



The President's Power to Make Recess Appointments

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[00:00:00.7] Jeffrey Rosen: The recess appointment clause of the Constitution grants the president power to appoint cabinet officials without the consent of Congress under extraordinary circumstances. President-elect Trump has indicated interest in triggering the clause to bypass the ordinary Senate confirmation process. Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate.

[00:00:26.5] Jeffrey Rosen: The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. President Trump's allies have articulated an expansive understanding of the recess appointment clause. And in this episode of We The People, we discuss the history and text of the clause, examine how President Trump might invoke it, and explore the legal merits of the proposal. Joining me to discuss this important issue are two leading constitutional scholars, Edward Whelan of EPPC and Thomas Berry of the Cato Institute.

[00:01:04.7] Jeffrey Rosen: Edward Whelan is a distinguished senior fellow at the Ethics and Public Policy Center, and he holds the Antonin Scalia Chair in Constitutional Studies. He directs EPPC's program on the Constitution, the courts, and the culture. And he writes about constitutional law and the judicial confirmation process including the superb newsletter Confirmation Tales. And his most recent book is *The Essential Scalia on the Constitution, the Courts, and the Rule of Law*. Ed, it is wonderful to welcome you to We The People.

[00:01:37.9] Ed Whelan: Thank you, Jeff.

[00:01:38.0] Jeffrey Rosen: And Thomas Berry is Director of the Cato Institute's Robert A. Levy Center for Constitutional Studies and Editor-in-Chief of the *Cato Supreme Court Review*. Before joining Cato, he was at the Pacific Legal Foundation, and he clerked for Judge E. Grady Jolly of the US Court of Appeals for the Fifth Circuit. His areas of interest include the separation of powers, executive branch appointments, and the First Amendment. Tom, it's wonderful to welcome you to We The People.

[00:02:02.5] Thomas Berry: Thank you so much for having me.

[00:02:05.9] Jeffrey Rosen: Let's begin with President Trump's proposal. Tom Berry, President Trump is proposing to trigger a congressional adjournment and then to make a recess appointment. What exactly is he proposing?

[00:02:20.7] Thomas Berry: Sure. Well, as often is the case, it's not always easy to nail down exactly what he's proposing because it usually comes in the form of a tweet or X post with a lot of all capital words, but not a lot of details. But as best we can tell, he's proposing that pretty much as soon as he's inaugurated, the Senate intentionally adjourns itself for the minimum length required to trigger a recess appointment, which under current Supreme Court precedent is 10 days.

[00:02:46.8] Thomas Berry: And then it seems that he would use that adjournment, use that triggering of the recess appointments clause to appoint essentially his whole cabinet and maybe even nominees beyond his cabinet. He says that it takes too long to appoint the people he wants, sometimes up to two years, and he needs these positions filled immediately in all caps, is what he tweeted. So and then perhaps even more dramatically, four years ago, he threatened and there are some rumors that he is once again threatening to invoke a never before used clause in the Constitution in Article 2 that could be interpreted to allow the president to force the Senate to adjourn against its will.

[00:03:28.8] Thomas Berry: A clause that says that the president can force an adjournment or can pick the time of adjournment if there's a disagreement between the House and Senate as to the time of adjournment. And that would really be unprecedented because that would, for the first time, allow a president to invoke the recess appointments clause even when the Senate is trying to prevent him from doing so.

[00:03:48.1] Jeffrey Rosen: Thank you so much for that. Ed, what would you add to President Trump's proposals as you understand them?

[00:03:54.7] Ed Whelan: Well, let me say at the outset that I would include myself as an ally of Donald Trump's. I am eager to make sure he doesn't do stupid, self-destructive things that would damage his presidency. And I think this idea is very much one of those. So, yeah, as Thomas indicated, the plan would be to do blanket recess appointments, completely bypassing the Senate's advice and consent function.

[00:04:21.7] Ed Whelan: And I would emphasize that that advice and consent function is an essential check on the president. It's something that Alexander Hamilton in the Federalist Papers emphasized serves to tend greatly to prevent the appointment of unfit characters. Hamilton goes on to explain that a president who has to submit nominees to the Senate would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations candidates who had no other merit than that of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

[00:05:01.6] Ed Whelan: Now, to be sure, the recess appointment power exists in the Constitution. And it's intended, as Hamilton explains, as an auxiliary method of appointment that is nothing more than a supplement to the general mode of appointing officers, that is with Senate

advice and consent. So what Donald Trump aims to do here, or at least what some of his advisors are encouraging him to do, would stand the appointment provisions of the Constitution on their head.

[00:05:27.5] Ed Whelan: It would be a radical, irreversible change in the Senate's powers if it were to succeed. I don't think it will succeed, in which case it would generate chaos for many months until the Supreme Court said, no, you can't do that.

[00:05:46.4] Jeffrey Rosen: Many thanks for that. Well, you've both identified at least two big questions. The first is, may the President fill vacancies that arise before Congress goes into recess? And the second is, if the Senate is uncooperative, can the President force a recess? Let's begin with that first question. Can the President fill vacancies that arise before Congress goes into recess? In the Noel Canning case in 2014, a majority opinion by Justice Breyer held, yes, he may. Tom, tell us about the Noel Canning case and whether it would justify President Trump's proposals or not.

[00:06:28.6] Thomas Berry: So the constitutional text where we should always start says the President shall have power to fill up all vacancies that may happen during the recess of the Senate. That's the key text. And specifically, the key dispute is, what does that language that may happen during, mean? Does that mean only a vacancy that arises while the Senate is out of town, where unexpectedly you have a new need to fill a position and the Senate's not available for advice and consent? Or does it include a broader notion of what happens after they've gone out of town? So a vacancy occurs, the Senate doesn't confirm anyone to fill it, then a pre-scheduled adjournment happens or a recess happens, and then the President takes advantage of that adjournment to employ a recess appointment.

[00:07:12.4] Thomas Berry: There was a lot of historical debate about this. Essentially, the President's legal scholars disagreed on it, and even the executive branch started to disagree about which approach to take. Eventually, the executive branch settled on a practice not surprisingly, that was more favorable to the executive branch. They started filling up vacancies that happened even before a particular recess occurred. This started in about the 1820s, I believe, on the notion that, well, if a vacancy happened three days before the Senate was scheduled to leave, it's not really feasible for them to have the time to confirm someone. So it really makes more practical sense to still allow recess appointments three days later, presuming that they never had the time to confirm someone.

[00:08:00.2] Thomas Berry: And then in Noel Canning, the Supreme Court agreed with that more expansive interpretation. They took the more functionalist, practical approach and relied a lot on history and essentially said, look, you know, it could be read either way, but this has been the settled practice since the 1820s. And given that, in their view, the text was not definitive, they ended up going with the practice that had prevailed over the long term.

[00:08:25.2] Jeffrey Rosen: Ed, Justice Scalia wrote an important concurrence in Noel Canning disagreeing with Justice Breyer's pragmatic approach. Tell us Justice Scalia's views and whether or not President Trump's schemes are consistent with them or not.

[00:08:41.0] Ed Whelan: Well, before I do, let me emphasize that the constitutional problems with President Trump's scheme exist even under the Breyer approach. So I don't want anyone to think that my arguments rest on the courts having to adopt Justice Scalia's position. I think that if a case ends up getting to the Supreme Court, it might well do so. But there are all sorts of problems with taking both fingers on both hands to count them, big, big problems with this scheme. So I just wanted that to be crystal clear.

[00:09:14.3] Ed Whelan: Look, in his separate opinion in Noel Canning, Justice Scalia, joined by three justices who are still on the court, the Chief Justice, Justice Thomas and Justice Alito, said two things about the recess appointments clause. Said first, the recess appointments clause does not empower the president at all during intrasession recesses. Now that is what the contemplated recess would be if the Senate were to go into session on January 3rd and then recess or be forced into recess sometime later, you would be dealing with an intra-session recess.

[00:09:49.5] Ed Whelan: And then second, he said that the recess appointment power does not apply to vacancies that did not themselves arise during the inter-session recess. So that would pose a separate problem for most, if not all, of the appointments that President Trump would make under this recess appointment scheme. The threshold problem is that there will be no recess, there will be no legitimate recess. And I think we're dealing with really a constitutionally outrageous effort on the part of a president to use the House to eviscerate the advice and consent powers of the Senate. Now, as Thomas indicated, there's an alternative in theory under which the Senate would make itself eunuchs by recessing instead of exercising its advice and consent power. I think that is a very unlikely scenario.

[00:10:53.1] Jeffrey Rosen: Tom, Ed said that President Trump's proposals would be unconstitutional under either the Breyer or Scalia approaches. Is that right? If this were being argued before the court, do you think it would be consistent with the Noel Canning majority or not? And do you think that the Supreme Court would have pulled it or not?

[00:11:15.2] Thomas Berry: I think the key unknown question is this scheme to force a recess, exactly as Ed said. I think if the Senate said, we're allies of President Trump, we completely agree with him that we need to fill all these right away, we're gonna voluntarily adjourn for 10 days. I think recess appointments under that 10-day gap, unfortunately, would be authorized under the Noel Canning opinion.

[00:11:39.5] Thomas Berry: Noel Canning didn't put any limits on what caused the adjournment, who caused it. Is it just a ploy to give the president a favor? It just said 10 days is long enough for it to be an adjournment. But the key point, and I completely agree with Ed, is that most likely the way the scheme would work is forcing the Senate against its will to adjourn. And this is from another part of Article 2. There's text that says, in case of disagreement between the two houses with respect to the time of adjournment, the president may adjourn them to such time as he shall think proper.

[00:12:10.2] Thomas Berry: So as far as I know and other people have looked into this, this has never been invoked before. So we're really in uncharted territory if the president attempted to invoke it. But the question is, first, how does that work? What is the disagreement? And then

second, would an adjournment of more than 10 days forced by the president be an adjournment that triggers a recess appointment? And I think that definitely is a step beyond Noel Canning.

[00:12:38.2] Thomas Berry: Noel Canning assumed the Senate controls when it's adjourned and when it's not, and that the Senate can prevent recess appointments. So that would absolutely be an unusual and unprecedented step. Though I should note that there was a dicta in Noel Canning that did mention this clause and said perhaps there's some push and pull between the president and the Senate, but it didn't go into any detail about how it would operate in practice.

[00:13:02.5] Jeffrey Rosen: Well, Ed, first, maybe one beat on why you suggest that President Trump's proposals would be problematic even under Justice Breyer's approach. And then take up this important second question that Tom has just flagged. Can the president force a disagreement? You've argued that Article 2, Section 3 said the recess authority kicks in in cases of disagreement, and that only arises when the Senate wants to adjourn and the House won't let it. So if you could take up those two questions, that'd be great.

[00:13:31.7] Ed Whelan: Sure. I think I see the two questions as one. I very much agree with what Thomas just said. And the reason why I think that this reliance on Article 2, Section 3 would not apply is that I do not think that you would have a disagreement between the two houses within the meaning of that provision.

[00:13:50.7] Ed Whelan: We need to go back, I think, and understand what role each house has with respect to the other. And it's in Article 1, we see that a house in order to adjourn for more than three days, needs the consent of the other house. So this is a matter on which they can actually disagree. The Senate could say in theory, we wanna adjourn for 15 days. The House says, we're not gonna consent to that. There you could have a disagreement, and I could see how that disagreement might fit within the language of Article 2, Section 3.

[00:14:27.5] Ed Whelan: What we're talking about here, though, is a situation in which the Senate presumably wants to stay in session. The House has no authority to prevent the Senate from staying in session, and its disagreement with its doing so is constitutionally no more significant than my disagreement with its doing so. So I don't see how a disagreement on a matter on which it has no authority could possibly trigger that provision in Article 2, Section 3.

[00:14:58.7] Jeffrey Rosen: Tom, do you agree with Ed's analysis of Article 2, Section 3? And there is another section which allows the president to force a disagreement after convening both houses. Does that raise different issues?

[00:15:14.6] Thomas Berry: Yes, I think I do agree with Ed. I think it's really sort of uncertain, but it doesn't make a lot of sense to just say anytime one house wants to adjourn and the other doesn't, that that's a disagreement. We have a part of the Constitution that essentially says one house cannot adjourn for longer than three days without the permission of the other house.

[00:15:33.7] Thomas Berry: So it doesn't make a lot of sense to me to say, oh, well, if one house wants to adjourn or if one house has a specific plan for how long to adjourn and the other disagrees, this is now a disagreement the president needs to settle because essentially that just

means you have the default, which is that they stick around for the whole session, which was the norm when the country started. They would stick around not for a very long session, but they'd stick around for several months, basically all the time, and then they'd have a gap along recess between two sessions. And I think the key is the point you raised about this president convening them.

[00:16:05.7] Thomas Berry: And I proposed a novolic conspiracy post. I'm not certain it's right, but there's a way to read very narrowly this clause as only connected to the one immediately preceding it. So I'll read the clause immediately preceding it as well. He refers to the president. He 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. All of that is one long clause between semicolons in article 2, section 3.

[00:16:39.3] Thomas Berry: And I think one way to read that is that those are connected as one single idea, that when it's talking about disagreement with respect to the time of adjournment, it means disagreement about when to adjourn an extraordinary session convened by the president because that's the one time where it might make sense for the president to get involved, because this is a session that the president called in the first place. So those special sessions have also pretty much gone by the wayside.

[00:17:06.9] Thomas Berry: I think the last one was called by President Truman. Nowadays, the Senate's pretty much always in session, so there's no need for them anymore. But one way to read that clause is that unless a special session has been called by the president, this notion of forcibly adjourning them can't be applied.

[00:17:24.1] Jeffrey Rosen: Many thanks for that. Ed, what do you think of Tom's suggestion that the president's power to adjourn both houses applies only when he's already used his extraordinary power to convene them? And in practice, what are the options that might trigger this clause going forward?

[00:17:41.7] Ed Whelan: Well, as a punctuation nerd, I was tempted to like this argument that relies heavily on semicolons. But I see at least two problems with it. One is Hamilton himself, when he discusses this provision, separates these two parts by semicolons. He treats them as independent of each other. Also, there are plenty of other provisions in the Constitution, in Article 1 and Article 2, that link clauses with semicolons, even though those clauses have no connection with each other. In other words, one doesn't limit the other.

[00:18:20.1] Ed Whelan: So I would discourage relying on this. I think the article I outlined is much stronger. It's also possible, I suppose, that if this argument were pursued, that President Trump could say, I hereby declare that both houses are convened on an emergency basis, even if they're already operating. So I think this is not the way to go.

[00:18:42.3] Jeffrey Rosen: Tom, how might this actually play out? Might the Senate willingly adjourn, and could that trigger the clause? What are the various scenarios?

[00:18:53.0] Thomas Berry: I think it's unlikely that they will do so willingly, as Ed said. Even if the majority of Senate Republicans are inclined to go along with whatever President Trump wants them to do, there still are those more moderate senators and those more institutionalist senators. We've seen comments, I know, from Lisa Murkowski, from Mitch McConnell, I think from Susan Collins. I think it would be very hard.

[00:19:15.8] Thomas Berry: I don't think you'll get to 50 or 51 senators in favor of intentionally granting a blank check for a 10-day adjournment and for unlimited recess appointments. So I think if push came to shove and President Trump really wanted to do this, it would have to be through this attempted forcible adjournment. And then I think you'd have litigation just like you had in Noel Canning.

[00:19:38.3] Thomas Berry: It varies how easy or how hard it is for private litigants to have standing. But if anyone, for example, were appointed by this method and then adjudicated a dispute, an agency dispute or brought charges against someone, initiated an agency action, that person would immediately have standing to sue and challenge their authority, challenge their appointment. That's what happened in the NLRB case.

[00:20:01.5] Thomas Berry: That's why it's not a coincidence that NLRB was the relevant party that ended up getting sued and challenged because they bring so many enforcement actions, there's a lot of people who are standing to challenge it. So that would end up being a long process. But ultimately, that's how it would get to the courts and we'd get an answer one way or another.

[00:20:20.7] Jeffrey Rosen: Ed, do you agree that that's the most likely way that this would get to the court if there were an involuntary attempt to force an adjournment? And then walk us through what the Supreme Court might do. It might revisit Noel Canning or not. If it applied to Noel Canning, would the precedents that Tom began by mentioning, the recess appointments dating back to the 1820s, be relevant? Is there any possibility that the court might uphold this scheme or not?

[00:20:50.2] Ed Whelan: Well, in terms of judicial challenges, I think there are countless possible ways that individuals aggrieved by recess appointees could bring challenges. Imagine Attorney General Matt Gaetz fires someone. That person would have a lawsuit right away and would challenge the authority of Matt Gaetz to fire him. So there's so many different ways that this could arise. It would probably take a matter of two or three months at minimum to get to the Supreme Court. You can see the possibility of bypassing the courts of appeals if there's enough confusion at the district court level.

[00:21:23.5] Ed Whelan: It would not be necessary for the court to revisit Noel Canning. The court could instead rule that there simply was no case of disagreement within the meaning of Article II, Section 3, that would give rise to the president's power to adjourn both houses. And on that basis, all of the recess appointments would be unconstitutional. I think it would be very easy to imagine a majority or unanimity around that proposition.

[00:21:53.9] Ed Whelan: If, however, the court wanted to revisit Noel Canning, have in mind that you have three justices who joined Justice Scalia's separate opinion in that case. And you have had three more justices join the court since then who are very much inclined towards Justice Scalia's originalist reading of the Constitution. Obviously, there might, in theory, be some stare decisis considerations to consider. But I think if anything, what we would learn from such an episode is the wisdom of Justice Scalia's approach and the dangers of the ad hoc approach of Justice Breyer's majority opinion.

[00:22:30.2] Ed Whelan: So I think it's very likely that you would have a majority of at least six justices to rule that the president has no power to make recess appointments during intrasession recesses. Whether the court also went on to hold that the president also has no power to use the recess appointment power to fill vacancies that arose before the recess is another question.

[00:23:04.8] Jeffrey Rosen: Many thanks for that. Tom, if the court took the case and if it held that there was a valid forced adjournment, would Justice Breyer's majority opinion in Noel Canning validate the power to make intrasession recess appointments? Justice Breyer in particular stressed history, as you mentioned. He said since 1929 and particularly since the end of World War II, Congress has shortened its intra-session breaks. Presidents have made thousands of intrasession recess appointments, including President Roosevelt commissioning Dwight Eisenhower as permanent major general, President Truman appointing Dean Acheson under secretary of state, and George HW Bush reappointing Alan Greenspan as chairman of the Federal Reserve. Justice Breyer said Justice Scalia does not dispute any of these facts.

[00:23:48.9] Jeffrey Rosen: And I guess my question is, if a majority wanted to affirm Justice Breyer's reading of history, might it conceivably uphold President Trump's scheme?

[00:23:58.0] Thomas Berry: Well, so I won't fight your hypo. As I understand your hypothetical, we take it as a given that President Trump wins on the first question, the really big question, which is even if an adjournment is forced by the president, that's still legitimate. One, he has the power to do that, in fact. And two, that's a valid 10 days adjournment. We're not going to make any distinction between forced adjournments versus voluntary Senate adjournments. Taking all that as a given in your hypothetical, and I think that's really the crux of the case, then I think yes, the rest of it would be settled by the Noel Canning precedent assuming unless that's overruled by a majority of the court and overcomes the force of stare decisis.

[00:24:35.0] Thomas Berry: The majority opinion was explicit on both of these questions. It said, it applies just as much to an intra-session recess, any 10-day gap, no matter where it comes in the calendar year, no matter what the Senate calls it, any 10-day adjournment is enough to trigger the recess appointments clause, and any vacancies that exist during that gap can be filled, not just ones that opened up during that gap.

[00:25:00.6] Thomas Berry: So you can go all the way back, it doesn't matter whether they resigned today or the day second before President Trump was inaugurated or two years ago, whether they haven't been filled for many, many months, all of them would be available to the president to fill at an instant during that as soon as you hit day 11 of that adjournment. In the past, presidents, we kind of had an era between Carter and Obama, when intrasession recess

appointments became much more common, but even during that era, you never had kind of blanket across the whole government recess appointments all at once.

[00:25:38.8] Thomas Berry: It was much more of a push and pull type of thing, where you would do it when the president was really frustrated because a nomination had been languishing, say. So Obama's appointments were only on an average, after seven months of someone having been nominated, but not yet confirmed. So that norm would be different, but the law would pretty much be settled by Noel Canning.

[00:26:02.3] Jeffrey Rosen: So it's on that central question, Justice Breyer's opinion suggested that rejecting intrasession recess appointments would be very disruptive, that thousands of such appointments had been made, and for pragmatic reasons, they should be validated. If the court did overturn that part of Noel Canning, how disruptive would it be?

[00:26:22.3] Ed Whelan: Oh, I don't think it'd be disruptive at all. I think Justice Breyer said that there was a practice of having these in the past, but obviously, going forward, if you have a new rule as clear as can be, there's no reason that there would be any disruption. There would, to be sure, be tremendous disruption in vacating the recess appointments, the blanket recess appointments of cabinet officials and whoever else that Trump would make under this scheme. That's one of the huge risks of this scheme, and I don't think the court would allow that to play a significant factor in his assessment.

[00:26:55.5] Ed Whelan: Let me illustrate, I think, one example of an intrasession recess appointment in the past, and let's see if we can see how that differs from what we're talking about here. This is actually of a cabinet official. Apparently, there have been three recess appointments of cabinet officials since 1900, whether and how many there were before then, I don't know. But in 1996, Ron Brown, who was transportation secretary, died in a plane crash. Some days later, after consulting with both parties in the Senate, Bill Clinton recess appointed Mickey Cantor to replace Ron Brown.

[00:27:35.0] Ed Whelan: Mickey Cantor had already been confirmed by the Senate with no controversy by voice vote to a cabinet level position as US trade representative, I believe. So here you have a situation where there's a recess, the president makes sure that this appointment is fine with everyone. It's a single person. It's in the last year of his administration.

[00:28:00.1] Ed Whelan: This is so dramatically different from forcing blanket recess appointees of cabinet officials on the Senate at the outset of the administration. No one would say that the example I provided of Mickey Cantor threatens or upends the constitutional scheme, but what this plan would do, certainly does.

[00:28:25.2] Jeffrey Rosen: Tom, do you agree that a new rule from the court wouldn't change practice all that much or not? And Ed, in his Q&A on this question, notes that no president has ever before tried to force a recess at the outset of his presidency. No president has made blanket recess appointments of cabinet officials at the outset of his presidency. And no president seems to have ever made a single recess appointment of a cabinet official at the outset of his

presidency. Does that all seem right, that this is relatively unprecedented and therefore striking it down wouldn't disrupt future practice?

[00:29:01.2] Thomas Berry: Yeah, I completely agree with that. I think it's important to emphasize that since Noel Canning was decided, it seemed at first that Breyer's opinion was a big win for the president, but actually ultimately, pragmatically, it was not because it endorsed pro forma sessions as a way for the Senate to prevent recess appointments. A pro forma session is where one person in an otherwise empty chamber bangs the gavel, says we're now in session, immediately bangs the gavel again, and says we're now adjourned for three more days. You conduct no business whatsoever, but the court said it doesn't matter. The Senate determines when it's in session and no one else can second guess them. They don't have to conduct any business other than bang the gavel twice.

[00:29:40.6] Thomas Berry: So given that, what's happened practically is that there have been, I think, not a single recess appointment in the last 10 years since Noel Canning was appointed. And that hasn't thrown a wrench in government functioning because what President Trump did not mention is we have a statute called the Vacancies Act. And that has essentially performed the function that the framers thought we needed recess appointments for. That's a statute that allows time-limited temporary acting officers in all of the major positions, but specifically limits who can be appointed to fill them so that they are just caretakers, and so that they've either been Senate-confirmed to another position or they're essentially long-time civil service members.

[00:30:20.3] Thomas Berry: So that's the way presidents of both parties have filled their cabinet at the beginning of an administration, and that's the way they would continue to unless we suddenly had this new norm of allowing recess appointments at the beginning of a term.

[00:30:37.4] Jeffrey Rosen: Ed, further thoughts on your helpful Q&A about the fact that no president has tried this before. You note that President Jefferson recess appointed Albert Gallatin as Treasury Secretary two and a half months into his presidency. And then what's the relevance of the Vacancies Act, and how might that be relevant moving forward?

[00:30:58.9] Ed Whelan: Well, as Thomas indicates, the Vacancy Reforms Act gives the president a fairly broad ability to name individuals as acting heads of offices. They're not appointed heads of the offices, but they're in an acting position, and they can do that for quite a while. So basically, there are plenty of ways that President Trump or any other president can begin to implement his agenda, take charge of his administration from the beginning.

[00:31:26.7] Ed Whelan: Let me emphasize too, one fact that I think has hardly been mentioned, if at all, in this conversation. There will be 53 Republicans in the Senate. This isn't a situation where a president is facing a hostile Senate. Competent nominees will be promptly confirmed. Hearings can start even before the president is able to make nominations. You can have hearings, as you did in 2017, in early January.

[00:31:55.5] Ed Whelan: Those nominees can be confirmed as soon as the president takes power and submits the nominations on January 20th. That happened with several cabinet officials back in 2017. This is a fake crisis. There is plenty of opportunity to get good nominees

through, and there's plenty of reason to wonder whether this is instead intended to get through the Senate nominees that, as Hamilton said, merely possess the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

[00:32:30.5] Jeffrey Rosen: Tom, Ed raises an important structural and constitutional concern, namely that Hamilton expected the Senate to play an independent checking function and that given Republican control of the Senate, there should be no trouble in getting qualified nominees through. But Hamilton and the framers anticipated that unqualified nominees would be rejected. Stepping back to that broader constitutional concern with the Senate doing its job, why is it important, and do you think that the Senate will do its constitutional job in this case?

[00:33:06.5] Thomas Berry: I completely agree that it's important. It's one of the most important roles for the Senate. The framers went back and forth for a while at the Constitutional Convention about how to divide up this appointment power, this nomination power. Some wanted the Senate to make the initial decision as a whole body, but they worried there'd be a lack of accountability. So they settled on one person, the president makes the pick, but then you have the Senate as that vetting role. I think Gouverneur Morris said that it was a split, so you'd have accountability in the president, but then you'd have security from that reviewing role, the vetting role of the Senate.

[00:33:38.8] Thomas Berry: And I think some of President Trump's picks show exactly why that's important, frankly. Some of them are out of the box, and I think there's very serious arguments that they're not qualified for the positions they're being nominated for. I won't make a strong view on that one way or the other, but that's exactly what the Senate should be doing because it's an extraordinary power that we place in one person, the president, and the Senate has to ensure that the people who help him are qualified.

[00:34:06.1] Thomas Berry: I do think, unfortunately, the framers' vision of each branch checking the other did not fully anticipate the role of parties and party cohesion and cooperation. So certainly, many Republican senators will vote yes on any one President Trump nominates just because they're of the same party, but there's still a significant contingent of senators who value the independent role. And so I think those swing votes, those moderates are going to take a very hard look at President Trump's nominees. And I anticipate the ones they think are qualified, they'll vote yes, and the ones they think are unqualified, they'll vote no.

[00:34:40.6] Jeffrey Rosen: Ed, say more about the history that you so helpfully highlight in your quotation from Hamilton in Federalist 76. You quote that language about how the danger to the president's reputation in betraying a spirit of favoritism or an unbecoming pursuit of popularity would deter him from making unqualified appointments. What did Hamilton and the founders anticipate the Senate to do, and has it played that checking role throughout history?: Have unqualified nominees been rejected, and why is it important for the Senate to exercise this independent function?

[00:35:16.9] Ed Whelan: Well, I don't claim to be a historian, and it's difficult to engage in a counterfactual that is to contemplate what sort of nominations might have been made if there weren't the Senate confirmation power. So I think it's no answer to Hamilton to say, oh, look,

there have been other bad nominees confirmed. The point that Hamilton makes is that this check that the Senate has been given is very important to help ensure quality picks. Will it guarantee them? Of course not. But does it have a tendency to constrain the president? Yes. And that's a tendency that we should all welcome. Let me highlight how short-sighted this gimmick is.

[00:36:01.8] Ed Whelan: Imagine that in 2029, a Democratic president takes office. And when I say short-sighted, I mean from the perspective of conservatives who are supporting this. Imagine further that you have a Senate with 56 Republicans, but you have a Democrat control of the House. How easy would it be for the Democratic president, if this scheme were upheld because I don't think it will be, but to completely bypass the Republican majority in the Senate and appoint folks who couldn't be confirmed.

[00:36:31.9] Ed Whelan: So here we have a situation in which you have a majority of Republicans in the Senate. It's easy to get very good people confirmed. And why we would dream of creating this precedent that would only come back to smash us in the face if it were upheld, I can't begin to fathom.

[00:36:53.6] Jeffrey Rosen: Tom, at the Cato Center, you focus on issues of separation of powers and on the advice and consent power. Do you have more to say about its history and the importance of the Senate exercising independent judgment, not swayed by party loyalty?

[00:37:12.8] Thomas Berry: It is important, and we've seen, even in recent history, we've seen nominees of the same party that controls the Senate fail to be confirmed because of scandals or because of issues that arise. We even saw one classic example. Tom Daschle had been Senate majority leader, and even his nomination for HHS secretary was eventually withdrawn in the face of a scandal that came to light. It became clear that he wasn't gonna be able to be confirmed. I believe the last cabinet nominee who actually came up for a vote and was voted down was John Tower, another former senator in the George HW Bush administration. Similarly, scandals came to light about him, about a drinking problem and other issues.

[00:37:52.3] Thomas Berry: So it's actually common for probably, on average, about one cabinet nomination to not end up succeeding per presidency, per presidential term. And that shows that the Senate, I think, is doing its job. It's not voting down people just because they would have picked someone a little closer to what the Senate wants ideologically. But if someone has a major scandal or a major issue of being unqualified, then they will absolutely play that checking role, even when the Senate and President are of the same party.

[00:38:23.0] Jeffrey Rosen: Thanks for that. Ed, I mentioned in the intro that I'm an avid reader of Confirmation Tales, which is your newsletter about the history of recent Supreme Court appointments starting in the 1980s. What lessons do you take from that history? It appears that Supreme Court nominations are decided more on pure party line votes than they used to be. Was there more independent judgment with both parties breaking ranks based on their evaluation of nominees and what historical trends do you see there?

[00:38:57.0] Ed Whelan: Well, there's no question that there has been increased polarization over Supreme Court nominees as judicial philosophy has divided the parties, and as you've had

liberal Republicans disappear and conservative or moderate Democrats disappear. But I actually think the most important lesson that I draw from the history of judicial confirmations is how shortsighted some folks can be in making rules changes that come back to hurt them in the long run.

[00:39:30.1] Ed Whelan: So I often say, "Thank you, Harry Reid." When I celebrate the conservative Supreme Court that we have, and I say that because Harry Reid, first of all cheered on the launch of partisan filibusters against lower court nominees in the Bush administration in 2003. Then when Republicans returned that practice against Barack Obama's nominees, he used the majority power of the Senate to abolish the filibuster while leaving in place, for completely unprincipled reasons, the filibuster of Supreme Court nominees, and then Democrats filibuster the nomination of Neil Gorsuch, which led to the abolition of the remaining filibuster.

[00:40:20.2] Ed Whelan: So at each step, I think there were gross miscalculations, especially the last one that had enduring consequences, and that I think Democrats would wish they could revisit. Here, it's Republicans who risk making the same gross error for very little, if any, upside, trying to completely change the constitutional system of appointments. It's probably gonna fail if they pursue it, if it succeeds, it's even worse either way, it's just an utter mess and there's no reason why the Trump team shouldn't simply proceed through the ordinary steps.

[00:41:02.1] Ed Whelan: Let me highlight, if I may, yet one other obstacle to this scheme. And that is that there's a federal law that states generally that recess appointees cannot receive pay. Now, there are exceptions to that, which have allowed some recess appointments in the past, but those exceptions would not apply here. The Trump team thanked me when I tweeted about this. They thanked me because they said, "Good, we can now figure out how to evade this." And two or three days later, a white paper by some Trump allies breezily asserts in a couple sentences that this long standing restriction on paying recess appointees is unconstitutional. So you're gonna see just so much necessary gamesmanship if President Trump has the poor judgment to follow the bad advice he's getting.

[00:41:58.5] Jeffrey Rosen: Such an important point about the institutional changes that both parties have made to the confirmation process that they've later come to regret including the elimination of the filibuster. Tom, what about that argument by President Trump's allies that the restriction on recess appointees receiving pay is unconstitutional? Might that possibly get any traction in the courts?

[00:42:18.7] Thomas Berry: It might. To give them credit, it's not a completely new argument. I actually reread professor Michael Rappaport's excellent article about the history and the original meaning of the recess appointments clause, a couple days ago, and this was written before the Noel Canning case. This essentially set out the groundwork for the Scalia view then, in my view, unfortunately was not the majority, but it's an excellent article. I recommend it to everyone. And he also, professor Rappaport says that, "Well, if, in fact, these recess appointments are constitutional in these scenarios, the intra-session appointment, the appointment for vacancies that arose before the adjournment. If those are constitutional, there's an argument that it's an unconstitutional condition to withhold the pay for validly appointed recess appointees.

[00:43:11.8] Thomas Berry: Unconstitutional conditions doctrine basically says, the government can't use its power of the purse to coerce people into doing things that it could not force them to do that it would be so you can't withhold the pay of a federal employee for exercising their protected First Amendment speech rights, for example. It's an interesting argument. I think, now that Noel Canning has said, yes, these are valid recess appointees, the next step in the argument would be, "Okay, if they're valid, then it's an unconstitutional condition."

[00:43:42.6] Thomas Berry: The other side of the argument, and I probably lean this way like Ed, would be to say, no, this is just simply the push and pull of each branch exercising its own prerogative that, okay, we now have a more expansive interpretation of recess appointments, but Congress still has its power of the purse. And so they can, through statute, discourage certain recess appointments that they don't think are as necessary. And that includes ones made when the vacancy did not arise during an adjournment. So my hope is that the courts would say, this is just the push and pull, and this is just Congress reasserting some of its original prerogative and some of the original understood meaning of the recess appointments clause.

[00:44:23.9] Jeffrey Rosen: Many thanks for that. As we wrap up this fascinating discussion, I wanna return to the million dollar question that we began with. Can the President adjourn Congress to make a recess appointment? President Trump's lawyers in their brief defending this proposal say the framers deliberately bestowed on the President the authority to adjourn Congress when two houses of that body disagreed. And there's broad consensus that all nine justices and Noel Canning agreed the President could use the adjournment clause to force an adjournment long enough under the Noel Canning majority opinions holding to make recess appointments as long as there's disagreement between the Senate and the House. Ed, any chance that the court might, in fact, uphold the power to adjourn a Congress to make a recess appointment if it happens?

[00:45:12.0] Ed Whelan: Oh, sure, there is a chance. I think it's a very small chance, but I'm not gonna rule it out. I think it would be a severe mistake, and I think there are plenty of grounds that would prevent the court from getting there. Let me mention that the same provision that Trump's advisors are relying on says that the President may adjourn the houses "To such time as he shall think proper." Now, I wonder, do they take the position that this provision would allow President Trump on January 20th if the house pursues his scheme to adjourn both houses until say, December 31st, only to be convened perhaps on an emergency basis when needed.

[00:45:57.9] Ed Whelan: Do they think that the houses don't have inherent authority to reconvene at any time they want to? I think the answers to this are clear that it would be absurd to think that this tiny provision enables the President to suspend representative government in our Congress. And I think that also bolsters the basic argument that I have made, that there is no reason to read the house's disagreement with the Senate deciding to stay in session as a disagreement that triggers the authority in Article 2 Section 3. In other words, the house simply has no say on that matter, so its disagreement is constitutionally irrelevant.

[00:46:45.9] Jeffrey Rosen: Well, it's time for closing thoughts in this great discussion. I'm so grateful to both of you for having illuminated the various constitutional arguments with such

clarity and precision. So I'll just ask you to sum up your views. Tom, if the President tries to force an adjournment of Congress and to make recess appointments of his cabinet officials, would that violate the Constitution or not?

[00:47:11.4] Thomas Berry: I believe that it would, and I'll make a point here that I think there's a lesson that the Supreme Court sometimes says it's better to say less rather than more, especially when an issue is not presented before it. So the language that President Trump's lawyers are clinging to from the Noel Canning majority opinion is just one sentence where it said, "The Constitution also gives the President, if he has enough allies in Congress, a way to force a recess," and then it cites that language that's from the majority.

[00:47:39.9] Thomas Berry: And then Scalia's concurrence is a little bit more equivocal. He says, if the House and Senate disagree, the President may be able to adjourn both to such time as he shall think proper. So that issue wasn't before the court. They really didn't need to say anything about it. And I think they probably shouldn't have said anything about it. But the fact that they did now might have given Trump the idea. And that's the claim, that's the cause of them saying all nine justices agree. I don't think there's enough there to determine one way or another what any of the justices really thought or what the court would think.

[00:48:11.0] Thomas Berry: So I would hope and think that the court would say, practically speaking, the Senate controls the spirit of Noel Canning. The point of it is that the Senate decides when it's in recess, and the practical purpose of the recess appointments clause is about when the Senate is unavailable, not about when the President forces them to be unavailable. And finally, I just completely agree with what Ed said. Anytime you're proposing a new power for the President, you have to think about, how would I feel if the person I least want to be President has this power? Because eventually they will.

[00:48:39.0] Jeffrey Rosen: Ed, the last word in this great discussion is to you, if President Trump forces an adjournment of Congress and tries to recess appoint his cabinet, would that violate the Constitution or not?

[00:48:52.9] Ed Whelan: It certainly would, for the reasons I've stated. I think it would be flatly unconstitutional. It would also be contrary to the basic scheme that the Constitution contemplates. It's anti-constitutional as well as unconstitutional, our friend Yuval Lavin describes it as a constitutional abomination, especially for the President to try to use the house to subvert the advice and consent powers of the Senate. I agree with Thomas's excellent summary. I, again, would simply add that as someone who hopes to see Donald Trump succeed as President, people who are pushing bad ideas on him should not consider themselves friends of his.

[00:49:44.1] Jeffrey Rosen: Thank you so much, Ed Whalen and Tom Berry, for a rigorous reasoned and illuminating discussion of the constitutional issues raised by the recess appointment of cabinet officials. Ed, Tom, thank you so much for joining.

[00:50:00.7] Ed Whelan: Thank you, Jeff.

[00:50:02.2] Thomas Berry: Thanks for having me.

[00:50:07.2] Jeffrey Rosen: Today's episode was produced by Bill Pollock and Samson Mostashari. It was engineered by Sedona LaMarre and Bill Pollock. Research was provided by Samson Mostashari and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of thoughtful conversation and civil debate.

[00:50:25.8] Jeffrey Rosen: Please check out the great new Constitution 101 course that the NCC has launched with Khan Academy. You can find it at constitutioncenter.org/con101. And let me know what you think. Sign up for the newsletter at constitutioncenter.org/connect. And always remember in your waking and sleeping moments that the NCC is a private nonprofit. We rely on your generosity, passion, and engagement. Support the mission by giving a donation of any amount at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.