

# Trump's recess appointments and money impounding versus Congress

By Dan Jacobson

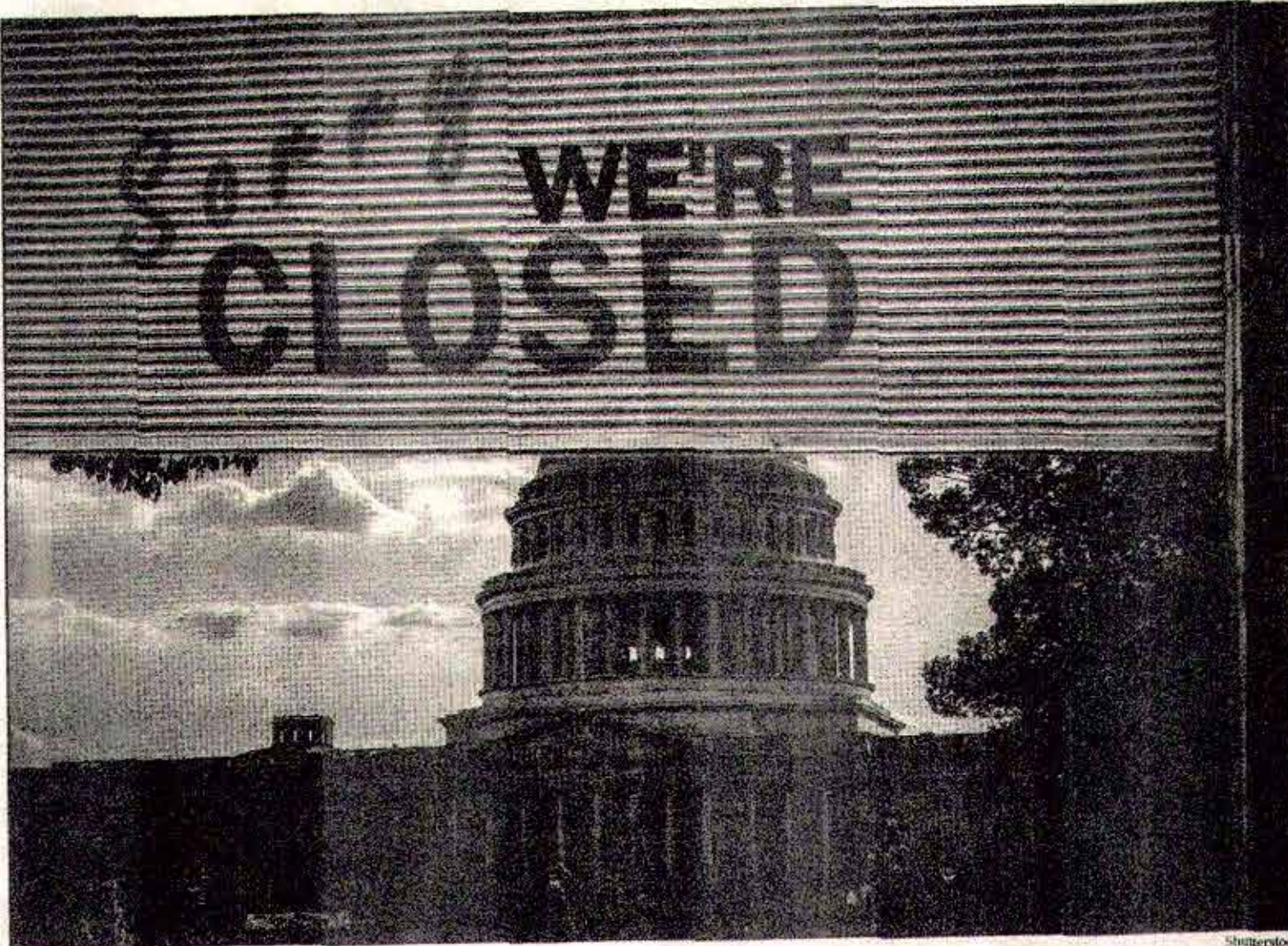
**A**t *Martinez v. Department of Transportation* 238 Cal.App.4th 559, 564 (2015), Justice William Bedsworth aptly noted that "there is what has become known as 'Godwin's Law' [which] (b)roadly speaking, [states] that the first side in an argument to compare the other side to Hitler or the Nazis loses." This article is an exception that proves Godwin's Law.

Nazi Germany's "Enabling Act" . . . allowed [Hitler] to enact laws, including ones that violated the Weimar Constitution, without approval of either parliament or Reich President von Hindenburg." (*Holocaust Encyclopedia*, U.S. Holocaust Memorial Museum, (<https://encyclopedia.ushmm.org/content/en/article/the-enabling-act>.) This effectively silenced the Reichstag (Germany's parliament).

"Donald Trump has demanded that . . . the Senate allow him to appoint officials to his new administration without confirmation hearings on Capitol Hill . . . In a demonstration of his political muscle, the US president-elect urged support for 'recess appointments,' which allow the president to make appointments while the Senate is temporarily paused." Trump's plan is to have the Senate simply not convene before he makes his appointments. *The Guardian*, Nov. 11, 2024, <https://www.theguardian.com/us-news/2024/nov/11/trump-senate-administration-hearings>.

Note: While in recent days the president-elect has been publicly quiet about his demand that the Senate not convene, he has not withdrawn that demand; and while pre-inaugural nominees have been visiting with Senators, Senate Majority Leader-Elect John Thune said on Nov. 15, 2024, "I think that all options are on the table, including recess appointments." *Newsweek*, Nov. 15, 2024, <https://www.newsweek.com/donald-trump-cabinet-recess-appointments-john-thune-1986307>. Besides, Donald Trump has years to silence the Congress. As shown above and below the President-Elect has already moved in that direction. Thus, it is in order to examine law designed to prevent the "Reichstaging" of Congress.

The President " . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Constitution, Art. II, § 2, Cl. 2. Just as California law has a strong rule against "surplusage," i.e., [i]f possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative



purpose." *Moyer v. Workmen's Comp. Appeals Board*, 10 Cal.3d 222, 230 (1973) [Internal quotation marks and citation omitted], the constitution is governed with the same rigid common sense. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

There's a word in Art. II, § 2, Cl. 2 that hasn't gained recent mass attention, but which commands respect and meaning under Chief Justice Marshall's *Marbury* admonition. That word is "by." Appointments are not only made "with" the "Advice and Consent of the Senate," but are also made "by" that "Advice and Consent." In the context of the Appointments Clause, the word "by" means, "As a means of conveyance; via." *Funk & Wagnalls Standard Dictionary* (1968) p. 182 "by" definition # 11. So, the appointment of U.S. officers, judges, etc. is not accomplished via the President alone; rather such appointments are jointly accomplished "by" both the President and the Senate. That accomplishment happens after the President solely "nominates" individuals for such positions; and upon the Senate solely "adv[is]ing and Consent[ing]." Both sets of duties must happen; thus, the appointment is a joint venture.

There is no doubt that the Senate's "Advice and Consent" role can restrain the President. "[R]estrain-

ing [the President] is precisely what must have been intended [by the Senate's Advice and Consent role]." The *Federalist* No. 77 (Alexander Hamilton). After all, the framers knew that affording the President had "the entire power of appointment would enable [the President] much more effectually to establish a dangerous empire over [the Senate], than a mere power of nomination subject to [the Senate's] control." *Id.*

For the Senate to allow all or most of President-Elect Trump's nominees to become "recess appointments" would clearly be against the words and intent of the constitution, according to a reading of the words in the appointments clause, logic, and Alexander Hamilton. The Senate's failure to convene, as demanded by the president-elect, would be at least a temporary suicide of part of our national legislature, a vital part thereof. In that sense, bowing to such an odious demand would partially reflect Nazi Germany's Enabling Act. It would be the beginning of turning the Senate into the toothless Reichstag.

"Donald Trump is entering his second term with vows to cut a vast array of government services . . . Rather than relying on his party's control of Congress to trim the budget, Trump and his advisers intend to test an obscure legal theory holding that presidents have sweeping power to withhold funding from programs they dislike. . . . Trump and his advisers are asserting that a president can unilaterally ignore Congress' spend-

ing decisions and 'impound' funds if he opposes them." In a campaign video, the president-elect said, "We can simply choke off the money." Redden, Molly, *ProPublica*, Nov. 26, 2024.

The president-elect apparently hasn't read and/or doesn't care about U.S. Constitution Art I, § 9, Cl. 7; Art. I, § 8; Art. I, § 8, Cl. 18; Art. I, § 8, Cls. 1-3, 5, and 6, 12, 13, 15, 16; or simple logic.

"Our Constitution gives Congress control over the public fisc, but it specifies that its control must be exercised in a specific manner. The Appropriations Clause commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.* 601 U.S. 416, 420 (May 16, 2024), citing U.S. Constitution Art. I § 9, Cl. 7; Opinion by Thomas, J., joined by Roberts, C. J., and Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson.

The Appropriations Clause mandates two things, in order for the government to spend money. Those two things are, [1] "a law that authorizes the disbursement of specified funds [2] for identified purposes." *Fin. Prot. Bureau*, supra at 418-419. [Italics added.]. "All legislative Powers herein granted shall be vested in [ ] Congress." U.S. Constitution, Art. I, § 8. Because Congress and only Congress can make a law, Congress is the only branch which can direct that money be spent; and Congress

is required to direct that such money be spent "for identified purposes."

Once Congress has made a law directing that money shall be spent "for identified purposes," the President comes into play. The President, "shall take Care that [such] Law[] be faithfully executed." U.S. Constitution Art. II, § 3. Since the appropriations law must be for "an identified purpose," far from having the right to impound funds, the Constitution commands the President to "take Care that the [subject Appropriations] Law[] be faithfully executed." I.e., the President must spend the appropriated money, and must do so "faithfully," on the project(s) and in the manner specified by the subject Congressional legislation.

More evidence of Congress' sole control of what Justice Thomas referenced as the Nation's "fisc" is at U.S. Constitution, § 8, Cl. 18. Congress has the power and right "[t]o make all Laws which shall be necessary and proper for carrying into Execution the [§ 8] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Much of Federal power emanates from § 8; but, even if a power emanates from another source (i.e., § 2 of the Fifteenth Amendment), it is Congress which has the right and power to appropriate money to enforce that power, with (1) a law, and (2) an identified purpose. *Fin. Prot. Bureau*, supra at 438.

Further evidence that it is only

Congress that controls the Nation's fisc is at Art. I, § 8, Cls. (1) Congress has the power to tax; (2) Congress has the power to borrow money; (3) Congress has the power to coin money; (6) Congress has the power to punish counterfeiting; (12), (13), (15), & (16) Congress has the power to raise and support the army, maintain the Navy, and provide for the Militia.

With this strong constitutional armor, it is no wonder that the Supreme Court has concluded that only Congress has the power of the purse, as it did - in 2024 - with an 8-1 vote for an opinion authored by - Justice Thomas.

The President not only has no power over the Nation's fisc, other than to faithfully carry out Congress' appropriations, for good measure, the President is statutorily banned from impounding funds without Congress' approval. In July of 1974, Congress passed the Congressional Budget and Impoundment Control Act of 1974, AKA the Impoundment Control Act (ICA). 93 CIS Legis. Hist. PL. 344. The ICA is codified at 2 U.S.C. §§ 681-688.

While the machinations of the ICA are somewhat detailed, that law allows the President to tell Congress that he or she wants to impound funds authorized by Congress for specific purpose(s); and the ICA provides what Congress must do to halt that impounding. In essence, the ICA describes how the President can suggest that appropriated funds be impounded, and how Congress must act to say "no" to that suggestion. See 2 U.S.C. § 683, and 2 U.S.C. § 688.

It is Congress that has full Constitutional control over spending. Any attempt by the president-elect to "choke off the money," *ProPublica*, Nov. 26, 2024, would not only be illegal, it would attack numerous Constitutional provisions, and that attack would have no Constitutional support. As citizens and as lawyers, we must be forever vigilant in protecting Congress; and, in not allowing Congress to be sidelined by Donald Trump, as the Reichstag was silenced by Adolf Hitler.

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