UNCHARTED TERRITORY: WHAT ARE THE CONSEQUENCES OF PRESIDENT OBAMA'S UNPRECEDENTED "RECESS" APPOINTMENTS?

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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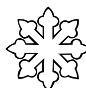

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UNCHARTED TERRITORY: WHAT ARE THE CONSEQUENCES OF PRESIDENT OBAMA'S UNPRECEDENTED "RECESS" APPOINTMENTS?

WEDNESDAY, FEBRUARY 1, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room 2154, Rayburn House Office Building, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Platts, McHenry, Jordan, Walberg, Lankford, Amash, Gosar, Labrador, DesJarlais, Gowdy, Guinta, Farenthold, Kelly, Cummings, Towns, Maloney, Norton, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Quigley, Davis, Welch, and Murphy.

Staff present: Kurt Bardella, senior policy advisor; Michael R. Bebeau and Gwen D'Luzansky, assistant clerks; Robert Borden, general counsel; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; David Brewer, counsel; Katelyn E. Christ, research analyst; John Cuaderes, deputy staff director; Adam P. Fromm, director of Member services and committee operations; Linda Good, chief clerk; Christopher Hixon, deputy chief counsel, oversight; Mark D. Marin, director of oversight; Kristin L. Nelson and Jeffrey Post, professional staff members; Laura L. Rush, deputy chief clerk; Rebecca Watkins, press secretary; Jeff Wease, deputy CIO; Jaron Bourke, minority director of administration; Beverly Britton Fraser and Claire Coleman, minority counsels; Kevin Corbin, minority deputy clerk; Ashley Etienne, minority director of communications; Susanne Sachsman Grooms, minority chief counsel; Carla Hultberg, minority chief clerk; Paul Kincaid, minority press secretary; Adam Koshkin, minority staff assistant; Lucinda Lessley, minority policy director; Leah Perry, minority chief oversight counsel; Jason Powell and Steven Rangel, minority senior counsels; Dave Rapallo, minority staff director; and Mark Stephenson, minority director of legislation.

Chairman ISSA. Good morning. The committee will come to order.

The Oversight and Government Reform Committee's mission is that we exist to secure two fundamental principles: First, Americans have the right to know that the money Washington takes from them is well spent; and, second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.

Our solemn responsibility is to hold government accountable to taxpayers because taxpayers have a right to know what they get from their government. We will work tirelessly, in partnership with citizen watchdogs, to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Government Reform Committee.

I will now recognize myself for an opening statement.

President Obama, on January 4th, executed a political power play. He put us in uncharted territory. At the very least, it creates an uncertain environment and significant risk, by his own attorney's writings. Although, as I know too well, if you shop enough, you can always get an attorney to give you the opinion you want. If you can go to enough attorneys, you will get it. And if you hire a good attorney, they will even tell you that you can pardon a criminal that is still a fugitive from justice. We know that from history. We know that from recent history now, that you can get an opinion that is exactly the opposite of centuries of precedent, exactly the opposite of your predecessors, exactly the opposite of still-Majority Leader Reid's own view of recess occurring or not occurring.

Vice President Biden in 2005 said, "No President is entitled to the appointment of anyone he nominates. No President is entitled by the mere fact he has nominated someone. That's why they wrote the Constitution the way they did. It says 'advice and consent.'" The Senate did not consent. The Senate chose specifically not to act, even bringing to a vote and failing to get cloture.

Ultimately, we will decide nothing here today. We are here to evaluate the risk to the American people of a government that has appointees who may not be able to act on behalf of the American people with the rule of law. The courts will soon decide—and the sooner, the better—whether or not these appointments are valid; and, if so, whether or not a law limiting taxes to the American people is valid. Because there can be no doubt the two cannot be valid. You cannot be in recess and not in recess. You cannot choose while in recess to pass a law and then choose to not be in recess for purposes of recess appointments.

Ultimately, these and other issues will be decided, but the committee is here to understand the risk, to understand the likelihood, and at least to ensure that government begins facing the real problem of this uncertainty—this uncertainty that may last only a few weeks or may last for the rest of this administration.

On December 23rd, while in pro forma session, the Senate passed and President Obama signed the Temporary Payroll Tax Continuation Act of 2011. I am just as concerned that the IRS is not collecting those taxes when, clearly, they were in recess, according to the President.

This creates another constitutional question. The Constitution did not consider partial recess or recess for this purpose and not that purpose. You are either in recess or you are not.

More importantly, the Senate may not act to be in recess to the exclusion of the other body. We, in fact, act together. We either are together, as required by the Constitution, or we are not. There is no such thing as the House is in session and the Senate is not, be-

cause if we are in session and the Senate is not, no law can be passed.

Our Founding Fathers anticipated us coming to Washington, or New York before that, for a period of time and going home to our constituencies for a rather significant period of time. Many Americans, rightfully so, think that we were better off when we left town for a period of time and really got in touch with the people we represent.

But that is not the issue here today. We are now a 365-day-a-year Congress. We are at the call of the President and can be back in a matter of hours. And when we are in fact in pro forma session, that is the anticipation—the anticipation that, if needed, we will be back with a full quorum in a short period of time. U.S. Senators were informed that, in fact, they could be called back. They were informed that they were not in recess, and they made that decision.

Today we will hear from a prominent U.S. Senator, but, more importantly, we will hear from a constitutional scholar—the son of a constitutional scholar about what he believes as a Senator. Then we will go on to hear from other witnesses.

But most importantly, there will be a lively dialog here today, because clearly the decision now is on a very partisan basis. The minority will insist that both are legal, while the majority will at least question that both cannot be legal and binding. One has to give.

With that, I recognize the ranking member for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. And I thank you for holding this hearing.

And to you, Senator Lee, welcome to our committee.

Mr. Chairman, if the committee really wants to conduct an even-handed examination of President Obama's recess appointments, we need to look at a much bigger issue first: the unprecedented obstruction by Senate Republicans of the constitutional confirmation process.

Republicans have raised constitutional concerns about the President's recess appointments, but the real issue here is the effort of 44 Republican Senators to sabotage the mission of the Consumer Financial Protection Bureau. In a letter the Republican Senators wrote last May, they declared their opposition to any—any—nominee to head the Consumer Financial Protection Bureau. These Republicans admitted that the President's nominee, Richard Cordray, was highly qualified for the position. As the attorney general of the State of Ohio, he recovered billions of dollars for retirees, investors, and business owners, and he was on the front lines of protecting consumers from fraudulent foreclosures and financial predators.

Senator Mike Lee conceded that Mr. Cordray was well qualified for this position, "My decision to oppose his confirmation by the Senate has nothing to do with his qualifications," said Senator Lee. "Rather, I feel it is my duty to oppose his confirmation as part of my opposition to the creation of CFPB itself."

This gang of 44 Republican Senators oppose the creation of the Consumer Protection Bureau. According to existing law, once a permanent director is put in place, the Bureau will have authority to issue regulations protecting consumers from unfair, deceptive, or

abusive consumer financial practices by mortgage servicers, payday lenders, debt collectors, private student lenders, and credit reporting agencies. These are exactly the protections Republicans wanted to block.

Article II of the Constitution says the President shall nominate and appoint officers of the United States, "with the advice and consent of the Senate." Nowhere does the Constitution authorize Senators to block all nominees, regardless of their qualifications, because they object to the current law—the current law—of the land and do not have the votes to change it. Constitutional scholar Thomas Mann calls this Republican boycott, "a modern-day form of nullification," and says, "There's nothing normal or routine about this."

As our committee has heard repeatedly, there are millions of American families who are currently in foreclosure, many of them in my district, many of whom were subjected to widespread and illegal abuses by mortgage servicers. Nearly 20 million consumers take out payday loans from an industry widely known for its unscrupulous behavior.

What is the Republican response? They want to cut the legs out from under the agency Congress created—Congress created—to protect American families from exactly these types of abuses by mortgage servicers, payday lenders, and credit reporting agencies.

Today's new concern about litigation arising from the appointment is a red herring. The corporate interests that opposed the creation of the Bureau to begin with are the same interests that are now aggressively challenging the consumer protections in court.

As with the Consumer Bureau, Republicans also oppose the entire mission of the National Labor Relations Board and have blocked the President's appointments in an effort to prevent the Board from functioning properly.

In short, Senate Republicans left the President with no choice. These recess appointments were the only way to comply with Congress' intent in establishing and maintaining fully functioning agencies.

The fact is that President Obama has been extremely restrained in his use of recess appointments. During their full terms, President George W. Bush had made 171 recess appointments; President Clinton had made 139 recess appointments; and President Reagan had made 240 recess appointments. In contrast, President Obama has made just 32 at this point in his Presidency.

I hope we can ask our witnesses today not only about the President's recess appointments but also about a much more significant issue: unprecedented obstructionism by Senate Republicans that is intended to cause irreparable harm to the American consumers.

And, with that, Mr. Chairman, I have a minority report that we produced, and I ask unanimous consent that it be inserted in the record.

Chairman ISSA. It doesn't appear to be a report, but the documents you have, we have reviewed them, and I have no objections. They will be placed in the record.

[The information referred to follows:]

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House of Representatives

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2/1/12

February 1, 2012

Dear Members of the Committee on Oversight and Government Reform:

Although Republicans have raised concerns about the President's recess appointments, the real issue here is the unprecedented obstruction by a gang of 44 Republican Senators to sabotage the mission of the Consumer Financial Protection Bureau (CFPB).

In a letter they wrote last May, they declared their opposition to **any nominee** to head the Bureau. Constitutional scholar Thomas Mann called this "a modern-day form of nullification" and said "[t]here is nothing normal or routine about this."

These Senators conceded that the President's nominee, Richard Cordray, was extremely well-qualified for the position. For example, Senator Mike Lee openly admitted: "[M]y decision to oppose his confirmation by the Senate has nothing to do with his qualifications. ... Rather, I feel it is my duty to oppose his confirmation as part of my opposition to the creation of CFPB itself."

According to the law Congress passed to reform the financial services industry, the Consumer Bureau would gain the authority to issue regulations protecting consumers from unfair, deceptive, and abusive financial practices once a permanent Director was put in place. But these are exactly the protections Republicans wanted to block. The corporate interests that opposed the creation of the Bureau to begin with are the same interests that are now aggressively challenging the President's recess appointments on Constitutional grounds.

But the gang of 44 Senate Republicans had left the President with no choice. Using his Constitutional authority to make recess appointments was the only way he could comply with the laws passed by both Houses of Congress to establish and maintain the CFPB as a fully functioning government agency.

The fact is that President Obama has been extremely restrained in his use of recess appointments. During their full terms, President George W. Bush made 171 recess appointments, President Clinton made 139, and President Reagan made 240. In contrast, to date President Obama has made only 32.

For your review, attached is a Minority Staff presentation entitled, *Unprecedented Obstruction: An Examination of the Facts Leading to President Obama's Recess Appointments.* I hope you will find it useful.

Sincerely,

Elijah E. Cummings
Ranking Member

UNPRECEDENTED OBSTRUCTION

An Examination of the Facts Leading to President Obama's Recess Appointments

Presentation of the Minority Staff

Rep. Elijah E. Cummings, Ranking Member

Committee on Oversight and Government Reform

U.S. House of Representatives

February 1, 2012

For information related to this presentation, please contact:

Minority Staff, Committee on Oversight and Government Reform

(202) 225-5051

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Republican Senators Objected to ***ANY*** Consumer Financial Protection Bureau Nominee

"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."

– Letter from 44 Republican Senators to President Obama –
(May 2, 2011)

UNPRECEDENTED OBSTRUCTION

"They insist that a legitimately passed law be changed before allowing it to function with a director – a modern-day form of nullification. ...There is nothing normal or routine about this. The Senate policing of non-cabinet appointments is sometimes more aggressive but the current practice goes well beyond that, more like pre-Civil War days than 20th century practice."

– Thomas Mann of the Brookings Institute –
(July 19, 2011)

Source: The New Nullification: GOP v. Obama Nominees, The New Republic (July 19, 2011)

UNPRECEDENTED OBSTRUCTION

Senator Mike Lee

"I find myself duty-bound to resist the consideration and approval of additional nominations until the President takes steps to remedy the situation."

Source: Statement of Senator Mike Lee, Senate Judiciary Committee Business Meeting (January 26, 2012)

C. Boyden Gray

"I believe the use of the Senate Cloture rule to permanently block nominations conflicts with the Constitution's Advice & Consent clause."

Source: The Hotline (March 1, 2005)

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UNPRECEDENTED OBSTRUCTION

Critical Consumer and Worker Protections Thwarted by Senate Republicans

National Labor Relations Board

- Form or join a union;
- Bargain collectively for a contract that sets wages, benefits, hours, and other working conditions;
- Discuss working conditions or union organizing with co-workers or a union;
- Act with co-workers to improve working conditions by raising complaints with an employer or a government agency; and
- Choose not to join a union or engage in union activities.

Consumer Financial Protection Bureau

- Identify and curb unfair, deceptive, and abusive financial practices;
- Rein in predatory payday loans;
- Ensure credit reporting agencies comply with consumer protections;
- Safeguard against abusive debt collection; and
- Monitor private student lenders, non-bank mortgage companies, and other financial institutions.

President Obama Used the Recess Appointments Power to Maintain Operation of Two Critical Agencies

"The American people deserve to have qualified public servants fighting for them every day—whether it is to enforce new consumer protections or uphold the rights of working Americans. We can't wait to act to strengthen the economy and restore security for our middle class and those trying to get in it, and that's why I am proud to appoint these fine individuals to get to work for the American people."

– The White House, Press Release, *President Obama Announced Recess Appointments to Key Administration Posts* – (January 4, 2012)

Republican Presidents Have Used Recess Appointments to Maintain Operation of Government

President Ronald Reagan

- Four Recess Appointments to the Legal Services Corporation
- Four Recess Appointments to Overseas Ambassadorships
- 28 Recess Appointments to Assorted Federal Agencies and Commissions

President George W. Bush

- One Recess Appointment to head the newly created Transportation Security Administration

Republican Presidents' Recess Appointments similar to President Obama

President Ronald Regan

Four Recess Appointments to Legal Services Corporation

"The new 'recess appointments' were necessary to give the board a quorum to operate, since the terms of all but two of the board members…expired last month."

Source: "4 Named to Board of Legal Unit," The New York Times (January 22, 1983)

Appointments of Four Overseas Ambassadors and 28 other people to various Federal agencies and Commissions

"Marlin Fitzwater, the White House spokesman, said all the appointments, 'represented an urgency of one kind or another…'"

Source: "Lame-Duke Appointments by President Touch Off Questions About Timing," The New York Times (November 24, 1988)

9

President Bush's 8 Recess Appointments to the National Labor Relations Board

Name	Year Appointed
Peter J. Hurtgen	2001
Michael Bartlett	2002
William B. Cowen	2002
Ronald E. Meisburg	2003
Peter Schaumber	2005
Peter N. Kirsanow	2006
Ronald E. Meisburg	2006
Dennis P. Walsh	2006

Double Standard on Recess Appointments?

President George W. Bush

John Magaw

Recess Appointed as Head of Newly-Created Transportation Security Administration

Rationale:

"Given the importance of moving quickly to protect the public … and the upcoming deadlines in congressional legislation, the president thought it was too important to wait for Congress…"

Source: "Bush Tackles Transportation Security," Associated Press (January 8, 2002)

Republican Reaction

Rep. John Mica, Member of House Committee on Oversight and Government Reform

"I am pleased that President Bush has taken this action to allow John Magaw to immediately assume the responsibilities of our nation's new undersecretary for transportation security."

Source: "Bush Tackles Transportation Security," Associated Press (January 8, 2002)

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Republican Reaction to President George W. Bush's Recess Appointments

Senator Kyl

"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."

-- Senate Floor Statement on Gonzales Nomination (February 2, 2005)

Senator Roberts

"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 taxpayer dollars."

-- Senate Floor Speech (November 12, 2003)

Office of Legal Counsel Approved President Obama's Appointments

"[A]llowing the Senate to prevent the President from exercising his authority under the Recess Appointments Clause by holding pro forma sessions would be inconsistent with both the purpose of the Clause and historical practice in analogous situations."

– Department of Justice, Office of Legal Counsel –
Memorandum on Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions
(January 6, 2012)

13

Two Former Office of Legal Counsel Officials from the Bush Administration Agree

"[T]he Senate cannot constitutionally thwart the president's recess appointment power through pro forma sessions...The president should consider calling the Senate's bluff by exercising his recess appointment power to challenge the use of pro forma sessions."

– Steven G. Bradbury and John P. Elwood –
Former Assistant and Deputy Assistant Attorney General
Office of Legal Counsel
(Served 2005 to 2009)

Source: "Call the Senate's Bluff on Recess Appointments," Washington Post (October 15, 2010)

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Pro Forma Sessions Do Not Thwart Recess Appointments

United States Court of Appeals for the Eleventh Circuit

"We accept that it was the intent of the framers to keep important offices filled and government functioning. ...The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause. ...We are unpersuaded by the argument that the recess appointment power may only be used in an intersession, but not an intrasession recess."

– *Evans v. Stephens* –
(October 14, 2004)

President Obama's Restrained Use of
Recess Appointment Power
Number of Recess Appointments Per Year
Reagan
Bush I
Clinton
Bush II
Obama
30.375
19.25
17.375
21.375
10.67
0
10
20
30
40
Source: Minority Staff Calculations & Think Progress

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Chairman ISSA. Thank you.

We now go to our first witness. Our first panel is Senator Mike Lee of Utah.

Senator Lee has spent his entire life both studying and participating in our judicial system. As a child, he attended arguments before the U.S. Supreme Court given by his father, Rex, who was Solicitor General under President Ronald Reagan. Senator Lee later clerked for Justice Alito, both when he was a member of the Third Circuit Court of Appeals and later a Supreme Court Justice.

After spending time in the private sector, he was asked to serve as the assistant U.S. attorney in Salt Lake and then as general counsel to Governor John Huntsman. Few people with this type of experience and understanding of our Constitution and our judicial process have served in the Congress. So, although Senator Lee is a freshman, he is certainly not new to the questions that the Senate faces and our country faces here today.

And, with that, Senator, I understand that you are both testifying and willing to take questions; is that correct?

Senator LEE. Yes, sir. Yes, sir.

Chairman ISSA. And as is customary for everyone except—actually, required in the rules—except for Members of Congress, you will not be sworn, in that you are a Member of our body.

With that, the gentleman is recognized.

STATEMENT OF HON. MICHAEL S. LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman and Ranking Member Cummings, for the invitation to come here and to address you and the other members of the committee. It is an honor to be here with you today.

I am here to defend the constitutional prerogatives of Congress. And I want to be clear from the outset that regardless of whatever political concerns I might have with these nominations, my overriding, dominating concern here is not partisan; rather, it is an institutional and a constitutional concern that I am here to explain and then answer any questions that you might have regarding those concerns.

President Obama's January 4, 2012, appointments are unconstitutional because they did not comply with the requirements for appointments set forth in the Constitution. Those requirements, I might add, are important because, as the Founding Fathers discussed in that fateful convention in the summer of 1787 that occurred in Philadelphia, the Founding Fathers were unwilling to grant this power on an unrestrained basis to an executive, as they argued that it would not be wise to, "grant so great a power to any single person, as the people would think we are leaning too much toward monarchy."

These appointments were unconstitutional because they neither received the advice and consent of the Senate nor were they made during a Senate recess, the kind of recess cognizable under the recess appointments clause. They are different in kind than previous recess appointments made by any President from any political party in our Nation's history. No President has ever unilaterally

appointed an executive officer during a recess of less than 3 days. Neither, to my knowledge, has a President of either party ever asserted the power to determine for himself when the Senate is or is not in session for purposes of the recess appointments clause.

In making these appointments, President Obama has not, to my knowledge, asserted that his January 4, 2012, appointments can be justified based on the 3-day adjournment that occurred between January 3, 2012, and January 6, 2012. And this is for good reason. Surely any such assertion of the recess appointment power would be unconstitutional.

The Department of Justice has repeatedly and over the course of many decades opined that an adjournment of significant length and particularly an adjournment of 3 days or less—that is, any adjournment that is of insignificant length because it is of 3 days or less—does not constitute a recess for purposes relevant to this recess appointments clause. And the text of the Constitution evidences that the Framers did not consider an adjournment like this to be constitutionally significant.

It is also significant here that Article I, Section 5 provides that neither House during the session of Congress shall, without the consent of the other, adjourn for more than 3 days. So if an intra-session adjournment of less than 3 days were to be considered constitutionally sufficient for the President to be able to exercise this recess appointment power, it is unclear what, if anything, would prevent the President from routinely bypassing the Constitution's advice and consent requirement in appointing nominees during even weekend adjournments, which routinely involve periods of 72 hours or even more in which the Senate may not be actually in the practice of holding committee hearings and voting and so forth.

Instead, in asserting that his appointments are constitutional, President Obama has relied on a memorandum opinion produced by the Office of Legal Counsel [OLC] in the Department of Justice. This OLC memorandum asserts that the President may unilaterally conclude that the Senate's brief pro forma sessions, such as those that were held on January 3, 2012, and continued every Tuesday and every Friday until January 23, 2012, somehow do not constitute sessions of the Senate for purposes relevant to the recess appointments clause.

This assertion is deeply flawed because, under the procedures established by the Constitution, it is for the Senate and it is not for the President to decide when the Senate is in session. Indeed, the Constitution expressly grants the power to determine the rules of its own proceedings.

To assert that the President has an unconstrained right to determine for himself when the session is or is not in session and to appoint nominees unilaterally at any time he feels the Senate is not as responsive as he would like it to be—even when the Senate is meeting—is to trample upon the Constitution's separation of powers and the system of checks and balances that animated the adoption of the advice and consent requirement.

I look forward to answering your questions. And as I answer those questions, I will continue to emphasize again and again that ours is not a government of one. These are real rights upon which the President has trampled. This is power that he has taken that

doesn't belong to him; it belongs to the American people. And under our constitutional system, that power is to be exercised by the people's elected representatives in the Senate and not by the President alone.

There are people throughout my State and across America who feel powerless, and that is why I have made the comments I have, that this is a lawless action that we need to object to strenuously.

Chairman ISSA. I thank the gentleman. I did not limit you to 5 minutes, but I appreciate your accuracy.

[The prepared statement of Senator Michael S. Lee follows:]

Testimony Before the House Committee on Oversight and Government Reform
President Obama's Unprecedented "Recess" Appointments
Wednesday, February 1 at 9:30 a.m.

Senator Michael S. Lee

Introduction

Chairman Issa and Members of the House Committee on Oversight and Government Reform. Thank you for the opportunity to testify before you today on an issue of utmost importance, a constitutional issue that goes to the heart of our structure of government.

I am here today to defend the constitutional prerogatives of Congress. The Constitution authorizes the president to appoint federal judges and executive officers only where one of two conditions is met: The president's appointment must either receive the Advice and Consent of the Senate or he must make that appointment during a Senate recess of significant duration.[1] On January 4, 2012, President Obama announced appointments to the Consumer Financial Protection Bureau and National Labor Relations Board, but those appointments did not receive the consent of the Senate and were not made during a Senate recess. Rather, these appointments came one day after the Senate held a pro-forma session on January 3, 2012, and only two days before the Senate held another such session on January 6, 2012.

Even more troubling, in justifying his unconstitutional appointments, the President relied on a Department of Justice memorandum that asserted that the president can unilaterally decide when the Senate is and is not in session for purposes of the Recess Appointments Clause. This reckless assertion of executive power and encroachment on the legislative branch cannot go unchecked. As duly sworn members of Congress, we each have an institutional and constitutional duty to preserve and defend the prerogatives of the legislative branch, particularly from the encroachments of the executive. If we, as Congress, do nothing, January 4, 2012 may well live on in infamy as a day the Congress refused to enforce a provision of the Constitution and instead ceded one of its rightful powers to the executive.

The Senate's Role under the Constitution

I wish first to address what is at stake in this constitutional struggle between the executive and legislative branches that President Obama's actions have instigated. I want to be clear from the outset that my concerns are not partisan, but rather are institutional and constitutional. At issue are the prerogatives of Congress as an institution, and the Constitution's

[1] Article II, section 2, clauses 2 & 3 of the Constitution provide 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," but 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."

structure of separation of powers and system of checks and balances. The Senate has an important role in the appointment of federal judges and officers, and all members of Congress, regardless of political party, should be deeply concerned when the executive encroaches on that constitutional function. If we as a body fail to protect this constitutional right and prerogative—if we lose it now—we may never get it back. Surrendering this power would have political implications for Democrats as well as Republicans, as the presidency will not always be controlled by one party. Even more fundamentally, allowing the president to void the Senate's advice and consent role would weaken a critical constitutional structure that serves to protect the liberty of all Americans. In Federalist 51, James Madison wrote that "the great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those who administer each [branch] *the necessary constitutional means* and personal motives to resist encroachments of the others." Among those constitutional means is the Senate's ability to withhold its consent for a nominee, forcing the president to work with Congress to address that body's concerns. If the executive branch is allowed to appoint judges and officers without consulting the Senate, our government will lose an important check on the power of the executive.

That the legislative branch is in dire need of such checks is in fact demonstrated by President Obama's justification for his appointments. During the past few days, it has sounded at times as if the President and other members of his party would justify bypassing the Senate's advice and consent role because that constitutional requirement is inconvenient to the President's ability to act in the manner he would like at the time he wishes. Far from recognizing that the Senate's advice and consent role serves its function when it forces the executive to make compromises, President Obama and other members of his party have labeled Senate Republicans as "obstructionist" and have suggested that their failure to confirm all the President's nominees according to the President's preferred timeline somehow justifies taking an extraordinary and novel view of the Constitution's Recess Appointments Clause. In this manner, President Obama would bully the Senate into abdicating its constitutional role to provide advice and consent. Under this approach, either the Senate must concede its independent judgment and immediately agree to the President's wishes with respect to appointments, or the President will simply bypass the Senate altogether.

Of course, this is not the first time our country has discussed the role that the executive and legislative branches should play in nominating officers to important government positions. At the Philadelphia Convention in the summer of 1787, some believed the legislature alone should have the appointment power. Others would have vested that power entirely in the executive.[2] The result, a compromise, was to authorize the president to nominate judges and executive officers, but only with the advice and consent of the Senate.[3] In other words, the view that would have made the Senate's advice and consent role non-obligatory—a view that can be

[2] 1 Max Farrand, *The Records of the Federal Convention of 1787*, 119-20 (1911).
[3] *See id.* at 41.

seen in President Obama's decision to bypass the Senate on January 4—was specifically rejected and did not prevail in the Constitution that was ratified.[4] Instead, those who feared placing the entire appointment power in either the executive or the legislature carried the day. Their choice was deliberate,[5] and we would do well to remember their words and the arguments and logic that led to adoption of our Constitution's collaborative appointment procedure. Proponents explained that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." And, strikingly, they argued that it would not be wise "to grant so great a power to any single person," as "[t]he people will think we are leaning too much towards Monarchy."[6]

It was no mistake that the obligatory advice and consent role was placed in the Senate. Indeed, some, including James Madison, considered placing the entire appointment power in the Senate, as these representatives were "sufficiently stable and independent to follow their deliberate judgments."[7] Similarly, in Federalist 76, Alexander Hamilton discussed the importance of involving the Senate in appointments:

> To what purpose then require the co-operation of the Senate? I answer that the necessity of their 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, in addition to this, it would be an efficacious source of stability in the administration.

The legislative branch has important and inescapable institutional rights under the constitutional system designed by the Framers. The Constitution also expressly provides for both separation of government powers and a system of inter-branch checks and balances. These strictures may sometimes seem inconvenient, but it simply will not do to ignore checks and

[4] 2 Max Farrand, *The Records of the Federal Convention of 1787*, 539 (1911).
[5] "Since the Framers had before them a range of different appointment methods, including appointment by the executive alone, *see* 1 William Blackstone, Commentaries on the Laws of England at *271-*73 (1822) (describing appointment by the King of England), by the legislature alone, see N.C. Const. of 1776, art. XIII, XIV, and by the executive with a council, see N.Y. Const. of 1777, art. XXIII, they must be presumed to have made an informed choice. One thus must conclude the Framers believed that a system where the President had the primary role in selecting officers, but was subject to a senatorial check, was superior to the available alternatives." Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLS L. Rev. 1487 at n. 26 (2005).
[6] 1 Max Farrand, *The Records of the Federal Convention of 1787*, 119 (1911).
[7] *Id.* at 120; *See also*, Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204 at n. 111 (1994) ("The debate on which branch would appoint judges reveals the power the Framers intended for the Senate. Although a few wished the Executive to enjoy the sole power of appointment [(James Wilson and Gouverneur Morris)], many desired that the Senate would unilaterally appoint judges [(James Madison, Alexander Martin, Roger Sherman, Gunning Bedford, Edmund Randolph, Oliver Ellsworth, and Charles Pinckney)]. Although the debate ended in the compromise of presidential nomination and Senate confirmation, it demonstrates the Framers' belief in the strengths of including the Senate in the process. This branch of the legislature provides stability and information in the appointment process, and supplies a needed check on the powers of the President.") (internal citations omitted).

balances *because* they are inconvenient and at the moment they serve the very purpose for which they were instituted.

The President's Announced Appointments Are Unconstitutional

Perhaps some do not see a real threat to the Constitution's system of checks and balances because they have been led to believe that President Obama's appointments do not represent a significant departure from past practice. Others perhaps have been led to believe that the constitutionality of the announced appointments is a close call that should be left to the courts to decide. Of course, leaving this issue to the courts is no solution at all, since President Obama's appointees have already taken office. Persons and entities affected by the regulations promulgated by these appointees are currently forced to operate in uncertainty, not knowing whether the government constraints placed upon them are validly authorized under the constitution. And, even if the issue does reach the courts and they correctly rule that the appointments are unconstitutional, a great mess will ensue as we try to put back together and make sense of the regulations that have been contaminated by unconstitutional exercises of regulatory power. But even more fundamentally, any suggestion that President Obama's appointments are neither novel nor unconstitutional is mistaken and must be seen as little more than an attempt to obfuscate the unprecedented and monumental nature of President Obama's unconstitutional assertion of executive power.

President Obama's appointments are different in kind than previous recess appointments made by any president of either party. No president has ever unilaterally appointed an executive officer during a recess of less than three days. Neither, to my knowledge, has a president of either party ever asserted the power to determine for himself when the Senate is or is not in session for purposes of the Recess Appointments Clause. Since ratification of the Constitution, presidents have gradually made more and more aggressive use of the Recess Appointments Clause, but no president has attempted anything even remotely as dramatic, novel, and unconstitutional as President Obama did on January 4, 2012.

From the nation's founding until the mid-nineteenth century, Congress routinely recessed for six to nine months at a time. It was based on this anticipated congressional schedule that the Framers placed the Recess Appointments Clause in the Constitution. That Clause was meant "to be nothing more than a supplement [to the normal method of appointment]," which required the Senate's advice and consent.[8] The Framers allowed for recess appointments because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers."[9] Over time, Congress began to meet throughout the year and take intra-session recesses in addition to its end-of-year inter-session recess. Although it is far from clear that the Constitution properly authorizes the president unilaterally to fill a vacancy arising during an

[8] *The Federalist No.* 76.
[9] *Id.*

intra-session adjournment,[10] presidents of both parties have asserted this power. At no point, however, has any president ever asserted the authority the make a recess appointment during an intra-session adjournment of less than three days, and the Department of Justice has repeatedly opined that such an appointment would not be constitutional.[11]

Perhaps for this reason, President Obama has not (to my knowledge) asserted that his January 4, 2012 appointments can be justified based on the three-day adjournment that occurred between January 3, 2012, and January 6, 2012. Surely, any such assertion of the recess appointment power during an adjournment of less than three days would be unconstitutional. The text of the Constitution evidences that the Framers did not consider an adjournment of less than three days to be constitutionally significant, as Article I, Section 5 provides that "neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."[12] Moreover, if an intra-session adjournment of less than three days were to be considered constitutionally sufficient for the president to exercise his recess appointment power, it is unclear what would prevent the president from routinely bypassing the Constitution's advice and consent requirement and appointing nominees during weekend adjournments.

Instead, in asserting that his appointments are constitutional, President Obama relied on a memorandum opinion from the DOJ Office of Legal Counsel ("OLC").[13] This memorandum asserts that the president may unilaterally conclude that the Senate's brief "pro forma" sessions beginning on January 3, 2012, and continuing every Tuesday and Friday until January 23, 2012, do not constitute sessions of the Senate for purposes of the Recess Appointments Clause. The memorandum consequently asserts that President Obama's January 4, 2012 appointments were made during an intra-session recess of twenty days and are constitutional.

The assertion in OLC's memorandum that the Senate's pro forma sessions are not Senate sessions for purposes of the Recess Appointments Clause is deeply flawed. Under the procedures set forth in the Constitution, it is for the Senate, not the president, to determine when the Senate is in session. Indeed, the Constitution expressly grants the Senate power to "determine the Rules of its Proceedings."[14] The Supreme Court has stated that although Congress cannot, "by its rules ignore constitutional restraints or violate fundamental rights, . . . within these limitations all matters of method 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

[10] *See* Evans v. Stephens, 387 F.3d 1220, 1228-38 (11th Cir. 2004) (Barkett, J., dissenting).

[11] *See, e.g.*, Opinion of U.S. Attorney Harry M. Daugherty, 33 U.S. Op. Att'y Gen. 20, 24-25 (1921) ("[N]o one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment [of 2 days] is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.") ("Daugherty Opinion"); Opinion of U.S. Acting Assistant Attorney General Daniel L. Koffsky, 2001 WL 34815745 (2001) (affirmatively recognizing DOJ's "seminal" 1921 opinion on recess appointments).

[12] U.S. Const. art. 1, § 5, cl. 4.

[13] *See* Memorandum Opinion for the Counsel to the President, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, *Lawfulness of Recess Appointments During A Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel 1 (2012) ("OLC Memorandum").

[14] U.S. Const. art. I., § 5, cl. 2.

more just."[15] It hardly needs be said that the Senate may not use its rules to violate the Constitution, and it can hardly be imagined—let alone asserted as an actual legal argument—that it has done so by providing for pro-forma sessions at which business, including the Senate's advice and consent function, may be conducted. To assert that the president has an unconstrained right to determine for himself when the Senate is or is not in session and to appoint nominees unilaterally at any time he feels the Senate is not as responsive as he would like it to be—even when the Senate is meeting—is to trample upon the Constitution's separation of government powers and the system of checks and balances that animated the adoption of an advice-and-consent requirement in the first place. The Constitution's separation of powers is "not simply an abstract generalization in the minds of the Framers: it [is a principle] woven into the document that they drafted in Philadelphia in the summer of 1787."[16] Surely, the Constitution's separation of powers can mean little if the executive is allowed to deprive the Senate of its constitutional right to make its own rules and determine for itself when it is and is not in session.

In asserting that the president may unilaterally determine when the Senate is and is not in session, the OLC memorandum engaged in a functional analysis of the Constitution that likewise must be rejected. The OLC memorandum chiefly relied on a prior opinion rendered by the executive branch. That opinion, rendered in 1921 by Attorney General Harry Daugherty, eschewed the plain text and original meaning of the Recess Appointments Clause, and instead gave it a "practical construction," asserting that the "touchstone" for determining when the Senate is in session is "its *practical effect: viz.*, whether or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations."[17] Notably, and perhaps unsurprisingly given that this was an executive branch opinion, Attorney General Daugherty's memo took an excessively expansive view of the executive's authority to determine when the Senate is in session. Without providing any citation or authority, the opinion asserted that "the President is necessarily vested with a large, although not unlimited discretion" in determining when the Senate is in session and that "[e]very presumption is to be indulged in favor of the validity of whatever action he may take."[18] OLC's memorandum adopted and extended Attorney General Daugherty's purported analysis and asserted that this functional approach to the Constitution can justify the president making a unilateral determination that the Senate is not in session. OLC's analysis and its conclusion, however, contradict the text and original meaning of the Recess Appointments Clause. As demonstrated above, and as Federalist 67 makes clear, "[t]he ordinary power of appointment is confined to the President and Senate

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[15] *United States v. Balin*, 144 U.S. 1, 5 (1892).
[16] *See INS v. Chadha*, 462 U.S. 919, 945 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[It was] the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *The Federalist No.* 47 (Madison) (stating, with respect to the principle of separation of powers, that "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.").
[17] OLC Memorandum at 12 (quoting Daugherty Memorandum at 2).
[18] *Id.* at 3-4.

JOINTLY," and the president's power to appoint nominees absent Senate approval is but a small exception to that rule for cases in which a significant recess of the Senate requires a position "in the public service to [be] fill[ed] without delay." Nothing in either the Constitution's text or the debates surrounding the Appointments Clause or the Recess Appointments Clause in any way suggests that the president has the unilateral power to appoint officers and judges at times when the Senate is regularly meeting, even if that body chooses not to conduct substantial business at those meetings.

OLC's memorandum also purports to rely on a 1905 report on recess appointments published by the Senate Judiciary Committee. Isolating a single clause from that report, OLC asserts that the Senate Judiciary Committee "adopted a functional understanding of the term 'recess' that focuses on the Senate's ability to conduct business."[19] But far from adopting any such interpretation of the Constitution, the Senate Judiciary Committee report is clear throughout that a "recess" for purposes of the Recess Appointments Clause "mean[s] something real, not something imaginary; something actual, not something fictitious."[20] Although it addressed a factual circumstance somewhat different from that presented by President Obama's January 4, 2012 appointments, the Senate Report confronted a similar assertion of executive power. As with President Obama, President Theodore Roosevelt sought to fabricate a "constructive recess" out of a very short period of time during which the Senate was not in session and during which he asserted that he could unilaterally make appointments. The Report rejected that attempt, noting that it would seem quite difficult for lawyer or layman to comprehend a 'constructive recess' of . . . the Senate."[21] Indeed, with near prescient accuracy, the Senate Report rejected exactly the kind of reasoning and the kind of executive assertion recently advanced by President Obama's administration:

> The framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.[22]

Here, as there, President Obama's attempt to infer and impute a recess must be rejected, and any attempt by OLC to rely on the very Senate Judiciary Report that rejected its logic must be seen as both ironic and futile.

In any event, the OLC memorandum's functionalist argument fails on its own terms. During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent. Notably, at one such pro forma session on December 23, 2011, the Senate passed a significant piece of

[19] *Id.* at 12 (quoting S. Rep. NO. 4389, at 2 (1905) ("Senate Report")).
[20] Senate Report at 2.
[21] *Id.*
[22] *Id.*

legislation, demonstrating that it is capable of conducting business at such sessions.[23] To nonetheless reach the President's desired conclusion, OLC's memorandum takes on the unenviable task of attempting to argue that even though the Senate was in session and capable of exercising its powers pursuant to unanimous consent, it was unable to conduct business. OLC's memorandum argues that the Senate is not capable of exercising its advice and consent function at pro forma sessions because little or no business has generally been conducted during such sessions and because the Senate has made statements suggesting that it intends not to conduct business at such sessions.[24] These arguments are beside the point. Regardless of how much business the Senate conducts during pro forma sessions or how much business it indicates in statements that it intends to conduct at such sessions, the Senate has been and continues to be *capable* of conducting business at such sessions—including advising and consenting to nominations—should it decide to do so. OLC's argument boils down to an untenable assertion that because the Senate has chosen not to act on President Obama's nominations during its sessions, it was incapable of doing so.

Moreover, in making so many functional arguments, OLC's memorandum essentially concedes that its own argument fails. Having set up its entire construct on the premise that even while conducting pro-forma sessions the Senate was "in practice . . . not available to provide advice and consent,"[25] the memorandum at another point expressly "recognize[s] that, *as a practical matter*, neither the scheduling order nor the quorum requirement will always prevent the Senate from acting without a quorum through unanimous consent."[26] If the "in practice" logic is good enough for the President, it is good enough for the Senate, leaving no grounds on which OLC can assert that the Senate is not in session during pro-forma sessions.

Finally, OLC's assertion that pro forma sessions are not cognizable for purposes of the Recess Appointments Clause violates past constitutional practice and tradition. In separate provisions, the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days,"[27] and that "unless [Congress] shall by law appoint a different day," Congress shall begin each annual session by meeting "at noon on the 3d day of January."[28] The Senate has commonly, and without objection, used pro forma sessions to fulfill both constitutional requirements, evidencing a past consensus that such sessions are of constitutional significance. President Obama's novel assertion that such sessions no longer count for purposes of the Recess Appointments Clause thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution.

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[23] *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765).
[24] OLC Memorandum at 13-14.
[25] *Id.* at 20
[26] *Id.* at 14, n. 17 (emphasis added).
[27] U.S. Const. art. 1, § 5, cl. 4
[28] *Id.* at amend. XX, § 2.

OLC's memorandum does not dispute the validity of this argument, instead attempting to dismiss these constitutional provisions as providing only "weak support" for the claim that pro-forma sessions are sessions for purposes of the Recess Appointments Clause. OLC's memorandum asserts that because it affects another branch of government, the Recess Appointments Clause must be treated differently than the other provisions of the Constitution, which affect only Congress and for which pro-forma session may therefore remain sufficient. But this argument merely follows a pattern in OLC's memorandum of assuming its conclusion. Having determined from the outset that the president's unilateral power to appoint judges and executive officers is both paramount and impervious to congressional interference, OLC dismisses the validity of each and every congressional prerogative for the sole reason that it is a right that has some effect on the executive. The Constitution's system of checks and balances would be a hollow guarantee indeed if it were never allowed to touch the executive.

In sum, the result of OLC's position is that of allowing an exception (the Recess Appointments Clause) to swallow the general rule (the Appointments Clause). The Recess Appointments Clause was never intended to obviate the Senate's participation in appointments. Rather, as the Senate Judiciary Committee's report explains, "[the Recess Appointments Clause] was carefully devised so as to accomplish the purpose in view [filling vacancies occurring while the Senate was in recess], without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate."[29] The flawed legal reasoning of OLC's memorandum would allow the president to circumvent an important provision and policy of the Constitution. It therefore must be rejected and opposed by Congress through whatever means necessary.

[29] Senate Report at 2.

Chairman ISSA. I will now recognize myself for a first round of questions.

Senator LEE. We will call it professional courtesy. I always appreciate it in the Senate when people limit themselves to the 5 minutes as well.

Chairman ISSA. Well, you know, being a House Member, I have noticed that when House Members go to the Senate, there is a veil of forgetfulness that we somehow see.

Senator, the CFPB, passed under Dodd-Frank, isn't it unique or fairly unique in that it receives its funding without appropriation from Congress?

Senator LEE. Yes, that is my understanding, is that because this position is embedded within the Federal Reserve, because the Federal Reserve Bank is not, in a sense—in a literal sense, in the traditional sense, a government agency but rather a private, for-profit corporation, it is not an entity that Congress controls in the sense of controlling its purse strings. And so that is a significant concern that many of our——

Chairman ISSA. Right. So you had no other way to ask for reform, consideration, or anything else other than this confirmation. It was an unusual situation in which one of the ordinary powers of the House and the Senate is to not fund something that a previous Congress has chosen to do. But in the case of the CFPB, that is not the case; is that correct?

Senator LEE. That is correct. And in that respect, it enjoys an unusual degree of insulation from the normal controls on any government. And that degree of insulation historically has been reserved for despots.

Chairman ISSA. Good word.

One of the points that I have been given by Cato—and I ask unanimous consent it be placed in the record—is, actually, on their Web site, they note that 97 percent of President Obama's nominations in 2011 were confirmed by your body. Is that roughly your understanding?

Senator LEE. Yes.

[The information referred to follows:]

97% of Obama Nominations in 2011 Were Confirmed by the Senate

Posted By Mark A. Calabria On January 12, 2012 @ 12:42 pm In Government and Politics | Comments Disabled

One of the rationales oft heard for Obama's recent "recess" appointments is that the Senate is not "doing its job" or that Republicans have blocked his nominees and that our government "cannot function." Putting aside the absurdity of the argument that somehow if Congress fails to "do its job" that empowers the President to take over its job, the simple fact is that the vast majority of Obama nominations have actually been confirmed by the Senate.

Between January 5, 2011, the beginning of the 1st session of the 112th Congress, and December 30,2011, the Senate received 20,517 nominations [1] from the Obama Administration. Of those, 19,815 were confirmed by the Senate, which rounds up to 97 percent. And this ignores the fact that some nominations, like those to the National Labor Relations Board, were not received until December, hardly giving the Senate any time to consider and confirm said nominations.

One can argue that not all nominations are equal. For instance the majority of nominations are military positions. You can decide for yourself whether a general or admiral is equal to an assistant secretary or bureau director. If one wants to produce a "quality-adjusted" nominations index, they are free to do so. None of this changes the basic fact: President Obama has had the majority of his nominations confirmed by the Senate. Claims to the contrary are simply false.

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[1] nominations : **http://www.gpo.gov/fdsys/pkg/CREC-2012-01-03/pdf/CREC-2012-01-03.pdf**

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Chairman ISSA. So the fact is, you are practically a rubber stamp to what the President wants, right?

Senator LEE. Some of us try not to see ourselves quite that way, but we have been very cooperative in confirming this President's nominees. I, in fact, myself, despite the fact that I have harbored significant policy, ideological, and political differences with many, if not most, of the President's nominees, I have continued to vote for them, and most of them have been confirmed, many with my vote.

Chairman ISSA. So you have exercised advice and consent and in the affirmative 97 percent of the time.

Let me go to another portion, because you are, both personally and as a family, historically better informed than we are. Hasn't the Senate exercised its refusal in the past, even at times to the Supreme Court? And hasn't it been the view that if the Senate decided not to have a Supreme Court, all they would have to do is wait for them to die off, that ultimately it is within the power over a period of time for the Senate to choose not to fill vacancies, that that is within its historic power, and they have asserted it in the past?

Senator LEE. The Supreme Court certainly is on a different plane from other government officials. The Supreme Court, unlike many other government officials, certainly unlike the people who serve in the NLRB or the CFPB or elsewhere, are not people whose positions are specifically created under and identified in the Constitution. So that is different.

But the overarching question you are asking is whether or not the Senate, in its advice and consent function, is required to give its consent, to, in fact, approve. And——

Chairman ISSA. Right.

Senator LEE [continuing]. It isn't. That is the Senate's prerogative.

Chairman ISSA. So both at district court, circuit court of appeals, and actually at the Supreme Court, they have chosen simply not to act on Presidential appointments in the past and, by doing so, let them hang until the President withdrew them or the nominee went somewhere else or the President's term expired or he found somebody else to appoint. Isn't that correct?

Senator LEE. In many, many instances, more instances than I can count.

Chairman ISSA. Now, Ambassadors are one of the confirmations that you do in the Senate. And if we do not have an ambassador, we, in fact, have a lower standing in that foreign country and a lower ability to have a presence around the world. Isn't that true?

Senator LEE. That argument has been made, and I suspect there is some truth to it.

Chairman ISSA. And isn't it routine—and they are certainly envisioned in the Constitution. They are not just some affectation of the last administration—or the administration's last Congress. So isn't it true that it has been the practice of the Senate, under Senator Reid, sometimes simply to say that nominee is dead on arrival and go find somebody else and not call for a vote?

Senator LEE. Yes.

Chairman ISSA. Isn't it true that often nominees are pre-vetted before they are put up so as not to embarrass them, and, in fact, there is a whole discussion because they so want to not have that controversy?

Senator LEE. That is also correct. It is a well-known fact that this occurs and with good reason.

Chairman ISSA. With good reason.

So I guess—a couple last questions. Motion to adjourn in the Senate—different body here, but it is in order here at any time. Was there a motion to adjourn by the Democrats issued? Did they try to adjourn?

Senator LEE. My understanding is that we could not adjourn because, consistent with Article I, Section 5 of the Constitution, we were required to obtain the consent of the House of Representatives to adjourn and, before adjourning, for any period of time longer than 72 hours.

Given that we didn't receive such consent, the Senate was unable to adjourn for any period of time longer than 72 hours. And so we continued holding pro forma sessions basically every 72 hours throughout that period of time.

Chairman ISSA. But let's talk about pro forma sessions, last question, very quickly. Every 3rd day, who got in the chair over in the Senate? Was it a Republican?

Senator LEE. Normally a Democrat is my understanding.

Chairman ISSA. Normally or always?

Senator LEE. Always.

Chairman ISSA. So Senator Reid had to put a Democrat in the chair to hold the pro forma session every 3rd day, and he did so.

Senator LEE. Correct.

Chairman ISSA. Thank you.

I yield back and recognize the ranking member for 5 minutes and 49 seconds.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

And again, Senator Lee, I want to thank you for bringing these concerns before us.

As you could tell from my opening statement, I am concerned that a large number of Senators tried to block a candidate who is extremely qualified for a post because they disagree with the law—the law—Congress passed creating the Consumer Bureau. On December 7, 2011, your office issued a press release that stated, "My decision to oppose his confirmation by the Senate has nothing to do with qualifications, but I feel it is my duty to oppose his confirmation as part of my opposition to the creation of the CFPB itself."

My question is, the Senate's role is to give advice and consent. Senator, just to be clear, you don't have any problem with Mr. Cordray, do you?

Senator LEE. I don't have any personal problem with him. I am sure he is a wonderful human being.

Mr. CUMMINGS. You felt that he was qualified for the job?

Senator LEE. I feel that he possesses professional qualifications which might well serve him well in a variety of government positions.

Mr. CUMMINGS. Let me put up Slide 5 up on the board.

C. Boyden Gray, who was the White House counsel to President Bush, will be testifying on the next panel of this hearing. And his view is that your actions would be an unconstitutional act for a Senator. Let me read to you what he said. It says, "I believe the use of the Senate cloture rule to permanently block nominations conflicts with the Constitution's advice and consent clause."

So, Senator Lee, is your message to Mr. Gray that he doesn't know his constitutional law?

Senator LEE. I certainly would never say that. I have enormous respect for Mr. Gray. I consider him a friend. I also consider him something of a role model as a constitutional scholar, and I admire his work.

I am not sure of the totality of the circumstances in which he made that comment, but let me say this: My belief is that because Congress is a legislative body consisting of elected officials and those elected officials are retired in increments—especially in the Senate, where we have elections only every 2 years—you often have a set of laws that one body has to deal with. In many instances, you have Members of a new Congress that didn't vote for a previous law. It is not at all uncommon, for instance, to have a law that creates a government office in one session of Congress that a subsequent Congress refuses to fund or refuses to fund part of its actions. That happens from time to time.

Now, you might have a Senate that decides not to confirm somebody to a particular position, perhaps because of the qualifications of the individual or perhaps they have concerns about the office or the power that that officer might wield. And I believe that it is not improper for a Congress to raise those concerns, raise substantive concerns about the office itself when going through the nominations process.

It is, at the end of the day, the Senate's prerogative to confirm or not to confirm. And there is nothing in the text, the original understanding, or the history of the Constitution that suggests that the Senate's prerogative to provide advice and consent to Presidential nominations means that the consent, in fact, has to be granted.

Mr. CUMMINGS. Uh-huh. So, in other words, if a Senator disagrees with the law, then it is your opinion that they are within their rights under the Constitution to basically say, I am not going to vote to confirm a nominee. Is that right?

Senator LEE. Yes, in——

Mr. CUMMINGS. Because the underpinning law—is that——

Senator LEE. Yes, and in precisely the same respect and for precisely the same reasons that a Senator or a Congressman, for that matter, might refuse to vote to fund a particular office that was created under a previous law, adopted by a previous Congress. That is not only not improper but that is part of what it means to live in a constitutional republic in which laws are made and government programs are funded only by regularly elected officials who stand for reelection and may lose election after a while.

Mr. CUMMINGS. In addition, on February 2, 2005, Senator Jon Kyl, one of your colleagues, made the following statement on the floor regarding the Gonzales nomination, and he said: "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."

What is your opinion on that, what he said?

Senator LEE. Well, again, you know, I make it a point not to speak for my colleagues. I don't know the totality of the circumstances in which my friend Senator Kyl made that statement.

But I will say, first of all, that any Senator may decide to grant or withhold his or her vote to confirm or not to confirm anyone for any reason, just as he or she is free to vote or not vote for any particular budget or appropriations act or anything else.

Second, and perhaps more importantly, the fact that there is delay, the fact that there has been delay in confirmations in every Senate, with every Presidential administration, Republican or Democratic, going back decades, in fact, going back throughout the entire history of our Republic, does not and cannot ever excuse the President of the United States in thumbing his nose at the U.S. Constitution. That is what has happened here. That is what we are talking about today.

Mr. CUMMINGS. So if Senators started blocking all the President's nominees because they disagreed with the laws that Congress passes, we would essentially have a form of nullification that could shut down the government, and that clearly is not what the Framers intended.

Senator LEE. Well, I am not sure that I can agree with that statement. Every Congress has the power to shut down the government should it choose, subject, of course, to what the electorate wants. If a Congress chose to shut down the government, my guess is that that would be extraordinarily unpopular, especially if it extended for a duration of more than just a few days.

Yeah, the Congress has the power to do all sorts of things. And the fact that the Senate could exercise that advice and consent power irresponsibly doesn't justify the President in circumventing those very same constitutional restrictions that give it that power.

Mr. CUMMINGS. I thank you, Mr. Chairman.

Chairman ISSA. I thank you.

And if I could make a clarification for the record, Ambassador Gray was in the first Bush administration. You said "President Bush"; I want to make sure everyone knew it was not the immediate past.

Mr. CUMMINGS. Right. Thank you.

Chairman ISSA. And, with that, we recognize the distinguished gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Senator Lee, welcome. Thank you for being with us today.

Who has standing to challenge this?

Senator LEE. Well, if you are talking about Article III standing for purposes of determining whether a case is justiciable in a Federal court, the most likely type of party that could establish standing would be a party aggrieved by an order, a decision, carrying the force of law by either the National Labor Relations Board or the Consumer Financial Protection Bureau. Once such an order has been issued and you have an aggrieved party, someone could, in theory, take that case to a Federal district court and say, I have

an injury in fact, it is fairly traceable to the conduct of the NLRB or the CFPB, and it is the kind of injury that could fairly be redressable in court.

Mr. GOWDY. Do U.S. Senators have standing to challenge the recess appointments?

Senator LEE. While there may be some disagreement on this, of the authorities that I have consulted, including those based on the Supreme Court decision in *Raines* v. *Byrd,* seems to suggest that U.S. Senators are likely not to have standing to bring the case in their own capacity, but they certainly could in all events participate as amici curiae.

Mr. GOWDY. There is often talk of precedent and stare decisis, particularly when people like the decision, initially. They don't tend to talk about precedent and stare decisis as much when they don't.

My concern is, whatever the analysis we have of the recess appointment clause, it should be the same irrespective of who the President is and what party they are in. Can you talk about the historical treatment of what a recess meant and what a better rule is going forward?

Because it strikes me that if the person in the chair were taking a nap, under the President's analysis, he could make a recess appointment, or if you all were out to lunch for a couple of hours. What is the difference between 3 hours and 3 days?

So what has historically been the rule and what is a good rule going forward, irrespective of who the President is?

Senator LEE. That is a great question. And I want to emphasize the concern embedded in your question here, that the answer can't simply be that the President may decide on his own accord when the Senate is in recess. If he regards that the Senate is doing insignificant work, for instance; if he decides that whoever is sitting in the presiding officer's chair is going to sleep or that they are likely not to do any work, that is dangerous. That creates a slippery slope in which he could decide to make recess appointments overnight or over a weekend or something like that, and that certainly can't be the case.

To answer your broader question, precedent has been established in recent decades, basically over the course of the last century. Before that, I think it was a little more informal, but we have had substantial precedent evolve over the last century.

We had in the early 1900's a series of recess appointments made by President Theodore Roosevelt, 167 recess appointments made in the seconds between the end of one Congress and the beginning of the next Congress, just in between gavel taps, basically. The Senate Judiciary Committee convened a panel and conducted a formal investigation to determine what the rule ought to be. And our custom and practice as it has evolved over the intervening century has been based, in part, on their analysis.

Here is one of their conclusions, and I quote from their 1905 report: "The Framers of the Constitution were providing against a real danger to the public interest and not just an imaginary one. They had in mind a period of time in which it would be harmful if an office were not filled—not a constructive, inferred, or imputed recess as opposed to an actual one." So, in other words, they are

saying you can't use an overly technical set of logic in order to reach the conclusion that you have a recess.

Now, that conclusion was followed up by an Attorney General's advisory opinion by Attorney General Daugherty, which was issued in 1921. And among other things in that report, he explained that regardless of exactly where you draw the line, he said, under no set of reasonable circumstances can you infer that an adjournment lasting less than 3 days could be deemed a recess for purposes of the recess appointments clause. He went on to say, it is probably too short even if you take it out to 7 days or to 10 days.

And ever since then, our analysis has been informed by those positions; that, if nothing else, we look back to those two clauses of the Constitution we talked about earlier—Article I, Section 5 and Article II, Section 2. Article II, Section 2 says the President has this power during a recess. Article I, Section 5 says that in order to adjourn for more than 72 hours, the Senate has to get permission of the House. So that has evolved as a sort of safe harbor. If we don't have permission from the House or for whatever reason we don't get it, then we are not in recess, because we are having to convene every 72 hours.

The fact that we might not pass laws doesn't mean that we can't. We, in fact, did pass a very significant law on December 23rd in one of those pro forma sessions, just days before these recess appointments were made.

So it is wrong to suggest, as the President's Office of Legal Counsel has suggested in advising him, that those pro forma sessions are meaningless for constitutional purposes here.

Mr. GOWDY. Mr. Chairman, I have additional questions but I am out of time, so perhaps one of my colleagues will take mercy on me later on.

Chairman ISSA. One can always hope.

And, with that, we recognize the former chairman of the full committee, Mr. Towns, for 5 minutes.

Mr. TOWNS. Thank you very much, Mr. Chairman. I appreciate——

Chairman ISSA. And if you would like to yield to the gentleman from South Carolina at any time, he is available.

Mr. TOWNS. Yeah, I don't think I will do that.

But let me just say that I really appreciate the Senator coming over to share with us, but, Mr. Chairman, I yield back the balance of my time because I really want to get to the witnesses. You know, I really do. And I am eager to get to the witnesses. And I hope my colleagues are, too.

I yield back.

Chairman ISSA. I thank the gentleman for yielding back.

We now go to the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

Thank you, Senator, for being here.

While I was home over the Christmas holiday and during this timeframe and after the President made these appointments, I got a great deal of email from my constituents asking, How could you let this happen? How do you fix this? What do you do? I mean, there was a real frustration. I think the American people got, on

a commonsense basis, that we were not in recess when we were meeting pro forma every 3 days, when we passed very significant legislation in the form of the payroll tax holiday that the President himself was calling for us to pass during these pro forma sessions.

So my question to you is, I am not going to get into the nitty-gritty of whether we were in recess. I think the American people, anybody with a lick of common sense, gets that we were not in recess.

But where do you go from here? What are our options in dealing with these people who are taking taxpayer money, making critical decisions affecting this country, that have bypassed the advice and consent of the Senate, as I think is required by the Constitution? I mean, what are some of our options here? What can we do?

It is clear courts don't like to get involved in these separation-of-powers issues. You answered Mr. Gowdy's question about standing. I mean, where do we go from here? Do we de-fund the positions? Well, that will never really get passed unless we can bury it in some other bill. I mean, we can't impeach him, I don't think, because they haven't committed any crimes. Do we amend the Constitution to make this problem not happen? Where do we go from here?

Senator LEE. Well, first of all, thank you for sharing that set of remarks about what you have heard from your constituents. It is very much consistent with what I have heard from my constituents in my State, which is that people are feeling frustrated, they are feeling a sense of powerlessness, they are feeling the sense that power that belongs properly to them, the American people, has been exercised, it has been taken by someone to whom it does not belong. The President has taken power that belongs to the people and is authorized to be exercised only by those duly elected to the U.S. Senate.

And so something does need to be done, and that is why I have drawn the attention to it in recent days that I have. That is why I have said that, for my part, in my role as a Senator, although I have cooperated, and cooperated happily, with this President even though he has appointed lot of people with whom I have significant political and philosophical disagreements, I have recognized he is the President, he did in fact win an election, elections have consequences, and I have confirmed most of those people who have come before me.

But for me, personally, that changes now. My response to that and my duty to the Constitution, based on the oath that I took to it just over a year ago when I took office, I think requires me to stand up for these constitutional prerogatives and to show the President that unless or until he rescinds these unconstitutional appointments and allows them to be considered under regular order in the Senate, he is not going to enjoy the same degree of complete cooperation that he has had.

Other responses might include an action in the courts, notwithstanding the doubt surrounding whether Senators have standing independently. Senators can, and I anticipate many will, participate as amici curiae in judicial actions that would be brought by other parties with standing. I think there is some possibility that courts could act. One of the problems is that the courts act rel-

atively slowly. And it seems somewhat unlikely to me that the courts will issue relief in the time that is required, because these recess appointments will be valid only through the end of the year. And if the courts act after that, it is sort of water under the bridge, in a sense.

Other options would include, as you have suggested, options that might involve de-funding these offices. Certainly in the case of the NLRB, we have to remember that the President can't fund anything on his own. He has to rely on Congress; Congress has the power of the purse. And the House of Representatives, in the first instance, holds the power of the purse. That is certainly an option.

There are problems that arise out of the fact that the CFPB is embodied within the Federal Reserve Bank. We might want to look at a change in substantive law, in the fact that we have given this office to that entity and we have given funding responsibility to an entity that is not within our funding control.

These are the primary levers that we use. In addition to all of those, I think it is important that we make sure that this is considered in the political discussion in the upcoming elections, both Presidential and congressional. Because we in America have to entrust that those we elect into office, particularly the chief executive officer position, will respect the limitations on their power. Ours is not a government of one. And for this President to pretend otherwise is an insult to the Constitution and it is an insult to the American people.

Chairman ISSA. Would the gentleman yield?

Mr. FARENTHOLD. Yes, sir.

Chairman ISSA. By the President doing the appointment on January 4th, not January 3rd, isn't it true that these individuals will enjoy a 2-year term, not a 1-year term?

Senator LEE. That is not my understanding. So the recess appointments clause in Article II, Section 2 provides that recess appointees will remain in power until the end of that session of that Congress.

So, it is interesting. We held our first session of the second session of the 112th Congress on January 3rd, 1 day before the President made these recess appointments. So it is my understanding that they will continue in office, assuming they are not invalidated in some other way, through the end of this session, which will last through the end of this year. We will start a new Congress, of course, in January of next year.

Chairman ISSA. Thank you. I yield back.

Mr. FARENTHOLD. I see my time has expired.

Chairman ISSA. I thank the gentleman for giving me what was left.

We now recognize the gentleman from Massachusetts, Mr. Lynch, for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman.

Senator, I just want to say how pleased I am to have you come before the committee. I appreciate your words and your cooperation, your assistance with this matter.

I do have to acknowledge, though, you are not under oath, so this is really just a chat. And it is one that I am enjoying, but we do

have another panel of witnesses that I would like to get to. So, with all due respect, I will yield back the balance of my time.

Thank you, sir.

Senator LEE. Thank you.

Chairman ISSA. Boy, that was quick.

Senator LEE. I would be happy to take an oath if you want me to, by the way.

Chairman ISSA. You know, you took an oath already, Senator, and——

Senator LEE. Indeed.

Chairman ISSA [continuing]. We think that is more than sufficient——

Senator LEE. That will do.

Chairman ISSA [continuing]. For ourselves and for the other body.

We now go to the gentleman from North Carolina, Mr. McHenry, for 5 minutes.

Mr. MCHENRY. I thank the chairman.

Senator Lee, thank you so much for being here. I certainly appreciate your testimony. And thank you for the work that you are doing, the heavy lifting you are doing in your first term in the U.S. Senate.

With that, I would like to yield the balance of my time to the gentleman from South Carolina, Mr. Gowdy.

Chairman ISSA. I knew you would get lucky from a fellow Carolinian.

Mr. GOWDY. Well, Congressman McHenry has always shown graciousness toward me, and I appreciate his yielding. Thank you for that.

Senator, how were you possibly to have vetted the NLRB putative appointees given when the names were submitted to the Senate?

Senator LEE. Yeah, thank you for raising that, Congressman Gowdy.

With regard to two of the appointees to the NLRB, their names were submitted just right before the Christmas holidays, and just days before, in fact. And, as a result, they had not gone through the committee process. They hadn't been vetted by any committee. We hadn't had time to set up a single committee hearing. And so that, in and of itself, ought to draw attention to the legitimacy of the procedures, the legitimacy of the constitutional analysis that led to these unconstitutional recess appointments.

It really is a stretch, to say the least, to say that any of these are legitimate recess appointees, and particularly so with regard to those.

This underscores the point, this was not justified, cannot be justified, by the fact that, inevitably, in any Senate confirmation proceeding, for any nominee, there may be some delays. There have been under every administration, in every Congress, in every Senate that I am aware of, ever. And the fact that that happens doesn't mean that the President can just ignore the Constitution. But that is especially so where they were given to us just days earlier, and we didn't even have time to vet them.

Mr. GOWDY. So you get the names on December the 15th, and what, 2½ weeks later, he makes a recess appointment and says that the Senate is not doing its job?

Senator LEE. That is correct.

Mr. GOWDY. And with respect to the Republican appointee to the NLRB, could Senator Reid have set that for a vote? I am not familiar with how the Senate works, but that name had been in the Senate for some time. It strikes me that if Senator Reid were concerned about whether or not there was a quorum on the NLRB, he could have set that, and he did not set that.

Senator LEE. As the majority leader, he does, in fact, control the Senate schedule and the Senate vote schedule, and he could have set that for a vote, and yet he did not.

And that opens up another issue, which is that at any given time, we can even do these sorts of things through a pro forma session. We have on occasion approved people by unanimous consent in a pro forma session. And that has been done in the past; it could have been done at the time. The fact that it didn't occur hardly means that we were not available to act on these.

Mr. GOWDY. Well, as I shared with you before Congressman McHenry was so gracious to give me some extra time, my real concern is, whatever we decide this analysis is, is going to have to be equally applicable whether we like who the President is or we wish we had another one. So it just strikes me that we have created something of a ratchet, because once you define it, it is very hard to expand it, once you limit it.

And it now seems to me the rule is, we are going to give you 2½ weeks to vet our nominees, and if you don't, then you are not doing your job. And if you are out for 3 days, that is a recess; and if we like the laws you passed, like the payroll tax extension, then you are not in recess. But if we don't like what you have done, you are in recess, which—the political gimmickry—the Constitution really should be immune from political games.

So can you speak to how you were in recess but yet you also passed this payroll tax extension upon which the Republic hung in the balance, if you listen to the rhetoric? How could you pass that but yet still be in recess?

Senator LEE. Well, of course, we couldn't. We had to be able to act, and we did, in fact, act. And we acted on December 23, 2011, to pass that into law.

The President demanded that Congress act. The President subsequently praised the Congress for moving into action quickly. He signed that legislation into law promptly. He recognized the legitimacy of Congress' actions, notwithstanding the fact that they were conducted, at least on the Senate side, in a pro forma session on December 23rd; notwithstanding the fact that previously we had anticipated that there might not be any formal business conducted, there was. And that indicates the fact that we were, in fact, open for business, as we were required to be under the Constitution, not having received the consent of the House of Representatives to adjourn for a period of more than 3 days.

This emphasizes my broader point, which is that my concern is neither Republican nor Democratic; it is neither liberal or conservative. This is politically ecumenical. This issue is simply an Amer-

ican one, one rooted in the rule of law and the U.S. Constitution to which we have all taken an oath. It is that we can't, as an institution, as a country, afford to allow one person to exercise power that does not properly belong to him, that the people have not properly given him. And that is what happened here. So I will be just as hard on any Republican President who dares try this nonsense as I am on this President.

Mr. GOWDY. Thank you, Senator.

Thank you, Mr. Chairman, and the gentleman from North Carolina.

Chairman ISSA. I thank the gentleman.

We now recognize the distinguished lady from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. I thank you, Mr. Chairman.

And I want to thank Senator Lee for appearing today.

I just want to say, I might have found the discussion edifying had there also been present a Senator who supported the appointments during this recess, since all Senators are known, are notorious for jealously guarding their institutional prerogatives.

But absent that, Mr. Chairman, I would just as soon get on to the next panel.

Chairman ISSA. I thank the gentlelady. I will note that we took all Senators who asked to be here.

And, with that, we recognize the gentleman from Tennessee for 5 minutes, Mr. DesJarlais.

Mr. DESJARLAIS. Thank you, Mr. Chairman.

And thank you, Senator, for being here. Unfortunately, I have a conflict with another hearing, so I am going to yield my time back to the good chairman, Mr. Issa.

Chairman ISSA. I thank the gentleman.

Now it is Tennessee and California that are teaming.

Senator, I did want to follow up on a couple of questions. You mentioned earlier Teddy Roosevelt's famous appointments. But those were specifically when the Congress went gavel to gavel; in other words, during the anticipated historic change of sessions. Did the President have that option in this case? Or could he have had that option to do it on January 3? Because wasn't there, in fact, a moment between sessions?

Senator LEE. Well, I don't regard there to have been an opportunity for him to issue an actual recess appointment. But I should point out that that hypothetical does get at a different set of facts. That deals with what you might call an intersession recess appointment, as opposed to——

Chairman ISSA. Isn't that one in which the court has spoken?

Senator LEE. Well, that is one in which a court has spoken. I believe you might be referring to the 11th Circuit decision in that regard.

Chairman ISSA. Right. But that would be one in which the President would know the likely outcome, at least historically, right?

Senator LEE. Perhaps. In a different set of circumstances, if they otherwise would support the conclusion that we were in recess for purposes of the recess appointments clause. But that would be called an intersession appointment, and this was an intrasession recess.

Chairman ISSA. But the President clearly waited. He waited until January 4th. It didn't come to his mind. The opinion he sought didn't just come in on January 3rd. He, with malice and forethought if you will—maybe malice is a little unkind. But with forethought and planning, he planned to do it after January 3rd, from all indications.

Senator LEE. I strongly suspect that this was not an arbitrary decision on the part of the President. He is a careful person who is familiar with the Constitution, and I am certain that this was deliberate.

Chairman ISSA. Isn't he sufficiently familiar with the Constitution that he had the opposite opinion when he was in the Senate that he now has as President?

Senator LEE. I think he got it right the first time and should have stuck with his first instinct.

Chairman ISSA. Presidents often say they grow in office. And perhaps he simply grows out of the office of the Senate and his respect for that President body, which is, quite frankly, my personal opinion that it is a lack of respect for the body he once belonged to.

Let me go through just one or more points. As a House Member, not having served in the Senate—they let me come over there once in a while and lobby you all; but that is about it—you have some interesting rules that are a little different than ours. First of all, a motion to adjourn is still a high standard or a low standard, if you will. In other words, it is immediately taken. So a motion to adjourn is always in order. And could, in fact, at any time, any Member could move to adjourn, even during the pro forma session, unless there was a specific exemption agreed to; right?

Senator LEE. That is correct.

Chairman ISSA. So any Member of the Democratic Party, not just Senator Reid, could have moved to adjourn in order to create a legitimate recess; correct?

Senator LEE. That is correct. I suppose that doesn't account for the need that they would have to get permission from the House to adjourn for more than 3 days. But separating that question out, yes.

Chairman ISSA. But of course, Senator Reid could have put no one in the chair on the 3rd day; isn't that correct?

Senator LEE. Yes.

Chairman ISSA. No power could have forced him to be in the chair?

Senator LEE. I am not familiar with any court or any precedent from the Supreme Court that would have led to a court injunction telling Senator Reid he had to do that.

Chairman ISSA. So every single Member of the majority in the Senate, including Senator Reid, had the ability to create a different set of circumstances and did not?

Senator LEE. Yes, sir.

Chairman ISSA. Additionally, anything that was passed was passed by unanimous consent, correct?

Senator LEE. Correct.

Chairman ISSA. So the fact is the December 23rd vote, any Member of the vote Senate—yourself included—could have come and taken that down. It was an affirmative decision that that agree-

ment was going to happen. It wasn't an accident. It wasn't like the UC was a surprise, and people just weren't there.

Senator LEE. That is correct. Any one of us could have objected and stopped that from proceeding.

Chairman ISSA. Now you are a little different in the Senate than the House. I know that because I have worked with Senate staff. Senate staff vets, as I understand, every one of these UCs. And unless the Senate staff responsible for the Senator either speaks to the Senator or makes that commitment for some reason on behalf of the Senator, UCs don't happen, right?

Senator LEE. That is correct.

Chairman ISSA. You have the process of holds, if you will. Everything starts with a hold, and then you release them?

Senator LEE. Yes.

Chairman ISSA. So if there had been an actual request for a vote during the pro forma session, a request for a UC, that would have come up, each of these appointees could have come up as a request for a UC and a Member would have had to show up physically and object to that appointment. And Senator Reid held no such vote.

Senator LEE. An objection could have been made, that is correct.

Chairman ISSA. But a Senator would have to be there to make the objection?

Senator LEE. Well, that is probably a discussion for a different day. An objection probably could be made. A hold probably could be imposed on a unanimous consent request without actual physical presence, but the objection would likely have triggered a requirement for a physical presence.

Chairman ISSA. My borrowed time has expired. But you have been very illuminating.

With that, we go to the gentleman from Virginia. And before we go to Mr. Connolly, I would ask unanimous consent that Democratic objections to recess appointments, which is a five-page document, be placed in the record, including the January 24, 2012, quote from the gentleman from Virginia, Mr. Connolly.

Without objection, so ordered.

[The information referred to follows:]

Democratic Opposition to Recess Appointments

Background: On August 1, 2005, former President George W. Bush installed John R. Bolton as ambassador to the United Nations through a recess appointment.[1] This marked the first time that a UN ambassador was recess appointed and the move was very "contentious" because Mr. Bolton was a controversial appointee.[2] The appointment followed a "five-month standoff between the White House and Senate Democrats…"[3] Mr. Bolton ultimately served in the post for just 16 months, until the recess appointment lapsed, because Democrats blocked his reappointment in 2006.[4] What is interesting about this recess appointment, however, is that Preside Bush made the move "over strong Democratic objections" that recess appointments were an abuse of power and undermined "the credibility of the United States."[5]

Then Senator Barack Obama (D-Ill), a member of the Foreign Relations Committee, vehemently opposed the move, stating:

> **It's the wrong thing to do**. John Bolton is the wrong person for the job… The president is entitled to take that action, but I don't think it will serve American foreign policy well.[6] (Emphasis Added).

In a press conference, Senator Obama continued:

> To some degree, **he's damaged goods** … Not in the history of United Nations representatives have we ever had a recess appointment, **somebody who couldn't get through a nomination in the Senate. And I think that that means that we will have less credibility and ironically be less equipped to reform the United Nations in the way that it needs to be reformed**….[7] (Emphasis Added).

(When pressed on the issue in a press gaggle on January 4, 2012, right after Obama's recent appointments, WH spokesperson Jay Carney stated "John Bolton was a highly controversial nominee whom Senator Obama opposed on the merits..."[8] However, Obama's latter remarks suggest he believes, to some degree, that recess appointment process undermines the credibility of appointees).

Senator Dick Durbin (D-Il) said, in the same news conference

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[1] Elisabeth Bumiller and Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, NY TIMES, (Aug. 2, 2005), http://www.nytimes.com/2005/08/02/politics/02bolton.html?pagewanted=all.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Jennifer Loven, *Officials: White House To Bypass Congress For Bolton Nomination*, AP, (July 31, 2005), http://news.google.com/newspapers?nid=1842&dat=20050730&id=HTsyAAAAIBAJ&sjid=4-QFAAAAIBAJ&pg=1339,3894240.
[7] Bernard Schoenburg, *Bush Sends Bolton To U.N.; Durbin, Obama Criticize Move, The State Journal-Register*, (Aug. 2, 2005).
[8] Jay Carney, *Press Gaggle by Press Secretary Jay Carney en route Cleveland, OH*, (Jan. 4, 2012).

When you have an appointment that is this critical and this sensitive, and the president basically says he's going to ignore the will of the Senate and push someone through, it's really troubling...[9] (Emphasis Added).

(Ironically, on January 4, 2012, Senator Durbin tweeted "In appointing Richard Cordray, the President put #Main Street ahead of #Wall Street. @CFPB will be a strong watchdog for #American #consumers.")[10]

Congresswoman Nancy Pelosi (D- Cali) released a press release, in which she stated

> The President's decision to circumvent the Senate and use a recess appointment naming John Bolton as ambassador to the United Nations Is a mistake.... For President Bush to use a recess appointment for such a controversial nominee... subverts the confirmation process in ways that will further harm the United State's reputation in the eyes of the international community. The American people deserve better.[11]

Then Senator Joe Biden (D-Del), Ranking Minority member, said this in prepared remarks during Mr. Bolton's nomination before U.S. Senate Committee on Foreign Relations, on May 12, 2005:

> With all due respect, Mr. Chairman, I think we're making a big mistake. **We should not stand for this encroachment on our authority. ... We do not work for the President. No one is entitled to appointment to an office requiring advice and consent – unless they have our consent. No President is *entitled* to approval of a nominee. We have undermined our authority and shirked the constitutional responsibility of this Committee....** [12]

Then Senate Minority Leader Harry Reid (D-Nev) said the appointments were

> The latest abuse of power by the bush administration [and that Bolton would arrive at the UN] with a cloud hanging over his head because he could not win confirmation....[13]

Senator Majority Leader Harry Reid (D-Nev), characterized Mr. Bush's move as

> the latest abuse of power by the Bush White House...[14]

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[9] Bernard Schoenburg, *Bush Sends Bolton To U.N.; Durbin, Obama Criticize Move, The State Journal-Register*, (Aug. 2, 2005).
[10] https://twitter.com/#!/SenatorDurbin.
[11] Nancy Pelosi, Press Release, *Pelosi: President's Recess Appointment of John Bolton is a "Mistake,"* (Aug. 1, 2005), http://pelosi.house.gov/news/press-releases/2005/08/releases-Aug05-bolton.shtml.
[12] *Statement of Senator Joseph R. Biden, Jr. Nomination of John Bolton to be UN Ambassador*, (May 12, 2005), http://www.foreign.senate.gov/imo/media/doc/BidenStatement050512.pdf.
[13] Mike Doring, *Bush Installs Bolton as U.N. Ambassador with Recess Appointment*, Seattle Times, (Aug. 2, 2005), http://seattletimes.nwsource.com/html/politics/2002415579_bolton02.html.

Senator Frank R. Lautenberg (D-NJ), said in a statement that

> even while the president preaches democracy around the world, he bends the rules and circumvents the will of Congress....[15]

The late Senator Edward M. Kennedy (D- Mass) immediately released a statement calling the move

> **a devious maneuver** [that] further darkens the cloud over Mr. Bolton's credibility at the U.N.... (Emphasis Added).[16]

[14] Elisabeth Bumiller and Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, NY TIMES, (Aug. 2, 2005), http://www.nytimes.com/2005/08/02/politics/02bolton.html?pagewanted=all.
[15] Elisabeth Bumiller and Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, NY TIMES, (Aug. 2, 2005), http://www.nytimes.com/2005/08/02/politics/02bolton.html?pagewanted=all.
[16] Elisabeth Bumiller and Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, NY TIMES, (Aug. 2, 2005), http://www.nytimes.com/2005/08/02/politics/02bolton.html?pagewanted=all.

Background: Senate Majority Leader Harry Reid (D- Nev) began using recess appointments in earnest in late 2007 to block appointments from George W. Bush.[17] Ironically, Senator Reid came out in support of President Obama's January 4 recess appointments.

On June 9, 2005, Harry Reid had this to say about President George W. Bush's recess appointment of Judge William Pryor to the 11th Circuit Court of Appeals:

> I agree with Senator KENNEDY [the late Senator Ted Kennedy (D-Mass)] that Mr. Pryor's recess appointment, which occurred during a brief recess of Congress, could easily be unconstitutional. It was certainly confrontational. Recess appointments lack the permanence and independence contemplated by the Framers of the Constitution. To confirm Mr. Pryor now would validate the President's regrettable decision to defy the Senate....[18]

On December 17, 2007, Harry Reid had this to say about Preside George W. Bush's attempt to recess appoint Steve G. Bardbury as Assistant Counsel to the Attorney General:

> He [President George W. Bush] wanted a person who cannot get through the Judiciary Committee to be Assistant Counsel to the Attorney General, a man by the name of [Steve G.] Bradbury. I talked to various members of the Judiciary Committee yesterday. They don't think the man is somebody who should be confirmed by the Senate. I would say, without a lot of hesitation, there is no chance he would be confirmed. It is my understanding he has already been recess appointed. I can't understand why the President wouldn't do what we have suggested. **My only solution is to prevent this and call a pro forma session again...**
>
> **I will keep the Senate in pro forma session to block the President from doing an end run around the Senate and the Constitution with his controversial nominations....**[19]

On July 28, 2008, Harry Reid called recess appointments "mischievous" on the Senate floor:

> We have had a difficult problem with the President now for some time. **We don't let him [President George W. Bush] have recess appointments because they are mischievous**, and unless we have an agreement before the recess, there will be no recess. We will meet every third day pro forma, as we have done during the last series of breaks. We don't need a vote to recess. We will just be in pro forma session. We will tell the House to do the same thing. So let's not be threatening about staying in during the August recess...[20]

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[17] CRS Report.
[18] Sen. Durbin, Congressional Record, S.6253, (June 9, 2005), http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi.
[19] Sen. Harry Reid, Congressional Record, S.15980, (Dec. 19, 2007), http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi.
[20] Sen. Reid, Congressional Record, S.7558, (July 28, 2008), http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi.

On January 24, 2012, Rep. Gerry Connolly called recess appointments as "executive encroachment on the prerogatives of the legislature"

> Let me also say, however, and this may surprise my colleagues on the Republican side of the aisle, **I frankly share their misgivings about recess appointments**. From my reading of the Constitution of the United States, recess appointments were intended to give the President the power to run the government when there were long stretches of Congress not being in session. And, frankly in my view, recess appointments have been abused by both Republican and Democratic Presidents. And, if my Republican friends in this Committee and in this body actually want to correct that, not by using you as the example, but by moving forward to correct that on a bipartisan basis, they would find this Democrat more than willing to cooperate because I think it's another example of, frankly, **executive encroachment on the prerogatives of the legislature**.

Former NLRB Democratic board member Dennis Devaney noted that the NLRB will have a "cloud" hanging over any rulings it makes after President Obama's recent appointments

> The National Labor Relations Board will have a **"cloud"** hanging over any rulings it makes after President Obama this week pushed through three recess appointments to the agency that don't pass "constitutional muster," a former member of the labor board said Thursday. **"My problem with it is I think there's going to be a cloud over whatever they do,"** said Dennis Devaney, a former NLRB board member and now a lawyer in Detroit. "...Anything they do is going to be subject to being undone, because they didn't have the authority to act."[21]

[21] Tim Devaney, *Business Groups Fear Revitalised NLRB*, THE WASHINGTON TIMES, (Jan 5, 2012), http://www.washingtontimes.com/news/2012/jan/5/business-groups-fear-revitalized-nlrb/

Chairman ISSA. With that, the gentleman is recognized for 5 minutes.

Mr. CONNOLLY. I thank the chair. And the chair is right in introducing into the record my longstanding view that recess appointments by Presidents of both parties have frankly long been abused. I don't believe that the Constitution envisioned recess appointments being routine things. They were designed for a time when Congress was not in session for long stretches of the calendar.

But that requires bipartisan cooperation to fix that problem. It has nothing to do with this President, per se. It is a longstanding institutional and constitutional issue. I would hope we could find bipartisan common ground. So I actually find myself sharing many of your misgivings, Senator Lee, about a recess appointment.

But having said that, I have listened respectfully to your point of view, and I respect it. I hope you will listen to mine.

I believe that a statement by 44 Republican Senators in the U.S. Senate announcing that they are going to try to thwart the implementation of a duly passed law—the Constitution envisioned how a law gets passed. It never envisioned that you got a second extra constitutional bite at the apple to thwart its implementation when you didn't have the votes to defeat it. And I believe that, frankly, that letter precipitated this issue and that you got what you deserved. And it set us all back, frankly, for those of us who have, as the chairman just indicated in introducing into the record, misgivings about recess appointments as a separate issue.

And so I guess, with all due respect, I consider this a rebuke because I think it is an extraordinary thing, a priori to announce no matter what, no matter the virtues of the appointees, no matter that fact that we have to respect that a law was duly passed and signed into law by the President of the United States as the Constitution calls for, we are going to thwart it. We in advance are announcing we are going oppose all appointments to prevent the implementation of that provision of the law. And I just think that is wrong. You win; you lose, fair or square.

And you have indicated that many of your constituents are nonplussed about this action. I would hope they would be equally nonplussed at the extra constitutional decision by you and so many of your colleagues to thwart a duly implemented law. That is my opinion, and I yield back.

Chairman ISSA. Before yielding back, would the gentleman also want to ask about the NLRB? You dealt with one. Did you have questions on the NLRB appointments?

Mr. CONNOLLY. I don't have any questions, Mr. Chairman. I just issued my statement. But I would say the same applies frankly to that as well.

Chairman ISSA. The gentleman yields back.

We now go to the gentleman from Michigan, Mr. Amash, for 5 minutes.

Mr. AMASH. Thank you, Mr. Chairman.

I simply want to thank one of my favorite Senators, Senator Lee for being here.

And I am going to yield my time to Mr. Guinta.

Mr. GUINTA. I thank the gentleman.

I thank the Senator for being here this morning. Two points for the record. I think he is here first because he asked to speak on the subject matter, and we want to hear what he has to say. Second, he has a rather unique perspective on these issues with his background and having opportunities to clerk in the Third Circuit Court as well as the Supreme Court, is my understanding. So I thank you for your comments.

I want to be clear. I don't support what the President did. I have looked at this issue. I have spent quite a bit of time looking at precedent, and I think this President in this circumstance overstepped his authority.

My understanding—and please correct me if I am wrong—is that it is the Senate and only the Senate—not the President of the United States—that has the capability to determine when the Senate is in recess. Is that your understanding?

Senator LEE. Yes. That is my understanding based on the text of the Constitution, based on the history of the Constitution, its original understanding, and on custom and practice as it has evolved over the last two centuries. We are expressly given the power, as is the House, to determine the rules for our own procedure and internal governance. And we do that.

Mr. GUINTA. So the President is relying, in making this recess appointment, on the Office of Legal Counsel's justification in a memo that they issued. And their memo essentially said that the OLC effectively asserts that the President may unilaterally determine if and when the Senate is in recess for purposes of exercising his recess appointment power.

So my read is that the President is looking at his legal counsel's opinion that says he can decide when the Senate is in recess. However, there is clear precedent that states, only the Senate has that authority. So that is problem number one with this process. The other two points I would like to make is that back in 1993 during the Clinton administration, the Department of Justice filed a legal brief in Federal court for the District of Columbia arguing that unless a recess lasted for 3 days, a President could not make an appointment, more than 3 days. The third point I would make is, in April 2010, then-Solicitor General Elena Kagen acknowledged before the U.S. Supreme Court that "the Senate may act to foreclose the President's recess appointment power by declining to recess for more than 2 or 3 days at a time over a lengthy period. Presidents have not, in recent decades, made recess appointments during intrasession recesses lasting fewer than 3 days."

So there is most recent opinions and precedents set by those who would likely support the philosophies of this President who have acknowledged that what this President is doing is wrong. And to speak to what the gentleman from Virginia mentioned is that this should be about appropriate powers of the executive branch. It should not be about Republican or Democratic philosophies. It should be about the country and what is good for the country. And I believe that all of us in the legislative body as well as in the executive need to adhere to the precedents and the laws and the rules that we have established. And without doing that, these bodies cannot gain greater credibility with the country. And I would submit that it makes sense for the President of the United States to

acknowledge in this circumstance he erred and that he should resolve it to reinstate the faith in the process that we have.

Senator LEE. If I can respond to that. Thank you very much, Congressman.

Yes, I share your concerns. And I have reviewed the Office of Legal Counsel's 23-page single-spaced memorandum. It is well written. It is well researched in the sense that it points out the precedents. But it reaches the wrong conclusion, and it reaches a conclusion that is at odds with the very precedents to which you refer and to the very logical positions to which you refer. And as I am responding to that, I would also like to respond simultaneously to Congressman Connolly's point because I think they kind of lead to the same conclusion here.

I understand and I share the frustration that so many Americans have expressed over the fact that there are delays at times, sometimes long delays, sometimes delays that don't get resolved until after that Congress is over or after that President is no longer in power. That is frustrating, especially for those of us whose names are on the line to be confirmed.

As frustrating as this is, constitutional government is necessarily, by its very nature, frustrating. It was designed to be frustrating in the sense that it was designed to make sure that it wasn't so efficient that we just passed laws really quickly. Efficiency doesn't always lead to liberty, and frequently, it leads to exactly the opposite position.

So the fact that this process is frustrating, the fact that there are at times delays, the fact that the delay has at some times been abused—even though it is the prerogative of the Senate to do that—does not and cannot ever justify circumventing the Constitution. And just saying, this is really necessary; this is really important. I am, therefore, going to do this. At every turn, when we have tried that in this country, it hasn't ended well. And I am determined not to allow that to happen here. I am not about to stand idly by as this precedent gets established knowing full well that it could and, unless we do something about it, it will be abused in the future not just by Democratic Presidents but by Republican Presidents.

Mr. GUINTA. I thank the Senator for his comments and I thank the gentleman from Michigan for yielding.

Mr. MCHENRY [presiding]. Mr. Welch of Vermont.

Mr. WELCH. Well, I thank Senator Lee for being here. I just have a short statement.

You know, there is an air of unreality about this for me, and I find this extremely discouraging. Mr. Guinta is right. People want us to abide by the rules.

Senator, you were making a very passionate statement about the rules. But this institution of Congress and the House and the Senate is seen rightly by Americans as totally dysfunctional, and we are in the process of proving the point.

I mean, there is a fundamental difference between deliberation and destructive delay. That is my view, and I think it is the American people's view. The rules that we work by in the House, the rules that you work by in the Senate, those are designed by Senators and House Members, and they suit our interests. They don't

get elevated to the level of constitutional rights. They are rules that oftentimes serve the interests of the majority party in both bodies.

The problem we are having here is Democrats can't work with Republicans in either body. The Senate, I believe, is seen as having a series of procedures that have one purpose, and that is to delay and not get to an answer to move forward on the business that America needs to be done. I mean, it is an astonishing spectacle what we are doing in this Congress in refusing to do the people's business. We haven't passed a budget. And I don't point the finger of blame at one party or the other. This institution just isn't working.

I mean, it has had a history in the past where it has been able to make decisions. So when we have what sounds, to me, like a very academic discussion—and I put myself in the seat of a constituent of mine who is wondering, what is it we are talking about; we have not passed a budget. That is disgraceful. And 2 years ago when the Democrats were in the majority, the finger of responsibility was pointed by my colleagues on the Republican side at our failure to do it. Now the Republicans, who are in the majority at least in the House—not in the Senate but have an active and powerful minority, we haven't been able to pass a budget. This is very destructive.

So, at the end of the day, you may be right in your legal argument, but it is not going to move this country forward, whether you are right or President Obama is right. So I just think we have to move past these procedural maneuvers that we create to allow us to assert our will and make decisions, do it in an up-or-down vote, allow there to be clarity for the American people where each of us stands. If they don't like the vote that we made, they have the opportunity in the next election to send somebody else here to do it. So thank you for being here, but I don't think we are getting anywhere.

Senator LEE. If I can respond to that, Congressman Welch. I appreciate your comments. Your concerns are very legitimate, and I share very many of them.

Let me reemphasize that there are delays built into the system. Part of the delay that is built into the system is constitutional. Part of it is based on the rules of each body, and the rules of each body are of course constitutionally the prerogative of each body.

The President of the United States, when he gave his State of the Union address last week in your Chamber here, told us that what he would like is to see a rule change and a policy change in the Senate that will lead to an up-or-down vote for each nominee within a finite period of time. That, of course, is ultimately a decision for the Senate to make. But I think that is where the debate and discussion over this ought to be.

In other words, the frustration that he has, that Members of this body have, that Members of the Senate have or the American people in general have ought to be directed toward a discussion about whether or in what way the Senate might change the rules of its procedure and not toward saying, we are frustrated with those rules, we are frustrated with the way that they manifested themselves in delay, and we, therefore, want the President to ignore the

Constitution. That final conclusion isn't the natural logical legitimate product of saying, we are frustrated. We ought to have a discussion about the rules themselves and not simply capitulate and say, let's give up, and the President can violate the Constitution if he wants.

Mr. WELCH. Thank you, sir.

I yield back.

Mr. MCHENRY. The gentleman yields back.

Mr. Guinta is recognized for 5 minutes.

Mr. GUINTA. Thank you, Mr. Chairman.

I would just simply add that while I don't disagree with the gentleman from Vermont's comments relative to let's focus on the legislative side on action and moving the country forward relative to policy, it also is equally important that we reiterate to the country that we are following our own rules. I mean, I think we teach our families, our children that rules are important. I get to go home on weekends and see my third grade daughter's basketball games. And there are rules. And it is a very important lesson to teach our children to abide by them. And if we simply can't do it as—what I think is an incredibly important body, the Congress and the President, then what kind of message is that sending to the Nation?

So I certainly appreciate my colleague's position relative to the legislative requirements of both bodies. And I would agree with them and urge both bodies to work together on a thing like a budget, the appropriations bills. By the way, maybe you could remind the Senators that we did, in the House, pass a budget last year, and we are going to pass another one this year. And we would love to have the Senate respond. But I would like to yield the remainder of my time back to the chair.

Mr. MCHENRY. I certainly appreciate my colleague yielding.

You know, it is interesting, my colleague on the other side of the aisle said, your legal argument might be right. It is sort of an interesting point of debate. What's the Constitution among friends, right? That old saying.

Let me ask you a couple of basic questions: How many Republicans are there currently in the U.S. Senate?

Senator LEE. 47.

Mr. MCHENRY. And 47 Senators, is that a majority of that body?

Senator LEE. No.

Mr. MCHENRY. Interesting. Okay. After the 2008 election—I know you weren't a Senator—but weren't there 60 Democrats in the U.S. Senate?

Senator LEE. Yes.

Mr. MCHENRY. And if you have 60 of any Senators together, do they even have to speak to the other 40 Senators in the elevator?

Senator LEE. Not much.

Mr. MCHENRY. Right. So let's just understand historically where this President has been. He had a supermajority in the U.S. Senate after the 2008 election. He was able to pass the stimulus through the House, through the Senate. Didn't get a single vote from Republicans in the U.S. House. It became law. This President has had a majority in the U.S. Senate for 4 years. He has had a majority—a supermajority in the U.S. House. Well, let me restate that. He

had 59 percent of the U.S. House after the 2008 election. So this idea that he is complaining about the Congress' inaction is pretty absurd. So let me go to the CFPB.

The President's lawyers said that there is a great risk, a litigation risk, that anything the CFPB does would be challenged based on the constitutionality of this appointment, anything the National Labor Relations Board does could be challenged legally based on this President's, I think, unprecedented action. You know, looking at that litigation risk and the amount of uncertainty that creates for small businesses, even big businesses and the impact it has on the economy, that is sort of a net impact of this debate that we are having. Now I know you are a constitutional scholar, but I also understand you represent the folks in Utah who are concerned, like my constituents, about jobs. This does have an impact on the American people in a real way. It is not some academic debate.

But you referenced the fact that the Senate is in session every 3 days when you are in pro forma session. If the House doesn't agree to adjourn, why does the Senate meet every 3 days? Where does that come from?

Senator LEE. Article I, Section 5, of the Constitution provides that we may not adjourn without the consent of the other body for a period of time longer than 3 days.

Mr. MCHENRY. Okay.

Senator LEE. And because the House of Representatives didn't grant us to adjourn for a period of time longer than 3 days, we had to continue to meet every 3 days.

Mr. MCHENRY. Okay. So when does this date back to, this action by the Senate, in practical impact. I know it was written——

Senator LEE. The last roll call vote on the floor of the Senate prior to the Christmas holidays was taken on December 17th, as I recall.

Mr. MCHENRY. Okay. So for the next almost month, it was pro forma session?

Senator LEE. Correct.

Mr. MCHENRY. As it was in the House?

Senator LEE. Correct.

Mr. MCHENRY. Talk about this litigation risk, the amount of uncertainty that these actions will create in our economy.

Senator LEE. Well, at a time when unemployment is at around 9 percent and at a time when one of the things that is chilling our economy and chilling the creation of growth of jobs is uncertainty and at a time when Americans and American businesses face regulatory compliance costs at an astounding rate of about $1.75 trillion a year, almost equal to the collective tax burden of the American people, the one thing that we don't need is more uncertainty in our regulatory structure. The fact that American businesses may become subject to an order issued by the NLRB or the CFPB at any time that may or may not be valid, that could be suspect in terms of their validity and, therefore, subject to litigation, litigation that would be costly and would prolong the uncertainty associated with their orders but litigation that would become absolutely necessary because in many instances, it might be a make-or-break moment for the company, this is exactly the kind of thing that will make our already dismal unemployment problem substantially worse. So

this has real ramifications. This is not a hypothetical injury. This is not an abstract problem. This is a problem that affects real Americans, who are just struggling to get by, struggling to find jobs, struggling to find full employment and good compensation. And this compounds that problem many-fold.

Mr. MCHENRY. Thank you, Senator Lee. And thank you for your testimony.

Just to mark this down as a Member of the House, you know, we always have a bit of—we chafe a bit at the actions of the Senate or the inactions of the Senate. But that is not a new thing, nor is that a partisan thing. It is as old as the Republic itself. The Senate is designed to be inefficient; and by God, it lives up to that expectation.

So, with that, I recognize Mr. Clay, the gentleman from Missouri, for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman.

I really have no questions for the Senator. Thank you for coming today.

But let me say that I do have an observation about the process known as recess appointments. Let me say, thank God for recess appointments, that we were able to appoint Richard Cordray as the leader of the CFPB because it is the law. Dodd-Frank is the law of the land. And it is necessary that we observe the law. We are a country of laws. And the function of the CFPB is to protect American consumers, and to have to succumb to the will of a minority of Senators who don't want to see this law implemented, the American people know what you are doing.

And pretty much this President has pulled the wool off of what you are trying to do. We know you are trying to thwart any achievement by this administration for political purposes. And so let me again restate, thank God for recess appointments and also for the NLRB, so that they can be up and running and functioning as a full body to protect the workers in this country.

So, Mr. Chairman, I have no questions, and I yield back the balance of my time. And it doesn't require a response.

Senator LEE. Mr. Chairman, if I could respond to that.

Mr. CLAY. It doesn't require a response, Mr. Chairman.

Mr. MCHENRY. Well, I certainly appreciate it. And I think the witness has an opportunity to answer.

Senator LEE. Thank you, Mr. Chairman.

I appreciate the fact that we have laws. And I need to point out that from time to time, Congress will pass a law and then not fund the office in charge of enforcing that law. It actually happens with some regularity. It has happened when Republican Congresses have enacted one law and subsequent Democratic Congresses have refused to fund it. The fact that a law is created but not funded or the subject of a full appropriations by a subsequent Congress is not lawless. It is part of the democratic institution.

And to give you an example, in your home State of Missouri, Congressman Clay, it is urban legend, at least, that it was once legal to shoot a Mormon in Missouri. I don't know whether that was in fact embodied in a statute. It might just reflect the extermination order issued by Governor Lilburn Boggs indicating that all

Mormons, members of my faith, could be exterminated. I am grateful that that wasn't funded, that that wasn't executed.

Now this is a very different kind of law than that one. But the fact that something is put into law one day doesn't eternally automatically inexorably obligate subsequent legislative bodies to fund activities occurring pursuant to that very law. And that is exactly what it means to be in a constitutional republic. We elect people. Those people pass laws, and then we make decisions about how the government is to be funded.

Mr. MCHENRY. If my colleague wishes to respond, he still has time.

I certainly appreciate it. And I would say to my colleague, if the chair may say, I will enjoy reciting your quote today when we have a Republican President. And perhaps that will happen. Who knows. But I certainly appreciate my colleague's indulgence there.

With that, Mr. Lankford is recognized for 5 minutes.

Mr. LANKFORD. Thank you, Mr. Chairman.

Senator, thanks for being here. And I can understand how the President could be frustrated with the Senate. You, as a Member of that body, I am sure you have even more frustration with the Senate than even we do in the House, if that is even possible.

Senator LEE. It is.

Mr. LANKFORD. After 1,000 days of waiting on a budget to come out of the Senate, we are all frustrated with the Senate and trying to figure out what is going to happen there.

The question revolves around, do the ends justify the means, though? Can we say, CFPB is going to do a good thing, so though I know it is not appropriately and constitutionally legal, we will get something good at the end, so the ends will justify the means. Can we do that in a constitutional republic?

Senator LEE. No, we can't. The Constitution is all about the means. That is the whole reason for having a Constitution. It determines the means by which we act. No ends can justify a willful disregard for the restrictions of the Constitution.

Mr. LANKFORD. Well, let me ask you a followup question then: Who gets to define what a recess is or what adjournment is? Does the executive branch define for the legislative branch what is an adjournment and what is a recess? Or does the legislative branch define what is an adjournment and what is a recess? Who gets to pick that?

Senator LEE. The Senate gets to decide when it is in recess.

Mr. LANKFORD. So the President can step in and say, I now declare you in recess?

Senator LEE. That is correct. He doesn't control our part of the government, as much as he might wish it would be true, as much as probably every President might have wished would be true.

Mr. LANKFORD. So, in 2007, when Senator Harry Reid kept the Senate in pro forma session to prevent the Bush administration from appointing people in a recess appointment, and the Bush administration acknowledged that by not appointing people, saying the Senate has defined they are not in recess, so they are not in recess, when this administration says, no, I don't accept the Senate's definition of recess, we are going to redefine recess; what precedent does that set?

Senator LEE. Well, it sets a new precedent, one that I fear could easily turn into a one-way ratchet in which subsequent Presidents, Presidents of both political parties, will be unwilling to retreat from that new high watermark established as a Presidential prerogative. That is what concerns me here.

Mr. LANKFORD. That is what concerns me as well.

The President has also said that they have communication from the Senate so it is a recess. So, basically, if the Senate didn't talk to me and send me messages, did any bills pass between the 17th of December and the 22nd of January? Was there any communication between the Senate and the President?

Senator LEE. Yes, there was. And in fact, there was very significant piece of legislation passed, one that the President urged the Congress to pass, on December 23rd that dealt with the payroll tax holiday extension.

Mr. LANKFORD. Correct. So the President's statement that there is no communication happening is not accurate; there was communication happening. These pro forma sessions did allow for communication; in fact, did allow for business. A statement was made, this is not for business purposes. Obviously, the payroll tax extension did pass. It seems like business to me.

Senator LEE. That assertion is neither factually accurate nor correct as a matter of constitutional law.

Mr. LANKFORD. Did the Senate ever have hearings on the candidates of NLRB, all three of them?

Senator LEE. No, it did not. And as for two of them, there was no time where they could have even possibly convened such a hearing.

Mr. LANKFORD. So the advice and consent, not only was there not even a release of the names; there wasn't even a possibility of a hearing. So to say this is a recess appointment, you have no possibility for a hearing. So this wasn't just a matter of, I submitted them earlier; you hadn't acted on them. This was a matter of, oh, while you are out of town, I am just going to put two people into office for the next 2 years?

Senator LEE. That is correct.

Mr. LANKFORD. I have a letter from the Associated Builders & Contractors, which I would like to enter into the record, if that is possible, Mr. Chairman.

Let me read one statement here. This is from the Associated Builders & Contractors, "Not only will this radical NLRB anti-worker and anti-business actions further damage prospects of investment in job growth, but questions about the NLRB's authority to act will invite litigation and ambiguity at a time when we need it the least."

I would like to ask unanimous consent that this letter be entered into the record.

Mr. PLATTS [presiding]. Without objection.

[The information referred to follows:]

February 1, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representative
Washington, DC 20515

Dear Chairman Issa and Ranking Member Cummings:

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, "Uncharted Territory: What are the Consequences of President Obama'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 what our Founders envisioned—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.

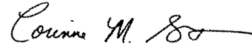
For the last year, the NLRB, under the direction of controversial recess appointee Craig Becker, has issued decisions, enforcement policies and rules designed to silence any discourse in the workplace over the possible disadvantages of union representation and grant vast new influence to organized labor. 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, with the House of Representatives passing several measures designed to address the agency's outrageous actions.

Out of concern that the NLRB would continue to operate out of the mainstream, all 47 Republican Senators sent a letter on December 19, 2011 asking the President to not recess appointees 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 Senator's concerns over continued radical NLRB activity 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." As Chairman Pearce attempts to hastily take advantage of a full five member board and rush to grant this and other wishes of big

labor, America's job creators and job seekers face increased uncertainty. Not only will this 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 restore balance in our workplace laws.

Sincerely,



Corrine M. Stevens
Senior Director, Legislative Affairs

Mr. LANKFORD. I have serious issues, which I can hear from you as well, because of the precedent that this sets. It sets a precedent that a President at some future date can reach into the Senate and define when they are on recess and when they are not and who he can appoint and who he cannot and extend them in a January timeframe to try to get 2 years.

With this precedent, if it stands, I don't see anything in the way from some future Memorial Day weekend the President saying, the Senate is not communicating with me over this long weekend. I am going to fill every court vacancy across the country. And they will be there for the next 2 years, and you can't stop me. Do you see anything in this that would stop that?

Senator LEE. Logically, it would be a very short hop, indeed, from the OLC memorandum justifying or purporting to justify these recess appointments and the kinds of recess appointments that you described occurring over a weekend.

Mr. LANKFORD. Okay.

Chairman ISSA. Would the gentleman yield for one quick question?

Mr. LANKFORD. Yes, I absolutely will yield.

Chairman ISSA. Mr. Connolly sort of berated and told you of his disapproval. Who would have or could have—not the 44 or the 47—who could have in fact held hearings—particularly let's talk about the NLRB. Who schedules those?

Senator LEE. The committee.

Chairman ISSA. And the committee is controlled by?

Senator LEE. Democrats.

Chairman ISSA. And did they schedule a hearing on NLRB appointees?

Senator LEE. At least not with respect to the two that were nominated on December 15.

Chairman ISSA. And who could have scheduled the vote on the first one?

Senator LEE. Democrats in the Senate.

Chairman ISSA. And it wasn't the 44 that stopped that, was it?

Senator LEE. Correct.

Chairman ISSA. Thank you.

I yield back.

Mr. PLATTS. The gentleman's time has expired.

I yield myself 5 minutes for the purpose of questions.

Senator Lee, I certainly your appreciate being here with us and your leadership on this important issue. My colleague from Oklahoma concluded with the main focus of my questioning in that the precedent here is pretty dramatic, if we do not undo what has occurred.

It is my understanding that the Department of Justice memorandum that in essence said that the President has a unilateral authority or ability to decide when you, the Senate, are in or isn't is unprecedented in this sense. Is that your understanding as well?

Senator LEE. Yes. I am aware of no precedent anywhere. And there was none sited either in the OLC memorandum or in any other source that I am aware of identifying any other Presidential recess appointment occurring under this set of circumstances.

Mr. PLATTS. And I think in your testimony, you emphasize that this isn't about partisan politics. This is about the institution of the Senate and, probably most importantly, the checks and balances that our Founding Fathers so wisely included in the Constitution in protecting the American people from, in essence, tyrannical rule and that that be understood here because you know today obviously the partisan nature of Washington and the media's focus on that can maybe shift the focus here from this is truly about the Constitution being upheld. And if we are not diligent in ensuring—in this case, the Constitution is upheld—we set a precedent, as the gentleman from Oklahoma said, that why, just in this instance, why isn't it, hey, you adjourned on a Thursday. We could plan on coming back Monday. And the President, whomever would be in that office in the future, say, hey, you are out of session; you are in recess for the weekend. I can appoint whomever I choose. That would eliminate the checks and balances and the advice and consent.

Senator LEE. Yes. That is exactly right. And this is what the Founding Fathers had in mind when they decided—they considered but decided against giving the President the unilateral authority to appoint nominees without Senate confirmation because "The people will think we are leaning too much toward monarchy." We were getting away from a system of monarchy in Great Britain. We didn't want one here, and that is why we did this. You are absolutely right in suggesting this is a slippery slope and that in the future, regardless of whether it is a Republican or a Democrat in office, this could become a problem, and it is a problem that could lead to the rendering a nullity or a virtual nullity the Senate's confirmation prerogative.

Mr. PLATTS. And while I certainly respect my colleague from Missouri's statements about his opinion that the Senate's politically motivated minority Members, Republican Members in blocking—even if that was the case, although I think the fact that there was not even a hearing held on the two nominees of the NLRB appointees, that even if that was the case, that would be the prerogative of a Senator. And ultimately, the public would decide whether that is a responsible approach or not. But it is still the constitutional right and prerogative of the Senator to block a nominee for whatever reason they choose. And ultimately, the voters will decide whether they were responsible in the conduct they engaged in. But it is not the President's prerogative to say, well, I am going to usurp that authority and unilaterally just do what I believe, you know, what I want to do.

So, Senator Lee, I again want to thank you for your leadership on the issue. And your constitutional expertise and knowledge that is so important to this debate and the focus that this is not about partisan politics. This is about the Constitution being upheld and not allowing a dramatic, wrongful precedent to be set that could have, you know, lasting implications for the checks and balances of our governing process here in America.

So, with that, I will yield to the gentleman from Michigan, Mr. Walberg, for the purpose of questions.

Mr. WALBERG. Thank you, Mr. Chairman.

And thank you, Senator Lee, for being here. I appreciate your service and I appreciate you being outspoken on constitutional issues of importance.

With no ill intent toward you and your service because, as I said, I appreciate your activity. But it has been said much by those of us Members of the People's House how frustrated we are with the do-nothing Senate, a literal do-nothing Senate; 1,007 days without passing a budget, without dealing with over 30 bills that we have sent for jobs purposes, and then listening to some of the cynical pandering by some of my colleagues on the other side of the aisle saying that we are not doing anything with jobs. It is frustrating. And I go back to my district, and I hear the frustration of my people, who are frustrated not simply with Democrats but with Republicans, with us all, that things aren't getting done.

It is challenging to take that, knowing that we are attempting to do it. So I can certainly surmise how the President might feel when he sees his Senate not providing affirmation to his appointments, confirming them and letting them go on with what his purpose is, what his intended process is about and what his objectives are. I can understand that.

But here in the People's House, we understand more maybe than any other branch what that means, that we are given the pleasure, privilege, honor, and duty of representing the people according to something more than just whims and wishes. And I would love to say to the people back in my district at certain times when I am not thinking clearly, well, we will just go on and do it ourselves. But the Constitution doesn't allow that. You made that very clear.

Senator Lee, could you explain to us as clearly as possible why there is an important process called confirmation that only the Senate is given to do and what important outcomes that has for the people of this great country under the Constitution established before them.

Senator LEE. Executive branch officials, particularly in this day and age and including and in particular these nominees, hold positions that wield enormous authority, law enforcement authority and, in some instances, somewhat regrettably, in my opinion, wholesale policymaking authority that can almost be likened to the authority that we wield as legislators.

But regardless of how you feel about the underlying statutes that give enormous policymaking authority to executive branch officials, they wield tremendous authority, as do the Federal judges, who also have the go through the confirmation process. So the Founding Fathers felt that it was absolutely imperative that these nominees receive in all instances where the Senate was not in recess, for purposes of the recess appointments clause, the rubber stamp of at least one House of Congress. And for whatever reason, they chose to give that to the Senate. And because they did, we take seriously our role to make sure that the President's nominees get vetted, to make sure that any who do not have the support of those voting in the Senate don't get confirmed and don't move on.

I think the best way I can summarize my answer to your question is just to say, it is important because it is what the Constitution requires. We have to follow the Constitution. Even where it is frustrating, even where it doesn't make sense to us, even where it

might thwart the objectives of our President, we have to follow them. And when we don't follow them, we set a dangerous precedent. Because if we are willing to ignore them for one purpose or another, for the political convenience of the President or someone else, then we ourselves remain vulnerable in every other area. We rely on the Constitution to protect our free exercise of religion, free speech, and everything else, every other one of the rights that can be found in that Constitution. We have to honor its procedures as well or else they won't be there for us when we need them because we always need them.

Mr. WALBERG. We always need them. And the Senate, unlike the House, at least originally intended—I know it has been amended with the 17th Amendment, a representative of the States, a broad, a broad concern, not just individual people in concern but a broad concern for the whole future of this great country, as undivided States and peoples together.

When I hear the President in the State of the Union address talk about, we need to get this done; and if you won't do it, I am going to do it; that is a concern. And I think it is being acted out and expressed in this process here of nonrecess recess appointments, stepping down on the Constitution, committing a constitutional crisis, and denigrating the body that is responsible for confirmation, oversight, care for what this country needs, and making sure that we don't have a monarch.

So I know my time has expired, but I certainly appreciate your commitment to the Constitution and affirmation today of its primacy. Thank you.

Chairman ISSA. Seeing no additional questions, I will thank the Senator with one closing question or comment—wait a second. Well, we will have one more, but before we do that, just quickly, I suspect that the reason that the Founding Fathers gave you the requirement for advice and consent is they intended you do a lot less than you are doing with the people's work of the House. I might just mention that, they didn't expect you to screw around with appropriations quite the way that you did.

But having said that, I just wanted to ask you one quick question. If we wanted as the President wants up-or-down vote on every one of his appointments and he wants them in a timely fashion, would it be equally fair for you to consider every vote of the House that we send over that dies in the Senate and for us to consider every Senate bill—forced to consider every Senate bill in its form that comes over from the Senate? Isn't it that sort of entire bucket of, it is the way it is, not the way we would like it to be?

Senator LEE. Yes. You know the fact is, governments are made up of individuals, especially in a representative government like ours. Individuals have opinions, and those opinions in the case of elected officials are based most frequently on the opinions of those they represent. We do have a country in which people disagree. We are not always going to have agreement. So, yeah, it is true, I suppose, if you take the same logic that would go into saying, let's have a rule change with regard to prompt automatic consideration of all nominees, the same logic might suggest prompt automatic vote and consideration by the House of all Senate legislation and vice versa.

Mr. PLATTS. I thank you. We now will get to our final questioner, if you have the time to give us 5 more minutes.

Thank you, Senator.

We now recognize the gentleman from Arizona, Dr. Gosar.

Mr. GOSAR. Senator Lee, thank you so very much.

This just brings to a point of reference that this isn't the only thing that you may have seen as a violation of our Constitution because it seems that we feign these rules when we want them and then we disdain them when we choose to avoid them. Are there any other things that you have seen this administration do besides these appointments that have bothered you in regards to the Constitution, violation of the Constitution rules and regulations?

Senator LEE. I have had a number of disagreements with this administration both on matters of policy and on matters of constitutional interpretation. Let me just focus on two or three. One dealt with the President's decision to engage the United States in something that I consider a war, in Libya, without a declaration of war from Congress. That is a congressional prerogative, outlined in Article I, Section 8. And not only did he not get a declaration from Congress, but he didn't even consult Congress. He sort of advised a few leaders in Congress as the jets were on their way to undertake that action. But he never got a declaration of war. I wasn't real pleased with that.

Nor was I pleased with the President's decision to sign legislation that I read as undermining the Fourth, Fifth, and Sixth Amendment rights of individual Americans that can be read, as I read it, to give the executive branch the power to detain indefinitely even U.S. citizens without trial, without a formal grand jury indictment, without the right to counsel or trial before a grand jury based on an allegation that they have become enemy combatants. He signed that while protesting it, but I disagreed with his decision to sign it.

I certainly disagreed with the policy and the constitutional analysis that went into the passage and signing by the President of the Affordable Care Act, and I disagreed with the constitutional analysis outlined in this 23-page memorandum written by the Office of Legal Counsel. Very good lawyers, some of the very best I know. And they did the best job that they could. But they came to a conclusion that is wrong.

Mr. GOSAR. So, Senator, if you trump the Constitution, the checks and balances are relatively slow, are they not?

Senator LEE. Yes.

Mr. GOSAR. So you have the monarchy looking at the ability to enforce or push something forward without having a means to correct it very quickly.

Senator LEE. Yes. Yes, that is right. And the fact that it is slow is by design. That is how we prevent the undue accretion of power to a chief executive, which the Founding Fathers knew presented some danger to individual liberty in America. And that is why we split up the power of the chief executive.

Now it is interesting, every time our Federal Government has expanded, and every time the authority of the executive has expanded at the expense of the Congress, and every time Federal authority has expanded at the expense of the States, you have always

had one common ingredient: A President, Presidents like Woodrow Wilson, especially Woodrow Wilson during and in the lead-up and in the aftermath of World War I, who have said, look, these are desperate times, and I have to be able to act, and I can't be slowed down by this elected body, who doesn't want to do my will as quickly as I want it to do. If you look back to that era, you will see that a lot of individual liberties were violated, and you will see that the government expanded at the Federal level at the expense of the States. You will see that the President's authority often expanded at the expense of Congress.

We need to not make those kinds of mistakes again and again and again. This is the kind of thing that, if left unchecked, will easily turn into another one of those mistakes.

Mr. GOSAR. I caution my colleagues on the other side of the aisle of upholding rules. I hope they remember that tomorrow when we have our special guest.

I would like to yield the balance of my time to Mr. Gowdy, if he would so like it.

Mr. GOWDY. I thank the gentleman from Arizona.

I want to thank you, Senator, for how generous you have been with your time this morning. Two things, and I will shut up and let you take the remainder of the time.

Assume that these appointments are held to be void ab initio 12 months from now, 18 months from now. What is the practical impact of having a year and a half worth of litigation that has been undone? And if you would please consider, along with your colleagues likeminded or otherwise in the Senate, seeing if you do have standing to stand up for the constitutional process.

Senator LEE. Right. Thank you, Congressman Gowdy.

The first impact I think will be that the parties will have undertaken a significant effort in litigating the validity of orders issued by the NLRB and the CFPB. Hopefully no one company will have to litigate orders issued by both entities, but I suppose anything is possible. In addition to the expense and the delay related to litigation, these companies and other companies—even those who may not be litigated, even those who may just be anticipating an order but might not receive it during a time period will inevitably have had to avoid making the kinds of investments that we desperately need in order to create jobs. It is almost impossible to measure, to quantify in any precise sense the amount of economic loss that will come from this. But one thing of which I can be sure is that loss will come, and it will be significant. So this is yet another reason why we shouldn't be doing this.

Sometimes my wife tells our children, just because you can do something doesn't mean that you should. Now perhaps the President can do this and get away with it at least for the time being as a matter of raw political power and will. But the fact that he can do that doesn't mean that it will, in the long run, survive constitutional review because I don't believe it will. And more importantly, it doesn't mean that he should. There are established procedures that go along with the recess appointment power. It is in the Constitution. It is there. But he needs to follow the practice, the procedure that makes sure that it doesn't swallow the rule. You can't let this exception swallow the rule. And that is the risk here.

He is doing this not just at the expense of individual Senators. That is not the important thing. He is doing this at the expense of the people, the people who are living in an economy that is depressed, where job creation is low—in part because of actions like this that create so much uncertainty in the marketplace.

You have my assurance that I and my Republican colleagues will continue to explore and attempt to exhaust every available option, including any that may be available in court. I have been advised by some legal experts that it is very unlikely that we, individually, would be able to establish standing. But we know that it is inevitable. And it is true that those subject to the rules will have standing and, at a minimum, will be able to participate as amici curiae in those actions. So we would like to do that.

Chairman ISSA [presiding]. The gentleman's time has expired. Seeing no one else seeking recognition, Senator, what you have done for us is especially appreciated. It is not often that Members of the House or the Senate give so much time to answer full questions in their area of expertise.

So, please, have our gratitude, and tell your friends they are always welcome. And with that, we will take about an 8 to 10 minute recess while they set up the next panel.

[Recess.]

Mr. GOWDY [presiding]. The committee will come to order.

We are pleased to have an extremely distinguished panel. I will introduce you from my left to right, your right to left.

First, we have the Honorable C. Boyden Gray, who currently heads the firm of Boyden Gray and Associates here in the District. Mr. Gray served as White House counsel during George H.W. Bush's administration and as an ambassador to the European Union during President George W. Bush's administration.

Mr. Andrew Pincus is a partner at Mayer Brown who advises clients on a host of financial services issues and is testifying today on behalf of the U.S. Chamber of Commerce.

Mr. Michael Gerhardt is the Samuel Ashe distinguished professor in constitutional law and director for the Center for Law and Government at the University of North Carolina School of Law.

Mr. David Rivkin is a partner at Baker Hostetler and cochairs the firm's appellate practice. He served at the Justice Department in the White House Counsel's Office during the Reagan around George H.W. Bush administrations.

Mr. Mark Carter is a partner at Dinsmore where he advises clients on traditional labor and employment law. Mr. Carter has extensive experience litigating before the National Labor Relations Board.

Pursuant to committee rules, all witnesses, except Members of Congress, will be sworn in before they testify.

So I would ask you to please rise and lift your right hands.

[Witnesses sworn.]

Mr. GOWDY. May the record reflect all witnesses answered in the affirmative.

We are pleased to recognize you for your opening statements. I am sure all of you perhaps have done this before. The lights mean what they traditionally mean in life. And with that, we would recognize Ambassador Gray.

STATEMENTS OF C. BOYDEN GRAY, FOUNDING PARTNER, BOYDEN GRAY & ASSOCIATES; ANDREW J. PINCUS, PARTNER, MAYER BROWN; MICHAEL J. GERHARDT, SAMUEL ASHE DISTINGUISHED PROFESSOR IN CONSTITUTIONAL LAW, UNIVERSITY OF NORTH CAROLINA [UNC] SCHOOL OF LAW; DAVID B. RIVKIN, PARTNER, BAKER HOSTETLER, LLP; AND MARK A. CARTER, PARTNER, DINSMORE & SHOHL, LLP

STATEMENT OF C. BOYDEN GRAY

Mr. GRAY. Mr. Chairman, thank you very much for the opportunity to testify.

You've just heard an extraordinary tutorial in a way from Senator Lee covering almost every aspect of this issue, both constitutional and practical. So I am going to try to keep what I say to an absolute minimum since there's very little I can add.

I want to start with the point that as far as the CFPB is concerned, there are many who think it's quite unconstitutional with the lack of oversight. So the recess comes in without a confirmation process or bypassing or ignoring the confirmation process and provides even less oversight.

As a practical matter, what has happened here and what will happen—if you look at footnote 13 of the OLC opinion is that what the White House has done is basically establish the basis for eliminating any need to comply with the confirmation process. What we have here was, as has been discussed in Senator Lee's testimony, not a delay, not inaction, not the Senate lollygagging but a situation where one nominee was, in fact, considered and addressed by the Senate and rejected, albeit by a filibuster, to be sure, but the reason doesn't indicate any different—if anything different would have happened, if he had been defeated on an up-or-down vote.

The other two nominees, as has been discussed, were barely there. I don't think they had even filled out their forms and hadn't had hearings. This wasn't a case of delay. It was just avoiding the constitutional process. The footnote 13 says there's no minimum time, and so it could happen over a Sunday.

I want to just say a couple of points about what this means for the business community. I don't want to take any thunder or even downplay what the others are going to testify to here, especially Andy Pincus coming after me representing the Chamber. But there's a lot of uncertainty. The President has given no guidance as to when he will do this, which agencies he's going to pick, what the reason will be. He's said nothing about that.

And so all agencies are under some—that have openings are under some uncertainty. We don't know the litigation impact of what will occur. The OLC opinion, as has been observed, mentions that there are litigation risks. I don't recall a single instance when I was White House counsel where we commissioned and asked for an OLC opinion that came out saying this is a litigation risk. I don't recall that ever happening. That's a real red flag. But it certainly does set into a high uncertainty anything that these agencies do with these appointees.

Regulatory uncertainty is a real problem. We don't talk about it that much. But in my experience in the business community, representing the clients in the business community, having been a

businessman myself, there's nothing more damaging than uncertainty, not knowing what the rules of the road are going to be. And for people subject to the NLRB with very, very broad jurisdiction, people subject to the Consumer Financial Protection Bureau, extraordinarily broad jurisdiction with no accountability by the political branches, no accountability by the White House. We've been over it, no accountability by the Congress and no accountability really by the courts, which are required to defer to the rulings of the consumer bureau. There's going to be amazing uncertainty that results from what has happened here. It just is unprecedented in my view.

I want to just close by making a couple of personal remarks. I, of course, watched over this, as White House counsel, as any White House counsel would and does. But I was also on the receiving end as an appointee in Bush 43. I was recessed at a legitimate 3-week recess. Because of Senator Reid, I was not rerecessed because President Bush thought that it couldn't happen. At the time I was frustrated by it. They made me, instead, a special envoy. I want you to know that I was a special envoy.

But I never felt as frustrated as I was that anything unconstitutional was being done by Senator Reid. I have a lot of other objections to how he tried to block me but not the actions he took in the Senate. Thank you very much.

[The prepared statement of Mr. Gray follows:]

Hearing before the
U.S. House of Representatives
Committee on Oversight and Government Reform

"UNCHARTED TERRITORY: WHAT ARE THE CONSEQUENCES OF PRESIDENT OBAMA'S UNPRECEDENTED 'RECESS' APPOINTMENTS"

February 1, 2012

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on this critically important issue. By unilaterally appointing Richard Cordray to lead the Consumer Financial Protection Bureau ("CFPB"), President Obama made an unconstitutional appointment to an unconstitutional office. As I have argued in several forums, the Dodd-Frank Act violates the Constitution by granting effectively unlimited power to the newly created CFPB, while limiting virtually all meaningful oversight of the CFPB's use of that power.[1] And that unconstitutionality is compounded by the Cordray appointment, which—like the president's subsequent unilateral appointments of three new members to the National Labor Relations Act ("NLRB")—was itself unconstitutional, because the Senate was not in "recess."

In my testimony today, I will briefly review those arguments. But in the end I would like to shift my focus to the practical effects of the President's

[1] *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Is It Constitution?*, Engage (2010) (co-authored with John Shu); *Cordray appointment raises a raft of red flags*, Washington Times, Jan. 17, 2012; *No checks, no balance in reform law*," Washington Times, Sept. 14, 2010; *Dodd-Frank, the real threat to the Constitution*, Washington Post, Dec. 31, 2010.

unconstitutional actions. Simply put, the "recess appointments" have taken two regulatory schemes—labor law and consumer financial regulation—that already are rife with uncertainty, and they have redoubled that uncertainty.

I. The CFPB Is Unconstitutional

As I have argued in detail elsewhere,[2] Dodd-Frank's Title X, which created the CFPB, is unconstitutional. First, Congress granted the CFPB unprecedented power but included no "intelligible principle" to guide and limit the agency's exercise of that power. The agency is free to regulate whatever it deems to be "unfair," "deceptive," or "abusive" business practices, not just by promulgating regulations, but also by simply filing lawsuits even in the absence of regulations. Yet Dodd-Frank does not actually *define* "unfair" or "deceptive," leaving the CFPB alone to define those terms at will.

Some might point to Mr. Cordray's assurances, in a hearing last week before this Committee's subcommittee, that the CFPB will not interpret those terms in "some new and bizarre way."[3] My first response is that there is something wrong where a federal statute is so devoid of direction that we have to rely on a regulator's own promise and sole discretion not to fully exercise his power. But my second, and more substantive, response is that Mr. Cordray's assurances are irrelevant to the constitutional question. As the Supreme Court explained a decade ago in *Whitman v.*

[2] *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Is It Constitution?*, Engage (2010) (co-authored with John Shu). *See also* C. Boyden Gray, *Dodd-Frank, the real threat to the Constitution*, Wash. Post, Dec. 31, 2010.

[3] Hrg. Before House Committee on Oversight and Government Reform, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs (Jan. 24, 2012).

American Trucking Associations, Inc.,[4] an unconstitutionally broad grant of power to an agency cannot be cured by the agency's promise to limit its own discretion.

Just as dangerous as its lack of guidance is the statute's effective elimination of every check and balance that would otherwise limit the CFPB's exercise of power. First, Congress relinquished its own "power of the purse" by freeing CFPB from the usual appropriations power; CFPB simply takes up to 12% of the Federal Reserve's operating costs. (And according to the statute, Congress is *prohibited* from reviewing CFPB's use of those funds.)

Second, the CFPB is largely freed from Executive Branch oversight, because the CFPB Director is "independent": he cannot be fired by the President, except under limited circumstances. Some might argue that the CFPB is checked by the newly created Financial Stability Oversight Council ("FSOC"), which has a nominal veto over CFPB regulations, but this is an empty threat. The FSOC can exercise this veto under only limited circumstances; even when those circumstances occur, the veto requires the votes of 7 of 10 FSOC members—and because the CFPB Director is himself an FSOC member, this actually requires 7 of the 9 remaining votes, a 78% supermajority. And the FSOC has no power to veto CFPB litigation, leaving the agency free to undertake regulation-by-litigation.

Third, the Judicial Branch's oversight is limited, because Dodd-Frank requires the courts to defer to the CFPB's interpretations of not just Dodd-Frank itself but also the myriad other statutes transferred to the CFPB's control, as

[4] 531 U.S. 457, 472-73 (2001).

though the CFPB were the only agency involved, thus precluding reference to the agencies that previously administered the statutes—and requiring deference to an agency not constrained by any intelligible statutory principle.

And finally, Dodd-Frank eliminates the internal check most common for "independent" agencies. Traditionally, independent agencies such as the CPSC, FERC, FCC, SEC, and others are multi-member, bipartisan commissions, where the members check one another. Indeed, this is the model that Elizabeth Warren originally proposed for the CFPB. But Dodd-Frank created the CFPB to have a single head, free to run the CFPB as he sees fit.

Each of these features raises constitutional concerns in and of themselves. Together, they create an unprecedented, unconstitutional agency. Forty-five Senators indicated they would support the nomination if some of these concerns were addressed. When they were not, the nomination was rejected.

II. The CFPB and NLRB "Recess" Appointments Are Unconstitutional

The President chose to disregard this constitutional check and balance, and instead appointed Mr. Cordray and the new NRLB members without the Senate's advice and consent. He called this a "recess appointment," but it was no such thing, because there was no "recess." The Senate chose not to adjourn for more than three days at a time—a well-established definition of "recess" that President Obama's own Justice Department reiterated in recent Supreme Court litigation.

After appointing Mr. Cordray and the NLRB members, the Obama Administration released an Office of Legal Counsel ("OLC") memorandum

attempting to legitimize the President's actions. But this *ex post facto* analysis was a transparent attempt to justify a preordained conclusion. Instead of explaining how a series of adjournments could add up into a "recess," the memorandum simply *asserted* that the Senate *was* in recess, and then asked whether the Senate's short sessions would suffice to "interrupt" the alleged recess. According to OLC, the President can deem the Senate to be in "recess" anytime the Senate is "unavailable" to confirm his nominations—a standard that could apply just as easily on weekends, holidays, or even at night.

In explaining that the power claimed by the President was unlimited, OLC stressed (in footnote 13 of its opinion) that it "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." And to leave no room for doubt, it quoted an older Justice Department brief's assertion that "there is no lower time limit that a recess must meet to trigger the recess appointment power." In short, the President and OLC have nullified the Senate's "advice and consent" power. The President in the State of the Union called for elimination of the filibuster, which had been the proximate cause of Cordray's rejection. But the recess-appointment power claimed by the White House already renders the filibuster irrelevant.

III. The President's Unconstitutional Actions Have Cast An Ominous Shadow of Uncertainty on American Businesses

The appointments power had been governed by rules and standards long understood and respected by both branches. Indeed, when Senate Majority Leader Reid announced in 2007 that the Senate would no longer recess, in order to

prevent President Bush from recess-appointing officers, President Bush's response was not to unilaterally appoint officers, but rather to respect the Senate's constitutional check against his own authority. But President Obama chose the other course of action, shattering those understandings and undermining the rule of law.

This action is not with costs, and first among them are the costs of uncertainty. As Justice Scalia wrote years ago in his essay, "The Rule of Law as a Law of Rules," one of the virtues of government constrained by law is "predictability": throughout modern history, "uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[5]

By declaring that he no longer considers himself bound by constitutional limits on his appointment power, the President has eliminated all predictability from the nomination-and-confirmation process. Neither the Senate nor the public knows what principles the President will follow in determining who gets a recess appointment. We also do not yet know *how* the Senate itself will respond, but we do know *that* it likely will respond by finding other means by which to achieve the checks and balances that previously were achieved by withholding consent for nominations. And this response will in turn have its own effects, anticipated and unanticipated.

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[5] 56 U. Chi. L. Rev. 1175, 1179 (1989).

But even setting aside this overarching uncertainty between the branches, the President's appointments impose uncertainty upon the public at large, especially for American industry. In taking the step of unilaterally appointing officers to the CFPB and the NLRB, the President did not tell the public why he chose them and not others. Was the choice related to the scope of their power over the economy? I have discussed the unlimited power of the CFPB. NLRB's own powers are no less dramatic and, at their worst, no less arbitrary, as we saw in the NLRB's attempt to use litigation to block Boeing's production of the 787 Dreamliner in South Carolina.

The agencies' capacity for disrupting the economy would be worrisome enough in and of itself; but having removed the check and balance of Senate confirmation from the appointment process, the regulators appointed by President Obama will be even less accountable, and therefore even more likely to assert their powers on American companies.

Generally speaking, uncertainty has an inhibiting effect on economic growth. The president of the Cleveland Federal Reserve Bank, Sandra Pianalto, stressed this in a speech last month:

> Uncertainty also plays a key role in holding back growth. I spend a lot of time talking with business leaders. Almost without exception, they tell me that uncertainty is making them more cautious. There are uncertainties regarding the resolution of federal, state, and local budget problems, which will translate into tax and spending issues. Then there are also regulatory

uncertainties: healthcare, environmental, and financial reform, to name just a few.[6]

Analyzing this issue more systematically, a team of Chicago and Stanford professors recently concluded that "U.S. policy uncertainty" is at "historically high levels," and cited the NLRB's recent Boeing complaint, among other policy disputes, as having "injected another source of uncertainty into business investment decisions."[7] Abandoning the confirmation process is almost certain to add to the existing regulatory drag on the economy.

Congress cannot rely exclusively on the courts to solve these problems by overturning the recess appointments. For even if the courts ultimately overturn these recess appointments, it is possible that they would stop short of vacating all actions taken by the unconstitutionally appointed agencies. One would assume that an unconstitutionally appointed regulator's actions would be null and void; indeed, that was the course recently taken by the courts after the Supreme Court held in *New Process Steel v. NRLB* that the NLRB lacked a quorum when only two of its five seats were filled.[8] But it is at least possible that the courts would allow the CFPB's and NLRB's post-appointment actions to stand even if their leaders were

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[6] http://www.clevelandfed.org/For_the_Public/News_and_Media/Speeches/2012/Pianalto_20120110.cfm

[7] *See* Scott R. Baker, Nicholas Bloom, and Steven J. Davis, *Policy Uncertainty is Choking Recovery*, Bloomberg.com (Oct. 5, 2011) (summarizing their study's conclusions). The full study, *Measuring Economic Policy Uncertainty*, is available at http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

[8] *New Process Steel, L.P. v. NRLB*, 130 S. Ct. 2635 (2010). After that decision, some federal courts vacated actions taken by the NLRB. *See, e.g., N.Y. and Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 728 (D.C. Cir. 2011); *County Waste of Ulster, L.L.C. v. NLRB*, 385 F. Appx. 11, 12 (2d Cir. 2010).

unconstitutionally appointed; that is precisely what the Supreme Court did in *Buckley v. Valeo*, when it held that Federal Election Commission members were unconstitutionally appointed yet it allowed the prior FEC's actions to stand.[9]

Because Congress cannot be sure that the courts will retroactively correct the CFPB's and NLRB's exercise of unconstitutional power even if they have been unconstitutionally staffed, it is all the more incumbent upon Congress to explore whatever checks and balances are available to pressure the Administration not to repeat its unconstitutional appointments, and to nominate a new CFPB Director and NLRB members who would secure the Senate's advice and consent.

* * *

Because these issues raise so many questions of constitutional first principles, I conclude by returning to one of the earliest scholars of American constitutional law, Chancellor James Kent. In his seminal *Commentaries on American Law*, Chancellor Kent reflected on the rule of law, and the need for stability and predictability in the enforcement of law. Although Kent, like Justice Scalia above, was referring first and foremost to judicial precedents, his analysis holds no less true for the precedents governing the relations between the Branches. And his analysis reiterates the need for clear rules and precedents directing and limiting agency power, which are absent from the CFPB and, as the Boeing incident demonstrates, from the NLRB.

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[9] *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976).

Specifically, Kent warned that once the law had been established "upon solemn argument and mature deliberation, the presumption is in favour of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and their contracts by it." The absence of such certainty would be "extremely inconvenient to the public, because it is "by the notoriety and stability of such rules, that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy, and to trust, and to deal with each other." If rules of law are "lightly disregarded, we should disturb and unsettle the great landmarks of property." This is but another elegant way of describing the adverse impact of uncertainty on economic growth and job creation.

Mr. GOWDY. Mr. Pincus.

STATEMENT OF ANDREW J. PINCUS

Mr. PINCUS. Mr. Chairman, Ranking Member Cummings, thank you for the opportunity to testify today on behalf of the U.S. Chamber of Commerce and the hundreds of thousands of businesses that the Chamber represents.

The Chamber strongly supports the goal of enhancing consumer protection, but we're extremely concerned that the recess appointment is actually going to have the opposite effect, reducing consumer protection, creating confusion and uncertainty for businesses that want to comply with the law and imposing unnecessary and duplicative costs on legitimate businesses.

Rather than focusing on the constitutional issues, which I agree with Ambassador Gray have been well discussed, I would like to focus on these consequences for consumers, for businesses, and for the economy of the judicial determination that the appointment of the director violates the Constitution.

And I think it's important to understand that the Dodd-Frank Act provided that prior to the appointment of a director, some of the powers of the bureau could be exercised by the Treasury Secretary. And these included rulemakings under Federal consumer laws that predated Dodd-Frank, very important laws like the Truth in Lending Act, the Fair Credit Reporting Act, Home Mortgage Disclosure Act, conducting supervisory examinations of banks with assets of over $10 billion, and taking enforcement actions with that category of banks.

And prior to January 4th, the actions taken in the bureau's name referenced this power and presumably were approved by the Secretary of the Treasury or his designee. Now, of course, all of the bureau's actions are going to be taken on the director's authority. And if that authority is held illegal, all of the bureau's actions, including those that previously could have been taken under the Treasury Secretary's authority, will be invalid. So, as a result of the recess appointment, what previously had been clear power to exercise some of the bureau's authority has been replaced by significant uncertainty with respect to all of the bureau's authority.

To take an example, the remittances rule that is going to go into effect on February 7th and that the bureau just issued could be challenged on this basis, even though it could have been issued under the Treasury Secretary's authority if the recess appointment had not occurred. And the same is true of the mortgage underwriting rule that is now being finalized by the bureau.

So you will have a situation where actions that would have been lawful—at least couldn't have been challenged on this authority basis before January 4—are now going to have a significant cloud over them, and we believe there is a very strong chance that the courts will find them unconstitutional, find the recess appointment unconstitutional.

If that happens, what's the effect? And the legal answer is clear. All of the bureau's actions will be invalidated. And the practical effect is just as dramatic as the legal effect. There is a real possibility of gaps in the consumer protections, punishments that the bureau imposed on fraudsters—people everybody agreed were rip-

ping off consumers—will be overturned. New regulations, such as the one I mentioned, will be null and void. Actions that could have been accomplished lawfully by the bureau acting under the Treasury Secretary's authority or by the bureau working in tandem with the FTC and other agencies will be sent back to square one.

Second, real confusion and uncertainty for legitimate businesses. What businesses want, as Ambassador Gray said, is clear rules for the road. But they will have exactly the opposite. If the courts declare the appointment invalid, should they comply with the rules that applied before the director was appointed? Should they comply with the new standards even though they're now legally questionable? With the director's appointment invalidated, who is going to provide guidance to businesses about what they should do if there is going to be a prolonged period of uncertainty?

And finally, duplicative compliance costs to the extent new rules become invalidated and businesses have to go back to restructure their operations to comply with old rules, that means unjustified and excessive costs. And that's money, of course, that businesses could have used to create new jobs, to expand their operations, something that our economy needs.

So the overall effect of the recess appointment is to put at risk significant consumer protection actions that would have rested on firm authority. And the potential consequences are going to hurt consumers, businesses, and the entire economy. Thank you. And I look forward to answering the committee's questions.

[The prepared statement of Mr. Pincus follows:]

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 115 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Chairman Issa, Ranking Member Cummings, and members of the Committee:

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. Thank you for the opportunity to testify before the Committee today on behalf of the U.S. Chamber of Commerce and the hundreds of thousands of businesses that the Chamber represents.

The Chamber strongly supports sound consumer protection regulation that deters and punishes financial fraud and predation and ensures that consumers receive clear, concise, and accurate disclosures about financial products. Everyone, businesses as well as consumers, benefits from a marketplace free of fraud and other deceptive and exploitative practices.

The Chamber has been engaged in an ongoing dialogue with the Consumer Financial Protection Bureau ("CFPB"), through meetings and the filing of public comment letters, to assist the Bureau in meeting these goals while avoiding the imposition of duplicative and unjustified regulatory burdens that divert resources essential to fuel economic growth and, perhaps even more importantly, prevent small businesses from obtaining the credit they need to expand—and create the new jobs that our economy so desperately needs.

On January 4 of this year, notwithstanding the fact that the Senate was in session on January 3 and again on January 6, President Obama invoked his recess appointment power under the United States Constitution to install Richard Cordray as the first director of the CFPB. The same day, the President also recess appointed Sharon Block, Terence F. Flynn, and Richard Griffin to fill vacant seats on the National Labor Relations Board.

This was an unprecedented exercise of the recess appointment power. There is a strong argument that these actions violate the Constitution and that, as a result, the appointments are invalid.

My testimony will address the adverse consequences that will result from a judicial finding of unconstitutionality. Invalidation of the appointment of the CFPB Director would have very significant adverse consequences, because it would lead to the invalidation of virtually all of the Bureau's actions since January 4, resulting in:

- serious gaps in consumer protection;

- a complete lack of certainty regarding the rules that businesses should follow; and

- infliction of substantial additional costs on business.

Finally, the burden imposed by the current uncertainty, and the very real possibility of the wholesale invalidation of the Bureau's actions, is magnified considerably by the huge challenges that the Bureau faces in exercising its power to protect consumers without gratuitously harming economic growth.

I. CONSEQUENCES OF A COURT DECISION HOLDING THE RECESS APPOINTMENT OF THE CFPB DIRECTOR UNCONSTITUTIONAL.

Very significant adverse consequences will follow from a judicial determination that the appointment of the Bureau's director violated the Constitution. Actions taken by the Bureau to protect consumers will be invalidated; and expenditures made by businesses to comply with now-invalid rules or enforcement results will have been wasted, because legally-valid standards adopted in the future could require different actions.

Most importantly, ***even regulatory acts that would have been lawful and enforceable if the President had not acted will instead be invalid because of the President's decision to make the recess appointment.***

To begin with, there can be no doubt that if the courts find that the President's appointment violated the Constitution, every act taken by the Director will be subject to invalidation on this basis. That has been the consequence of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*,[1] which held that the Labor Board lacked the power to act when it consisted of only two members. As the dissenting Justices observed, the effect of the Court's ruling was to invalidate more than 500 decisions.[2]

Of course, there may be some acts that are not susceptible to challenge in court because they do not affect private parties. But any act that affects a private party can

[1] 130 S.Ct. 2635 (2010).

[2] 130 S.Ct at 2645; *see also NLRB v. Talmadge Park*, 608 F.3d 913 (2d Cir. 2010) applying *New Process Steel* in refusing to enforce decision).

be set aside, and it seems likely that litigation will be brought in all, or virtually all, such circumstances.[3]

The starting point in understanding the consequences of an unconstitutional recess appointment—in terms of the scope of actions that will be invalidated—is the fact that the Secretary of the Treasury was empowered to—and was—exercising a substantial part of the Bureau's authority prior to the appointment of the Director. As the Committee is aware, Section 1066(a) of the Dodd-Frank Act states, "The Secretary is authorized to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate in accordance with section 1011."

The Inspectors General of the Federal Reserve and Department of the Treasury have explained that this provision permitted the Treasury Secretary to exercise the subset of the Bureau's authority referred to in subtitle F of title X of the statute.[4] That included:

"the authority to

- prescribe rules, issue orders, and produce guidance related to the federal consumer financial laws that were, prior to the designated transfer date, within the authority of the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration;

- conduct examinations (for federal consumer financial law purposes) of banks, savings associations, and credit unions with total assets in excess of $10 billion, and any affiliates thereof;

- prescribe rules, issue guidelines, and conduct a study or issue a report (with certain limitations) under the enumerated consumer laws that were previously within the authority of the Federal Trade Commission (FTC) prior to the designated transfer date;

[3] Numerous other precedents demonstrate the availability of such relief. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177, 182-83 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 & n.6 (D.C. Cir. 1993); *Olympic Federal Savings and Loan Association v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990).

[4] Letter to The Honorable Spencer Bachus, Chairman, Committee on Financial Services, and The Honorable Judy Biggert, Chairman, Committee on Financial Services, Subcommittee on Insurance, Housing and Community Opportunity at 5-7 (Jan. 10, 2011) ("January 10 Letter").

- conduct all consumer protection functions relating to the Real Estate Settlement Procedures Act of 1974, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, and the Interstate Land Sales Full Disclosure Act that were previously within the authority of the Secretary of the Department of Housing and Urban Development prior to the designated transfer date;

- enforce all orders, resolutions, determinations, agreements, and rulings that have been issued, made, prescribed, or allowed to become effective prior to the designated transfer date by any transferor agency or by a court of competent jurisdiction, in the performance of consumer financial protection functions that are transferred to the Bureau, with respect to a bank, savings association, or credit union with total assets in excess of $10 billion, and any affiliates thereof; and

- replace the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Department of Housing and Urban Development in any lawsuit or proceeding that was commenced by or against one of the transferor agencies prior to the designated transfer date, with respect to a consumer financial protection function transferred to the Bureau."

January 10 Letter, at 5-6. The IGs are clear that the Secretary's authority did not include the Bureau's "newly–established federal consumer financial regulatory authorities." *Id.* at 6; *see also id.* at 7 n.4.

Prior to the President's January 4 action, actions taken in the Bureau's name referenced the Treasury Secretary's authority and, presumably, were approved by the Secretary or his designee exercising this authority.[5] Their legality accordingly did not turn on the presence or absence of a Director.

Now, by contrast, all of the Bureau's actions will be taken on the Director's authority. If that authority is held illegal, all of those actions—those that previously could have been taken under the Treasury Secretary's Section 1066(a) authority, as well as those that could not—will be invalid.

[5] *E.g.*, 76 Fed. Reg. 45168 n.1 (2011); 76 Fed. Reg. 44226, 44229 n.27 (2011).

Thus, regulations issued under statutory authority that predated Dodd-Frank, which could have been promulgated lawfully under Section 1066(a), will now be invalid because they were approved by the Director. That conclusion applies to the remittance rule that the Bureau is scheduled to publish in the Federal Register on February 7, and that is to become effective on that date.

Another example is the proposed rule issued by the Federal Register last April under the Truth in Lending Act, required by the Dodd-Frank Act, that would require creditors to determine a consumer's ability to repay a mortgage before making the loan and would establish minimum mortgage underwriting standards.[6] That rulemaking responsibility has now been transferred to the Bureau, and—because of the President's action—if and when the Bureau issues a rule, that rule will be subject to invalidation on grounds of the Director's lack of authority. The same is true of every single rulemaking that the Bureau undertakes pursuant to statutory authority that pre-dated the Dodd-Frank Act.[7]

In addition, of course, any actions taken pursuant to the Bureau's new authority will be subject to automatic invalidation by the courts. That includes any rules issued pursuant to authority conferred by the Dodd-Frank Act and any enforcement or supervisory actions taken with respect to non-bank entities.

This will produce a number of very substantial adverse consequences.

First, serious gaps in consumer protection. Everything that the Bureau does from January 4 forward will be invalidated—punishments imposed on fraudsters will be overturned; new regulations designed to protect consumers will be null and void. Actions that could have been accomplished lawfully—by the Bureau alone or the Bureau working in tandem with the FTC and other agencies—will be sent back to square one. In the meantime, to the extent those actions were necessary to shield consumers from harm, consumers will be left unprotected.

Second, businesses that have expended valuable resources complying with rules adopted by the Bureau or with principles announced by the Bureau in enforcement actions will face a complete lack of certainty regarding the rules applicable to their behavior. Should they comply with the rules that applied prior to the Bureau's action? Should they comply with the Bureau's standards notwithstanding their invalidation?

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[6] 76 Fed. Reg. 27390 (2011).

[7] The Bureau has indicated its intention to issue a number of rules pursuant to these statutory authorities. *See* Fall 2011 Regulatory Agenda, *available at* http://www.reginfo.gov/public/do/eAgendaMain?operation-=OPERATION_GET-_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170.

Third, any change in the standards due to invalidation of the Bureau's actions will impose new costs on business—and mean that the funds expended to comply with the Bureau's rules or enforcement standards were effectively wasted. Given our economic situation, subjecting business to the potential waste of these significant resources, resources that could have been used to create new jobs, is simply intolerable.

II. SIGNIFICANT CHALLENGES FACING THE BUREAU.

Although the focus of today's hearing is the uncertainty and other harm as a result of the President's recess appointments, I would be remiss if I failed to bring to the Committee's attention to the uncertainty for businesses that has been created by the CFPB already, independent of the recess appointment, and the very significant challenges that the Bureau faces in carrying out its mission.

There is a "right way" for the Bureau to go about its work—establishing rules for business that are clear, consistent, and innovation-friendly, and under which the choices for consumers and small businesses are transparent and robust; and a "wrong way" for the Bureau to conduct itself that could lead to duplicative or even contradictory layers of regulation for already struggling businesses, and a contraction in the availability of credit, for both consumers and small businesses. Following are some key challenges that the Bureau is confronting.

- *Simplifying Disclosure*

One of the most widely-recognized problems in consumer protection today is the confusing, overlapping, and often inconsistent disclosure obligations imposed by various federal and state laws. Rather than giving consumers the information they need to make informed decisions, the current regulatory regime more often hides the most important information in a forest of forms and jargon. These rules also may make it difficult for businesses to include in their agreements the provisions necessary to spell out intelligibly both parties' obligations. The Chamber supports the Bureau's efforts to improve disclosure and seek industry input. Of course, disclosure obligations cannot and should not be used as a means to prevent inclusion within a contract of the necessary and appropriate provisions defining the terms of a transaction, including alternative dispute resolution provisions that are permitted under applicable state and federal laws—provisions that repeatedly have been shown to reduce cost and increase consumers' ability to obtain fair resolution of their complaints.

The Bureau has been engaged in informal processes to identify potential approaches to changing current disclosure obligations in the mortgage and credit card contexts. Informal consultations prior to initiating a rulemaking are often useful in setting the stage for the legally-required rulemaking process, but it is important to recognize that they cannot substitute for that process, which provides important procedural protections for all interested parties. For example, the Bureau has not made public the comments received in the course of its informal outreach, but all comments received in a rulemaking process are publicly available, and the Bureau will be obligated to provide reasons for its decision, including a response to issues raised by the comments.

Moreover, there is always a risk—given the very substantial discretionary authority that a regulator exercises over regulated companies—that individual companies asked to engage in informal discussions will feel pressured to accede to the regulator's proposals, for fear of being identified publicly as "anti-consumer" or subjected to more intensive regulatory scrutiny. In reforming disclosure standards, therefore, the Bureau should, and must, conduct a rulemaking proceeding that exposes its proposals to broad and searching public comment and consideration, as well as unbiased evaluation by the Bureau itself, and that is not designed merely to ratify quickly the results of its informal processes.

In addition, as discussed below, the Bureau has special obligations to identify and address potential impacts on small business, but—as far as the Chamber is aware—it has not done so in connection with its informal discussions regarding changes in disclosure. That is a significant omission, because small businesses are the least likely to be able to devote resources to monitoring and participating in agencies' informal deliberations. The Bureau should initiate these processes in connection with its informal consultation, and not wait until the formal rulemaking process begins.

- *Avoiding Substitution of Uncertainty for Currently-Clear "Rules of the Road"*

The business community is eager to comply with Federal consumer financial protection laws, but the transfer of so much existing authority to a new regulator can lead to new, and very different, interpretations of long-established standards. In addition, the CFPB has the authority to define new terms such as "abusive" for which there is no established body of law. The combined effect is substantial uncertainty about how new and shifting standards will affect legitimate transactions engaged in by companies seeking to comply fully with the law. The CFPB can help by making it clear that existing standards remain in place, including sub-regulatory guidance and opinion letters, until new standards are promulgated to replace them. New terms, like "abusive" should not be used in an enforcement context until the CFPB has clearly

defined what the term means. Companies want to comply with the law, but the CFPB must be clear about expectations rather than engaging in "gotcha" enforcement during this transition period.

- *Preserving Credit Availability and Choice for Consumers and Small Businesses*

Products and services that are marketed through the use of fraud and other deceptive practices are worthy targets for the CFPB, and their elimination benefits both consumers and legitimate competitors in the marketplace. However, the CFPB must be careful not to use that broad authority to ban legitimate products or services, or features of legitimate products, simply because it does not understand or favor them.

Consumers and small businesses rely on consumer credit products and services, and one of the key strengths of our credit markets is the abundance, and diversity, of legitimate products and services that fit needs of all kinds. Recognizing the importance of consumer choice, Congress specifically prohibited the Bureau from requiring businesses to offer products with characteristics specified by the Bureau—for example, so called "plain vanilla" products. Thus, while the Bureau can and should ensure that consumers have the facts they need to make informed decisions, it should not make those decisions for consumers by requiring the offering of some financial products and prohibiting the offering of others. The credit market will remain vibrant only if informed consumers are free to make those decisions for themselves.

To take just one example, attempting to regulate interest rates or the availability of particular products or services through the use of the "abusive" authority would clearly violate Congress's intent—and would harm consumers and small businesses. The diversity of our credit markets is an economic strength, not a liability, and an attempt to regulate away useful consumer options where there is no taint of fraud would injure, not protect, the public.

- *Focusing Enforcement Activity on Fraudsters*

The Bureau has considerable discretion in determining how to exercise its enforcement authority. The Bureau should focus first on instances of clear, unadulterated fraud. Not only does fraud harm consumers, but – as you have repeatedly pointed out – it harms legitimate businesses that may lose customers to fraudsters and, possibly, have their reputations tarnished because the marketplace

finds it difficult to distinguish between their products and services and those tainted by fraud.

There is always a temptation to use enforcement powers "innovatively," especially powers that are as broad as the Bureau's. Enforcement actions typically command larger headlines, and – especially when enforcement targets are subject to regulation as well – those named as respondents feel considerable pressure to settle rather than incur the regulator's enmity by contesting the charges. And once one company "knuckles under" in an enforcement action, other regulated businesses feel even more pressure to "fall in line." Enforcement therefore can be an easy way to impose very significant regulatory changes while avoiding public comment, cost/benefit analysis, small business panels, and judicial review.

The Bureau must resist this temptation. There is more than enough real, undisputed fraud – especially in these tough economic times – to engage the Bureau's enforcement resources. And in light of the very significant adverse consequences that would result from regulatory overreach – in terms of contraction of credit and, therefore, loss of jobs – the Bureau's decision-making with respect to extensions of settled principles must be based on the broad record that is produced through a public rulemaking.

- *Reducing Regulatory Burden through Consolidation and Coordination*

Those who advocated creation of the CFPB argued that the new agency would consolidate regulatory and enforcement functions spread across numerous Federal agencies and statutes. By bringing together disparate elements under one roof, they asserted, the CFPB would increase the Federal government's focus on consumer financial protection, and also reduce duplication and increase the efficiency of the government's work in this area. In fact, however, very substantial overlap still exists between the CFPB, Federal agencies, and state regulators and state Attorneys General – overlap that can lead to duplicative or even conflicting approaches.

For example, the Act requires the Bureau to issue rules regarding coordination with State enforcement efforts and authorizes the Bureau to provide guidance to coordinate enforcement with State AGs and other regulators (Section 1042(c)). But the interim rules that the Bureau has issued simply require state officials to inform the Bureau of their actions; they provide no mechanism for promoting consistent, nationwide interpretations of the statutory and regulatory requirements.

The Chamber filed comments in response to the interim rule urging that the rules be revised to require the Bureau to take action when it determines that a state

official has proposed an interpretation of federal law not consistent with the Bureau's view. Such an approach is essential to avoid the fragmentation of our national credit market as a result of the application by different State AGs of inconsistent legal standards. The Chamber also recommends that the Bureau consider establishing an office or otherwise designating staff within the Bureau that will have authority and responsibility for monitoring and coordinating the activities of State AGs.

The Act also requires the Bureau to negotiate an agreement with the FTC to coordinate enforcement activities (Section 1024(c)(3)). That agreement has now been released. Although it meets the technical statutory requirement of requiring coordination with respect to contemplated investigations, it does not address the very significant real-world problem that the agencies' overlapping jurisdiction creates: businesses wanting to ensure that their conduct conforms to the law now must obtain guidance from two federal regulators, rather than one (and, in addition, worry about the possible conflicting interpretations of more than 100 state officials).

The Chamber filed comments suggesting that the agencies allocate to the Bureau responsibility for providing informal guidance to companies principally engaged in the financial services business and allocate to the FTC responsibility for providing informal guidance to all other businesses (*i.e.*, companies that are principally engaged in other lines of commerce that are subject to the Bureau's jurisdiction because of peripheral engagement with respect to consumer financial products or services). The agencies could coordinate among themselves to ensure that all informal guidance issued is consistent with the views of both agencies.

The Chamber does applaud the Bureau's decision to seek the public's input regarding regulations that are "outdated, unnecessary, or unduly burdensome..." The Chamber is hopeful that the CFPB will carefully consider the comments it receives, and that this process will yield tangible reductions in regulatory burden.

- *Using Examination Authority Effectively*

The Bureau has embarked upon examinations of banks, and announced plans to exercise its examination authority with respect to non-bank institutions. Examination is most effective when it is not an adversarial process—examination is not litigation – and the Chamber hopes that the Bureau will follow that approach in its examinations.

One important challenge that the Bureau will face relates to the protection of the attorney-client privilege in the examination process. Federal law makes clear that provision of privileged information to bank regulators does not waive the privilege.

The Bureau's General Counsel has issued a bulletin explaining why the same standard applies when privileged information is provided to the Bureau. As Director Cordray has recognized, however, it would be best to extend the statutory protection rather than relying simply on the Bureau's analysis.

- *Basing Regulatory Decisions on Credible Empirical Evidence*

Various officials associated with the Bureau have repeatedly stated that the Bureau's decisions will be "data-driven." The Chamber applauds that approach. Too often, government agencies act on the basis of anecdote rather than a well-grounded factual analysis.

But the Chamber is concerned that the Bureau's words may not be reflected in its actions. With some frequency, posts on the Bureau's blog seem to be based on newspaper articles or "studies" that, upon examination, fall far short of any possible standard of credibility. While blog posts are not rules or enforcement actions, the pronouncements of regulators – even informal pronouncements – can have significant impact. The Chamber urges the Bureau to apply to these informal written statements the same rigor that it has said it will espouse for its more official undertakings.

- *Focusing on Rigorous Cost-Benefit Analysis and Assessing Small Business Impact*

Given the broad scope of the Bureau's jurisdiction and rulemaking and enforcement authority, any rules that the Bureau promulgates and enforcement decisions that the Bureau makes will affect a large number of companies that are not engaged principally in the provision of financial services. Many of these are small businesses. In addition, as discussed above, small businesses are very substantial users of consumer credit products and services.

For these reasons, it is critical that the Bureau follow the President's Executive Order 13579, which asks independent agencies to apply the cost-benefit and other provisions of the Executive Order (Number 13563) directed to Executive agency rulemaking, and to strictly adhere to the particular process Congress prescribed for rule writing at the CFPB, which itself requires weighing of costs and benefits. In addition to preparing a full cost benefit analysis, the CFPB must also asses regulations' impact on consumers' access to credit, and must separately carefully assess the economic impact of its actions on small businesses through the procedures specified in the Small Business Regulatory Fairness Act (SBREFA). These businesses often will be situated differently from the financial services businesses likely to be the Bureau's

principal focus, and the CFPB must take steps to protect Main Street businesses against unnecessary, and unnecessarily burdensome, regulation.

* * * * *

Thank you again for the opportunity to testify before the Committee today. I look forward to answering your questions.

Mr. GOWDY. Mr. Gerhardt.

STATEMENT OF MICHAEL J. GERHARDT

Mr. GERHARDT. Thank you for the opportunity to be here today. I greatly appreciate the invitation.

At the outset, let me just make two quick personal comments, if I may. First of all, as a constitutional law professor, I have to tell you that there's nothing more special, no greater honor than there is for me to be able to participate in a hearing like this, so I am grateful for that.

At the same time, I speak for myself today and of course for no one else and not for my institution. Nonetheless, let me at least say that, as somebody who teaches at the University of North Carolina Law School, I do want to state for the record that Mr. Gray is a North Carolina treasure, so I hope you will allow me that.

Of course, I also understand you've got my written statement, and I don't want to go back through that in any detail. I do want to take my brief time today to focus on a couple of issues, the first one of which, of course, has to do with the major question that has concerned this committee and other people, and that is the question about whether the time during which the President acted to make his recess appointments was, in fact, a recess in a constitutional sense.

Let me just point out for the record what we haven't said so far. To begin with, courts generally treat that action with a presumption of constitutionality. Second, it should be noted that virtually all authorities agree that a recess is not a fixed time and that the President of the United States does have an independent judgment about whether or not there is a recess in a constitutional sense. Moreover, almost every authority, and I think almost every President, has agreed that in exercising judgment about questions like, this the President is entitled to take what we call a functional approach, a functional analysis. That is, to take competing considerations into account, and that is I think what the President of the United States has done.

At the same time, the President of the United States, I think, has understood that if—in this circumstance, we assume that the break that he counts as a recess was not a recess, then the Senate, in effect, has the power through pro forma sessions to completely nullify the recess appointment authority. So, in a sense, the President, I think, has acted sensibly and soundly to defend his own prerogatives.

Beyond that, I think the memorandum from the Office of Legal Counsel that provides one basis for his actions is a perfectly sound document. It notes, for example, that over history, Presidents have taken a functional approach to determining whether or not they should exercise this power. Beyond that, the document notes that this is not the first time that there's been a disagreement between the President and the Senate over whether or not there's a recess. It also notes that courts, generally speaking, are very reluctant to interfere with the President's exercise of judgment in this context, all of which leads me to think that the President's case here is a sound one and a credible one.

Beyond that, we have before us a question about the—a question about the President's duties under the Constitution. Recall that the President takes an oath to take care to enforce the laws faithfully. No doubt in this case the President considered that if he didn't act, there would be laws left unenforced, laws that he obviously is trying to do what he can to put into implementation.

We've talked a lot about uncertainty today, but I think it's fair to say that the uncertainty doesn't just cut in one direction. There are a lot of Americans, I suspect, who are uncertain about what's happening with the National Labor Relations Board, what's happening with the Consumer Financial Protection Bureau. And they're concerned about what happens if these laws are not enforced, if there are certain regulations that are not made in this context. I suspect that the President took all those concerns into account in determining, on balance, that the time was right for him to act.

Last, I would just want to emphasize that if we look into the past, we will find, generally speaking, that courts don't overturn recess appointments, I think even like those that we're talking about in this case. I think the doctrines that pertain to case or controversy, I think the timing of a lawsuit, are all such that it is highly unlikely that these recess appointments will, in fact, be overturned, but I should also point out that the Constitution provides a check, actually two checks, on the recess appointment authority. One is, is that they're temporary. The other is that the man who made them is politically accountable. So I think that we should keep in mind the full set of checks and balances when we talk about the constitutionality of what's occurred in this circumstance. Thank you.

[The prepared statement of Mr. Gerhardt follows:]

I very much appreciate the opportunity to testify before the House Oversight Committee on the ramifications of President Obama's recess appointments to the National Labor Relations Board (NLRB) and the Consumer Financial Protection Bureau (CFPB). I appreciate the Committee's concerns that these appointments have drawn the federal government into "unchartered territory" and may have been "unprecedented," but, as I explain below, I believe the foundations for the President's actions are sound and the appointments are not unprecedented or reckless.

As we all know, President Obama made the disputed recess appointments during a pro forma session that occurred in the midst of a break, which I presume everyone agrees was a recess. The critical question confronting the President – and the House Oversight Committee in these hearings – was whether the time at which President Obama made three recess appointments to the NLRB and one to the CFPB was a "recess" in the constitutional sense. Obviously, the President answered this question based on a practical, or functional, analysis. The OLC Memorandum supporting his actions was grounded in the same methodology. See "Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions," 36 Opinions of the Office of Legal Counsel 1 (January 6, 2012). Those who criticize the President's constitutional authority to make these recess appointments generally counter with a response grounded in a different methodology – a formalist analysis – that eschews practical exigencies and treats the text and original meaning as defining the full extent of the federal government's powers, including those of the President. They thus argue that historical practices do not matter and that the Senate was not in recess because it said it was not and thus it was not in a recess or a period during which the President's authority to make recess appointments applied.

The functional analysis on which both President Obama and OLC relied to answer the question before the Committee is a traditional, widely used approach to separation of powers issues. Generally, it can be found in a long line of respected Supreme Court and presidential decisions, including, perhaps most famously, in Justice Robert Jackson's concurrence in the Steel Seizure Case, Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952). As more than one commentator has pointed out, the President's analysis in the instant case is fully supported by historical practices, a straightforward reading of the pertinent portion of Article II (declaring "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"), and Supreme Court precedent, all of which are recognized as legitimate sources of constitutional meaning. See, e.g., Peter M. Shane, "OLC's Skillful Defense of President Obama's Recess Appointments and its Possible Aftershocks," The Huffington Post, January 13, 2012; Laurence H. Tribe, "Games and Gimmicks in the Senate, The New York Times, January 5, 2012. Under such circumstances, it cannot fairly be said that the president was wrong or acted

recklessly. To the contrary, he acted on the basis of a methodology that has a rich, distinguished history in constitutional analysis.

Moreover, it is obvious that President Obama had strong, compelling reasons not only to use a practical approach to constitutional construction but also to make the recess appointments that he made to both the NLRB and the CFPB. Of course, he would be aware of President Bush's reluctance to use his recess appointment power under similar circumstances. At the same time, President Obama no doubt appreciated that pursuant to his oath that he is constitutionally obliged to "take Care that the laws are faithfully executed" (Article II, section 3), including of course the Constitution, the laws creating the offices that he filled, and the laws that his recess appointees were charged with implementing. The persistent obstruction of his nominations to both the NLRB and the CFPB forced him to consider appropriate responses and all possible harms arising from his failure to act as well as the failure of the Senate to act on any of his nominations and the ensuing harm to the American public and to the enforcement of the law. The possible harms of not having these positions filled include depriving both the NLRB and the CFPB of the leadership that they both require in order to perform their important missions. Indeed, without President Obama's recess appointments to the NLRB, it would lack the requisite quorum, which would disable it from undertaking such fundamental and important actions as adjudicating unfair labor practice proceedings and reviewing employer challenges to union elections. Obviously, the absence of a director of the CFPB disables the bureau from being able to fully discharge its statutory authority, including oversight of non-financial institutions and prohibiting illegal acts or practices in connection with consumer financial products and services. The President undoubtedly found that these harms outweighed any reluctance on his part to act. Such reasoning is a classical illustration of functional analysis in constitutional law.

Nonetheless, I appreciate that some Committee members will be concerned about at least two issues, one constitutional and the other statutory. The first is the question of what constitutes a "recess" for constitutional purposes. On this question, I hope that we can agree to "start with a presumption that [the President's] acts are constitutional," as the Eleventh Circuit ruled in a case challenging President George W. Bush's recess appointment of a judge to the Eleventh Circuit. Evans v. Stephens, 387 Fed. Rep. 3d 1220, 1222 (11th Circuit 2004). As Chief Judge Edmondson explained for the panel in that case, this "presumption is a rebuttable one: but the burden is on the challengers to overcome it with their arguments and persuade us to the contrary. Just to show that plausible interpretations of the pertinent constitutional clause exist other than that advanced by the President is not enough." Id. I find it significant that courts and presidents generally agree that, as the Eleventh Circuit held in *Evans v. Stephens*, the "Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment under the Recess Appointment Clause. And we do not set the limit today." The

court further acknowledged that in the past "fairly short [intra-session] recesses have given rise to presidential [recess] appointments . . ." A recess does not, in other words, turn on the length of a break. And, in this case, the President determined that the pro forma sessions conducted during a recess were not sessions in substance. He construed them effectively as breaks during which the Senate was unable to take any action on his nominations. He further determined that they had been designed in part to frustrate his recess appointment power. It hardly seems unreasonable for the President to take some action to protect the institutional prerogatives of his office, particularly an action that the Constitution expressly reserves to him.

One statutory question of interest to the Committee is whether the language in Dodd-Frank describing the director's position as presidentially nominated and Senate confirmed precludes a president from filling the position with a temporary appointee. Interpreting this language as precluding a recess appointment is problematic because it means the act would be unconstitutional. The problem is that this construction is directly at odds with the language in Article II authorizing a president "to fill up all Vacancies that may happen during the Recess of the Senate . . ." Article II, section 2, clause 3. This clause is not only an exception to the Appointments Clause generally, but also it has a clear meaning: "All" means all. Congress does not have the authority to carve out exceptions to the scope of this clause. If it had such power, it could easily legislate the recess appointment power out of existence.

We are therefore bound to opt for a construction of the statute that avoids this constitutional infirmity. An obvious, alternative construction is the one that the President chose – namely, that this language merely refers to the director of the CFPB as someone who has been duly appointed. The language used to describe the director is, in fact, not unique. In a quick search done on Lexis this weekend, a colleague of mine found 227 federal statutes defining other federal offices in the identical or nearly identical fashion. The use of this language to describe the director therefore appears to be commonly used in Congress to describe officials who have been duly appointed. There is no question that someone who has been given a recess appointment has been duly appointed.

The final issue is whether there have ever been any recess appointments made to the 227 federal offices, whose directors or heads are described as presidentially nominated and Senate confirmed. I regret that the late notice I received to appear in today's hearing gave me very limited opportunity to research *all* of these federal offices to determine precisely how many of them have been previously been filled by recess appointments. Nonetheless, I did some preliminary research and found recess appointments made by Presidents Reagan, Clinton, and George W. Bush to positions described statutorily as presidentially nominated and Senate confirmed. For example, President Reagn made recess appointments to similarly described positions on the Federal Reserve Board, the Consumer Products Safety Division, and the Nuclear Regulatory, while President Clinton named James

King as a recess appointee to be the director of the Office of Personnel Management. President George W. Bush made recess appointments to the Federal Trade Commission, the Federal Election Commission, and the Immigration and Naturalization Service. In 2004, President Bush named John Bolton as a recess appointee to serve as U.S. Ambassador to the United Nations, a position that is statutorily defined as presidentially nominated and Senate confirmed. See Stephen Koff, "Will Recent Appointment Handcuff Consumer Cop?, The Plain Dealer, January 17, 2012, http://www.politifact.com/ohio/article/2012/jan/17/nations-top-consumer-cop-handcuffed/.

It might be of interest to Committee members to know as well that, while Article III judgeships are defined in Article II as presidentially nominated and Senate confirmed, "beginning with President Washington, over 300 recess appointments to the federal judiciary (including fifteen to the Supreme Court) have been made. Historical evidence of this practice alone might not make the recess appointment constitutional, but this historical practice – looked at in the light of the text of the Constitution – supports [the] conclusion in favor of the constitutionality of recess appointments to the federal judiciary." *Evans v. Stephens*, 387 F.3d at 1223.

Neither President Obama's use of functional analysis nor his recess appointments appear to be unprecedented. The fact that the appellate court in Evans v. Stephens used precisely the same kind of reasoning that the President used in making his appointments merely provides further support for a method of constitutional construction that presidents have routinely employed and that is as old as the Constitution. It is easy to see that, in employing this methodology, the President attempted to act as modestly and as cautiously as he could, for he made his actions as transparent as possible, restricted his exercise of his recess appointment authority to the circumstances he considered to be the most acute, and had clear support for his actions based on the text of the Constitution, historical practices, and the compelling need to avoid the harms that he believed would have resulted had he chosen not to act.

I also cannot agree with critics of the recent recess appointments that they will do more than harm than good. To begin with, these recess appointments appear to be the only feasible means by which these positions will be filled in the foreseeable future. The fact that these appointments have been made increases the likelihood that the affected agencies will be able to fulfill their statutory objectives, whereas allowing the positions to remain unfilled leaves many Americans unsure about whether or when these statutory objectives may ever be realized. It seems perfectly appropriate for the President to take such concerns into account as well. If we agree with the court in *Evans v. Stephens* that a president's recess appointments are presumably constitutional, then there is less reason to be uncertain about the legality of President Obama's recess appointments. We could, like the court, treat them at least as presumptively constitutional. Indeed, one can be rather confident about the legality of the official actions that these recess appointees will undertake,

since courts are generally reluctant to interfere with a president's exercise of his recess appointment authority. If past is prologue, these appointments will stand.

Mr. GOWDY. Mr. Rivkin.

STATEMENT OF DAVID B. RIVKIN

Mr. RIVKIN. Mr. Chairman, Ranking Member Cummings, it's a pleasure to be before you today.

I also wanted to emphasize that I'm speaking on my own behalf and not on behalf of my law firm and of our clients. Let me briefly walk through what I consider to be some of the most unfortunate implications of what I consider to be—deal with a number of other individuals on constitutional use of recess appointments by the President.

First, as is the case with most separation of power disputes, they transcend the immediate circumstances, immediate agencies involved. I'm not going to repeat the predictions that you've heard that the courts will not so much, with due respect to Professor Gerhardt, would not overturn the recess appointments as such but would basically nullify, hold null and void all of the regulatory products that would have been put out by the two agencies, and therefore—during the tenure of those individuals and therefore would accomplish nothing useful. I'm not going to talk about massive regulatory uncertainty.

Let me talk about the constitutional implications, which to me, as somebody who cares passionately about the Constitution, are most important. The most important problem here is that the President's actions put at risk Congress' own rights and prerogatives. The most important one, of course, and we heard about it earlier today, is the scope of congressional power to determine the rules of its proceedings.

And until now, it's always been assumed that Congress alone can set the terms of its sessions and evaluate compliance with the rules. The President's functionalist approach effectively strips this power from Congress, claiming that he may look past Congress' own judgments and determine for himself their legal effect.

What I would want to tell you is that approach, if allowed to stand, would empower Presidents of both parties to cast doubt on nearly any congressional action, and in the process decisively tip the balance of power away from Article I to Article II. Now, we've heard a little bit of a discussion this morning about how that would work in the context of appointments. The President, indeed, can staff the entire executive branch with make-believe recess appointments and therefore eviscerate this very important check and balance that the Framers placed on the Senate, but let's talk about legislative power, power to pass legislation as such. Let's forget about appointments for a second.

The President, of course, as we all know, is a participant in the legislative process, but he does not have an absolute veto. Presidential vetoes can and have been overridden by veto-proof majorities in both houses. Now under the President's functionalist approach, the President, for example, might take the position that any legislation passed by a quorum in the Senate, and as we all know, much of the Senate legislative business is done without a quorum or, for that matter, without even a vote being taken by unanimous consent. In that respect, there's nothing particularly unusual about pro forma sessions. So the President can take the

position that that legislation, piece of legislation, was unlawful and therefore can be disregarded with impunity and without invoking even the need to veto it.

Another area where the same problem can occur and the President can determine for himself when Congress is in recess concerns a so-called pocket veto. As we all know, the Constitution provides if a bill is passed by Congress and not signed by the President, it becomes law within 10 days of a bill being submitted to a President, Sundays excepted, unless Congress by its adjournment prevents the return of a bill, in which case the bill dies.

Now, if the President is able to determine for himself when Congress is in session, he can take the position that Congress is in recess, and therefore, he can, in effect, pocket veto any legislation he dislikes without paying any political price.

Now, I've heard a little bit of a discussion today, let me say first, about the legal opinion because it eliminates the broader point I'm going to make. With all due respect, it's the worst opinion I've ever seen OLC issue. The first 18 pages of it go through policy precedent that nobody is disputing. The analysis in pages 18 and 19 is entirely conclusory. It basically takes the—what animates this opinion, to put it very crisply, is that somehow the President is entitled to recess appointments. With respect, that's bunk. A recess appointment is a gap filler. It's available to a President when there's a recess. If the Senate so wanted, it can arrange for itself to be in constant session, 24/7. The President does not have a power to secure a given number of recess appointments, nor, with all due respect does Congressman Cummings and his colleagues, the President has the right to populate the executive branch with the people he finds congenial.

I'm actually sympathetic to that view, having served in the executive branch, but if the Senate wishes to disapprove or not vote on the President's nominees, the President would be very lonely. That is perhaps unfortunate, but that is not a reason to warp the Constitution.

So there is a great deal at stake here, and we're talking about probably the greatest aggrandizement of executive power in American history, and it's amazing to me that people who were very critical of a previous President in this area, unjustly in my opinion, seem to be quite silent now. Thank you.

[The prepared statement of Mr. Rivkin follows:]

Chairman Issa, Ranking Minority Member Cummings, members of the Committee: I thank you for the opportunity to testify today about legal and policy problems associated with President Obama's unprecedented "recess" appointments. I hope that my testimony will contribute to the Committee's work.

Introduction

My name is David B. Rivkin, Jr. I am an attorney specializing in matters of constitutional law at the firm of Baker Hostetler LLP and co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including service in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy.

I have a particularly keen interest in the structural separation of powers, both vertical – between the federal government and the States – and horizontal – among Congress, the Executive and Judiciary. I also have been involved professionally in a number of cases, both in and out of government, that have implicated the constitutional separation of powers. As the most recent examples of my engagement with constitutional matters, my colleagues at Baker Hostetler and I served as outside counsel in the district and circuit court proceedings to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010 and represent the State of Louisiana in its challenge to the constitutionality of the 2010 census.

I am testifying today on my own behalf and do not speak either on behalf of my law firm or any of our clients.

Background

To inform the discussion which follows, we should begin by considering the several constitutional provisions that speak to the appointments process. In this regard, Article II, section 2, clause 2 provides that the President "shall nominate, and by and with 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." The next clause, clause 3, provides that 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."

Article I, section 5, grants each House the widest latitude in determining how it shall operate and function, including the handling of such matters as elections and qualifications of its members, what constitutes a quorum necessary to transact business, and how to compel the attendances of absent members. Clause 2 of section 5 specifically provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly behavior and, with the Concurrence of two thirds expel a Member." And clause 4 provides that "neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, no to any other Place than that in which the two Houses shall be sitting." Last, but not least, Article II, section 3 grants the President the power to, "on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."

Discussion

President Obama's January 4 appointments of Richard Cordray as head of the new Consumer Financial Protection Bureau ("CFPB") and of three new members to the National Labor Relations Board ("NLRB") are unconstitutional. First, these positions require Senate confirmation. The President's ability to fill them without securing that confirmation, using his constitutional power to "fill up vacancies that may happen during the recess of the Senate," depends upon entirely there actually being a recess. Both the House of Representatives -- and more particularly the Senate -- were open for business at the time the President made his "recess appointments". The new appointees can pocket their government paychecks, but all their official acts will be void as a matter of law and will be struck down by the courts in legal challenges that are certain to come.

The Constitution's Framers assumed – rightly at the time – that Congress would convene for only part of each year, and that there would be long stretches of time during which the Senate would be unavailable to play its critical advice-and-consent role in the appointment of federal officials. Their solution was to allow the President to make temporary, "recess" appointments permitting the individuals chosen to serve for up to two years, until the end of Congress' next session. This, it was thought, would give the Senate time to act upon actual nominees for the offices once it reconvened without leaving these – perhaps critical – posts vacant for many months.

Although at first sparingly, Presidents have used this authority with increasing frequency, especially in recent times, as a means of making politically-controversial appointments in the face of significant Senate opposition. As a policy matter, I don't begrudge their use of recess appointments. My experience in

the Executive Branch has fostered a keen appreciation of the President's need to have subordinates who share his policy preferences and vision. Denying the President an opportunity to select the key members of his Administration, and particularly doing so without ever holding an actual vote on the nominee, is an unfortunate development in constitutional practice. In too many cases, well-qualified and honorable men and women have been left in limbo for months or even years, awaiting Senate action on their nominations. Indeed, my own nomination during the George W. Bush Administration to an Executive Branch commission died without so much as an up-or-down vote.

But Congress's unwise and vexing obstructionism does not empower the President to disregard the plain terms of the Constitution. For example, no matter the acrimony between the President and the Senate, the President's lawyers have always properly advised him that his recess appointment power can be constitutionally exercised only so long as the Senate is in "recess."

But this is where, without admitting to discarding that vital limitation, the Obama Administration has gotten lawyerly – or clever – in its interpretation of the Constitution. The Constitution does not define a "recess." In view of the original purpose of the recess appointment power, a period of more than at least a few days has been considered a necessary prerequisite. This is particularly the case because the Constitution also provides, in Article 1, section 5, clause 4, that neither house of Congress may "adjourn for more than three days" without the other's consent, ensuring that the flow of legislative work cannot be unilaterally interrupted by one or the other chamber. The Senate can hardly be "in recess" in the absence of such an agreement.

In recent years, and especially during President George W. Bush administration, the Senate has attempted (whether on its own accord, or at the House's behest) to block recess appointments by remaining "in session" on a pro forma basis. Whether such sessions, irrespective of their precise modalities, are inherently sufficient to defeat a presidential recess appointment is open to legitimate debate. But in circumstances where the Senate is not merely "in session" as a theoretical matter, but is actually conducting business – albeit on the basis of agreements that measures can and will be adopted by "unanimous consent" without an actual vote – there can be no question that it is not in recess.

That is the situation today. The traditional test for whether recess appointments can be made, as articulated by the Justice Department's Office of Legal Counsel, is "whether the adjournment of the Senate is of such duration that the Senate could 'not receive communications from the President or participate as a body in making appointments.'" *Intrasession Recess Appointments,* 13 Op. O.L.C. at 271, 272 (1989) (quoting *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. at 20, 24 (1921)). The Senate, which is controlled by the President's own party, was fully capable on January 4 of performing both functions in accordance with its rules. Indeed, the Senate was operating pursuant to the same order governing the pro forma in January as it was in December, when it passed President Obama's then highest legislative priority, a two month payroll tax holiday, which the President promptly signed. If the Senate was, in fact, on recess, then its vote on this bill was defective, and the "law" is null and void. The President, of course, seems to reject this view, though he has offered no explanation of his inconsistency.

That is, in itself, problematic. The President is, in effect, claiming an open-ended authority to determine when the Senate is in recess, despite that body's own judgment and the factual realities. That is an astonishing and unprecedented

usurpation. It is not up to the President to decide whether the Senate is organized properly or working hard enough. However much previous presidents may have resented the Senate's practice of staying "in session" to defeat his recess appointment power, they nevertheless always respected the Senate's judgment – the judgment of a coordinate branch constitutionally in charge of its own rules and procedures – on the point. President Obama's "recess" appointments thereby mark a significant break with precedent, one that may have serious consequences far beyond the present circumstances.

What's At Stake in this Dispute

To begin with, the President has done his new appointees and their agencies no favors. Both the NLRB and CFPB are regulatory agencies, with profound real-world impact. Those individuals and businesses subject to regulations and rulings adopted during the tenure of Obama's recess appointees can challenge the legality of those measures in the courts, and will very likely succeed. Until then, there will be massive regulatory uncertainty.

Indeed, only two years ago in *New Process Steel v. NLRB*, the Supreme Court undercut hundreds of NLRB decisions by ruling that the board had not lawfully organized itself after the terms of two members had expired, leaving it without a quorum. Similar issues will arise when both the CFPB and NLRB begin to act with members whose appointments are constitutionally unsound. In this regard, the fact that the President has apparently triggered the constitutional crisis without really expecting to produce any lasting policy impacts and for no better reason than to bolster his claim of running against "do nothing" Congress – a key plank of his reelection campaign – makes his behavior all the more reprehensible.

Far beyond his appointees' regulatory initiatives, President Obama's actions in this instance call into question, and place at risk, Congress's own rights and prerogatives. Three come to mind immediately.

First, and broadest, is the scope of Congress's power to "determine the rules of its proceedings." U.S. Const., Article I, section 5. Until now, it was always assumed that Congress alone could set the terms of its sessions and evaluate its own compliance with those rules. The President's "functionalist" approach strips this power from Congress, claiming that the President may look past Congress's own descriptions of its actions and determine for himself their legal effect. This precedent, if allowed to stand, would empower the President to cast doubt on nearly any action by Congress and, in the process, will tip the Constitution's balance of power between the political branches from Congress and toward the President.

This is no small shift. Until now, the President's power over Congress's acts has been limited. While the President does participate in the legislative process, his ability to block legislation by casting a veto has never been an absolute one. Presidential vetoes can and have been overridden by veto-proof majorities in both Houses. And, while some presidents have asserted an authority to disregard as void *ab initio* those congressional enactments that they believed to be unconstitutional, such claims have been met with strong opposition and criticism from Congress and the legal profession. Indeed, these criticisms were at the heart of arguments that President George W. Bush's use of the signing statements was unconstitutional.

But under President Obama's functionalist approach, the President would be able to disregard, without ever bothering to exercise his veto power, numerous statutes

that Congress has properly enacted. The President could, under this theory, adjudge whether the Senate actually transacted "morning business" in the morning and whether a quorum was properly in place at the time of votes. In this context, the President might, for example, take the position that any legislation which passed without a quorum in the Senate (and much of Senate's legislative business is done without a quorum or, for that matter, even without a vote being taken, by "unanimous consent") was unlawful and could be disregarded with impunity.

Another area in which the President's ability to determine for himself when Congress is in recess concerns the use of the "pocket veto." Article I, Section 7, clause 2, provides that a bill passed by Congress, but not signed by the President, becomes law "within 10 days (Sundays excepted) after it shall have been presented to him". Clause 2 further provides that if "the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law." However, if the President is able to decide for himself when Congress is in recess, he can take the position that lots of legislation that he dislikes, and yet does not wish to veto for the fear of incurring a political price, is subject to pocket veto.

It is simply impossible to predict, at this time, all of the ways in which today's precedent will be manipulated to justify further arrogations of Congress's rights, but it is certain that it will resonate in many future disputes, further distorting the practice of the constitutional separation of power.

The second casualty is Congress's right to define and apply the word "recess" as it is used in the Constitution. *See* U.S. Const., Article II, Section 2, clause 3. As of last Wednesday, that term has a new meaning: Congress is in "recess" when the President says so.

Third is the power of each chamber to prevent the other from acting to "adjourn for more than three days" without consent. U.S. Const., Article I, Section 5, clause 4. If this precedent stands, that power is an apparent nullity.

One of the worst aspects of the Administration's position is its total failure to consider these constitutional concerns, much less address them properly. Indeed, the January 6, 2012, Office of Legal Counsel ("OLC") opinion, which the Administration released in an effort to buttress its position, does not even attempt to address the broader implications for the separation of powers of its claim that the President can determine for himself when the Senate is in recess, disregarding the views of Congress. Instead, the OLC. opinion proceeds from the flawed premise that the Senate's practice of using pro forma sessions is invalid because it impedes *the President's power* to make recess appointments. This is a strange claim. The Constitution allows the President to make recess appointments only when the Senate is in recess; it does not guarantee him the right to make one or more of such appointments. To the extent that the Senate remains in session continuously and never recesses, whether intra- or inter- session, the President's recess appointment power would never come into play. In this way, OLC takes what was meant and written as a gap-filler or safety valve – what to do when the Senate is out of town and unable to confirm a nominee to a vital position – and converts it into an affirmative grant of power that guarantees the President the right to make some number of appointments without the Senate's approval.

Conclusion

I am confident that the courts will strike down this unprecedented usurpation of Congress's power – that is, your power. But this branch cannot and should not count on the judicial branch to vindicate its own rights. It should take every action

in its power to assert itself against the President until he acknowledges the error of his ways and respects Congress's authority over legislation and appointments. If Congress does not do so, it places itself at great risk of weakness and irrelevance.

Chairman ISSA [presiding]. Thank you.
Mr. Carter.

STATEMENT OF MARK A. CARTER

Mr. CARTER. Thank you, Chairman Issa and Ranking Member Cummings, for inviting me to testify before the committee today.

As a direct consequence of the appointments of members Richard Griffin, Sharon Block, and Terence Flynn on January 4th, every administrative decision and every administrative rule or regulation implemented by the National Labor Relations Board will be subject to appeal or attack. This vulnerability will necessarily impact the agency's ability to accomplish its primary mission of promoting industrial peace and stability in labor relations and minimizing the likelihood that labor strife will negatively impact interstate commerce in the United States.

As recently as January 26th, the chairman of the NLRB reportedly told the Associated Press [AP] reported, that the NLRB would push for new rules that give unions a boost in organizing members. The chairman is quoted as stating, we presume the constitutionality of the President's appointments, and we go forward based on that understanding.

The chairman's reference to the constitutionality of these appointments is a critical issue. As you have heard today, if the appointment of the three recess members is not constitutionally sound, the actions of the NLRB will be ultra vires, and every decision, rule, regulation or official action of the agency will be subject to legal challenge on that basis.

This is because of a June 2010 U.S. Supreme Court opinion called New Process Steel versus NLRB. In New Process Steel the employer appealed from an adverse decision by the NLRB in the Seventh Circuit Court of Appeals. The primary issue resolved by the Court was whether the NLRB could issue an administrative decision with two members resolving the case. The statute contemplates a full complement of five board members, one of whom is the chairman. Section 3(b) of the act permits the board to delegate its authority to a panel of three members.

When the administrative decision in New Process Steel was entered, there were only two individuals in place at the board, the chairman and one member. In its decision, the Supreme Court held that in order for the NLRB to issue a viable decision, at least three individuals must compose the board itself.

It is axiomatic that any decision or official action taken by an NLRB composed of two or fewer individuals is ultra vires and cannot be enforceable. The Court rendered this decision despite the fact that the two-person board had resolved almost 600 cases and fully appreciating the Board's argument that it had a desire to keep its doors open. The Court concluded that the statute did not permit the agency to, "create a tail that would not only wag the dog but would continue to wag after the dog had died."

The Federal courts will necessarily hear the argument that parties appearing before the NLRB have been adversely treated by the wagging tail of a deceased dog. If the courts ultimately conclude that the recess appointments of the board were accomplished unconstitutionally, then the decisions and regulations the agency

issues that result in adverse impact to any party are vulnerable under the new process precedent. If the three recess appointees are not validly appointed, then the decisions and regulations emanating from the board as currently composed are actually only being issued by two individuals, Chairman Pearce and Member Hayes. If only two persons comprise the board, their action is ultra vires.

The obligations of this agency to strive to accomplish its mission should not be taken lightly. The agency is created by Congress, and it does not and should not seek to enforce or advance any private rights. Rather, it is a public agency that was created to, "protect the public welfare," which is inextricably involved in labor disputes. The Supreme Court of the United States has held that the board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

The consequences of the recess appointments of members Griffin, Block, and Flynn, through no fault of their own, are that in every litigation resolved by the agency and with regard to every rule or regulation implemented by the agency during their tenure, anyone who desires to challenge that action may under New Process Steel. Regardless of whether those challenges are successful are not, the agency's mission to minimize labor strife and to remove obstructions to interstate commerce will be frustrated.

[The prepared statement of Mr. Carter follows:]

Thank you Chairman Issa, Ranking Member Cummings, and Members of the Committee for inviting me to testify on this important topic.

My name is Mark Carter. I am the labor practice group chair and a partner with the law firm of Dinsmore & Shohl. The views I express in this testimony are my own, and I am not appearing on behalf of any client or organization.

As a direct consequence of the appointments of Members Richard Griffin, Sharon Block and Terrence Flynn on January 4, 2012, every administrative decision and every administrative rule or regulation implemented by the National Labor Relations Board will be subject to appeal or attack. This vulnerability will necessarily impact the Agency's ability to accomplish its primary mission of promoting industrial peace and stability in labor relations and minimizing the likelihood that labor strife will negatively impact interstate commerce in the United States.[1]

As recently as January 26 of this year, the Chairman of the NLRB reportedly told the Associated Press that the NLRB would "push for new rules that give unions a boost in organizing members."[2] The Chairman is quoted as stating "(w)e presume the constitutionality of the president's appointments, and we go forward based on that understanding."[3]

The Chairman's reference to the constitutionality of these appointments is a critical issue. As you have heard, or will hear today, if the appointment of the three recess members is not constitutionally sound, the actions of the NLRB will be *ultra vires* and every decision, rule, regulation or official action the Agency takes will be subject to legal challenge on that basis.

In June of 2010 the United States Supreme Court issued its decision in New Process Steel, L.P. v. National Labor Relations Board.[4] In New Process Steel, the employer appealed from an adverse decision by the NLRB and the Seventh Circuit Court of Appeals.[5] The primary issue resolved by the court was whether the NLRB could issue an administrative decision with two Members resolving the case. The statute contemplates a full complement of five Board members, one of whom is designated chairman. Section 3(b) of the Act permits the Board to delegate its authority to a panel of three Members. When the administrative decision in New Process Steel was entered there were only two individuals in place at the Board, the Chairman and one Member. In its 5-4 decision authored by Justice Stevens, the Court held that in order for the NLRB to issue a viable decision, at least three individuals must compose the Board itself.

It is axiomatic that any decision, or official action taken, by an NLRB composed of two or fewer individuals is *ultra vires* and cannot be enforceable. The court rendered this decision

[1] See, 29 USC §151, and, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62 (1975).
[2] *Labor Board Chief to Push Organizing Rules*, Sam Hananel (January 26, 2012 Associated Press).
[3] *Id.*
[4] New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010).
[5] New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009).

despite the fact that the two-person Board had resolved almost 600 cases and fully appreciating the Board's argument that it had a desire to "keep its doors open."[6] The court concluded that the statute did not permit the Agency to "create a tail that would not only wag the dog, but would continue to wag after the dog had died."[7]

The federal courts will necessarily hear the argument that parties appearing before the NLRB have been adversely treated by the wagging tail of a deceased dog. If the courts ultimately conclude that the recent recess appointments at the NLRB were accomplished unconstitutionally, then the decisions and regulations the Agency issues that result in adverse impact to any party are vulnerable to an attack under the New Process Steel precedent. If the three recess appointees are not validly appointed then the decisions and regulations emanating from the NLRB as currently composed are actually only being issued by two individuals: Chairman Pearce and Member Hayes. If only two persons comprise the Board, their action is *ultra vires*.

With the Board actively pursuing an agenda involving rule-making and the resolution of administrative appeals, parties' rights will be impacted. In every administrative decision resolved by the Board there is a winner and a loser. Those parties who lose, whether they be a union, an employer or an employee, will be strongly incented to appeal the adverse decision to a reviewing circuit court of appeals on the basis that the NLRB was not composed of the minimum three individuals necessary to issue an enforceable order.

The uncertainty created by this state of affairs will impact labor stability and commerce. For example, if the NLRB issues an order that requires an employer to relocate work from one manufacturing plant to another, significant interests for all parties are at stake. If the parties presume the constitutionality of the NLRB appointments and comply with the order, the employer will lose its investment in the engineering of, and the use of, the new plant; the employees of the new plant will lose their jobs if the plant is not re-engineered; and the work will be relocated pursuant to the Board's direction. However, if the Board's decision is determined to be unenforceable, the work could be returned to the new facility, that plant's employees rehired and the employer would face the costs associated with the exercise. One is left to imagine the degree of labor strife that is predictable as a result of this scenario, particularly when it is recognized that the employees to whom the work was "returned" would face the loss of their jobs.

Similarly, if the Agency issues new regulations without statutory authority, those regulations would have impact on all employers, unions and employees within the NLRB's jurisdiction throughout the nation. If the NLRB were to issue a rule permitting representational election voting to be accomplished over the internet or through email, for example, and the rule was ultimately determined to be *ultra vires*, all such election certifications would be subject to

[6] New Process Steel, L.P., 130 S.Ct. at 2644-2645 (2010).
[7] New Process Steel, L.P., 130 S.Ct at 2645 (2010).

challenge, and that could precipitate dramatic labor strife between employers and unions. A certified union and the employer could be in the midst of collective bargaining only to learn that the representation status of the union was decertified because of an *ultra vires* regulation.

The obligations of the Agency to strive to accomplish its mission should not be taken lightly. The Agency, as created by Congress, does not and should not seek to enforce or advance any private rights. Rather, it is a public agency that was created to "protect the public welfare which is inextricably involved in labor disputes."[8] The Supreme Court of the United States has held that "(t)he Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."[9]

While the Agency may presume the constitutionality of the appointments, it is not the province of the Board to make that determination. If the Agency is wrong in that presumption, significant debilitation to labor stability and interstate commerce is likely to follow. Even if the Agency is correct, other parties within the purview of the NLRB may, and are likely to, presume the unconstitutionality of the appointments and act accordingly. Their presumptions will invite the courts to resolve the issue but may also incent the parties to act as if their presumptions are inevitable and result in unnecessary labor strife or frustrate interstate commerce. For example, a union that presumes the unconstitutionality of the appointments may forego a petition to represent employees who desire collective bargaining because it has concluded that a certification under an *ultra vires* election procedure is counter-productive.

The consequences of the recess appointments of Members Griffin, Block and Flynn, through no fault of their own, are that in every litigation resolved by the Agency and with regard to every rule or regulation implemented by the Agency during their tenure, anyone who desires to challenge that action may under New Process Steel. Regardless of whether those challenges are successful or not, the Agency's mission to minimize labor strife and remove obstructions to interstate commerce will be frustrated. It is likely that increased labor strife and more challenges to commerce will result.

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[8] Garner, et al. v. Teamsters, 346 U.S. 485, 493 (1953).

[9] Garner, et al. v. Teamsters, 346 U.S. 485, 493-494 (1953).

Chairman ISSA. Thank you.

I'll recognize myself for a first round of questions and follow right up with Mr. Carter. How did the NLRB only have two members at that time of that decision, the steel decision?

Mr. CARTER. At the time of the New Process Steel decision——

Chairman ISSA. New Process Steel.

Mr. CARTER [continuing]. There was—the Senate was continuing with pro forma sessions, and there was—it was impossible to make any recess appointments.

Chairman ISSA. And to your knowledge, did the executive branch issue some sort of a statement on that, you know, challenging the Senate's ability to have pro forma sessions at that time?

Mr. CARTER. I'm not aware of that, sir.

Chairman ISSA. Ambassador Gray, you, you're pretty significant to today's hearings because when you had the questions before you, you reached a different conclusion. Would you tell us a little bit about how you, as I think Mr. Rivkin and Mr. Carter both did, how you could think again and agree with the decision. Is there any way you could agree with the decision made by counsel on behalf of the President that allowed these extraordinary events to occur, particularly as to the two or three NLRB people, two of whom had not even been given time to be considered by the Senate?

Mr. GRAY. Well, the trump card is held, at least in the theoretical sense, by the Office of Legal Counsel in the Department of Justice, and they came out with this ruling, which, gosh, I don't think we would have permitted because, as I said earlier, it acknowledges a litigation risk which we would have said no, that's not good enough; give us an answer that doesn't throw the whole thing into a cocked hat. So for that reason alone, I think that I would never have allowed this opinion to issue in the form that it issued.

Beyond that, if you look at footnote 13, it's very disingenuous in my view. It says we have never formally taken a position that there's any lower limit to the time necessary to justify a recess appointment, and you know, in the 4 years I was—well, I was in the White House actually a total of 12 years watching and then dealing directly with appointments of this kind—never once was there any hint that the time period could be less than 3 days, certainly even when I was in the White House not less than 2 or 3 weeks. It hadn't gotten down to the 10-day limit, and there's plenty on the record to suggest that it is a 3-day, and of course, we have the Constitution giving the House authority to refuse a recess shorter than 3 days, so—but to repeat, the litigation risks red flag in this opinion is one that really disturbs me a great deal.

Chairman ISSA. Now, we earlier heard, and from personal knowledge I know that the House did not grant the Senate the ability to be in recess. Assuming that the House's authority now has been waived, that we no longer have that authority, how do you square that? How does the House lose its constitutional authority to have to acquiesce to the Senate going into recess and vice versa?

Mr. GRAY. Well, that's one of the infirmities of this opinion. It's saying that—and I know there's a difference of opinion from the professor at my alma mater, but what he said——

Chairman ISSA. If you were still there, you would have been updated on the new Constitution, perhaps.

Mr. GRAY. I would have been taught better than I was when— no, I just don't understand, Mr. Chairman, how anyone can say that the President has the power to decide when you or when the Senate is or is not in recess, and that's——

Chairman ISSA. And that's a question I guess I'll beg for all of you. The Senate is not the only question here. Isn't the question whether or not the House's prerogative, guaranteed within the Constitution, was, in fact, preempted by a decision that—not just that the Senate was somehow acting not available. I could understand that if it was a question only of is the Senate really in session or not, but how do you square, how do any of you square the House not acting, as constitutionally we have to, to allow a recess? Even if that chair were vacant day after day after day, wouldn't it be true that the House ultimately has an equal share in determining whether or not there is a recess?

Mr. RIVKIN. If I may take a stab at it.

Chairman ISSA. Please, Mr. Rivkin.

Mr. RIVKIN. Mr. Chairman, you're absolutely right. OLC opinion somewhat disingenuously claims that the constitutional language you were talking about, section 5, clause 4, really deals with the relationship between the two houses of, two parts of Article I, so you may not be in recess for purposes of intra-Article I relations, but you're somehow in recess under the functionalist analysis vis—vis Article II. I think it's an indefensible position and——

Chairman ISSA. And, by the way, we sometimes think the Senate is in recess when we send bills over there, I made that clear to Senator Lee, that we often wonder what they're doing when we send them over and they die there. But isn't this a very straight, and I would like to have anyone who disagrees, very straight question of the Constitution and whether or not the House gave its permission for a recess?

Mr. RIVKIN. Absolutely. There's not much original founding era history in explaining why that section was created, but clearly, it is created to ensure that there is a continuous and agreed-upon functioning of Article I as a branch. So it is therefore a reason. Let me also say the following, that gives you, and I'm remiss for not mentioning it in my remarks, you have an independent injury by virtue of a President's unconstitutional behavior, quite aside from usurping the Senate's confirmation power, he has effectively vitiated your power to deal with your peers in the Senate because it may be an important bargaining chip in some future procedures. And the problem with the President's analysis, it has no meaningful limiting principle. And you mentioned this point in one of your questions with Senator Lee, the President can say you're in a pro forma session today, I like what you did, you passed the payroll bill extension; therefore, you're not in recess. But in the next pro forma session, even when you're operating under the same standing order, exactly the same opportunity by unanimous consent to accomplish anything, because you didn't do anything, you're not in session, you're in recess. The same can be said about any of the Senate sessions.

Chairman ISSA. Thank you.

My time has expired, but I want to make sure all witnesses got to answer.

Mr. Gerhardt, I think you might have a different view.

Mr. GERHARDT. I appreciate that very much, Mr. Chairman. Thank you.

Just two quick responses. The first is to remember what it means to say that the President has an independent judgment about the constitutional meaning here. It's not to say that each of the other branches don't have their own respective say, and his isn't something that binds you, but at the same time, I think what it means to say is he doesn't feel bound by what your independent judgment may be.

The second thing is, what is occurring, I think, in this debate is sort of like two trains or ships passing in the night. Essentially, I think what the Senate and perhaps the House have done is they've made a decision to place form over substance, and clearly what the President has done is decided to put substance over form when it comes to making a decision in this particular circumstance.

Chairman ISSA. I thank the gentleman for his opinion. I'm glad I have a different alma mater.

Mr. Cummings is recognized for 5 minutes.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

On May 2, 2011, 44 Republican Senators sent a letter to the President of the United States to voice their objection regarding the Consumer Financial Protection Bureau.

The Republican Senators did not express concerns regarding the qualifications of a particular nominee for the CFPB director position. Rather, the gang of 44 Republicans objected to the fact that the Dodd-Frank Act is now the law of the land and that the Consumer Financial Protection Bureau would be able to protect consumers from unscrupulous mortgage servicers, payday lenders, and debt collectors once the director was installed.

Now, Mr. Gerhardt, I would like to point your attention to slide 3, and here's what those 44 Republican Senators actually stated, and I quote, 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.

Mr. Gerhardt, in your opinion, does it raise concerns that such a large bloc of Senators would declare so openly that they are boycotting the constitutional confirmation process even for highly qualified candidates?

Mr. GERHARDT. I think my reaction is basically that these Senators are, of course, free to express their judgment, and the size here may be somewhat significant in that they comprise a minority within the Senate, but at the same time, there are all sorts of checks and balances, not just across branches but within branches. And so I would certainly defend and support the fact that they've got the freedom to make that—to make their judgments clear.

But, as the statement itself suggests, what they want is reform of a law that's already in—or reform to a law that already exists. So the President's job is not to enforce a law that hasn't yet been

passed. The President's job is to enforce a law that actually is already on the books, and so I think that's partly what he's undertaking here is to do what he can to implement or to make possible the fullest implementation of this agency or this bureau's function.

Mr. CUMMINGS. Now, in your written testimony about the President's recess appointment, you state, and I quote, the persistent obstruction of his nominations to both the NLRB and to the CFPB forced them to consider appropriate responses and all possible harms arising from his failure to act as well as the failure of the Senate to act on any of his nominations and the ensuing harm to the American public and to the enforcement of the law.

Looking at slide 4, on July 19, 2011, the New Republic quoted Thomas Mann of the Brookings Institute as saying, Senate Republicans insist that a legitimately passed law be changed before allowing it to function with a director—a modern day form of nullification. There is nothing normal or routine about this.

But, Mr. Gerhardt, do you believe that President Obama acted constitutionally in making the recess appointment to the bureau?

Mr. GERHARDT. I do, and I've stated that in the written statement, and I obviously repeated it here orally today.

And as far as Mr. Mann's comment is concerned, I think, again, it reflects the kind of checks and balances that we have. This is a very dynamic process, and this is exactly—what we're seeing today is checks and balances in operation. This is how it works. You can pass a law, but I think as Senator Lee pointed out, there are various things that could be done subsequently if people think differently, but the important thing to understand is it's all done within the process, and I think the President acted within that process.

Mr. CUMMINGS. Now, if the CFPB director position had not been filled, the bureau would not have been able to use its new powers to protect consumers from deceptive mortgage servicing, payday lending, and debt collection practices. Does the President have a duty to make sure that the consumer protections enacted by Congress are executed?

Mr. GERHARDT. Obviously, I think the answer to that is yes. I think he does have a duty to do that, and I think that's partially not just constitutionally obliged on his part, but this is where he might also say or think, look, there's a lot of harm that's done from the fact that I can't get this law implemented, and he's trying to redress that harm. So I think he's constitutionally entitled to make those judgments.

Mr. CUMMINGS. Thank you.

Chairman ISSA. Would the gentleman like additional time to ask about the NLRB?

Mr. CUMMINGS. This will—not—thank you for the additional time, but I do.

Chairman ISSA. The gentleman has an additional 30 seconds.

Mr. CUMMINGS. Mr. Gerhardt, are you aware of any instance where a large group of Senators vowed to the President that they would block any nominee to a Federal agency unless changes were made to the agency's enabling act?

Mr. GERHARDT. That is a great question, and I have to say I can't think of anything off the top of my head, but that may not mean very much.

Mr. CUMMINGS. Okay. Very well.

Thank you, Mr. Chairman.

Chairman ISSA. I so much miss Senator Byrd.

I'm sure there's a quote somewhere that's on topic.

With that, we recognize the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. I also want to thank the gentleman from Oklahoma for his courtesy.

Professor, is there a different definition of recess, depending upon which party is in power?

Mr. GERHARDT. I think the answer would be no.

Mr. GOWDY. And one of the good things about the law is hopefully it provides order and predictability for those to come. So what's the new definition of recess for future Republican Presidents?

Mr. GERHARDT. I think it's actually pretty much the same. You know, keep in mind that the President here is acting against a backdrop where we have more than just the OLC opinion that's expressing a judgment about recess. There is, for example, the 1905 report from the Senate Judiciary Committee that essentially says that the President may treat as a recess a period of time in which the Senate is unable to receive or act on nominations.

Mr. GOWDY. Well, let's analyze that for a moment. The two NLRB names were given on December the 15th, and they were recess appointed on January the 4th. Do you think that now talismanically 2½ weeks is enough time to demand that the Senate act on something?

Mr. GERHARDT. Obviously, that's not my judgment call to be made.

Mr. GOWDY. Do you think if a President were to conclude that 2½ weeks was enough time for the Senate to act on something that that would withstand constitutional scrutiny?

Mr. GERHARDT. Well, if you're asking me, yes, I think the answer is going to be yes because I think this falls within the discretion of the President.

Mr. GOWDY. So 2½ weeks. What about a length of time in terms of recess? Because 10 days, according to you, is too long; 3 days, can the recess be less than 3 days?

Mr. GERHARDT. I think as a practical matter the answer is going to be yes because that's what the President is using here.

Mr. GOWDY. Can it be less than 1 day?

Mr. GERHARDT. It might well turn out to be the answer is yes.

Mr. GOWDY. Can it be over the lunch break?

Mr. GERHARDT. But let me point out that the fact that something might be constitutional doesn't mean you have to do it, and so——

Mr. GOWDY. I agree, the Constitution says he shall have the power.

Mr. GERHARDT. Right.

Mr. GOWDY. He doesn't have to do it.

Mr. GERHARDT. Right. And so he might conclude as a practical matter that he does have an opportunity to make a recess appointment.

Mr. GOWDY. I'm trying to get a sense of if our country were to be fortunate 1 day to have a President Lankford from Oklahoma that if the Senate——

Chairman ISSA. That would be good fortune.

Mr. GOWDY. If the Senate were on lunch break or taking a nap, as has been known to happen from time to time, is that a sufficient length of time by which the President can use his recess appointment power?

Mr. GERHARDT. Well, again, clearly, practically speaking, I think he can make a judgment, and perhaps most people would make a judgment that these breaks that you've just described are probably not recesses for fairly obvious reasons.

Mr. GOWDY. I'm looking for the law.

Mr. GERHARDT. But we're talking about the pro forma sessions here, and that I think raises a slightly different——

Mr. GOWDY. Well, that gets to my next point. How can the payroll tax cut be effective if they were on recess?

Mr. GERHARDT. I think the answer to that is by the time when the President makes this judgment, he obviously has concluded that the Senate is not in a position to be able to act on these nominations, and he thinks that the——

Mr. GOWDY. But how could they act on nominations which weren't even given to them in a timely fashion? They got them on December the 15th, and they didn't even have the proper paperwork.

Mr. GERHARDT. I understand that. But let me just remind you what the recess appointments clause says: The President may fill up all vacancies. And so there are vacancies that were created for one reason or another, and I think under those circumstances he may be able to choose to fill——

Mr. GOWDY. Do you think the founders had a 2-hour recess in mind when they drafted that clause?

Mr. GERHARDT. I don't know what they had in mind.

Mr. GOWDY. Well, but you're a constitutional law expert.

Mr. GERHARDT. I can tell you this.

Mr. GOWDY. What do you think?

Mr. GERHARDT. I think they didn't have a fixed period in mind.

Mr. GOWDY. Do you think they envisioned 2 hours?

Mr. GERHARDT. Like I said, I don't think that they were thinking at that level of detail. I think they thought, to the extent they did address that, it's not a fixed period, and what we're talking about here is a circumstance in which the President, like most Presidents, approaches this issue in a very practical way, balancing the competing consideration.

Mr. GOWDY. Well, speaking of the President's practicality, he referred to Ambassador Bolton as being damaged and having his credibility undercut because he was a recess appointee. Do you think the same analysis would apply to his recess appointees, that they are damaged and have less credibility?

Mr. GERHARDT. You mean damaged politically?

Mr. GOWDY. I don't know how the President meant it.

Mr. GERHARDT. Yeah, I was going to say, I'm not sure I understand the context of the statement, so I don't know that I could tell you what he was thinking or why he said that, but I think what happens, of course, is there—the Constitution and politics converge all the time, and in a circumstance like this where the President makes a judgment, it's not just going to have constitutional ramifications. It will have political ramifications.

Mr. GOWDY. You keep using the word judgment, and I'm trying to get to what the law is because the beauty of the law is it instructs future people what they can and cannot do, so I'm not as interested in someone's judgment as I am what the law was going forward for the next President. Is there any time limit associated with recess?

Mr. GERHARDT. I think the answer would be probably yes because I think you have to put all this into context.

Mr. GOWDY. It's less than 3 days, though?

Mr. GERHARDT. I don't know if it's less than 3 days or not, but I do think that it's a matter of context, it's a matter of what are the practicalities at the moment the President is making that judgment. Keep in mind that the President is making this determination based not just on the text but also based on the recognition that recess is not a fixed concept, and beyond that, he's also making a determination I think based on the law, the law he has to enforce, and the text that I think that gives him this authority, and the recognition that if he doesn't act, then in a sense what's happened is the Senate might be able to literally eviscerate his power.

Mr. GOWDY. I'm out of time, Mr. Chairman. If I could have 15 seconds to ask my final question, and I promise it is my final question.

Chairman ISSA. Ask unanimous consent. Without objection, the gentleman is given an additional 15 seconds.

Mr. GOWDY. Thank you, Mr. Chairman.

You mentioned a judgment. Are you moved at all by the fact that the Senate is controlled by the same party that controls the White House, and the third NLRB appointee, the Republican appointee, was never given a hearing, was never scheduled a hearing by the Democrats who are in charge of the Senate because some of us would be suspicious of collusion, that you just don't schedule it, and you wait until a nap takes place, and then you go ahead and make a recess appointment.

Mr. GERHARDT. I would just say this with all due respect, the politics of this are not my concern. I try to look at this strictly from the vantage point of what the Constitution might have to say about this and what the constitutional law might be, so the parties involved which the President, the Senators, the nominees, are not factors in my calculation.

Mr. GOWDY. Thank you, Mr. Chairman.

Chairman ISSA. I thank the gentleman. The gentleman yields back.

We now recognize the gentlelady from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Gerhardt, I'm not going to give you any law school hypotheticals or worst-case absurd examples, even though I regard

my prior profession, my real profession as a professor of law at Georgetown University Law Center. I still go over there to teach once a week. I look first to the written legal advice the President received from the Office of Legal Counsel. I look there because the Office of Legal Counsel is considered, I think, by most of us to be the least political office in the Justice Department because the job of that office is to keep the President from getting in trouble.

And if someone would put up some words that I asked the staff to get for me from his analysis, "Allowing the Senate to prevent the President from exercising his authority under the recess appointments clause by holding pro forma sessions would be inconsistent with both the purpose of the clause and historical practice in analogous situations."

Now, this opinion appears to raise serious separation of powers questions. Let me ask you, since Congress is constantly looking to the Framers, whether you think the Framers intended Congress to overturn a law by refusing to confirm an appointee to run an agency, do you think the Framers had that as a possibility in mind?

Mr. GERHARDT. Well, let me just say at the outset that of course the statement here is essentially an iteration of what I've been saying, and I think the OLC memo, with all due respect, is a perfectly good example of the kind of work one gets from OLC, which is not just nonpartisan, but they try and look at all the competing sides and come out with their judgment.

In terms of your question, I think the Framers sort of told us what they think about that circumstance when they set up the Constitution. Obviously, laws are made a certain way in compliance with Article I. That's how laws are made. But there may be other factors that come along the way—funding and other things which are made through other laws. But in terms of nullifying a law, one chamber of Congress doesn't have the authority, I think, to nullify a law, that laws are made through compliance with the bicameral and presentment clauses.

Ms. NORTON. Well, I was intrigued by—therefore, you know, I always want to look and see, what does the other side say, so I wanted to see what former Office of Legal Counsel had said under comparable circumstances.

Now, this President is known for his patience and unflappability, some would say criticized for his patience, particularly with this Congress. Here, let's take the office of—the consumer bureau. The response to—one of the most important responses to the most serious economic crisis in our lifetime or at least the lifetime of many of us, victimized millions of Americans. This agency has not been functioning as a full agency because there has been nobody to lead it.

Now, it's one thing to be patient. It's another thing to become a wimp and to let your duty to attend to the laws vanish in the face of a Congress which simply refuses to do what has largely been done in the past. So in looking to prior legal counsel, the staff found the two former Assistants Attorney General, John P. Elwood and the former Deputy Attorney General. Both subscribe to this statement. "The Senate cannot constitutionally thwart the President's recess appointment power through pro forma sessions. The President should consider calling the Senate's bluff by exercising

his recess appointment power to challenge the use of pro forma sessions.” This President appointed—did not, in fact, move forward with one appointee that the Senate disagreed with. All right. He says to the Senate, here’s another one I have for you, and the Senate says, All right, you’ve come up with somebody who is fully appointed, and tell you what, we disagree with the underlying law that this appointee is to administer. It does seem to me that the notion of calling the Senate’s bluff comes into play at some point, and I would like to know your view of that.

Mr. GERHARDT. Well——

Ms. NORTON. If the President had simply allowed this to go on——

Mr. GERHARDT. Right, right.

Ms. NORTON [continuing]. Indefinitely——

Mr. GERHARDT. Right.

Ms. NORTON [continuing]. Instead of finally calling the question, take it to court, do what you want to, but I’m calling the bluff now after virtually, almost 4 years in which this particular bureau has not been able to function.

Mr. GERHARDT. If the President——

Chairman ISSA. Would the gentlelady yield for just a second? Did you mean to say 4 years on this agency?

Ms. NORTON. Almost.

Chairman ISSA. No.

Ms. NORTON. All right. Two—When did we pass it?

Chairman ISSA. Dodd-Frank was a year ago.

Ms. NORTON. I stand corrected on the time. My point remains.

Chairman ISSA. The gentlelady will have an additional 30 seconds.

Ms. NORTON. I thank the gentleman for putting into the record the correct number of years, whatever it is, and whatever the staff finds I’m sure would be the case. The point I made by introducing this was the President’s patience had been quite exhaustive and that even members of a prior administration who had held this very office had said at some point, somebody’s going to have to, “call the Senate’s bluff,” I think that’s what was done here, and I ask for your response with respect to that, or should he just have let it go on maybe for another 2, 4 years, however long it might have taken?

Mr. GERHARDT. And I do think that that opinion reflects the fact that the basis for the President’s actions are not uniquely partisan. That is to say, there’s a wider, more solid ground on which he is operating. But to directly answer your question, I think that if the President—I think the President faced a situation where he knew that if he didn’t act, there would be these harms that would continue to occur, that the Consumer Financial Protection Bureau would be left unable to perform some of its most important functions, and that would leave, in his judgment, the American people harmed. So that’s the harm that he’s looking at there. He could look at this other situation and say, look, if I act, what harm might there be? Clearly, in his judgment, he didn’t think there was as much harm by acting. In fact, he actually thought he would be producing some good. That’s not an unreasonable stance for him to

take. So, in fact, to stand pat simply would have allowed harms to buildup over time and the law to go unenforced.

Chairman ISSA. I thank the gentleman.

I now yield 5 minutes to the gentleman from Oklahoma, Mr. Lankford, and would ask him if he would yield for 30—15 seconds?

Mr. LANKFORD. I absolutely would, Mr. Chairman.

Chairman ISSA. I just want to make the point that one thing I have seen a pattern of today is that every question seems to be about the Consumer Financial Protection Bureau and none about people whose applications arrived in the Senate, two people whose applications arrived in the Senate formally after they were sworn in. Yield back.

Mr. LANKFORD. Thank you, Mr. Chairman, and that is exactly where I want to be able to land on it. It is interesting to me that a lot of this conversation is about, could this be permissible, is there some person out there somewhere? Obviously, the statement there from the Bush administration that there was an individual that considered this. The Bush administration did not take that advice. They took the advice of others over the top of that and said, no, that's not legally appropriate. What this has done is for political expediency of the President, to make him look tough, to fight against the allegations that you've been weak in the past, he's got to get in an election year and try to look real tough and like I'm going to force some things down their throat so I can look manly. But it opens up all of this litigation, and every action at the NLRB suddenly is going to go to court, and it will cost millions of dollars so he can politically look better in a campaign year, but this will drag out all of these cases for years now in litigation. It's frustrating to me in that we have to sit and discuss what are the issues of litigation when this was a settled issue 2 years ago. I go back to the steel issue, the New Process Steel with Deputy Solicitor General Neal Katyal, as I go back through the oral arguments that I pulled up, he looks directly at Chief Justice Roberts, doing oral arguments before the Supreme Court, and Chief Justice Roberts discussing the NLRB and the vacancies, asked a point blank question, And the recess appointment power doesn't work why? To which he responds—this is the Obama administration Deputy Solicitor General responds back to the Chief Justice of the Supreme Court, The recess appointment power can work in a recess. I think our office has opined that the recess has to be longer than 3 days.

Now, this seems fairly clear to me that this is not an issue about recess appointments and does the President have the power to do recess appointments. He absolutely has the constitutional power to do recess appointments. This is not a recess. This is a constitutional issue. This is an issue of can the executive branch define for the Senate when they're in recess and when they're not. Is this the power of a monarch to reach into the legislative branch and say, you are in the way, I'm going to now declare you in recess, and I'm going to put in who I want, and on top of that to drop their names in on the 15th of December and then to say it's been long enough 2 weeks later, I've waited for you all this time, I'm now going to go ahead and put them into place seems absurd on its face.

So while we can discuss all the issues of the CFPB and the dynamics of the politics of it, in reality, the biggest issue that sets

the largest precedent is the NLRB case. If the President has some power to ignore the advice and consent of the Senate and if he can in 1 day drop a name in and before hearings are even scheduled over some weekend in the future or as has been opined already over a lunch break can now declare I'm not in communication with the Senate, they're in place, do it in January and ignore the advice and consent now for 2 years, and can fill all vacancies, why can't a future President some January over a weekend fill every single court, all of them, and say, this is my recess responsibility, the precedent has been set over here, that was ignored by the Senate, the courts have upheld it. What would slow down some future President from doing that? Anyone is welcome to answer that. Let me take some different opinions here. Go ahead.

Mr. RIVKIN. Well, let me say nothing would prevent this from happening. In fact, I mentioned in my oral remarks that it would fundamentally recast not just the constitutional balance, but it would, in effect, enable the President to put into office people whom otherwise would not get confirmation for reasons that don't have to do with partisanship. You really can have an executive branch comprised of political hacks who come in, know they're only going to be there during the limited term, and do the President's bidding and feel completely unaccountable.

Mr. LANKFORD. So, at that point, advice and consent is gone?

Mr. RIVKIN. Advice and consent is completely eviscerated. Again, the problem with the functionalist approach is, aside from the fact that it's not found in the text, it has no limiting principle, and the notion—I mean, I hate to engage in law professor like hypotheticals, but under the notion that if you have a genuine emergency, you can disregard something; why couldn't you disregard an appropriations rider or a statute which does not give the President to draw money from the Treasury, and you say there's an emergency, I'm going to draw power because I want to enforce the law? The House passes appropriation riders all the time that prevent agencies from spending their funds. The President can say, I don't care, there's a statute on the books, there's an appropriation rider which says EPA cannot do something, but I don't care, I'm going to use the money. There's no difference.

Chairman ISSA. And with that, we recognize the gentleman from Massachusetts, Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

And thank all of you. I think we have pretty thoroughly gone over the constitutional aspects of this situation, and I think it has been enlightening, at least for me and I hope for my colleagues as well on that.

I thought I would take a different look at that, stepping away from the constitutional issue directly on that.

Ambassador Gray, you obviously looked at this thing from both sides, you know, given you're President Bush's recess appointment on that basis and also your White House counsel position. Back in March 2005, there was an article in the Hotline that reported a statement from you, and I'll quote it, I believe the use of the Senate cloture rule to permanently block nominations conflicts with the Constitution's advice and consent clause.

Do you remember making that statement?

Mr. GRAY. Yes, sir, I do.

Mr. TIERNEY. How do you feel about that today? Do you agree with it, or have you changed your mind?

Mr. GRAY. The statement was made in the context of judicial appointments. There had never been a filibuster of a judicial appointment for 200 and whatever years, so I thought it was perfectly appropriate then, and I still think it's not appropriate to filibuster judicial nominees.

But that's a different issue, both in terms of who the nominee is to, say, the Supreme Court versus a nominee to the NLRB. It's a different issue. It's also a different issue, whether or not cloture should be used against the judge is a totally different issue than whether a President can declare a recess whenever he feels like it under whatever criteria he wants to use.

And I think it's important to say that I don't think the recess appointment power is a response to rejection. I take the point that, of course, the NLRB people hadn't even filled out their forms yet, but it's also true that Cordray was rejected. Now, he was rejected by a filibuster, but he was rejected, and the OLC opinion doesn't say that recess is appropriate to deal with a filibuster issue. I don't think the word filibuster appears anywhere in the Office of Legal Counsel opinion.

So the recess is not an antidote to rejection. And of course, there was contemplation in Dodd-Frank that there might not be a director confirmed because the legislation provides specifically that the agency can do a whole number of things, but certain things it cannot do until there's a director confirmed by the Senate. And so it was understood that maybe there wouldn't be a director confirmed. Maybe the director would be rejected. That was understood by everybody who passed that legislation. So I've given you too long an answer, and I should——

Mr. TIERNEY. No, we're here to get your information. Take your time.

Mr. GRAY. But I do think the filibuster issue was quite distinct. The rule 22 issue is very, very distinct from whether the President has the authority to avoid the confirmation process and declare recesses whenever he feels like it.

Mr. TIERNEY. Mr. Pincus, you made a statement at the beginning of your remarks that the Chamber of Commerce supports consumer protection. Is that correct?

Mr. PINCUS. Yes.

Mr. TIERNEY. So I'm fair to say that you also made some comments about certainty, that the business community appreciates certainty in the implementation of laws as they are on the books.

Mr. PINCUS. Yes.

Mr. TIERNEY. When you look at the statute and you look at statements like those made by 44 Republican Senators who wrote to the President vowing that they would block any nominee regardless of party affiliation because they objected to the very structure of the Consumer Financial Protection Bureau, you see that statement, you know the law has been passed, it hasn't been fully satisfied yet because there's been no appointment, and then 44 Members of a particular party come out and say, well, we're just never going to act on that so you're going to be with that uncertainty for a long

period of time. How does that impact your comments about the Chamber's desire for consumer protection and your comments about the desire for certainty?

Mr. PINCUS. Well, I guess two answers, Congressman.

First of all, on consumer protection, as I said in my testimony, there's a lot that the bureau can do under the Treasury Secretary's authority. There are many rulemaking responsibilities that Congress laid out in Dodd-Frank, and there are many other rulemakings that the bureau could undertake.

Mr. TIERNEY. Well, if I could just—not to be rude but because my time is limited, let me stop you on that point so we can explore it.

Mr. PINCUS. Yeah.

Mr. TIERNEY. What it won't be able to do, however, unless somebody is appointed, is identify and curb unfair, deceptive, and abusive financial practices; won't be able to rein in predatory payday loans; won't be able to ensure credit reporting agencies comply with consumer protections; won't be able to safeguard against abusive debt collection; and it won't be able to monitor private student lenders and nonbank mortgage companies and other financial institutions, just to name a few. So those you would consider——

Mr. PINCUS. Could I respond?

Mr. TIERNEY. Of course. Those you consider not important or not relevant?

Mr. PINCUS. No, they may well be important, but a couple of points. First of all, the FTC does have the power right now to act against unfair and deceptive practices, is doing it. In fact, this week, announced a large significant enforcement action on consumer debt collection, and it has been doing it right along and has devoted very substantial resources, so part of the—there's a bigger argument about whether or not, where the gap was that the bureau was designed to fill. Much of the argument in the run-up to Dodd-Frank was, we're very troubled that the bank regulatory agencies don't focus on consumer protection with respect to the entities they regulate, which were banks, and we need to transfer that power to a new regulator that will focus on that regulation. That's the power that the CFPB had prior to January 4th and was exercising.

As the legislation moved through Congress, other—it expanded to focus on other entities, all of whom are already regulated both at the State level and by the FTC, and the FTC has very, very broad power and the State attorneys general certainly have very broad power, so all of the entities you listed are already regulated both by the FTC and the States. So the question is, I think there's a question both about the gap and whether there is one, and we would suggest that there isn't, and that really the question here doesn't create uncertainty, and in fact as I discuss in my written testimony, a huge amount of uncertainty is going to be created by the overlap between the State AGs, the FTC, and the CFPB, all of whom now regulate these same entities and all of whom may regulate them in totally different ways.

Mr. TIERNEY. And you don't feel that the failure or the statement of 44 Senators that they're just not going to appoint anybody on that basis leaves any uncertainty at all as to how that act is going to be conforming going forward?

Mr. PINCUS. Well, what it does is, is it means that particular part isn't going to take effect until there's some check, that same bipartisan check on the bureau that exists for the FTC, the CFP—the Consumer Products Safety Commission, the SEC, the CFTC, and just about every other regulatory agency.

Mr. TIERNEY. So the Chamber is okay with that being uncertain as to whether and when that part of the statute is going to be implicated?

Mr. PINCUS. Well, I think it's going to be uncertain for sometime, and I think the question is going to be, can we get a regulatory structure that makes sense going forward.

Mr. TIERNEY. Well, the question really is, are you going to get somebody appointed, but you're okay with there being no appointment, so I guess that follows then that you're okay with that part of uncertainty?

Chairman ISSA. Your time has expired, but the gentleman may answer.

Mr. PINCUS. Congressman, I think what we're okay with is that the part of the statute that was effective and was being administered was being described, was being fleshed out. The idea that parts of the statute that wouldn't come into effect until a director was appointed wouldn't be fleshed out until a director is appointed makes perfect sense because the business community is not now subject to them. The problem now is that the business community is placed in a very difficult situation where a lot of enforcement actions and regulations are going to be issued that businesses will, legitimate businesses will feel they have to conform with, that may turn out to be totally invalid, and they may have to then spend a lot of money to go back to the status quo because it turns out everything that's happened gets set aside by the courts.

Mr. TIERNEY. Or it may not.

Chairman ISSA. And with that, we go to the gentleman from Arizona, who has been patiently waiting, Mr.—Dr. Gosar.

Mr. GOSAR. Thank you. You know, Ambassador Gray, I would like to give you a quick moment to respond to Mr. Gerhardt as regards to his comments earlier about the constitutionality and how the process facilitated the ends are okay with the process.

Mr. GRAY. Well, I don't know how long I have.

No, I will stick with what I've already said and what Senator Lee said. If the President can just say, well, I actually think that the Senate really is lollygagging around now and ought to be in session, lunch, but they're not, the Chamber's empty, and, you know, they rejected my nominee for X position, and not by filibuster, say, but by an up or down vote by a 20 vote margin, and I don't like that, and therefore, I see a recess opportunity here, and I'm going to name this person to this agency anyway.

Now, that's not the way the Constitution is supposed to work. And there is no absolutely irreducible right to make and get nominees confirmed to I think maybe any entity except, you know, military. I want to hedge my thing on, you know, some diplomatic positions, Supreme Court, but for the average agency, I don't believe there's any irreducible minimum right that the President has to say that there's going to be a recess anytime I say there is, and

therefore, I can just override the confirmation process. I don't think that's what the Constitution means.

I think there's another point to be made here, not to belabor it, but the CFPB and the NLRB are creatures of Congress. They're your creatures. They're not creatures of the President. And if you don't want to staff them, I don't think you have to staff them. Now, in addition to them being creations of you, they are so-called independent agencies. Now I have problems with the doctrine that any agency can be independent once it's set up of the President's control, but the President takes this view, too; these are independent agencies.

They are your agencies. Not only did you create them, but you, independence meaning, you actually have the upper hand in controlling them. And if you don't want to staff them, you don't have to staff them, and you don't have to fund them.

Mr. GOSAR. So it brings me to my next point, Mr. Pincus.

Staffing, we're business people. I was a dentist before. I'm impersonating a politician now. A business, when we go through a staffing process, particularly when we have a new rule, we have to flush it out, what's right, what's wrong, and particularly when it's rushed through. I mean I wasn't part of the 111th Congress, and I see some problematic issues, particularly with both sets of appointments. Isn't getting it right what is the most important about process?

Mr. PINCUS. I think that's right, Congressman.

I think getting it right is important. I also think—you know, my mother always said, two wrongs don't make a right.

Mr. GOSAR. Thank you. Perfectly said.

Ambassador Gray, over the history of our country, who has inflicted more harm to the Constitution, constitutionalists or the average person?

Mr. GRAY. I'm not sure—who is a constitutionalist?

Mr. GOSAR. We have attorneys that claim that they follow the Constitution, and we see it inflected upon the Constitution over and over again the challenges that depart from the original intention from our Constitution. I don't see the average person making these claims, a violation of the Constitution. But I do see attorneys with constitutional backgrounds who do make those.

Mr. GRAY. Well, this is another hearing. Certainly there are many of us who think that academia is the source of a lot of wonderful theories.

Mr. GOSAR. And the President was what?

Mr. GRAY. Well, he was an academic. Often this gets translated through law clerks who get put out into the field working for judges and influence judges. I mean, this is a long conversation.

But no, the public is not guilty of this. And part of the reaction of the last election is a lot of people in the public are saying, well, wait a second. There is something out of kilter here. And what we thought about is limited government, that something has gotten out of hand. And that, I think, is a valid point to raise, and it's not the fault of the average voter in America.

Mr. GOSAR. To me, if I'm the average guy on Main Street, if we're playing basketball, this is a blatantly flagrant foul in which

you have time-out, you take a penalty, and you are excused from process, from playing the game at all. That's how bad this is.

If I could ask for you indulgence with one more quick question?

Chairman ISSA. The gentleman will be granted an additional 30 seconds, plus Mr. Gerhardt does want to comment, so we will allow additional time for that.

Mr. GOSAR. Mr. Carter, I know in regards to the NLRB, you know, prior to this with the two members on there, most of these processes in which they were they were going to go through were really noncontroversial. And now that we've had these appointments, how do you think they are going to respond? Are they going to still stay to the noncontroversial aspects of what's before them? Or are they going to go into the realm of the controversy?

Mr. CARTER. Well, let's try to deal with this empirically. When Member Peter Schaumber and Member Wilma Liebman were left as the sole two members of the National Labor Relations Board, they came upon an agreement. It was the subject of the argument and new process deal whereby they agreed not to decide any controversial cases, those cases that normally would require at least three majority votes to overturn prior board precedent. And they did so in a collegial fashion despite the fact that Member Schaumber was of the Republican Party and Ms. Liebman was a Member of the Democratic Party. Left to their own desserts, it's possible for members of the NLRB bipartisanly to proceed collegially.

With regard to the current board as it's currently composed, what they do is what they will do. But based on the January 26th report from the Associated Press quoting Chairman Pearce, who defines the agenda of the board, it is obvious that they are contemplating supplementing already controversial election regulations and attacking the docket of administrative appeals that are before the board. It appears to be a board, by his report to the press, that is going to be aggressive in pursuing its agenda.

Mr. GOSAR. Thank you.

Chairman ISSA. Mr. Gerhardt, you had a short statement to make.

Mr. GERHARDT. I very much appreciate that, Mr. Chairman. It is very kind of you.

Just a few quick points I would like to try to make in partial response to what's been said.

First, I hope we don't lose sight of the fact that I actually think that an important premise we should have here is that everybody is acting in good faith. That is to say, I assume and I actually do more than assume that everybody here, whether I agree with them or not, is acting in good faith.

I carry that same presumption with regard to Senator Lee, who was obviously very eloquent and insightful, and to all Senators and, of course, to the President. So that is my operating presumption.

The second is that I think it's important to remember just to maybe clarify in the record that recess appointments are perfectly appropriate to be made to independent agencies and for that matter have been made to Article III courts and have been upheld re-

peatedly over time. So I don't think there's any question about the constitutionality of that.

And then, last, I just want to point out that in a lot of situations, we've been hypothesizing circumstances other than those in which the President actually made these recess appointments. If we focus on the specific situation in which he made them, these pro forma sessions, in that situation, I think he's acting upon fairly strong constitutional ground. If we change the facts, we obviously might need to change our analysis. But in terms of the facts of this case, I think he has a credible ground.

Chairman ISSA. Well we're about to go to Mr. Davis.

I might only mention that in the case of the NLRB, to be functioning, you only had to do one recess appointment.

With that, we go to the gentleman from Illinois, Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman.

I want to thank the witnesses for their patience.

We keep hearing about how there is going to be a cloud—and I'm quoting—a cloud over whatever decisions the NLRB or the CFPB may make. All the same things will be true, according to some people, when rules are promulgated. We've heard that these appointees, their official acts will be void as a matter of law because again, they didn't have the authority to act.

Professor Gerhardt, you have opined that the foundations for the President's actions are sound and the appointments are not unprecedented or reckless and will withstand legal scrutiny; is that correct?

Mr. GERHARDT. That is correct, sir.

Mr. DAVIS. So then is it fair to say that in your opinion, these appointees do have authority to act because the President's appointments were lawful?

Mr. GERHARDT. That would be the case I would make, yes.

Mr. DAVIS. So if the appointments were lawful, can't we dismiss all this hype talk about these nominations creating a cloud over these agencies' decisions?

Mr. GERHARDT. Well, there, sir, I might have to actually slightly disagree with you. Here is where maybe being a law professor is a bit of a confounding thing. I actually do believe in dialog. I actually do believe in give-and-take, and I think that's a robust and important part of our democratic system.

Mr. DAVIS. And I would certainly agree with that. But isn't it a fact that all agency decisions or judicial decisions, regardless of whether or not a recess appointment had been made, are vulnerable to being challenged in court?

Mr. GERHARDT. You are saying, is it possible for anything to be challenged in court? The answer is yes. It could be challenged in court. But that doesn't mean it will be struck down.

Mr. DAVIS. In fact, would you agree that for the most major proposed regulations, judicial review of some kind is almost certain to follow?

Mr. GERHARDT. Yes, sir. It reminds me of the scene in Shakespeare where two characters come to the ocean, and one says to the other, I can summon great creatures from the deep, and the other says, yes, but will they come? So you can sue and you can litigate, but it doesn't necessarily mean that will bring it down.

Mr. DAVIS. In fact, two rules recently promulgated by the NLRB to reform election rules and require the posting of workers' rights are being challenged by the Chamber of Commerce and other business groups right now. So I really think it's sort of a false premise to say that recess appointments are going to create litigation when the litigation is likely to take place in any event, whether these are recess appointees or any other kind of appointees. Individuals still have the option to ask for judicial review.

Mr. GERHARDT. Yes, sir. I think that it is quite likely. This is an era of litigation, and litigation is oftentimes caused by another means.

Mr. DAVIS. Thank you very much.

I have no further question, Mr. Chairman. I yield back.

Chairman ISSA. The gentleman yields back.

With that, we go to the gentleman from Cleveland Ohio, a distinguished mayor in his own right, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Issa. It is good to be here with you.

I have been listening to some of the testimony from my office as well as here. And I keep hearing criticism of the President for not giving the Senate enough time to consider his nominees for the NLRB before making recess appointments.

Now, Mr. Rivkin, isn't it true that President Bush at least made two recess appointments to the board, Mr. Cowen and Mr. Bartlett, without ever nominating either of them to the Senate at all; is that true?

Mr. RIVKIN. Well, I'm not sure, Congressman Kucinich if it's true. I know NLRB is not——

Mr. KUCINICH. Well, let me assert for the record that it is true. And Mr. Pincus——

Mr. RIVKIN. Let me just say——

Mr. KUCINICH. I have to move on to Mr. Pincus. You know, you didn't give me the answer.

Mr. Pincus, as slide 10 shows—could we have the slide put up here? Thank you very much.

That slide shows President Bush's recess appointments. He made eight recess appointments to the NLRB during his presidency. Now did the Chamber of Commerce object to Mr. Bush's recess appointments that you know of?

Mr. PINCUS. I don't know, Congressman. But none of them were made in the circumstances here.

Mr. KUCINICH. Okay. So you don't know what the Chamber did; okay.

The National Labor Relations Board, Mr. Pincus, ensures protection of workplace rights for union and nonunion workers alike. Now slide six—go to slide six—shows the NLRB protects the right to form or join a union, the right to bargain for wages, benefits, the right to decent working conditions, and the right to take action with coworkers to improve working conditions.

Now, Mr. Pincus, you are here today representing the Chamber of Commerce, correct?

Mr. PINCUS. Yes.

Mr. KUCINICH. And the Chamber does represent business interests, correct?

Mr. PINCUS. Yes.

Mr. KUCINICH. And on behalf of those business interests the Chamber represents, it usually doesn't advocate for greater restrictions on company management, right?

Mr. PINCUS. I don't represent the Chamber in connection with labor issues though. That's really outside my area of expertise.

Mr. KUCINICH. But you represent the interests of company management, of CEOs at some of the most powerful companies in the country, right?

Mr. PINCUS. I don't with respect to any labor law issues.

Mr. KUCINICH. What about with respect to corporate policy?

Mr. PINCUS. Certainly, I have clients who are individuals. I've got clients who are companies.

Mr. KUCINICH. Well, let me ask you, hasn't the Chamber filed a lawsuit against the NLRB for its rule requiring employers to post a notice explaining employees' rights to unionize? Are you familiar with that?

Mr. PINCUS. I know, Congressman, that the Chamber has challenged an NLRB rule. I'm not representing it with respect to that issue. Mr. Carter is more of an expert on that than I am.

Chairman ISSA. The chair will stipulate that there is, in fact, an open case disputing the legitimacy of that.

Mr. KUCINICH. I appreciate that the chair could answer the question; Mr. Pincus couldn't. But hasn't the Chamber, Mr. Pincus, filed a lawsuit against the NLRB for its rule reforming election procedures to alleviate the delays, abuse of process, and unnecessary litigation which plagued the current system for workers who want to vote on whether to have a union?

Mr. PINCUS. I know the Chamber is one of the parties challenging that rule, yes.

Mr. KUCINICH. So, as a representative of the Chamber of Commerce, a board without a quorum that can't enforce workers' rights is somewhat ideal, isn't it?

Mr. PINCUS. I don't think that a board—that a government agency that can't act is ideal. On the other hand, our constitutional system, as Senator Lee said quite eloquently, I think anticipates there are going to be these collisions that have to get worked out. When the government had to close because there was no funding because an appropriations bill hadn't been passed, I think everyone would agree that wasn't ideal either, but it got worked out.

Mr. KUCINICH. It got worked out. But what hasn't been worked out here is the Chamber's consistent opposition to the NLRB. And frankly, the concern that I have, Mr. Chairman, is that these oppositions to the recess appointments—and what they really represent is opposition to the NLRB because the witness didn't give us any information about what they did when President Bush made the appointments.

So I thank very much to the witnesses for their participation.

I thank the chair for the opportunity to be here.

Chairman ISSA. Thank you.

Ambassador Gray, as far as you know, all of those appointments that were up I think in slide 10, these all occurred during mutually agreeable recess events?

Mr. GRAY. Yes, sir.

Chairman ISSA. So the fact is, the Senate allowed for recess appointments by its very design, along with the House?

Mr. GRAY. Absolutely. There's nothing—nothing illegal or unconstitutional about a recess appointment except in the context when there's no recess.

Chairman ISSA. And I would like to look at all five of you—and I will take a head nod—nobody here today for the whole several hours, first or second panel, objected to the power of a recess appointment; is that correct?

So there's no dispute that the President has an absolute constitutional—one would say obligation to keep the government running during recesses. And that's why the Founding Fathers gave a recess appointment authority; correct?

Mr. Gerhardt, you have been very good and I think you have been balanced in trying to answer questions, even though you somewhat disagree with some of the other panelists. You said something earlier that I focused on a little bit and that's, since the administration itself says there is litigation risk, I thought I heard you say—and maybe you want to correct that—that there wasn't because there was risk that it would be upheld.

Isn't there litigation risk? And isn't that risk potentially leading for this committee to the fact that NLRB or the Consumer Financial Protection Bureau would have laws similar to the New Steel that might have to be invalidated? Isn't that a risk? Not just a risk of litigation but a risk that their actions could leave them not valid in what they do between now and whenever the Supreme Court finally acts?

Mr. GERHARDT. I very much appreciate the question, Mr. Chairman. I don't think the fact that the OLC memo mentioned that there's litigation risk tells us anything about the merits of the case.

Chairman ISSA. Sure. And Mr. Davis, when he originally posed that—I don't think he knows the outcome. It might be—if it goes up and says, hey, they were in recess, then there's no risk to these appointments. But there may be some risk to the law from January 23rd—December 23rd. But let's just assume that the court divines that they weren't in recess on the 23rd; they were in recess on the 24th for purposes. Then nothing happens. All we have had is a lot of litigation for a period of time.

What if it doesn't happen? This committee came together to ask all of you and our first witness about what if. And I will start with Mr. Carter, and I will sort of go from right to left this time. What if, in fact, we find that these appointments—one or more of them—would be considered to be inappropriate, and we assume it would be all of them or none of them. What is the risk to the actions of the NLRB and these individuals, three individuals—both parties—and obviously the lesser actions, specifically, of the new director?

Mr. CARTER. Mr. Chairman, that's the greatest danger here is the volume of risk. The volume of risk is expansive. Unlike the situation that Congressman Davis was describing, which is, well, every bit of litigation is subject to appeal, right? I mean, so what's the difference? What we're talking about here is an agency that is acting ultra vires with the NLRB. It's not one or two of the cases that might be brought to appeal by one of the litigants. It's every case that they decide. It's every regulation that they implement.

It's every official action that they take. And those affect real people with real rights who will really be hurt.

Two examples, if I may. Let's take a situation where an employer is told by the NLRB this coming year that they have legally relocated work from one manufacturing plant to another.

Chairman ISSA. You mean, maybe to South Carolina?

Mr. CARTER. Let's say to South Carolina, sir.

Chairman ISSA. Oh, wait a second; that one got sort of dropped once the union got what they wanted. Okay. Go ahead. Continue.

Mr. CARTER. Let's say West Virginia, my home State, where we really need jobs. And the National Labor Relations Board says, you can't put a new plant there, employer. Everything you put into that re-engineering and that plant, all the people that you've hired and their livelihood that they've already taken out mortgages on and bought cars with, that's all gone. They don't have jobs. You don't have use of that plant. We're transferring that work back. But then——

Chairman ISSA. But couldn't the people of West Virginia assume that the President was inappropriate in the recess decision and just decide to ignore it? Couldn't they just ignore what the President's done since he ignored what the Senate said? I mean, isn't there a constitutional power of the House, the Senate, the Supreme Court, and maybe, just maybe the American people? I mean, I know they're not explicitly named, except I thought they had these rights, you know, life, liberty, and the pursuit of happiness. And there's nothing that has ever made me happier than a paycheck.

Mr. CARTER. Anything that this committee can do to ensure that the citizenry is free from abuse by the government, which is the purpose of the Constitution, would be extremely welcomed by any citizen so affected.

But it's not just companies with risk. It's not just employees.

Chairman ISSA. I wasn't thinking of a company ignoring it. I was thinking of those citizens not letting themselves be laid off.

Mr. CARTER. Mr. Chairman, consider the last one. And I won't trouble you anymore. But consider this hypothetical—and it's not a hypothetical. What if I'm part of a shop and my employer is abusing me and those who I work with. And I want to form a union. And I have a right to form a union. So I file a petition with the National Labor Relations Board. And the National Labor Relations Board comes in, and they hold an election, and that union is certified to be my representative, and that union begins to bargain for me. And then a Federal court says, it's unconstitutional. They can't certify you. It's an ultra vires action. I decertify that election result.

What happens to the labor strife when those employees who had been bargaining all of a sudden don't have a bargaining representative? Do you think they would put a picket line up? I think in my State they would. What happens to commerce? What happens when that strike starts? And what happens to that employer? What happens to products? Real people, real rights, real ramifications, really dangerous, what these recess appointments have done to our labor relations system in this country.

Chairman ISSA. Thank you.

Mr. Rivkin.

Mr. RIVKIN. Thank you, Mr. Chairman.

Two points for you very briefly.

First of all, with respect to Professor Gerhardt, I think that the fact that OLC—and Mr. Gray made this point earlier—mentions, albeit in a fairly mild language the possibility of a litigation risk, is, A, unprecedented and quite probative. And second, picking up on an excellent point made by Mr. Carter is a fundamental difference, quite aside from sort of a specific economic footprint is a fundamental difference from a constitutional perspective between challenging a specific decision and challenging the legitimacy of a whole subset of a tenure of a given agency. I think it's far more destructive not only because of all the things that would come down, but frankly, it does not inspire, especially at a time when so many Americans are questioning some of the behavior of all branches of our government to find that a given agency or two agencies have been acting unconstitutionally for a couple of years is a very bad thing in terms of maintaining the confidence of the people in the government, quite aside from all of the cost of businesses and commerce involved.

Chairman ISSA. Thank you.

Mr. Gerhardt, and in the narrow question of, if it is ruled that these are not, would you like to speak to the consequences?

Mr. GERHARDT. Sure. And I appreciate that.

Assuming that that were to occur, there are a couple of things. One is, I think you still may have a mootness problem. That is to say, so much has already transpired; to what extent can any of that be undone ever by a court? And then I think the second thing I would just add to all of that is just to reiterate——

Chairman ISSA. But in a light of New Steel, they did unring the bell, didn't they?

Mr. GERHARDT. No. I understand that.

Chairman ISSA. So a small injustice, they can unring, but thousands of them you think the court wouldn't do it? Wouldn't that fly in the face of Miranda? They unrung a lot of bells with Miranda, didn't they?

Mr. GERHARDT. They unrung a lot of bells with that. But we're talking—so in a way, we can't have our cake and eat it, too, here.

Chairman ISSA. But isn't the Court—the Supreme Court, specifically, which we suspect this will get to them—aren't they bound not to weigh competitive harm but in fact to weigh the constitutional issue? Did they have the ability to—I mean, look, Dred Scott could have been kept because it has been around for a long time, and there was a lot of harm to reversing it, wasn't there?

Mr. GERHARDT. Well, the reversal, of course, occurred through a constitutional amendment after a bloody civil war. So that's about as consequential——

Chairman ISSA. So your assumption would be that, you know, probably that that is one of those examples where the court would just say, well, we're unringing the bell, but we are granting no relief to the injured?

Mr. GERHARDT. I am saying that I think that that is one of the justiciability problems here.

Chairman ISSA. Mr. Pincus, I'm sure you concur. Just give us your short concurrence here.

Mr. PINCUS. I was going to say I—let me start with what the courts will do. I think it's quite clear that as long as the issue is preserved by an individual and the thousands and thousands of individuals and companies that have been harmed and their individual cases, they're all going to get relief. You know, in New Process Steel, I think there were 500 decisions that were overturned. And I don't there is any basis—and in fact, I cite some decisions in my testimony.

Chairman ISSA. So this is sort of a classic Chamber question of, the Chamber essentially has to find a way to form a class to make sure everybody's onboard; otherwise their failure to object could lead them to live with the decision?

Mr. PINCUS. I think that there's a theoretical risk of that. But I think this issue has gotten so much attention that I don't think there's any company that is going to be subject to either an order of the NLRB or an enforcement action or other action by the bureau that is not going to know to have a paragraph in it's complaint saying, and by the way, the director or the two members were appointed unconstitutionally. I think it would be probably close to——

Chairman ISSA. Three members.

Mr. PINCUS. Three members, yes.

So I think there will be relief. And I think that's what makes the case, the situation very different from Mr. Davis'. And sure, there are a lot of judicial review of government actions. The government wins almost all of those cases. And they are all, of course, case-specific. What we are talking about here are thousands, maybe, certainly hundreds of government decisions that will all be set aside at once. And that is obviously a big waste, especially, as I said in my testimony, when some of them are going to involve fraudsters, who could have been prosecuted by the preappointment bureau or by the FTC and who will now go fee or have to go back to square one. There is a lot of harm that is going to happen I think and a lot of wasted government resources, unfortunately.

Chairman ISSA. Ambassador, this may not be—the cost may not be right up your alley. But do you want to take a little crack at it?

Mr. GRAY. Yes, sir. Well, I did put it in my prepared testimony, which also deals with New Process, which was where they didn't have a quorum. But in *Buckley* v. *Valeo*—and not to throw a monkey wrench into this—but there were questions about the makeup of the FTC because of the appointments clause. And I will just read you what the court said: It is also our view that the commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the commission's administrative actions and determinations to this date. So *Buckley* v. *Valeo,* to the extent that it's a precedent—and Andy is the former SG—that looks like it may cast some doubt on the applicability of your process.

Chairman ISSA. Well, I'm not going to allow any further follow up on this. I think for purposes of the record, we've been pretty clear.

I'm going to ask you one final one, and this is one that you may all weigh in on as constitutional scholars and only in that way.

Historically, the court has held very little—they've respected directions from the Congress when it came in the form of a law. They have not ordinarily given standing. And Senator Lee said that in his testimony in the Q&A. But in the case in which the House of Representatives has not granted the Senate the right to adjourn, does, in your opinion, the House of Representatives have a separate action, separate from law but as a body of government constitutionally specifically given a right/obligation, do you believe that we have a potential standing?

Mr. GRAY. I will just say, first, I'm skeptical. But I don't think it matters. There is going to be a challenge. There is going to be a ripe case that comes up. You will file amicus briefs, and what you say will be taken very, very seriously.

Mr. RIVKIN. I think that you do have a standing to indicate the constitutional authority under section 5, clause 4. And as much as I respect my good friend and former boss, Mr. Gray, I think that it is essential for you to speak with your own independent voice for a simple reason that, if you look at the separation of powers issues over the 200-plus years, and only see analysis, the behavior of each branch, at each particular point is given tremendous weight. It is your constitutional interests to vindicate. The fact that private plaintiffs may well strike down all of the regulatory emanations from NLRB and CFPB does not substitute for at least trying, if you fail in motion practice, the motion to dismiss because of lack of standing, and I don't think you will, it's still worth trying to at least demonstrate that you take your constitutional authority seriously.

Chairman ISSA. Mr. Carter.

And Mr. Gerhardt, I am coming to you as the last word.

Mr. CARTER. I have been persuaded by both of these fine gentlemen. My only word of caution, if it's of any value at all is, I was very, very convinced by comments from the Congressman regard the inappropriate invasion of the House's jurisdiction as well as the Senate's when the chief executive sought to define what was adjournment, what was recess. That is the balance that I would encourage the House to consider, because ultimately, what this is, is a separation of powers argument, where the chief executive has plainly infringed upon the legislative branch's authority.

Chairman ISSA. Mr. Pincus, you have the second last word. Briefly.

Mr. PINCUS. I agree with Ambassador Gray. I would add one other caution, which is, I think—it's inactions between the branches, or their Representatives, that the courts are most likely to invoke the political question doctrine. And I think that's not likely to happen in the kind of lawsuit that we're talking about, where there's a private party who's the plaintiff and the House or Members of the House and the Senate appear as amici.

Chairman ISSA. Mr. Gerhardt, I am thoroughly looking forward to seeing that because on this, I don't think the question is the same as the ones that you have been asked up until now.

Mr. GERHARDT. Right. And it will not surprise you, therefore, Mr. Chairman, that I probably agree with Ambassador Gray on this one. I think it's not likely. I think the House would have inde-

pendent standing, but that may just be a technical matter. There's no question at all that the House would be heard on that.

Chairman ISSA. What do you think about Mr. Rivkin saying, but you ought to try?

Mr. GERHARDT. Well, you could try. But I think what I think we see from the standing cases is that it's not likely that the court is going to recognize some independent standing on the part of the House here for the reasons that I think Mr. Pincus suggests and I think for reasons we've seen in other cases in the past. In other cases where recess appointments have been challenged, the Pocket Veto Case, for example, we don't see the House given independent standing in that circumstance.

Chairman ISSA. But the executive branch often asserts independent standing——

Mr. RIVKIN. Just a second—a point, as litigators, we all know there is enormous difference in participating as amicus and participating as a party. And even if you don't gain independent standing, I'm sure Professor Gerhardt would agree, you would gain standing, piggyback standing because it is not subject to the same constitutional analysis. It is important for you to speak in as robust a voice. And with all due respect, filing amici briefs is not the same thing.

Chairman ISSA. Well, I thank you all for your opinions. As chair, the challenge I have is the question we asked you all here for, which is the potential near irreparable harm to individuals in the execution of government, the cost to government in dollars probably is de minimis, even if it's in the millions, compared to the human lives of businesses and others around the country who will assume one thing and, if it's reversed, deal years later with a very different outcome. So it is what this committee I think will continue to try to evaluate. I would ask only two things and that is, as you look back on today's statements, questions, and answers, we'll hold the record open for 5 additional days and longer, if I get a request from any of you, to revise and extend or give us any additional information you think would help us in our deliberative process. Seeing only shaking heads positive, we stand adjourned.

And, by the way, that's adjourned, not recessed.

[Whereupon, at 1:25 p.m., the committee was adjourned.]

[The prepared statement of Hon. Gerald E. Connolly follows:]

Statement Gerald E. Connolly
Hearing on Recess Appointments
February 1st, 2012

Republicans in the Senate filibustered nominees to agencies including but not limited to the Consumer Financial Protection Bureau and National Labor Relations Board for *years*. Such obstruction of public law, and transparent attempts to cripple the agencies established by our nation's laws, truly are unprecedented. Perhaps, therefore, any action President Obama would take to keep our government working also is unprecedented, because it is a direct result of Republican obstruction.

Senator McConnell, Speaker Boehner, and the Republican leadership have not hidden their objective—complete inaction by federal agencies with a mission to which Republicans object. An agency to protect consumers from predatory lenders and reckless Wall Street speculators? Republicans will stop at nothing to prevent that agency from operating as established by the Dodd-Frank Wall Street Reform Act. An agency to protect American workers? Republicans will filibuster any National Labor Relations Board appointee because they would prefer to leave the Board with so few members that it can't even have a quorum and therefore cannot conduct any business. Constitutional scholar Thomas Mann noted that Republican opposition to *any* Consume Financial Protection Bureau appointee constitutes "a modern-day form of nullification." Never before has a major American political party made nihilism a central pillar of its philosophy.

Ironically, President Obama has made far fewer recess appointments than previous Presidents. Recess appointments in single terms of the H.W. Bush, Clinton, and G.W. Bush were 74, 139, and 171, respectively. By comparison, President Obama has made a paltry 28 recess appointments. There is no question that the founders were serious about Senatorial confirmation of major political appointees, and Presidents should as a matter of Constitutional fidelity make appointments through regular order to permit consideration by the Senate. However, the founders clearly did not anticipate the emergence of a major party which seems to have no respect for the rule of law and will use any tactics, guerilla or otherwise, to block implementation of public law and cripple federal agencies established under public law.

Because Republicans have prioritized political gain over execution of the law, sadly President Obama seems to have had little choice but to make recess appointments to the Consumer Financial Protection Bureau. It is imperative that this agency be able to carry out its mission. As the U.S. Conference of Mayors stated in a letter to the Senate opposing the CFPB filibuster, "As long as these largely unregulated sectors of the financial services industry are allowed to operate without accountability, we will continue to see empty homes and shuttered stores in needlessly impoverished neighborhoods."

Sadly, scoring political points remains a higher priority for some than restoring our housing market, cracking down on predatory lenders, or protecting the rights of American workers. Their obstruction has compromised not only the health of our economy but the integrity of our Constitutional system by leaving the President no choice but to make recess appointments to keep agencies open and carry out the laws of our nation.

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