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Recess Appointments Made by President Barack Obama

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Summary

Under the Constitution, the President and the Senate share the power to make appointments to high-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. The report discusses these appointments in the context of recess appointment authorities and practices generally, and it provides related statistics. Congressional actions to prevent recess appointments are also discussed.

President Obama made 32 recess appointments, all to full-time positions. During his presidency, President William J. Clinton made 139 recess appointments, 95 to full-time positions and 44 to part-time positions. President George W. Bush made 171 recess appointments, 99 to full-time positions and 72 to part-time positions.

Six of President Obama's recess appointments were made during recesses between Congresses or between sessions of Congress (*intersession* recess appointments). The remaining 26 were made during recesses within sessions of Congress (*intrasession* recess appointments).

In each of the 32 instances in which President Obama made a recess appointment, the individual also was 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 20 of the 32 cases, the Senate later confirmed the nominee to the position to which he or she had been recess appointed. The nominations of the 12 remaining recess appointees were either returned to, or withdrawn by, the President.

Beginning in the 110th Congress, 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.

In January 2012, President Obama made four recess appointments during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012, a period that was generally considered too short to permit recess appointments. The recess during which the President made the appointments was part of a period of Senate absence that, absent the pro forma sessions, would have constituted an intrasession adjournment of 10 days or longer.

In an opinion regarding the lawfulness of these appointments, the Office of Legal Counsel at the Department of Justice argued that "the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause." The U.S. Supreme Court later concluded otherwise in a case regarding three of the four appointments. It held that, for purposes of the Clause, "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business." The three recess appointments at issue were found to be constitutionally invalid.

Additional information on recess appointments may be found in other CRS reports: CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by (name redacted); and CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by (name redacted) and (name redacted).

This report will not be updated.

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Under the Appointments Clause of the Constitution, the President and the Senate share the power to fill high-level politically appointed positions in the federal government.¹ The Recess Appointments Clause of 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

President Barack Obama made 32 recess appointments.⁷ 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.

From the 110th Congress onward, it became common for the Senate and House to use certain scheduling practices as a means of precluding the President from making recess appointments.⁸ As discussed in greater detail later in this report, the practices do this by preventing the

¹ "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...." U.S. Constitution, Art. II, §2, cl. 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. Constitution, Art. II, §2, cl. 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, *2015-2016 Official Congressional Directory 114th Congress*, S. Pub. 114-1, 114th Cong. (Washington: GPO, 2016), pp. 528-546.

⁷ As discussed later in this report, three of these recess appointments were found to be constitutionally invalid by the U.S. Supreme Court in *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

⁸ The evolution of this use of scheduling practices is discussed in greater detail in the appendix of this report.

occurrence of a Senate recess of sufficient length for the President to be able to use his recess appointment authority.

President Obama made four recess appointments during a three-day recess between pro forma sessions of the Senate on January 3 and January 6, 2012, a period that was generally considered too short to permit recess appointments. 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 December 17, 2011.⁹ This schedule provided for a series of pro forma sessions with intervening three- and four-day recesses.¹⁰ The recess during which the President made the appointments was part of a period of Senate absence that would otherwise have constituted an intrasession adjournment of 10 days or longer.

In an opinion regarding the lawfulness of these appointments, the Office of Legal Counsel at the Department of Justice argued that “the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause.”¹¹ The U.S. Supreme Court later concluded otherwise in a case regarding three of the four appointments. It held that, for purposes of the Clause, “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”¹² These three recess appointments were found by the Court to be constitutionally invalid.

This report identifies recess appointments made by President Obama. The report discusses these recess appointments in the context of recess appointment authorities and practices generally, and it provides related statistics. Congressional actions to prevent recess appointments prior to and during the Obama presidency, the President’s unconstitutional appointments, and the judiciary’s response are discussed in more detail in an appendix to the report. Additional information concerning recess appointments by President George W. Bush, general recess appointment practices, and legal issues pertaining to judicial recess appointments in particular may be found in other CRS reports.¹³

⁹ 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.

¹⁰ 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).

¹¹ “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/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion_0.pdf.

¹² *Noel Canning*, 134 S. Ct. 2550, 2574. For more information and analysis regarding this case, see CRS Legal Sidebar WSLG990, *The Supreme Court Rules (At Last) on the Recess Appointments Clause*, by (name redacted)

¹³ See CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by (name redacted) and (name redacted); CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by (name redacted); and CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by (name redacted)

Characteristics of Recess Appointments by President Obama

Full-Time and Part-Time Positions

All of the 32 recess appointments made by President Obama were to full-time positions. During his presidency, President William J. Clinton made 139 recess appointments, 95 to full-time positions and 44 to part-time positions. President George W. Bush made 171 recess appointments, 99 to full-time positions and 72 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 included 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	0	0	0	0	32
Part-time	0	0	0	0	0	0	0	0	0	0
Total	0	28	0	4	0	0	0	0	0	32^a

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

Note: Each of the three presidencies lasted for eight years. Each President served during nine calendar years, however, since a President's term begins and ends on January 20.

- a. As discussed in the text of this report, three of these recess appointments were found to be constitutionally invalid by the U.S. Supreme Court in *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

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.”¹⁴ 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.¹⁵ 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.¹⁶ 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. Since the 1940s, most Presidents have made recess appointments during both kinds of recess.

Notwithstanding the legal opinions and practices of the preceding decades, a Department of Justice legal opinion and two federal appeals court decisions related to the four controversial 2012 recess appointments made by President Barack Obama raised questions about what a “recess” is for purposes of exercising the recess appointment power.¹⁷ In a June 26, 2014, opinion, the U.S. Supreme Court addressed these questions. It held that the President’s recess appointment power extends to both intersession and intrasession recesses. The Court also held

¹⁴ U.S. Constitution, Art. II, §2, cl. 3.

¹⁵ U.S. Constitution, Amendment XX, §2.

¹⁶ 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.

¹⁷ As previously discussed, the Justice Department 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. (“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/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion_0.pdf) 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 recesses. (*Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, 499 (D.C. Cir. 2013).) 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. (*National Labor Relations Board v. New Vista Nursing and Rehabilitation*, No. 11-3440, 2013 WL 2099742, at *1 (3d Cir. May 16, 2013).)

that the President may use the recess appointment power essentially only during a recess of 10 days or longer.¹⁸

One reason for the controversy may be that, in one sense, intrasession recess appointments have afforded the President the ability to fill positions unilaterally for longer periods than would have been the case under 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.¹⁹ 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.

President Obama made 6 intersession recess appointments and 26 intrasession recess appointments.

Table 2. Summary Information Concerning Recess Appointments Made by President Barack Obama

All recess appointments	32^a
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

¹⁸ *Noel Canning*, 134 S. Ct. 2550, 2566-2567 (2014). The Court stated that a Senate recess of 3 days is “is not long enough to trigger the President’s recess appointment power,” and a recess of more than 3 days but less than 10 is “presumptively too short to fall within the Clause” but “leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break.” The opinion gave as an example of an unusual circumstance an instance such as “a national catastrophe . . . that renders the Senate unavailable but calls for an urgent response.” The Court noted that “political opposition in the Senate would not qualify as an unusual circumstance.”

¹⁹ Pryor was subsequently confirmed by the Senate and appointed to the position permanently.

All recess appointments	32^a
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 ^b	
Resulted in confirmation	20
Withdrawn by the President and not resubmitted	9
Returned to the President and not resubmitted	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.lis.gov/nomis/>.

- a. As discussed in the text of this report, three of these recess appointments were found to be constitutionally invalid by the U.S. Supreme Court in *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).
- b. 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 (name redacted).

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, 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.²⁰ President Clinton 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.²¹ 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

²⁰ 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 and district courts.

²¹ Neil A. Lewis, "Senator Vows He Will Fight Clinton's Judicial Selection," *New York Times*, December 29, 2000, p. A16.

retired.²² 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.²³

President Obama 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.²⁴ 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.²⁵

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 disrespecting 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 before the President uses the recess appointment authority to do so.

Each of the 32 recess appointments made by President Obama was preceded by a related nomination of the individual given the recess appointment. The elapsed time between initial nomination and the announcement of 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).²⁶

²² See entry for Charles Willis Pickering Sr. in the “Biographical Directory of Federal Judges” at the Federal Judicial Center website: <https://www.fjc.gov/history/judges>.

²³ For more, see CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by (name redacted)

²⁴ For the purposes of this report, a related nomination was defined as a nomination, by the appointing President, to the position to which the recess appointment was made.

²⁵ 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.

²⁶ 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 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.

In 20 of the 32 instances in which a related nomination was submitted, the Senate subsequently confirmed the nominee to the position to which he or she had been recess appointed. With regard to the 12 remaining individuals, the nominations of 9 were subsequently withdrawn by the President, and the nominations of the 3 remaining individuals were returned to the President, under Senate rules.

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 Made by President Barack Obama
(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
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

Appointee	Position	Agency	Date Announced
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 Publishing 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^a	Member	National Labor Relations Board	01/04/12
Terence F. Flynn^a	Member	National Labor Relations Board	01/04/12
Richard Griffin Jr.^a	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.lis.gov/nomis/>; and news releases from the Obama Administration White House website, at <https://obamawhitehouse.archives.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).

- a. As discussed in the text of this report, this recess appointment was among three that were found to be constitutionally invalid by the U.S. Supreme Court in *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

Appendix. The Evolution of Congressional Scheduling Practices to Block Recess Appointments

From the 110th Congress onward, it became commonplace for the Senate and House to use certain scheduling practices as a means of precluding recess appointments by the President. The practices do this by preventing the occurrence of a Senate recess of sufficient length for the President to be able to use his recess appointment authority. In a June 26, 2014, opinion, the U.S. Supreme Court held that the President may use the recess appointment power essentially only during a Senate recess of 10 days or longer.²⁷ Furthermore, the Court concluded that, for purposes of the Recess Appointments Clause, “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”²⁸ This implies that the Senate would also determine if and when it will adjourn for a recess of 10 days or longer and thus allow for the possibility of recess appointments. In this way, the Court validated the use of congressional scheduling as a mechanism for preventing the President from making recess appointments.

One set of scheduling practices that has 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 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 opinions of Attorneys General and the Office of Legal Counsel, has offered differing views on this issue. Prior to the 2014 U.S. Supreme Court opinion just discussed, no settled understanding appeared to exist. One view, which was discussed by Attorney General Harry M. 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 Adjournments Clause.²⁹ 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,

²⁷ *Noel Canning*, 134 S. Ct. 2550, 2566-2567. See below for more detail.

²⁸ *Noel Canning*, 134 S. Ct. 2550, 2574.

²⁹ U.S. Constitution, Art. I, §5, cl. 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 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 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 (continued...)

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.³⁰

In 1993, a brief submitted by the Department of Justice in the case of *Mackie v. Clinton*³¹ 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.³²

Pursuant to the Adjournments Clause, Congress generally provides for an intrasession recess of more than three days by adopting a concurrent resolution.³³ This form of measure is appropriate 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.³⁴

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.³⁵ From November

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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.

³⁰ 33 Op. A.G. 20, at 24-25 (1921).

³¹ 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."

³² Justice Department Brief, pp. 25-26.

³³ As noted in footnote 29, the two chambers have each recessed for a four-day weekends without the consent of the other under the rationale that Sunday is not counted under such circumstances.

³⁴ 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.

³⁵ It appears that some such practice was considered, but not implemented, during the 1980s and 1990s. While the nomination of Robert H. Bork to be an Associate Justice of the Supreme Court was under Senate consideration in 1987, Senate Majority Leader Robert C. Byrd threatened to use the practice to prevent President Ronald W. Reagan from making a recess appointment to that body: "I would say that if there is any thought, that there will be a recess appointment of a Supreme Court Justice, such an approach will not be feasible, and the administration ought to know it. ... I would not adjourn the Senate. If it comes to that, we will go into pro forma meetings, and we will be here and ready to do business if need be." (Senator Robert C. Byrd, "The Defense Bill Conference Report," remarks in the Senate, *Congressional Record*, vol. 133, part 19 (October 7, 1987), pp. 26833-26834.) There are indications that Senator Byrd had raised this possibility in communications with President Reagan in 1985, as well. 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 (continued...)"

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.³⁶

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.”³⁷ The Senate recessed later that day and pro forma meetings were convened on November 20, 23, 27, 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 2007.³⁸

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.³⁹ 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

(...continued)

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 Byrd and President 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).

³⁶ 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.

³⁷ Sen. Harry Reid, “Recess Appointments,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (November 16, 2007), p. S14609.

³⁸ 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 (name redacted) and (name redacted).

³⁹ 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 and 113th Congresses, the Senate and the White House were controlled by one party, and the House was controlled by the other. During the 114th Congress, the arrangements returned to those under the 110th Congress: the White House and Congress were controlled by different parties.

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.⁴⁰

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.⁴¹

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 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.”⁴² 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 appeared 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.”⁴³

⁴⁰ Brian Friel, “Senate to Block Recess Appointments,” *CQ Today Online News*, September 29, 2010, available at <http://www.cq.com/doc/news-3743961?10&search=AwSIIdNKK>.

⁴¹ 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.

⁴² U.S. Congress, Senate, Senator David Vitter, “Vitter, DeMint Urge House to Block Controversial Recess Appointments,” press release, May 25, 2011. A copy of this letter is available from the author of this report upon request.

⁴³ U.S. Congress, House, Representative Jeff Landry, letter to the Speaker of the House John Boehner, et al., June 15, 2011. A copy of this letter is available from the author of this report upon request.

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.⁴⁴

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, 2011.⁴⁵ 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.

In an opinion regarding the lawfulness of these appointments, the Office of Legal Counsel at the Department of Justice argued that "the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for the purposes of the Recess Appointments Clause."⁴⁶ However, the constitutionality of three of the four recess appointments was challenged.⁴⁷

As noted above, in a June 26, 2014, opinion, the U.S. Supreme Court addressed this question, concluding that, for purposes of the Recess Appointments Clause, "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."⁴⁸ Furthermore, the Court held that the President may use the recess appointment power essentially only during a recess of 10 days or longer. A Senate recess of 3 days "is not long enough to trigger the President's recess appointment power," and a recess of more than 3 days but

⁴⁴ The House also used pro forma sessions during such periods of extended absence.

⁴⁵ 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.

⁴⁶ "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/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion_0.pdf.

⁴⁷ 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 recesses. It also held that only those vacancies that occurred (rather than merely existed) during a recess could be filled through appointment during that recess. (*Noel Canning v. Nat'l Labor Relations Bd.*, 705 F.3d 490, 499 (D.C. Cir. 2013).) 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. This court did not render a holding on the timing of a vacancy relative to a recess during which it may be filled through recess appointment. (*National Labor Relations Board v. New Vista Nursing and Rehabilitation*, No. 11-3440, 2013 WL 2099742, at *1 (3d Cir. May 16, 2013).)

⁴⁸ *Noel Canning*, 134 S. Ct. 2550, 2574. In addition to the issues discussed here, the Court addressed ancillary questions that had been raised in lower court proceedings. It held that the President's recess appointment power extends to both intersession and intrasession recesses, and it concluded that the recess appointment power can be used to fill both vacancies that initially occur during a recess and those that arise when the Senate is in session.

less than 10 is “presumptively too short to fall within the Clause” but “leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break.”⁴⁹

This implies that the Senate would determine if and when it will adjourn for a recess of 10 days or longer and thus allow for the possibility of recess appointments. Under the Adjournments Clause of the Constitution, however, such a determination requires the consent of the House.⁵⁰ Consequently, either the Senate or the House can unilaterally prevent a Senate adjournment of 10 days or longer that would permit the President to exercise his recess appointment authority.

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⁴⁹ *Noel Canning*, 134 S. Ct. 2550, 2566-2567 (2014). The opinion gave as an example of an unusual circumstance an instance such as “a national catastrophe ... that renders the Senate unavailable but calls for an urgent response.” The Court noted that “political opposition in the Senate would not qualify as an unusual circumstance.”

⁵⁰ Article I, §5, clause 4 of the Constitution provides: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”

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