Question and Answer: Recess Appointments

Introduction: In light of the extensive time required for the Senate to consider nominees to executive offices, President-elect Donald Trump recently suggested the possibility of using the recess appointment power afforded by the Constitution. This has prompted widespread discussion and speculation regarding recess appointments in news media and online forums, with much confusion. The following resource addresses some common questions regarding the President's and Congress's constitutional appointment powers.

Question 1: Is it constitutional for a President to initiate recess appointments of executive branch officers, including cabinet officials?

Answer: Yes. The Constitution explicitly provides for the President to initiate recess appointments under Article II, Section 2, Clause 3, "*The President shall have the Power to fill up all vacancies that may happen during the Recess of the Senate, by granting commissions which shall expire at the End of their next Session.*"

The founders understood the need for the President to choose the members of his administration in order to faithfully carry out the duties of the Executive Branch. During the Constitutional Convention of 1787, James Wilson of Pennsylvania argued that "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." Wilson, and the rest of the founders, understood that the President had a right to a team of executive officers whom the President trusted to perform his duties.

Question 2: Does not the Constitution allow recess appointments only in certain emergency-type situations?

Answer: No, the Constitution does not require an emergency for the President to appointment executive officers during a Senate recess. The Courts have found that all vacancies present during a recess—i.e., "that happen to exist"—regardless of whether they arose during or prior to that recess, are eligible for filling with a recess appointment.

There are numerous examples of past Presidents making appointments during routine Senate recesses. President George W. Bush made 171 recess appointments over the course of his two terms, 141 of those during *intra-session* recesses. Presidents Bill Clinton and Ronald Reagan

also made use of the recess appointment power to appoint executive branch officials when the Senate was in recess.

Question 3: Is it constitutional for a President, at the outset of their administration, to initiate recess appointments of executive branch officers?

Answer: Yes. This is not a legal question, it's a practical one.

Historically, the Senate could be expected to give a simple voice vote to each nominee of the President, exercising its advice-and-consent power in just hours or days. Given the extraordinary growth in the size of the administrative state and the number of executive branch appointments subject to Senate confirmation (about 1,200 out of 4,000 total appointed positions), plus the increase in the amount of time taken for each nomination to be considered under current practice, the President is functionally prohibited from exercising his full executive authority until months after taking office. The modern conventions of Senate confirmation include extensive background checks, committee hearings, and multiple votes. Consequently, the average number of days it took the Senate to confirm a presidential nominee for a Senate-confirmed office (excluding federal judges, U.S. marshals, and U.S. attorneys) was approximately 130 during the Obama Administration, 154 during the first Trump Administration, and 137 during the Biden Administration.

Recess appointments are a constitutional remedy that enables the President to administer the government while the Senate continues to consider nominees. 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."

Question 4: Is Senate confirmation a prerequisite for an officer to serve in the Executive branch?

Answer: No. The Appointments Clause and the Recess Appointments Clause are equally viable methods for appointing officers to executive positions. Under the Recess Appointments Clause, the President may temporarily appoint officers to vacant offices without the advice and consent of the Senate when the Senate is in a recess of a sufficient length of time (not less than 10 days).

Question 5: Isn't using recess appointments just a way to bypass the Senate's advice and consent power?

Answer: Not at all. Advice and consent is unquestionably a Senate power granted by the Constitution, which is why Presidents typically submit recess-appointed officers to the Senate for confirmation. If the Senate fails to confirm a recess appointee, those appointed would be unable to remain in the role after the recess commission expires.

Question 6: What is the term of office for officials appointed via Recess Appointment power?

Answer: The Recess Appointments Clause, Article II, Section 2, Clause 3, provides that 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."

The Supreme Court has found that—absent Senate confirmation of the recess appointee—a recess appointment made *inter-session* (between *sine die* adjournments of Congress) permits the appointee to serve until the end of the next Senate session (about one year). However, an appointment made *intra-session* (during a session of Congress) permits the appointee to serve until the end of the *following* session (about two years).

Question 7: Is the recess appointment power constitutionally inferior to the other appointment power?

Answer: No. The Courts and the Executive Branch have firmly rejected any notion that recess appointments are somehow constitutionally inferior. The Supreme Court has unequivocally stated that the Constitution is to be regarded as a singular instrument, and all its provisions are to be deemed equally valid, including the Recess Appointment Clause. A recess appointee, like a Senate-confirmed appointee, has been appointed by a method specified in the Constitution and truly holds the office.

Question 8: Are there any limits on the President's power to recess appointment officers?

Answer: Yes, recess appointments can only be made during recesses of certain length.

In a recent unanimous decision, *National Labor Relations Board v. Noel Canning,* the Supreme Court provided clear guidelines for the constitutionality of recess appointments. The Court found

that all vacancies present during a recess—i.e., "that happen to exist"—regardless of whether they arose during or prior to that recess, are eligible for filling with a recess appointment. It also found that recess appointments can be made during both *inter-session* (between *sine die* adjournments of Congress) and *intra-session* (during a session of Congress) recesses.

In *Canning*, the Court ultimately rejected President Obama's recess appointments on the grounds that the recess was too short (the Senate had convened for *pro forma* sessions so that no recess had lasted longer than 3 days). Based on history and practice, the Court dictated that a recess must be at least 10 days long for a recess appointment to be in order.

Question 9: Can the President initiate a recess?

Answer: Yes, in a specific circumstance. Article II, Section 3 gives the President authority to adjourn Congress when the two Chambers of Congress have a "disagreement" about the timing of an adjournment.

> "[The President] may… 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."

It must be noted that while Presidents have convened Congress dozens of times (most recently President Truman in 1948) the power to adjourn has never been exercised. That being said, adjourning Congress requires a Concurrent Resolution passed by both the House and Senate. It stands to reason that if one body were to pass an adjournment resolution and the other were not, the presidential power to adjourn would be activated (a sort of "tie-breaker" between the bodies). Concurrent resolutions are privileged, meaning they cannot be filibustered in the Senate.

Question 10: Did Senate confirmations look different during the founding era?

Answer: Yes, very different. Background checks, committee referrals, and the summoning of presidential nominees for lengthy hearings and invasive inquisitions were all completely foreign to the Framers. Historically, the President of the Senate could assign a day for consideration of the President's nominees, to be taken up in executive session on the floor and voted on. Thus the Senate could—and often did—discharge its advice-and-consent power within just one or two days. For example, Alexander Hamilton's nomination to the Office of Secretary of the Treasury was approved by the Senate on the same day it was submitted by President Washington.

Question 11: Does *Federalist No. 67* repudiate the notion of utilizing recess appointments as a means of putting Cabinet officers in place?

Answer: No. Hamilton makes it clear that while recess appointments are typically considered an auxiliary method, they are constitutionally provided "in cases in which the general method was inadequate." Long structural delays in the existing general method that averaged nearly *five months* during the first Trump administration and over *four months* during the Biden administration can reasonably be construed as an *inadequacy*.

Question 12: Is there any limit to the number of recess appointments that can be made?

Answer: No, the Constitution does not limit the number of recess appointments that can be made.

Question 13: Is there a limited government argument for recess appointments?

Answer: Yes. Long structural delays in the existing "advice and consent" allow the federal bureaucracy to operate on autopilot with or without executive branch leadership. The timely appointment of the President's team ensures that a department or agency operates under the elected President's vision and is consistent with the will of the people as opposed to the whims of an unelected bureaucracy.

Question 14: If Republicans establish a practice of recess appointments won't the next Democratic President do the same?

Answer: The Constitution applies to both parties alike. Any future President may lawfully make recess appointments during an adjournment of sufficient length whether the current President does so or not.

The Framer's vision of the executive authority of the President was that Presidents are entitled to their team, subject to the advice-and-consent of the Senate and the limitations of recess

appointees. Congress also has several other checks and balances upon the executive, including advice and consent, oversight, appropriations, making laws, and the veto override.

Further, conservatives should consider whether a Republican President who is prevented from wielding influence over the administrative state is not in a much worse position than a Democratic President who is prevented from doing so.The unconstitutional administrative state tends to keep rolling along when officials have not been appointed to direct it. In which direction does that inertia trend?

Question 15: Are recess appointments 'constitutional gimmicks,' 'loopholes,' and 'back up plans'?

Answer: No. Recess appointments are a specific constitutional tool outlined in Article II, Section 2, Clause 3 to ensure the President can effectively execute the laws of the land when, as Hamilton articulates in *Federalist No. 67*, the general method is inadequate.

That the constitutional appointment power is considered by some a "gimmick" or "loophole" only underscores how far removed we are from constitutional governance.

Question 16: Do recess appointees get paid?

Answer: Yes. 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.