

Recess Appointment Power

Elizabeth Joh: So, in August, the Senate and the House of Representatives usually take a recess. That's a break from their usual proceedings. Members of Congress get to go home, see their families, talk to constituents...

Roman Mars: Raise money.

Elizabeth Joh: There's actually a federal law from the 1970s that specifies this break. It says to Congress that it shall take an August break unless we're at war. I mean literal war not political war. This formal August recess wasn't always considered something that was necessary to legislate. And there's a good reason. In the early days, Congress was usually done by then. Until the early 20th century, Senate sessions just weren't that long. The Senate met usually in December, stayed in session for five or six months, and then during the rest of the year, senators went home. Believe it or not, being a senator was at one time a part-time job.

Roman Mars: Kind of seems like that now too.

Elizabeth Joh: The break was also a relief from the really hot summers in Washington, D.C.--summers that are notoriously hot and humid.

Roman Mars: You might even call it swampy.

Elizabeth Joh: And the Senate chamber didn't even get "manufactured weather"--that's what they called air conditioning--until the 1920s. And even that system was pretty primitive. The air conditioning eventually got better. But there was another problem that developed, too. As time went on, Senate sessions got longer and longer. By the 1960s, the Senate was still meeting without an extended break well into the fall. And in 1963, the Senate convened in January and didn't formally adjourn until December. The Senate majority leader at that time, Montana Senator Mike Mansfield, said he didn't recognize his wife anymore. A senator from Wyoming named Gale McGee convinced his colleagues to test out an August break in 1969. It turned out to be good enough of an idea that the Legislative Reorganization Act of 1970, signed in 1971, included a formal August recess.

Roman Mars: It looks like the current Senate will be taking some kind of recess this August.

Elizabeth Joh: Why might this matter to President Trump? Because the job of attorney general might be free sometime soon. And the Constitution might--just might--let the president fill that job without getting the usual required Senate approval. That's called the president's recess power.

Roman Mars: And it's yet another constitutional power Trump's unusual presidency is bringing up. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the actions and swirling speculations about Trump and channel that noise into learning our Constitution like we never have before. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. We're going to take a quick recess here, but we'll be back with Trump Con Law. As we discussed in Episode #2 of this podcast, there's a specific way the president gets to hire important positions in the federal government.

Elizabeth Joh: The Constitution says the president can appoint ambassadors, public ministers and council, judges of the Supreme Court, and all other officers of the United States. The part about officers doesn't mean the president hires everyone in the executive branch, but he does get to choose some of the most important policymaking jobs. These include the jobs you've probably heard of, like the secretary of state, the secretary of defense, and the attorney general. But the Senate has a role to play here, too. In order for the president to have his choices installed, the Senate has to give the president its so-called "advice and consent." The Constitution's specific about that. So that means the president needs the Senate's okay in order to hire people under his appointments power. In the early days of our nation's history, that was sometimes a problem, like when the Senate was in session for only half the year, and they had to take horses or later trains to travel back and forth to Washington.

Roman Mars: What if someone resigned or died and the Senate wasn't in session?

Elizabeth Joh: It turns out that the Constitution, in this case, gives the president something called the recess appointment power. Article II of the Constitution--that's the portion that addresses the president--says 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. That clause, which people usually call the Recess Appointments Clause, seems to give the president the ability to appoint people to positions by himself without the Senate's okay when the Senate isn't there. Keep in mind that the president can't just appoint people all by himself when the Senate is in session. The other part of the Constitution, the Appointments Clause, says, "Nope, you have to work with the Senate." So, let's assume that the Recess Appointments Power was designed by the founders for a benign reason. We don't want the government to come to a halt because the Senate's on break and the president needs, for example, a new secretary of state, right? It seems like a good safety valve.

Roman Mars: It turns out that modern presidents have used the recess appointments power in other ways, too, namely, to fight political gridlock.

Elizabeth Joh: So, a few facts. Every two years we have a new Congress--a two-year period of legislative business. That's usually divided into two annual sessions, one starting in early January and finishing up in December. Congress gets a break between sessions; they're called "inter-sessions." And they get short breaks during their legislative sessions; they're called "intra-" or "within-sessions." So, let's say you're the president and a majority of the Senate comes from the opposing political party. You might have a hard time getting the Senate to approve of the people you want to hire under your Appointments Clause power. So, here's an example. In March of 2016, President Obama nominated Judge Merrick Garland to fill the spot on the Supreme Court that opened up when Justice Antonin Scalia had died. He used his appointments power under the Constitution. But in Garland's case, the Senate refused even to hold a hearing on Judge Garland. He didn't make it to the Supreme Court, and there was nothing President Obama could do about it under his appointments power.

Roman Mars: So, when you're the president, what can you do if the Senate will not confirm your nominee?

Elizabeth Joh: You could wait until the Senate is in one of its recesses and do a stealth appointment. "See? The Senate's not in session. I can use my recess appointment power." Nothing in the Constitution explicitly says that this is off-limits--that the president can't use

the recess power in this way. And historically, presidents have used their recess power in exactly this way--to put people in positions when it's not clear that the president could have received the Senate's approval. You might think this isn't a big deal since the position is temporary, but the Constitution does say that a recess appointment lasts until the end of the next congressional session. So, if it's timed right, a recess appointment, in theory, can last almost two years. And the person who has that job has all the powers of a person who would have gone through the normal process with Senate approval.

Roman Mars: So, it would seem that with the recess appointments power, the modern president has a distinct advantage over the Senate. But not so fast.

Elizabeth Joh: About a decade ago, the Senate formally started what are called "pro forma sessions of the Senate." These are Senate sessions where one Senator gavels in and gavels out. The whole session lasts about a minute. Usually, it's in front of an entirely empty Senate chamber. And the entire point? To make sure that a president doesn't have the chance to make a recess appointment. Can't make a recess appointment when we're not in recess, right? So, you might think, "Surely the Supreme Court must have put a stop to this silly nonsense." Well, it took them until 2014, actually, to have a case where they interpreted the recess appointment power. The National Labor Relations Board, or the NLRB, is a federal agency that has the job of investigating and ruling on unfair labor practices. Both President George W. Bush and President Obama had a really hard time getting the Senate to act on their nominees to the NLRB.

Roman Mars: Which meant at times the board did not have enough people on it.

Elizabeth Joh: They're supposed to have five to get anything done. Normally, the Senate takes a break in late December. In 2011, the Senate decided it would go on break, but it would schedule a bunch of these pro forma sessions from late December until early January, when it would get back to regular business. Remember, these pro forma sessions are just for show. And in fact, this time the Senate adopted a unanimous agreement that no business would be conducted during them. There was no point to them. President Obama's response to this was basically, "You guys are in recess." And on January 4th--between one pro forma session and another--President Obama used his recess appointment power to fill three empty spots on the NLRB.

Roman Mars: So, the question became, was this an okay use of the president's constitutional authority?

Elizabeth Joh: In the 2014 case of NLRB versus Noel Canning, the Supreme Court said no and ruled against the president. It's a long opinion, so I'm just going to point out what's relevant here. The Supreme Court said, "Yes, the president has the power to make appointments by himself when the Senate is in recess." And this applies to any kind of recess that Congress has between sessions or in the middle of a session. But a recess that counts for the purposes of this power normally has to be at least ten days. The Court relied on history in part to come up with this number. So that break during which Obama put his recess appointees in was shorter than that, so they didn't count. And those pro forma sessions set up just to block the president? As the Supreme Court put it, "The Senate's in session when it says it is." Translation: Those just for the purpose of blocking the president's sessions are good enough to prevent the president from using his recess appointment power. The result for President Obama was that his particular use of the recess appointment power was unconstitutional.

Roman Mars: So, let's get to Trump.

Elizabeth Joh: Jeff Sessions is the current attorney general of the United States.

Roman Mars: As we record this, you never really know these days.

Elizabeth Joh: The attorney general is the head of the Department of Justice and a member of the president's cabinet. Sessions was appointed by President Trump under his appointments power. And then he was confirmed by the Senate. Of course, the problem for Attorney General Sessions is that now Trump seems to have cooled to him. It's been reported that Trump is upset with Sessions for recusing himself from the investigation into any ties the Trump campaign might have had with Russia. How do we know he's upset? Well, on July 24th, Trump described the attorney general in a tweet as "beleaguered under siege." The next day, Trump said in another tweet that Sessions was, quote, "weak." And in a press conference later that day, Trump said he was, quote, "disappointed" in his attorney general.

Roman Mars: It's entirely possible, then, that Trump might fire Sessions, which he totally has the right to do.

Elizabeth Joh: Or he could make life so miserable for Sessions that he resigns. In either case, we'd have an opening for a new attorney general. So, at this point, there are a number of possible choose your own adventure routes that Trump might take, including the same appointment process that he used to appoint Sessions in the first place. But here's where Trump runs into some problems. What if, for example, Trump wants a new attorney general who'd be more willing to fire special counsel Bob Mueller? Mueller is in charge of investigating Russian interference in the 2016 election. And it's been reported by The Washington Post that Trump has considered using his recess power to replace sessions. So, in theory, a new attorney general appointed right around now could serve through 2018. But remember, the Supreme Court says it's up to the Senate to decide when it's in recess. And that's what's been happening so far this year. The Senate has been scheduling these pro forma sessions that have no other purpose than to stop the president from making recess appointments. If the Senate decides to schedule more pro forma sessions during their August recess, that would be a way to block Trump from picking an attorney general all by himself. In fact, Senate Majority Leader Mitch McConnell has already delayed the August recess; the 1970 law lets him do that. Now it could get a little crazier. Normally, when Congress goes on a break, they adopt a resolution to do it. But what if, for some reason, the Senate just can't agree on whether they want to take a formal break and they don't agree to whether or not there are going to be pro forma sessions either. Well, the Constitution says that the president has the power if the House and Senate disagree on when to take a formal break--or it's called an "adjournment"--that the president, quote, "may adjourn them to such time as he shall think a proper." Translation: A president could force the Senate into a recess and then use his recess power. And in fact, that 2014 case about the recess appointment power? In that case, the late Justice Scalia brought up this very portion of the Constitution to say, "Well, the Senate has a lot of power. But the president has this little thing in his back pocket, too."

Roman Mars: Which brings us to the classic crazy law school hypothetical.

Elizabeth Joh: So, could Trump say, "I declare you, the Senate, are in recess. And I'm naming my own A.G. And there's nothing you can do about it."? Guess what? No president has ever tried to use this power. And so that means we really have no idea what the limits

of this power mean. And maybe this, too, could be another way that the Constitution might be tested by President Trump.

Roman Mars: One more 30-second recess, and then Trump Con Law continues. Is there any reason to believe that a recess appointment is necessary, given the fact that, so far, all of his appointments have been confirmed by the Senate?

Elizabeth Joh: I think there would be pushback potentially in this case because I think there is growing concern that a replacement for an attorney general might be the type of pick that might be more amenable to doing something that Trump wants to do--in other words, not recuse himself--and potentially maybe just agree to Trump's wishes and fire Bob Mueller. We can't know that. But if that's a concern, then the whole scheme is set up so that the Senate can either just say, "Vote this person down," which they're allowed to do--or they can, even in a recess situation, say, "Well, we're just never going to be in recess. We're going to have a junior senator talk to an empty chamber all by himself and pretend they're doing something when they're really not." And that's what that 2014 case really says--that it's up to the Senate to decide when it's on vacation and when it's not. And one of the interesting things about that case is that, you know, one of the things you can say is before the Supreme Court decided this case of NLRB versus Noah Canning, you might think, "Well, this seems like a ridiculous gaming strategy that both sides have used," so the Supreme Court should put a stop to it. It's gridlock. And really, one way to think about the Supreme Court's case is to say, "Well, democracy's inefficient and messy, but that's just the way it is."

Roman Mars: So, you could leave this thinking that recess appointments and Senate counter moves to stop recess appointments are just petty politics. But it turns out some recess appointments have been very significant and positive.

Elizabeth Joh: So even though the news about Trump gives us a picture of the recess appointment power as if it's some nasty game between the Senate and the president, if you look back in history, the recess appointment power has had some really good uses, too. So, the president can also use his recess appointment power to appoint judges when there are vacancies and the Senate is in recess. And in fact, there's a lot of evidence to suggest that the recess appointment power has been used to increase diversity on the federal courts. So, the very first Black federal judge with life tenure was William Hastie. And he actually himself was a recess appointment appointed by President Truman.

Roman Mars: This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop collective. I put together a great Spotify playlist of Doomtree songs from the show and other favorites of mine from their catalog. I've been listening to it nonstop. Find it, and you will love it. You can find out all about Doomtree Records, get merch, and learn about their current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by the Knight Foundation and donors who are listeners just like you.