# Brief: On the Article II Recess Appointments Clause

**By Jeff Clark and Anthony Licata**

Given the extensive delays experienced during his first administration in getting the Senate to approve his nominees expeditiously, President-elect Donald Trump recently proposed the use of recess appointments, if necessary, to briskly stand up his new administration early next year. The question is whether the law and our history confirms the President's belief that he should be allowed to assemble his Cabinet quickly via recess appointments?" ***The answer is "yes."***

## Article II Power of Appointment

James Madison proclaimed on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[1] "Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute."[2]

The President retains unfettered discretion to select every Officer to be considered by the Senate for confirmation, whereas the Senate's advice-and-consent authority is confined to mere binary approbation (*i.e.*, aye or nay) of the President's nominees.[3] From that perspective, it is unsurprising that the practice of Senate committee referrals and the summoning of presidential nominees for lengthy hearings and invasive inquisitions are modern conventions completely foreign to the Constitution's Framers and were not how the confirmation process, often using voice votes, was operated for most of the country's history.[4]

The appointment power is vested in the President under the regime erected by Article II of the Constitution. Two clauses, in particular, grant this power: the Appointments Clause and the Recess Appointments Clause. These clauses exist to ensure the efficient appointment and near-perpetual commission of subordinate executive officers under the direct charge of the President, so that gaps in offices led by presidential appointees do not exist for lengthy periods of time.

The Appointments Clause grants to the Senate an advice-and-consent qualification on the appointment of executive officers and, in conjunction with the House, the authority to statutorily create such offices in the first instance,[5] yet the "entire 'executive Power'" to appoint, remove, supervise, command and control each and every one of these executive officers and offices "belongs to the President alone" under Article II.[6] As Chief Justice Taft observed, the "ordinary duties of officers prescribed by statute come under the general administrative control of the

President by virtue of the general grant to him of the executive power," which necessarily includes the power of "appointment and removal of executive officers" and of "supervis[ing] and guid[ing] their construction of statutes under which they act."[7]

Whereas under the Appointments Clause, the "power of appointment is confided to the President and Senate ***jointly***" (in view of the Senate having the power under that clause to withhold consent), the Recess Appointments Clause "authorise[s] the President, ***singly***, to make temporary appointments" to vacant Offices, which may be "necessary for the public service to fill without delay."[8] The Framers additionally saw to it that, notwithstanding the senatorial advice-and-consent qualification on appointments,[9] the President "shall have Power to fill up all Vacancies [in Offices] that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[10] As President Monroe's Attorney General, William Wirt, propounded in his cornerstone opinion interpreting the Recess Appointments Clause: "The substantial purpose of the [C]onstitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."[11]

The Courts and the Executive Branch have firmly rejected any notion that "a recess appointment is somehow a constitutionally inferior procedure, not entirely valid or in some way suspect" based on the argument that "the normal appointment process envisioned by the Constitution is nomination by the President with confirmation by the Senate."[12] "The Constitution . . . must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."[13] The Appointments Clause, taken in juxtaposition with the Recess Appointment Clause, is no exception. A recess appointee, just like a Senate-confirmed appointee, "is appointed by one of the methods specified in the Constitution itself . . . he holds the office; and he receives its pay."[14] Furthermore, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity."[15]

**Recess of the Senate**

Under the Recess Appointments Clause, the President's constitutional power to recess appoint Officers to vacant Offices without the advice and consent of the Senate is triggered either by an inter-session recess of the Senate ***or by*** an intra-session recess of the Senate. The Senate or the House "announces an inter-session recess by approving a resolution stating that it will 'adjourn *sine die*,' *i.e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin)," whereas the Senate or House "announces any such 'intra-session recess' by adopting a resolution stating that it will 'adjourn' to a fixed date, a few days or weeks or even months later." *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014).

Although the applicability of "Recess of the Senate" to intra-session recesses is less clear as a textual matter, this construction has been solidified, indeed liquidated, by longstanding practice, as "Presidents have made thousands of intra-session recess appointments" since 1929. *Id.* at 529. For example, during intra-session recesses, President Franklin D. Roosevelt recess appointed Dwight D. Eisenhower as a permanent Major General, President Harry Truman recess appointed Dean Acheson as Under Secretary of State, and President George H.W. Bush recess appointed Alan Greenspan as Chairman of the Federal Reserve Board. *Id.*

However, not every nominal "Recess of the Senate" (whether inter-session or intra-session) of the Senate permits use of the President's recess appointment power. The Congressional Adjournments Clause provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three [3] days."[16] Derived from this bicameral consent-to-adjourn requirement is the rule of thumb that if the Senate's recess is "so short that it does not require the consent of the House, it is too short *[per se]* to trigger the Recess Appointments Clause." *Noel Canning*, 573 U.S. at 538. The Supreme Court synthesized from this rule of thumb and historical practice that a Senate Recess "of more than 3 days but less than 10 days is ***presumptively*** too short to fall within the Clause" as well.[17] *Id.* (emphasis added).

Thus, if the Senate is in recess for at least 10 days, the President may grant recess commissions to fill up all vacancies in Offices for any reason, *i.e.* ones that (1) may still exist as a *sine die* adjournment period begins or that arise after the *sine die* adjournment period begins but before it ends (inter-session recesses); (2) may still exist as an intra-session recess begins, or (3) may arise during the intra-session recess itself (with categories (2) and (3) both being species of intra-session recesses). Recess commissions granted by the President to fill vacant Offices retain constitutional validity until either the Senate confirms the recess appointee for permanent appointment to the Office (if the President opts to use the Appointments Clause) or otherwise until the end of the next session of the Senate if the President desires to use only the Recess Appointments Clause. A President who grants a recess commission traditionally also seeks permanent appointment of the recess appointee to the Office by simultaneously submitting his nomination to the Senate for full consideration under the advice-and-consent check. ***For this reason, recess appointments are not invariably a mechanism that bypasses the Senate***.

Next, the Framers very deliberately bestowed upon the President authority to adjourn the Congress when the two Houses of that body disagreed about whether to take a recess. Indeed, they are prevented from returning to their duties until the President deems that return to be fitting:

> "[***The President***] may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he ***may adjourn them*** to such Time ***as he shall think proper***."[18]

This empowers the President, under designated circumstances, to exert such direct control over the legislative schedule as to determine when the Senate is in session or in recess—which carries the constitutionally dispositive consequence of when the President has the choice of using the Recess Appointments Clause or the Appointments Clause or both versus when he may only use the latter.[19] In the Supreme Court's *Noel Canning* decision, the majority opinion pronounced that "[t]he Constitution gives the President (if he has enough allies in Congress) a way to ***force a recess***."[20] It is also important to recognize textually that this clause of the Constitution to force a recess is triggered merely when there is disagreement between the two Houses of Congress; it is different than the President's power "on extraordinary Occasions" to ***convene*** both Houses.[21]

Justice Scalia, writing for the remaining members of the *Noel Canning* Court in a concurrence, agreed with the majority and proclaimed that "Members of the President's party in Congress may be able to ***prevent the Senate*** from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President ***may be able to adjourn both*** 'to such Time as he shall think proper.'"[22] Ergo, there is broad consensus that "all nine justices of the Supreme Court [in *Noel Canning*] agreed that the President could use the Adjournment Clause to force an adjournment long enough, under the *Noel Canning* majority opinion's holding and review of the history of presidential nominations, to make recess appointments, as long as there is a disagreement between the Senate and the House regarding when to adjourn."[23]

**Federal Vacancies Reform Act**

Recognizing the imperative of keeping the Executive Branch functioning properly and avoiding overlong vacancies, Congress passed a law to allow the President to fill vacancies with acting officers as a bridge to completing the confirmation process. This is the Federal Vacancies Reform Act (FVRA). The FVRA process can also be lawfully used to extend recess appointments by up to 210 days and this has occurred in the past without incident.[24]

President George W. Bush recess appointed Eugene Scalia to be Solicitor of Labor on January 11, 2002.[25] In late November 2002, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) was asked "whether Eugene Scalia, now serving as the Solicitor for the Department of Labor under a recess appointment, could be designated the Acting Solicitor after his recess appointment expires" if he were appointed to a non-career senior executive service (SES) position beforehand.[26] OLC concluded that "Mr. Scalia could be designated, while serving in his non-career [SES] position, as the Acting Solicitor after his recess appointment expires."[27] There is no reason that President Trump could not make use of the FVRA in the same way that President Bush did. At no point in between 2002 and now has Congress ever amended the FVRA to render the FVRA's augmentation of a recess appointment effectively continued by redesignating the recess-appointed officer to the same office in an acting capacity. Indeed, six Justices of the Supreme Court (Roberts, C.J., along with Kennedy, Thomas, Breyer, Alito, and Kagan) fully endorsed a strict and broad textual reading of the FVRA in *NLRB v. SW General,*

*Inc.*, 580 U.S. 288 (2017) (declining to allow non-first assistant to the General Counsel of the NLRB to go on serving as the Acting General Counsel by President Obama, even though that official was one of the three types of officials the FVRA generally allowed to serve as an acting officer, because his service was prohibited by a separate textual provision of the FVRA).[28]

**Paying Recess Appointees**

Finally, it should be noted that, conventionally, on account of having been appointed to the Office by one of the methods specified by the Constitution itself, a recess appointee must receive pay on the same plane as any Senate-confirmed officer. The Pay Act Amendment of 1940, 5 U.S.C. § 5503, which purports to prohibit the use of funds to pay recess appointees to many vacancies that existed while the Senate was in session, attempted to invade this constitutional principle. However, that statute is unconstitutional in three respects and would not survive a challenge: (1) it encroaches upon the President's unmistakable and historically acknowledged power (in both *Noel Canning* and *SW General*) to make recess appointments during intra-session recesses; (2) it requires the President to submit certain categories of intra-session recess appointments to the Senate for confirmation within 40 days of the start of the next session of the Senate (whereas the Constitution does not require ***any procedure*** be used to later confirm recess-appointed officers at all, as long as their appointment does not exceed the end of the session in which they were appointed); and (3) any application of its pay restrictions to Article III Judges infringes upon those Judges' special right, which other officers do not have, to undiminished compensation.

**Conclusion**

In conclusion, the President's full range of powers under the Recess Appointments Clause, the base Appointments Clause, and those two sets of powers as supplemented by the FVRA are broad and extremely powerful—more than adequate to put the Houses of Congress into recess for a sufficient length of time and make recess appointments to fill out subordinate Executive Branch roles to avoid any delay in the enactment of his agenda.

## Endnotes

**1.** 1 Annals of Cong. 463 (1789) (James Madison).

**2.** James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 528 (Westport: Greenwood Press ed. 1920) (quoting James Wilson).

**3.** The Federalist No. 66 (Hamilton) at 360 (Mar. 11, 1788) (1818 ed.) ("They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves ***choose***—they can only ratify or reject the choice he may have made.") (italics in original).

**4.** *See, e.g.*, Drew DeSilver, *Up Until the Postwar Era, U.S. Supreme Court Confirmations Usually Were Routine Business*, Pew Research Center (Feb. 7, 2022).

**5.** See U.S. Const. art. II, § 2, cl. 2 (Appointments Clause) (providing that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone").

**6.** *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting U.S. Const. art. II, § 1, cl. 1); *Myers v. United States*, 272 U.S. 135, 164 (1926).

**7.** *Myers*, 272 U.S. at 135, 164.

**8.** The Federalist No. 67 (Hamilton) at 365 (Mar. 11, 1788) (1818 ed.) (italics in original).

**9.** *See* U.S. Const. art. II, § 2, cl. 2 (Appointments Clause).

**10.** U.S. Const. art. II, § 2, cl. 3 (Recess Appointments Clause).

**11.** *Executive Authority to Fill Vacancies*, 1 Op. A.G. 631, 632 (1823).

**12.** *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996); *see also Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 215 (2002) (citing *Swan*, 100 F.3d at 987).

**13.** *United States v. Woodley*, 751 F.2d 1008, 1009–10 (9th Cir. 1985) (quoting *Prout v. Starr*, 188 U.S. 537, 543 (1903)).

**14.** *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 215 (citing *Swan*, 100 F.3d at 987).

**15.** *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979).

**16.** U.S. Const. art. I, § 5, cl. 4.

**17.** *See also id.* at 537 (providing that the period is "calculated by counting the calendar days running from the day after the recess begins and including the day the recess ends.").

**18.** U.S. Const. art. II, § 3 (emphasis added); *cf.* Frederic Maitland, Constitutional History of England 293-94 (1919) (explaining that the King of England's prerogatives included the powers

to, *inter alia*, summon and adjourn Parliament). The Framers designed a system that denied to the President the power to dissolve Congress (a power the King sometimes had as to Parliament), but gave the President the analogue to the regal power to prorogue (discontinue/recess) the Parliament, but cabined that power to situations where the two Houses of Congress disagreed on whether to take adjournments/recesses.

**19.** *See* *Noel Canning*, 573 U.S. at 550–51 (recognizing the President's Convene and Adjourn Clause powers as "exceptions" to the Senate's general "control over its schedule" for purposes of determining when the recess-appointment power applies).

**20.** *Id.* at 555 (citing U.S. Const. art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper")) (emphasis added).

**21.** The *Wall Street Journal* has argued that the Recess Appointments Clause power was conferred on the President only because the Framers knew no world other than one of horses and buggies and could not have anticipated jets or high-speed trains allowing Congress to quickly get back to the capital city whenever necessary. *See* *Trump's Recess-Appointment Scheme: To install AG Matt Gaetz this way would be anti-constitutional*, Wall St. J. (Nov. 14, 2024). If that were truly the exclusive raison d'être for the Recess Appointments Clause, then the President would not have been given the power to decide when Congress should return to session and come out of recess in Article 2, Section 3. That Section would instead have been given a time fuse (one appropriate to 18th century realities), yet it was not.

**22.** *Noel Canning*, 573 U.S. at 614 (Scalia, J., concurring in the judgment).

**23.** Hans A. von Spakovsky, et al., *Can the President Adjourn Congress and Make Appointments Without Senate Confirmation?*, Heritage Foundation (Apr. 17, 2020).

**24.** 5 U.S.C. § 3346.

**25.** *See* Press Release, Appointment Announcement, George W. Bush White House (Jan. 11, 2002).

**26.** *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 211.

**27.** *Id.*

**28.** A few commentators have argued that the separate concurring opinion of Justice Scalia in *Noel Canning* (joined by Chief Justice John Roberts as well as Justices Thomas and Alito) means that Roberts, Thomas, and Alito would, in 2025 and beyond, "find themselves in an awkward position" if President Trump makes broad use of his recess appointment powers. Madiba K. Dennie, *Trump's Recess Appointments Scheme Is a Show of Power Over the Supreme Court, Too: A decade ago, three conservative justices expressed their belief that what Trump wants to do with his Cabinet is unconstitutional*, Balls and Strikes (Nov. 15, 2024). The argument is offered to try to suggest that an opportunity to reconsider and discard *Noel Canning* will arise if President Trump's recess appointments are challenged in the Supreme Court. This ignores the fact that

Roberts (who authored *SW General*) and Alito seem to have readily conceded that *Noel Canning* is valid precedent in how it characterized the long and unbroken history of presidential intra-session recess appointments. *See* *SW General*, 580 U.S. at 308. Roberts and Alito merely said in *SW* General that the FVRA did not have such a long history.