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Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to appear before you this morning and present my views on the constitutionality of the President's January 4 recess appointments. The President's recess appointment power is a subject I have studied both as a government employee and as a private citizen—in government, as an Assistant to the Solicitor General, and later as the Deputy Assistant Attorney General for the Office of Legal Counsel that oversaw personnel issues; and as a private citizen, as a student of the law with an interest in the Founding era and questions of structural constitutional law.

As we will discuss today, both Houses of Congress have used pro forma sessions for a variety of purposes through our Nation's History. But beginning in November 2007, a new purpose was devised: to break a lengthy intrasession recess into a series of breaks believed to be too short for the President to make recess appointments. Thus, the basic question we will be discussing today is whether pro forma sessions at which no business is scheduled to be conducted are sufficient to interrupt the recess of the Senate, and thus to prevent the President from using his authority under Article II of the Constitution to make recess appointments. Because pro forma sessions were not used for this purpose during the first 218 years of the American experiment, the constitutional question is undoubtedly a novel one.

As any student of recess appointments will tell you, there are few judicial opinions even touching generally on the subject of recess appointments,[1] and none is particularly illuminating of the question now presented. The sources that shed light on the President's ability to make recess appointments notwithstanding pro forma sessions include founding-era documents, executive and legislative materials reflecting the practices of both branches, and judicial opinions on related subjects.

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[1] Evans v. Stephens, 387 F.3d 1220, 1225-26 (11th Cir. 2004) (en banc); Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996); United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 710-14 (2d Cir. 1962); Nippon Steel Corp. v. Int'l Trade Comm'n, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002); Wilkinson v. Legal Servs. Corp., 865 F. Supp. 891, 900 (D.D.C. 1994), rev'd, 80 F.3d 535 (D.C. Cir. 1996); Mackie v. Clinton, 827 F. Supp. 56, 57-58 (D.D.C. 1993), vacated as moot, Nos. 93-5287, 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994); McCalpin v. Dana, No. 82-542, at 14 (D.D.C. Oct. 5, 1982); Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979); Gould v. United States, 19 Ct. Cl. 593, 595-96 (1884); In re Farrow, 3 F. 112, 115-16 (N.D. Ga. 1880); Schenck v. Peay, 21 F. Cas. 672 (E.D. Ark. 1869); In re District Attorney of United States, 7 F. Cas. 731 (E.D. Pa. 1868).

There are credible arguments to be made on both sides of the question. Professor Turley and Mr. Cooper have set forth the opposing view persuasively, and I respect their analyses. However, I believe the better view, based on the traditional view of the Recess Appointments Clause, is that pro forma sessions at which no business is conducted do not interrupt the recess of the Senate for purposes of the Recess Appointments Clause.

My testimony today addresses the question of the constitutionality of the appointments, not their advisability or the manner in which the White House handled the nominations.

I.

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have 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." U.S. Const. art. II, § 2, cl. 3. The Clause immediately follows the Appointments Clause, which establishes the general method for appointment of Officers of the United States. There was little discussion of the Recess Appointments Clause at the Constitutional Convention. But Alexander Hamilton described it in The Federalist as providing a "supplement" to the President's appointment power, establishing an "auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67, at 409 (Clinton Rossiter ed. 1961).

The Department of Justice has long taken the view that "the term 'recess' includes intrasession recesses if they are of substantial length." Recess Appointments During an Intrasession Recess, 16 Op. O.L.C. 15, 15 (1992); Recess Appointments—Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314, 316 (1979); Recess Appointments, 41 Op. Att'y Gen. 463, 468 (1960); Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 21-22, 25 (1921) ("Daugherty Opinion"). The Comptroller General, an Officer of Congress, has long concurred in the view that an extended intrasession adjournment of the Senate is a "recess" in the constitutional sense, during which "an appointment properly may be made." Appointments—Recess Appointments, 28 Comp. Gen. 30, 34 (1948). The few judicial opinions that have addressed the subject have likewise concluded that a President may validly make appointments during intrasession recesses. The en banc Eleventh Circuit upheld the recess appointment of a judge made during an eleven-day intrasession recess. See Evans v. Stephens, 387 F.3d 1220, 1224-26 (11th Cir. 2004) (en banc); see also Nippon Steel Corp. v. Int'l Trade Comm'n, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002); Gould v. United States, 19 Ct. Cl. 593, 595-96 (1884).

In The Federalist, Hamilton explained that the Clause was needed because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and it "might be necessary for the public service to fill

[vacancies] without delay." The Federalist No. 67, at 410. Other contemporaneous materials also indicate that the recess appointment power is necessary for situations when the Senate is unable to advise on appointments. See 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 135-36 (Jonathan Elliott ed., 2d ed. 1836) ("Elliott's Debates") (statement of Archibald Maclaine at North Carolina ratification convention) (July 28, 1788) ("Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments, as well as receive ambassadors and other public ministers. This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences."); cf. Letters of Cato IV, reprinted in 2 The Complete Anti-Federalist 114 (Herbert J. Storing ed., 1981) ("Though the president, during the sitting of the legislature, is assisted by the senate, yet he is without a constitutional council in their recess . . . ."). Thus, since the earliest days of the Republic, the Recess Appointment Clause has been thought to be available when the Senate was not "in session for the appointment of officers." The Federalist No. 67, at 410.

Sources from the first half of the nineteenth century likewise indicate that the Recess Appointments Clause is implicated when the Senate is not able to review nominations. Justice Story wrote, "There was but one of two courses to be adopted [at the Founding]; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." 3 Joseph Story, Commentaries on the Constitution of the United States § 1551, at 410 (1833); id. § 1552, at 411 (contrasting recesses with when "the senate is assembled"). Executive materials from that period likewise indicate that the President could make recess appointments to fill "all vacancies which . . . happen to exist at a time when the Senate cannot be consulted as to filling them." Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 633 (1823) (emphasis added); Power of President to Fill Vacancies, 3 Op. Att'y Gen. 673, 676 (1841) ("[T]he convention very wisely provided against the possibility of [an "interregna in the executive powers"] by enabling and requiring the President to keep full every office of the government during a recess of the Senate, when his advisers could not be consulted . . . .") (emphasis added).

Consistent with those early views, the Department of Justice's understanding of the term "recess" has long emphasized the practical availability of the Senate to give advice and consent. In 1921, citing opinions of his predecessors dating back to the Monroe administration, Attorney General Harry M. Daugherty argued that the question "is whether in a practical sense the Senate is in session so that its advice

and consent can be obtained. To give the word 'recess' a technical and not a practical construction, is to disregard substance for form." 33 Op. Att'y Gen. at 21-22; see also id. at 25 ("Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?"); accord Recess Appointments, 41 Op. Att'y Gen. at 467 (looking to "practical effect" of an intrasession recess in determining whether it implicates recess appointment power, and "whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations").

The Executive Branch is not alone in emphasizing the practical availability of the Senate in determining whether the recess appointment power is implicated. More than a century ago, the Senate Judiciary Committee endorsed a practical understanding of the term "recess" that focuses on the Senate's ability to perform its functions. The Committee wrote:

> It was evidently intended by the framers of the Constitution that [the word "recess"] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. 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. . . . Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (second emphasis added); see also Riddick's Senate Procedure 947 & n.46 (1992) (citing report as authoritative "on what constitutes a 'Recess of the Senate'"), available at http://www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-88.pdf; cf. 1 George T. Custis, Constitutional History of the United States 486 n.1 (1889) ("This expression, a 'house', or 'each house,' is several times employed in the Constitution with reference to the faculties and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business.") (emphasis added).

The Comptroller General attributed a similar purpose to the Clause in his opinion discussing the use of the Pay Act, 5 U.S.C. § 5503, to pay officers serving under intrasession recess appointments, saying that such persons would be appointed "when the Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment." Appointments—Recess Appointments, 28 Comp. Gen. at 37.

II.

Applying those principles suggests that during pro forma sessions at which no business is to be conducted, "the Senate is not sitting in regular or extraordinary session as a branch of the Congress" and "its members owe no duty of attendance," S. Rep. No. 58-4389, at 2, and accordingly they do not interrupt the recess of the Senate.

At the risk of being obvious, these are, after all, "pro forma" sessions, meaning they are "[d]one as a formality; perfunctory," AMERICAN HERITAGE DICTIONARY 1400 (4th ed. 2000), that they have the form of a session but not the substance. See also BLACK'S LAW DICTIONARY (9th ed. 2009) ("Made or done as a formality."; "pro forma session. A legislative session held not to conduct business but only to satisfy a constitutional provision that neither house may adjourn for longer than a certain time (usu. three days) without the other house's consent."). During the three Congresses when such sessions have been used to prevent recess appointments, such sessions typically have lasted around 30 seconds from gavel to gavel, and the terms of the recess order ordinarily foreordain that it will be a "pro forma session only, with no business conducted" during those sessions. 154 Cong. Rec. S2194 (daily ed. Mar. 13, 2008).[2] It is therefore not surprising that the public statements of many Members of the Senate suggest that they do not view these pro forma sessions to interrupt the recess. See, e.g., 157 Cong. Rec. S6826 (daily ed. Oct. 20, 2011) (statement of Sen. Inhofe) (referring to the upcoming "1-week recess"); id. at S4182 (daily ed. June 29, 2011) (statement of Sen. Sessions) ("the Senate is scheduled to take a week off, to go into recess to celebrate the Fourth of July . . . ."); 154 Cong. Rec. S7984 (daily ed. Aug. 1, 2008) (statement of Sen. Hatch) (referring to upcoming "5-week recess"); id. at S7999 (daily ed. Aug. 1, 2008) (statement of Sen. Dodd) (noting that Senate would be in "adjournment or recess until the first week in September"); id. at S7713 (daily ed. July 30, 2008) (statement of Sen. Cornyn) (referring to the upcoming "month-long recess"); see also id. at S2193 (daily ed. Mar. 13, 2008) (statement of Sen. Leahy) (referring to the upcoming "2-week Easter recess"); id. at S1728 (daily ed. Mar. 7, 2008) (statement of Sen. Kyl) (same); see also 157 Cong. Rec. S8349 (daily ed. Dec. 6, 2011)

[2] See, e.g., 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011); id. at S7876 (daily ed. Nov. 18, 2011); id. at S6891 (daily ed. Oct. 20, 2011); id. at S6009 (daily ed. Sept. 26, 2011); id. at S5292 (daily ed. Aug. 2, 2011); id. at S3465 (daily ed. May 26, 2011); 156 Cong. Rec. S7775 (daily ed. Sept. 29, 2010); 154 Cong. Rec. S10,958 (daily ed. Dec. 11, 2008); id. at S10,776 (daily ed. Nov. 20, 2008); id. at S8077 (daily ed. Aug. 1, 2008); id. at S1085 (daily ed. Feb. 14, 2008); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); id. at S14,661 (daily ed. Nov. 16, 2007); accord 154 Cong. Rec. S4849 (daily ed. May 22, 2008) (recess order stating that "no action or debate" is to occur during pro forma sessions).

(statement of Sen. Durbin) (urging passage of payroll tax cut extension "before the holiday recess"). Some of those statements also specifically note that the Senate will be unable to perform work during that period. See 157 Cong. Rec. S5035 (daily ed. July 29, 2011) (statement of Sen. Thune) (saying of August recess "[w]e are not going to be able to consider these [trade] agreements until September"). Many of the calendars the Senate makes available to the public treat recesses punctuated with pro forma sessions as a single recess, rather than a series of shorter recesses, noting that "usually no business is conducted during these time periods." 2011-2012 Congressional Directory 538 n.2 (Joint Comm. on Printing, 112th Cong., comp. 2011); United States Senate, The Dates of Sessions of the Congress, http://www.senate.gov/reference/Sessions/sessionDates.htm.

Perhaps most tellingly, the Senate usually takes special steps for the appointment of personnel at the outset of recesses punctuated with pro forma sessions that mirror the steps it takes at the outset of lengthy recesses without such sessions. Compare, e.g., 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that "notwithstanding the upcoming recess or adjournment of the Senate, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards, conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate"),[3] with 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010) (similar order at outset of 39-day recess); 153 Cong. Rec. S10,991 (daily ed. Aug. 3, 2007) (similar order at outset of 32-day recess). The fact that the Senate takes such steps suggest an appreciation that, even with pro forma sessions, it will be unable act on appointments during that period using ordinary procedures.

Under the circumstances, I believe that the President could properly conclude that the Senate is not available to consider nominations during pro forma sessions at which no business is to be conducted, and that accordingly, for the entire period that the Senate is in recess, "it can not . . . participate as a body in making appointments." S. Rep. No. 58-4389, at 2; Daugherty Opinion, 33 Op. Att'y Gen. at 25 (discussing the President's "large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate").

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[3] See, also, e.g., 157 Cong. Rec. S7876 (daily ed. Nov. 18, 2011); id. at S5292 (daily ed. Aug. 2, 2011); id. at S3463 (daily ed. May 26, 2011); 156 Cong. Rec. S7775 (daily ed. Sept. 29, 2010); 154 Cong Rec. S10,958 (daily ed. Dec. 11, 2008); id. at S10,776 (daily ed. Nov. 20, 2008); id. at S10,427 (daily ed. Oct. 2, 2008); id. at S8077 (daily ed. Aug. 1, 2008); id. at S6332 (daily ed. June 27, 2008); id. at S4848 (daily ed. May 22, 2008); id. at S2190 (daily ed. Mar. 13, 2008); id. at S1085 (daily ed. Feb. 14, 2008); 153 Cong. Rec. S16,060 (daily ed. Dec. 19, 2007); id. at S14,655 (daily ed. Nov. 16, 2007).

III.

I recognize that there are credible arguments supporting the conclusion that the President lacks constitutional authority to make recess appointments when the Senate is meeting in pro forma sessions every three days. I would like to devote the rest of my presentation to explaining why I believe those arguments are ultimately unpersuasive.

The first is that the Senate has used pro forma sessions in other contexts to fulfill constitutional requirements. For example, beginning in 1980, pro forma sessions have been used sporadically to address the Twentieth Amendment's requirement that, in the absence of legislation providing otherwise, Congress must convene on January 3. The Senate held the first pro forma session during the recess in question for that purpose. In addition, pro forma sessions have been used to address the requirement that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. Indeed, the pro forma sessions during the January recess we are discussing today were held for that purpose because, it is reported, the House of Representatives did not adopt a concurrent resolution to provide for a recess in order to force the Senate into pro forma sessions. *See* Henry B. Hogue, Cong. Research Serv., RS21308, Recess Appointments: Frequently Asked Questions 9 (Jan. 9, 2012). Based on my review of the Congressional Record, it appears that historically, Congress typically did not use a series of pro forma sessions to satisfy that provision; ordinarily, if a House was going to be out for an extended period, it would make arrangements with the other Body for a formal recess. There is a more limited historical tradition of using a series of pro forma sessions to avoid taking a lengthy formal recess.

I do not believe the use of pro forma sessions for administrative purposes means that the President must consider the Senate to be available to review appointments during those sessions. There is no comparable history of using pro forma sessions in an effort to defeat the President's recess appointment power before 2007 (although the use of such sessions to prevent recess appointments reportedly was contemplated once during the early 1980s[4]). It is reasonable to believe that Congress has greater leeway to use such sessions for internal Legislative Branch operations, because the Constitution provides that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Even if

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[4] *See* 145 Cong. Rec. 29,915 (1999) (statement of Sen. Inhofe) (stating that Senator Byrd "extracted from [the President] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would give the list to the majority leader . . . in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place").

pro forma sessions are part of interchamber relations, their operation is nonetheless confined to the Legislative Branch of government. It does not follow that such pro forma sessions would interrupt the recess of the Senate for purposes of a very different provision of a different article of the Constitution that was intended to serve a very different purpose: "to keep . . . offices filled." Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. at 632; accord 4 Elliott's Debates at 136 (statement of Archibald Maclaine) (noting that failure to fill offices during recesses "may occasion public inconveniences").

The second major argument is that, because of the Senate's constitutional power to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, the Executive Branch is bound by that Chamber's understanding of whether pro forma sessions interrupt a "Recess of the Senate" for the purposes of the Recess Appointments Clause. That Clause has long been understood to permit each House to establish rules to govern itself. See, e.g., United States v. Ballin, 144 U.S. 1, 5 (1892) ("[A]ll matters of method [of proceeding] are open to the determination of the house . . . .").

Critics of the President's recent recess appointments have argued that the Senate's decision that its pro forma sessions interrupt its recess must be deemed conclusive by the other branches, and that any other result would be tantamount to "executive interference in the Senate's internal procedures," "tell[ing] the Senate what it must do to bring itself into session." Statement of Charles J. Cooper before the U.S. House of Representatives Committee on Education and the Workforce Concerning "The NLRB Recess Appointments: Implications for America's Workers and Employers," at 5 (Feb. 7, 2012).

To begin with, the analysis I have outlined above does not require the President to look behind the terms of the Senate's orders or to do anything but take them at face value. The Senate plainly identifies the sessions as "pro forma" and states that there is to be "no business conducted" during them. The President can consider those statements and "determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." Daugherty Opinion, 33 Op. Att'y Gen. at 25.

Moreover, the Supreme Court has made clear that this authority of each House to establish "the Rules of its Proceedings," does not permit Congress "by its rules [to] ignore constitutional restraints or violate fundamental rights." Ballin, 144 U.S. at 5 (emphasis added). And when "the rules affect[] persons other than members of the Senate, the question is of necessity a judicial one" for resolution by the Courts. United States v. Smith, 286 U.S. 6, 33 (1932). Interpreting pro forma sessions at which no business was conducted to be sufficient to interrupt a "Recess of the Senate" would unquestionably affect the President's constitutional authority to make recess appointments—indeed, that is the main point of such sessions. Courts have recognized that "preclud[ing] the President from making a recess

appointment . . . would seriously impair his constitutional authority." Staebler v. Carter, 464 F. Supp. 585, 598 (D.D.C. 1979). But "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Loving v. United States, 517 U.S. 748, 757 (1996). The Supreme Court takes a skeptical view of congressional action that "'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, 487 U.S. 654, 695 (1988) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)). And courts have specifically noted the importance of the Recess Appointments Clause in our system of checks and balances. *See* McCalpin v. Dana, No. 82-542, at 14 (D.D.C. Oct. 5, 1982) ("The system of checks and balances crafted by the Framers . . . strongly supports the retention of the President's power to make recess appointments."), vacated as moot, 766 F.2d 535 (D.C. Cir. 1985); id. at 14 (explaining that the "President's recess appointment power" and "the Senate's power to subject nominees to the confirmation process" are both "important tool[s]" and "the presence of both powers in the Constitution demonstrates that the Framers . . . concluded that these powers should co-exist"); Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979) ("it is . . . not appropriate to assume that this [Recess Appointments] Clause has a species of subordinate standing in the constitutional scheme").

This conclusion does not interfere with the Senate's ability to establish rules governing its own procedures. It does nothing to undermine its ability to use such sessions for internal congressional purposes. It only means that the Senate is not able unilaterally to prevent the President from exercising a power that Article II vests in him alone. It is difficult to explain what valid interest the Senate has in having its rules prevent the President from making recess appointments at a time when the Senate recognizes that the ongoing recess prevents it from making its own appointments using ordinary procedures. *See, e.g.*, 157 Cong. Rec. S8783.

Third, critics argue that the Senate is actually available to perform the advise and consent function notwithstanding the fact that its Members are at home and the Chamber is virtually empty. They point to the fact that twice during the 111th Congress, the Senate passed legislation by unanimous consent during what was originally scheduled to be a pro forma session, most recently on December 23, 2011. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011); id. at S5297 (daily ed. Aug. 5, 2011). Thus, they argue, the Senate might provide advice and consent on pending nominations during what was scheduled to be a pro forma session in that manner, and that is enough to mean that the Senate is "available" or "able" to advise on recess appointments, even if it has chosen not to. *See, e.g.*, Michael McConnell, The OLC Opinion on Recess Appointments (Jan. 12, 2012), available at http://www.advancingafreesociety.org/2012/01/12/olc-recess/. This is a serious

argument against the validity of the January 4 recess appointments. But ultimately, I am not persuaded.

The Office of Legal Counsel opinion that the Department of Justice released concluded that "the President may properly rely on the public pronouncements of the Senate that it will not conduct business . . . in determining whether the Senate remains in recess, regardless of whether the Senate has disregarded its own orders on prior occasions." Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, Memorandum Op. for the Counsel to the President, from Virginia A. Seitz, at 23 (Jan. 6, 2012), available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. But I don't believe the President only has the Senate's public pronouncements to rely on; those are just the beginning of what the President could legitimately consider in concluding that the Senate was unavailable to advise on appointments. I am aware of about 22 recesses since November 2007 during which the Senate has used pro forma sessions in an effort to deny the President the ability to make recess appointments, see http://www.senate.gov/reference/Sessions/sessionDates.htm, and each of those typically involved several pro forma sessions. The two instances during 2011 are the only instances I am aware of in which the Senate has performed business at what was scheduled to be a pro forma session. But in any event, there is no question that those episodes are atypical and that it is not a common practice to pass legislation by unanimous consent during a session that has been designated to have no business conducted at it. Those two pieces of legislation are the proverbial exceptions that prove the rule that, as the Congressional Research Service explained, "[n]ormally, it is understood that during a pro forma session no business will be conducted." Henry B. Hogue, Cong. Research Serv., RS21308, Recess Appointments: Frequently Asked Questions 3 (Jan. 9, 2011). The Airport and Airway Extension act was passed in a rush during the August recess to end a costly and controversial partial shutdown of the FAA. See FAA Shutdown: Senate to Pass House Bill, End Shutdown, ABC News, available at http://abcnews.go.com/Politics/senate-accepts-house-bill-end-faa-shutdown/story?id-14235752. And the payroll tax cut extension was passed two days before Christmas to avoid an increase in tax rates. The public statements of Senators about the very recesses during which those bills were passed make clear their own belief that "[w]e are not going to be able to consider [legislative action]" during those recesses notwithstanding the pro forma sessions. 157 Cong. Rec. S5035 (daily ed. July 29, 2011) (statement of Sen. Thune) (urging President to "submit [certain] trade agreements to Congress before the August recess" although "[w]e are not going to be able to consider these agreements until September"); id. at S8349 (daily ed. Dec. 6, 2011) (statement of Sen. Durbin) (suggesting that if Congress does not take action on payroll tax cut extension "before the holiday recess," it will expire January 1). And as noted, the Senate here made special arrangements for its own appointments to be made during the recess, suggesting it did not anticipate the Body would be available to make them in the ordinary manner.

The fact that the Senate will sometimes take extraordinary steps to avert emergencies does not mean that the President should look at a recess order saying that no business will be conducted at upcoming pro forma sessions and think the Senate should not be taken at its word, that the upcoming recess actually presents an opportunity to move on pending nominations. That is particularly so because only items that are sufficiently uncontroversial that they can proceed by unanimous consent can realistically be addressed when virtually none of the Members is present. See Riddick's Senate Procedure 1046 ("No debate nor business can be transacted in the absence of a quorum . . . ."). The theoretical possibility that a Senate that is in recess will nonetheless take action is not enough to mean that the Senate is "sitting in regular or extraordinary session as a branch of the Congress" and is available to advise on appointments. S. Rep. No. 58-4389, at 2. Adjournment resolutions commonly provide that Congress stands adjourned until a specified date, unless the leaders of the two Houses order their reassembly earlier in the public interest. The Senate had adjourned pursuant to such a resolution when President Bush appointed Judge William H. Pryor, Jr. to the Eleventh Circuit. See, e.g., H.R. Con. Res. 361, 108th Cong. (2004) (providing that Congress "stand[s] adjourned until 2 p.m. on Tuesday, February 24, 2004, or until" "[t]he Speaker of the House and the Majority Leader of the Senate . . . shall notify the Members of the House and the Senate, respectively, to reassemble at such place and time as they may designate whenever, in their opinion, the public interest shall warrant it"). But there was no serious contention made that the theoretical possibility that the Senate would be reconvened meant the President's recess appointment power was unavailable. Such an argument would prove too much: because the President can call the Senate into session, see U.S. Const. art. 2, § 3, cl. 2, the possibility of Senate action would mean the body was never in recess.

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I would like to close with a few more general observations.

It is often said that use of the Recess Appointment Clause only makes sense in the context of the long recesses that Congress had at the time of the Founding, which often lasted for months. It is also often said that a recess appointment is a serious usurpation of the Senate's advice and consent function, an effort to circumvent the process, and an effort to arrogate to the President an "absolute power" of appointment that was denied to him by the Constitution.

That was certainly not how it was viewed at the time of the Founding. The practices of the Founding generation tend to show that the Recess Appointments Clause was originally viewed in the terms used by the Federalist No. 67—as simply an "auxiliary" means of appointment to keep offices filled temporarily, and that keeping offices filled was something the Founding generation evidently put a significant premium on.

During the first Congress, when many of the Framers of the Constitution were serving in office, President Washington recess appointed three judges during a recess of the Senate, one of the appointments came just 13 days before the Senate reconvened. I have reviewed the Annals of Congress for some indication that any Members of Congress objected to the use of the recess appointment power when the Senate was poised to return, and I have found none. When President Washington formally nominated this group of judges, they were all confirmed two days later. This was not a fluke. When in 1819, President Monroe recess appointed two judges 12 and 13 days before the Senate reconvened, there was no recorded comment in Congress, and the judges were likewise confirmed two days after they were nominated. The same was true when in 1806, President Jefferson recess appointed Brockholst Livingston to the Supreme Court 21 days before the Senate reconvened. There was no recorded dissent and he was promptly confirmed. This suggests that the Founding generation viewed recess appointments truly as an auxiliary means to keep offices filled on a temporary basis, and that they considered it important to keep offices filled to conduct the people's business.

Three developments since that time have increased the potential for friction between the President and Congress on recess appointments.

The first is the Executive Branch's assertion of authority (eventually acquiesced in by Congress) that the President can appoint officials not only when a vacancy first occurs during the Senate's recess, but also when the vacancy predates the recess but continues into it. *See* DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829, at 188 & n.192 (2001); Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. at 633. That interpretation, which dates to the Monroe Administration, increases the opportunities for the President to recess appoint persons whose nominations have encountered opposition. The second is that Congress has longer and fewer sessions. They have has grown from between 38 and 246 days during the early Congresses (with an average session probably around 150 days) to a record 367 days during the 110th Congress; and while 25 of the first 76 Congresses had three sessions (the 67th Congress had four), we've settled into a pattern of two sessions per Congress. That, together with a third development—the advent of intrasession recess appointments beginning during the 1860s (which became common during the 20th Century)—make the expiration of a recess appointment "at the end of [the Senate's] next Session" a more-distant prospect. As a result, recess appointments seem less a temporary measure, and some of them approach the duration of Senate-confirmed officers.

This is not to say that modern recess appointment practice is unconstitutional—after all, it is virtually impossible to think of practices in any of the three Branches that have not changed over the centuries to respond to modern conditions. But it does mean that modern government faces greater opportunities for conflict. Unless longstanding interpretations of the Clause change significantly, or Congress reverts to the 18th Century model of shorter sessions, the current legal

framework is here to stay. If that is so, the best path forward might still be found in the practices of the Founding generation, even though much has changed. A sense of restraint, respect for the interests of other Branches of government, and appropriate mindfulness of the need to keep the government functioning is a model that has served well for much of the Nation's history.