

Understanding the Centrality of the Appointments Clause as a Structural
Safeguard of Our Scheme of Separated Powers: The Senate's Exclusive
and Plenary Confirmation Power Trumps Presidential Intrasession
Recess Appointments

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Executive Summary

The Constitution establishes a procedure for the nomination and appointment of officers of the United States that includes important roles for both the President and the Senate. The debates of our founding fathers, as well as Supreme Court opinions, explain that these provisions were intended to create important checks and balances on the branches of Government involved. The Justice Department's Office of Legal Counsel opinion, which purports to identify the legal basis of the recess appointments of four individuals to important Government positions this past January, asserts that the President has the unilateral ability to determine the existence of a "recess" for purposes of triggering the President's recess appointment authority. This conclusion would appear to undermine the balance of powers that is inherent in the Appointments Clause. It would also appear to conflict with the constitutional right of the Senate to determine its own rules and procedures. The use of a pro forma procedure during an intrasession recess of the Senate also raises the unresolved issue of whether any recess appointment can ever be made while the Senate is in such an intrasession adjournment, or instead does this authority only relate to intercessional periods. While there is no definitive judicial precedent as yet, a review of the constitutional debates, prior court rulings, and the history of recess appointments indicates that the validity of the intrasession recess appointments at issue is questionable, and that compelling arguments may be made that they are invalid.

Understanding the Centrality of the Appointments Clause as a Structural Safeguard of Our Scheme of Separated Powers: The Senate’s Exclusive and Plenary Confirmation Power Trumps Presidential Intrasession Recess Appointments

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I. Introduction

Under the Constitution, the President has the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions that shall expire at the End of their next Session” (Recess Clause).³ On December 17, 2011, the Senate agreed by unanimous consent to “adjourn and convene for pro forma sessions only, with no business being conducted,” every Tuesday and Friday from that date until January 23, 2012. During that period, on January 3, 2012, it convened a pro forma session to commence the second session of the 112th Congress, as required by the Constitution, and adjourned within a minute.

On January 4, 2012, supported by a legal opinion of the Justice Department’s Office of Legal Counsel (OLC),⁴ President Obama made recess appointments of Richard Cordray to be the first director of the Consumer Financial Protection Board (CFPB), and of Sharon Block, Richard Griffin and Terry Flynn to be members of the National Labor Relations Board (NLRB). OLC concluded that pro forma sessions in which no business is to be conducted did not have the legal effect of interrupting a 20 day intrasession recess which the OLC claimed would qualify as a recess under the Recess Clause.⁵ In a bold assertion of Executive power, the OLC opinion found that the President has the *unilateral* discretion to determine that the Senate is “in recess” for purpose of permitting the President to avoid the requirement for Senate confirmation of nominations. The result of the appointments is to install the appointees in their respective offices for almost two years.

The effect of the presidential actions has been to ignite political and legal firestorms that are likely to exacerbate the current near paralysis of the Senate

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² The views expressed in this paper are solely those of the author and do not reflect a position of the Constitution Project.

³ Art. II, Sec. 2, cl. 3.

⁴ Office of Legal Counsel Memorandum for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (January 6, 2012)(OLC Opinion).

⁵ An “intrasession recess” is a recess that occurs during a session of the Senate. An “intersession recess” occurs between two different sessions of the Senate, in other words, after the end of the one session but before the beginning of the next session.

confirmation process⁶ and force litigation of recess appointment issues that have been unresolved for over a century.⁷ The reason for the present impasse in the appointment of these Executive Branch principal officers is not subtle. The Republican Senate minority, with the support of the House Republican majority, has publically acknowledged that it is determined to use the leverage of stalling the confirmation of the first director of CFPB in order to prevent the new agency from exercising the full range of powers available to it under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA).⁸ The apparent objective is to obtain an agreement with the Administration to revise the structure and funding independence of the Bureau. Similarly, the Senate seeks to block the NLRB appointments in order to deprive the agency of a quorum necessary to promulgate what the Senate minority perceives as labor friendly rules.⁹ Cordray’s nomination, which was made a full year after the establishment of the Bureau,¹⁰ was reported favorably out of committee, but the threat of a filibuster, and the lack of 60 votes to enforce cloture, prevented a floor vote. Two of the three NLRB appointees, Block and Griffin, were nominated on December 15, 2011, two days before the adjournment, and thus have not been vetted nor the subject of a congressional hearing.

As will be more fully elaborated below, this paper concludes that OLC’s assertion that the President has unilateral discretionary authority to determine whether the Senate is in recess for purposes of the Recess Clause is constitutionally flawed. This conclusion is based on a thorough review of all relevant precedents, the historic use of the recess appointments power, the plain language used in the Constitution and its formative history, and the basic principles of separation of powers that are central to the operation of our Government and the protection of abuse by any one branch.

II. The Senate’s Role in the Confirmation Process is Exclusive and Plenary

A. The Framers Designed a General Appointments Scheme Bounded by Strict Checks and Balances

The OLC opinion assiduously avoids any mention or discussion of the Appointments Clause itself or the Framers’ debates over the general power of

⁶ See ,e.g., Josh Rogin, “McCain removes hold on Lippert nomination,” Wash. Post, Feb. 9, 2012, A 15. The article explains that nominations are stalled because of Republican anger at recess appointment of Cordray.

⁷ The NLRB appointments have already been challenged in a pending suit, *National Association of Manufacturers v. NLRB*, Case No. 1:11-cv-01629-ABJ(D.C.D.C.).

⁸ Public Law No. 111-203 (2010). Subtitle F authorized the Treasury Secretary to perform the functions of that subtitle, which included overseeing the set up of the new agency and selecting the date of the transfer of personnel and authorities from seven other agencies. He was to perform these functions until a director is confirmed. The Secretary interpreted his mission to allow him assume and exercise the transferred functions, but not any new authorities established elsewhere in the DFA, until a director is confirmed. He did so until the Cordray appointment.

⁹ The Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) that the Board carry on substantive operations without at least three of its five members properly in office.

¹⁰ Under section 1018 of the Dodd-Frank Act, the Consumer Financial Protection Bureau was established on the date of enactment, July 21, 2010. Mr. Cordray was nominated for the position of Director on July 18, 2011.

appointment. Those debates were heated, contentious and revelatory of their awareness of the importance of how and where to vest control over the appointing power. The Recess Clause, on the other hand, was adopted by the Constitutional Convention without any debate. In light of the substantial Convention discussion of the appointment power, the lack of any debate on the Recess Clause suggests that the Framers thought that Clause would not affect the meticulously developed scheme of checks and balances of the Appointments Clause, which requires action by both the President and the Senate to effect an appointment.¹¹ This view is corroborated by the statement of Alexander Hamilton in his Federalist Paper No. 67, where he deemed the Recess Clause to be “auxiliary” and “supplementary” in nature.¹²

The Convention debates on the appointments authority, on the other hand, shed much light on the intended limited scope of the Recess Clause. The debate records clearly show that the delegates voiced great distrust of the Executive and expressed the need for checks and balances to counteract the power of the President. Over the course of the considerations, the delegates rejected attempts to vest appointment power solely in either the President or the legislature. In the end a compromise was reached that required the input of both branches so as to achieve the goals of responsibility and accountability.¹³

The initial draft constitution presented at Philadelphia (the Virginia Plan) lodged in Congress the responsibility for choosing both the Executive and members of the national judiciary. The Executive would have been empowered “to appoint to offices in cases not provided for” by the Constitution. James Wilson objected to the appointment of judges by a legislature: “Experience shewed the impropriety of such appointments, by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.” Other delegates feared that vesting such power in a single person would be “leaning too much toward Monarchy.”¹⁴ A later, interim version of the draft constitution vested in the Senate the authority to appoint ambassadors, public ministers and judges of the Supreme Court, while empowering a now independent President to appoint all other officers not provided for in the constitution.¹⁵ Roger Sherman objected to the draft language contending that it conferred too much power on the President and enabled him “to set up an Absolute Government.”¹⁶

When the Committee on Detail reported back to the Convention the language that became the Appointments Clause, it reflected major compromises: the Senate was shorn of its power to appoint ambassadors and Supreme Court justices; the President could

¹¹ Article II, sec. 2, cl. 2.

¹² The Federalist No. 67, at 409-10 (Alexander Hamilton)(Clinton Rossiter ed. 1961).

¹³ See, e.g., Michael A. Carrier, When Is the Senate in Recess for the Purposes of the Recess Appointments Clause?, 92 Mich. L. Rev. 2204,2224-25 (1994).

¹⁴ I The Records of the Federal Convention of 1797, at 21, 63, 119 (Max Farrand, ed. Rev. ed. 1966(Farrand)

¹⁵ 2 Farrand at 185.

¹⁶ Id. at 405.

nominate, but not appoint, all the principal officers of the United States; and the Senate would confirm his nominees. Responding to objections against this blending of the appointing power, Gouverneur Morris explained that the benefit of the shared authority was “that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”¹⁷ The delegates approved the proposed compromise.¹⁸ The Convention then agreed, without discussion or opposition, to the Recess Clause.¹⁹

Alexander Hamilton explained in Federalist Paper No. 76 why the Convention had withdrawn from the President “the absolute power of appointment.”²⁰ Under the constitutional plan:

[T]he necessity of [the Senate’s] concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.²¹

Hamilton also commented that “The possibility of rejection would be a strong motive to care in proposing” and would deter the President from naming “candidates who had no other merit than that of coming from the same State to which he particularly belonged, or being in some way or other personally allied to him, or possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”²² The Supreme Court has consistently stated its accord with this understanding of the nature, purpose and effect of the compromises, respecting the adoption of an appointments process that is safeguarded by these checks and balances.²³

B. Effective Checks and Balances Require that the Powers of the Branches at Each Stage of the General Appointments Scheme Are Exclusive and Plenary

The adopted general appointments scheme provides that the President “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

¹⁷ Id. at 539.

¹⁸ Id. at 539-40

¹⁹ Id. at 540.

²⁰ The Federalist No. 76, at 482.

²¹ Id. at 483.

²² Id.

²³ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 122,129-30 (1976); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878,883-84 (1991); *Edmond v. United States*, 520 U.S. 651,650-60 (1997).

provided for, and which shall be established; but 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....The President...shall Commission all the Officers of the United States.”²⁴

This finely tuned scheme establishes three separate and distinct stages for appointments. The first is the “nomination” by the President alone; the second is the Senate’s assent (or not) to the nominee’s “appointment;” and the third is the final appointment and commissioning by the President.²⁵ At each stage the respective branch prerogatives are carefully and clearly demarked and have long been understood to be exclusive and plenary to that branch. Thus, only the President can nominate and commission.²⁶ Congressional appointments are prohibited.²⁷ A presidential failure to nominate for a vacant position cannot be remedied by a judicial order.²⁸ Thus, just as the Senate may block a nomination in order to forestall the appointment of a principal officer, the President may achieve the same result by refusing to nominate a principal officer. In either case the failure to appoint an officer may be based on considerations other than the qualifications of the nominee, and in each case, the result is a valid exercise of a prerogative of that branch of Government.

The President is also insulated in the third stage of the process. An appointment to an office is not completed until the President signs a commission. Even after approval by the Senate the President may change his mind, and the confirmed appointee will be denied his or her position.²⁹ But once the commission is signed, the appointment is complete and a court may command its delivery to the appointee. The President, however, is bound by his nomination and cannot commission an officer for a post different from the one for which he was nominated. Finally, the Supreme Court has held that the Senate cannot change its mind about a confirmation after having assented to it, notifying the President of its assent and the President having signed the commission.³⁰

While the nomination and commissioning stage are within the exclusive domain of the Executive, the confirmation stage is solely the province of the Senate.³¹ The Senate may confirm or reject or not act at all. With its constitutional authority to determine its rules of proceedings³² it can make confirmations easy (through unanimous consent

²⁴ Art. II, sec. 2, cl.2 and sec. 3.

²⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803) n ; *Dysart v. United States*, 369 F. 3d at 369 F. 3d 1303, 1306, 1311-12 (Fed. Cir. 2004).

²⁶ *Marbury v. Madison*, 5 U.S. at 155 (The nomination process is “the sole act of the president” and “completely voluntary.”)

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976); *Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928).

²⁸ *Marbury*, 5 U.S. at 165-67; *Dysart*, 369 F.3d at 1317.

²⁹ *Dysart*, id. at 1316.

³⁰ *United States v. Smith*, 286 U.S. 6 (1932).

³¹ *INS v. Chadha*, 462 U.S. 919, 955 (1983)(“The Senate alone was given final unreviewable power to approve or disapprove Presidential appointments.”).

³² Art. I, sec.5, cl.2.

resolutions), difficult (through threats of filibuster and the need for 60 votes for cloture), or impossible (by staying in session continuously). OLC concedes that Congress can defeat nominations by staying in continuous session³³ and cannot challenge the legality of the filibuster. The Framers saw no difficulty in an outcome that left an office vacant. The remedy, after the failure of negotiation and compromise, would come through public judgment of the political process. This was made clear by Justice Scalia writing for a unanimous Court in *Edmond v. United States* (1997):

[T]he Appointments Clause is more than a matter of “etiquette or protocol;” it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal . . . officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial branches. . . . This disposition was designed to ensure higher quality of appointments; the Framers anticipated that the President would be less vulnerable to interest group pressure and personal favoritism than a collective body. “The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation.” [citing Hamilton and Story] The President’s power to select principal officers of the United States was not left unguarded, however, as Article II further requires “Advice and Consent of the Senate.” This serves both to curb executive abuses of the appointment power . . . and to promote a judicious choice of [persons] for filling the offices of the union. . . . By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.³⁴

Justice Scalia went on to quote Alexander Hamilton: “The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the Senate for approving, would participate, though in different degrees, in opprobrium and disgrace.”³⁵

³³ OLC Opinion at p. 4.

³⁴ 520 U.S. 651,659-60 (1997)

³⁵ 520 U.S. at 660, quoting Hamilton in Federalist No.77. The sentences preceding the quoted material make it clear that the nomination and confirmation process was to be a joint endeavor of separately empowered political entities that would be transparent and visible, allowing the public to assign blame for a failure of the process: “In that [appointments] plan [of the proposed Constitution] the power of nomination is unequivocally vested in the executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety, and the public would be a no loss to determine what part had performed by the different actors.”

In sum, the Appointments Clause establishes a process that is a fundamental structural safeguard designed to ensure responsibility and accountability of each of the political actors. At each stage the relevant actor has complete discretion and power to perform its constitutionally assigned role and, with very narrow exceptions,³⁶ each actor may act or may take measures to protect the integrity of its role in the process. Thus the President has withheld submitting nominations in order to effect changes in targeted programs,³⁷ and the Senate has used its constitutionally-based authority to establish rules of procedure for similar purposes.

III. The Senate's Rulemaking Power Allows It to Authorize Pro Forma Sessions That Prevent the President From Making Recess Appointments

A. The Courts Have Recognized the Breadth of the Senate's Rulemaking Power

In authorizing pro forma sessions between December 17, 2011 and January 23, 2012, the Senate was exercising its constitutionally vested rulemaking power. The Constitution empowers “each House [to] determine the Rules of its Proceedings...”³⁸ This power has been construed broadly by the courts. The Supreme Court has held that where neither express constitutional constraints, nor fundamental rights are ignored, “[all] matters of method are open to the determination of the house... The power to make rules is ... not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, *absolute and beyond challenge of any other body or tribunal.*”³⁹ In *Nixon v. United States*,⁴⁰ the Supreme Court held a challenge to the Senate's decision to establish a special committee to hear impeachment evidence against Judge Nixon, and to make recommendations to the full Senate, to be nonjusticiable. The Court found that there was “a textually demonstrable constitutional commitment of the issue to [the Senate]; or a lack of judicially discoverable and manageable standards for resolving [the issue].”⁴¹ Indeed, the Court

³⁶ The Supreme Court in *Myers v. United States*, 272 U.S. 252, 128-29 (1926) recognized the Congress might impose specific qualifications for nominees for particular offices, but such qualifications cannot have the effect of selecting a specific individual for nomination.

³⁷ Presidents in the past have withheld nominations in order to cause detrimental consequences for targeted programs or policies. Extended vacancies may contribute to agency inaction, foster confusion among nonpolitical employees, and undermine agency legitimacy. See Ann Joseph O'Connell, “Vacant Offices: Delays in Staffing Top Agency Positions,” 82 So. Cal. L. Rev. 913 (2009).

³⁸ Article I, sec. 5, cl. 2.

³⁹ *U.S. v. Ballin*, 144 U.S. 1,5 (1892). See also note 49, *infra*, noting that the Senate rules permit legislative action even during a pro forma session.

⁴⁰ 506 U.S. 224 (1993).

⁴¹ 506 U.S. at 228-29.

commented that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”⁴²

The constitutional power of each House of Congress to establish its own rules and procedures relates to all manner of how each body will or will not take a legislative action committed to it. In *INS v. Chadha*,⁴³ the Supreme Court held that one or two house legislative vetoes were exercises of legislative power that affected the rights, duties and obligations of persons outside the legislative branch. These legislative veto provisions were therefore unconstitutional by failing to comply with the requirements of bicameral passage and presentation to the President. However, the Court specifically exempted legislative actions taken pursuant to the Rulemaking Clause.⁴⁴ The Court recognized that although the exercise of the rulemaking power may have an incidental impact outside the legislative branch, as long as the predominant focus is internal to the House or Senate, it is a valid constitutional exercise of that body’s rulemaking authority. The Court also took pains to note that among the four explicit textual commitments allowing either House to act alone was the Senate’s confirmation authority, stating that: “The Senate alone was given final unreviewable power to approve or disapprove Presidential appointments.”⁴⁵

The instances of Senate or House rules that have affected Executive actions are myriad and include committee issuance of subpoenas and the authorization of contempt citations for failure to comply with such subpoenas; fast track procedures for review and possible rejection of agency final rules and commercial treaties that require implementing legislation; and filibusters of proposed legislation and nominations, all of which are indubitably constitutional.⁴⁶ Senate rules that have been put in place regarding actions during adjournments or recesses include designating an officer to receive messages from the Executive; the authorization of standing committees to continue hearings, committee

⁴² Id. at 237-38. The lower federal appellate courts have been similarly deferential. See, e.g., *United States v. Rostenkowski*, 59 F. 3d 1291, 1306-07 (D.C. Cir. 1995) explaining that “[w]here... a court cannot be confident that its interpretation [of a House rule] is correct, there is too great a chance that it will interpret the Rule differently than would the Congress itself; in this circumstance, the court would effectively be making the rules—a power the Rulemaking Clause reserves to each House alone.... Though that Clause may be most directly concerned with the question, it does not supplant the doctrine of separation of powers nor authorize the a court to set naught the allocation of authority in the Rulemaking Clause.” See also, *Skaggs v. Carle*, 110 F. 3d 831, 836 (D.C. Cir. 1997)(denying member standing to challenge a rule, citing *Rostenkowski*).

⁴³ 462 U.S. 919 (1983).

⁴⁴ 462 U.S. at 956 n.21. The Court also identified several provisions of the Constitution specifically allowing legislative actions that do not have to comply with the Presentation Clause, including the Senate’s sole and unreviewable powers to conduct impeachment trials, ratify treaties, and confirm nominations. Id., at 955.

⁴⁵ 462 U.S. at 955.

⁴⁶ For an articulation of the constitutional and historical bases of the filibuster see the testimony of Professor Michael Gerhardt in Hearing, “Judicial Nominations and Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent,” before the Subcomm. on the Constitution of the Senate Judiciary Committee, 108th Cong., 1st Sess. (2003).

authority to conduct investigations and to issue subpoenas;⁴⁷ and to receive and conduct hearings on nominations submitted by newly elected Presidents.⁴⁸

Finally, it is important to underline the breadth and means of the Senate's exercise of its rulemaking authority that is illustrated by its actions in the December 17, 2011 adjournment and in the previous adjournment in August 2011. Both adjournment resolutions provided that no business would be conducted during the pro forma sessions. In each, however, the Senate passed urgent legislation by unanimous consent.⁴⁹

B. The Senate's Confirmation Authority Is Not Limited to Up or Down Votes

The confirmation authority is exclusively committed to the Senate. This authority includes the determination when the Senate will declare a constitutionally recognized "recess" that will trigger the President's recess appointment powers. The Framers nowhere insisted that the House and Senate shut up shop at specified times. Rather, the Framers and early commentators understood that, as a practical matter, because of the difficulties of transportation and personal needs at home, there would be lengthy recesses after the work in a session had been completed. It was thought "it would 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."⁵⁰ But there is no evidence whatsoever that the Senate could not stay in continuous session indefinitely, thereby thwarting a nomination. OLC does not dispute that. It is also clear that the Framers anticipated there would short breaks during a session and provided for them.⁵¹

But in the first 132 years of the Republic, only one President, the embattled Andrew Johnson in 1867, thought to make a recess appointment during an adjournment in the Senate proceedings occurring during a session of the Congress. The next intrasession recess appointment occurred in 1921. That action, by President Harding, rested on an opinion by his Attorney General, Harry Daugherty.⁵² Daugherty's opinion overruled a contrary 1901 opinion rendered by Attorney General Philander Knox⁵³ who advised President Roosevelt that an intrasession adjournment of 18 days was not a constitutional recess that supported an exercise of the recess appointment power. Attorney General Knox relied for his opinion on the absence of any recognition by his

⁴⁷ Senate Standing Rule XXVI (1).

⁴⁸ See, Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?," 92 Mich. L. Rev. 2204, 2242-43 (1994)(Carrier).

⁴⁹ See 157 Cong. Rec. S 8729 (daily ed. Dec. 23, 2011)(Temporary Payroll Tax Cut Continuation Act of 2011); and 157 Cong. Rec. 5297 (daily ed. Aug. 5, 2011)(Airport and Airways Extension Act of 2011).

⁵⁰ Hamilton, The Federalist No. 67, at 409-10.

⁵¹ Art. I, sec. 5, cl. 4 ("Neither House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days.").

⁵² 23 Op. Atty. Gen. 599 (1901).

⁵³ 33 Op. Atty. Gen. 20 (1921).

predecessors of such an authority, the wording of the Recess Clause limiting the power in the singular—“the Recess”—and that the fact that allowing for intrasession appointments would be “convenient,” was not sufficient to overcome the constitutional requirement for Senate confirmation. As explained by Attorney General Knox: “It may be that Congress might ‘temporarily adjourn’ for several months as well as several days, and thus seriously curtail the President’s power of making recess appointments. But this argument from convenience . . . cannot be admitted to obscure the true principles and distinctions ruling the point.”⁵⁴ The Attorney General also recognized that no constitutionally supportable bright line could be drawn allowing Presidents to invoke the Recess Clause only during certain recesses: “[If the president could make a recess appointment during this 18-day recess], I see no reason why such an appointment should not be made during any [intrasession recess], as from Thursday or Friday until the following Monday.”⁵⁵

Daugherty’s contrary opinion relied heavily on a 1905 Senate Judiciary Committee report that vehemently objected to President Roosevelt’s recess appointments in December 1903 of 160 officials (including two that were controversial) in the instant between the end of one session of the 57th Congress and the beginning of the next session. Roosevelt justified it as a “constructive recess.” The Committee in its criticism attempted to define an appropriate recess in practical terms saying “recess” meant “something real, not something imaginary; something actual, not something fictitious.”⁵⁶ The Committee, of course, was making no reference to intrasession adjournments because it was dealing with Roosevelt’s intercession appointments; there was no thought of any application of its remarks to intrasession recess appointments which had been ruled unavailable just four years before. Attorney General Daugherty, however, drew on that “definition,” claiming that the term recess should be given a “practical,” not a “technical,” construction, and that “the real question” was “whether in a practical sense the Senate is in session so that its advice and consent could be obtained.”⁵⁷ Although Daugherty admitted there was a line drawing problem regarding the appropriate length for any intrasession recess, he opined that the 28 day adjournment was long enough but that 5 or 10 days was not. The Attorney General then resolved the line drawing problem by advising that the President is 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.”⁵⁸

Daugherty’s opinion has been the touchstone for Attorney General and OLC opinions since then, flitting between adjournments as short as 3 and 10 days. Not only has Knox’s critique not been satisfactorily answered, but circumstances have borne out

⁵⁴ 23 Op. Atty. Gen. at 603.

⁵⁵ Id.

⁵⁶ Sen. Rep. No. 4389, 58th Cong., 3d Sess.2 (1905).

⁵⁷ 33 Op. Atty. Gen. at 21-22.

⁵⁸ Id. at 25.

his concerns. The number of intrasession recess appointments have increased dramatically in the past three decades even though there has been no significant increase in the amount of time spent in intrasession recesses. A reviewing court could logically find that the Senate's role in the confirmation process is being undermined and usurped by relatively recent aggressive use by the President of his recess appointment power. Assuming for the moment that some number of intrasession days reflect an appropriate constitutional recess, and the President can, in his discretion determine when the Senate is "unavailable," what is left of the Senate's confirmation authority? The answer is nothing, and that should be unacceptable to any reviewing court.

The proper question is not the "availability" of the Senate to act but, rather, the Senate's "willingness" to act, a determination that the Framers and Supreme Court rulings have long recognized is textually committed to that body's sole and exclusive discretion under the scheme of the general appointments process and the exercise of its rulemaking power. If the Senate can stay in session perpetually, if it can filibuster a nomination to death or by even by the threat to do so, it can protect its prerogative by conducting pro forma sessions. Such action is not a unconstitutional "sham." It is an appropriate defensive posture against a reasonably perceived threat of Executive usurpation. And there can be no "bad" reason for stopping a nomination that would allow a court to intervene. The only remedy is purely political, the opprobrium of the electorate against the actor who is deemed to be wrong. Indeed, if this situation goes before a court it will likely be guided by the nonjusticiability standard enunciated in *Nixon v. United States*. A court reviewing the question of how many days are required for an intrasession adjournment to be considered a constitutional recess will not have any manageable standard to guide its decision, and will be faced with the clear constitutional commitments of rulemaking power and confirmation authority to the Senate. It would be unlikely that the judicial branch would interfere with these clear Senate prerogatives.

In summary, the Constitution specifically committed to the Senate the exclusive authority to confirm nominations. The Constitution also expressly authorizes the Senate to establish its own rules for all of its proceedings. The debates held by Framers emphasized the important role of the Senate as a balance and check on the President's appointment power, but are silent on the Recess Appointment provision. The President's actions may well be seen as an attempt at usurping the Senate's authority and role in the appointment process.

IV. There is No Long-Standing Historic Practice that Supports Intrasession Recess Appointments

The OLC Opinion makes much of a purported long-standing historic practice and recognition of presidential intrasession recess appointments. As explained above, intrasession recess appointments are a relatively new phenomenon, occurring almost

exclusively since 1947. There is no record of any President having made an intrasession recess appointment until July 1867, and none thereafter until August 1921. Indeed, as has been related above, in 1901 Attorney General Knox issued an opinion that advised President Roosevelt that recess appointment power applies only during “the period after the final adjournment of Congress for the session, and before the next session begins.”⁵⁹ The Knox opinion was abandoned by Attorney General Daugherty in 1921,⁶⁰ when President Harding used that tactic to make an intrasession appointment, but only one other such intrasession recess appointment was made (Coolidge in 1928) until 1947.

Thus, there were three intrasession appointments in the first 150 years of the republic. Usage thereafter was initially modest, a total of 54 between 1947 and 1980. However, intrasession appointments increased in the Reagan (73), Bush (37), and Clinton (53) administrations.⁶¹ Intrasession appointments burgeoned during the G.W. Bush administration to 141. Thus far President Obama has issued 26. Also, for the first time in the history of the United States, intrasession appointments exceeded intercession appointments in the Bush and Obama eras: 141 intrasession appointments to 30 intersession appointments for Bush and 26 to 6 so far for Obama, an indication of an increased and conscious Executive abandonment of the Senate confirmation process.

The fact is that, contrary to the implications of the OLC assertions, intrasession recess appointments do not date back to our founding era but are a development occurring in the last half century, with a dramatic increase in use in the last decade. In adjudicating issues about the scope of the recess appointment power, the Ninth Circuit noted that courts give “considerable weight...to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs.”⁶² That is certainly not the case here. In *INS v. Chadha*,⁶³ the Supreme Court held that hundreds of legislative veto provisions were unconstitutional. The Court noted that its “inquiry is sharpened rather than blunted by the fact that congressional veto provisions are apparently increasing in frequency.” In that case the Court expressly noted that such veto devices first appeared in 1932, only 50 years before its ruling, and slowly increased in usage from five such provisions in the period 1932 to 1939 to 34 between 1950 to 1959, and then increased to 163 such provisions in 89 laws between 1970 to 1975, the last period of statistics available to it.⁶⁴ This applies forcefully in the context of the current intrasession appointments controversy, which has come to dominate the recess appointment process in

⁵⁹ 23 Op. Atty. Gen. 599 (1901).

⁶⁰ 33 Op. Atty. Gen. 20 (1921).

⁶¹ Carrier, *supra* note 50 at 2212 note 48.

⁶² *Woodley v. United States*, 751 F.2d 1008 (9th Cir. 1985)(quoting *Buckley v. Valeo*, 424 U.S. 1, 140 n.176).

⁶³ 462 U.S. 919 (1983).

⁶⁴ 462 U.S. at 340-41. The Court was also undoubtedly aware that in 1982 the Senate passed by a 94-0 vote a regulatory reform bill, S. 1080, that would have imposed a two-house legislative veto on all future agency rulemakings. 128 Cong. Rec. S2572-2605 (daily ed. March 23, 1982). A house companion bill, H.R. 746, did not receive floor consideration.

the past ten years. The *Chadha* Court, echoing Attorney General Knox, rejected out of hand that claims of convenience and necessity could override constitutional principles.

The inconsistent Attorney General and OLC views of the recess appointments power demonstrates the risk of constitutional interpretations that may be tainted by institutional self interest. As it has become apparent, attempts to establish minimum required length of an intrasession are unworkable in light of Congress’s contemporary scheduling patterns. The OLC now seeks to advance an interpretation of the Recess Clause that would debase the role of the Senate in the appointments process. Under the OLC opinion, the President alone would be able to declare the Senate “unavailable,” thus permitting an appointment without Senate consent. The central decision the Framers made, that the appointment process should require action by two branches of the Government, and should not be conferred on the President alone, would be eviscerated. Whatever deference the courts in the past may have given to consistent and well-reasoned Attorney General or OLC opinions, the “checkered background”⁶⁵ of the Executive’s views could well leave a reviewing court with the view that these opinions do not rest on any constitutional principle and are not entitled to judicial deference on the important constitutional issue raised in this case.

V. Congress Has Never Acquiesced to the Validity of Intrasession Recess Appointments

The OLC Opinion effectively claims that Congress, as an institution, has not challenged the validity of intrasession recess appointments since the 1921 Daugherty opinion and thus has acquiesced in the now established practice. To the contrary, Congress, since the founding of the country, has taken strong and consistent measures to protect the Senate’s prerogatives. The use of pro forma sessions is simply the latest protective act in its arsenal, and it is an appropriate, as well as lawful response to the numerous recent attempts by the Executive branch to avoid the confirmation process.

A. The Vacancies Acts

Congress has long been concerned about presidential usurpation of the Senate’s confirmation power through temporary appointments that are made without Senate confirmation. In 1795 Congress passed a law limiting to six months the time a temporary assignee could hold an office as an “acting” official.⁶⁶ In 1868 Congress passed the first comprehensive vacancy act restricting the use of acting officials when an incumbent dies or becomes disabled in office. The intent of this legislation was to make it difficult for the President to use “acting officials” rather than putting forth nominees for Senate

⁶⁵ 3 Op. Off. Legal Counsel 314, 315 (1979).

⁶⁶ 1 Stat. 415 (1795). On the history of vacancies acts, see Morton Rosenberg, “Validity of Designation of Bill Lann Lee As Acting Attorney General for Civil Rights,” CRS General Distribution Memo, January 14, 1998 (CRS Vacancies Memo).

confirmation. If a vacancy was not filled by a confirmed nominee within the statutorily prescribed time, the powers of the office could not be used. This caused five cabinet departments to shut down when the President failed to have the department heads timely nominated and confirmed. In its current form, the Federal Vacancies Reform Act limits the tenure of acting officials in positions covered by this law to 210 days. After that time, if there is no nominee, the position becomes vacant and its duties cannot be exercised.⁶⁷ The Reform Act was designed to eliminate Justice Department interpretations of the predecessor legislation that allowed presidential designees to hold office for indefinite periods, sometimes years, without nominations or confirmations.⁶⁸

B. Holdover Provisions

Congress often accompanies fixed term positions with so-called “holdover” provisions that allow an incumbent to continue in office until the office is filled by a senate confirmed successor. Four District of Columbia Circuit district court cases have dealt with the question whether the President, during a holdover period, may make a recess appointment. The OLC’s treatment of the rulings lends the impression that they were constitutional rulings on the issue that raise doubts as to the validity of such provisions. They were not. All were disposed of as matters of statutory construction, albeit constructions that properly avoided possible Appointments Clause questions. In two,⁶⁹ the district courts found that there was no vacancy; in one because the holdover was time limited to a determinate one year; the other because the statutory language was directory (“shall continue to serve” until a successor “has been appointed and qualified.”). In two others,⁷⁰ the courts found the holdover tenure provision too indefinite and therefore the office was deemed vacant and subject to a recess appointment. In *Swan v. Clinton*⁷¹, the D.C. Circuit appeals emphasized the need for a clear legislative statement on intent in such cases.

C. Pay Limitations

In 1863, Congress enacted a provision that placed a flat prohibition on the payment of salary to recess appointees to positions that had become vacant during a period when the Senate was in session.⁷² As explained by Senator Fessenden at that time: “It may not be in our power to prevent the appointment, but it is in our power prevent the

⁶⁷ See, the Federal Vacancies Reform Act of 1998, codified at 5 U.S.C. §§ 3345-3348d (2006) and Senate Report No. 105-250, 105th Cong., 2d Sess. (1998) (Senate Report); and CRS Vacancies Memo. .

⁶⁸ Senate Report at 3-9, 11-15, 17-20.

⁶⁹ *Wilkinson v. Legal Services Corp.* 865 F. Supp. 891, 900 (D.D.C. 1994), rev’d on other grounds, 80 F. 3d 535 (D.C. Cir. 1996) and *Mackie v. Clinton*, 827 F. Supp 56, 57-58 (D.D.C. 1993) vacated as moot (D.C. Cir. Mar. 9, 1994).

⁷⁰ *McCalpin v. Dana*, No. 82-542 (D.D.C. October 5, 1982), appeal dismissed as moot, 766, F.2d 535 (D.C. Cir. 1984).

⁷¹ 100 F. 3d 973 (D.C. Cir. 1996).

⁷² 12 Stat. 642 (1863).

payment; and when the payment is prevented, I think that will probably put an end to the habit of making such appointments.”⁷³ That prohibition remained intact until 1940 when it was amended to make it less burdensome on recess appointees. It provides three exceptions to the payment prohibition: (1) for appointees to vacancies that arise within 30 days of a recess; (2) for appointees to an office for which a nomination was pending at the time of the recess, so long as the nomination is not of the person appointed during the previous recess of the Senate; and (3) for appointees selected to an office where a nomination has been made but rejected by the Senate within 30 days of the recess, and the appointee was not the person rejected.⁷⁴

The Executive has never challenged the constitutionality of these confirmation protective measures.

VI. The Supreme Court Has Not Resolved the Issue of the Constitutionality of Intr-session Recess Appointments

The constitutional question whether recess appointments are valid during an intr-session recess is not settled. In 2004, the 11th Circuit held in *Evans v. Stephens*⁷⁵ such an appointment to be valid. On denying *certiorari*, Justice Stevens pointedly explained that the Court’s denial was not a ruling on the merits of the argument, and that “it would be a mistake to assume that our disposition of the petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as to this, with appointments made without the consent of the Senate during short intr-session ‘recesses.’”⁷⁶ The OLC opinion agrees the issue is still open.

The Supreme Court has repeatedly stressed the need for “vigilance” against attempts by each of the three branches of Government to exceed the outer limits of its power. The Supreme Court has not hesitated to invalidate such attempts.⁷⁷ Use of the recess appointment power during this past January, in the face of a clear Senate stance evincing an intent not to take a constitutional recess, is just such an action. By invoking the recess power the President has avoided the Senate’s exclusive constitutional function

⁷³ 33 Cong. Globe 564-65 (1863).

⁷⁴ 5 U.S.C. § 5503 (a)(1)-(3), (b)(2006).

⁷⁵ *Evans v. Stephens*, 387 F. 3d 1220, 1224-26 (11th Cir. 2004). cert. denied 544 U.S. 942 (2005).

⁷⁶ *Id.* 544 U.S. at 942-43. See also Michael B. Rappaport, “The Original Meaning of the Recess Appointments Clause,” 52 UCLA L. Rev 1487 (2005)(arguing that the Constitution permits recess appointments only during an inter-session recess).

⁷⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976)(Congress may not appoint superior officers of the United States); *INS v. Chadha*, 462 U.S. 919 (1983)(Congress may not control execution of the laws except through Article I procedures); *Bowsher v. Synar*, 478 U.S. 714 (1986)(Congress may not exercise removal power over officers performing executive functions); *Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)(Congress may not maintain control of an executive entity by means of a review entity it has appointed); *Clinton v. City of New York*, 524 U.S. 417 (1998)(Congress cannot delegate, and the President cannot exercise, the power to repeal a provision of law).

to advise and consent on presidential appointments. Indeed, two of the appointees were nominated only two days before the adjournment, not giving the Senate even time to vet and hold hearings.

The heart of the issue here is that the failure of the President to follow the constitutional rules for appointments raises the specter of presidential usurpation of power. The Supreme Court has long expressed concerns “over encroachment and aggrandizement” of one branch over the other, and these concerns have “animated our jurisprudence and arouses our vigilance against the ‘hydraulic pressure inherent within each of the separate branches to exceed the limits of its power.’”⁷⁸ Justice Kennedy, in his concurrence in the Line Item Veto Case, saw the issue there as raising just the structural concerns the Framers feared most: a concentration of power in the hands of a single branch as a threat to liberty. He stated:

To say that the political branches have a somewhat free hand to reallocate their own authority would seem to require the acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment....The latter premise, too, is flawed. Liberty is always at stake when one or more branches seek to transgress the separation of powers.⁷⁹

The liberty interest at stake is dramatically evident in present situation. The President, by exercising an invalid recess appointment power, is evading the presidential obligation to seek advice and consent of the Senate for four principal officers of the United States. He is aggrandizing senatorial power by ignoring the constitutional design that vests in “the Senate alone...final unreviewable power to approve or disapprove Presidential appointments.”⁸⁰ The action puts in place officials with no legal authority to affect the rights, duties and obligations of persons purportedly subject to their authority.

Preservation of the Constitution’s delicate sharing of appointment authority between the branches, and the Constitution’s commitment to each House of Power to prescribe its own rules of procedure (including the decision to convene pro forma sessions in order to prevent recess appointments), will be a significant factors that may motivate a court to reject the President’s apparent attempt to “accrete these powers to a single branch.”

VII. Ramifications of a Court Ruling That Nullifies the President’s Recess Appointments

⁷⁸ *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

⁷⁹ *Clinton v. New York*, U.S. at 449-50.

⁸⁰ *Chadha*, 462 U.S. at 955.

The Supreme Court and federal appellate and district courts have recognized the right and standing of persons suffering a legally cognizable injury to seek legal redress from alleged violations of the Appointments Clause.⁸¹ The essence of these claims is that under the Constitution a person cannot be subject to government regulation when the appointed official lacks the legal authority to act. The injury to be redressed is the potential threat that the government is acting against a person through an official with no lawful authority to so act.”[J]udicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated.”⁸² The Supreme Court has held that the *de facto* doctrine⁸³ will not apply to a successful plaintiff in such a challenge.⁸⁴ But whether a successful Appointments Clause challenge will be given retroactive effect appears to be a matter of remedial discretion. In *Buckley v. Valeo*,⁸⁵ which struck down congressional appointments to the Federal Election Commission, the Court upheld all the past acts of the Commission as valid under the *de facto* doctrine. In other instances it has stayed its remedial action to allow Congress a limited time to construct a legislative remedy.

Adverse court rulings may present unique problems in addition to the foreseeable disruptive effects on the operations at both the CFPB and the NLRB. The judicial challenges will create uncertainty amongst those regulated by the agencies. These challenges could also affect the regulators, who may limit their actions over concerns of their legal status. Certainly agency leverage in bargaining settlements will be diminished. The recent experience at the NLRB is cautionary.

After the Supreme Court determined that the NLRB had been operating for two and a half years without a quorum, the Court remanded the matter to the court of appeals. The Supreme Court understood that its decision called into question nearly 600 adjudicatory rulings, including 96 that were pending appeal in various federal courts. After the NLRB obtained the necessary quorum it began to review all of the 96 cases that previously been appealed to the federal courts. It is not clear how they were disposing the cases not appealed.⁸⁶ The NLRB again lost its quorum at the end of 2011 by virtue of the end of three members’ terms. In order to permit the NLRB to function, the President

⁸¹ See *Ryder v. U.S.*, 515 U.S. 177 (1995) and cases cited *infra* at note 82. However, the courts have rejected the standing of members of Congress to bring actions based on violation of the Appointments Clause, holding that their remedy is through Congressional, rather than judicial action. See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997).

⁸² *Landry v. FDIC*, 204 F. 3d 1125, 1130-1132 (D.C. Cir. 2000), cert denied 121 S.Ct. 298 (2000); See also, *Olympic Savings & Loan v. Director, OTS*, 732 F. Supp. 1183, 1188-90 (D.D.C. 1990); *Andrade v Lauer*, 729 F. 25 1475, 1495 (D.C. Cir. 1984); *Pa. Dept. of Welfare v. United States*, 124 F. Supp. 2d 917, 920-24 (D.C. W.D. Pa. 2000); *Williams v. Phillips*, 360 F. Supp. 1362, (D.D.C.), stay denied, 482 F. 2d.669 (D.C. Cir. 1973).

⁸³ The *de facto* doctrine protects actions of governmental officials acting under “color” of lawful authority. It is designed to prevent disruption in settled actions that could result from a determination that an official has been improperly appointed.

⁸⁴ *Ryder v. United States*, 515 U.S. 177 (1995).

⁸⁵ 424 U.S. 1, 142-43 (1976).

⁸⁶ M. Trevor Lyons, “Putting the Genie Back in the Bottle: What Happens in the Wake of the Decision in *New Process Steel v. NLRB*,” 32 *New Jersey Labor and Employment L. Qtly.* 14 (2011).

made the three appointments discussed above. However, at least one case challenging the constitutionality of the NLRB recess appointments has already been filed.

The CFPB also faces what are potentially more serious problems. It is possible that an adverse ruling would be limited to reversal of the particular regulatory action contested. This would result if the court invokes the *de facto* doctrine and validates all other past actions of the agency. Alternatively, a court might provide a time certain for Congress to pass legislation to validate retroactively past agency actions.

One question that will have to be faced is what happens if Mr. Cordray's appointment is declared unconstitutional? Does the Treasury Secretary automatically resume his prior limited assumption of only the transferred powers of the then vacant office of Director; or would he now assume all the powers of the Director who has been deposed because he was unlawfully appointed? Has Cordray already ratified all the actions the Treasury Secretary took in the period July 21, 2011 until January 4, 2012 and, if so, are the ratifications valid? All these questions may become relevant in the event of an adverse ruling since there remains a serious legal question whether the Treasury lawfully assumed the duties that were transferred on July 21, 2011. The attached appendix discusses those legal issues.

VIII. Concluding Observations

The Constitution establishes a procedure for the nomination and appointment of officers of the United States that includes important roles for both the President and the Senate. The debates of our founding fathers, as well as Supreme Court opinions, explain that these provisions were intended to create important checks and balances on the branches of Government involved. The OLC legal opinion, which purports to identify the legal basis of the recess appointments of four individuals to important Government positions this past January, asserts that the President has the unilateral ability to determine the existence of a "recess" for purposes of triggering the President's recess appointment authority. This conclusion would appear to undermine the balance of powers that is inherent in the Appointments Clause. It would also appear to conflict with the constitutional right of the Senate to determine its own rules and procedures. The use of a pro forma procedure during an intrasession recess of the Senate also raises the unresolved issue of whether any recess appointment can ever be made while the Senate is in such an intrasession adjournment, or instead does this authority only relate to intercessional periods. While there is no definitive precedent as yet, a review of the constitutional debates, prior court rulings, and the history of recess appointments indicates that the validity of the intrasession recess appointments at issue is questionable, and that compelling arguments may be made that they are invalid.