STATEMENT OF CHARLES J. COOPER

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"Executive Overreach: The President's Unprecedented 'Recess' Appointments"

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Good morning Mr. Chairman and Members of the Committee. My name is Charles J. Cooper, and I am a partner in the Washington, D.C., law firm of Cooper & Kirk, PLLC. I appreciate the Committee's invitation to present my views on the constitutionality of the President's January 4 recess appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau. For reasons I will explain below, I believe that the President exceeded his constitutional authority by making these appointments during a three-day adjournment between pro forma Senate sessions. But first I would like to outline the professional experience that informs my thinking on this important subject.

I have spent the bulk of my career, both as a government lawyer and in private practice, litigating or otherwise studying a broad range of constitutional issues. From 1985 to 1988, I served as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, where I advised President Reagan and Attorney General Meese on numerous separation of powers and other constitutional issues. Perhaps most notable for present purposes, in early 1988 the President asked the Justice Department for its opinion as to whether the Constitution vests the President with an inherent power to exercise a line-item veto. After exhaustive study, the Office of Legal Counsel ("OLC") concluded that the proposition was not well-founded and that the President could not conscientiously attempt to exercise such a power. OLC's opinion is publicly available at 12 Op. O.L.C. 128 (1988).[1]

[1] As a former head of OLC, I am obliged to note that it is entirely proper and natural, in my view, for the Executive Branch and its legal advisors generally to favor, and to jealously protect, the powers and prerogatives of the office of the Presidency. That each branch of government will be alert to and guard against encroachment by the others—which is inevitable—is a fundamental premise on which the separation of powers is based. It follows, I believe, that the President is entitled to receive "the benefit of a reasonable doubt as to the law" from his legal advisors in the Department of Justice. *See* JACK L. GOLDSMITH, THE TERROR PRESIDENCY 35 (2007) (quoting EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 221-22 (1958)). Certainly this was OLC's view during the time when I served in that office in the Reagan Administration. To be sure, the President must be able to rely on OLC for *independent* legal analysis and advice; advocacy in defense of an Administration policy or action is a responsibility that falls to other components of the Department. OLC's obligation is to "provide advice based on its best understanding of what the law requires," and the office's faithful performance of that function will at times require it to advise that "the law precludes an action that [the] President strongly desires to take." *Guidelines for the President's Legal Advisors*, 81 INDIANA L. J. 1345, 1348-49 (2006). But OLC is not a court, and its independence does not entail the neutrality that is the hallmark of judicial independence. "OLC differs from a court in that its responsibilities include *facilitating* the work of the Executive Branch and the *objectives* of the

Since leaving government service in 1988, I have been involved in a number of significant separation of powers cases in both the Supreme Court and the lower federal courts. *E.g.*, *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that individual congressmen lack standing to challenge Line Item Veto Act); *Clinton v. New York*, 524 U.S. 417 (1998) (holding that Line Item Veto Act violates Presentment Clause); *FEC v. NRA*, 513 U.S. 88 (1994) (dismissing case as improvidently granted because FEC lacked statutory authority to file cert petition); *FEC v. NRA*, 6 F.3d 821 (D.C. Cir. 1993) (holding that congressional appointment of *ex officio*, nonvoting FEC commissioners violates the Appointments Clause); *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990) (enjoining operations of the Office of Thrift Supervision because Directors' appointments were not authorized by Appointments Clause or Vacancies Act). Together, these experiences have made me a student of the system of checks and balances implicated by the recess appointments that are the subject of this hearing.

I

Between December 17, 2011, and January 23, 2012, the Senate held a series of "pro forma sessions" designed to break the holiday period into three-day adjournments in order to comply with its constitutional obligation not to adjourn for more than three days during a congressional session without the consent of the House of Representatives. U.S. CONST. Art. I, § 5, cl. 4. The order that scheduled these pro forma sessions was entered by unanimous consent and provided that there was to be "no business conducted." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). At one of its pro forma sessions, however, the Senate passed by unanimous consent a two-month extension of the payroll tax cut, as requested by President Obama. *Id.* at S8789 (daily ed. Dec. 23, 2011). And on January 3, 2012, the Senate met in pro forma session to comply with the Twentieth Amendment's requirement that Congress meet on that date "in every year . . . unless they shall by law appoint a different date." The following day, on January 4, the President made four recess appointments, making Richard Cordray the first Director of the

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President, consistent with the requirements of the law." *Id.* Indeed, "OLC must take account of the administration's goals and assist their accomplishment within the law." *Id.* Thus, OLC should maintain a relationship of what I call "friendly independence" to the Administration and the President it serves.

OLC often confronts legal issues that do not have black or white answers; many are close and difficult questions of law, and the answer is sufficiently uncertain—sufficiently gray—that OLC cannot properly, conscientiously say that the proposed Executive Branch action is legally precluded. If the answer falls in the gray area—it is neither yes nor no, but rather is maybe yes and maybe no—then the action is not controlled by law, and the President is free to choose the course that best serves his purpose and goals, in full view of the legal risks. In approving the constitutionality of the recess appointments at issue here, OLC candidly acknowledged that "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." 2012 OLC op. at 4. And while I believe that the constitutional question raised by the January 4 recess appointments is not close, and that the litigation risk for the appointments is preclusive, I respect the views of those, within OLC and without, who see it differently.

Consumer Financial Protection Bureau ("CFPB") and filling three vacant seats on the National Labor Relations Board ("NLRB"). The Cordray appointment, if sustained, will empower the CFPB to exercise Dodd-Frank's "newly-established federal consumer financial regulatory authorities" for the first time. Letter from Inspectors General of the Federal Reserve and Department of the Treasury to Spencer Bachus, Chairman, Committee on Financial Services, and Judy Biggert, Chairman, Committee on Financial Services, Subcommittee on Insurance, Housing and Community Opportunity at 6 (Jan. 10, 2011); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1066 (codified at 12 U.S.C. § 5586) (authorizing Secretary of the Treasury to exercise certain preexisting federal powers transferred to the CFPB until a CFPB Director is appointed). The NLRB recess appointments are of similar significance because without them the Board would have only two members, and thus would lack the quorum needed to take action. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Two days after announcing the appointments, on January 6, the Administration released an OLC opinion that explains the legal rationale for the President's actions. Before addressing the merits of OLC's analysis, some background on the constitutional provisions at issue may be useful.

II

The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate" to "appoint . . . Officers of the United States." U.S. CONST. Art. II, § 2, cl. 2. This "general mode of appointing officers of the United States" is "confined to the President and Senate jointly," THE FEDERALIST NO. 67 (Alexander Hamilton), and it has always been the method by which the vast majority of officers receive their commissions. As a "supplement" to this usual procedure, *id.*, the Recess Appointments Clause authorizes the President 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. II, § 2, cl. 3. The Framers gave the President this "auxiliary" power because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and yet "vacancies might happen in their recess, which it might be necessary for the public service to fill without delay." THE FEDERALIST NO. 67.

Because the Recess Appointments Clause permits the President, under the specified circumstances, to bypass the Senate and make appointments unilaterally, it has been a rich source of conflict between Presidents and Congresses since the early days of the Republic. The earliest disputes concerned the questions whether a recently created office, which has never before been occupied, creates a "vacancy" and whether a vacancy that occurs when the Senate is in session "happen[s] during the recess of the Senate." *See, e.g.*, Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976); Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, at 165-67 (John Catanzariti et al. ed., 1990); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350-53 (R. Worthington ed., 1884); 26 Annals of Cong. 652-58, 694-722, 742-60 (1814); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 188-89 (2001). Although there is substantial textual and historical support for a negative answer to both of these questions, *see* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); *Stephens v. Evans*, 387 F.3d 1220, 1228 (11th Cir. 2004) (Barkett, J., dissenting), in an 1823 opinion Attorney

General William Wirt embraced the broader view that the Executive Branch has taken since. 1 Op. Att'y Gen. 631 (1823). Attorney General Wirt's opinion reads the phrase "may happen during the recess of the Senate" to mean "may happen to exist during the recess of the Senate," and so concludes that the President may fill any seat that is open during a recess regardless of when it became open or whether it has been previously occupied. *Id.* at 631-32.

Lengthy adjournments during sessions of Congress were rare in the early nineteenth century, but longer so-called "intrasession recesses" became more common in recent decades. With a single exception, *see* Rappaport, *supra* at 1572, the uniform practice of Presidents through World War I was to refrain from making recess appointments during intrasession adjournments, and in 1901 Attorney General Knox concluded that the President lacks constitutional authority to do so, 23 Op. Att'y Gen. 599 (1901). But in 1921, Attorney General Daugherty advised President Coolidge that he could break with prior precedent and constitutionally make recess appointments any time the Senate is unable to "receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). Although the Senate has intermittently objected to intrasession recess appointments in the years since, *see, e.g.*, Brief for Senator Edward M. Kennedy as Amicus Curiae, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424), Attorney General Daugherty's opinion is the basis for what has become the Executive Branch's settled view, *see, e.g.*, *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272-73 (1989); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315-16 (1979); 41 Op. Att'y Gen. 463, 468 (1960). Although the Supreme Court has never addressed the meaning of the Recess Appointments Clause, a number of the Courts of Appeals have acquiesced, in whole or in part, in the Executive's longstanding view of this Clause. *See, e.g.*, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding intrasession recess appointment to fill vacancy that occurred while the Senate was in session); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985 (en banc) (upholding recess appointment to fill vacancy that did not arise while the Senate was in recess); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) (same).

Against this backdrop of interbranch disputes and shifting historical practices, the constitutional issue that brings this Committee into session today is whether the Senate may use pro forma sessions to prevent the President from making recess appointments. More concretely, the question is whether the Senate was continuously in recess from December 17 to January 23 despite repeatedly gaveling itself into session and, in one instance, actually passing a bill. In my view, the Senate was not in "Recess" during its pro forma sessions, and the recess appointments at issue exceeded the President's constitutional authority.

III

Before discussing the Administration's legal rationale for the January 4 appointments, I will first frame the issue by noting two things that OLC's opinion does not say. First, the opinion does not suggest that the President can make recess appointments during a Senate adjournment of only three days—the length of the adjournment between the pro forma sessions at issue here. Instead, OLC's legal argument rests entirely on its conclusion that the Senate is not actually in session during its pro forma sessions, and so was in continuous recess between December 17 and January 23. For OLC, then, the Senate's pro forma sessions are a constitutional nullity, at least for purposes of the Recess Appointments Clause.

OLC's reluctance to argue that the President can make recess appointments during a three-day Senate adjournment is hardly surprising given the substantial weight of authority to the contrary. Even Attorney General Daugherty, whose 1921 opinion extended the President's recess appointment power to intrasession adjournments, acknowledged that "an adjournment of 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. at 25. Since then, lawyers serving in numerous Administrations have advised Presidents to wait for a recess of some significant duration before making recess appointments. *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* at 3 (Feb. 20, 2004); *The Pocket Veto: Historical Practice and Judicial Precedent*, 6 Op. O.L.C. 134, 149 (1982) (observing that OLC "has generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief"); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315-16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970). Indeed, the current Administration recently took this position before the Supreme Court in *New Process Steel*, arguing that "the Senate may act to foreclose" the President's power to recess appoint a third member of the NLRB "by declining to recess for more than two or three days at a time over a lengthy period." Letter to William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457); *see also* Transcript of Oral Argument at 50, *New Process Steel*, 130 S. Ct. 2635 (Katyal) (explaining that for the President to make a recess appointment "the recess has to be longer than 3 days"). And recent Presidents have accepted their lawyers' advice: from the start of the Reagan Administration until last month, the shortest recess during which a President made a recess appointment was 10 days. *See* Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 10 (Jan. 9, 2012).

If, as I believe, the Administration is wrong when it claims that pro forma Senate sessions are a legal nullity, then the President's appointments are contrary to both the weight of legal authority and historical practice. Indeed, as far as I am aware, the present case would stand alone as the shortest intrasession recess during which any President has ever made a recess appointment. Presidents have made recess appointments during *intersession* recesses of less than three days on only two occasions, Hogue, *supra*, at 10, and in at least one of these cases the Senate vigorously protested, *see* S. Rep. No. 4389, 58th Cong., 3d Sess., *reprinted in* 39 Cong. Rec. 3823, 3824 (1905).

Second, the OLC opinion does not suggest that the Senate is powerless to block recess appointments by remaining in session. To the contrary, OLC expressly acknowledges that "[t]he Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session." 2012 OLC Op. at 1. The only question, then, is whether the Senate's acknowledged power to thwart the President's recess appointment power was properly exercised through its use of pro forma sessions.

IV

The threshold reason to conclude that the Senate's pro forma sessions interrupted its holiday adjournment is that the Senate says so. The Constitution vests in each House of Congress

the power to "determine the Rules of its Proceedings," U.S. CONST. Article I, § 5, cl. 4, and rules governing how and when the Senate meets and adjourns are quintessential rules of proceedings. Because the Rulemaking Clause commits to the Senate judgments about the meaning of its own rules, the Senate's determination that it was repeatedly in session between December 17 and January 23 should end the matter.

The Framers understood that the Houses of Congress must have authority to make their own rules to function as a coequal branch of government. *See* Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, Document 14 ("Each house of Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."). As Joseph Story explained in his authoritative constitutional treatise, "[t]he humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 835 (1833).

When Congress makes rules that govern its proceedings, the President should, like the courts, defer to the legislative branch. *See Mester Mfg. v. INS*, 879 F.2d at 571 (9th Cir. 1989) ("The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress."). Courts honor Congress' rules under the enrolled bill rule by treating the attestations of the two houses as "conclusive evidence that a bill was passed by Congress," even in the face of evidence that demonstrates otherwise. *Pub. Citizen v. District of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007); *see also OneSimpleLoan v. U.S. Secretary of Educ.*, 496 F.3d 197 (2d Cir. 2007). This doctrine reflects "the respect due to a coordinate branch of government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), and underscores the very limited inquiry courts make where the Congress' rules of proceedings are at issue. For similar reasons, the D.C. Circuit has held that it will defer to Congress' interpretation of ambiguous congressional rules—to the point that disputes over the meaning of such rules are nonjusticiable; were it otherwise, "the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone." *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995).[2] And although OLC is surely correct when it says that Congress "'may not by its rules ignore constitutional restraints or violate fundamental rights,'"

[2] Accordingly, there is a substantial argument that any ambiguity over when the Senate is in session is nonjusticiable and that in such a case a court should refuse to entertain arguments contrary to the Senate's own determination that it is in session. If a court so held, it would still hear challenges to the President's recess appointments but would refuse to second-guess the Senate's determination that it was not in recess during its pro forma sessions between December 17 and January 23. *See United States v. Mandel*, 914 F.2d 1214 (9th Cir. 1990) (permitting prosecution for exporting goods on commodity control list to proceed even after concluding that political question doctrine barred defendant's challenge to Secretary of Commerce's decision to place particular items on list). This is not to say that a court would defer even to a Senate determination that is manifestly and unambiguously false as a factual matter, such as a claim that the Senate was in continuous session during a prolonged period when the Senate chamber was in fact empty. Here, regardless of whether the Senate has absolute or only very broad discretion to say when it is in session, it plainly acted within the bounds of its authority by declaring itself to be in session at times when it was able to, and in one instance actually did, pass legislation.

2012 OLC Op. at 20 (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)), the Supreme Court has made clear that "within these limitations all matters of method are open to the [Senate's] determination," *Ballin*, 144 U.S. at 5.

The present case underscores the Framers' wisdom in giving each House of Congress exclusive authority to make its own rules. Here the President purports to tell the Senate what it must do to bring itself into session and retroactively declares a series of Senate sessions to be a constitutional nullity. The Rulemaking Clause does not permit such executive interference in the Senate's internal procedures any more than it would permit similar interference by the courts. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). To hold otherwise would threaten Congress's ability to function as an independent branch of government, undermining the checks and balances that the Framers "built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). For this reason I believe that OLC is in error when it concludes that the President has "large, although not unlimited discretion to determine when there is a real and genuine recess." 2012 OLC Op. at 14 (internal quotation marks omitted). It is for the Senate, not the President, to establish and interpret Senate rules and procedures.

It is no answer to say that the Senate could use its rulemaking authority to prevent the President from making recess appointments "by declaring itself in session when, in practice, it is not available to provide advice and consent." 2012 OLC Op. at 20. As discussed in detail below, the Senate has not done this, for it is available to provide advice and consent during its pro forma sessions. In any event, the Constitution empowers the Senate to block recess appointments by refusing to recess, and the validity of the President's January 4 appointments depends on his judgment that the Senate unsuccessfully attempted to exercise this power. As Alexander Hamilton explained in Federalist 76, the Framers denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. The prospect of an intransigent Senate that refuses to confirm the President's nominees is an unavoidable corollary of the Framers' decision to "divid[e] the power to appoint the principal federal officers . . . between the Executive and Legislative branches." *Freytag v. Commissioner*, 501 U.S. 868, 869 (1991).

V

But even if the Rulemaking Clause did not give the Congress exclusive authority to decide when and how to recess, the better view would still be that the President cannot make recess appointments when the Senate is in pro forma session. Although the use of pro forma sessions to block recess appointments is a relatively new practice—first threatened during the Reagan Administration and first used against George W. Bush—there is a firmly established practice of using pro forma sessions to satisfy the requirements of other constitutional provisions.

Since at least 1949, the Senate has repeatedly held pro forma sessions to comply with Article I, Section 5's requirement that it not adjourn for more than three days without the House's permission. *See, e.g.*, 95 Cong. Rec.12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); 96 Cong. Rec. 7821 (May 29,1950); 96 Cong. Rec. 16,980 (Dec. 22,1950); 96 Cong. Rec. 17,020 (Dec. 26, 1950); 96 Cong. Rec. 17,022

(Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); 97 Cong. Rec. 2898 (Mar. 26, 1951); 97 Cong. Rec. 10,956 (Aug. 31, 1951); 97 Cong. Rec. 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957). Congress has also used pro forma sessions to satisfy the Twentieth Amendment's requirement that it meet at noon on January 3 to start a new session unless a different time is specified by statute. *See* H.R. Con. Res. 232, 96th Cong., 93 Stat 1438 (1979) (pro forma session to be held on January 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (pro forma session to be held on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (pro forma session to be held on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session to be held on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session to be held on January 3, 2012). Pro forma sessions have long been widely accepted as a permissible method of fulfilling these constitutional mandates, and it is difficult to see how the Senate could be in session for purposes of one constitutional provision while in recess for purposes of another.

VI

Rejecting these arguments, OLC relies instead on the purpose of the Recess Appointments Clause: "to provide a method of appointment when the Senate [is] unavailable to provide advice and consent." 2012 OLC Op. at 15. Throughout its lengthy opinion, OLC repeatedly emphasizes the Executive Branch's "traditional view that the Recess Appointments Clause is to be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations . . . ." *Id.* at 4. In concluding that a pro forma session of the Senate is indistinguishable from a recess of the Senate, OLC argues that "the touchstone is [the pro forma sessions'] 'practical effect, viz., whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations.' " *Id.* at 12 (quoting *Recess Appointments*, 41 Op. Att'y Gen. at 467).[3]

OLC is certainly correct that the Recess Appointments Clause was intended to provide "an auxiliary method of appointment," as Hamilton put in Federalist No. 67, for filling "vacancies that may happen during the recess of the Senate," when the Senate is unavailable to perform its advice and consent function. But even accepting at face value OLC's "practical construction" of the Recess Appointments Clause, the recess appointments made by the President on January 4 cannot reasonably be justified on the ground that the Senate was *unavailable* or otherwise *unable* to perform its advice and consent function. Rather, the Senate has simply been *unwilling* to provide its advice and consent to the President's nominees.

First, not only has the Senate been "available" *in fact* to consider these nominations, it has *actually been considering* some of them for many months. The President recess appointed Terence Flynn to a seat on the NLRB that had been vacant since August 27, 2010, when Peter Schaumber's statutory term expired. National Labor Relations Board, *Members of the NLRB*

[3] *See also, e.g.*, 2012 OLC Op. at 14 ("[B]rief pro forma sessions of this sort, at which the Senate is not capable of acting on nominations, may properly be viewed as insufficient to terminate an ongoing recess for purposes of the Clause."); *id.* at 15 ("[W]e believe the critical inquiry is the 'practical' one identified above—to wit, whether the Senate is available to perform its advise and consent function.").

since 1935, https://www.nlrb.gov/members-nlrb-1935 (last visited Feb. 11, 2012). This vacancy thus occurred by operation of law, not as a result of some unexpected event such as resignation or death. Yet the President waited over four months, until January 2011, to nominate Mr. Flynn to fill the seat. Far from being unavailable or otherwise unable to provide its advice and consent to Mr. Flynn's nomination, the Senate has simply been unwilling to do so for over a year. In the case of Richard Griffin, the President waited until December 15, 2011—two days before the Senate's adjournment for the holiday—to nominate him to a seat that became vacant at the expiration of Wilma Liebman's statutory term months earlier, on August 27, 2011. *Id.* Again, this vacancy on the NLRB occurred by operation of law; it took no one by surprise. It is untenable for OLC to claim that the President acted to fill these vacancies because the Senate was not "capable of exercising its constitutional function of advising and consenting to executive nominations." 2012 OLC Op. at 12.

Indeed, in publicly announcing his recess appointment of Mr. Cordray to the CFPB, President Obama abandoned any pretense that he was acting because the Senate was unavailable to consider the nomination. To the contrary, the President declared that he was making the recess appointment *despite* the fact that the Senate *had been considering* the nomination for over six months. This is what he said: "Now, I nominated Richard for this job last summer . . . For almost half a year, Republicans in the Senate have blocked Richard's confirmation. They refused to even give Richard an up or down vote . . . ." President Barak Obama, Remarks by the President on the Economy, *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy (Jan. 4, 2012). The President was not complaining that the Senate was unavailable or unable to confirm Mr. Cordray. He was complaining that the Senate refused to confirm Mr. Cordray. And, as he candidly proclaimed: "I refuse to take no for an answer." *Id.*

Thus, the President himself has openly acknowledged that his purpose in recess appointing Mr. Cordray to the CFPB had nothing to do with the only purpose offered by his lawyers at OLC as providing a constitutional justification for the exercise of his power to do so. The President's January 4 recess appointments were driven not by any concern that the Senate was unavailable to perform its constitutional role in the appointment of government officers, but rather by the President's determination, openly avowed, to circumvent the Senate's role.

VII

For OLC, however, the Senate's availability to perform its advice and consent function is not determined by whether the Senate is *in fact* available to consider a nomination, or even by whether it has in fact *been considering* a nomination for many months. Rather, OLC focuses solely on whether the Senate's availability to consider a nomination is interrupted by a recess of sufficient duration to justify exercise of the President's recess appointment power. And, as previously noted, it has opined that the Senate was unavailable throughout its holiday adjournment—from December 17 to January 23—because the days in which the Senate held a pro forma session were constitutionally indistinguishable from the days in which the Senate chamber was dark and empty.

But this assertion collapses under the weight of a single inconvenient truth: while holding a pro forma session on December 23, the Senate passed a bill—a two-month extension of the payroll tax cut—which the President promptly signed into law. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). (The House passed the extension bill on the same day, also during a pro forma

session.) This was not the first time that the Senate had passed legislation during a pro forma session. *See id.* at S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act during pro forma session). In passing the payroll tax cut extension, the Senate acted by unanimous consent, the same procedure by which the Senate confirms most presidential nominees. MICHAEL L. KOEMPEL & JUDY SCHNEIDER, CONGRESSIONAL DESKBOOK § 10.80 (5th ed. 2007); *see, e.g.*, 157 Cong. Rec. S7874-75 (daily ed. Nov. 18, 2011); 157 Cong. Rec. S4303 (daily ed. June 30, 2011); 156 Cong. Rec. S587 (daily ed. Feb. 11, 2010). In fact, the Senate confirmed numerous nominees by unanimous consent the very day it agreed to hold the pro forma sessions at issue here. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011). If the Senate can pass legislation by unanimous consent during a pro forma session, then it can surely confirm the President's nominees in the same manner, especially if there is an immediate and indisputable need for it to do so. Further, Senate committees often consider presidential appointees when the Senate is in intrasession recesses. During the intrasession recess from January 7 to January 20, 1993, for example, Senate committees "considered nearly every one of President-elect Clinton's cabinet nominations." Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)). Had some national emergency over the holiday break made the filling of a vacant office imperative, there is no doubt that the Senate would have been able to confirm a nominee at one of its pro forma sessions. Nor is there any doubt that the President could have called the Senate into session for the purpose of performing its advice and consent function, if he determined that the national interest required him to do so. U.S. CONST., ART. II, § 3, cl. 2.

The OLC opinion answers that, even if in fact the Senate is able to act during its pro forma sessions, the President "may properly rely on the public pronouncements of the Senate that it will not conduct business." 2012 OLC Op. at 21. There are several problems with this argument.

First, the Senate's scheduling order directing that no business be conducted during pro forma sessions was entered by unanimous consent, and there can be no doubt that the Senate was perfectly free to overrule it, and to conduct business, by unanimous consent. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 1313 (1992) ("A unanimous consent agreement can be set aside by another unanimous consent agreement."). Surely, under a "practical construction" of the Recess Appointments Clause "focusing on the Senate's ability to provide advice and consent to nominations," 2012 OLC Op. at 4, the indisputable practical reality that the Senate is able to provide advice and consent to nominations during a pro forma session trumps a non-binding public pronouncement to the contrary. Second, given that the Senate passed a law during its pro forma session on December 23, prior to the January 4 recess appointments, the President plainly was not entitled to rely on the Senate's *repudiated* public pronouncement that no business would be conducted at such sessions. If a Senate recess is defined as any period during which the Senate is not available to conduct business, then surely the Senate cannot be in recess when it passes legislation. Finally, President Obama in fact has not relied on the Senate's no-business pronouncement. It was the President who urged the Senate to pass the two-month extension of the payroll tax cut during the holiday adjournment, and he promptly signed the bill into law notwithstanding that it was passed by the Senate in plain violation of the order scheduling the December 23 pro forma session. The President surely is not entitled *both* to rely on the Senate's public pronouncement that it will not conduct business *and* to ignore it, as he pleases.

Rather than furthering the purpose of the President's recess appointment power, the OLC opinion would allow that power to swallow the Senate's authority to withhold its consent when it believes a nominee should not be confirmed. The President's January 4 recess appointments had nothing to do with whether the Senate was available to act and everything to do with the Senate's unwillingness to confirm the President's nominees. As with every branch of our government, there is "hydraulic pressure" within the Executive "to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Regardless of whether the President has sought to exceed his power for good or ill, it is Congress' constitutional responsibility to resist him.