Are the Recent Recess Appointments Constitutional?

*Charles J. Cooper, Michael B. Rappaport, Peter M. Shane, William R. Yeomans, and Dean A. Reuter**

Mr. Reuter: Welcome to the Federalist Society's practice group podcast. The following podcast, hosted by the Federalist Society's Federalism and Separation of Powers Practice Group, was recorded on February 24, 2012, during a live telephone conference call held exclusively for Federalist Society members. My name is Dean Reuter, Vice President and Director of Practice Groups at the Federalist Society.

Before we begin, please note that the Federalist Society takes no position on particular legal or public policy issues. All expressions of opinion are those of the speakers. Also, this call is being recorded for use as a podcast in the future.

We have assembled four experts for today's call, two in support of the recent recess appointments made by President Obama to the NLRB and the CFPB, and two opposed. I will introduce them only very briefly in the order in which they will speak. Each will speak for five to six minutes, after which we will have a general discussion, after which we will return to the audience for your questions.

Leading off will be two speakers critical of the recess appointment authority. Michael Rappaport is a professor of law at University of San Diego School of Law, where he teaches advanced constitutional law and advanced constitutional history and legislation. His research focuses on originalism, super-majority rules, and the separation of powers and federalism.

He will be followed by Mr. Charles "Chuck" Cooper, Principal and Founder of the Washington, D.C. law firm Cooper & Kirk. Mr. Cooper has been named one of the ten best litigators in D.C. by the *National Law Journal*—no small feat in a city where it seems like nearly everyone is a litigator.

We then will turn to the other side of the equation, hearing next from Professor William Yeomans of American University College of Law. Prior to being a professor there, he served as Chief Counsel on the Senate Judiciary Committee for Senator Kennedy after a decades-long career in the Department of Justice.

Fourth will be Professor Peter Shane of Ohio State University Moritz College of Law, where he specializes in, among other things, separation of powers law.

Professor Rappaport, please go right ahead with your opening remarks.

Professor Rappaport[1]: I'd like to focus my remarks on the original meaning of the Recess Appointments Clause. In my view, the modern interpretation of the Clause under both Democratic and Republican Presidents has departed from the original meaning as clearly and as badly as any Warren Court opinion. In my view, President Obama's recent recess appointments assume that modern view of the Recess Appointments Clause. But then they take a step beyond that view, a step in the opposite direction of the original meaning.

The first step to getting back to the original meaning is to identify what that meaning is. And there are two issues here. One could be described as when does the vacancy have to occur for a recess appointment to be allowed? And the other is what type of recess allows a recess appointment, an inter-session recess, or an intra-session recess?

Before getting to this question, I want to make an argument based on the structure of the Constitution for why the original meaning of the Recess Appointments Clause should not be read broadly. The Constitution does not give the President the power to appoint officers. Instead, he shares that power with the Senate. The Constitution does recognize that sometimes it makes sense to allow the appointments without Senate confirmation, but it allows that to occur only when the Congress consents, and only for inferior officers. The Constitution says that the Congress can pass a law vesting the appointment in the President alone, but only for inferior officers. Thus, the overall structure of the Appointments Clause in the Constitution itself makes clear that Senate confirmation is centrally important for the appointment of superior officers. The modern interpretation of the Recess Appointments Clause, which allows the President freely to circumvent Senate confirmation, is inconsistent with that view.

Now let me move to each of these two particular issues. The first one is when must a vacancy occur for there to be a recess appointment? The Recess Appointments Clause says that the President has the power to fill up all vacancies that may happen during the recess of the Senate. So the question here is when does the vacancy have to occur? And I think the text pretty clearly indicates that the vacancy must occur during the recess of the Senate. This strongly implies that the Recess Appointments Clause has the following meaning: If a vacancy arises during a recess, then the President can make a recess appointment to fill that vacancy during that recess; once that recess ends, the President's recess appointment power ends for that vacancy.

The Constitution assumes here that the President and the Senate can make an appointment during the session. Once they come back into session, they're assumed to be able to make an appointment. This interpretation also makes good sense. It gives a strong purpose to the Recess Appointments Clause; after all, it allows temporary appointments to be made if a vacancy arises. And at the time of the Constitution, these recesses would typically be for six to nine months, so you would want to be able to make a recess appointment during that period. But this interpretation prevents the President from circumventing Senate confirmation. Once the President can recess-appoint a person to a position that was vacant during the session (as it is under the modern interpretation), the way is open for the President to circumvent senatorial consent. If a Senate won't confirm his nominee, he can simply wait until the recess and recess-appoint a person at that time, which is what President Obama did.

Now the second issue, very briefly, is what type of recess counts, an inter-session recess or an intra-session recess? An inter-session recess is a recess between the two annual sessions of Congress. An intra-session recess is a recess that occurs during the session. Now it might seem that the Constitution

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answered this by using the simple term "recess," and so applies the Recess Appointments Clause to both inter-session and intra-session recesses. But this is mistaken. The Constitution uses the term "adjournment" to refer to both inter-session and intra-session recesses. When it uses the term "recess", it refers only to inter-session recess. Well, what's the evidence for this? First, at the time of the Constitution, "recess" had a meaning that referred to breaks between sessions. You can see this in the influential Massachusetts Constitution. By contrast, one meaning of "adjournment" at the time of the Constitution was "any break during or between sessions." This understanding of "recess" and "adjournment" also makes sense of all the seven or eight clauses that use this term in the Constitution. By contrast, other definitions of "recess" are problematic. Allowing recess appointments for all recesses would allow the President to recess-appoint for a one-day recess or a one-hour recess.

Now, the modern understanding limits the intra-session recesses to those of at least three or ten days, depending on whom you ask. But this is problematic for at least two reasons. First, three or ten days is just too short a time to justify a recess appointment. Secondly, there is no basis for either period in the Constitution; it's made up.

There is other evidence. For one, intra-session adjournments were very short and very rare at the time of the framing, thus, unlikely to be thought to have justified recess appointments. Moreover, if one allows intra-session recess appointments, the result is that recess appointments for intra-session recesses are longer, possibly twice as long, as they are for inter-session recess appointments, which doesn't make any sense at all. While, on this issue, I don't think any piece of evidence is conclusive, overall, the weight of this evidence strongly suggests that only intra-session recesses are covered.

Those are my remarks on the original meaning. I will end right there.

Mr. Reuter: Thank you, Professor Rappaport. Now we will hear the opening remarks of Mr. Chuck Cooper.

Mr. Cooper: Thank you very much, Dean. I want to thank you and the Federalist Society first for organizing this call on this important and interesting subject, and for inviting me to participate.

I want to bring the focus specifically to the issue that is at the heart of the constitutional question raised by President Obama's recess appointments on January 4, and that issue is whether the Senate was continuously in recess from December 17 to January 23, when the Senate and the Congress took its holiday break. The Administration, in an opinion by the Office of Legal Counsel, takes the position that the Senate was in an unbroken inter-session recess during this period, despite the fact that the Senate repeatedly gaveled itself into *pro forma* sessions, and in one of those sessions, actually passed legislation.

In my view, the Senate was not in continuous recess during that period, and the January 4 recess appointments exceeded the President's constitutional authority under the Recess Appointments Clause.

I come to this view rather reluctantly because, as some of you—certainly, those of you on the panel here—know, I am an Article II man. I served in the Office of Legal Counsel for many years, as did three of the other participants on this call.

But the first and threshold reason to conclude, in my opinion, that the Senate's *pro forma* sessions interrupted the holiday adjournment is that the Senate says so. The Constitution's Rulemaking Clause vests in each House of Congress the power to determine the rules of its proceedings, and rules governing how and when the Senate meets and adjourns are quintessentially rules of its proceedings. Because the Rulemaking Clause commits to the Senate judgments about the meaning of its own rules, the Senate's holding of repeated *pro forma* sessions between December 17 and January 23, in my opinion, should end the matter.

The second important point is that there is a firmly-established practice of using *pro forma* sessions to satisfy the requirements of other constitutional provisions. For example, since at least 1949, the Senate has repeatedly held *pro forma* sessions to comply with Article I, Section 5's requirement that it not adjourn for more than three days without the consent of the House of Representatives in the absence of statutes to the contrary. The Congress also uses *pro forma* sessions frequently to satisfy the 20th Amendment's requirement that it meet at noon on January 3 of every year to start a new session of Congress unless a different time is specified by statute.

The January 3 *pro forma* session this past year really brings into sharp focus what I think is the reason that OLC's analysis simply cannot be sustained. By holding that *pro forma* session, the Senate was satisfying two constitutional provisions—one, the 20th Amendment requirement that it meet on that day, and two, the requirement that the Senate not unilaterally adjourn for more than three days. The purpose of the January 3 session was to be in compliance with those constitutional requirements. Now, OLC has implicitly acknowledged that January 3 was the start of the new session of Congress because, it argues, the January appointments were intra-session appointments, and therefore, these appointees get two years instead of one year on their terms. But, even as OLC accepts the *pro forma* session on January 3 as beginning a new session of Congress under the Recess Appointments Clause, it denies that the very same January 3 session concluded a "recess," as that word is used under the Recess Appointments Clause.

Now OLC rejects these arguments that I've outlined, relying instead on what it says is the purpose of the Recess Appointments Clause, which is to provide a method of appointment when the Senate is unavailable to provide advice and consent. OLC says that the *pro forma* sessions were essentially a sham and the President has the discretion to ignore them because, as a practical matter, the Senate was unavailable to consider his nominees. But in my view, that factual predicate for the Administration's analysis collapses under the weight of a single inconvenient truth, which is that on December 23, 2011, during a *pro forma* session, the Senate actually passed legislation, as had the House of Representatives, also in a *pro forma* session, to extend for two months the payroll tax cut. And they did that by unanimous consent, which is the very same procedure that the Senate uses to conduct most of its business, including the vast majority of its advice-and-consent function. If the Senate is available to pass legislation by unanimous consent during

a *pro forma* session, then it just seems to me untenable to say that it is unavailable to confirm the President's nominee in the same manner at the same session.

The final point I'll make very quickly here is that OLC says that the President was entitled to rely on the scheduling order that established these *pro forma* sessions, where the Senate stated that it will not conduct any business at the *pro forma* sessions. There are two quick points to make on that—actually, there are several, but two that I'll make now. One is that by the time the President made the recess appointments on January 4, the Senate had already repudiated its no-business pronouncement by passing a statute, again, during that December 23 *pro forma* session. The President surely isn't entitled to rely on an order that was not binding on the Senate in the first place and that has been repudiated by the Senate itself.

The second point is this: The President in fact did not rely on the Senate's no-business pronouncement because it was the President who urged the Senate to pass the two-month payroll tax cut extension and promptly signed it into law, notwithstanding the fact that it was passed at a *pro forma* session, an allegedly sham session. The President surely isn't entitled both to rely on the Senate's no-business public pronouncement and to ignore it, as he pleases.

With that, Dean, I'll subside until our question period.

Mr. Reuter: Thank you very much. We were just listening to Chuck Cooper. Now, Professor Bill Yeomans, for his opening remarks—go ahead, Professor Yeomans.

Professor Yeomans: Thank you, Dean. I want to thank you and the Federalist Society for pulling together this teleforum and inviting me to participate.

Chuck said that he was an Article II man. I think I'm an Article II and an Article I man. So I am very ecumenical in this process. And I obviously come to a different conclusion from Chuck about the constitutionality of the President's recess appointments. At this point, I think it might be helpful to provide a little bit of context, just so we have some flavor of what we are discussing here.

It is important not to forget that these appointments followed an unprecedented period of obstruction of the President's nominees, both executive nominations and judicial nominations. During this period, the minority in the Senate cast aside the traditional presumption in favor of letting the President get his team in place, with occasional exceptions, and made slow-walking nominees the usual course. So, even three years into his presidency, the President still has executive vacancies to fill. So it seems to me, in the face of this record, the President has shown admirable restraint. He didn't engage in a sweeping exercise of the recess appointment power. He didn't recess-appoint judges as his predecessor did, despite the fact that virtually every one of his judicial nominees that has been voted out of committee has been held on the Senate floor, the requirement of 60 votes has become the norm, and there are roughly, at this point, 100 judicial vacancies. So, rather than engage in a sweeping course of appointments, the President filled these four positions that were essential to allow agencies of government to function. I think that's important.

These appointments are particularly justified because the Senate's obstruction of the nominees directly interfered with the President's ability to take care that the laws are faithfully executed. So the NLRB would have gone out of business with only two members. The Consumer Financial Protection Bureau, which had only recently been created by Congress, would have been unable to exercise a significant part of its authority, the regulation of various non-bank entities, without a Director. So these appointments were very limited in scope, and only in response to determined obstruction did he make them. And it is worth noting that the obstruction, certainly with regard to Richard Cordray, was not based on any objection to him personally. Rather, the forty-four members of the minority signed a statement that they would oppose any head of the consumer bureau. In other words, they would prevent the President from executing the law by refusing to confirm a head. Likewise, a number of members made statements suggesting that they were not that upset about seeing the NLRB go out of business.

Now, turning to the argument that the President was disabled from making recess appointments by the Senate's *pro forma* sessions every three days, I think it's fairly clear that in fact the Senate was in recess. The Senate went out pursuant to a unanimous consent agreement that stated that it would adjourn and convene for *pro forma* sessions only, with no business conducted. And it did that. Senators were not in their offices. They were widely dispersed, many of them on CODELs, going around the world. Staffers were showing up in jeans and flip-flops. So the Senate was not sitting as a deliberative body. It wasn't ready; it wasn't able to receive the President's nominations and to act on them. Rather, it was engaging in a sham effort to thwart the President's recess appointment power. That was the entire purpose of the *pro forma* sessions. Surely, the Senate can't strip the President of his recess appointment power by pretending to be in session.

Obviously, the Democrats initiated this process, and their successful use of these *pro forma* sessions to prevent the President from making recess appointments beginning in November 2007, I think, did a little more than to demonstrate that Harry Reid may have been a better poker player than George W. Bush because it was a bluff. It was a bluff that worked. Part of the reason it worked, of course, was a political calculation, which has always been the principal check on recess appointments. Recess appointments that rankle will be met with a political response if the minority finds it in its interest to do so. So the President may have concluded that, at this point, he didn't have that much to lose. But certainly, he understood that check.

So, in response to the argument that the Senate has absolute power to determine whether or not it's in recess, the argument has to be that it cannot use its internal process to thwart the legitimate exercise of power by another branch. For example, the Senate could not simply adopt a standing rule or a unanimous consent agreement that it's never in recess for purposes of the President's appointment power and that, regardless of whether all its members were gone for extended periods and no business would be conducted, the President is still required simply to accept that the Senate is not in recess. The

Senate can't strip the President of his constitutional authority in that fashion.

It is interesting to note that many people, including Steven Bradbury, for instance, who presided over the Office of Legal Counsel under President Bush when the Democrats launched the *pro forma* session gambit, and whose possible recess appointment was a target of the gambit, subsequently said that the Senate can't constitutionally thwart the President's recess appointment power through *pro forma* sessions. He and others, of course, rely on a definition of "recess" that the Senate Judiciary Committee adopted over a century ago and that is still cited as authoritative by Riddick and others, that says a recess of the Senate occurs whenever the Senate is not sitting for the discharge of its functions and when it cannot participate as a body in the making of appointments. This practical, common-sense view of the meaning of "recess" has been employed consistently in the modern era by the Department of Justice. As Attorney General Daugherty said, to give the word "recess" a technical and not a practical construction is to disregard substance for form.

And to the contention, quickly, that the Senate was not actually in recess because they are only in the recess and conducted some business by unanimous consent. I think, to be sure, the President has to be entitled to rely on the Senate's unanimously-adopted representation that it is not going to conduct business. It did pass the extension of the payroll tax by unanimous consent on December 23. It conducted no further business after that, and as Chuck just said, the actual session during which these recess appointments were made started on January 3 and ran through January 23. So, because the Senate said it wasn't going to do any business, the President had every reason to believe it wouldn't, and it didn't.

The originalist view that Professor Rappaport lays out is very interesting, but we have come a long way since then. Modern Presidents have used the recess appointment power very robustly. Reagan made 240. George H. W. Bush made 74 in his one term. Bill Clinton, 139. George W. Bush upped that to 171, even though he was shut down for the last year of his presidency. In the face of that, it seems to me that President Obama has shown considerable restraint. He has now made only 33, and I'd like to think that his restraint is a reflection of his understanding that our government works best when the political branches don't unnecessarily push their assertions of constitutional authority with regard to the other branch to the extreme. The health of our democracy and the continuing functioning of our government depends on that sense of moderation.

I will stop there and pass the baton.

Mr. Reuter: Thank you. That was Professor Bill Yeomans, and now let's turn to Professor Peter Shane for his opening remarks.

Professor Shane: Thanks, Dean. Let me also say that I'm grateful to the Federalist Society for organizing this debate and including me on the panel. The recess appointments issue is an important one, and I do want to say to people that if they're looking for two beautifully written legal opinions, they should see both the Office of Legal Counsel opinion on this matter from January 6 and Chuck Cooper's February 7 statement to the House Committee on Education and the Workforce. They're both terrific, and I've thanked Chuck before—I now thank him again—for providing me, as a con law teacher, with excellent teaching materials.

Bill Yeomans just explained in eloquent terms why the OLC opinion was sound in rejecting the theory that the Senate's *pro forma* sessions interrupted what was effectively a month-long recess, a recess long enough under numerous institutional precedents to support recess appointments. And despite arguments that Chuck made in his statement to the House, I would like to add that I persist in thinking that, whatever your position on Bill's issue, I actually regard the three-day recess as long enough to permit recess appointments. Let me explain why.

I should start at the outset by expressing some sympathy for Mike Rappaport's position, but like Bill, I think it's too late in the day for originalism. As Justice Frankfurter wrote in his *Youngstown* concurrence, "It is an impermissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss that life has written upon them." The executive branch repudiated half of Mike's view of the Recess Appointments Clause in 1823, the part about a vacancy first having to occur during the recess. And Presidents of both political parties over the last ninety years have consistently disregarded the other half, all of this pretty much with Congress's effective acquiescence. There really is no possibility, I think, that any court will invalidate a recess appointment at this stage either because the relevant vacancy occurred prior to the recess or because the recess fell within, rather than between, congressional sessions.

I should also say, just as a side point, if we're going to look at Article II, Section 2 through a 1789 lens, I'd like to do that as well for Article I, Section 5, under which the House purported to prevent the Senate from going into adjournment. I assume that the purpose of that provision is to enable either house of Congress to keep the other house in town while pressing business is at hand that requires the interaction of both houses. For one house to object to the long-term adjournment of the other house when the obstructionist house itself is in recess, seems like an obvious abuse of power and a likely departure from original intent also.

But in place of original intent, for which I think we have seen too much water under the bridge, I would argue that the soundest view of the word "recess" now is to give that word what people would regard as its ordinary, non-technical meaning. Bill referred to the opinion of Attorney General Daugherty, but that opinion actually adopted its wording from a 1905 Senate Judiciary Committee report that was written to object to Teddy Roosevelt's appointments that occurred during a kind of infinitesimal break between two sessions of Congress. That is, the Senate said that "'recess" means "the period of time when members owe no duty of attendance, when its chamber is empty, when, because of its absence, it cannot participate as a body in making appointments." That certainly describes the three days between January 3 and January 6.

The main objection to this reading, and the one that Mike's remarks anticipate, is that my reading has no obvious

stopping point. A lunch break could be as much the occasion for a recess appointment as a three-week vacation. But if I may quote Justice Scalia's dissent in *Morrison v Olson*, "A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused." Or, to quote a yet earlier opinion of the Supreme Court, "The possible abuse of power is not really an argument against its existence." The President may, of course, use his recess appointments power, or his veto power, or his pardon power, or his power to convene Congress on extraordinary occasions, or, to mention the power he could have used here, his authority to adjourn Congress when the houses are in disagreement as to the date of adjournment. Again, quoting Justice Scalia, "The checks against any branch's abuse of its exclusive powers are two-fold: first, retaliation by one of the other branch's use of its exclusive powers; and second, and ultimately, the political check that the people will replace those in the political branches who are guilty of abuse." That, I think, describes the current situation. There is no other legally-enforceable limit here.

In this case, the President's use of his recess appointments power was his deployment of an exclusive presidential authority to respond to the Senate's abuse, or, more accurately, the congressional Republicans' abuse, of their excusive power. Echoing Bill here, I'd like to say that congressional Republicans have been engaged in what has been called and can really only be called a campaign of nullification, whether to nullify the 2008 presidential election or to nullify statutes enacted by the prior Congress with which they disagree. They haven't voted down the President's nominees; they frequently have not even objected to them. They have simply blocked votes on grounds unrelated to the merits of the nominee—in Richard Cordray's case, over their ostensible preference for a multi-member independent agency over a single-headed agency that Congress actually created.

If members of Congress want to amend the Dodd- Frank Act and create a multi-member CFPB, that's their privilege. Under Article I, Section 7, the two houses need only agree on a common text enacted by a majority vote, and send it to the President for his signature. Under *Chadha*, however, that's the only way they can legislate. Legislating an agency into inaction by exercising textually-unconstrained power to withhold a vote on nominations is an abuse of the Constitution. Chief Justice Hughes once wrote that "[b]ehind the words of the constitutional provisions are postulates that limit and control." And I thought one of those postulates was a requirement that all three branches interact in a way that enables government to move forward.

I'll just conclude by saying that those who object to the January recess appointments have criticized the alleged denigration of the Senate's intended role in the appointments process. But that role is no loftier than the President's nominating power or his obligation to take care that the laws be faithfully executed. What President Obama did was to fill vacancies that had to be filled in order for the agencies involved to function lawfully, and what he did was consistent with the text of the Constitution, whatever the status of the *pro forma* sessions.

Thank you.

Mr. Reuter: Thank you. That was Peter Shane.

In a moment, we're going to open the floor to questions from the audience. First, I want to give Professor Mike Rappaport and Chuck Cooper 60 seconds to respond to anything they heard in the later presentations.

Professor Rappaport: Just very briefly, I think the two presentations defending President Obama's appointments here really just don't take into account the fact that the Constitution gives the Senate advice and consent power here. You see it over and over again. I'll mention just one example. They talk about how the Senate was thwarting the power of the President to make appointments. But of course, the appointments power is shared between the Senate and the President. One can just as easily say that the President, by refusing to compromise with the Senate and, for example, make appointments that they found acceptable, or work out other deals that were acceptable, was thwarting their power. So there's nothing that gives the President a preeminent power here. The Constitution requires both of them.

And very quickly, the other point that I'd like to make is that I don't think it's too late in the day to go back to originalism. We are not in an area, let's say, like the New Deal enumerated powers questions, where overturning bad precedents would lead to a large number of programs becoming unconstitutional. The Supreme Court has never decided this question. If it were to decide tomorrow that the original meaning was the correct meaning for the Recess Appointments Clause, things would go on. There would be no significant disruption. There would be a lot of negotiating between the Senate and the Executive that might have to occur. There would be a couple of changes in statute that needed to go on, but no significant disruption. We are not too late in the day. The Supreme Court can do this. Whether they will, that's another story.

Mr. Reuter: Chuck Cooper, 60 seconds.

Mr. Cooper: Yes. Thank you, Dean.

Just one point—I want to emphasize what Mike has just said. I certainly don't agree that it is too late in the day for an originalist interpretation by the Supreme Court of the Recess Appointments Clause. I think Mike Rappaport makes a very strong argument in support of his conclusion. And I think that issue is very much on the table when the Recess Appointments Clause powers are tested.

The other point I want to make very quickly is that Bill Yeomans did acknowledge, to his credit, that it was Senator Reid who invented the *pro forma* session of the Senate in order to frustrate President Bush's recess appointment power for some period of many, many months. I don't think it was a bluff in the sense that George Bush simply caved to a bluff. I rather think instead that the President respected the prerogatives of the Senate to determine for itself when it adjourns and when it is in session, and I think that decision was the admirable restraint that was shown, not the recess appointments made in the face of *pro forma* sessions that the President Obama undertook.

Mr. Reuter: Professor Shane, what about that? What about the notion that both Mike Rappaport and Chuck Cooper

mentioned, that there hasn't been a lot of reliance on anything other than the originalist interpretation that Professor Rappaport argues for?

Professor Shane: Well, I can only say that, first, five votes on the Supreme Court can do whatever five Justices on the Supreme Court want to do. But it would be, I think, dramatically inconsistent with the Supreme Court's separation of powers jurisprudence to ignore ninety years of history on the inter-session appointments point and nearly 200 years of history on the question whether the vacancy actually has to occur during the recess. In fact, Congress has enacted a statute that permits the pay of recess appointees if they are filling a vacancy that occurred even within, I think, thirty days of the recess. So Congress, by its own enactments, has acknowledged that the vacancies don't have to originate during a recess.

I also have to say, I think it's sort of funny to think about this as President Obama declining to respect the prerogative of the Senate to remain in session. The Senate had no prerogative here. The Senate had to do something consistent with internal congressional procedures to satisfy the requirement that it not adjourn in a way that offended the House's determination that it remain in at least *pro forma* session. And there is no requirement in the Constitution with regard to appointments that the President defer to the House of Representatives on anything.

Mr. Reuter: Professor Yeomans, let me give you just a brief chance to respond to anything you heard and then we'll turn to the audience for questions.

Professor Yeomans: Okay. Well, I don't have very much to add. I'll be very brief.

In response to Chuck's point, certainly, it was Harry Reid who initiated the *pro forma* session to try to frustrate recess appointments. I was working in the Senate at the time, and many of us were quite surprised that there were no further recess appointments. Perhaps, that was because of an admirable sense of restraint, or it may well have been a political calculation. Certainly, I will never know. But there were many people at the time who viewed it as a bluff and were somewhat surprised at its success.

Mr. Reuter: Thank you. That was Professor Yeomans. Now let's turn to the audience for questions.

Audience Participant: It seems the issue comes down to whether or not there was a recess. And although neither the Senate nor Congress may change the meaning of words in the Constitution, there is still some ambiguity as to what constitutes a "recess."

Historically, that has meant the theory of following an adjournment. And if there is no adjournment—that is, a de facto recess occurs—then an ambiguity arises as to whether or not the interim period is a de facto recess or a formal recess. It seems like there is a need for clarification of that in the statute or in a constitutional amendment. So how might that be worded, and what method would be needed to define and clarify the issue?

Professor Shane: I would say that it is quite unlikely that the Constitution is going to be amended on this point. It also seems to me fairly doubtful that the two branches will agree on a common text to enact into statute.

Bill referred in his remarks to what, for decades upon decades, has been an operating presumption in the Senate, a presumption in favor of confirming presidential appointees, particularly within the executive branch. There probably has been an even stronger presumption that those nominees are entitled to a vote. That highlights the importance—the importance in implementing the Recess Appointments Clause—of informal norms that enable the branches to move forward, even in the face of different parties in control of the different ends of Pennsylvania Avenue and the competing prerogatives with which they've been vested by Article I and Article II.

Again, I want to say here, it's not that the President was refusing to listen to objections that were being made to his nominees. There were no objections made to Richard Cordray. The objections were being made to the structure of the agency that he was appointed to head. If the Senate could simply go back to the informal norms, then you would find the President continuing to exercise restraint in the exercise of his powers, which may not be very much limited by the text, but which are certainly limited by institutional prudence.

Mr. Cooper: If I could just add here, Dean, that I think that the inter-branch conflict we've seen over presidential nominees has proceeded now for many decades as a very bipartisan phenomenon. And it's, in my view, no more likely that the executive branch and the legislative branch are going to go back to those informal norms than it is that the Constitution is going be amended over this subject matter.

I would also add that I agree with our questioner here that there is some ambiguity on the meaning of "recess," and whether or not the Senate is genuinely in session during *pro forma* sessions. I actually don't think it's a close question, but to whatever extent there is an ambiguity, I submit that it's the Senate's view that should resolve that ambiguity under the rulemaking power. The Senate has the authority to determine whether it was in session or was in recess during those *pro forma* sessions.

Professor Rappaport: And I might add, with respect to Chuck's point, I think the Supreme Court has said that. In *United States v Ballin*, it said that each house can adopt any reasonable mechanism. That was in the case of a quorum, but the same would hold true, presumably, for a recess. So it's not just the Clause, but it is a Supreme Court opinion.

Professor Shane: And let me just jump in quickly. I would say, in response to that, it's fairly clear that the Senate cannot have absolute authority to define what a recess would be. The President is entitled to some discretion in determining whether or not the Senate is actually in recess when he is exercising his own power to make recess appointments. So there has to be some practical basis for analyzing whether or not the Senate is actually in recess. It can't simply be the Senate's say-so.

Mr. Cooper: Well, let me just jump in quickly and say that I agree that the Senate doesn't have absolute power, as you put it now for the second time, to decree that it's in recess if, in fact, it is meeting around the clock. But if there is any genuine factual predicate for its judgment that it is in session—such as, I think, the *pro forma* sessions amply support, particularly in light of the December 23 *pro forma* session passage of legislation—then I think any idea that there is an ambiguity over that issue would have to be resolved in favor of the Senate's own judgment in terms of the application of its rules and proceedings.

Professor Shane: Well, we disagree on that. We probably shouldn't extend this; we probably should let somebody else ask a question. But I think we have a fundamental disagreement about when the Senate is in *pro forma* session and says it's not available for the conduct of business, whether that doesn't lay a fairly firm predicate for the President to exercise his discretion to decide if the Senate, for purposes of recess appointments, is in recess.

Mr. Reuter: All right. Let's go to the next question from the next caller.

Audience Participant: I wanted to ask a question that goes to a point that Chuck Cooper made. If the President had exercised his recess appointment authority the week before he did, it would have been clear that the appointment would expire at the end of the current session that we're in. But he waited until the first week of the current session. And, as a consequence of that, the appointment will last, the commission will expire, at the end of 2014. But in doing that, the basis for that is that the President and the OLC are relying on the very same *pro forma* session that they're ignoring for other purposes. Right? The fact, as Chuck pointed out, that there was a *pro forma* session on January 3 that started this new session of the current Congress.

What is the response to that? The executive branch generally has done this, but how is it that we can consider the formalities for one purpose and ignore them for other purposes?

Mr. Reuter: I think that's a question for Professor Yeomans or Professor Shane. Do you want to go first?

Professor Shane: Do you want to start, or should I?

Professor Yeomans: Go ahead, Peter.

Professor Shane: Well, I think I'm just putting into different words something you've already said, which is, the exercise by Congress of its own rulemaking powers is undoubtedly conclusive with regard to the internal affairs of Congress. Congress may not, however, exercise those powers in a way that derogates from the powers of the other branches or the rights of individuals.

Congress argued in *Buckley v. Valeo* that the Necessary and Proper Clause gave it the authority to invent a new way of authorizing the appointment of officers, and the Supreme Court said, no, that the Necessary and Proper Clause can't be used—even though it's obviously a comprehensive textual statement of Congress's implied powers—to circumvent the constitutional design. And that was similarly the Court's reasoning in *Chadha*.

So the design here involves the President nominating and the Senate advising and consenting. They can certainly vote no. But simply to refuse to act is not consistent with the constitutional design, and it seems to me, in that case, the President is entirely consistent in saying, look, for Congress's own purposes, you have determined that a *pro forma* session complies with the constitutional starting date. That doesn't affect the executive branch adversely, so that's fine. But you cannot use your rulemaking power to oust me of the recess appointments power. That seems to me to be perfectly consistent.

Professor Rappaport: I find it very odd to talk about the constitutional design when the assumption is we're departing from the constitutional design. We're not looking to the original meaning here. I don't really understand what that means. It may be the constitutional design of an attorney general in 1901, but it's not what we normally mean by "constitutional design." I'll just leave it at that.

Mr. Cooper: Can I just jump in real quickly here? I think that Peter's answer really brings into sharp focus what I think is the single biggest problem with the constitutionality of these recess appointments. It's that the President and OLC are seizing upon the language of the Recess Appointments Clause both to claim the benefits and avoid the disadvantages of *pro forma* sessions. On the one hand, they say the January 3 *pro forma* session didn't exist and therefore didn't interrupt or end a recess, as the word "recess" appears in the Recess Appointments Clause. But the Recess Appointments Clause also says that the term of the recess appointee will extend to the end of the next session of Congress. They then accept the proposition that the January 3 *pro forma* session did exist as a valid session for purposes of them defining that word "session" within the Recess Appointments Clause because they claim that these appointees will hold their appointments to the end of 2013.

So this is an instance when the President is really schizophrenic in his assessment of the validity of the *pro forma* sessions, accepting it when it advantages him and rejecting it when it doesn't.

Professor Shane: Well, I think the point that I made was that he accepted it when it was irrelevant to the exercise of presidential power and he rejected it when it derogated from the exercise of presidential power, which seems to me to be exactly the way the executive branch should operate. The President may well feel it was inappropriate for Congress to rely on a *pro forma* session to comply with the Constitution. But he has no stake in that. So it would disrespect the prerogatives of Congress to say that was improper.

The point I want to reiterate is we can multiply the ways in which the exercise of power could be accelerated here. Mike says, how can we talk about the constitutional design when we're not going back to 1789? Yes, if you go back to 1789, people thought about a Congress that probably would be around for only a few months, and everybody would disperse to their farms

and businesses, and the recess appointments power was intended to accommodate the many months in which they'd be out. But, if you ask the same Framers, when Congress is in session for that few months, can the Senate just ignore the President's nominees and leave those offices vacant, I have no reason to think that the founding generation would have said that's okay. I think that is a departure from the original design.

All the President has done here is to exercise the recess appointments power to the minimum extent necessary to keep these agencies going. He didn't try to adjourn Congress, which might have been interesting. I hope Congress doesn't try to adjourn and then reconvene and adjourn and reconvene to create 48-hour sessions to shorten the Cordray appointment. One can imagine all kinds of separation of powers nightmares. There has to be some kind of return to common-sensical norms.

Professor Rappaport: I just don't understand the basic point being made here, which is that the President is entitled to discretion when it comes to the definition of his powers. And I don't really understand why that would be. I mean, in fact, it seems to me that if he's got a really exceptional power like the recess appointments power, we wouldn't want to give him discretion to do exactly what he's done, which is to exercise his discretion when it helps him and then to exercise a different kind of discretion to avoid hurting him. Instead, we just want to look at what the right answer is. Now, on the other hand, when we talk about the Congress, the rules power is a bookkeeping kind of power or an internal operation power. It does make sense to give discretion in that area.

So I just don't understand why we would want to give the President discretion here. That's not necessarily the normal assumption.

Mr. Cooper: The notion that the President has discretion to determine when the Senate is in recess flows directly from that 1921 opinion by Attorney General Daugherty. There was never any hint of that before 1921. And this executive branch jurisprudence that Peter and Bill cling to, as they say it's too late for originalism and too much water has passed over the dam, is Presidents interpreting the extent of their own power. Believe me, that will not, in my opinion anyway, dissuade a Supreme Court from trying to answer what the correct intendment and original meaning of the Recess Appointments Clause was in applying it to today's world.

Professor Shane: Well, let me just say quickly, I do think that it will be somewhat persuasive that the President is not completely constrained to rely on the Senate's definition of "recess" and does have the ability to make some judgment as to whether or not he thinks the Senate is in recess for purposes of exercising a power that is the President's, the power to make a recess appointment.

Mr. Reuter: Gentlemen, we are up on the hour. Let me give each of you 30 seconds for final thoughts. And let's do this in the order in which we opened. Mike Rappaport, your final thoughts?

Professor Rappaport: Well, I guess I'm hopeful that the Supreme Court will eventually decide this question sooner rather than later. And I really don't think that there's any reason to think that they can't decide this in accordance with the original meaning. A couple of Beltway practices would change. We would have to have compromises on different kind of questions. But basically, the public wouldn't experience any disruption at all, and we would move closer to a situation where there would be, then, fewer recess appointments.

We're in a modern world of airplanes and communications. You would think there would be fewer recess appointments in this world, not a greater number of recess appointments as compared to the horse-and-buggy days of the Constitution. Instead, it's been exactly the reverse. Why? Not because of any legitimate circumstances, but because of power-grabs by Presidents, I would say of both parties, but the most recent one and most aggressive one from President Obama.

Mr. Reuter: Chuck Cooper, a final thought?

Mr. Cooper: I would only add to that very fine summation by Mike Rappaport that I really think the President's January 4 recess appointments have now pushed all of the presidential chips in the middle of the table, on his recess appointment power anyway, because when these appointments are challenged and litigated—and it's just a matter of time before they are—before someone, or some corporate entity or union or something, is disadvantaged by an order of the now-sitting NLRB, or some bank or financial institution is disadvantaged by an action of Mr. Cordray's agency. And when that case comes forward, any litigator worth his or her salt is going to put on the table the points that Mike Rappaport has made about the original meaning of the Recess Appointments Clause and the really extraordinary limitations that, if you follow the text of that clause and the apparent understanding of it from the Framers, really would limit recess appointments to very narrow circumstances.

Mr. Reuter: Professor Yeomans, a final thought?

Professor Yeomans: Very briefly. Certainly, Chuck is right; this is going to be litigated. But it's not at all clear that this ultimate issue will be decided, it seems to me.

I think that, contrary to what some have said, these appointments were very much an exercise of restraint by President Obama in the face of the resistance that his nominees have received in Congress, and not because of any complaints about the nominees but for completely extraneous reasons. I would hope that his restraint in not going on and making a passel of recess appointments would be reciprocated, and that maybe we could enter into a time when there could be restraint both by the Executive and Congress, and we could achieve some constructive result.

Now I'm not overly optimistic that that's going to happen, but that would be the ideal.

Mr. Reuter: Thank you. Professor Peter Shane, a final thought?

Professor Shane: Sure. I guess I would add to Bill's eloquent statement my point again that the Constitution does not authorize a minority in the Senate to effectively legislate by blocking all presidential appointees in order to prevent a previously authorized agency from doing what is statutorily authorized business.

Any interpretation of this is going to go with the ordinary, non-technical meaning of the word "recess." It's going to be the pragmatic reading that Attorney General Daugherty adopted from the Senate Judiciary Report of 1905. If this does go to the Supreme Court, and if a Justice other than Justice Thomas adopts Mike Rappaport's theory, I would be delighted to buy him dinner.

Professor Rappaport: I'll remember it.

Mr. Reuter: It's on tape. It's recorded.

Mr. Cooper: What about me, Peter?

Professor Shane: I'll buy you all dinner.

Mr. Reuter: That's also on tape, and I'm including myself in that group. Let me thank our call-in audience for their attention and for their questions today. But especially, let me thank our experts for your remarks and your insights today. We certainly appreciate your participating in the call. We are adjourned. Thank you very much.

Endnotes

1 Professor Rappaport's thoughts are based on his article *The Original Meaning of the Recess Appointments Clause*, available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775169&download=yes.