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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director* January 6, 2012

## Via Electronic Transmission

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Attorney General Holder:

On Wednesday, President Obama deviated from over 90 years of precedent established by the Department of Justice (Department), and the Department's Office of Legal Counsel (OLC), by recess appointing four individuals to posts in the Administration, namely Richard Cordray as the director of the Consumer Financial Protection Bureau and three members of the National Labor Relations Board, despite the fact that the Senate has not adjourned under the terms of a concurrent resolution passed by Congress. This action was allegedly based upon legal advice provided to the President by the Office of White House Counsel. We write today seeking information about what role, if any, the Department or OLC played in developing, formulating, or advising the White House on the decision to make these recess appointments. Further, we want to know whether the Department has formally revised or amended past opinions issued by the Department on this matter.

In 1921, Attorney General Daugherty issued an opinion to the President regarding recess appointments and the length of recess required for the President to make an appointment under Article II Section 2 of the U.S. Constitution. The Attorney General opined that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment [of 2 days] is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution."<sup>1</sup> The reasoning of the 1921 opinion was given affirmative recognition in subsequent opinions issued by the Department, including opinions issued in 1960,<sup>2</sup> 1992,<sup>3</sup> and 2001.<sup>4</sup>

The Department has also weighed in on the applicable time period for recess appointments in legal filings in federal courts. In 1993, the Department filed a brief in the federal district court for the District of Columbia arguing, "If the 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

<sup>1</sup> 33 U.S. Op. Atty. Gen. 20, 25 (1921).

<sup>2</sup> 41 U.S. Op. Atty. Gen. 463, 468 (1960) (stating "I fully agree with the reasoning and with the conclusions reached in that opinion.").

<sup>3</sup> 16 U.S. Op. Off. Legal Counsel 15, (1992) (concluding that the President could make a recess appointment during an intrasession recess from January 3, 1992, to January 21, 1992).

<sup>4</sup> 2001 OLC LEXIS 27.

more than three days without obtaining the consent of the House of Representatives.”<sup>5</sup> Additionally, the Department, via the Office of the Solicitor General, argued in a 2004 brief to the Supreme Court, “To this day, official congressional documents define a ‘recess’ as ‘any period of three or more complete days—excluding Sundays—when either the House of Representatives or the Senate is not in session.’”<sup>6</sup> This exact argument was also filed by the Solicitor General in another case during 2004.<sup>7</sup> Most recently, the Deputy Solicitor General argued before the Supreme Court in 2010 that “the recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days.”<sup>8</sup>

Taken together, these authorities by the Department clearly indicate the view that a congressional recess must be longer than three days – and perhaps at least as long as ten<sup>9</sup>— in order for a recess appointment to be constitutional. These various authorities have reached this conclusion for over 90 years and have become the stated position of the Executive Branch, including multiple representations before the Supreme Court, regarding the required length of time for a recess in order for the President to make a recess appointment.

Given the Department’s historical position on this issue and the President’s unprecedented decision to unilaterally reject the years of Department precedent and Executive Branch practice, we ask that you provide responses to the following questions:

- (1) Was the Department asked to provide legal advice to the President regarding the decision to issue recess appointments of Cordray, Block, Flynn, and Griffin? If so, was a formal opinion from the Department prepared? If so, which office at the Department prepared the advice? If such advice was prepared, when will it to be made public?
- (2) If a formal opinion was prepared, provide a copy of that opinion.
- (3) Attorney General Opinions, such as the one offered in 1921, are essentially the forerunner to opinions that today come from the Office of Legal Counsel, providing legal advice to the President and executive branch on questions of law. Such OLC opinions are accorded, in the words of one former head of OLC, a “superstrong stare decisis presumption.” Was the 1921 Attorney General Opinion withdrawn to make way for this new opinion of law that a recess appointment could be exercised when the Senate is in recess for only three days?

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<sup>5</sup> Memorandum of Points and Authorities in Support of Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment, at 24-26, *Mackie v. Clinton*, 827 F.Supp.56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13, (D.C. Cir. 1993).

<sup>6</sup> Brief for the United States in Opposition, *Miller v. United States*, No. 04-38 (2004) available at <http://www.justice.gov/osg/briefs/2004/0responses/2004-0038.resp.pdf> (last visited Jan. 5, 2012) (citing

<sup>7</sup> See Brief for the United States in Opposition, *Evans v. Stephens*, No. 04-828 (2004) available at <http://www.justice.gov/osg/briefs/2004/0responses/2004-0828.resp.pdf> (last visited Jan 5, 2012).

<sup>8</sup> *New Process Steel v. Nat’l Labor Relations Bd.*, No. 08-1457 pg. 50 (March 23, 2010), statement of Deputy Solicitor General Neil Katyal available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1457.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf) (last visited Jan. 5, 2012).

<sup>9</sup> It is noteworthy to add that according to the Congressional Research Service, prior to President Obama’s recent recess appointments, no president in the past 30 years dating back to President Reagan, had made a recess appointment in a shorter recess than 11 days for an intersession recess and 10 days for an intrasession appointment. See Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions*, pg. 3, Dec. 12, 2011.

- (4) Has the Department formally withdrawn any other prior opinions issued by the Attorney General or OLC regarding the length of time a recess must extend prior to the President making a recess appointment? If so, which ones were withdrawn or overturned? Provide the basis for withdrawing or overturning those opinions.
- (5) Given this unprecedented maneuver of recess appointments taking place while the Senate stood in recess for only three days, would it be the Department's position that the President could make a recess appointment during the weekend or when the Senate stands in recess from the evening of one weekday to the morning of the next weekday?
- (6) In 2010, the Deputy Solicitor General argued before the Supreme Court that "recess has to be longer than 3 days" for the President to use the recess appointment power. Does the Department continue to support this position? If not, why not?
- (7) In the event that the Department has not withdrawn or overturned any of the prior opinions issued by the Attorney General or OLC, how does the Department reconcile those opinions with the decision of the President to make recess appointments while the Senate remained in Session? If you believe the positions can be reconciled, provide a legal basis supporting this position.
- (8) Do you believe the President's decision to make these recess appointments notwithstanding the absence of an adjournment resolution is constitutional? Please explain.

Thank you for your prompt attention to this matter and for responding no later than January 20, 2012. We look forward to your detailed response.

Sincerely,

Chuck Grassley

Kevin S. Felt

Tommy

Jefferson

John Cornyn

Gregory

William S. E.

Tom White