



## AAF: Conservatives, Let's Slow Down on Recess Appointments

**TOPLINE:** President Trump is [publicly planning](#) to use his recess appointment power more aggressively than recent presidents. Conservatives must be clear-eyed about the potential consequences of following in the footsteps of President Barack Obama by continuing to "go nuclear" on important safeguards like the Senate's prerogatives in the confirmation process. The Constitution's design depends on the three branches of government jealously guarding their constitutionally delegated powers from one another. Members of both the House and the Senate should reject any call to collude with another branch to undermine the essential check of senatorial advice and consent.

### What is a Recess Appointment?

- Recess appointments exist to ensure the continuity of government when the House and Senate are in recess. Historically, until the 20<sup>th</sup> century, the Senate rarely met for more than half the year, creating an extended period where the President's nominees couldn't be considered and approved.
- [Article II, Section 2 Clause 3](#) of the Constitution grants the President 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."
- Currently, the House and Senate must be recessed for **at least 10 days** before the President can begin making recess appointments.

### Obama Created A Recess Appointments Crisis

- In January 2012, President Obama invoked the Recess Appointments Clause during a three-day recess to install three new members on the National Labor Relations Board (NLRB)
- Noel Canning, a businessman, disputed the legitimacy of a subsequent order he received from the NLRB, claiming it lacked a quorum because those three members had been invalidly appointed.
- In *NLRB v. Canning* (2014), SCOTUS unanimously held that Obama's recess appointments were invalid but disagreed as to why.
  - A liberal, five-member majority thought that the three-day recess was simply too short.
  - A conservative, four-member minority (Scalia, Roberts, Thomas, Alito) [argued](#) that the problem ran much deeper: "*The Constitution cabins that power in two significant ways.*"
    - "*First, it may be exercised only in 'the Recess of the Senate,' that is, **the intermission between 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.*"

### Recess Appointments - "A Weapon To Be Wielded by Future Presidents Against Future Senates"

- Scalia's [concurrency](#) warned that "*Members of the President's party in Congress may be able to prevent the Senate from holding pro forma sessions with the necessary frequency, and if the House and Senate disagree, the President may be able to adjourn both 'to such Time as he shall think proper' because of the holding.*"
- Scalia: "***The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates.***"

**BOTTOMLINE:** Conservatives long-warned liberals about the consequences of their disastrous jurisprudence, which they only pretend to care about now that they have been voted out of power. Although some on the right are now arguing that conservatives should use this liberal loophole to install Trump's nominees (including forcing the Senate to [adjourn against its will](#)), the Senate must assert its rights and conservatives must defend the clear text of the Constitution over any short-term political expediency.