Testimony Before the House Committee on Oversight and Government Reform
President Obama's Unprecedented "Recess" Appointments
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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

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[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

[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.