Written Statement

Oversight Hearing on

"Uncharted Territory: What are the Consequences of

President Obama's Unprecedented 'Recess' Appointments?"

Before the

Committee on Oversight and Government Reform,

United States House of Representatives

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Rayburn House Office Building, Room 2154, 9:30 a.m.

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.

DAVID B. RIVKIN, JR.

David B. Rivkin, Jr., is a partner in the Washington office of Baker Hostetler LLP and Co-Chairs the Firm's Appellate and Major Motions practice. He also is a Co-Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies, a Visiting Fellow at the Center for National Interest, and a Contributing Editor of the National Review magazine.

Mr. Rivkin specializes in regulatory – *e.g.*, energy and environmental matters, export controls, Foreign Corrupt Practices Act, sanctions -- and appellate litigation work, with a particular emphasis on complex constitutional, international law and public policy issues. He is a recipient of numerous academic and professional awards, including Phi Alpha Theta (1981), U.S. Naval Proceedings annual Alfred Thayer Mahan Award for the best maritime affairs article (1984), and the Burton Award for Legal Achievement (2011).

Before returning to the private sector in 1993, Mr. Rivkin served in a variety of legal and policy positions in the Reagan and George H. W. Bush Administrations, including stints at the White House Counsel's office, Office of the Vice President and the Departments of Justice and Energy. While in the government, he handled a variety of national security and domestic issues, including intelligence oversight, export controls, environmental and energy policy, sanctions, trade and constitutional issues. Prior to embarking on a legal career, he served during the 1970s and 1980s as a defense and foreign policy analyst, focusing on Soviet affairs, arms control, naval strategy and NATO-related issues. Mr. Rivkin holds a J.D. degree from Columbia University Law School, a Master's degree in Soviet Affairs from Georgetown University, and a Bachelor of Science degree from the Georgetown University's School of Foreign Service.

Mr. Rivkin is a member of the District of Columbia Bar and the Council on Foreign Relations. He is a prolific writer and commentator and, over the years, has published numerous papers, articles, op eds, book reviews, and book chapters on a variety of international, legal, constitutional, defense, arms control, foreign policy, environmental and energy issues for various newspapers and magazines, including the *Wall Street Journal*, *Washington Post*, *New York Times*, *Washington Times*, *Los Angeles Times*, *Foreign Affairs*, *Foreign Policy*, *National Interest*, *National Review*, *Policy Review*, *Harvard Journal of Law & Policy*, *American University Law Review*, *Administrative Law Journal*, *University of Pennsylvania Law Review*, and *University of Chicago Journal of International Law*.

Mr. Rivkin has written widely about various aspects of the international law of armed conflict, including ***jus in bello***, treatment of unlawful combatants and ***jus ad bellum***-related matters. He has filed *amicus* briefs in several leading post-September 11 national security cases and has been a frequent commentator and guest on TV and radio shows, including CNN, NBC and MSNBC, CBS, ABC, FOX News, NPR, PBS, BBC, Canadian Broadcasting Corporation, and numerous Australian, French, German and Swiss TV stations.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: David B. Rivkin, Jr.

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.
Signature: David B Rivkin

Date: January 31, 2012