

RECESS RUCKUS

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On December 17, 2011, the Senate prepared to end its business for the year. But rather than simply recess until January, the Senate instead unanimously agreed that, once every few days, it would convene a series of “pro forma sessions only, with no business conducted” – typically lasting 30 to 40 seconds each.¹

What explains this curious behavior – and the constitutional struggle that has subsequently unfolded between President Barack Obama and various Republican Senators over the legal effect of these pro forma sessions? The answer can be found in a decades-old struggle between the executive and legislative branches of government over the proper meaning of the Recess Appointments Clause.

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Article II of the Constitution gives 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.”² Such appointments require no Senate confirmation, so they are naturally viewed by Senators with suspicion.

In particular, Senators have duelled with Presidents over one particular question: What kind of Senate “recess” can give rise to a recess appointment? Is the power limited to the recess between different sessions of Congress? Or can recess appointments occur when

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¹ 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

² U.S. Const. art. II, § 2, cl. 3.

the Senate takes a break in the middle of a session of Congress – commonly known as “intra-” (as opposed to “inter-”) “session recesses”?

For decades, the Executive Branch has taken the view that the power applies during intra- as well as inter-session recesses. But there is a potential *reductio ad absurdum* problem here: If intra-session breaks can trigger the recess appointments power, does every such break do so? Could the President make recess appointments when the Senate adjourns for the evening? Or for lunch?

The way to avoid a slippery slope is to identify a principled limit. Towards that end, the Executive Branch has historically turned to another provision of the Constitution. According to Article I, “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than *three days*.”³ Invoking this provision, the Justice Department concluded as early as 1921 that intra-session recess appointments are generally valid – but not for recesses of three days or less.⁴

In light of this assurance, the Senate has over time come to accept the legitimacy of intra-session recess appointments.

To be sure, many Senators howled when, during an 11-day intrasession recess in 2004, President George W. Bush gave a recess appointment to then-Alabama Attorney General William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Over 40 Senators blocked a vote on his nomination – thereby motivating President Bush to grant the recess appointment. But only one Senator, Edward M. Kennedy, actually went to the trouble of filing amicus briefs questioning the constitutionality of his recess appointment.

³ U.S. Const. art. I, § 5, cl. 4 (emphasis added).

⁴ See, e.g., 33 Op. Att’y Gen. 20, 24-25 (1921) (“If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term ‘recess’ must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.”).

He argued that the Constitution forbids *all* intra-session recess appointments, regardless of the length of the recess, an argument the Eleventh Circuit later rejected.⁵

Rather than join Kennedy's amicus effort, his Senate colleagues later banded together to protect Senate prerogatives in a different manner. Instead of protesting the legitimacy of all intra-session recess appointments, regardless of duration, the Senate responded by adopting defensive measures that presume that the three-day rule imposes meaningful limits on the recess appointment power. Shortly after Democrats won back a majority of the Senate in 2007, the new Senate leadership instituted the practice of conducting pro-forma sessions once every few days, in hopes of preventing the President from making recess appointments due to the three-day rule – a tactic the Bush Administration never publicly challenged.⁶

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This pro-forma session strategy continues to this day – and has given birth to the latest constitutional controversy over Presidential appointments. On January 4, President Obama made four recess appointments – notwithstanding the fact that the appointments occurred during the three-day gap between pro forma Senate sessions on January 3 and 6.

Senate Republicans howled. Their objections were formally delivered to the Administration when Senate Judiciary Committee Republicans submitted a letter to Attorney General Eric Holder, demanding to know how the Administration could reconcile these appointments with the three-day rule.

Notably, the Obama Administration responded by releasing an Office of Legal Counsel opinion that specifically avoided attacking

⁵ *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

⁶ Cf. Steven G. Bradbury & John P. Elwood, *Call the Senate's bluff on recess appointments*, Wash. Post, Oct. 15, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html (“Although Bradbury was nominated as assistant attorney general in 2005, his nomination was never voted on by the full Senate. Individual senators put holds on the nomination, and Senate leaders instituted pro forma sessions to prevent a recess appointment.”).

the three-day rule.⁷ OLC instead concluded that the pro forma sessions were simply insufficient to interrupt an on-going recess. Under its view, the January 4 appointments took place in the midst of a 20-day recess between January 3 (the first day of the new session of Congress) and January 23 – rather than a mere three-day recess between January 3 and January 6.

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However the controversy over pro forma sessions is ultimately resolved, one lesson emerges: The three-day rule has come to earn a certain measure of respect by both executive and legislative branch officials from both major political parties.

Yet remarkably, this respect has occurred not as a result of judicial decision, but rather through the work of the political branches.

What's more, a number of key documents in this area have not previously been the subject of formal publication. Indeed, the briefs we publish here have been cited by scholars, commentators, and public officials on various occasions – yet based on our research have never been made available to ordinary citizens on the Internet or through Westlaw, LEXIS, or any other source.

These two ingredients make this latest controversy perfect fodder for *Pub. L. Misc.*⁸ In the pages that follow, readers will find two federal district court briefs filed by the Justice Department in 1993 in the matter of *Mackie v. Clinton* – one was recently cited by Senate Republicans, the other by OLC. We also include here the amicus brief submitted to the Eleventh Circuit by Senator Kennedy in 2004, along with the recent letter from Senate Judiciary Committee Republicans protesting the January 4 recess appointments by President Obama. All of these documents are published here for the benefit of scholars, practitioners, and other interested observers.

⁷ *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Jan. 6, 2012, available at www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

⁸ See generally James C. Ho & Trevor W. Morrison, *Introducing Pub. L. Misc.*, 1 J.L. (1 PUB. L. MISC.) 13 (2011).

Perhaps the most significant legal document in the current controversy is the OLC opinion addressing the President's authority to make the January 4 recess appointments. We published a similarly prominent OLC opinion in our last issue, addressing the President's power to order the use of military force in Libya.⁹ But because OLC's published opinions are formally archived and readily accessible, we have decided as a matter of policy no longer to reproduce them in *Pub. L. Misc.* Instead, we will focus on less readily available materials, like correspondence between the executive and legislative branches, trial court briefs filed by the Justice Department, and so on. Perhaps someday those materials will be just as carefully organized and easily accessible as OLC opinions, rendering an effort like *Pub. L. Misc.* obsolete. Nothing would please us more.

⁹ See Letter from Caroline D. Krass to Eric H. Holder, Jr., *Presidential Powers – Hostilities and War Powers*, 1 J.L. (1 PUB. L. MISC.) 260 (2011).