Order Code RS21308
Updated March 12, 2008

CRS Report for Congress

Recess Appointments: Frequently Asked Questions

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Summary

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

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

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

How Often Have Recent Presidents Made Recess Appointments? President William J. Clinton made 139 recess appointments during his eight years in office, 95 to full-time positions. During his first seven years in office, President George W. Bush made 171 recess appointments, of which 105 were to full-time positions.[2]

What Is a "Session"? For the purposes of the recess appointment clause, the word "session" refers to the period between the reconvening of the Senate after a sine die adjournment and the next sine die adjournment. The Twentieth Amendment to the Constitution provides that Congress will meet annually on January 3, "unless they shall by law appoint a different day."[3] Generally, a session of the Senate begins on that day and continues until sine die adjournment, usually in the fall.[4] The Senate could be called back into session after sine die adjournment if certain conditions have been included in the adjournment resolution. Nonetheless, sine die adjournment is generally considered to be the end of the Senate's session for purposes of the expiration of a recess appointment.[5]

What Is a "Recess"? Generally, a recess is a break in House or Senate proceedings. Neither House may take a break of more than three days without the consent of the other.[6] Such consent is usually provided through a concurrent resolution.[7] A recess within a session is referred to as an *intrasession* recess. In recent decades, Congress has typically adjourned for 5-11 intrasession recesses of more than three days, usually in conjunction with national holidays. The break between the end of one session and the beginning of the next is referred to as an *intersession* recess. In recent decades, each Congress has consisted of two 9-12 month sessions separated by an intersession recess. The period between the second session of one Congress and the first session of the following Congress is also an intersession recess.

Recent Presidents have made both intersession and intrasession recess appointments. Intrasession recess appointments were unusual, however, prior to the 1940s, in part because intrasession recesses were less common at that time. Intrasession recess appointments have sometimes provoked controversy in the Senate, and some academic literature also has called their legitimacy into question.[8] Intrasession recess appointments

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[2] For more, see CRS Report RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-January 31, 2008*, by Henry B. Hogue and Maureen Bearden.

[3] U.S. Constitution, 20th Amend., § 2.

[4] Congress can also meet in extraordinary session; this last happened in the 1940s.

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

[6] U.S. Constitution, Art. 1, § 5, cl. 4.

[7] A concurrent resolution requires adoption by both houses, but does not require the President's signature.

[8] 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 Plantiffs' Motion, and in Opposition to Defendants' Motions, for Summary Judgment on Count Two," U.S. District Court for the District

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are usually of longer duration than intersession recess appointments. (See below, "How long does a recess appointment last?")

How Long Must the Senate Be in Recess Before a President May Make a Recess Appointment? The Constitution does not specify the length of time that the Senate must be in recess before the President may make a recess appointment. Over the last century, as shorter recesses have become more commonplace, the Department of Justice has offered differing views on this issue. Most recently, in 1993, a Justice Department brief implied that the President may make a recess appointment during a recess of more than three days.[9] On at least three occasions, the Senate has used procedural tools to prevent the occurrence of a recess of more than three days for the stated purpose of preventing such appointments: the 2007 Thanksgiving holiday period,[10] the period between the first and second sessions of the 110th Congress,[11] and the 2008 Presidents Day holiday period.[12] In each of these cases, the Senate met in pro forma sessions (during which no business was to be conducted) every three or four days over the course of what otherwise would have been a longer Senate recess. The President made no recess appointments during these periods.

Although President Theodore Roosevelt once made recess appointments during an intersession recess of less than one day, the shortest recess during which appointments have been made during the past 20 years was 9 days. Appointments made during short recesses (less than 30 days) have sometimes aroused controversy, and they may involve a political cost for the President. Controversy has been particularly acute in instances when Senators perceived that the President was using the recess appointment process to circumvent the confirmation process for a nominee who was opposed in the Senate.

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[8] (...continued)
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.

[9] *Mackie v. Clinton*, Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-26, Civ. Action No. 93-0032-LFO, (D.D.C. 1993).

[10] 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." (Sen. Harry Reid, "Recess Appointments," remarks in the Senate, *Congressional Record*, daily edition, vol. 153, November 16, 2007, p. S14609.)

[11] On December 19, 2007, the Senate Majority Leader announced that pro forma meetings would be held in the following days to prevent the President from making recess appointments. (Sen. Harry Reid, "Order of Business," remarks in the Senate, *Congressional Record*, daily edition, vol. 153, December 19, 2007, p. S15980.) Later that day, the Senate agreed, by unanimous consent, to hold a series of pro forma sessions until a sine die adjournment of the first session on December 31, 2007, and to hold another series beginning with the convening of the second session on January 3, 2008. (Sen. Harry Reid, "Order of Procedure," remarks in the Senate, *Congressional Record*, daily edition, vol. 153, December 19, 2007, p. S16069.)

[12] Sen. Harry Reid, "Order of Procedure," remarks in the Senate, *Congressional Record*, daily edition, vol. 154, February 14, 2008, p. S1085. See also Sen. Harry Reid, "Pending Nominees," *Congressional Record*, daily edition, vol. 154, February 6, 2008, pp. S692-S694.

What Constitutes a "Vacancy"? Historically, questions have arisen about the meaning of the constitutional phrase "Vacancies that may happen during the Recess of the Senate." Does "happen" mean "exist" or "occur"? The first meaning would allow the President to make recess appointments to any position that became vacant prior to the recess and continued to be vacant during the recess, as well as positions that became vacant during the recess. The second meaning would allow recess appointments only to positions that became vacant during the recess. Although this question was a source of controversy in the early 19th century, Attorneys General and courts have now long supported the first, broader interpretation of the phrase.[13]

A second question regarding the meaning of "Vacancies" arises in connection with recess appointments to fixed-term positions, such as those often associated with regulatory boards and commissions. In order to promote continuity of operations, Congress has often included "holdover" provisions in the statutory language creating such positions. The question then arises whether or not a position is vacant, for the purposes of a recess appointment, if an individual is continuing to serve, under a holdover provision, past the end of his or her term. The courts have varied in their rulings on this matter, and it has not been settled definitively by an appellate court. Based on decisions to date, however, the answer appears to hinge on the specific language of the holdover provision. For example, if the language is mandatory (the officeholder "*shall* continue to serve after the expiration of his term"), rather than permissive ("*may* continue to serve"), the position has been seen by the courts as not vacant, and therefore not available for a recess appointment.[14] When the provision includes a specific time limit for the holdover, such as one year, the position has also been seen as not vacant.[15]

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

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

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[13] For a further discussion of this controversy and a list of related opinions, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by T.J. Halstead.

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

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

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.[16] 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.

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

What Is the Difference Between the Authority and Pay of a Confirmed Appointee and Those of a Recess Appointee? A confirmed appointee and a recess appointee have the same legal authority and receive the same rate of pay. However, two provisions of law may, under certain circumstances, prevent a recess appointee from being paid. (See below, "Are there any legal constraints on the President's recess appointment power?")

Are There Any Legal Constraints on the President's Recess Appointment Power? There is no qualification on the President's "Power to fill up all Vacancies..." in the constitutional provision. Neither is there a statutory constraint on this power. There are, however, two provisions of law that may prevent a recess appointee from being paid. Under 5 U.S.C. § 5503(a), if the position to which the President makes a recess appointment 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.[17] For this reason, when a recess appointment is made, the President generally submits a new nomination to the position even when an old nomination is pending. In addition, although a recess appointee whose nomination to a full term is subsequently rejected by the Senate may continue to serve until the end of the recess appointment, a provision routinely included in an appropriations act may prevent him or her from being paid after the rejection. (See below, "What happens if the nomination of a recess appointee is rejected?")

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

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

What Happens If the Nomination of a Recess Appointee Is Rejected? Rejection by the Senate does not end the recess appointment. However, a recurring provision of the appropriations act funding the Department of the Treasury and specified other departments and agencies may prevent an appointee from being paid after his or her rejection. The provision reads, "Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person."[18] A similar provision has been part of this annual funding activity for at least 50 years. As a practical matter, nominations are rarely rejected by a vote of the full Senate.

Can the President Make Successive Recess Appointments to the Same Position? The President may make successive recess appointments of the same or a different individual to a position. Payment from the Treasury to the appointee may be limited, however, under 5 U.S.C. § 5503. As discussed above, this section provides that if the position to which the President makes a recess appointment fell vacant while the Senate was in session, the recess appointee may not be paid from the Treasury until he or she is confirmed by the Senate. Of the three exemptions to this pay prohibition, the first and third would not apply here. The second exemption, however, provides that, "if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent," the prohibition would not apply.[19] The clause "other than the nomination of an individual appointed during the preceding recess of the Senate" probably would prevent payment in the case of most successive recess appointments. This interpretation has been supported by the Department of Justice, which stated in 1991, "Although its language is far from clear, section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees."[20]

Can a Recess Appointment Be Used to Fill a Vacancy on the Federal Bench? Presidents have long made recess appointments to the federal judiciary. In recent years, however, recess appointments of federal judges have been unusual and controversial. Over the past 25 years, there have been only three recess appointments to fill Article III judgeships. President William J. Clinton recess appointed Roger L. Gregory to the Fourth Circuit on December 27, 2000, a step that met some opposition in the Senate. Ultimately, Gregory was re-nominated by President George W. Bush and confirmed by the Senate. On January 16, 2004, President 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.[21] On February 20, 2004, President Bush named William H. Pryor to the Eleventh Circuit Court of Appeals. Pryor was subsequently confirmed by the Senate.[22]

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[18] P.L. 110-161, Div. D, § 709.

[19] 5 U.S.C. § 5503(a)(2).

[20] 15 Op. O.L.C. 93 (1991). See also 6 Op. O.L.C. 585 (1982); 41 Op. A.G. 463 (1960).

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

[22] For more, see CRS Report RS22039, *Federal Recess Judges*, by Louis Fisher.