



Recess Appointments Made by President Barack Obama

Henry B. Hogue

Specialist in American National Government

Maureen Bearden

Information Research Specialist

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Summary

Under the Constitution, the President and the Senate share the power to make appointments to the highest-level politically appointed positions in the federal government. The Constitution also empowers the President unilaterally to make a temporary appointment to such a position if it is vacant and the Senate is in recess. Such an appointment, termed a recess appointment, expires at the end of the following session of the Senate. This report identifies recess appointments by President Barack Obama, from the beginning of his presidency, on January 20, 2009, until June 3, 2013. The report discusses these appointments in the context of recess appointment authorities and practices generally, and it provides related statistics. Congressional efforts to prevent further recess appointments are also discussed.

As of June 3, 2013, President Obama had made 32 recess appointments, all to full-time positions. By the same point in his presidency, President William J. Clinton had made 36 recess appointments, 22 to full-time positions and 14 to part-time positions. President George W. Bush had made 120 recess appointments, 67 to full-time positions and 53 to part-time positions. Six of President Obama's recess appointments had been made during recesses between Congresses or between sessions of Congress (*intersession* recess appointments). The remaining 26 had been made during recesses within sessions of Congress (*intrasession* recess appointments).

In each of the 32 instances in which President Obama had made a recess appointment, the individual had also been nominated to the position to which he or she was appointed. In all of these cases, a related nomination to the position preceded the recess appointment. In 19 of the 32 cases, as of June 3, 2013, the Senate had later confirmed the nominee to the position to which he or she had been recess appointed. With regard to the 13 remaining individuals, nominations of 3 were pending; nominations for the other 10 were not.

During the 110th, 111th, and 112th Congresses, the Senate periodically used pro forma sessions to prevent the occurrence of a recess of more than three days. There appears to have been an expectation that this scheduling would block the President from making recess appointments, based on an argument that an absence of the Senate of three days or less would not constitute a "recess" long enough to permit the use of this authority. However, consistent with a January 2012 opinion of the Office of Legal Counsel at the Department of Justice, the President reached a different conclusion as to the effect of this scheduling practice. On January 4, 2012, during a three-day period of adjournment between two pro forma sessions of the Senate, the White House announced President Obama's intent to make four recess appointments.

As of June 3, 2013, two federal courts of appeals had issued decisions related to the 2012 appointments and had found the appointments at issue in each case to be unconstitutional. For further information on these cases and the issues involved, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu; CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter; CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey; and CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

Additional information on recess appointments may be found in other CRS reports: CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; CRS Report

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

This report will be updated as developments warrant.

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Under the Constitution, the President and the Senate share the power to make appointments to the highest-level politically appointed positions in the federal government.¹ The Constitution also empowers the President unilaterally to make a temporary appointment to such a position if it is vacant and the Senate is in recess.² Such an appointment, termed a *recess appointment*, expires at the end of the following session of the Senate.³ The records of debate at the Constitutional Convention do not provide much evidence of the framers' intentions in the Recess Appointment Clause. A discussion of the clause by Alexander Hamilton, in *The Federalist Papers*, suggests that its purpose was to provide an alternative method of appointment that would allow the filling of vacancies "without delay" during periods of Senate absence.⁴ Opinions by later Attorneys General also supported this general notion, suggesting that the purpose of the clause was to allow the President to maintain the continuity of administrative government through the temporary filling of offices during periods when the Senate was not in session, at which time his nominees could not be considered or confirmed.⁵ This interpretation is supported by the fact that both houses of Congress had relatively short sessions and long recesses during the early years of the Republic. In fact, until the beginning of the 20th century, the Senate was, on average, in session less than half the year.⁶

As of June 3, 2013, President Barack Obama had made 32 recess appointments. Of the 32, he made 22 during recesses within the second session of the 111th Congress. He made six during the recess between the adjournment of the 111th Congress and the convening of the 112th Congress.

On January 4, 2012, during a three-day period of adjournment between two pro forma sessions of the Senate, the White House announced President Obama's intent to make four recess appointments. The period of adjournment took place shortly after the second session of the 112th Congress convened and thus was a recess within a session, or an intrasession recess (discussed below). The recess and pro forma sessions had been set as part of the Senate schedule for the period of December 20, 2011, through January 23, 2012, established by unanimous consent on

¹ U.S. Const. Article II, Section 2, clause 2. The clause also provides for the appointment of inferior officers in three other ways, subject to congressional discretion: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

² "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." U.S. Const. Article II, Section 2, clause 3.

³ As discussed in detail later in this report, each Congress covers a two-year period, generally composed of two sessions.

⁴ *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961). Hamilton described the Recess Appointment Clause as a "supplement to the [Appointments Clause] for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." He went on to write that the "ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments 'during the recess of the Senate, by granting commissions which shall expire at the end of their next session'" (pp. 409-410) (emphasis in the original).

⁵ An opinion by Attorney General William Wirt in 1823 concerning the meaning of the word "happen" in the clause provides one example. In part, he stated, "The substantial purpose of the constitution was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed." 1 Op. A.G. 631, at 632 (1823).

⁶ U.S. Congress, Joint Committee on Printing, *2009-2010 Official Congressional Directory 111th Congress*, S. Pub. 111-14, 111th Cong. (Washington: GPO, 2009), pp. 526-542.

December 17, 2011.⁷ This schedule provided for a series of pro forma sessions with intervening three- and four-day recesses.⁸

President Obama's January 4, 2012, recess appointments have been controversial. The Senate schedule agreed to for the period of December 20, 2011, through January 23, 2012, appears to have been intended to prevent recess appointments during this period. President Obama's recess appointments during the period, supported by an opinion of the Office of Legal Counsel (OLC) at the Department of Justice that was released the following week,⁹ indicate that the Administration does not regard congressional scheduling practices, such as those used during this period, as an impediment to the exercise of the recess appointment power. As of June 3, 2013, two federal courts of appeals had issued decisions related to the 2012 appointments and had found the appointments at issue in each case to be unconstitutional.¹⁰ The long term impact of the OLC opinion and the appellate court decisions on recess appointment practice was not immediately clear.¹¹

This report identifies recess appointments by President Obama, from the beginning of his presidency, on January 20, 2009, until June 3, 2013. The report discusses these recess appointments in the context of recess appointment authorities and practices generally, and it provides related statistics. The congressional efforts to prevent further recess appointments, just mentioned, are also described in more detail. Additional information concerning recess appointments by President George W. Bush, general recess appointment practices, judicial recess appointments, and legal issues related to recess appointments may be found in other CRS reports.¹²

⁷ Sen. Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, *Congressional Record*, vol. 157, part 195 (December 17, 2011), pp. S8783-S8784.

⁸ Pro forma sessions are short meetings of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other house. Normally, it is understood that during a pro forma session no business will be conducted. Business has sometimes been conducted during pro forma sessions, however. For example, on December 23, 2011, during the period under discussion here, the Senate convened as scheduled and, by unanimous consent, agreed to a process for passage of the Temporary Payroll Tax Cut Continuation Act of 2011 (Sen. Harry Reid, "Unanimous Consent Agreement" remarks in the Senate, *Congressional Record*, daily edition, vol. 157 (December 23, 2011), p. S8789).

⁹ 36 U.S. Op. O.L.C. *1 (2012).

¹⁰ For further information on these cases and the issues involved, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu; CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter; and CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

¹¹ For more on the impact of the first appeals court decision, see CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey.

¹² See CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen Bearden; CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T.J. Halstead; and CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

Characteristics of Recess Appointments by President Obama

Full-Time and Part-Time Positions

All of the 32 recess appointments made by President Obama, as of June 3, 2013, were to full-time positions. By the same point in the first term of his presidency, President William J. Clinton had made 36 recess appointments, 22 to full-time positions and 14 to part-time positions. President George W. Bush had made 120 recess appointments, 67 to full-time positions and 53 to part-time positions. **Table 1** provides the number of recess appointments in each of these categories, by calendar year, for each of these presidencies. In general, the top leadership positions in the federal government are full-time positions to which appointments are made through the advice and consent process. For example, the full-time offices to which President Obama has made recess appointments include the Deputy Attorney General, the Deputy U.S. Trade Representative, and five Under Secretaries. Part-time positions can also be vested with statutory policy-making authority that can have broad impact. The members of the Defense Base Closure and Realignment Commission, who received recess appointments from President George W. Bush, could be considered among the positions in this category.

Table 1. Annual Number of Recess Appointments to Full-Time and Part-Time Positions by Recent Presidents

	Calendar Year of Presidency									Total
	1 st	2 nd	3 rd	4 th	5 th	6 th	7 th	8 th	January of 9 th	
President William J. Clinton										
Full-time	0	3	1	17	9	11	11	38	5	95
Part-time	0	0	0	14	0	0	0	21	9	44
Total	0	3	1	31	9	11	11	59	14	139
President George W. Bush										
Full-time	1	19	14	30	8	23	4	0	0	99
Part-time	0	3	24	15	13	17	0	0	0	72
Total	1	22	38	45	21	40	4	0	0	171
President Barack Obama										
Full-time	0	28	0	4	0					32
Part-time	0	0	0	0	0					0
Total	0	28	0	4	0^a					32^a

Source: Table developed by the Congressional Research Service using data obtained, during the Clinton and Bush presidencies, from news releases from the White House website, now at <http://www.clintonlibrary.gov/archivesearch.html/> and <http://georgewbush-whitehouse.archives.gov/>, respectively; the White House Executive Clerk; and the Legislative Information System (LIS) nominations database, at <http://www.congress.gov/nomis/>.

Note: The presidencies of William J. Clinton and George W. Bush each lasted for eight years. Each served during nine calendar years, however, since a President's term begins and ends on January 20.

a. Number of recess appointments through June 3, 2013.

Within-Session and Between-Session Recess Appointments

The text of the Constitution states that the President has the authority to exercise the recess appointment power during “the Recess of the Senate.”¹³ The precise meaning of this phrase has been a matter of some debate, which has also appealed to the distinction between two congressional recesses: those which occur within sessions of the Senate and those which occur between sessions.

The Constitution prescribes that a new regular session of Congress shall convene annually.¹⁴ An annual session of either house ends with a sine die adjournment; that is, an adjournment “without day,” meaning that the chamber adjourns without setting a day for its next meeting, and therefore will not meet again until the day fixed by the Constitution (or by law) for the next annual session to convene. In current practice in this context, a “recess of the Senate” may refer either to a period between the sine die adjournment of one annual session and the convening of the next, or to a period within an annual session during which the Senate does not meet. A recess between sine die adjournment of one session and the convening of the next is also known as an *intersession recess*. A recess within a session is also known as an *intrasession recess*.

In the early days of Congress, lengthy intersession recesses were common. Before the 1940s, on the other hand, intrasession recess appointments were unusual, largely because the occasion seldom arose. Intrasession recess appointments have sometimes provoked controversy in the Senate, and some academic literature also has called their legitimacy into question.¹⁵ Legal opinions have also varied on this issue over time. In general, however, recent opinions have supported the President’s use of the recess appointment authority during intrasession recesses.¹⁶ Recent Presidents have made recess appointments during both kinds of recess.

Notwithstanding the legal opinions and practices of recent decades, a legal opinion of the Office of Legal Counsel (OLC) at the Department of Justice and decisions of two federal courts of appeals related to four controversial recess appointments by President Barack Obama on January 4, 2012, raised questions about what a “recess” is with regard to the recess appointment power. OLC argued that the determination of whether a “recess” is underway is not merely a matter of observing formal Senate scheduling. Rather, the President may also determine whether a recess is underway by assessing whether the Senate is available to participate in the advice and consent process.¹⁷ In a January 25, 2013, decision, the U.S. Court of Appeals for the D.C. Circuit held that, for purposes of the Recess Appointments Clause, “the Recess” means only intersession

¹³ U.S. Const. Article II, Section 2, clause 3.

¹⁴ U.S. Const. Amendment XX, Section 2.

¹⁵ Regarding Senate controversy, see Sen. George Mitchell, “The Senate’s Constitutional Authority to Advise and Consent to the Appointment of Federal Officers,” *Congressional Record*, vol. 139, July 1, 1993, p. 15266; and Senate Legal Counsel, “Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs’ Motion, and in Opposition to Defendants’ Motions, for Summary Judgment on Count Two,” U.S. District Court for the District of Columbia, *Mackie v. Clinton*, Civ. Action No. 93-0032-LFO, *Congressional Record*, vol. 139, July 1, 1993, pp. 15267-15274. For academic literature, see, 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.

¹⁶ For information and analysis related to the legal context in this area, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

¹⁷ “Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions,” Memorandum Opinion for the Counsel to the President, January 6, 2012, available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

recesses.¹⁸ A May 16, 2013, decision of the U.S. Court of Appeals for the Third Circuit also held that the President's recess appointment power extends only to intersession recesses.¹⁹ The long term impact of the OLC opinion and the appellate court decisions on recess appointment practice was not immediately clear.²⁰

One reason for the controversy may be that, in one sense, intrasession recess appointments may afford the President the ability to fill positions unilaterally for longer periods than would intersession appointments. Under the constitutional provision previously quoted, a recess appointment expires at the sine die adjournment of the Senate's "next session." Accordingly, if the President makes a recess appointment during an intersession recess, the duration of the appointment will include the remainder of that recess and the full length of the session that follows. In the case of an intrasession recess appointment, on the other hand, the duration of the appointment will include the rest of the session in progress, the ensuing intersession recess, and the full length of the session that follows. At any point during a session, as a result, by making a recess appointment during a recess within a session, the President may fill a position not just for the rest of the session, but until near the end of the following session. This may add as much as a year to the duration of an appointment.

A comparison of two recess appointments during the 108th Congress illustrates the difference in recess appointment duration that results from the timing of appointments. During the recess between the first and second sessions, President George W. Bush appointed Charles W. Pickering to an appeals court judgeship. Several weeks later, during the first recess of the second session, President Bush appointed William H. Pryor to a judgeship on another appeals court. Pickering's appointment expired after less than 11 months, at the end of the second session. Pryor's recess appointment would have expired after approximately 22 months, at the end of the first session of the 109th Congress.²¹ Although the Pickering and Pryor recess appointments were only several weeks apart, Pryor could have served nearly twice as long because his appointment was made during an intrasession recess.

As of June 3, 2013, President Obama had made six intersession recess appointments and 26 intrasession recess appointments.

¹⁸ *Noel Canning v. Nat'l Labor Relations Bd.*, 705 F.3d 490, 499 (D.C. Cir. 2013). The court also found that the recess appointment power may be used to fill only those vacancies that have arisen during the recess in which the appointment is made. For more on *Noel Canning*, see CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter.

¹⁹ See CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

²⁰ For more on the impact of the first appeals court decision, see CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey.

²¹ Pryor was subsequently confirmed by the Senate and appointed to the position permanently.

Table 2. Summary Information Concerning Recess Appointments by President Barack Obama, as of June 3, 2013

All recess appointments	32
By type of position	
Full-time	32
Part-time	0
By type of recess	
Appointments during intersession recesses—between sessions of Congress	6
Appointments during intrasession recesses—within sessions of Congress	26
By branch	
Appointments to legislative branch positions	1
Appointments to executive branch positions	31
Appointments to judicial branch positions	0
Recess appointments for which a related nomination was made	32
By nomination timing	
First related nomination preceded recess appointment	32
First related nomination followed recess appointment	0
By disposition of nomination, as of June 3, 2013 ^a	
Resulted in confirmation	19
Withdrawn by the President and not resubmitted	7
Returned to the President and not resubmitted	3
Pending	3

Source: Table developed by Congressional Research Service using data obtained from news releases from the White House website and the Legislative Information System (LIS) nominations database, available to the congressional community at <http://www.congress.gov/nomis>.

- a. The number shown is the number of cases, rather than the number of nominations. Some recess appointments were associated with more than one nomination. For example, the President usually submits a new nomination of an individual after the Senate reconvenes following his or her recess appointment in order to comply with 5 U.S.C. § 5503. For more information, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

Recess Appointments by Branch

Presidents have long made recess appointments to positions in all three branches of government. Recess appointments to advice and consent positions in the legislative branch have been the least common, in part because this branch has so few positions of this nature. Most recess appointments have been to executive branch positions. Presidents have also made recess appointments to positions in the federal judiciary. In recent years, however, recess appointments to federal judgeships have been controversial. During the past 25 years, Presidents have made recess appointments to fill Article III judgeships on only three occasions.²² President Clinton

²² An Article III judgeship is one that has been established in statute under the provisions and authority of Article III of the U.S. Constitution. These include U.S. Supreme Court justice positions, and judgeships for the U.S. courts of appeal (continued...)

recess appointed Roger L. Gregory to the U.S. Court of Appeals for the Fourth Circuit on December 27, 2000, a step that reportedly met opposition in the Senate.²³ President Clinton's nomination of Gregory was not confirmed, but President George W. Bush renominated him and he was then confirmed by the Senate. On January 16, 2004, President Bush recess appointed Charles W. Pickering to the U.S. Court of Appeals for the Fifth Circuit. Pickering's appointment expired at the end of the second session of the 108th Congress, and he retired.²⁴ On February 20, 2004, President Bush named William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit Court of Appeals. Pryor was subsequently confirmed by the Senate.²⁵

As of June 3, 2013, President Obama had made one recess appointment to the legislative branch (to the position of Public Printer), 31 recess appointments to executive branch positions, and no recess appointments to positions in the judicial branch.

Recess Appointments and Related Nominations

In most instances in which recent Presidents have made a recess appointment, they have also submitted a related nomination to the Senate.²⁶ Often a recess appointment is preceded by such a nomination, but this is not required. Typically the individual who is given the recess appointment is also the nominee, but the President will sometimes use a recess appointment to fill a position while a different nominee to the same position is going through the Senate confirmation process. Under certain conditions, a provision of law may prevent a recess appointee from being paid from the Treasury unless the President submits a nomination to the position subsequent to the appointment.²⁷

When the President has made a recess appointment before, or soon after, submitting a nomination for the position, the action has sometimes been perceived as pre-empting the Senate consideration process. Critics of this practice argue that, absent an urgent need to fill a position immediately, the Senate should be given the opportunity to exercise its constitutional role.

Each of the 32 recess appointments made by President Obama, as of June 3, 2013, was preceded by a related nomination.²⁸ The elapsed time between initial nomination and the announcement of

(...continued)

and district courts.

²³ Neil A. Lewis, "Senator Vows He Will Fight Clinton's Judicial Selection," *New York Times*, December 29, 2000, p. A16.

²⁴ See entry for Charles Willis Pickering Sr. in the "Biographical Directory of Federal Judges" at the Federal Judicial Center website: <http://www.fjc.gov/history/home.nsf/page/judges.html>.

²⁵ For more, see CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead.

²⁶ For the purposes of this report, a related nomination was defined as a nomination, by President Obama, to the position to which the recess appointment was made.

²⁷ Under 5 U.S.C. § 5503(a), if the position to which the President makes a recess appointment became vacant while the Senate was in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. The salary prohibition does not apply if (1) the vacancy arose within 30 days of the end of the session; (2) a nomination for the office (other than the nomination of someone given a recess appointment during the preceding recess) was pending when the Senate recessed; or (3) a nomination was rejected within 30 days of the end of the session and another individual was given the recess appointment. A recess appointment falling under any one of these three exceptions must be followed by a nomination to the position not later than 40 days after the beginning of the next session of the Senate.

²⁸ As of June 23, 2013, in each of these 32 instances, the individual nominated was the same as the individual given the (continued...)

the recess appointment ranged from 20 days (about three weeks) to 437 days (about 14½ months). The mean, or average, elapsed time between a nomination and an associated recess appointment announcement was 216 days (about seven months). The median elapsed time was slightly shorter: 211 days (approximately seven months).²⁹

In 19 of the 32 instances in which a related nomination had been made, the Senate had confirmed the nominee to the position to which he or she had been recess appointed, as of June 3, 2013. With regard to the 13 remaining individuals, nominations of 3 were pending; nominations for the other 10 were not. Of these 10, 7 were subsequently withdrawn by the President. Nominations of the 3 remaining individuals had been returned to the President, under Senate rules, and the President had not submitted a new nomination.

Congressional Efforts to Block Recess Appointments by Limiting Recess Duration³⁰

From the 110th Congress onward, new scheduling practices have arisen that appear intended to prevent the President from making recess appointments. As previously discussed, these practices do not appear to have prevented President Obama from making recess appointments. As discussed below, however, these appointments have been controversial and the subject of litigation.³¹

One set of scheduling practices that have arisen was implemented by the Senate alone; no unusual action or inaction by the House was necessary. A second, related set of practices, which developed in the 112th Congress, arose from the lack of a concurrent resolution of adjournment, which can result from a lack of consent by either the House or the Senate. This section describes these developments and the impact they have had on the incidence of recess appointments.

Background

The Constitution does not specify the length of time that the Senate must be in recess in order for the President to make a recess appointment. Over the last century, recesses both within and between sessions have tended to become shorter than recesses between sessions of Congress

(...continued)

recess appointment.

²⁹ Two measures of central tendency are presented here: the mean, or average, and the median. The mean is the more familiar measure, and it was calculated by adding together the elapsed times for all of the cases and dividing the resulting sum by the total number of cases (32—each appointment that had been preceded by a nomination is a case in this instance). The median is the middle number in a set of observations (or, in this case, because of an even number of observations, the average of the two middle numbers). In data sets, such as this one, where the data are skewed because of a limited number of extreme values, the median is often considered to be the more accurate of the two measures of central tendency.

³⁰ This section is drawn from an June 8, 2012, CRS Congressional Distribution Memorandum, “Recess Appointments during Short Intervals between Sessions and Historical Efforts to Prevent Recess Appointments through Congressional Scheduling,” by Henry B. Hogue and Richard S. Beth. Copies of this memorandum are available to the congressional community from its authors. Hereinafter cited as “CRS CD Memorandum.”

³¹ The legality of the President’s actions has been addressed in an opinion by the Office of Legal Counsel at the Department of Justice as well as decisions of two federal courts of appeal, discussed below.

commonly used to be. This circumstance has brought to prominence the question of how long a recess must be before it may be appropriate for the President to take advantage of his constitutional power to fill vacancies through recess appointments.

Over time, the Department of Justice, through Attorneys General and Office of Legal Counsel opinions, has offered differing views on this issue, and no settled understanding on these questions appears to exist. One view, which was discussed by Attorney General Daugherty in a 1921 opinion, implied that a linkage might be established between the meaning of “the Recess of the Senate,” for Recess Appointments Clause purposes, and the meaning of “adjourn for more than three days,” for purposes of the Adjournment Clause.³² In the opinion, Daugherty argued that the President had the authority to make a recess appointment during an intrasession recess of 29 days. He stated,

If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other.³³

In 1993, a brief submitted by the Department of Justice in the case of *Mackie v. Clinton*³⁴ articulated this argument more fully. Arguing that the recess during which the recess appointment at issue in the case was made was of sufficient length, the brief stated,

If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate’s ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives.... It might be argued that this means that the Framers did not consider one, two and three day recesses to be constitutionally significant....

Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.³⁵

Pursuant to the Adjournment Clause, Congress generally provides for an intrasession recess of more than three days by adopting a concurrent resolution.³⁶ This form of measure is appropriate

³² U.S. Const. Article I, Section 5, clause 4. This clause provides that “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days....” In practice, the period has often extended to not more than four calendar days over a weekend. Under House precedents, “The House of Representatives in adjourning for not more than three days must take into the count either the day of adjourning or the day of the meeting, and Sunday is not taken into account in making this computation.” U.S. Congress, House, *Constitution, Jefferson’s Manual and Rules of the House of Representatives of the United States, One Hundred Twelfth Congress, 111th Cong., 2nd sess.*, H.Doc. 111-157 (Washington: GPO, 2011), sec. 83. Senate practice appears to be consistent with this approach. Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, 101st Cong., 2nd Sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 15-16, 1265.

³³ 33 Op. A.G. 20, at 24-25 (1921).

³⁴ Memorandum of Points and Authorities in Support of Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment, at 24-6, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993). Hereinafter cited as “Justice Department Brief.”

³⁵ Justice Department Brief, pp. 25-26.

³⁶ In practice, the period has often extended to not more than four calendar days over a weekend. Under congressional precedents, Sunday is considered a “dies non,” or a day on which the two chambers are not expected to meet, for purposes of determining whether Congress has adjourned for “not more than three days” with regard to the Adjournment Clause. Under House precedents, “The House of Representatives in adjourning for not more than three (continued...)”

for each house to consent to a recess of the other, because it requires adoption by both houses, but not action by the President. These resolutions typically specify the date or range of dates on which each of the chambers will adjourn and the date upon which each chamber will reconvene.³⁷

Practices Implemented Unilaterally by the Senate

The logic of the argument laid out in the Department of Justice brief appears to underlie congressional practices that were first implemented during the 110th Congress.³⁸ From November 2007 through the end of the George W. Bush presidency, the Senate structured its recesses in a way that was intended, at least initially, to prevent the President from making recess appointments. The approach involved the use of pro forma sessions, which are short meetings of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other house. Normally, it is understood that during a pro forma session no business will be conducted.³⁹

On November 16, 2007, the Senate majority leader announced that the Senate would “be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.”⁴⁰ The Senate recessed later that day and pro forma meetings were convened on November 20, 23, 27,

(...continued)

days must take into the count either the day of adjourning or the day of the meeting, and Sunday is not taken into account in making this computation” U.S. Congress, House, *Constitution, Jefferson’s Manual and Rules of the House of Representatives of the United States, One Hundred Tenth Congress, 109th Cong., 2nd sess.*, H.Doc. 109-157 (Washington: GPO, 2007), p. 37. Senate practice appears to be consistent with this approach (Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices, 101st Cong., 2nd sess.*, S.Doc. 101-28, (Washington: GPO, 1992), pp. 15-16).

³⁷ Modern resolutions also typically include provisions allowing some combination of the elected leaders in each house, such as the Speaker of the House and the majority leader of the Senate, acting jointly after consultation with the minority leaders in each chamber, to reconvene their respective chambers sooner.

³⁸ It appears that some such practice was considered, but not implemented, during the 1980s and 1990s. In response to certain recess appointments by President William J. Clinton in 1999, one Republican Senator reportedly stated, “What we can do—if they’re appointments that he should not make—is just not go into recess.... We’ll just go into pro forma. You’re in session, theoretically, but there’s no votes” (Dave Boyer, “Clinton Warned Against Recess Appointments; GOP Senators May Not Adjourn,” *Washington Times*, November 5, 1999, p. A1). In remarks on the Senate floor, the Senator indicated that a threat of this practice had been part of recess appointment negotiations in 1985 between Senator Robert C. Byrd and President Ronald W. Reagan: “He [Byrd] extracted from him [Reagan] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would have to give the list to the majority leader ... in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place” (Senator James M. Inhofe, “Recess Appointments,” remarks in the Senate, *Congressional Record*, vol. 145, part 163 (November 17, 1999), p. 29915).

³⁹ Business has sometimes been conducted during pro forma sessions, however. For example, by unanimous consent, the Senate agreed, on August 2, 2011, that it would “recess and convene for pro forma session only, with no business conducted” on a number of dates in August and early September, including August 5, 2011 (Sen. Harry Reid, “Orders for Friday, August 5 through Tuesday, September 6, 2011,” remarks in the Senate, *Congressional Record*, daily edition, vol. 157 (August 2, 2011), p. S5292). On August 5, 2011, the Senate convened as scheduled and, by unanimous consent, passed the Airport and Airway Extension Act of 2011, Part IV (Sen. Jim Webb, “Airport and Airway Extension Act of 2011, Part IV” remarks in the Senate, *Congressional Record*, daily edition, vol. 157 (August 5, 2011), p. S5297). It is established practice in the Senate that an order entered by unanimous consent can be superseded by a subsequent unanimous consent order.

⁴⁰ Sen. Harry Reid, “Recess Appointments,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (November 16, 2007), p. S14609.

and 29, with no business conducted. The Senate next conducted business after reconvening on December 3, 2007. During the remainder of 2007 and 2008, similar procedures were followed during most other periods that would otherwise have been Senate recesses of a week or longer in duration, including not only intrasession recesses, but also the period of sine die adjournment at the end of 2007.⁴¹

The Senate pro forma session practice appears to have achieved its stated intent during the final 14 months of the Bush Administration: President Bush made no recess appointments between the initial pro forma sessions in November 2007 and the end of his presidency.

The Senate did not use the pro forma session practices during or after the first session of the 111th Congress.⁴² Toward the end of the second session, however, the Senate structured its 2010 pre-election break as a series of shorter recesses separated by pro forma sessions. In this case, the use of the practice reportedly stemmed from a lack of agreement between the Senate majority leader and the Senate minority leader regarding the disposition of pending nominations over the break.⁴³

President Obama did not make any recess appointments during this period.

The procedures used by the Senate during the 110th and 111th Congresses supplemented the adjournment procedures typically used by the Senate and the House. In each of the instances where the pro forma session practice was used during these Congresses, the two chambers also adopted a concurrent resolution of adjournment. In each case, the schedule of pro forma sessions was established in the Senate by unanimous consent within the terms provided for in the concurrent resolution.⁴⁴

Senate Practices Necessitated by the Absence of House Consent to Adjourn

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

During the middle of the first session of the 112th Congress, a new related practice appeared to emerge. On May 25, 2011, in a letter to Speaker of the House John Boehner, 20 Senators urged

⁴¹ For further information on the use of the practice during the Bush Administration, see CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen Bearden.

⁴² When the practice under discussion here was first used, during the 110th Congress, Congress and the White House were controlled by different parties. During the 111th Congress, when the practice was not used, the two institutions were controlled by the same party. During the 112th Congress, the Senate and the White House were controlled by one party, and the House was controlled by the other.

⁴³ Brian Friel, "Senate to Block Recess Appointments," *CQ Today Online News*, September 29, 2010, available through a search at <http://www.cq.com/search/news-tab/older-cqtoday?cqtodayPublDate=20120123>.

⁴⁴ For example, H.Con.Res. 259 (110th Congress) provided that, "when the Senate recesses or adjourns on any day from Thursday, November 15, 2007, through Thursday, November 29, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand recessed or adjourned until noon on Monday, December 3, 2007, or such other time on that day as may be specified by its Majority Leader or his designee in the motion to recess or adjourn...." The series of pro forma sessions established by the Senate prior to its period of absence around this time concluded with a pro forma session on November 29, 2007, the last date upon which the Senate could adjourn under the resolution.

him “to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president’s term.”⁴⁵ The letter stated that “President Obama has used recess appointments to fill powerful positions with individuals whose views are so outside the mainstream that they cannot be confirmed by the Senate of the United States,” and it referred to the Senate practices of 2007 as “a successful attempt to thwart President Bush’s recess appointment powers.” The request of the Senators appears similarly intended to block President Obama from using the recess appointment power.

In a June 15, 2011, letter to the Speaker of the House, the House majority leader, and the House majority whip, 78 Representatives requested that “all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress.”⁴⁶

Between May 12, 2011, and the end of that year, no concurrent resolution of adjournment was introduced in either chamber. During periods of extended absence, the Senate used pro forma sessions to avoid recesses of more than three days.⁴⁷

Appointments During a Three-Day Recess Between Two Pro Forma Sessions

As previously discussed, on January 4, 2012, during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012, the White House announced President Obama’s intent to make four recess appointments. The recess and pro forma sessions had been provided for as part of the Senate schedule for the period of December 20, 2011, through January 23, 2012, established by unanimous consent on December 17, 2011.⁴⁸ This schedule, similar to those agreed to before extended Senate breaks in earlier months, provided for a series of pro forma sessions with intervening three- and four-day recesses.

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

An opinion of the Office of Legal Counsel (OLC) at the Department of Justice and decisions of two federal courts of appeals related to these four recess appointments addressed the constitutionality of the President’s actions. OLC argued that the recess appointments were constitutional,⁴⁹ while the two appellate courts found the appointments at issue in each case to be

⁴⁵ U.S. Congress, Senate, Senator David Vitter, “Vitter, DeMint Urge House to Block Controversial Recess Appointments,” press release, May 25, 2011, available through a search at <http://vitter.senate.gov>.

⁴⁶ U.S. Congress, House, Representative Jeff Landry, letter to the Speaker of the House John Boehner, et al., June 15, 2011, available through a search at <http://landry.house.gov>.

⁴⁷ The House has also used pro forma sessions during such periods of extended absence.

⁴⁸ Sen. Ron Wyden, “Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012,” remarks in the Senate, *Congressional Record*, vol. 157, part 195 (December 17, 2011), pp. S8783-S8784.

⁴⁹ “Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions,” Memorandum Opinion for the Counsel to the President, January 6, 2012, available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>.

unconstitutional.⁵⁰ The long term impact of the OLC opinion and the appellate court decisions on recess appointment practice was not immediately clear.⁵¹

Historical Examples of Recess Appointments During Brief Adjournments Between Sessions

Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a President made a recess appointment was 11 days, and the shortest intrasession recess during which a President made a recess appointment was 10 days. CRS data on recess appointments before this period, which were collected from publically available sources, are incomplete. Similarly, CRS data concerning the historical use of pro forma sessions by the Senate are incomplete.

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

On one of these occasions, the President made a recess appointment during an intersession recess of three days or less, when the Senate had adjourned sine die under the terms of a concurrent resolution. The adjournment began when the Senate adjourned the second session of the 80th Congress sine die on December 31, 1948, and concluded when the first session of the 81st Congress was convened on January 3, 1949. On January 1, 1949, during this three-day adjournment between sessions, official records indicate that President Harry S. Truman recess appointed Oswald Ryan to be a member of the Civil Aeronautics Board.⁵² Ryan had been serving on the board, and President Truman appointed him to a new term. Notably, the adoption of a concurrent resolution prior to this short intersession recess distinguishes it from the short intrasession recesses resulting from practices during the 112th Congress, where no concurrent resolution had been introduced.

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

⁵⁰ *Noel Canning* and *National Labor Relations Board v. New Vista Nursing and Rehabilitation*, No. 11-3440, 2013 WL 2099742, at *1 (3d Cir. May 16, 2013). For more on *Noel Canning*, see CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter. For more on *New Vista Nursing and Rehabilitation*, see CRS Report WSLG521, *3rd Circuit: President's Recess Appointment Power Only Extends to Intersession Recesses*, by David H. Carpenter.

⁵¹ For more on the impact of the first appeals court decision, see CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey.

⁵² Declaration of Ronald R. Geisler, exhibit 2, page 2, *Bowers v. Moffett*, Civil Action No. 82-0195 (D.D.C. 1982).

made over 160 recess appointments—mostly of military officers.⁵³ The Roosevelt Administration treated the period between these sessions as a “constructive recess.”⁵⁴

The historical instances cited here indicate that recess appointments have, on occasion, been attempted during sine die adjournments of three days or fewer. Nevertheless, the instances cited here each have unique characteristics, and their potential applicability under current practices and conditions remains open to question.⁵⁵

Obama Recess Appointment Data

The individual Obama recess appointments are shown in **Table 3**. The table provides, for each appointment, the name of the appointee, the position to which he or she was appointed, and the date on which the appointment was announced. Entries in bold are recess appointments that were made during a recess within a session of Congress (*intrasession* recess appointments). All other entries are recess appointments that were made during a recess between Congresses or between sessions of Congress (*intersession* recess appointments).

**Table 3. Recess Appointments by President Barack Obama,
January 20, 2009–June 3, 2013**

(Intrasession appointments bolded)

Appointee	Position	Agency	Date announced
Jeffrey A. Goldstein	Under Secretary for Domestic Finance	Department of the Treasury	03/27/10
Michael F. Mundaca	Assistant Secretary for Tax Policy	Department of the Treasury	03/27/10
Eric L. Hirschhorn	Under Secretary for Export Administration	Department of Commerce	03/27/10
Michael W. Punke	Deputy U.S. Trade Representative - Geneva	Office of the U.S. Trade Representative	03/27/10
Francisco J. Sánchez	Under Secretary for International Trade	Department of Commerce	03/27/10
Islam A. Siddiqui	Chief Agricultural Negotiator	Office of the U.S. Trade Representative	03/27/10
Alan D. Bersin	Commissioner of U.S. Customs and Border Protection	Department of Homeland Security	03/27/10

⁵³ The first session of the 58th Congress was an “extraordinary,” session convened at the call of the President. See CRS CD Memorandum for more detail.

⁵⁴ See letter from Secretary of War Elihu Root to Senator Redfield Proctor, Acting Chairman of the Senate Committee on Military Affairs, printed at “Recess Appointments,” *Congressional Record*, vol. 38 (February 4, 1904), p. 1604.

⁵⁵ For more on these historical instances and their potential applicability under current practices and conditions, see CRS CD Memorandum.

Appointee	Position	Agency	Date announced
Jill L. Thompson	Member	Farm Credit Administration	03/27/10
Rafael Borrás	Under Secretary for Management	Department of Homeland Security	03/27/10
Craig Becker	Member	National Labor Relations Board	03/27/10
Mark G. Pearce	Member	National Labor Relations Board	03/27/10
Jacqueline A. Berrien	Member (designated chair)	Equal Employment Opportunity Commission	03/27/10
Chai R. Feldblum	Member	Equal Employment Opportunity Commission	03/27/10
Victoria A. Lipnic	Member	Equal Employment Opportunity Commission	03/27/10
P. David Lopez	General Counsel	Equal Employment Opportunity Commission	03/27/10
Donald M. Berwick	Administrator of the Centers for Medicare and Medicaid Services	Department of Health and Human Services	07/07/10
Philip E. Coyle III	Associate Director for National Security and International Affairs	Office of Science and Technology Policy	07/07/10
Joshua Gotbaum	Director	Pension Benefit Guaranty Corporation	07/07/10
Mari Carmen Aponte	Chief of Mission, El Salvador	Department of State	08/19/10
Elisabeth A. Hagen	Under Secretary for Food Safety	Department of Agriculture	08/19/10
Winslow L. Sargeant	Chief Counsel for Advocacy	Small Business Administration	08/19/10
Richard Sorian	Assistant Secretary for Public Affairs	Department of Health and Human Services	08/19/10
James M. Cole	Deputy Attorney General	Department of Justice	12/29/10
William J. Boarman	Public Printer	Government Printing Office	12/29/10
Robert S. Ford	Chief of Mission, Syrian Arab Republic	Department of State	12/29/10
Francis J. Ricciardone Jr.	Chief of Mission, Turkey	Department of State	12/29/10
Matthew J. Bryza	Chief of Mission, Azerbaijan	Department of State	12/29/10
Norman L. Eisen	Chief of Mission, Czech Republic	Department of State	12/29/10
Richard Cordray	Director	Bureau of Consumer Financial Protection	01/04/12
Sharon Block	Member	National Labor Relations Board	01/04/12

Appointee	Position	Agency	Date announced
Terence F. Flynn	Member	National Labor Relations Board	01/04/12
Richard Griffin Jr.	Member	National Labor Relations Board	01/04/12

Sources: Table created by CRS using data from the *Daily Compilation of Presidential Documents*, available at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CPD>; the Senate nominations database of the Legislative Information System, available to the congressional community at <http://www.congress.gov/nomis/>; and news releases from the Obama Administration White House website, at <http://www.whitehouse.gov>.

Notes: Entries in bold are recess appointments that were made during recesses within a session of Congress (intrasession recess appointments). All other entries are recess appointments that were made during a recess between Congresses or between sessions of Congress (intersession recess appointments).

Author Contact Information

Henry B. Hogue

Specialist in American National
Government
hhogue@crs.loc.gov, 7-0642

Maureen Bearden

Information Research Specialist
mbearden@crs.loc.gov, 7-8955