.”⁴ During the ratification debates in Pennsylvania, Thomas McKean noted with approval the sharing of the appointive power with the Senate and stated 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 to fill up all vacancies that may happen during their recess; the commissions, to expire at the end of the next session.”⁵ Likewise, during the ratification debates in North Carolina, Archibald Maclaine stated:

It has been objected...that the power of appointing officers was something like a monarchical power. 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 this business, or else it will be neglected; and such neglect may occasion public inconveniences.⁶

¹ 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 department heads. *Id.*

² U.S. Const., Art. II, § 2, cl. 3.

³ Louis Fisher, *Recess Appointments of Federal Judges*, Congressional Research Service, Rep. No. CRS Report RL31112 at 1 (2001).

⁴ *The Federalist*, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

⁵ *2 The Documentary History of the Ratification of the Constitution* 537 (Merrill Jensen, ed. 1976).

⁶ Edward A Hartnett, *Recess Appointments of Article III Judges: Three Constitutional* (continued...)

In light of its express provisions and these pronouncements, it is generally accepted that the Clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function.⁷ This conception of the recess appointment power as a practical accommodation is supported by the fact that until the Civil War, Congress consistently met for relatively short sessions followed by long recesses of six to nine months.⁸ This pattern largely adhered during and after the Civil War, with Congress scheduling an intrasession recess of approximately two weeks from the end of December until the beginning of January.⁹ The recess practices of Congress changed in the mid-twentieth century, and are now characterized by more frequent recesses of relatively short duration within sessions of a Congress. Adjournments between sessions are also shorter.¹⁰

However, in addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause 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.¹¹ Presidents Jackson, Taylor, and Lincoln made hundreds of recess appointments during their terms.¹² Additionally, recess appointments to the judiciary were common during the early years of the Republic, with the first five Presidents making 31 such appointments, including five to the Supreme Court.¹³ Among these, President Washington's recess appointment of John Rutledge as Chief Justice generated significant controversy, ultimately factoring in his rejection by the Senate.¹⁴ It is interesting to note, however, that "no recorded challenge was made to the

⁶ (...continued)

Questions, 26 *Cardozo L. Rev.* 377, 380-81 (2005) (quoting 4 *The Founders' Constitution* 37, 102-03 (P. Kurland ed., 1787)).

⁷ Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Congressional Research Service, Rep. No. CRS Report RS21308 at 1 (2005).

⁸ *Id.* See also Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 *Mich. L. Rev.* 2204, 2212 (1994).

⁹ *Id.* at 2212.

¹⁰ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 1500-01 (2005).

¹¹ See, 20 *Op. A.G.* 284 (1996).

¹² See, Fish, Carl R. "Removal of Officials by the Presidents of the United States." *Annual Report of the American Historical Association for the Year 1899*. Vol. 1. Washington, D.C., Government Printing Office (1900).

¹³ Thomas A Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 *Colum. L. Rev.* 1758, 1755 (1984).

¹⁴ *Id.* at 1775-76.

constitutionality of his recess appointment.”¹⁵ In total, twelve Justices have been appointed to the Supreme Court during Senate recesses, and many of these Justices participated in Court business prior to Senate action on their nominations.¹⁶ The mid-nineteenth century phenomena of long congressional adjournments, frequent resort to recess appointments, and the rise of the spoils system in the federal government spurred Congress to impose statutory restrictions on the President’s appointment and removal power, including restrictions on paying certain classes of recess appointees.¹⁷ Additionally, the Tenure of Office Act of 1867, that figured prominently in the impeachment effort against President Johnson, included several provisions purporting to limit the recess appointment power of the President.¹⁸

As noted above, modern congressional recess practices differ significantly from the initial dynamic; sessions of Congress are now characterized by more frequent recesses of relatively short duration and adjournments between sessions have likewise become shorter.¹⁹ Accordingly, controversy over recess appointments may also now adhere to additional factors, such as the length of a recess, and the application of statutory restrictions to recess appointees.

Textual Issues and Historical Interpretation

As noted above, practices with respect to recess appointments developed early and debates between Presidents and the Congress over the propriety of particular recess appointments occurred in the formative years of the Republic.²⁰ Formal consideration of the issue has occurred primarily in the context of Attorney General opinions, with periodic attention from the courts and Congress. Aspects of the recess appointment power were considered as early as 1792, and there were at least nineteen formal Attorneys General opinions in the nineteenth century on recess appointments, the earliest being in 1823. The most recent major exposition by an Attorney General on the recess appointment power was in 1992 and while many of the interpretational questions surrounding the Clause are now deemed, at least by the Executive Branch, to be settled, the course of arriving at these interpretations was not unbroken by contrary opinions and expressions of doubt.

“Vacancies that may happen”.

An initial question that arose was what constitutes a vacancy “that may happen during the Recess of the Senate.” If the term “happen” is interpreted as referring only to vacancies that occur during a recess, it necessarily follows that the President would lack authority to make a recess appointment to a vacancy that existed prior to the

¹⁵ *Id.* at 1776.

¹⁶ Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, *Presidential Studies Quarterly* 34, No. 3 at 661 (2004).

¹⁷ See n.89 and accompanying text, *infra*.

¹⁸ See n.94 and accompanying text, *infra*.

¹⁹ Rappaport, n.10, *supra*.

²⁰ See Curtis, n.13, *supra*, at 1758.

recess. Conversely, if “happen” is construed more broadly to encompass vacancies that exist during a recess, the President would be empowered to make a recess appointment to any vacant position, irrespective of whether the position became vacant prior to or during “the Recess of the Senate.” In 1792, the first Attorney General, Edmund Randolph, responded 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.²¹ Positing whether the unfilled office was a vacancy “which has happened during the recess of the Senate,” Randolph concluded that the vacancy occurred on the day the office had been created, and thus could not be filled with a recess appointment.²² Randolph 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.”²³ In 1799, Alexander Hamilton, then serving as Major General of the Army, responded to a similar inquiry from the Secretary of War, stating “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.”²⁴

In 1823, Attorney General William Wirt, without mentioning the Randolph interpretation, concluded that the phrase encompassed all vacancies that happen to exist during “the Recess.”²⁵ While Attorney General Wirt acknowledged that the “opposite construction is, perhaps, more strictly consonant with the mere letter” of the Clause (namely, the construction limiting the President to filling vacancies that originate during a recess), he opted for, in his view, “the only construction of the Constitution which is compatible with its spirit, reason, and purpose.”²⁶ Wirt stated further:

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.²⁷

Early controversies between the Senate and the President revolved around the meaning of this phrase and opposition to the interpretation offered by Attorney

²¹ 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). *See also*, Hartnett, n.6, *supra*, at 384-86; Rappaport, n.10, *supra*, at 1518-19.

²² Randolph, n.21, *supra*, at 166; Rappaport, n.10, *supra*, at 1519.

²³ Randolph, n.21, *supra*, at 166; Rappaport, n.10, *supra*, at 1519.

²⁴ Rappaport, n.10, *supra*, at 1519.

²⁵ 1 Op. A.G. 631, 633-34 (1823).

²⁶ *Id.*

²⁷ *Id.* at 632.

General Wirt had been expressed in the Senate.²⁸ Story, in his Commentaries on the Constitution, also seems 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).²⁹

Subsequent opinions of the Attorney General in 1832 and 1841 endorsed Wirt's interpretation, although both involved second recess appointments after initial recess commissions had expired, and both opinions noted that, under such circumstances, the vacancy could be said to occur after adjournment of the Senate when the first recess commission ended.³⁰ Furthermore, Attorney General Taney, in the 1832 opinion stated 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 of the constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or at all events, that the vacancy should not be a protracted one."³¹ Attorney General Taney went on to stress, however, that "vacancies are not *designedly* to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate."³²

In a brief opinion in 1845, Attorney General Mason concluded that "[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."³³ The Attorney General did not mention his predecessor's opinions to the contrary, although in a subsequent opinion he did note the prior opinions and stated that "[f]rom the commencement of the government, it is believed that a power has been exercised which would appear to be inconsistent with a construction of the section of the constitution which would confine the meaning of the word 'happen' to the time at which the office is in fact vacated."³⁴ Attorney General Evarts discussed this later opinion of Mason's in an opinion issued in 1868, stating that it "expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors."³⁵

Beginning in 1855, formal Attorneys General opinions returned to the Wirt interpretation, even with respect to newly created offices that had never been filled.³⁶ Attorney General Bates, in an 1862 opinion, stated that the question "is settled...as far, at least, as a constitutional question can be settled, by the continued practice of

²⁸ See George H. Haynes, *The Senate of the United States*, Vol. 2 at 772-73 (Russell and Russell ed., 1960).

²⁹ 3 Story, *Commentaries on the Constitution of the United States* 411 (Da Capo ed., 1970).

³⁰ 2 Op. A.G. 525 (1832); 3 Op. A.G. 673 (1841).

³¹ 2 Op. A.G. at 526-27.

³² 2 Op. A.G. at 528 (emphasis in original).

³³ 4 Op. A.G. 361, 363 (1845).

³⁴ 4 Op. A.G. 523, 525 (1846).

³⁵ 12 Op. A.G. 455 (1868).

³⁶ 7 Op. A.G. 186 (1855); 18 Op. A.G. 28 (1884); 19 Op. A.G. 261 (1889).

your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate.”³⁷ Attorney General Stanberry justified his interpretation by noting that the term vacancy “implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?”³⁸ Stanberry further stated that executive power must always have capacity for action and that to adopt a narrow construction of the Recess Appointments Clause would interfere with that ability.³⁹ Attorney General Evarts, in an 1868 opinion, declared the matter so settled that it is “hardly useful to express an opinion as upon an original question.”⁴⁰ Evarts nonetheless “attempted to weigh anew the opposing interpretation of this clause of the Constitution” in light of the “renewed interest in the whole subject of executive authority in appointments to office, excited by recent legislation of Congress,” ultimately concluding that “I...cannot but give my concurrence to the views of my learned predecessors.”⁴¹ Subsequent Attorneys General opinions have consistently interpreted “happen” to mean “happen to exist” and have condoned recess appointments to offices that became vacant while the Senate was in session.⁴²

This interpretation was first adopted by a federal court in the 1880 decision *In re Farrow*.⁴³ 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.”⁴⁴ In reaching his conclusion, Circuit Justice Woods rejected the contrary opinion of a district court, stating that its holding “ought not to be held to outweigh the authority of the great number which are cited in support of the opposite view, and of the practice of the executive department for nearly 60 years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress.”⁴⁵ The holding in *Farrow* was also

³⁷ 10 Op. A.G. 356 (1862)

³⁸ 12 op. A.G. 32, 34 (1866) (emphasis in original).

³⁹ *Id.* at 38.

⁴⁰ 12 Op. A.G. 449, 452 (1868).

⁴¹ *Id.*

⁴² See 14 Op. A.G. 562 (1875); 15 Op. A.G. 207 (1877); 16 Op. A.G. 522 (1880); 16 Op. A.G. 538 (1880); 17 Op. A.G. 521 (1883); 18 Op. A.G. 29 (1884); 19 Op. A.G. 261 (1889); 26 Op. A.G. 234 (1907); 30 Op. A.G. 314 (1914); 33 Op. A.G. 20 (1921); 41 Op. A.G. 463 (1960); 6 U.S. Op. Off. Legal Counsel 585 (1982).

⁴³ 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 senate was in session.”).

⁴⁴ *Id.* at 115.

⁴⁵ *Id.* at 115 (rejecting the holding in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (No. 3924, E.D. Pa. 1868)); see also, contrary opinion in *Schenck v. Peay*, 21 Fed. Cas. 672 (No. 12451 E.D. Ark. 1869).

followed by Circuit Justice Woods in *In re Yancey*.⁴⁶ This interpretation has adhered in judicial opinions considering the issue in the modern era. In *United States v. Alocco*, for instance, the Court of Appeals for the Second Circuit stated that a contrary interpretation “would create executive paralysis and do violence to the orderly functioning of our complex government.”⁴⁷ Likewise, in *United States v. Woodley*, the Court of Appeals for the Ninth Circuit stated that a contrary 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.”⁴⁸ Most recently, in *Evans v. Stephens*, the Court of Appeals for the Eleventh Circuit stated 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.”⁴⁹ The decisions in *Alocco*, *Woodley*, and *Evans v. Stephens* 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.⁵⁰

Thus, Attorneys General and courts have rejected a narrow interpretation of the provision and have adopted a construction seen as necessary for continuous and efficient operation of the government. It can also be argued that the Congress has acquiesced in this interpretation, primarily through the passage of statutes, discussed below, that recognize the possibility of such appointments.⁵¹ Furthermore, while congressional statements disputing the prevailing interpretation have been made during periods of controversy surrounding recess appointments, such statements have been made by “individual members of the senate...but not the senate itself.”⁵²

“the Recess of the Senate”.

Another question that emerged later was the meaning of the phrase “the Recess of the Senate” in the Clause. The first formal opinion on the subject was issued by Attorney General Knox in 1901, and concluded that the phrase applied only to adjournments between sessions of Congress (commonly referred to as “intersession” recesses).⁵³ In reaching this determination, Knox placed significant weight on the use of the definite article “the” in the Recess Appointments Clause, emphasizing that

⁴⁶ 28 Fed. 445, 450 (C.C.W.D. Tenn. 1886).

⁴⁷ 305 F.3d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

⁴⁸ 751 F.2d 1008, 1012 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

⁴⁹ 387 F.3d 1220, 1226-27 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 1640 (2005).

⁵⁰ For an analysis of the interplay of the Recess Appointments Clause and Article III of the Constitution, see CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T.J. Halstead (2005).

⁵¹ See n.89 and accompanying text, *infra*.

⁵² *Farrow*, 3 Fed. at 115.

⁵³ 23 Op. A.G. 599 (1901).

“[i]t will be observed that the phrase is ‘*the recess.*’”⁵⁴ The opinion further concluded that if recess appointments were allowed during periods other than an intersession recess, nothing would prevent an appointment from being made “during any adjournment, as from Thursday or Friday until the following Monday.”⁵⁵ The opinion specifically rejected a Court of Claims decision that upheld paying the salary of an Army paymaster appointed during a temporary recess in 1867 (the recess extended from July 20 to November 21, 1867).⁵⁶

This position was abandoned in 1921 in an opinion issued by Attorney General Daugherty that declared that an appointment made during a 29 day intrasession recess was constitutional. 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.”⁵⁷ In support of this interpretation, the Attorney General cited the Court of Claims decision repudiated in the Knox opinion, as well as a 1905 report of the Senate Judiciary Committee that had been asked to examine the meaning of the term “recess.” The report had concluded:

It was evidently intended by the framers of the Constitution that it [Article II, sec. 2] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.... This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.⁵⁸

Further emphasizing this functional approach, the Daugherty opinion rejected the notion that this broader interpretation would authorize intrasession appointments during brief adjournments, declaring that “an adjournment for 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”⁵⁹ 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,

⁵⁴ 23 Op. A.G. at 600 (emphasis in original).

⁵⁵ *Id.* at 603.

⁵⁶ *See Gould v. United States*, 19 Ct. Cl. 593 (1884).

⁵⁷ 33 Op. A.G. 20, 23 (1921).

⁵⁸ S.Rept. No. 4389, 58th Cong., 3d Sess. 2 (1905); 39 Cong. Rec. 3823-24 (1905).

⁵⁹ *Id.* at 25.

necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.”⁶⁰ Subsequent Attorney General and Department of Justice Office of Legal Counsel opinions have continued to support the constitutionality of intrasession recess appointments, with more recent pronouncements on the issue asserting that the Clause encompasses all recesses in excess of three days.⁶¹

It would appear that the pocket veto case, *Kennedy v. Sampson*, has influenced, at least to a minor degree, the view of the propriety of recess appointments during short recesses of the Senate.⁶² In *Kennedy*, the court struck down the exercise of the President’s pocket veto power during a six-day intrasession recess of the Congress. The Constitution provides that a bill becomes law if not returned by the President after presentment within ten days, “unless the Congress by their adjournment prevent its return, in which case it shall not be a law.”⁶³ The case cast doubt on the validity of all intrasession pocket vetoes, not only those of short duration, and Presidents have since limited their pocket vetoes to periods between sessions or after a Congress has finally adjourned.⁶⁴ The Department of Justice, while asserting the validity of a recess appointment during a 33 day intrasession recess, nevertheless advised President Carter that “in view of the functional affinity between the pocket veto and recess appointment powers, Presidents during recent years have been hesitant to make recess appointments during intrasession recesses of the Senate.”⁶⁵

While the decision in *Kennedy* appears to have moderated the use of the recess appointment power in some instances, recent Presidents have nonetheless made numerous appointments during short intrasession recesses. President Reagan, for instance, made a number of intrasession recess appointments, one during an 18 day recess ending September 8, 1982, nine during a 23 day recess ending on July 23, 1984, and two during the 13 day recess ending on January 21, 1985. President George H.W. Bush made eight intrasession recess appointments, the shortest occurring during a 17 day recess. President Clinton made numerous intrasession appointments, including five during an 11 day recess ending on January 22, 1996, five during a 16 day recess ending on April 15, 1996, one during a nine day recess ending on June 3, 1996, and one during an 11 day recess ending on January 20, 2001. President George W. Bush has continued the recent practice of making appointments during brief intrasession recesses, including six such appointments during a recess ending on April 28, 2003, four during a 10 day recess ending on April 19, 2004, and, perhaps most controversially, the appointment of William H. Pryor to the Court of Appeals

⁶⁰ *Id.* at 25.

⁶¹ See *Evans v. Stephens*, No. 04-828, Brief for the United States in Opposition to Petition for a Writ of Certiorari, at 11 (U.S. 2005); *Mackie v. Clinton*, Memorandum of Points and Authorities in support of Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment, at 24-26, Civ. Action No. 93-0032-LFO (D.D.C. 1993).

⁶² 511 F.2d 430 (D.C. Cir. 1974).

⁶³ U.S. Const., Art. I, § 7, cl. 2.

⁶⁴ See *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (invalidating intersession pocket veto), *vacated as moot sub nom., Burke v. Barnes*, 479 U.S. 361 (1987).

⁶⁵ 3 U.S. Op. Off. Legal Counsel 314, 316 (1979).

for the Eleventh Circuit on February 20, 2004, on the seventh day of a ten day recess ending on February 23, 2004.⁶⁶ The Court of Appeals for the Eleventh Circuit upheld Pryor's appointment, stating:

The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause. And we do not set that limit today. Although a President has not before appointed a judge to an Article III court during an intrasession recess as short as the one in this case, appointments to other offices — offices ordinarily requiring Senate confirmation — have been made during intrasession recess of about this length or shorter. Furthermore, several times in the past, fairly short intrasession recesses have given rise to presidential appointments of judges to Article III courts.⁶⁷

While it did not specifically address “intrasession” recess appointments, the 1905 Senate Judiciary Committee Report, mentioned above and relied on by Attorney General Daugherty in his 1921 opinion, was prompted by what undoubtedly was the briefest recess ever relied on by a President in order to make recess appointments. At the moment the 58th Congress, 1st session ended at noon, December 7, 1903 and the 2nd session immediately began, President Theodore Roosevelt announced the recess appointment of over 160, mostly military, officers. Two of these appointees had previously held recess appointments and were controversial officeholders. Taking action in accordance with the aforementioned position of Attorney General Knox rejecting the validity of intrasession recess appointments, Roosevelt construed the period between these sessions as a constructive recess.⁶⁸ The 1905 Senate Judiciary Committee Report was issued fourteen months after this action and, as is indicated by the quotation included above, emphatically rejected Roosevelt's action. It is important to note, however, that the Report, while expressing disapprobation of the President's exercise of the recess appointment power in such a manner, could be interpreted as validating the execution of intrasession recess appointments generally. Furthermore, Roosevelt's actions could be viewed as a practical manifestation of the potential infirmities of the Knox interpretation: that is to say, if a formalistic interpretation of the Clause rests upon a concern that allowing intrasession appointments will foster systematic avoidance of the Senate's advice and consent function, the fact that a President is able to make such appointments during an instantaneous “constructive recess” of the Senate would appear to belie such a distinction.⁶⁹ Alternatively, it could be argued that this historically anomalous event is simply that, and lends no weight to the overall consideration of the matter.

The question of what constituted a recess for purposes of the appointment power arose substantially later than the vacancy issue due to the fact that Congress took few intrasession recesses, other than brief holiday recesses, until the advent of

⁶⁶ Information on recess appointments may be obtained in the *Weekly Compilation of Presidential Documents*.

⁶⁷ *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 16401 (2005).

⁶⁸ See Hogue, n.16, *supra*, at 671.

⁶⁹ See Hartnett, n.6, *supra*, at 416.

the modern era.⁷⁰ Further, as is evident from the aforementioned precedents, the question of what constitutes a “recess” has become more critical as the opportunity for the execution of such appointments has increased. Indeed, as illustrated above, there has been a steady and significant increase in intrasession recess appointments attendant to this shift in the recess practices of the Congress.

Authority and Tenure of Recess Appointees

As a fundamental matter, it is important to note that a confirmed appointee and a recess appointee possess the same legal authority.⁷¹ 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 term or at the pleasure of the President, subject to the requirements laid out by Congress in creating the position.⁷² The reconvening of the Senate during the same session after a recess is deemed a continuation of the session and is not regarded as the “next session” within the meaning of the constitutional provision.⁷³ Thus, for example, persons appointed during the traditional August recess of a 1st session of a Congress could serve until the end of the second session, which would likely be late in the following year. The President may remove a recess appointee before 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.⁷⁴

If the nomination of the person appointed during the recess is confirmed upon the reconvening of the Senate, it has been held that the new commission for the full statutory term commences from the date of the recess appointment. In other words, the full statutory term relates back to the date on which the person first assumed office by means of the recess appointment. The determination of this question may also depend on the particular statutory provision regarding terms of office and filling of vacancies.⁷⁵ It is important to note that Senate rejection of the nomination of a recess appointee does not constitute a removal, and that the rejected nominee may still hold office under the Constitution until the termination of the session.⁷⁶ Furthermore, upon the expiration of the constitutional term of a recess appointee, a new recess appointment, either of the same, or another person, may be made.⁷⁷ Successive recess appointments of the same individual, however, may implicate the pay restriction delineated in 5 U.S.C. §5503(a)(2), as is discussed in further detail

⁷⁰ See *Carrier*, n.8, *supra*, at 2212-13.

⁷¹ See *Hogue*, n.7, *supra*, at 3.

⁷² *Id.* at 3.

⁷³ 41 Op. A.G. 463, 470-71 (1960); 28 Comp. Gen. 121 (1948).

⁷⁴ 41 Op. A.G. at 471.

⁷⁵ 37 Op. A.G. 282 (1933); 9 Comp. Gen. 190 (1929).

⁷⁶ See, *In re Marshalship*, 20 Fed. 379 (D. Ala. 1884); 2 Op. A.G. 336 (1830); 21 Comp. Dec. 789 (1915) (Comptroller of the Currency).

⁷⁷ 2 Op. A.G. 525 (1832); 3 Op. A.G. 673 (1841); 4 Op. A.G. 523 (1846); 11 Op. A.G. 179 (1865); 28 Comp. Gen. 30, 38 (1948); 28 Comp. Gen. 121, 129 (1948).

below. Also, while not addressing the issue directly, the court in *Staebler v. Carter* noted 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.”⁷⁸

Additionally, it should be noted that a vacancy must exist before the President can exercise his recess appointment authority.⁷⁹ While this observation may seem self evident, the issue may be complicated by the presence of “holdover” provisions that regularly accompany fixed term positions. As an example of such a provision, a member of the Federal Election Commission “may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.”⁸⁰ Considering this provision in *Staebler*, the court upheld a recess appointment to a position that was still occupied by a holdover Federal Election Commissioner, based on a determination that the expiration of the holdover commissioner’s formal term created an immediate and ongoing vacancy.⁸¹ Conversely, in *Mackie v. Clinton*, the district court held that the holdover provision for a member of the Board of Governors of the United States Postal Service did not constitute a vacancy sufficient to allow the appointment of a new member pursuant to the Recess Appointments Clause.⁸² The relevant statutory provision provides that “[t]he terms of the 9 Governors shall be nine years.... [a] Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.”⁸³ Relying on this language, the court invalidated a recess appointment to the Board, based on its determination that the language of the holdover provision established that a holdover Governor was to hold the office after the expiration of his term, for a period not to exceed one year, “unless he dies, resigns, is lawfully removed or ‘some successor has qualified,’ i.e. has been nominated by the President and confirmed by the Senate.”⁸⁴ From these decisions, it seems apparent that the issue of whether a holdover provision constitutes a vacancy

⁷⁸ 464 F.Supp. at 601, n.41.

⁷⁹ See 3 U.S. Op. Off. Legal Counsel 314, 317 (1979) (“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)).

⁸⁰ 2 U.S.C. §437c(a)(2)(B).

⁸¹ 464 F.Supp. at 589.

⁸² 827 F.Supp. 56 (1993), *vacated as moot*, 1994 WL 163761 (D.C. Cir. 1994).

⁸³ 39 U.S.C. §202(b).

⁸⁴ *Mackie*, 827 F.Supp. at 58. See also, *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996); *Wilkinson v. Legal Services Corp.*, 80 F.Supp. 891 (D.D.C. 1994), *reversed on other grounds*, *Wilkinson v. Legal Services Corp.*, 80 F.3d 535 (D.C. Cir. 1996); *McCalpin v. Dana*, No. 85-542 (D.D.C. 1982), *vacated as moot sub nom.*, *McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985).

for recess appointment purposes will hinge on the specific language contained therein.⁸⁵

Congressional Action

Since the early history of the Republic, Congress has established a statutory framework designed to protect the Senate’s constitutional role in the confirmation process. For instance, the Federal Vacancies Reform Act of 1998 (which governs the filling of vacancies falling outside the scope of the Recess Appointments Clause) establishes which individuals may be designated by the President to temporarily perform the duties and functions of vacant office and the length of time a designee may serve.⁸⁶ The original version of the Vacancies Act was enacted in 1868,⁸⁷ and the legislative roots of such provisions can be traced back to a 1795 enactment limiting the time a temporary assignee could hold office to six months.⁸⁸

In 1863, Congress attached a rider to the FY1864 Army Appropriations Act that was the forerunner of current statutory provisions. It prohibited the payment of money 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,” and provided further that “nor shall any money be paid out of 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.”⁸⁹ Under this language, an officer might have to serve without pay (relying on savings or loans), until such time as the Senate consented to the nomination.⁹⁰ These provisions were enacted in response to President Lincoln’s recess appointment of hundreds of military officers in violation of statutory authorization.⁹¹ The question of the proper interpretation of the word “happen” in the Recess Appointments Clause was raised with several Senators echoing the position of a contemporaneously issued Senate Judiciary Committee Report stating that vacancies that arose while the Senate was in session could not be filled by recess appointment.⁹² Other members noted that contrary opinions existed on the subject. Elaborating on the intent of the provision, Senator Fessenden stated:

⁸⁵ See Hogue, n.7, *supra*, at 3; Fisher, n.3, *supra*, at 8.

⁸⁶ 5 U.S.C. §§ 3345-3349d. The Vacancies Act provides 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.

⁸⁷ 15 Stat. 168 (1868).

⁸⁸ 1 Stat. 415 (1795).

⁸⁹ 12 Stat. 642, 646 (1863).

⁹⁰ See Fisher, n.3, *supra*, at 5.

⁹¹ See 33 Cong. Globe 564-65 (1863).

⁹² S. Rep. No. 80, 37th Cong., 3d Sess. (1863).

“[i]t 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.”⁹³

These provisions were followed by the passage of the Tenure of Office Act in 1867, which contained a number of restrictions on the President’s appointment and removal powers.⁹⁴ 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. Such removals were to be reported to the Senate after it reconvened and, in the event that the Senate did not concur with the suspension, “such officer so suspended” was to “resume the functions of his office.”⁹⁵ 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.”⁹⁶ The act also delineated criminal penalties and cut-off of salary for violations of its provisions. President Andrew Johnson ignored the provisions of the act in removing Secretary of War Edwin Stanton from office, precipitating his impeachment.⁹⁷ Congress amended the act in 1869,⁹⁸ and ultimately repealed the provisions entirely in 1887.⁹⁹ Similar limits on the President’s removal power were struck down as unconstitutional in the 1926 decision of *Myers v. United States*, with the Court stating: “we have no hesitation in holding that... the Tenure 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.”¹⁰⁰

The salary bar 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.¹⁰¹ Codified at 5 U.S.C. § 5503, it currently establishes that if a vacancy existed while the Senate was in session a person subsequently appointed to that position during a recess may not receive his salary until he is confirmed by the Senate. Exceptions to this payment prohibition are provided (1) for appointees to vacancies that arise within 30 days of the recess; (2)

⁹³ 33 Cong. Globe 565 (1863).

⁹⁴ 14 Stat. 430 (1867).

⁹⁵ *Id.*

⁹⁶ *Id.* at 431.

⁹⁷ See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 40 Duke L.J. 1, 87-88 (1999).

⁹⁸ 16 Stat. 6 (1869).

⁹⁹ 24 Stat. 500 (1887).

¹⁰⁰ 272 U.S. 52, 176 (1926).

¹⁰¹ See Fisher, n.3, *supra*, at 6.

for appointees to an office for which a nomination was pending at the time of the recess, so long as the nomination is not of an individual appointed during the preceding recess of the Senate; and (3) for appointees selected to an office where a nomination had been made but rejected by the Senate within 30 days of the recess, and the appointee was not the individual so rejected.¹⁰² Section 5503(b) provides that a nomination to fill a vacancy falling within any of the aforementioned exceptions must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

Put more succinctly, a recess appointee to a vacancy existing while the Senate was in session can receive salary pending Senate confirmation of his nomination if (1) the vacancy arose within 30 days before the end of the session, (2) a nomination for the office (other than the nomination of a person appointed during the preceding recess) was pending at the end of the session, or (3) if a nomination for the office was rejected within 30 days of the end of the session and a person other than the rejected nominee receives the recess appointment. These exceptions were designed, as stated in a House Report accompanying the act, “to render the existing prohibition on the payment of salaries more flexible.”¹⁰³ 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.”¹⁰⁴

It is interesting to note that the term “session” as used in § 5503 refers to any time the Senate convenes, and, as such, does not have the same meaning as employed in the Recess Appointment Clause. The version of this law preceding § 5503 used the phrase “termination of the session” as opposed to the phrase “end of the session,” which now appears in § 5503(a)(1). This revision was not intended as a substantive change, however.¹⁰⁵ 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.”¹⁰⁶

In addition to the restrictions laid out in § 5503, an annual funding limitation has been included in all Treasury and General Governmental Appropriations Acts for over 60 years that prohibits the payment of any recess appointee whose nomination has been voted down by the Senate.¹⁰⁷

The provisions governing recess appointments are designed to protect the Senate’s advice and consent function by confining the recess appointment power of

¹⁰² 5 U.S.C. § 5503(a)(1)-(3).

¹⁰³ H. Rep. No. 2646, 76th Cong., 3d Sess. 1 (1940).

¹⁰⁴ *Id.* See also, 28 Comp. Gen. 30 (1948)

¹⁰⁵ See S. Rep. No. 1380, 89th Cong., 2d Sess. 20, 105 (1966).

¹⁰⁶ 28 Comp. Gen. 30, 37 (1948); see also 41 Op. A.G.463, 473-75 (1960)

¹⁰⁷ See, e.g., P.L. 108-447, Div. H, Sec. 609; 118 Stat. 3274.

the President. By targeting the compensation of appointees as opposed to the President's recess appointment power itself, these limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. The court in *Staebler v. Carter* noted in dicta 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."¹⁰⁸ Additional constitutional concerns might arise from the application of these provisions to judicial recess appointees.¹⁰⁹ Attorneys General have consistently advised Presidents of the applicability of the pay restriction statutes without raising constitutional concerns.¹¹⁰

The scope of the decision in *Evans* could be seen as lending credence to the concerns raised in *Staebler*. As touched upon above, the Eleventh Circuit in *Evans* upheld the intrasession recess appointment of William H. Pryor to that court, based upon a broad interpretation of the President's authority under the Clause.¹¹¹ The court's decision was accompanied by a dissent from Judge Barkett arguing that a literal and restrictive interpretation of the Clause was necessitated by the "real, concrete concern that the understanding of the recess appointment power embraced by the majority will allow the President to repeatedly bypass the role the Framers intended the Senate to play in reviewing presidential nominees."¹¹² Accordingly, the majority's acceptance of brief intrasession recess appointments, coupled with the potential constitutional invalidity of the statutory restrictions noted above, could give rise to a dynamic whereby the President would have a legal and constitutional basis upon which to completely bypass the Senate confirmation process, in that the President would be empowered to make successive recess appointments during short recesses with the practical effect of enabling an appointee to serve throughout the course of an Administration without submitting to the Senate confirmation process.¹¹³ The development of such a dynamic is plausible in light of the decisions in *Staebler* and *Evans*, and could arguably transform the Recess Appointments Clause from the supplementary and auxiliary mechanism discussed by Hamilton into a more significant grant of presidential power.

In addition to the aforementioned statutory provisions, Congress has also attempted to influence presidential action in the recess appointment context through resolutions. Resolutions objecting to Madison's appointments of envoys to Great Britain were debated in 1814, but not brought to a vote.¹¹⁴ It is arguable that a sense of the Senate resolution enacted in 1960 expressing reservation over recess appointments to the Supreme Court has influenced presidential exercise of the recess

¹⁰⁸ 464 F.Supp. 585, 596 (D.D.C. 1979).

¹⁰⁹ See Halstead, n.50, *supra*, at 11.

¹¹⁰ See, e.g., 15 U.S. Op. Off. Legal Counsel 91 (1991); 41 Op. A.G. 463, 472-80 (1960).

¹¹¹ See Halstead, n.50, *supra*, at 8-11.

¹¹² *Evans*, 387 F.3d at 1235.

¹¹³ See Halstead, n.50, *supra*, at 11 for additional consideration of this issue in the Article III context.

¹¹⁴ See Haynes, n.28, *supra*, at 772-73.

appointment power in the judicial context.¹¹⁵ Prompted by President Eisenhower's recess appointments of Earl Warren, William J. Brennan, Jr., and Potter Stewart to the Supreme Court in 1953, 1956, and 1958, respectively, Senator Hart introduced S.Res. 334 to discourage such appointments. The resolution provided that it was the sense of the Senate that this type of recess appointment "is not wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States." The resolution further announced the position that such appointments should be avoided "except under unusual and urgent circumstances."¹¹⁶ No recess appointments to the Supreme Court have been made since the enactment of this resolution, and there has been an attendant decrease in the number of judicial recess appointments generally, with only four such appointments occurring since 1960. However, as is indicated by the decision in *Evans*, the use of the recess appointment power in the judicial context remains a contentious issue.

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 also been employed by Presidents for political purposes throughout the history of the Republic. As such, the Clause has been the source of recurrent controversy, beginning with the Administration of George Washington, and continuing to the current Administration of George W. Bush. Historical interpretation and judicial treatment of the Clause have fleshed out many of its inherent ambiguities, to the extent that there is now precedent supporting the propriety of such appointments irrespective of when the vacancy at issue arose. Likewise, precedent has been established to support recess appointments during both intersession and brief intrasession recesses. However, many tensions remain regarding the proper scope and application of the Clause. These tensions, coupled with the lack of any definitive consideration by the Supreme Court, would thus seem to ensure that the Clause will continue to be the source of political and legal controversy.

¹¹⁵ 106 Cong. Rec. 18145 (1960).

¹¹⁶ 106 Cong. Rec. 12761 (1960). *See also*, Fisher n.3, *supra*, at 16.