

Sec. 2—Powers, Duties of the President

Cl. 3—Vacancies During Recess of Senate

position was abandoned in 1921 in an opinion issued by Attorney General Daugherty that declared that an appointment made during a 29-day recess was constitutional.

Daugherty's opinion focused on the practical aspects of the recess appointment dynamic, stating that, "[i]f the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions."⁶²⁵ Further emphasizing this functional approach, Daugherty's opinion rejected the notion that this broader interpretation would authorize intrasession appointments during brief adjournments, declaring that "an adjournment for 5 or even 10 days can [not] be said to constitute the recess intended by the Constitution."⁶²⁶ The opinion concluded by emphasizing that, although "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take . . . , there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review."⁶²⁷ Subsequent Attorney General and Department of Justice Office of Legal Counsel opinions continued to support the constitutionality of intrasession recess appointments, although it remained clear that a Senate "recess" did not include holidays, or very brief temporary adjournments.⁶²⁸

The Supreme Court, again in *Noel Canning*, confirmed this functional approach to the recess appointment power. The Court found nothing in dictionary definitions or common usage contemporaneous to the Constitution that would suggest that an intrasession recess was not a recess. The Court noted that, while the phrase "the Recess" might suggest limiting recess appointments to the single break between session of Congress, the word "the" can also be used "generically or universally,"⁶²⁹ and that there were examples of "the Recess" being used in the broader manner at the time of the found-

⁶²⁵ 33 Op. Att'y Gen. 20, 23 (1921). The reference to "an adjournment to a specified date" refers to the practice of the Senate (and the House) to announce an intersession recess by approving a resolution stating that it will adjourn "sine die," i.e., without specifying a date to return, in which case Congress will reconvene when the next formal session is scheduled to begin. Currently, that date is set under the Twentieth Amendment U.S. Const. Amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day").

⁶²⁶ 33 Op. Att'y Gen. at 25.

⁶²⁷ 33 Op. Att'y Gen. at 25.

⁶²⁸ 23 Op. Att'y Gen. 599 (1901); 22 Op. Att'y Gen. 82 (1898). A "recess," in addition, may be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. See 3 W. Willoughby, *supra*, at 1508–1509.

⁶²⁹ For instance, the Constitution directs the Senate to choose a President *pro tempore* "in the Absence of the Vice- President." Art. I, §3, cl. 5.