THE CASE FOR JUDICIAL REVIEW OF PRESIDENT OBAMA'S JANUARY 4 RECESS APPOINTMENTS

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INTRODUCTION

On January 4, 2012, President Barack Obama appointed four individuals to positions in administrative agencies under the auspice of the Recess Appointments Clause in the U.S. Constitution. He appointed Richard Cordray as the head of the Consumer Financial Protection Bureau (CFPB) and Sharon Block, Terence Flynn, and Richard Griffin as Commissioners on the National Labor Relations Board (NLRB).[1] Richard

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1. *See* Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J., Jan. 4, 2012, http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html.

Cordray was previously denied confirmation to the CFPB in a Republican filibuster.[2]

Though President Obama sent the three NLRB nominations to Congress after the recess appointments, there are numerous court and political challenges to his ability to make these appointments.[3] The discussion of the appointments has been sharply characterized by political rhetoric with headlines ranging from *Obama Deserves Praise for Keeping GOP in Check*[4] to *Obama's Cordray Appointment Mocks the Constitution*.[5] Despite the politicized rhetoric surrounding the recent appointments, they are in fact quite commonly used by presidents. As of January 4, 2012, President Obama had made thirty-two recess appointments;[6] President George W. Bush made 171 recess appointments, President Clinton made 139, and President Reagan made 240.[7]

Article II provides that the President "shall nominate, and by and with

2. *See* Jonathan Turley, *Column: Obama's Recess Appointments an Abuse of Power*, USA TODAY, Feb. 14, 2012, http://www.usatoday.com/news/opinion/forum/story/2012-02-14/recess-appointments-cordray-nomination/53094876/1 (conceding that while Cordray was a well-qualified nominee, sometimes the selection process is just as important as the selection itself).

3. *See* Tom Schoenberg, *Obama Recess Appointments Can't Be Challenged in Labor Rule Suit*, BLOOMBERG (Mar. 3, 2012, 3:08 AM), http://www.bloomberg.com/news/2012-03-02/judge-rejects-challenge-to-obama-labor-relations-board-recess-appointments.html (listing four lawsuits where the appointments have been raised to avoid enforcement of actions); *see also* Press Release, H. Educ. & Workforce Comm., Committee Announces Hearing to Examine Unprecedented NLRB Recess Appointments (Jan. 25, 2012), *available at* http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=276580 (quoting Rep. Phil Roe as saying the recess appointments were "an abuse of power").

4. Ian Millhiser, *Obama Deserves Praise for Keeping GOP in Check*, USNEWS (Jan. 6, 2012), http://www.usnews.com/debate-club/is-the-cordray-appointment-constitutional/obama-deserves-praise-for-keeping-gop-in-check (arguing that these agencies were created by Congress to support the American people and that by refusing to appoint President Obama's candidates or to take a recess, it is an "attempt to shut these agencies down [which] is a direct assault on the rule of law").

5. Phil Kerpen, *Obama's Cordray Appointment Mocks the Constitution*, FOXNEWS.COM (Jan. 4, 2012), http://www.foxnews.com/opinion/2012/01/04/obamas-cordray-appointment-mocks-constitution (pointing to President Obama's statement as a candidate that he "taught the Constitution for 10 years" and, if elected, he would "obey the Constitution of the United States" as evidence that President Obama has failed to live up to the promise that he would not "make laws as he is going along").

6. President Obama has not made additional appointments since the January 4, 2012 appointments as of November 1, 2012.

7. HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2012); *see* Ed O'Keefe, *Obama's Recess Appointments Will Create Uncertainty, GOP Critics Say*, WASH. POST, Feb. 1, 2012, http://www.washingtonpost.com/blogs/federal-eye/post/obamas-recess-appointments-will-create-uncertainty-gop-critics-say/2012/01/31/gIQAHbdbhQ_blog.html.

the Advice and Consent of the Senate" appoint federal nominees to office.[8] The very next clause is known as the Recess Appointments Clause (the Clause) which states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[9] Neither house of Congress can recess for more than three days without the consent of the other house.[10] During the recent appointments, the U.S. House of Representatives denied the U.S. Senate's request for a recess, instead holding sessions every three days in an attempt to prevent such appointments as those made by President Obama. President Obama, with the support of the Department of Justice (DOJ), argued that the U.S. Senate sessions were pro forma and thus, the Senate was in recess—regardless of whether the House was in session or had granted the Senate's request for a recess.[11]

This Article argues that while the Clause may not have originally been intended to cover the recesses that exist today, the current precedent did allow President Obama to legally make the recess appointments. However, this Article acknowledges the likelihood that the legality of the appointments will be settled in the courts and could reach the Supreme Court; thus, the ensuing years will likely bring a new interpretation of the Clause and greater clarification from the courts that will assist both the Executive and Legislative Branches. Part I summarizes the history of the Clause including past use of the Clause and the effect of pro forma sessions on that use. Part II focuses on President Obama's January 4, 2012 appointments—providing background on the reasons for making the appointments, the individuals that were appointed, and where those appointments currently stand. Section A discusses current court challenges to the appointments, including the inability to find a proper jurisdictional place. However, it is more likely that the courts will ultimately make the decision; thus, Section B discusses the constitutionality of the appointments and potential conclusions a reviewing court could reach. Section B suggests that Congress should not be able to use its internal procedures to thwart the President's constitutional responsibility to carry out the laws enacted by Congress, which he cannot do without effective administrative agencies.

8. U.S. CONST. art. II, § 2, cl. 2.

9. U.S. CONST. art. II, § 2, cl. 3.

10. U.S. CONST. art. I, § 5, cl. 4.

11. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *1–2 (O.L.C. Jan. 6, 2012) (discussing the Office of Legal Counsel's consistent stance that a "recess" within the meaning of the Recess Appointments Clause permits the President to exercise his constitutional power to fill vacancies in offices, so long as the recess is a sufficient length).

Finally, Section C briefly describes the issues that would arise should the challenge ultimately reach the Supreme Court.

I. HISTORY OF THE RECESS APPOINTMENTS CLAUSE

The constitutional provision for recess appointments essentially excludes the Senate from the appointment process, providing that the President can approve temporary commissions that occur during a "Recess of the Senate."[12] The Clause is "broad and indefinite in scope."[13] The Constitutional Congress adopted the Clause without debate and without dissent.[14] In *Federalist No. 67*, Alexander Hamilton described the purpose of the Clause:

> The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the [Recess and Appointments] clause is evidently intended to authorize the President, singly, to make temporary appointments.[15]

Hamilton further described the Clause as providing a "supplement" to the President's appointment power and establishing "an auxiliary method of appointment, in cases to which the general method was inadequate."[16]

Intrasession recesses[17] have become quite common since 1943, but started with President Johnson in 1867.[18] The appointments were often related to the length of the recess, "because none of the intrasession recesses

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12. *Cf.* Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 751–52 (2009) (citing U.S. CONST. art. II, § 2, cl. 3) (describing that on the face of the Recess Appointments Clause the "power and discretion [is] solely in the hands of the president").

13. *Id.* at 752, 777 (concluding that the Recess Appointments Clause "should essentially be read out of the Constitution when examining Article III vacancies").

14. Louis Fisher, *Recess Appointments of Federal Judges*, *in* The SUPREME COURT AND THE FEDERAL JUDICIARY 126 (Steven C. Caldwell ed., 2002).

15. THE FEDERALIST NO. 67, at 409–10 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases omitted). Hamilton also explains that the word "officers" refers to those positions described in the Advice and Consent Clause. *Id.*

16. *Id.* at 409.

17. Because President Obama's appointments occurred after the Second Session of the 112th Congress convened, they are characterized as having occurred during an intrasession recess. Thus, this Article will focus on intrasession recesses.

18. *See* Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 666 (2004) (discussing the history and frequency of intrasession recess appointments).

taken by the Senate until that time had lasted more than 15 days."[19] Presidents Harding and Coolidge each made intrasession recess appointments in the 1920s during recesses of twenty-seven and thirteen days.[20] Then, "Beginning in 1943, presidents started to routinely make recess appointments during long intrasession recesses."[21] However, it is very difficult to determine how many recess appointments presidents have made because, prior to 1965, "recess appointments were recorded in haphazard fashion."[22] "The last five Presidents have all made appointments during intrasession recess of fourteen days or fewer."[23]

The Executive Branch's analysis of the Clause has focused on the availability of the Senate to be consulted on nominations.[24] The DOJ has "long interpreted the term 'recess' to include intrasession recesses if they are of substantial length."[25] In a 1921 opinion, then-Attorney General Daugherty, serving under President Harding, determined that "[r]egardless of whether the Senate has adjourned or recessed, the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained."[26]

The Senate Judiciary Committee has also characterized the term "recess" as "something real, not something imaginary; something actual, not something fictitious"[27] and has defined the term to mean:

> [T]he 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 receive communications from the President or participate as a body in making appointments.[28]

Traditionally, the Clause has been read to apply when a vacancy exists and does not require that the vacancy actually arise during the recess.[29]

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19. *Id.*
20. *Id.*
21. *Id.* at 666.
22. Memorandum from Rogelio Garcia, Analyst in Am. Nat'l Gov't, to the Senate Comm. on Banking, Hous. and Urban Affairs, Cong. Research Serv., Library of Congress, *Number of Recess Appointments, by Administration, from 1933 to 1984* at 1 (Mar. 13, 1985).
23. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *5 (O.L.C. Jan. 6, 2012).
24. *Id.* at *8 (citing Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 633 (1823)).
25. Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272 (1989).
26. Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 21–22 (1921).
27. S. REP. NO. 58-4389, at 2 (1905).
28. *Id.* (emphasis omitted).
29. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52

There is little case law developing the confines of the Clause. "[T]he constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could not receive communications from the President or participate as a body in making appointments."[30] The U.S. Court of Appeals for the Eleventh Circuit concluded in *Evans v. Stephens*[31] that "Recess of the Senate" includes intrasession recesses and declined to set a lower bound on the required length of time the Senate must be in recess for the President to make such appointments.[32] Litigants had challenged the President's intrasession appointment of Judge William H. Pryor Jr. to the court during an eleven-day Presidents' Day break.[33] The majority opinion relied on the text of the Constitution, the intent of the Framers, historical practice, and precedent to uphold the President's constitutional authority to make the appointment.[34]

The Supreme Court has never decided the issue; however, Justice Stevens filed a statement respecting the denial of certiorari in *Evans* and agreeing that there were "legitimate prudential reasons for denying certiorari,"[35] but stating that the "case . . . raise[d] significant constitutional questions regarding the President's intrasession appointment" and "it would be a mistake to assume that . . . disposition of th[e] petition constitute[d] a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies . . . with appointments made absent consent of the Senate during short intrasession 'recesses.'"[36]

UCLA L. REV. 1487, 1487 (2005).

30. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *4 (O.L.C. Jan. 6, 2012) (internal quotation marks omitted) (citing Intrasession Recess Appointments, 13 Op. O.L.C. at 272).

31. 387 F.3d 1220 (11th Cir. 2004) (en banc).

32. *Id.* at 1222, 1225; *see also* Nippon Steel Corp. v. U.S. 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 appointments."). *But see Evans*, 387 F.3d at 1228–29 n.2 (Barkett, J., dissenting) ("Although I would not reach this question, the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.").

33. *Evans*, 387 F.3d at 1221–22.

34. However, a dissenting judge argued that the Clause "directly, expressly, and unambiguously" required that the vacancy occur during the recess. *Evans*, 387 F.3d at 1229 (Barkett, J., dissenting).

35. *Evans v. Stephens*, 544 U.S. 942, 942–43 (2005) (Stevens, J., opinion respecting the denial of certiorari).

36. *Id.*

A recess appointment expires in one of a few ways: either at the end of the Senate's next session or when the appointee or another individual is nominated, confirmed, and permanently appointed.[37] In practice, an appointment could last for almost two years, although the length of the appointee's term will differ based on when the appointment is made.[38]

A. Pro Forma Sessions

A "pro forma session" is defined by the Senate as "a brief meeting of the Senate (sometimes only a few minutes in duration)."[39] It is held usually to satisfy the constitutional obligation that neither chamber can adjourn for more than three days without the consent of the other.[40] During the last three Congresses, pro forma sessions have lasted only a few seconds.[41] Frequently, messages from the President received during the recess are not entered into the *Congressional Record* until the Senate returns from a substantive session even if pro forma sessions are held.[42]

The Senate has frequently conducted pro forma sessions during recesses since late 2007. Pro forma sessions have been used to explicitly prevent recess appointments. For example, during the presidency of George W. Bush, the Senate Majority Leader, Harry Reid, announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[43] Additionally, pro forma sessions have been used to meet Congress's obligation to convene on January 3 each year, to permit a cloture vote to ripen, or to hear an address.[44]

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37. HOGUE, *supra* note 7, at 4.

38. *See id.* at 4–5 (discussing the difference in potential lengths of appointment between Charles W. Pickering and William H. Pryor to judgeships on courts of appeals based on when appointed by President George W. Bush).

39. U.S. SENATE, http://www.senate.gov/reference/glossary_term/pro_forma_session.htm (last visited Nov. 30, 2012); *see also* U.S. CONST. art. I, § 5, cl. 4.

40. U.S. CONST. art. I, § 5, cl. 4.

41. *See, e.g.*, 157 CONG. REC. 8793 (daily ed. Dec. 30, 2011) (pro forma session lasted thirty-two seconds); *id.* at S5301 (daily ed. Aug. 12, 2011) (pro forma session lasted twenty-four seconds); 156 CONG. REC. S7857 (daily ed. Oct. 26, 2010) (pro forma session lasted twenty-seven seconds); 154 CONG. REC. S10,525 (daily ed. Oct. 30, 2008) (pro forma session lasted eight seconds).

42. *See, e.g.*, 157 CONG. REC. S7905 (daily ed. Nov. 28, 2011) (message from the President was sent on November 21, recorded on November 28); *id.* at S6916 (daily ed. Oct. 31, 2011) (message from the President received on October 25, recorded on October 31).

43. 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

44. *See* U.S. CONST. amend. XX, § 2; *see e.g.*, 133 CONG. REC. 15,445 (1987) (ordering a pro forma to qualify the cloture motion to be voted on the next day); 139 CONG. REC. 3039 (1993) (stating that any pro forma session would be for the purpose of hearing the Presidents' Day address).

II. THE JANUARY 4 APPOINTMENTS

During the first few months of the 112th Congress, the House and Senate passed concurrent resolutions of adjournment prior to periods of absence of more than three days. On December 17, 2011, the Senate agreed by unanimous consent to "adjourn and convene for pro forma sessions only" with "no business conducted" every Tuesday and Friday.[45] The Senate convened a pro forma session on January 3, 2012.[46] The session lasted less than one minute.[47]

On January 4, 2012, President Obama announced recess appointments to "Key Administration Posts."[48] President Obama appointed Richard Cordray as Director of the CFPB, where Cordray previously served as the Chief of Enforcement.[49] President Obama nominated Cordray to head the CFPB for the five-year term on July 18, 2011; however, on December 8, 2011, a Republican filibuster blocked Cordray's appointment despite the support of a majority of the Senate.[50] The filibuster met opposition and was hailed as the first time a "minority party in the Senate has ever before decided to render an agency inoperative by refusing to allow up or down votes on any nominee to run it."[51] Additionally, President Obama appointed Sharon Block, Terence F. Flynn,[52] and Richard Griffin to the NLRB.[53] Block previously worked at the Department of Labor, Flynn was the Chief Counsel to NLRB Board Member Brian Hayes, and Griffin was

45. 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011).

46. 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

47. *Id.*

48. Press Release, The White House, Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

49. *Id.*

50. *Cf.* Jonathan Turley, *Is the Cordray Recess Appointment Constitutional?*, JONATHAN TURLEY BLOG (Jan. 6, 2012, 11:21 AM), http://jonathanturley.org/2012/01/06/is-the-cordray-recess-appointment-constitutional ("The Cordray controversy, however, combines the controversial use of filibustering with the controversial practice of recess appointments—a perfect storm of dysfunctional actions by both parties.").

51. Jonathan Bernstein, *In Blocking Cordray, Senate GOP Proves How Radical It's Become*, WASH. POST, Dec. 8, 2011, http://www.washingtonpost.com/blogs/plum-line/post/in-blocking-cordray-senate-gop-proves-how-radical-its-become/2011/12/08/gIQA4x0bfO_blog.html.

52. Terence Flynn resigned from the NLRB in July 2012 amid accusations of ethics violations. *See, e.g.,* Sam Hananel, *Terence Flynn Resigns from National Labor Relations Board Amid Ethics Violation Allegations*, HUFFINGTON POST, May 27, 2012, http://www.huffingtonpost.com/2012/05/28/terence-flynn-resigns-nlrb_n_1549708.html.

53. Press Release, *supra* note 48.

the General Counsel for the International Union of Operating Engineers.[54] On February 13, 2012, President Obama sent the nominations of Block, Flynn, and Griffin to the Senate.[55]

According to the DOJ Office of Legal Counsel's (OLC's) letter to Attorney General Holder supporting the President's appointments, the "sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to receive communications from the President or participate as a body in making appointments."[56] The OLC letter frames the discussion as whether the President had the authority to make recess appointments during an intrasession recess of twenty days, despite the pro forma sessions, finding that the pro forma sessions had no effect on the number of days of the intrasession recess.[57] While the Senate could potentially remove the President's ability to make recess appointments by remaining continuously in session, the OLC concluded that pro forma sessions where no business is conducted do not limit the President's recess appointment power.[58] The OLC asserted that there was "little doubt that a twenty-day recess may give rise to presidential authority to make recess appointments."[59] Furthermore, it rejected any assertion that the failure of the House to consent to the Senate's adjournment had an effect on the Senate's actual availability and thus, did not affect the determination of whether the Senate was in fact in "Recess."[60]

Opponents of the appointments frame the question as whether the President can make intrasession recess appointments when the recess is only three days rather than twenty, finding that the January 4 appointments occurred during a three-day recess between two pro forma sessions of the

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54. *Id.*

55. Press Release, The White House, Office of the Press Sec'y, Presidential Nominations Sent to the Senate (Feb. 13, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/13/presidential-nominations-sent-senate.

56. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *1 (O.L.C. Jan. 6, 2012) (internal quotation marks omitted).

57. *Id.* at *7 n.13 ("Because we conclude that pro forma sessions do not [have the legal effect of interrupting the recess of the Senate], we need not decide whether the President could make a recess appointment during a three-day intrasession recess."); *see id.* at *13 (reiterating that the Department of Justice does mention that the period of time could be characterized as a thirty-seven-day recess because the Senate adjourned pursuant to an order that there would also be no business conducted during the final seventeen days of the first session).

58. *See id.* (concluding that such an interpretation is consistent with the purpose of the Clause and with historical practice).

59. *Id.* at *5.

60. *Id.* at *15.

Senate. The Senate Majority Leader has stated that pro forma sessions break a long recess into shorter adjournments, each of which might ordinarily be deemed too short to be considered a recess within the meaning of the Clause and thus, the sessions prevent the President from exercising power to make recess appointments.[61]

A. Getting to the Courthouse

The Constitution does not specifically define the scope of a partial Senate recess or the effect of pro forma sessions on the Clause—courts will ultimately have to decide. Whether Congress can prevent the President from making recess appointments by conducting pro forma sessions is a "novel" question "and the substantial arguments on each side create some litigation risk for such appointments."[62] Even the OLC recognized in its letter, "Due to this limited judicial authority, we cannot predict with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones."[63] It further acknowledged, "If an official appointed during the current recess takes action that gives rise to a justiciable claim, litigants might challenge the appointment on the ground that the Constitution's reference to 'the Recess of the Senate' contemplates only the recess at the end of a session."[64] Thus, the constitutionality of these appointments is likely to be determined by the federal courts; however, a litigant must first get a court to reach the merits of its claim. The three greatest obstacles challengers face are: standing, ripeness, and the political question doctrine.

1. Standing

An element of the case or controversy requirement is that the plaintiff must establish standing to sue—there must be an injury fairly traceable to the alleged misconduct likely to be redressed by the requested relief.[65] In *Evans*, a case decided by the Eleventh Circuit, the plaintiffs reached standing by moving for the judge appointed through the Clause to recuse himself.[66] Since the appointments are not Article III judges, a similar

61. 154 CONG. REC. 16,625 (2008) (statement of Sen. Reid); 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

62. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *4 (O.L.C. Jan. 6, 2012).

63. *See id.* at *7.

64. *Id.*

65. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

66. *See generally* Evans v. Stephens, 387 F.3d 1220, 1227 (11th Cir. 2004) (en banc)

challenge has proved more difficult.

Challenges to the Cordray appointment are just beginning as the CFPB has begun to promulgate and enforce its first regulations. One such case is *State National Bank of Big Spring v. Geithner*,[67] where the plaintiffs—a small national bank and two nonprofit organizations—filed suit against multiple parties including the Treasury Secretary, Comptroller of the Currency, Cordray, the CFPB, and the chairs of various agencies, including the Securities and Exchange Commission, challenging the constitutionality of the CFPB on a number of bases. The challenge to the appointment of Cordray is just one of the constitutional violations alleged in the thirty-one-page complaint.[68] However, the Complaint fails to allege any final agency action or enforcement by the CFPB to create standing for the challenge to Cordray and is ripe for a motion to dismiss for lack of standing by the DOJ. The CFPB issued its first enforcement action on July 18, 2012, creating the first true opportunity for a litigant with standing to challenge the appointment.[69] As the CFPB continues to enforce regulations more challenges are likely to arise, although many litigants may wait to challenge the constitutionality of his appointment pending the resolution of the challenges to the NLRB appointments.

Individuals affected by decisions of the NLRB made with the new appointees have already taken to the courts to seek redress and to avoid the claimed "years of legal uncertainty for actions taken by those agencies and chaos for companies affected by the decisions."[70] The challengers often claim that NLRB decisions cannot be applied because the requisite quorum was not met to make those decisions since President Obama's appointees are not constitutional appointees.[71] There are currently cases pending in

(stating that the recess appointment of Judge Pryor was within the President's constitutional authority and that the court lacks the legal standards to determine "how much Presidential deference is due to the Senate").

67. Complaint at 3–4, State Nat'l Bank of Big Spring v. Geithner, No. 12-01032 (D.D.C. filed June 21, 2012), 2012 WL 2365284.

68. *Id.*

69. Press Release, Consumer Fin. Prot. Bureau, CFPB Probe into Capital One Credit Card Marketing Results in $140 Million Consumer Refund (July 18, 2012), *available at* http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe.

70. O'Keefe, *supra* note 7.

71. *See, e.g.*, Petition for Review, Stewart v. NLRB, No. 12-1338 (D.C. Cir. Aug. 1, 2012); Representation of Parties' Consent to Participation As Amici Curiae, Noel Canning v. NLRB, Case Nos. 12-1115, 12-1153 (D.C. Cir. Apr. 25, 2012); Petition for Review, Richards v. NLRB, No. 12-1973 (7th Cir. Apr. 23, 2012); Complaint, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-01629 (D.D.C. Sept. 8, 2011); Amended Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act, Paulsen v. Renaissance Equity Holdings, LLC, No. 12-cv-350 (E.D.N.Y. Mar. 1, 2012).

both the Court of Appeals for the District of Columbia and the Seventh Circuit.[72] The Senate GOP joined the plethora of NLRB challengers, retaining Miguel Estrada to represent them and filing an amicus brief in the case of *Noel Canning v. NLRB*,[73] a case before the U.S Court of Appeals for the D.C. Circuit challenging a cease and desist order relating to a refusal to bargain.[74] The D.C. Circuit Court of Appeals extended the briefing schedule for the *Noel Canning* case; it is scheduled to be fully briefed on December 11, 2012.[75] As a result of the Supreme Court's decision in *Raines v. Byrd*,[76] it is increasingly difficult for members of Congress to bring a lawsuit alleging diminution of their constitutional role, which likely explains why the Senate GOP's current plan is to file an amicus brief rather than attempt a lawsuit on its own.[77]

However, the cases decided thus far by district court judges have not reached favorable results for those challenging the appointments. In *National Ass'n of Manufacturers v. NLRB*,[78] Judge Amy Jackson of the District Court for the District of Columbia held that NLRB appointments could not be challenged as part of a lawsuit over requirements for businesses to inform employees of their rights, stating that "[t]he court declines this invitation to take up a political dispute that is not before it."[79] Similarly, on March 1, 2012, Paul Clement asked a federal district court judge to throw

72. Petition for Review, *Stewart*, *supra* note 71; Petition for Review, *Richards*, *supra* note 71; Petition for Review of Decision and Order of the National Labor Relations Board, *Canning*, *supra* note 71; Complaint, *Nat'l Ass'n of Mfrs.*, *supra* note 71.

73. Representation of Parties' Consent to Participation as Amici Curiae, *supra* note 71.

74. *See* Ed O'Keefe, *Senate GOP Joining Legal Action Against Obama Recess Appointments*, WASH. POST, Apr. 17, 2012, http://www.washingtonpost.com/blogs/2chambers/post/senate-gop-joining-legal-action-against-obama-recess-appointments/2012/04/17/gIQAuEJbOT_blog.html (specifying that the challenge "will demonstrate to the Court how the President's unconstitutional actions fundamentally endanger the Congress's role in providing a check on the excesses of the executive branch"). After *Raines v. Byrd*, 521 U.S. 811, 821 (1997), the Senate GOP cannot bring suit on its own to claim "diminution of legislative power," rather, any lawsuit on those grounds would need to be brought by the Senate or Congress in its entirety.

75. Order Granting Motion to Consolidate Briefing at 2, Noel Canning v. NLRB, No. 12-1115 (D.C. Cir. Aug. 15, 2012), *available at* http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Order%20Granting%20Motion%20to%20Consolidate%20Briefing.pdf.

76. 521 U.S. 811.

77. *Cf.* Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999) (recognizing that the *Raines* decision made "untenable" the Circuit's legislative standing cases, Kennedy v. Sampson, 511 F.2d 430 (1974) and Moore v. U.S. House of Representatives, 733 F.2d 946 (1984)).

78. No. 11-CV-01629 (D.D.C. Mar. 2, 2012).

79. Order Denying Motion for Leave to Supplement Complaint, Nat'l Ass'n of Mfrs. v. NLRB, No. 11-CV-01629 (D.D.C. March 2, 2012), ECF No. 60.

out a court petition seeking to halt a lockout of seventy workers under the lack of quorum theory.[80] The court ruled that the NLRB could proceed in pursuing a halt to the lockout and refused to reach the constitutional issue of the recess appointments, instead ruling that the action by the NLRB was proper.[81] Thus far, the challengers are finding it difficult to persuade a court to address the constitutional challenge against the recess appointments, as opposed to deciding the case on administrative principles.

2. Ripeness

Recess appointments expire at the Senate's next session or if the recess appointee or another is confirmed. Thus, a case has to overcome any mootness issues. These mootness issues could arise from either the recess appointee or the President no longer holding their positions. Challenges to recess appointments have suffered ripeness issues before. The appointments could be challenged since President Obama will remain in office. In *Mackie v. Clinton*,[82] challengers sought invalidation of President Bush's appointment of a member to the Board of Governors of the United States Postal Service.[83] The district court judge determined there was no "vacancy" to be filled, and thus the purported appointment was null and void; however, the court found that "[i]n view of the fact that President Bush is no longer in office . . . [the] Complaint is moot."[84] The recent recess appointees will create agency decisions that have a lasting effect, which likely means that the harm will continue to occur and a challenge to the constitutionality or validity of a rule would be reviewed.

3. Political Question

Even if a court finds a case otherwise justiciable, it could avoid the constitutional questions by determining that a challenge presented only a political question. The Supreme Court outlined the political question doctrine in *Baker v. Carr*,[85] explaining that it would not resolve questions

80. Paulsen v. Renaissance Equity Holdings, LLC, 849 F. Supp. 2d 335, 338, 342 (E.D.N.Y. 2012).

81. *See* Jessica Dye, *Judge Upholds NLRB Petition in Brooklyn Dispute*, REUTERS, Mar. 27, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/03_-_March/Judge_upholds_NLRB_petition_in_Brooklyn_dispute (explaining that U.S. District Judge Brian Cogan declined to reach the constitutional issue and instead ruled that the action had been properly brought by the NLRB).

82. 827 F. Supp. 56 (D.D.C. 1993).

83. *Id.* at 57.

84. *Id.* at 58–59.

85. 369 U.S. 186 (1962).

with either "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 . . . ."[86] In *Powell v. McCormack*,[87] the Court further determined the scope of a "textual commitment" by the Constitution to a coordinate branch and created a narrow exception—where the Constitution expressly prescribes all the requirements without leaving any authority to Congress to change those requirements, a claim is justiciable.[88]

In *Evans v. Stephens*,[89] the Eleventh Circuit determined that with regards to the appointment of a judge, it was within the Court's "authority and duty to construe and to apply the Constitution as it is written" and thus concluded that the Constitution gave the President the authority to "appoint a judge to fill a vacancy on an Article III court during a ten- or eleven-day, intrasession recess of the Senate."[90] The court differentiated that review from review of the argument that "this specific recess appointment circumvented and showed an improper lack of deference to the Senate's advice-and-consent role" finding that the latter argument constituted a political question moving beyond just interpretation of the text of the Constitution and into discretionary power or "good policy."[91]

Similar to the court's avoidance of the policy arguments in *Evans*, a court could avoid the constitutional question of the January 4 recess appointments by finding any challenge to the recess appointments to be a political question. There has been a "textually demonstrable constitutional commitment"[92] that the houses of Congress "may determine the Rules of its Proceedings."[93] Thus, a court could find that the Constitution commits any determination of whether the Senate is in recess to the Senate and its rules. Additionally, a reviewing court could find it difficult to create "manageable standards for resolving" the conflict—is a court going to mandate how many members must be present to create a legislative session or how many minutes the Senate must meet to avoid a pro forma session? However, the decision reached in *Evans* provides a niche for a reviewing court to focus on

86. *Id.* at 217 (listing other political questions that the court would similarly not find justiciable).

87. 395 U.S. 486 (1969).

88. *Id.* at 548.

89. 387 F.3d 1220 (11th Cir. 2004) (en banc).

90. *Id.* at 1227.

91. *Id.* ("These matters are criteria of political wisdom and are highly subjective. They might be the proper cause for political challenges to the President, but not for judicial decision making. . . .").

92. Baker v. Carr, 369 U.S. 186, 217 (1962).

93. U.S. CONST. art. I, § 5, cl. 2.

interpreting the text of the Constitution and to avoid questions determining how much deference is due to the Senate.

Although a court could duck behind these jurisdictional concerns as a means of constitutional avoidance, it is more likely that a court will determine at least part of the recess appointment challenges to be justiciable. Judges will recognize the importance of creating clarity and providing guidance for the Executive and Legislative Branches on the constitutional handling of appointments.

B. Potential Outcomes

There is no doubt the Clause served a crucial function early in American history when the Senate took long recesses and presidential action was necessary, but it is unclear whether the same need is still present today.[94] The outcome of any court decision finding justiciable the constitutional questions will depend greatly on the framing of the analysis or, at an appellate level, the question certified.

The DOJ supports an application of the traditional understanding that the Clause must be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations. The DOJ emphasizes the functionality of the Clause, yet it seems to be a circular argument. In support of the President's appointments, the OLC relies heavily on historical writings that it believes indicate that the recess appointment power "is required to address situations in which the Senate is *unable* to provide advice and consent on appointments"[95]—but fails to make the distinction that with the recent appointments it seems more appropriate to characterize the Senate as *unwilling* to provide advice and consent on appointments rather than actually unavailable to do so.[96] The twenty senators that urged House Speaker John Boehner "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term"[97] intended to block President

94. *Cf.* Denton, *supra* note 12, at 769 (explaining why the Recess Appointments Clause fulfilled a crucial function in early American history).

95. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *8 (O.L.C. Jan. 6, 2012) (emphasis added).

96. *See* HOGUE, *supra* note 7, at 7 ("From the 110th Congress onward, new scheduling practices have arisen that appear intended to prevent the President from making recess appointments.").

97. Press Release, Sen. David Vitter, Vitter, DeMint Urge House to Block Controversial Recess Appointments (May 25, 2011), *available at* http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77; *see also* Letter from Rep. Jeff

Obama from using the recess appointment power. The White House characterized the sessions as "an overt attempt to prevent the President from exercising his authority during this period . . . using a gimmick called 'pro forma' sessions."[98] The OLC does not find this distinction relevant and argues that any analysis should focus on whether the Senate could actually give advice and consent. It is arguable whether the Senate could have provided that advice and consent, but through proper legislative means it chose not to and thus, would not have been unable to consent as OLC suggests.

The DOJ argues that if the Senate can use pro forma sessions to avoid a "Recess of the Senate" then, practically, the Senate could preclude the President from making recess appointments even if the Senate were unavailable for a significant period of time.[99] However, as the DOJ acknowledges, the Senate passed legislation during pro forma sessions in 2011 and has agreed to a conference with the House during a session, even putting the messages received from the House on the record[100]—exemplifying that the Senate could theoretically provide advice and consent on pending nominations during a pro forma session in the same manner.

Because the Supreme Court has not interpreted the Clause, it is unlikely a court would have any on-point controlling precedent to apply.[101] A decision could be reached on a number of points: whether the vacancy has to arise during the recess or can arise prior to the recess; whether it is a twenty-day or three-day recess and thus, the effect of pro forma sessions on the President's power; and whether the Clause as intended by the Founders is even relevant in today's society where the Senate is more frequently in session.

The DOJ should differentiate federal judiciary appointments, which

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Landry & Rep. Austin Scott, to John Boehner, Speaker of the House, et. al. (June 15, 2011), *available at* http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf (conveying a request from seventy-eight Representatives 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").

98. Dan Pfeiffer, *America's Consumer Watchdog*, THE WHITE HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog.

99. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *12 (O.L.C. Jan. 6, 2012).

100. *Id.* at *16.

101. *See supra* notes 31–36 and accompanying text (discussing *Evans* where both the majority and Justice Stevens comment on the denial of certiorari regarding Article III recess appointments).

have internal mechanisms for coping with judicial vacancies, from administrative agency appointments. The CFPB and the NLRB were created by acts of Congress and need a director and adequate members to hold a quorum, respectively, to effectuate the goals of their creation. Carrying out the laws enacted by Congress through the administrative state is required of the President, and Congress should not be able to use its internal procedures to thwart those constitutional responsibilities of the President. Specifically with regards to the Cordray appointment, those in opposition did not oppose the nominee but rather took the position that they would not approve anyone to lead the CFPB.[102] Thus, any position should emphasize the difficult situation of the President as he tries to carry out his mandatory duties under the Constitution to execute the laws as the Legislative Branch refuses to approve a necessary appointee. This differentiation can also help distance the case from *Evans* where Justice Stevens seemed eager to address Article III recess appointments.

As a secondary argument in defense of the appointments, if the case challenged Cordray's appointment, the DOJ could use the suit as an opportunity to challenge the filibuster used to block Cordray. The DOJ could argue that Cordray was in fact approved by the Senate because Cordray gained majority support, but not the higher requisite needed to overcome the Republican filibuster. Similar to *Powell*, the DOJ could reason that the Constitution lays out all that is required for a presidential appointee to be confirmed—"the Advice and Consent of the Senate."[103] When the Framers desired a two-thirds approval requirement, as with treaties discussed in the same paragraph, they specified such a requirement. No two-thirds approval requirement is mentioned for presidential nominees. However, this argument would also face the counterargument that since the Constitution is not specific—i.e., does not explicitly require only a majority vote—the constitutionality should be determined by custom or practice, and thus it should be left up to the Senate since the Constitution allows it to make its own rules.[104] The DOJ would have to argue that Congress's custom of making its own rules is inconsistent with the Constitutional provision on presidential appointees and return to the argument that this should not allow the Legislature to keep the Executive Branch from executing the laws as the Constitution requires.

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102. *See, e.g.*, Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. TIMES, Sept. 7, 2011, http://articles.latimes.com/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907 (noting that in Richard Cordray's confirmation hearings the Senate Republicans cautioned him he could not overcome the unanimous opposition to a job "they believed was far too powerful").

103. U.S. CONST. art. II, § 2, cl. 2.

104. *See* U.S. CONST. art. I, § 5, cl. 2.

C. The Ultimate Showdown: Reaching the Supreme Court

With cases pending in both the Court of Appeals for the D.C. Circuit and the Seventh Circuit, a filing of a petition for a writ of certiorari in the Supreme Court is almost certain. The Supreme Court might use any challenge to the recent recess appointments as an opportunity to clarify the Clause,[105] as Justice Stevens indicated in the denial of certiorari in *Evans*.[106] Similar to the Supreme Court's analysis of the Commerce Clause through health care, any review of the Clause could yield unpredictable results.[107]

If the Court made it past the jurisdictional elements and the political question doctrine, the only certainty is that Justice Antonin Scalia would cite the 1773 dictionary to define "recess" as in *District of Columbia v. Heller*[108] when he used it to define the word "Arms" at the time when the Constitution was written.[109] While this author did not have access to Justice Scalia's preferred dictionaries—the 1773 edition of Samuel Johnson's Dictionary of the English Language or Timothy Cunningham's 1771 Legal Dictionary[110]—slightly more recent dictionaries do not provide much guidance. The 1783 edition of the Cunningham Dictionary does not contain a definition for recess and the 1785 Johnson Dictionary's relevant definition of recess is "remission or suspension of any procedure."[111] Johnson uses these examples: "On both sides they made rather a kind of recess, than a breach of treaty, and concluded upon a truce" and "I conceived this parliament would find work, with convenient recesses, for the first three years."[112] The dictionary definition will not provide originalists with much guidance in determining the Founders' intent as to

105. *Cf.* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all (citing legal specialists stating that "it was likely that the Supreme Court would eventually have an opportunity to review whether it was lawful for Mr. Obama to grant the recess appointments").

106. *See supra* notes 33–36 and accompanying text.

107. *Cf.* Alex M. Parker, *Richard Cordray Recess Appointment Sparks More Bickering*, U.S. NEWS & WORLD REPORT (Jan. 4, 2012), http://www.usnews.com/news/articles/2012/01/04/richard-cordray-recess-appointment-sparks-more-bickering (suggesting that banks could challenge regulations issued under Cordray's leadership, but, "[a]s with court challenges to the Affordable Care Act's constitutionality, the current Supreme Court makeup can be a wildcard").

108. 554 U.S. 570 (2008).

109. *Id.* at 581.

110. *Id.*

111. SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE cdlxi (6th ed. 1785).

112. *Id.*

how long that recess needs to be to allow presidential recess appointments.

Additionally, controversial recusal issues would likely arise. Now-Supreme Court Justice Elena Kagan argued as Solicitor General that the recess appointment of a member of the NLRB does not render moot the controversy about legal consequences of a Board quorum.[113] She wrote that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period."[114] The DOJ differentiates that position from its current support of President Obama's recent recess appointments suggesting that now-Justice Kagan's letter addressed "the question whether an intrasession recess of three days or fewer constitutes a recess under the Recess Appointments Clause" rather than the current question of whether "pro forma sessions at which no business is conducted interrupt a recess that is more than three days long in a manner that would preclude the President from exercising his appointment power under the Clause."[115] However, this seems to be a rather forced distinction and, depending on the question certified by the Supreme Court, could be irrelevant.

CONCLUSION

President Obama's controversial January 4 recess appointments are being challenged in multiple lawsuits, and the addition of the Senate GOP as an amicus further raises the stakes. However, without the January 4 recess appointments, federal agencies would lack the necessary leadership to function, and in turn, the President would not be fulfilling his constitutional duty to execute the laws. Although a court could duck behind jurisdictional concerns as a means of constitutional avoidance, it is more likely, given the importance of the issues, that a court will determine part of the recess appointment challenges to be justiciable. The current political process has reached an extreme: either the President can determine when the Senate is in recess—ignoring the required consent of the House—or the Senate can deny the President the opportunity to make recess appointments even when they may be unavailable to fulfill their constitutional advice-and-consent role. Clarification from the courts regarding the Clause should be welcomed as an opportunity to both create clarity and provide guidance for the Executive and Legislative Branches.

113. Letter from Elena Kagan, Solicitor Gen., Office of the Solicitor Gen., to William K. Suter, Clerk, Supreme Court of the United States, at 3 (Apr. 26, 2010).

114. *Id.*

115. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, at *18 (O.L.C. Jan. 6, 2012).