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2138 RAYBURN HOUSE OFFICE BUILDING

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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.

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.

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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
Chairman