

# **UNPRECEDENTED OBSTRUCTION**

---

## **An Examination of the Facts Leading to President Obama's Recess Appointments**

**Presentation of the Minority Staff**

**Rep. Elijah E. Cummings, Ranking Member**

**Committee on Oversight and Government Reform**

**U.S. House of Representatives**

**February 1, 2012**



For information related to this presentation, please contact:

Minority Staff, Committee on Oversight and Government Reform

(202) 225-5051

<http://democrats.oversight.house.gov/>

---

# Republican Senators Objected to ANY Consumer Financial Protection Bureau Nominee

---

“We will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the Consumer Financial Protection Bureau is reformed.”

– Letter from 44 Republican Senators to President Obama –  
(May 2, 2011)

# UNPRECEDENTED OBSTRUCTION

---

“They insist that a legitimately passed law be changed before allowing it to function with a director – a modern-day form of nullification. ...There is nothing normal or routine about this. The Senate policing of non-cabinet appointments is sometimes more aggressive but the current practice goes well beyond that, more like pre-Civil War days than 20th century practice.”

– Thomas Mann of the Brookings Institute –  
(July 19, 2011)

*Source: The New Nullification: GOP v. Obama Nominees, The New Republic  
(July 19, 2011)*

# UNPRECEDENTED OBSTRUCTION

---

## Senator Mike Lee

---

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

*Source: Statement of Senator Mike Lee, Senate Judiciary Committee Business Meeting  
(January 26, 2012)*

---

## C. Boyden Gray

---

“I believe the use of the Senate Cloture rule to permanently block nominations conflicts with the Constitution’s Advice & Consent clause.”

*Source: The Hotline  
(March 1, 2005)*

# UNPRECEDENTED OBSTRUCTION

---

## Critical Consumer and Worker Protections Thwarted by Senate Republicans

---

### National Labor Relations Board

- Form or join a union;
- Bargain collectively for a contract that sets wages, benefits, hours, and other working conditions;
- Discuss working conditions or union organizing with co-workers or a union;
- Act with co-workers to improve working conditions by raising complaints with an employer or a government agency; and
- Choose not to join a union or engage in union activities.

### Consumer Financial Protection Bureau

- Identify and curb unfair, deceptive, and abusive financial practices;
- Rein in predatory payday loans;
- Ensure credit reporting agencies comply with consumer protections;
- Safeguard against abusive debt collection; and
- Monitor private student lenders, non-bank mortgage companies, and other financial institutions.

---

# President Obama Used the Recess Appointments Power to Maintain Operation of Two Critical Agencies

---

“The American people deserve to have qualified public servants fighting for them every day—whether it is to enforce new consumer protections or uphold the rights of working Americans. We can’t wait to act to strengthen the economy and restore security for our middle class and those trying to get in it, and that’s why I am proud to appoint these fine individuals to get to work for the American people.”

– The White House, Press Release, *President Obama Announced Recess Appointments to Key Administration Posts* –  
(January 4, 2012)

---

# Republican Presidents Have Used Recess Appointments to Maintain Operation of Government

---

## President Ronald Reagan

- Four Recess Appointments to the Legal Services Corporation
- Four Recess Appointments to Overseas Ambassadorships
- 28 Recess Appointments to Assorted Federal Agencies and Commissions

## President George W. Bush

- One Recess Appointment to head the newly created Transportation Security Administration



---

# Republican Presidents' Recess Appointments similar to President Obama

---

## President Ronald Reagan

### **Four Recess Appointments to Legal Services Corporation**

“The new ‘recess appointments’ were necessary to give the board a quorum to operate, since the terms of all but two of the board members...expired last month.”

*Source: “4 Named to Board of Legal Unit,” The New York Times  
(January 22, 1983)*

---

### **Appointments of Four Overseas Ambassadors and 28 other people to various Federal agencies and Commissions**

“Marlin Fitzwater, the White House spokesman, said all the appointments, ‘represented an urgency of one kind or another...’”

*Source: “Lame-Duke Appointments by President Touch Off Questions About Timing,” The New York Times  
(November 24, 1988)*

---

# President Bush's 8 Recess Appointments to the National Labor Relations Board

---

<b>Name</b>	<b>Year Appointed</b>
Peter J. Hurtgen	2001
Michael Bartlett	2002
William B. Cowen	2002
Ronald E. Meisburg	2003
Peter Schaumber	2005
Peter N. Kirsanow	2006
Ronald E. Meisburg	2006
Dennis P. Walsh	2006

---

# Double Standard on Recess Appointments?

---

## President George W. Bush

Recess Appointed as Head of Newly-Created  
Transportation Security Administration

---

John Magaw

Rationale:

“Given the importance of moving quickly to protect the public ... and the upcoming deadlines in congressional legislation, the president thought it was too important to wait for Congress...”

*Source: “Bush Tackles Transportation Security,” Associated Press (January 8, 2002)*

---

Republican  
Reaction

Rep. John Mica, Member of House Committee on  
Oversight and Government Reform

---

“I am pleased that President Bush has taken this action to allow John Magaw to immediately assume the responsibilities of our nation’s new undersecretary for transportation security.”

*Source: “Bush Tackles Transportation Security,” Associated Press (January 8, 2002)*

---

# Republican Reaction to President George W. Bush's Recess Appointments

---

## Senator Kyl

“When someone is qualified and has the confidence of the President ... unless there is some highly disqualifying factor brought to our attention – [we] should accede to the President’s request for his nomination and confirm the individual.”

-- Senate Floor Statement on  
Gonzales Nomination (February 2, 2005)

## Senator Roberts

“The American people are paying for fully staffed courts and are getting obstructionism and vacant benches. Reckless behavior such as this is irresponsible and a waste of taxpayer dollars.”

-- Senate Floor Speech (November 12, 2003)

---

# Office of Legal Counsel Approved President Obama's Appointments

---

“[A]llowing the Senate to prevent the President from exercising his authority under the Recess Appointments Clause by holding pro forma sessions would be inconsistent with both the purpose of the Clause and historical practice in analogous situations.”

– Department of Justice, Office of Legal Counsel –  
*Memorandum on Lawfulness of Recess Appointments During a Recess of the  
Senate Notwithstanding Periodic Pro Forma Sessions*  
(January 6, 2012)

---

# Two Former Office of Legal Counsel Officials from the Bush Administration Agree

---

“[T]he Senate cannot constitutionally thwart the president's recess appointment power through pro forma sessions...The president should consider calling the Senate's bluff by exercising his recess appointment power to challenge the use of pro forma sessions.”

– Steven G. Bradbury and John P. Elwood –  
Former Assistant and Deputy Assistant Attorney General  
Office of Legal Counsel  
(Served 2005 to 2009)

*Source: “Call the Senate's Bluff on Recess  
Appointments,” Washington Post  
(October 15, 2010)*

---

# Pro Forma Sessions Do Not Thwart Recess Appointments

---

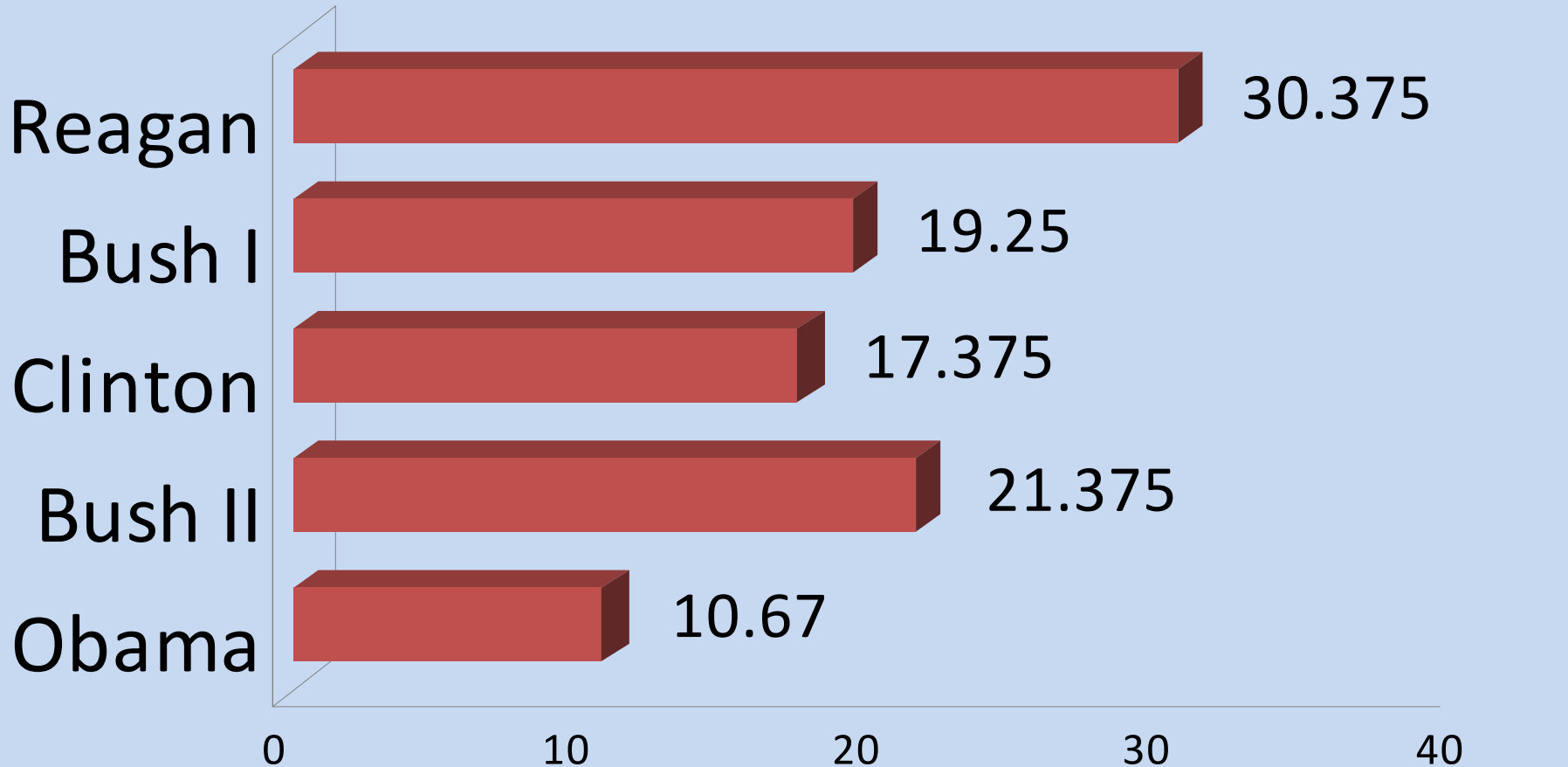
United States Court of Appeals for the Eleventh Circuit

“We accept that it was the intent of the framers to keep important offices filled and government functioning. ...The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause. ...We are unpersuaded by the argument that the recess appointment power may only be used in an intersession, but not an intrasession recess.”

– *Evans v. Stephens* –  
(October 14, 2004)

# President Obama's Restrained Use of Recess Appointment Power

Number of Recess Appointments Per Year



Source: Minority Staff Calculations & Think Progress