EXECUTIVE OVERREACH: THE PRESIDENT'S UNPRECEDENTED "RECESS" APPOINTMENTS

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EXECUTIVE OVERREACH: THE PRESIDENT'S UNPRECEDENTED "RECESS" APPOINTMENTS

WEDNESDAY, FEBRUARY 15, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:11 a.m., in room 2141, Rayburn Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbenner, Coble, Gallegly, Goodlatte, Lungren, Chabot, King, Franks, Gohmert, Poe, Griffin, Marino, Gowdy, Adams, Quayle, Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Johnson, and Quigley.

Staff present: (Majority) Zachary Somers, Counsel; Travis Norton, Counsel; (Minority) Aaron Hiller, Counsel; and Danielle Brown, Counsel.

Mr. SMITH. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone here today on an important subject. I am going to recognize myself for an opening statement, and then several other Members. And then we will proceed to testimony and then questions.

On January 4, the President announced his unprecedented appointments of three individuals to the National Labor Relations Board, and Richard Cordray as Director of the Consumer Financial Protection Bureau. These appointments go well beyond past Presidential practice and raise serious constitutional concerns.

The Constitution provides the President with the authority to, quote, Fill up all vacancies that may happen during the recess of the Senate, end quote. However, the President's recent appointments were made at a time when the Senate was demonstrably not in recess.

During this supposed recess, the Senate passed one of the President's leading legislative priorities, a temporary extension of the payroll tax cut. It also discharged its constitutional obligation to come into session beginning on January 3 of every year.

Moreover, the Senate, itself, which has the power under Article I, Section 5 of the Constitution, to determine the rules of its proceedings, did not believe it was in recess when these appointments were made. As Senator Majority Leader Reid stated on the Senate floor regarding a similar period in 2007, quote, The Senate will be

coming in for pro forma sessions to prevent recess appointments, end quote.

What was acceptable in 2007 should be equally acceptable today.

In fact, not only was the Senate not in recess when the President made these appointments, but it appears that under the Constitution, it legally could not have been. The Constitution provides that neither house of Congress may adjourn for more than 3 consecutive days without the consent of the other house. Accordingly, the Senate could not have adjourned its session and gone into recess without the consent of the House, which the House did not give.

Despite these facts, the President claimed the unilateral authority to declare that the Senate is in recess for purposes of the Recess Appointments Clause. Such an astounding assertion of power raises serious constitutional concerns, and has the potential to adversely affect the balance of power between the President and the Congress. Regrettably, these appointments are part of a pattern of the President bypassing Congress and asserting executive power past constitutional and customary limits. For example, when the President's cap-and-trade legislation failed to pass Congress, he had the Environmental Protection Agency issue equivalent regulations instead. When Congress refused to enact the President's card check legislation, doing away with secret ballots in union elections, the President's National Labor Relations Board announced it was going to impose the change by administrative decree. And when Congress defeated the Dream Act, the President's illegal immigration amnesty proposal, the Administration instructed immigration officials to adopt enforcement measures that often bring about the same result as the Dream Act.

In addition to disrespecting Congress's constitutional authority when Congress has refused to enact his policy preferences, the President has also ignored laws passed by Congress. For instance, rather than seeking legislative repeal of the Defensive Marriage Act, the President simply instructed his Justice Department to stop defending its constitutionality. And the President ignored the Religious Freedom Restoration Act by failing to give religious organizations an exemption from the Health and Human Services contraceptive mandate.

One of the fundamental principles of American democracy is that we are a Nation of laws. America's elected leaders swear to follow our Constitution and our statutes even when they do not agree with them. With these recess appointments, the President may have violated the Constitution by disregarding the rule of law.

That concludes my opening statement. And the gentleman from Michigan, the Ranking Member, Mr. Conyers, is recognized for his.

Mr. CONYERS. Thank you, Chairman Smith, and to our distinguished witnesses and Members of the Committee. I am always allowed to present a view frequently considerably different from the one of the Chairman, and I will proceed to do so now.

The Framers included recess appointment clause in the Article II of the Constitution to ensure that government continues to function when the Senate is unavailable to confirm Executive nominees. Our Founding Fathers knew that the failure to appoint leaders to key executive branch agencies could result in real harm to the American people.

Until recently, very recently, I thought even the leadership of the Senate minority, the distinguished Senator from Kentucky, agreed with me on that point. I happen to have the letter in which he did so in writing with me at this point. But also consider the words of the distinguished Senator from Arizona, John Kyl, on the floor of the Senate in February of 2005: "When someone is qualified and has the confidence of the President, unless there is some highly disqualifying factor brought to our attention, we should accede to the President's request for his nomination, and confirm the individual." The senior Senator from Kansas, Senator Pat Roberts, expressed a similar idea with respect to judicial nominees.

The American people are paying for fully staffed courts and are getting obstructionism and vacant benches. Reckless behavior such as this is irresponsible and a waste of taxpayers' dollars.

And so the title given to this hearing suggests that some of my colleagues may have already determined the validity of President Obama's January 4 recess appointments. But a fair discussion ought to include the context for the Administration's decision to invoke the recess appointments clause of the United States Constitution; namely, unprecedented obstruction in the United States Senate itself.

Failure to consider admittedly qualified candidates threatens real harm to the American people. And I have two documents that go to the troubling nature of the Senate minority and its complete unwillingness to consider qualified nominees of either party.

The first is a letter to President Obama, signed by 44 Members of the Senate, all Republicans, including the two I quoted earlier, stating that they will not support the consideration of any nominee, regardless of party affiliation.

To the CFPB director, it is very simple. They decided to take the new Consumer Financial Protection Bureau hostage, they don't like the CFPB, which is their right, and demand that the finance industry have more influence over an agency designed to curb abuses in the finance industry.

The second is a "USA Today" article, dated December 28, 2011, in which the official historian of the United States Senate, Don Ritchie, states that never before in the history of the Senate have a handful of senators blocked a nominee to shut down an agency's business. He states, "We haven't found any precedent for making an agency powerless by not confirming anyone to run it." It is worth discussing the nature of the two agencies that the Senate minority seems to want to shut down through inaction.

You know the Consumer Financial Protection Bureau is a product of the Dodd-Frank legislation passed recently. The agency is an independent watchdog, working on behalf of American consumers, to curb unfair, deceptive, and abusive financial practices, to reign in predatory payday loans, to safeguard against abusive debt collection, and to monitor private student lenders non-bank mortgage companies and other institutions.

The National Labor Relations Board helps working Americans to form unions and to bargain collectively for fair wages and safe working conditions. And it is also a fair and public venue for working out disputes between labor and management.

So I believe these two functions, Mr. Chairman, enforcing a set of basic protections for American consumers, maintaining a level playing field for American workers, are vital to our economy and to the security of the American middle class. And so I hope to hear from our witnesses about these issues that you and I have raised.

I thank you for the time.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from Arizona, Mr. Franks, the Chairman of the Constitution Subcommittee, is recognized for an opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, no one questions that when the Senate is in recess the President does, indeed, have the authority to make recess appointments. That power is clearly set forth in the Constitution. Further, no one questions that recess appointments have always been controversial. Presidents of both political parties have made politically unpopular recess appointments. And no one questions whether it can be frustrating to try to get nominees through the Senate. Senate-delaying tactics have stalled nominees on both sides of the aisle. But never before in this country's history has a President made a recess appointment during a time when the Senate was not actually in recess. To quote former Attorney General Meese, "It is a constitutional abuse of a high order."

In 2007, Mr. Chairman, Senate Majority Leader Reid and Senate Democrats, which at the time included then Senator Obama, adopted the practice of holding pro forma sessions, rather than adjourning, to block President Bush's ability to make recess appointments. The President must think that the rules he and his Senate democrat colleagues developed to hamstring President Bush do not apply to him. But it is an axiom of democratic government that the same rules apply no matter who holds office.

And Mr. Chairman, just as an aside here, I know the witnesses will address the issue that some of the laws that were passed in pro forma session were considered legal even by the Administration. And it blows my mind to think that both the recess appointments can be in recess and that those pro forma laws can be valid at the same time.

Thus, although the President may object to the Senate's practice of holding pro forma session instead of recessing, he may not simply ignore the factual realities and make recess appointments when the Senate is not in recess. Even President Bush, who my friends on the other side of the aisle assailed for taking unilateral executive action, refused to provoke a constitutional crisis by making recess appointments while the Senate was meeting regularly in pro forma session.

The President's supporters may argue that the President sought the Justice Department's advice before making these appointments, and that the Department advised him that the appointments were permissible. Leaving aside the fact that the legal memo supporting the President's appointments was belatedly issued 2 days after the appointments were announced. The President, by his own words, has acknowledged that the reason he appointed these individuals had nothing to do with the only justification the Justice Department offered in support of his exercise of power.

The Justice Department asserted that the President has the authority to determine that the Senate is "unavailable to perform its advice and consent function, and to exercise its power to make recess appointments." Yet, in making these appointments, Mr. Chairman, the President did not determine that the Senate was unavailable to confirm his nominees. He determined that the Senate was unwilling to confirm them.

In fact, in appointing Mr. Cordray, the President declared, "I refuse to take no for an answer." Mr. Chairman, just as the President has refused to take no for an answer, Congress should refuse to accept the legality of these illegal appointments. If these appointments are allowed to stand unchallenged, they will threaten the bedrock principle of separation of powers that lies at the base of our constitutional republic.

By circumventing the Senate's advice and consent role, the President is concentrating the power of appointment in the executive branch alone. However, as James Madison recognized, The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, may justly be pronounced the very definition of tyranny."

And with that, Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Franks.

The gentleman from New York, Mr. Nadler, the Ranking Member of the Constitution Subcommittee, is recognized for an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Clashes between the branches of government are not unknown in our constitutional history. And this one is a classic one. It starts off with, in my view, improper exercise of power by the Senate, or by the Senate minority, and for the first time in American history, refusing to confirm people not on the grounds of the qualifications of the people, of the appointees, or the nominees, I should say, but by asserting that we don't like the law that was passed, and unless the law is changed, we will confirm nobody. We will nullify the effect of the law by refusing to confirm anyone to execute the law.

This is an invasion of the prerogatives of the Congress that passed the law, and of the obligation of the Executive to enforce the law, because it destroys the ability of the Executive to enforce the law, and is intended by its terms and by the statements of the minority leadership of the Senate to do just that. That was its purpose.

The Consumer Financial Protection Board shall not be allowed to function until its structure is changed in a way that we don't have the votes to change it, is essentially what the minority leadership of the Senate said. Confronted by that, the Executive perhaps overreached by making these recess appointments.

Now, I object to the title of the hearing, "Executive Overreach: The President's Unprecedented Recess Appointments." Whether there was executive overreach is a matter that will be determined by the courts. You can make a good case either way, frankly.

One of our witnesses, I was just glancing over his testimony, quotes from a report of the Senate Judiciary Committee from over a century ago, in which it essentially agrees with the current Administration's interpretation. And it says, "The recess power

means, in our judgment, the period of time when the Senate is not sitting in regular or extraordinary sessions, the branch of the Congress, during 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 cannot receive communications from the President, or participate as a body in making appointments."

That is an interpretation by the Senate Judiciary Committee over 100 years ago. And if that is accepted, then the President was justified in making these recess appointments, because the pro forma sessions of the Senate were just that. The Senate was not capable of acting, should it wish to do so, on the President's nominations, by design, and its pro forma sessions only intended to frustrate the President's exercise of his constitutional power without, in fact, giving the Senate power to consider those nominations at that time.

That interpretation would make the President's actions completely justified. Whether the Supreme Court will agree with that interpretation or with the contrary interpretation, as I said, I think there is good law on both sides. We will see. I am not clear about the purpose of this hearing, since I have heard no one suggest that the House of Representatives can do anything about this, other than make statements and give opinions.

I do think that we have a constitutional problem when a minority in the Senate takes it upon itself to rule against the will of the majority and to try to nullify laws by simply not confirming people, regardless of their qualifications, and stating so, unless the law is changed. And when confronted by that unconstitutional, in my opinion, Senate overreach, it is not surprising the Executive would use what weapons it has in its armory. And we are considering the consequences of that. But we really should be considering the entire question of how do you deal with a minority that seeks to act as the majority, and to frustrate the will of the majority and of the Executive in unprecedented ways, and seeks to nullify the law. And that, it seems to me, is the larger question here. And this question is a consequence of those actions.

I thank you. And I yield back.

Mr. SMITH. I thank you, Mr. Nadler. We have a distinguished panel of witnesses today. And let me proceed to introduce them.

Our first witness is Charles Cooper, a partner in the law firm of Cooper & Kirk. In 1985, Mr. Cooper was appointed Assistant Attorney General for the Office of Legal Counsel by President Reagan. Additionally, after attending the University of Alabama School of Law, where he finished first in his class, he served as a law clerk to Chief Justice Rehnquist. Mr. Cooper has been named one of the 10 best civil litigators in Washington, D.C.

Our second witness is John Elwood, a partner at Vinson & Elkins. Before joining Vincent & Elkins, Mr. Elwood served in several senior positions at the Justice Department, including as Deputy Assistant Attorney General, in the Office of Legal Counsel, and as an assistant to the Solicitor General. In addition, Mr. Elwood, a graduate of Yale Law School, served as a law clerk to Justice Kennedy.

Our final witness is Jonathan Turley, the Shapiro Professor of Public Interest Law, at the George Washington University Law School. Professor Turley, an alumnus of Northwestern University Law School, is a nationally recognized legal scholar, who has written extensively in areas ranging from constitutional law, to legal theory, to tort law. He has been recognized as the second most cited law professor in the country.

We welcome you all. I look forward to your testimony. And just as a reminder, there is a 5-minute limit on the testimony. But whatever is not stated, we can put into the record. So we will proceed.

Mr. Cooper, will you start us off?

TESTIMONY OF CHARLES J. COOPER, PARTNER, COOPER & KIRK, PLLC

Mr. COOPER. Thank you very much, Chairman Smith. And good morning Ranking Member Conyers, Members of the Committee. I appreciate very much the Committee's invitation to testify this morning on this very important separation of powers issue. And I am especially honored to be in the company of these distinguished panelists, Professor Turley and Mr. Elwood.

The issue that is at the heart of the Committee's constitutional inquiry this morning is whether the Senate was in continuous recess from December 17 to January 23, last, during the holiday break. The Administration, in an opinion authored by the Office of Legal Counsel, takes the position that it was, despite the fact that the Senate repeatedly gaveled itself into pro forma session, and, in fact, passed legislation during one of those sessions.

In my view, the Senate was not continuously in recess during that period, and the January 4 recess appointments, therefore, exceeded the President's authority under the recess appointment clause.

OLC's legal argument rests entirely on the conclusion that even as the Senate held pro forma sessions, and passed legislation during one of them, it remained in recess. Now, that view, I believe, is unsustainable for three key reasons. There are more, but there are three I will mention this morning.

The first and threshold reason to conclude that the Senate was not in continuous recess is that the Senate says so. The Constitution's rulemaking clause commits to each house of Congress the power to determine the rules of its proceedings. And rules governing when and how a house of Congress determines whether it adjourns or meets are quintessential rules of proceedings. Because the rulemaking power commits that authority and the interpretation of that authority, to the Senate's judgments, the Senate's holding of repeated pro forma sessions between December 17 and January 23, in my opinion, should end the matter.

Second, there is a firmly established practice of using pro forma sessions to satisfy other constitutional requirements requiring that the bodies of Congress be in session. For example, the Senate has repeatedly held pro forma sessions to comply with Article I, Section 5's requirement that it not adjourn for more than 3 days without the consent of this body.

Congress also uses pro forma sessions to satisfy the 20th Amendment's requirement that it meet at noon on January 3 every year to start a new session of Congress, unless a different time is established by statute. And it is very difficult to see how the Senate can be in session for purposes of satisfying one constitutional provision, while in recess for purposes of the other constitutional provision.

And I would like to add this point, which isn't in my written testimony. But by treating the January 4 appointments as occurring during an intra-session recess, rather than an intersession recess, OLC tacitly acknowledged that the Senate's January 3 pro forma session started a new session of Congress, as that word is used in the recess appointment clause.

And since recess appointee's commissions constitutionally expire at the end of the next session of Congress, under the recess appointment clause, that approach allows the President's appointees to serve until the end of 2013, rather than the end of 2012. So in that way, OLC's treatment of the January 3 pro forma session of the Senate is really schizophrenic. They have determined that it is sufficient to start a new session, as that term is used in the recess appointment clause, but inadequate to end a recess under that same recess appointment clause.

Now OLC rejects all of these arguments and relies, instead, on what it says is the purpose of the recess appointment clause. In its words, to provide a method of appointment when the Senate is unavailable to provide advice and consent. So OLC says the pro forma sessions are essentially a sham, and that the President has discretion to ignore them.

But that assertion collapses under the weight of one inconvenient truth. At one of those pro forma sessions, on December 23, the Senate and the House of Representatives actually passed legislation, the 2-month extension of the payroll tax cut, which the President promptly signed into law. So in passing that payroll tax cut extension bill, the Senate acted by unanimous consent, the very same procedure by which the vast majority of Federal nominees are confirmed.

If the Senate is available to pass legislation by unanimous consent during a pro forma session, then it is surely available to confirm the President's nominees by the same procedure. The OLC opinion answers that, in fact, the simple fact that the Senate is able to act during its pro forma sessions is irrelevant in light of the fact that the President may properly rely, according to OLC, on public pronouncements that the Senate will not conduct business during pro forma sessions. There are several problems with that argument, I submit, but I want to highlight just two in the few moments that I have remaining.

First, by the time the President made the recess appointments at issue here, on January 4, the Senate had itself repudiated the no-business pronouncement that it made when it scheduled those pro forma sessions. And it is difficult to see how the President can rely on a public pronouncement by the Senate that the Senate itself has previously repudiated.

The second point is this: The President did not, in fact, rely on the no-business public pronouncements. It was the President who urged the Senate and this body to pass the 2-month payroll tax ex-

tension during the holiday recess and in pro forma session. And it was the President who promptly signed it into law. The President is not entitled both to rely upon the no-business public pronouncement and to ignore it, as he pleases.

The short of my testimony, Mr. Chairman, is that the President's January 4 recess appointments, in truth, had nothing to do with whether the Senate was available to act, and everything to do with the Senate's unwillingness to confirm the President's nominees. And regardless of whether you think the President, in this instance, sought to exceed his power for good or for ill, I would submit that it is Congress's responsibility, its constitutional responsibility, to resist this constitutional excess of his authority.

Thank you very much.

[The prepared statement of Mr. Cooper follows:]

STATEMENT OF CHARLES J. COOPER

Partner, Cooper & Kirk, PLLC

Before the House Committee on the Judiciary

Concerning

"Executive Overreach: The President's Unprecedented 'Recess' Appointments"

February 15, 2012

Good morning Mr. Chairman and Members of the Committee. My name is Charles J. Cooper, and I am a partner in the Washington, D.C., law firm of Cooper & Kirk, PLLC. I appreciate the Committee's invitation to present my views on the constitutionality of the President's January 4 recess appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau. For reasons I will explain below, I believe that the President exceeded his constitutional authority by making these appointments during a three-day adjournment between pro forma Senate sessions. But first I would like to outline the professional experience that informs my thinking on this important subject.

I have spent the bulk of my career, both as a government lawyer and in private practice, litigating or otherwise studying a broad range of constitutional issues. From 1985 to 1988, I served as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, where I advised President Reagan and Attorney General Meese on numerous separation of powers and other constitutional issues. Perhaps most notable for present purposes, in early 1988 the President asked the Justice Department for its opinion as to whether the Constitution vests the President with an inherent power to exercise a line-item veto. After exhaustive study, the Office of Legal Counsel ("OLC") concluded that the proposition was not well-founded and that the President could not conscientiously attempt to exercise such a power. OLC's opinion is publicly available at 12 Op. O.L.C. 128 (1988).[1]

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[1] As a former head of OLC, I am obliged to note that it is entirely proper and natural, in my view, for the Executive Branch and its legal advisors generally to favor, and to jealously protect, the powers and prerogatives of the office of the Presidency. That each branch of government will be alert to and guard against encroachment by the others—which is inevitable—is a fundamental premise on which the separation of powers is based. It follows, I believe, that the President is entitled to receive "the benefit of a reasonable doubt as to the law" from his legal advisors in the Department of Justice. *See* JACK L. GOLDSMITH, THE TERROR PRESIDENCY 35 (2007) (quoting EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 221-22 (1958)). Certainly this was OLC's view during the time when I served in that office in the Reagan Administration. To be sure, the President must be able to rely on OLC for *independent* legal analysis and advice; advocacy in defense of an Administration policy or action is a responsibility that falls to other components of the Department. OLC's obligation is to "provide advice based on its best understanding of what the law requires," and the office's faithful performance of that function will at times require it to advise that "the law precludes an action that [the] President strongly desires to take." *Guidelines for the President's Legal Advisors*, 81 INDIANA L. J. 1345, 1348-49 (2006). But OLC is not a court, and its independence does not entail the neutrality that is the hallmark of judicial independence. "OLC differs from a court in that its responsibilities include *facilitating* the work of the Executive Branch and the *objectives* of the

Since leaving government service in 1988, I have been involved in a number of significant separation of powers cases in both the Supreme Court and the lower federal courts. *E.g.*, *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that individual congressmen lack standing to challenge Line Item Veto Act); *Clinton v. New York*, 524 U.S. 417 (1998) (holding that Line Item Veto Act violates Presentment Clause); *FEC v. NRA*, 513 U.S. 88 (1994) (dismissing case as improvidently granted because FEC lacked statutory authority to file cert petition); *FEC v. NRA*, 6 F.3d 821 (D.C. Cir. 1993) (holding that congressional appointment of *ex officio*, nonvoting FEC commissioners violates the Appointments Clause); *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990) (enjoining operations of the Office of Thrift Supervision because Directors' appointments were not authorized by Appointments Clause or Vacancies Act). Together, these experiences have made me a student of the system of checks and balances implicated by the recess appointments that are the subject of this hearing.

I

Between December 17, 2011, and January 23, 2012, the Senate held a series of "pro forma sessions" designed to break the holiday period into three-day adjournments in order to comply with its constitutional obligation not to adjourn for more than three days during a congressional session without the consent of the House of Representatives. U.S. CONST. Art. I, § 5, cl. 4. The order that scheduled these pro forma sessions was entered by unanimous consent and provided that there was to be "no business conducted." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). At one of its pro forma sessions, however, the Senate passed by unanimous consent a two-month extension of the payroll tax cut, as requested by President Obama. *Id.* at S8789 (daily ed. Dec. 23, 2011). And on January 3, 2012, the Senate met in pro forma session to comply with the Twentieth Amendment's requirement that Congress meet on that date "in every year . . . unless they shall by law appoint a different date." The following day, on January 4, the President made four recess appointments, making Richard Cordray the first Director of the

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President, consistent with the requirements of the law." *Id.* Indeed, "OLC must take account of the administration's goals and assist their accomplishment within the law." *Id.* Thus, OLC should maintain a relationship of what I call "friendly independence" to the Administration and the President it serves.

OLC often confronts legal issues that do not have black or white answers; many are close and difficult questions of law, and the answer is sufficiently uncertain—sufficiently gray—that OLC cannot properly, conscientiously say that the proposed Executive Branch action is legally precluded. If the answer falls in the gray area—it is neither yes nor no, but rather is maybe yes and maybe no—then the action is not controlled by law, and the President is free to choose the course that best serves his purpose and goals, in full view of the legal risks. In approving the constitutionality of the recess appointments at issue here, OLC candidly acknowledged that "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." 2012 OLC op. at 4. And while I believe that the constitutional question raised by the January 4 recess appointments is not close, and that the litigation risk for the appointments is preclusive, I respect the views of those, within OLC and without, who see it differently.

Consumer Financial Protection Bureau ("CFPB") and filling three vacant seats on the National Labor Relations Board ("NLRB"). The Cordray appointment, if sustained, will empower the CFPB to exercise Dodd-Frank's "newly-established federal consumer financial regulatory authorities" for the first time. Letter from Inspectors General of the Federal Reserve and Department of the Treasury to Spencer Bachus, Chairman, Committee on Financial Services, and Judy Biggert, Chairman, Committee on Financial Services, Subcommittee on Insurance, Housing and Community Opportunity at 6 (Jan. 10, 2011); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1066 (codified at 12 U.S.C. § 5586) (authorizing Secretary of the Treasury to exercise certain preexisting federal powers transferred to the CFPB until a CFPB Director is appointed). The NLRB recess appointments are of similar significance because without them the Board would have only two members, and thus would lack the quorum needed to take action. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Two days after announcing the appointments, on January 6, the Administration released an OLC opinion that explains the legal rationale for the President's actions. Before addressing the merits of OLC's analysis, some background on the constitutional provisions at issue may be useful.

II

The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate" to "appoint . . . Officers of the United States." U.S. CONST. Art. II, § 2, cl. 2. This "general mode of appointing officers of the United States" is "confined to the President and Senate jointly," THE FEDERALIST NO. 67 (Alexander Hamilton), and it has always been the method by which the vast majority of officers receive their commissions. As a "supplement" to this usual procedure, *id.*, the Recess Appointments Clause authorizes the President 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 Framers gave the President this "auxiliary" power because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and yet "vacancies might happen in their recess, which it might be necessary for the public service to fill without delay." THE FEDERALIST NO. 67.

Because the Recess Appointments Clause permits the President, under the specified circumstances, to bypass the Senate and make appointments unilaterally, it has been a rich source of conflict between Presidents and Congresses since the early days of the Republic. The earliest disputes concerned the questions whether a recently created office, which has never before been occupied, creates a "vacancy" and whether a vacancy that occurs when the Senate is in session "happen[s] during the recess of the Senate." *See, e.g.*, Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976); Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, at 165-67 (John Catanzariti et al. ed., 1990); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350-53 (R. Worthington ed., 1884); 26 Annals of Cong. 652-58, 694-722, 742-60 (1814); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 188-89 (2001). Although there is substantial textual and historical support for a negative answer to both of these questions, *see* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); *Stephens v. Evans*, 387 F.3d 1220, 1228 (11th Cir. 2004) (Barkett, J., dissenting), in an 1823 opinion Attorney

General William Wirt embraced the broader view that the Executive Branch has taken since. 1 Op. Att'y Gen. 631 (1823). Attorney General Wirt's opinion reads the phrase "may happen during the recess of the Senate" to mean "may happen to exist during the recess of the Senate," and so concludes that the President may fill any seat that is open during a recess regardless of when it became open or whether it has been previously occupied. *Id.* at 631-32.

Lengthy adjournments during sessions of Congress were rare in the early nineteenth century, but longer so-called "intrasession recesses" became more common in recent decades. With a single exception, *see* Rappaport, *supra* at 1572, the uniform practice of Presidents through World War I was to refrain from making recess appointments during intrasession adjournments, and in 1901 Attorney General Knox concluded that the President lacks constitutional authority to do so, 23 Op. Att'y Gen. 599 (1901). But in 1921, Attorney General Daugherty advised President Coolidge that he could break with prior precedent and constitutionally make recess appointments any time the Senate is unable to "receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). Although the Senate has intermittently objected to intrasession recess appointments in the years since, *see, e.g.*, Brief for Senator Edward M. Kennedy as Amicus Curiae, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424), Attorney General Daugherty's opinion is the basis for what has become the Executive Branch's settled view, *see, e.g.*, *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272-73 (1989); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315-16 (1979); 41 Op. Att'y Gen. 463, 468 (1960). Although the Supreme Court has never addressed the meaning of the Recess Appointments Clause, a number of the Courts of Appeals have acquiesced, in whole or in part, in the Executive's longstanding view of this Clause. *See, e.g.*, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding intrasession recess appointment to fill vacancy that occurred while the Senate was in session); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985 (en banc) (upholding recess appointment to fill vacancy that did not arise while the Senate was in recess); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) (same).

Against this backdrop of interbranch disputes and shifting historical practices, the constitutional issue that brings this Committee into session today is whether the Senate may use pro forma sessions to prevent the President from making recess appointments. More concretely, the question is whether the Senate was continuously in recess from December 17 to January 23 despite repeatedly gaveling itself into session and, in one instance, actually passing a bill. In my view, the Senate was not in "Recess" during its pro forma sessions, and the recess appointments at issue exceeded the President's constitutional authority.

III

Before discussing the Administration's legal rationale for the January 4 appointments, I will first frame the issue by noting two things that OLC's opinion does not say. First, the opinion does not suggest that the President can make recess appointments during a Senate adjournment of only three days—the length of the adjournment between the pro forma sessions at issue here. Instead, OLC's legal argument rests entirely on its conclusion that the Senate is not actually in session during its pro forma sessions, and so was in continuous recess between December 17 and January 23. For OLC, then, the Senate's pro forma sessions are a constitutional nullity, at least for purposes of the Recess Appointments Clause.

OLC's reluctance to argue that the President can make recess appointments during a three-day Senate adjournment is hardly surprising given the substantial weight of authority to the contrary. Even Attorney General Daugherty, whose 1921 opinion extended the President's recess appointment power to intrasession adjournments, acknowledged that "an adjournment of 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. at 25. Since then, lawyers serving in numerous Administrations have advised Presidents to wait for a recess of some significant duration before making recess appointments. *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* at 3 (Feb. 20, 2004); *The Pocket Veto: Historical Practice and Judicial Precedent*, 6 Op. O.L.C. 134, 149 (1982) (observing that OLC "has generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief"); *Recess Appointments – Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315-16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970). Indeed, the current Administration recently took this position before the Supreme Court in *New Process Steel*, arguing that "the Senate may act to foreclose" the President's power to recess appoint a third member of the NLRB "by declining to recess for more than two or three days at a time over a lengthy period." Letter to William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457); *see also* Transcript of Oral Argument at 50, *New Process Steel*, 130 S. Ct. 2635 (Katyal) (explaining that for the President to make a recess appointment "the recess has to be longer than 3 days"). And recent Presidents have accepted their lawyers' advice: from the start of the Reagan Administration until last month, the shortest recess during which a President made a recess appointment was 10 days. *See* Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 10 (Jan. 9, 2012).

If, as I believe, the Administration is wrong when it claims that pro forma Senate sessions are a legal nullity, then the President's appointments are contrary to both the weight of legal authority and historical practice. Indeed, as far as I am aware, the present case would stand alone as the shortest intrasession recess during which any President has ever made a recess appointment. Presidents have made recess appointments during *intersession* recesses of less than three days on only two occasions, Hogue, *supra*, at 10, and in at least one of these cases the Senate vigorously protested, *see* S. Rep. No. 4389, 58th Cong., 3d Sess., *reprinted in* 39 Cong. Rec. 3823, 3824 (1905).

Second, the OLC opinion does not suggest that the Senate is powerless to block recess appointments by remaining in session. To the contrary, OLC expressly acknowledges that "[t]he Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session." 2012 OLC Op. at 1. The only question, then, is whether the Senate's acknowledged power to thwart the President's recess appointment power was properly exercised through its use of pro forma sessions.

IV

The threshold reason to conclude that the Senate's pro forma sessions interrupted its holiday adjournment is that the Senate says so. The Constitution vests in each House of Congress

the power to "determine the Rules of its Proceedings," U.S. CONST. Article I, § 5, cl. 4, and rules governing how and when the Senate meets and adjourns are quintessential rules of proceedings. Because the Rulemaking Clause commits to the Senate judgments about the meaning of its own rules, the Senate's determination that it was repeatedly in session between December 17 and January 23 should end the matter.

The Framers understood that the Houses of Congress must have authority to make their own rules to function as a coequal branch of government. *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, Document 14 ("Each house of Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."). As Joseph Story explained in his authoritative constitutional treatise, "[t]he humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 835 (1833).

When Congress makes rules that govern its proceedings, the President should, like the courts, defer to the legislative branch. *See Mester Mfg. v. INS*, 879 F.2d at 571 (9th Cir. 1989) ("The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress."). Courts honor Congress' rules under the enrolled bill rule by treating the attestations of the two houses as "conclusive evidence that a bill was passed by Congress," even in the face of evidence that demonstrates otherwise. *Pub. Citizen v. District of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007); *see also OneSimpleLoan v. U.S. Secretary of Educ.*, 496 F.3d 197 (2d Cir. 2007). This doctrine reflects "the respect due to a coordinate branch of government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), and underscores the very limited inquiry courts make where the Congress' rules of proceedings are at issue. For similar reasons, the D.C. Circuit has held that it will defer to Congress' interpretation of ambiguous congressional rules—to the point that disputes over the meaning of such rules are nonjusticiable; were it otherwise, "the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone." *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995).[2] And although OLC is surely correct when it says that Congress "'may not by its rules ignore constitutional restraints or violate fundamental rights,'"

[2] Accordingly, there is a substantial argument that any ambiguity over when the Senate is in session is nonjusticiable and that in such a case a court should refuse to entertain arguments contrary to the Senate's own determination that it is in session. If a court so held, it would still hear challenges to the President's recess appointments but would refuse to second-guess the Senate's determination that it was not in recess during its pro forma sessions between December 17 and January 23. *See United States v. Mandel*, 914 F.2d 1214 (9th Cir. 1990) (permitting prosecution for exporting goods on commodity control list to proceed even after concluding that political question doctrine barred defendant's challenge to Secretary of Commerce's decision to place particular items on list). This is not to say that a court would defer even to a Senate determination that is manifestly and unambiguously false as a factual matter, such as a claim that the Senate was in continuous session during a prolonged period when the Senate chamber was in fact empty. Here, regardless of whether the Senate has absolute or only very broad discretion to say when it is in session, it plainly acted within the bounds of its authority by declaring itself to be in session at times when it was able to, and in one instance actually did, pass legislation.

2012 OLC Op. at 20 (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)), the Supreme Court has made clear that "within these limitations all matters of method are open to the [Senate's] determination," *Ballin*, 144 U.S. at 5.

The present case underscores the Framers' wisdom in giving each House of Congress exclusive authority to make its own rules. Here the President purports to tell the Senate what it must do to bring itself into session and retroactively declares a series of Senate sessions to be a constitutional nullity. The Rulemaking Clause does not permit such executive interference in the Senate's internal procedures any more than it would permit similar interference by the courts. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). To hold otherwise would threaten Congress's ability to function as an independent branch of government, undermining the checks and balances that the Framers "built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). For this reason I believe that OLC is in error when it concludes that the President has "large, although not unlimited discretion to determine when there is a real and genuine recess." 2012 OLC Op. at 14 (internal quotation marks omitted). It is for the Senate, not the President, to establish and interpret Senate rules and procedures.

It is no answer to say that the Senate could use its rulemaking authority to prevent the President from making recess appointments "by declaring itself in session when, in practice, it is not available to provide advice and consent." 2012 OLC Op. at 20. As discussed in detail below, the Senate has not done this, for it is available to provide advice and consent during its pro forma sessions. In any event, the Constitution empowers the Senate to block recess appointments by refusing to recess, and the validity of the President's January 4 appointments depends on his judgment that the Senate unsuccessfully attempted to exercise this power. As Alexander Hamilton explained in Federalist 76, the Framers denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. The prospect of an intransigent Senate that refuses to confirm the President's nominees is an unavoidable corollary of the Framers' decision to "divid[e] the power to appoint the principal federal officers . . . between the Executive and Legislative branches." *Freytag v. Commissioner*, 501 U.S. 868, 869 (1991).

V

But even if the Rulemaking Clause did not give the Congress exclusive authority to decide when and how to recess, the better view would still be that the President cannot make recess appointments when the Senate is in pro forma session. Although the use of pro forma sessions to block recess appointments is a relatively new practice—first threatened during the Reagan Administration and first used against George W. Bush—there is a firmly established practice of using pro forma sessions to satisfy the requirements of other constitutional provisions.

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 House's permission. *See, e.g.*, 95 Cong. Rec.12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); 96 Cong. Rec. 7821 (May 29,1950); 96 Cong. Rec. 16,980 (Dec. 22,1950); 96 Cong. Rec. 17,020 (Dec. 26, 1950); 96 Cong. Rec. 17,022

(Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); 97 Cong. Rec. 2898 (Mar. 26, 1951); 97 Cong. Rec. 10,956 (Aug. 31, 1951); 97 Cong. Rec. 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957). Congress has also used pro forma sessions to satisfy the Twentieth Amendment's requirement that it meet at noon on January 3 to start a new session unless a different time is specified by statute. *See* H.R. Con. Res. 232, 96th Cong., 93 Stat 1438 (1979) (pro forma session to be held on January 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (pro forma session to be held on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (pro forma session to be held on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session to be held on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session to be held on January 3, 2012). Pro forma sessions have long been widely accepted as a permissible method of fulfilling these constitutional mandates, and it is difficult to see how the Senate could be in session for purposes of one constitutional provision while in recess for purposes of another.

VI

Rejecting these arguments, OLC relies instead on the purpose of the Recess Appointments Clause: "to provide a method of appointment when the Senate [is] unavailable to provide advice and consent." 2012 OLC Op. at 15. Throughout its lengthy opinion, OLC repeatedly emphasizes the Executive Branch's "traditional view that the Recess Appointments Clause is to be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations . . . ." *Id.* at 4. In concluding that a pro forma session of the Senate is indistinguishable from a recess of the Senate, OLC argues that "the touchstone is [the pro forma sessions'] 'practical effect, viz., whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations.' " *Id.* at 12 (quoting *Recess Appointments*, 41 Op. Att'y Gen. at 467).[3]

OLC is certainly correct that the Recess Appointments Clause was intended to provide "an auxiliary method of appointment," as Hamilton put in Federalist No. 67, for filling "vacancies that may happen during the recess of the Senate," when the Senate is unavailable to perform its advice and consent function. But even accepting at face value OLC's "practical construction" of the Recess Appointments Clause, the recess appointments made by the President on January 4 cannot reasonably be justified on the ground that the Senate was *unavailable* or otherwise *unable* to perform its advice and consent function. Rather, the Senate has simply been *unwilling* to provide its advice and consent to the President's nominees.

First, not only has the Senate been "available" *in fact* to consider these nominations, it has *actually been considering* some of them for many months. The President recess appointed Terence Flynn to a seat on the NLRB that had been vacant since August 27, 2010, when Peter Schaumber's statutory term expired. National Labor Relations Board, *Members of the NLRB*

[3] *See also, e.g.*, 2012 OLC Op. at 14 ("[B]rief pro forma sessions of this sort, at which the Senate is not capable of acting on nominations, may properly be viewed as insufficient to terminate an ongoing recess for purposes of the Clause."); *id.* at 15 ("[W]e believe the critical inquiry is the 'practical' one identified above—to wit, whether the Senate is available to perform its advise and consent function.").

since 1935, https://www.nlrb.gov/members-nlrb-1935 (last visited Feb. 11, 2012). This vacancy thus occurred by operation of law, not as a result of some unexpected event such as resignation or death. Yet the President waited over four months, until January 2011, to nominate Mr. Flynn to fill the seat. Far from being unavailable or otherwise unable to provide its advice and consent to Mr. Flynn's nomination, the Senate has simply been unwilling to do so for over a year. In the case of Richard Griffin, the President waited until December 15, 2011—two days before the Senate's adjournment for the holiday—to nominate him to a seat that became vacant at the expiration of Wilma Liebman's statutory term months earlier, on August 27, 2011. *Id.* Again, this vacancy on the NLRB occurred by operation of law; it took no one by surprise. It is untenable for OLC to claim that the President acted to fill these vacancies because the Senate was not "capable of exercising its constitutional function of advising and consenting to executive nominations." 2012 OLC Op. at 12.

Indeed, in publicly announcing his recess appointment of Mr. Cordray to the CFPB, President Obama abandoned any pretense that he was acting because the Senate was unavailable to consider the nomination. To the contrary, the President declared that he was making the recess appointment *despite* the fact that the Senate *had been considering* the nomination for over six months. This is what he said: "Now, I nominated Richard for this job last summer . . . For almost half a year, Republicans in the Senate have blocked Richard's confirmation. They refused to even give Richard an up or down vote . . . ." President Barak Obama, Remarks by the President on the Economy, *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy (Jan. 4, 2012). The President was not complaining that the Senate was unavailable or unable to confirm Mr. Cordray. He was complaining that the Senate refused to confirm Mr. Cordray. And, as he candidly proclaimed: "I refuse to take no for an answer." *Id.*

Thus, the President himself has openly acknowledged that his purpose in recess appointing Mr. Cordray to the CFPB had nothing to do with the only purpose offered by his lawyers at OLC as providing a constitutional justification for the exercise of his power to do so. The President's January 4 recess appointments were driven not by any concern that the Senate was unavailable to perform its constitutional role in the appointment of government officers, but rather by the President's determination, openly avowed, to circumvent the Senate's role.

VII

For OLC, however, the Senate's availability to perform its advice and consent function is not determined by whether the Senate is *in fact* available to consider a nomination, or even by whether it has in fact *been considering* a nomination for many months. Rather, OLC focuses solely on whether the Senate's availability to consider a nomination is interrupted by a recess of sufficient duration to justify exercise of the President's recess appointment power. And, as previously noted, it has opined that the Senate was unavailable throughout its holiday adjournment—from December 17 to January 23—because the days in which the Senate held a pro forma session were constitutionally indistinguishable from the days in which the Senate chamber was dark and empty.

But this assertion collapses under the weight of a single inconvenient truth: while holding a pro forma session on December 23, the Senate passed a bill—a two-month extension of the payroll tax cut—which the President promptly signed into law. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). (The House passed the extension bill on the same day, also during a pro forma

session.) This was not the first time that the Senate had passed legislation during a pro forma session. *See id.* at S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act during pro forma session). In passing the payroll tax cut extension, the Senate acted by unanimous consent, the same procedure by which the Senate confirms most presidential nominees. MICHAEL L. KOEMPEL & JUDY SCHNEIDER, CONGRESSIONAL DESKBOOK § 10.80 (5th ed. 2007); *see, e.g.*, 157 Cong. Rec. S7874-75 (daily ed. Nov. 18, 2011); 157 Cong. Rec. S4303 (daily ed. June 30, 2011); 156 Cong. Rec. S587 (daily ed. Feb. 11, 2010). In fact, the Senate confirmed numerous nominees by unanimous consent the very day it agreed to hold the pro forma sessions at issue here. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011). If the Senate can pass legislation by unanimous consent during a pro forma session, then it can surely confirm the President's nominees in the same manner, especially if there is an immediate and indisputable need for it to do so. Further, Senate committees often consider presidential appointees when the Senate is in intrasession recesses. During the intrasession recess from January 7 to January 20, 1993, for example, Senate committees "considered nearly every one of President-elect Clinton's cabinet nominations." Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)). Had some national emergency over the holiday break made the filling of a vacant office imperative, there is no doubt that the Senate would have been able to confirm a nominee at one of its pro forma sessions. Nor is there any doubt that the President could have called the Senate into session for the purpose of performing its advice and consent function, if he determined that the national interest required him to do so. U.S. CONST., ART. II, § 3, cl. 2.

The OLC opinion answers that, even if in fact the Senate is able to act during its pro forma sessions, the President "may properly rely on the public pronouncements of the Senate that it will not conduct business." 2012 OLC Op. at 21. There are several problems with this argument.

First, the Senate's scheduling order directing that no business be conducted during pro forma sessions was entered by unanimous consent, and there can be no doubt that the Senate was perfectly free to overrule it, and to conduct business, by unanimous consent. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 1313 (1992) ("A unanimous consent agreement can be set aside by another unanimous consent agreement."). Surely, under a "practical construction" of the Recess Appointments Clause "focusing on the Senate's ability to provide advice and consent to nominations," 2012 OLC Op. at 4, the indisputable practical reality that the Senate is able to provide advice and consent to nominations during a pro forma session trumps a non-binding public pronouncement to the contrary. Second, given that the Senate passed a law during its pro forma session on December 23, prior to the January 4 recess appointments, the President plainly was not entitled to rely on the Senate's *repudiated* public pronouncement that no business would be conducted at such sessions. If a Senate recess is defined as any period during which the Senate is not available to conduct business, then surely the Senate cannot be in recess when it passes legislation. Finally, President Obama in fact has not relied on the Senate's no-business pronouncement. It was the President who urged the Senate to pass the two-month extension of the payroll tax cut during the holiday adjournment, and he promptly signed the bill into law notwithstanding that it was passed by the Senate in plain violation of the order scheduling the December 23 pro forma session. The President surely is not entitled *both* to rely on the Senate's public pronouncement that it will not conduct business *and* to ignore it, as he pleases.

Rather than furthering the purpose of the President's recess appointment power, the OLC opinion would allow that power to swallow the Senate's authority to withhold its consent when it believes a nominee should not be confirmed. The President's January 4 recess appointments had nothing to do with whether the Senate was available to act and everything to do with the Senate's unwillingness to confirm the President's nominees. As with every branch of our government, there is "hydraulic pressure" within the Executive "to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Regardless of whether the President has sought to exceed his power for good or ill, it is Congress' constitutional responsibility to resist him.

Mr. SMITH. Thank you, Mr. Cooper.
Mr. Elwood?

TESTIMONY OF JOHN P. ELWOOD, VINSON & ELKINS

Mr. ELWOOD. Mr. Chairman, Ranking Member Conyers, thank you for giving me the opportunity to appear before you this morn-

ing, and present my thoughts on the constitutionality of the President's January 4 recess appointments. I will confine my prepared remarks this morning to the question of their constitutionality, not whether they were advisable or appropriate, as a matter of comity, between the branches of government.

The executive branch and the Senate have long used a practical and functional test to determine when the Senate is in recess for purposes of the President's recess appointment authority. As Congressman Nadler noted, the Senate Judiciary Committee wrote in an authoritative 1905 report that the Framers meant 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 the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, when its Members owe no duty of attendance when its chamber is empty."

Based on the language of the Senate orders creating the recess, I believe the President reasonably concluded that the Pro Forma sessions held around the time of the appointments did not interrupt the ongoing recess of the Senate.

The recess order specified that the Senate would hold "Pro forma sessions only, with no business conducted." As the name "pro forma" makes clear, the sessions had only the form and not the substance of a legislative session. The Senate has held scores of pro forma sessions during 22 recesses since the procedure was first used in November 2007 to prevent recess appointments. Overwhelmingly, each session has lasted only about 30 seconds, and true to the terms of the recess orders, no business has been conducted.

The Senate's other actions confirmed that they were in recess at the time. Before this recess, the Senate put in place a special mechanism for what the Senate procedure manual calls recess appointments to commissions, committees, and boards, reflecting recognition both that normal procedures wouldn't work, because of the recess, and that it is important to keep positions filled.

Under the circumstances, the "mass of mankind" would conclude that the Senate remained in recess, despite the pro forma sessions. And, indeed, the public statements of senators reflect their belief that the Senate was not available for the entire recess, and that no legislative business would be done during that time.

I acknowledge that there are at least three credible arguments for why the pro forma sessions did interrupt the Senate's recess, as Mr. Cooper has recited. The implication of these arguments is that the appointments were made during what is essentially a 3-day recess. Ultimately, I do not find the arguments persuasive.

First, it is true that the pro forma sessions here were not simply conducted to prevent recess appointments. Because the House did not consent to adjournment, reportedly, in order to prevent recess appointments, the session sought to satisfy the requirement of Article I that neither house shall adjourn for more than 3 days without the consent of the other.

One session was also held to satisfy the 20th Amendment's requirement that Congress must meet on January 3, unless it provides otherwise. But assuming the pro forma sessions satisfy those

requirements, it does not follow that they would interrupt the recess of the Senate for purposes of a differently worded provision of a different article of the Constitution that was intended to serve a very different need, to keep offices filled.

In constitutional law, context matters. The very same clause of the Constitution gives Congress the power to regulate commerce, "Among the several States and with the Indian tribes." But Congress has plenary authority to regulate Indian affairs, but not interstate commerce.

It is reasonable to believe that Congress has greater leeway to use pro forma sessions for internal legislative branch operations than it does to affect the powers of another branch. And while there is a historical tradition of using pro forma sessions for legislative purposes, there is no comparable tradition of using a series of such sessions to deny the President authority to make appointments during what would otherwise plainly be a lengthy recess.

Second, the Constitution gives the Senate the power to determine the rules of its proceedings. But the courts have recognized that a House's power to govern its internal affairs does not give it license to override constitutional limits on its authority, such as by impairing the functions of a coordinate branch. It is particularly difficult for the Senate to justify denying the President the ability to keep executive offices filled at a time it grants its own leadership authority to make appointments despite the recess.

Finally, it is true that twice during the 111th Congress the Senate enacted legislation by unanimous consent during what were originally scheduled to be pro forma sessions. I do not believe those two unusual episodes, which involved extraordinary efforts to avert imminent harm, prove that the Senate is available, as a general matter, to do work during pro forma sessions.

The recess order here explicitly said that no work was to be conducted during the sessions. And as the Congressional Research Service concluded just last month, "Normally, it is understood that during a pro forma session, no business will be conducted".

Even before these two outlier sessions where legislation was passed, Senators stated, quote, "We are not going to be able to consider legislation, unquote, during the recess. If even Members of the Senate believe there is no reasonable possibility of performing legislative work during pro forma sessions, I see no basis for holding the President to a higher standard.

I look forward to answering your questions.

[The prepared statement of Mr. Elwood follows:]

STATEMENT OF JOHN P. ELWOOD

Before the U.S. House of Representatives Committee on the Judiciary

Executive Overreach: The President's Unprecedented "Recess" Appointments

February 15, 2012

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)

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[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.

* * * * *

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.

Mr. SMITH. Thank you, Mr. Elwood.

Professor Turley?

TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC LAW, GEORGE WASHINGTON UNIVERSITY

Mr. TURLEY. Thank you, Mr. Chairman, Ranking Member Conyers, Members of the Committee, my name is Jonathan Turley.

And I am a law professor at George Washington University. It is an honor to appear before you today to talk about such an important issue in our constitutional scheme.

It is also an honor to follow my two esteemed colleagues. Although, I feel a bit like Rocky III, that all of the good themes and characters have been taken. So I am probably going to rely heavily on my written testimony to fill out what has already been addressed. But I would like to amplify a couple of points.

First of all, I want to say at the outset that I have long supported Mr. Cordray, who I thought was a very well-qualified nominee. This has nothing to do with him. To the contrary, constitutional analysis has to be dispassionate and detached. On this occasion, whether one supports the nomination or does not, it is really immaterial to the constitutional analysis. What is material is what I view as a circumvention of the delicate balance created in our system by the Framers.

I should note that often in this debate it has been cited that this was required, because of the extraordinary politics of our time. I just want to emphasize, as a matter of accuracy, that there is nothing extraordinary about our current politics. Indeed, the Framers would have viewed our current politics as relatively tame. When the Framers were doing what you do now, the political situation was positively lethal, with Federalists and Jeffersonians not just trying to arrest each other, but in some cases, put each other to death. So we should not forget that people like Jefferson called his opponents the, quote, Reign of the witches. This was a fairly intense period. The divisions were quite deep.

We shouldn't allow dysfunctional politics to justify dysfunctional constitutional measures. I believe this is one such measure. I believe that President Obama has, indeed, violated the Constitution with these appointments.

I will now return to the language of Article II, Section 2, Clause 3. We have talked about it, but I will simply note, I have often viewed this to be not a closed question. I think the plain meaning of the recess appointments clause is obvious. I subscribe to the original interpretation of the clause. Ironically, I believe that if Congress stayed with that original interpretation, which was written for very good reasons, to only apply to vacancies that occur within a recess, we would have avoided much of the controversies we have seen in modern time.

It is not a provision that is supposed to circumvent the checks and balances of the system, particularly the preceding clause, which is the appointments clause. What it does is it requires a President to convince Congress. That is what the checks and balances are. Congress is allowed to block or reject a nominee for good reason, bad reason, or no reason at all. They have to work together.

Now, as a father of four, I often have to tell my kids that recess is not a time, really, where rules don't apply. Unfortunately, Presidents have treated recesses that way, that it somehow relieves them of those requirements of checks and balances. It does not, in my view.

I also want to emphasize something that is quite important. As my able colleagues have addressed some of the legal issues and interpretations that go into this language, much of this debate is de-

tached from the reality of the clause, of why it was enacted. I don't believe there is any question as to what the Framers saw as being accomplished by the recess appointments clause. Because back then, recess appointments were not viewed as uncommon. To the contrary, they were very common. But they were common, because Congress often recessed for 6 to 9 months. So Congress was not here. Your predecessors would travel on dirt roads by horse, to far distances, and they would disappear. So the recess appointments clause was desperately needed, particularly when you had a Supreme Court with only six members. You couldn't really have many vacancies. So, indeed, it was used a great deal. But the purpose was also obvious. It was something that you needed to act on out of necessity.

In my testimony, I point to the views expressed by Alexander Hamilton, which quite clearly reject the current views of the clause. It also refers to objections made for the recess appointments clause. It is threatening a monarchal system of powers for the President. Those objections were opposed by Framers, who pointed out that this was a very limited power. And I would encourage that the views of the first attorney general of the United States, Edmund Randolph, be considered.

Randolph was in a unique position to interpret the clause. He was not only a Framer, but he was actually on the committee on detail, one of the most important groups in the Constitutional Convention. Randolph was also a remarkably principled man. A brilliant lawyer. He was presented with this question when the ink was barely dry on this clause. And he said clearly, it could not be used for a vacancy that did not occur during the recess. That view was amplified later by other attorney generals in our history.

The OLC opinion that has been issued by the Obama administration is certainly well written and well researched. I have a lot of respect for that office. I strongly disagree with the conclusions of that opinion. It tries too hard to thread the needle on this. I think the clear language and purpose of the clause is being frustrated.

I have been a critic of past recess appointments, including appointments by President Bush. But this is, indeed, a standout. We have not seen a recess appointment quite like this one. I believe it should unify Members of this institution.

After this clause was ripped from its textual moorings, it has floated dangerously in the choppy waters between the executive and legislative branches. It has done a disservice to the country over that period. As I often tell my students, in a Madisonian system it is often as important how you do something as what you do. I think this is the wrong means.

Thank you for your time.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University

Executive Overreach:
The President's Unprecedented "Recess" Appointments

Committee on the Judiciary
United States House of Representatives

2141 Rayburn House Office Building

February 15, 2012

Chairman Smith, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the constitutional concerns raised by the recent recess appointments by President Barack Obama.

The recent recess appointment of Richard Cordray as Director of the Consumer Financial Protection Bureau and three individuals to the National Labor Relations Board[1] has triggered an intense debate over the constitutionality and legitimacy of recess appointments. However, this is only the latest in a long line of such controversies. As you know, recess appointments have been controversial for much of our history, though (as I will explain) the meaning and use of recess appointments has changed dramatically over two centuries.

At the outset, I wish to be clear that I believe Mr. Cordray is a well-qualified nominee and I supported his confirmation. I have also been a critic of congressional practices and rules used to block nominees such as blue slipping.[2] However, my views of the merits of the Cordray appointment or national politics are immaterial. Rather this question concerns the balance of constitutional power between the legislative and executive branches. In my opinion, these appointments circumvent the delicate balance of power in our Constitution and radically distort the purpose of the Recess Appointments Clause. Moreover, these latest appointments are stand

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1 I will refer to these appointments as "the Cordray appointment" for the sake of brevity and since it was Cordray appointment that was the subject of such express opposition before the claimed recess period.

2 *See* Jonathan Turley, *Seeing Red Over Blue Slipping*, L.A. Times, May 16, 2001, http://articles.latimes.com/2001/may/16/local/me-64023. Blue slipping is a practice that has a negative impact on the entire confirmation process and invites abuse by Senators. It is also used by presidents to reinforce claims that recess appointments are justified as countermeasures for such undemocratic procedures.

outs among rather ignoble company – they openly defy congressional opposition and circumvent congressional authority. The Cordray and other appointments constitute an abuse of power and invite future presidents to engage in the same dysfunctional game of brinksmanship.

As noted below, the Framers' original concerns that spawned the Recess Appointments Clause have largely been ameliorated by longer congressional sessions. Now, such appointments are often made out of political expedience but achieve such short-term political goals at a heavy cost to the constitutional system. While I have strong reservations concerning the constitutionality of these appointments, I have even stronger objections to the appointments as a matter of policy and practice. There is a good-faith debate over the meaning of Article II, Section 2 of the U.S. Constitution. Yet I do not see the positive precedent set by appointments during a recess of less than three days – a virtual blink of Congress used to circumvent the confirmation process. Reducing the constitutional process to a type of blinking contest between the branches only degrades and destabilizes a system upon which all of the branches – and the American people – depend.

Throughout history, the interpretation of this Recess Appointments Clause has evolved to the increasing benefit of the Executive Branch – allowing the Clause to be used to circumvent congressional opposition. Indeed, the debate today is generally confined to the question of what technically constitutes a "recess" for the purposes of the Clause, treating as settled the question of whether the Clause can be used to fill a position that the Senate has chosen to leave vacant. In my view, the Clause is now routinely used not only for an unintended purpose but a purpose that is inimical to core values in our constitutional system. I have long favored the original interpretation of the Clause: that it applies only to vacancies occurring during a recess. This interpretation is truer to the Constitution and would avoid many of the controversies of modern times. I readily admit that I am in the minority on that view, but I discuss the original and later interpretations to demonstrate how far we have moved from the plain meaning of the Clause. Frankly, I believe that our system would be far better off under the original meaning of the Clause, which would have avoided many of the controversies of modern times.

Putting aside my preference for original interpretation, I view the latest appointments as radically divorced from both the language and the logic of the Clause, even including the broader interpretations that have governed recess appointments for much of our history. It has long been accepted that presidents can make recess appointments to vacancies that existed before the recess began, but it has not been accepted that presidents can properly make those appointments during brief breaks of less than three days – a time period derived from the Adjournments Clause. The latest appointments can only be justified by discarding both the plain meaning and the long history behind this Clause. Worse still, the appointments directly contradict the values and purpose of the shared powers under the first two articles. In the end, the President's contortion of the meaning of the Recess Appointments Clause does not improve our system, but introduces the very scourge that the Framers sought to avoid: the concentration of power in one person over federal offices.

One final point before looking at the language and history behind this Clause. There is a common habit of referring to our current "extraordinary" political divisions as justifying extraordinary measures. However, there is nothing extraordinary about our current politics. If

anything, our current political discourse would have been viewed as relatively tame by the Framers. The Framers knew something about rabid politics and its expression in legislative and executive measures. The division between the Jeffersonians and the Federalists was quite literally lethal with both sides seeking to arrest or even kill their opponents. Thomas Jefferson referred to his Federalist opponents as "the reign of the witches."[3] We should not use our dysfunctional political divisions to justify taking dysfunctional constitutional measures. Regardless of one's interpretation of the language and history of this Clause, there should be consensus -- certainly in Congress -- that these latest appointments do both the Constitution and our country a disservice.

I. THE LANGUAGE OF THE RECESS APPOINTMENTS CLAUSE.

The most obvious place to start (and ideally end) constitutional analysis is with the text of the Constitution. Article II, Section 2, cl. 3 of the U.S. Constitution states:

> The 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.

The meaning of the words "that may happen during the Recess of the Senate" is the heart of the controversy. On their face, the words imply that the vacancies themselves should arise during the recess period, as opposed to existing as previously vacant positions that the Senate chose not to fill with a confirmation vote. The words "may happen during the Recess" are clear and plain in their meaning. Most people would conclude that something "happens" during a period by occurring within the specified period. Merriam-Webster defines "happens" as "to come into being or occur as an event, process, or result." The event referenced in the Clause is the recess and the thing that comes into being within that event is the vacancy.

The text preceding this Clause is also relevant and reinforces this plain meaning. The Recess Appointments Clause follows the Appointments Clause, which describes the confirmation process and provides shared powers in the appointment of high-ranking officials. Article II, Section 2, cl. 2 of the United States Constitution states:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In the Appointments Clause, the Framers state twice that such appointments could only

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[3] In his letter to John Taylor on June 4, 1798, Jefferson counseled "a little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles."

be made with "the Advice and Consent of the Senate." It is a critical check and balance provision that the two branches must agree on who should sit on federal courts and in federal offices. Thus, the Recess Appointments Clause is written as an exception to this general rule in the event that vacancies "happen during the Recess of the Senate." Notably, there is no suggestion that it is intended to allow an alternative to the confirmation process to be used on an opportunistic basis or in retaliation for a nomination that was not confirmed. To the contrary, the values of shared power stated repeatedly in the preceding clause indicate that those are the defining values for the interpretation of the clause. A president must convince Congress on the merits of a confirmation and Congress may withhold its consent for good reason, bad reason, or no reason at all. That is the nature of a shared power of nomination and confirmation.

Even if one dispenses with the plain meaning of the Clause, the language at a minimum closely tethers the meaning to the inability to fill a position during a recess. What it does not indicate or support is the idea that the recess bears the same meaning as it does in elementary school: a time to play outside of the usual rules.[4] The language states that the Clause is there for appointments that cannot be addressed by Congress due to its absence. Unfortunately, the language was adopted in the Constitutional Convention without debate – denying us a contemporary record on the intent of the Framers at that time. 2 The Records of the Federal Convention of 1787, at 533, 540 (Max Farrand ed., rev. ed. 1966). Thus, given the disagreement over the plain meaning, we can turn to the early understanding and interpretation of the Recess Appointment Clause.

II. THE ORIGINAL MEANING AND THE EARLY INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE.

As we have seen, the most natural reading of the Recess Appointments Clause would favor the view that it was intended to address vacancies that occur during a recess. This is not to say that such an eventuality was viewed as unlikely or uncommon. To the contrary, it was anticipated that the Clause would be used with some regularity because, during this period, Congress was commonly in recess for much of the year. Members had to travel far distances on horseback or carriage, often along dirt roads to meet. It was not uncommon, therefore, for a recess to last six or even nine months. During those years, critical federal positions such as the Chief Justice of the Supreme Court would have to remain vacant absent the power to temporarily fill the positions until Congress returned.

The historical context of the Clause is lost in much of the modern debates over its meaning. Indeed, it is often suggested the Clause would become largely meaningless were it limited to vacancies that occur during a recess or even if limited to more substantial recesses. Since the vast majority of modern vacancies "happen" before a recess, it would be rare to have a valid recess appointment. However, this complaint misses the point: the diminished importance of the Clause is caused by changes to Congress' schedule, not to the original constitutional function of the Clause. At the time it was drafted and for much of our history, such recess vacancies were indeed quite common with Congress out of session for many months at a time.

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[4] Jonathan Turley, *Recess Appointments and Cordray Controversy*, USA Today, February 15, 2012.

Presidents Jackson, Taylor, and Lincoln alone made hundreds of recess appointments during their terms out of necessity with Congress out of town. These included appointments to the Supreme Court, which was smaller in size than it is today – making vacancies more significant in their impact. This is not to say that some of these appointments were not controversial, but the controversy often turned on the fact that the President appointed someone who did not have the support of most members.

This more limited interpretation is supported by early defenses and descriptions of the Clause. When various leaders at the time objected to the dangers of a president making unilateral appointments, even on a temporary basis, Alexander Hamilton and other advocates emphasized that the Clause was a limited precaution to handle vacancies. In *The Federalist Papers*, Alexander Hamilton referred to the recess appointment power as "*nothing more* than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (Alexander Hamilton) (emphasis added). There was never a suggestion that the confirmation process was "inadequate" due to congressional opposition or delay of a preexisting vacancy. Rather, the inadequacy referenced the inability of a vacancy to be filled. Hamilton went on to stress that the Clause was designed in recognition that Congress could not be expected to remain in session continually:

> "The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of offices; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause [the Recess Appointments Clause] is evidently intended to authorise the President *singly* to make temporary appointments . . . ." *Id.*

Hamilton again referenced the limited recess appointments power as occurring only when the joint power over federal offices shared with the Senate cannot be practically realized. This meaning was reaffirmed in 1799 when Hamilton was asked by the Secretary of War about the meaning of the Clause. Hamilton, then serving as Major General of the Army, strongly contested any claim that a recess appointment could be used to fill a preexisting vacancy: "[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate."

During the North Carolina ratification debate, Archibald Maclaine also rose to address concerns over the use of the Clause to circumvent Congress. In his statement, he referred to the fears of a president using the Clause to make unilateral appointments. He assured his colleagues that the president is given this limited authority simply because he is the only official who does not go into recess but rather remains active throughout his term:

> It has been objected . . . that the power of appointing officers was something like a monarchical power. 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 . . . 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.

Note the description of the context for such exigencies. Maclaine emphasized that the Senate would simply not be available "to advise [the President] in the appointment of officers" because it would sit only "from time to time."[5] Clearly a vacancy that preexisted a recess would have allowed for such advice from the Senate, including advise that a nominee is opposed by Senators or unlikely to receive sufficient votes. Likewise, the use of a brief interruption of less than three days would not reflect the obvious purpose of the Clause to avoid the "public inconveniences" of a position going months without an official. The "monarchical power" described by critics is precisely the power to use the Clause to circumvent opposition in Congress – the very use to which it is often put in modern appointments, including the Cordray nomination.

The earliest interpretation by the Executive Branch followed this narrow view of the Clause. In 1792, Thomas Jefferson (then Secretary of Foreign Affairs) raised the meaning of the Clause with Edmund Randolph, the first Attorney General and one of the most influential members of the Constitutional Convention (and a member of the important Committee on Detail). Randolph, uniquely qualified to answer the question as a Framer, came down squarely on the side of the plain meaning of the Clause - that it applies only to vacancies arising during a recess. Unlike modern interpretations (including the recent opinion of the Office of Legal Counsel on the Cordray appointment), Randolph's interpretation ran against his own interest and that of the Administration in which he served. Jefferson wanted to know if a recess appointment could be used to install the new Chief Coiner of the Mint. Since this was a new position, Jefferson asked if the position could be viewed as a vacancy arising during a recess. After all, no nomination had been made before the recess. Randolph, however, displayed his characteristic legal acumen and independence. Randolph demurred and said that the vacancy did not fit the extremely narrow meaning and purpose of the Clause. He posited that the vacancy "happened" not during the recess but when the position was created. To use the Recess Appointment Clause, he insisted, would violate the "spirit of the Constitution." Moreover, Randolph warned that the Recess Appointments Clause had to be "interpreted strictly" because it represented "an exception to the general participation of the Senate." I have always found Hamilton's and Randolph's interpretation to be the most faithful to the language and history of the Clause as well as to the structure and the integrity of the Constitution.

III. LATER INTERPRETATIONS AND APPLICATIONS OF THE RECESS APPOINTMENTS CLAUSE

For much of our history, hundreds of officials were given recess appointments by presidents from George Washington to Abraham Lincoln out of true necessity. This included

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[5] Other references to the clause were quite limited and often only restated the terminology of the Clause. *See*, *e.g.*, 2 Elliott's Debates 513 (statement of Thomas M'Kean) (Dec. 11, 1787) ("Nor need the Senate be under any necessity of sitting constantly, as has been alleged; for there is an express provision made to enable the President to fill up all Vacancies that may happen during their recess . . . . ")

appointments to the Judiciary, where lifetime tenure is a core guarantee of the independence of judicial review. Ironically, some of these appointments proved the wisdom of requiring confirmation. For example, George Washington gave a recess appointment in 1795 to John Rutledge of South Carolina to serve as Chief Justice of the Supreme Court. Rutledge was himself a member of the Constitutional Convention and chaired the important Committee on Detail. He was a successful lawyer and a central leader of the Revolution in South Carolina. However, he was later described by South Carolinian members as prone to "mad frollicks" and "frequently so much deranged, as to be in a great measure deprived of his senses." Rutledge tried repeatedly to drown himself in various rivers before finally resigning within a year of his appointment. Had Rutledge been subject to the confirmation process, his "mad frollicks" may have been addressed. Yet, the appointment fit the standard set by Edward Randolph (who ironically served with Rutledge as a member of the Committee of Detail and a framer of the Constitution). During a long recess of Congress, U.S. Supreme Court Chief Justice John Jay resigned on June 28, 1795 to assume the post of Governor of New York (a post that he ran for while still sitting on the bench). With Congress out of session, Washington appointed Rutledge as the second Chief Justice of the United States on June 30, 1795. Despite disasters like the Rutledge recess appointment, the practice continued out of necessity due to the long congressional recesses.

Almost four decades after the adoption of the Constitution, a more liberal interpretation of the Clause was put forward by Attorney General William Wirt – an interpretation that not only failed to mention the view of the first attorney general but dismissed the statements of contemporaries on its meaning. Wirt announced that he would interpret the Clause to mean that recess appointments could be made for any vacancies that existed during the Recess as opposed to occurring during the Recess. While acknowledging that the "opposite construction is, perhaps, more strictly consonant with the mere letter" of the Clause, he insisted that the more liberal interpretation was in keeping with the Clause's "spirit, reason, and purpose." It was, in my view, an opportunistic interpretation by Wirt – an interpretation eagerly embraced by later presidents desiring a broader range of recess appointments. Notably, however, (as will be discussed below) the recent OLC opinion goes beyond even the Wirt interpretation.

Wirt's interpretation was founded on the overriding view that the purpose of the Constitution was to avoid vacancies. "The substantial purpose of the Constitution," he said, "was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed."[6] What is missing from this analysis is the countervailing purpose of the Constitution to compel both branches to work together in filling these positions – the substantial purpose of the preceding Appointments Clause.

Wirt converted the words "as may happen to occur during the Recess" in the Clause to "as may happen *to exist* during the Recess." Vacancies could "happen to exist" for a number of reasons, including the Senate's opposition to the candidate or a president's gaming the system for a recess appointment. In rephrasing the Constitution, Wirt made the existence of a vacancy the sole and outcome-determinative consideration, stating that he found it "highly desirable to avoid a construction" that would produce the "pernicious" and "ruinous" result of allowing a

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[6] 1 Op. A.G. at 632.

vacancy to continue through a recess. To reinforce his view, Wirt hypothesized a variety of exigent circumstances:

> "It may arise from various other causes: the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions: a sudden and destructive pestilence, disabling or destroying a quorum of that body; such an invasion of the enemy as renders their reassemblage elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the President in the last hour of their session, and inadvertently rising before a renomination can be made."

The parade of horribles offered by Wirt only reinforces the view that the motivating underlying the Clause (and his broad interpretation of it) are not as relevant to the modern Congress. All of these examples presuppose the type of lengthy recess that existed at the time with months of inactivity. Moreover, Wirt also reflects the problem with delays in notification of such things as the death of an official in a far off part of the country – a death which would today be almost immediately known. Congress has even prepared for disaster like the loss of the capital city, let alone the Capitol building.

The real motivating concern of Wirt's interpretation was loosening the grip of Congress over federal appointments. At issue was the desire to fill a position of a Navy agent in New York, which became open during the Senate term and remained open into the intersession recess. It did not happen to be caused by any of the occurrences listed by Wirt and there is no indication that it could not have been addressed during the regular session, as it was known that the previous appointment would expire during the session. It was a poor choice for establishing a sweeping interpretation, but Wirt did his best:

> "If we interpret the word 'happen' as being merely equivalent to "happen to exist," (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished."

It is a prophetic choice of words: the use of the power to address "all vacancies . . . from any casualty." The common "casualty" in controversial appointments like Cordray's is the occurrence of congressional opposition to confirmation. The "casualty" is the very right of advice and consent created in the preceding Appointments Clause. Accordingly, it is not surprising that recess appointments under the Wirt interpretation included flagrant efforts to circumvent Congress during periods of political division – with higher numbers of such appointments during such periods. President William Clinton made 139 recess appointments while President George Bush made 171 such appointments. Once the occurrence of the vacancy was decoupled from the period of the recess, controversies mounted over the circumvention of Congress. Indeed, many of these controversies closely resemble the very hypotheticals put forward by opponents before ratification – and denied by Framers as the function of the Clause.

There were many who disagreed with Wirt's opportunistic interpretation. However, it was Congress that undermined its own institutional authority. While (as I discuss below) Congress has periodically moved to restrict recess appointments, the Justice Department argued that the failure to aggressively oppose the Wirt interpretation meant that Congress had accepted it. This perceived passivity was then cited for increasingly liberal interpretations of the Clause. By 1862, Attorney General Edward Bates was able to advise Lincoln that there was no longer any debate over his filling preexisting vacancies since the matter "is settled . . . as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." A few judges have also relied on historical practice to justify the Wirt interpretation as a "settled" question, though the Supreme Court has never ruled on the controversy.[7] In *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005), the Eleventh Circuit not only started its analysis with a heavy presumption that a president's actions are constitutional (because he took an oath to uphold the Constitution),[8] but (after a rather cursory treatment of the language and history of the Clause) emphasized that [h]istory unites with our reading to support our conclusion."[9] The dissenting judge in that case, however, correctly dismissed the use of historical practice to supplant the plain meaning of the text. *Id.* 1228 n.2 ("the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.").

Bates' reliance on historical practice is a common defense of the broad view of the Clause. Such historical practice arguments are, in my view, a poor substitute for constitutional analysis. The mere fact that Congress has failed to protect its powers under the Constitution does not change that document's meaning any more than a long history of appointing officials without Senate approval during sessions would constructively change the meaning of the Appointments Clause. These arguments often sound like a form of constitutional adverse possession, where presidents can now claim constitutional territory left unclaimed or undefended by Congress. Such views would leave the Constitution dependent on the historically unreliable priorities and actions of officials in both the Executive and Legislative branches. James Madison sought to create a system that recognized the often flawed nature of mankind. He famously warned: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." The fact that presidents have historically gotten away with abusing recess appointments is not a compelling basis for establishing the meaning of this Clause.

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[7] *See also Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 n. 13 (Ct. Int'l Trade 2002).

[8] Some courts adopt what could be viewed as a blind eye to the obvious gaming that occurs in these disputes, noting that such use of presidential power "cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies." *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962). One only has to recall Madison's admonition of "if men were angels" (discussed below) to refute such assumptions.

[9] *See also Nippon Steel Corp.*, 239 F. Supp. 2d at 1374 n. 13.

With the effective elimination of the occurrence language from the Clause, later interpretations struggled with the question of what constituted a "session." On its face, a session refers simply to the period between the reconvening of Congress (after a prior *sine die* adjournment[10]) and the next *sine die* adjournment. However, the reconstruction of the Clause produced considerable gaming of the schedule and terminology as both branches struggled to assert their authority over federal offices. Once again, the most obvious meaning of recess - including only *intersession* recesses between the first and second sessions of Congress - soon became too restrictive for political advantage. In my opinion, intersession recesses were clearly the type of recess complicated by the drafters. After all, *intrasession* recesses are often short and the necessity of recess appointments cited by people like Hamilton are absent in such brief breaks. Indeed, early commentary seemed to refer to the intersession recess of Congress. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) ("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.").

Yet, as political divisions mounted in modern times, presidents began to claim that intrasession recesses are encompassed by the Clause. This began with President Andrew Johnson and has continued to this day.[11] Between 2001 and 2007, for example, President George Bush made a total of 171 recess appointments. Of those, an astonishing 141 were made during intrasession recesses averaging only twenty-five days.[12] The result was to reduce the debate to how long of a recess is needed to invoke the power of recess appointments.

Intrasession appointments, however, remain constitutionally dubious to many academics and jurists. Indeed, this question came up in the challenge to the appointment of Judge William H. Pryor in 2004 when the Eleventh Circuit found that the recess appointment was valid.[13] Pryor was given an intrasession appointment on February 20, 2004 during an eleven-day recess. Associate Justice John Paul Stevens wrote a relatively rare concurrence to the denial of certiorari in which he noted that the Pryor controversy "raises significant constitutional questions regarding the President's intrasession appointment." *Evans v. Stephens*, 544 U.S. 942, 942-43 (2005) (Stevens, J., respecting denial of certiorari). While he agreed that certiorari was not appropriate in the case, he cautioned that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits." *Id.*

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[10] *Sine die* comes from the Latin "without day," indicating adjournment without a further meeting or hearing.

[11] This practice has been supported by a few courts, which reviewed intrasession appointments. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1221-22, 1227 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 117 (C.C.N.D. Ga. 1880).

[12] Congressional Research Service, *Recess Appointments Made By President George W. Bush , January 20, 2001 October 31, 2008*, at 1-17 (2008) (Henry B. Hogue & Maureen Bearden).

[13] *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005).

The inclusion of virtually any claimed recess as the basis for recess appointments served to shift the analysis from the actual Recess Appointments Clause (and even the general Appointments Clause) to the Adjournments Clause. Article I, Section 5, clause 4 states that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Under the Adjournments Clause, Congress routinely passes a concurrent resolution to adjourn. Conversely, either house can effectively bar the adjournment of the other house by declining to concur in the adjournment. Since the Adjournment Clause indicates that breaks of less than three days do not require bicameral consent, it would appear clear that such short periods were not viewed as a recess for either the Adjournments Clause or the Recess Appointments Clause. This was the position taken by the Justice Department in *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993). Because Sundays are not generally considered in this calculation,[14] the result is that four-day breaks have historically not been viewed as a recess. Most recess appointments, even with the inclusion of the intrasessions, have been well beyond four days. The shortest such modern recess appointment was 10 days.

While the three-day rule is a world apart from the original meaning of the Clause as first articulated by Hamilton and our first Attorney General, it did offer a textual basis for some limitation on the use of recess appointments and an acknowledgment that such recesses cannot be defined as virtually any interruption in business of Congress. It is that interpretation that was shattered with the Cordray Appointment controversy.

IV. THE CORDRAY APPOINTMENT AND OLC OPINION

In the Cordray appointment, the Obama Administration combined virtually every controversial element in the use of the Clause into a single recess appointment – a perfect constitutional storm. Not only did the President chose to make an intrasession appointment but he did so during a break of only three days in claiming that he could not wait for Congress to return. He took this step to install an official who had been previously considered by the Senate and blocked by a vote of 45 members in a filibuster. The White House could have easily arranged for this to be an intersession appointment, but selected a day that added the intrasession controversy to the mix – creating an unprecedented test case of a modern appointment.

The appointment came on January 4, 2012. The Senate had set two pro forma sessions by unanimous consent to run on January 3rd and January 6th – part of the schedule set for December 20, 2011 to January 23, 2012. However, Congress convened on January 3, 2012 as the start of the second session of the 112th Congress.

Notably, the fact that this was deemed a "pro forma" session, it did not forestall the possibility of business being conducted by Congress. On December 23, 2011, the Senate convened and passed a major piece of legislation, the Temporary Payroll Tax Cut Continuation

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[14] U.S. Congress, *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Twelfth Congress*, 111th Cong., 2nd sess., H. Doc. 111-157 (Washington: GPO 2011); *Congressional Research Service*, Report RS21308, *Recess Appointments: Frequently Asked Questions* (Henry B. Hogue).

Act of 2011. Thus, while using a pro forma session to move a major legislative priority, the Administration proceeded to claim that the pro forma session was void of substance or legislative business.

Throughout the Cordray controversy, it was clear that the impediment for the White House was political, not some inability to submit the nominee to Congress during a recess. Indeed, when Cordray was blocked by the filibuster, President Obama announced, "We will not allow politics as usual on Capitol Hill to stand in the way."[15] Notably, the barrier to Cordray's appointment was a substantive objection of a significant number of Senators to the new board that he would head. Whatever the merits of that objection, the appointment is a common concern for the legislative branch - accountability and funding of federal offices. It is precisely that type of issue upon which presidents are sometimes forced to compromise – or rally political pressure to force opponents to yield. Thus, this was a problem where the Congress and the President were at an impasse and the recess appointment was used to avoid having to engage or compromise with Congress. In a speech announcing the recess appointment, President Obama declared that he would simply not accept the decision to filibuster the nomination, stating, "That's inexcusable. It's wrong. And I refuse to take no for an answer."[16] The President's choice of words is telling. He did indeed receive an answer to his request for confirmation. Forty-five Senators voted to block the nomination in accordance with the Senate's own rules and prior practices. The President was assuring citizens that he would simply not accept that decision of Congress. That is clearly not the purpose of the Recess Appointments Clause and, in my view, contradicts the core principles of the Constitution in establishing our tripartite system of checks and balances. Whether it is the previously discussed Randolph interpretation or the later adopted Adjournment Clause (Three-Day) interpretation (or even the Wirt interpretation), the appointment contradicts the spirit and language of the Constitution. Indeed, it creates a virtually limitless rule for future presidents – allowing the briefest of breaks to be sufficient to circumvent Congress.

The January 6, 2012 opinion of Assistant Attorney General Virginia Seitz and the Office of Legal Counsel (OLC) has been offered by the Administration to explain that the Cordray appointment is consistent with past interpretations and practices. I respectfully disagree with not just the conclusion but the analysis of the opinion of Seitz and the Office of Legal Counsel (OLC). While well-argued and well-researched, the OLC opinion tries too hard to thread the needle through textual and historical sources to justify the appointments. To do so, Seitz resolves every interpretative question in favor of the president – an analysis that should find few allies in the legislative branch by members of either party. Because I respect Seitz and her staff, I was very disappointed in the analysis from an office that is supposed to render detached and dispassionate legal opinions. As shown by towering figures like Randolph, the Justice Department once distinguished itself with analysis that often conflicted with the interests of the governing administration and president. There is simply more advocacy than analysis in this

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[15] Ylan Q. Mui, *Senate Blocks Richard Cordray Confirmation To Head Consumer Watchdog Agency*, Wash. Post, December 8, 2011, http://www.washingtonpost.com/blogs/2chambers/post/senate-republicans-block-cordray-as-obama-consumer-watchdog-nominee/2011/12/08/gIQA6j9BfO_blog.html.

[16] Peter Nicholas, Lisa Mascaro and Jim Puzzanghera, *With Senate Idle, Obama Goes To Work*, L.A. Times, January 5, 2012, at A1.

latest opinion, which contains some glaring contradictions and omissions.

By categorically rejecting the notion of pro forma sessions as avoiding a recess, the OLC insists that it does not have to address how long or how short a recess can be to justify a recess appointment. OLC Op. at 9 n. 13. ("Because we conclude that pro forma sessions do not have this effect [that the Senate is unavailable to fulfill its advice-and-consent role], we need not decide whether the President could make a recess appointment during a three-day intrasession recess. This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment."). It essentially solves the problem by changing the question. By effectively saying that the President decides what is a session for the purposes of the Clause, it simply concludes that these are not sessions to the satisfaction of the President. *But see* Letter for William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 560 U.S. __, 130 S.Ct. 2635 (2010) ("the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.").

While acknowledging the deference given to Congress on defining the meaning of "session" for other constitutional purposes, OLC insists that those applications of pro forma sessions "affect the Legislative Branch alone." Thus they question whether a branch can unilaterally define such a term when it affects another branch in the ability to use a related power. I found this argument the most intriguing since I recently represented members of Congress in federal courts challenging the President's intervention into Libya without a declaration or authorization of war as required under the Constitution. Like the Appointment Power, war is a shared power where the President proposes a war and the Congress must declare it. Yet, the Administration argued that the Congress and the Court must defer to it on what a "war" means. Both the text and the history of the Constitution clearly stated that the Framers did not want a president to be able to take the country to war on his own authority. *See, e.g.*, 1 *The Records of the Federal Convention of 1787*, *supra*, at 19; 2 *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 528 (statement of James Wilson) (Jonathan Elliot ed., 1836) (emphasis added); 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* (Jonathan Elliot ed., 1836) (statement of Edmond Randolph); *see also* James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 433 (Robert Green McCloskey ed., 1967) ("The power of declaring war, and the other powers naturally connected with it, are vested in congress."). However, in the Libyan case, the Obama Administration insisted that the President could define the critical term "war" to the exclusion of Congress. Thus, if the President deemed a military intervention not to be a "war," neither Congress nor the courts could countermand that judgment, according to their interpretation. Indeed, the Administration successfully fought standing in the case – effectively making the unilateral definition unreviewable and unchallengeable.[17] Thus, while the OLC

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[17] I will not return to my prior call for Congress to address the standing crisis in constitutional law where an increasing number of areas are deemed as effectively unchallengeable. I will only add that I believe the Framers would have been astonished that such

insists that the President may define terms that completely negate congressional powers, it insists that Congress cannot define such basic terms as whether it is in session – if a President disagrees. The previous cases deferring to congressional definitions on what constitutes a session reflect the fact that it is the Congress that determines when it will meet and conduct business. The degree to which business is addressed remains with Congress, which (as was shown with the tax legislation) can address substantive business during such sessions.

The courts routinely defer to Congress on how it defines and conducts its business. Article I expressly leaves it to members to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, the Supreme Court has held "all matters of method [of proceeding] are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.") The OLC is correct that this principle is limited and cannot be used to violate other guarantees of the Constitution. However, the OLC's objections to deferring to Congress brushes over the fact that the pro forma sessions are utilized to keep a President from circumventing the Appointments Clause. Once again, the aspirational language hides the fact that it is the President who is engaging in a transparent and artificial claim that he must fill a vacancy because the Senate is not available for a couple of days to offer advice and consent – that is, advice and consent again on a previously blocked nomination.

While insisting that the President may unilaterally end the constitutional debate by declaring a congressional session to be functionally a recess, the OLC does suggest that any recess – even a recess of seconds – could be a legitimate basis for appointments regardless of whether it occurs when Congress is in session or between sessions. Indeed, the only way suggested by the OLC for Congress to protect its constitutional right of advice and consent would be for "[t]he Senate [to] remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations." OLC Op. at 1. The OLC notably never tries to justify such an extreme position in terms of the original or logical purpose of the Clause in the overall context of the appointment process. Nor does it explain why an intrasession recess is not a transparently artificial excuse when Congress is in session and only a matter of days away from advice and consent – conferral that had already been made in the earlier session with unsuccessful results. Even the broader interpretations of recent administrations have acknowledged that the length of a recess can be determinative. Memorandum of Jack L. Goldsmith III to Alberto R. Gonzales, Counsel to the President, *Re: Recess Appointments in the Current Recess of the Senate* at 1 (Feb. 20, 2004) (noting that "a recess during a session of the Senate, *at least if it is sufficient length*, can be a 'Recess" within the meaning of the Recess Appointments Clause") (emphasis added).

The prior opinions of Attorneys General stressed the length of the recess in maintaining a line of shared authority with Congress – a line treated dismissively in the latest opinion. For example, the OLC relies on the 1921 opinion of former Attorney General Daugherty that "the

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a core question as the declaration of war has been left as a matter that is practically unreviewable in such cases as the Libyan challenge.

President is necessarily vested with a 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." *Intrasession Recess Appointments*, 33 Op. O.L.C. at 25. Notably, however, Daugherty also stressed that the length of the claimed recess was key and whether it "is of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." *Id.* at 272. Moreover, Daugherty stated that "an adjournment of 5 or even 10 d[a]ys [could not] be said to constitute the recess intended by the Constitution." *Id.* at 25. The OLC's position erases any real consideration of duration from the calculus while embracing Daugherty's extreme expression of presidential deference. This includes his insistence that "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take." *Id.* The OLC does not explain why the President should be so indulged or, more importantly, why Congress is not entitled to such a presumption as opposed to a president circumventing the Appointments Clause. There are ample reasons to believe that such a presumption rests with Congress. After all, pro forma sessions have been used in other constitutional contexts as true sessions. Thus, the Twentieth Amendment requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." Congress has satisfied this requirement with pro forma sessions. *See, e.g.*, H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979). Likewise, as previously noted, these sessions have been used to satisfy the Adjournment Clause. U.S. Const. art. I, § 5, cl. 4. There is no clear reason why such sessions are sufficient for these other clauses, but not the Recess Appointments Clause. Ironically, while much of the OLC opinion treated historical practice as largely determinative in interpreting constitutional terms in its favor, it dismisses the fact that the very same term ("session") has been left to Congress to define.

In advancing this consistently broad interpretation of the Clause, the OLC opinion relegates to footnotes or dismisses outright the opposing views of past Attorney Generals like Randolph. For example it ignores the views of Attorney General Knox, who wrote at length on the Wirt interpretation and affirmed that it did not apply to intrasession recesses. Knox stressed that, despite the desire to make such appointments, the "period following the final adjournment for the session which is the recess during which the President has power to fill vacancies." *Appointments of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 601-02 (1901). Not only did Knox reject the broad interpretation but specifically clarified that "[t]he opinions of Mr. Wirt . . . and all of the other opinions on this subject relate only to appointments during the recess of the Senate between two sessions of Congress." *Id.* Knox described the very situation in which we now find ourselves: a fluid interpretation that leaves no structure or limits guiding the respective powers of the two branches in cases of appointments. *Id.* at 603 ("If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday."). The OLC simply dismisses such views as "reversed" by Daugherty, OLC Op. at 5 n.6, while representing its current approach as long-recognized and accepted.[18]

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[18] For the record, it is worth noting that OLC opinions are only "reversed" in the mind of the OLC. They are not precedent binding on anyone outside of the Justice Department and, as

Again, the OLC places overwhelming emphasis on what it views as the acquiescence of Congress to its broader interpretation of the Clause. It is the very adverse possession claim that I addressed earlier – the claim that somehow the Executive Branch has acquired title to a power of Congress by adversely occupying the area of recess appointments. Moreover, it omits repeated congressional objections to the increasingly broad interpretations given the Clause, including objections to the Wirt interpretation as "a perversion of language."[19] Yet, even past efforts of Congress to deter some recess appointments is cited by the OLC as *support for* its sweeping claim of recess powers. The OLC cited the Pay Act, 5 U.S.C. § 5503 (2006) as evidence of "congressional acquiescence to recess appointments" because it allowed for payment in some recess cases.[20] Thus, by passing a bill that took a moderate position on the salaries of recess appointees, Congress is said to have acquiesced and conceded that the appointments were constitutional. I have already stated why I find this use of historical practice to be no substitute for constitutional analysis. Again, the OLC suggests a long history of acquiescence by omitting conflicting congressional statements or relegating them to footnotes. *See, e.g.,* OLC Op. at 7 n. 10 (quoting S. Rep. No. 37-80 at 3 (1863) ("It cannot, we think, be disputed that the period of time designated in the clause as 'the recess of the Senate,' includes the space beginning with the indivisible point of time which next follows that at which it adjourned, and ending with that which next precedes the moment of the commencement of their next session."). Congressional opposition to recess appointments has been consistent and vocal, particularly opposition to intrasession appointments. However, due to standing barriers and a judicial disinclination to consider these cases, Congress has faced limited options in combatting abuse recess appointments, which one Democratic Senator described as putting "a finger in the eye of the Constitution." Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees*, N.Y. Times, Mar. 27, 2004, at A1 (quoting Senator Charles Schumer). The fact that Congress did not apply some nuclear option in dealing with such appointments shows an effort to reach a practical compromise and not an acquiescence to the claim unilateral power of presidents. Indeed, the OLC opinion seems to be written on the principle of "no good deed goes unpunished." If anything, the latest OLC opinion would seem to encourage more aggressive responses by Congress to demonstrate its opposition to these claims – a curious message to send the legislative branch.

V. CONCLUSION

Recess appointments have long been a case of shifting alliances for constitutional experts and members who have called for greater adherence to the language and purpose of the Recess Appointments Clause. It is a common dilemma in constitutional law. There is a story that the poet William Wordsworth was once told by a friend that his poem "The Happy Warrior" was his very best work. Wordsworth reportedly responded, "you are mistaken; your judgment is affected by your moral approval of the lines." The point is simple. The reader was enthusiastic about the

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shown in the history of recess appointments and the most recent opinion, represent nary a speed bump for Administrations intent on making conflicting claims.

[19] S. Rep. No. 37-80, at 1 (1863).

[20] Notably, while citing the Act as support for its interpretation of the Clause, the OLC notes later that it has serious "concerns about the constitutionality of the Pay Act." OLC Op. at 17.

poem not because of the poetry but what the poem said about the ideal of Lord Horatio Nelson and the warrior spirit. Constitutional scholars often experience that same fleeting affection for constitutional provisions where members suddenly embrace language due to their political approval of the lines. The Cordray appointment is a prime example. Some members who were silent during the recess appointments of George W. Bush have become vocal opponents of the practice under President Obama. Conversely, Democrats who now stand silent once cried foul when Bush used recess appointments to circumvent significant opposition to nominees. There are others, however, who truly love the Constitution not for their political "approval of the lines" but their approval of the system as a whole – a system of delicately balanced powers that should be maintained regardless of the merits of any particular controversy.

The Cordray appointment is different by an order of magnitude from past controversies under this Clause and should unite members of both parties in asserting their collective institutional interests. In Federalist No. 51, James Madison explained the essence of the separation of powers – and the expected defense of each branch of its constitutional prerogatives and privileges:

> "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

The Framers based their hopes on the stability of the constitutional system on government officials acting to jealously protect the authority of their respective branch (or "department") of government. It was assumed that this would be the case even where a president of the same party was threatening legislative authority – institutional interests would work to maintain the balance of the system. Frankly, their trust in human nature and institutional interest has not been realized in many cases where members of Congress have yielded to the intrusions or circumventions of presidents.

Nevertheless, Congress has sought through the years to prevent the circumvention of the confirmation process. Thus, as early as 1863, Congress used the power of the purse to discourage abusive recess appointments.[21] One such law, 5 U.S.C. 5503(a), reflects part of the original understanding of the Clause and seeks to deny federal salaries to recess appointments made to vacancies that existed during the prior session.[22] Likewise, members have sought to

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[21] Congress has also included provisions in specific bills barring the payment of salaries to individuals appointed with a vote of Congress. *See, e.g.,* P.L. 110-161, Div. D Section 709, 121 Stat. 2021.

[22] However, Congress created exceptions to this rule if the vacancy occurred within 30 days of the end of the prior session or a nomination for the position was pending at the time that Congress went into recess. Additionally, the rule did not apply if a nomination was rejected within 30 days of the end of the session and another person received the recess appointment. The law, in my view, captures the spirit of the Clause even if it is more liberal than the view

reach agreements with presidents to avoid these confrontations. The late Senator Robert C. Byrd (D., West Virginia) was legendary for his defense of congressional authority and the separation of powers. To that end, Byrd reached an agreement with President Reagan to avoid such appointments.[23] Notably, however, Reagan still made 240 recess appointments during his two terms.

The most obvious defensive measure was holding the previously discussed pro forma sessions to keep from triggering the recess option. This was the approach of the Senate majority leader in 2007, Senator Harry Reid (D., Nev.), when he announced that the Senate would be "coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[24] While this practice has been denounced as an artificial and even a ridiculous display, it was compelled by the departure from the plain meaning of the Clause and the circumvention of Congress. Congress was forced to engage in what some view as the theater of the absurd of holding pro forma sessions to protect its express constitutional right of advice and consent. Notably, President Bush respected the line drawn by the Senate and did not make recess appointments between the pro forma sessions in November 2007 and the end of his presidency. I believe that the Framers who would have found the need for pro forma sessions to be against all reason and logic. For their part, presidents have engaged in equally ridiculous practices. In December 1903, President Theodore Roosevelt made the ultimate technical claim of a recess and made more than 160 recess appointments in the seconds between the close one session of Congress and the opening of the next.[25]

Whether it is Roosevelt's "constructive recess" of a few seconds or Obama's recess of a couple of days, these recess appointments notably lack even a pretense necessity in being unable to consult with Congress. With Congress only seconds away for Roosevelt or a few days for Obama, neither could claim any "public inconvenience[]" just presidential convenience. While the OLC treats the pro forma sessions as absurd, it does little to acknowledge the absurdity of the President asserting that the country could not wait for him to have the advice and consent of the Senate -- that would reconvene in a matter of days.

Legislative and informal agreements have not stemmed the tide of recess appointments or their use to circumvent Congress. For many years I have encouraged members to take a more consistent approach to recess appointment abuse. To paraphrase Robert Frost, good fences make good constitutional neighbors. The increasingly broad interpretations of the Clause have left the border between the branches dangerously undefined. It has resulted repeatedly in a game of chicken as with Roosevelt's appointment. The Senate was not willing to strip all of these officers and officials of their posts and relented. Since then the defense of the original intent of

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originally put forward by Attorney General Randolph.

[23] Vol. 145 Congressional Record S29915 (Senator Inhofe).

[24] Senate, *Congressional Record*, daily edition, vol. 153 (November 16, 2007), p. S14609 (Senator Harry Reid).

[25] Likewise, President Harry S. Truman used the two days between sessions of the 80th Congress to make a recess appointment for Oswald Ryan to the Civil Aeronautics Board after his prior term expired.

the Clause has largely followed the passing partisan interests of the time. What is needed is a consistent, bipartisan effort to protect the institutional authority of Congress. Over the years, I have encouraged members to create such rules to reign in runaway recess appointments and reinforce the Appointments Clause itself. With the recent appointments, presidents are now claiming the ability to use any recess of any length to make a recess appointment that could conceivably last up to two years if the president makes the appointment in the middle of a session.[26] Thus, a president in the final two years of his term in office could largely dispense with the inconvenience of confirmations – the ultimate example of an exception swallowing a rule.

First, I have strongly recommended that the Congress put a practical end to judicial recess appointments. Such appointments have existed from the earliest period of the Republic. Indeed, the first five Presidents made 31 such appointments, including five to the Supreme Court. However, as previously discussed, such appointments were necessitated by the long congressional recesses that could interrupt appointments for up to nine months at a time. With a limited number of federal judges (and a six-person Supreme Court) such extended vacancies presented a serious problem for the court the system and civic order. That is not the case today. Modern judicial appointments are often used as a form of retaliation against Congress for refusing to confirm nominees. Not only does this put the Clause to an unintended use, it undermines the guarantee under Article III for judges who are independent. A recess appointed judge is dependent on the Administration to put forward his or her name for a later confirmation. That individual is also aware that any decisions rendered during the recess appointment could be used against him or her. Congress should maintain an unwavering rule that anyone given a recess appointment to a judicial position would be categorically rejected for later confirmation. Even if a president were willing to appoint such a short-term jurist, most lawyers would be reluctant to place themselves on this list of barred nominees. Second, the Congress should maintain the same rule for intrasession recess appointments or appointments during three-day recesses for the reasons previously stated. Third, Congress should at a minimum bar any later confirmation to any nominee who received a recess appointment after being previously submitted to Congress in the earlier session.[27]

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[26] This is far longer than anticipated by the Framers. *See, e.g.,* 3 Elliott's Debates 409-10 (statement of James Madison at Virginia ratification convention) ("There will not be occasion for the continual residence of the senators at the seat of government . . . it is observed that the President when vacancies happen during the recess of the Senate, may fill them till it meets.").

[27] While my preference would be a return to the original meaning of the Clause, it is certainly true that the number of positions subject to confirmation have increased dramatically – as have the delays in confirmation. There are many vacancies that continue unfilled due to simple delay and logistical barriers. Accordingly, a strong argument could be made that, while the congressional recesses are now shorter, the demands of government and the "public inconveniences" of vacancies are now simply different. Thus, there are always alternative avenues for reaching a type of détente between the branches and end the recess wars. Congress could temper this rule with a formal waiver of the bar on confirmation if, before the end of the prior session, it passed a resolution acknowledging that certain nominees (who did not receive a final vote) could be legitimately given a recess appointment. This resolution would merely

Finally, Congress can more aggressively use its power of the purse as well as its ability to block any confirmations until an agreement is reached on recess appointments. The best argument for such a strong response can be found in the OLC opinion itself where efforts of Congress to reach compromise with past presidents is now being cited as an acquiescence to the interpretations of the Executive Branch. Under the same view, the Cordray nomination (if left unaddressed) would set an unprecedented claim of unilateral appointment power in the Executive Branch. Despite my respect for Mr. Cordray's background and intellect, his appointment comes at too high a price for the balance of power under Article I and Article II. In a Madisonian system, it is often as important how you do something as what you do. The Cordray appointment is the wrong means to a worthy purpose. A congressional check on abusive recess appointments is long overdue and has contributed to the current controversy. After this Clause was ripped from its textual moorings, it has floated dangerously in the choppy waters between the Executive and Legislative Branches. It is time, in my view, to move back toward to logical limitations on the recess appointment power articulated by Hamilton and Randolph. Good politics often makes for bad law. The Cordray nomination, regrettably, is one such example.

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acknowledge that the nominees were not rejected (or filibustered) on the merits and Congress would not treat the appointment as a circumvention of its authority. Obviously, nothing would stop a president from making abuse appointments, subject to court challenges. However, if Congress were to maintain this principled line regardless of the party of the president, it would greatly reduce the abuse of this Clause. If nominees were truly left unconfirmed due to administrative or logistical problems, the two branches could agree that those nominees would not be barred due to any recess appointment. The point is that such an agreement would reflect that the recess appointment was not being used to circumvent opposition to the nominee.

Mr. SMITH. Thank you, Professor Turley. It is pretty clear that this is a subject that could have benefited by more than 5 minutes from each of our panelists today. It is complex, and it is sensitive in many ways.

Let me recognize myself for 5 minutes for questions. And on the way to questions, without objection, we will make, Professor Turley, your op-ed in today's "USA Today" a part of the record.

[The information referred to follows:]

EDIT

Recess appointments: president as ruler ; Circumventing Congress is unwise. Sidestepping the Constitution is dangerous.

Jonathan Turley

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For most Americans, the term "recess" brings to mind fond memories of free time to play outside the strict rules of the classroom. For presidents, the term can have the same euphoric effect as a free hand to play outside the strict rules of the Constitution.

While the Constitution requires high-level officials to be confirmed by the Senate, an arcane provision in Article II states that a president can make recess appointments when Congress is not in session. However, what if Congress did not think it was recessed and a president handed out appointments over the equivalent of a long weekend? That is the controversy brewing in Congress, which is looking into four appointments President Obama made in January. Those appointments include that of Richard Cordray, who had been denied confirmation to a consumer protection board in a Republican filibuster.

For the record, I support Cordray, a well-qualified nominee who has been treated poorly by the political system. However, in a nation committed to the rule of law, it is often as important how you do something as what you do. This is not the way to win a fight with Congress over a nomination.

Partisan gamesmanship

The controversy is loaded with partisan rhetoric and chest pounding on both sides. It is the common lament of academics that the concern over the faithful interpretation of the Constitution arises only when it is politically expedient. Though there are exceptions in Congress, the Cordray appointment is a prime example. Many members who were silent during the recess appointments of George W. Bush have become vocal opponents of the practice under Obama. Conversely, Democrats who now stand silent once cried foul when Bush used recess appointments to circumvent significant opposition to nominees, such as John Bolton to be ambassador to the United Nations.

Yet the latest recess appointments push this controversy to a new extreme. The shortest prior period for a recess appointment in recent history was a break of 10 days. In this case, Congress did not intend to take such a recess and took steps to "stay in business" to prevent any end run by the president. Under the Constitution, neither chamber of Congress can recess for more than three days without the consent of the other chamber. This winter, the House expressly declined to give consent -- holding sessions every three days to prevent any recess appointments. Moreover, this session was hardly "pro forma." Just three days after going into the session in December, Congress passed the president's demand for a two-month payroll tax holiday extension. So the Obama administration was doing business with Congress on important legislation while simultaneously claiming that Congress was functionally out of session.

Since the very first administration, presidents have taken advantage of this free hall pass to fill offices. The first five presidents made dozens of recess appointments, including five to the Supreme Court. Ironically, some of these appointments proved the wisdom of requiring confirmation. For example, George Washington gave a recess appointment in 1795 to John Rutledge of South Carolina to serve as chief justice. Rutledge was later described by his fellow South Carolinians as prone to "mad frollicks" and "frequently so much deranged, as to be in a great measure deprived of his senses." Rutledge tried repeatedly to drown himself in various rivers before finally resigning within a year of his appointment.

The use of such unilateral power strikes at the very heart of our system of government and dangerously tips the balance of power. President Obama clearly wanted to make a point about his effort to protect consumers. But for the Constitution, that political point comes at too high a price. Replacing an intransigent Congress with an imperial president is no bargain for those who value our constitutional system.

When it made sense

While there can be debate over the precise meaning of Article II's reference to "vacancies that may happen during the recess," it was not intended to mean this. The earliest interpretations of this language took the plain meaning of the language as addressing vacancies that occur during a recess. In the early period of the Republic, Congress would often be recessed for six or even nine months out of the year. Alexander Hamilton and others argued that the provision simply reflected this practical necessity to fill positions during breaks.

With the long modern congressional sessions, the motivating concern behind the Recess Appointment Clause is largely gone. It is primarily used today for the purpose that the Framers clearly did not intend -- circumventing Congress. For that reason, I have criticized past presidents for appointing submitted nominees who were not confirmed because of congressional opposition.

The Cordray appointment, like its recent precedents, threatens to turn a carefully balanced process of nominations and confirmations into little more than a type of blinking contest with Congress. Putting aside the contradiction with both the language and history of the Constitution, it is bad policy and an abuse of power that all citizens, regardless of party affiliation, should condemn.

Jonathan **Turley**, the Shapiro Professor of Public Interest Law at George Washington University, is a member of **USA TODAY**'s Board of Contributors. He will testify on the recess appointment power before the House Judiciary Committee today.

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Mr. TURLEY. Thanks.

Mr. SMITH. Let me address my first question to Mr. Cooper and Mr. Turley, but precede it by saying this: To me, and I haven't heard anyone say otherwise, what the President did, to me, was unprecedented, unprecedented in our 200-year history. And to me, to justify what the President did, you would have to come up with a new interpretation of the Constitution.

First, the President should know better. He was a professor of constitutional law. Second of all, it appears, to me, at least, that the Department of Justice is coming across as an apologist for the President. And in doing so, it is coming across as a politicized department, not necessarily a department worthy of the respect of the American people for dispassionately making a ruling or offering an opinion on the Constitution.

And let me offer as evidence of this the fact that, as I understand it, two of the four appointments were made 2 days after the President and the Attorney General alleged that the Senate had gone into recess. The reason I think this is acting in bad faith is because, clearly, there was no time for the Senate to perform its advice and consent responsibilities if the President was just giving them 2 days to do that after he nominated these two individuals.

So clearly, it was an end-run around the Constitution, and an end-run around the Senate. And to me, the impression given is that the President and the Attorney General are saying that we know better than the Senate what is good for them, and we know better than the Senate what rules should apply. That is dangerous. That is an assumption of Presidential powers that, as I say, is unprecedented, and very worrisome to me.

Mr. Cooper and Mr. Turley, let me quote from the last paragraph of the op-ed. You say the Cordray appointment is bad policy and an abuse of power that all citizens, regardless of party affiliation, should condemn. That is a strong statement with which I agree. But I wanted to ask Mr. Cooper and Mr. Turley if they wanted to elaborate a little bit more on my point, that the President, to me, acted in bad faith by making nominations, and then in their own words, only having given the Senate 2 days to act on those nominations before they allegedly went into recess, according to the President. Of course, we dispute that.

But Mr. Cooper, you are welcome to comment on that point.

Mr. COOPER. Thank you very much, Chairman Smith. I am not going to characterize the appointments, you know, in any particular way, but I will add to the point that you have made, because I think that the real factual circumstances behind some of these appointments are much more egregious than you have outlined, in terms of the apparent intentionality of those appointments.

Two of them, at least, were to fill vacancies that had existed for months before the December 15 nominations took place. They were vacancies that arose not by virtue of any particular casualty, as Alexander Hamilton put it, that is, you know, the death or the resignation of an incumbent. They arose, because the statutory term of the previous office holders had expired months before. And so those vacancies stayed vacant for a period of several months.

And in an analysis which OLC offers, that stresses the notion that the President must act, because the Senate is unavailable, simply cannot, in my opinion, tenably be maintained in a situation which the President himself has not taken advantage of the clear availability of the Senate to act on his nominations and to consider them for months on end. Vacancies that, by the way, again, took no one by surprise. So I think it is difficult more so than you have even suggested.

Mr. SMITH. I agree with you. It is worse than I said. Thank you for making that point.

Mr. Turley?

Mr. TURLEY. First of all, I would like to agree with the op-ed as strongly as I could. One of the things I think is important to note here is, I was very surprised by the timing of the recess appointment. It did not have to be what is called an intra-session appointment. In making an intra-session appointment, the White House really created this perfect storm of controversy. It added all of the controversial elements that we have seen in previous recess appointments and combined them.

I do not believe that the clause applies to intra-session appointments. They never have. There is a great amount of literature that has strongly opposed past intra-session appointments. What I think is missing here, when the White House talks about the artificiality of a pro forma session, which I address is really not up to the President to define, what is missing is a recognition of the artificiality of the claim of a need for recess appointments. The idea that I couldn't have the advice and consent of Congress, so I had to move. I had to go ahead and circumvent Congress. That circumvents something fundamentally more critical to the Constitution than who defines recess. It is a President who is saying something that is facially not true. The Senate was available for advice and consent.

When the President said in his public comments, I won't accept no for an answer, it was a telling way of expressing the reason for the appointment. He did get an answer. He didn't get an answer that he liked. And I might not like that answer. But it was an answer. That is, Congress said it would not confirm this nominee. They can do that for good reasons, bad reasons, or no reasons at all. But to say that in this blink of time that you can move a recess appointment reduces this entire clause to a blinking contest, that Congress can't have even the smallest recess.

Now it is not that it is unprecedented. President Teddy Roosevelt did it in seconds. He did it in seconds between the gaveling of a close of one session and the gaveling of the opening of another session, and moved 160 nominees. He was wrong. That was not the purpose the clause was designed for. And I think President Obama is also wrong. But this has all the elements together that have been individually controversial in past appointments.

Mr. SMITH. Thank you, Mr. Turley.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I enjoy this conversation quite a bit, because it is almost as if no one here in the room recognizes that this matter is going to court. And as soon as standing of the parties going to court is established, this matter will be

before the Federal judiciary for resolution. So we can come back and review these opinions.

I particularly appreciated Professor Turley's historical reminders to us about this process. But since Mr. Elwood did not get a chance to respond at all, I would like to just turn back the clock a few minutes and ask him to join in on the discussion that the Chairman enjoyed with Messers Cooper and Turley.

Mr. ELWOOD. Well, as an initial matter, I do want to separate the constitutional question with the sort of matter of inter-branch relations and etiquette, because I think there are plenty of opportunities when a branch has the right to act, but it doesn't necessarily mean that it should. And I think that it is true, as Professor Turley said, that I think since 1823, when the executive branch first officially set forth the position, that the recess appointment clause applied not only to vacancies that occurred during the recess. That is, when somebody dropped dead or resigned during the recess, but also to vacancies that existed before the recess.

There has been increased opportunity for a clash between the branches. And it is true that to say people who received recess appointments, that there has been an opportunity to pass on them in the past. But that is a criticism that can be leveled against the, you know, practice of recess appointments for over 150 years, that these are people whose nominations have been pending, and for one reason or another have languished frequently, because not necessarily that they would survive and up-or-down vote, but because you were able to slow-roll people in the Senate.

So, I guess the point of my long and rambling answer is that the criticism that is leveled at the current recess appointment is one that could be leveled against 150 years of recess appointment practice. It is not that particular to this one; although, I am not about to deny that the circumstances of this case may have made it a little bit harder to take for the people in the Senate.

Mr. CONYERS. Well, the one thing that cannot be disputed, and I, again, refer to Professor Turley's historical summary, is that never before in the history of the United States Senate have 44 Senators written the President of the United States to tell him that they would not support the consideration of any nominee to be the director of the Consumer Financial Protection Bureau. And it seemed, to me, clear that that was done for the express purpose of shutting down an agency.

Wouldn't you agree? First, Mr. Elwood. Then Mr. Cooper. And then Mr. Turley.

Mr. ELWOOD. Well, I think one of the things that it may show is just that the point of the recess appointments clause was to keep offices filled, and the Framers did take that very seriously, as I noted in my prepared testimony. But even though these recesses frequently lasted months and months, as Professor Turley said, they made recess appointments when the Senate was going to be available pretty soon. President Washington recessed appointed somebody 13 days before the Senate returned, which was a sign to him that 13 days is too long to leave an office unfilled. So I think that it may be an indication of the President's felt need to use the clause.

Mr. COOPER. Thank you, Mr. Conyers. I don't come to this Committee with any brief in support of the Senate in this particular instance or in any other. And, in fact, I believe that the Senate and the President, over the course of the last few decades, in particular, and their inter-branch disputes in this area, have rendered the appointment process quite dysfunctional. And I think it is very unfortunate.

But, I do come here with a brief for the simple proposition that the Senate has the power, as Professor Turley has suggested. It has the power to withhold its consent for a good reason, or a bad reason, or no reason at all. That is not how I would advocate to the Senate that it should exercise its power. But I believe it has that power.

Thank you.

Mr. TURLEY. Thank you, Mr. Conyers. I would amplify that same point. It may, indeed, be unprecedented, in terms of the letter, although, I suspect that there have been past cases where a letter wasn't sent, but the message was certainly sent. But the point is that the Senators actually had that ability in the previous session and used it. They refused to approve this nominee.

The Constitution doesn't go into motivations or the merits of the nominee. So, they clearly had the right to do what they said in the letter. The question now is whether the President has the power on the recess appointment to circumvent that will of Congress. Here, you had advice and consent already given, in the sense that they said, we oppose this nominee. This was a clear effort to circumvent that.

I think the Framers would have been mortified. This is what the objections were during the ratification convention. You had people stand up. Now, we don't have a record, as you know. You are a great student of the Constitution. And you know that we don't have a record in terms of the intent behind the recess appointments clause. But in the ratification debates, people stood up and said, I don't like it. Doesn't this give the President the power of a king?

The people supporting it said, no, that is not it. This is just for that period of a recess. It is a small supplemental power to what should guide our interpretation, which is the appointments clause and the preceding clause.

Mr. CONYERS. Thank you. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Conyers. The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing. And I share your concern about the constitutional precedent that is being set here by a President seeking to violate the Constitution and appoint individuals while the United States Senate is in session. And I also want to mention that a similar hearing was held last week in the Education and Workforce Committee, where I serve, specifically on the three appointments to the National Labor Relations Board. I appreciate Chuck Cooper's testifying at both of these hearings. And I appreciate his observations.

Mr. Cooper, I wonder if you could comment on this. You recall in your testimony that when you headed the Office of Legal Counsel in 1988, the Office concluded the President did not have inher-

ent power to exercise a line item veto. You say you reached this conclusion only after exhaustive study. By contrast, the formal written OLC opinion justifying President Obama's unprecedented recess appointment was admittedly not ready until after the appointments were made.

Does that give you any reason to worry that the OLC's analysis of this critical issue might have been hasty, rushed, or even results driven, even written in order to respond to what had already been done by the President?

Mr. COOPER. Actually, Congressman Goodlatte, it seems clear to me from the thorough going nature of the OLC opinion that even though it wasn't released until a couple of days after the appointments took place, the work, and the research, and the analysis that went into it had to have long pre-dated that.

So I suspect myself, but I certainly know the facts behind the interworkings, but knowing the Office the way I do, I suspect they had rendered their advice on the basis of the analysis that ultimately was released in that written opinion.

As I have testified, I don't agree with the conclusions in that written opinion. And I tend to agree with Professor Turley that they are, in many respects, unsound and contradictory. But I rather suspect that the conclusions they reached had been formed prior to the time, and communicated to the President prior to the time those appointments were actually made.

Mr. GOODLATTE. What about the question about whether they were results driven? In the appraisal business, we have individuals whose title is MIA. And sometimes the joke about an appraisal that comes back with some suspect quality is that MIA means made as instructed. [Laughter.]

Mr. COOPER. Well, Congress Goodlatte, let me answer your question this way. I believe that the President is entitled to the benefit of the doubt on legal issues from his lawyers that advise him. Just as I believe that this body is, from the lawyers that advise it. And that the Office of Legal Counsel is responsible to give independent and careful legal advice to the President, but it should and quite properly does seek in ways that are consistent with intellectual integrity, facilitate the President's desired goals and objectives. And so I view the OLC as owing a duty of friendly independence to the President. Not hostile independence.

That having been said, I, again, believe that this advice rendered to the President was not sound. And I think it was advice that, to my mind, ought not to have been given.

Mr. GOODLATTE. Let me ask each of the witnesses. Article II, Section 2, Clause 3 of the Constitution states that, "The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session." Doesn't the plain meaning of this clause demonstrate that the vacancies had to have happened during the recess in question? Under this interpretation, the recess appointment would be necessary, because the Senate would not have had an opportunity to act on the nominee during its previous session.

Have there been any Supreme Court decisions that have directly ruled on the question of whether the President can make recess ap-

pointments when the vacancy does not actually arise during the recess.

Professor Turley has already——

Voice. Use the mike.

Mr. GOODLATTE. Based on his observations that the original meeting times of the Senate were——

Mr. NADLER. Mr. Chairman, the gentleman is not—we can't hear him.

Mr. GOODLATTE. I have the light on, but the microphone is not working.

Mr. SMITH. We have our technician in the back of the room working on it, I think.

Mr. GOODLATTE. If the panelists can hear my question, I will just proceed. But Professor Turley was clear in his answer that when the Senate wasn't in session for 6 or 9 months at a time, this power in the Constitution was of vital importance, but the meaning of it seems to have been directed at allowing the President to act during those periods of time. I wonder if Mr. Cooper and Mr. Elwood would address that point.

Mr. COOPER. Mr. Goodlatte, I haven't done the in-depth research that I would want to have done, in order to render an actual opinion to you on that subject. But I will say this. I have read Professor Turley's testimony very carefully, and in the researches that I have done previously, and in particular, I would commend your attention on this question to a "Law Review" article written by Professor Mike Rappaport, a colleague of mine when I was in the Office of Legal Counsel, for whom I have great respect, who has concluded that the original understanding of the recess appointment clause would require that the vacancy actually occur during the recess of the Senate, during the intersession recess of the Senate. And the case that I have seen made there, which I haven't independently looked beneath and beyond, is very compelling.

Mr. GOODLATTE. And clearly, since the Senate met and passed a 2-month extension of the payroll tax the day before these recess appointments were made, that was not the facts of this case that we are looking at now.

Mr. COOPER. Yes.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Let me first ask the following to follow-up. By the way, I recently had my house appraised, so I now know that if the appraiser had an MIA after his name, I should consult Mr. Goodlatte.

In any event, to follow-up on Mr. Goodlatte's questioning, since 1823, let me ask the three of you, is there any question in your mind that if a vacancy occurred while the Senate is in session, and the Senate were then, without voting on that vacancy, to adjourn sine die for six or 8 months, the President would have authority to fill that vacancy. Is there any question of that? Or is that simply an academic discussion these days?

Mr. TURLEY. I would be happy to take it. Actually, I think there is a question of that. If you take a look at Hamilton's statements, and particularly Randolph's statement, they are very clear.

Mr. NADLER. No. No. Let me say. We understand Randolph and Hamilton, but the practice since, I think you said 1823, given the constitutional history——

Mr. TURLEY. Yes.

Mr. NADLER. Is there any question in the——

Mr. TURLEY. I think the OLC places great importance. I have to say, to OLC's credit, the decision in *Evans* put a lot of importance on that very historical practice.

The Supreme Court has not ruled on that. And to Mr. Elwood's credit, I agree with him that the limited cases that are out there are not very helpful. But I do want to point out one thing in my written testimony. I have strong objections to the use of historical practices as substitute for constitutional analysis.

What the OLC is arguing, in my view, is it can do an adverse possession claim. That if Congress doesn't defend its territory over a long period of time, somehow the executive branch acquires that territory.

Mr. NADLER. Anybody else comment on that? Has this been an object of question for the last 150 years?

Mr. ELWOOD. This is a question that puts me in the horns of a dilemma, because I agree with Mr. Turley. I mean ordinarily, contemporaneous practice at the Founding is kind of what matters most to me, but I also am a big believer in sort of stare decisis. And it has been more or less the accepted practice between the two branches. And around 1823, the Monroe administration, which is the tail-end of the Founding generation, that if it happens to exist during the recess of the Senate, the appointment can be made.

And I don't view it as an adverse possession theory. I view it as when the Constitution is ambiguous, the practice of the parties implementing it can help shed light on it.

Mr. NADLER. And that practice has been fairly uniform since the 1820's.

Mr. ELWOOD. I believe so.

Mr. NADLER. Thank you.

Mr. ELWOOD. I am sorry. I don't have time to——

Mr. NADLER. Let me go further. We all know the adage that hard cases make bad law. And I would submit that this is a hard case, because the Senate, or at least a minority of the Senate very clearly acted with intention and with a statement to that effect that they intended to nullify the President's ability to fulfill his constitutional duty, that he should take care that the laws be faithfully executed, by saying that they would block any confirmation of anyone to an office, unless the law were changed in a way that they didn't have the votes to change it. So, the President's ability to enforce the law was going to be deliberately frustrated by the minority in the Senate. And that is the situation that the President was responding to.

Now, certainly, they had the power to do that. Certainly, I think from a constitutional point of view, that is not the intention of the Framers, that the President should be frustrated from enforcing the law until the law is changed to a minority's liking. And so the President then acted with the action that we are talking about. And the question then becomes, I think, a question of pure technical law.

The Senators had the ability, under the Constitution, to frustrate the President's ability to fulfill his constitutional mandate. The President was trying to use his power to get around that. And it is not nice to look at either side. And no one really has clean hands. And one could make a political argument as to who started the fight first, and who, you know, threw the first punch, and so forth. But nobody is fighting with clean hands here.

Now, my question is directed to Mr. Elwood. And that is, okay, I can understand the argument, and I sympathize with the argument that the Senate's recess cannot be simply understood because it says so. It has to be understood within the context of the purpose of the constitutional clause. Can it, in fact, consider a President's nominee? And if the answer is no, then it is effectively in recess for that purpose. That is an argument that is made. I will accept that argument.

But how do you answer the question that, well, it is obviously not really in recess and unable to function for the purpose of considering a Presidential nominee, which would allow the President to make an interim appointment, as evidenced by the fact that, not the day before, but a few weeks before, it actually passed legislation, namely, the payroll tax extension, while in supposedly pro forma session. Doesn't that really say it is not really pro forma session, whatever the Senate says?

Mr. ELWOOD. I think the response is that those instances are kind of the exception that proved the rule. As the Congressional Research Service said, you know, pro forma sessions, normally business doesn't get done. And business can get done when something very bad is going to happen, otherwise. Such as when the payroll tax exemption would come back in January 1, or the FAA shutdown would continue.

But I think that it is basically no different. I mean, of course, the Senate can come back when it wants to, but that is something it can do even without pro forma sessions. Virtually, all of these recesses, normal Senate recesses, are subject to recall by the majority leader. But, you know, that was the kind of order that was in place when Judge Pryor was recess appointed. And, you know, even though that was a very heavily litigated case, that argument was never made. The fact that they could have come back if they wanted to was enough to mean that they weren't really in recess at that time.

Mr. NADLER. Thank you.

Mr. SMITH. Thank you, Mr. Nadler.

The gentleman from California, Mr. Lungren, is recognized.

Mr. LUNGREN. Thank you very much, Mr. Chairman. And thank the three of you for testifying here.

Mr. Elwood, it is not a matter of law, but one of the rules of logic is the law of non-contradiction. One cannot be A and not A at the same time. And in this case, you have a question of whether the Senate was really in recess, and, therefore, making itself unavailable for purposes of responding to the President's appointments. But on the other hand, you have the Senate actually accomplishing legislation.

Now, either they were not in recess and were in session, which allowed them to pass legislation, which the President urged them

to, and then subsequently signed, or they were not in session, and incapable of carrying out that constitutional act.

So, my question to you is: How can your analysis be justified that, in fact, the Senate was not in actual session? You indicated that there were statements that they made that they would not be in session for purposes of doing any legislative work, as instructive, as we should analyze this. But at the same time, the President stated publically that he was recess appointing Mr. Cordray precisely because the Senate, having considered the nomination, would not confirm him, and the President, quote, Refused to take no for an answer.

So, how do we arrive at the conclusion you gave us that the President's action was, in this case, constitutional?

Mr. ELWOOD. I think that the thing is that the pro forma sessions merely have the form of a legislative session. They are not the substance of a legislative session.

Mr. LUNGREN. Well, how did the Senate act then?

Mr. ELWOOD. When the majority leader takes the floor and says this was a pro forma session. We decided that by unanimous consent. But now by unanimous consent, this is a legislative session, we are going to pass a bill. I mean at that point, it is no longer just a pro forma session. He has made it a real live session of Congress.

When he leaves that day and they adjourn, I presume they go back to the terms of the recess order, which say that they are pro forma sessions only, with no business to be conducted. And I think it is along the lines of how the Senate can always do business. The majority leader can always call them back to do work.

Mr. LUNDGREN. So it is based on what the Senate majority leader said. Well, on November 16, 2007, Senate Majority Leader Harry Reid announced that the Senate would, quote, Be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments, end quote. So he said it back in 2007, the precise reason they were staying in session, even though it was called pro forma, was to prevent the then President from recess appointments.

Is that statement that he made at that time now inoperable, in view of the statement you just quoted him making?

Mr. ELWOOD. I don't know that I understand your question.

Mr. LUNGREN. Well, I thought you just told me that when the majority leader comes to the floor and says we are no longer in pro forma session, we are now in session. We are going to consider this bill. We are going to pass this bill. That is not only illustrative, but determinative of the nature of the session, and, therefore, the President's ability to act in the appointment category.

But then when I give you a quote of the same person acting in the same manner, Senate Majority Leader Harry Reid, saying that the purpose of the pro forma session, so-called pro forma session, was to prevent recess appointments, that has no consequence, in terms of his understanding of the Constitution?

Mr. ELWOOD. I think that the point you are making is that that is the legislative purpose, is denying the President the ability to make the recess appointments, and that it is the legislative busi-

ness that makes those real sessions. That is my problem, is that I am just not 100 percent sure what you mean by that.

Mr. LUNGREN. Well, I am not 100 percent sure what you mean. I am sorry. I guess I could just quote Humpty Dumpty. When I use a word, Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean, neither more nor less. The question is, said Alice, whether you can make works so many different things. The question is, said Humpty Dumpty, which is to be master. That is all.

I would hope that the master in this case is the Constitution. And the words of the Constitution are fairly specific. And I think, in fact, as Professor Turley has suggested, we understand what the context was when this section of the Constitution was placed there. If we are going to give up everything to the President of the United States, democrat or republican, to say it doesn't matter what the words mean, that Presidents can get around it, frankly, we have ceded some of the authority of the legislative branch.

And I would just say this. It is demonstrable that our Founding Fathers created an inefficient governing system precisely to protect our liberties. And we can bemoan that fact. But the Senate is an absolutely essential mechanism to appointment making, except in extraordinary circumstances, which are supposed to be recess appointments, and we are making it ordinary.

Thank you.

Mr. SMITH. Thank you, Mr. Lungren.

The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I just have to comment on all this balance of power between the executive and legislative branch from people that want to give the President the line item veto.

One of the problems we have in this discussion is, we have a problem, but there is nothing the House can do about it. We can't confirm any of these appointments. And if we were to declare this either constitutional or not constitutional by resolution, or however we express ourselves, it would have zero legal consequence.

Just for the record, Mr. Chairman, the records I have point out that President Reagan made 240 recess appointments, President George H. W. Bush, 74, in just one term. President Clinton, 139. President George W. Bush, 171. And President Obama, 28, so far.

Mr. Turley, I guess the whole discussion is: What is a recess? You indicated that President Roosevelt made recess appointments in the time between two gavel whacks. What happened to those, what, 100-and-some appointments?

Mr. TURLEY. It was about 160. There was discussion in Congress at the time as to whether they should move aggressively against them. These were largely military officers, and Congress decided that it would not move aggressively against them.

Mr. SCOTT. Were any of the appointments ever removed, because they were inappropriately appointed?

Mr. TURLEY. No. Indeed, one of the things I have suggested in the past to Members of this Committee is that Congress should be more aggressive, that they should create bright-line rules as to how they will respond, regardless of the merits or individual, to the abuse of the recess appointment.

One of the things I've suggested in the past and suggest in this testimony is that I think that the Congress should refuse confirmation to any intra-session appointee.

Mr. SCOTT. You make a distinction between intersession, and I guess at the end of the session, you adjourn sine die for the rest of the year. What does intersession mean? That is during the year?

Mr. TURLEY. Yes. What happened here is that the second session of Congress had begun. So, it's an intra-session appointment.

Mr. SCOTT. Okay. Well, what do you call what happens in August, when we take off for the month? We call it an August recess.

Mr. TURLEY. Right. In my view, breaks in a session, whether it is a first or second session, where Congress is sitting, is not an appropriate basis for an appointment, but the more critical issue here, and it sort of goes to the Humpty Dumpty issue. This is the first time I have incorporated Humpty Dumpty and Hamilton in the same testimony. But there is something valid in the Humpty Dumpty reference. And that is, if you read the OLC opinion, they state something that I find quite chilling; where they say it is up to the President's satisfaction as to what constitutes a recess. To me, that flips the presumption. It also contradicts past court cases that defer to this body to define whether it is in recess. I think that is an extremely dangerous position to take, as we debate this intra-session versus intersession.

Mr. SCOTT. But there is no length of time by which you need to recess for it to be a recess for the purposes of recess appointments.

Mr. TURLEY. Well, historically, the OLC has always looked to the adjournments clause and said that anything shorter than 3 days, although, that is practically 4 days, would clearly not be sufficient for a recess. The OLC sort of dances around that. They effectively answer the question by changing the question, and saying since we don't believe that this is real, that this pro forma session is a session, we don't have to get into that.

Mr. SCOTT. Is there any possibility that the courts might leave this up to the idea of a political question, *Evans v. Stephens*?

Mr. TURLEY. You are absolutely right. That is a real possibility. The courts tend to leave this to the branches to work out. I think that is a serious problem. You know, the courts, too often, leave this to a political process. We have an extremely dysfunctional situation here. We have an independent judiciary for a reason.

Mr. SCOTT. What did *Evans v. Stephens* rule? What did they decide in that case?

Mr. TURLEY. In *Stephens*, they did say that the appointment was valid. The recess appointment there. Although, there was one dissent. But, also, I should note, Justice John Paul Stevens, when the matter came up to the Supreme Court, wrote a very rare statement in the denial of cert. He agreed that the case was not appropriate for certiorari. But he wrote a written opinion, which is rare, and said do not assume that this court accepts, or at least that Justice, that an intra-session appointment is valid under the clause.

Mr. SCOTT. But the majority did not cert.

Mr. TURLEY. He agreed with the majority, because he did not believe that this was worthy of certiorari.

Mr. SMITH. All right. Thank you, Mr. Scott.

The gentleman from Arizona, Mr. Franks, is recognized.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, I think that Mr. Cooper and Mr. Lungren made compelling arguments that these pro forma sessions were, indeed, substantive. I think that you used the word, Mr. Elwood, that these might or might not have been substantive. And the thing that made them substantive, of course, is that a law was passed. I mean we are lawmakers. I don't know how to make a session more substantive than if, indeed, a law can be passed during the session.

So, with that said, it seems to me that to reasonable minds that that question has been answered. But the other thoughts that have been postulated today about whether or not Congress, or specifically even the House, has any role in responding to it, and I would submit that there are some possibilities. And one would be reviving the understanding that the President can circumvent the Senate, to use a phrase, only when the vacancy first arises during the Senate's recess. That is essentially trying to revive the original meaning of the clause itself. Congress could accomplish this, for example, by amending the Pay Act to prohibit paying a recess appointee's salary, unless the vacancy actually arose during the recess.

Mr. Turley, I note in your testimony you advocate for the original understanding that I am discussing here, saying it would, "Avoid many of the controversies of modern times." Now that is a professor's way of saying this would fix their wagon. But would you elaborate on that a little bit?

Mr. TURLEY. Thank you, sir. Yes. I thought it was quite surprising to see the OLC use the decision of this body and the Pay Act as evidence against Congress's authority. That is, the Justice Department has argued that because you allowed some of these appointees to be compensated, you were conceding or acquiescing to their claims as part of the adverse possession notion that I talked about earlier. I do think you should consider amending the Pay Act.

Also, I do think that this body's involved. Of the adjournment's clause, both of the Houses decide whether to adjourn. This body is intimately involved in that. And there was a consensus between the Houses to take this step.

I will also note that regardless of your party, this idea that it is the President that has to be satisfied that you are in session is a very dangerous notion. Thomas Jefferson said in 1790 that each house of Congress has the natural right to govern itself. Article I, Section 5, Clause 4 says that each house determines its rules. Cases like Mester, out of the Ninth Circuit, have said that extreme deference is given to the Houses.

What I thought was really remarkable of the OLC, was not only that all presumptions were ruled in favor of the President, but that they believed that even the interpretation of whether you are doing business or not ultimately will rest with the President. That would radically shift the center of gravity under Article I and Article II.

Mr. FRANKS. Well, of course, it makes all the sense in the world to me what you are saying.

Mr. Cooper, if I could turn to you. First, let me suggest to you that this is not just a casual discussion. H.R. 3770, I am one of the co-sponsors, and there are many on this Committee who are co-

sponsors, does, indeed, do exactly what we are talking about here. And so, Mr. Cooper, you testified that there is substantial textual and historical support that, as originally understood, the recess appointment power is limited to vacancies that occur while the Senate is in recess.

Do you think amending the Pay Act would be a good way or a way for Congress to require the Executive to respect the Constitution's dictates, and/or do you think there are other options available to us?

Mr. COOPER. Congressman Franks, I completely agree with the response that Professor Turley has provided just now, and believe that the Pay Act would be an entirely apt way in amending it along the lines that you are suggesting, an entirely apt way for the Congress to react to what it believes and what I have testified is Presidential overreach in this episode.

I also want to add that I think that notwithstanding the fact that the House of Representatives has no agency in the appointment process, only the Senate and the President, doesn't in any way eliminate this body's quite appropriate interest in what is occurring here, when we are talking about the separation of powers between the Congress and the President, and the checks and balances that are at stake here.

And keep in mind this, as Professor Turley has suggested, the President has, with his lawyers' blessing, assumed the power to decide for himself when the Senate and when the House is in session, and when it is in recess, even when in disagreement with the bodies' own determinations on that score. I just don't believe that any court is going to defer to the President's judgment about that, rather than the Senate's, with respect to its determination, or the House of Representatives, with respect to its determination. At least if there is any factual predicate, whatsoever, for the bodies' determination.

Mr. FRANKS. Well, Mr. Chairman, I am going to suggest that H.R. 3770 might be a good way for us to respond to this, because it is still a thought in my mind that we have the purse strings given to us by the Constitution, of course, unless the President would somehow say that we no longer have that. And then we would, of course, have to defer to him.

Mr. SMITH. Thank you, Mr. Franks.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized.

Ms. JACKSON LEE. Thank you very much to the witnesses.

And I guess my first rhetorical question is: What are the American people to do when we are sitting here collectively, the three branches of government, to work on their behalf?

I just have a very brief question. Professor Turley, thank you for your work. And I just have this quick question. I am just holding this up. Have you just constitutionally, and as a professor who watches the political scene, as it relates to our constitutional duties, seen a letter, written by 44 Senators, that indicates, I think the opening lines, that they will not confirm any nominee, regardless of party affiliation, to be the director of a particular agency? Have you ever seen this kind of action?

Mr. TURLEY. Honestly, no.

Ms. JACKSON LEE. And I appreciate that. And I appreciate your perspective. And if I could just move to Mr. Elwood to raise a question with you.

The Chairman made a good point that this will ultimately wind up in the courts. But let me reemphasize constitutionally, because I think we have gotten muddied, and put recess over to the side. The Constitution establishes, actually, two methods, by which a President can have a person appointed to a position. And that is by the advice and consent of the Senate. I just want you to say yes. And it does establish recess appointments. Is that not correct?

Mr. ELWOOD. That is correct.

Ms. JACKSON LEE. So we are not talking about an unconstitutional act. It is in the Constitution, defined recess, and then advice and consent. Is that correct?

Mr. ELWOOD. That is correct, Congresswoman. And one thing to emphasize.

Ms. JACKSON LEE. And talk fast.

Mr. ELWOOD. Okay. Is that even though people say it is like a monarchical power, that the people who have been recess appointed are a tiny number compared to the number who go through the Senate.

Ms. JACKSON LEE. And let me just say this. I am not afraid of what may potentially happen with my inclination to think that this was legitimate. I know my friends have a real challenge with the present Administration. But I think it was important that my colleague indicated Ronald Reagan used it. George Bush used it. Bill Clinton used. George H.W. Bush. George W. And then it seems, at the end of his career, or his tenure for the first term, President Obama used it, actually, the least.

But what I want us to frame, because there is an issue as to who has standing. My understanding is, and then you can respond to this, that with respect to Mr. Cordray, that the standing will come from individuals expressing a harm, whether it is the NLRB, or whether it is the Consumer Protection. And if you would make that point. Let me just raise this other question, if you would make that point of doing so.

Then I want to just refer you to your own words of the President should call the Senate's bluff by exercising its recess appointment power to challenge the use of a pro forma session. The alternative will likely be greater gridlock, which, for me, is an abdication of the duty we have to the American people.

If you would just do the standing question and the question of how is the President to do his work for the American people, protected by the Constitution, if we have letters like this and gridlock. Mr. Elwood.

Mr. ELWOOD. It is true that unlike a lot of recess appointments, the people who were subject to recess appointments in early January this year are going to do things that affect people. And as a consequence, there will be people who have the ability to challenge whether they were validly installed in office.

Ms. JACKSON LEE. And that will be your standing basis.

Mr. ELWOOD. Yes. Exactly.

Ms. JACKSON LEE. That is how you would determine who has standing.

Mr. ELWOOD. Yes. Exactly.

Ms. JACKSON LEE. All right. Go ahead.

Mr. ELWOOD. And as to the point about gridlock, it is true that even though recess appointments can sort of poison relations between the branches, it can also sort of dislodge things. It can sort of encourage the parties to work together more, because the realization of the President will just go unilaterally if the Senate does not move, can cause them to sort of limit their objections to a smaller body that they really care about, and let the other ones go by.

Ms. JACKSON LEE. In your constitutional review, have you seen any harm being done by recess appointments egregious? Let's look at the last Presidents that we just spoke about. Except political disagreements. But Reagan. George H.W. Bill Clinton. George W. Bush. Have there been a crisis in government by those appointments, or have Presidents used them to move the government process along, from your review?

Mr. ELWOOD. I do not view them to have caused a crisis.

Ms. JACKSON LEE. And do you think we are in a crisis right now, with the President's utilization of appointing these individuals, NLRB and the individual from the consumer agency?

Mr. ELWOOD. I don't view it as a crisis. I agree that this is kind of a sticky situation, and it is a novel use of the power, because of the novel situation that the President found himself in. But I wouldn't term it a crisis.

Ms. JACKSON LEE. You think he is within his constitutional authority.

Mr. ELWOOD. Yes, I do.

Ms. JACKSON LEE. I have a letter that I would like to submit to the record, Mr. Chairman. On December 9, I wrote a letter, as the then chairwoman of the Transportation and Security Committee, after the Transportation and Security Administration appointee had been vacant for a year, after the Christmas Day alleged bombing, to ask for a recess appointment, because we could not seemingly move on that position. And for reasons of transparency, I am going to ask to submit that letter into the record.

Mr. SMITH. Without objection. That letter will be made a part of the record.*

Ms. JACKSON LEE. And I would thank the gentlemen for their answers. Yield back.

Mr. SMITH. Thank you, Ms. Jackson Lee.

The gentleman from South Carolina, Mr. Gowdy, is recognized.

Mr. GOWDY. Thank you, Mr. Chairman. I will thank all the panelists.

Mr. Elwood, what is stare decisis?

Mr. ELWOOD. Stare decisis, I don't remember what it means in Latin. But it just means that you comply with decisions once made, unless there is a very good reason for overruling it.

Mr. GOWDY. Right. And it is important that we have consistency and predictability in the law. That is why most of us chose to go

*The information referred to was not received by the Committee at the time of the printing of this hearing.

into the law, because of the order, and the predictability, and the reliability of it.

Mr. ELWOOD. There is a lot to that. Yes.

Mr. GOWDY. So I guess what I am saying to the former attorney general from California's point, when Harry Reid uses pro forma sessions to thwart a Republican President from making appointments, it is really tough to explain to the public how that same analysis shouldn't be used when there is a democrat in the White House.

Mr. ELWOOD. There is a certain appeal to that idea. Yes.

Mr. GOWDY. In other words, the definition of recess, or pro forma, or functionality shouldn't ebb and flow with the vagaries of political cycles.

Mr. ELWOOD. No objection here.

Mr. GOWDY. Do you agree the Senate can't adjourn without the consent of the House for more than 3 days?

Mr. ELWOOD. No.

Mr. GOWDY. You do not. Does your version of the Constitution read differently than mine?

Mr. ELWOOD. Wait. I may have misunderstood the question.

Mr. GOWDY. The Senate cannot adjourn without the consent of the House.

Mr. ELWOOD. Yes.

Mr. GOWDY. All right. And the House never gave its consent.

Mr. ELWOOD. That is also correct.

Mr. GOWDY. All right. Do you agree that there is a difference between being unavailable and being unwilling?

Mr. ELWOOD. I agree.

Mr. GOWDY. All right. I want to ask specifically about Terence Flynn. Not that I am not interested in Mr. Cordray, but I think that NLRB appointments, or punitive appointments, are even more egregious in many regards. That vacancy occurred in August of 2010. And his name was set forth in January of 2011. Now forgive my South Carolina math, but that is 4 months, thereabouts. So, the President waited 4 months, this position that is so vital to the fabric of our republic being wound together, he waited 4 months to even put a name forward. Do you disagree with my chronology?

Mr. ELWOOD. Absolutely not.

Mr. GOWDY. All right. So, January 2011, his name is sent forth. And he is not recess appointed for another year. Now who controls the Senate? Which party?

Mr. ELWOOD. The Democrats do.

Mr. GOWDY. Which means who controls the calendar in the Senate?

Mr. ELWOOD. The Democrats do.

Mr. GOWDY. Are you aware of Senator Reid's scheduling any hearings on Mr. Flynn?

Mr. ELWOOD. I am not aware one way or the other.

Mr. GOWDY. So, you would not disagree if I told you he didn't.

Mr. ELWOOD. No.

Mr. GOWDY. So, you would agree that for a full year the Senate was available to take up this nomination.

Mr. ELWOOD. Yes.

Mr. GOWDY. And yet, they did not.

Mr. ELWOOD. I understand that to be the case.

Mr. GOWDY. Let me ask you about the other two. Those vacancies occurred in August of 2011. And those names were set forth in December of 2012. Again, 4 months. He waited 4 months to even name someone to fill the vacancies, but yet, the fabric of our republic will unravel if he doesn't make a recess appointment within 3 days.

Mr. ELWOOD. I agree with your chronology. As I noted in both my written testimony and my oral testimony, I was just here to talk about the constitutionality of all of it. Not whether it was good intra-branch etiquette.

Mr. GOWDY. Well, the Senate doesn't ever have to adjourn, do they?

Mr. ELWOOD. No. They do not.

Mr. GOWDY. So they have the power to thwart all recess appointments, if they want to.

Mr. ELWOOD. By staying in session. Yes.

Mr. GOWDY. Can you understand how people would be vexed at how you can never adjourn, but yet you can't define the terms of your own adjournment?

Mr. ELWOOD. I don't think so.

Mr. GOWDY. You don't find that vexing.

Mr. ELWOOD. No. Because if you mean to stay in session, stay in session. But you can't just say, I am in session now.

Mr. GOWDY. But that gets to my other point of this desire, on the behalf of our fellow citizens, to have some consistency without the vicissitudes of political cycles. When Harry Reid says he is going to stay in pro forma session to thwart President Bush, how is a pro forma session any different when he does it when there is a democrat in the White House?

Mr. ELWOOD. Well, I thought he was wrong the last time.

Mr. GOWDY. Well, I could care less about the politics of it. What I am interested in, I would like to think the Constitution kind of transcends politics. And I don't like games being played with it. And as I interpret it now, a nap can constitute a recess, which has been known to happen from time to time in the other body. A nap. [Laughter.]

Mr. LUNGREN. More often than not.

Mr. GOWDY. I defer to the gentleman from California. Whatever the definition of recess is has to be good for both parties. Whatever the definition of pro forma is has to be good enough for both parties. And whatever this newfound analysis called functionality is, has to be good enough for both parties.

And with that, I am out of time, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Gowdy.

The gentleman from Arizona, Mr. Quayle, is recognized.

Mr. QUAYLE. Thank you, Mr. Chairman. And I want to thank all the panelists for being here.

Professor Turley, we have heard that recess appointments were done under President Reagan, President Bush, 41, President Clinton, President Bush, 43, and also President Obama. Were any of those recess appointments done during a pro forma session that was being put forth by the Senate?

Mr. TURLEY. Nothing quite like this. In fact, when the line was drawn in the Bush administration, with regard to pro forma sessions, President Bush did respect that line, did not do further appointments.

What you really have here is a sort of strata graphic record, where you started out with the plain meaning of the clause. And people like Hamilton and Randolph, very significant figures, reinforced the plain meaning of the path.

What happened, in terms of decoupling, actually occurred under Attorney General Wirt 4 decades later, and it was Wirt who decoupled it. But the interesting thing, if you go back and look at Wirt's opinion, he actually says the plain meaning of the clause contradicts my interpretation. He says that I recognize that the clause does read so that it only applies to vacancies during a recess, that occur in the recess. But he said I am going to read it according to what I think is the spirit. That was the critical point, where we became untethered.

Mr. QUAYLE. And if this is allowed to stand, I mean we have heard that there are court cases going to challenge this, but if this is allowed to stand, and the reasoning that the OLC has given, saying that the President basically has the ability to define when the Senate is in session or when it is not in session, and set the precedent where the President can make a recess appointment at night, when the Senate gavels out for the day.

Mr. TURLEY. Yes. That is quite striking because this is not a term that only occurs in this clause. Recess has been defined by Congress and there has been deference to that definition under the 20th Amendment, under the adjournments clause. What the OLC is trying to say, in threading that needle, is that those didn't affect another branch.

One of the things I point out is that this is probably sort of a one-sided analysis out of the OLC. I didn't think it was very fair, in that, basically, what they are saying is it is what we say it is. As I point out, I have represented Members of Congress most recently in the Libyan challenge, including Members of this Committee. In that case, the executive branch had a very similar situation, where we were challenging the right of the President to commit forces to war, with shared authority, belonging to Congress, to make a declaration. What the White House said is, war is what we define it to be.

Now, that is obviously a definition that affects another branch. But it did not stop the Administration from saying we can define war, and we just simply define something as not a war. Well, that leaves very little room for the legislative branch, when you are defining all the key terms, and saying it unilaterally belongs to us.

Mr. QUAYLE. So it says that basically the precedent would be set that the President, if you follow this reasoning, could make recess appointments when the Senate gavels out.

Mr. TURLEY. Yes. If you look closely, the OLC said the only way that you could totally protect yourself is just stay in session all the time.

Mr. QUAYLE. Back in 1987, there was an interesting maneuver that occurred, where there was actually two legislative days that were put forth, and one calendar day, so that the majority in the

House could be able to pass a rule that was running into some issues. Could the President, under the reasoning of the OLC, actually be able to make an appointment in between those two legislative days, and not a calendar day? Could they make a recess appointment, following this reasoning, in just a few hours, in between those two gavels?

Mr. TURLEY. Well, following the OLC's analysis, they say that it is up to the President, if he decides that you are not functionally ready to give advice and consent, that in that gap, no matter how short it might be, theoretically, he could act.

Now, they say we don't address the 3-day question, because we don't think that this is really a session. But they also say the only way that you could entirely protect yourself is for you never to stop doing business.

One of the things I just wanted to add is, we are blessed with Framers who were brilliant and also practical people. It borders on defamation to suggest that Framers would create such an absurd and ridiculous situation. What we are detaching here is the artificiality that we have all talked about. This artificiality of saying, I had to act, because I couldn't wait for the advice and consent of the Senate, which might be minutes or seconds away. That, obviously, is not the spirit of the clause. But ever since we decoupled this issue from the language of the clause, we have gotten into this theater of the absurd. And I think it is a cautionary tale that sometimes it is better to stick with the plain meaning of the clause.

Mr. QUAYLE. Thank you, Professor. Yield back.

Mr. SMITH. Thank you, Mr. Quayle.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized out of order, to ask one question, to which she says there is a yes or no answer.

Ms. JACKSON LEE. Yes.

Mr. SMITH. The gentlewoman from Texas is recognized.

Ms. JACKSON LEE. Thank you. I read in some of your testimony. In any event, does a Congressperson, or Congress, or the House have any standing to pursue this in a court of law?

Mr. Elwood?

Mr. ELWOOD. The courts have always been pretty skeptical of saying legislators have standing as legislators.

Mr. SMITH. Is your mike on, Mr. Elwood? Thank you.

Mr. ELWOOD. You would think I could figure the button out by this point.

But I think that the most obvious person to have standing would be someone injured by their regulations or actions of someone on the NLRB or the CPFB.

Ms. JACKSON LEE. Mr. Cooper?

Mr. COOPER. Thank you. Actually having represented Members of this body and the Senate in the reigns against Byrd and the challenge to the old Line Item Veto Act, and having lost the question of representational standing, I would say that I doubt it very seriously.

Ms. JACKSON LEE. Professor?

Mr. TURLEY. I was the last to represent Members of this Committee in the Libyan challenge. We did argue there. I strongly believe that Members of Congress should have standing. But as

Chuck points out, the Supreme Court has taken a negative view of that.

It is not entirely closed off, but they are very hostile to it. I believe they are dead wrong. That Members of Congress have standing.

Ms. JACKSON LEE. But they are hostile to it.

Mr. TURLEY. Yes.

Ms. JACKSON LEE. Thank you. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Ms. Jackson Lee. The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman. I was going to ask the gentle lady from Texas if she would allow me the courtesy to listen to my questions now. But just a little facetious thought that went through my mind. There is no such thing as a yes or no answer in this town. We know that.

I thank the witnesses for their testimony, and confess that it is harder for me to dig down into the nuances of this when I read the Constitution. I think I understand the intent of the Constitution. I think we have been fairly unanimous in our understanding of what the Constitution says, what it was understood to mean at the time of its ratification, what we understand it to mean today. And the question then comes back to: Why would there be any question that the House decides when they are in session, the Senate decides they are in session, or the legislature of the Congress decides when they are in session? And I think the points that were made, that if we allow the President, as Mr. Cooper pointed out, to assume the authority, to declare when the Congress is and isn't in session, that is an extra constitutional assumption, we should be very offended by that assumption.

The only thing that I would come back to is, is if there is a misunderstanding on this, and to me, it is very, very clear, and it has been very well reiterated, but if there is a misunderstanding here, it is back to the letter of the Constitution then. And so, if that is the case, and we think about how it might potentially be litigated with the Supreme Court, if the Supreme Court should find perhaps with the opinion of Mr. Elwood, then I would find myself facing the question of how do I draft an amendment to the Constitution that could be more clear.

And I pose that question to Mr. Elwood. How would you phrase the Constitution to end up with a result the rest of us believe in a fashion clear enough that you would concede the point?

Mr. ELWOOD. It depends on which portion of it you wish to address. Because it definitely has been the case that you could just, to address what I think Professor Turley and I agree is one of the biggest issues of longstanding for these kinds of appointments is, that it only applies to vacancies that arise during the recess of the Senate. I think you could just say virtually the same thing that you did the first time, except you just say it only applies to vacancies that arise during the recess of the Senate, as opposed to happen to exist, I think.

Mr. KING. Does the Constitution say that today? That it applies to vacancies that arise during recess, and gives the President the authority to make recess appointments. So, how is that a distinction?

Mr. ELWOOD. Well, it at least means that you couldn't use it to fill offices with the people that you have had sitting around for months waiting to fill those offices. It would only be if the vacancy arose during that time.

Mr. KING. So you are speaking in a means of addressing the unsuccessfully challenged practice of declaring vacancies to be vacancies created during recess. And I am fine with reverting back to the letter and the intent of the Constitution and its origins. I would like to stay with it. If the American people decided to reinforce this in the aftermath of all the litigation we might be faced with here, how would we define a constitutional prohibition to the President making recess appointments? How would we actually say that in the English language in a way that might stick?

Mr. ELWOOD. As I sit here, I think there are several ways to skin the cat. And I don't know if that would be whether to say that each House will have conclusive authority to define whether it is in recess or not, you know, for purposes of the recess appointments clause, or some other way of addressing it. Or stating it as a prohibition on use of recess appointments during certain circumstances.

Mr. KING. Would you speculate as to whether you think the President believes he had declared the Senate not to be in session? Did he contemplate that?

Mr. ELWOOD. No. Looking at it from his point of view, I think that he would say he is not looking behind the Senate's own orders, that the Senate's own orders say, oh, we are not going to do any work at that time. We are just going to come in and bang the gavel.

And I think that, you know, looking at what the Senators themselves said at the time, as they went out, they thought they were going out for recess. They didn't view the pro forma sessions as having substance either.

Mr. KING. Then why were they having pro forma sessions? Do you know?

Mr. ELWOOD. I think that if you ask them why are they having pro forma sessions, they would say to prevent the President from having a recess appointment power.

Mr. KING. Exercising their constitutional authority to have pro forma sessions to prevent the President from having recess appointment power.

Mr. ELWOOD. That is the question, I think. Yes. But technically, and this is correct, they were doing it because the House didn't consent to adjourn for more than 3 days.

Mr. KING. Mr. Cooper?

Mr. COOPER. Thank you, Congressman King.

Let us focus for just a second on January 3, 2012. The reason the Senate came into session on that day satisfied three constitutional requirements. Number one, the 20th Amendment demanded it on that day. So, the Senate had to come into session. Number two, the Senate did it because the House refused to consent to a recess of more than 3 days. And so, the Senate had no choice, in light of that, but to come into session.

Finally, I would argue that the Senate came into session not to prevent the President from exercising his recess appointment power, but to make itself available to exercise its advice and consent authority for the President, in such event as some exigency or

some emergency along the scale of the necessity of passing the 2-month extension of the payroll tax cut presented.

So there were three reasons on January 3 that the Senate came into session. And those reasons, every one, were constitutionally driven. And it seems to me to be really quite fanciful to say that the Senate was in recess on January 3, 2012. But that is the necessary result of the OLC analysis.

Mr. KING. Thank you, Mr. Cooper. And if I could just quickly follow-up the question with this. Would you concede then, Mr. Cooper, that the Senate went into pro forma sessions to make themselves available for recess appointments, or appointments the President might make during that period of time, or if they were there to prevent the President from making recess appointments? In either case, would you agree that that would be a constitutional position of the Senate?

Mr. COOPER. No question. I do believe that would be a constitutional motivation for the Senate to come into session.

Mr. KING. Thank you. I thank all the witnesses. Thank you, Mr. Chairman. Yield back.

Mr. SMITH. Thank you, Mr. King.

The gentleman from Texas, Mr. Poe, is recognized.

Mr. POE. Thank you, Mr. Chairman.

I know the ultimate question is: Was the Senate in recess or not? But before we get there, a question is: Who determines whether the Senate was in recess or in session? It seems to me the Senate determines if they were in recess or in session. Not the President. Of course, the President thinks they were. He defines recess to mean whatever he wants it to be. And his lawyers, who are his lawyers, take his position. It means what he says it means.

And I guess the next question is: What do we define recess as? It is back to the old, what does "is" mean? We have heard that one a long time ago. I would ask this question, under the philosophy, it is the President determines the recess between gavels. The House and the Senate normally recess to hear from the President on the state of the union. The Senate recesses. We recess. And we all wait for the President to show up, and then it is gaveled.

Under the argument of Mr. Elwood, you would think that the President in between those gavels, he could appoint anybody to anything he wanted to, because we are in recess, but we are all here, ready to hear from him. I think that is a little absurd. Whether it is a 3-day rule, or it is just seconds, the President doesn't determine the definition of recess or in session for the body. We do. Any more than we determine whether he is in recess or not. I think that is his obligation, to determine whether he is available, or whether he is in recess, or whether he is in session, or able to work.

So, it is ironic, to me, that we are having this debate over what the word "recess" means. The Senate says they were not. They were in session. I mean I am one that does not necessarily think that the Senate works as much as they should. I refer to them as the siesta Senate on occasions. But the Senate makes the determination, it would seem to me.

I think the Constitution says the House has to agree when the Senate goes in recess. My question is a yes or no question. Did the

House agree for the Senate to go in recess, if they went into recess? Professor Turley?

Mr. TURLEY. No. They withheld their approval. It requires bicameral approval. They withheld it.

Mr. POE. Mr. Elwood?

Mr. ELWOOD. That is correct. They withheld their consent to go into adjournment.

Mr. POE. Mr. Cooper?

Mr. COOPER. I agree. The House withheld its consent. And presumably, and the reason that power resides in both houses, was so that the House could insist that the Senate be available to do its part in the legislative process, just as surely as the Senate could remain in session, pro forma session, to make itself available to the President for some kind of exigent action, such as confirming a particularly important Federal officer.

Mr. POE. And the House can't go into recess without the consent of the Senate. It works both ways. Isn't that correct?

Mr. COOPER. That is right. That is right.

Mr. POE. All right. And then my final comment, and really question is, and I agree with you Professor, I think probably the smartest people that ever existed, to determine a government, our Founders, were those people. I really do believe that. Contrary to what Justice Ginsburg says about our Constitution, I think it is the finest document ever written for a government.

What was their intent for even putting this in the Constitution?

Mr. TURLEY. Well, this is one of those situations where there is such a significant disconnect between the language and the history. First of all, the language. When it says, "Happen to occur," it seems to me it could not be more clear. It was basically agreed by Wirt, when he decoupled the language, that he was adding "happen to exist." He essentially put in "to exist" in the language, which is manifestly different. What happens to exist could happen for any number of reasons, but virtually all of them are political.

The Framers were facing a new government, where Congress would be gone for as much as 9 months at a time. They created a very logical and very clear clause that said during that period we accept that the President can make these appointments. The irony is that if you look back at the references that were made in the ratification debates, they all express this as a matter of fairness to Congress, because they said we don't want to force Congress to be in session all the time.

So because you are going to be gone for this length of time, because you had to, it took a lot of time to go to Ohio or Kentucky by horseback, they said we are going to give the President this authority. Randolph does a wonderful job with this, and lays out why you would do such violence to the balance of the power, if you were to read that out.

What is interesting is that the other guy on the committee of detail that served with Randolph was John Rutledge. Rutledge was given a recess appointment. And it met Randolph's test. I will note, there is a reason why we want Congress involved, because Rutledge was found to be perfectly insane. He suffered from what were called mad frolics, and proceeded to repeatedly try to drown him-

self in the river. That probably would have come out in a confirmation hearing. [Laughter.]

Tthat is probably the reason why the Framers wanted to keep this narrow.

Mr. POE. If I may have one additional minute, with unanimous consent.

Didn't the Framers want the Senate involved on appointments? The President appoints them. The Senate, Congress, the people approve it. Who rules over us? I mean that is the original intent. And that is the rule, not the exception, where the President sneaks in and appoints them in between gavels. That is not the purpose. The purpose is, generally, let the Senate confirm these people.

Mr. TURLEY. Absolutely. The center of gravity here is the preceding clause. The appointments clause. That is what defines the issue. What is happening is, this is the example of the exception swallowing the rule, because the appointments recess clause is a mere supplement, as Hamilton said, to the appointments clause. It is being used today to essentially devour the appointments clause.

It is also very important, when you read the OLC's opinion, they missed the point that you just made. This is a shared power. The President does not have the authority, is not supposed to have the authority to place high-level officials into offices. They didn't want that, and so power is shared with the Senate. That is what does such great violence, as Randolph would say, if you allow the recess appointments clause to be torn from its constitutional moorings.

Mr. POE. I yield back. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Poe.

The gentleman from Texas, Mr. Gohmert, is recognized.

Mr. GOHMERT. Thank you, Mr. Chairman. And we do appreciate all the witnesses. I had a chance to review materials that you had submitted before. And I apologize for not being here for the entire hearing.

But as my former judge colleague here expressed concern, if the President can take this interpretation of a recess to make an appointment, then it certainly begs the question as to, is there any time that he can make a recess appointment.

And Professor Turley, we don't always end up on the same side, but I always have great respect for your intellectual approach to issues. And if you have been asked this, and I ask your indulgence, but has there ever been a President who has asserted that recess appointments could be made during less than a 3-day recess, when there has been no need to ask the House for authority under the Constitution for a formal recess?

Mr. TURLEY. Thank you, Congressman. I am happy to say we do sometimes agree. We certainly have had many——

Mr. GOHMERT. Yes, we do.

Mr. TURLEY [continuing]. Conversations over the years about the Constitution.

Mr. GOHMERT. I hope that doesn't scare you when we do.

Mr. TURLEY. The answer is no. Once we tore ourselves away from the text, and to Wirt's credit, he said that is exactly what I am doing. That is, Wirt said I acknowledge that the text says this, and I am going to do that.

Once we cross that Rubicon, we found ourselves floating, as to, it put all the pressure on what would constitute a recess. Then there were a lot of opportunistic interpretations given throughout the years. The one line that was drawn was the 3-day recess, because it would make sense. You look at the adjournment's clause. Clearly, 3 days does not constitute a recess under that clause. It was a very logical connection. So the OLC said we have to accept that certainly if it is less than 3 days, it can't be a recess.

They say that they are not getting rid of that line in the current OLC opinion. They do. That is, they make it perfectly clear that it is what the President says it is. They also omit some critical details. They rely on a thing called the Dougherty opinion, which is out of the OLC. A Dougherty in the opinion says that an adjournment of, quote, 5 or even 10 days could not constitute a recess.

So, even the opinion they rely upon returned to that touchstone of you can't take such a brief period, a blink, and say they are not available for advice and consent.

Mr. GOHMERT. Anyone else aware of any President who has ever taken this position since we had a constitution ratified in 1789?

Mr. COOPER. I would only add that there has been an episode, which has been referred to here previously today a couple of times. In the early 1900's, when Theodore Roosevelt made some 160 recess appointments to the military offices, literally between two whacks of the gavel, as one of the Congressmen put it. And this was in a constructive recess, according to Theodore Roosevelt. It was a shameful abuse of Presidential power and a plain violation, I think, of the intendment of the recess appointment clause.

Mr. GOHMERT. So this President, this White House is wanting to identify with that shameful abuse of the recess appointments, apparently.

Mr. COOPER. Well, I have been chagrined that that episode has been called upon by the President and by his lawyers as authority. The Senate report that that episode yielded did say, as has been quoted here today, that the recess of the Senate cannot be imaginary, it must be real. It has to be a time when the Senate's chamber is empty. But when you understand what they were reacting to, what they were saying made perfect sense, with a President declaring the instant of time between two whacks of the gavel being a recess, a constructive recess.

Mr. GOHMERT. But since the recess normally has to be 3 days, of course, the recess clause says if it is more than that, the House has to concur in it. But let me ask one quick question, if I have the indulgence and unanimous consent to ask this question.

But in each of your opinions, who would be required to have standing to raise this issue? I realize the Supreme Court wants to make sure there is a justiceable issue. And then I have heard some of the Supreme Court Justice talk about standing is one of their favorite tools in order to prevent from having to make a decision.

But surely, a U.S. Senator would have standing to raise this issue, would they not?

Mr. TURLEY. It is actually a tough call. Both Chuck and I have been in this situation in court. And I believe that they should have standing. And I think a credible claim could be made. But whenever you have Members standing claims, you start out with a

heavy presumption that they don't have standing. That does not mean that other people would not have clear standing. Those people affected by the judgments of the agency, or individuals, would have a clear issue. And, in fact, a good challenge might combine all of the above. That is, they may make a combination of people to make sure you have standing to bring this forward.

To me, I would be appalled for a court to, if it has legitimate standing, not to rule on this. I know they prefer the political branches to hash it out, but this is becoming cert.

Mr. COOPER. Can I only add this? I rather doubt that a Member of the Senate will be held, anyway, to have standing, having lost that argument in a previous litigation. But someone with standing will come forward.

Mr. GOHMERT. Well, who would that be?

Mr. COOPER. Well, it will be an individual or an entity that has been adversely affected by a ruling by Mr. Cordray's agency or by the NRLB. They will have standing and they will definitely bring forward.

And the one thing that really the President has done here is that when that litigation comes forward, all the recess appointment chips will be pushed in the middle of the table. That is what the President has done. Not just whether or not this was a recess, these pro forma sessions, or whether they were true sessions of Congress, but whether or not a recess is possible under the plain language of the clause, when the vacancy that is being filled did not actually happen during the recess. That is going to be on the table. Any litigator zealously advancing his client's interests is definitely going to litigate that issue. And so, the President, in taking this act, has pushed all the recess appointment chips in the middle of the table.

Mr. GOHMERT. Do you all agree on that?

Mr. ELWOOD. Absolutely.

Mr. GOHMERT. If someone is harmed by a decision by an act by one of these appointees, then they should have standing. Then all decisions by the appointees and all the appointments made during the recess would be an issue.

Mr. ELWOOD. That is right. As Professor Turley said, he described it as a perfect storm of recess appointment controversies. Another way is this is kind of one-stop shopping for addressing virtually every issue that is raised in recess appointments litigation, if it is true. It is an intra-session recess. It didn't arise during the recess. So not to mix metaphors, but it is absolutely true. All the chips are on the table.

Mr. GOHMERT. And I appreciate the Chairman's indulgence, and really appreciate you all's insights. Thank you.

Mr. SMITH. Thank you, Mr. Gohmert.

The gentleman from Georgia, Mr. Johnson, is recognized.

Mr. JOHNSON. Thank you, Mr. Chairman. Good morning to the witnesses.

We are all aware that this hearing is entitled "Executive Overreach: The President's Unprecedented Recess Appointments." I would suggest, however, that we have a hearing to examine the unprecedented obstruction of the Senate republicans of the confirmation process, and how it is hurting our economic recovery, our ef-

forts at law enforcement, and also the ensuring of liberty and justice for all Americans.

For example, we do not have a permanent director for the ATF, haven't had one since 2003. Based on this kind of refusal to confirm agency leaders, and Federal judges, and others, some would say that this Senate confirmation process is flawed and plain old dysfunctional.

Senate republicans have not been shy about their goal, which is to defeat President Obama, make him a one-term President. I think that is pretty well known and accepted, due to the public utterances of various republican leaders, particularly, Mitch O'Connell, of the Senate.

Mr. Cooper, Mr. Elwood, and Mr. Turley, I would like for you to comment on the unprecedented delays and refusals to confirm Presidential appointees during President Obama's administration, and whether or not this delaying tactic is hurting America.

Mr. Cooper, you first. And be as succinct as you can, please.

Mr. COOPER. Well, I would only say I don't think that the delays that we are seeing now in the confirmation process are unprecedented. I think this is a problem. And I agree with you, Congressman Johnson, it is a very serious problem. The dysfunctionality of the appointment process. But it is not one that is, you know, just now coming. It is one that we have unfortunately, I believe, witnessed growing worse and worse over the course of the last few decades.

Mr. JOHNSON. And I could not disagree with you on that. I believe that you are correct. But at this time, you know, we are either looking at this problem or we are looking past the problem for partisan reasons.

Mr. Elwood, what do you say about it?

Mr. ELWOOD. I agree with what Mr. Cooper said, that it has been a problem for decades. The one thing I will point out is that the founding generation viewed, apparently, even in a space of a couple weeks, with an office being not filled, as too much, just based on the recess appointment practices of the early Presidents, who would recess appoint people when the Senate was coming back in a couple of weeks. And this was when confirmations didn't take a long time. People were typically confirmed after 2 days, literally.

Mr. JOHNSON. So this is really an affront to the Framers of our Constitution, in terms of the delay in confirming Presidential appointees.

Professor Turley, what would you have to say about it, sir?

Mr. TURLEY. Congressman Johnson, it is good to see you. The last time we saw each other, you were my opposing counsel in the Porteous impeachment trial in the Senate.

Mr. JOHNSON. You did a fantastic job.

Mr. TURLEY. Well, I much prefer this relationship. But I would certainly echo what was said before, that it is not unprecedented. Although, I will add, it was Mr. Elwood, who I think has done a terrific job and a well-balanced job in presenting the facts and the history, but I will note that even though a matter of 2 weeks was viewed as sufficient for an appointment, back then there were fewer Federal offices. So a vacancy had a much more pronounced

effect upon the Federal Government than it does today. But I certainly agree with him that that period existed.

And I will also add that the Framers anticipated that there would be these moments. They lived in rather rabid political moments. They make the current Congress look like the very model of efficiency, compared when you look back at where they were.

The President's option is to do what he did in the Cordray case. He went to Ohio. He rallied people in a speech. He said, you know, this is wrong. We have an election, and you have to vote to change it. I think the Framers viewed that as the course, as opposed to the President saying, so, I am just going to define this as not being a session. I'm going to go ahead and circumvent Congress, because I can't get their advice and consent on a nomination that I previously gave them, and they said no.

Mr. JOHNSON. Well, I will tell you, even though the Framers, during that era of governance, may have been in practice worse than we are today, they still set forth aspirational goals for us to aspire to.

And Mr. Elwood, if you would, how do you respond to those who argue that these recent recess appointments to the NLRB and the CFPB do us more harm than good?

Mr. ELWOOD. Well, I am not sure what all harms they are saying will arise. I have testified earlier that I don't view these recess appointments—although, I concede that they are unprecedented, because the situation is unprecedented—I don't consider this to be a crisis.

And even though it certainly, I think, sours the relationship between the branches, recess appointments, they can cause the branches to work more closely, because they understand that the President, you know, may just recess appoint people if they don't cooperate.

So I think it is not something I understand, the relationship between the branches, as a practical matter, but I certainly know that it can actually, in a strange way, and in some circumstances, not all, actually promote closer cooperation on appointments.

Mr. COOPER. Mr. Johnson and Mr. Chairman, may I have just a moment to footnote a point that was previously made?

Mr. SMITH. Yes. Of course.

Mr. COOPER. In the early days of the Republic, I think we have to keep in mind, when an office became vacant, the job literally didn't get done, because it was only one person. We did not have a bureaucracy like we have today. And we didn't have a vacancy act, which, by operation of law, basically renders a subordinate officer acting as the acting officer to do the functions of the now vacant office.

So it is a much different situation today than it was. Not to say that it isn't dysfunctional, and that it is definitely an unfortunate and sometimes costly thing for these positions to go unfilled for prolonged periods of time. But it is rarely the case that the function itself is not being done.

Mr. JOHNSON. Well, but isn't it a fact, though, that a leaderless bureaucracy, you have a bureaucracy that is going to do something, without leadership, can't that state of being do more harm than good, as opposed to not having any leadership, whatsoever? It is

the same thing. But no leadership and no bureaucracy is a little better than a big bureaucracy and no leadership.

Mr. COOPER. I don't know how I would try to quantify those harms, but I would concede to you that leaderless bureaucracy for a prolonged period, with a confirmed officer, is a bad thing for the agency, and a bad thing for the people's business.

Mr. JOHNSON. Okay.

Mr. SMITH. Thank you, Mr. Johnson. The gentleman's time has expired.

I want to thank the panelists for their comments today. This was excellent testimony and very helpful to all of us. I also want to single out the gentleman from California, Mr. Lungren, for staying the entire period of the hearing. He gets the best attendance award of the day.

And with that, without objection, Members will have 5 additional days to submit questions, or additional materials for the record.

And we stand adjourned.

[Whereupon, at 12:33 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary

On January 4, the President announced his unprecedented appointments of three individuals to the National Labor Relations Board and Richard Cordray as Director of the Consumer Financial Protection Bureau. These appointments go well beyond past presidential practice and raise serious constitutional concerns.

The Constitution provides the President with the authority to "fill up all vacancies that may happen during the recess of the Senate." However, the President's recent appointments were made at a time at which the Senate was demonstrably not in recess.

During this supposed recess the Senate passed one of the President's leading legislative priorities, a temporary extension of the payroll tax cut. It also discharged its constitutional obligation to come into session beginning on January 3 of every year.

Moreover, the Senate itself, which has the power under Article I, Section 5 of the Constitution to determine "the rules of its proceedings," did not believe it was in recess when these appointments were made. As Senate Majority Leader Reid stated on the Senate floor regarding a similar period in 2007, "the Senate will be coming in for pro forma sessions . . . to prevent recess appointments." What was acceptable for the Constitution in 2007 should be equally acceptable today.

In fact, not only was the Senate not in recess when the President made these appointments, but it appears that under the Constitution it legally could not have been.

The Constitution provides that neither house of Congress may adjourn for more than three consecutive days without the consent of the other house. Accordingly, the Senate could not have adjourned its session and gone into recess without the consent of the House, which the House did not give.

Despite these facts, the President has claimed the unilateral authority to declare that the Senate is in recess for purposes of the recess appointments clause.

Such an astounding assertion of power raises serious constitutional concerns and has the potential to adversely affect the balance of power between the President and the Congress.

Regrettably, these appointments are part of a pattern of the President bypassing Congress and exerting executive power past constitutional and customary limits.

For example, when the President's cap-and-trade legislation failed to pass Congress, he had the Environmental Protection Agency issue regulations instead.

When Congress refused to enact the President's "card check" legislation doing away with secret ballots in union elections, the President's National Labor Relations board imposed the change by administrative decree.

And, when Congress defeated the DREAM Act, the President's illegal immigration amnesty proposal, the Administration instructed immigration officials to adopt enforcement measures that often bring about the same ends as the DREAM Act.

In addition to disrespecting Congress's constitutional authority when Congress has refused to enact his policy preferences, the President has also ignored laws passed by Congress.

For instance, rather than seeking legislative repeal of the Defense of Marriage Act, the President simply instructed his Justice Department to stop defending its constitutionality. And the President ignored the Religious Freedom Restoration Act by failing to give religious organizations an exemption from the Health and Human Services' contraceptive mandate.

One of the fundamental principles of American democracy is that we are a nation of laws. America's elected leaders swear to follow our Constitution and our statutes even when they do not agree with them.

With these recess appointments, the President may have violated the constitution by disregarding the rule of law.

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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives

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(Vacancy)

January 24, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

Dear Attorney General Holder,

I write regarding the President's unprecedented, unilateral appointments of three individuals to the National Labor Relations Board (NLRB) and Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB). These appointments go well beyond past presidential practice and raise serious separation of powers concerns.

Although the Constitution provides the President with the authority to "to fill up all Vacancies that may happen during the Recess of the Senate,"[1] the President's recent appointments appear to have been made at a time at which the Senate was demonstrably not in recess. Indeed, on December 23, 2011, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011, one of the President's leading legislative priorities, which the President promptly signed into law. Additionally, on January 3, 2012, the Senate discharged its constitutional duty to assemble under the Twentieth Amendment. Moreover, the Senate, which has the power to determine "the rules of its proceedings,"[2] did not believe it was in "recess" for purposes of the recess appointments clause during the relevant time period. As Senate Majority Leader Reid stated on the floor of the Senate regarding a similar period in 2007, "the Senate will be coming in for pro forma sessions . . . to prevent recess appointments."[3]

In fact, not only does it appear that the Senate was not in recess when the President made these appointments, but it appears that under the Constitution it legally could not have been. The Constitution provides that neither house of Congress may adjourn for more than three consecutive days without the consent of the other house.[4] Accordingly, the Senate could not have adjourned its session and gone into recess without the consent of the House, which the House did not give.

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[1] U.S. Const. art. II, § 2, cl. 3.
[2] U.S. Const. art I, § 5, cl. 2.
[3] 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007).
[4] U.S. Const. art I, § 5, cl. 4.

Despite these facts and the Justice Department's acknowledgement of "substantial arguments" against the constitutionality of these appointments, in an expansive assertion of executive power the Department concluded that the President has the unilateral "discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."[5] Such an astounding assertion of power raises serious separation of powers concerns and has the potential to dramatically shift the balance of power between the President and the Congress toward the President.

What is more, by bypassing the Senate and making these unprecedented appointments, there will undoubtedly be uncertainty over the legal status of any action taken by either the NLRB or the CFPB while these appointees remain in their positions.[6] The Office of Legal Counsel acknowledged as much in its legal opinion, observing that "we cannot predict with certainty how courts will react to challenges [of these appointments]."[7]

Given the significant constitutional and legal questions raised by these appointments, I write to inquire as to the role the Justice Department played in assessing the legal issues surrounding these appointments. Specifically, I ask that you respond to the following questions and produce the following materials no later than Tuesday, February 7, 2012:

1. Please produce a copy of every Office of Legal Counsel (OLC) opinion or memorandum, or other document, cited or referenced in the January 6, 2012, Memorandum Opinion for the Counsel to the President, *Re: Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* ("January 6th OLC Opinion").

2. Please produce a copy of every OLC opinion or memorandum or opinion of the Attorney General, or other document, that was not cited or referenced in the January 6th OLC Opinion but addresses the subject of the advice given to the Counsel to the President in the January 6th OLC Opinion.

3. Was any OLC opinion or memorandum, or opinion of the Attorney General, withdrawn or modified in connection with the January 6th OLC Opinion? If so, please produce a copy of every such opinion or memorandum.

4. Please produce all documents, including emails, created prior to the January 6th OLC Opinion (which is dated two days after the appointments were made) that constitute OLC's final advice on the authority of the President to make recess appointments during the period between January 3 and January 23, 2012.

5. Please provide a list of all Justice Department officials and offices and components of the Justice Department, including but not limited to the Attorney General, the Deputy Attorney General, the Associate Attorney General, and the Solicitor General, who were

[5] Memorandum Opinion for the Counsel to the President, *Re: Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* at 4, 23 (Jan. 6, 2012).
[6] *See New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010).
[7] *Id.* at 8.

consulted regarding the authority of the President to make recess appointments during the period between January 3 and January 23, 2012, or any other period after December 17, 2011.

6. As the January 6th OLC Opinion postdates the recess appointments at issue, please provide a timeline of the Justice Department's involvement in addressing the authority of the President to make recess appointments since January 20, 2009.

7. Please produce all documents, including emails, related to the recess appointments of officials to the CFPB and the NLRB (both sent to or from the Justice Department) that relate in any way to the decision to make such recess appointments, including, but not limited to, expressions of concern by the Justice Department or any other agencies that these Presidential appointments have the potential to disrupt the agencies' ability to function effectively.

Thank you for your prompt attention to this matter.

Sincerely,

Lamar Smith

Lamar Smith
Chairman

OPINION | January 10, 2012

Democrats and Executive Overreach

It's a mistake to excuse Obama's disregard for the Constitution. Precedents set now will be exploited by the next administration.

By MICHAEL MCCONNELL

One reason so many Americans entrusted Barack Obama with the presidency was his pledge to correct the prior administration's tendency to push unilateral executive power beyond constitutional and customary limits.

Yet last week's recess appointments of Richard Cordray as the first chief of the Consumer Financial Protection Bureau and three new members to the President's National Labor Relations Board—taken together with other aggressive and probably unconstitutional executive actions—suggest that this president lacks a proper respect for constitutional checks and balances.

The Obama administration has offered no considered legal defense for the recess appointments. It even appears that it got no opinion from the Office of Legal Counsel in advance of the action—a sure sign the administration understood it was on shaky legal ground.

It is hard to imagine a plausible constitutional basis for the appointments. The president has power to make recess appointments only when the Senate is in recess. Several years ago—under the leadership of Harry Reid and with the vote of then-Sen. Obama—the Senate adopted a practice of holding pro forma sessions every three days during its holidays with the expressed purpose of preventing President George W. Bush from making recess appointments during intrasession adjournments. This administration must think the rules made to hamstring President Bush do not apply to President Obama. But an essential bedrock of any functioning democratic republic is that the same rules apply regardless of who holds office.

It does not matter, constitutionally, that congressional Republicans have abused their authority by refusing to confirm qualified nominees—just as congressional Democrats did in the previous administration. Governance in a divided system is by nature frustrating. But the president cannot use unconstitutional means to combat political shenanigans. If the filibuster is a problem, the Senate majority has power to eliminate or weaken it, by an amendment to Senate Rule 22. They just need to be aware that the same rules will apply to them if and when they return to minority status and wish to use the filibuster to obstruct Republican appointments and policies.

AFP/Getty Images

Moreover, in this case, two of the recess appointees to the National Labor Relations Board had just been nominated and sent to the Senate on Dec. 15—two days before the holiday. So it is simply not true that they were victims of Republican obstructionism, even if that mattered.

Some of the administration's supporters have tried to argue that the pro forma sessions are a sham and thus that the Senate has been in recess since Dec. 17. Aside from the

President Obama alongside Richard Cordray, head of the Consumer Financial Protection Bureau, in Shaker Heights, Ohio, Jan. 4.

fact that these sessions are not, in fact, a sham—the Senate enacted the payroll tax holiday extension, President Obama's leading legislative priority, on Dec. 23 during one of those pro forma sessions—the plain language of the Constitution precludes any such conclusion.

Article I, Section 5, Clause 4 requires the concurrence of the other house to any adjournment of more than three days. The Senate did not request, and the House did not agree to, any such adjournment. This means that the Senate was not in adjournment according to the Constitution (let alone in "recess," which requires a longer break).

Others have argued that the president can make recess appointments during any adjournment, however brief, including the three days between pro forma sessions. That cannot be right, because it would allow the president free rein to avoid senatorial advice and consent, which is a major structural feature of the Constitution. He could, for example, make an appointment overnight, or during a lunch break. In a brief in the Supreme Court in 2004, Harvard law professor Laurence Tribe dismissed as "absurd" any suggestion that a period of "a fortnight, or a weekend, or overnight" is a "recess" for purposes of the Recess Appointments Clause.

This is not the first time this administration has asserted unilateral executive power beyond past presidential practice and the seeming letter of the Constitution. Its slender justification for going to war in Libya without a congressional declaration persuaded almost no one, and its evasion of the reporting requirements of the War Powers Resolution—over the legal objections of Justice Department lawyers—was even more brazen. According to the administration, not only was our involvement in Libya not a "war" for constitutional purposes; it did not even amount to "hostilities" that trigger a reporting requirement and a 60-day deadline for congressional authorization.

Indeed, the Obama administration has admitted to a strategy of governing by executive order when it cannot prevail through proper legislative channels. Rather than work with Congress to get reasonable changes to President Bush's No Child Left Behind education law, it has used an aggressive interpretation of its waiver authority to substitute the president's favored policies for the law passed by Congress. When the president's preferred cap-and-trade legislation to limit carbon emissions failed in Congress, the Environmental Protection Agency announced it would proceed by regulation instead. And when Congress refused to enact "card check" legislation doing away with secret ballots in union elections, the president's National Labor Relations Board announced plans to impose the change by administrative fiat—one of the reasons Senate Republicans have tried to block appointments.

The English philosopher John Locke, who so influenced our Founding Fathers, wrote that a "good prince" is more dangerous than a bad one because the people are less vigilant to protect against the aggrandizement of power when they perceive the ruler as beneficent.

I fear many Democrats are falling into this trap. They like President Obama and his policies, and they are willing to look the other way when it comes to constitutional niceties. The problem is that checks and balances are important, precedents created by one administration will be exploited by the next, and not all princes are good.

Mr. McConnell, a former federal judge, is a professor of law and director of the Constitutional Law Center at Stanford Law School, and a senior fellow at the Hoover Institution.

Prepared Statement of the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Member, Committee on the Judiciary

No one questions that when the Senate is in recess the President has the authority to make recess appointments. That power is clearly set forth in the Constitution. Further, no one questions that recess appointments have always been controversial. Presidents of both political parties have made politically unpopular recess appointments. And, no one questions whether it can be frustrating to try to get nominees through the Senate. Senate delaying tactics have stalled nominees on both sides of the aisle.

But never before in this country's history has a President made a recess appointment during a time when the Senate was not actually in recess. Because that—to quote former Attorney General Meese—"is a constitutional abuse of high order."

In 2007, Senate Majority Leader Reid and Senate Democrats, which at the time included then-Senator Obama, adopted the practice of holding pro forma sessions, rather than adjourning, to block President Bush's ability to make recess appointments. The President must think that the rules he and his Senate Democratic colleagues developed to hamstring President Bush do not apply to him. But it is an axiom of democratic government that the same rules apply no matter who holds office.

Thus, although the President may object to the Senate's practice of holding pro forma session instead of recessing, he may not simply ignore the factual realities and make recess appointments when the Senate is not in recess. Even President Bush, who my friends on the other side of the aisle assailed for taking unilateral executive action, refused to provoke a constitutional crisis by making recess appointments while the Senate was meeting regularly in pro forma session.

The President's supporters may argue that the President sought the Justice Department's advice before making these appointments and that the Department advised him that the appointments were permissible. Leaving aside the fact that the legal memo supporting the President's appointments was belatedly issued two days after the appointments were announced, the President by his own words has acknowledged that the reason he appointed these individuals had nothing to do with the only justification the Justice Department offered in support of his exercise of power.

The Justice Department asserted that the President has the authority to determine that the Senate is "unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments." Yet, in making these appointments, the President did not determine that the Senate was *unavailable* to confirm his nominees; he determined the Senate was *unwilling* to confirm them. In fact, in appointing Mr. Cordrary the President declared, "I refuse to take no for an answer."

Mr. Chairman, just as the President has refused to take no for an answer, Congress should refuse to accept the legality of these appointments. If these appointments are allowed to stand unchallenged, they will threaten the bedrock principle of separation of powers that lies at the base of our constitutional republic.

By circumventing the Senate's advice and consent role, the President is concentrating the power of appointment in the Executive Branch alone. However, as James Madison recognized, "[t]he accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny."

February 14, 2012

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Smith and Ranking Member Conyers:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing more than 22,000 merit shop construction and construction-related firms, I am writing in regard to the full committee hearing titled, "Executive Overreach: The President's Unprecedented 'Recess' Appointments."

On Jan. 4, 2012, President Obama ignored constitutionally established separation of powers and the rules of the U.S. Senate by appointing three individuals, Sharon Block (D), Richard Griffin (D), and Terry Flynn (R), to the National Labor Relations Board (NLRB) during a pro forma session. ABC believes the President's actions show a blatant disregard for the Constitution and decades of legal opinion. The President's actions will have immediate and long-term negative consequences for our economy and our country.

If allowed to stand, the appointments will set a chilling precedent for presidential power that vastly exceeds our Founders' vision—essentially granting the executive branch unlimited authority to appoint any person to any federal post without any meaningful review by the Senate. In practical terms, this means in many cases no congressional checks on appointments of controversial individuals to key posts and diminished public accountability for vast, unelected federal bureaucracies. The President's unlawful appointments to the NLRB illustrate the dangers of such unchecked executive power.

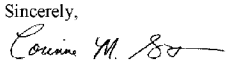
For the last year, the NLRB, under the direction of controversial recess appointee Craig Becker, has issued decisions, enforcement policies and rules designed to silence any discourse in the workplace over the possible disadvantages of union representation and grant vast new influence to organized labor. The NLRB's radical positions have injected further uncertainty into our economy, hampered job growth and investment and caught the attention of the public and elected officials, resulting in the House of Representatives passing several measures designed to address the agency's outrageous actions.

Concerned that an unchecked NLRB would expand its activist agenda, all 47 Republican Senators sent a letter on December 19, 2011 asking the President not to place his nominees to the NLRB through recess appointments and "instead allow for a full and thorough review of their qualifications through regular order in the Senate." The President ignored the letter, and the Senators' concerns are now a reality. NLRB Chairman Mark Pearce recently told the Associated Press he plans to urge the Board to approve new rules by the end of the year that would "make it easier for unions to establish and win representation elections in workplaces." While Chairman

Pearce is hastily taking advantage of a full five member board and rushing to grant the wishes of big labor, America's job creators and job seekers face increased uncertainty. Not only will the radical NLRB's anti-worker and anti-business actions further damage prospects of investment and job growth, but questions about the NLRB's authority to act will invite litigation and ambiguity at a time we need it least.

Thank you for your attention to this important matter, we look forward to working with you to protect the Constitution and restore balance in our workplace laws.

Sincerely,



Corrine M. Stevens
Senior Director, Legislative Affairs

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House of Representatives
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January 17, 2012

Congressman Lamar Smith
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith,

It is with great conviction that I write you regarding the recent debate surrounding the constitutionality of President Barak Obama's use of executive powers to appoint a head to the Consumer Financial Protection Bureau (CFPB) and three board members to the National Labor Relations Board (NLRB). This tremendous usurp of power from the elected representatives of the people of the United States is a breach of constitutional law.

Under the Constitution, Article II, §2, clause 2, the President has the power to make appointments to high-level policy making positions in the federal government with collaboration and approval by the Senate. The President may make temporary recess appointments when the Senate is in a period of recess. The Senate cannot take a recess of more than 3 days unless approval is given by the House of Representatives. As you are aware, the Senate was in a pro forma session when the President made his appointments.

My major cause of concern comes from the President's complete lack of regard for the Constitution and the proper and defined roles of the three branches of government. The push by the President to appoint a head to the CFPB directly defies the Senate and prevents appropriate oversight in the approval of executive appointments.

As we push for greater transparency and accountability to the American people, I urge you to hold a hearing on the constitutionality of the President's use of executive recess appointment authority to a federal agency that has not yet been appropriated federal taxpayer funding. As stewards of the authority and funds of the American people, we have an obligation to ensure fiscal responsibility and strict adherence to the Constitution that we all swore to protect.

Sincerely,

W. Todd Akin

W. Todd Akin
Member of Congress

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Congress of the United States
Washington, DC 20515

February 14, 2012

Honorable Lamar Smith
Chairman
Judiciary Committee
2138 Rayburn House Office Building
Washington D.C. 20515

VIA HAND DELIVERY

Dear Chairman Smith,

I write to express my appreciation for your work as Chairman of the Judiciary Committee. Thank you for holding hearings regarding President Obama's decision to ignore the Constitution and make appointments to executive agencies without having them first confirmed by the Senate.

As you know, on January 4, 2012, President Obama appointed Mr. Richard Cordray as head of the Consumer Financial Protection Bureau, along with three new members to the National Labor Relations Board. I believe these appointments are unconstitutional because they circumvented confirmation from the Senate, even while the Senate was in session. In response to this blatant example of executive overreach, I wrote a letter to President Obama which was signed by twenty-six of our House colleagues. I told the President that I found his feeble attempt to distinguish pro forma sessions as a parliamentary ploy to be disingenuous, particularly in light of his reliance on pro forma sessions to pass the December extension of the payroll tax cut. I do not believe the President should be allowed to unilaterally declare the Senate unavailable to perform its constitutional obligations, especially when he does so only when it suits his political interests.

I appreciate you conducting these hearings on this very important issue because I have heard about it from Hoosiers in my district. Respectfully, I request that you include my letter to the President as part of the official record.

Sincerely,

Todd Rokita
Member of Congress

TR/ct

Enclosure

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Congress of the United States
Washington, DC 20515

January 23, 2012

President Barack Obama
1600 Pennsylvania Avenue NW
Washington, DC 20500

VIA HAND DELIVERY

Dear President Obama:

We are writing regarding your January 4, 2012, appointments of Mr. Cordray as head of the Consumer Financial Protection Bureau and three new members to the National Labor Relations Board. Having read the justification for these appointments put forth by the Department of Justice's Office of Legal Counsel (OLC), we respectfully disagree with its analysis. We believe these appointments are unconstitutional and an egregious display of executive overreach. We ask that you refrain from attempting to circumvent the Constitution by making these appointments while the Senate remains in pro forma session.

In its memo, the OLC attempted to justify these appointments by saying the executive branch should essentially have the authority to determine when the Senate is unavailable to perform its constitutional obligations. We find this to be an extraordinary claim which has no basis in the Constitution or any other legal precedent. Nowhere is the executive branch vested with this power. Instead, both Houses are vested with the power to determine their own rules and proceedings. In this case, both Chambers have determined that pro forma sessions are legitimate sessions.

The OLC made a feeble attempt to distinguish pro forma sessions as merely a parliamentary ploy. We find this to be disingenuous, particularly in light of your reliance on a pro forma session to pass the two month extension of the payroll tax cut in December. Your administration cannot argue on the one hand that no business is conducted during pro forma sessions, while simultaneously using these sessions as a way for the Senate to perform its constitutional obligations in the process of passing bills. Either the Senate is unavailable during pro forma sessions to perform all its constitutional obligations, thus delegitimizing this recent two month extension, or the Senate is available to perform its duties - both cannot be the case.

The executive branch should not be deciding whether the Senate is unavailable to provide its advice and consent. Our Founding Fathers formed a new nation because they were tired of executive overreach. Many of them served in colonial legislatures that frequently had to contend with colonial governors attempting to decide the fitness of the legislatures to perform their duties. We believe that our Founding Fathers, who created such a robust government marked by separation of powers, would be shocked and dismayed by the utter disregard you have shown the

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Constitution and the United States Congress. As John Adams astutely noted, we must have a "government of laws and not of men."

We therefore respectfully ask that these appointments be rescinded immediately. Additionally, in the future, we ask that all nominees be confirmed by the Senate as defined by the Constitution.

Sincerely,

Todd Rokita
Member of Congress

Paul C Broun

Ron Paul

Doug Lamborn

Jim Walberg

Paul A. Gosar

Clyde Lummis

SC-03

Gary Bucshon

Karly Hartzler

Peter Olson

WI-08

UT-3

IN-3

TX-23

TX 27

NM-02

MITCH McCONNELL
Kentucky

United States Senate
OFFICE OF THE REPUBLICAN LEADER

May 2, 2011

The Honorable Barack Obama
The President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500-0005

Dear Mr. President:

We write to express our concerns about the lack of accountability in the structure of the Consumer Financial Protection Bureau (CFPB). As presently organized, far too much power will be vested in the CFPB director without any effective checks and balances. Accordingly, we will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the Consumer Financial Protection Bureau is reformed.

The Dodd-Frank Act grants the CFPB director unprecedented authority over financial institutions and main street businesses. The CFPB director will have vast rulemaking, supervisory, investigative and enforcement powers and the authority to regulate any person or business that offers or sells a "financial product or service." This authority will extend to not just traditional financial institutions, but also potentially thousands of entrepreneurs and small businesses.

This authority will directly affect every American household by limiting their choices when purchasing financial products, restricting the availability of credit to consumers, and increasing the cost of goods or services purchased using credit. Furthermore, these regulations could put small banks and businesses at a competitive disadvantage to big banks and businesses, which can more easily absorb compliance costs. How the CFPB director exercises his or her authority therefore will have a profound influence on the future of our economy and job creation.

Despite this broad mandate the Dodd-Frank Act failed to provide any real checks on the CFPB director's powers. Once confirmed, the director effectively answers to no one. The CFPB director will be appointed for a five year term and can only be removed by the President in cases of "inefficiency, neglect of duty, or malfeasance in office." Thus, the director cannot even be removed for poor performance, including enacting ill-conceived regulations.

Moreover, the Dodd-Frank Act grants the director unfettered authority to set the budget of the CFPB. No agency or institution, including Congress, can review the CFPB budget, and no mechanisms were put in place to ensure that the director is effectively managing public money.

While the Financial Stability Oversight Council (FSOC) could vote to stay or set aside a regulation issued by the director, the circumstances under which the council can take such action are so narrow as to make this check illusory. The council can act <u>only</u> if the regulation puts at

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202-224-3135

risk the safety and soundness of the entire U.S. banking system or the stability of the U.S. financial system. Moreover, the procedural requirements for the FSOC to act are so high that it will be practically impossible for the FSOC to overrule the CFPB director.

To be clear, we support strong and effective consumer protection. The present structure of the Consumer Financial Protection Bureau, however, violates basic principles of accountability and our democratic values. No person should have the unfettered authority presently granted to the director of the Consumer Financial Protection Bureau. Therefore, we believe that the Senate should not consider any nominee to be CFPB director until the CFPB is properly reformed. We urge the adoption of the following reforms:

- **Establish a board of directors to oversee the Consumer Financial Protection Bureau**. To prevent a single individual from dominating the actions of the CFPB it should be governed by a board of directors. Diversifying the leadership of the CFPB would also reduce the potential for the politicization of the CFPB and ensure the consideration of multiple viewpoints in the CFPB's decision-making. This structure is consistent with the organization of the Federal Reserve Board, the Securities and Exchange Commission, and the Federal Deposit Insurance Corporation.

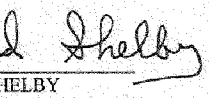
- **Subject the Consumer Financial Protection Bureau to the appropriations process.** To ensure that the CFPB does not engage in wasteful or inappropriate spending and has effective oversight, the CFPB should be subject to the Congressional appropriations process. The Securities and Exchange Commission, Commodity Futures Trading Commission, and the Federal Trade Commission have long been subject to the appropriations process for the same reasons.

- **Establish a safety-and-soundness check for the prudential regulators**. Federal bank regulators should be given meaningful tools to prevent the CFPB's regulations from needlessly causing a bank failure. After all, one of the best consumer protections is a safe and sound bank. Such a check by the prudential regulators will provide a reasonable restraint on the CFPB's authority and ensure that the CFPB's regulations strike the right balance between consumer protection and safety-and-soundness.

We believe these are commonsense reforms that can be promptly adopted by Congress on a bipartisan basis without having to revisit the numerous other flaws with the underlying legislation. We look forward to working with you to adopt these consensus reforms.

Sincerely,

MITCH MCCONNELL
REPUBLICAN LEADER



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Senate politics shut down some agencies
USA Today
By Gregory Korte, December 28, 2011, 1:00:38 AM

WASHINGTON — When Senate Republicans filibustered President Obama's nominee to a key consumer watchdog post this month, it was the first time in history the Senate blocked an appointment in an effort to effectively shut down an agency.

It likely won't be the last. Already, Senate Republicans are threatening to hold up Obama's nominees to a number of posts overseeing elections, labor law and health care -- and in each case, they aim to kill the agency outright.

Senate Republicans say refusing to confirm a nominee is the only recourse they have left after Democrats pushed through legislation without listening to Republicans' concerns about transparency and accountability.

Part of the problem is that Democrats have "created so many new agencies without Republican input," said Don Stewart, a spokesman for Senate Minority Leader Mitch McConnell, R-Ky. "There's a whole bunch of new nominees or confirmable spots to have a debate over."

In blocking the president's nomination of Richard Cordray to the Consumer Financial Protection Bureau Dec. 8, McConnell said, "We are not going to let the president put another unelected czar in place."

By law, only the bureau's director can exercise the new powers granted under the Dodd-Frank Wall Street Reform and Consumer Protection Act last year. Without one, the bureau can't regulate payday lenders, debt collectors and credit-reporting agencies, for example.

Confirmation battles in the Senate are nothing new, but the reasoning is. Never before had the Senate explicitly blocked a nominee to shut down an agency's business, says Don Ritchie, the Senate's official historian.

Many reasons for rejection

The Senate has rejected nominees for all kinds of reasons, Ritchie says, "but we haven't found any precedent for making an agency powerless by not confirming anyone to run it."

"Nonsense," counters Sen. Richard Shelby, R-Ala. Both parties have routinely held up nominations for exactly that reason, he says. "The only thing different in this particular case is that it is completely transparent. … We are right here in the open."

One scholar calls it a new and disturbing trend.

"If your view is that an agency shouldn't exist, and so you're going to use your one vote against a nominee, that's fine. But using the filibuster to raise the bar to 60 (votes), not because they're awful people, but because you're trying to delegitimize an agency, that's very far over the line," says Norm Ornstein of the conservative-leaning American Enterprise Institute.

The Senate hasn't filibustered Obama's nominees to the Election Assistance Commission (EAC), but they are stuck in committee -- with the same effect. The four-member commission has been two members short for a year now -- leaving it short of the three members required by law to conduct business. The remaining two members are leaving this month.

Also, the executive director has left, and the general counsel is acting in his place. He, in turn, has been nominated to another federal post. If he leaves, there will be no one running the agency day-to-day.

Vacancies just languish

It's a "slow death," says Gracia Hillman, a former Democratic commissioner. "One by one by one the vacancies have been languishing and languishing and languishing," she says. Republicans have "attacked that agency every way they could."

Rep. Gregg Harper, R-Miss., calls the EAC a "zombie agency" that continues to exist even after its original mission -- to dispense $3.1 billion in federal election aid to states -- was accomplished by 2006. Since then, its staff has grown from 21 to as high as 37. It now has 31 full-time employees and a $16.2 million annual budget.

"Only in Washington is the solution to dysfunction expansion," said Harper, the elections subcommittee chairman.

The House has passed a Harper bill to kill the EAC directly. The Obama administration supports the agency, saying it "continues to perform crucial statutory responsibilities" such as certifiying voting machines, and ensuring disabled people have access to polls.

Obama has nominated three people to the commission, but they're stuck in a Senate committee. Those nominees, Sen. Lamar Alexander, R-Tenn., said, are "very well qualified" but they should find another government job where they would have "something to do."

"Ronald Reagan once said, 'A government bureau is the nearest thing to eternal life we will ever see on this earth,'" Alexander said at a June hearing on the nominations. "Should we not try, using this opportunity, to prove President Reagan wrong?"

Other targets

Senate politics are also threatening to shut down two other prominent federal agencies:

•The five-member National Labor Relations Board, which oversees labor law, already has two vacancies. Another seat will come open in January, because Obama named Craig Becker as a recess appointment and his term ends when the Senate adjourns. Last year, the Supreme Court ruled that the NLRB needs at least three members to decide cases -- so another vacancy would effectively shut it down.

Sen. Lindsey Graham, R-S.C., has pledged to block all nominations to the board, even after the NLRB dropped its complaint against Boeing for attempting to open a factory in South Carolina, a non-union state.

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