THE WAYS IN WHICH PRESIDENT-ELECT TRUMP'S APPOINTEES COULD ASSUME THEIR POSITIONS WITHOUT SENATE CONFIRMATION

What are we looking at in terms of Cabinet-level and other political appointments?

- The nominees could be confirmed by the Senate – there is no filibuster and the GOP controls the Senate.
- The President could seek to appoint nominees in acting capacities.
- The Senate could adjourn, with the approval of the House, allowing the President to make recess appointments.
- The House could adopt a concurrent resolution for both chambers to adjourn, and were the Senate to reject it, there is a theory under which the President could force an adjournment of the Senate and make his recess appointments.

There are approximately 4,000 positions in the Federal government that are filled by political appointment (nomination by the President), and over 1,200 of these positions (PASs) require Senate confirmation. President Trump will have three routes available to him to fill PAS positions: confirmation by the Senate under the Appointments Clause of the Constitution, appointment of acting officials under the Federal Vacancies Reform Act of 1998 ("FVRA") and appointments under position-specific temporary appointments authority (*see generally,* CRS, "Temporarily Filling Presidentially Appointed" – updated January 8, 2024 and CRS, "Recess Appointments: Frequently Asked Questions" – updated March 11, 2015).

President-elect Trump's more controversial Cabinet-level nominations, including one that has already been withdrawn, have prompted questions around the confirmation process and, in particular, the risk of so-called "recess appointments." Recall that on November 10, Trump posted on Truth Social, "Any Republican Senator seeking the coveted LEADERSHIP position in the United States Senate must agree to Recess Appointments (in the Senate!), without which we will not be able to get people confirmed in a timely manner." The broader question is whether the GOP-controlled Senate that is sworn in on January 3 will discharge its role as an independent check on presidential power via its Constitutional advice and consent authority, or will fealty win out? The question is presented in the context of both the nominations themselves as well as the reported efforts to skip FBI background checks for those and other PAS nominations.

Routes for Political Appointments

Senate Confirmation

Ever since 2013, when Senate Democrats forced a rule change that eliminated the filibuster for executive branch nominations, Senate advice and consent has been by simple majority vote. While Democrats can ask questions and perhaps deploy some procedural roadblocks, the fate of the Trump nominees will be in the hands of Senate Republicans.

Hearings can be held starting after the GOP majority of the new Senate is sworn in on January 3. Votes can be held immediately after noon on January 20. Typically, nominations are allocated to the appropriate Senate committee. It is expected that at least for most Cabinet-level nominees, and particularly the Secretaries of Defense and State, public

confirmation hearings will be held. The relevant committee will then report to the full Senate, favorably, unfavorably or with no recommendation.

Incidentally, with Democrats in the majority in 2021, Biden became the first incoming president in 40 years to get all of his initial traditional (15) Cabinet nominees confirmed, and in record time (within two months). (*See* "Biden's slow and steady approach on Cabinet choices seems to be working.")

Recess Appointments

Under Article II, Section 2, Clause 3 of the Constitution, the President is empowered to make recess appointments to fill vacancies that occur during the recess of the Senate. These recess appointments expire at the end of the next session of the Senate (one or two years, depending on when made). This authority made sense in the days when members of Congress would be away from the capital for months at a time, and travelling to the capital took days or weeks.

President Bill Clinton made 139 recess appointments, President George W. Bush made 171 and President Barack Obama made 32. (*See* "Could Trump Install Gaetz Without Senate Approval? A Recess Appointment Primer.")

Since the days of the 110th Congress, both the Senate and the House have used scheduling practices, such that the Senate is never in recess long enough, so as to prevent recess appointments. Every three days, the Senate is gaveled back in for "pro forma" sessions to prevent these appointments.

President Obama attempted to make recess appointments during a pro forma session between January 3 and January 6, 2012. In June 2014 (so, two and half years after the appointments), the Supreme Court concluded unanimously (in *Nat'l Labor Relations Bd. v. Noel Canning*) that the appointments were unconstitutional, holding that the Senate is in session when it says it is, provided under its own rules, it retains the capacity to transact Senate business. The Court held that a President may generally use the recess appointment power only during a Senate recess (whether intersession (between the two annual sessions of Congress) or intrasession (breaks taken during the January- December annual session)) of 10 days or longer. This is the only time the Supreme Court has ruled on recess appointments.

If the Republican-controlled Senate wanted to abdicate its advice and consent responsibilities for controversial nominees, it could voluntarily adjourn for ten or more days, allowing President Trump to make recess appointments. To do so, however, under the Adjournments Clause (Article I, Section 5, Clause 4), which states that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting," the Senate would need the concurrence of the House to adjourn.

Acting Officials

Under the FVRA, the President can appoint acting officials to fill a PAS position for up to 210 days (nearly seven months) beginning on the date the vacancy occurs or, if the vacancy occurred during a Senate recess, when the Senate reconvenes. If the vacancy exists during the first 60 days following inauguration, the 210-day period only starts to run 90 days after

Inauguration Day. The timeline can be extended depending on the outcome of the Senate confirmation process. If a nominee is rejected, the acting official may serve in the role for an additional 210 days, with the clock resetting while another nominee is under consideration. (*See generally* ACUS Flowchart.)

An individual cannot simultaneously serve in an acting capacity and as a nominee for that position. Once the FVRA period lapses, only the head of the agency may perform the functions or duties of that office that theretofore were performed by the acting official.

During the first Trump administration, as of February 2020, according to a Washington Post analysis ("Trump's government full of temps"), across 22-Cabinet-level positions, acting officials had served a total of 2,736 days. Moreover, as Becca Damante of the Constitutional Accountability Center noted in her *Just Security* article ("At Least 15 Trump Officials Do Not Hold Their Positions Lawfully"), Trump repeatedly ignored the time limits set out in the FVRA, allowing acting officials to remain in their positions after the FVRA time limit had lapsed.

- As of September 2020, at least 15 other acting officials were serving in positions past the time limit. Chad Wolf, for example, served 14 months as acting Secretary of Homeland Security. A federal judge later ruled (in November 2020) that Wolf had lacked the authority to limit the work permits issued under the Deferred Action for Childhood Arrivals (DACA) program because he was serving unlawfully. Russell Vought served as acting Director of the Office of Management and Budget for 18 months (after Mick Mulvaney moved to the White House as acting Chief of Staff) before gaining Senate confirmation.
- The group of 15 did not include offices that were being filled by officials whose initial appointments were not in conformity with the FVRA or other federal law, and the group did not include other offices that had been filled by illegal acting officials at various points over the previous four years, but were no longer being illegally filled.
- The group also did not include offices that were vacant, but whose functions and duties were being performed by another (non-confirmed) official. A least 21 officials in at least 10 executive branch departments were performing functions and duties of vacant offices that could no longer be filled by "acting" officials due to the FVRA time limit.

Position-Specific Temporary Appointments

Congress has provided for acting officials to carry out the functions of specified PAS positions when the incumber is absent or unable to serve or when that position is vacant. According to the Congressional Research Service, generally, there are several methods used:

- a specified official is automatically designated as acting;
- a specified official is automatically designated as acting, unless the President provides otherwise in the case of a vacancy;
- the President designates an official to serve in an acting capacity in the case of a vacancy; or

- the head of the agency designates an acting official.

It is possible that both the agency-specific statute and the FVRA may be available to temporarily fill a vacancy in such a position.

During the Biden administration, the Government and Accountability Office ruled that Acting Labor Secretary Julie Su could continue serving indefinitely, even as her Senate confirmation was held up, as she was serving as the Deputy Labor Secretary when Martin Walsh resigned as Labor Secretary. The ruling was based on a position-specific designation, as a result of which the FVRA time limitations did not apply.

End Runs

A-never-before-used provision of the Constitution (part of Article II, Section 3) empowers the President to adjourn one or both chambers of Congress, if, for example, the Senate and the House disagree (in case of "Disagreement between them") as to when to be in session. As Scott Bomboy of the National Constitutional Center recently noted ("Understanding the Constitution's Recess Appointments Clause"), Section 3 is linked to the Adjournments Clause. Although this power has never been used, Trump did float the idea of using it in April 2020 (seeking to make executive appointments to deal with the pandemic), going so far as to label the practice "of leaving town while conducting phony pro forma sessions," thereby thwarting his ability to make recess appointments, as "a dereliction of duty."

As set out by Edward Whelan, distinguished senior fellow of the Ethics and Public Policy Center ("Mike Johnson must block Trump's scheme on recess appointments"), were the Speaker of the House, following January 3, to put forward a concurrent resolution to adjourn (House rules permit the House to vote on a concurrent resolution providing for the adjournment of both chambers), were it to pass the Republican-controlled House and were the Senate to refuse to approve it, in theory, President Trump could, citing "Disagreement," adjourn both chambers long enough (for at least 10 days) to make recess appointments. Were the Senate to approve it, the Senate would adjourn. In theory, under the 20th Amendment, adjournment could extend an entire year (until January 3, 2026).

Whelen notes that, in his concurring opinion in the *Canning* case (joined by Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito), Justice Antonin Scalia characterized the recess-appointment power as an "anachronism" because "modern forms of communication and transportation" render the Senate always available to consider nominations. "The need [the power] was designed to fill," he wrote, 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." Scalia, Whelan notes, also argued that the recess appointments power should be limited to *inter*session recesses and should not apply to the *intra*session recess that Trump might seek to take advantage of.

Bomboy quotes the Library of Congress in noting that the Founders "intended the Adjournments Clause as an element of separation of powers, to give legislative leaders a strong incentive to cooperate rather than surrender their adjournment powers to the president." He then quotes Justice Joseph Story, writing in his *Commentaries on the Constitution of the United States,* in which he recalled that under the British constitutional

system, the King could call for a legislative recess at any time or call for a new legislature. "Under the colonial governments, 'the undue exercise of the same power by the royal governors constituted a great public grievance and was one of the numerous cases of misrule upon which the Declaration of Independence strenuously relied.'"

Concluding Thoughts

There are any number of variables that can, and may well, come into play between now and the point at which the formal confirmation processes get underway following Inauguration Day. One nominee has already withdrawn. Among the many variables is the extent to which Republican Senators will fall into line over the more controversial nominations or will stand firm. After all, as the playbook calls for ceaselessly testing loyalty, there is no better a test of loyalty than the confirmation of controversial nominees. Will the GOP Senators default to loyalty to the leader or will they properly exercise one of their most sacred constitutional duties? Defaulting to loyalty could mean Senate approval of controversial nominees or a Senate vote to adjourn for ten or more days to allow for recess appointments.

And, if there is an attempted, and untested, end-run around the confirmation process, it might well need exigent circumstances as a justification, perhaps an external threat to national security to provide cover. That said, there are legal theories that suggest that the end-run could be unconstitutional (*see, e.g.,* the Cato Institute, "On 'Disagreement' and the Presidential Power to Adjourn Congress").

If the issue were to end up at the Supreme Court (and note, someone would need standing to bring the action), it could take a while. But, if the *Canning* decision is any guide, this Supreme Court is unlikely to be favorably disposed toward efforts to short-circuit the Senate confirmation process.

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