President Obama's January 4, 2012, Recess Appointments: Legal Issues

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Summary

The U.S. Constitution establishes two methods by which Presidents may appoint officers of the United States: either with the advice and consent of the Senate, or unilaterally "during the Recess of the Senate." These two constitutional provisions have long served as sources of political tension between Presidents and Congresses, and the same has held true since President Obama took office.

At the end of the first session of the 112th Congress, the Senate had not acted upon the nominations of the Director to the recently established Bureau of Consumer Financial Protection (CFPB or Bureau) or of members to the National Labor Relations Board (NLRB). On December 17, 2011, the Senate adopted a unanimous consent agreement that established a series of "pro forma" sessions to occur from December 20, 2011, until January 23, 2012, with brief recesses in between. The unanimous consent agreement established that "no business" would be conducted during the pro forma sessions and that the second session would begin at 12:00 p.m., January 3, 2012.

On January 4, 2012, despite the periodic pro forma sessions of the Senate, the President, asserting his Recess Appointments Clause powers, announced his intent to appoint Richard Cordray to be Director of the CFPB and Terrence F. Flynn, Sharon Block, and Richard F. Griffin Jr. to be Members of the NLRB. The unique facts underlying the President's January 4, 2012, recess appointments raise a number of unresolved constitutional questions regarding the scope of the Recess Appointments Clause. However, the Clause itself contains ambiguities, and with a lack of judicial precedent that may otherwise elucidate the provision, it is difficult to predict how a reviewing court would define the contours of the President's recess appointment authority.

If the President's recess appointments are challenged, it appears the most likely plaintiffs to satisfy the court's standing requirements would be a private individual or association who, following the appointments, has suffered an injury as a result of some discrete action taken by the CFPB or NLRB. Were the court to proceed to the merits of the challenge, the primary question presented would likely be whether the President made the January 4 recess appointments "during a recess of the Senate." This issue, however, appears to involve questions of separation of powers and the internal proceedings of the Senate, and may potentially be deemed to involve political questions inappropriate for judicial review and better resolved by the President and Congress. Finally, even if the recess appointments are considered constitutionally valid, it appears likely that other questions may be raised as to Director Cordray's authority.

This report analyzes the legal issues associated with the President's asserted exercise of his Recess Appointments Clause power on January 4, 2012. The report begins with a general legal overview of the Recess Appointments Clause. This is followed by an analysis of two legal principles, standing and the political question doctrine, which may impede a reviewing court from reaching the merits of a potential legal challenge to the appointments. The examination of these justiciability issues is followed by an analysis of the constitutional validity of the appointments; potential statutory restrictions on a recess appointee's authority to exercise the powers of the CFPB; and how actions taken by the recess appointees could be impacted by a court ruling that the appointments are unlawful.

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Introduction

The U.S. Constitution establishes two methods by which Presidents may appoint officers of the United States: either with the advice and consent of the Senate,[1] or unilaterally "during the Recess of the Senate."[2] These two constitutional provisions have long served as sources of political tension between Presidents and Congresses,[3] and the same has held true since President Obama took office. This tension is illuminated by President Obama's difficulty in obtaining Senate confirmation of nominations for the Directorship of the newly-established Bureau of Consumer Financial Protection (CFPB or Bureau) and Members of the National Labor Relations Board (NLRB or Board).

President Obama formally nominated Richard Cordray to be the first Director of the CFPB on July 18, 2011.[4] In May 2011, 44 Senators signed a letter to the President stating that they would oppose the confirmation of any nominee to serve as CFPB Director until substantive changes to the structure of the Bureau were enacted into law.[5] On October 6, 2011, the Senate Committee on Banking, Housing, and Urban Affairs (Senate Banking Committee) approved Cordray's nomination for a full vote of the Senate.[6] However, on December 8, 2011, the Senate fell seven votes shy of the 60-vote threshold necessary to reach cloture and move to a vote on the nomination.[7]

The NLRB, an agency with certain powers to investigate and adjudicate unfair labor practices, consists of up to five officials who are to be appointed by the President with the advice and consent of the Senate.[8] However, there have been periods during the presidencies of both George W. Bush and Obama in which the board has had vacancies, including a period of more than two years in which the NLRB operated with only two members. In a 2010 decision, *New Process Steel, L.P. v. National Labor Relations Board*,[9] the U.S. Supreme Court ruled that the National Labor Relations Act prevents the NLRB from exercising rulemaking powers without having three or more acting members. In 2010, the NLRB had operated with a quorum of three or more members; however, by August 2011, there were only three members remaining, the minimum number of members required to establish a quorum. The NLRB was slated to lose one member by

[1] U.S. CONST. Art. II, §2, cl. 2 (Appointments Clause). The Appointments Clause further provides: "... 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."

[2] U.S. CONST. Art. II, §2, cl. 3 (Recess Appointments Clause).

[3] CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu, at 2 (citing numerous examples of contentious recess appointments).

[4] 157 CONG. REC. S4646 (daily ed. July 18, 2011). See also *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, The White House Blog, July 18, 2011, available at http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau.

[5] *44 U.S. Sen. to Obama: No Accountability, No Confirmation*, Sen. Richard Shelby, News Release, May 5, 2011, available at http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation.

[6] *Johnson Statement on Committee Approval of Richard Cordray's Nomination to Lead the CFPB*, S. Comm. on Banking, Hous., and Urban Affairs, Press Release, Oct. 6, 2011, available at http://banking.senate.gov/public/index.cfm?FuseAction=Newsroom.PressReleases&ContentRecord_id=d9d510a6-c46e-c82f-11bd-f76798a1ab1c.

[7] 157 CONG. REC. S8429 (daily ed. Dec. 8, 2011).

[8] 29 U.S.C. §153.

[9] 560 U.S. ___ ; 130 S. Ct. 2635 (2010) .

the end of the first session of the 112th Congress. Therefore, in an effort to prevent board membership from dropping below the minimum quorum required for the NLRB to fully conduct business, President Obama nominated Terrence F. Flynn, Sharon Block, and Richard F. Griffin Jr. to be Board members.[10] However, the Senate did not confirm any of the nominees before the third member's term expired.

Following Senate inaction, the President reportedly considered making recess appointments should the Senate go into recess. However, the Senate, at various times during the 112th Congress, has held "pro forma" sessions, which are intended, at least in part, to prevent the existence of a Senate recess sufficient to permit the President to exercise his constitutional authority to unilaterally appoint officers.[11] These pro forma sessions typically are governed by unanimous consent agreements of the Senate that prohibit the chamber from conducting any formal business.[12] The pro forma sessions generally have been held every three or four days, and typically consist of a single Senator gaveling in the session and, shortly thereafter, gaveling the session out.

On December 17, 2011, the Senate adopted a unanimous consent agreement that scheduled a series of pro forma sessions to occur from December 20, 2011, until January 23, 2012, with brief recesses in between. The unanimous consent agreement established that "no business" would be conducted during the pro forma sessions and that the second session would begin at 12:00 p.m., January 3, 2012.[13]

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[10] 157 CONG. REC. S68 (daily ed. Jan. 5, 2011) (Flynn); 157 CONG. REC. S8691 (daily ed. Dec. 15, 2011) (Block and Griffin Jr.).

[11] This use of pro forma sessions to prevent the President from making recess appointments is a relatively new convention that apparently was first exercised in November 2007. These sessions may be conducted by the will of the Senate, alone, or they may be prompted by the House's refusal to consent to a request of the Senate to adjourn for longer than three days, as required by the Adjournment Clause. This constitutional provision requires both houses of Congress to get approval from the other in order to "adjourn for more than three days." U.S. CONST. Art. I, §5, cl. 4. Although initially instituted by the Senate as a means of preventing the President from making recess appointments, today the practice is more often compelled by the lack of agreement between the House and Senate pursuant to the Adjournment Clause. Neither the House nor the Senate had introduced a concurrent resolution of adjournment from May 12, 2011, until January 3, 2012. In a June 2011 letter to House Leadership, numerous Members of the House requested that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress." Letter to the Speaker of the House John Boehner, et al., June 15, 2011, available at http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf. A similar letter addressed to House leadership was signed by a group of Senators on May 25, 2011. *Vitter, DeMint Urge House to Block Controversial Recess Appointments*, U.S. Sen. David Vitter, Press Release, May 25, 2011, available at http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77&Region_id=&Issue_id=.

[12] However, the Senate can agree to conduct business pursuant to a subsequent unanimous consent agreement. See, e.g., 157 CONG. REC. S8789 (daily ed. Dec. 23, 2011) (ordering, by unanimous consent, the passage of H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011).

[13] 157 CONG. REC. S883-S8784 (daily ed. Dec. 17, 2011). The unanimous consent agreement stated, in its entirety:

> Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Tuesday, December 20, at 11 a.m.; Friday, December 23, at 9:30 a.m.; Tuesday, December 27, at 12 p.m.; Friday, December 30, at 11 a.m.; and that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Friday, January 6,

(continued...)

On January 4, 2012, despite the periodic pro forma sessions of the Senate, the President, asserting his authority under the Recess Appointments Clause, announced his intent to appoint Cordray to serve as the first CFPB Director and Block, Griffin Jr., and Terrence F. Flynn, to be members of the NLRB.[14] The appointments occurred in the time between pro forma sessions on January 3 and January 6, 2012.

The President's actions have proven to be contentious.[15] In addition to their impact on relations between the executive and legislative branches, these appointments also raise a number of significant legal questions regarding the scope of the President's authority under the Recess Appointments Clause and the statutory authorities these individuals may exercise—questions that may spark litigation.[16]

This report analyzes the legal issues associated with the President's exercise of his Recess Appointments Clause power on January 4, 2012. To set the framework of our discussion, the report begins with a general legal overview of the Recess Appointments Clause. This is followed by an analysis of two legal principles, standing and the political question doctrine, which may impede a reviewing court from reaching the merits of a potential legal challenge to the appointments. The examination of these justiciability issues is followed by an analysis of the constitutional validity of the appointments; potential statutory restrictions on a recess appointee's authority to exercise the powers of the CFPB; and how actions taken by the recess appointees may be impacted by a court ruling that the appointments are unlawful.

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> at 11 a.m.; Tuesday, January 10, at 11 a.m.; Friday, January 13, at 12 p.m.; Tuesday, January 17, at 10:15 a.m.; Friday, January 20, at 2 p.m.; and that the Senate adjourn on Friday, January 20, until 2 p.m. on Monday, January 23; that following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, and the time for the two leaders be reserved for their use later in the day; further, that following any leader remarks the Senate be in a period of morning business until 4 p.m., with Senators permitted to speak therein for up to 10 minutes each, and that following morning business, the Senate proceed to executive session under the previous order.

[14] *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, Jan. 4, 2012, available at http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[15] See, e.g., Jennifer Rubin, *Obama's recess appointments: The ex-law professor makes a power grab*, Wash. Post, Jan. 5, 2012.

[16] See, e.g., Jeremy Pelofsky, *Analysis: Obama consumer chief decision under a legal cloud*, Reuters, Jan. 5, 2012; Kevin Bodardus, *Obama defies lawmakers with recess appointments to labor board*, The Hill, Jan. 4, 2012 (reporting that the Association of Builders & Contractors and the National Association of Manufacturers are considering legal action); Peter Schroeder, *Court fight over recess appointments 'almost certain,' Chamber says*, The Hill, Jan. 4, 2012 (quoting a high-ranking official with the U.S. Chamber of Commerce: "What we do know is .. it's almost certain ultimately a court will decide if what the president did is legal or not.").

Overview of the Recess Appointments Clause[17]

The U.S. Constitution explicitly provides the President with two methods of appointing officers of the United States. First, the Appointments Clause establishes 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, whose Appointments are not herein otherwise provided for and which shall be established by Law."[18] Second, the Recess Appointments Clause authorizes the President 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."[19] During the meetings of the Constitutional Convention, there was no debate on the Recess Appointments Clause.[20] However, in light of the constitutional text and historical pronouncements, it is generally accepted that the Recess Appointments Clause was designed to foster administrative continuity by enabling the President to ensure unfettered operation of the government during periods when the Senate was not in session and, therefore, unable to perform its advice and consent function.[21]

The inherent ambiguities of the Recess Appointments Clause, such as the interpretation of the phrases "Vacancies that may happen" and "Recess of the Senate," have primarily received formal consideration from the executive branch in the form of Attorneys General opinions, with only periodic attention from the courts and Congress.[22] Some interpretive questions surrounding the Clause are generally regarded as settled. For example, through interpretation and practice, a "Recess" for purposes of the Recess Appointments Clause encompasses both the inter- and intrasession recesses of the Congress.[23] While there have been varying opinions about the

[17] For further information on the existing legal landscape, see CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu. For general information on recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

[18] U.S. CONST., Art. II, §2, cl. 2. The Appointments Clause further provides: "... 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."

[19] U.S. CONST., Art. II, §2, cl. 3.

[20] M. Ferrand, *Records of the Federal Convention of 1787*, at 533, 540, 574, 600 (rev. ed. 1966). The Clause was first drafted in Hamilton's plan of government, adopted upon motion of Richard Spaight of North Carolina, and left unchanged by the Committee of Style. See *id*.

[21] In Federalist No. 67, Alexander Hamilton wrote of the Recess Appointments Clause "The relation in which that clause stands to the [Appointments Clause] ... denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment ... [can] ... 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 officers and as vacancies might happen ... it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments ..." The Federalist, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (emphasis in original).

[22] For example, aspects of the recess appointments power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19th century on recess appointments, the earliest written in 1823.

[23] Generally, an intersession recess is between *sine die* adjournment of one session and the convening of the next. An intrasession recess is a recess, or a brief adjournment, within a session. See Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (concluding that the "Recess of the Senate" includes intrasession recesses). However, the first formal Attorney General opinion on the matter concluded that the phrase applied only to adjournments between sessions of Congress (intersession recess). 23 Op. A.G. 599 (1901). Twenty years later, this position was abandoned, and the Attorney General concluded that an appointment made during a 29-day intrasession recess was constitutional. 33 Op. A.G. 20, 23 (1921). Subsequent Attorneys General opinions and Department of Justice Office of Legal Counsel opinions have continued to support the constitutionality of intrasession recess appointments. See 16 Op. O.L.C. 15 (1992).

duration of an intrasession recess sufficient for the President to make a recess appointment, the shortest duration in the modern era for an intrasession recess appointment has been 10 days.[24]

In addition, it is generally understood that the commission of a recess appointee expires at the *sine die* adjournment of the Senate's "next Session."[25] In practice, an individual receiving an intersession appointment would serve until the end of the following session. However, an individual receiving an intrasession appointment—for example, during the traditional August recess of a first session of Congress—would serve until the end of the following session, that is, the end of the second session. As an intrasession recess appointment during the second session of the 112th Congress, President Obama's January 4 appointments could serve until the end of the first session of the 113th Congress.

Furthermore, as a constitutional matter, a recess appointee possesses the same legal authority as a confirmed appointee. In upholding the President's authority to make a recess appointment of an Article III judge, the U.S. Court of Appeals for the Eleventh Circuit (11th Circuit) stated:

> The Constitution, on its face, neither distinguishes nor limits the powers that a recess appointee may exercise while in office. That is, during the limited term in which a recess appointee serves, the appointee is afforded the full extent of authority commensurate with that office.[26]

Similarly, a federal district court explained:

> There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment.… In the absence of persuasive evidence to the contrary, it is therefore not appropriate to assume that this Clause has a species of subordinate standing in the constitutional scheme…. There is no justification for implying additional restrictions not supported by the constitutional language.[27]

Congress has, however, attempted to dissuade the President from making recess appointments through legislation. For example, Congress has passed legislation that restricts certain recess appointees from receiving salaries.[28]

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[24] Excluding the January 2012 appointments, the shortest intrasession recess appointment since the Reagan presidency was made by President Clinton during an intrasession recess of 10 days. Other appointments made during short intrasession recesses include by President George W. Bush conferring four recess appointments during an 11-day recess ending on April 19, 2004.

[25] See 41 Op. A.G. 463, 470-471 (1960); 28 Comp. Gen. 121 (1948). In contrast, a confirmed appointee will serve at the pleasure of the President, subject to the statutory requirements of the position.

[26] *Evans*, 387 F.3d at 1223-24.

[27] Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979) (addressing the plaintiff's argument that the recess appointment power was intended to be restricted to instances of absolute need, that is, when no person is available to occupy the office on any tenable basis). See also Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996) (rejecting the plaintiff's argument that "rests on the assumption that a recess appointment is somehow a constitutionally inferior procedure, not entirely valid or in some way suspect, an assumption that the Constitution precludes us from making.").

[28] 5 U.S.C. §5503 (generally restricting payment from the Treasury to a recess appointee unless one of three exceptions applies). The appointees to the CFPB and NLRB likely would fall under an exception to the general statutory prohibition on payment of salary to recess appointees. Under 5 U.S.C. §5503(a)(2), a recess appointee may be paid if, at the end of the session, a nomination is pending for the office and the nomination is not of an individual who had been given a recess appointment during the preceding recess. In each appointee's case, a nomination had been pending for that individual at the end of the first session of the 112th Congress, and none of them had served as a prior recess appointee. However, an argument could be made questioning whether the statutory restriction on payment would be (continued...)

Given the historical interpretation of the Recess Appointments Clause and the historical use of its authority, the President's appointments of Cordray, Flynn, Block, and Griffin Jr. during a three-day recess between pro forma sessions raises a number of significant legal questions that may lead to judicial challenge. However, prior to assessing the merits of any challenge, a reviewing court would first consider a number of preliminary questions of justiciability—including whether the plaintiffs who have brought the claim have standing and whether the asserted claims present matters appropriately resolved by a court. An extended preliminary discussion of these justiciability questions is necessary because they may have relevance to many of the underlying legal questions posed by the Recess Appointments Clause, the President's recent actions thereunder, and the operation of the statutory authorities exercised by the recess appointees in this case.

Justiciability: Potential Hurdles to Judicial Review

Although the Supreme Court has established a number of "justiciability" doctrines to ensure that a claim is properly before a court, concerns relating to standing and the political question doctrine appear to present the most likely hurdles to judicial resolution of any challenge to the President's appointments.[29] The standing doctrine asks whether the particular plaintiff has a legal right to a judicial determination on the merits before the court, while the political question doctrine asks whether the claim presented is inappropriate for judicial review. If a court determines that a plaintiff lacks standing or that the nature of the questions presented precludes review, the court will dismiss the claim, leaving the status quo undisturbed.

General Standing Requirements

The law with respect to standing is a mix of both constitutional requirements and prudential considerations.[30] To satisfy Article III constitutional standing, a plaintiff must satisfy three requirements.[31] First, a plaintiff must allege to have suffered an injury in fact, which is personal, concrete, and particularized, not vague or abstract.[32] Second, the plaintiff's injury must be "fairly traceable to the defendant's allegedly unlawful conduct."[33] Third, the plaintiff's injury must be an injury that is likely to be redressed by the relief requested from the court.[34]

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applicable to a recess appointed Director of the CFPB because it seems uncertain whether "payment ... [would be] made from the Treasury" to such a recess appointee, given the funding structure of the CFPB. See 15 Op. O.L.C. 91, 93 (1991) (concluding that recess appointees to the Federal Housing Finance Board (FHFB) could still be paid notwithstanding 5 U.S.C. §5503, as the salaries of the directors were not paid from the Treasury but "[r]ather, they derive from nonappropriated funds that the FHFB has deposited in a Treasury account.").

[29] Other doctrines of justiciability include ripeness, and mootness.

[30] See Dep't of Commerce v. House of Representatives, 525 U.S. 316, 328-29 (1999). By law, Congress can grant a right to sue to a plaintiff who otherwise lacks standing. According to the Court, however, such a law can eliminate only prudential, but not constitutional, standing requirements. See Raines v. Byrd, 521 U.S. 811, 820 n..3 (1997).

[31] Article III of the Constitution specifically limits the exercise of federal judicial power to "cases" and "controversies." U.S. CONST. Art. III, §2.

[32] *Raines*, 521 U.S. at 819; Allen v. Wright, 468 U.S. 737, 751 (1984).

[33] *Allen*, 468 U.S. at 751.

[34] *Id*.

In addition to the constitutional questions posed by the doctrine of standing, federal courts also follow a well-developed set of prudential principles that are relevant to a standing inquiry.[35] Like their constitutional counterparts, these judicially created limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[36] However, unlike the constitutional requirements, prudential standing requirements "can be modified or abrogated by Congress."[37] These prudential principles require that (1) a plaintiff assert his own legal rights and interests, not those of a third party; (2) a plaintiff's complaint be encompassed by the "zone of interests" protected or regulated by the constitutional or statutory guarantee at issue; and (3) the court not adjudicate "abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches."[38]

A challenge to President Obama's recess appointments will likely come from one of three classes of plaintiffs. A private individual who has suffered an injury as a result of some discrete action by either the CFPB or the NLRB would be the most likely plaintiff to obtain standing. However, given the separation of powers issues associated with the President's recess appointments, either individual Members of Congress, or the Senate as a whole may also seek to challenge the appointments. Congressional plaintiffs, however, would need to survive an "especially rigorous" standing inquiry.

Private Individuals or Associations Challenging President Obama's Recess Appointments

Private plaintiffs must comply with the three constitutional standing requirements and the judicially imposed prudential principles. Private plaintiffs who are impacted by rules issued or enforcement actions implemented against them by the CFPB or NLRB after President Obama's recess appointments may likely have standing to challenge the validity of the appointments.[39] These private plaintiffs may include individuals, businesses, or an association suing on behalf of its members, if it meets the independent requirements of associational standing.[40]

These claims would assert either that the Director lacked the authority to take action due to his improper appointment, or that the NLRB lacked a quorum given that three of the five board

[35] Bennett v. Spear, 520 U.S. 154, 162 (1997).

[36] *Id.*

[37] *Id*.

[38] Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, 454 U.S. 464, 474 (1982) (internal quotations omitted).

[39] Andrade v. Lauer, 729 F.2d 1475, 1495-96 (D.C. Cir. 1984) (finding that federal employees challenging their dismissals because the appointment of the officials ordering the dismissals contravened the Appointments Clause, had standing even if the employees could be dismissed by a properly appointed official). Private plaintiffs may likely have standing to challenge CFPB actions, taken at the direction and under the authority of Cordray, or NLRB actions taken after January 4, 2012, even if the agency could have taken the same action before January 4, 2012, because plaintiffs would be alleging an injury based on the agency improperly taking action against them.

[40] An association has standing to sue on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The third prong is a prudential, rather than constitutional, requirement. See United Food & Commercial Workers v. Brown Grp., 517 U.S. 544 (1996).

members were improperly appointed. Private plaintiffs would also need to ensure that their claims are ripe[41] and that their alleged injury is sufficiently concrete and particularized.

The recent case *New Process Steel, L.P. v. NLRB*,[42] provides an example of how a private plaintiff may obtain standing based on an injury arising from an agency action. In *New Process Steel, L.P.*, the court found that the plaintiff suffered a concrete and particularized injury in fact when the NLRB issued a decision finding it had engaged in unfair labor practices.[43] The Court found that the injury was personal, not vague or abstract, since the Board issued the decision specifically against New Process Steel and imposed mandatory conditions on the business to remedy its violation, including compensating its employees for any losses caused by the business's action.[44] Additionally, the Court found that the injury was fairly traceable to the actions of the NLRB, and it was the type of injury that is typically redressed via judicial action. A private plaintiff alleging an injury caused by actions taken by the CFPB or NLRB after the recess appointments were made that is similar to the injury alleged in *New Process Steel, L.P.* may be likely to have standing to challenge the validity of the appointments.

Members of Congress as Plaintiffs

The Supreme Court last delved into the issue of individual Member standing in its 1997 decision in *Raines v. Byrd*.[45] The Court held that six Members of Congress did not have standing to challenge the Line Item Veto Act of 1996 because their complaint did not establish that they had suffered a personal, particularized, and concrete injury.[46] In light of this decision, there appear to be two ways that a Member of Congress may satisfy the standing injury requirement discussed above. First, a Member plaintiff who alleges a personal injury, such as the loss of a Member's seat, may likely fulfill the injury requirement of standing.[47] Second, a Member plaintiff who alleges an institutional injury may likely also obtain standing, but only if the injury amounts to "vote nullification."[48] Additionally, when a case invokes "core separation of powers questions at

[41] Plaintiffs must also show that their claim is ripe for judicial review, meaning that their injury is not speculative or based on future events that may not occur, but rather actual or imminent. Therefore, the plaintiffs' claim is more likely to be ripe if a promulgated rule has already caused actual injury, poses the risk of imminent injury, or has been enforced against them.

[42] 560 U.S. ___ ; 130 S. Ct. 2635 (2010).

[43] New Process Steel L.P., Case 25-CA-30470, 2008 NLRB LEXIS 120 (finding the business's refusal to implement a collective bargaining agreement in negotiation with the employees' union was an unfair labor practice).

[44] *New Process Steel L.P.*, 130 S. Ct. at 2650 (holding that the business must adhere to the collective bargaining agreement and pay employees for losses in earnings or other benefits they were denied due to business's actions).

[45] 521 U.S. 811 (1997).

[46] *Id.* at 829.

[47] See Powell v. McCormack, 395 U.S. 486 (1969) (holding that Rep. Powell had standing because he was able to demonstrate a private, personal injury—the loss of his seat and deprivation of his federal salary).

[48] *Raines*, 521 U.S. at 826 (noting that the plaintiff's alleged injury, a loss of legislative authority, was an institutional injury). The Court in *Coleman v. Miller*, 307 U.S. 433 (1939), held that Kansas state legislators who voted against a constitutional amendment that was ultimately ratified because of a tie-breaking vote cast by the lieutenant governor, had standing to bring suit against the state. The dissenting votes were essentially nullified by the tie-breaking vote. The *Raines* Court distinguished the injury alleged by the plaintiffs in that case ("the abstract dilution of institutional legislative power") from the injury asserted in *Coleman* (vote nullification) (521 U.S. at 826), and found it unnecessary to address the "precise parameters" of vote nullification. See also Campbell v. Clinton, 52 F. Supp. 2d 34, 42 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 50 (2000) (clarifying the scope of vote nullification).

the heart of the relationship among the three branches of our government" an "especially rigorous" standing inquiry may be administered by the court.[49]

The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has held that "vote nullification" only occurs if Congress has no other legislative remedies available to rectify its alleged injury.[50] For example, the Member plaintiffs in *Campbell v. Clinton* did not have standing to challenge the President's decision to assert military force in the Federal Republic of Yugoslavia without congressional authorization because Congress had available legislative remedies, namely to "[pass] a law forbidding the use of U.S. forces in the Yugoslav campaign."[51] Therefore, the Member plaintiffs' institutional injury did not rise to the level of vote nullification and could not satisfy the standing requirements.[52]

A Member challenging President Obama's recess appointments may argue that the President's actions circumvented the Senate's "Advice and Consent" appointments function under Article II of the Constitution, causing the Member to suffer an institutional injury akin to the loss of legislative authority.[53] Whether or not this institutional injury amounts to vote nullification depends on how broadly the requirement that Congress lack a legislative remedy is interpreted. On the one hand, if the legislative remedy question is narrowly framed, a reviewing court could find that Congress has no legislative remedy available because Congress likely cannot directly remove a recess appointee from his position.[54] On the other hand, if the injury is framed more broadly, Congress has the authority to pass legislation that substantively impacts the NLRB and CFPB recess appointees. For instance, Congress could pass legislation that cuts off funding for the CFPB and NLRB or that dilutes the authority of the CFPB Director by converting the Bureau's leadership structure to a board or commission. Indeed, Congress also has the authority to repeal the legislation creating the agencies or the statutory authorization for the specific offices. Given the analysis in *Raines* and *Campbell*, substantial arguments could likely be made that legislative remedies are available to a Member plaintiff seeking to challenge the President's recess appointments, which may call into question the Member's ability to satisfy the injury prong of the standing doctrine.

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[49] Walker v. Cheney, 230 F. Supp. 2d 51, 65 (D.D.C. 2002) (*quoting Raines*, 521 U.S. at 819).

[50] *Campbell*, 203 F.3d 19, 22-23 (D.C. Cir. 2002).

[51] *Id*.

[52] Most recently, the U.S. District Court for the District of Columbia denied several Members of the House standing to challenge President Obama's use of force in Libya because their alleged institutional injury did not amount to vote nullification. In that case, the Members retained legislative remedies, including passing a law directing the withdrawal of U.S. troops or a law utilizing Congress's power over military appropriations. Kucinich v. Obama, 2011 U.S. Dist. LEXIS 121349, *26-27 (D.D.C. 2011) ("[t]he plaintiffs' votes were given full effect. They simply lost that vote ...") (internal quotations omitted).

[53] U.S. CONST. Art. II, §2, cl. 2. See *Raines*, 521 U.S. at 820-21 (noting that the plaintiffs' alleged injury, a loss of legislative authority, was an institutional injury because "it is not claimed in any private capacity but solely because they are Members of Congress"). Members of the House of Representatives likely would not be able to allege an institutional injury because the House has no express constitutional role in appointments.

[54] See Bowsher v. Synar, 478 U.S. 714, 726 (1986) (holding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."). Congress does have the power to impeach "civil Officers of the United States," but only if convicted of "Treason, Bribery, or other high Crimes and Misdemeanors." It is unlikely that this power would be implicated in a discussion of legislative remedies to these recess appointments. See U.S. CONST. Art. II, §4. It may be possible to argue that the Senate may effectively remove a recess appointee by utilizing more than two annual sessions in one Congress. See, generally, Colloquy, *Getting at Recess Appointments*, 103 N.W. L. REV. COLLOQUY 282 (2009).

Congressional Institutions as Plaintiffs

On several occasions, courts have held that congressional institutions, such as the full House or Senate or authorized Committees, have standing to sue based on an institutional injury.[55] However, in order to sue as an institutional plaintiff, it appears that an authorization from a House of Congress to bring suit may be required. [56] Authorization "is the key factor that moves [the suit] from the impermissible category of an individual plaintiff asserting an institutional injury ... to the permissible category of an institutional plaintiff asserting an institutional injury...."[57] An institutional plaintiff's institutional injury must be a concrete and particularized injury in fact in order to satisfy the standing requirement. For example, the courts have determined that "being denied access to information that is the subject of a subpoena" is a "concrete and personalized" injury in fact.[58] Outside the subpoena context, a full House has been permitted to intervene in a case where the alleged injury "directly (particularly) implicated the authority of Congress within our scheme of government, and the scope and reach of its ability to allocate power among the three branches."[59] Following *Raines*, it is unclear if an institutional plaintiff's injury would be considered "concrete and personalized" if the plaintiff has legislative remedies available to redress its injury.[60]

A congressional institution challenging President Obama's recess appointments would likely be subject to an "especially rigorous" standing inquiry, since the case would raise significant separation of powers questions.[61] The institutional plaintiff would likely argue that the President's actions thwarted the Senate's constitutional obligation to provide "Advice and Consent" on nominations—thereby establishing a concrete and particularized injury in fact.[62] The plaintiff would likely need Senate authorization to bring a suit, showing that the institutional plaintiff is permitted to represent the alleged institutional harm.[63] However, it remains unclear if the *Raines*

[55] See, e.g., United States v. Am. Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976) [hereinafter *AT&T*]; Comm. on Judiciary, House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008), Ashland Oil, Inc. v. Fed. Trade Comm'n, 409 F. Supp. 297 (D.D.C. 1976), *aff'd* 548 F.2d 977 (D.C. Cir. 1976). The House of Representatives likely would not be able to allege an institutional injury because the House has no express constitutional role in appointments.

[56] See, e.g., Reed v. Cnty Commissioners of Del. Cnty Pa., 277 U.S. 376, 388-89 (1928) (finding that the special committee did not have standing because the resolution conferring its investigative power did not authorize it to seek judicial recourse); *AT&T*, 551 F.2d at 391 (stating that the House passed H. RES. 1420, allowing the plaintiff Committee Chairman to intervene in the suit on behalf of the House). It is likely that the authorization must specifically state the House's intention to allow the plaintiff to represent the chamber's institutional interests in a suit, rather than just conferring the power to take "such other acts as may be necessary." *Reed*, 277 U.S. at 389.

[57] *Miers*, 558 F. Supp. 2d at 71.

[58] *Id.* at 68. See also *AT&T*, 551 F.2d at 391 ("[T]he House as a whole has standing to assert its investigatory power....").

[59] Newdow v. U.S. Cong., 313 F.3d 495, 498 (9th Cir. 2002) (denying the Senate standing to intervene in a case challenging the Pledge of Allegiance because its injury did not extend beyond frustration of a general desire for the law to be enforced). See also INS v. Chadha, 462 U.S. 919, 930 n. 5 (1983) (allowing both houses, authorized by resolution, to intervene in a case challenging the constitutionality of a statute giving the houses power to review and veto executive decisions about deportation).

[60] See *Walker*, 230 F. Supp. 2d at 69 (holding that the Comptroller General did not have standing to enforce a subpoena because the institutional injury was too vague and Congress did not authorize him to sue and had alternate remedies to redress its injury). Many outstanding questions regarding the scope of a permissible institutional plaintiff's injury in fact persist post-*Raines*.

[61] See *infra* section "Political Question Doctrine."

[62] See U.S. CONST. Art. II, §2, cl. 2.

[63] The Senate Majority Leader has expressed his support for the President's recess appointees, casting doubt that the Senate would authorize a legal challenge. See David Nakamura and Felicia Sonmez, *Obama Appoints Richard Cordray*
(continued...)

and *Campbell* standard, denying standing to a plaintiff alleging an institutional injury if a legislative remedy is available to rectify the injury, is applied to institutional plaintiffs as it is to Member plaintiffs. If authorized institutional plaintiffs can establish standing notwithstanding any available legislative remedies, then arguably, the Senate's alleged institutional injury satisfies the injury requirement, since it probably directly impacts the Senate's authority within the governmental scheme.[64] To the contrary, if institutional plaintiffs are treated similarly to Member plaintiffs, the Senate would likely be denied standing because it arguably has an alternate legislative remedy to redress its injury.

Political Question Doctrine

Even if a reviewing court determines that a plaintiff has standing, the court may still dismiss aspects of a challenge to the President's recess appointments—prior to reaching the merits of the case—as a nonjusticiable political question. The political question doctrine is generally characterized as an "amorphous,"[65] self-imposed bar to adjudicating certain disputes that are considered "inappropriate" for judicial review.[66] Thus, courts may abstain from resolving matters that, due to their political[67] nature, may more appropriately be resolved by the other branches. By encouraging judicial self-restraint, especially in the face of inter-branch conflicts, the doctrine seeks to preserve the limited role of the judicial branch vis-à-vis the other branches of government.[68] The doctrine finds its roots in *Marbury v. Madison*, in which Chief Justice John Marshall noted that "questions in their nature political," or that are committed to presidential discretion either by the Constitution or by statute, "can not be [resolved] by this court."[69] However, the modern doctrine, which "hing[es] on conceptions of separation of powers," has expanded to apply beyond challenges to executive action and is often invoked to bar judicial review of cases involving disputes between the executive and legislative branch.[70]

Although the Supreme Court articulated criteria for use in applying the political question doctrine in the 1962 decision of *Baker v. Carr*, most commentators consider the standards supplied to be

(...continued)

to Head Consumer Watchdog Bureau, Wash. Post., Jan. 4, 2012.

[64] See *Newdow*, 313 F.3d at 498.

[65] Nixon v. United States, 938 F.2d 239, 248 (D.C. Cir. 1991) (Randolph, J. concurring) (*quoting* Morgan v. United States, 801 F.2d 445 (D.C. Cir. 1986) (Scalia, J.)), *aff'd*, 506 U.S. 224 (1993).

[66] See United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) ("The doctrine is designed to restrain the judiciary from inappropriate interference in the business of the other branches of government...."). Although the doctrine is arguably a constitutional justiciability doctrine as it is primarily based on a respect for the separation of powers doctrine, it may be more accurately characterized as "prudential." See Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (describing the political question doctrine as "deriving in large part from prudential concerns about the respect we owe the political departments.").

[67] This is not to say that any case requiring a court to resolve a "political" issue is nonjusticiable. See, e.g., Baker v. Carr, 369 U.S. 186, 217 (1962) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

[68] Powell v. McCormack, 395 U.S. 486, 518 (1969) ("[P]olitical questions are not justiciable primarily because of the separation of powers within the Federal Government.").

[69] 5 U.S. 137, 170 (1803).

[70] United States ex rel. Hollander v. Clay, 420 F. Supp. 853, 856-57 (D.D.C. 1976).

an insufficient basis for determining what does or does not constitute a political question.[71] In *Baker*, the Court explained that political questions typically involve:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[72]

Although the *Baker* standards may be of limited usefulness, the Court has identified a number of constitutional provisions that, by their very subject matter, tend to trigger the political question doctrine—therefore precluding judicial review in most circumstances. For example, the Supreme Court has repeatedly held that legal challenges founded on the Republican Form of Government Clause are nonjusticiable.[73] Additionally, the political question doctrine has previously been invoked as a justification for abstaining from reviewing Congress's own internal processes,[74] procedural aspects of the impeachment process,[75] and the manner in which Constitutional amendments are ratified.[76]

Given the ambiguities of the *Baker* criteria, it can be difficult to predict how, and even whether a reviewing court would invoke the political question doctrine. Notwithstanding this ambiguity, no court has held that the Recess Appointments Clause, by its very subject matter, precludes judicial review. Indeed, a number of lower federal courts have considered challenges to presidential appointments made pursuant to the Clause. In hearing these cases, courts have used constitutional text, history, practice, and precedent to resolve significant interpretive controversies such as when a vacancy arises for the purpose of the Clause; whether the Clause applies to both intersession and intrasession recesses; and whether the President can rely on the Clause to appoint an Article III Judge.[77] All these questions were found to be appropriate for judicial consideration—providing evidence of the courts' willingness to look closely at the constitutional text and interpret the contours of the President's recess appointment power.

However, there are important aspects of any potential challenge to a presidential recess appointment that a court may view as "political questions" inappropriate for consideration. For example, the U.S. Court of Appeals for the Eleventh Circuit has previously held that any claim that the President's recess appointment "circumvented and showed an improper lack of deference

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[71] See, e.g., John P. Frank, *Political Questions*, in Supreme Court and Supreme Law 36-37 (Edmund Kahn ed., 1954) ("The political question doctrine is one of the least satisfactory terms known to the law. The origin, scope, and purpose of the concept have eluded all attempts at precise statements. ... [The doctrine amounts to] a magical formula that has the practical result of relieving a court of the necessity of thinking further about a particular problem.").

[72] Baker v. Carr, 369 U.S. 186, 217 (1962).

[73] See, e.g., Luther v. Borden, 48 U.S. 1 (1849); Pac. States Tel. v. Oregon, 223 U.S 118 (1912); U.S. CONST., Art. IV, §4 ("The United States shall guarantee to every State in this Union a Republican Form of Government…").

[74] Field v. Clark, 143 U.S. 649 (1892).

[75] Nixon v. United States, 506 U.S. 224 (1993).

[76] Coleman v. Miller, 307 U.S. 433 (1939).

[77] See Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985); United States v. Allocco, 305 F.2d 704 (2nd Cir. 1962).

to the Senate's advice-and-consent role" raises a nonjusticiable political question.[78] In dismissing the argument, the circuit court was uncomfortable departing from the text of the constitutional provision in order to determine "how much presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him."[79]

The unique nature of the circumstances surrounding President Obama's recess appointments may raise additional questions that a reviewing court may hesitate to consider on the merits. For example, an eventual plaintiff could argue that, due to the Senate's pro forma sessions, the Senate was not in a recess of sufficient duration to trigger the President's recess appointment power.[80] Such an argument could present two potential political questions. First, out of respect for the independence of the Senate, a reviewing court may decline to consider the question of whether pro forma sessions are constitutionally meaningful or constitute a session of Congress adequate to prevent the President's use of his recess appointment power, as evaluating such a question may force a court to review the internal proceedings of the Senate. The Constitution provides an express textual commitment to the Senate to establish its own rules and procedures.[81] Courts have historically "grappled with whether challenges to this type of internal rule present nonjusticiable political questions for the reason that there is an explicit textual commitment to each house to set its own rules."[82] Accordingly, if a reviewing court finds the question of whether the Senate is in session or in recess to be one more appropriately answered by the Senate—as the source of its own rules and proceedings—the political question doctrine may prevent review.[83] However, the Supreme Court has previously reviewed the validity and application of Senate rules that may violate the Constitution or affect interests outside of the legislative branch.[84]

Second, unless a court draws from the Adjournment Clause,[85] there is a substantial possibility that a reviewing court would be unwilling to establish an alternative minimum duration of a recess (i.e. number of days) necessary to trigger the President's recess apportionment authority.[86] Such a question may lack a "judicially discoverable and manageable standard" upon which the court can rely.[87] As will be discussed *infra*, the Recess Appointments Clause is silent as to how long the Senate must be in recess before the President may validly assert his recess appointment powers. Although the executive branch appears to have historically implied that a recess of at least three days is likely necessary, that result does not appear to be constitutionally required.[88] Given the

[78] *Evans*, 387 F.3d at 1227.

[79] *Id*.

[80] See *infra* section "Must the Senate Be in a Recess for a Minimum Number of Days Before a President Can Make a Recess Appointment?"

[81] U.S. CONST. Art I §5 ("Each House may determine the Rules of its Proceedings.").

[82] Hinrichs v. Speaker of the House of Representatives, 506 F.3d 584, 608 (7th Cir. 2007).

[83] *Nixon*, 506 U.S. at 224 (holding a challenge to the Senate's procedures for trying an impeached official to be a political question.).

[84] United States v. Smith, 286 U.S. 6, 33 (1932) (noting that since "the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."); United States v. Ballin, 144 U.S. 1, 5 (1892) (stating that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights.").

[85] See *infra* section "Must the Senate Be in a Recess for a Minimum Number of Days Before a President Can Make a Recess Appointment?" The Adjournment Clause provides that neither house may adjourn without the consent of the other "for more than three days." U.S. CONST. Art. I, §4, cl. 4.

[86] *Evans*, 387 F.3d at 1225.

[87] *Baker*, 369 U.S. at 217.

[88] *Evans,* 387 F.3d at 1225.

constitutional ambiguity—and without additional criteria or other "judicially discoverable standards"—a reviewing court may determine that the precise length of time for which the Senate must be in recess before a recess appointment is permissible is a question best resolved by the political branches.[89] The scope of the Clause in this respect would thus be defined by the President and Congress, rather than the courts, with each branch utilizing the tools provided to it under the Constitution to influence the actions of the other branch.[90]

A court may, of course, extract its own standard by drawing from the Adjournment Clause, for example, or from history and precedent.[91] Furthermore, even if a reviewing court considers the questions relating to pro forma sessions and the minimum recess duration to be nonjusticiable, the court would not necessarily be forced to dismiss the case as a whole. Indeed, the court could avoid these determinations and still reach the merits of the appointments on other grounds.[92]

Were the Appointments Made During a Sufficient "Recess of the Senate"?

If a reviewing court determines that a plaintiff challenging the appointments of Cordray, Flynn, Block, or Griffin Jr. has met all elements of justiciability, the court may proceed to assess the merits of the suit. The primary issue before a court would be whether the appointments were made in compliance with the strictures of the Recess Appointments Clause, which provides the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate."[93] Prior to proceeding to a consideration of this question, a brief recitation of the unique factual circumstances underlying the President's January 4 recess appointments may be helpful.

The Senate, on December 17, 2011, adopted a unanimous consent agreement that scheduled a series of pro forma sessions to occur every few days from December 20, 2011, until January 23, 2012. The unanimous consent agreement expressly established that "no business" would be

[89] The Department of Justice, for example, has argued that apart from drawing from the Adjournment Clause, U.S. CONST. Art. I, §5, cl. 4, establishing any other specific number of days as that which is required to constitute a recess for purposes of the Recess Appointments Clause would be "arbitrary." Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-6, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) [hereinafter DOJ 1993 Brief] ("Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.").

[90] A political resolution may result in an informal understanding between the branches as to when recess appointments are proper. Under such a scenario, Congress's most influential tool may be in restricting funding to the agency in which the officer was appointed. See McCalpin v. Durant, 766 F.2d 535, 537 (D.C. Cir. 1985) ("The Executive's repeated recourse to recess appointments to the Legal Services Corporation (LSC) Board, was matched by Congress' repeated resort to appropriations riders restraining [the LSC's] operations…With the political branches engaged in these thrusts and parries, we did not rush to judgment. Although we did not regard the case as off limits to the judiciary, we hesitated to resolve a conundrum Congress had become aware of and was best suited to address in the first instance.").

[91] See Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1282 (2006) ("[I]n cases in which constitutional norms are not themselves judicially manageable standards, courts properly seek to devise such standards."). See *infra* section "Are There Other Criteria that Could Give Meaning to "Recess" for Purposes of the Recess Appointments Clause?"

[92] For instance, in *Baker v Carr*, the Court described how a court can "isolate" the political question and proceed with the case. 369 U.S. at 216.

[93] U.S. CONST. Art. II, §2, cl. 3.

conducted during the pro forma sessions. The agreement also provided that the second session of the 112th Congress would commence with a pro forma session at 12:00 p.m. on January 3, 2012,[94] and that a subsequent pro forma session would be held on January 6, 2012. On January 4, 2012, between these two pro forma sessions, the President, asserting his Recess Appointments Clause powers, announced his intent to appoint Cordray to serve as the first CFPB Director and Block, Griffin Jr., and Flynn, to be members of the NLRB.[95]

While it appears well established that the Senate was in an intrasession recess following the conclusion of the January 3rd pro forma session that convened the second session of the 112th Congress, it is not clear how to measure that intrasession recess and whether it was sufficient to trigger the President's power under the Recess Appointments Clause. The Senate was either in one of a series of short recesses created by the pro forma sessions, or in a single intrasession recess of 20 days—spanning from January 3rd to January 23rd.[96] The length of the recess may be of great importance, as it appears that no President, at least in the modern era, has made an intrasession recess appointment during a recess of less than 10 days.[97] The President has asserted that pro forma sessions are not meaningful sessions of Congress for purposes of the Recess Appointments Clause and, therefore, cannot interrupt a longer recess. Under this reasoning, the President's January 4 recess appointments were consistent with established historical precedent as they were made during a 20-day recess.[98] Critics, however, assert that the pro forma sessions are meaningful sessions of Congress and, therefore terminate a recess. Under this reasoning, the President's recess appointments broke from established historical precedent, as they were made during a recess of only three days.

These unique facts raise at least two significant, and mostly unresolved[99] constitutional questions. First, may Congress utilize pro forma sessions to interrupt the duration of an otherwise continual

[94] 157 CONG. REC. S8783-S8784 (daily ed. Dec. 17, 2011). U.S. CONST. Amend. XX, §2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.")

[95] *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, Jan. 4, 2012, available at http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[96] The 20-day intrasession recess is based on the Senate's break from January 3 to January 23, 2012. The calculation of the total length of the recess includes Sundays and either the day of adjourning or the day of reconvening. However, a different day count is used to determine whether or not the consent of the other house is required for Adjournment Clause purposes. Under House precedents, "The House of Representatives in adjourning for not more than three days must take into the count either the day of adjourning or the day of the meeting, and Sunday is not taken into account in making this computation." U.S. Congress, House, *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Tenth Congress*, 109th Cong., 2nd sess., H.DOC. 109-157 (Washington: GPO, 2007), p. 37. Senate practice appears to be consistent with this approach. (Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.DOC. 101-28, (Washington: GPO, 1992), pp. 15-16). Other counting methods might be used in other contexts. For example, a method in which neither the day of adjournment nor the day of reconvening were counted has been used elsewhere. This method takes into account that the Senate could act on nominations on either of these days, obviating the need for a recess appointment.

[97] Excluding the January 2012 appointments, the shortest intrasession recess appointment since the Reagan presidency was made by President Clinton during an intrasession recess of 10 days. Other appointments made during short intrasession recesses include by President George W. Bush conferring four recess appointments during an 11-day recess ending on April 19, 2004.

[98] 36 Op. O.L.C. *1 (2012).

[99] Based on judicial precedent and longstanding Attorneys General opinions, it appears that "Vacancies" existed for purposes of the Recess Appointments Clause for each position filled at both the National Labor Relations Board and the Consumer Financial Protection Bureau. Some have questioned whether the Recess Appointments Clause may be (continued...)

intrasession recess so as to prevent a recess appointment? Second, is there a minimum number of days for which the Senate must be out of session before a President may constitutionally exercise his recess appointment power? The following section now examines each of these questions in turn.

Did the Pro Forma Sessions Create Recesses Insufficient for Recess Appointments?

Beginning in 2007, the Senate began using "pro forma" sessions to avoid a sustained break of more than three days, with the apparent intent of preventing the President from exercising his recess appointment powers.[100] A pro forma session is generally understood to be a short meeting of the chamber in which little or no business is typically conducted, and in recent Senate practice it is often routinely agreed upon by unanimous consent that no business will be conducted.[101] Pro forma sessions of the Senate typically involve a Senator convening the session, assuming the chair, and adjourning.[102] For example, during the first session of the 112th Congress, there were eight occasions when the Senate suspended its business for an overall period of longer than three days but held pro forma sessions at least every three days pursuant to a unanimous consent agreement.[103] During each of these periods, the Senate held pro forma sessions at least every three

(...continued)

used to fill a newly established office. The Recess Appointments Clause is unlike the Vacancies Reform Act (VRA), a statutory alternative to filling some advice and consent positions. Under the VRA, a "vacancy" arises when the relevant officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. §3345(a). The Recess Appointments Clause is not so limited, and there are several historical examples of the President relying on his recess appointment power to install an initial leader at a newly-established agency. See also 26 Op. Atty. Gen. 234 (1907) ("President has the power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Congress.").

[100] In November 2007, the Senate Majority Leader announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments." *See* Sen. Harry Reid, "Recess Appointments," remarks in Senate, 153 CONG. REC. S14698 (daily ed., November 16, 2007). It recessed later that day and, pursuant to a unanimous consent agreement, pro forma meetings were convened on November 20, 23, 27, and 29 with no business conducted. Such a practice continued at the end of December 2007 as well. The development of this practice is perhaps informed by existing statements of the Department of Justice that link the Recess Appointments Clause to the Adjournment Clause. However, it also appears that the use of pro forma sessions to prevent recess appointments was at least contemplated as early as the 1980s. See 145 CONG. REC. 29915 (1999) (statement of Sen. James Inhofe) ("[Senator Byrd] extracted from [the President] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would give the list to the majority leader ... in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into a recess and staying pro forma so the recess appointments could not take place.") See CRS Congressional Distribution Memorandum, "Efforts to Prevent Recess Appointments through Congressional Scheduling and Historical Recess Appointments During Short Intervals Between Sessions," by Henry Hogue and Richard Beth (October 24, 2011). See also CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

[101] For example, an order for adjournment on May 26, 2011, stated: "Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m. on Friday, May 27, for a pro forma session only, with no business conducted; that when the Senate adjourns on Friday, May 27, it stand adjourned until 10 a.m. on Tuesday, May 31, for a pro forma session only, with no business conducted ..." 157 CONG. REC. S3465 (daily ed. May 26, 2011).

[102] As noted previously, pro forma sessions are relatively short in duration, often lasting no more than a few minutes. See 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

[103] 157 CONG. REC. S3465 (daily ed. May 26, 2011); 157 CONG. REC. S4305-S4306 (daily ed. Jun. 30, 2011); 157 CONG. REC. S5292 (daily ed. Aug. 2, 2011); 157 CONG. REC. S6009 (Sept. 26, 2011); 157 CONG. REC. S6356 (daily ed. Oct. 6, 2011); 157 CONG. REC. S6891(daily ed. Oct. 20, 2011); 157 CONG. REC. S7876 (daily ed. Nov. 18, 2011); 157 CONG. REC. S8783-S8784 (daily ed. Dec 17, 2011).

days pursuant to a unanimous consent agreement. The President did not make any recess appointments during these periods.

To evaluate the lawfulness of the January 4 appointments, a reviewing court would likely first need to determine the length of the recess within which President Obama made his recess appointments. Assuming such a consideration is not barred by the political question doctrine, a court would likely need to determine whether a pro forma session is a session of Congress sufficient to interrupt an otherwise continual intrasession recess (such a session will hereinafter be called a "standard session"), and therefore meaningful for purposes of the Recess Appointment Clause. If the Senate's pro forma sessions do act as standard sessions, then the recess within which the President made his appointments would have been one of three days.

There appear to be at least three potential approaches a reviewing court could take to evaluate whether pro forma sessions constitute standard sessions. First, it is possible that a court could determine that any session of Congress, including any pro forma session, constitutes a standard session. Second, a court could determine that a pro forma session is a standard session only if business is actually conducted during the pro forma session. Lastly, a court could determine that a pro forma session is a standard session so long as the Senate has the capacity to conduct business during the session. Each approach will be evaluated below.

First, a reviewing court could find that any pro forma session, regardless of its length, purpose, attendance, or other characteristic, is not distinguishable from any other standard session of Congress where Members vote on legislation or engage in debate.[104] This approach could be affected by a court's inclination to show deference to the Senate in determining its own schedule. Viewed in this light, all pro forma sessions held by the Senate would break up a long intrasession recess by creating shorter recesses. If a court were to reach this conclusion, the January 4 appointments would have occurred during a three-day recess of the Senate (i.e., January 4 to January 6). Under this approach, whether the appointments were lawfully made would depend on whether a three-day recess constitutes a "Recess" sufficient to trigger the Presidents authority for purposes of the Recess Appointments Clause.

A reviewing court may, however, choose to look at what specifically occurs during pro forma sessions to determine whether they constitute standard sessions, and are therefore meaningful for purposes of the Recess Appointments Clause. Under this approach, only if "business" were actually conducted during a pro forma session would it be considered a standard session. As explicitly provided for by the unanimous consent agreements, "business" has generally not been conducted at recent pro forma sessions.[105] With respect to the specific sessions at issue here, the December 17, 2011, unanimous consent agreement provided that "no business" was to be conducted during any of the pro forma sessions. During the January 3, 2012, pro forma session, the Senate convened at 12:01 p.m. and adjourned at 12:02 p.m. until January 6, 2012, when it convened at 11:00:03 a.m. and adjourned at 11:00:32 a.m.[106] Nor does it appear that "business" has been conducted at any subsequent pro forma session. Under an approach that considers the

[104] However, a court may choose not to question the pro forma sessions because the Senate itself considers such sessions adequate. See *supra* section "Political Question Doctrine."

[105] It is unclear how a court would define "business" or whether it would even choose to do so. See *supra* section "Political Question Doctrine." However, a court may consider approving legislation or confirming appointees to be actions sufficient to constitute "business," but that quickly meeting and adjourning, or appointing a Senator to be President Pro Tempore would not be actions sufficient actions to constitute "business."

[106] 158 CONG. REC. S1 (daily ed., Jan. 3, 2012); 158 CONG. REC. S3 (daily ed., Jan. 6, 2012).

content of the specific session, it seems unlikely that any of the January pro forma sessions would be considered standard sessions. Under this approach, the January 4 appointments could be considered to have occurred during an intrasession recess of 20 days, in which case a court would likely consider them to be consistent with established historical precedent.[107]

Finally, a reviewing court may determine that a pro forma session is a standard session so long as the Senate has the capacity to conduct business. Although the Senate agreed by unanimous consent that no business would be conducted during the pro forma sessions, that decision can be reversed by the same means. For example, there were two occasions during the 112th Congress when the Senate conducted business by unanimous consent after it had previously adopted a unanimous consent agreement to adjourn and hold a series of pro forma sessions in which no business was to be conducted. Under these subsequent agreements, the Senate approved legislation, H.R. 2553, the Airport and Airway Extension Act of 2011 Part IV, on August 5, 2011, and H.R. 3765, Temporary Payroll Tax Cut Continuation Act of 2011 on December 23, 2011.[108] Additionally, it should be noted that with respect to appointments, the Senate has previously confirmed nominees by unanimous consent.[109] Therefore, as the Senate may be considered to have the capacity to consider nominations and conduct other business pursuant to separate unanimous consent agreements, a court may then determine that pro forma sessions are standard sessions, and therefore meaningful for purposes of the Recess Appointments Clause. If a court were to reach this conclusion, then all the January 2012 pro forma sessions could be considered standard sessions, such that they break up a long intrasession recess into brief recesses. Under this approach, the President would have made the January 4 appointments over a three-day recess. Whether the appointments were lawfully made in this situation, again, depends upon whether a "Recess" for purposes of the Recess Appointments Clause must be a minimum number of days for the President to exercise his authority.

Must the Senate Be in a Recess for a Minimum Number of Days Before a President Can Make a Recess Appointment?

Based on the preceding analytical framework, it is possible a hypothetical reviewing court could determine that the President made the January 4 appointments during a three-day recess. Given the brevity of this recess, a reviewing court may then consider whether the Recess Appointments Clause requires that a recess of the Senate be in progress for a minimum number of days before the President is authorized to exercise his recess appointment power. This conclusion could likely depend upon whether a court finds a link between the Recess Appointments Clause and the Adjournment Clause.

As stated previously, it appears to be generally settled that a "Recess" under the Recess Appointments Clause encompasses both inter- and intrasession recesses of the Senate.[110]

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[107] See Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004). This is the conclusion made by the January 2012 Office of Legal Counsel (OLC) opinion. 36 Op. O.L.C. *1 (2012). See also 16 O.L.C. 15 (1992) (concluding that a recess spanning from January 3, 1992 to January 21, 1992 was of sufficient length to permit the President to exercise his recess appointment powers.).

[108] 157 CONG. REC. S5297 (daily ed. August 5, 2011), "Unanimous consent to consider and pass H.R. 2553"; 157 CONG. REC. S8789 (daily ed., December 23, 2011), "Unanimous consent to consider and pass H.R. 3765."

[109] CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

[110] *Evans*, 387 F.3d at 1224-5 ("[W]e accept that 'the Recess,' originally and through today, could just as properly refer (continued...)

Historical practice seems to indicate that an intrasession "Recess" should be one of sufficient length for the President to make a recess appointment.[111] However, the Constitution does not explicitly define "Recess" for purposes of the Recess Appointments Clause, nor does there appear to be a constitutionally required length of time that must be satisfied before the President exercises his authority under the Clause.[112] Because of the ambiguous nature of the Recess Appointments Clause, the Adjournment Clause has historically been drawn upon to impart meaning to the term "Recess." The Adjournment Clause provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."[113] Based on this linkage, it could be argued that a "Recess" must be longer than three days for the President to exercise his recess appointment power.[114]

Prior to 1857, Presidents had virtually no occasion to make intrasession recess appointments, because Congress did not take such breaks. However, since the late 19th century, Congress has frequently scheduled more intrasession recesses, during which periods Presidents have exercised their recess appointment authority. In 1921, Attorney General Daugherty declared that the President had the authority to make a recess appointment during an intrasession recess of 29 days. However, he also arguably limited the scope of his opinion when, referencing the Adjournment Clause, he stated the opinion was not meant to imply that "the power exists if the adjournment is for only 2 instead of 28 days ... Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution."[115] In fact, in 1979 the Office of Legal Counsel (OLC) informally advised against making a recess appointment over a six-day intrasession recess based on "the warning in Attorney General Daugherty's opinion."[116]

(...continued)

generically to any one—intrasession or intersession—of the Senate's acts of recessing, that is taking a break."). See also Gould v. United States, 19 Ct. Cl. 593, 595-96 (1884) ("We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned ... , could be and was legally filled by appointment of the President acting alone."); Nippon Steel Corp v. United States Int'l Trade Comm'n, 239 F. Supp. 2d 1367, 1374 n. 13 (Ct. Int'l Trade 2002) ("The long history of the practice (since at least 1867) without serious objection by the Senate, ... demonstrates the legitimacy of these [intrasession] appointments.").

[111] See 33 Op. Atty. Gen. 20, 23 (1921) (declaring that an appointment made during a 29-day intrasession recess to be constitutional but that "an adjournment of 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution." *Id*. at 25.)

[112] *Evans*, 387 F.3d at 1225 ("The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause. And we do not set that limit today. ... That an intersession recess might be shorter than an intrasession recess is entirely possible.") While a court may also be interested in addressing whether a required length of time should also apply to intersession recess appointments, the January 2012 appointments were made after the second session of the 112th Congress convened. Accordingly, intersession recesses are not addressed in this report.

[113] U.S. CONST., Art. I, §5, cl. 4.

[114] For adjournments of more than three days, the Senate must obtain the consent of the House. Consent is routinely accomplished by approval of a concurrent resolution by both Houses. For example, during the 108th Cong., 2nd sess., for the intrasession recess lasting from October 11, 2004 to November 16, 2004, both chambers approved H.CON.RES. 518. With respect to the Senate, it provided: "... when the Senate recesses or adjourns ..., on a motion offered pursuant to this concurrent resolution by its Majority Leader ..., it stand[s] recessed or adjourned until noon on Monday, November 15, 2004, or noon on Tuesday, November 16, 2004, as may be specified in the motion to recess or adjourn, or until such other time on either day as may be so specified." As adopted, the offered motion to adjourn by Senate Majority Leader Bill Frist declared the "Senate adjourned until Tuesday, November 16, 2004, at 12 noon." 150 CONG. REC.S11334 (daily ed. Oct. 16, 2004).

[115] 33 Op. Atty. Gen. 20, 24 (1921).

[116] 3 Op. O.L.C. 314, 316 (1979). The OLC also noted that as a result of "functional affinity between the pocket veto and recess appointment power" and the court decision, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) where a (continued...)

Furthermore, the Department of Justice (DOJ), during litigation, appears to have supported a link between the Adjournment Clause and Recess Appointments Clause. In 1993, the DOJ submitted a brief in the case *Mackie v. Clinton*,[117] where it responded to the plaintiff's assertion that the 13-day recess in question was of insufficient duration to trigger the recess appointment power. The brief noted that no Attorney General or court has found that the President lacks the authority to make recess appointments during a 13-day recess. Nevertheless, the brief stated:

> If the [intrasession] recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives. It might be argued that the Framers did not consider one, two and three day recesses to be constitutionally significant.[118]

The DOJ has reiterated this view in subsequent briefs,[119] and more recently during oral argument before the Supreme Court in *New Process Steel v. National Labor Relations Board*.[120] Specifically, the Deputy Solicitor General, Neil Katyal, stated that "[T]he recess appointment power can work—in a recess. I think our office has opined the recess has to be longer than 3 days."[121]

Does the Adjournment Clause Give Meaning to "Recess" for Purposes of the Recess Appointments Clause?

A reviewing court may consider accepting that the Adjournment Clause informs the meaning of "Recess" for purposes of the Recess Appointments Clause. When considering historical practice, courts have stated: "The ... Supreme Court has made clear that considerable weight is to be given to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution ...." (internal citations omitted).[122] While intrasession recess appointments cannot be traced to the founding period, the executive branch appears to have acknowledged some link between the two clauses since the President first began making such

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court held that a six-day adjournment had not prevented the return of a bill on account of its short duration, "Presidents during recent years have been hesitant to make recess appointments during intrasession recesses of the Senate." *Id*. at 316.

[117] Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993) (holding that the holdover provision for a member of the Board of Governors of the United States Postal Service did not constitute a vacancy sufficient to allow the appointment of a new member pursuant to the Recess Appointments Clause).

[118] DOJ 1993 Brief, *supra* note 89, at 24-6. The DOJ 1993 Brief also declared: "Apart from the three-day requirement ..., the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary." *Id*. at 26.

[119] See, e.g., Brief for the United States in Opposition to Petition for *Writ of Certiorari*, at 10, United States v. Miller, 104 Fed. Appx. 150 (11th Cir. 2004), *cert denied*., 544 U.S. 919 (2005); and Brief for the United States in Opposition to Petition for *Writ of Certiorari*, at 11, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1640 (2005) (both Briefs stating "... the Recess Appointments Clause encompasses all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less, see U.S. Const. Art. I, §5, cl. 4).").

[120] New Process Steel, L.P. v. Nat'l Labor Relations Board, 130 S. Ct. 2635 (2010).

[121] Transcript of Oral Argument at 50, New Process Steel, L.P. v. Nat'l Labor Relations Board, 130 S. Ct. 2653 (2010) (No. 08-1457). Notwithstanding these statements, the OLC in its January 2012 opinion noted: "This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make recess appointment." 36 Op. O.L.C. *9 n.13 (2012).

[122] See, e.g., *Woodley*, 751 F.2d at 1012.

appointments. In light of the historical views and acceptance of the executive branch,[123] discussed above, a court may therefore conclude that recess appointments may only be made during intrasession recesses of more three days.

As discussed above, it is possible that a court may find that pro forma sessions constitute standard sessions of the Senate such that they could break up a continual intrasession recess into shorter recesses. However, if a court were to determine that a "Recess" for purposes of the Recess Appointments Clause must be *more than three days*, then the President would not be able to exercise his recess appointment powers where the interpretations of pro forma session resulted in the President making the January 4 appointments during a recess of only three days.

Are There Other Criteria that Could Give Meaning to "Recess" for Purposes of the Recess Appointments Clause?

However, arguments could also be made that there is no determinative constitutional basis for linking the Adjournment Clause to the Recess Appointments Clause.[124] First, the Adjournment Clause does not use the term "recess," and the Recess Appointment Clause, likewise, does not use the term "adjourn." Second, from a structural perspective, the Adjournment Clause is located in Article I, Section 5 of the Constitution, which sets forth the internal rulemaking authorities of the houses. The Recess Appointments Clause, on the other hand, is located in Article II, Section 2 of the Constitution, which establishes the express authorities of the President. As the two sections do not speak to similar functions or duties of the respective branches, a court may find no basis for referencing a constitutionally required rule of legislative procedure as relevant to the interpretation of a term related to the President's recess appointment powers. Accordingly, a court could define "Recess" for purposes of the Clause in a manner wholly unrelated to the Adjournment Clause.

If a "Recess" for purposes of the Clause is not tied to the three-day requirement from the Adjournment Clause, a court may be hesitant to establish a bright-line minimum length of time without a constitutional provision upon which it can rely. As noted previously, the political question doctrine may act as a deterrent to making such a determination. However, the Senate's ability to exercise its advice and consent prerogative may be greatly undermined absent a time requirement because the President arguably would have the authority to make a recess appointment whenever there is any break of the Senate at all, for instance over a weekend. Given this potential, it is possible a court may depend upon descriptive criteria to define a "Recess" for purposes of the Clause, as did a 1905 report of the Senate Committee on the Judiciary.[125] The Senate report, which was issued in response to President Theodore Roosevelt's intersession recess

[123] Arguably, Congress has also accepted that a recess must be more than three days, as it has held pro forma sessions, discussed *infra*, every three or four days in an attempt to prevent the President from exercising his recess appointment power.

[124] See, e.g., *Woodley*, 751 F.2d at 1025 (Norris, J., dissenting) (*discussing I.N.S. v. Chadha*, 462 U.S. 919 (1983), the dissent in *Woodley* opined: "[T]he courts must critically evaluate a historical practice before deciding how much to accord it in the process of interpreting the Constitution.").

[125] For example, in the 1880 decision *In re Farrow*, 3 F. at 113-4, the court held that a vacancy that existed before the recess of the Senate was "vacant" for purposes of the Recess Appointments Clause. In reaching its conclusion, the court found instructive and invoked the "practice of the executive department of the government for nearly 60 years ... and the concurring opinions of 10 of the distinguished jurists who have filled the office of attorney general of the United States...." *Id*. at 114.)

appointments during the 58th Congress,[126] first stated: "The word 'recess' is one of ordinary, not technical signification, and it is evidently used in the constitutional provision in its common and popular sense."[127] It further states that it was the intention of the Framers that "[a recess] should mean something real, not something imaginary; something actual, not something fictitious."[128] Perhaps most instructive, the report asserts:

> [Recess] means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress ...* ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not [*sic*] receive communications from the President or participate as a body in making appointments.[129]

Attorneys General opinions have made statements similar to that of the Senate report. An Attorneys General opinion from 1960 stated:

> does the word "recess" relate only to a formal termination of the session of the Senate, or does it refer as well to a temporary adjournment of the Senate, protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations? It is my opinion, which finds its support in executive as well as in the legislative and judicial authority, that the latter interpretation is the correct one.[130]

Without an explicit standard for a required minimum length of time, for purposes of the Clause, a court might turn to what it means for the Senate to be "absent" in such a way that permits the President to use his recess appointment power. Alternatively, as it would to evaluate pro forma sessions, a court could look at what it means for the Senate to conduct "business" in such a way that prevents the President from using his recess appointment power. However, it may prove difficult for a court to provide meaningful definitions for these terms.[131] The January 2012 OLC opinion makes a similar argument. Without reaching a conclusion on a minimum length of time,[132] the OLC emphasized the practical purpose of the recess appointment power and opined that a "Recess" exists when, "as a practical matter, the Senate is not available to give its advice and consent to executive nominations."[133]

If a court were to establish a descriptive meaning of "Recess" for purposes of the Clause, that standard would determine whether the President could rely upon his recess appointment power to make the January 4 appointments. In such case, the length of the recess in which the President made his recess appointments may not be a dispositive factor. As described above, a reviewing

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[126] In 1903, President Theodore Roosevelt recess appointed over 160 military officers during what is undoubtedly the briefest recess ever relied on by a President. In the 58th Congress, the first session ended at noon—December 7, 1903, and the second session began immediately thereafter. The President construed the moment between the end of the first and the beginning of the second as a "constructive" recess.

[127] S.RPT. 58-4389 at 1 (1905).

[128] S.RPT. 58-4389 at 2.

[129] S.RPT 58-4389 at 2 (emphasis in the original).

[130] 41 Op. Atty. Gen.. 463, 466 (1960) (emphasis added). Other early Attorneys General opinions, including the 1921 Attorney General Daugherty opinion, opined that a "Recess" is determined by "whether in a *practical sense* the Senate is in a session so that its advice and consent can be obtained." 33 Op. Atty. Gen. at 21-22 (emphasis in the original).

[131] Indeed, a court could decline to consider these matters under the political question doctrine.

[132] 36 Op. O.L.C. *9, n.13. ("Because we conclude that pro forma sessions do not have this effect, we need not decide whether the President could make a recess appointment during a three-day intrasession recess.").

[133] 36 Op. O.L.C. *13.

court could evaluate the effect pro forma sessions have, or may not have, on a recess from several different perspectives. Given this framework, it may be possible that a court could find the Senate to be "absent," despite its use of pro forma sessions, if it determined that the Senate could not "receive communications from the President or participate as a body in making appointments," in the words of the 1905 Senate report. If a court were to reach this conclusion, then it seems that the President could have the ability to rely upon his recess appointment power to make the January 4 appointments. Alternatively, if a reviewing court were to find that the Senate was indeed able to conduct "business" such that it could take up its "advising and consenting functions [to] executive nominations" by unanimous consent. Under this viewpoint, it seems unlikely that the President could have relied upon his recess appointment power to make the January 4 appointments.

Potential Separation of Powers Concerns Associated with the Prolonged Use of Pro Forma Sessions

A reviewing court may also take into account general separation of powers concerns that may arise from the prolonged use of pro forma sessions. [134] For example, were a court to conclude that pro forma sessions are standard sessions such that they prevent a "Recess" from occurring under the Clause, the Senate may be able to utilize such sessions to repeatedly and consistently block the President from making recess appointments. Such a scenario could result in a complete abrogation of the President's recess appointment power during lengthy intrasession recesses.[135] This scenario may raise constitutional concerns under the separation of powers doctrine.[136]

The separation of powers doctrine stands for the proposition that certain political functions must be allocated amongst various governmental branches, so as to avoid domination by any one entity. [137] The doctrine primarily acts to prevent the aggrandizement of a particular branch through

[134] It is unclear whether a court would reach a discussion on the separation of powers doctrine if a ruling on the issue would result in an instruction to one of the coordinate branches of government, namely the legislature, on whether it may or may not use certain discretionary procedures afforded to it by the Constitution. Of relevance here is that Article I of the Constitution provides, "Each House may determine the Rules of its own Proceedings ..." U.S. CONST., Art I., §5, cl. 2. This may be a nonjusticiable issue under the political question doctrine. See *supra* "Political Question Doctrine."

[135] To assist in analyzing whether separation of powers principles have been violated, "... a [worst case scenario] is ... a useful tool for interpreting a statute which impacts ...the powers of these branches, and which, depending on the construction ultimately adopted, may significantly change their authority relative to each other." *Staebler*, 464 F. Supp. at 599

[136] For example, one hypothetical that could raise separation of powers concerns would involve the Senate concluding its business in April and holding pro forma sessions from then until it reconvenes for a new session in January. The current circumstance and practice of the Senate may be distinguishable. It appears that the Senate has utilized pro forma sessions during breaks that are, at a maximum, approximately one month. The Senate is consequently available at all other times to act on the President's nominations, and thus the Senate would not be interfering with the President's ability to "take Care that the Laws be faithfully executed." Additionally, the current practice arguably exists as a result of the House of Representatives not agreeing to a concurrent resolution to adjourn for more than three days under the Adjournment Clause. This separation of powers analysis is not an exhaustive study, but it examines the concerns that may be raised in light of the Senate taking steps to encroach upon the President's recess appointment power. For instance, a court might also find similar separation of powers concerns if the President could unilaterally determine when to use his recess appointments authority by independently determining when the Senate is, or is not, in "Recess" for purposes of the Clause.

[137] See *infra* section "Does a Congressional Restriction on the Powers Exercised by a Recess Appointee Violate the Separation of Powers Doctrine?"

the Constitution's structure of checks and balances. However, not all encroachments by one branch upon another violate the separation of powers doctrine—especially in areas where the Constitution envisions shared power between the branches. The Appointments Clause clearly contemplates roles for both the President and the Senate in appointing officers of the United States,[138] whereas the Recess Appointments Clause provides the President with the ability to unilaterally make temporary appointments, but only during the Senate's absence. If the Congress took formal steps to prevent the President from exercising his powers under the Appointments Clause, such action likely would violate the separation of powers doctrine.[139] Likewise, if the Senate took measures, such as the prolonged use of pro forma sessions, to effectively prevent the President's exercise of his authority under the Recess Appointments Clause, such actions could raise similar separation of powers concerns.

While there is no uniform jurisprudential approach to evaluating separation of powers cases, the Supreme Court appears to have developed two main analytical frameworks by which it scrutinizes the Constitution's allocation of power. These analytical approaches are referred to as formalism—which emphasizes precise definitional boundaries—and functionalism—which deemphasizes the efficacy of adhering to such precise boundaries, relying instead on the effect of the exercise of power. Although these frameworks share a common concern regarding branch self-aggrandizement, they differ greatly in their views regarding the scope of the separation of powers and the degree to which governmental functions may be intermingled.[140]

Under what could be considered a formalist approach, a reviewing court may view the plain text of the Recess Appointments Clause as a purely conditional power.[141] The Constitution has delineated clear boundaries to the President's use of his traditional appointment power as compared to his recess appointment power. Whereas the President may submit a nomination to the Senate for its advice and consent at any time, the "auxiliary" recess appointment power is triggered only upon a specific event—a "Recess of the Senate."[142] Therefore, if pro forma sessions are found to be meaningful for purposes of the Clause, the Senate's procedural mechanism could be viewed as ensuring that the contingency the Founders deemed necessary to trigger the President's recess appointment power simply does not occur. Without the occurrence of a recess, the President's recess appointment power is not activated and therefore cannot be infringed.[143] Under this view, the repeated, consistent, and prolonged use of pro forma sessions to prevent a "Recess" may not be distinguishable from a scenario in which a Senate chooses never to adjourn. The DOJ has acknowledged that "Congress can prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations."[144] Thus, under this analytical framework, the mere fact that the President is

[138] U.S. CONST., Art. II, §2, cl. 2 (Appointments Clause).

[139] See, e.g., Buckley v. Valeo, 424 U.S. 1, 134-135 (1976) (holding that Congress may not appoint executive officials performing substantial functions under the law but that officers performing such functions must be appointed in accordance with provisions of the Appointments Clause of the Constitution).

[140] See Peter R. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987).

[141] U.S. CONST., Art. II, §2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate.").

[142] The Federalist, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961)

[143] The President, however, would ultimately retain the authority to make intercession recess appointments and appointments with the advice and consent of the Senate.

[144] 36 Op. O.L.C. at *17 ("We conclude that while Congress can prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations, it cannot do so by (continued...)

consistently barred from using his recess appointment power may not give rise to separation of powers concerns.

Under a functionalist approach, a court is more likely to consider whether the consistent and repetitive use of pro forma sessions interferes with the President's ability under the Recess Appointments Clause to maintain the continuity of administrative government. For example, in the context of "Vacancies" for purposes of the Clause, the judicial and executive branches have consistently rejected a narrow and literal interpretation of when a vacancy may exist because of the practical considerations behind the Clause. It was the opinion of the Attorney General in 1832 that the Constitution "was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one. It was the intention of the [C]onstitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or at all events, that the vacancy should not be a protracted one."[145] In addition, a court could find that the use of a tactic, which would essentially prohibit the President from effectively using his recess appointment power to "take Care that the Laws be faithfully executed," [146] would be an unconstitutional enhancement of legislative power in relation to the executive branch.[147] Hence, from a functionalist approach, overriding separation of powers concerns may indicate that the Senate's use of pro forma sessions, even if deemed meaningful, could nonetheless "impermissibly undermine" the powers of the President or prevent the President "from accomplishing [his] constitutionally assigned functions."[148]

Summary of Recess Clause Questions

Overall, whether President Obama could rely upon his recess appointment power to make the January 4 appointments is dependent on whether there was a "Recess of the Senate" for purposes of the Recess Appointments Clause. The unique facts of the situation—appointments made between two pro forma sessions—raise significant and unresolved constitutional issues. A

(...continued)

conducting pro forma sessions during a recess.").

[145] 2 Op. Atty. Gen. 525, 526-7 (1832). See also 1 Op. Atty. Gen. 631, 33-34 (1823). Judicial opinions have echoed this same sentiment. See also United States v. Allocco, 305 F.3d 704, 712 (2d Cir. 1962) (holding that a contrary interpretation "would create executive paralysis and do violence to the orderly functioning of our complex government."); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (holding that a contrary interpretation would "lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Session reconvenes"); and Evans v. Stephens, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (declaring that "interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session of the Senate but to empower him to fill a vacancy that arises immediate thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning.").

[146] U.S. CONST., Art. II, §3.

[147] The court in *Staebler v. Carter* recognized that, "if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation." *Staebler*, 464 F. Supp. at 599-600 (concluding that the plaintiff's construction should be avoided because if carried to its logical conclusion, a commissioner could remain in office indefinitely notwithstanding the expiration of his term; in the court's view, this would render the President totally powerless by constitutional means to protect himself and the powers conferred upon him by the Appointments Clause would be usurped).

[148] See Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 851, 856 (1986). See also Loving v. United States, 517 U.S. 748, 757 (1996); Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 443 (1977) (*citing* United States v. Nixon, 418 U.S. 683, 711-12 (1974)).

reviewing court may turn to the Adjournment Clause to provide a definition of "Recess" for purposes of the Clause, in which case a "Recess" must be longer than three days for the President to exercise his authority. Yet, a reviewing court may also find no basis for linking these Clauses and, alternatively, unless barred by the political question doctrine, could establish a definition of "Recess" by relying upon descriptive criteria. In such case, a "Recess" for purposes of the Clause might hinge on what it means for the Senate to be "absent" or "conducting business" in such a way that either permits or prevents the President from exercising his recess appointment power. Whether a "Recess" within the meaning of the Clause is specifically defined as one that is more than three days or is based on descriptive criteria, it is unclear whether Congress may utilize pro forma sessions to disrupt the duration of an otherwise continual intrasession recess. If pro forma sessions are found not to be meaningful for purposes of the Clause, then the President's recess appointments would likely be considered to have been validly made during a single intrasession recess of at least 20 days. Alternatively, if a reviewing court were to find the Senate's pro forma sessions to be meaningful for purposes of the Clause, then the sessions may be sufficient to prevent a President from making a recess appointment. However, even if these sessions are deemed meaningful such that they would prevent a "Recess" from occurring, prolonged use of pro forma sessions by the legislative branch may raise separation of powers concerns that could compel a court to re-evaluate the contours of each branch's role in the recess appointment context.

If the Appointments Are Lawful, Do the Statutory Provisions of the Consumer Financial Protection Act Restrict Cordray's Powers?

Assuming, arguendo, that the President's appointment of Richard Cordray is constitutional, questions remain as to whether, and to what extent, the specific statutory language of the Consumer Financial Protection Act (CFP Act) restricts Cordray's powers.[149] To address these questions, this report first provides a general description of the CFPB. It then analyzes the provisions of the CFP Act that provide the Secretary of the Treasury (Secretary) certain powers to perform the functions of the CFPB until a Director is appointed, which is followed by an analysis of the impact that the President's recess appointment may have on both Cordray's and the Secretary's CFPB authorities.

Overview of the Consumer Financial Protection Bureau

The CFPB was established by Title X of the Dodd-Frank Act, the CFP Act.[150] The CFP Act alters the consumer financial protection landscape by largely consolidating regulatory authority and, to a lesser extent, supervisory and enforcement authority in one regulator—the CFPB.[151] It also

[149] These questions would apply, not just to Cordray, but also to any other individual who is lawfully recess appointed to be CFPB Director prior to one being confirmed by the Senate. There is no similar statutory concern regarding the announced appointments to the NLRB.

[150] For a more detailed analysis of the CFPB and the CFP Act, see CRS Report R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau*, by David H. Carpenter.

[151] The Bureau has jurisdiction over an array of consumer financial products and services, including deposit taking, mortgage lending, credit card lending, loan servicing, check guaranteeing, the collection of consumer report data, debt (continued...)

provides the CFPB the authority to prescribe regulations to implement 18 federal "enumerated consumer laws"[152] that largely were in place prior to Dodd-Frank's enactment, such as the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA).

Section 1011 of the CFP Act provides that the Bureau is to be headed by a single Director, who "shall be appointed by the President, by and with the advice and consent of the Senate."[153] However, section 1066 of the CFP Act provides the Secretary the authority to perform some, but not all, of the Bureau's authorities until a CFPB Director is appointed.[154]

Statutory Interpretation of CFP Act Section 1066

CFP Act section 1066 serves as the primary source of the Secretary's interim authority over the Bureau.[155] It states, in relevant part:

> (a) In General.—The Secretary is authorized to perform the functions of the Bureau under this subtitle [F] until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.[156]

The first half of this provision establishes the *scope* of the Secretary's authority. The second half defines *when* the Secretary's authority shall terminate.

Section 1066 does not authorize the Secretary to exercise the full panoply of the Bureau's powers. Rather, the scope of the Secretary's authority under section 1066 is limited to "the functions of the Bureau under this subtitle [F]...." Generally speaking, subtitle F of the CFP Act transfers certain consumer financial protection functions from seven "transferor agencies"[157] to the Bureau.[158] For clarity, this report refers to the authorities provided under subtitle F that the

(...continued)

collection, real estate settlement services, money transmitting, and financial data processing. The Bureau serves as the primary federal consumer financial supervisor of many of the institutions that offer these products and services.

[152] For a full listing of the "enumerated consumer laws," see P.L. 111-203 §1002(12), 12 U.S.C. §5481(12).

[153] P.L. 111-203 §1011, 12 U.S.C. §5491.

[154] For a more detailed analysis of these authorities, see CRS Report R41839, *Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection*, by David H. Carpenter.

[155] Three other CFP Act provisions (sections 1062, 1017(a)(3), and 1066(b)) provided the Secretary authority related to the Bureau; however, those authorities terminated on July 21, 2011, the designated transfer date. P.L. 111-203 §1062, 12 U.S.C. §5582; P.L. 111-203 §1017(a)(3), 12 U.S.C. §5497(a)(3); P.L. 111-203 §1066(b), 12 U.S.C. §5586(b).

[156] P.L. 111-203 §1066(a), 12 U.S.C. §5586(a).

[157] The transferor agencies are: the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD). P.L. 111-203 §1061(a)(2), 12 U.S.C. §5581(a)(2). Note also that the Dodd-Frank Act eliminated the OTS and transferred much of its powers to other regulators. P.L. 111-203, Title III.

[158] More specifically, the powers that were transferred to the Bureau under subtitle F, which the Secretary has the interim authority to exercise, include

- "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law," including the rulemaking authority under the 18 enumerated consumer laws, that was held by the HUD, FRB, OCC, OTS, FDIC, and NCUA;
- certain consumer compliance examination and other supervisory authorities over "larger depository institutions" (i.e., banks, thrifts, savings associations, and credit unions with more than $10 billion in assets);

(continued...)

Secretary may exercise pursuant to section 1066 as "transferred powers" or "transferred authorities."

The powers provided to the Bureau pursuant to provisions outside of subtitle F generally are the Bureau's "newly established" powers—that is, the enhanced consumer protection authorities that were not explicitly provided by law to federal regulators before the Dodd-Frank Act. An example of a newly established power is the authority to supervise covered non-depository financial institutions, such as payday lenders and check cashers.[159] Given that the newly established powers are provided for by provisions other than subtitle F, they do not appear to be within the scope of the Secretary's authorities as defined by CFP Act section 1066.

The Secretary's authority to exercise the Bureau's transferred powers lasts "until the Director of the Bureau is confirmed by the Senate in accordance with section 1011." Section 1011 sets forth that the Director of the CFPB is to be "appointed by the President, by and with the advice and consent of the Senate." This language in section 1011 is virtually identical to the statutory language used to establish many other advice and consent positions.[160] This standard advice and consent language does not explicitly reference the President's recess appointment powers. However, this language has never been construed by a court to prevent the President from exercising his recess appointment powers, and there are numerous examples in which such positions have been filled by recess appointees without judicial challenge.[161]

Had Richard Cordray been nominated by the President and confirmed by the Senate to be the first CFPB Director, it would seem clear that the Secretary's power to exercise the transferred authorities would have terminated, and Cordray would have assumed the full powers of the Director position. The fact that Cordray was recess appointed without being "confirmed by the Senate" may call into question whether, through section 1066, Congress intended to place restrictions on the powers of a recess appointed CFPB Director.

(...continued)

- primary enforcement authority of consumer financial laws and regulations over larger depositories;
- subject to certain limitations, the authority "to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under [the enumerated consumer laws] ..." that was previously held by the FTC; and
- the authority to coordinate a process by which certain employees of all of the transferor agencies other than the FTC are identified to be transferred to the CFPB, as necessary to perform the transferred authorities. P.L. 111-203 §1061, 12 U.S.C. §5581.

[159] Other newly established powers include new rulemaking powers, distinct from the rulemaking authorities provided under the 18 enumerated consumer laws, and certain limited consumer compliance enforcement and examination powers over "smaller depository institutions" (i.e., banks, thrifts, savings associations, and credit unions with $10 billion or less in assets). P.L. 111-203 §§1024 and 1026, 12 U.S.C. §§5514 and 5516.

[160] See, e.g., 12 U.S.C. §2 (Comptroller of the Currency); 12 U.S.C. §241 (Board of Governors of the Federal Reserve System); 15 U.S.C. §78D (Securities and Exchange Commissioners); 12 U.S.C. §635a (President of the Export-Import Bank of the United States); 12 U.S.C. §1752a (National Credit Union Administration Board Members); 12 U.S.C. §1812 (Board of Directors of the Federal Deposit Insurance Corporation); 12 U.S.C. §2242 (Farm Credit Administration Board): 12 U.S.C. §2279aa-2 (Board of Directors of the Federal Agricultural Mortgage Corporation); 12 U.S.C. §4512 (Director of the Federal Housing Finance Agency).

[161] For example, the Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC) to be comprised of five members "to be appointed by the President by and with the advice and consent of the Senate." 15 U.S.C. §78d. President Franklin D. Roosevelt appears to have recess appointed the first five SEC commissioners. U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, vol. 76, p. 19 ("I nominate the following-named persons to be members of the Securities and Exchange Commission for the terms indicated, to which offices they were appointed during the last recess of the Senate....").

There appear to be at least two different ways that a reviewing court could interpret section 1066 with respect to both Cordray's and the Secretary's authorities.[162] Under one interpretation, a reviewing court could find that Cordray holds all of the powers provided to the CFPB—both the transferred authorities previously exercised by the Secretary and the newly established powers. Under a second interpretation, a court could conceivably determine that Cordray assumes only the CFPB's newly established powers, while the Secretary retains the power to exercise the transferred authorities until a Director is actually confirmed by the Senate. Each interpretation is discussed below.

Interpretation One: Cordray Assumes Both the Newly Established and Transferred Authorities as Director

Under the first interpretation, a reviewing court may stress that the phrase "until a Director is confirmed by the Senate" must be read in conjunction with the clause that follows: "in accordance with section 1011." As previously mentioned, section 1011 uses the standard statutory language to establish advice and consent positions, and it is generally understood that these positions can be filled pursuant to both of the procedures expressly provided for under the constitution. As a result, a court could interpret the relevant language of section 1066, with its reference to section 1011, as merely an alternative, or equivalent way, of expressing the standard process of appointing advice and consent positions. Had Congress truly intended to only allow a Senate-confirmed Director to exercise the full powers of the position, then a court may find it would not have referenced section 1011.

Additionally, construing section 1066 as restricting a recess appointee's authority would run contrary to the generally established principle that, as a constitutional matter, recess appointees possess the same legal authority as Senate-confirmed appointees.[163] A canon of statutory interpretation commonly employed by courts is to presume that Congress is aware of established law and intends for new statutes to be consistent with established interpretations of law absent a clear indication to the contrary.[164] A court may reason that had Congress intended to take the unusual step of restricting the authority of a recess appointed CFPB Director, it would have expressed that intention more clearly.[165] This could have been accomplished through an explicit

[162] To help understand the intent of statutory language, courts may look to the legislative history of the provision in question. In sum, financial reform legislation in the 111th Congress began with a white paper issued by the Treasury Department in the Summer of 2009. *Financial Regulatory Reform: A New Foundation*, Dept. of the Treasury, available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf. Over a series of weeks, the Treasury Department began issuing draft legislative language that would implement the proposals outlined in the white paper, including the establishment of a new agency devoted to consumer financial protection. These discussion drafts served as the starting point for Congressional action in 2009. By the Spring of 2010, Senator Christopher Dodd, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs (Banking Committee) began circulating discussion drafts of the legislation that were largely based off of the Treasury Department's draft legislation. It appears that the legislative language providing interim authority for the proposed consumer protection agency never (formally) deviated substantially from the original Treasury Department draft language during Senate debate. The CFP Act that was discharged by unanimous consent from the Banking Committee and that initially passed the full Senate as H.R. 4173, 111th Cong. §1066(a), in lieu of S. 3217, 111th Cong. §1066(a), is identical to the language of the Dodd-Frank Act §1066(a) that was signed into law. None of the three congressional reports on the consumer protection proposals offer much detail regarding the intent of the "as confirmed by the Senate" language.

[163] See *supra* section "Overview of the Recess Appointments Clause."

[164] See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig, at 19.

[165] *Staebler*, 464 F. Supp. at 591 ("Moreover, there is no basis either in the language of the statute or in its legislative history to support the conclusion that Congress meant to rein in the President in such an unprecedented manner. In the (continued...)

delineation of the powers to be held by an initial recess appointee, on the one hand, and by a Senate-confirmed appointee on the other.[166]

In sum, a court could interpret section 1066 as a legislative delegation to the Secretary to exercise certain CFPB functions until a Director can be appointed pursuant to either of the standard methods that are expressly provided by the Constitution: by the advice and consent of the Senate or by a recess appointment. Under this interpretation, a Senate-confirmed Director or a recess appointed Director, such as Cordray, would assume the full authorities established by the CFP Act—both the newly established and transferred powers—and the Secretary's interim authority to exercise the Bureau's transferred powers would terminate.

Interpretation Two: Cordray Only Assumes the Newly Established Authorities, Secretary Geithner Retains the Transferred Authorities

Under the second interpretation, it could be argued that the statutory language may be construed as stipulating that the Secretary's transferred authorities terminate, and the Director's full authorities are assumed, only upon the appointment of a Senate-confirmed Director. This construction would turn on a strict interpretation of the language "until the Director of the Bureau is confirmed by the Senate." To reach this conclusion, proponents likely would rely on two common canons of statutory interpretation. The first is the rule of surplusage: which provides that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[167] Under this reading, it could be argued that Congress intended the language "until confirmed by the Senate" to have a different meaning than, and to be read distinctly from, that of section 1011. To further buttress this position, a one could apply a second canon that "where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[168] It could be argued that if Congress intended to merely reiterate the standard advice and consent language of section 1011, then it could have used the very same section 1011 phrasing in drafting section 1066. In other words, instead of using the phrase "until confirmed by the Senate," in section 1066, the drafters could have used the phrase "shall be appointed," that is used in section 1011 (and in many other places within the U.S. Code).[169]

(...continued)

absence of a clearly-expressed legislative intent, the Court will not speculate that the Congress sought to achieve a result which would be both unusual and probably beyond its constitutional power.").

[166] This is akin to what Congress has done in restricting the pay of certain recess appointees via 5 U.S.C. §5503.This "recess appointments" section states, in relevant part: "Payment for services may not be made from the Treasury of the United States to *an individual appointed during a recess of the Senate* to fill a vacancy in an existing office...." 5 U.S.C. §5503 (emphasis added). In addition to making an explicit reference to recess appointments, drafters of section 1066 could have further clarified an intent to deviate from the norm by eliminating the phrase "in accordance with section 1011."

[167] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[168] Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). See also CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig, at 15-16.

[169] See *supra* note 160. Although the phrase "appointed by the President, by and with the advice and consent of the Senate" is far more common, the language "as confirmed by the Senate" is codified in a handful of places throughout the U.S. Code. See, e.g., 7 U.S.C. §2009bb-1 (Northern Great Plains Regional Authority), 25 U.S.C. §640d-11 (Office of Navajo and Hopi Indian Relocation), 22 U.S.C. §4605 (U.S. Institute of Peace).

Relying on this premise, the clearest understanding of section 1066 would be that the Secretary retains his authority to exercise the transferred powers until the Senate takes steps to confirm a CFPB Director. By extension, a recess appointed Director, such as Cordray, could only directly exercise the Bureau's newly established powers.[170]

Interpretation two may raise a number of potential interpretive problems. First, it would seem to render meaningless the clause "in accordance with section 1011," given the generally established understanding of the statutory language of section 1011. Additionally, under the second interpretation, section 1066 would impose statutory restrictions on the authorities that may be exercised by a recess appointee that would not apply to a Senate-confirmed appointee. This disparate treatment of recess appointees and Senate-confirmed appointees could be viewed as interfering with the President's constitutionally provided recess appointment power. Such an interpretation would likely raise separation of powers issues that a court may want to avoid.

Constitutional Avoidance and Interpretation Two

If interpretation two raises constitutional concerns that could be avoided,[171] it is unlikely that a reviewing court will adopt that interpretation. The Supreme Court has stated that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[172] Therefore, "if a case can be decided upon two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[173] Under this doctrine of "constitutional avoidance" a reviewing court would likely resolve the ambiguities of section 1066 so as to avoid a construction that raises constitutional questions.[174] Therefore, when presented with both possible interpretations of section 1066, a reviewing court may take into consideration that a statutory restriction on the authorities of a recess appointee, as would be imposed under interpretation two, would likely raise constitutional concerns.

Does Interpretation Two Raise Separation of Powers Concerns?

An interpretation of section 1066 that limits a recess appointee's ability to exercise the full authorities delegated to his office could be viewed as interfering with the President's express constitutional authority to "fill up all Vacancies that may happen during the Recess of the Senate…"[175] However, not all legislative encroachments on presidential authority constitute a violation of separation of powers. Our constitutional structure "by no means contemplates a total

[170] The power of the Secretary to delegate the authority to exercise the transferred powers to the Director is discussed *infra*.

[171] Interpretation one does not raise separation of powers problems.

[172] DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988).

[173] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[174] Also known as the doctrine of "constitutional doubt," courts will generally construe statutes "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998); Jones v. United States, 529 U.S. 848, 857 (2000).

[175] U.S. CONST. Art II, §2 cl. 3.

separation of each of [the] three essential branches of government."[176] Indeed, the Founding Fathers recognized that a "hermetic sealing off" of the various branches would "preclude establishment of a nation capable of governing itself effectively."[177]

The constitutionality of congressional restrictions on the authority exercised by a recess appointee—like those that would be imposed by interpretation two of section 1066—would be a question of first impression by the courts. However, if one were to interpret section 1066 as preventing Cordray from exercising the full powers of his office, then it would have to be determined whether the provision actually limits the President's constitutional authority to make recess appointments, and if so, whether that limitation is sufficient to constitute an unconstitutional legislative infringement on executive power.

Does Interpretation Two Act as a Limitation on the President's Authority to Make Recess Appointments?

It is not clear whether an interpretation of section 1066 that would prevent a recess appointee from exercising the full powers of his office would actually restrict the President's authority to *make* recess appointments. The provision would not directly limit whom the President may appoint or how and when the President may make such an appointment.[178] Instead, the provision purports to limit the authorities the Director may exercise, in the absence of Senate confirmation, *after* a recess appointment is made.[179] Thus, the provision would arguably act to restrict the Director, rather than the President.

Viewing the provision in this manner, one could characterize section 1066 as simply defining the contours and powers of the Office of the Director of the CFPB. Congress has broad authority to create, structure, and organize executive branch offices, agencies, and departments.[180] Additionally, it is Congress, upon creating an office, that delegates to the officer the authority to act.[181] Congress is free to limit, restrict, or condition how that delegated authority may be exercised,[182] and an officer may not act in contravention to, or in excess of, the statutory authority provided to him by Congress.[183] Therefore, it could be argued that, in enacting section 1066, Congress structured the office and limited the delegation of authority such that the Director could only exercise the transferred powers once "confirmed by the Senate."[184] If one accepts the view that section 1066 represents a restricted delegation of authority to the Director, rather than a

[176] *Buckley*, 424 U.S. at 121.

[177] *Id*.

[178] Pursuant to the interpretation proposed, the provision would prevent the Director from exercising the "transferred powers" unless he was confirmed by the Senate.

[179] Nor has Congress "retained for itself…powers of control or supervision" over the Director. Morrison v. Olson, 487 U.S. 654, 694 (1988).

[180] Congress's power in this regard stems from its authority to create offices in conjunction with the Necessary and Proper Clause. U.S. CONST. Art II, §2, cl. 2; U.S. CONST. Art. I, §8, cl. 18.

[181] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[182] Congress's freedom in delegating authority is subject to certain limitations including the nondelegation doctrine and the principles established under *INS v. Chadha*, 462 U.S. 919 (1983).

[183] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[184] P.L. 111-203 §1066(a), 12 U.S.C. §5586(a).

limitation on the President's ability to make recess appointments, then it seems unlikely that interpretation two would be determined to raise concerns under the separation of powers doctrine.

Alternatively, interpretation two could be viewed as an indirect interference with the President's recess appointment power in that it restricts the authorities that may be exercised by a recess appointee—thereby designating him as having lesser constitutional standing as compared to that of a Senate-confirmed officer. Lower federal courts, however, have made clear that recess appointees possess the same constitutional authority as a Senate-confirmed appointee. History does not "suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment."[185] The Court of Appeals for the Eleventh Circuit, for instance, has stated that "during the limited term in which a recess appointee serves, the appointee is afforded the full extent of authority commensurate with that office."[186] The executive branch also has taken the position that Congress may not intrude on the President's power by "granting less power to a recess appointee than a Senate-confirmed occupant of the office would exercise."[187] Thus, if section 1066 is interpreted to permit a Senate-confirmed appointee to exercise the full authority of the office, while forbidding a recess appointee from exercising those same powers, it may act to limit the effectiveness of presidential recess appointments by preventing the President from meaningfully filling an existing vacancy in the manner envisioned by the Recess Appointments Clause.

Does a Congressional Restriction on the Powers Exercised by a Recess Appointee Violate the Separation of Powers Doctrine?

Even accepting that interpretation two would amount to an indirect limitation on the President's recess appointment power, the provision cannot be characterized as a total prohibition on those appointments. However, the provision may nonetheless infringe on the President's constitutional authority to such a degree that it raises significant constitutional questions under the separation of powers doctrine.

Any discussion of the division of authority between Congress and the President in the context of the Recess Appointments Clause should note that a series of lower federal court cases considering challenges to the President's use of his recess appointment power have repeatedly rejected attempts to restrict the President's constitutional authority to make such appointments.[188] These

[185] *Staebler*, 464 F. Supp. at 597.

[186] *Evans*, 387 F.3d at 1223-24 (the court continued: "For those who fear [] recess appointments because the appointments bypass the Senate completely, we stress that obvious: the temporary [appointees] lose their offices at the end of the Senate's next session."); See also, *Swan*, 100 F.3d at 973 (rejecting the plaintiff's argument because it "rests on the assumption that a recess appointment is somehow a constitutionally inferior procedure, not entirely valid or in some way suspect, an assumption that the Constitution precludes us from making").

[187] 36 Op. O.L.C. 16 (2012). Presidents have also objected to congressional attempts to limit the powers exercised by a recess appointee. Id. (*citing* Statement on Signing the Energy Policy Act of 1992, 2 Pub. Papers of George H.W. Bush 1962, 1963 (Oct. 24, 1992); Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1985, 2 Pub. Papers of Ronald Reagan 1210, 1211 (Aug. 30 1984) (explaining that a bill intended to restrict powers of recess appointees would raise "troubling constitutional issues.")).

[188] See Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (holding that that recess appointments to Article III courts are permitted, and that the President may make recess appointments during intrasession and intercession recesses); *Staebler*, 464 F. Supp. at 585 (holding that the holdover provision of the Federal Election Campaign Act did not limit the President's ability to make a recess appointment); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (holding that the President may utilize the Clause to appoint Article III judges and is not limited to filling only those vacancies that arise during a recess);United States v. Allocco, 305 F.2d 704 (2nd Cir. 1962) (holding that the Clause permits the (continued...)

cases also suggest that, in considering constitutional questions regarding recess appointments, reviewing courts should give deference to the President as he plays the "primary" role in the appointment process.[189] In *Evans v. Stephens*, the appeals court noted that "when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional."[190] The *Staebler* court also noted this principle of deference to the President, stating that where there is an "ambiguity ... it is appropriate to consider that the President was intended by the framers of the Constitution to possess the active, initiating, and preferred role with respect to the appointment of officers of the United States."[191]

With this background in mind, a constitutional analysis would consider whether an interpretation that section 1066 restricts the powers exercised by a recess appointee would result in an infringement on the President's power sufficient to violate the separation of powers doctrine. Often the outcome of a challenge will depend on the nature of the infringement, the power that is being infringed, and the extent to which the court views that power as essential to the functioning of the branch. As noted previously, while there is no uniform jurisprudential approach to evaluating separation of powers cases, the Supreme Court appears to have developed two main analytical frameworks: formalism—which emphasizes precise definitional boundaries—and functionalism—which deemphasizes the efficacy of adhering to such precise boundaries, relying instead on the effect of the exercise of power.

A formalist approach is more likely to reach a conclusion that a congressional restriction similar to interpretation two of section 1066 violates the separation of powers doctrine than a more flexible functionalist approach. Under a formalist approach, the President's recess appointment authority would likely be viewed as deriving from a clear and exclusive constitutional commitment to the President. Therefore, any congressional attempt to limit the President's exercise of his recess appointment power could be considered an unconstitutional legislative encroachment. Under this reasoning, a statutory provision that permits a Senate-confirmed appointee to exercise powers denied to a recess appointee may be characterized as intruding on the President's authority to make recess appointments, thus constituting an unconstitutional limitation on an express presidential power.[192]

A similar analysis has been applied to other expressly enumerated executive powers. For example, with respect to the President's authority to "grant Reprieves and Pardons for Offenses

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President to appoint Article III judges and to make recess appointments to vacancies that initially arose while the Senate was still in session). However, not all courts have taken a broad view of the President's authority under the Recess Appointments Clause. The D.C. District Court has twice held—on statutory, rather than constitutional grounds—that the President may not validly make a recess appointment where Congress has "expressly provided for the temporary continuation in office of an incumbent whose term has expired…" *Mackie*, 827 F. Supp at 57; Wilkinson v. Legal Services Corp. 865 F. Supp 891, 900 (D.D.C. 1994) (holding that under the Legal Services Corporation Act, "[t]he expiration of a statutory term of office, therefore, does not create a 'vacancy' that requires application of the Recess Appointments Clause."), *rev'd* on other grounds, 80 F.3d 535 (D.C. Cir. 1996).

[189] *Staebler*, 464 F. Supp. at 599.

[190] 387 F.3d 1220, 1222 (11th Cir. 2004).

[191] 464 F. Supp. at 597. "[T]here is no justification for implying additional restrictions not supported by the constitutional language." *Id*. at 599.

[192] The "established view of the Executive Branch" is that "Congress may not derogate from the President's constitutional authority to fill up vacancies during a recess, by granting less power to a recess appointee than a Senate-confirmed occupant of the office would exercise." 36 Op. O.L.C. 16 (2012).

against the United States,"[193] the Supreme Court has stated that "[t]his power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[194] Likewise, the Court has held that the authority to negotiate treaties is exclusive to the President.[195] Although the President completes treaties with the advice and consent of the Senate, "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[196] The analogy to the President's authority to negotiate treaties may be especially apt given that the treaty context involves shared authority between the Senate and the President. With respect to the treaty making process, the Court has been willing to draw distinct lines delineating the roles of each branch. One could argue that the same may be true with respect to recess appointments. Although the Senate's participation was clearly envisioned under the traditional Appointments Clause, the Recess Appointments Clause arguably operates as a "separate" and independent authority[197] of the President from which the Senate is excluded. Accordingly, significant separation of powers concerns could arise under a formalist approach to evaluating congressional restrictions on powers exercised by a recess appointee.[198]

Separation of powers concerns associated with a congressional restriction on the powers exercised by a recess appointee, however, may be less significant under a functionalist approach. The Supreme Court has recognized very few presidential powers that are entirely excluded from congressional influence or interference. The President's recess appointment power may be viewed as one in which reasonable congressional intrusions are permitted as long as Congress does not prevent the President "from accomplishing [his] constitutionally assigned functions."[199] The analysis may be similar to that which has been applied to the President's traditional appointment and removal powers. Although the Constitution expressly provides the President power to appoint officers of the United States, the Court has upheld certain statutory constructs that impact the President's traditional appointment powers. While Congress may not vest the authority to appoint officers in itself, Congress may prescribe reasonable and relevant qualifications along with other rules of eligibility for appointees.[200] Likewise, although the Court has held that the President enjoys the implied constitutional power to oversee executive officers through removal,[201] that

[193] U.S. CONST. Art. II, §2 ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in cases of Impeachment.").

[194] Ex Parte Garland, 71 U.S. 333, 380 (1866).

[195] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[196] *Id*.

[197] The Federalist, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("the ordinary power of appointment is confined to the President and Senate *jointly*…the [recess appointment] clause is evidently intended to authorize the President, *singly*, to make temporary appointments 'during the recess of the Senate…'" (emphasis in the original)).

[198] The *Staebler* opinion would appear to support such an approach to the Recess Appointments Clause. After determining that to interpret the Federal Election Campaign Act holdover provision in a manner that prevents the President from making a recess appointment "might well unconstitutionally infringe upon the powers of the President under the Recess Appointments Clause," the Court stated, "[i]t might be noted that if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. §5503 [limiting the salary of recess appointed officers] might also be invalid."

[199] Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 443 (1977) (*citing* United States v. Nixon, 418 U.S. 683, 711-12 (1974)).

[200] See Myers v. United States, 272 U.S. 52, 128-29 (holding that Congress may set qualifications for appointees provided "that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designations.").

[201] *Id*. at 161 ("[T]he President has the exclusive power of removing executive officers of the United States whom he (continued...)

power is not free from reasonable congressional regulation.[202] Application of a functionalist analysis would require a consideration of whether section 1066 has the effect of "impermissibly undermin[ing]" the Presidents ability to exercise a "core function."[203] Under such an approach, a restriction on the powers available to a recess appointee, rather than a restriction on the recess appointment itself, may not excessively interfere with the President's ability to fill vacancies.[204] Accordingly, separation of powers concerns could be regarded as less significant under a functionalist approach to congressional limitations on the President's recess appointment power.

Potential Judicial Interpretation of CFP Act Section 1066

Although it is unclear whether interpreting section 1066 in a manner that restricts the authorities exercised by a recess appointee—but not a Senate-confirmed appointee—would violate the separation of powers doctrine, the foregoing analysis suggests that such an interpretation would at least raise constitutional concerns. Presented with two "reasonably susceptible interpretations"—one that is consistent with historical practice, the other that may lead to a constitutional conflict—the doctrine of "constitutional avoidance" indicates a substantial possibility that a reviewing court would adopt the construction of section 1066 that raises no constitutional difficulties.[205] Therefore, it seems unlikely that a court would adopt interpretation two and give effect to section 1066 in a manner that prevents a recess appointed director from exercising the transferred powers. In addition, interpretation two would arguably represent a unique and novel restriction on a longstanding presidential power. Without a clear statement of legislative intent, which section 1066 lacks, a court may be disinclined to interpret an ambiguous statutory provision in a manner that may significantly alter the division of power between the branches.[206] Accordingly, it seems unlikely that a reviewing court would interpret section 1066 in a manner that restricts the authorities that may be exercised by a recess appointee, and therefore, if Cordray's appointment was valid, he appears likely to be free to exercise the full authorities of his office.

Furthermore, it should be noted that even if a court were to construe section 1066 under the second interpretation, the statutory limitations on Cordray's ability to exercise the full powers of the CFPB Director could be circumvented simply by the Secretary delegating the transferred

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has appointed by and with the advice and consent of the Senate.").

[202] Humphreys Executor v. United States, 295 U.S. 602 (1935) (upholding Congress's authority to insulate officers of independent agencies from presidential removal.).

[203] Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 851, 856 (1986). See also Loving v. United States, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another.").

[204] This view would also support the constitutionality of the Pay Act, which restricts the payment of salaries to certain recess appointees. 5 U.S.C. §5503.

[205] United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407-09 (1909) ("[W]hen the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is [the Court's] plain duty to adopt that construction which save the statute from constitutional infirmity." (internal citations omitted)).

[206] Similarly, the court in *Staebler* identified a number of constitutional concerns associated with interpreting the statute in a manner that prohibited the President from replacing a holdover Commissioner of the Federal Election Commission via a recess appointment. The court noted that "it is an established rule of statutory construction that, where a serious doubt of constitutionality is raised, the Court should ascertain whether a construction is possible by which the question may be avoided and give the law that meaning if this can be fairly done." *Staebler*, 464 F. Supp. at 596.

powers to Cordray.[207] In other words, if a court agreed with this interpretation, Cordray could exercise the newly established powers pursuant to his recess appointment and could exercise the transferred powers upon a formal delegation from the Secretary.

De Facto Officer Doctrine

With the legal uncertainty surrounding the President's recess appointments of Cordray, Flynn, Block, and Griffin Jr., it seems prudent to review how decisions made and actions performed by the CFPB and NLRB under the direction of these individuals would be treated if a court determined that their appointments were unconstitutional.

The de facto officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[208] Therefore, even if a reviewing court were to invalidate the appointment of an officer, the de facto officer doctrine could be applied to limit the remedies available to the plaintiffs. The purpose of the doctrine is to maintain stability, prevent a disruption of the status quo caused by the overturning of accepted decisions, and facilitate the orderly functioning of the government despite technical defects.[209] The Supreme Court, however, has recognized that the doctrine is applied most often in cases where an appointment is challenged based on a "merely technical" statutory defect.[210] In cases that hinge on more than mere technicalities, such as cases involving a "challenge to the constitutional validity"[211] of an appointment or a statutory challenge that "embodies a strong policy concerning the proper administration of judicial business,"[212] courts have declined to apply the doctrine.[213] Additionally, several circuit courts have explicitly rejected application of the doctrine when a constitutional challenge is presented.[214]

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[207] The Secretary of the Treasury has wide-ranging statutory powers beyond those pertaining to the CFPB. These powers include managing the U.S. government's receipts and public debt, minting coins and printing currency, and detecting and preventing fraud involving the government's receipts. 31 U.S.C. §321(a). To exercise these powers, the Secretary of the Treasury is provided the general authority to "delegate duties and powers of the Secretary to another officer or employee of the Department of the Treasury." 31 U.S.C. §321(b).

[208] Ryder v. United States, 515 U.S. 177, 180 (1995) (*quoting* Norton v. Shelby County, 118 U.S. 425, 440 (1886)).

[209] See *Ryder*, 515 U.S. at 180-81.

[210] Nguyen v. United States, 539 U.S. 69, 77 (2003) (*quoting* Glidden Co. v. Zdanok, 370 U.S. 530, 535 (1962) (plurality)). See also *Ryder*, 515 U.S. at 181-82. Additionally, the doctrine seems to be applied only in cases where the appointment's validity is collaterally attacked, meaning that the plaintiff does not raise the issue of the appointee's alleged invalid appointment until after the appointee's actions are finalized. Courts seem more hesitant to apply the doctrine when the appointee's qualifications are directly attacked in a timely manner. See *Ryder*, 515 U.S. at 181-82; McDowell v. United States, 159 U.S. 596, 601 (1895); Ball v. United States, 140 U.S. 118, 128-29 (1891) (finding that criminal defendant could not be granted relief on his claim that the judge issuing his sentence was improperly appointed); Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1150 (10th Cir. 1991) (upholding District Court's decision to apply de facto officer doctrine to validate unconstitutionally appointed officer's actions when appointment was collaterally attacked); *Andrade*, 729 F.2d at 1499 (declining to apply the de facto officer doctrine when the plaintiff questions the appointment's validity "at or around the time that the challenged government action is taken....").

[211] *Ryder*, 515 U.S. at 182-83.

[212] *Nguyen*, 539 U.S. at 78 (*quoting Glidden*, 370 U.S. at 536).

[213] *Nguyen*, 539 U.S. at 78; *Ryder*, 515 U.S. at 182-83.

[214] United States v. Gantt, 194 F.3d 987, 998 (9th Cir. 1999) (noting that the court would follow "the modern trend ... not to ratify the actions of an improperly appointed officer of the United States under the ancient 'de facto officer' (continued...)

It seems unlikely that a court would choose to apply the de facto officer doctrine in a case challenging the CFPB and NLRB recess appointments. Any challenge to the recess appointments will likely raise substantial constitutional questions based on issues of separation of powers and the interpretation of the Recess Appointments Clause.[215] Therefore, it appears this case would fall under the Court's statement in *Ryder v. United States*, that a "timely challenge to the constitutional validity" of an appointment warrants a "decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."[216] This principle was exemplified in *Buckley v. Valeo*, where plaintiffs successfully argued that the appointment of four members of the Federal Election Commission by Congress, rather than the President, violated the Appointments Clause.[217] The Court did not explicitly apply the de facto officer doctrine, since it both invalidated the appointments and granted the plaintiffs their requested declaratory and injunctive relief.[218] However, even without relying on the de facto officer doctrine, the Court still "summarily"[219] held that the Commission's past actions remained valid and did not provide further explanation.[220] More recently, following a finding that the NLRB lacked authority to issue decisions with only two Board members, the Court in *New Process Steel v. NLRB* granted the plaintiff relief by vacating and remanding its adjudication to the NLRB.[221] In *New Process Steel*, the Court did not even address the continued validity or possible precedential value of the decisions made by the two-member Board.[222] Although the Court's statement in *Ryder* means a plaintiff likely may be granted relief if a court invalidated the CFPB and NLRB appointees, the future consequences of such an invalidation remain uncertain.

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doctrine"); Fed. Election Comm'n v. Nat'l Rifle Ass'n Political Victory Fund, 6 F.3d 821, 828 (D.C. Cir. 1998) (finding that when "appellants raise a constitutional challenge as a defense to an enforcement action ... no theory would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case").

[215] U.S. CONST. Art. II, §2, cl. 3.

[216] *Ryder*, 515 U.S. at 182-83.

[217] *Buckley*, 424 U.S. at 140-42. Additionally, the Court stayed its judgment for no more than 30 days to allow Congress to validly reconstitute the Commission, since the existing Commission was declared invalid and could not exercise any authority.

[218] *Id.* at 142. See *Ryder*, 515 U.S. at 183 ("Neither *Buckley* nor *Connor* explicitly relied on the *de facto* officer doctrine, though the result reached in each case validated the past acts of public officials.").

[219] *Ryder*, 515 U.S. at 182.

[220] *Buckley*, 424 U.S. at 142.

[221] *New Process Steel, L.P.*, 130 S.Ct. at 2645 (2010).

[222] See *New Process Steel, L.P.*, 130 S.Ct at 2645. On the day the Court issued its decision, the NLRB announced in a press release that it expected all pending cases originally adjudicated by the now-invalidated two-member Board to be vacated and remanded. *Supreme Court rule two-member NLRB lacked authority to issue decisions*, Nat'l Labor Relations Bd., Press Release, June 17, 2010, available at http://www.nlrb.gov/news-media/news-releases/archive-news.

Conclusions

The unique facts underlying the President's January 4, 2012, recess appointments raise a number of unresolved constitutional questions regarding the scope of the Recess Appointments Clause. However, the Clause itself contains ambiguities, and with a lack of judicial precedent that may otherwise elucidate the provision, it is difficult to predict how a reviewing court would define the contours of the President's recess appointment authority.

If the President's recess appointments are challenged, it appears the most likely plaintiffs to satisfy the court's standing requirements would be a private individual or association who, following the appointments, has suffered an injury as a result of some discrete action taken by the CFPB or NLRB. Were the court to proceed to the merits of the challenge, the primary question presented would likely be whether the President made the January 4 recess appointments "during a recess of the Senate." That determination may hinge on whether the Senate's pro forma sessions were adequate to interrupt an otherwise continuous recess. Although there are several approaches a court could take in evaluating the impact of the sessions, whether the President is constitutionally authorized to make a recess appointment would also depend on how a court chooses to define a "Recess" for purposes of the Recess Appointments Clause. Aspects of both of these determinations, which appear to involve questions of separation of powers and the internal proceedings of the Senate, may potentially be deemed to involve political questions inappropriate for judicial review and better resolved by the President and Congress.

Finally, even if the recess appointments are considered constitutionally valid, it appears likely that questions may be raised as to Director Cordray's authority. However, given the potential constitutional concerns that could be associated with an interpretation of the CFP Act that restricts the authorities delegated to a recess appointee as opposed to a Senate-confirmed appointee, it is likely that a reviewing court would avoid a construction that prevents Cordray from exercising the full authorities of his office.

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