THE OLC OPINION ON OBAMA'S RECESS APPOINTMENTS

Out of the blue this morning, the Obama Administration has released the OLC opinion it relied on in making last weeks recess appointments of Richard Cordray to the CFPB and others to the NLRB. Several legal analysts and pundits have lobbied publicly and privately for the memo, which almost certainly existed, to be released, maybe the most cogent of the public pleas being made by Jack Goldsmith at Lawfare. Honestly, I agreed fully with Jack, but since the White House was reticent to admit it even existed, and since (as Josh Gerstein pointed out) a 2nd Circuit opinion from 2005 likely meant it was not subject to FOIA, I was not sure how soon it would meet public eyes.

Well, here it is in all its glory.

While some had suggested the reason the White House would not discuss whether there even was an opinion, much less release it, was that the OLC did not support the President's ability to so recess appoint. I never particularly gave this much credit, even though Obama clearly is not above acting contrary to OLC advice, he did exactly that regarding the Libya war action. And, indeed, here the OLC did support his action in their 23 page opinion.

> Although the Senate will have held pro forma sessions regularly from January 3 through January 23, in our judgment, those sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to "'receive communications from the President or participate as a body in making appointments.'" Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272

> (1989) (quoting Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 24 (1921) ("Daugherty Opinion")). Thus, the President has the authority under the Recess Appointments Clause to make appointments during this period. The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for pro forma sessions at which no business is to be conducted.

As I previously have noted, the entire "block" of the President's recess appointment power is predicated upon the Article I, Section 5 provision in the Constitution that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days". And, so upon what exactly does the OLC hang their hat on that the three day periods do not prevent a "recess" within the meaning of a President's Article II, Section 2, Clause 3 recess appointment power? Mostly some reasonably thin quotes from GOP Senators that were not directly on point, and some spare language culled from an otherwise non-definitive webpage at the Senate site:

> Public statements by some Members of the Senate reveal that they do not consider these pro forma sessions to interrupt a recess. See, e.g., 157 Cong. Rec. S6826 (daily ed. Oct. 20, 2011) (statement of Sen. Inhofe) (referring to the upcoming "1-week recess"); id. at S5035 (daily ed. July 29, 2011) (statement of Sen. Thune) (calling on the Administration to send trade agreements to Congress "before the August recess" even though "[w]e are not going to be able to consider these agreements until September"); id. at S4182 (daily ed. June 29, 2011) (statement of Sen.

> Sessions) (“Now the Senate is scheduled to take a week off, to go into recess to celebrate the Fourth of July . . . .”); 156 Cong. Rec. at S8116-17 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy) (referring to the period when “the Senate recessed for the elections” as the “October recess”); 154 Cong. Rec. S7984 (daily ed. Aug. 1, 2008) (statement of Sen. Hatch) (referring to upcoming “5-week recess”); id. at S7999 (daily ed. Aug. 1, 2008) (statement of Sen. Dodd) (noting that Senate would be in “adjournment or recess until the first week in September”); id. at S7713 (daily ed. July 30, 2008) (statement of Sen. Cornyn) (referring to the upcoming “month- long recess”); see also id. at S2193 (daily ed. Mar. 13, 2008) (statement of Sen. Leahy) (referring to the upcoming “2-week Easter recess”).
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> Likewise, the Senate as a body does not uniformly appear to consider its recess broken by pre-set pro forma sessions. The Senate’s web page on the sessions of Congress, which defines a recess as “a break in House or Senate proceedings of three days or more, excluding Sundays,” treats such a period of recess as unitary, rather than breaking it into three-day segments.

Nice argument, marginally compelling, but certainly not authoritative. There are numerous pages devoted to a discussion of the historical use and practice of recess appointments during which the OLC concludes that a recess of twenty (20) days is indeed a sufficient recess to permit recess appointments. That is all well and good, but nobody really would have disputed that, as it was nearly universally agreed by this point in history that any recess of ten or more days sufficed; the only questions were did the 3 day ruse interrupt a longer recess and, if so, could a President appoint in gaps less than

three days.

The key statement, as it pertains to how certain the OLC (or anybody else for that matter) is on this issue is this:

> Due to this limited judicial authority, we cannot predict with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones.

Interestingly, in making this conclusion, the OLC cites *Evans v. Stephens*, which I have long pointed out stands for the proposition that there does not currently exist any defined limit as to what is "too short of a recess".

The second half of the OLC memo explores in more detail whether the 3 day ruse is sufficient and effective to block a President from the making of recess appointments. Quite frankly, it is mostly a pretty rambling and self serving discussion at that point, and does little to add to the cause. The one interesting part is a cite to the Federalist Papers, which I always find interesting and instructive:

> The Clause was adopted at the Constitutional Convention without debate. See 2 The Records of the Federal Convention of 1787, at 533, 540 (Max Farrand ed., rev. ed. 1966).14 Alexander Hamilton described the Clause in The Federalist as providing a "supplement" to the President's appointment power, establishing an "auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67, at 409 (Clinton Rossiter ed., 1961). The Clause was necessary because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and it "might be necessary for the public service to fill [vacancies] without delay." Id. at

> 410.

The one other semi-notable area of support comes on page 17, and delineates the only other interesting case authority other than *Evans*:

> There is also some judicial authority recognizing the need to protect the President's recess appointment authority from congressional incursion. See McCalpin v. Dana, No. 82-542, at 14 (D.D.C. Oct. 5, 1982) ("The system of checks and balances crafted by the Framers . . . strongly supports the retention of the President's power to make recess appointments."), vacated as moot, 766 F.2d 535 (D.C. Cir. 1985); id. at 14 (explaining that the "President's recess appointment power" and "the Senate's power to subject nominees to the confirmation process" are both "important tool[s]" and "the presence of both powers in the Constitution demonstrates that the Framers . . . concluded that these powers should co-exist"); Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979) ("it is . . . not appropriate to assume that this Clause has a species of subordinate standing in the constitutional scheme"); id. at 598 ("It follows that a construction of [a statute] which would preclude the President from making a recess appointment in this situation—i.e., during a Senate recess and after the statutory term of the incumbent [official] has expired—would seriously impair his constitutional authority and should be avoided [if it] is possible to do so."); see also Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996) (rejecting an argument that "rests on the assumption that a recess appointment is somehow a constitutionally inferior procedure"). But see Wilkinson v. Legal Servs. Corp.,

> 865 F. Supp. 891, 900 (D.D.C. 1994) (concluding, contrary to McCalpin and Staebler, that a holdover provision could preclude a recess appointment), rev'd on other grounds, 80 F.3d 535 (D.C. Cir. 1996); Mackie v. Clinton, 827 F. Supp. 56, 57-58 (D.D.C. 1993) (same), vacated as moot, Nos. 93-5287, 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

Really, that is about the long and short of the substantive portion of the opinion. As stated above, even by the OLC itself, there is thin precedent and law guiding the question, and it is nearly impossible to know where courts, much less the Supreme Court, will come down on this.

Also the issue of what the relative power of Mr. Cordray's position of Director really vests, as discussed in this post, is not at issue or discussion in this OLC memo. Both the issue of propriety of the recess appointment as performed by President Obama, and what power it gives to the CFPB and Cordray even if legal, are still extremely cognizable issues for court challenge. Expect just that.

One interesting, and previously unknown (as far as I can discern or am aware of) fact is that the *Bush Administration* briefed this issue literally days before leaving office:

> We draw on the analysis developed by this Office when it first considered the issue. See Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions" (Jan. 9, 2009).

So, the Bush/Cheney regime was actively briefing and filing memoranda on the lawfulness of a President making recess appointments in the face of the 3 day Congressional ruse, eleven days

before they left office.

You would think it hard to believe the Bush Administration just wanted to leave a “how to manual” for Barack Obama to make recess appointments in the face of the 3 day ruse. Even though Obama was entering with huge majorities in both chambers of Congress, you would think they would assume they could get at least one of the chambers back (which they certainly did in 2010).

Well, you would be wrong. I spoke to the author of said memo to the file (which is not an “official OLC Memo”) at the Bush OLC, John P. Elwood, and he assured, no, nothing nefarious. It turns out that it was just a memo that had been worked on at some point, and he was cleaning up his office and desk in getting ready to leave office, and filed it officially “in case the next guys might need it”. I have to commend Mr. Elwood for so doing, and his consistency on the issue can be seen in this Washington Post Op-Ed from October of 2010 and this article at the Volokh Conspiracy last week when Obama used his theory and actually pulled the trigger on the recess appointments. Good show Mr. Elwood.

But, the fact that the Obama OLC went to such lengths to cite informal memoranda to the file, and statements by GOP senators of questionable context, exposes quite clearly how desperate they are both for foundation for their argument and support for the proposition it is a non-controversial bi-partisan position. That is, shall we say, a pretty thin raft. The litigation will be coming and it will be hotly contested.