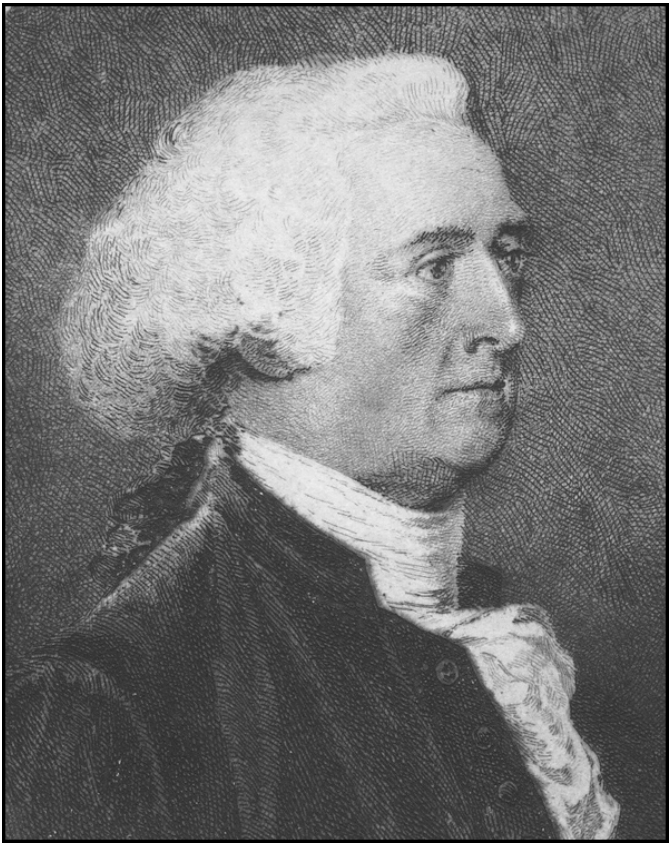

John Rutledge, Chief Justice by recess appointment,
August 12 – December 15, 1795.

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James C. Ho & Trevor W. Morrison, editors

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RECESS RUCKUS

James C. Ho[†] *& Trevor W. Morrison*[*]

On December 17, 2011, the Senate prepared to end its business for the year. But rather than simply recess until January, the Senate instead unanimously agreed that, once every few days, it would convene a series of "pro forma sessions only, with no business conducted" – typically lasting 30 to 40 seconds each.[1]

What explains this curious behavior – and the constitutional struggle that has subsequently unfolded between President Barack Obama and various Republican Senators over the legal effect of these pro forma sessions? The answer can be found in a decades-old struggle between the executive and legislative branches of government over the proper meaning of the Recess Appointments Clause.

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Article II of the Constitution gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[2] Such appointments require no Senate confirmation, so they are naturally viewed by Senators with suspicion.

In particular, Senators have dueled with Presidents over one particular question: What kind of Senate "recess" can give rise to a recess appointment? Is the power limited to the recess between different sessions of Congress? Or can recess appointments occur when

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[1] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).
[2] U.S. Const. art. II, § 2, cl. 3.

the Senate takes a break in the middle of a session of Congress – commonly known as "intra-" (as opposed to "inter-") "session recesses"?

For decades, the Executive Branch has taken the view that the power applies during intra- as well as inter-session recesses. But there is a potential *reductio ad absurdum* problem here: If intra-session breaks can trigger the recess appointments power, does *every* such break do so? Could the President make recess appointments when the Senate adjourns for the evening? Or for lunch?

The way to avoid a slippery slope is to identify a principled limit. Towards that end, the Executive Branch has historically turned to another provision of the Constitution. According to Article I, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than *three days*."[3] Invoking this provision, the Justice Department concluded as early as 1921 that intra-session recess appointments are generally valid – but not for recesses of three days or less.[4]

In light of this assurance, the Senate has over time come to accept the legitimacy of intra-session recess appointments.

To be sure, many Senators howled when, during an 11-day intrasession recess in 2004, President George W. Bush gave a recess appointment to then-Alabama Attorney General William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Over 40 Senators blocked a vote on his nomination – thereby motivating President Bush to grant the recess appointment. But only one Senator, Edward M. Kennedy, actually went to the trouble of filing amicus briefs questioning the constitutionality of his recess appointment.

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[3] U.S. Const. art. I, § 5, cl. 4 (emphasis added).

[4] *See, e.g.,* 33 Op. Att'y Gen. 20, 24-25 (1921) ("If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term 'recess' must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.").

He argued that the Constitution forbids *all* intra-session recess appointments, regardless of the length of the recess, an argument the Eleventh Circuit later rejected.[5]

Rather than join Kennedy's amicus effort, his Senate colleagues later banded together to protect Senate prerogatives in a different manner. Instead of protesting the legitimacy of all intra-session recess appointments, regardless of duration, the Senate responded by adopting defensive measures that presume that the three-day rule imposes meaningful limits on the recess appointment power. Shortly after Democrats won back a majority of the Senate in 2007, the new Senate leadership instituted the practice of conducting pro-forma sessions once every few days, in hopes of preventing the President from making recess appointments due to the three-day rule – a tactic the Bush Administration never publicly challenged.[6]

• • •

This pro-forma session strategy continues to this day – and has given birth to the latest constitutional controversy over Presidential appointments. On January 4, President Obama made four recess appointments – notwithstanding the fact that the appointments occurred during the three-day gap between pro forma Senate sessions on January 3 and 6.

Senate Republicans howled. Their objections were formally delivered to the Administration when Senate Judiciary Committee Republicans submitted a letter to Attorney General Eric Holder, demanding to know how the Administration could reconcile these appointments with the three-day rule.

Notably, the Obama Administration responded by releasing an Office of Legal Counsel opinion that specifically avoided attacking

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[5] *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

[6] *Cf.* Steven G. Bradbury & John P. Elwood, *Call the Senate's bluff on recess appointments*, Wash. Post, Oct. 15, 2010, *available at* www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html ("Although Bradbury was nominated as assistant attorney general in 2005, his nomination was never voted on by the full Senate. Individual senators put holds on the nomination, and Senate leaders instituted pro forma sessions to prevent a recess appointment.").

the three-day rule.[7] OLC instead concluded that the pro forma sessions were simply insufficient to interrupt an on-going recess. Under its view, the January 4 appointments took place in the midst of a 20-day recess between January 3 (the first day of the new session of Congress) and January 23 – rather than a mere three-day recess between January 3 and January 6.

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However the controversy over pro forma sessions is ultimately resolved, one lesson emerges: The three-day rule has come to earn a certain measure of respect by both executive and legislative branch officials from both major political parties.

Yet remarkably, this respect has occurred not as a result of judicial decision, but rather through the work of the political branches.

What's more, a number of key documents in this area have not previously been the subject of formal publication. Indeed, the briefs we publish here have been cited by scholars, commentators, and public officials on various occasions – yet based on our research have never been made available to ordinary citizens on the Internet or through Westlaw, LEXIS, or any other source.

These two ingredients make this latest controversy perfect fodder for *Pub. L. Misc.*[8] In the pages that follow, readers will find two federal district court briefs filed by the Justice Department in 1993 in the matter of *Mackie v. Clinton* – one was recently cited by Senate Republicans, the other by OLC. We also include here the amicus brief submitted to the Eleventh Circuit by Senator Kennedy in 2004, along with the recent letter from Senate Judiciary Committee Republicans protesting the January 4 recess appointments by President Obama. All of these documents are published here for the benefit of scholars, practitioners, and other interested observers.

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[7] *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Jan. 6, 2012, *available at* www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

[8] *See generally* James C. Ho & Trevor W. Morrison, *Introducing* Pub. L. Misc., 1 J.L. (1 PUB. L. MISC.) 13 (2011).

Perhaps the most significant legal document in the current controversy is the OLC opinion addressing the President's authority to make the January 4 recess appointments. We published a similarly prominent OLC opinion in our last issue, addressing the President's power to order the use of military force in Libya.[9] But because OLC's published opinions are formally archived and readily accessible, we have decided as a matter of policy no longer to reproduce them in *Pub. L. Misc.* Instead, we will focus on less readily available materials, like correspondence between the executive and legislative branches, trial court briefs filed by the Justice Department, and so on. Perhaps someday those materials will be just as carefully organized and easily accessible as OLC opinions, rendering an effort like *Pub. L. Misc.* obsolete. Nothing would please us more.

[9] *See* Letter from Caroline D. Krass to Eric H. Holder, Jr., *Presidential Powers – Hostilities and War Powers*, 1 J.L. (1 PUB. L. MISC.) 260 (2011).

RECESS APPOINTMENTS

Brief by Stuart E. Schiffer (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

June 21, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT II

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[*Editors' note*: The table of contents and some superfluous front matter have been omitted.]

[*1] INTRODUCTION

This case concerns the validity of the January 8, 1993 recess appointment of Thomas Ludlow Ashley to be a Governor of the United States Postal Service.

The Recess Appointments Clause to the Constitution grants to the President "Power to fill up all Vacancies that may happen during the Recess of the Senate . . . ." U.S. CONST., art. II, § 2, cl. 3. There are thus three elements that must exist to trigger the President's recess appointment authority: there must be (1) a "Vacancy" which (2) "happens" during (3) a "Recess of the Senate." All three elements are present in this case.

First, the position to which Governor Ashley was appointed was vacant: although Governor Ashley's predecessor, Crocker Nevin, was authorized to continue in office temporarily pursuant to the holdover provision of the Postal Reorganization Act, 39 U.S.C. § 202(b), his term had expired on December 8, 1992. See Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979). Second, the vacancy existed and was filled during the Senate's recess from [*2] January 7 to January 20, 1993. Third, the January 1993 recess was a "Recess" within the meaning of the Recess Appointments Clause. The Senate had plainly adjourned; there was no duty for its members to attend as a body, and the Senate had no ability during that period to act on presidential nominations. The Constitution does not by its terms limit the recess appointment power to recesses between sessions of Congress or impose any lower limit on the length of a recess to which the Recess Appointments Clause applies. Indeed, as shown below, many Presidents have made recess appointments during intrasession recesses and recesses of comparable length to the one at issue in this case.

Finally, the fact that the Postal Reorganization Act permitted Mr. Nevin to continue in office until his successor had "qualified" does not pose a bar to Governor Ashley's appointment. There is nothing in the Act which suggests that an appointee does not qualify within its terms by a recess appointment so long as the Senate is not in session, and this Court may not presume that Congress intended

to restrict the President's recess appointment powers without a more explicit indication.

In sum, the President validly exercised his constitutional authority to fill vacancies that happen during Senate recesses and Mr. Nevin's holdover status did not restrict the President's recess appointment power. Accordingly, summary judgment should be granted for defendants.

[*3] STATEMENT OF FACTS

1. This case originally began as a suit to enjoin the President from removing certain members of the Postal Service Board of Governors. See Complaint, Count I. After Governor Ashley's recess appointment, the Complaint was amended to restate Count I and to include a challenge to the recess appointment. See Amended Complaint, Counts I and II. The parties have reached an agreement by which Count I may be resolved. Accordingly, only Count II is addressed by this motion.

2. On August 15, 1986, Crocker Nevin was appointed a Governor of the United States Postal Service for a term that expired on December 8, 1992. Amended Complaint ¶ 6. On January 8, 1993, Mr. Nevin was serving as Governor pursuant to section 202(b) of Act, which provides that "[a] Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year." 39 U.S.C. § 202(b). Id.

3. On January 5, 1993, Senator Mitchell introduced a "concurrent resolution (S. Con Res. 3) providing for a recess . . . [which] "[R]esolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The [*4] motion was agreed to, and the Senate, at 8:10 p.m. recessed . . . ." 139 Cong. Rec. S53 (daily ed. January 7, 1993).

4. On January 8, 1993, former President Bush appointed Thom-

as Ludlow Ashley to the Postal Service Board of Governors. 29 Wkly Comp. Pres. Doc. 29 (1993).

ARGUMENT

[*Editors' note*: Parts I and II of the Argument have been omitted.]

[*7] III. THE SENATE'S RECESS FROM JANUARY 7 TO JANUARY 20, 1993 TRIGGERED THE PRESIDENT'S RECESS APPOINTMENT POWER

A. The Ordinary Meaning Of The Term "Recess" Establishes That The Senate Was In Recess On January 8, 1993

The recess appointment power, by the terms of the clause, must be exercised during a "Recess of the Senate." That phrase should be interpreted according to its ordinary meaning, unless the Constitution clearly prescribes otherwise. United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their ordinary meaning as distinguished from technical meaning. Where the intention is clear there is no room for construction and no excuse for interpolation or addition."). Webster's Dictionary, published in 1828, defines "recess" as, among other things, a "Remission or suspension of business or [*8] procedure; as, the house of representative has a recess of half an hour." II N. Webster, An American Dictionary of the English language 51 (1828). There is no dispute that there was a break in the Senate's session between January 7 and January 20, 1993, during which the business of the Senate as a body was suspended. Hence, the Senate was in "recess" on January 8, 1993, as the meaning of that term is ordinarily understood.

B. The Senate Was In "Recess" On January 8, 1993, Under The Senate's General Definition Of The Term

The Senate also was in recess as that term is defined by the Senate itself. The term "recess" as used in the Recess Appointments

Clause is defined in a Senate Judiciary Committee report issued in 1905. The report states that the word "recess is one of ordinary, not technical signification and it is evidently used in the constitutional provision in its common and popular sense." The committee concluded that "recess" refers to "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions . . .'" id. at 24 (quoting S. Rep. No. 4389, 58th Cong., 3d Sess. (1905) (emphasis in original).

Thus, under the Senate's definition of the term "recess," the President plainly was authorized to exercise his recess appointment authority to appoint Governor Ashley. There can be no dispute that the Senate was not sitting in regular or extraordinary session for any purpose on January 8, 1993, when Mr. Ashley was appointed Governor. [*9]

C. The Senate Characterized Its January 1993 Break In Session As A Recess

On January 5, 1993, the Senate considered a concurrent resolution "PROVIDING FOR A RECESS OR ADJOURNMENT OF THE SENATE AND THE HOUSE" 131 Cong. Rec S11. (daily ed. Jan. 5, 1993). It was introduced by Senator Mitchell as "A concurrent resolution (S. Con Res. 3) providing for a recess or adjournment of the Senate from January 6 or 7, 1993 to January 20, 1993 . . . ." Id. (emphasis added). Moreover, the concurrent resolution itself "Resolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." Id. (emphasis added). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The motion was agreed to, and the Senate, at 8:10 p.m., recessed until Wednesday, January 20, 1993, at 3:00 p.m." 131 Cong. Rec. S53 (daily ed. Jan. 7, 1993) (added emphasis).

Accordingly, that the Senate was in recess on January 8, 1993, is not subject to dispute.

D. The Term "Recess" Is Not Limited To Intersession Recesses Under The Recess Appointments Clause

It might be argued that the use of the term "the Recess of the Senate" in the Recess Appointments Clause limits the President's recess appointment powers to the recess of the Senate between the two sessions of Congress, and not within a session of Congress, as here. But the Constitution does not impose a single [*10] "Recess" on the Senate. On the contrary, there is no limit on the number of sessions that a Congress may have. The first Congress, for example, held a third session from Dec. 6, 1790 to Mar. 3, 1791, and the 67th Congress held a fourth session from Dec. 4, 1922 to Mar. 3, 1923. Congressional Quarterly's Guide to Congress (4th ed.), at 113-A and 116-A. Nor is there is any evidence that the Framers intended the use of the word "the" to have any substantive effect on the scope of the clause.

Moreover, there would be grave practical objections to an interpretation limiting the recess appointment powers to intersession recesses. In the first place, such an interpretation would interfere with the "substantial purpose" animating the Clause, which was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823). The Senate is equally unable to act on Presidential nominations when it is in recess between sessions of Congress, or within a single session. To permit recess appointments only in one instance but not the other would mean that vacancies would necessarily remain unfilled, contrary to the Framers' intent. Indeed, it would leave the President's recess appointment powers at the mercy of the Senate's schedule; and to the extent that the Senate, as in the modern era, decides to rely more heavily on intrasession recesses rather than recesses between sessions, the power to fill offices as provided by the Constitution would be diminished. [*11]

1. Attorneys General Opinions

In 1921, the Attorney General was asked to determine whether the President had the power to make appointments during an intrasession recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y Gen. 20 (1921). The opinion concluded

that there is no constitutional distinction between an intersession recess and an adjournment during a session, and that a "recess" for purposes of the Clause need only be a practical break in the Senate's session such that its advice and consent to the appointment cannot be obtained. Id. at 21.[4]

In reaching this conclusion, the Attorney General was persuaded by a long line of Attorneys General opinions interpreting the recess appointment power broadly. In 1823, for example, the Attorney General had addressed the question of whether the President could fill a vacancy that arose when the Senate was in session. He opined that:

> the substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the [*12] Constitution will be sacrificed to a dubious construction of its letter.

1 Op. Att'y Gen. 632, 633 (1823). On the same question, in 1866, the Attorney General stated:

> the true theory of the Constitution [is] that as to the Executive power, it is always to be in action, or in capacity for action; and that to meet this necessity, there is a provision against a vacancy in the chief Executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone.

12 Op. Att'y Gen 32, 35 (1866).

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[4] The opinion expressed doubts about whether the power could be exercised during adjournments lasting "5 or even 10 days" but fails to give the analysis or authority for that statement. As noted above, nothing in the terms or legislative history of the clause suggests that there is any bottom limit for the length of a recess before the power can properly be exercised. In any event, the Attorney General further stated that the question did not lend itself to an absolute limit, and that it was up to the President to exercise his discretion in the matter. Id.; see also 3 Op. Off. Legal Counsel at 315.

The President's authority to make recess appointments during intrasession recesses has been reaffirmed on numerous occasions by the Department of Justice,[5] and by the opinion of the Comptroller General. See 28 Comp. Gen. 30, 34-36 (1948).[6] "While opinions of the Attorney General of course are not binding [on the courts], they are entitled to some deference, especially where judicial decisions construing a statute are lacking." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 n.6 (D.C. Cir. 1984) (concurring opinion of Judge Edwards). [*13]

2. Past Presidential Practice

There is also a long-standing practice of making recess appointments during intrasession recesses. For example, intrasession judicial recess appointments include Samuel Blatchford (S.D.N.Y.), appointed in the 1867 intrasession recess; Roy Harper (D. Mo.), Edward A. Tamm (D.D.C.), Samuel H. Kaufman (S.D.N.Y.) and Paul P. Rao (Customs Ct.), appointed during an intrasession in 1948; and William M. Byrne (S.D. Ca.), Oliver J. Carter (N.D. Ca.) and Walter M. Bastian (D.D.C.), appointed during an intrasession recess in 1950. Exhibit 3, p. 1.[7]

Intrasession recess appointments to regulatory agencies have included: John Esch, appointed to the Interstate Commerce Commission in 1928; John H. Fahey, J. Alston Adams, and Nathaniel Dyke,

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[5] See, e.g., 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 41 Op. Att'y Gen. 463, 468 (1961). This view also is supported by the court's opinion in Gould v. United States, 19 Ct. Cl. 593, 595 (1867) (service during intrasession recess appointment included in calculation of pay).

[6] The Comptroller General agrees that recess appointments are permissible when the Senate is recessed long enough so as to be unavailable as a practical matter. Id.

[7] The press of time has prevented defendants from obtaining a complete list of recess appointments. Most of the examples referenced in this memorandum were derived from a alphabetical listing of judicial recess appointments up to 1982, filed in Woodley v. United States, 726 F.2d 1328 (9th Cir. 1983), rev'd, 751 F.2d 1008 (1985) (en banc), and a list of recess appointments filed in Bowers v. Moffett, No. 82-0195 (D.D.C. 1982). The Woodley and Bowers lists are attached hereto as Exhibits 1 and 2, respectively. For the Court's convenience, all intrasession recess appointments from these lists, and others that defendants were able to uncover, have been collected into a single list attached as Exhibit 3.

Jr. appointed to the Federal Home Loan Bank Board during a 1947 intrasession recess; Byron D. Woodside and Philip A. Loomis, Jr. to the SEC in 1960 and 1971, respectively. See Exhibit 3, p. 6.

President Nixon made at least 6 recess appointments during a 1970 intrasession recess and President Carter made at least 17 [*14] intrasession recess appointments. President Reagan made at least 22 such appointments in 1981. See Exhibit 3, pp. 2-5.

Evidence of the manner in which the power has been exercised in practice is traditionally accorded considerable weight by the Supreme Court in interpreting the Constitution. See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915) (acknowledging the rule that "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself – even when the validity of the practice is the subject of the investigation"); Accord Udall. v. Tallman, 380 U.S. 1, 17 (1965). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring). The above examples establish intrasession recess appointments as a long and consistent presidential practice.

E. There Is No Lower Time Limit That A Recess Must Meet To Trigger The Recess Appointment Power

The language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time. Hence, nothing in the Clause prevented the President from making recess appointments during the 13 day recess in January 1993.

There also is a long-standing practice of making recess appointments during recesses of comparable durations. President Coolidge made a recess appointment during a 14-day recess;[8] [*15] President Franklin Roosevelt made recess appointments during a recess lasting

[8] On January 3, 1928, John Esch was appointed to the ICC during the recess lasting from December 21, 1927 until Jan. 4, 1928. See Exhibit 2, p. 6; Congressional Quarterly's Guide to Congress (4th ed.) [hereinafter cited as "Cong. Quarterly"), at 116-A (listing the sessions of Congress from 1789 to 1991). For the Court's convenience, defendants have attached the relevant pages of the Cong. Quarterly at Exhibit 4.

15 days;[9] President Truman made a recess appointment during a 4 day recess,[10] and an 18 day recess.[11] President Johnson recess appointed Judge Spottswood Robinson during an 8 day recess.[12]

Moreover, President Nixon appointed the first Board of Governors for the Postal Service under the Postal Reorganization Act during a 19 day recess from January 2, 1971 to January 21, 1971.[13] President Carter made seven recess appointment during a 13 day recess.[14] Six of these appointments were made on the morning of the day the Senate reconvened.

[*16] More recently, in a situation directly analogous to the present case, President Reagan made two recess appointments during the 14-day recess between the convening of Congress and the President's inauguration in 1985.[15] President Bush had previously made a recess appointment during an 18-day recess in January, 1992.[16] The January 1992 recess was approved by OLC. See 16 OLC Op. (Prelim. Print) 15 (1992).

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[9] Paul A. Porter was appointed to the FCC on December 20, 1944, during the recess from December 19, 1944 to January 3, 1945. See Exhibit 3, p. 6; Cong. Quarterly, p. 117-A.

[10] On January 4, 1949, President Truman appointed Oswald Ryan to the Civil Aeronautics Board during the recess from December 31, 1948 to January 3, 1949. See Exhibit 2, p. 23; Cong. Quarterly at p. 117-A.

[11] John Alston Adams and William K. Divers were appointed to the Federal Home Loan Bank Board on December 20, 1947 during a recess from December 19, 1947 to January 6, 1948. Exhibit 2, p. 26; Cong. Quarterly, p. 117-A.

[12] See Exhibit 1. This recess lasted from December 30, 1963 until January 7, 1964. Cong. Quarterly, p. 117-A.

[13] See Exhibit 2, p. 7; Cong. Quarterly, p. 118-A.

[14] See Exhibit 2, p. 12; Cong. Quarterly, p. 119-A.

[15] During the recess from January 7, 1985 to January 21, 1985, President Reagan appointed John A. Bohn, Jr., First Vice President of the Export-Import Bank, and Richard H. Hughes Director, Export-Import Bank. See 21 Wkly Comp. Pres. Doc. 85 (1985); 131 Cong. Rec. 586 (1985).

[16] On January 15, 1992, President Bush appointed Daniel Evans Chairperson, and Marilyn R. Seymann, Lawrence V. Costiglio, and William C. Perkins, members of the Federal Housing Finance Board; and Albert V. Casey, Chief Executive Officer of the Resolution Trust Corp., during a recess from January 3, 1992 to January 21, 1992. 28 Wkly. Comp. Pres. Doc. 129-30 (January 15, 1992); 138 Cong. Rec. S1 (daily ed. Jan. 3, 1992).

The length of a recess is not a ground upon which the Court may distinguish between and among recesses. The Constitution provides no basis for a court to conclude, for example, that a 30 day recess is sufficiently long or that a 5 day recess is too short. Moreover, any lower limit would have to be applied to intersession and intrasession recesses alike because there is no basis for distinguishing between the two. Everyone appears to agree however that intersession recesses are subject to no restrictions. Indeed, there is a long standing presidential practice of making recess appointments within days or even hours of the end of an intersession recess. Yet, this situation is [*17] functionally indistinguishable from making a recess appointment at anytime during a short recess.

In 1789, for example, George Washington appointed Judge William Paca to the bench 13 days before the Senate reconvened from an intersession recess lasting almost 100 days and in 1819, Judge Roger Skinner was appointed 12 days before the end of an intersession recess.[17] This is functionally equivalent to the situation we have here, where the recess appointment was made on the first full day of a 13 day recess. More recently, Spottswood Robinson and A. Leon Higginbotham were appointed 1 day before the end of an intersession recess in 1964 (Exhibit 1) and President Nixon appointed Donald T. Regan and others to the Securities Investor Protection Corp., on the day the intersession recess ended in 1971. Exhibit 2 at p. 7. These are just a few of the many examples that show that this practice has been consistently repeated.

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[17] See alphabetical list of judicial recess appointments attached at Exhibit 1. Evidence that this practice occurred during the time when the Framers were still active in government establishes that the practice is consistent with their understanding of how the Constitution should work. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-92 (1983). See also Mistretta v. United States, 109 S. Ct. 647, 669-70 (1989); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936); J.W. Hampton. Jr. & Co. v. United States, 276 U.S. 394, 412 (1928). In the context of the Recess Appointments Clause itself, the Ninth Circuit relied upon the historical practice of Presidents making judicial recess appointments, to uphold President Carter's recess appointment of a district judge against a challenge based on Article III of the Constitution. United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc).

These recess appointments also refute the proposition that the President's power to act during a short recess is limited to [*18] exceptional or emergency situations. As the Court recognized in Staebler, "recess appointments traditionally have not been made only in exceptional circumstances, but whenever Congress was not in session." 464 F. Supp at 597. Moreover, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment to be used only in cases of extreme necessity." Id. This construction of the clause is borne out by the historical practice regarding the recess appointment power since its first use.

F. No Further Limitations On The Recess Of The Senate Constitutionally May Be Implied

As demonstrated above, Congress plainly was in recess in January 1993, pursuant to the ordinary meaning of the term. There is no basis to provide that the recess must meet any additional requirements. Indeed, the Court in Staebler refused to impose additional restrictions on the language of the Recess Appointments Clause. Staebler v. Carter, 464 F. Supp. at 597. After reviewing the language of the Recess Appointments Clause and its sparse legislative history, the Court opined:

> [T]wo limitations on the applicability of the Recess Appointments Clause are part of the Clause itself that it may be invoked only when the Senate is in recess, and that the President's recess commissions 'shall expire at the End of (the next congressional) Session. * * * There is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language.'

Staebler, 464 F. Supp. at 597.

[*19] The only constitutional restriction upon the Senate's ability to adjourn its sessions is that adjournments for more than three days require the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4.[18] Apart from this 3 day limitation, the Constitution

[18] It could be argued that the proscription against Senate adjournments for more

provides no basis upon which the Court could approve certain recesses and disapprove others.

G. There Is No Principled Basis Upon Which A Line Might Be Drawn To Invalidate 13 Day Recesses

The courts have no authority to add restrictions to the Constitution. See Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993); Powell v. McCormick, 395 U.S. 486, 550 (1969). But even if this legal bar did not exist, it would be very difficult indeed to determine how or where a line might be drawn to distinguish between recesses. As discussed above, recesses cannot be approved or disapproved based upon their length. And, as the Court in Staebler recognized, nothing confines the exercise of the recess appointment power to emergency or exceptional situations. Furthermore, anything less than a bright line would encourage litigation over the validity of the appointment and could force an agency to delay important decisions until the litigation is resolved. It is difficult, [*20] however, to conceive how the court could determine where a line would be drawn. See Nixon, 113 S. Ct. at 736 (word used in Impeachment Clause "lacks sufficient precision to afford any judicially manageable standard of review").

The clause does impose limits and these certainly can be enforced by this Court. As shown above, however, those limits are only that a "vacancy" "happen" during the "recess" of the Senate, all of which are met in this case. Any further refinement of the recess power therefore should proceed only through constitutional agreements between the Legislative and Executive Branches of government.

[*Editors' note*: Part IV of the Argument has been omitted.]

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than three days without House consent manifests the Framer's intent to attach lesser importance to one, two, or three day recesses. However, the Court need not reach that issue. Even assuming arguendo that the recess appointment could not be exercised during adjournments of less than three days, that fact would not invalidate Governor Ashley's appointment.

[*25] CONCLUSION

As demonstrated above, all of the prerequisites for the exercise of the recess appointment power were in existence when former President Bush recess appointed Mr. Ashley to the Postal Service Board of Governors and the Act, as properly construed, did not prohibit the President from issuing the recess appointment. Accordingly, summary judgment should be granted for defendants.

Respectfully Submitted,

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RECESS APPOINTMENTS

Brief by Frank W. Hunger (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

July 2, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Respectfully submitted,

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[*Editors' note*: A superfluous heading has been omitted.]

[*1] INTRODUCTION

This suit challenges the validity of the recess appointment of Thomas Ludlow Ashley to the Postal Service Board of Governors.[1] Mr. Ashley was appointed to succeed Crocker Nevin who at the time was serving temporarily, after his term had expired, pursuant to the holdover provision of the Postal Reorganization Act ("Postal Act" or "The Act").

Three elements trigger the recess appointment power: a 1) "vacancy" must 2) "happen," during 3) a Senate "recess." Only the first and third elements are at issue in this case. Plaintiff's challenge to these elements fails for the following reasons.

[*2] First, the decision in Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979), proves that a vacancy existed in Mr. Nevin's position on the date his statutory term of office ended. Plaintiff contends that the holdover provision of the Postal Act creates not a present vacancy that can be filled by recess appointment, but a prospective one to be filled by presidential appointment after Senate confirmation.[2] However, the Postal Act originally defined a vacancy as occurring upon the expiration of a Governor's term and there is no evidence that the holdover provision was intended to change this definition. Moreover, even if the vacancy were to be considered a prospective one, plaintiff cannot prevail unless he also proves that the vacancy can only be filled by an appointee who has been confirmed by the Senate. Because the Postal Act contains no such restriction, plaintiff's prospective vacancy theory fails.

Second, the plaintiff does not contend that the Senate was not in recess on January 8, 1993, when Mr. Ashley was recess appointed. Instead, plaintiff asserts that this recess was not the "type of recess" contemplated by the recess clause. While plaintiff suggests that "recess" is confined to those occurring between sessions of Congress,

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[1] As noted in their opening brief, defendants challenge the standing of all plaintiffs other than Crocker Nevin, whom defendants refer to as the plaintiff herein.

[2] President Clinton has announced his intention to nominate Einar Dyhrkopp to the Postal Service Board of Governors. See Star Tribune, June 29, 1993 (State ed.), available in LEXIS, Nexis Library, Majpap File. If Mr. Dyhrkopp is confirmed and appointed, plaintiff's recess appointment challenge would be moot.

the terms of the Constitution impose no such limitation. Furthermore, plaintiff's [*3] interpretation is contrary to the purpose of the recess clause and would upset the balance of power allocated under the Constitution. Plaintiff argues, alternatively, that even if intrasession recesses generally are accepted, this particular intrasession recess was too brief to count. As demonstrated in defendants' opening brief, as well as below, there is no basis in the Constitution for the Court to draw such distinctions.

ARGUMENT

[*Editors' note*: Part I of the Argument has been omitted.]

[*17] II. THE PRESIDENT PROPERLY EXERCISED HIS RECESS APPOINTMENT POWERS DURING THE SENATE'S JANUARY 1993 RECESS

Plaintiff here does not argue that Congress was not in "recess" from January 7, to January 20, 1993. Instead, plaintiff contends that the January recess was not the "type" of recess contemplated by the Recess Appointments Clause. Plaintiff's Brief at 23. According to plaintiff, only an intersession recess is the right kind of recess. Plaintiff's implied limitation on the unqualified language of the Constitution would thwart the purposes of the recess clause and upset the balance of power between the branches. Accordingly, interpreting "recess" to include both intersession and intrasession recesses is more reasonable.

A. The Terms Of The Recess Appointments Clause Permit A Finding That "Recess" Means Both Intersession And Intrasession Recesses

The recess clause provides that:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Art. II, § 2, cl. 3.

Plaintiff contends that use of the term "the Recess" in the singular evidences the Framers' intent to limit use of the recess power to intersession recesses because the general practice has been for each Congress to have two sessions. Plaintiff's Brief at 25-26. Plaintiff asserts that "the Recess" therefore logically refers to the interval between these two sessions. The problem with such logic, as we have pointed out, is that nothing [*18] in the Constitution limits the number of sessions that a Congress may have. Congress often has held three sessions, as did the First, Fifth and Eleventh Congresses; indeed, a fourth session was held by the 67th Congress.[15]

Plaintiff relies on the language providing that a recess commission will "expire at the End of [Congress'] Next session" as further evidence that the Recess refers to intersession recesses only. Plaintiff asserts that extending the recess to intrasession recesses could make a recess appointment valid for nearly two years.[16] History shows that recess appointees have been granted commissions that would allow them to serve in that capacity for similar periods. For example, William Allen (S. D. Ill.) was recess appointed on April 18, 1887 for a term that would not have expired pursuant to the recess clause until October 20, 1888 – a period of 18 months. See Defendants' Brief, Exh. 1 at p. Al. Similarly, in 1849, Henry Boice was recess appointed on May 9, 1849 for a term that would have expired on September 30, 1850, almost 17 months later. Id. at p. A3. Indeed, the record indicates that Judge Boice would have actually served most of that period because he was not confirmed until August 2, 1850. Thus, the fact that Mr. Ashley's [*19] appointment conceivably could last for an extended period of time is no basis for disapproving his recess appointment.

Plaintiff contends that the Framers could not have intended to allow persons appointed at the beginning or middle of an intrasession recess "when the Senate's resumed availability for advice and con-

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[15] In fact, of the 103 Congresses, 25 have had three or more sessions.

[16] Last year, Congress adjourned sine die on October 8, 1992. Assuming a similar schedule next year, the maximum time the recess appointment could last is approximately 20 months. Obviously, if it adjourned earlier than October, the time would be less.

sent is imminent" to serve longer than those appointed during prolonged intersession recesses. Plaintiff's Brief at p. 28. This argument proceeds on the faulty premise that recess appointments made close to the time when the Senate will be resuming its session are somehow inappropriate or that some penalty should attach. However, as defendants have shown, many individuals have been recess appointed over the years during the last days of an intersession recess. Defendants' Brief at 17 and Exhs. 1, 2 & 4. Because such appointments were likewise made when the Senate's return to business was imminent, the situations are functionally equivalent. Application of the "end of their next session" language can produce the same results, whether the recess appointment is made during an intersession or an intrasession recess. Thus, this language is no evidence that "the Recess" refers only to intersession recesses.[17] [*20]

B. Limiting "The Recess" To Intersession Recesses Would Nullify The Purpose Of The Recess Clause

The "substantial purpose" of the Recess Appointments Clause was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823); United States v. Woodley, 751 F.2d 1008, 1013 (9th Cir. 1985) (en banc). The latter part of this century has seen intrasession recesses become lengthier and more frequent. To prohibit the President from exercising his recess appointment power during these periods necessarily would mean that vacancies would go unfilled, contrary to the clause's purpose.

Ironically, plaintiff's interpretation would inhibit the President from filling vacancies even when the need to act without delay is

[17] Moreover, the fact that frequent intrasession recesses were uncommon in the early days of the Republic does not mean that Congress did not anticipate them. The Constitution provides no limitation on the Senate's ability to recess, apart from the requirement that the House consent to adjournments lasting more than three days. Surely, the Framers did not provide the Senate with expansive power to recess during its sessions without appreciating that intrasession recesses could occur with greater frequency in the future. The fact that early intrasession recesses were infrequent is no reason to assume that the Framers' only concern was keeping vacancies filled during intercession recesses.

plainly present. On August 10, 1991, for example, President Bush issued a recess appointment to reappoint Alan Greenspan as Chairman of the Federal Reserve Bank during an intrasession recess. 27 Wkly Comp. Pres. Doc. 1126 (1991). President Bush had nominated Mr. Greenspan on July 19, 1991; however, the Senate recessed on August 9, 1991 without acting on the nomination. See 27 Wkly Comp. Pres. Doc. 1051 (1991). Under plaintiff's view of the recess clause, the President would have been without authority to fill this important vacancy. The President has also appointed members of his cabinet by recess appointment. Neil Goldschmidt was first appointed Secretary of Transportation by recess appointment. See Defendants' Brief, [*21] Exh. 2 at p. 11. Donald P. Hodel also was recess appointed Secretary of Energy in November 1982, when the President accepted the resignation of Secretary James B. Edwards. See 18 Wkly Comp. Pres. Doc. 1438, 1508 (1982). The Court should reject any interpretation that would prevent the President from filling important vacancies that need to filled without delay.

C. Limiting "The Recess" To Intersession Recesses Would Upset The Balance Of Power Between The Branches

The Constitution must be interpreted in light of its underlying principle of checks and balances. Buckley v. Valeo, 424 U.S. at 120; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) (The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). As the Court in Staebler recognized, "if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation." 464 F. Supp. at 599-600.

If the recess clause is interpreted as applying only during intersession recesses, Congress could easily eliminate the President's ability to make any recess appointments, even though Congress could still recess for substantial periods of time. In 1903, for exam-

ple, the 58th Congress convened an extraordinary session on November 9, 1903, that lasted until noon of December 7, 1903, the same day and hour fixed by law for the [*22] opening of the first regular session of the 58th Congress. See 37 Cong. Rec. 544; 38 Cong. Rec. 1. The Senate also eliminated the intersession recess when, on January 3, 1941, the third session of the 76th Congress ended at noon and the first session of 77th Congress began, see 86 Cong. Rec. 14059; and on December 2, 1867, when there was no gap between the first and second sessions of the 40th Congress, see 77 Cong. Globe 817; 78 Cong. Globe 1. Nothing prevents Congress from taking as many intrasession recesses as it chooses during the year. And, so long as its sine die adjournment was immediately followed by the beginning of the subsequent session, the President would be unable to make any recess appointments. On the other hand, if "the Recess" is construed to include intrasession recesses, this would simply acknowledge the manner in which Presidents have been exercising the recess appointment power since at least 1867.[18]

Plaintiff argues that recognition of intrasession recesses would allow the President to make recess appointments the primary method of filling offices by simply renewing the recess appointees' commissions at the end of every succeeding session [*23] of Congress. Plaintiff's Brief at 24. While such action by the President would be unlikely, the Senate is not without means to protect its prerogatives.[19]

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[18] Plaintiff disputes that there is a "consistent" historical practice because, notwithstanding the early intrasession appointments, this power has only been exercised regularly over the past 20-30 years. Plaintiff's Brief at 29. Plaintiff answers his own argument, however, by pointing out that the frequency at which Congress recesses during its session has dramatically increased in recent years. Obviously, intrasession recess appointments cannot be made regularly when intrasession recesses are infrequent. As we have noted above, the fact that Congress chose infrequently to recess during its sessions in the early days of the Republic does not evidence any intent to allow offices to remain unfilled during these periods.

[19] It also is significant that for scores of years Presidents have construed the clause as permitting recess appointments during intrasession recesses without "leveraging" it into the "primary method of filling federal offices" as plaintiff suggests.

For example, 5 U.S.C. § 5503 provides that if the President makes a recess appointment to fill a vacancy which existed while the Senate was in session and which can be filled permanently only with the advice and consent of the Senate such as Mr. Nevin's seat, payment for services rendered by the recess appointee may not be made from Treasury funds until the appointee is confirmed, unless one of three conditions are met: (1) the vacancy arose within 30 days before the end of the session; (2) a nomination to fill the vacancy was pending in the Senate at the time it went into recess; or (3) a nomination to fill the vacancy was rejected by the Senate within 30 days before the end of the session, and a different individual receives the recess appointment. 5 U.S.C. 5503(a). A nomination to fill a vacancy as described in (1), (2), or (3) above must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. Id. at 5503(b).

The Senate also could refuse to confirm the recess appointee, should the President submit his nomination, or refuse to confirm nominees for other offices, or refuse to pass key legislation proposed by the President. The prospect that the [*24] Senate could take such actions serves to discourage the President from exercising his recess appointment powers to the extreme. By contrast, should intrasession recesses be excluded, and should the Senate recess in such a way as to eliminate the President's recess appointment powers, there are no comparable ways for the President to protect himself. Thus, plaintiff's proposed limitation on "the Recess" would upset the balance in the allocation of power between the branches far more than would defendants' construction. Accordingly, plaintiff's construction should be rejected.

D. The Constitution Provides No Basis For Imposing Additional Requirements On Recess Appointments Made During Intrasession Recesses

1. Duration Of The Recess

Defendants have shown that the language of the recess clause does not require that the Recess of the Senate last for any minimum

time, and have shown that there is a long-standing practice of making recess appointments during recesses of comparable durations. See Defendants' Brief, at 14-18. Plaintiff apparently concedes that there are no time limits or other implied restrictions on intersession recesses. Plaintiff contends, however, that recess appointments made during intrasession recesses should be subjected to different treatment. Plaintiff's Brief at 29-34.

Plaintiff asserts that the recess was of insufficient duration to trigger the recess appointment powers, relying on several Attorneys General opinions that have cautioned against [*25] use of the power during short intrasession recesses. Plaintiff's Brief at 30. None of these opinions concluded that the President lacked the power to make appointments during a recess like the one here. Of course, the question of whether the recess appointment power exists is much different from the question of whether it should be used.

If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4. It might be argued that this means that the Framers did not consider one, two and three day recesses to be constitutionally significant. But that situation is not presented here because the recess lasted 13 days.[20] Moreover, no Attorney General or court has found that the President lacks the power to make recess appointments during 13-day recesses.[21]

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[20] In our brief, defendants have characterized the recess as lasting 13 days, because the Senate did not reconvene until 3:00 p.m. on January 20, 1993, and because the President could have exercised his recess appointment power up until the moment the Senate reconvened. Accordingly, there were 13 separate days between January 7, 1993 at 8:00 p.m. when the Senate recessed, and 3:00 p.m. on January 20, during which the President could have made recess appointments. Plaintiff has counted the recess as 12 days. Because none of defendants.' arguments turn on whether the recess is considered to have lasted 12 or 13 days, plaintiff's calculation of the length of the recess makes no difference.

[21] While one Attorney General did opine that the President could not make recess appointments during a Christmas recess, this was based on his view that the power could not be exercised during an intrasession recess and was not based on the

[*26] As the Court in Staebler held, "there is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language." Staebler, 464 F. Supp. at 597. Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.

2. Practical Considerations

Plaintiff argues that intrasession recess appointments should be confined by practical considerations. Plaintiff's Brief at 30-34. Insofar as this requires adding restrictions on the recess power not found in the Constitution, the Court has no authority to do so. Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993).[22] Plaintiff argues that Attorneys General [*27] have analyzed the validity of proposed recess appointments based on whether "in a practical sense, the Senate is in session that its advice and consent can be obtained," 33 Op. Att'y Gen. at 21-22. Even applying this standard, however, the recess appointment was valid because the Senate was

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length of the recess. See 23 Op. Att'y Gen. at 604. This view was repudiated by the Attorney General in 1921, in an opinion expressly approving intrasession recess appointments. 33 Op. Att'y Gen. 20 (1921). This latter interpretation has been followed by all subsequent Attorneys General and by Presidents through their practice. See Defendants' Brief at 11-14.

[22] The pocket veto decisions plaintiff relies upon are distinguishable. The constitutional provision at issue in those cases allows a bill passed by Congress to become law without the President's signature if the President does not return it to the originating house within ten days after presentment, "unless the Congress by their Adjournment prevent its Return . . . ." U.S. CONST., § art. I, § 7, cl. 2. That language was read as not prohibiting Congress from acting to lift the obstacles to returning the bill that an adjournment may have imposed. See Wright v. United States, 302 U.S. 583, 589 (1938). Thus, the courts have looked at the circumstances surrounding the adjournment to determine whether there were any obstacles that prevented the bill's return and, if so, whether Congress had satisfactorily removed them. See Barnes v. Kline, 759 F.2d 21, 32-35 (D.C. Cir. 1985). The language of the Recess Appointments Clause, however, is not comparable. There is no way for the Senate to advise and consent to a nomination unless it is in session.

not in a position to act on Mr. Ashley's nomination during the January recess.

The Senate was not sitting in a regular or extraordinary session from January 7 to January 20 and its members owed no duty of attendance. This is plain from the resolution providing for the Senate recess. Sen. Con. Res. 3, 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). In addition to specifying the dates of the recess, the resolution further provided for the leaders of the Senate and House to notify their members "to reassemble whenever, in their opinions, the public interest shall warrant it." Id. Obviously, such a provision in the resolution would be unnecessary if the members already were obligated to be present to conduct business as a legislative body. Because there was no opportunity for the Senate to consider and act on nominations during the January recess, the Senate's advice and consent to defendant Ashley's appointment could not be obtained.[23]

[*28] CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

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[23] The fact that Senate committees might have met to conduct business during the recess does not alter this conclusion. A Senate committee cannot "advice and consent" to a presidential nomination on behalf of the full Senate body. Nor does the ceremonial submission of numerous nominations to the Senate by President Bush on his last day in office require a different result. Just because there is a recess does not mean that the President must make recess appointments. Rather, the President remains free to determine which offices, if any, should be filled by recess appointment and the offices for which a nomination should be sent forward.

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RECESS APPOINTMENTS

Brief by Edward M. Kennedy (additional counsel listed in brief) before the U.S. Court of Appeals for the Eleventh Circuit

June 6, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15783
Albert ADEFEMI,
Petitioner-Appellant,

v.

John ASHCROFT, et al.,
Respondents-Appellees

No. 02-12924
UNITED STATES,
Plaintiff-Appellee,

v.

Carl M. DRURY, Jr.,
Defendant-Appellant

No. 01-16485
UNITED STATES,
Plaintiff-Appellee,

v.

Deborah STANFORD
Claimant-Appellant

BRIEF OF *AMICUS CURIAE*, UNITED STATES SENATOR EDWARD M. KENNEDY, PRO SE, SUGGESTING LACK OF JURISDICTION ON THE GROUND THAT JUDGE PRYOR'S APPOINTMENT TO THIS COURT IS UNCONSTITUTIONAL

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[*Editors' note*: Superfluous front matter and the tables of contents and authorities have been omitted.]

[*1] IDENTITY AND INTEREST OF THE AMICUS

Amicus Edward M. Kennedy has been a United States Senator from the Commonwealth of Massachusetts since his election in November 1962. He has remained in that office continuously since then, having been re-elected in 1964, 1970, 1976, 1982, 1988, 1994, and 2000. He is the second-most senior member of the Senate and has served on its Committee on the Judiciary continuously since becoming a Senator, serving as its Chairman from 1979-1981. In the Committee and on the Senate floor, he has participated in the constitutional "advice and consent" function with respect to the appointment of virtually every United States Judge since the start of the First Session of the 88th Congress.

Senator Kennedy has a longstanding and substantial interest in assuring that the constitutional roles and prerogatives of the Senate are not compromised, that the division and separation of powers among the Branches enshrined in the Constitution are preserved and protected, that the independence of the Judicial Branch from the Executive Branch guaranteed in Article III of the Constitution is not breached, and, in particular, that those who have not been appointed as judges of courts of the United States in accordance with the applicable constitutional and statutory provisions are not permitted to jeopardize and interfere with the proper operation of the courts by participating in cases that the Constitution prohibits them from deciding.

[*2] Amicus specifically participated actively in the Senate Judiciary Committee's consideration of the nomination of William Pryor, Jr., to this Court. He also participated in the Senate debate on whether, under the Senate's Rules, the Senate should proceed with that nomination, and, upon the votes to determine whether the Senate would do so, voted with the prevailing side against proceeding to confirm him.

SOURCE OF AUTHORITY TO FILE

Together with this brief, amicus has filed a motion for leave to file a brief amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

Whether an intra-session recess appointment of a judge to an Article III court violates the U.S. Constitution.

BACKGROUND

President Bush nominated William Pryor to fill a vacancy on this Court on April 9, 2003, early in the First Session of the 108th Congress. 149 Cong. Rec. S5101 (daily ed. Apr. 9, 2003). The Senate Judiciary Committee held a hearing on Judge Pryor's nomination on June 11, 2003. *See Judicial and Executive Nominations Before the S. Comm. on the Judiciary,* 108th Cong. (June 11, 2003), *available at* http://judiciary . senate.gov/hearing.cfm?id=802.

[*3] During the First Session of the 108th Congress, the Senate debated the nomination over the course of several days. A number of Senators opposed the nomination. *See* 149 Cong. Rec. S10,455 (daily ed. July 31, 2003); 149 Cong. Rec. S14,085 (daily ed. Nov. 6, 2003). Under Rule 22 of the Rules of the Senate, adopted pursuant to Article I, Section 5 of the Constitution, proponents of the nomination twice attempted to terminate debate and proceed to a vote on the nomination. Both attempts failed, *see* 149 Cong. Rec. 510,455 (daily ed. July 31, 2003); 149 Cong. Rec. 514,085 (daily ed. Nov. 6, 2003), and therefore the Senate did not confirm the nominee during its First Session. That Session ended on December 9, 2003, and the ensuing Senate Recess lasted until January 20, 2004.[1]

On the evening of Thursday, February 12, 2004, the Senate adjourned for ten days for the Presidents' Day holiday until Monday, February 23, a period encompassing five business days, a three-day holiday weekend, and a two-day weekend. 150 Cong. Rec. S1413 (daily ed. Feb. 12, 2004). President Bush announced Judge Pryor's recess appointment on the afternoon of Friday, February 20, 2004,

[1] The nomination was effectively withdrawn and a new nomination of Mr. Pryor made on March 11, 2004. *See President's Nominations Submitted to the Senate*, Weekly Comp. Pres. Doc. Vol. 40, Number 11, at 401 (Mar. 15, 2004). No steps to proceed with this re-nomination have been taken.

the last business day before the Congress returned from its ten-day adjournment. As discussed in the Argument below, that brief adjournment is by far [*4] the shortest intra-session "recess" during which a President has ever invoked the Recess Appointments Clause to appoint an Article III judge.

SUMMARY OF THE ARGUMENT

The appointment of Judge Pryor is unconstitutional. An intra-session adjournment is not "the Recess" to which the Recess Appointments Clause refers. Moreover, even if (contrary to our argument) the phrase "the Recess" is a "practical" rather than literal construction, there is *no* "practical" justification for construing "the Recess" to include an intra-session adjournment *for purposes of an appointment to an Article III judgeship*. Indeed, these appointments cause such profound harm to the judicial independence guaranteed by Article III that on any practical construction of the Recess Appointments Clause, which must account for *constitutional* principles and consequences, intra-session appointments of judges ought to be especially disfavored.

ARGUMENT

I. THE CONSTITUTION DOES NOT AUTHORIZE RECESS APPOINTMENTS – PARTICULARLY OF ARTICLE III JUDGES – DURING INTRA-SESSION SENATE ADJOURNMENTS

The text, original understanding, and purpose of the Recess Appointments Clause all demonstrate that an intra-session Senate adjournment is not "the Recess" [*5] to which the Clause refers. At the very least, the Clause does not authorize intrasession appointments of Article III judges.[2]

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[2] By authorizing the President to "fill up all Vacancies that may happen during the Recess of the Senate," the Recess Appointments Clause can be interpreted as authorizing recess appointments only to fill vacancies actually created-"happen" - during inter-session recesses. Although two federal courts have rejected this construction, see *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir.) (en banc), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269 (1985); *United States v. Allocco*,

A. The Text Of The Recess Appointments Clause

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during *the Recess* of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. I, § 2, cl. 3 (emphasis added). Any analysis of the Constitution must begin with the plain language of the text. *See, e.g., Solorio v. United States,* 483 U.S. 435, 447, 107 S. Ct. 2924, 2931 (1987). The Framers' use of the defmite article "the," and of the singular, rather than the plural, form of "Recess," both indicate that the Constitution refers to one specific "Recess" – that is, the recess that occurs between sessions of Congress (including the period *between* the Second Session of one Congress and the First Session of the next). If the Framers had [*6] intended to authorize the President to make appointments during breaks *within* a session, they could easily have drafted the Clause using the plural form "Recesses," the singular indefinite "a Recess," or another phrase altogether, such as "during adjournments" or "when the Senate is not in session."

However, the Framers chose not to use these alternatives because "Recess," the word they used, was a term of art that referred specifically to the break between the generally uninterrupted sessions of Congress. Indeed, elsewhere the Framers did use a different term – "adjourn" – to refer to a cessation of legislative business that occurs *during* sessions of Congress. Article I of the Constitution directs that "[n]either House, *during* the Session of Congress, shall, without the Consent of the other, *adjourn* for more than three days . . . ." U.S. Const. art. I, § *5,* cl. 4 (emphases added). By choosing the term "the Recess" in Article II, rather than referring to a period in which Congress was merely "adjourn[ed]," the Framers thus made

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305 F.2d 704, 709-14 (2d Cir. 1962), *cert. denied*, 371 U.S. 964, 83 S. Ct. 545 (1963), that conclusion is subject to serious challenge. *See, e.g.,* William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 21 Const. Comment. (forthcoming 2004), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=542902; Recent Case, *President Has Power to Issue Recess Commission to Federal Judge When Vacancy First Arises During Session of Senate*, 111 U. Pa. L. Rev. 364, 368 (1963).

clear that the Recess Appointments Clause was to be used only during the breaks that occur *between* sessions of Congress. *Cf. United States v. Verdugo-Urquidez,* 494 U.S. 259, 265-66, 110 S. Ct. 1056, 1060-61 (1990) (differentiating between "the people" and "person" or "accused" as used in various constitutional amendments). Interpreting the Recess Appointments Clause as authorizing appointments only during inter-session recesses is the only construction that gives [*7] meaning to the Framers' use of two different terms – "the Recess" and "Adjourn" – to describe the different kinds of breaks in the legislative schedule.

This reading of the Clause is confirmed by the Clause's provision that a recess appointee's commission "shall expire at the End of [the Senate's] next Session." Reading the Clause to permit intra-session appointments would mean that a recess appointment would be valid not only during the remainder of the session in which the appointment was made, but until the end of the following session. This would result in an absurd situation that the Framers could not have envisioned. Judge Pryor, for instance, was appointed in February 2004, very early in the Second Session of the 108th Congress. Reading "the Recess" to include the ten-day February adjournment, Judge Pryor's commission would last nearly *two years,* until the conclusion of the First Session of the 109th Congress at the end of *2005 – a* result that serves none of the purposes of the Clause and that the Framers certainly could not have intended, given their careful and deliberate decision to check the President's appointment power by requiring Senate consent, *see infra* Part I.B. By contrast, construing "the Recess" to refer only to an inter-session recess comports with common sense: The Framers intended a recess appointee to serve until the end of the "next Session" – that is, the new Senate session that begins at the end of "the Recess" during which the appointment was made. Such a process would provide the Senate, upon its return, with one full session in which to [*8] decide whether to consent to the President's nomination – certainly sufficient time for the Senate to play its constitutional role. By contrast, allowing a recess appointee to serve without Senate consent for virtually two full years serves no conceivable constitutional end.

B. Constitutional Purpose and Function

The purpose of the Recess Appointments Clause was to permit the President to temporarily appoint officers when "the Recess" – which at the time of the founding meant the lone, lengthy inter-session break – prevents the Senate from fulfilling its constitutional role in the usual appointments process. Because intra-session adjournments do not generally implicate the purpose of the Clause, there is no basis for construing the Clause to encompass such adjournments.

The Framers intended to give the Senate an important check on the President's power to appoint officers of the United States, including federal judges. U.S. Const. art. II, § 2, cl. 2. The Framers were determined "to limit the distribution of the power of appointment" – a power "deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag v. Comm'r of Internal Revenue,* 501 U.S. 868, 883-84, 111 S. Ct. 2631, 2641 (1991) (quoting Gordon Wood, *The Creation of The American Republic 1776-1787,* at 143 (1969)). The Constitution thus divides "the power to appoint the principal federal officers . . . between the Executive and Legislative Branches," *id.* at 884, by requiring "the [*9] Advice and Consent of the Senate" for the President's appointment of such officers, including federal judges, U.S. Const. art. II, § 2, cl. 2. This division was basic to the balance of powers envisioned by the Framers.

Against this general principle, the Recess Appointments Clause was intended to prevent a crisis in vacancies that might result if this procedure were required when the Senate was disabled from fulfilling its advice-and-consent function. Alexander Hamilton described the recess-appointment power as "nothing more than a supplement to" the ordinary appointment process for "cases to which the general method was inadequate." *The Federalist* No. 67, at 391 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton noted that the ordinary appointment process "is confided to the President and Senate *jointly,* and can therefore only be exercised during the session of the Senate." *Id.* The Recess Appointments Clause was required "as vacancies might happen *in their recess,* which it might be necessary for the public service to fill without delay." *Id.* Thus, the

recess-appointment power was crafted to ensure "convenience, promptitude of action, and general security" and to avoid the burden and expense of requiring "that the senate should be perpetually in session" to consider the President's appointments. 3 Joseph Story, *Commentaries on the Constitution* § 1551 (1833); *see also* 1 Op. Att'y Gen. 631, 632 (1823) (noting that the "meaning" of the Clause is that the President may fill a vacancy "which the public interests require to be [*10] immediately filled" when "the advice and consent of the Senate cannot be immediately asked, because of their recess").

In dealing with a provision, such as the Recess Appointments Clause, that departs from the Constitution's basic separation-of-powers framework, courts must interpret the provision in accord with the "specific purpose it is intended to serve." *Kennedy v. Sampson,* 511 F.2d 430, 437 (D.C. Cir. 1974) (construing the Pocket Veto Clause not to apply to an intra-session adjournment of Congress); *see also Wright v. United States,* 302 U.S. 583, 596, 58 S. Ct. 395, 400 (1938) (noting that the Pocket Veto Clause should be construed to effectuate its "two fundamental purposes"). The Recess Appointments Clause represents an "exception" to the general separation-of-powers framework of the Constitution, and of the Appointments Clause in particular. It authorizes the President to act in an exceptional manner when Congress's absence prevents it from performing its constitutional functions. It should therefore be construed to apply narrowly to an actual inter-session "Recess." Otherwise, the President will be able to aggrandize his power at the expense of the Senate by invoking an *exceptional* power – conferred upon him only for the rare situations in which the Senate cannot give advice and consent – and using it during brief Senate adjournments in which there is no such emergency need.

[*11] Modern intra-session Senate adjournments do not implicate the "specific purpose" of the Recess Appointments Clause because during such adjournments the Senate is not entirely "absent so that it can not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 25 (1921). Unlike inter-session recesses in the early Congresses, which

lasted for months, the "overwhelming majority of intra-session recesses last less than twenty days." Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?,* 92 Mich. L. Rev. 2204, 2240 (1994) (citing U.S. Gov't Printing Office, *1993-1994 Official Congressional Directory: 103d Congress* 580-90 (1993)). During the Second Session of the 107th Congress, for example, the Senate had six intra-session adjournments, none longer than eighteen days except for the summer recess of thirty-four days. *See* U.S. Gov't Printing Office, *2003-2004 Official Congressional Directory: 108th Congress* 525 (2004). "Only four intrasession recesses in history have exceeded sixty days, and none of these occurred in the past forty years." Carrier, *supra,* at 2240; *see also Sampson,* 511 F.2d at 441 ("[I]ntrasession adjournments of Congress have virtually never occasioned interruptions of [great] magnitude."). Moreover, as explained below, such adjournments do not interrupt the processing of nominations in the Senate. Modern intra-session adjournments do not undermine the President's ability to receive the advice and consent of the Senate, [*12] and therefore ought not be considered a "Recess" for purposes of the Recess Appointments Clause.

C. Department of Justice Opinions

With the exception of one minor and immaterial dictum, no court has addressed whether the President has the constitutional authority to make a recess appointment during an *intra-session* Senate adjournment that is not a formal recess.[3] Therefore, to defend such appointments, the Executive Branch has relied almost exclusively on (i) a 1921 Attorney General Opinion and (ii) the history of intra-session appointments. But neither of those sources provides credible authority for the constitutionality of Judge Pryor's intra-session appointment.

Most Attorneys General Opinions are written on behalf of the Executive to defend presidential prerogatives vis-à-vis Congress. As

[3] *Gould v. United States*, 19 Ct. Cl. 593, 596 (1884) (commenting that the legality of the intra-session recess appointment was "immaterial" to the question presented).

such, a court should accord them no precedential value and should consider them only to the extent that they are persuasive. *Cf. Crandon v. United States,* 494 U.S. 152, 177-78, 110 S. Ct. 997, 1011-12 (1990) (Scalia, J., concurring in the judgment); *see also* Henry M. Hart, Jr., Letter, Harv. L. Sch. Rec., Oct. 8, 1953, at 2 [hereinafter Hart Letter], *reprinted in Recess Appointments to the Supreme Court – Constitutional But* [*13] *Unwise?,* 10 Stan. L. Rev. 124, 127 n.12 (1957) ("[O]ccasional practice backed by mere assumption cannot settle a basic question of constitutional principle.").

This is especially true when, as here, those Opinions are inconsistent. Because there was with one exception virtually no use of the recess-appointment power before the Twentieth Century, the Executive's first known consideration of the question occurred in 1901, when Attorney General Knox stated that the recess-appointment power is limited to *inter-session* appointments, i.e., those made *between* sessions of Congress. 23 Op. Att'y Gen. 599, 600 (1901).

In 1921, however, Attorney General Daugherty "overruled" the Knox opinion, *see* 3 Op. Off. Legal Counsel 314, 315 (1979), concluding that the President could make recess appointments during an intra-session adjournment. 33 Op. Att'y Gen. 20 (1921). Attorney General Daugherty conceded that he was making a "practical construction" of the Constitution. *Id* at 22. He did not even attempt to justify his conclusion in light of the plain language, structure, or history of Article II. The 1921 Opinion was limited in its assertion of presidential authority. The "real question," in Attorney General Daugherty's view, was "whether *in a practical sense* the Senate is in session *so that its advice and consent can be obtained." Id.* at 21-22 (emphasis added). He concluded that an intra-session adjournment could be deemed a "recess" only in circumstances in which the Senate is "absent so that it can not receive communications from the President [*14] or participate as a body in making appointments." *Id.* at 25. "[L]ooking at the matter from [such] a practical standpoint," Daugherty reasoned that "no one" would view an adjournment "for 5 or even 10 days" as satisfying that prerequisite. *Id.*

Subsequent opinions of an Acting Attorney General and of the Office of Legal Counsel have uncritically followed the 1921 Daugherty Opinion without offering any additional significant constitutional defense of intra-session recess appointments and by consistently avoiding textual analysis of the Recess Appointments Clause.[4] *See* Carrier, *supra,* at 2236-38. In particular, those Opinions have offered no explanation beyond Executive expediency as to why the President should act in accord with Daugherty's questionable Opinion rather than following the sounder conclusion that General Knox reached in 1901, a conclusion that comports with the text, history, and purpose of Article II.

Even on their own terms, these Attorneys General Opinions would not justify Judge Pryor's appointment: They explicitly permit intra-session recess appointments only when it is *practically impossible* for the President to obtain the Senate's advice and consent because the Senate cannot receive presidential communications and cannot "participate" in its constitutionally assigned functions. [*15] *See, e.g.,* 1996 OLC Memo, *supra,* at *122 n.102; 16 Op. Off. Legal Counsel 15, 15-16 (1992); 41 Op. Att'y Gen. 463, 467 (1966). Even a much longer adjournment than the ten days at issue here would not have the disabling "practical" effect that Daugherty feared, because today's Senate can receive presidential nominations during adjournments, and the Senate Committees can and do commence or continue the advice-and-consent process during such adjournments.[5] *See* Carrier, *supra,* at 2241-43. Thus, whether it is to-

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[4] E.g., Off. Legal Counsel, *The Constitutional Separation of Powers Between the President and Congress*, 1996 OLC LEXIS 6, at *121 (1996), *available* at http://www.usdoj.gov/olc/delly.htm [hereinafter 1996 OLC Memo]; 41 Op. Att'y Gen. 463, 466-69 (1960).

[5] The Senate has authorized its Secretary to receive messages from the President, including nominations, which the Secretary then refers to the appropriate committee. *See* 149 Cong. Rec. S8 (daily ed. Jan. 7, 2003). A committee that receives a nomination during an intra-session recess can initiate the advice-and-consent process during the recess if necessary. The Senate rules authorize each committee "to hold . . . hearings," to require "the attendance of . . . witnesses," and "to take . . . testimony" during the "sessions, recesses, and adjourned periods of the Senate." Senate Standing Rule 26.1. For example, during the intra-session recess

day incorrect to assume that adjournments of "substantial" length – such as a month-long summer adjournment or a two-month election-related adjournment – could ever meet Attorney General Daugherty's test under certain circumstances, surely Daugherty was correct in concluding that a ten-day adjournment, such as in the present case, does *not* suffice, *see* 33 Op. Att'y Gen. 20, 25 (1921). It would be frivolous to argue that such an adjournment is "protracted enough to prevent [the [*16] Senate] from performing its functions of advising and consenting to executive nominations." 41 Op. Att'y Gen. 463, 466 (1966); *see also id.* at 469.

In the current case, the February recess in fact did not prevent the Senate from performing its function of advice and consent for Executive nominations. On the contrary, the Pryor nomination was communicated to the Senate ten months earlier; had been the subject of Judiciary Committee inquiries, hearings, and action; had been debated on the Senate floor twice; and had twice failed to obtain enough votes to go forward under Senate rules. Beginning on the very next business day after the purported recess appointment, the proponents of the nomination could have immediately resumed the Senate's "participation" in the constitutional process. Plainly, what prompted this recess appointment was not the Executive's disappointment that the Senate could not "participate" because of the holiday recess, but rather the Executive's effort to bypass the Senate's constitutionally assigned role. In the present case, the Pryor appointment was made on Friday when the Senate was returning to session on the following Monday. The Senate is rarely in session on a Saturday or Sunday. If the current appointment is upheld, this Court will be ruling that a recess appointment made after the Senate adjourns on any Friday would be valid even if the Senate is only in recess for the weekend, and the advice-and-consent function of the Senate would be a dead letter.

[*17] To the extent that the constitutional calculus should, as Attorney General Daugherty suggested, take account of the "practical"

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from January 7 to January 20, 1993, Senate committees "considered nearly every one of President-elect Clinton's cabinet nominations." Carrier, *supra*, at 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)).

effects of an intra-session "recess" appointment, surely those practical effects must necessarily include constitutional consequences. As explained in Part II, recess appointments to Article III judgeships result in profound harm to the judicial independence guaranteed by Article III. In cases such as this, in which the President appoints a judicial nominee whom the Senate has already refused to confirm, such appointments directly undermine the Senate's advice-and-consent function. Thus, far from alleviating a situation in which the Senate is, by virtue of its absence, unable to perform its advice-and-consent function, the intra-session recess appointment here undermines that function. It empowers the President to use any long weekend or holiday when the Senate is not in session as an excuse to install temporary judges in office even when the Senate has declined to confirm them – judges who have therefore not taken office pursuant to the democratic checks and balances that the Constitution prescribes.

D. The History Of Recess Appointments

Nor can the Department of Justice plausibly rely on the "[p]ast practice" of intra-session recess appointments to sustain the constitutionality of the practice. *See, e.g.,* 16 Op. Off. Legal Counsel 15, 16 (1992). Use of the recess-appointment power during short intra-session adjournments has no venerable historical pedigree. Like the legislative veto [*18] invalidated in *INS v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764 (1983), the intra-session recess appointment has become an all-too-common phenomenon – but the history of its use is both recent and sporadic. Indeed, it is a practice that has only flourished in recent years precisely *because* of, and pursuant to, the post-1920 Opinions of the Attorneys General.

As of 1901, when the Executive Branch first considered – and *rejected – the* constitutionality of the practice, records reveal only a handful of instances of nonmilitary intra-session recess appointments, all made by President Andrew Johnson in 1867. *See* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3, 5 (Apr. 23, 2004) [hereinafter 4/23/04 CRS Report]. Even after the 1921 Daugherty Opinion opened the door to the practice, Presi-

dents made fewer than a dozen intra-session appointments between 1921 and *1947 – none* of them to an Article III judgeship. *Id.* at 3, 7-9. During the period between 1947 and 1954, a small cluster of intra-session appointments (including a dozen judges) took place, but even then, the adjournments in question ranged from five weeks to twenty-one weeks in duration. *Id.* at 9-20; *see also* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments to Article III Courts* 2 (Mar. 2, 2004) [hereinafter 3/2/04 CRS Report]. Only since the 1970s have recess appointments during intra-session adjournments become a more recurrent, rather than a sporadic and extraordinary, practice. A practice "of such recent vintage," *Printz v. United* [*19] *States,* 521 U.S. 898, 918, 117 S. Ct. at 2376 (1997), cannot serve to justify the constitutionality of an otherwise unconstitutional practice.

Even the *recent* history does not support Judge Pryor's nomination. From 1954 until the Pryor nomination, Presidents made *no* intra-session appointments to Article III judgeships. *See* 3/2/04 CRS Report, *supra,* at 2. What is more, Judge Pryor's appointment came during a ten-day adjournment that is by far the shortest intra-session "recess" during which any Article III appointment has been made.[6] *Id.* This appointment is therefore an historical anomaly, not business as usual.

II. THE PRESIDENT MAY NOT MAKE RECESS APPOINTMENTS OF ARTICLE III JUDGES UNDER THE CIRCUMSTANCES PRESENT HERE

By filling offices with judges who lack the Article III protection of life tenure, recess appointments of federal judges, under any cir-

[6] The next-shortest adjournment for an Article III intra-session appointment occurred in 1948, when President Truman made several appointments at the beginning of a break scheduled to last more than six months but that in fact lasted only five weeks. *See* 41 Op. Att'y Gen. 463, 468 (1966); 4/23/04 CRS Report, *supra*, at 16. Even beyond judges, intra-session recess appointments within short recesses are exceedingly uncommon. Before the current President, only two of the nearly 300 intra-session appointments were made during recesses of under ten days, and only twenty-seven during recesses of between 11 and 20 days. *Id.*

cumstances, dilute Article III's guarantees of judicial independence. Given the grave constitutional doubt that any intra- [*20] session recess appointments are constitutional, the intra-session appointments to Article III judgeships clearly transgress constitutional bounds.

A. Principles of Judicial Independence

The Constitution envisions a federal judiciary composed of judges whose "jealously guarded" independence is assured by the "clear institutional protections" of life tenure and guaranteed salary. *N Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 60, 102 S. Ct. 2858, 2866 (1982). This independence is a fundamental part of the constitutional design. One of the charges that the Declaration of Independence leveled against the King was that he had "made Judges dependent on his Will alone, for the tenure of their Offices, and the Amount and Payment of their Salaries." The Declaration of Independence para. 11 (U.S. 1776). To remedy these defects, the Framers established "permanency in office" and a guaranteed salary as "indispensable ingredient[s] in [the] constitution" that could protect the judicial "firmness and independence" that served "as the citadel of the public justice and the public security." *The Federalist* No. 78, at 538 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ; *see also* Hart Letter, *supra,* at 2 ("On few other points in the Constitutional Convention were the framers in such complete accord as on the necessity of protecting judges from every kind of extraneous influence upon their decisions."); *cf.* 106 Cong. Rec. 18,130 (1960) [*21] (statement of Sen. Ervin) (describing the harm that could be done to judicial independence by recess appointments to the Supreme Court).

To ensure judicial independence, the Supreme Court has emphasized that federal judges exercising full Article III powers should have Article III's basic protections. In *Glidden Co. v. Zdanok,* 370 U.S. 530, 82 S. Ct. 1459 (1962), a majority of the Court affirmed the decisions of appellate panels comprised partly of judges from the Court of Claims and the Court of Customs and Patent Appeals only because those judges were protected by Article III. By contrast, in

Northern Pipeline, the Court invalidated a statute that authorized bankruptcy judges lacking Article III protections, 458 U.S. at 60-61, 102 S. Ct. at 2866, to exercise Article III power over a "broad range of questions," *id.* at 74. Recess-appointed judges sit on Article III courts such as this one, and exercise the full authority of Article III judges, yet they are deprived of Article III's protections of judicial independence. First, by the express words of the Recess Appointments Clause, they serve only temporary terms. Second, their salaries, if any, are at the mercy of Congress. *See, e.g.,* Act of Feb. 9, 1863, ch. 26, § 2, 12 Stat. 642, 646 (1863) (prohibiting payment of recess appointees until confirmation by the Senate); 5 U.S.C. § 5503 (2004) (detailing circumstances under which recess appointees may not be paid); Act of Jan. 23, 2004, Pub. L. No. 108-199, § 609, 118 Stat. 3 (2004) (depriving payment to recess appointees once their nominations are rejected).

[*22] The absence of protections for judicial independence subjects recess-appointed judges to political pressure from both the Legislative Branch and the Executive Branch. Recess-appointed judges are vulnerable to the President because he has the power to withdraw the judge's nomination (if the candidate is already nominated) or to withhold the judge's nomination (if the judge has not yet been nominated). More important, because Congress has power over such a judge's salary and his ultimate appointment, the judge may consciously or unconsciously calibrate decisions to appease Senators who would subject such decisions to close scrutiny at subsequent confirmation hearings.

Justice Brennan, who received a recess appointment to the Supreme Court in 1956, was aggressively questioned about his views on communism by Senator Joseph McCarthy during his subsequent confirmation hearings. *See Woodley,* 751 F.2d at 1015 (Norris, J., dissenting); *cf. Recess Appointments to the Supreme Court, supra,* at 141-42 (suggesting that concerns about such questioning led the Supreme Court to delay issuing two decisions written by Justice Brennan).

Similarly, Judge Pryor himself is already scheduled to sit on at least one case involving a highly controversial issue concerning the

qualified immunity of prison guards, with respect to which Senators have previously criticized him after the Supreme Court rejected his arguments (made in his capacity as Alabama's Attorney General) in *Hope v. Pelzer,* 536 U.S. 730, 122 S. Ct. 2508 (2002). *See* [*23] Jonathan Ringel, *11 th Circuit to Rehear Strip-Search Case En Banc,* Fulton County Daily Report, Apr. 12, 2004 (describing then-Attorney General Pryor's advocacy and explaining how a case to be heard en banc by the Eleventh Circuit, *Evans v. City of Zebulon,* 351 F.3d 485, 490, 497-98 (11th Cir. 2003), *reh'g en banc granted,* 364 F.3d 1298 (2004), involves a similar question); 149 Cong. Rec. S 14,085 (daily ed. Nov. 6, 2003) (statement of Sen. Kennedy) (criticizing Pryor's argument in *Hope v. Pelzer);* 149 Cong. Rec. 514,085 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer) (same); 149 Cong. Rec. S10,251 (daily ed. July 30, 2003) (statement of Sen. Durbin) (same). It is certain that Congress will closely consider any vote or opinion by Judge Pryor on this issue when it later considers his nomination. Such scrutiny may place serious pressures on Judge Pryor's decisions, making him a judge who decides cases with "one eye over his shoulder on Congress." Professor Paul A. Freund, Harv. L. Sch. Rec., Oct. 8, 1953, *reprinted in* House Comm. on the Judiciary, 86th Cong. 1st Sess., *Recess Appointments of Federal Judges* (Comm. Print Jan. 1959).

Politically vulnerable judges undermine the rights of individual litigants "to have claims decided before judges who are free from potential domination by other branches of government." *CFTC v. Schor,* 478 U.S. 833, 848, 106 S. Ct. 3245, 3255 (1986) (quoting *United States v. Will,* 449 U.S. 200, 218, 101 S. Ct. 471, 482 (1980)). No one, whether litigants or non-parties, will "believe the decision is that [*24] of judges 'as independent as the lot of humanity will admit,' if the decisive vote is cast by a [judge] whose job depends, among other things, on his surviving thereafter the raking fire of confirmation hearings," or the political inclinations of the President who controls the nomination. Hart Letter, *supra,* at 2. When a recess-appointed judge is subject to such external pressures, individual litigants lose the protections that Article III guarantees.

Even if an individual recess-appointed judge is not *in fact* influ-

enced by the political branches, the fact that a federal judge appears to be vulnerable to politics threatens the public perception of the judiciary as a legitimate institution. *Cf.* 28 U.S.C. § 455 (2004) (requiring the recusal of judges for the appearance of bias). The public perception of the illegitimacy of Judge Pryor's decisions will harm the judiciary even if Judge Pryor himself is in fact judging without fear or favor.

B. Prior Precedent

It is true that the only two courts of appeals to have addressed this issue have upheld recess appointments of federal judges. *Allocco,* 305 F.2d at 708-09; *Woodley, supra.* Judge Norris's dissenting opinion in *Woodley* presents a comprehensive and carefully reasoned analysis of the issue and compellingly demonstrates the fundamental weaknesses in both cases. At the very least, his opinion demonstrates vividly why those who would apply the recess-appointment power broadly have a heavy burden to meet.

[*25] Neither *Allocco* nor *Woodley* relied upon the text or structure of the Constitution. Indeed, the *Woodley* court acknowledged that the text of Articles II and III provides no basis for favoring one over the other in attempting to reconcile the inevitable tension between the two Articles on the question of recess appointments of federal judges. 751 F.2d at 1010. In choosing to subordinate Article III to Article II, both courts relied virtually exclusively upon "historical practice, consensus, and acquiescence." *Id.; Allocco,* 305 F.2d at 709, 713-14. In particular, each majority emphasized that President Washington made recess judicial appointments without any objection from Congress or from Framers who were members of Washington's cabinet (Hamilton, Jay, and Randolph), and that the practice has continued unabated, allegedly with "unbroken acceptance," *Woodley,* 751 F.2d at 1011, throughout the nation's history. *See id.* at 1010-12; *Allocco,* 305 F.2d at 709.

The four-judge dissent in *Woodley* demonstrated why both courts were mistaken in assuming that history resolves the question. Of course, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers,*

463 U.S. 783, 790, 103 S. Ct. 3330, 3335 (1983).[7] Early Presidents did *not* adopt the practice of judicial recess appointments [*26] after considered, reasoned deliberation as to the constitutional question. 751 F.2d at 1026-28 (Norris, J., dissenting); *cf. Marsh,* 463 U.S. at 791, 103 S. Ct. at 3336 (explaining that the First Congress "considered carefully" objections to legislative prayer based upon the First Amendment, which was debated and approved that same week). Moreover, Presidents have *unilaterally* adopted the practice in question, *without* any congressional input or approval – indeed, without even any *opportunity* for the legislature to weigh in. 751 F.2d at 1026. Thus, the historical precedent, no matter how longstanding, cannot resolve the constitutional impasse. The dissenters correctly concluded that because history – like text, structure, and evidence of the Framers' intent – does *not* provide a resolution to the "extraordinary situation" of "a direct conflict between two provisions of the Constitution," *id.* at 1017 (Norris, J., dissenting), it is necessary to evaluate and balance the competing constitutional values at stake, *id.* at 1015 (Norris, J., dissenting). They then proceeded to demonstrate that the recess appointment of judges seriously undermines the constitutional command "'that the independence of the Judiciary be jealously guarded,'" *id* at 1022 (Norris, J., dissenting) (quoting *Northern Pipeline,* 458 U.S. at 60, 102 S. Ct. at 2866).[8]

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[7] *See also id*. ('"It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)).

[8] The court in *Allocco* further relied on the questionable empirical assumption that political pressures on judges were at best a "hypothetical risk," 305 F.2d at 709, an assumption explicitly cited by the court in *Woodley*, 751 F.2d at 1014. Thus, both decisions fail to appreciate the far-reaching consequences of their arguments in an era where Congress closely scrutinizes the judiciary and the federal courts decide highly charged political issues. The *Allocco* court also underestimated another significant cost of permitting recess appointments of judges when it casually dismissed the argument that a President could use "the recess power to avoid the necessity of securing consent of the Senate whenever he found that advisable," and that "[b]y waiting until the Senate adjourns [the President] could fill judicial and other high offices with men unacceptable to the Senate," thus "present[ing] the Senate, after it reconvenes, with a fait accompli, forcing it to confirm his choice

[*27] The dissenters also demonstrated that in this context "[t]he concerns for efficiency, convenience, and expediency that underlie the Recess Appointments Clause pale in comparison." *Id.* at 1024. As explained above, brief Senate adjournments do not in any material respect diminish the capacity of the Senate to fulfill its constitutionally assigned advice-and-consent role. Even if President Bush were correct that this Court "need[ed] more judges to do its work with the efficiency the American people deserve and expect," White House Statement on Appointment of William H. Pryor, Jr., February 20, 2004, *available at* http://www.whitehouse.govinews/releases/2004/02/20040220-6.html, it was inappropriate to alleviate any harm to the judicial process as a result of the continuing vacancy by resort to the Recess Appointments Power, which was *not* designed to permit the President to install judges that the Senate has declined to confirm.

[*28] Finally, neither *Woodley* nor *Allocco* considered the constitutionality of intra-session recess appointments of federal judges, the principal issue here. For the reasons discussed above, such appointments pose different and troubling questions well beyond the difficulties posed by recess appointments generally.

C. Circumvention of the Senate's Role Under the Constitution

The reasoning of *Allocco* and *Woodley* cannot justify President Bush's recess appointment of Judge Pryor, which raises particular concerns under Article III. The circumstances surrounding Judge Pryor's nomination plainly demonstrate that this recess appointment was used to circumvent the Senate's advice-and-consent role and the requirements of Article III. The fact that a vacancy remained open on this Court as of the date of Judge Pryor's appointment was not in any respect the result of the Senate's brief holiday recess; it

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or to ignore a man already in office." 305 F.2d at 714. The court, noting that the Senate has confirmed almost all recess appointees to the bench, concluded that "history is eloquent proof' that such abuses are unlikely to occur. *Id* That confidence, however, is belied by recent recess appointments, including that of Judge Pryor.

was, instead, a function of the fact that the Senate, acting *in* its constitutionally assigned role, *already had declined* to confirm Judge Pryor, and of the President's failure to nominate for confirmation someone whom the Senate would be more likely to confirm pursuant to its longstanding rules. In these circumstances, invoking that short adjournment as a justification for circumventing the Senate's constitutional role is a manifest charade.

[*29] Judge Pryor's recess appointment stands in stark contrast with earlier uses of the recess-appointment power, which raised far fewer concerns with respect to Article III because there was little reason to believe that the Senate would not confirm the judges in question. As a recent report notes, most judicial recess appointees "were uncontroversial, with the recess appointment serving merely as a mechanism of convenience to allow the appointee to take office sooner rather than later." Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments* 13 (2004), *available at* http://fairjudiciary.com/cfl_contents/press/recessappointments.pdf. Thus, it is not surprising that the Senate has confirmed the "vast majority" (approximately eighty-five percent) of recess-appointed judges. *See id.* Unlike these earlier uses of the recess-appointment power, the President's appointment of Judge Pryor was not merely a "mechanism of convenience" but rather an effort to circumvent the Senate's confirmation process. Mayton, *supra, at* 41.

None of the factors that have been invoked as allegedly making the Pryor recess appointment distinctive, and thus as preventing that appointment from serving as a precedent for countless others, withstands analysis. If the concerns supposedly justifying President Bush's recess appointment in this case constitute sufficiently exigent circumstances to validate an intra-session recess appointment, then almost every future recess appointment could be made during extremely short [*30] Senate recesses on the same basis. If the Pryor nomination is validated, it would become an invitation to the current or any future President to use the Recess Appointments Clause to bypass Article II's advice-and-consent requirement, during any or all of the numerous weekend and holiday adjournments that characterize every Senate session.

CONCLUSION

For the foregoing reasons, the Court should declare, as a jurisdictional matter, that Judge Pryor's recess appointment is unconstitutional and that he may not participate in these cases as a circuit judge.

Respectfully Submitted,

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[*Because Ordinary Mail to the United States Senate is diverted to outside facilities for extended security screening and clearance, all correspondence and filings should be transmitted electronically or by overnight courier service. Upon request, an email address will be provided to the Court and the parties for this purpose.]

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RECESS APPOINTMENTS

Letter from Charles Grassley (additional signers listed in letter) to Eric Holder

January 6, 2012

[on stationery of the United States Senate, Committee on the Judiciary]

January 6, 2012

Via Electronic Transmission

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

Dear Attorney General Holder:

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

In 1921, Attorney General Daugherty issued an opinion to the President regarding recess appointments and the length of recess required for the President to make an appointment under Article II

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

The Department has also weighed in on the applicable time period for recess appointments in legal filings in federal courts. In 1993, the Department filed a brief in the federal district court for the District of Columbia arguing, "If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for [*2] more than three days without obtaining the consent of the House of Representatives."[5] Additionally, the Department, via the Office of the Solicitor General, argued in a 2004 brief to the Supreme Court, "To this day, official congressional documents define a 'recess' as 'any period of three or more complete days – excluding Sundays – when either the House of Representatives or the Senate is not in session."[6] This exact argument was also filed by the Solicitor General in another case during 2004.[7] Most recently, the Deputy Solicitor General ar-

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[1] 33 U.S. Op. Atty. Gen. 20, 25 (1921).

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

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

[4] 2001 OLC LEXIS 27.

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

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

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

gued before the Supreme Court in 2010 that "the recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days."[8]

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

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

(1) Was the Department asked to provide legal advice to the President regarding the decision to issue recess appointments of Cordray, Block, Flynn, and Griffin? If so, was a formal opinion from the Department prepared? If so, which office at the Department prepared the advice? If such advice was prepared, when will it to be made public?

(2) If a formal opinion was prepared, provide a copy of that opinion.

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

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

(3) Attorney General Opinions, such as the one offered in 1921, are essentially the forerunner to opinions that today come from the Office of Legal Counsel, providing legal advice to the President and executive branch on questions of law. Such OLC opinions are accorded, in the words of one former head of OLC, a "superstrong stare decisis presumption." Was the 1921 Attorney General Opinion withdrawn to make way for this new opinion of law that a recess appointment could be exercised when the Senate is in recess for only three days? [*3]

(4) Has the Department formally withdrawn any other prior opinions issued by the Attorney General or OLC regarding the length of time a recess must extend prior to the President making a recess appointment? If so, which ones were withdrawn or overturned? Provide the basis for withdrawing or overturning those opinions.

(5) Given this unprecedented maneuver of recess appointments taking place while the Senate stood in recess for only three days, would it be the Department's position that the President could make a recess appointment during the weekend or when the Senate stands in recess from the evening of one weekday to the morning of the next weekday?

(6) In 2010, the Deputy Solicitor General argued before the Supreme Court that "recess has to be longer than 3 days" for the President to use the recess appointment power. Does the Department continue to support this position? If not, why not?

(7) In the event that the Department has not withdrawn or overturned any of the prior opinions issued by the Attorney General or OLC, how does the Department reconcile those opinions with the decision of the President to make recess appointments while the Senate remained

in Session? If you believe the positions can be reconciled, provide a legal basis supporting this position.

(8) Do you believe the President's decision to make these recess appointments notwithstanding the absence of an adjournment resolution is constitutional? Please explain.

Thank you for your prompt attention to this matter and for responding no later than January 20, 2011. We look forward to your detailed response.

Sincerely,

[signed by Senators Charles E. Grassley, Orrin G. Hatch, John Kyl, Jeff Sessions, Lindsey O. Graham, John Cornyn, Michael S. Lee, and Tom Coburn]

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