January 30, 2025

Advice and Consent, and the Limited Role of Recess Appointment Power

One of the President's most consequential duties while in office is to appoint officers to the executive branch who will carry out the President's agenda.[1] The President, however, does not act unanimously in filling these important positions. Article II of the Constitution requires that the President obtain "the Advice and Consent" of the Senate when appointing all principal officers, including cabinet members. The Advice and Consent Process serves as an important check on the President's power and is critical for properly vetting the individuals selected to serve in positions of public trust.

The Framers of the Constitution plainly understood the Advice and Consent Process as an integral tool in preserving the separation of powers and ensuring executive officers remain accountable to the American people, and this process remains fundamental to our system of checks and balances.

The Constitution provides for recess appointments only as a limited exception to the usual Advice and Consent Process. Recess appointments allow the President to make appointments while the Senate is in recess, an exception deemed necessary in the Founding Era when travel was arduous and slow. As Founding Era documents and recent Supreme Court precedent make clear, the recess appointment power was intended merely as a failsafe in circumstances when the Senate was unable to meet and therefore could not consider Presidential nominations.

Recent suggestions by President Trump that he may try to force the Senate into a recess so that he may fill critical executive branch positions with recess appointments would be an extraordinary circumvention of the Advice and Consent Process.[2] The Constitution allows the President to adjourn Congress for a "disagreement" between the chambers, but this authority has never been used and would seriously undermine our system of checks and balances. As further explained below, this dangerous idea must be rejected by Congress not only to protect its own constitutional role, but to safeguard the American public from executive overreach.

I. THE ADVICE AND CONSENT PROCESS

Article II of the U.S. Constitution authorizes the President to nominate "Officers of the United States, whose Appointments are not herein otherwise provided for [in the Constitution], and

[1] *See* The Federalist No. 68 (Alexander Hamilton) ("[T]he true test of a good government is its aptitude and tendency to produce a good administration."); The Federalist No. 76 (Alexander Hamilton) (declaring this sentiment directly applicable to appointments)

[2] *See* Ed O'Keefe & Major Garrett, *Trump Warns He'll Adjourn Congress to Make Recess Appointments. How Would That Work?*, CBS News (Jan. 22, 2025), https://www.cbsnews.com/news/trump-recess-appointments-adjourning-congress/.

which shall be established by Law[.]"[3] Importantly, it requires the President to obtain "the Advice and Consent of the Senate" to appoint principal officers, including cabinet officials (the "Advice and Consent Process").[4] In other words, the President alone is vested with the authority to *nominate* principal officers, but nominees may *take office* only once they have been confirmed by a majority of the Senate.[5] The Advice and Consent Process is a critical tool in preserving the separation of powers and ensuring executive officers remain accountable to the American people.

Throughout the Advice and Consent Process, nominees undergo rigorous public and private scrutiny—as the Founders intended. Under today's Senate practices, nominees must testify publicly before the Senate, answer lengthy questionnaires, be subjected to an FBI background check, and complete a governmental ethics screening.[6] Nominees are required to provide information relating to potential conflicts of interest, their ability to protect national security, their qualifications for office, personal and professional associations, and their financial dealings, amongst other disclosures. Today, the Advice and Consent Process includes a series of hearings in the Senate, which are televised and widely reported on by media outlets. This process allows Senators to assess a nominee's fitness to serve in high levels of the federal government. Moreover, it allows the American public to scrutinize a nominee's record and ultimately hold elected and appointed officials accountable for the actions they take.

Advice and Consent and the Separation of Powers

The founding generation—having just broken free from a tyrannical monarch—sought to protect the new nation from the arbitrary rule of its chief executive.[7] One of the Founders' primary concerns was the abuse of executive branch appointments.[8] In *Freytag v. Commissioner of Internal Revenue*—a case concerning appointments of inferior officers—Justice Harry Blackmun explained the Founders' hesitations:

> The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power because "the

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[3] U.S. CONST. art. II, § 2, cl. 2.

[4] U.S. CONST. art. II, § 2, cl. 2. Inferior officers may be appointed by the President, agency heads, or courts without the advice and consent of the Senate, provided Congress authorizes it by statute. *See id.*

[5] Under current Senate rules, executive branch nominations are not subject to a filibuster, so confirmation requires a simple majority.

[6] See, e.g., Statement of Sean M. Stiff, Cong. Rsrch. Serv., in *Senate Procedures to Confirm Nominees: Hearing Before the Comm. On Rules and Administration of the U.S. Senate*, 118th Cong. (Jul. 30, 2024), https://crsreports.congress.gov/product/pdf/TE/TE10105; John B. Bellinger, III, et al., *Presidential Appointments and Senate Confirmations: A Guide for Prospective Trump Administration Political Appointees*, ARNOLD & PORTER (Nov. 13, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/11/a-guide-for-prospective-trump-administration-political-appointees; Robert K. Kelner, et al., *A Primer for Navigating the Presidential Appointee Vetting and Confirmation Process*, COVINGTON (Nov. 8, 2024), https://www.cov.com/en/news-and-insights/insights/2024/11/a-primer-for-navigating-the-presidential-appointee-vetting-and-confirmation-process.

[7] *See, e.g.*, N.L.R.B. v. Noel Canning, 573 U.S. 513, 601–02 (2014) (Scalia, J. concurring) (quoting I.N.S. v. Chadha, 462 U.S. 919, 959 (1983)) ("As we have recognized, while the Constitution's government-structuring provisions can seem 'clumsy' and 'inefficient,' they reflect 'hard choices . . . consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.'"); James P. Pfiffner, Federalist *No. 70: Is the President Too Powerful?*, PUB. ADMIN. REV. S112, S112-13 (Dec. 2011) (describing Founding Era visions for the executive).

[8] *See* Freytag v. Comm'r, 501 U.S. 868, 883 (1991).

> power of appointment to offices" was deemed "the most insidious and powerful weapon of eighteenth century despotism."[9]

The Founders viewed the Senate's role in appointing executive branch officers as a "critical protection against despotism[.]"[10] By allowing the legislative branch an opportunity to exert checks and balances on the executive branch, the Constitution thereby preserves the separation of powers—a feature that is paramount to the structure of our government.[11] Indeed, the Framers of our Constitution understood the advice and consent requirement to be a substantial factor in distinguishing our constitutional republic from the British monarchy and the absolute authority it vested in its ruler.[12] In the view of the Founders, the alternative option—allowing the President to have "the entire power of appointment" without the advice and consent of the Senate—could have enabled the executive branch to "establish a dangerous empire over [the Senate]," undermining the foundational values of our nation.[13]

By creating a strong separation of powers, the Framers of our Constitution sought to prevent one branch of government from becoming too powerful.[14] These protections were central to safeguarding the individual liberties of the American people.[15] In the *Federalist Papers*, James Madison famously warned against the accumulation of powers in a single branch of government:

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[9] *Id.* (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 79 (1969)).

[10] *Noel Canning*, 573 U.S. at 579 (Scalia, J. concurring)

[11] *See id.* at 579, 571 (Scalia, J. concurring) (noting that the structural provisions of the Constitution "reflect the founding generation's deep conviction that 'checks and balances were the foundation of a structure of government that would protect liberty.'") (quoting Bowsher v. Synar, 478 U.S. 714, 722 (1986)); *Noel Canning*, 573 U.S. at 595 (Scalia, J. concurring) (quoting *Bowsher*, 478 U.S. at 722) ("The Senate's check on the President's appointment power was seen as vital because ' "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power.' "); THE FEDERALIST NOS. 67, 69, 76, 77 (Alexander Hamilton). *See also*, David French, *Donald Trump Thinks He Won't Have Enough Power*, N.Y. TIMES (Nov. 24, 2024), https://www.nytimes.com/2024/11/24/opinion/trump-recess-appointments-constitution.html; Derek Scissors, *Senate Confirmation Is a Must for Conservatives*, AM. ENTER. INST. (Nov. 19, 2024), https://www.aei.org/foreign-and-defense-policy/senate-confirmation-is-a-must-for-conservatives/; Andy Craig, *On "Disagreement" and the Presidential Power to Adjourn Congress*, CATO AT LIBERTY (Nov. 18, 2024), https://www.cato.org/blog/disagreement-presidential-power-adjourn-congress; Ed Whelan, *The House Has No Authority to 'Disagree' with the Senate's Decision to Remain in Session*, NAT'L REV. (Nov. 17, 2024), https://www.nationalreview.com/bench-memos/the-house-has-no-authority-to-disagree-with-senates-decision-to-remain-in-session/ [hereinafter "Whelan, *Congressional Disagreement*"].

[12] *See* THE FEDERALIST NO. 69 (Alexander Hamilton).

[13] THE FEDERALIST NO. 77 (Alexander Hamilton).

[14] *See* THE FEDERALIST NO. 47 (James Madison); THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison). The Framers explained the importance of the inter-reliance of the branches in *Federalist 51*:

> TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

Id.

[15] *See, e.g.*, N.L.R.B. v. Noel Canning, 573 U.S. 513, 525 (2014) (noting that "the separation of powers can serve to safeguard individual liberty[.]"); *id.* at 571 (Scalia J. concurring) (quoting Bowsher v. Synar, 478 U.S. 714, 722 (1986)) ("Those structural provisions [of the Constitution] reflect the founding generation's deep conviction that 'checks and balances were the foundation of a structure of government that would protect liberty.'""); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring).

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [*sic*], or elective, may justly be pronounced the very definition of tyranny.[16]

And the Framers of our Constitution were keenly aware of the threat tyranny posed to individual liberties. In a concurring opinion in *Clinton v. City of New York*, Justice Anthony Kennedy summarized the Founders' vision:

> Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.[17]

Forgoing the Advice and Consent Process would therefore undermine the separation of powers and threaten the individual liberties of the American people.[18]

II. RECESS APPOINTMENTS

Given the importance of the Senate's advice and consent power in Article I of the Constitution, Article II sets out just a single exception that allows the President to appoint executive officers without the Senate's involvement.[19] The Recess Appointments Clause states in full:

> 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.[20]

This "power [is] a tool carefully designed to fill a narrow and specific need[.]"[21] As both Founding Era documents and recent Supreme Court precedent make clear, recess appointments are "a subsidiary, not a primary, method for appointing officers of the United States," including cabinet-level officials.[22]

Recess appointments are therefore a tool that should be deployed narrowly, and only for practical—not political—purposes, in line with the Founders' vision.

Early Purpose and Use of the Recess Appointment Power

Though there was little debate discussing the reason for the recess appointment power at the Constitutional Convention, it is easy to see how its original purpose was a purely practical one.[23] In the early years of Congress, the Senate was typically in recess for more time than it was in

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[16] THE FEDERALIST NO. 47 (James Madison).

[17] *Clinton v. City of New York*, 524 U.S. at 450 (Kennedy, J. concurring).

[18] *See Noel Canning*, 573 U.S. at 571 (Scalia, J. concurring).

[19] U.S. CONST. art. II, § 2, cl. 3 (the "Recess Appointments Clause").

[20] *Id.*

[21] *Noel Canning*, 573 U.S. at 570 (Scalia, J. concurring).

[22] *Noel Canning*, 573 U.S. at 522.

[23] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498 (2005); Becky Little, *The 18th-Century Origins of Recess Appointments*, HISTORY (Nov. 13, 2024), https://www.history.com/news/constitution-congress-recess-appointments.

session, with recesses averaging around six to nine months per year.[24] Given the rudimentary transportation and technology that existed in 1787 when the Recess Appointment Clause was conceived, this power was likely viewed as a necessity for the proper functioning of the executive branch to be used in the event that an office became vacant during a recess of the Senate.[25] This is because the methods of communication and transportation available at the time were extremely limited and convening an emergency session of Congress to confirm an appointment when Senators were in their home states could have taken weeks.[26] Indeed, delayed meetings of state delegations—including the Constitutional Convention—were quite common during the Founding Era when poor weather delayed travel and prevented a quorum from being present.[27] In a high profile example, voting in the first Congress had to be delayed for more than a month after it convened on March 4, 1789, because of Members' late arrivals, with only 22 of 81 Members present on the first day.[28]

If the Senate was in recess when an executive office became vacant, waiting for the Senate to appoint a replacement could have meant leaving important positions unfilled as Senators travelled hundreds of miles by wagon or on horseback on narrow dirt roads to return to the then-capital Philadelphia.[29] At the same time, the Founders believed it was important for legislators in a republican form of government to spend time among their constituents, so the Senate could not be constantly in session.[30]

In *Federalist 67*, Alexander Hamilton explains that recess appointments were intended to be used merely as a failsafe when the Senate was unavailable to confirm a nominee:

> The relation in which [the Recess Appointments] clause stands to the other [Advice and Consent Clause, art. II, § 2, cl. 2], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate JOINTLY, and can therefore only be exercised during the session of the Senate[.][31]

The first uses of Recess Appointment Clause in the early years of the Republic further evince its practical purpose.[32] In 1790, during the recess of the Senate, President George Washington

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[24] *See* Rappaport, *supra* note 23 at 1498.

[25] *See id.*

[26] *See id*; *Convention: A Daily Journal, Monday, May 14, 1787*, CONCORDIA UNIV. IRVINE CTR. FOR CIVICS EDUC., https://www.cui.edu/centers-institutes/center-for-civics-education/convention-a-daily-journal/post/monday-may-14-1787.

[27] *See id.*

[28] Little, *supra* note 23.

[29] *See id.*

[30] *See* Rappaport, *supra* note 23 at 1500-01.

[31] THE FEDERALIST NO. 67 (Alexander Hamilton).

[32] *See President George Washington's Message to the Senate Regarding Recess Appointments* (Feb. 9, 1790), in *Records of the U.S. Senate*, NAT'L ARCHIVE, https://founders.archives.gov/documents/Washington/05-05-02-0065 [hereinafter "Washington Recess Appointments Letter"]; Jessie Kratz, *Advice and Consent and the Recess Appointment*, in *Constitution, Presidents, U.S. Senate*, NAT'L ARCHIVE (Jan. 4, 2015), https://prologue.blogs.archives.gov/2015/01/04/advice-and-consent-and-the-recess-appointment/.

deployed the power to appoint William Nelson Jr. as attorney for the district of Virginia, filling a vacancy created during the Senate's recess when John Marshall declined serving in the position.[33] At the same time, President Washington filled several vacant federal judgeships.[34] In his message informing the Senate of the appointments, President Washington stressed that the appointments were "temporary" and would expire at the end of the subsequent session of the Senate, "and indeed ought not to endure longer than until others can be regularly made[.]"[35] Washington then submitted the same nominees for confirmation in the Senate.[36] Other early recess appointments followed a similar pattern, with several notable exceptions that were widely and contemporaneously rebuked.[37]

N.L.R.B. v. Noel Canning

By the early 2000s, uses of recess appointments had become somewhat unwieldy, with presidents often deploying the authority for political reasons to install nominees who likely would not have been confirmed in the Senate.[38] Between January 20, 1993, and February 14, 2015, Presidents made 312 recess appointments.[39] Of these, President William J. Clinton made 139, including 95 full-time positions, President George W. Bush made 171, including 99 full-time positions, and President Barack Obama made 32, all full-time positions.[40] It was in this context that the Supreme Court for the first (and only) time considered the proper application of the Recess Appointments Clause.[41]

In 2014, the U.S. Supreme Court cabined the President's ability to make recess appointments in *N.L.R.B. v. Noel Canning*.[42] The case arose out of labor dispute heard by the National Labor Relations Board (N.L.R.B.).[43] Seeking to have the N.L.R.B.'s order set aside, Noel Canning argued that President Obama exceeded his authority under the Recess Appointments Clause when he appointed three of the five members of the Board.[44] President Obama made the appointments during a three-day adjournment between pro forma sessions of the Senate after one nomination had been pending in the Senate for nearly a year and the two others were pending for several weeks.[45]

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[33] *See* Washington Recess Appointments Letter, *supra* note 32.

[34] *See id.*

[35] *Id.*

[36] *See id.*

[37] *See* Little, *supra* note 23.

[38] *See* Henry B. Hogue, Cong. Rsch. Serv., RS21308, Recess Appointments: Frequently Asked Questions 1 (Mar. 11, 2015), https://crsreports.congress.gov/product/pdf/RS/RS21308 [hereinafter "C.R.S., Recess Appointments"].

[39] *Id.*

[40] *Id.*

[41] N.L.R.B. v. Noel Canning, 573 U.S. 513 (2014).

[42] *Id.*

[43] *See id.* at 520.

[44] *See id.*

[45] *See id.* at 520-21.

The Court unanimously held that the three-day recess in the middle of the session was insufficient to give rise to the recess appointment power.[46] The five-justice majority decided that recess appointments would be "presumptively" invalid if made during a recess lasting fewer than 10 days and that pro forma sessions of the Senate restart the clock when determining the length of the recess.[47] The five justices further opined that recess appointments could be made during an intrasession recess (not just intersession recesses)[48] and where the vacancy being filled arose before the recess (rather than arising during the recess).[49] Importantly, however, these two declarations were not necessary to the outcome of the case and the four remaining justices sharply disagreed.[50]

When taken together with the requirement in Article I of the Constitution that prohibits either chamber of Congress from adjourning for more than three days without consent of the other, the decision in *Noel Canning* means that in order to recess for a sufficient length of time to trigger the recess appointment power, both chambers of Congress must agree to adjourn.[51] Given these constraints, the practice of Presidential recess appointments has disappeared almost entirely in the wake of *Noel Canning*, by virtue of the Senate holding pro forma sessions when most Senators are away from Washington on breaks.[52]

JUSTICE SCALIA'S NOEL CANNING CONCURRENCE

Justice Antonin Scalia, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito—recognizing the importance of the Advice and Consent Process to the Constitution's checks and balances of power—would have gone even further to restrict the President's authority to make recess appointments. Calling the majority's interpretation of the Recess Appointments Clause "atextual,"[53] the four justices would have held:

> [T]he Constitution cabins [the Recess Appointment] power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between

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[46] *See id.* at 519; *id.* at 537 ("A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power.").

[47] *Id.* at 537-38, 549-56. The Court noted:

> We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. (It should go without saying . . . that political opposition in the Senate would not qualify as an unusual circumstance.)

Id. at 538. In other words, almost all recess appointments made during a recess lasting fewer than 10 days will be impermissible, including those made for political reasons or because of a disagreement between the President and the Senate.

[48] The Senate takes two types of recesses. *Intersession* recesses occur between sessions of the Senate while *intrasession* recesses occur during a session of the Senate.

[49] *See id.* at 519.

[50] *See id.* at 569 (Scalia, J. concurring). Justice Scalia's concurrence is discussed further below.

[51] *See id*; U.S. CONST. art. I, § 5, cl. 4 (providing that neither chamber may adjourn for longer than three days without consent of the other).

[52] *See* Marne Marotta, *et al.*, *What Are Recess Appointments, and Will President-Elect Trump Bring Them Back?*, ARNOLD & PORTER (Nov. 20, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/11/what-are-recess-appointments-and-will-president-elect-trump-bring-them-back.

[53] *Noel Canning*, 573 U.S. at 70 (Scalia, J. concurring).

> two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding.[54]

In other words, any appointment made during an intrasession recess—that is a short break during the regular session—which would normally require the advice and consent of the Senate would be invalid.[55] Similarly, the President could not use recess appointments to fill vacancies that arose while the Senate was in session or that arose during a recess, but remained vacant during the subsequent session of the Senate.[56] Justice Scalia stressed that these restrictions are crucial "[t]o prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process[.][57]

Justice Scalia also questioned the continued utility of the recess appointment power in light of 21st century methods of communication and transportation, calling it "an anachronism[.]"[58] He continued:

> The need it was designed to fill no longer exists, and its only remaining use is the ignoble one of enabling the President to circumvent the Senate's role in the appointment process.[59]

Indeed, in a world where the Senate is rarely adjourned for longer than a few days, Senators receive news and updates instantaneously, and even the farthest serving Members can return to Washington in a single day, it is unclear that Congress still takes the types of recesses that made the recess appointments power necessary.

Several legal scholars have gone so far as suggesting that if President Trump abuses his authority to make recess appointments, the Supreme Court would likely follow Justice Scalia's concurrence, invalidating any appointment made during an intrasession recess or made to fill a vacancy that arose before the recess began.[60]

III. FORCED RECESS

Even if the Senate refuses to adjourn to allow the President to make recess appointments, President Trump has suggested he could force a recess under a never before used clause of the

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[54] *Id.* at 569 (Scalia, J. concurring).

[55] *See id.* (Scalia, J. concurring).

[56] *See id.* (Scalia, J. concurring).

[57] *Id.* (Scalia, J. concurring).

[58] *Id.* at 579 (Scalia, J. concurring).

[59] *Id.* at 579-80 (Scalia, J. concurring).

[60] *See, e.g.*, Ed Whelan, *Supreme Court Could Invalidate Intrasession Recess Appointments*, NAT'L REV. (Nov. 13, 2024), https://www.nationalreview.com/bench-memos/supreme-court-could-invalidate-intrasession-recess-appointments/ [hereinafter "Whelan, *Supreme Court*"]; Jed Rubenfeld, *Would Trump's Justices Approve His Recess Appointments?*, WALL ST. J. (Nov. 18, 2024), https://www.wsj.com/opinion/would-trumps-justices-approve-his-recess-appointments-supreme-court-scalia-d164cc53; Mark Sherman, *Recess Appointments Could Put Trump at Odds with Conservatives on the Supreme Court*, AP (Dec. 1, 2024), https://apnews.com/article/supreme-court-trump-recess-appointments-senate-constitution-55004d00cfa7d4b4832e9701cad48a06.

Constitution that provides for forced recess in extremely rare instances.[61] However, doing so would still require cooperation of Congress because the President can only force a recess in the event of a disagreement between the chambers.[62]

When and How the Senate May Recess in General

The U.S. Constitution gives the Senate "extensive control" over its own schedule and the rules of its proceedings, including when to adjourn and convene.[63] There are only "limited exceptions" to this authority.[64] Relevant here, neither chamber may adjourn for more than three days without the consent of the other.[65] In other words, absent intervention by the President, both the House of Representatives and the Senate must agree to adjourn in order for the Senate to take a recess of sufficient length to trigger the recess appointments power.[66] However, if there is disagreement between the House of Representatives and the Senate with respect to the time of adjournment, the Constitution authorizes the President to order it.[67] Similarly, a recessed Senate must meet if the President calls it into session.[68]

The Senate takes two types of recesses. *Intersession* recesses occur between sessions of the Senate while *intrasession* recesses occur during a session of the Senate. Under current Supreme Court precedent, recess appointments are permitted during both, provided that the recess is of sufficient length to trigger the authority.[69] Recesses requiring consent of both Houses of Congress are generally ordered through an "adjournment resolution," which is a concurrent resolution that can be adopted by a simple majority in both chambers.[70] To initiate an intersession recess, one chamber adopts a resolution by a simple majority stating that it will "adjourn *sin die*."[71] To initiate an intrasession recess, one chamber adopts a resolution by a simple majority stating that it will adjourn for a fixed number of days.[72] The other chamber consents to both types of resolutions by adopting with a simple majority the same resolution through the normal concurrent resolution process.[73]

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[61] *See* O'Keefe & Garrett, *supra* note 2; U.S. Const. art. II, § 3 ("[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[.]").

[62] *See id.*

[63] *See Noel Canning*, 573 U.S. at 551; *see also* U.S. Const. art. I, § 5, cl. 2; United States v. Ballin, 144 U.S. 1, 5 (1892).

[64] *Noel Canning*, 573 U.S. at 551 (citing U.S. Const. art. I, § 5, cl. 4; *id.* art. II, § 2; *id.* amend. 20, § 2).

[65] U.S. Const. art. I, § 5, cl. 4.

[66] *Id.*; *Noel Canning*, 573 U.S. at 538.

[67] U.S. Const. art. II, § 3.

[68] *See id.* art. II, § 3.

[69] *Noel Canning*, 573 U.S. at 556.

[70] *See* Valerie Heitshusen, Cong. Rsch. Ser., Sessions, R42977, Adjournments, and Recesses of Congress 7, 9-11 (Jul. 19, 2016), https://crsreports.congress.gov/product/pdf/R/R42977 [hereinafter "C.R.S., Sessions & Adjournments"]; Riddick's Senate Procedure: Precedents and Practices: Adjournment, S. Doc. 101-28, 101st Congress (Jan. 1, 1992), https://www.govinfo.gov/collection/riddicks-senate-procedure [hereinafter "Riddick's Senate Procedure: Adjournment"].

[71] *See* C.R.S., Sessions & Adjournments, *supra* note 70 at 9-11.

[72] *See id.* at 7.

[73] *See id.* at 7, 9-11.

A motion to adjourn is considered privileged and takes precedence over any other motion before the Senate.[74] Under current Senate rules, motions to adjourn are not subject to debate and cannot be filibustered.[75] Motions to adjourn until a specific date,[76] however, may be amended, giving senators who oppose adjournment an opportunity to delay the vote.[77]

Forced Recess by the President

Though the President ordinarily plays no role in the convening or adjourning of Congress, in the case of disagreement with respect to the time of adjournment, the Constitution authorizes the President to step in and order it. The full language is in the statement of Presidential power in one clause of Article II, Section 3:

> [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[.][78]

While presidents have regularly exercised their authority to convene one or both houses of Congress, no president has ever forced Congress to adjourn.[79] Consequently, there is some uncertainty about when this authority arises, however the Founders plainly intended the power to be a narrow one.[80] In *Federalist 69*, Alexander Hamilton explains, "The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment."[81]

In line with the Founders' understanding of the President's limited adjournment power, Senators should take a narrow view of which sessions of Congress the President has the authority to adjourn and the nature of the disagreement necessary to trigger the authority.

LIMITATION ON WHICH SESSIONS THE PRESIDENT MAY ADJOURN

Numerous conservative scholars have suggested that the President may only adjourn a special session of Congress convened by the President under Article II, Section 3.[82] In other words, the

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[74] *See id.* at 1, 4-5.

[75] *See id.* at 1, 3, 14.

[76] A simple motion to adjourn (i.e., one made without a specific date of return) cannot be amended. *See id.* at 3.

[77] *See id.* at 9; The Daily Blast with Greg Sargent, *How Trump Can Steamroll Senate with Gaetz Pick, Explained*, New Republic (Nov. 19, 2024), https://newrepublic.com/article/188576/transcript-trump-can-steamroll-senate-gaetz-pick-explained (interviewing Sarah Binder).

[78] *Id.*

[79] See Library of Congress, *U.S. Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, Art. II, S3.1 The President's Legislative Role*, https://constitution.congress.gov/browse/essay/artII-S3-1/ALDE_00013550/.

[80] *See* The Federalist No. 69 (Alexander Hamilton); *see also* The Federalist No. 77 (Alexander Hamilton) (describing the power of adjournment as one of "[t]he *only* remaining powers of the Executive") (emphasis added). In a single sentence in *N.L.R.B. v. Noel Canning*, the Supreme Court suggested the President might be able to force an adjournment to trigger the recess appointment authority. *See* N.L.R.B. v. Noel Canning, 573 U.S. 513, 555 (2014). Importantly, however, this sentence has no precedential value. It was not briefed before the Supreme Court, nor was it at issue in the lower courts.

[81] The Federalist No. 69 (Alexander Hamilton); *see also* The Federalist No. 77 (Alexander Hamilton).

[82] *See, e.g.*, Craig, *supra* note 11; Whelan, *Congressional Disagreement*, *supra* note 11.

President's authority to adjourn Congress does not arise during a regular session.[83] This interpretation is based on the text and history of Article II, Section 3, and constitutional structure more generally.[84] First, the constitutional clause authorizing the President to adjourn Congress immediately follows the clause authorizing the President to convene Congress on "extraordinary Occasions," suggesting the two powers are linked.[85] By contrast, if the President could adjourn *any* session of Congress, the Framers would have likely positioned that authority in Article I, Section 5, which requires consent of both chambers of Congress for a recess lasting more than three days.[86]

The drafting history of Article II, Section 3 and contemporaneous practice further support a limited understanding of when the President may adjourn Congress.[87] While there was very little attention paid to the adjournment power during the Constitutional Convention, members of the committee responsible for the clause's drafting only mentioned the power in relation to the President's authority to convene Congress.[88] Moreover, the Founding generation viewed the regular prorogation (or forced adjournment) of colonial legislatures by royal governors and the King as a serious abuse of power, even calling attention to such abuses in the Declaration of Independence.[89]

The Framers of the Constitution thus likely intended to restrict the President's authority to adjourn Congress only to sessions convened by the President. Today, this means that the President may not use this authority to force a recess during a regular session in order to trigger the recess appointments power.

NATURE OF THE DISAGREEMENT BETWEEN THE CHAMBERS

The circumstances under which there has been a "Disagreement between [the Houses], with Respect to the Time of Adjournment" sufficient to trigger the adjournment authority are similarly narrow.[90] As Andy Craig points out for the Cato Institute:

> A disagreement only occurs when one chamber actually expresses its disagreement with the other. This requires action, not simply inaction. It means adopting a conflicting adjournment resolution of its own. Or at the very least, to take a floor vote and

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[83] *See* Allan Erbsen, *Constitutional Limits on the President's Authority to Adjourn Congress*, U. MINN. L. SCH. LEGAL STUDIES, Research Paper No. 24-47 at 20-43 (rev'd. Dec. 20, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5043238.

[84] *See id.*

[85] *See* U.S. CONST. art. II, § 3; Erbsen, *supra* note 83 at 20-23.

[86] *See* U.S. CONST. art. I, § 5, cl. 4; Erbsen, *supra* note 83 at 20-23; *id.* at 22 ("One might think that the Disagreement Clause needed to be in Article II because it addresses presidential power. However, Article I already mentions the President in two contexts: impeachment and presentment.101 A third mention would have been sensible if the Framers intended the Disagreement Clause to modify the Consent Clause for all sessions.").

[87] *See id.* at 25-27.

[88] *See id.*

[89] *See id.* at 27-34; THE DECLARATION OF INDEPENDENCE (U.S. 1176) (noting that the King "has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people" and that the King and his allies have "suspend[ed] our own Legislatures, and declar[ed] themselves invested with power to legislate for us in all cases whatsoever").

[90] *See, e.g.*, Craig, *supra* note 11; Whelan, *Congressional Disagreement*, *supra* note 11; *see also* THE FEDERALIST NO. 77 (Alexander Hamilton) (noting that the executive has the power to adjourn Congress "when they cannot themselves agree upon the *time* of adjournment") (emphasis added).

affirmatively reject the proposed adjournment resolution, which the Senate has no obligation to do.[91]

The reason for this limitation is a practical one: If the passage of an adjournment resolution by one chamber and mere silence by the other constituted "disagreement," there would be no principled way to determine how long the second chamber's silence must last before a disagreement occurred.[92]

Some conservative scholars have also argued that the President may only use the adjournment power to set the *time* of adjournment when both chambers agree to go into recess but cannot agree when to do so or how long to remain adjourned.[93] According to conservative scholar Ed Whelan, this is because Article I, Section 5 of the Constitution only gives each chamber authority to prevent the other from adjourning.[94] It does not authorize one chamber to prevent the other from staying in session.[95] This means that "for the purposes of Article II, section 3, there can never be a 'Case of Disagreement' between the House and Senate over the Senate's staying in session."[96] Under this theory, if the two chambers do not agree to recess *at some point*, the President may not use the adjournment power to force the chambers to do so.[97]

Either way, the clear consensus is that the President's power to adjourn Congress—thereby creating the opportunity to make Recess appointments—must be a narrow one.[98]

The Senate's role in confirming presidential nominees is a fundamental constitutional authority carefully designed to ensure proper scrutiny of powerful executive branch positions. It serves as a critical check on the executive branch and recess appointments remain a narrow exception to the normal course of confirming nominees. Consistent with the Framers' intention for limited use of recess appointments, recent Supreme Court precedent has clearly cabined their use—and abuse—by the executive branch. It would be a serious breach of the Constitution's framework for the balance of power between the branches for the Senate to allow the President to make recess appointments simply to avoid the Advice and Consent Process, or to cooperate with the House to manufacture a "disagreement" with that body towards that same end. In

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[91] Craig, *supra* note 11.

[92] *See id.*

[93] *See, e.g.*, *id.*; Whelan, *Congressional Disagreement*, *supra* note 11; THE FEDERALIST NO. 77 (Alexander Hamilton).

[94] *See* Whelan, *Congressional Disagreement*, *supra* note 11.

[95] *Id.*

[96] *Id.*

[97] *See id.*

[98] *See* French, *supra* note 11; Whelan, *Congressional Disagreement*, *supra* note 11; Craig, *supra* note 11; Erbsen, *supra* note 11; Scissors, *supra* note 11; We the People with Jeffrey Rosen, *The President's Power to Make Recess Appointments*, NAT'L CONST. CTR., at 00:03:54.7 (Nov. 21, 2024), https://constitutioncenter.org/news-debate/podcasts/the-presidents-power-to-make-recess-appointments (interview with Ed Whelan, Thomas Berry, and Jeffrey Rosen on the President's recess appointment power).

addition, using recess appointments to evade the Advice and Consent Process would violate the public's right to scrutinize and hold the executive branch accountable for its personnel and their subsequent decisions.

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