Understanding the Centrality of the Appointments Clause as a Structural Safeguard of Our Scheme of Separated Powers: The Senate’s Exclusive and Plenary Confirmation Power Trumps Presidential Intrasession Recess Appointments

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Executive Summary

The Constitution establishes a procedure for the nomination and appointment of officers of the United States that includes important roles for both the President and the Senate. The debates of our founding fathers, as well as Supreme Court opinions, explain that these provisions were intended to create important checks and balances on the branches of Government involved. The Justice Department’s Office of Legal Counsel opinion, which purports to identify the legal basis of the recess appointments of four individuals to important Government positions this past January, asserts that the President has the unilateral ability to determine the existence of a “recess” for purposes of triggering the President’s recess appointment authority. This conclusion would appear to undermine the balance of powers that is inherent in the Appointments Clause. It would also appear to conflict with the constitutional right of the Senate to determine its own rules and procedures. The use of a pro forma procedure during an intrasession recess of the Senate also raises the unresolved issue of whether any recess appointment can ever be made while the Senate is in such an intrasession adjournment, or instead does this authority only relate to intercessional periods. While there is no definitive judicial precedent as yet, a review of the constitutional debates, prior court rulings, and the history of recess appointments indicates that the validity of the intrasession recess appointments at issue is questionable, and that compelling arguments may be made that they are invalid.

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I. Introduction

Under the Constitution, the President has the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions that shall expire at the End of their next Session” (Recess Clause).[[4]](#footnote-4) On December 17, 2011, the Senate agreed by unanimous consent to “adjourn and convene for pro forma sessions only, with no business being conducted,” every Tuesday and Friday from that date until January 23, 2012. During that period, on January 3, 2012, it convened a pro forma session to commence the second session of the 112th Congress, as required by the Constitution, and adjourned within a minute.

On January 4, 2012, supported by a legal opinion of the Justice Department’s Office of Legal Counsel (OLC),[[5]](#footnote-5) President Obama made recess appointments of Richard Cordray to be the first director of the Consumer Financial Protection Board (CFPB), and of Sharon Block, Richard Griffin and Terry Flynn to be members of the National Labor Relations Board (NLRB). OLC concluded that pro forma sessions in which no business is to be conducted did not have the legal effect of interrupting a 20 day intrasession recess which the OLC claimed would qualify as a recess under the Recess Clause.[[6]](#footnote-6) In a bold assertion of Executive power, the OLC opinion found that the President has the *unilateral* discretion to determine that the Senate is “in recess” for the purpose of permitting the President to avoid the requirement for Senate confirmation of nominations. The result of the appointments is to install the appointees in their respective offices for almost two years.

The effect of the presidential actions has been to ignite political and legal firestorms that are likely to exacerbate the current near paralysis of the Senate confirmation process[[7]](#footnote-7) and force litigation of recess appointment issues that have been unresolved for over a century.[[8]](#footnote-8) The reason for the present impasse in the appointment of these Executive Branch principal officers is not subtle. The Republican Senate minority, with the support of the House Republican majority, has publically acknowledged that it is determined to use the leverage of stalling the confirmation of the first director of CFPB in order to prevent the new agency from exercising the full range of powers available to it under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA).[[9]](#footnote-9) The apparent objective is to obtain an agreement with the Administration to revise the structure and funding independence of the Bureau. Similarly, the Senate Republicans seek to block the NLRB appointments in order to deprive the agency of a quorum necessary to promulgate what the Senate minority perceives as labor friendly rules.[[10]](#footnote-10) Cordray’s nomination, which was made a full year after the establishment of the Bureau,[[11]](#footnote-11) was reported favorably out of committee, but the threat of a filibuster, and the lack of 60 votes to enforce cloture, prevented a floor vote. Two of the three NLRB appointees, Block and Griffin, were nominated on December 15, 2011, two days before the adjournment, and thus have not been vetted nor the subject of a congressional hearing.

As will be more fully elaborated below, this paper concludes that OLC’s assertion that the President has unilateral discretionary authority to determine whether the Senate is in recess for purposes of the Recess Clause is constitutionally flawed. This conclusion is based on a thorough review of all relevant precedents, the historic use of the recess appointments power, the plain language used in the Constitution and its formative history, and the basic principles of separation of powers that are central to the operation of our Government and the protection of abuse by any one branch.

II. The Senate’s Role in the Confirmation Process is Exclusive and Plenary

1. The Framers Designed a General Appointments Scheme Bounded by Strict Checks and Balances

The OLC opinion assiduously avoids any mention or discussion of the Appointments Clause itself or the Framers’ debates over the general power of appointment. Those debates were heated, contentious and revelatory of their awareness of the importance of how and where to vest control over the appointing power. The Recess Clause, on the other hand, was adopted by the Constitutional Convention without any debate. In light of the substantial Convention discussion of the appointment power, the lack of any debate on the Recess Clause suggests that the Framers thought that Clause would not affect the meticulously developed scheme of checks and balances of the Appointments Clause, which requires action by both the President and the Senate to effect an appointment.[[12]](#footnote-12) This view is corroborated by the statement of Alexander Hamilton in his Federalist Paper No. 67, where he deemed the Recess Clause to be “auxiliary” and “supplementary” in nature.[[13]](#footnote-13)

The Convention debates on the appointments authority, on the other hand, shed much light on the intended limited scope of the Recess Clause. The debate records clearly show that the delegates voiced great distrust of the Executive and expressed the need for checks and balances to counteract the power of the President. Over the course of the considerations, the delegates rejected attempts to vest appointment power solely in either the President or the legislature. In the end a compromise was reached that required the input of both branches so as to achieve the goals of responsibility and accountability.[[14]](#footnote-14)

The initial draft constitution presented at Philadelphia (the Virginia Plan) lodged in Congress the responsibility for choosing both the Executive and members of the national judiciary. The Executive would have been empowered “to appoint to offices in cases not provided for” by the Constitution. James Wilson objected to the appointment of judges by a legislature: “Experience shewed the impropriety of such appointments, by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.” Other delegates feared that vesting such power in a single person would be “leaning too much toward Monarchy.”[[15]](#footnote-15) A later, interim version of the draft constitution vested in the Senate the authority to appoint ambassadors, public ministers and judges of the Supreme Court, while empowering a now independent President to appoint all other officers not provided for in the constitution.[[16]](#footnote-16) Roger Sherman objected to the draft language contending that it conferred too much power on the President and enabled him “to set up an Absolute Government.”[[17]](#footnote-17)

When the Committee on Detail reported back to the Convention the language that became the Appointments Clause, it reflected major compromises: the Senate was shorn of its power to appoint ambassadors and Supreme Court justices; the President could nominate, but not appoint, all the principal officers of the United States; and the Senate would confirm his nominees. Responding to objections against this blending of the appointing power, Gouverneur Morris explained that the benefit of the shared authority was “that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”[[18]](#footnote-18) The delegates approved the proposed compromise.[[19]](#footnote-19) The Convention then agreed, without discussion or opposition, to the Recess Clause.[[20]](#footnote-20)

Alexander Hamilton explained in Federalist Paper No. 76 why the Convention had withdrawn from the President “the absolute power of appointment.”[[21]](#footnote-21) Under the constitutional plan:

[T]he necessity of [the Senate’s] concurrence would have a powerful,

though, in general, a silent operation. It would be an excellent check

upon a spirit of favoritism in the president, and would tend greatly to

prevent the appointment of unfit characters from state prejudice, from

family connection, from personal attachment, or from a view to popularity.

In addition to this, it would be an efficacious source of stability in the administration. [[22]](#footnote-22)

Hamilton also commented that “The possibility of rejection would be a strong motive to care in proposing” and would deter the President from naming “candidates who had no other merit than that of coming from the same State to which he particularly belonged, or being in some way or other personally allied to him, or possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”[[23]](#footnote-23) The Supreme Court has consistently stated its accord with this understanding of the nature, purpose and effect of the compromises, respecting the adoption of an appointments process that is safeguarded by these checks and balances.[[24]](#footnote-24)

1. Effective Checks and Balances Require that the Powers of the Political Branches at Each Stage of the General Appointments Scheme Are Exclusive and Plenary

The adopted general appointments scheme provides 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; but 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….The President…shall Commission all the Officers of the United States.”[[25]](#footnote-25)

This finely tuned scheme establishes three separate and distinct stages for appointments. The first is the “nomination” by the President alone; the second is the Senate’s assent (or not) to the nominee’s “appointment;” and the third is the final appointment and commissioning by the President.[[26]](#footnote-26) At each stage the respective branch prerogatives are carefully and clearly demarked and have long been understood to be exclusive and plenary to that branch. Thus, only the President can nominate and commission.[[27]](#footnote-27) Congressional appointments are prohibited.[[28]](#footnote-28) A presidential failure to nominate for a vacant position cannot be remedied by a judicial order directing such action.[[29]](#footnote-29) Also, just as the Senate may block a nomination in order to forestall the appointment of a principal officer, the President may achieve the same result by refusing to nominate a principal officer. In either case the failure to appoint an officer may be based on considerations other than the qualifications of the nominee, and in each case, the result is a valid exercise of a prerogative of that branch of Government. Once the Senate reports a successful confirmation the president is free to commission the appointee at his discretion.

**1**. **Presidential Control of Nominations.** In fact, presidents in the past have often withheld nominations for vacant advice and consent positions which may cause detrimental consequences for targeted programs or policies, at times in order to force a particular congressional action. Such extended vacancies can provide significant Executive leverage since they may contribute to a desired agency inaction, foster confusion among nonpolitical employees, or undermine agency legitimacy.[[30]](#footnote-30) Although courts will not direct a presidential submission of a nomination, an extended, indefinite delay that allows an unconfirmed occupant of a vacant office advice and consent to exercise its substantive authorities may be found unlawful and to have tainted actions taken. Contemporaneous illustrations of the presidential exercise of the “power of nonappointment” and its consequences are illuminating.

1. *Reorganization of the Department of Energy* *(1999-2000)*

Years of heightened concerns with respect to the effectiveness of oversight and management by the Department of Energy (DOE) of the security of its nuclear weapons laboratories prompted investigations by DOE itself and the FBI, presidential directives to DOE calling for new counterintelligence measures, and congressional hearings. Those examinations culminated in June 1999 with the release of a report by a Special Investigation Panel of the President’s Foreign Intelligence Advisory Board on security and counterintelligence problems at DOE (the Rudman Report) which depicted the Department as “[a] dysfunctional bureaucracy that has proven it is incapable of reforming itself” and strongly recommended that the weapons laboratories “must have their own autonomous operational structure free of all other obligations imposed by DOE management.”[[31]](#footnote-31) Congress adopted the essence of the Rudman Report’s restructuring goals and proposals in its passage of Title 32 of the National Defense Authorization Act for FY 2000.[[32]](#footnote-32)

The legislation created a new, semi-autonomous agency within DOE, the National Nuclear Security Administration (NNSA), to be headed by an Administrator for Nuclear Security (who would also hold the title of Under Secretary of Nuclear Security) appointed by the President. Title 32 contained provisions to ensure insulation of NNSA from direct control by the Secretary or other DOE managers over management of its operations. These included barring DOE officials, other than the Secretary, from directing any NNSA officials or staff; specifying that the Secretary had to act through the Administrator in providing direction to the NNSA; prohibiting the Secretary from delegating any his authority over the Administrator to any one other the Deputy Secretary; and creating NNSA executive and personnel management offices duplicative of comparable main DOE offices.

In his signing statement of October 5, 1999,[[33]](#footnote-33) President Clinton expressed misgivings with respect to the structural arrangements within the new agency and the limitations on the Secretary’s ability to direct and control the activities and personnel of the NNSA, but did not suggest that the legislation raised constitutional or other legal issues. In particular, the President objected to what he saw as the isolation of the personnel and contractors of the NNSA from direction by Department officials outside the new agency; the limitation on the Secretary’s ability to employ his statutory authorities to direct the activities and personnel of the NNSA both personally and through designated subordinates; the removal of the Secretary’s direct authority over certain sensitive classified programs; and the potentially deleterious effect of creating redundant support functions in the areas of procurement , personnel, public affairs , legal affairs, security, and counterintelligence.

To ensure that these perceived deficiencies did not, in his view, undermine the Secretary’s statutory responsibilities in the area, the President directed the Secretary assume the duties and functions of the new office of Under Secretary for Nuclear Security and to “guide and direct” all NNSA personal by using his authority, “to the extent permitted by law,” to assign (i.e., “dual hat”) departmental officers and employees to concurrent offices within NNSA. The Secretary was also directed to “mitigate” the risks to the chain of command between him and subordinate agency personnel presented by the legislation’s redundant functions “to the extent permissible under law.” The President indicated he might not submit a nomination for the a new Administrator until action was taken by Congress to remedy the identified deficiencies and to “harmonize” the Secretary’s authorities with those vested in the Under Secretary/Administrator.

The Secretary complied with the presidential directions by filling18 NNSA positions with main DOE officials and suggested that he would continue such “dual hatting” indefinitely. He also attempted to integrate the NNSA into the Department’s much criticized organizational structures and management practices through exercise of his statutory reorganization powers. The President delayed nomination of an Administrator until May 2000 but a confirmation vote was blocked over the issue of the refusal of the nominee, at the direction of the Secretary, to discontinue the practice of dual hatting. Congressional hearings critically highlighted that these practices served to undermine NNSA’s intended autonomy, blur lines of authority, overburden individual officials and avoided the essential reforms of the Department’s structures and practices that impelled passage of the legislation.[[34]](#footnote-34) The hearings made it clear that it was understood that congressional legal action to force a nomination was unavailable.[[35]](#footnote-35)

The impasse was resolved in June 2000 by the public exposure of another security breach at a nuclear laboratory. The Secretary, facing renewed congressional criticism for the breach and for having impeded the effectuation of NNSA’s autonomy, retreated from his dual hatting policy, which facilitated the confirmation of the first Administrator. Congress quickly followed up with passage of legislation that (1) explicitly prohibited dual hatting at NNSA; (2) made the Secretary’s statutory reorganization authority inapplicable to NNSA; and (3) limited at-will presidential removal of the Administrator except for cause for three years from the date of his confirmation.[[36]](#footnote-36)

1. *President Obama’s Failure to Nominate Inspectors General to Existing Vacant Positions (2009-2012)*

A recent congressional hearing[[37]](#footnote-37) has revealed that as of May 2012 , 10 of 73 statutory inspector general (IG) positions were vacant. Of those 10 vacancies, 7 require nomination by the President and Senate confirmation, but only 2 have nominees pending confirmation.[[38]](#footnote-38) The longest vacancy without a nomination has been at the State Department where the position has been unfilled since January 2008, over four and a half years, followed by the Interior Department (three and a half years), the Labor Department (over 37 months), the USAID (over 10 months), the Defense Department (over 8 months), and the Securities Exchange Commission (over seven months).[[39]](#footnote-39)

Over recent years IGs have established themselves as the bulwark of oversight of the executive bureaucracy. Their effectiveness in combatting fraud, abuse, waste, maladministration and inefficiency derives from their ability to perform audits and investigations with significant independence. That independence, in turn, stems from their unique dual-reporting structure, which requires that they report their findings to both the agency head and to Congress, as well as other tools that support independence such as access to their own counsel, separate budgets, the discretion to audit and investigate matters of their choosing without agency interference, and indefinite tenure. Although an IG may be removed by the president at-will, such action must be reported by the IG to Congress accompanied by justifications. Testimony at the hearing made it clear, however, that IG effectiveness can become tenuous and be diminished when the office does not have permanent leadership and when vacancies extend for long periods. In such circumstances lengthy vacancies can affect the credibility of acting IGs which, in turn, can detract from the appearance, and even the fact, of independence.[[40]](#footnote-40)

*(iii) President Obama’s Failure to Make Timely Nominations to Existing Vacant Principal Officer Positions (2009-2012)*

In at least three instances since 2009 President Obama has failed to submit timely nominations for newly created principal officer positions that has resulted in delays in the start up and implementation important regulatory programs and raised substantial legal uncertainty whether the substantive actions of the designated temporary occupants of those offices were lawful.

The first concerns the Office of the Director of the Consumer Financial Bureau (CFPB), which involves one of the recess appointees that is the subject of this paper. The office was created by Title X of the Dodd-Frank Act (DFA)[[41]](#footnote-41) which established the CFPB as an independent agency within the Federal Reserve System. The Director must be appointed by President, subject to Senate confirmation, and serves for a five year term and is removable by the president only “for cause.” The DFA directs the transfer of existing Federal agency consumer protection authorities to the Bureau by a date certain. Those powers, as well as new authorities established by the DFA, are vested in the Director alone, and may not be exercised by anyone other than a Senate confirmed Director. The DFA became effective on July 21, 2010.

In anticipation of a hiatus period between the time needed for the orderly transfer of the authorities and personnel of seven agencies to the new agency and the confirmation of a new Director, Section 1066 (a) of the DFA provides that the Treasury Secretary “is authorized to perform the functions of the Bureau under *this* subtitle [F] until” a Director is confirmed.[[42]](#footnote-42) An opinion letter by the Inspectors General of Treasury and the Federal Reserve Board in January 2011 to a House jurisdictional committee opined that, pursuant to Section 1066(a), the Treasury Secretary could exercise the transferred agency functions on the transfer date if there was no Director, but not any of the new authorities created by the DFA. The transfer date selected by the Secretary (as authorized by the DFA) was July 21, 2011. The IGs’ opinion letter never addresses the potential conflicts their interpretation raised with respect to the structure and purposes of the DFA and no reasoned basis for not including the new authorities of the CFPB established by the DFA. In fact, the only task delegated to the Secretary by Subtitle F was to oversee and facilitate the transfer of consumer protection functions and the organizational set up of the Bureau. Moreover, the structural independence of the CFPB intended by Congress--in addition to the for cause removal protection the agency is not subject OMB legislative clearance and apportionment requirements nor to congressional appropriations oversight because it is funded through the Federal Reserve System—is contradicted by the possibility that an official subject to at-will presidential removal (the Treasury Secretary) would assume the policy development and enforcement powers for an indefinite period.

President Obama nominated Richard Cordray to be CFPB Director on July 18, 2011, three days before the transfer date,[[43]](#footnote-43) essentially a full year after the DFA’s effective date. The nomination never received floor consideration. The Secretary assumed the limited substantive duties of the Director on July 21 and continued to perform them until Mr. Cordray’s recess appointment on January 4, 2012. If Cordray’s recess appointment is declared unconstitutional there could be serious remedial and administrative problems and consequences. The first question that will arise is whether any of Cordray’s substantive actions taken during his tenure will survive. As is more fully discussed below, it is likely, but not certain, that the *de facto* doctrine will be invoked to validate them. The next question will be what actions will be necessary and permissible to continue CFPB’s operation. A new nomination will be certainly be necessary.[[44]](#footnote-44) But the government may argue that to avoid a long hiatus that may result from a controverted appointment process, administrative duties should be allowed to revert to the Treasury Secretary. That course, however, will directly raise the question whether Section 1066(a) actually authorizes the Secretary to assume any of the Director’s statutorily vested duties and powers. Since the Federal Vacancies Reform Act of 1998 does cover new offices for which there never was a valid incumbent,[[45]](#footnote-45) there is a likelihood of a lengthy period of an inoperative CFPB.

A second instance of the failure of the President to submit a timely nomination for an important advice and consent position concerns the Office of the Director of the Federal Housing Finance Agency (FHFA). FHFA is an independent agency established by the Housing and Economic Recovery Act of 2008 (HERA)[[46]](#footnote-46) with broad authority and powers to oversee and regulate the components of the Nation’s secondary mortgage markets: Fannie Mae, Freddie Mac and the Office of Finance of the Federal Home Loan Bank System. FHFA is to be headed by a Director with encompassing supervisory and regulatory authority over these entities and extraordinary independence from executive and congressional control and influence.[[47]](#footnote-47) The Director is to be appointed by the President with the advice and consent of the Senate for a five year term and is removable by the President only for cause. HERA also provided for the abolition of three agencies that had served (ineffectively) as the predecessor overseers of the regulated entities, including the Office of Federal Housing Enterprise Oversight (OFHEO), and the transfer of their personnel to FHFA.

All substantive supervisory and regulatory powers and duties of FHFA are expressly vested in the Director. Also, similar to the recognition of a need for prompt regulatory action in the situation of the future CFPB, HERA provided for an immediate start up for FHFA. Unlike the opaque CFPB provision, the HERA mandate was express and unequivocal, providing that “during the period beginning of the effective date of [HERA], and ending on the date on which the Director is appointed and confirmed, the person serving as the Director of [OFHEO] on that effective date shall act for all purposes as, and with the full powers of, the Director.”[[48]](#footnote-48)

Since July 30, 2008, the effective date of HERA, a period in excess of four years, there has been no confirmed Director of FHFA. During that time an acting FHFA Director has, among other actions, placed Fannie Mae and Freddie Mac into conservatorship, disbursed over $150 billion in bailout funds to preserve the secondary mortgage market, paid over $100 million in legal expenses to defend security fraud claims by former entity officials, issued numerous substantive rules, one of which assured that even successful security fraud claims would not be paid by the entities, and filed a lawsuit against 17 financial institutions and 131 of their officers and unaffiliated lead underwriters. The complaints charge violations of federal securities laws and common law for misrepresentations in the sale of residential private-label mortgage backed securities.

The first acting Director, the then incumbent OFHEO Director, served until his resignation on August 25, 2009. On that date, pursuant to a HERA provision that allows the President to “designate” one of the FHFA deputy directors as the acting Director “[i]n the event of the death, resignation, sickness or absence of *the Director”* until the appointment and confirmation of a new Director[[49]](#footnote-49), the Chief Executive selected Edward DeMarco. Mr. Demarco has now served for three years as the acting Director. On November 25, 2010, President Obama submitted the nomination of Joseph A. Smith, Jr. to fill the position. Following a Senate committee vote to report the nomination favorably, no floor action was taken and, on the *sine die* adjournment of the 111th Congress, the nomination was returned to the President. No further nomination for the position has been sent up by the President since the convening of the 112th Congress, a period of over 20 months.

During his tenure Mr. DeMarco has been subject to criticism from congressional committees, the Treasury Department, the Inspector General for FHFA, and persons affected by actions taken and not taken. Between August 2011 and March 2012 the FHFA Inspector General issued eight negative evaluations and audits respecting program and operational problems and deficiencies. These included a finding that FHFA failed to properly oversee the Enterprises’ participation in Treasury’s Home Affordable Modification Program (HAMP) which involves servicers agreeing to modify mortgages for borrowers facing imminent default or foreclosure which resulted in the omission of significant details in the agreement between the Enterprises and servicers concerning payments to the Enterprises, the scope their responsibilities, and the processes to resolve differences. A second evaluation found that FHFA had not taken any decisive action to compel Fannie Mae to establish an effective operational risk management program “despite Fannie Mae’s continuing failure to do so being known to the regulators since 2006.” Other evaluations found deficiencies in FHFA’s oversight of heightened risk posed by foreclosure processing abuses; that FHFA had not taken critical steps to strengthen its oversight of troubled FHLBanks; and that FHFA had failed to clearly define its oversight role respecting Freddie Mac’s responsibility for monitoring mortgage servicing contractors.[[50]](#footnote-50)

The FHFA is also presently defending a legal challenge to a rule promulgated in 2011 that declared that any successful class action securities fraud claims judgment or settlement occurring during the period of conservatorship or receivership of the Enterprises would be relegated to the lowest level payment priority, thereby assuring there will be no monetary recovery. The class action plaintiffs, representing all state sponsored employee retirement funds, asserts that (1) FHFA and its acting Director have no statutory authority import and Bankruptcy Code concepts and requirements into HERA’s conservatorship/receivership scheme, and (2) that the absence of a confirmed Director for a period exceeding four violates the Appointments Clause and vitiates any authority to promulgate the challenged rule. The case is presently before a federal district court awaiting rulings on opposing motions for summary judgment.[[51]](#footnote-51)

A third newly created position that has never been occupied by a confirmed official is that of the Director of the Office of Financial Research (OFR). Title I of Dodd-Frank created OFR to support the Financial Stability Oversight Council (FSOC or Council) and its member agencies in its mission of identifying threats to the financial stability of the United States, promoting market discipline, and responding to emerging risks to the financial stability. A key task of the FSOC is to identify nonbank financial entities that may pose a threat to the financial security of the United States. The Council is vested with power to designate such a company as a “systemically important financial institution,” a SIFI. The consequences of such designations are significant and substantial. The designee companies will be subject to indefinite, close regulatory supervision by the Federal Reserve Board (Board) under “enhanced prudential standards” tailored to relieve the material stress and dangers the firms pose to the financial system. Further, under Title II of the DFA, the Treasury Secretary, who is the chairman of the FOSC, has the authority, upon recommendation of the FDIC and certain other agencies, to place a nonbank firm designated a SIFI into FDIC receivership and possible resolution.

The DFA itself does not clarify what thresholds will trigger a SIFI designation. The FOSC does not have the authority issue substantive rules respecting information gathering and sharing nor does it have the investigative power to demand and enforce such demands in court. The Council’s first attempt formulate guidance was a failure and the efficacy of its most recent issuance is yet to be determined. Each of the three steps leading to a SIFI determination in the recently promulgated guidance need huge amounts of financial data that require sophisticated analysis. Complicating the situation further is that the financial regulatory agencies that compose the Council—the Federal Reserve Board, the Comptroller of the Currency, the Commodity Futures Trading Commission, the Securities Exchange Commission, the Consumer Financial Protection Board, the federal Housing Finance Agency, the National Credit Union Association, and the Federal Deposit Insurance Corporation—have variegated information collection gathering and data analysis systems that need to be coordinated with an as yet still not developed scheme of risk analysis.

With this background in mind, the crucial role OFR plays in the success of the SIFI program becomes apparent. The DFA establishes OFR as an independent entity within the Treasury Department. It is headed by a Director appointed by the President with the consent of the Senate for a six year term who may hold over after the term ends until a successor is confirmed. The Director has “the sole discretion in the manner [he or she] fulfills the responsibilities and exercises the authorities in this subtitle.”[[52]](#footnote-52) Among the Director’s significant duties is the issuance of binding rules respecting the collection of data on behalf of the Council, and providing such data to the Council and member agencies; issuing rules standardizing the types and formats of data reported and collected; and issuing rules assisting member agencies in determining the types and formats authorized by the DFA to be collected by such member agencies.[[53]](#footnote-53) Rules promulgated with respect to standardization must be implemented by the member agencies within three years, after which time the OFR may implement them and supersede existing agency rules (after consultation with the Secretary).[[54]](#footnote-54) The Director must report to and testify before its jurisdictional committees annually with respect OFR’s work and assessment of market stability and potential threats. No other executive branch officer or agency can require the Director to submit that testimony or testimony on any other matter to Congress for prior review.[[55]](#footnote-55) The Director can issue subpoenas and seek enforcement of them in federal district court without consultation with the chairman or the Council.[[56]](#footnote-56) Thus, the Council does not have independent information gathering and investigative powers, and must rely on OFR.

Finally, OFR is the sole source of funding for the Council. Pursuant to DFA Section 155, Congress established a “Financial Research Fund” which is the repository for funds received from the Federal Reserve Board that covered all of the expenses of OFR during the first two years of its operation and that after July 21, 2012 will receive funds from assessments on bank holding companies with consolidated assets of $50 billion or more and on nonbank companies supervised by the Board of Governors. None of such funds are deemed to be appropriated monies and are not subject to apportionment by OMB. They may be utilized for any function or purpose of OFR. Under DFA Section 118, one of those purposes is to fund the operations of the Council. Effectively, then, OFR is relatively free of significant executive and congressional oversight controls and influences.

In an early optimistic commentary on OFR’s potential for success, the author emphasized that it “is critical that the first Director be personally strong and exceptionally well regarded” and that the search should not be a “wonks-only affair.” “The OFR Director must swiftly maximize all statutory opportunities to create a culture of strength and independence. The Director must also go beyond the statutes’ bare bones mandates and fill out an agency that is more than just an extension of the Treasury and that has the freedom to seek out the advice of those economists and other experts who got it right.” [[57]](#footnote-57) President Obama nominated Richard Berner as the first Director of OFR on December 16, 2011, 17 months after the effective date of the DFA. Mr. Berner’s nomination was favorably reported out of the Senate Banking Committee on May 29, 2012, but no floor action has yet to be taken.

On June 18, 2012, the Systemic Risk Council[[58]](#footnote-58) issued “A Call to Action” over its perception that “the lack of progress made by the members of the” FSOC and OFR to address the critical issues as mandated by the DFA derives from “[a] sense of complacency [that] has made reforms for effective oversight seem less urgent despite escalating problems elsewhere in the global financial system.” It charges that “OFR has failed to establish and activate a robust data collection process…[that] includes the ability to collect, analyze and model vast amounts of information about financial markets and participants.” It further asserts that “OFR has yet to announce that it has established secure computing environments for data storage and sharing.”

On June 27, 2012, the Treasury Department’s Inspector General issued an assessment of the effectiveness and status of Treasury’s efforts after 21 months to establish OFR “in a manner that achieves its legislative mandate.” The IG concludes that the stand-up is still a work in progress, noting that in April 2012 it had finalized a comprehensive implementation plan that “lays out the expected evolution of OFR’s capabilities, reaching a mature state by fiscal year 2016. Concurrent with the development of its comprehensive implementation plan, OFR also began to develop its analytic and data support for FSOC, and its Research and Analysis Center has sponsored seminars and published two working papers on risk assessment topics.”[[59]](#footnote-59) The IG made no mention of the effect of the absence of a confirmed Director was having, but commented that OFR has taken “longer than might have been expected to implement a project management capability and finalize a comprehensive implementation plan. OFR”s operational success will depend, in part, on its ability to execute its plan.”[[60]](#footnote-60)

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This brief description past and current instances of presidential manipulation of the nomination power belies the OLC opinion’s assertion that Senate pro forma sessions unconstitutionally interfere with the President’s role in the appointments scheme. Rather, it confirms the thesis presented here: At each stage of the appointments the political actor’s role is plenary, exclusive and judicially unreviewable. The examples just recounted underline that the only remedy available for delays by political actors is resort to the political processes. That theme and conclusion is buttressed in the following examination of the commissioning and confirmation stages of the appointments process.

**2. Presidential Control of Appointments and Commissioning.** The President is also insulated in the third stage of the process. An appointment to an office is not completed until the President signs a commission. Even after approval by the Senate the President may change his mind, and the confirmed appointee will be denied his or her position.[[61]](#footnote-61) But once the commission is signed, the appointment is complete and a court may command its delivery to the appointee. The President, however, is bound by his nomination and cannot commission an officer for a post different from the one for which he was nominated. Finally, the Supreme Court in *United States v. Smith* has held that the Senate cannot change its mind about a confirmation after having assented to it, notifying the President of its assent and the President having signed the commission.[[62]](#footnote-62) That ruling confirms the understanding that the President and the Senate must respect the constitutional formalities vested in and employed by each other. In *Smith*, the Court considered whether George Otis Smith was appointed to the Federal Power Commission. On December 20, 1930, the Secretary of the Senate formally notified the President of the confirmation, and the President the same day signed and had delivered to Smith a commission appointing him to the office. On January 5, 1931, the first day the Senate was again in session after the confirmation vote, the Senate reconsidered Smith’s nomination and asked the President to return the resolution of confirmation. The President refused on the ground that he had already appointed Smith.

The Court held that Smith was validly appointed despite the Senate’s reconsideration of its consent to the nomination. Writing for the Court, Justice Brandeis noted that “[i]t is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties, and that each branch be able to rely upon definite and formal notice of action by another.”[[63]](#footnote-63) Justice Brandeis rejected the notion that the Senate could retract a confirmation after formal notification to the President and appointment, explaining that “[t]he uncertainty and confusion which would be engendered by such a construction repel its adoption.”[[64]](#footnote-64) Similarly, when the Senate declares that it is in session, the President must honor that formality. To allow the President to deem the Senate in recess on a day that the Senate regards itself as in session, and on that basis make a recess appointment he could not otherwise make, would sow great “uncertainty and confusion” over the duties of the Senate and the President as to the nomination, confirmation and appointments of executive officers.

**3. Senate Control of the Confirmation Process.** While the nomination and commissioning stage are within the exclusive domain of the Executive, the confirmation stage is solely the province of the Senate.[[65]](#footnote-65) The Senate may confirm or reject or not act at all. With its constitutional authority to determine its rules of proceedings[[66]](#footnote-66) it can make confirmations easy (through unanimous consent resolutions), difficult (through threats of filibuster and the need for 60 votes for cloture), or impossible (by staying in session continuously). OLC concedes that Congress can defeat nominations by staying in continuous session[[67]](#footnote-67) and cannot challenge the legality of the filibuster. The Framers saw no difficulty in an outcome that left an office vacant. The remedy, after the failure of negotiation and compromise, would come through public judgment of the political process. This was made clear by Justice Scalia writing for a unanimous Court in *Edmond v. United States* (1997):

[T]he Appointments Clause is more than a matter of “etiquette or protocol;” it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal … officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial branches….This disposition was designed to ensure higher quality of appointments; the Framers anticipated that the President would be less vulnerable to interest group pressure and personal favoritism than a collective body. “The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation.” [citing Hamilton and Story] The President’s power to select principal officers of the United States was not left unguarded, however, as Article II further requires “Advice and Consent of the Senate.” This serves both to curb executive abuses of the appointment power . . . . and to promote a judicious choice of [persons] for filling the offices of the union….By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.[[68]](#footnote-68)

Justice Scalia went on to quote Alexander Hamilton: “The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the Senate for approving, would participate, though in different degrees, in opprobrium and disgrace.”[[69]](#footnote-69)

In sum, the Appointments Clause establishes a process that is a fundamental structural safeguard designed to ensure responsibility and accountability of each of the political actors. At each stage the relevant actor has complete discretion and power to perform its constitutionally assigned role and, with very narrow exceptions,[[70]](#footnote-70) each actor may act or may take measures to protect the integrity of its role in the process. Thus the President has withheld submitting nominations in order to influence or effect changes in targeted programs,[[71]](#footnote-71) and the Senate has used its constitutionally-based authority to establish rules of procedure for similar purposes.

III. The Senate’s Rulemaking Power Allows It to Authorize Pro Forma Sessions That Prevent the President From Making Recess Appointments

1. The Courts Have Recognized the Breadth of the Senate’s Rulemaking Power

In authorizing pro forma sessions between December 17, 2011 and January 23, 2012, the Senate was exercising its constitutionally vested rulemaking power. The Constitution empowers “each House [to] determine the Rules of its Proceedings…”[[72]](#footnote-72) This power has been construed broadly by the courts. The Supreme Court has held that where neither express constitutional constraints, nor fundamental rights are ignored, “[all] matters of method are open to the determination of the house…The power to make rules is … not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, *absolute and beyond challenge of any other body or tribunal*.”[[73]](#footnote-73) In *Nixon v. United States,[[74]](#footnote-74)* the Supreme Court held a challenge to the Senate’s decision to establish a special committee to hear impeachment evidence against Judge Nixon, and to make recommendations to the full Senate, to be nonjusticiable. The Court found that there was “a textually demonstrable constitutional commitment of the issue to [the Senate]; or a lack of judicially discoverable and manageable standards for resolving [the issue].”[[75]](#footnote-75) Indeed, the Court commented that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”[[76]](#footnote-76)

The constitutional power of each House of Congress to establish its own rules and procedures relates to all manner of how each body will or will not take a legislative action committed to it. In *INS v. Chadha,[[77]](#footnote-77)* the Supreme Court held that one or two house legislative vetoes were exercises of legislative power that affected the rights, duties and obligations of persons outside the legislative branch. These legislative veto provisions were therefore unconstitutional by failing to comply with the requirements of bicameral passage and presentation to the President. However, the Court specifically exempted legislative actions taken pursuant to the Rulemaking Clause.[[78]](#footnote-78) The Court recognized that although the exercise of the rulemaking power may have an incidental impact outside the legislative branch, as long as the predominant focus is internal to the House or Senate, it is a valid constitutional exercise of that body’s rulemaking authority. The Court also took pains to note that among the four explicit textual commitments allowing either House to act alone was the Senate’s confirmation authority, stating that: “The Senate alone was given final unreviewable power to approve or disapprove Presidential appointments.”[[79]](#footnote-79)

The instances of Senate or House rules that have affected Executive actions are myriad and include committee issuance of subpoenas and the authorization of contempt citations for failure to comply with such subpoenas; fast track procedures for review and possible rejection of agency final rules and commercial treaties that require implementing legislation; and filibusters of proposed legislation and nominations, all of which are indubitably constitutional.[[80]](#footnote-80) Senate rules that have been put in place regarding actions during adjournments or recesses include designating an officer to receive messages from the Executive; the authorization of standing committees to continue hearings, committee authority to conduct investigations and to issue subpoenas;[[81]](#footnote-81)and to receive and conduct hearings on nominations submitted by newly elected Presidents.[[82]](#footnote-82)

Finally, it is important to underline the breadth and means of the Senate’s exercise of its rulemaking authority that is illustrated by its actions in the December 17, 2011 adjournment and in the previous adjournment in August 2011. Both adjournment resolutions provided that no business would be conducted during the pro forma sessions. In each, however, the Senate passed urgent legislation by unanimous consent.[[83]](#footnote-83)

With respect to the nature and impact of pro formasessions in particular, a recent Congressional Research Service study is illuminating.[[84]](#footnote-84) CRS emphasizes that “[i]t is important to note that the term pro forma describes *the reason* for holding the session, it does not distinguish *the nature of the session itself…*.While the primary purpose of a pro forma session of the Senate may be to comply with the constitutional strictures on adjournment , a pro forma session *is not materially different from other Senate sessions.* While, as noted above, the Senate has customarily agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction. Should the Senate choose to conduct legislative or executive business at a pro forma session, it could, providing it could assemble the necessary quorum or gain the consent of all Senators to act.”[[85]](#footnote-85) To illustrate the variety of purposes the Senate has sought to achieve, apart from complying with constitutional adjournment requirements, the CRS study notes the two instances referenced above during which important substantive legislation was passed, and identified three periods of pro forma sessions that allowed the Senate to avoid returning nominations to the President, and six pro forma days that satisfied the constitutional or statutory requirement that the Senate convene a new session. It also catalogs the numerous statutory provisions that require computing periods of congressional sessions for purposes of determining whether a particular action or authority has become effective. For example, under the Congressional Review Act, certain agency rules do not become effective until the Senate has had 60 days of “session” to act on a joint resolution of disapproval of a reported final rule. For these purposes, “days of pro forma session” are counted, a practice that has accepted by both the legislative and executive branches.

The CRS study also sheds further light on the critical question of when the Senate is in recess for the constitutional purpose of recess appointments. The consistent practice reflected in the Senate’s use pro forma sessions supports the understanding, that dates back to the adoption of the Constitution, that the terms “session” and “recess” are reciprocal and exclusive. That is, although the Senate does not expect to conduct business in such sessions, it retains the ability (and the authority) to do so whenever it should be necessary to do so. Thus during sessions declared to be pro forma there can be no recess appointments. The Senate is in session whenever it is available to do business. It is unavailable, thereby allowing recess appointments, when it clearly declares itself to be so, as when it joins in a concurrent resolution pursuant to Article I, section 5, cl. 4. Either determination, made pursuant to its exercise of its constitutionally-based and unreviewable rulemaking power, is the Senate’s alone; there is no presidential role in that constitutional determination.[[86]](#footnote-86) This understanding of the reciprocal and exclusive nature of the constitutional concepts of the terms “session” and “recess” is reflected in the Recess Clause itself,[[87]](#footnote-87) and recognized by Alexander Hamilton in Federalist No. 67, Justice Story in his Commentaries on the Constitution, Attorney General Wirt’s 1823 opinion allowing intersession recess appointments, and Attorney General Knox’s opinion rejecting the validity of intrasession appointments.[[88]](#footnote-88)

1. The Senate’s Confirmation Authority Is Not Limited to Up or Down Votes

The confirmation authority is exclusively committed to the Senate. This authority includes the determination when the Senate will declare a constitutionally recognized “recess” that will trigger the President’s recess appointment powers. The Framers nowhere insisted that the House and Senate shut up shop at specified times. Rather, the Framers and early commentators understood that, as a practical matter, because of the difficulties of transportation and personal needs at home, there would be lengthy recesses after the work in a session had been completed. It was thought “it would improper to oblige the Senate to be continually in session for the appointment of officers” and it “might be necessary for the public service to fill [vacancies] without delay.”[[89]](#footnote-89) But there is no evidence whatsoever that the Senate could not stay in continuous session indefinitely, thereby thwarting a nomination. OLC does not dispute that. It is also clear that the Framers anticipated there would short breaks during a session and provided for them.[[90]](#footnote-90)

But in the first 132 years of the Republic, only one President, the embattled Andrew Johnson in 1867, thought to make a recess appointment during an adjournment in the Senate proceedings occurring during a session of the Congress. The next intrasession recess appointment occurred in 1921. That action, by President Harding, rested on an opinion by his Attorney General, Harry Daugherty.[[91]](#footnote-91) Daugherty’s opinion overruled a contrary 1901 opinion rendered by Attorney General Philander Knox[[92]](#footnote-92) who advised President Roosevelt that an intrasession adjournment of 18 days was not a constitutional recess that supported an exercise of the recess appointment power. Attorney General Knox relied for his opinion on the absence of any recognition by his predecessors of such an authority, the wording of the Recess Clause limiting the power in the singular—“the Recess”— and that the fact that allowing for intrasession appointments would be “convenient” was not sufficient to overcome the constitutional requirement for Senate confirmation. As explained by Attorney General Knox: “It may be that Congress might ‘temporarily adjourn’ for several months as well as several days, and thus seriously curtail the President’s power of making recess appointments. But this argument from convenience …cannot be admitted to obscure the true principles and distinctions ruling the point.”[[93]](#footnote-93) The Attorney General also recognized that no constitutionally supportable bright line could be drawn allowing Presidents to invoke the Recess Clause only during certain recesses: “[If the president could make a recess appointment during this 18-day recess], I see no reason why such an appointment should not be made during any [intrasession recess], as from Thursday or Friday until the following Monday.”[[94]](#footnote-94)

Daugherty’s contrary opinion relied heavily on a 1905 Senate Judiciary Committee report that vehemently objected to President Roosevelt’s recess appointments in December 1903 of 160 officials (including two that were controversial) in the instant between the end of one session of the 57th Congress and the beginning of the next session. Roosevelt justified it as a “constructive recess.” The Committee in its criticism attempted to define an appropriate recess in practical terms saying “recess” meant “something real, not something imaginary; something actual, not something fictitious.”[[95]](#footnote-95) The Committee, of course, was making no reference to intrasession adjournments because it was dealing with Roosevelt’s intercession appointments; there was no thought of any application of its remarks to intrasession recess appointments which had been ruled unavailable just four years before. Attorney General Daugherty, however, drew on that “definition,” claiming that the term recess should be given a “practical,” not a “technical,” construction, and that “the real question” was “whether in a practical sense the Senate is in session so that its advice and consent could be obtained.”[[96]](#footnote-96) Although Daugherty admitted there was a line drawing problem regarding the appropriate length for any intrasession recess, he opined that the 28 day adjournment was long enough but that 5 or 10 days was not. The Attorney General then resolved the line drawing problem by advising that the President is vested with “a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”[[97]](#footnote-97)

Daugherty’s opinion has been the touchstone for Attorney General and OLC opinions since then, flitting between adjournments as short as 3 and 10 days. Not only has Knox’s critique not been satisfactorily answered, but circumstances have borne out his concerns. The number of intrasession recess appointments have increased dramatically in the past three decades even though there has been no significant increase in the amount of time spent in intrasession recesses. A reviewing court could logically find that the Senate’s role in the confirmation process is being undermined and usurped by relatively recent aggressive use by the President of his recess appointment power. Assuming for the moment that some number of intrasession days reflect an appropriate constitutional recess, and the President can, in his discretion determine when the Senate is “unavailable,” what is left of the Senate’s confirmation authority? The answer is nothing, and that should be unacceptable to any reviewing court.

The proper question is not the “availability” of the Senate to act but, rather, the Senate’s “willingness” to act, a determination that the Framers and Supreme Court rulings have long recognized is textually committed to that body’s sole and exclusive discretion under the scheme of the general appointments process and the exercise of its rulemaking power. If the Senate can stay in session perpetually, if it can filibuster a nomination to death or by even by the threat to do so, it can protect its prerogative by conducting pro forma sessions. Such action is not a unconstitutional “sham.” It is an appropriate defensive posture against a reasonably perceived threat of Executive usurpation. And there can be no “bad” reason for stopping a nomination that would allow a court to intervene. The only remedy is purely political, the opprobrium of the electorate against the actor who is deemed to be wrong. Indeed, if this situation goes before a court it will likely be guided by the nonjusticiability standard enunciated in *Nixon v. United States.* A court reviewing the question of how many days are required for an intrasession adjournment to be considered a constitutional recess will not have any manageable standard to guide its decision, and will be faced with the clear constitutional commitments of rulemaking power and confirmation authority to the Senate. It would be unlikely that the judicial branch would interfere with these clear Senate prerogatives.

In summary, the Constitution specifically committed to the Senate the exclusive authority to confirm nominations. The Constitution also expressly authorizes the Senate to establish its own rules for all of its proceedings. The debates held by Framers emphasized the important role of the Senate as a balance and check on the President’s appointment power, but are silent on the Recess Appointment provision. The President’s actions may well be seen as an attempt at usurping the Senate’s authority and role in the appointment process.

IV. There is No Long-Standing Historic Practice that Supports Intrasession Recess Appointments

The OLC Opinion makes much of a purported long-standing historic practice and recognition of presidential intrasession recess appointments. As explained above, intrasession recess appointments are a relatively new phenomenon, occurring almost exclusively since 1947. There is no record of any President having made an intrasession recess appointment until July 1867, and none thereafter until August 1921. Indeed, as has been related above, in 1901 Attorney General Knox issued an opinion that advised President Roosevelt that recess appointment power applies only during “the period after the final adjournment of Congress for the session, and before the next session begins.”[[98]](#footnote-98) The Knox opinion was abandoned by Attorney General Daugherty in 1921,[[99]](#footnote-99) when President Harding used that tactic to make an intrasession appointment, but only one other such intrasession recess appointment was made (Coolidge in 1928) until 1947.

Thus, there were three intrasession appointments in the first 150 years of the republic. Usage thereafter was initially modest, a total of 54 between 1947 and 1980. However, intrasession appointments increased in the Reagan (73), Bush (37), and Clinton (53) administrations.[[100]](#footnote-100) Intrasession appointments burgeoned during the G.W. Bush administration to 141. Thus far President Obama has issued 26. Also, for the first time in the history of the United States, intrasession appointments exceeded intercession appointments in the Bush and Obama eras: 141 intrasession appointments to 30 intersession appointments for Bush and 26 to 6 so far for Obama, an indication of an increased and conscious Executive abandonment of the Senate confirmation process.

The fact is that, contrary to the implications of the OLC assertions, intrasession recess appointments do not date back to our founding era but are a development occurring in the last half century, with a dramatic increase in use in the last decade. In adjudicating issues about the scope of the recess appointment power, the Ninth Circuit noted that courts give “considerable weight…to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs.”[[101]](#footnote-101) That is certainly not the case here. In *INS v. Chadha*,[[102]](#footnote-102) the Supreme Court held that hundreds of legislative veto provisions were unconstitutional. The Court noted that its “inquiry is sharpened rather than blunted by the fact that congressional veto provisions are apparently increasing in frequency.” In that case the Court expressly noted that such veto devices first appeared in 1932, only 50 years before its ruling, and slowly increased in usage from five such provisions in the period 1932 to 1939 to 34 between 1950 to 1959, and then increased to 163 such provisions in 89 laws between 1970 to 1975, the last period of statistics available to it.[[103]](#footnote-103) This applies forcefully in the context of the current intrasession appointments controversy, which has come to dominate the recess appointment process in the past ten years. The *Chadha* Court, echoing Attorney General Knox, rejected out of hand that claims of convenience and necessity could override constitutional principles.

The inconsistent Attorney General and OLC views of the recess appointments power demonstrates the risk of constitutional interpretations that may be tainted by institutional self interest. As it has become apparent, attempts to establish minimum required length of an intrasession are unworkable in light of Congress’s contemporary scheduling patterns. The OLC now seeks to advance an interpretation of the Recess Clause that would debase the role of the Senate in the appointments process. Under the OLC opinion, the President alone would be able to declare the Senate “unavailable,” thus permitting an appointment without Senate consent. The central decision the Framers made, that the appointment process should require action by two branches of the Government, and should not be conferred on the President alone, would be eviscerated. Whatever deference the courts in the past may have given to consistent and well-reasoned Attorney General or OLC opinions, the “checkered background” [[104]](#footnote-104) of the Executive’s views could well leave a reviewing court with the view that these opinions do not rest on any constitutional principle and are not entitled to judicial deference on the important constitutional issue raised in this case.

V. Congress Has Never Acquiesced to the Validity of Intrasession Recess Appointments

The OLC Opinion effectively claims that Congress, as an institution, has not

challenged the validity of intrasession recess appointments since the 1921 Daugherty

opinion and thus has acquiesced in the now established practice. To the contrary,

Congress, since the founding of the country, has taken strong and consistent measures to protect the Senate’s prerogatives. The use of pro forma sessions is simply the latest protective act in its arsenal, and it is an appropriate, as well as lawful, response to the most extreme Executive usurpation ever.

1. The Vacancies Acts

Congress has long been concerned about presidential usurpation of the Senate’s confirmation power through temporary appointments that are made without Senate confirmation. In 1795 Congress passed a law limiting to six months the time a temporary assignee could hold an office as an “acting” official.[[105]](#footnote-105) In 1868 Congress passed the first comprehensive vacancies act restricting the use of acting officials when an incumbent dies or becomes disabled in office.[[106]](#footnote-106) The clear intent of this legislation was to prevent the President from delaying sending forth nominations for advice and consent positions which could thereby evade the Senates confirmation prerogative, and to provide the exclusive means for temporarily filling vacancies in covered positions unless Congress explicitly provided a superseding mechanism.[[107]](#footnote-107) That legislative action was coincident with the only presidential intrasession recess appointment in the 19th century and followed passage of legislation in 1863, discussed below, prohibiting the pay of recess appointees, which made manifest congressional rejection of the notion of presidential authority to make such intrasession appointments.

Only two options were available under the 1868 statute: either a first assistant or a presidential designee who had previously received Senate confirmation could serve for a strictly defined and limited period. The period was originally 10 days until 1891 when it was extended to 30 days. It was lengthened again in1988 to 120 days, and in 1998 to its current limit of 210 days.[[108]](#footnote-108) An unbroken line of Attorney General opinions spanning a period of over 50 years reflected the understanding that there could be only one period of occupancy per vacancy (a first assistant’s and a presidential designee’s service could not be piggy-backed) and that a pending nomination did not toll the limitation period. The Act was understood by Attorneys General to apply in this rigid manner whether the office involved was that of a bureau chief or the head of a department. In fact, four cabinet heads (Navy, Postmaster General, Treasury (twice), and State) were declared vacant during this period. The only recourse of a President if the Act was unavailable was the nomination process or a recess appointment.[[109]](#footnote-109)

Continued congressional concern over presidential evasion of the Senate’s confirmation prerogative was at the heart of the enactment of the Federal Vacancies Reform Act of 1998.[[110]](#footnote-110) The impetus for the legislative action was the development by the Justice Department in the early 1970’s of the legal notion that where an executive department’s enabling legislation vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials as he or she sees fit, such authority supersedes the Vacancies Act’s requirements and limitations on temporarily filling vacant advice and consent positions, allowing for the presidential designation of acting officials for indefinite periods, even without the submission of a nomination to the Senate to fill the position on a permanent basis.[[111]](#footnote-111) Since every executive department and single-headed independent agency has such provisions, the effect of the theory was to exempt every such department and agency from Vacancies Act coverage. As a consequence, by early 1998, 20 percent of the 320 advice and consent positions in the executive departments were being unlawfully held by acting officials, some for several years.[[112]](#footnote-112) The reform legislation enacted made its requirements and limitations the exclusive means for temporarily filling vacancies in advice and consent positions and explicitly foreclosed further utilization DOJ’s exemptive theory.[[113]](#footnote-113)

1. Holdover Provisions

Congress often accompanies fixed term positions with so-called “holdover” provisions that allow an incumbent to continue in office until the office is filled by a Senate confirmed successor. Four District of Columbia Circuit district court cases have dealt with the question whether the President, during a holdover period, may make a recess appointment. The OLC’s treatment of the rulings lends the impression that they were constitutional rulings on the issue that raise doubts as to the validity of such provisions. They were not. All were disposed of as matters of statutory construction, albeit constructions that properly avoided possible Appointments Clause questions. In two,[[114]](#footnote-114) the district courts found that there was no vacancy; in one because the holdover was time limited to a determinate one year; the other because the statutory language was directory (“shall continue to serve” until a successor “has been appointed and qualified.”). In two others,[[115]](#footnote-115) the courts found the holdover tenure provision too indefinite and therefore the office was deemed vacant and subject to a recess appointment. In *Swan v. Clinton[[116]](#footnote-116),*  the D.C. Circuit appeals emphasized the need for a clear legislative statement on intent in such cases but raised no judicial constitutional concern that such provisions interfere with the President’s recess appointment authority.

1. Pay Act Limitations

In 1863, Congress enacted a provision that placed a flat prohibition on the payment of salary to recess appointees to positions that had become vacant during a period when the Senate was in session.[[117]](#footnote-117) As explained by Senator Fessenden at that time: “It may not be in our power to prevent the appointment, but it is in our power prevent the payment; and when the payment is prevented, I think that will probably put an end to the habit of making such appointments.”[[118]](#footnote-118) It is important to note that at the time of the passage of the Pay Act intrasession recess appointments were unknown. The understanding at the time was that recess appointments could be made only during intersession recesses. Indeed, the construct of the Pay Act indicates a recognition that “session” and “recess” were mutually exclusive periods.

That prohibition, and its non-recognition of intrasession appointments, remained intact until 1940 when it was amended to make it less burdensome on recess appointees. It is to be recalled that by 1940 there had been only three intrasession appointments in history, two of which relied on the problematic 1921 Daugherty opinion. The amendment did not disturb the original statutory construct that preserves a distinction between a session and a recess. It provided three exceptions to the payment prohibition: (1) for appointees to vacancies that arise within 30 days of a recess; (2) for appointees to an office for which a nomination was pending at the time of the recess, so long as the nomination is not of the person appointed during the previous recess of the Senate; and (3) for appointees selected to an office where a nomination has been made but rejected by the Senate within 30 days of the recess, and the appointee was not the person rejected. [[119]](#footnote-119)

In addition to the restrictions prescribed in Section 5503, an annual funding limitation has been included in all Treasury and General Government Appropriations Acts for over 60 years that prohibits the payment of any recess appointee whose nomination has been voted down by the Senate.[[120]](#footnote-120) In 2009 Congress enacted another permanent appropriation rider that would prohibit payment “to any individual carrying out the responsibilities of any position requiring Senate advice and consent in an acting or temporary capacity after the second submission of a nomination for that individual has been withdrawn or returned to the President.[[121]](#footnote-121)

The vacancies, holdover and pay acts are elaborative devices designed to sustain, protect and make effective the preemptive constitutional direction to the President to obtain Senate consent for the officers chosen to execute the laws Congress has enacted. These acts did not create the presidential obligation, the Constituition has done that. These enactments since 1795 have simply provided the time table and parameters for its fulfillment. Some reflect political accommodations designed to provide practical incentives for timely Executive compliance. Such accommodations cannot be construed as acquiescence to an abdication of a core Senate constitutional responsibility. They have been part of a scheme, never constitutionally questioned by the Executive, to assure that the President does not evade, and thereby undermine, the Senate’s confirmation prerogative.

VI. The Supreme Court Has Not Resolved the Issue of the Constitutionality of Intrasession Recess Appointments

The constitutional question whether recess appointments are valid during an intrasession recess is not settled. In 2004, the 11th Circuit held in *Evans v. Stephens[[122]](#footnote-122)* such an appointment to be valid. On denying *certiorari*, Justice Stevens pointedly explained that the Court’s denial was not a ruling on the merits of the argument, and that “it would be a mistake to assume that our disposition of the petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as to this, with appointments made without the consent of the Senate during short intrasession ‘recesses.’”[[123]](#footnote-123) The OLC opinion agrees the issue is still open.

The Supreme Court has repeatedly stressed the need for “vigilance” against attempts by each of the three branches of Government to exceed the outer limits of its power. The Supreme Court has not hesitated to invalidate such attempts.[[124]](#footnote-124) Use of the recess appointment power during this past January, in the face of a clear Senate stance evincing an intent not to take a constitutional recess, is just such an action. By invoking the recess power the President has avoided the Senate’s exclusive constitutional function to advise and consent on presidential appointments. Indeed, two of the appointees were nominated only two days before the adjournment, not giving the Senate even time to vet and hold hearings.

The heart of the issue here is that the failure of the President to follow the constitutional rules for appointments raises the specter of presidential usurpation of power. The Supreme Court has long expressed concerns “over encroachment and aggrandizement” of one branch over the other, and these concerns have “ animated our jurisprudence and arouses our vigilance against the ‘hydraulic pressure inherent within each of the separate branches to exceed the limits of its power.”[[125]](#footnote-125) Justice Kennedy, in his concurrence in the Line Item Veto Case, saw the issue there as raising just the structural concerns the Framers feared most: a concentration of power in the hands of a single branch as a threat to liberty. He stated:

To say that the political branches have a somewhat free hand to reallocate their own authority would seem to require the acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment….The latter premise, too, is flawed. Liberty is always at stake when one or more branches seek to transgress the separation of powers.[[126]](#footnote-126)

The liberty interest at stake is dramatically evident in present situation. The President, by exercising an invalid recess appointment power, is evading the presidential obligation to seek advice and consent of the Senate for four principal officers of the United States. He is undermining senatorial power by ignoring the constitutional design that vests in “the Senate alone…final unreviewable power to approve or disapprove Presidential appointments.”[[127]](#footnote-127) The action puts in place officials with no legal authority to affect the rights, duties and obligations of persons purportedly subject to their authority.

Preservation of the Constitution’s delicate sharing of appointment authority between the branches, and the Constitution’s commitment to each House of Power to prescribe its own rules of procedure (including the decision to convene pro forma sessions in order to prevent recess appointments), will be a significant factors that may motivate a court to reject the President’s apparent attempt to “accrete these powers to a single branch.”

VII. Ramifications of a Court Ruling That Nullifies the President’s Recess Appointments

The Supreme Court and federal appellate and district courts have recognized the right and standing of persons suffering a legally cognizable injury to seek legal redress from alleged violations of the Appointments Clause.[[128]](#footnote-128) The essence of these claims is that under the Constitution a person cannot be subject to government regulation when the appointed official lacks the legal authority to act. The injury to be redressed is the potential threat that the government is acting against a person through an official with no lawful authority to so act.”[J]udicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated.”[[129]](#footnote-129) The Supreme Court has held that the *de facto* doctrine[[130]](#footnote-130) will not apply to a successful plaintiff in such a challenge.[[131]](#footnote-131) But whether a successful Appointments Clause challenge will be given retroactive effect appears to be a matter of remedial discretion. In *Buckley v. Valeo,[[132]](#footnote-132)* which struck down congressional appointments to the Federal Election Commission, the Court upheld all the past acts of the Commission as valid under the *de facto* doctrine. In other instances it has stayed its remedial action to allow Congress a limited time to construct a legislative remedy.

Adverse court rulings may present unique problems in addition to the foreseeable disruptive effects on the operations at both the CFPB and the NLRB. The judicial challenges will create uncertainty amongst those regulated by the agencies. These challenges could also affect the regulators, who may limit their actions over concerns of their legal status. Certainly agency leverage in bargaining settlements will be diminished. The recent experience at the NLRB is cautionary.

After the Supreme Court determined that the NLRB had been operating for two and a half years without a quorum, the Court remanded the matter to the court of appeals. The Supreme Court understood that its decision called into question nearly 600 adjudicatory rulings, including 96 that were pending appeal in various federal courts. After the NLRB obtained the necessary quorum it began to review all of the 96 cases that previously been appealed to the federal courts. It is not clear how they were disposing the cases not appealed.[[133]](#footnote-133) The NLRB again lost its quorum at the end of 2011 by virtue of the end of three members’ terms. In order to permit the NLRB to function, the President made the three appointments discussed above. However, at least one case challenging the constitutionality of the NLRB recess appointments has already been filed.

The CFPB also faces what are potentially more serious problems. It is possible that an adverse ruling would be limited to reversal of the particular regulatory action contested. This would result if the court invokes the *de facto* doctrine and validates all other past actions of the agency. Alternatively, a court might provide a time certain for Congress to pass legislation to validate retroactively past agency actions.

One question that will have to be faced is what happens if Mr. Cordray’s appointment is declared unconstitutional? Does the Treasury Secretary automatically resume his prior limited assumption of only the transferred powers of the then vacant office of Director; or would he now assume all the powers of the Director who has been deposed because he was unlawfully appointed? Has Cordray already ratified all the actions the Treasury Secretary took in the period July 21, 2011 until January 4, 2012 and, if so, are the ratifications valid? All these questions may become relevant in the event of an adverse ruling since there remains a serious legal question whether the Treasury Secretary lawfully assumed the duties that were transferred on July 21, 2011.

VIII. Concluding Observations

The Constitution establishes a procedure for the nomination and appointment of officers of the United States that includes important roles for both the President and the Senate. The debates of our founding fathers, as well as Supreme Court opinions, explain that these provisions were intended to create important checks and balances on the branches of Government involved. The OLC legal opinion, which purports to identify the legal basis of the recess appointments of four individuals to important Government positions this past January, asserts that the President has the unilateral ability to determine the existence of a “recess” for purposes of triggering the President’s recess appointment authority. This conclusion would appear to undermine the balance of powers that is inherent in the Appointments Clause. It would also appear to conflict with the constitutional right of the Senate to determine its own rules and procedures. The use of a pro forma procedure during an intrasession adjournment of the Senate also raises the unresolved issue of whether any recess appointment can ever be made while the Senate is in such an intrasession adjournment, or instead does this authority only relate to intercessional periods. While there is no definitive precedent as yet, a review of the constitutional debates, prior court rulings, and the history of recess appointments indicates that the validity of the intrasession recess appointments at issue is questionable, and that compelling arguments may be made that they are invalid.

1. A previous version of this paper was presented at a forum sponsored by the American Enterprise Institute on February 21, 2012 and may be accessed at www.aei.org. [↑](#footnote-ref-1)
2. New York University (B.A. 1957); Harvard Law School (LL.B. 1960). Specialist in American Public Law, Congressional Research Service (1973-2008). [↑](#footnote-ref-2)
3. The views expressed in this paper are solely those of the author and do not reflect a position of the Constitution Project. [↑](#footnote-ref-3)
4. Art. II, Sec. 2, cl. 3. [↑](#footnote-ref-4)
5. Office of Legal Counsel Memorandum for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (January 6, 2012)(OLC Opinion). [↑](#footnote-ref-5)
6. An “intrasession recess” is a recess that occurs during a session of the Senate. An “intersession recess” occurs between two different sessions of the Senate, in other words, after the end of the one session but before the beginning of the next session. [↑](#footnote-ref-6)
7. See ,e.g., Josh Rogin, “McCain removes hold on Lippert nomination,” Wash. Post, Feb. 9, 2012, A 15. The article explains that nominations are stalled because of Republican anger at the recess appointment of Cordray. [↑](#footnote-ref-7)
8. The NLRB appointments are being challenged in a pending suit now pending in the Court of Appeals for the District of Columbia Circuit, *Noel Canning, A Division of Noel Canning Corporation v. NLRB,* Case Nos. 12-1115, 12-1153. The Cordray appointment is being challenged in *State National Bank of Big Spring, et al. v. Timothy Geithner, et al .,*Case No. 2012-civ-01032 (ESH) (D.C.D.C., filed June 21, 2012).Two challenges to the NLRB appointments have been dismissed as premature and not ripe for adjudication. *National Association of Manufacturers v. NLRB,* Case No. 1:11-cv-01629-ABJ (D.C.D.C. Mar. 2, 2012); *James G. Paulson v. Renaissance Equity Holdings, LLC,* Case N0. 12-civ-0350 (BMC), D.C. E.D. N.Y., Mar. 27, 2012.*.* [↑](#footnote-ref-8)
9. Public Law No. 111-203 (2010). Subtitle F authorized the Treasury Secretary to perform the functions of that subtitle, which included overseeing the setup of the new agency and selecting the date of the transfer of personnel and authorities from seven other agencies. He was to perform these functions until a director is confirmed. The Secretary interpreted his mission to allow him assume and exercise the existing functions to be transferred to CFPB from other agencies, but not any new authorities established elsewhere in the DFA, until a director is confirmed. He did so until the Cordray appointment. Cordray is now exercising the full complement of DFA authorities. [↑](#footnote-ref-9)
10. The Supreme Court held in *New Process Steel, L.P. v. NLRB,* 130 S. Ct. 2635 (2010) that the Board cannot carry on substantive operations without at least three of its five members properly in office. [↑](#footnote-ref-10)
11. Under section 1018 of the Dodd-Frank Act, the Consumer Financial Protection Bureau was established on the date of enactment, July 21, 2010. Mr. Cordray was nominated for the position of Director on July 18, 2011. [↑](#footnote-ref-11)
12. Article II, sec. 2, cl. 2. [↑](#footnote-ref-12)
13. The Federalist No. 67, at 409-10 (Alexander Hamilton)(Clinton Rossiter ed. 1961). [↑](#footnote-ref-13)
14. See, e.g., Michael A. Carrier, When Is the Senate in Recess for the Purposes of the Recess Appointments Clause?, 92 Mich. L. Rev. 2204,2224-25 (1994). [↑](#footnote-ref-14)
15. I The Records of the Federal Convention of 1797, at 21, 63, 119 (Max Farrand, ed. Rev. ed. 1966(Farrand) [↑](#footnote-ref-15)
16. 2 Farrand at 185. [↑](#footnote-ref-16)
17. Id. at 405. [↑](#footnote-ref-17)
18. Id. at 539. [↑](#footnote-ref-18)
19. Id. at 539-40 [↑](#footnote-ref-19)
20. Id. at 540. [↑](#footnote-ref-20)
21. The Federalist No. 76, at 482. [↑](#footnote-ref-21)
22. Id. at 483. [↑](#footnote-ref-22)
23. Id. [↑](#footnote-ref-23)
24. See, .e.g., *Buckley v. Valeo,* 424 U.S. 1, 122,129-30 (1976); *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 878,883-84 (1991); *Edmond v. United States,* 520 U.S. 651,650-60 (1997). [↑](#footnote-ref-24)
25. Art. II, sec. 2, cl.2 and sec. 3. [↑](#footnote-ref-25)
26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803); Dysart v. United States, 369 F. 3d 1303, 1306, 1311-12 (Fed. Cir. 2004). [↑](#footnote-ref-26)
27. *Marbury v. Madison*, 5 U.S. at 155 (The nomination process is “the sole act of the president” and “completely voluntary.”) [↑](#footnote-ref-27)
28. *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928); *Olympic Savings & Loan Assn. v. Director, OTS,* 732 F. Supp. 1183, 1192-93 (D.D.C. 1990), *appeal dismissed as moot,* 903 F. 2d 837 (D.C. Cir. 1990)(*Olympic).* [↑](#footnote-ref-28)
29. *Marbury*, 5 U.S. at 165-67; Dysart, 369 F.3d at 1317. [↑](#footnote-ref-29)
30. See, Ann Joseph O’Connell, *Vacant Office Delays in Staffing Top Agency Positions,”* 82 So. Cal. L. Rev. 913 (2009)(O’Connell).. [↑](#footnote-ref-30)
31. See, Special Panel on Department of Energy Reorganization, House Committee on Armed Services, “*Establishing The National Nuclear Security Administration: A Year of Obstacles and Opportunities”* 1-2(October 13, 2000)(Special Panel Report). [↑](#footnote-ref-31)
32. Public Law 106-65, Title XXXII, 113 Stat. 512, 953-971 (October 5, 1999). [↑](#footnote-ref-32)
33. 35 Wkly. Comp. Pres. Docs. 1927-30 (1999). [↑](#footnote-ref-33)
34. See, Hearings on the National Nuclear Security Administration before the Special Oversight Panel On Department of Energy Reorganization of the House Committee onArmed Services, 106 th Cong., 2d Sess. (March 2 and 16 2000)((H.A.S.C. No. 106-48). See also, Establishing the National Nuclear Security Administration: A Year of Obstacle and Opportunities, An assessment by the Special Oversight Panel on the Department of Energy Reorganization, Committee on Armed Services, U.S. House of Representatives (October 13, 2000), accessed at http://www.hsdl.org/?view&did=440076 [↑](#footnote-ref-34)
35. See, id., testimony of Morton Rosenberg at 6-9, 71. [↑](#footnote-ref-35)
36. See House Conference Report 106-945, enacted into law Pub. L. 106-398, Title XXX!, Subtitle D, secs. 3151, 3157, 3159, 114 Stat. 1654 (2000). [↑](#footnote-ref-36)
37. Hearing, “Where Are ll the Watchdogs? Addressing Inspector General Vacancies,” before the House Committee on Oversight and Government Reform, 112th Cong., 2d Sess. (May 10,2012)(IG Vacancies Hearing). [↑](#footnote-ref-37)
38. An eighth IG position, that of the Special Inspector General for Afghanistan Reconstruction (SIGAR), requires only presidential designation but none had made been as of the date of the hearing. The position had been vacant for over 15 months. On May 23, 2012, President Obama announced the appointment John Sopko to the position. [↑](#footnote-ref-38)
39. Vacancies Act Hearing, testimony of Jake Weins. [↑](#footnote-ref-39)
40. Id. [↑](#footnote-ref-40)
41. Pub. L. 111-203, 124 Stat. 1373 (2010). [↑](#footnote-ref-41)
42. Emphasis supplied. [↑](#footnote-ref-42)
43. Under DFA Section 1062 (c) the Secretary could have delayed the transfer date for six months by simply publishing a notice of extension in the Federal register. The effect of the delay would have allowed the consumer protection functions to remain with the seven agencies and cointnue to be implemented by them. [↑](#footnote-ref-43)
44. There is currently no nomination pending for the office. DOJ has apparently concluded that 5 U.S.C 5503, which requires a nomination be submitted within 40 days of the return of the Senate after a recess, in order allow a recess appointee to be paid, does not apply because the Director is paid by nonappropriated funds of the Federal Reserve Board which are excepted from requirement.. [↑](#footnote-ref-44)
45. *Olympic, supra* n. 28, 732 F. Supp. at 1194-96; *Franklin Savings Ass’n v. Director, OTS,* 740 F. Supp. 1535, 1539 (D. Kansas 1990). [↑](#footnote-ref-45)
46. Pub L. 110-289, 122 Stat. 2654 (2008). [↑](#footnote-ref-46)
47. FHFA is not subject OMB legislative clearance and apportionment requirements or to congressional appropriations oversight since it receives its operational funding from assessments on Fannie, Freddie and the Home Loan Banks. [↑](#footnote-ref-47)
48. 12 U.S.C. 4511 (b) (5). [↑](#footnote-ref-48)
49. 12 U.S.C. 4511 (f)(emphasis supplied). [↑](#footnote-ref-49)
50. See, The Annual Report of the Council of Inspectors General on Financial Oversight-July 2012, pp. 40-48 (detailing recent examples of the FHFA-OIG’s Financial Oversight work). [↑](#footnote-ref-50)
51. See, *Ohio Public Employees Retirement System, et al. v. Federal Housing Finance Agency, et al.,* Case No. 1:11-cv-01543 (RJL), (D.C.D.C.).  [↑](#footnote-ref-51)
52. DFA, Section 152 (a)(1),(2) and (5). [↑](#footnote-ref-52)
53. DFA, Section 153 (a). [↑](#footnote-ref-53)
54. DFA, Section 153 (c) (2). [↑](#footnote-ref-54)
55. DFA, Section 153 (d)(1)(2). [↑](#footnote-ref-55)
56. DFA, Section 153 (f)(1)-(3). [↑](#footnote-ref-56)
57. Jennifer S. Taub, “Great Expectations for the Office of Financial Research,” in “Will It Work? How Will We Know?”: The Future of Financial Reform,” 23-28, The Roosevelt Institute Project on Global Finance (October 2010). [↑](#footnote-ref-57)
58. The Systemic Risk Council was formed by the CFA Institute and the Pew Charitable Trusts to “monitor and encourageregulatory reform of U.S. capital markets focused on systemic risk.” It is chaired by Sheila Bair of the Pew Charitable trusts, a former chair of the FDIC. [↑](#footnote-ref-58)
59. Audit Report. Office of Inspector Generral, Department of the Treasury. OIG-12-057, “Dodd-Frank Act: Treasury Has Made Progress to Stand-Up the Office of Financial Research 1-2 (June 27, 2012). [↑](#footnote-ref-59)
60. Id. at 11. [↑](#footnote-ref-60)
61. *Dysart,* id. at 1316. [↑](#footnote-ref-61)
62. *United States v. Smith*, 286 U.S. 6 (1932). [↑](#footnote-ref-62)
63. Id. at 35. [↑](#footnote-ref-63)
64. Id. at 36. [↑](#footnote-ref-64)
65. *INS v. Chadha*, 462 U.S. 919, 955 (1983)(“The Senate alone was given final unreviewable power to approve or disapprove Presidential appointments.”). [↑](#footnote-ref-65)
66. Art. I, sec.5, cl.2. [↑](#footnote-ref-66)
67. OLC Opinion at p. 4. [↑](#footnote-ref-67)
68. 520 U.S. 651,659-60 (1997) [↑](#footnote-ref-68)
69. 520 U.S. at 660, quoting Hamilton in Federalist No.77. The sentences preceding the quoted material make it clear that the nomination and confirmation process was to be a joint endeavor of separately empowered political entities that would be transparent and visible, allowing the public to assign blame for a failure of the process: “In that [appointments] plan [of the proposed Constitution] the power of nomination is unequivocally vested in the executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment , from the mode of conducting it, would naturally become matters of notoriety, and the public would be a no loss to determine what part had performed by the different actors.” [↑](#footnote-ref-69)
70. The Supreme Court in *Myers v. United States*, 272 U.S. 252, 128-29 (1926) recognized the Congress might impose specific qualifications for nominees for particular offices, but such qualifications cannot have the effect of selecting a specific individual for nomination. [↑](#footnote-ref-70)
71. Presidents in the past have withheld nominations in order to cause detrimental consequences for targeted programs or policies. Extended vacancies may contribute to agency inaction, foster confusion among nonpolitical employees, and undermine agency legitimacy. See Ann Joseph O’Connell, “Vacant Offices: Delays in Staffing Top Agency Positions,” 82 So. Cal. L. Rev. 913 (2009). [↑](#footnote-ref-71)
72. Article I, sec. 5, cl. 2. [↑](#footnote-ref-72)
73. *U.S. v. Ballin*, 144 U.S. 1,5 (1892). See also *infra* notes 83-85 and accompanying text, noting that the Senate rules permit legislative action even during a pro forma session. [↑](#footnote-ref-73)
74. 506 U.S. 224 (1993). [↑](#footnote-ref-74)
75. 506 U.S. at 228-29. [↑](#footnote-ref-75)
76. Id. at 237-38. The lower federal appellate courts have been similarly deferential. See, e.g., *United States v. Rostenkowski*, 59 F. 3d 1291, 1306-07 (D.C. Cir. 1995) explaining that “[w]here…a court cannot be confident that its interpretation [of a House rule] is correct, there is too great a chance that it will interpret the Rule differently than would the Congress itself; in this circumstance, the court would effectively be making the rules—a power the Rulemaking Clause reserves to each House alone….Though that Clause may be most directly concerned with the question, it does not supplant the doctrine of separation of powers nor authorize the a court to set naught the allocation of authority in the Rulemaking Clause.” See also, *Skaggs v. Carle*, 110 F. 3d 831, 836 (D.C. Cir. 1997)(denying member standing to challenge a rule, citing *Rostenkowski*). [↑](#footnote-ref-76)
77. 462 U.S. 919 (1983). [↑](#footnote-ref-77)
78. 462 U.S. at 956 n.21. The Court also identified several provisions of the Constitution specifically allowing legislative actions that do not have to comply with the Presentation Clause, including the Senate’s sole and unreviewable powers to conduct impeachment trials, ratify treaties, and confirm nominations. Id., at 955. [↑](#footnote-ref-78)
79. 462 U.S. at 955. [↑](#footnote-ref-79)
80. For an articulation of the constitutional and historical bases of the filibuster see the testimony of Professor Michael Gerhardt in Hearing, “Judicial Nominations and Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent,” before the Subcomm. on the Constitution of the Senate Judiciary Committee, 108th Cong., 1st Sess. (2003). [↑](#footnote-ref-80)
81. Senate Standing Rule XXVI (1). [↑](#footnote-ref-81)
82. See, Michael A. Carrier,” When Is the Senate in Recess for Purposes of the Recess Appointments Clause?,” 92 Mich. L. Rev. 2204, 2242-43 (1994)(Carrier). [↑](#footnote-ref-82)
83. See 157 Cong. Rec. S 8729 (daily ed. Dec. 23, 2011)(Temporary Payroll Tax Cut Continuation Act of 2011); and 157 Cong. Rec. 5297 (daily ed. Aug. 5, 2011)( Airport and Airways Extension Act of 2011). [↑](#footnote-ref-83)
84. Memorandum, “Certain Questions Related to Pro Forma Sessions of the Senate,” to the Senate Minority Leader from Christopher M. Davis, Analyst on Congress and the legislative Process (March 8, 2012), reprinted at 158 Cong. Rec. S5954-56 (daily ed., August 2, 2012)(CRS Study). [↑](#footnote-ref-84)
85. Id. at 5954 (emphasis supplied). [↑](#footnote-ref-85)
86. For a thorough and exhaustive discussion and analysis of the law, history and academic commentary on the Recess Clause see the series of posts at [www.pointoforder/recessappointments](http://www.pointoforder/recessappointments) authored by Michael Stern. [↑](#footnote-ref-86)
87. Article II, sec. 2, cl. 3 states that “[t]he President shall have the Power to fill up all vacancies that mayhappen during the recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” [↑](#footnote-ref-87)
88. See Stern, *supra* note 86, posts of February 29, 2012 (“The Purposes of the Recess Appointments Clause”); March 5, 2012 (“What’s Happening? Re-running the Wirt-Rappaport Debate on the Recess Appointments Clause”); March 21, 2012 (“A Recess By Any Other Name”); March 27, 2012 (“Attorney General Knox and the Multi-Session Recess Appointment”); and May 3, 2012 (“Burying the Multi-Session Recess Appointment Theory”).  [↑](#footnote-ref-88)
89. Hamilton, The Federalist No. 67, at 409-10. [↑](#footnote-ref-89)
90. Art, I, sec. 5, cl. 4 (“Neither House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days.”). [↑](#footnote-ref-90)
91. 23 Op. Atty. Gen. 599 (1901). [↑](#footnote-ref-91)
92. 33 Op. Atty. Gen. 20 (1921). [↑](#footnote-ref-92)
93. 23 Op. Atty. Gen. at 603. [↑](#footnote-ref-93)
94. Id. [↑](#footnote-ref-94)
95. Sen. Rep. No. 4389, 58th Cong., 3d Sess.2 (1905). [↑](#footnote-ref-95)
96. 33 Op. Atty. Gen. at 21-22. [↑](#footnote-ref-96)
97. Id. at 25. [↑](#footnote-ref-97)
98. 23 Op. Atty. Gen. 599 (1901). [↑](#footnote-ref-98)
99. 33 Op. Atty. Gen. 20 (1921). [↑](#footnote-ref-99)
100. Carrier, supra note 50 at 2212 note 48. [↑](#footnote-ref-100)
101. *Woodley v. United States*, 751 F.2d 1008 (9th Cir. 1985)(quoting *Buckley v. Valeo*, 424 U.S. 1, 140 n.176). [↑](#footnote-ref-101)
102. 462 U.S. 919 (1983). [↑](#footnote-ref-102)
103. 462 U.S. at 340-41. The Court was also undoubtedly aware that in 1982 the Senate passed by a 94-0 vote a regulatory reform bill, S. 1080, that would have imposed a two-house legislative veto on all future agency rulemakings. 128 Cong. Rec. S2572-2605 (daily ed. March 23, 1982). A house companion bill, H.R. 746, did not receive floor consideration. [↑](#footnote-ref-103)
104. 3 Op. Off. Legal Counsel 314, 315 (1979). [↑](#footnote-ref-104)
105. 1 Stat. 415 (1795). On the history of vacancies acts, see Morton Rosenberg, “Validity of Designation of Bill Lann Lee As Acting Attorney General for Civil Rights,” CRS General Distribution Memo, January 14, 1998 (CRS Vacancies Memo). [↑](#footnote-ref-105)
106. Act of July 23, 1868, ch. 227, 15 Stat. 168. [↑](#footnote-ref-106)
107. CRS Vacancies Memo, 6-7 (detailing legislative history). [↑](#footnote-ref-107)
108. The 1868 Act replaced the Act of February 20, 1863, ch. 45, 12 Stat. 56, which allowed temporary appointments for up to six months. [↑](#footnote-ref-108)
109. See, 16 Op. Atty. Gen. 596, 597 (1880); 17 Op. Atty. Gen, 530 (1883); 18 Op. Atty. Gen. 50 (1884); 18 Op. Atty. Gen 58 (1884); 20 Op. Atty. Gen. 8 (1891); 27 Op. Atty. Gen. 337, 345-46 (1909); and 32 Op. Atty. Gen. 139, 141 (1920). The 1920 AG opinion was cited approvingly as the Department’s definitive interpretation of Section 3348 of the Act by 1977 Office of Legal Counsel opinion. 1 Op. OLC 150, 152 n.1 (1977). See also CRs Vacancies Memo at 7-8, discussing the AG opinions. [↑](#footnote-ref-109)
110. Pub. L. 105-277, 112 Stat. 2681-611, *codified at* 5 U.S.C. 3345-3349d (2006). [↑](#footnote-ref-110)
111. See, “Federal Vacancies Reform Act of 1998,” Senate Report No. 105-250, 105th Cong., 2d Sess. 3 (1998) (Senate Report). [↑](#footnote-ref-111)
112. Senate Report at 5. [↑](#footnote-ref-112)
113. See 5 U.S.C. 3547 (b) and Senate Report at 17. The Senate Report also took pains to explain the Reform Act’s repudiation and correction of the holding in *Doolin Security Savings Bank v. OTS,* 139 F. 3d 203 (D.C. Cir. 1998), that the then-120 day time limit on the occupancy of a covered vacant office does not commence until the President acts to temporarily fill a vacancy pursuant to the terms of the Act. That is, in the court’s view, if there was no first assistant and the President did not immediately act to designate an eligible official, the vacancy had not been “filled” and the 120-day limitation period did not begin to run. Asserting that this was never the case and that the reform act will reflect this interpretive rejection, the report explains that “A limit must be placed on the president’s time to fill a position. If the purpose of the Vacancies Act is to limit the President’s power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the president unilaterally decides. Such a scheme obliterates the constitutional requirement that the officer serve only after the Senate confirms the nominee.” The Report’s section-by-section analysisof new sections 3345 and 3346 explicitly reject this view. Senate Report at 5-9, 11-13. [↑](#footnote-ref-113)
114. *Wilkinson v. Legal Services Corp*. 865 F. Supp. 891, 900 (D.D.C. 1994), rev’d on other grounds, 80 F. 3d 535 (D.C. Cir. 1996) and Mackie v. Clinton, 827 F. Supp. 56, 57-58 (D.D.C. 1993) vacated as moot (D.C. Cir. Mar. 9, 1994). [↑](#footnote-ref-114)
115. *McCalpin v. Dana*, No. 82-542 (D.D.C. October 5, 1982), appeal dismissed as moot, 766, F.2d 535 (D.C. Cir. 1984). [↑](#footnote-ref-115)
116. 100 F. 3d 973 (D.C. Cir. 1996). [↑](#footnote-ref-116)
117. 12 Stat. 642 (1863). [↑](#footnote-ref-117)
118. 33 Cong. Globe 564-65 (1863). [↑](#footnote-ref-118)
119. 5 U.S.C. § 5503 (a)(1)-(3), (b)(2006). See Michael Stern, “*The Pay Act and the GAO as a Means of Constitutional Settlement,” August 16, 2012, accessible at* www.pointoforder.com/recessappointments. [↑](#footnote-ref-119)
120. 5 U.S.C. note preceding Section 5501; Pub.L. 110-161, 121 Stat. 2021 (2007). [↑](#footnote-ref-120)
121. Pub. L. 111-8, 123 Stat. 693 (2009). Although the limitation appears to be designed for payment to persons appointed pursuant to the Vacancies Reform Act, it arguably could be applied to recess appointees given they are acting in a “temporary capacity.” [↑](#footnote-ref-121)
122. *Evans v. Stephens*, 387 F. 3d 1220, 1224-26 (11th Cir. 2004). cert. denied 544 U.S. 942 (2005). [↑](#footnote-ref-122)
123. Id. 544 U.S. at 942-43. See also Michael B. Rappaport, “The Original Meaning of the Recess Appointments Clause,” 52 UCLA L. Rev 1487 (2005)(arguing that the Constitution permits recess appointments only during an intercession recess). [↑](#footnote-ref-123)
124. *Buckley v. Valeo*. 424 U.S. 1 (1976)(Congress may not appoint superior officers of the United States); *INS v. Chadha*, 462 U.S. 919 (1983)(Congress may not control execution of the laws except through Article I procedures); Bowsher v. Synar, 478 U.S. 714 (1986)(Congress may not exercise removal power over officers performing executive functions); *Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc*., 501 U.S. 252 (1991)(Congress may not maintain control of an executive entity by means of a review entity it has appointed); *Clinton v. City of New York*, 524 U.S. 417 (1998)(Congress cannot delegate, and the President cannot exercise, the power to repeal a provision of law). [↑](#footnote-ref-124)
125. *Mistretta v. United States*, 488 U.S. 361, 382 (1989). [↑](#footnote-ref-125)
126. *Clinton v. New York*, U.S. at 449-50. [↑](#footnote-ref-126)
127. *Chadha*, 462 U.S. at 955. [↑](#footnote-ref-127)
128. See *Ryder v. U,S,* 515 U.S. 177 (1995) and cases cited *infra* at note 82. However, the courts have rejected the standing of members of Congress to bring actions based on violation of the Appointments Clause, holding that their remedy is through Congressional, rather than judicial action. See, e.g., *Raines v. Byrd,* 521 U.S. 811 (1997). [↑](#footnote-ref-128)
129. *Landry v. FDIC*, 204 F. 3d 1125, 1130-1132 (D.C. Cir. 2000), cert denied 121 S.Ct. 298 (2000); See also, *Olympic Savings & Loan v. Director, OTS*, 732 F. Supp. 1183, 1188-90 (D.D.C. 1990); *Andrade v Lauer*, 729 F. 25 1475, 1495 (D.C. Cir. 1984); *Pa. Dept. of Welfare v. United States*, 124 F. Supp. 2d 917, 920-24 (D.C. W.D. Pa. 2000); *Williams v. Phillips*, 360 F. Supp. 1362, (D.D.C.), stay denied, 482 F. 2d.669 (D.C. Cir. 1973). [↑](#footnote-ref-129)
130. The de facto doctrine protects actions of governmental officials acting under “color” of lawful authority. It is designed to prevent disruption in settled actions that could result from a determination that an official has been improperly appointed. [↑](#footnote-ref-130)
131. *Ryder v. United States*, 515 U.S. 177 (1995). [↑](#footnote-ref-131)
132. 424 U.S. 1, 142-43 (1976). [↑](#footnote-ref-132)
133. M. Trevor Lyons, “Putting the Genie Back in the Bottle: What Happens in the Wake of the Decision in New Process Steel v. NLRB,” 32 New Jersey Labor and Employment L. Qtly. 14 (2011). [↑](#footnote-ref-133)