Testimony of

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Hearing on, "Unchartered Territory: What Are the Consequences of President Obama's Unprecedented 'Recess' Appointments?"

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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.

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