

Intelligence Agency 2006–2009; Director of the National Security Agency 1999–2006; Mike McConnell, Vice Admiral USN (RET); Director of National Intelligence, 2007–2009; Director of the National Security Agency, 1992–1996; Michael B. Mukasey, Partner, Debevoise & Plimpton; Attorney General, 2007–2009; U.S. District Judge, Southern District of New York, 1988–2006; John Negroponte, Deputy Secretary of State, 2007–2009; Director of National Intelligence, 2005–2007; Thomas Pickering, Under Secretary of State for Political Affairs, 1997–2000; Former U.S. Ambassador; Frances Townsend, Assistant to the President for Homeland Security and Counterterrorism, 2004–2008; Kenneth L. Wainstein, Assistant to the President for Homeland Security and Counterterrorism, 2008–2009; Assistant Attorney General for National Security, Department of Justice, 2006–2008; Juan Zarate, Deputy National Security Advisor, Combating Terrorism, 2005–2009; Assistant Secretary of the Treasury, Terrorist Financing and Financial Crimes, 2004–2005.

#### PRO FORMA SESSION APPOINTMENTS

Mr. McCONNELL. Mr. President, in January of this year the President of the United States made several appointments without obtaining the Senate's advice and consent. He asserted that the Recess Appointments Clause of the Constitution authorized these appointments, even though the Senate was conducting a series of pro forma sessions at the time of the appointments. According to the administration, these pro forma sessions had no legal effect on the President's authority under this Clause because pro forma sessions do not allow the Senate to perform its constitutional functions or conduct business. The Congressional Research Service has found, however, that pro forma sessions, such as the ones occurring during the time of these so-called recess appointments, have satisfied—and continue to satisfy—numerous Constitutional, statutory, and legislative requirements, and that the Senate, in fact, has conducted business during such sessions. The Congressional Research Service also has found that the administration has repeatedly recognized the legal validity of pro forma sessions for purposes of satisfying these various requirements. I ask unanimous consent that the analysis of the Congressional Research Service from March 8, 2012 entitled "Certain Questions Related to Pro Forma Sessions of the Senate" be printed in the RECORD following this statement.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONGRESSIONAL RESEARCH SERVICE,  
March 8, 2012.

#### MEMORANDUM

To: Senate Minority Leader

From: Christopher M. Davis, Analyst on Congress and the Legislative Process, 7-0656

Subject: Certain Questions Related to Pro Forma Sessions of the Senate

This memorandum responds to your request for information about certain pro forma sessions of the Senate. Specifically, you asked CRS to identify instances in which a pro forma session of the Senate might be interpreted as accomplishing some further end in addition to meeting the constitutional requirement that neither cham-

ber recess or adjourn for extended periods without the permission of the other.

#### PRO FORMA SESSIONS OF CONGRESS GENERALLY

Under Article I, Section 5, Clause 4 of the Constitution, neither chamber of Congress may adjourn or recess for more than three days without the consent of the other. In calculating such a three day period, either the day of adjourning or the day of convening must be included. Sundays are excluded from the calculation, being considered a dies non under longstanding parliamentary law.

A chamber can adjourn within the three day limit, for example, from Thursday to Monday, or from Friday to Tuesday, by simply adopting a motion. Should a chamber wish to leave for a longer period, however, the other chamber must consent to the absence. Historically, for such purposes, the two houses have most often adopted a concurrent resolution through which each consents to the absence of the other for a specified period.

In the normal course of business, party leaders in one or both chambers may wish to schedule periods of absence that exceed the three day constitutional limit by only a short period, perhaps by as little as one day. It is not uncommon, for example, for the House or Senate to adjourn from Thursday to Tuesday, or from Friday to Wednesday. In instances of this type, the chambers have evolved a practice of holding a short session sometime during the absence to comply with the constitutional limit described above. Such "pro forma" sessions, or sessions held for the sake of formality, allow a chamber to comply with the Constitution but not expend the time or trouble of acting on an adjournment resolution. In most cases, little or no business is conducted during such sessions because it is generally understood that few Members are present, and that the primary purpose of the meeting is to obviate the need to agree to an adjournment resolution. The Senate often adopts an order by unanimous consent which specifies that such a meeting or series of meetings is to be pro forma and that no legislative business is to be conducted on such days.

It is important to note that the term pro forma describes the reason for holding the session, it does not distinguish the nature of the session itself. In common congressional usage, Members and staff often use the term pro forma as being synonymous with a session at which no business will be conducted. While the primary purpose of a pro forma session of the Senate may be to comply with the constitutional strictures on adjournment, a pro forma session is not materially different from other Senate sessions. While, as noted above, the Senate has customarily agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction. Should the Senate choose to conduct legislative or executive business at a pro forma session, it could, providing it could assemble the necessary quorum or gain the consent of all Senators to act. The House of Representatives, which is bound by the same constitutional requirements as the Senate, regularly permits business on pro forma days, including the introduction and referral of legislation, the filing of committee reports and co-sponsorship forms, and the receipt and referral of executive communications and Presidential messages. Even in cases in which the Senate has agreed not to conduct business at a pro forma session, it could subsequently adopt a second consent agreement which would permit them to do so.

#### OTHER MOTIVATIONS OR PURPOSES FOR PRO FORMA SESSIONS OF THE SENATE

While the primary purpose of a pro forma session of the Senate has been to comply with the constitutional limits on adjournments and recesses, it is possible that such

meetings, being sessions of the Senate, may have additional purposes as well. At your request, CRS examined pro forma sessions of the Senate which occurred between the 109th Congress (2005–2006) and the present as well as the opening day of each Senate session between 1934 and the present, in order to identify sessions which may have satisfied some other purpose in addition to compliance with Article I, Section 5, Clause 4 of the Constitution. On the basis of these data, CRS identified two pro forma sessions at which legislative business was conducted, three periods of pro forma sessions that allowed the Senate to avoid returning nominations to the President, and six pro forma days that satisfied the constitutional or statutory requirement that the Senate convene a new session. In addition, both the Senate and the Executive Branch take pro forma sessions into account in calculating various required time periods pursuant to expedited procedure statutes. The following sections discuss each of these categories in turn.

The instances cited in this memorandum cannot be said to be exhaustive, but are intended to underscore the idea that pro forma Senate sessions may be motivated by factors other than complying with the constitutional limit on adjournments, and may satisfy the requirements of other procedural authorities, including other provisions of the Constitution, Senate rules, and statutes.

#### PRO FORMA SESSIONS AT WHICH LEGISLATIVE BUSINESS WAS CONDUCTED

Using information from the Legislative Information System of the U.S. Congress (LIS) and relevant issues of the daily Congressional Record and Senate Calendar of Business, CRS identified 114 pro forma sessions of the Senate which occurred between January 4, 2005 and March 8, 2012. These pro forma sessions are identified in Table 1.

Of these 114 pro forma meetings of the Senate, CRS identified two at which legislative business appears to have been conducted. On both of these occasions, the two houses had agreed to no adjournment resolution, so that the Senate was required to meet in order to avoid violating the constitutional prohibition on absences of more than three days length. The days in question are:

December 23, 2011: On this day, the Senate adopted an order by unanimous consent which provided for Senate passage of a H.R. 3765, a House measure extending the, "payroll tax, unemployment insurance, TANF, and the Medicare payment fix." The consent order further provided that upon receiving a message from the House of Representatives requesting a conference with the Senate on H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2012, the Senate agree to the request, and the Senate presiding officer be authorized to appoint Senate conferees with a party ratio of 4-3. An enrolled measure was also signed on this day by Sen. Reid, serving as Acting President Pro Tempore.

August 5, 2011: On this day, the Senate, by unanimous consent, passed H.R. 2553, a measure to amend the Internal Revenue Code of 1986 to extend the funding and expenditure authority of the Airport and Airway Trust Fund and to amend title 49, United States Code, to extend the airport improvement program.

In the first instance cited above, the previous meeting of the Senate had occurred on Tuesday, December 20, 2011. In the second instance, the Senate had most recently met on Tuesday, August 2, 2011. At both of these pro forma sessions, pursuant to unanimous consent orders adopted by the Senate, no legislative or executive business was to be conducted. The Senate subsequently, however,

decided to conduct business during the session.

**PRO FORMA SESSIONS WHICH SATISFIED SENATE RULES GOVERNING THE RETURN OF PRESIDENTIAL NOMINATIONS**

CRS also identified three distinct periods of recent pro forma Senate session which, in addition to satisfying the constitutional limits on recesses and adjournments discussed above, also seemed to satisfy provisions of the Senate's standing rules related to the consideration of presidential nominations. Paragraph 6 of Senate Rule XXXI, states in part:

... if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

In short, unless the Senate takes action (such as adopting a unanimous consent request) to override the provisions of Rule XXXI, the Senate Executive Clerk is supposed to return all nominations to the President at the outset of any period in which the Senate is to be absent for more than thirty calendar days.

In the three instances identified, the Senate held only pro forma meetings during periods in excess of thirty days. In each period, however, nominations were not returned to the President pursuant to Rule XXXI. It seems apparent that the Senate viewed its occasional pro forma meetings as a means of preventing a recess of more than thirty days for purposes of these requirements of its rules. Arguably, the Executive Branch, not having had its nominations returned to it as would be the well-established practice, was also at least aware of the Senate's understanding in this regard. The three periods in question identified are:

August 2—September 6, 2011: The Senate held pro forma sessions during this 34-day period of recess. No unanimous consent agreement was identified to hold pending nominations in status quo and they were not returned to the President.

September 29—November 15, 2010: The Senate held pro forma sessions during this 47-day period of recess. No unanimous consent agreement was identified as being adopted prior to the recess to hold pending nominations in status quo and they were not returned to the President.

2008–2009: The Senate held pro forma sessions during three relevant periods of recess in 2008–2009: August 1–September 8, 2008 (31 days); October 2–November 17, 2008 (46 days); and November 20, 2008–January 3, 2009, the balance of the 110th Congress (43 days). Consequently, although no unanimous agreement was identified as having been adopted in 2008 to hold pending nominations in status quo, they were not returned to the President until the sine die adjournment of the Congress.

**PRO FORMA SESSIONS OF THE SENATE WHICH SATISFIED THE 20TH AMENDMENT**

CRS also identified six pro forma meetings of the Senate which satisfied the provisions of Clause 2 of the 20th Amendment to the Constitution.

Clause two of the 20th amendment to the Constitution states:

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

At your request, CRS examined the opening day session of each regular and special session of the Senate held between 1934 and the present, the period coinciding with the period that paragraph 2 of the 20th Amend-

ment has been in force. CRS identified six Senate pro forma opening day sessions which satisfied the constitutional requirements for convening its session on the prescribed date. These opening day pro forma sessions were:

January 3, 1980  
January 3, 1992  
January 3, 2006  
January 3, 2008  
January 5, 2010  
January 3, 2012

With one exception, the January 3, 1980 session, each of these meetings was pro forma in nature, with no legislative or organizational business conducted. In the case of the January 3, 1980 session, the Senate referred a previously-received message from President Jimmy Carter transmitting his veto of S. 2096, a bill to provide for a study by the Secretary of Health, Education, and Welfare of the long-term health effects in humans of exposure to dioxins. In addition, five Senators inserted undelivered remarks in the Congressional Record on this day. The approximate duration of the January 3, 1980 session of the Senate was two minutes.

**PRO FORMA SESSIONS COUNT FOR PURPOSES OF COMPUTING CERTAIN STATUTORY TIME PERIODS**

Finally, CRS has identified several rules enacted in statute under which pro forma sessions are treated as sessions of the Senate like any other for purposes of computing certain time periods related to actions taken by Congress and the President. Pro forma Senate sessions satisfy not only the limits on recesses and adjournments contained in Article I, Section 5, Clause 4, but also the provisions of each of these statutory rules in the eyes of both the Executive and Legislative Branches.

Congress sometimes chooses to include in law provisions which delegate to the President or another Executive Branch official the authority to issue a regulation or take some other specified action. As part of this delegation of authority, Congress often reserves the right in the law to pass its own judgment on the proposed regulation or action, typically by passing a joint resolution to approve or disapprove it before it takes effect. To facilitate action on such a joint resolution, Congress often writes into law special parliamentary procedures for considering the measure, including strict time periods for the introduction, committee action, and floor consideration of such a joint resolution. Such statutory procedures are often colloquially referred to as "fast track" procedures because they expedite the consideration of specified legislation in one or both chambers.

Time periods under such statutory rules are usually calculated in one of two ways. The first way marks time by counting days of "House/Senate session." Under such a mechanism, any day which the House or Senate meets counts toward the deadline established by the law. Under the terms of the Congressional Review Act, for example, the Senate has 60 days of "Senate session" to act under fast track procedures on a joint resolution which would disapprove a proposed rule promulgated by the Executive Branch. Both branches understand and have agreed to this time period for expedited action before a proposed agency rule can enter into force. When calculating time periods under statutory rules of this type, pro forma sessions of the Senate count as days of Senate session; that is, they are viewed as a session of the Senate like any other.

The second way of counting time which is common in such statutory rules is known as counting "days of continuous session." This way of calculating time periods takes into account the differing schedules of the House and Senate. When counting days of contin-

uous session, every calendar day is counted, including Sundays and holidays, and the count pauses only when either the House or Senate (or both) have adjourned for more than three days pursuant to an adjournment resolution. For example, under the terms of the Defense Base Closure and Realignment Act of 1990, the Secretary of Defense may not close or realign any of the specified military installations until 45 "days of continuous session" have elapsed after a base closure plan is submitted to the House and Senate. As with the Congressional Review Act described above, both the Legislative and Executive Branch understand and have agreed to be bound by this manner of counting.

As with days of Senate session, pro forma meetings of the Senate are also taken into account by both branches when calculating "days of continuous session" for purposes of such statutory rules. Should the Senate meet in a series of pro forma sessions, a statutory "days of continuous session" clock would continue to run not only on the days of the pro forma sessions themselves, but also during the intervals of three or fewer days between the pro forma sessions, when the Senate was absent but formally in recess.

CRS has identified 22 statutory legislative procedures now in law which calculate time periods in either or both of the ways discussed above and which take pro forma days of Senate session into account in conducting a specific calculation. These statutory rules are:

Executive Reorganization Authority (5 U.S.C. 902–912). (Days of continuous session);  
District of Columbia Home Rule Act, 303(b), 602(c), 604. (Days of continuous session);

Title X of the Congressional Budget and Impoundment Control Act of 1974, 1011–13, 1017. (Days of continuous session);

Multiemployer Guarantees, Revised Schedules [Employee Retirement Income Security Act of 1974, 4022A (29 U.S.C. 1322a)]. (Days of continuous session);

Atomic Energy Act Provisions on Nuclear Non-Proliferation [42 U.S.C. 2153–60]. (Days of continuous session);

Trade Act of 1974, Procedures for Trade Implementing Bills and Resolutions of Disapproval [19 U.S.C. 2191–2192]. (Days of continuous session);

Energy Policy and Conservation Act [42 U.S.C. 6421]. (Days of continuous session);

Nuclear Waste Fund Fees [42 U.S.C. 10222]. (Days of continuous session);

The Atomic Energy Act of 1954, As Amended (22 U.S.C. 2776(b)). (Days of continuous session);

Federal Election Commission Regulations, 311(d) [2 U.S.C. 438(d)] (Days of Senate session);

Crude Oil Transportation Systems, [43 U.S.C. 2008]. (Days of continuous session);

Alaska National Interest Lands Conservation Act [16 U.S.C. 3232–3233]. (Days of continuous session);

Federal Lands Policy and Management Act of 1976 [43 U.S.C. 1701]. (Days of continuous session);

Marine Fisheries Conservation Act [16 U.S.C. 1823]. (Days of continuous session);

Nuclear Waste Policy Act of 1982 [42 U.S.C. 10101]. (Days of continuous session);

Defense Base Closure and Realignment of 1990, as amended [10 U.S.C. 2687 note]. (Days of continuous session);

Congressional Accountability Act of 1995 [2 U.S.C. 1384]. (Days of continuous session);

Congressional Review of Agency Rule-making [5 U.S.C. 801, 802, 804]. (Days of continuous session and days of Senate session);

Balanced Budget and Emergency Deficit Control Act 258 [2 U.S.C. 904(i), 907a–907d]. (Days of continuous session);

Medicare Cost Containment, Medicare Prescription Drug, Improvement, and Modernization Act of 2003 [31 U.S.C. 1105 note]. (Days of Senate session);

Minimum Standards for Identification of Documents; Intelligence Reform and Terrorism Prevention Act of 2004 [49 U.S.C. 44901 note]. (Days of Senate session); and

Independent Payment Advisory Board [42 U.S.C. 1395kkk]. (Days of continuous session).

TABLE I. PRO FORMA SESSIONS OF THE U.S. SENATE: 2005–2012  
[As of March 8, 2012]

| Congress & Years  | Pro forma Day  |
|-------------------|--|
| 112th (2011–2012) | 02/24/2012<br>02/21/2012<br>01/20/2012<br>01/17/2012<br>01/13/2012<br>01/10/2012<br>01/06/2012<br>01/03/2012<br>12/30/2011<br>12/27/2011<br>12/23/2011<br>12/20/2011<br>11/25/2011<br>11/22/2011<br>10/27/2011<br>10/24/2011<br>10/07/2011<br>09/29/2011<br>09/02/2011<br>08/30/2011<br>08/26/2011<br>08/23/2011<br>08/19/2011<br>08/16/2011<br>08/12/2011<br>08/09/2011<br>08/05/2011<br>06/03/2011<br>05/31/2011<br>11/12/2010<br>11/10/2010<br>11/08/2010<br>11/04/2010<br>11/01/2010<br>10/29/2010<br>10/26/2010<br>10/22/2010<br>10/19/2010<br>10/15/2010<br>10/12/2010<br>10/08/2010<br>10/05/2010<br>10/01/2010<br>01/19/2010<br>01/05/2010<br>10/09/2009<br>08/10/2010<br>12/30/2008<br>12/26/2008<br>12/23/2008<br>12/19/2008<br>12/16/2008<br>12/12/2008<br>12/05/2008<br>12/02/2008<br>11/29/2008<br>11/26/2008<br>11/24/2008<br>11/13/2008<br>11/10/2008<br>11/06/2008<br>11/03/2008<br>10/30/2008<br>10/27/2008<br>10/23/2008<br>10/20/2008<br>10/16/2008<br>10/14/2008<br>10/10/2008<br>10/07/2008<br>10/06/2008<br>09/05/2008<br>09/02/2008<br>08/29/2008<br>08/26/2008<br>08/22/2008<br>08/19/2008<br>08/15/2008<br>08/12/2008<br>08/08/2008<br>08/05/2008<br>07/27/2008<br>06/30/2008<br>05/29/2008<br>05/27/2008<br>05/23/2008<br>03/27/2008<br>03/24/2008<br>03/21/2008<br>03/18/2008<br>02/22/2008<br>02/19/2008 |
| 111th (2009–2010) |  |
| 110th (2007–2008) |  |

TABLE I. PRO FORMA SESSIONS OF THE U.S. SENATE: 2005–2012—Continued  
[As of March 8, 2012]

| Congress & Years  | Pro forma Day  |
|-------------------|--|
|                   | 02/15/2008<br>01/18/2008<br>01/15/2008<br>01/11/2008<br>01/09/2008<br>01/07/2008<br>01/03/2008<br>12/31/2007<br>12/28/2007<br>12/26/2007<br>12/23/2007<br>12/21/2007<br>11/29/2007<br>11/27/2007<br>11/23/2007<br>11/20/2007<br>11/09/2007<br>10/05/2007<br>09/14/2007<br>01/24/2006<br>01/20/2006<br>01/03/2006 |
| 109th (2005–2006) |  |

Source: CRS analysis of relevant issues of the Congressional Record, Senate Calendar of Business, and data from the Legislative Information System of the U.S. Congress (LIS).

I trust that this information meets your needs. If I can be of any additional help, please do not hesitate to contact me at 7-0656 or cmdavis@crs.loc.gov.

DROUGHT

Mr. DURBIN. About 2 weeks ago, I visited a farm near my home town of Springfield, IL to see the impact of the ongoing drought.

From the road, I couldn't tell there was anything wrong with the crop.

But as we went into the field, it quickly became clear that the crop was in poor shape.

Following that visit, I met with the Illinois corn growers and the soybean growers and farmers from across the state.

The message I heard was straightforward; it is as bad or worse than it has been in decades.

Since that visit to a Springfield farm, drought conditions have only gotten worse.

100 percent of Illinois and 64 percent of the country is facing severe or harsher drought conditions.

Today, USDA announced 66 additional Illinois counties as primary disaster counties.

With this announcement, all but four counties, Will, Cook, Kane, DuPage—in Illinois qualify for disaster assistance.

Very little rain, combined with abnormally high temperatures, is decimating many of the primary crop-growing areas of the country.

71 percent of the corn crop and 56 percent of the soybean crop in Illinois is rated as poor or very poor.

This is in a State that regularly ranks as a top producer for both of these commodities.

That means feed prices for livestock and eventually food prices for the rest of us are increasing.

Everyone is going to feel the impact of this historic drought.

In response to conditions on the ground, Governor Quinn created a multi-agency drought task force in Illinois.

The task force is coordinating State and Federal resources to ensure pro-

ducers and communities are receiving the timely assistance.

President Obama and Secretary Vilsack have done a commendable job of taking steps to help provide assistance to impacted producers and communities.

They have sped up the disaster declaration process helping producers more quickly gain access to the limited disaster programs currently available.

They have reduced interest rates on emergency loans.

They have made it easier for land that is in conservation to open earlier for haying and grazing for livestock producers.

And the administration is working with crop insurance companies to try to give producers more time to make premium payments.

But we can do more.

And since we can't make rain, the single most important step Congress can take is to pass a farm bill.

Most farmers will tell you they can survive one bad year.

But right now farmers can't even plan for future years.

More than a month ago, the Senate passed the Local Food, Farms, and Jobs Act, more commonly known as the farm bill, with a 64–35 bipartisan vote.

The bill would reauthorize several expired disaster programs to immediately help producers.

Equally, if not more important, the bill would provide certainty for producers—allowing them to make long-term plans for getting through this drought and recovering from a bad year.

Unfortunately the House has failed to act.

In the roughly 40 days since the Senate passed a bill, the House has not even brought a companion measure to the House floor. During those 40 days another 20 percent of the country has developed drought conditions. During those 40 days, 98 of 102 counties in Illinois qualified for disaster assistance. During those 40 days, many farmers in Illinois have lost their crops.

It is well past time for the House to take up and pass a farm bill that includes robust disaster assistance paired with the long-term policy farmers need.

I will repeat something I said 2 weeks ago.

Our producers and rural America already face a natural disaster. I don't think it is too much that we spare them a manmade disaster by failing to pass a farm bill.

DEATH OF OSWALDO PAYÁ

Mr. DURBIN. Mr. President, some of you may have seen in the press last week that an inspiring Cuban citizen who tirelessly fought for a peaceful transition to democracy recently died in a tragic car accident on that island.

Oswaldo Payá was a modest man. A brave man. A hero. A Cuban patriot.