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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Virginia A. Seitz, **"Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions"** (2012)

Virginia Seitz was the head of the Office of Legal Counsel in Obama administration. A former clerk for Justice William Brennan and well-regarded federal appellate lawyer before her appointment to the OLC, Seitz was regarded as a potential Supreme Court nominee for a Democratic administration. In January 2012, she provided a legal opinion for the counsel to the president evaluating the legality of presidential recess appointments.

On December 17, 2011, the U.S. Senate agreed to "adjourn and convene for pro forma sessions only" until January 23, 2012, thereby attempting to avoid taking an extended recess between the first and second session of the 112th Congress. Pro forma sessions are a parliamentary maneuver that had been used for a variety of purposes over the course of the twentieth century. In recent years they were increasingly being used to deny presidents who were having difficulty getting their nominees confirmed by the Senate an opportunity to make recess appointments. President Obama determined to make a "recess appointment" during early January, before the Senate returned for its regular second session. The administration named a director for the newly created Consumer Financial Protection Bureau (CFPB) and three members to serve on the National Labor Relations Board (NLRB). The CFPB appointee had been filibustered on the floor on the Senate in the fall. The NLRB appointees had not previously been considered by the Senate, but at the start of 2012 the NLRB lost its quorum for making legally binding decisions. Recess appointments can serve until the end of congressional session without facing Senate confirmation. Administration opponents immediately objected that the presidential power to make appointments to fill vacancies when the Senate was in recess could not be exercised during this period, which was broken up by "pro forma sessions." Administration allies responded that these sessions were a sham and had been designed specifically to prevent Obama from making recess appointments. The administration supported its legal position with the OLC opinion from Seitz, which argued that the Senate was practically and legally in recess throughout the period from mid-December to late January. What is the purpose of recess appointments, according to Seitz? Are pro forma sessions compatible with that purpose?

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The Office has consistently advised that "a recess during a session of the Senate, at least if it sufficient length, can be a 'Recess' within the meaning of the Recess Appointments Clause" during which the President may exercise his power to fill vacant offices. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* (Feb. 20, 2004). Although the Senate will have held pro forma sessions regularly from January 3 through January 23, in our judgment, those sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to "receive communications from the President or participate as a body in making appointments." Thus, the President has the authority under the Recess Appointments Clause to make appointments during this period. The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for pro forma sessions at which no business is to be conducted.

Beginning in late 2007, and continuing into the 112th Congress, the Senate has frequently conducted pro forma sessions during sessions of Congress. These pro forma sessions typically last only a few seconds, and apparently require the presence of only one Senator. Senate orders adopted by

unanimous consent provide in advance that there is to be "no business conducted" at such sessions. . . . The Senate Majority Leader has stated that such pro forma sessions break a long recess into shorter adjournments, each of which might ordinarily be deemed too short to be considered a "recess" within the meaning of the Recess Appointments Clause, thus preventing the President from exercising his constitutional power to make recess appointments. . . .

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[T]he Senate as a body does not uniformly appear to consider its recess broken by pre-set pro forma sessions. The Senate's web page on the sessions of Congress, which defines a recess as "a break in House or Senate proceedings of three days or more, excluding Sundays," treats such a period of recess as unitary, rather than breaking it into three-day segments. . . . More substantively, despite the pro forma sessions, the Senate has taken special steps to provide for the appointment of congressional personnel during longer recesses (including this one), indicating that the Senate recognizes that it is not in session during this period for the purpose of making appointments under ordinary procedures. And when messages are received from the President during the recess, they are laid before the Senate and entered into the Congressional Record until the Senate returns for a substantive session, even if pro forma sessions are convened in the meantime. . . .

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Under a framework first articulated by Attorney General Daugherty in 1921, and subsequently reaffirmed and applied by several opinions of the Attorney General and this Office, the "constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could 'not receive communications from the President or participate as a body in making appointments.'" Although "the line of demarcation can not be accurately drawn" in determining whether an intrasession recess is of sufficient length to permit the President to make a recess appointment, "the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess in making it impossible for him to receive the advice and consent of the Senate." . . .

We have little doubt that a twenty-day recess may give rise to presidential authority to make recess appointments. Attorneys General and this Office have repeatedly affirmed the President's authority to make recess appointments during intrasession recesses of similar or shorter length. . . .

The recess appointment practice of past Presidents confirms the views expressed in these opinions. . . . Intrasession recesses were rare in the early years of the Republic, and when they occurred, they were brief. But as intrasession recesses became common, so too did intrasession recess appointments. President Johnson is believed to have made the first intrasession recess appointments in 1867. . . .

There is significant (albeit not uniform) evidence that the Executive Branch's view that recess appointments during intrasession recesses are constitutional has been accepted by Congress and its officers. Most relevant, in our view, is the Pay Act, which sets out the circumstances in which a recess appointee may be paid a salary from the Treasury. The Attorney General has taken the position that the Act constitutes congressional acquiescence to recess appointments under circumstances where the Act would permit payment. . . .

While there is little judicial precedent addressing the President's authority to make intrasession recess appointments, what decisions there are uniformly conclude that the President does have such an authority. . . .

The second question we consider is whether Congress can prevent the President from making appointments during a recess by providing for pro formal sessions at which no business is to be conducted, where those pro forma sessions are intended to divide a longer recess into a series of shorter adjournments. . . .

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[Founding-era writings] emphasize that the recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments. . . . Thus, from the days of the Founding, the Recess Appointments Clause has been considered implicated when the Senate is not "in session for the appointment of officers." *The Federalist No. 67.*

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Opinions of the Attorney General have construed the Clause in order to fulfill its purpose that there be an uninterrupted power to fill federal offices. Thus, Attorney General Wirt advised in 1823 that "whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have the power of filling it by an appointment" because "[t]he substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." . . .

. . . . In his seminal opinion concluding that a significant intrasession adjournment is a "recess" in which recess appointments can be made, Attorney General Daugherty focused on this point: "Regardless of whether the Senate has adjourned or recessed, the real question . . . is whether *in a practical sense* the Senate is in session so that *its advance and consent can be obtained*." (second emphasis added). . . . Thus, in determining whether an intrasession adjournment constitutes a recess in the constitutional sense, the touchstone is "its *practical effect: vis*., whether or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations" (emphasis added). . . .

Significantly, a century ago, the Senate Judiciary Committee adopted a functional understanding of the term "recess" that focuses on the Senate's ability to conduct business. In rejecting the theory that President Theodore Roosevelt could make recess appointments during a brief "constructive recess" between two sessions of Congress, the Committee wrote of the Recess Appointments Clause:

> It was evidently intended by the framers of the Constitution that [the word "recess] should means something real, not something imaginary; something actual, not something fictitious. . . . It means, in our judgment, . . . the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President *or participate as a body in making appointments*. . . . (second emphasis added)

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Guided by these principles, we conclude that the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause. Our conclusion rests on three considerations.

First, both the Framers' original understanding of the Recess Appointments Clause and the longstanding views of the Executive and Legislative Branches support the conclusion that the President may make recess appointments when he determines that, as a practical matter, the Senate is not available to give advice and consent to executive nominations. . . .

. . . . A lengthy recess broken only by pro forma sessions closely resembles an unbroken recess of the same length. . . .

Second, allowing the Senate to prevent the President from exercising his authority under the Recess Appointments Clause by holding pro forma session would be inconsistent with both the purpose of the Clause and historical practice in analogous situations. . . . If the Senate can avoid a "Recess of the Senate" under the Clause by having a single member "gavel in" before an empty chamber, then the Senate can preclude the President from making recess appointments even when, as a practical matter, it is unavailable to fulfill its constitutional role in the appointment process for a significant period of time. The purpose of the Clause is better served by a construction that permits the President to make recess appointments when the Senate is unavailable to advise and consent for lengthy periods. . . .

Third, permitting the Senate to prevent the President from making recess appointments through pro forma sessions would raise constitutional separation of powers concerns. To preserve the constitutional balance of powers, the Supreme Court has held that congressional action is invalid if it "undermine[s] the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison v. Olson* (1988). . . .

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We recognize that the Senate may choose to remain continuously in session and available to exercise its advise-and-consent function and thereby prevent the President from making recess appointments. But . . . the President may properly determine that the Senate is not available under the Recess Appointments Clause when, while in recess, it holds pro forma sessions where no business can be conducted. Such sessions do not have legal effect of interrupting a Senate recess for purposes of the Recess Appointments Clause.

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