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Bypassing the Senate: How Recess Appointments Can Affect the Regulatory Landscape

This update explores what recess appointments are, the legal and political hurdles involved in effectuating them, and how these developments could affect regulated industries.

Of the roughly 4,000 positions filled by presidential appointment, approximately one quarter—more than 1,300—require Senate confirmation.[1] As President-elect Trump unveils his key nominees, questions mount about whether he might attempt to leverage the president's constitutional recess appointment power and bypass the standard Senate confirmation process. This authority grants the president the power to make appointments without affording the Senate an opportunity to advise on and consent to the president's nominations. Trump has explicitly acknowledged he is considering making recess appointments, posting on X during Senate leadership elections that "[a]ny Republican Senator seeking the coveted LEADERSHIP position in the United States Senate must agree to Recess Appointments (in the Senate!). . . ."[2] Should Trump choose to use this power, it likely will lead to legal challenges and potentially undermine the administration's relationship with the Senate.

As corporations recalibrate expectations and priorities due to the change in political control of Washington, it is helpful to understand how recess appointments could affect the regulatory landscape. Greater executive branch control over key appointments without Senate oversight could result in a shift in how laws are enforced, policies are shaped, and regulations are implemented. Recess appointments also could lead to uncertainty regarding the legitimacy of

some regulations or other agency actions. The following sections explore what recess appointments are, the legal and political hurdles involved in effectuating them, and how these developments could affect regulated industries.

I. The Standard Nomination Process

To understand the significance of recess appointments, it is important to first understand the typical nomination and confirmation process with Senate advice and consent. Usually, presidential nominations require a multi-step vetting process. First, the White House Office of Presidential Personnel conducts an initial screening, which typically includes a Federal Bureau of Investigation (FBI) background check into the nominee's employment, financial, criminal, and personal history. In some instances, even before formally nominating someone, the White House will consult with key senators to understand how the Senate might receive the potential nominee. After completing the White House background investigation process, the president transmits nominations to the Senate, where the nominee is referred to the committee of jurisdiction that will further vet the nominee.[3] The committee vetting process often includes a lengthy questionnaire for the nominee, financial disclosure, private staff- and senator-level meetings with the nominee, review of the nominee's FBI file, and public committee hearings where senators can question the nominee publicly.

The committee then votes on whether to report the nominee to the full Senate by majority vote. If the nominee fails to secure a majority, the full Senate can still consider the nominee if it agrees to a motion or resolution to discharge the nominee from committee, a multi-step process that often requires an affirmative vote of 60 senators.[4] Nominees who secure a majority of committee votes or are discharged from committee, however, can be confirmed by a majority vote of the full Senate.[5]

If a committee does not report or discharge a nominee, including when a nominee fails to garner a majority of votes, the nomination remains pending. Pending nominations are returned to the president at the end of a Congress.[6]

II. The Recess Appointment Process

In contrast, the recess appointment process, borne out of necessity and travel practicalities at the time of the founding,[7] forgoes much of the typical nomination process and allows the president to make an appointment while the Senate is in recess, and thus without the Senate's advice and consent. The Constitution gives the president "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."[8] The appointment is temporary and expires at the adjournment of the Senate's next session, meaning that a recess appointee generally cannot serve longer than two years.[9]

For the president to make a valid recess appointment, the Senate must formally agree to recess for longer than ten days.[10] In order to do so, the Senate must obtain the "Consent" of the House.[11] Typically, this happens through a concurrent resolution, which does not require the president's signature but must pass the House—by majority vote—and the Senate—subject to the filibuster. Congress rarely votes on these so-called adjournment resolutions and neither

chamber has agreed to such a resolution since 2016.[12] Instead, they have each met every three days, so they remain in session.[13]

III. Modern Use of Recess Appointments

Despite longer congressional sessions and the improvement of modern travel, which has largely mooted the Founders' concerns about congressional recesses and continuity of government, presidents in recent history have used the recess appointments power to make executive branch appointments.[14] For example, President Clinton made 139 recess appointments; President George W. Bush made 171; and President Obama made 32.

Modern use of the recess appointments power changed drastically in 2014, when the Supreme Court severely restricted the power in *National Labor Relations Board v. Noel Canning*.[15] There, Noel Canning, a bottler and distributor, appealed a National Labor Relations Board ("NLRB") decision that the company violated federal law.[16] In its appeal, Noel Canning claimed that three of the five members of the NLRB had been unconstitutionally appointed by then-President Obama during a three-day recess in 2012.[17] The Court held that the three-day Senate break from session was too short to be considered a "recess" for the purposes of the Appointments Clause. Instead, the Court held that a Senate recess must be longer than ten days for a recess appointment to be valid.[18] But not all justices thought ten days was the right interpretation of the Clause, leaving the door open for future challenges. In a concurring opinion, Justice Scalia—joined by Chief Justice Roberts and Justices Thomas and Alito—wrote that the only recess recognized by the Constitution is the recess between annual sessions of Congress and that a ten-day intra-session recess, or recess within a session, is insufficient.[19] In Justice Scalia's opinion, the "Court's decision transform[ed] the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future presidents against future Senates."[20]

Since *Noel Canning*, there has not been a single recess appointment because the Senate conducts "pro forma" sessions every three days under Article I, Section 5, preventing the chamber from being in an official recess.

IV. Obstacles to Recess Appointments

Should Trump wish to exercise his recess appointments authority, he will have to overcome several obstacles. Practically speaking, Congress must be in recess. As noted above, Congress has not recessed for longer than three days since the *Noel Canning* decision to prevent presidents from making recess appointments. It is not clear that the Senate—even though it is held by the same party as the incoming administration—would be willing to cede its advice and consent power voluntarily. Further, House Republicans will hold only the slimmest majority; persuading all of them to support adjourning for the purpose of bypassing the Senate confirmation process could be challenging. House and Senate members who do vote to adjourn likely will face significant backlash from the president.

As a result, it is less likely that either chamber—never mind both chambers—will agree to an adjournment resolution, making it more difficult for Trump to use his recess appointment authority.

V. Presidential Authority to Recess Congress

Even if Congress does not agree to adjourn, the Constitution arguably grants the president authority to force Congress to adjourn when there is "Disagreement between [the chambers], with Respect to the Time of Adjournment"[21] —although no president has ever used that authority. Because no president has ever adjourned Congress, it is not clear how the power would work in practice. If, for example, one chamber agreed to an adjournment resolution, but the other did not, the chambers would be in disagreement. Theoretically, the president could then adjourn Congress for eleven days or longer, per the *Noel Canning* time prescription, and exercise his recess appointment authority.

Practically, however, there are additional barriers to consider, including how the president must notify Congress to effectuate an adjournment and how each chamber effectuates the adjournment within their own rules. Additionally, legal challenges relying on the separation of powers doctrine to the president's use of the adjournment power are likely, though individual members of Congress may not have standing to bring suit.[22]

VI. Possible Effects of Recess Appointments

Trump's use of the recess appointment power likely would have several downstream effects, particularly for regulated industries.

First, because recess appointments bypass Senate scrutiny, appointees may have a scant public record around how and whether they will enforce existing regulations and whether their enforcement priorities differ dramatically from their predecessors. The lack of information—and stability—is especially relevant for companies in highly-regulated industries, such as the energy, healthcare, telecommunication, and finance sectors, to name a few.

Next, parties affected by regulations promulgated by recess appointees installed during a presidentially-enforced recess may well challenge such regulations, arguing that, based on the *Noel Canning* precedent, the regulations are invalid because they were issued by an invalidly appointed agency head. Additionally, agency employees could ostensibly decline to follow directions from a recess appointee, citing a lack of constitutional authority to require them to do so.[23] Contested recess appointments[24] would have the dual effect of creating legal uncertainties for regulated industries and congesting the Trump administration's deregulation efforts.[25]

Conclusion

It remains to be seen whether Trump will attempt to bypass the Senate's advice and consent role to install controversial appointments or to avoid bureaucratic delays for even non-controversial appointments. Businesses may want to stay apprised of this issue as they consider how the incoming administration's regulatory actions affect them and what challenges may be available to

them or to organizations opposing the new administration's regulatory changes. Gibson Dunn will be monitoring these developments closely and is available to advise clients regarding how to navigate any uncertainty that arises regarding recess appointments.

[1] Chris Piper & Paul Hitlin, *Presidential Appointments Are Hard to Track – And Growing*, Ctr. for Presidential Transition (Sept. 26, 2024), https://presidentialtransition.org/presidential-appointments-are-hard-to-track-and-growing/.

[2] @realDonaldTrump, X (Nov. 10, 2024, 2:21 PM), https://x.com/realDonaldTrump/status/1855692242981155259.

[3] Senate Rule XXXI.

[4] Senate Rule XVII. In 2013, Senate Democrats set new precedent, providing that most presidential nominees are not subject to a 60-vote threshold through which cloture is invoked. Valerie Heitshusen, Cong. Rsch. Serv., R43331, Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings of November 21, 2013 4 (2013). Instead, cloture is invoked—and a nominee is confirmed—by simple majority vote.

[5] Senate Rule XXXI.

[6] *Id.*

[7] *See* Jessi Kratz, *Advice and Consent and the Recess Appointment*, Ctr. for Legis. Archives, U.S. Nat'l Archives (Jan. 4, 2015) https://prologue.blogs.archives.gov/2015/01/04/advice-and-consent-and-the-recess-appointment/ (explaining how, at the Founding, the intended purpose of recess appointments was to ensure the work of government could continue when the Senate was not in session); The Federalist No. 67 (Alexander Hamilton) (stating that it "would have been improper to oblige [the Senate] to be continually in session for the appointment of officers" and declaring that the Appointments Clause was "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate").

[8] U.S. Const. art. II, § 2, cl. 3.

[9] *Id.*

[10] *NLRB. v. Noel Canning*, 573 U.S. 513, 538 (2014).

[11] U.S. Const. art. I, § 5 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . .").

[12] S. Con .Res. 50, 114th Cong. (as agreed to by the House, July 25, 2016).

[13] *See id.*; *see also* U.S. Const. art. I, § 5 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . .").

[14] Henry B. Hogue, Cong. Rsch. Serv., RS21308, Recess Appointments: Frequently Asked Questions 5 (2015).

[15] 573 U.S. 513 (2014).

[16] *Id.* at 520.

[17] *Id.* at 519.

[18] *Id*. at 513, 614.

[19] *Id.* at 575.

[20] *Id.* at 570.

[21] U.S. Const. art. II, § 3, cl. 2.

[22] Individual members of Congress likely will not have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (individual members who voted against Line Item Veto Act lacked standing to sue because they "alleged no injury to themselves as individuals, . . . the institutional injury they allege[d] is wholly abstract and widely dispersed, ... and their attempt to litigate this dispute at this time and in this form is contrary to historical experience"). However, any party suffering an injury-in-fact by agency regulation or action would have standing to also challenge the nomination. *See, e.g.*, *Noel Canning*, 573 U.S. at 519.

[23] *See* What the Hell is Going On? Making Sense of the World, *WTH Is Trump Trying to Recess Appoint Cabinet Members? John Yoo Explains*, American Enterprise Institute (Nov. 21, 2024), https://www.aei.org/podcast/wth-is-trump-trying-to-recess-appoint-cabinet-members-john-yoo-explains/.

[24] If Trump appoints judges during recess, those judges' appointments—and thus possibly their decisions—could be subject to challenge. That possibility, challenging the ruling of a judge that was improperly appointed, would be an issue of first impression.

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