

## Mounting a Judicial Challenge to President Barack Obama's Recess Appointment of Richard Cordray: The Constitutional Mandate of Standing

### I. INTRODUCTION

On December 7, 1903, during consecutive sessions of the Senate, the Senate President Pro Tem brought down the gavel to signal the end of one session and the simultaneous beginning of another.<sup>1</sup> During this split-second transition, President Theodore Roosevelt made over 160 recess appointments.<sup>2</sup> Although no evidence suggests that judicial action was taken to challenge President Roosevelt's appointments, the Senate Judiciary Committee issued a report indicating fervent disapproval of the notion that the President is empowered to make recess appointments during such a constructive recess.<sup>3</sup> Until the unprecedented decision of *Canning v. NLRB*,<sup>4</sup> custom and practice evolved over the intervening century based, at least in part, on this Senate Judiciary Committee interpretation of the Recess Appointment Clause.<sup>5</sup>

This Note will demonstrate that the Article III standing doctrine

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1. See generally John Elwood, Comment to *Recess Appointment of Richard Cordray Despite Pro Forma Sessions*, VOLOKH CONSPIRACY (Jan. 4, 2012, 10:45 AM), <http://www.volokh.com/2012/01/04/recess-appointment-of-richard-cordray-despite-pro-forma-sessions/> (describing the brief transition between sessions and President Roosevelt's split-second recess appointments).

2. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 4 (2012) [hereinafter *Lawfulness Recess Appt.*]; see also HENRY B. HOGUE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS, C.R.S. REP. NO. RS21308, 10 (2012) [hereinafter HOGUE].

3. See S. REP. NO. 58-4389, at 2 (1905), available at 39 CONG. REC. 3823, 3824. The Senate continues to cite this report as an authoritative source on what constitutes a recess of the Senate. See also *Riddick's Senate Procedure* 947 & n.46 (1992) (citing report), available at <http://www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-88.pdf>.

4. No. 12-1115, 2013 WL 276024, at \*1 (D.C. Cir. Jan. 25, 2013).

5. See *Uncharted Territory: What are the Consequences of President Obama's Unprecedented "Recess" Appointments: Before the Comm. On Oversight and Government Reform*, 112th Cong. 41 (2012) [hereinafter *Uncharted Territory*] (statement of Hon. Michael S. Lee, U.S. Senator from the State of Utah); see also *Lawfulness Recess Appt.*, *supra* note 2, at 12.

will serve as an impasse to a constitutional challenge of President Barack Obama's recess appointment of Richard Cordray as director of the Consumer Financial Protection Bureau (hereinafter "Bureau"). Part II of this piece explores the political preface to Cordray's appointment. This Part considers recent judicial challenges to the appointments of both Cordray and concurrently appointed members of the National Labor Relations Board (hereinafter "Board"). Part III of this Note examines the Recess Appointment Clause of the United States Constitution, as well as the constitutionality of President Obama's January 2012 recess appointment of Richard Cordray. Part IV addresses the prudential and constitutional requirements of the Article III standing doctrine as interpreted by the Court in its seminal decision, *Raines v. Byrd*.<sup>6</sup> This part then matches an array of potential plaintiffs with the likelihood of satisfying the federal courts' robust standing requirements. Lastly, notwithstanding the United States Court of Appeals for the District of Columbia's (hereinafter "D.C. Circuit") decision in *Canning*, this Note concludes by suggesting that the validity of Bureau regulations is not threatened by the recess appointment of Richard Cordray.

## II. BACKGROUND

The January 4, 2012, recess appointment of Richard Cordray has generated enormous controversy among Congressional and mainstream Republicans alike.<sup>7</sup> After this contentious appointment, it was widely assumed that lawsuits would be filed against the Bureau, declaring the appointment void as the product of an unconstitutional presidential recess appointment.<sup>8</sup> Indeed, litigants in numerous cases pending in the D.C. Circuit and in other federal courts have raised the issue of President Obama's January 2012 recess appointments.<sup>9</sup> In fact,

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6. 521 U.S. 811, 818 (1997).

7. See Kevin Wack, *CFPB Move Sparks Legal, Political Heat*, AM. BANKER (Jan. 6, 2012), <https://www.americanbanker.com/issues/1774/cfpb-cordray-recess-appointment-legal-political-fallout-1045477-1.html?zkDo=emailArticlePrompt>.

8. See Rachel Witkowski, *Texas Bank to Take Lead in CFPB Lawsuit*, AM. BANKER (June 21, 2012), <http://www.americanbanker.com/issues/177120/texas-bank-to-take-lead-in-cfpb-lawsuit-1050307-1.html>.

9. Lawrence E. Dubé, *Appointments and Nominations: D.C. Circuit Ponders Recess Appointments And Competing Views of President's Power*, BNA BANKING DAILY, Dec. 6, 2012 [hereinafter Dubé], available at

a three-judge panel of the D.C. Circuit struck down President Obama's recess appointments of three members to the Board.<sup>10</sup> Relying heavily on a textual and original understanding of the Constitution, the court held that the appointments were not made during "the Recess" of the Senate, nor did the relevant vacancies arise during "the Recess."<sup>11</sup> This "novel and unprecedented"<sup>12</sup> decision now casts serious doubt on whether President's Obama's recess appointment of Richard Cordray to the Bureau is constitutional.<sup>13</sup>

Cordray's appointment is under direct attack in the litigation of *State Nat'l Bank of Big Spring, Tex. v. Geithner*.<sup>14</sup> The plaintiffs, a small national bank in Texas and two non-profit organizations in Washington, D.C., have brought suit against the Bureau, *inter alia*, in the United States District Court for the District of Columbia.<sup>15</sup> The Complaint alleges that Cordray was appointed to office neither with the advice and consent of the Senate, nor during a Senate recess.<sup>16</sup> In

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[http://news.bna.com/bdln/BDLNWB/split\\_display.adp?fedfid=28850612&vname=bbdbulallissues&wsn=498213500&searchid=19163807&doctypeid=1&type=date&mode=doc&split=0&scm=BDLNWB&pg=0](http://news.bna.com/bdln/BDLNWB/split_display.adp?fedfid=28850612&vname=bbdbulallissues&wsn=498213500&searchid=19163807&doctypeid=1&type=date&mode=doc&split=0&scm=BDLNWB&pg=0). On November 30, 2012, the U.S. Court of Appeals for the Seventh Circuit heard arguments in two combined cases, *Richards v. NLRB*, No. 12-1973, and *Lugo v. NLRB*, No. 12-1984, that raise the issue of President Obama's January 2012 recess appointments. Judges William J. Bauer, Ilana Diamond Rovner, and Ann Claire Williams have taken the cases under advisement. The NLRB has informed the D.C. Circuit that the constitutionality of the NLRB recess appointments has been raised by parties in eight cases in the D.C. Circuit. In addition to the *Richards* and *Lugo* cases, the issue has been raised and briefed in four cases pending before the Third and Fourth circuits. In another case filed in the D.C. Circuit case, *Center for Social Change Inc. v. NLRB*, No. 12-1161, oral argument was scheduled for December 5, 2012, but the plaintiff agreed with NLRB on the entry of a consent judgment, which the court approved on December 3, 2012. *See id.*

10. *Canning v. NLRB*, No. 12-1115, 2013 WL 276024, at \*1 (D.C. Cir. Jan. 25, 2013).

11. *Id.* at \*16, \*21 (holding that "the Recess" is limited to intersession recesses). The Board conceded at oral argument that the appointments at issue were not made during "the Recess." The President made his three appointments to the Board on January 4, 2012, which was after Congress began a new session on January 3. *Id.* at 16.

12. Kate Berry, *Cordray Recess Appointment Called into Question with Court Ruling*, AM. BANKER (Jan. 25, 2013) (quoting Jay Carney, White House spokesman), [http://www.americanbanker.com/issues/178\\_18/with-nlr-ruling-cordray-recess-appointment-called-into-question-1056185-1.html](http://www.americanbanker.com/issues/178_18/with-nlr-ruling-cordray-recess-appointment-called-into-question-1056185-1.html) [hereinafter Berry]. Mr. Carney also stated that the decision contradicted more than 280 intrasession recess appointments made by both Republicans and Democrats since 1887. *See id.*

13. *Id.* (quoting Senate Minority Leader, Mitch McConnell).

14. No. 1:12-cv-01032-esh (D.D.C. 2012); *see also* Dubé, *supra* note 9.

15. Pls.' Compl. at ¶ 2, *State Nat'l Bank of Big Spring, Tex. v. Geithner*, No. 1:12-cv-01032-esh (D.D.C. filed June 21, 2012) [hereinafter Pl.'s Compl.], available at <http://www.scribd.com/doc/97863924/SNB-v-Geithner-Complaint>.

16. *Id.* The plaintiffs also challenge the constitutionality of the Bureau, certain pieces

support of the claim, the plaintiffs cite three grounds, all of which suggest that the recess appointment was an unconstitutional exercise of presidential authority. First, the plaintiffs argue that the Constitution provides the Senate with the exclusive power to determine its rules, noting that the Senate declared itself to be in session at the time Cordray was appointed.<sup>17</sup> Second, the plaintiffs contend that the House of Representatives did not consent to a Senate adjournment of longer than three days, as it must to effect a recess.<sup>18</sup> Lastly, the plaintiffs note that the Senate passed significant economic policy legislation during the session that Cordray was appointed, an apparent indicator that the chamber was not in a period of recess.<sup>19</sup> For these reasons, the plaintiffs argue that the Senate was not in recess; thus, the President was not authorized to appoint Cordray as the director of the Bureau in the absence of Senate confirmation.<sup>20</sup>

In defense of the claim, the Department of Justice (“DOJ”) argues that the plaintiffs do not possess Article III standing to bring suit. As such, on November 20, 2012, the DOJ moved the court to dismiss the claim.<sup>21</sup> Despite the DOJ’s motion, if the court’s decision in *Canning* remains controlling authority on the issue, the decision will become binding precedent on the United States District Court for the District of Columbia, where the current challenge to Cordray’s appointment awaits judicial consideration.<sup>22</sup> The significance of the *Canning* decision is that, simultaneously with the putative recess appointments of three members to the Board, the President also utilized the same recess appointment authority to appoint Cordray as the first

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of the Dodd-Frank Act, and the creation of the Financial Stability Oversight Council.

17. *Id.* at ¶ 81.

18. *Id.* at ¶ 82. The Constitution requires that neither House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days. *See* U.S. CONST. art. I, § 5, cl. 4. According to the plaintiffs, the House of Representatives never consented to a Senate adjournment of longer than three days.

19. Pls.’ Compl., *supra* note 15, at ¶ 83.

20. The president has the power, provided two-thirds “of the Senators present concur . . . [to] appoint all other officers of the United States . . . .” U.S. CONST. art. II, § 2, cl. 2.

21. Defs.’ Mem. at 15, 48, *State Nat’l Bank of Big Spring, Tex. v. Geithner*, No. 1:12-cv-01032-esh (D.D.C. filed Nov. 20, 2012).

22. Client Memorandum from Davis Polk & Wardwell on Implications for the CFPB After the D.C. Circuit’s Recess Appointments Decision 2 (Jan. 28, 2013) [hereinafter Davis Polk] (on file with author).

Director of the Bureau.<sup>23</sup> Hence, it is possible that Cordray's appointment may be found to be defective as well.<sup>24</sup>

The President's power to appoint the director of the Bureau derives from section 1011 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").<sup>25</sup> Until the director is in place, the Bureau may enforce existing regulations that it inherited from the other banking regulators, but it may not exercise any new powers, including its authority over non-banks.<sup>26</sup> Dodd-Frank largely precludes the Bureau from supervising nonbank institutions without a Director in place.<sup>27</sup>

Following President Obama's recess appointment of Richard Cordray as the director of the Bureau, the agency began operating at its full statutory capacity. In fact, shortly after Cordray's installation as the Bureau's director, Cordray announced the implementation of the Bureau's supervision program for nonbank financial institutions.<sup>28</sup> Accordingly, the Bureau's flagship nonbank supervision rule was proposed on February 17, 2012.<sup>29</sup>

In sum, Title X of Dodd-Frank created the Bureau to enforce federal consumer financial laws and regulations.<sup>30</sup> The Bureau's statutory obligations are grounded in the goal of making markets for consumer financial products and services work in a fair, transparent, and competitive manner.<sup>31</sup> This new authority includes the ability to

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23. Client Alert, Joseph T. Lynyak, III, et al., D.C. Circuit Court Decision Calls Into Question the Constitutionality of the Appointment of the Director of the CFPB 1 (Jan. 28, 2013) [hereinafter Lynyak] (on file with author).

24. *Id.*

25. 12 U.S.C. § 5491 (Supp. IV 2010).

26. *Id.* § 5512. A "nonbank" is a company that offers or provides consumer financial products or services but does not have a bank, thrift, or credit union charter.

27. See Review of CFPB Implementation Planning Activities, FRB OIG 2011-03, OIG-11-088 at 3-4 (July 15, 2011), available at [http://federalreserve.gov/oig/files/OIG 2011 Review of CFPB Implementation Planning Activities.pdf](http://federalreserve.gov/oig/files/OIG%2011%20Review%20of%20CFPB%20Implementation%20Planning%20Activities.pdf).

28. See Lynyak, *supra* note 23.

29. See 12 CFR pt. § 1090 (2012). The Bureau proposed the initial rule to begin defining who meets the test for "larger participants" in certain nonbank markets. The Bureau will establish procedures to supervise a nonbank company where the Bureau has reasonable cause to believe it poses risks to consumers. See also Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Nonbank Supervision Program (Jan. 5, 2012) (on file with author).

30. See generally 12 U.S.C. § 5511 (Supp. IV 2010).

31. See *id.*; Elizabeth Warren, Warren Outlines CFPB's Mission for Consumers, 30 ABI INST. 10 (2011) [hereinafter Warren], available at [http://journal.abi.org/sites/default/files/2011/March/LegUp\\_0.pdf](http://journal.abi.org/sites/default/files/2011/March/LegUp_0.pdf).

oversee nonbanks and the ability to prohibit unfair, deceptive, abusive acts or practices.<sup>32</sup> Since the appointment of Cordray, the Bureau has promulgated numerous provisions aimed at creating a level playing field where both parties to the transaction understand the terms of the deal, where the price and the risk of products are clear, and where direct comparisons can be made from one product to another.<sup>33</sup> Overall, the Bureau endeavors to promote transparency between the consumer and the financial institution.<sup>34</sup>

From the beginning, the overwhelming majority of Republicans disagreed with the underlying policies and practices of the Bureau.<sup>35</sup> The contentiousness surrounding the creation of the Bureau became apparent early when only three House Republicans voted in favor of Dodd-Frank in the wake of the 2008 financial crisis.<sup>36</sup> Additional opposition was reflected in efforts by congressional Republicans to delay the President's attempt at nominating a director to head the agency.<sup>37</sup> In exchange for the votes necessary to confirm a director, as specified under Dodd-Frank, congressional Republicans demanded that the Obama Administration agree to structural changes in the agency.<sup>38</sup> Mindful of Republican opposition in the Senate, President Obama refrained from nominating Elizabeth Warren, the popular consumer

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32. See *id.* 12 U.S.C. § 5511(b)(2); Kate Davidson, *Will Cordray Recess Appointment Cloud CFPB's Future*, AM. BANKER (Jan. 5, 2012), [http://www.americanbanker.com/issues/177\\_3/obama-cordray-cfpb-1045446-1.html](http://www.americanbanker.com/issues/177_3/obama-cordray-cfpb-1045446-1.html) [hereinafter Davidson].

33. See *id.* 12 U.S.C. § 5511; Warren, *supra* note 31.

34. See *id.* 12 U.S.C. § 5511; Warren, *supra* note 31 (“When consumers are presented with a choice . . . and they know the true costs, the actual benefits, and the real risks of those products, they will be better able to make decisions for themselves and their families.”).

35. Rob Blackwell, *Why D.C. Gridlock Will Keep CFPB Leaderless for Years*, AM. BANKER (Aug. 5, 2011), [http://www.americanbanker.com/issues/176\\_151/warren-cordraycfpb-recess-appointments-obama-1040929-1.html](http://www.americanbanker.com/issues/176_151/warren-cordraycfpb-recess-appointments-obama-1040929-1.html).

36. Catherine Dunn, *Reflections on Dodd-Frank, Two Years Later*, CORP. COUNSEL (July 19, 2012), available at [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202563526466&Reflections\\_on\\_DoddFrank\\_Two\\_Years\\_Later&slreturn=20121003141525](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202563526466&Reflections_on_DoddFrank_Two_Years_Later&slreturn=20121003141525).

37. Kevin Wack, *GOP Shifts Tactics on CFPB Concerns*, AM. BANKER (Feb. 1, 2012), [https://www.americanbanker.com/issues/177\\_21/cordray-cfpb-legal-challenges-1046228-1.html](https://www.americanbanker.com/issues/177_21/cordray-cfpb-legal-challenges-1046228-1.html) [hereinafter Wack].

38. *Id.* Senate Republicans pledged to oppose the confirmation of the Director until the Bureau's leadership structure is changed from unitary Director to a five-member board and until other federal banking regulators could more easily overrule actions by the Bureau that it thought may undermine the soundness and safety of the financial system.

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advocate who helped establish the agency as a special adviser to the President, to head the Bureau.<sup>39</sup> The President instead exercised his Recess Appointment Clause power to appoint Richard Cordray as the first director of the Bureau.<sup>40</sup> This unchartered recess appointment prompted national and congressional callings for judicial intervention.<sup>41</sup>

## III. RECESS APPOINTMENT CLAUSE, ART. II, § 2, CL. 3

A. *Historical Perspective*

The Recess Appointment Clause of the United States Constitution provides the president with 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.”<sup>42</sup> A recess of the Senate has been defined as a break in Senate proceedings.<sup>43</sup> Furthermore, the term recess has been divided into two separate breaks of Congress: intrasession and intersession.<sup>44</sup> A recess within a session is referred to as an intrasession recess, while the break between the sine die adjournment of one session and the convening of the next is referred to as an intersession recess.<sup>45</sup> Although the Court has not opined on the issue, the United States Court of Appeals for the Eleventh Circuit held that the Recess Appointment Clause permits the President to fill vacancies, to assure the proper functioning of our government, during both intrasession recesses and intersession recesses.<sup>46</sup> In stark contrast, however, the D.C. Circuit recently held that a president may only make intersession recess appointments.<sup>47</sup> This

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39. Deborah Solomon, *Obama to Nominate Consumer Bureau Chief Next Week*, WALL ST. J., July 15, 2011, available at <http://blogs.wsj.com/washwire/2011/07/15/obama-to-nominate-consumer-bureau-chief-next-week/>.

40. Berry, *supra* note 12 (noting that the *Canning* decision comes just one day after President Obama re-nominated Cordray to the CFPB post on January 24, 2013).

41. See Wack, *supra* note 27.

42. U.S. CONST. art. II, § 2, cl. 3.

43. See HOGUE, *supra* note 2, at 10.

44. *Id.* at 2.

45. *Id.* The Senate defines adjournment sine die as the end of a legislative session “without day.” These adjournments are used to indicate the final adjournment of an annual or the two-year session of a Congress.

46. See *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004).

47. *Canning v. NLRB*, No. 12-1115, 2013 WL 276024, at \*16 (D.C. Cir. Jan. 25, 2013). (“[An] appointment may be made in ‘the Recess,’ but it ends at the end of the next

distinction is highly relevant, particularly in the *Canning* litigation, as both the petitioners and respondents conceded that the subject recess appointments were made during an intrasession recess.<sup>48</sup> Before the *Canning* decision, recent presidents appointed officers during both intersession and intrasession recess appointments.<sup>49</sup>

The Constitution does not specify the length of time that the Senate must be in recess before the president may make a recess appointment.<sup>50</sup> Because neither chamber may take a break of more than three days without the consent of the other,<sup>51</sup> the modern legislature has employed the use of pro forma sessions to avoid a recess of more than three days, and, therefore, the necessity of obtaining the consent of the other house.<sup>52</sup> These periodic three-day sessions can last only a few seconds and apparently only require the presence of one senator.<sup>53</sup>

Beginning in late 2007, and continuing into the 112th Congress, the Senate has frequently conducted pro forma sessions during recesses occurring within sessions of Congress.<sup>54</sup> Aside from circumventing the adjournment requirement, pro forma sessions appear to serve another purpose. From November 2007 through the end of George W. Bush's presidency, the Senate employed pro forma sessions to prevent President Bush from making recess appointments.<sup>55</sup> On November 17, 2007, the Senate majority leader announced that the Senate would be meeting for pro forma sessions during the Thanksgiving holiday to

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'Session.' The natural interpretation of the Clause is that the Constitution is noting a difference between 'the Recess' and the 'Session.' Either the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in 'the Recess.'").

48. *Id.* at \*8.

49. See HOGUE, *supra* note 2, at 10. For example, On December 23, 1982, President Ronald W. Reagan, during an intersession recess, appointed John C. Miller to be a member of the NLRB. On May 31, 1996, President William J. Clinton, during an intrasession recess, appointed Johnny H. Hayes to be a member of the Tennessee Valley Authority.

50. *Id.* at 2.

51. See U.S. CONST. art. I, §5, cl. 4.

52. See HOGUE, *supra* note 2, at 4.

53. See, e.g., 157 CONG. REC. D1404 (daily ed. Dec. 30, 2011) (noting that day's pro forma session lasted from 11:00:02 until 11:00:34 a.m.); 157 CONG. REC. D903 (daily ed. Aug. 12, 2011) (noting that day's pro forma session lasted from 12:00:08 until 12:00:32 p.m.). See also Lawfulness Recess Appt., *supra* note 2, at 13.

54. See Lawfulness Recess Appt., *supra* note 2, at 2 (noting that a "pro forma" session is a brief meeting of the Senate).

55. See HOGUE, *supra* note 2, at 8.

prevent presidential recess appointments.<sup>56</sup> The use of the pro forma sessions appeared to have achieved its stated intent: President Bush made no recess appointments during this time.<sup>57</sup>

Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, the shortest intrasession recess during which a President made a recess appointment was ten days.<sup>58</sup> Historically, only two Presidents have made a recess appointment during a recess of three days or less.<sup>59</sup> President Truman made a recess appointment to a member of the Civil Aeronautics Board during a three-day intersession recess. Importantly, however, this appointment was made after the 80th Congress adopted a concurrent resolution prior to its recess.<sup>60</sup> On another occasion,<sup>61</sup> President Theodore Roosevelt made over 160 recess appointments during a transition between sessions of less than a day in length, where no concurrent resolution regarding the transition between sessions had been adopted.<sup>62</sup> The Senate Judiciary Committee issued a report condemning President Roosevelt's recess appointments, noting that the Recess Appointment Clause "was carefully devised so as to accomplish the purpose in view [filling vacancies during a recess of the Senate], without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate."<sup>63</sup> The Committee criticized the President's act of unilaterally making appointments during a "constructive recess" and maintained that [the Framers] had in mind a

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56. See 153 CONG. REC. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Harry Reid on Recess Appointments).

57. See HOGUE, *supra* note 2, at 4.

58. See "Digest of Other White House Announcements," *Weekly Compilation of Presidential Documents*, vol. 18 (December 23, 1982), p. 1662. President Ronald W. Reagan recess appointed John C. Miller to be a member of the National Labor Relations Board on December 23, 1982, during a recess that began that day and lasted until the Senate reconvened on January 3, 1983; HOGUE, *supra* note 2, at n. 13.

59. See HOGUE, *supra* note 2, at 10.

60. *Id.*

61. See *supra* p. 1.

62. See S. REP. NO. 58-4389, at 2 (1905), available at 39 CONG. REC. 3823, 3824; see also Daugherty Opinion, 33 Op. Att'y Gen. 20, 24 (1921) (noting that this report was "most significant of all" authorities in supporting the conclusion that a substantial intrasession adjournment was a constitutional "recess").

63. Mike Lee, *Was President Barack Obama's January 2012 Recess Appointment of Richard Cordray Constitutional*, FORBES (Apr. 3, 2012), available at <http://www.forbes.com/sites/quora/2012/04/03/was-president-barack-obamas-january-2012-recess-appointment-of-richard-cordray-constitutional/>.

period of time in which it would be harmful if an office were not filled—not a constructive, inferred, or imputed recess as opposed to an actual one.”<sup>64</sup>

*B. President Obama’s Recess Appointment of Richard Cordray*

In May 2011, forty-four Senators signed a petition stating that they would oppose the confirmation of any nominee to serve as director of the Bureau until substantive changes to the structure of the Bureau were enacted into law.<sup>65</sup> On December 17, 2011, the Senate agreed by unanimous consent to adjourn and convene for pro forma sessions only, with no business conducted, every Tuesday and Friday between that date and January 23, 2012.<sup>66</sup> On January 4, 2012, despite the periodic pro forma sessions of the Senate, and in the absence of a concurrent resolution between the two Houses, President Obama exercised his Recess Appointment Clause power and announced the appointment of Richard Cordray as the first director of the Bureau.<sup>67</sup> This appointment, executed during a three-day intrasession recess between two pro-forma sessions, has presented many unresolved constitutional issues.

*C. Constitutionality*

After the appointment of Cordray, a political fulmination ripened among constitutional scholars and commentators. Those viewing the January 2012 recess appointments as constitutional tend to rely on a functional understanding of the Recess Appointment Clause power, positing the view that pro forma sessions cannot be used to nullify the President’s recess appointment authority.<sup>68</sup> On the other

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64. S. REP. NO. 58-4389, *available at* 39 CONG. REC. 3823, 3824 (1905).

65. *See* News Release, Sen. Richard Shelby, 44 U.S. Senators to Obama: No Accountability, No Confirmation (May 5, 2011) (on file with United States Senate).

66. *See* 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011) (statement of Sen. Ron Wyden).

67. *See* DAVID H. CARPENTER, PRESIDENT OBAMA’S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES, C.R.S. REP. NO. R42323, at 6 (2012) [hereinafter CARPENTER]. The President also appointed Terrence F. Flynn, Sharon Block, and Richard F. Griffin Jr. as members of the National Labor Relations Board. These were the appointments struck down in *Canning*.

68. *See Uncharted Territory*, *supra* note 5, at 100-07 (statement of Michael J. Gerhardt, Samuel Ashe distinguished professor in constitutional law and director for the Center of Law and Government, University of North Carolina School of Law).

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hand, scholars labeling the recess appointment unconstitutional argue, *inter alia*, that Cordray's appointment was made without receiving the advice and consent of the Senate, a bedrock constitutional requirement.<sup>69</sup> These advocates argue that the appointment was not made during a Senate recess, at least the kind of recess cognizable under the Recess Appointment Clause.<sup>70</sup>

### 1. Arguments Supporting Constitutionality

Two days after the controversial appointment of Cordray, the Department of Justice Office of Legal Counsel ("OLC") released a memorandum opining that the recess appointment constituted a valid exercise of the President's Recess Appointment Clause power.<sup>71</sup> In its opinion, the OLC considered whether a recess that is punctuated by periodic pro forma sessions, at which Congress has declared in advance that no business is to be conducted, is sufficient to invoke a president's recess appointment power.<sup>72</sup> In concluding that the President may make recess appointments during periodic pro forma sessions, the OLC cited both the Framers' original understanding, as well as a functional interpretation of the Recess Appointment Clause:

First, both the Framers' original understanding of the Recess Appointments Clause and the longstanding views of the Executive and Legislative Branches support the conclusion that the President may make recess appointments when he determines that, as a practical matter, the Senate is not available to give advice and consent to executive nominations. The Recess Appointments Clause was adopted to allow the President to fill offices when the Senate was not "in session for the appointment of officers." The Federalist No. 67, at 410 (Alexander Hamilton). And, from the early days of the Republic, the Executive has taken the

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69. *Id.* at 26 (statement of Hon. Michael S. Lee, U.S. Senator from the State of Utah).

70. *Id.*

71. *See* Lawfulness Recess Appt., *supra* note 2 (finding the President's recess appointments as a valid exercise of presidential authority).

72. *See id.* at 4.

position that “all vacancies which . . . happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President.” Executive Authority to Fill Vacancies, 1 Op. Att’y Gen. at 633. Likewise, in 1905, the Senate Judiciary Committee defined “recess” as used in the Clause to be the period of time when the Senate cannot “participate as a body in making appointments.”<sup>73</sup>

Furthermore, the OLC reasoned that allowing the Senate to prevent the President from exercising his authority under the Recess Appointment Clause by holding pro forma sessions would be inconsistent with the purpose of the Recess Appointment Clause;<sup>74</sup> the purpose, of course, is to provide a method of appointment when the Senate is unavailable to provide its advice and consent function.<sup>75</sup> In a written statement to Congress, Professor Michael J. Gerhardt of the University of North Carolina School of Law noted that President Obama construed the pro forma sessions “effectively as breaks during which the Senate was unable to take any action on his nominations.”<sup>76</sup> Similarly, Deputy Assistant Attorney General Beth S. Brinkmann, arguing for the government in *Canning*, stated that the Senate was functionally in an extended recess in January 2012 when President Obama made the subject recess appointments.<sup>77</sup> Indeed, the overarching theme of these arguments appears to be that because the Senate cannot exercise its advice and consent function during pro forma sessions, these sessions constitute a recess of the Senate for purposes of the Recess Appointment Clause.<sup>78</sup> While the United States Supreme Court has not addressed the issue, the court in *Canning* wholly rejected this argument. The *Canning* court explained, “Allowing the President to

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73. *Id.* at 13 (internal citations omitted).

74. *Id.* at 4.

75. *Id.* at 15.

76. *Uncharted Territory*, *supra* note 5, at 104 (statement of Michael J. Gerhardt, Distinguished Professor, University of North Carolina School of Law).

77. See Dubé, *supra* note 9.

78. See generally Lawfulness Recess Appt., *supra* note 2 (noting that when determining whether an intrasession adjournment constitutes a recess in the constitutional sense, the touchstone is “its practical effect: viz., whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations.”).

define the scope of his own appointments power would eviscerate the Constitution's separation of powers."<sup>79</sup>

## 2. Arguments Against Constitutionality

Other observers have taken the position that President Obama's putative recess appointment of Cordray was an unconstitutional exercise of his Recess Appointment Clause authority.<sup>80</sup> During oral arguments in the *Canning* case,<sup>81</sup> Judge Thomas B. Griffith noted that recess appointments have become an occasion for presidents frustrated by Senate delay to make "almost metaphysical arguments" in favor of recess appointments.<sup>82</sup> The judge said the result could be that a president who cannot win Senate confirmation for a nominee gets "two bites at the apple" by making a recess appointment.<sup>83</sup> This colloquy transpired before the court ruled unanimously to strike down the President's recess appointments of three members to the Board, rendering the Board's disputed decision void for a lack of quorum.

Furthermore, Edwin Meese, former U.S. Attorney General under President Ronald Reagan, contends that a president cannot choose what sessions of the Senate he deems to be "real."<sup>84</sup> Meese argues that pro forma sessions are not constitutionally meaningless and highlights the fact that bills can be passed during a pro forma hearing.<sup>85</sup> Likewise, Mike Lee, U.S. Senator from Utah, deemed the appointment unconstitutional by drawing an analogy to President Roosevelt's 1903 recess appointments.<sup>86</sup> According to Lee, President Obama's unilateral appointment of Cordray while the Senate was holding pro-forma

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79. *Canning v. NLRB*, No. 12-1115, 2013 WL 276024, at \*13 (D.C. Cir. Jan. 25, 2013).

80. See Edwin Meese III & Todd Gaziano, *Obama's Recess Appointments are Unconstitutional*, WASH. POST, Jan. 5, 2012, available at [http://www.washingtonpost.com/opinions/obamas-recess-appointments-are-unconstitutional/2012/01/05/gIQAnWRfdP\\_story.html](http://www.washingtonpost.com/opinions/obamas-recess-appointments-are-unconstitutional/2012/01/05/gIQAnWRfdP_story.html); see also Mike Lee, *Was President Barack Obama's January 2012 Recess Appointment of Richard Cordray Constitutional*, FORBES (Apr. 3, 2012), <http://www.forbes.com/sites/quora/2012/04/03/was-president-barack-obamas-january-2012-recess-appointment-of-richard-cordray-constitutional/>.

81. See *supra* pp. 3-4.

82. See Dubé, *supra* note 9.

83. *Id.*

84. See Meese, *supra* note 80.

85. See *id.*

86. See Lee, *supra* note 80.

sessions was an attempt to fabricate a constructive, inferred, or imputed recess;<sup>87</sup> and, the Senate Judiciary Committee rejected the proposition that a constructive recess is a recess sufficient to invoke the President's Recess Appointment Clause power.<sup>88</sup> Further, Senate Minority Leader, Mitch McConnell, claims that the President has overstepped his constitutional authority by removing Congress' role in examining nominees.<sup>89</sup> This, according to McConnell, provides the President with free rein to avoid senatorial advice and consent, which is a major structural feature of the Constitution.<sup>90</sup>

Of note, the plaintiffs in *Geithner* argue that the Senate has the exclusive power to determine its rules; therefore, when it proclaimed to be in recess in January 2012, it was, in fact, in a period of recess.<sup>91</sup> This argument has been somewhat complicated by the Senate's recent reluctance to appear in an amicus role to recent challenges to the appointments, leaving courts without a full statement of the Senate's views.<sup>92</sup> In fact, Judge Griffith, during the *Canning* proceedings, unsuccessfully probed litigants for the Senate's position regarding the January 2012 pro forma proceedings.<sup>93</sup> Indeed, the novel twist in President Obama's recess appointments is that the Senate did not believe it was in a period of recess.<sup>94</sup>

The *Canning* decision drew a distinction between "a recess" and "the Recess."<sup>95</sup> The court, employing literal, textual constitutional interpretation, noted that the word "the" was and is a definite article; thus, "the Recess" was something other than a generic break in the

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87. *See id.*

88. *See id.*; *see also supra* pp. 12-13.

89. *See Wack, supra* note 37.

90. *See* Michael McConnell, *Democrats and Executive Overreach*, WALL ST. J., Aug. 20, 2012, available at <http://online.wsj.com/article/SB10001424052970204257504577150661990141658.html>.

91. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings."); Pls.' Compl., *supra* note 15, at ¶ 81.

92. *See* Dubé, *supra* note 9. The Senate refused to participate in an amicus role in the *Canning* case.

93. *See id.*

94. *See* Davis Polk, *supra* note 22, at 1-2 (differentiating between the recess appointment upheld in *Evans* from the recess appointments that were struck down in *Canning*).

95. *Canning v. NLRB*, No. 12-1115, 2013 WL 276024, at \*8 (D.C. Cir. Jan. 25, 2013). The *Canning* court relied heavily on a literal, textual interpretation of the Constitution.

proceedings.<sup>96</sup> “The Recess,” according to the court, denoted a period between sessions that would end with the ensuing session of the Senate.<sup>97</sup> The *Canning* court concluded that President Obama’s recess appointments did not occur during “the Recess,” but rather during an ongoing session.<sup>98</sup> As such, the court nullified the recess appointments.

Because the *Canning* decision has no direct effect on the Bureau, a plaintiff will have to challenge the Cordray appointment in a separate action.<sup>99</sup> Thus, *ipso facto*, a plaintiff bringing suit in federal court must satisfy the Article III standing requirements.<sup>100</sup>

#### IV. ARTICLE III STANDING

Those who do not possess Article III standing may not litigate as suitors in the federal courts of the United States.<sup>101</sup> In the matter of *Allen v. Wright*,<sup>102</sup> the Court reiterated its time-honored concern about keeping the judiciary’s power within its proper constitutional sphere.<sup>103</sup> The Court emphasized that Article III standing is built on the idea of separation of powers, and that instead of resolving cases for the sake of convenience and efficiency, it will carefully confirm that the plaintiff has met the burden of standing under Article III.<sup>104</sup> Although the Court has established a number of justiciability doctrines to ensure that a claim is properly before a court, concerns relating to standing appear to present the most probable hurdles to the judicial resolution of a challenge to President Obama’s recess appointments.<sup>105</sup> The Court

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96. *Id.* at \*8-9 (stating that the Framers did not mean “a recess”).

97. *Id.* at \*9. The *Canning* court noted that the Senate is in session, or it is in “the Recess.” If it has broken for three days within an ongoing session, it is no in “the Recess.” *Id.*

98. *Id.* at \*16. The court also held that the president may only fill vacancies arising during “the Recess,” as opposed to vacancies that happen to exist during the recess. The court found the relevant vacancies to not arise during the intersession recess of the Senate. *Id.* at \*21.

99. *See Berry, supra* note 12.

100. Advisory Opinion, *Alston & Bird L.L.P., The Impact of Noel Canning on Richard Cordray’s Directorship of the CFPB and on CFPB Post-Appointment Activity 4* (Jan. 29, 2013) [hereinafter *Alston*] (on file with author).

101. *See Valley Forge Christian Coll. v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

102. 104 S.Ct. 3315 (1984).

103. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997).

104. *Id.* at 818.

105. *CARPENTER, supra* note 67, at 6.

espoused an interpretation of the Article III standing doctrine in the flagship case, *Raines v. Byrd*.<sup>106</sup>

A. *The Raines Decision*

Members of the 104th Congress opposed the Line Item Veto Act, which gave the President the authority to cancel certain spending and tax benefit measures after he signed them into law.<sup>107</sup> The day after the Act went into effect, congressional opponents filed suit against Executive Branch officials, challenging the Act's constitutionality.<sup>108</sup> In finding that the challengers did not have the requisite standing to bring suit, the Court stated that the Plaintiffs did not base their claim on a personal injury but rather on the basis of political loss.<sup>109</sup> Moreover, the Court held that historical practice refutes the Congress members' position.<sup>110</sup> The Court referenced analogous confrontations between one or both Houses and the Executive Branch where no suit was brought on the basis of claimed injury to official authority or power.<sup>111</sup> Although granting standing in such a case would not be irrational, the Constitution has a more restrictive role for Article III courts.<sup>112</sup>

B. *Constitutional Requirements*

The United States Constitution grants the federal courts judicial power over cases or controversies.<sup>113</sup> One requirement of case-or-controversy jurisdiction is that the plaintiff must have standing to sue.<sup>114</sup> This requirement, which the plaintiff bears the burden of establishing, focuses on whether the plaintiff is the proper party to bring suit, although this inquiry often turns on the nature and source of the claim

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106. 521 U.S. 811, 818 (1997).

107. *See id.*

108. *See Raines*, 521 U.S. at 814.

109. *Id.* at 821. (“[Plaintiffs] base their claim on a loss of political power, not loss of something to which they are personally entitled, such as their seats as Members of Congress after their constituents elected.”).

110. *Id.*

111. *Id.*

112. *Id.*

113. U.S. CONST. art. III, § 2, cl. 1 (limiting the exercise of federal judicial power to “cases” and “controversies.”); *see Raines*, 521 U.S. at 821.

114. *Raines*, 521 U.S. at 818.

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presented.<sup>115</sup>

To meet the Article III standing requirement, a two-fold showing by the plaintiff is required.<sup>116</sup> First, the plaintiff must allege personal injury that is fairly traceable to the defendant's alleged unlawful conduct.<sup>117</sup> In other words, the plaintiff must establish that she has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to her.<sup>118</sup> Next, the plaintiff must show that the unlawful conduct is likely to be redressed by the requested relief.<sup>119</sup> The Court has emphasized that the alleged injury must be legally and judicially cognizable, i.e., the plaintiff has suffered "an invasion of a legally protected interest which is . . . concrete and particularized, and that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'"<sup>120</sup> The Court has labeled the constitutional requirement of standing a bedrock requirement.<sup>121</sup>

### C. Prudential Requirements

The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.<sup>122</sup> These self-imposed prudential limitations are founded in concern about the proper limited-role of the courts in the democratic society.<sup>123</sup> By law, Congress can grant a right to sue to a plaintiff who otherwise lacks standing.<sup>124</sup> According to the Court, however, such a law can only eliminate prudential, as opposed to constitutional, standing requirements.<sup>125</sup>

In order to satisfy the prudential requirements of standing, a plaintiff's injury must fall within the "zone of interests" protected or regulated by the statutory provision or constitutional guarantee in

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

123. *Id.*

124. *See Raines*, 521 U.S. at 820 n.3.

125. *Id.*

question.<sup>126</sup> The plaintiff must assert her own legal rights and interests and cannot rest her claim for relief on the legal rights or interests of third parties.<sup>127</sup> Furthermore, even when a plaintiff asserts injury recognizable under the Article III requirements, the Court has abstained from “adjudicating abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.”<sup>128</sup> The policy behind these prudential guidelines tends to parallel the policies reflected in the Article III requirement of actual or threatened injury susceptible to judicial remedy.<sup>129</sup> Notwithstanding the satisfaction of the foregoing prudential considerations, a plaintiff cannot substitute such a showing for the rigorous Article III requirements.<sup>130</sup>

### 1. Private Individual Challenge

In the context of directly challenging a Presidential recess appointment, the injury component of the standing requirement is difficult, if not insurmountable, to satisfy.<sup>131</sup> Because a private individual is presumably not involved in the recess appointment process, it would be exceedingly difficult for an individual to allege injury stemming from the recess appointment itself.<sup>132</sup> In other words, an individual plaintiff claiming injury resulting from the President’s recess appointment alone will not survive constitutional muster, at least in terms of standing. For instance, in the matter of *Bush v. Gore*,<sup>133</sup> a private individual plaintiff could not have obtained standing to challenge the conclusions of the Florida ballot counts.<sup>134</sup> This is largely because an individual private plaintiff does not have a personal stake in

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126. *Bennett*, 520 U.S. at 162.

127. *See* *Valley Forge Christian Coll. v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

128. *Id.*

129. *Id.*

130. *Id.* at 475.

131. Interview with Michael Gerhardt, Samuel Ashe distinguished professor in constitutional law and director for the Center of Law and Government, University of North Carolina School of Law (Sept. 19, 2012).

132. *Id.*

133. 531 U.S. 98 (2000) (resolving the ballot recount dispute during the 2000 presidential election between George W. Bush and Al Gore).

134. Gerhardt, *supra* note 131.

the matter.<sup>135</sup>

In *Geithner*, the broader lawsuit directly challenging Cordray's appointment,<sup>136</sup> the plaintiffs have not been burdened by a Bureau enforcement action or regulation. In fact, the plaintiff bank, being considerably smaller than \$10 billion in assets, is generally not subject to examination by the Bureau.<sup>137</sup> As part of the plaintiff bank's effort to assert standing, it alleges that it exited the consumer mortgage lending business in October 2010 because of regulatory uncertainty stemming from what is characterized as an open-ended grant of authority to the Bureau in this area.<sup>138</sup> As discussed above, *Raines* forces a plaintiff to assert a concrete and particularized injury.<sup>139</sup> Thus, the injury alleged in *Geithner*, i.e., the forbearance of conducting business in the mortgage industry, is hardly an existing, concrete injury cognizable under *Raines*. Because the plaintiffs have not been adversely affected by a Bureau enforcement action, and because the plaintiffs are not *subject* to the rules and regulations issued by the Bureau, the court is likely to grant the DOJ's motion to dismiss.<sup>140</sup>

## 2. Congressional Member Challenge

As of January 2013, no senator has tested the standing doctrine in challenging a presidential recess appointment. Indeed, it is questionable whether a senator could claim personal injury from such an appointment.<sup>141</sup> The standing inquiry is "especially rigorous" when reaching the merits of a dispute would force a court to decide the constitutionality of an action taken by one of the other two branches of the Federal Government.<sup>142</sup> If a member of Congress initiated an action to challenge the President's recess appointment, the Court would employ a more searching, comprehensive standing inquiry<sup>143</sup>—as it did

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135. *Id.*

136. See Davis Polk, *supra* note 22, at 1; see also *supra* pp. 4-6.

137. See 12 U.S.C. § 5515 (2006).

138. Pls.' Comp., *supra* note 15, at ¶ 12.

139. See *Raines v. Byrd*, 521 U.S. 811, 819 (1997); see *supra* pp. 20-23.

140. See Davis Polk, *supra* note 22, at 3 (predicting that it is likely that the district court will grant the DOJ's motion to dismiss).

141. Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 250 (2008).

142. *Raines*, 521 U.S. at 819 (emphasis added).

143. *Id.* at 819.

in *Raines*. Thus, the *Raines* decision seems to insinuate that members of Congress do not have standing to bring a case in their own capacity but may be capable of participating as *amici curiae*.<sup>144</sup>

As a caveat, however, the Court has held that a congressional member, serving as a plaintiff, may gain standing by alleging an institutional injury but only if the injury amounts to vote nullification.<sup>145</sup> The *Raines* Court suggested that vote nullification may, under certain circumstances, satisfy the injury component of the standing requirement.<sup>146</sup> In *Campbell v. Clinton*,<sup>147</sup> the D.C. Circuit held that vote nullification only occurs if Congress has no other legislative remedies available to rectify its alleged injury.<sup>148</sup> In terms of a presidential recess appointment, Congress undoubtedly has other legislative remedies at its disposal to counterattack a defective recess appointment. For instance, Congress could repeal the legislation that created the agency from the beginning.<sup>149</sup> Congress could also dilute the authority of the Bureau director, transferring such authority to another individual or entity.<sup>150</sup> These legislative remedies, among others, call into question the possibility of a congressional plaintiff satisfying the injury component of the standing doctrine.<sup>151</sup>

### 3. Congressional Institution Challenge

Another conceivable route for contesting the President's recess appointment is a judicial action by a congressional institution as a

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144. *Uncharted Territory*, *supra* note 5, at 41 (arguing before the House Judiciary Committee, Senator Lee noted that much doubt surrounds the proposition that members of Congress could establish standing in this context).

145. *Raines*, 521 U.S. at 812 (distinguishing vote nullification in *Coleman v. Miller*, 307 U.S. 433 (1939) by noting that in *Coleman* the Court held that "state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification, had a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *see also* CARPENTER, *supra* note 67, at 3.

146. *Raines*, 521 U.S. at 822.

147. 203 F.3d 19 (D.C. Cir. 2002).

148. *Id.* at 22-23.

149. *See* CARPENTER, *supra* note 67, at 9. Congress abolished the longstanding Interstate Commerce Commission in 1995.

150. *Id.*

151. *Id.*

whole. On numerous occasions, courts have permitted a plaintiff to bring suit on behalf of a congressional institution.<sup>152</sup> In the principal case, *United States v. American Telephone and Telegraph Company*<sup>153</sup> (“AT&T”), the House of Representatives designated a member of a House subcommittee to act on its behalf in a suit brought by the DOJ to enjoin a telephone company from complying with a subpoena.<sup>154</sup> The House, prior to bringing suit, passed a resolution authorizing a member of the subcommittee, Chairman Moss, to sue for an institutional injury, or more specifically to defend Congress’ institutional interest in compliance with properly issued subpoenas.<sup>155</sup> The AT&T court found that the House as a whole had standing to assert its investigatory power; therefore, it could designate a member to act on its behalf.<sup>156</sup>

In *Miers*, the court found that the House Committee on the Judiciary had standing to bring a civil action to enforce congressional subpoenas.<sup>157</sup> The court, relying heavily on AT&T, stated that an institution’s authorization of the suit is the central factor that “moves [a] case from the impermissible category of an individual plaintiff asserting an institutional injury . . . to the permissible category of an institutional plaintiff asserting an institutional injury.”<sup>158</sup> Thus, it appears that in order to gain standing, in addition to the *Raines* constitutional requirements, an institutional plaintiff must be authorized<sup>159</sup> to bring the suit by a house of Congress. The only institutional injuries that have satisfied this requirement, outside of the subpoena context, have “directly implicated the authority of Congress within [the] scheme of government, and the scope and reach of its ability to allocate power

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152. See, e.g., *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (holding that the House as a whole had standing to assert its investigatory power and could designate a member to act on its behalf); see also *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 53 (D.D.C. 2008) (holding that House committee had standing to bring civil action to enforce congressional subpoenas issued to senior presidential aides).

153. 551 F.2d 384 (D.C. Cir. 1976).

154. *Id.* at 391.

155. *Id.*

156. *Id.*

157. *Miers*, 558 F. Supp. 2d at 78 (relying heavily on a distinction between *Raines* and AT&T).

158. *Id.* at 71.

159. *Reed v. Cnty. Comm’rs of Del. Cnty., Pa.*, 277 U.S. 376, 388-89 (1928) (finding that the committee did not have standing because the resolution granting its investigative power did not authorize it to seek judicial recourse).

among the three branches.”<sup>160</sup>

For instance, in the Line Item Veto case, *INS v. Chadha*,<sup>161</sup> the Court allowed both houses of Congress to participate in a challenge of an act that provided both houses with the power to review and veto executive decisions of deportation.<sup>162</sup> Furthermore, in *Coleman v. Miller*,<sup>163</sup> the Court held that vote nullification was a sufficient institutional injury, as it would deprive the legislators of maintaining the effectiveness of their votes.<sup>164</sup>

In the context of recess appointments, however, the House of Representatives would not be able to claim an institutional injury because it does not have a direct constitutional role in recess appointments. Although it is recognized that the House of Representatives has inherent voting and subpoena powers, recess appointments do not loom within its scheme of government. On the other hand, the Senate has a direct role in the recess appointment process through its advice and consent function. The Senate may be able to claim an institutional injury, but after *Raines*, it is unclear if the injury would be considered concrete and personalized if the plaintiff has legislative remedies available to redress its injury.<sup>165</sup> As noted above, the Senate has legislative remedies at its disposal to counter an improper presidential recess appointment.<sup>166</sup>

Furthermore, an institutional plaintiff must show that the dispute is “traditionally thought to be capable of resolution through the judicial process.”<sup>167</sup> Aside from the *Canning* ruling, historically, there has never been a successful challenge to a presidential recess appointment.

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160. *Newdow v. U.S. Congress*, 313 F.3d 495, 498 (9th Cir. 2002) (holding that Senate lacked standing to intervene because it showed no harm beyond a broad frustration of desire to see the challenged law enforced as written).

161. 462 U.S. 919 (1983).

162. *See id.*

163. 307 U.S. 433 (1939).

164. *See id.* This case is currently the only action in which the Court has held that legislators alleging an institutional injury have standing; it may be an exception to *Raines* injury component based on the concreteness of the alleged injury.

165. *See Raines v. Byrd*, 521 U.S. 811, 819 (1997). (“In addition, the conclusion reached here neither deprives Members of Congress of an adequate remedy since they may repeal the Act or exempt appropriations bills from its reach, nor does it foreclose the Act from constitutional challenge by someone who suffers judicially cognizable injury resulting from it.”).

166. *See supra* p. 27.

167. *U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 66 (D.D.C. 2008).

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Therefore, it is difficult to conceive that such a challenge is traditionally thought capable of resolution through the judicial process. Because of the foregoing reasons, and because the Court has stressed that the standing inquiry is especially rigorous where important separation of powers concerns are implicated by a dispute,<sup>168</sup> an institutional plaintiff faces an onerous task in establishing Article III standing.<sup>169</sup>

#### 4. Plaintiff Impacted by Bureau Regulation

As a general rule, a person<sup>170</sup> who suffers a legal wrong because of agency action or who is adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review of such action.<sup>171</sup> For instance, in *New Process Steel, L.P. v. NLRB*,<sup>172</sup> the Board issued a decision enforceable directly against the plaintiff, levying mandatory conditions on the business to remedy a violation of an agency regulation.<sup>173</sup> Relying on a provision that permitted judicial review of a Board decision,<sup>174</sup> the *New Process Steel* Court held that the Board must have a quorum in order to lawfully take action.<sup>175</sup> Importantly, this case suggests that a reviewing court may inquire into whether an agency decision-maker has the authority to lawfully act.

Analogously, in *Canning*, the putative recess appointees constituted a majority of the Board's quorum, which in turn provided the requisite authority for the Board's actions.<sup>176</sup> As the court

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168. *Raines*, 521 U.S. at 819.

169. *Uncharted Territory*, *supra* note 5, at 72 (statement of C. Boyden Grey, former White House counsel to Pres. Bush, stating that he is "skeptical" that the House of Representatives, as a body, has standing to bring suit).

170. A "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency under the Administrative Procedure Act. 5 U.S.C. § 551 (2006).

171. See *Bullard v. Webster*, 623 F.2d 1042, 1045 (5th Cir. 1980) (interpreting 5 U.S.C. § 702 (2006)).

172. 130 S.Ct. 2635 (2010) (holding that the business must abide to bargaining agreement and pay employees for losses in earnings). The *Canning* court cited *New Process Steel* when it invoked jurisdiction over the case. *Canning v. NLRB*, No. 12-1115, 2013 WL 276024, at \*1 (D.C. Cir. Jan. 25, 2013).

173. *New Process Steel*, 130 S.Ct. 2635 at 2639.

174. 29 U.S.C. § 160(e) (2006) (permitting judicial review of a Board decision). The *Canning* court cited this statute in upholding jurisdiction of the matter on review.

175. *New Process Steel*, 130 S.Ct. at 2635.

176. See *Canning*, 2013 WL 276024, at \*1.

explained, “Because the Board must have a quorum in order to lawfully take action, if petitioner is correct [that the Board members were not validly appointed], then the order under review is void *ab initio*.”<sup>177</sup> Relying, at least in part, on *New Process Steel*, the D.C. Circuit elected to address the constitutional issue of whether the President validly appointed three Board members, whose presence on the Board comprised the quorum for the disputed decision.<sup>178</sup>

Similar to the National Labor Relation Board’s quorum requirement, the Bureau’s newly established powers are dependent on a director being in place.<sup>179</sup> In other words, any non-inherited regulatory power may be exercised only after a director is in office; otherwise, the agency’s action is not in accordance with law. Akin to *Canning*, in the absence of a validly appointed director, the Bureau’s enforcement action against a plaintiff may be void *ab initio*.<sup>180</sup> It therefore follows from *New Process Steel* and *Canning* that any Bureau assertion of such an enforcement power against a particular entity would likely provide that particular entity with standing to challenge Cordray’s appointment.<sup>181</sup> To date, however, the Bureau has entered only a handful of enforcement actions (three against banks and three against debt relief companies), conducted several exams of banks and nonbanks (but no public supervisory action arising out of those exams), and promulgated a number of final rules.<sup>182</sup> Therefore, the class of plaintiffs qualifying under *Canning* and *Noel Process Steel* is rather limited; nonetheless, such a plaintiff would seemingly have standing to challenge Cordray’s appointment. This observation is conditioned, of course, on the *Canning* decision’s disposition on appeal. While it is debatable whether the Court will grant a writ of certiorari to hear the case in the first place,<sup>183</sup> if the Court were to overturn the case, the pre-*Canning* doubt<sup>184</sup>

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177. *Id.*

178. *Id.* at \*24.

179. See Alston, *supra* note 100, at 2 (“The only authority held by the CFPB prior to the appointment of Mr. Cordray was whatever authority was transferred to it from other federal agencies. The power to prohibit unfair, deceptive or abusive acts in connection with consumer financial products and services and the power to supervise non depository institutions were not among those powers transferred to the CFPB.”).

180. See *Canning*, 2013 WL 276024, at \*1.

181. See Alston, *supra* note 100, at 3.

182. Client Alert, Morrison Foerster, D.C. Circuit Hands the CFPB a Setback? (Jan. 29, 2013) (on file with author).

183. On February 7, 2013, the Court denied an emergency application in the matter of

surrounding a judicial challenge to a presidential recess appointment is likely to be resuscitated.<sup>185</sup>

What is less clear, however, is whether any party subject to the rules and regulations issued by the Bureau pursuant to its Dodd-Frank powers has standing, regardless of whether it is targeted by an enforcement action.<sup>186</sup> The question, then, is whether these private parties, such as a nonbank that did not previously have to account to any federal regulator, could mount a private suit challenging the Cordray appointment and establish standing. The D.C. Circuit has held that a plaintiff may challenge a putative recess appointment even if the appointment is “radically attenuated” to the plaintiff’s injury.<sup>187</sup> Even upon fulfilling this liberal interpretation of the injury component, a plaintiff must establish additional constitutional and prudential standing requirements. The plaintiff’s injury must fall within the zone of interests protected by the constitutional guarantee in question; and, the injury must be redressable by the requested relief. Moreover, the federal courts have abstained from adjudicating abstract questions of

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*HealthBridge Management v. Kreisberg*, No. 3:12-cv-01299 (D. Conn. 2013). The application contested the constitutionality of the President’s putative recess appointments of three members to the Board. The denial of the application suggests that the Court is not willing to jump into the recess appointment fray before it is presented with a certiorari petition in *Canning* or another appellate court decision ruling on the validity of the appointments. Barbara S. Mishkin, *Full U.S. Supreme Court Rejects Application Challenging NLRB Recess Appointments*, CFPB MONITOR (Feb. 7, 2013), <http://www.cfpbmonitor.com/2013/02/07/full-u-s-supreme-court-rejects-application-challenging-nlr-recess-appointments/>.

184. This is the first time a federal appeals court ruled the Constitution limits the president’s power to make recess appointments to the period between sessions of Congress, and only if that vacancy arises during that period.

The U.S. Court of Appeals in Atlanta rejected similar arguments in 2004 by Democratic Senator Ted Kennedy when it upheld President George W. Bush’s recess pick of U.S. Circuit Judge William Pryor. Therefore, before *Canning*, it was, at best, a dubious proposition that the judiciary would nullify a presidential recess appointment. See Tom Schoenberg, *Obama Defeat on NLRB Picks a Rare Loss on Recess Power*, BLOOMBERG (Jan. 28, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-01-28/obama-defeat-on-nlr-picks-a-rare-loss-on-recess-power.html>.

185. See Alston, *supra* note 100, at 3 (noting that much of its standing analysis will be rendered moot if *Canning* is reversed on appeal). The Government has 45 days to seek rehearing en banc by the full DC Circuit. If it decides to appeal directly to the United States Supreme Court, it will have 60 days to file its petition for writ of certiorari. See Regulatory and Government Affairs Alert, Wilmer Hale, DC Circuit Invalidates Obama Recess Appointments 1 (Jan. 25, 2013) (on file with author).

186. *Id.* at 4.

187. See Landry v. FDIC, 204 F.3d 1125, 1131 (D.C. Cir. 2000); see also Alston, *supra* note 100, at 4.

wide public significant which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.<sup>188</sup> These standing requirements present a lofty hurdle for a plaintiff only subject to the Bureau's authority. In sum, such a plaintiff is undoubtedly on a weaker footing than a plaintiff directly injured by an agency enforcement action.<sup>189</sup>

## V. CONCLUSION

What is abundantly clear from the *Raines* decision is that federal courts will not listen to arguments brought by someone who only has an ideological axe to grind.<sup>190</sup> Courts tend to respect the direction of Congress when it comes in the form of laws, not judicial undertakings.<sup>191</sup> While the *Geithner* case is likely to be dismissed for a lack of standing, the *Canning* decision could spawn new lawsuits brought by plaintiffs impacted by the increasing number of final promulgations of the Bureau.<sup>192</sup> Despite the lack of Bureau enforcement activity, plaintiffs aggrieved by such regulations are the most likely to establish standing in federal court.

Irrespective of whether the Cordray appointment is invalidated, Dodd-Frank empowers the Acting Secretary of the Treasury to ratify certain actions of the Bureau when no director is in place.<sup>193</sup> This recourse along with the "de facto officer" doctrine provides a sense of security for existing Bureau promulgations.<sup>194</sup> Moreover, the recess

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188. See *supra* pp. 22-24.

189. However, in light of the Supreme Court's broad interpretation of standing in Appointments Clause cases, it is certainly possible that such a party would be found to have standing to challenge Mr. Cordray's appointment. Alston, *supra* note 100, at 4.

190. Lauren Saunders, *Challengers to CFPB Recess Appointment Face Another Hurdle*, NAT'L CONSUMER LAW. CTR. (Feb. 2, 2012), <http://www.nclc.org/images/pdf/pr-reports/pr-cfpb-interim-authority.pdf>.

191. *Uncharted Territory*, *supra* note 5, at 36 (statement of Rep. Darrell Issa, Cal.).

192. See Davis Polk, *supra* note 22, at 3.

193. See 12 U.S.C. § 5586 (Supp. IV 2010).

194. See Regulatory and Government Affairs Alert, Wilmer Hale, DC Circuit Invalidates Obama Recess Appointments 1 (Jan. 25, 2013) (on file with author). The De Facto Officer Doctrine is an equitable doctrine that courts invoke from time to time to prevent chaos due to invalid appointments. Although the De Facto Officer Doctrine is by no means automatic, and should only apply in extenuating circumstances, courts have some leeway to ratify actions already taken by Cordray as Director. Morrison Foerster, *supra* note 182.

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appointment of Richard Cordray will expire at the end of the year.<sup>195</sup> Because courts move relatively slow, a judicial resolution is not likely to develop until after the expiration of Cordray's term, deeming the issue "water under the bridge." For these reasons, financial institutions and consumers alike should plan on complying with the promulgations of the Consumer Financial Protection Bureau.

S. AUSTIN KING

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195. On January 24, 2012, President Obama re-nominated Richard Cordray as Director of the Bureau. Congressional Republicans have again threatened to block the nomination unless substantive changes are made to the Bureau. See Karen Weise, *The Consumer Watchdog Comes Under New Fire From Congress*, BLOOMBERG BUSINESSWEEK (Feb. 4, 2013), <http://www.businessweek.com/articles/2013-02-04/the-consumer-watchdog-comes-under-new-fire-from-congress>.