Written Statement

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Executive Overreach:
The President's Unprecedented "Recess" Appointments

Committee on the Judiciary
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Chairman Smith, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the constitutional concerns raised by the recent recess appointments by President Barack Obama.

The recent recess appointment of Richard Cordray as Director of the Consumer Financial Protection Bureau and three individuals to the National Labor Relations Board[1] has triggered an intense debate over the constitutionality and legitimacy of recess appointments. However, this is only the latest in a long line of such controversies. As you know, recess appointments have been controversial for much of our history, though (as I will explain) the meaning and use of recess appointments has changed dramatically over two centuries.

At the outset, I wish to be clear that I believe Mr. Cordray is a well-qualified nominee and I supported his confirmation. I have also been a critic of congressional practices and rules used to block nominees such as blue slipping.[2] However, my views of the merits of the Cordray appointment or national politics are immaterial. Rather this question concerns the balance of constitutional power between the legislative and executive branches. In my opinion, these appointments circumvent the delicate balance of power in our Constitution and radically distort the purpose of the Recess Appointments Clause. Moreover, these latest appointments are stand

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1 I will refer to these appointments as "the Cordray appointment" for the sake of brevity and since it was Cordray appointment that was the subject of such express opposition before the claimed recess period.

2 *See* Jonathan Turley, *Seeing Red Over Blue Slipping*, L.A. Times, May 16, 2001, http://articles.latimes.com/2001/may/16/local/me-64023. Blue slipping is a practice that has a negative impact on the entire confirmation process and invites abuse by Senators. It is also used by presidents to reinforce claims that recess appointments are justified as countermeasures for such undemocratic procedures.

outs among rather ignoble company – they openly defy congressional opposition and circumvent congressional authority. The Cordray and other appointments constitute an abuse of power and invite future presidents to engage in the same dysfunctional game of brinksmanship.

As noted below, the Framers' original concerns that spawned the Recess Appointments Clause have largely been ameliorated by longer congressional sessions. Now, such appointments are often made out of political expedience but achieve such short-term political goals at a heavy cost to the constitutional system. While I have strong reservations concerning the constitutionality of these appointments, I have even stronger objections to the appointments as a matter of policy and practice. There is a good-faith debate over the meaning of Article II, Section 2 of the U.S. Constitution. Yet I do not see the positive precedent set by appointments during a recess of less than three days – a virtual blink of Congress used to circumvent the confirmation process. Reducing the constitutional process to a type of blinking contest between the branches only degrades and destabilizes a system upon which all of the branches – and the American people – depend.

Throughout history, the interpretation of this Recess Appointments Clause has evolved to the increasing benefit of the Executive Branch – allowing the Clause to be used to circumvent congressional opposition. Indeed, the debate today is generally confined to the question of what technically constitutes a "recess" for the purposes of the Clause, treating as settled the question of whether the Clause can be used to fill a position that the Senate has chosen to leave vacant. In my view, the Clause is now routinely used not only for an unintended purpose but a purpose that is inimical to core values in our constitutional system. I have long favored the original interpretation of the Clause: that it applies only to vacancies occurring during a recess. This interpretation is truer to the Constitution and would avoid many of the controversies of modern times. I readily admit that I am in the minority on that view, but I discuss the original and later interpretations to demonstrate how far we have moved from the plain meaning of the Clause. Frankly, I believe that our system would be far better off under the original meaning of the Clause, which would have avoided many of the controversies of modern times.

Putting aside my preference for original interpretation, I view the latest appointments as radically divorced from both the language and the logic of the Clause, even including the broader interpretations that have governed recess appointments for much of our history. It has long been accepted that presidents can make recess appointments to vacancies that existed before the recess began, but it has not been accepted that presidents can properly make those appointments during brief breaks of less than three days – a time period derived from the Adjournments Clause. The latest appointments can only be justified by discarding both the plain meaning and the long history behind this Clause. Worse still, the appointments directly contradict the values and purpose of the shared powers under the first two articles. In the end, the President's contortion of the meaning of the Recess Appointments Clause does not improve our system, but introduces the very scourge that the Framers sought to avoid: the concentration of power in one person over federal offices.

One final point before looking at the language and history behind this Clause. There is a common habit of referring to our current "extraordinary" political divisions as justifying extraordinary measures. However, there is nothing extraordinary about our current politics. If

anything, our current political discourse would have been viewed as relatively tame by the Framers. The Framers knew something about rabid politics and its expression in legislative and executive measures. The division between the Jeffersonians and the Federalists was quite literally lethal with both sides seeking to arrest or even kill their opponents. Thomas Jefferson referred to his Federalist opponents as "the reign of the witches."[3] We should not use our dysfunctional political divisions to justify taking dysfunctional constitutional measures. Regardless of one's interpretation of the language and history of this Clause, there should be consensus -- certainly in Congress -- that these latest appointments do both the Constitution and our country a disservice.

I. THE LANGUAGE OF THE RECESS APPOINTMENTS CLAUSE.

The most obvious place to start (and ideally end) constitutional analysis is with the text of the Constitution. Article II, Section 2, cl. 3 of the U.S. Constitution states:

> 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.

The meaning of the words "that may happen during the Recess of the Senate" is the heart of the controversy. On their face, the words imply that the vacancies themselves should arise during the recess period, as opposed to existing as previously vacant positions that the Senate chose not to fill with a confirmation vote. The words "may happen during the Recess" are clear and plain in their meaning. Most people would conclude that something "happens" during a period by occurring within the specified period. Merriam-Webster defines "happens" as "to come into being or occur as an event, process, or result." The event referenced in the Clause is the recess and the thing that comes into being within that event is the vacancy.

The text preceding this Clause is also relevant and reinforces this plain meaning. The Recess Appointments Clause follows the Appointments Clause, which describes the confirmation process and provides shared powers in the appointment of high-ranking officials. Article II, Section 2, cl. 2 of the United States Constitution states:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In the Appointments Clause, the Framers state twice that such appointments could only

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[3] In his letter to John Taylor on June 4, 1798, Jefferson counseled "a little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles."

be made with "the Advice and Consent of the Senate." It is a critical check and balance provision that the two branches must agree on who should sit on federal courts and in federal offices. Thus, the Recess Appointments Clause is written as an exception to this general rule in the event that vacancies "happen during the Recess of the Senate." Notably, there is no suggestion that it is intended to allow an alternative to the confirmation process to be used on an opportunistic basis or in retaliation for a nomination that was not confirmed. To the contrary, the values of shared power stated repeatedly in the preceding clause indicate that those are the defining values for the interpretation of the clause. A president must convince Congress on the merits of a confirmation and Congress may withhold its consent for good reason, bad reason, or no reason at all. That is the nature of a shared power of nomination and confirmation.

Even if one dispenses with the plain meaning of the Clause, the language at a minimum closely tethers the meaning to the inability to fill a position during a recess. What it does not indicate or support is the idea that the recess bears the same meaning as it does in elementary school: a time to play outside of the usual rules.[4] The language states that the Clause is there for appointments that cannot be addressed by Congress due to its absence. Unfortunately, the language was adopted in the Constitutional Convention without debate – denying us a contemporary record on the intent of the Framers at that time. 2 The Records of the Federal Convention of 1787, at 533, 540 (Max Farrand ed., rev. ed. 1966). Thus, given the disagreement over the plain meaning, we can turn to the early understanding and interpretation of the Recess Appointment Clause.

II. THE ORIGINAL MEANING AND THE EARLY INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE.

As we have seen, the most natural reading of the Recess Appointments Clause would favor the view that it was intended to address vacancies that occur during a recess. This is not to say that such an eventuality was viewed as unlikely or uncommon. To the contrary, it was anticipated that the Clause would be used with some regularity because, during this period, Congress was commonly in recess for much of the year. Members had to travel far distances on horseback or carriage, often along dirt roads to meet. It was not uncommon, therefore, for a recess to last six or even nine months. During those years, critical federal positions such as the Chief Justice of the Supreme Court would have to remain vacant absent the power to temporarily fill the positions until Congress returned.

The historical context of the Clause is lost in much of the modern debates over its meaning. Indeed, it is often suggested the Clause would become largely meaningless were it limited to vacancies that occur during a recess or even if limited to more substantial recesses. Since the vast majority of modern vacancies "happen" before a recess, it would be rare to have a valid recess appointment. However, this complaint misses the point: the diminished importance of the Clause is caused by changes to Congress' schedule, not to the original constitutional function of the Clause. At the time it was drafted and for much of our history, such recess vacancies were indeed quite common with Congress out of session for many months at a time.

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[4] Jonathan Turley, *Recess Appointments and Cordray Controversy*, USA Today, February 15, 2012.

Presidents Jackson, Taylor, and Lincoln alone made hundreds of recess appointments during their terms out of necessity with Congress out of town. These included appointments to the Supreme Court, which was smaller in size than it is today – making vacancies more significant in their impact. This is not to say that some of these appointments were not controversial, but the controversy often turned on the fact that the President appointed someone who did not have the support of most members.

This more limited interpretation is supported by early defenses and descriptions of the Clause. When various leaders at the time objected to the dangers of a president making unilateral appointments, even on a temporary basis, Alexander Hamilton and other advocates emphasized that the Clause was a limited precaution to handle vacancies. In *The Federalist Papers*, Alexander Hamilton referred to the recess appointment power as "*nothing more* than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (Alexander Hamilton) (emphasis added). There was never a suggestion that the confirmation process was "inadequate" due to congressional opposition or delay of a preexisting vacancy. Rather, the inadequacy referenced the inability of a vacancy to be filled. Hamilton went on to stress that the Clause was designed in recognition that Congress could not be expected to remain in session continually:

> "The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of offices; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause [the Recess Appointments Clause] is evidently intended to authorise the President *singly* to make temporary appointments . . . ." *Id.*

Hamilton again referenced the limited recess appointments power as occurring only when the joint power over federal offices shared with the Senate cannot be practically realized. This meaning was reaffirmed in 1799 when Hamilton was asked by the Secretary of War about the meaning of the Clause. Hamilton, then serving as Major General of the Army, strongly contested any claim that a recess appointment could be used to fill a preexisting vacancy: "[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate."

During the North Carolina ratification debate, Archibald Maclaine also rose to address concerns over the use of the Clause to circumvent Congress. In his statement, he referred to the fears of a president using the Clause to make unilateral appointments. He assured his colleagues that the president is given this limited authority simply because he is the only official who does not go into recess but rather remains active throughout his term:

> It has been objected . . . that the power of appointing officers was something like a monarchical power. Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments . . . This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for,

> though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences.

Note the description of the context for such exigencies. Maclaine emphasized that the Senate would simply not be available "to advise [the President] in the appointment of officers" because it would sit only "from time to time."[5] Clearly a vacancy that preexisted a recess would have allowed for such advice from the Senate, including advise that a nominee is opposed by Senators or unlikely to receive sufficient votes. Likewise, the use of a brief interruption of less than three days would not reflect the obvious purpose of the Clause to avoid the "public inconveniences" of a position going months without an official. The "monarchical power" described by critics is precisely the power to use the Clause to circumvent opposition in Congress – the very use to which it is often put in modern appointments, including the Cordray nomination.

The earliest interpretation by the Executive Branch followed this narrow view of the Clause. In 1792, Thomas Jefferson (then Secretary of Foreign Affairs) raised the meaning of the Clause with Edmund Randolph, the first Attorney General and one of the most influential members of the Constitutional Convention (and a member of the important Committee on Detail). Randolph, uniquely qualified to answer the question as a Framer, came down squarely on the side of the plain meaning of the Clause - that it applies only to vacancies arising during a recess. Unlike modern interpretations (including the recent opinion of the Office of Legal Counsel on the Cordray appointment), Randolph's interpretation ran against his own interest and that of the Administration in which he served. Jefferson wanted to know if a recess appointment could be used to install the new Chief Coiner of the Mint. Since this was a new position, Jefferson asked if the position could be viewed as a vacancy arising during a recess. After all, no nomination had been made before the recess. Randolph, however, displayed his characteristic legal acumen and independence. Randolph demurred and said that the vacancy did not fit the extremely narrow meaning and purpose of the Clause. He posited that the vacancy "happened" not during the recess but when the position was created. To use the Recess Appointment Clause, he insisted, would violate the "spirit of the Constitution." Moreover, Randolph warned that the Recess Appointments Clause had to be "interpreted strictly" because it represented "an exception to the general participation of the Senate." I have always found Hamilton's and Randolph's interpretation to be the most faithful to the language and history of the Clause as well as to the structure and the integrity of the Constitution.

III. LATER INTERPRETATIONS AND APPLICATIONS OF THE RECESS APPOINTMENTS CLAUSE

For much of our history, hundreds of officials were given recess appointments by presidents from George Washington to Abraham Lincoln out of true necessity. This included

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[5] Other references to the clause were quite limited and often only restated the terminology of the Clause. *See, e.g.*, 2 Elliott's Debates 513 (statement of Thomas M'Kean) (Dec. 11, 1787) ("Nor need the Senate be under any necessity of sitting constantly, as has been alleged; for there is an express provision made to enable the President to fill up all Vacancies that may happen during their recess . . . . ")

appointments to the Judiciary, where lifetime tenure is a core guarantee of the independence of judicial review. Ironically, some of these appointments proved the wisdom of requiring confirmation. For example, George Washington gave a recess appointment in 1795 to John Rutledge of South Carolina to serve as Chief Justice of the Supreme Court. Rutledge was himself a member of the Constitutional Convention and chaired the important Committee on Detail. He was a successful lawyer and a central leader of the Revolution in South Carolina. However, he was later described by South Carolinian members as prone to "mad frollicks" and "frequently so much deranged, as to be in a great measure deprived of his senses." Rutledge tried repeatedly to drown himself in various rivers before finally resigning within a year of his appointment. Had Rutledge been subject to the confirmation process, his "mad frollicks" may have been addressed. Yet, the appointment fit the standard set by Edward Randolph (who ironically served with Rutledge as a member of the Committee of Detail and a framer of the Constitution). During a long recess of Congress, U.S. Supreme Court Chief Justice John Jay resigned on June 28, 1795 to assume the post of Governor of New York (a post that he ran for while still sitting on the bench). With Congress out of session, Washington appointed Rutledge as the second Chief Justice of the United States on June 30, 1795. Despite disasters like the Rutledge recess appointment, the practice continued out of necessity due to the long congressional recesses.

Almost four decades after the adoption of the Constitution, a more liberal interpretation of the Clause was put forward by Attorney General William Wirt – an interpretation that not only failed to mention the view of the first attorney general but dismissed the statements of contemporaries on its meaning. Wirt announced that he would interpret the Clause to mean that recess appointments could be made for any vacancies that existed during the Recess as opposed to occurring during the Recess. While acknowledging that the "opposite construction is, perhaps, more strictly consonant with the mere letter" of the Clause, he insisted that the more liberal interpretation was in keeping with the Clause's "spirit, reason, and purpose." It was, in my view, an opportunistic interpretation by Wirt – an interpretation eagerly embraced by later presidents desiring a broader range of recess appointments. Notably, however, (as will be discussed below) the recent OLC opinion goes beyond even the Wirt interpretation.

Wirt's interpretation was founded on the overriding view that the purpose of the Constitution was to avoid vacancies. "The substantial purpose of the Constitution," he said, "was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed."[6] What is missing from this analysis is the countervailing purpose of the Constitution to compel both branches to work together in filling these positions – the substantial purpose of the preceding Appointments Clause.

Wirt converted the words "as may happen to occur during the Recess" in the Clause to "as may happen *to exist* during the Recess." Vacancies could "happen to exist" for a number of reasons, including the Senate's opposition to the candidate or a president's gaming the system for a recess appointment. In rephrasing the Constitution, Wirt made the existence of a vacancy the sole and outcome-determinative consideration, stating that he found it "highly desirable to avoid a construction" that would produce the "pernicious" and "ruinous" result of allowing a

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[6] 1 Op. A.G. at 632.

vacancy to continue through a recess. To reinforce his view, Wirt hypothesized a variety of exigent circumstances:

> "It may arise from various other causes: the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions: a sudden and destructive pestilence, disabling or destroying a quorum of that body; such an invasion of the enemy as renders their reassemblage elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the President in the last hour of their session, and inadvertently rising before a renomination can be made."

The parade of horribles offered by Wirt only reinforces the view that the motivating underlying the Clause (and his broad interpretation of it) are not as relevant to the modern Congress. All of these examples presuppose the type of lengthy recess that existed at the time with months of inactivity. Moreover, Wirt also reflects the problem with delays in notification of such things as the death of an official in a far off part of the country – a death which would today be almost immediately known. Congress has even prepared for disaster like the loss of the capital city, let alone the Capitol building.

The real motivating concern of Wirt's interpretation was loosening the grip of Congress over federal appointments. At issue was the desire to fill a position of a Navy agent in New York, which became open during the Senate term and remained open into the intersession recess. It did not happen to be caused by any of the occurrences listed by Wirt and there is no indication that it could not have been addressed during the regular session, as it was known that the previous appointment would expire during the session. It was a poor choice for establishing a sweeping interpretation, but Wirt did his best:

> "If we interpret the word 'happen' as being merely equivalent to "happen to exist," (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished."

It is a prophetic choice of words: the use of the power to address "all vacancies . . . from any casualty." The common "casualty" in controversial appointments like Cordray's is the occurrence of congressional opposition to confirmation. The "casualty" is the very right of advice and consent created in the preceding Appointments Clause. Accordingly, it is not surprising that recess appointments under the Wirt interpretation included flagrant efforts to circumvent Congress during periods of political division – with higher numbers of such appointments during such periods. President William Clinton made 139 recess appointments while President George Bush made 171 such appointments. Once the occurrence of the vacancy was decoupled from the period of the recess, controversies mounted over the circumvention of Congress. Indeed, many of these controversies closely resemble the very hypotheticals put forward by opponents before ratification – and denied by Framers as the function of the Clause.

There were many who disagreed with Wirt's opportunistic interpretation. However, it was Congress that undermined its own institutional authority. While (as I discuss below) Congress has periodically moved to restrict recess appointments, the Justice Department argued that the failure to aggressively oppose the Wirt interpretation meant that Congress had accepted it. This perceived passivity was then cited for increasingly liberal interpretations of the Clause. By 1862, Attorney General Edward Bates was able to advise Lincoln that there was no longer any debate over his filling preexisting vacancies since the matter "is settled . . . as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." A few judges have also relied on historical practice to justify the Wirt interpretation as a "settled" question, though the Supreme Court has never ruled on the controversy.[7] In *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005), the Eleventh Circuit not only started its analysis with a heavy presumption that a president's actions are constitutional (because he took an oath to uphold the Constitution),[8] but (after a rather cursory treatment of the language and history of the Clause) emphasized that [h]istory unites with our reading to support our conclusion."[9] The dissenting judge in that case, however, correctly dismissed the use of historical practice to supplant the plain meaning of the text. *Id.* 1228 n.2 ("the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.").

Bates' reliance on historical practice is a common defense of the broad view of the Clause. Such historical practice arguments are, in my view, a poor substitute for constitutional analysis. The mere fact that Congress has failed to protect its powers under the Constitution does not change that document's meaning any more than a long history of appointing officials without Senate approval during sessions would constructively change the meaning of the Appointments Clause. These arguments often sound like a form of constitutional adverse possession, where presidents can now claim constitutional territory left unclaimed or undefended by Congress. Such views would leave the Constitution dependent on the historically unreliable priorities and actions of officials in both the Executive and Legislative branches. James Madison sought to create a system that recognized the often flawed nature of mankind. He famously warned: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." The fact that presidents have historically gotten away with abusing recess appointments is not a compelling basis for establishing the meaning of this Clause.

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[7] *See also Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 n. 13 (Ct. Int'l Trade 2002).

[8] Some courts adopt what could be viewed as a blind eye to the obvious gaming that occurs in these disputes, noting that such use of presidential power "cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies." *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962). One only has to recall Madison's admonition of "if men were angels" (discussed below) to refute such assumptions.

[9] *See also Nippon Steel Corp.*, 239 F. Supp. 2d at 1374 n. 13.

With the effective elimination of the occurrence language from the Clause, later interpretations struggled with the question of what constituted a "session." On its face, a session refers simply to the period between the reconvening of Congress (after a prior *sine die* adjournment[10]) and the next *sine die* adjournment. However, the reconstruction of the Clause produced considerable gaming of the schedule and terminology as both branches struggled to assert their authority over federal offices. Once again, the most obvious meaning of recess - including only *intersession* recesses between the first and second sessions of Congress - soon became too restrictive for political advantage. In my opinion, intersession recesses were clearly the type of recess complicated by the drafters. After all, *intrasession* recesses are often short and the necessity of recess appointments cited by people like Hamilton are absent in such brief breaks. Indeed, early commentary seemed to refer to the intersession recess of Congress. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833) ("There was but one of two courses to be adopted [at the Founding]; either, that the Senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject.").

Yet, as political divisions mounted in modern times, presidents began to claim that intrasession recesses are encompassed by the Clause. This began with President Andrew Johnson and has continued to this day.[11] Between 2001 and 2007, for example, President George Bush made a total of 171 recess appointments. Of those, an astonishing 141 were made during intrasession recesses averaging only twenty-five days.[12] The result was to reduce the debate to how long of a recess is needed to invoke the power of recess appointments.

Intrasession appointments, however, remain constitutionally dubious to many academics and jurists. Indeed, this question came up in the challenge to the appointment of Judge William H. Pryor in 2004 when the Eleventh Circuit found that the recess appointment was valid.[13] Pryor was given an intrasession appointment on February 20, 2004 during an eleven-day recess. Associate Justice John Paul Stevens wrote a relatively rare concurrence to the denial of certiorari in which he noted that the Pryor controversy "raises significant constitutional questions regarding the President's intrasession appointment." *Evans v. Stephens*, 544 U.S. 942, 942-43 (2005) (Stevens, J., respecting denial of certiorari). While he agreed that certiorari was not appropriate in the case, he cautioned that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits." *Id.*

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[10] *Sine die* comes from the Latin "without day," indicating adjournment without a further meeting or hearing.

[11] This practice has been supported by a few courts, which reviewed intrasession appointments. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1221-22, 1227 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 117 (C.C.N.D. Ga. 1880).

[12] Congressional Research Service, *Recess Appointments Made By President George W. Bush , January 20, 2001 – October 31, 2008*, at 1-17 (2008) (Henry B. Hogue & Maureen Bearden).

[13] *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005).

The inclusion of virtually any claimed recess as the basis for recess appointments served to shift the analysis from the actual Recess Appointments Clause (and even the general Appointments Clause) to the Adjournments Clause. Article I, Section 5, clause 4 states that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Under the Adjournments Clause, Congress routinely passes a concurrent resolution to adjourn. Conversely, either house can effectively bar the adjournment of the other house by declining to concur in the adjournment. Since the Adjournment Clause indicates that breaks of less than three days do not require bicameral consent, it would appear clear that such short periods were not viewed as a recess for either the Adjournments Clause or the Recess Appointments Clause. This was the position taken by the Justice Department in *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993). Because Sundays are not generally considered in this calculation,[14] the result is that four-day breaks have historically not been viewed as a recess. Most recess appointments, even with the inclusion of the intrasessions, have been well beyond four days. The shortest such modern recess appointment was 10 days.

While the three-day rule is a world apart from the original meaning of the Clause as first articulated by Hamilton and our first Attorney General, it did offer a textual basis for some limitation on the use of recess appointments and an acknowledgment that such recesses cannot be defined as virtually any interruption in business of Congress. It is that interpretation that was shattered with the Cordray Appointment controversy.

IV. THE CORDRAY APPOINTMENT AND OLC OPINION

In the Cordray appointment, the Obama Administration combined virtually every controversial element in the use of the Clause into a single recess appointment – a perfect constitutional storm. Not only did the President chose to make an intrasession appointment but he did so during a break of only three days in claiming that he could not wait for Congress to return. He took this step to install an official who had been previously considered by the Senate and blocked by a vote of 45 members in a filibuster. The White House could have easily arranged for this to be an intersession appointment, but selected a day that added the intrasession controversy to the mix – creating an unprecedented test case of a modern appointment.

The appointment came on January 4, 2012. The Senate had set two pro forma sessions by unanimous consent to run on January 3rd and January 6th – part of the schedule set for December 20, 2011 to January 23, 2012. However, Congress convened on January 3, 2012 as the start of the second session of the 112th Congress.

Notably, the fact that this was deemed a "pro forma" session, it did not forestall the possibility of business being conducted by Congress. On December 23, 2011, the Senate convened and passed a major piece of legislation, the Temporary Payroll Tax Cut Continuation

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[14] U.S. Congress, *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Twelfth Congress*, 111th Cong., 2nd sess., H. Doc. 111-157 (Washington: GPO 2011); *Congressional Research Service*, Report RS21308, *Recess Appointments: Frequently Asked Questions* (Henry B. Hogue).

Act of 2011. Thus, while using a pro forma session to move a major legislative priority, the Administration proceeded to claim that the pro forma session was void of substance or legislative business.

Throughout the Cordray controversy, it was clear that the impediment for the White House was political, not some inability to submit the nominee to Congress during a recess. Indeed, when Cordray was blocked by the filibuster, President Obama announced, "We will not allow politics as usual on Capitol Hill to stand in the way."[15] Notably, the barrier to Cordray's appointment was a substantive objection of a significant number of Senators to the new board that he would head. Whatever the merits of that objection, the appointment is a common concern for the legislative branch - accountability and funding of federal offices. It is precisely that type of issue upon which presidents are sometimes forced to compromise – or rally political pressure to force opponents to yield. Thus, this was a problem where the Congress and the President were at an impasse and the recess appointment was used to avoid having to engage or compromise with Congress. In a speech announcing the recess appointment, President Obama declared that he would simply not accept the decision to filibuster the nomination, stating, "That's inexcusable. It's wrong. And I refuse to take no for an answer."[16] The President's choice of words is telling. He did indeed receive an answer to his request for confirmation. Forty-five Senators voted to block the nomination in accordance with the Senate's own rules and prior practices. The President was assuring citizens that he would simply not accept that decision of Congress. That is clearly not the purpose of the Recess Appointments Clause and, in my view, contradicts the core principles of the Constitution in establishing our tripartite system of checks and balances. Whether it is the previously discussed Randolph interpretation or the later adopted Adjournment Clause (Three-Day) interpretation (or even the Wirt interpretation), the appointment contradicts the spirit and language of the Constitution. Indeed, it creates a virtually limitless rule for future presidents – allowing the briefest of breaks to be sufficient to circumvent Congress.

The January 6, 2012 opinion of Assistant Attorney General Virginia Seitz and the Office of Legal Counsel (OLC) has been offered by the Administration to explain that the Cordray appointment is consistent with past interpretations and practices. I respectfully disagree with not just the conclusion but the analysis of the opinion of Seitz and the Office of Legal Counsel (OLC). While well-argued and well-researched, the OLC opinion tries too hard to thread the needle through textual and historical sources to justify the appointments. To do so, Seitz resolves every interpretative question in favor of the president – an analysis that should find few allies in the legislative branch by members of either party. Because I respect Seitz and her staff, I was very disappointed in the analysis from an office that is supposed to render detached and dispassionate legal opinions. As shown by towering figures like Randolph, the Justice Department once distinguished itself with analysis that often conflicted with the interests of the governing administration and president. There is simply more advocacy than analysis in this

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[15] Ylan Q. Mui, *Senate Blocks Richard Cordray Confirmation To Head Consumer Watchdog Agency*, Wash. Post, December 8, 2011, http://www.washingtonpost.com/blogs/2chambers/post/senate-republicans-block-cordray-as-obama-consumer-watchdog-nominee/2011/12/08/gIQA6j9BfO_blog.html.

[16] Peter Nicholas, Lisa Mascaro and Jim Puzzanghera, *With Senate Idle, Obama Goes To Work*, L.A. Times, January 5, 2012, at A1.

latest opinion, which contains some glaring contradictions and omissions.

By categorically rejecting the notion of pro forma sessions as avoiding a recess, the OLC insists that it does not have to address how long or how short a recess can be to justify a recess appointment. OLC Op. at 9 n. 13. ("Because we conclude that pro forma sessions do not have this effect [that the Senate is unavailable to fulfill its advice-and-consent role], we need not decide whether the President could make a recess appointment during a three-day intrasession recess. This Office 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."). It essentially solves the problem by changing the question. By effectively saying that the President decides what is a session for the purposes of the Clause, it simply concludes that these are not sessions to the satisfaction of the President. *But see* Letter for William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 560 U.S. __, 130 S.Ct. 2635 (2010) ("the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.").

While acknowledging the deference given to Congress on defining the meaning of "session" for other constitutional purposes, OLC insists that those applications of pro forma sessions "affect the Legislative Branch alone." Thus they question whether a branch can unilaterally define such a term when it affects another branch in the ability to use a related power. I found this argument the most intriguing since I recently represented members of Congress in federal courts challenging the President's intervention into Libya without a declaration or authorization of war as required under the Constitution. Like the Appointment Power, war is a shared power where the President proposes a war and the Congress must declare it. Yet, the Administration argued that the Congress and the Court must defer to it on what a "war" means. Both the text and the history of the Constitution clearly stated that the Framers did not want a president to be able to take the country to war on his own authority. *See, e.g.*, 1 *The Records of the Federal Convention of 1787*, *supra*, at 19; 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 528 (statement of James Wilson) (Jonathan Elliot ed., 1836) (emphasis added); 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* (Jonathan Elliot ed., 1836) (statement of Edmond Randolph); *see also* James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 433 (Robert Green McCloskey ed., 1967) ("The power of declaring war, and the other powers naturally connected with it, are vested in congress."). However, in the Libyan case, the Obama Administration insisted that the President could define the critical term "war" to the exclusion of Congress. Thus, if the President deemed a military intervention not to be a "war," neither Congress nor the courts could countermand that judgment, according to their interpretation. Indeed, the Administration successfully fought standing in the case – effectively making the unilateral definition unreviewable and unchallengeable.[17] Thus, while the OLC

[17] I will not return to my prior call for Congress to address the standing crisis in constitutional law where an increasing number of areas are deemed as effectively unchallengeable. I will only add that I believe the Framers would have been astonished that such

insists that the President may define terms that completely negate congressional powers, it insists that Congress cannot define such basic terms as whether it is in session – if a President disagrees. The previous cases deferring to congressional definitions on what constitutes a session reflect the fact that it is the Congress that determines when it will meet and conduct business. The degree to which business is addressed remains with Congress, which (as was shown with the tax legislation) can address substantive business during such sessions.

The courts routinely defer to Congress on how it defines and conducts its business. Article I expressly leaves it to members to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, the Supreme Court has held "all matters of method [of proceeding] 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 more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.") The OLC is correct that this principle is limited and cannot be used to violate other guarantees of the Constitution. However, the OLC's objections to deferring to Congress brushes over the fact that the pro forma sessions are utilized to keep a President from circumventing the Appointments Clause. Once again, the aspirational language hides the fact that it is the President who is engaging in a transparent and artificial claim that he must fill a vacancy because the Senate is not available for a couple of days to offer advice and consent – that is, advice and consent again on a previously blocked nomination.

While insisting that the President may unilaterally end the constitutional debate by declaring a congressional session to be functionally a recess, the OLC does suggest that any recess – even a recess of seconds – could be a legitimate basis for appointments regardless of whether it occurs when Congress is in session or between sessions. Indeed, the only way suggested by the OLC for Congress to protect its constitutional right of advice and consent would be for "[t]he Senate [to] remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations." OLC Op. at 1. The OLC notably never tries to justify such an extreme position in terms of the original or logical purpose of the Clause in the overall context of the appointment process. Nor does it explain why an intrasession recess is not a transparently artificial excuse when Congress is in session and only a matter of days away from advice and consent – conferral that had already been made in the earlier session with unsuccessful results. Even the broader interpretations of recent administrations have acknowledged that the length of a recess can be determinative. Memorandum of Jack L. Goldsmith III to Alberto R. Gonzales, Counsel to the President, *Re: Recess Appointments in the Current Recess of the Senate* at 1 (Feb. 20, 2004) (noting that "a recess during a session of the Senate, *at least if it is sufficient length*, can be a 'Recess" within the meaning of the Recess Appointments Clause") (emphasis added).

The prior opinions of Attorneys General stressed the length of the recess in maintaining a line of shared authority with Congress – a line treated dismissively in the latest opinion. For example, the OLC relies on the 1921 opinion of former Attorney General Daugherty that "the

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a core question as the declaration of war has been left as a matter that is practically unreviewable in such cases as the Libyan challenge.

President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." *Intrasession Recess Appointments*, 33 Op. O.L.C. at 25. Notably, however, Daugherty also stressed that the length of the claimed recess was key and whether it "is of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." *Id.* at 272. Moreover, Daugherty stated that "an adjournment of 5 or even 10 d[a]ys [could not] be said to constitute the recess intended by the Constitution." *Id.* at 25. The OLC's position erases any real consideration of duration from the calculus while embracing Daugherty's extreme expression of presidential deference. This includes his insistence that "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take." *Id.* The OLC does not explain why the President should be so indulged or, more importantly, why Congress is not entitled to such a presumption as opposed to a president circumventing the Appointments Clause. There are ample reasons to believe that such a presumption rests with Congress. After all, pro forma sessions have been used in other constitutional contexts as true sessions. Thus, the Twentieth Amendment requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." Congress has satisfied this requirement with pro forma sessions. *See, e.g.*, H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979). Likewise, as previously noted, these sessions have been used to satisfy the Adjournment Clause. U.S. Const. art. I, § 5, cl. 4. There is no clear reason why such sessions are sufficient for these other clauses, but not the Recess Appointments Clause. Ironically, while much of the OLC opinion treated historical practice as largely determinative in interpreting constitutional terms in its favor, it dismisses the fact that the very same term ("session") has been left to Congress to define.

In advancing this consistently broad interpretation of the Clause, the OLC opinion relegates to footnotes or dismisses outright the opposing views of past Attorney Generals like Randolph. For example it ignores the views of Attorney General Knox, who wrote at length on the Wirt interpretation and affirmed that it did not apply to intrasession recesses. Knox stressed that, despite the desire to make such appointments, the "period following the final adjournment for the session which is the recess during which the President has power to fill vacancies." *Appointments of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 601-02 (1901). Not only did Knox reject the broad interpretation but specifically clarified that "[t]he opinions of Mr. Wirt . . . and all of the other opinions on this subject relate only to appointments during the recess of the Senate between two sessions of Congress." *Id.* Knox described the very situation in which we now find ourselves: a fluid interpretation that leaves no structure or limits guiding the respective powers of the two branches in cases of appointments. *Id.* at 603 ("If a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday."). The OLC simply dismisses such views as "reversed" by Daugherty, OLC Op. at 5 n.6, while representing its current approach as long-recognized and accepted.[18]

[18] For the record, it is worth noting that OLC opinions are only "reversed" in the mind of the OLC. They are not precedent binding on anyone outside of the Justice Department and, as

Again, the OLC places overwhelming emphasis on what it views as the acquiescence of Congress to its broader interpretation of the Clause. It is the very adverse possession claim that I addressed earlier – the claim that somehow the Executive Branch has acquired title to a power of Congress by adversely occupying the area of recess appointments. Moreover, it omits repeated congressional objections to the increasingly broad interpretations given the Clause, including objections to the Wirt interpretation as "a perversion of language."[19] Yet, even past efforts of Congress to deter some recess appointments is cited by the OLC as *support for* its sweeping claim of recess powers. The OLC cited the Pay Act, 5 U.S.C. § 5503 (2006) as evidence of "congressional acquiescence to recess appointments" because it allowed for payment in some recess cases.[20] Thus, by passing a bill that took a moderate position on the salaries of recess appointees, Congress is said to have acquiesced and conceded that the appointments were constitutional. I have already stated why I find this use of historical practice to be no substitute for constitutional analysis. Again, the OLC suggests a long history of acquiescence by omitting conflicting congressional statements or relegating them to footnotes. *See, e.g.,* OLC Op. at 7 n. 10 (quoting S. Rep. No. 37-80 at 3 (1863) ("It cannot, we think, be disputed that the period of time designated in the clause as 'the recess of the Senate,' includes the space beginning with the indivisible point of time which next follows that at which it adjourned, and ending with that which next precedes the moment of the commencement of their next session."). Congressional opposition to recess appointments has been consistent and vocal, particularly opposition to intrasession appointments. However, due to standing barriers and a judicial disinclination to consider these cases, Congress has faced limited options in combatting abuse recess appointments, which one Democratic Senator described as putting "a finger in the eye of the Constitution." Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees*, N.Y. Times, Mar. 27, 2004, at A1 (quoting Senator Charles Schumer). The fact that Congress did not apply some nuclear option in dealing with such appointments shows an effort to reach a practical compromise and not an acquiescence to the claim unilateral power of presidents. Indeed, the OLC opinion seems to be written on the principle of "no good deed goes unpunished." If anything, the latest OLC opinion would seem to encourage more aggressive responses by Congress to demonstrate its opposition to these claims – a curious message to send the legislative branch.

V. CONCLUSION

Recess appointments have long been a case of shifting alliances for constitutional experts and members who have called for greater adherence to the language and purpose of the Recess Appointments Clause. It is a common dilemma in constitutional law. There is a story that the poet William Wordsworth was once told by a friend that his poem "The Happy Warrior" was his very best work. Wordsworth reportedly responded, "you are mistaken; your judgment is affected by your moral approval of the lines." The point is simple. The reader was enthusiastic about the

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shown in the history of recess appointments and the most recent opinion, represent nary a speed bump for Administrations intent on making conflicting claims.

[19] S. Rep. No. 37-80, at 1 (1863).

[20] Notably, while citing the Act as support for its interpretation of the Clause, the OLC notes later that it has serious "concerns about the constitutionality of the Pay Act." OLC Op. at 17.

poem not because of the poetry but what the poem said about the ideal of Lord Horatio Nelson and the warrior spirit. Constitutional scholars often experience that same fleeting affection for constitutional provisions where members suddenly embrace language due to their political approval of the lines. The Cordray appointment is a prime example. Some members who were silent during the recess appointments of George W. Bush have become vocal opponents of the practice under President Obama. Conversely, Democrats who now stand silent once cried foul when Bush used recess appointments to circumvent significant opposition to nominees. There are others, however, who truly love the Constitution not for their political "approval of the lines" but their approval of the system as a whole – a system of delicately balanced powers that should be maintained regardless of the merits of any particular controversy.

The Cordray appointment is different by an order of magnitude from past controversies under this Clause and should unite members of both parties in asserting their collective institutional interests. In Federalist No. 51, James Madison explained the essence of the separation of powers – and the expected defense of each branch of its constitutional prerogatives and privileges:

> "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

The Framers based their hopes on the stability of the constitutional system on government officials acting to jealously protect the authority of their respective branch (or "department") of government. It was assumed that this would be the case even where a president of the same party was threatening legislative authority – institutional interests would work to maintain the balance of the system. Frankly, their trust in human nature and institutional interest has not been realized in many cases where members of Congress have yielded to the intrusions or circumventions of presidents.

Nevertheless, Congress has sought through the years to prevent the circumvention of the confirmation process. Thus, as early as 1863, Congress used the power of the purse to discourage abusive recess appointments.[21] One such law, 5 U.S.C. 5503(a), reflects part of the original understanding of the Clause and seeks to deny federal salaries to recess appointments made to vacancies that existed during the prior session.[22] Likewise, members have sought to

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[21] Congress has also included provisions in specific bills barring the payment of salaries to individuals appointed with a vote of Congress. *See, e.g.,* P.L. 110-161, Div. D Section 709, 121 Stat. 2021.

[22] However, Congress created exceptions to this rule if the vacancy occurred within 30 days of the end of the prior session or a nomination for the position was pending at the time that Congress went into recess. Additionally, the rule did not apply if a nomination was rejected within 30 days of the end of the session and another person received the recess appointment. The law, in my view, captures the spirit of the Clause even if it is more liberal than the view

reach agreements with presidents to avoid these confrontations. The late Senator Robert C. Byrd (D., West Virginia) was legendary for his defense of congressional authority and the separation of powers. To that end, Byrd reached an agreement with President Reagan to avoid such appointments.[23] Notably, however, Reagan still made 240 recess appointments during his two terms.

The most obvious defensive measure was holding the previously discussed pro forma sessions to keep from triggering the recess option. This was the approach of the Senate majority leader in 2007, Senator Harry Reid (D., Nev.), when he announced that the Senate would be "coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[24] While this practice has been denounced as an artificial and even a ridiculous display, it was compelled by the departure from the plain meaning of the Clause and the circumvention of Congress. Congress was forced to engage in what some view as the theater of the absurd of holding pro forma sessions to protect its express constitutional right of advice and consent. Notably, President Bush respected the line drawn by the Senate and did not make recess appointments between the pro forma sessions in November 2007 and the end of his presidency. I believe that the Framers who would have found the need for pro forma sessions to be against all reason and logic. For their part, presidents have engaged in equally ridiculous practices. In December 1903, President Theodore Roosevelt made the ultimate technical claim of a recess and made more than 160 recess appointments in the seconds between the close one session of Congress and the opening of the next.[25]

Whether it is Roosevelt's "constructive recess" of a few seconds or Obama's recess of a couple of days, these recess appointments notably lack even a pretense necessity in being unable to consult with Congress. With Congress only seconds away for Roosevelt or a few days for Obama, neither could claim any "public inconvenience[]" just presidential convenience. While the OLC treats the pro forma sessions as absurd, it does little to acknowledge the absurdity of the President asserting that the country could not wait for him to have the advice and consent of the Senate -- that would reconvene in a matter of days.

Legislative and informal agreements have not stemmed the tide of recess appointments or their use to circumvent Congress. For many years I have encouraged members to take a more consistent approach to recess appointment abuse. To paraphrase Robert Frost, good fences make good constitutional neighbors. The increasingly broad interpretations of the Clause have left the border between the branches dangerously undefined. It has resulted repeatedly in a game of chicken as with Roosevelt's appointment. The Senate was not willing to strip all of these officers and officials of their posts and relented. Since then the defense of the original intent of

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originally put forward by Attorney General Randolph.

[23] Vol. 145 Congressional Record S29915 (Senator Inhofe).

[24] Senate, *Congressional Record,* daily edition, vol. 153 (November 16, 2007), p. S14609 (Senator Harry Reid).

[25] Likewise, President Harry S. Truman used the two days between sessions of the 80th Congress to make a recess appointment for Oswald Ryan to the Civil Aeronautics Board after his prior term expired.

the Clause has largely followed the passing partisan interests of the time. What is needed is a consistent, bipartisan effort to protect the institutional authority of Congress. Over the years, I have encouraged members to create such rules to reign in runaway recess appointments and reinforce the Appointments Clause itself. With the recent appointments, presidents are now claiming the ability to use any recess of any length to make a recess appointment that could conceivably last up to two years if the president makes the appointment in the middle of a session.[26] Thus, a president in the final two years of his term in office could largely dispense with the inconvenience of confirmations – the ultimate example of an exception swallowing a rule.

First, I have strongly recommended that the Congress put a practical end to judicial recess appointments. Such appointments have existed from the earliest period of the Republic. Indeed, the first five Presidents made 31 such appointments, including five to the Supreme Court. However, as previously discussed, such appointments were necessitated by the long congressional recesses that could interrupt appointments for up to nine months at a time. With a limited number of federal judges (and a six-person Supreme Court) such extended vacancies presented a serious problem for the court the system and civic order. That is not the case today. Modern judicial appointments are often used as a form of retaliation against Congress for refusing to confirm nominees. Not only does this put the Clause to an unintended use, it undermines the guarantee under Article III for judges who are independent. A recess appointed judge is dependent on the Administration to put forward his or her name for a later confirmation. That individual is also aware that any decisions rendered during the recess appointment could be used against him or her. Congress should maintain an unwavering rule that anyone given a recess appointment to a judicial position would be categorically rejected for later confirmation. Even if a president were willing to appoint such a short-term jurist, most lawyers would be reluctant to place themselves on this list of barred nominees. Second, the Congress should maintain the same rule for intrasession recess appointments or appointments during three-day recesses for the reasons previously stated. Third, Congress should at a minimum bar any later confirmation to any nominee who received a recess appointment after being previously submitted to Congress in the earlier session.[27]

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[26] This is far longer than anticipated by the Framers. *See, e.g.*, 3 Elliott's Debates 409-10 (statement of James Madison at Virginia ratification convention) ("There will not be occasion for the continual residence of the senators at the seat of government . . . it is observed that the President when vacancies happen during the recess of the Senate, may fill them till it meets.").

[27] While my preference would be a return to the original meaning of the Clause, it is certainly true that the number of positions subject to confirmation have increased dramatically – as have the delays in confirmation. There are many vacancies that continue unfilled due to simple delay and logistical barriers. Accordingly, a strong argument could be made that, while the congressional recesses are now shorter, the demands of government and the "public inconveniences" of vacancies are now simply different. Thus, there are always alternative avenues for reaching a type of détente between the branches and end the recess wars. Congress could temper this rule with a formal waiver of the bar on confirmation if, before the end of the prior session, it passed a resolution acknowledging that certain nominees (who did not receive a final vote) could be legitimately given a recess appointment. This resolution would merely

Finally, Congress can more aggressively use its power of the purse as well as its ability to block any confirmations until an agreement is reached on recess appointments. The best argument for such a strong response can be found in the OLC opinion itself where efforts of Congress to reach compromise with past presidents is now being cited as an acquiescence to the interpretations of the Executive Branch. Under the same view, the Cordray nomination (if left unaddressed) would set an unprecedented claim of unilateral appointment power in the Executive Branch. Despite my respect for Mr. Cordray's background and intellect, his appointment comes at too high a price for the balance of power under Article I and Article II. In a Madisonian system, it is often as important how you do something as what you do. The Cordray appointment is the wrong means to a worthy purpose. A congressional check on abusive recess appointments is long overdue and has contributed to the current controversy. After this Clause was ripped from its textual moorings, it has floated dangerously in the choppy waters between the Executive and Legislative Branches. It is time, in my view, to move back toward to logical limitations on the recess appointment power articulated by Hamilton and Randolph. Good politics often makes for bad law. The Cordray nomination, regrettably, is one such example.

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acknowledge that the nominees were not rejected (or filibustered) on the merits and Congress would not treat the appointment as a circumvention of its authority. Obviously, nothing would stop a president from making abuse appointments, subject to court challenges. However, if Congress were to maintain this principled line regardless of the party of the president, it would greatly reduce the abuse of this Clause. If nominees were truly left unconfirmed due to administrative or logistical problems, the two branches could agree that those nominees would not be barred due to any recess appointment. The point is that such an agreement would reflect that the recess appointment was not being used to circumvent opposition to the nominee.