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Unconstitutional Recess Appointments
Judiciary Committee Statement
January 26, 2012

- President Obama's January 4, 2012, appointments to the Consumer Financial Protection Bureau and National Labor Relations Board are different in kind than previous recess appointments made by Presidents of both parties. These four appointments are unconstitutional because they did not, as required by Article II, Section 2, receive the "Advice and Consent" of the Senate.
- President Obama has asserted that the appointments are constitutional under the Recess Appointments Clause. That clause provides that the President may "fill up all Vacancies that may happen during the Recess of the Senate." That clause does not apply here, however, because the Senate was not in recess when President Obama made the appointments in question.
- In making these appointments, the President did not state that he believes an intrasession adjournment of less than three days constitutes a recess, and there can be little dispute that such a brief adjournment, as occurred between January 3, 2012, and January 6, 2012, does not in fact constitute a recess for purposes of the Recess Appointments Clause.
    - The Department of Justice has consistently maintained that an intrasession adjournment must be longer than three days to constitute such a recess.
    - And the text of the Constitution evidences that the Framers did not consider an adjournment of less than three days to be constitutionally significant. Indeed, Article I, Section 5 provides that "neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."
    - At the time the appointments in question were made, the Senate had not received consent from the House to adjourn for more than three days.
- If an intrasession adjournment of less than three days were to be considered constitutionally sufficient for the President to exercise his recess appointment

power, it is unclear what would prevent the President from routinely bypassing the Constitution's advice and consent requirement and appointing nominees during weekend adjournments.

- The DOJ Office of Legal Counsel asserts that the President may unilaterally conclude that the Senate's brief "pro forma" sessions do not constitute sessions of the Senate for purposes of the Recess Appointments Clause. This assertion is deeply flawed.
    - It is for the Senate, not the President, to determine when the Senate is in session. The Constitution expressly grants the Senate power to "determine the Rules of its Proceedings." U.S. Const. art. I., § 5, cl. 2.
    - Granting the President unilateral power to override the Senate's determination of when it is in session would undermine this constitutional prerogative and violate the Constitution's fundamental separation of government powers.
- The OLC memorandum asserts that the "touchstone" for determining when the Senate is in session is "its *practical effect*: *viz.*, whether or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations." This analysis contradicts the text and original understanding of the Recess Appointments Clause.
    - The purpose of that clause was to avoid obliging the Senate "to be continually in session for the appointment of officers." *The Federalist No. 67* (Alexander Hamilton).
    - Nothing in either the Constitution's text or the debates surrounding the Recess Appointments Clause in any way suggests that the President should have the unilateral power to appoint officers and judges at times when the Senate is regularly meeting, even if that body is not conducting substantial business.
- In addition, the OLC memorandum's functionalist argument fails on its own terms. During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent. Notably, at one such pro forma session on December 23, 2011, the Senate passed a significant piece of legislation, demonstrating that it is capable of conducting business at such sessions.
- Regardless of how much business the Senate conducts during pro forma sessions or how much business it indicates in statements that it intends to conduct at such sessions, the Senate has been and continues to be *capable* of

conducting business at such sessions—including advising and consenting to nominations—should it decide to do so.

  - OLC's argument boils down to an untenable assertion that because the Senate has chosen not to act on the President's nominations during its sessions, it was incapable of doing so.

- Finally, OLC's assertion that pro forma sessions are not cognizable for purposes of the Recess Appointments Clause violates established constitutional practice and tradition. The Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," U.S. Const. art. 1, § 5, cl. 4, and that "unless [Congress] shall by law appoint a different day," Congress shall begin each annual session by meeting "at noon on the 3d day of January," *Id.* amend. XX, § 2.
  - The Senate has commonly, and without objection, used pro forma sessions to fulfill both constitutional requirements, evidencing a past consensus that such sessions are of constitutional significance.
  - President Obama's novel assertion that such sessions no longer count for purposes of the Recess Appointments Clause thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution.
- President Obama's January 4, 2012, appointments to the CFPB and NLRB are unconstitutional.
  - As duly sworn United States Senators, we each have an institutional and constitutional duty to preserve and defend the prerogatives of the Senate, particularly from the encroachments of the Executive.
  - The President's unconstitutional appointments simply cannot stand.
- Throughout my time on this Committee, I have made it a point to work collaboratively with Members from across the aisle. I have also gone out of my way to cooperate with the current Administration to ensure that the overwhelming majority of the President's nominees are considered and receive a vote. And I have voted for dozens of nominees with whom I fundamentally disagree on various issues. But I will do so no more.
- My concerns are non-partisan and I will be equally critical of any Republican President who might attempt to make recess appointments under the same flawed legal theory.
- Given this President's blatant and egregious disregard both for proper constitutional procedures and the Senate's unquestioned role in such

appointments, I find myself duty-bound to resist the consideration and approval of additional nominations until the President takes steps to remedy the situation.

- Regardless of the precise course I choose to pursue, the President certainly will not continue to enjoy my nearly complete cooperation, unless and until he rescinds his unconstitutional recess appointments.