Hearing before the
U.S. House of Representatives
Committee on Oversight and Government Reform

"UNCHARTERED TERRITORY: WHAT ARE THE CONSEQUENCES OF PRESIDENT OBAMA'S UNPRECEDENTED 'RECESS' APPOINTMENTS"

February 1, 2012

<u>Statement of Amb. C. Boyden Gray</u>

I am pleased to have been asked to testify before the Committee on this critically important issue. By unilaterally appointing Richard Cordray to lead the Consumer Financial Protection Bureau ("CFPB"), President Obama made an unconstitutional appointment to an unconstitutional office. As I have argued in several forums, the Dodd-Frank Act violates the Constitution by granting effectively unlimited power to the newly created CFPB, while limiting virtually all meaningful oversight of the CFPB's use of that power.[1] And that unconstitutionality is compounded by the Cordray appointment, which—like the president's subsequent unilateral appointments of three new members to the National Labor Relations Act ("NLRB")—was itself unconstitutional, because the Senate was not in "recess."

In my testimony today, I will briefly review those arguments. But in the end I would like to shift my focus to the practical effects of the President's

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[1] *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Is It Constitution?*, Engage (2010) (co-authored with John Shu); *Cordray appointment raises a raft of red flags*, Washington Times, Jan. 17, 2012; *No checks, no balance in reform law*," Washington Times, Sept. 14, 2010; *Dodd-Frank, the real threat to the Constitution*, Washington Post, Dec. 31, 2010.

unconstitutional actions. Simply put, the "recess appointments" have taken two regulatory schemes—labor law and consumer financial regulation—that already are rife with uncertainty, and they have redoubled that uncertainty.

I. The CFPB Is Unconstitutional

As I have argued in detail elsewhere,[2] Dodd-Frank's Title X, which created the CFPB, is unconstitutional. First, Congress granted the CFPB unprecedented power but included no "intelligible principle" to guide and limit the agency's exercise of that power. The agency is free to regulate whatever it deems to be "unfair," "deceptive," or "abusive" business practices, not just by promulgating regulations, but also by simply filing lawsuits even in the absence of regulations. Yet Dodd-Frank does not actually *define* "unfair" or "deceptive," leaving the CFPB alone to define those terms at will.

Some might point to Mr. Cordray's assurances, in a hearing last week before this Committee's subcommittee, that the CFPB will not interpret those terms in "some new and bizarre way."[3] My first response is that there is something wrong where a federal statute is so devoid of direction that we have to rely on a regulator's own promise and sole discretion not to fully exercise his power. But my second, and more substantive, response is that Mr. Cordray's assurances are irrelevant to the constitutional question. As the Supreme Court explained a decade ago in *Whitman v.*

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[2] *The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Is It Constitution?*, Engage (2010) (co-authored with John Shu). *See also* C. Boyden Gray*, Dodd-Frank, the real threat to the Constitution*, Wash. Post, Dec. 31, 2010.

[3] Hrg. Before House Committee on Oversight and Government Reform, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs (Jan. 24, 2012).

American Trucking Associations, Inc.,[4] an unconstitutionally broad grant of power to an agency cannot be cured by the agency's promise to limit its own discretion.

Just as dangerous as its lack of guidance is the statute's effective elimination of every check and balance that would otherwise limit the CFPB's exercise of power. First, Congress relinquished its own "power of the purse" by freeing CFPB from the usual appropriations power; CFPB simply takes up to 12% of the Federal Reserve's operating costs. (And according to the statute, Congress is *prohibited* from reviewing CFPB's use of those funds.)

Second, the CFPB is largely freed from Executive Branch oversight, because the CFPB Director is "independent": he cannot be fired by the President, except under limited circumstances. Some might argue that the CFPB is checked by the newly created Financial Stability Oversight Council ("FSOC"), which has a nominal veto over CFPB regulations, but this is an empty threat. The FSOC can exercise this veto under only limited circumstances; even when those circumstances occur, the veto requires the votes of 7 of 10 FSOC members—and because the CFPB Director is himself an FSOC member, this actually requires 7 of the 9 remaining votes, a 78% supermajority. And the FSOC has no power to veto CFPB litigation, leaving the agency free to undertake regulation-by-litigation.

Third, the Judicial Branch's oversight is limited, because Dodd-Frank requires the courts to defer to the CFPB's interpretations of not just Dodd-Frank itself but also the myriad other statutes transferred to the CFPB's control, as

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[4] 531 U.S. 457, 472-73 (2001).

though the CFPB were the only agency involved, thus precluding reference to the agencies that previously administered the statutes—and requiring deference to an agency not constrained by any intelligible statutory principle.

And finally, Dodd-Frank eliminates the internal check most common for "independent" agencies. Traditionally, independent agencies such as the CPSC, FERC, FCC, SEC, and others are multi-member, bipartisan commissions, where the members check one another. Indeed, this is the model that Elizabeth Warren originally proposed for the CFPB. But Dodd-Frank created the CFPB to have a single head, free to run the CFPB as he sees fit.

Each of these features raises constitutional concerns in and of themselves. Together, they create an unprecedented, unconstitutional agency. Forty-five Senators indicated they would support the nomination if some of these concerns were addressed. When they were not, the nomination was rejected.

II. The CFPB and NLRB "Recess" Appointments Are Unconstitutional

The President chose to disregard this constitutional check and balance, and instead appointed Mr. Cordray and the new NRLB members without the Senate's advice and consent. He called this a "recess appointment," but it was no such thing, because there was no "recess." The Senate chose not to adjourn for more than three days at a time—a well-established definition of "recess" that President Obama's own Justice Department reiterated in recent Supreme Court litigation.

After appointing Mr. Cordray and the NLRB members, the Obama Administration released an Office of Legal Counsel ("OLC") memorandum attempting to legitimize the President's actions. But this *ex post facto* analysis was a transparent attempt to justify a preordained conclusion. Instead of explaining how a series of adjournments could add up into a "recess," the memorandum simply *asserted* that the Senate *was* in recess, and then asked whether the Senate's short sessions would suffice to "interrupt" the alleged recess. According to OLC, the President can deem the Senate to be in "recess" anytime the Senate is "unavailable" to confirm his nominations—a standard that could apply just as easily on weekends, holidays, or even at night.

In explaining that the power claimed by the President was unlimited, OLC stressed (in footnote 13 of its opinion) that it "has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment." And to leave no room for doubt, it quoted an older Justice Department brief's assertion that "there is no lower time limit that a recess must meet to trigger the recess appointment power." In short, the President and OLC have nullified the Senate's "advice and consent" power. The President in the State of the Union called for elimination of the filibuster, which had been the proximate cause of Cordray's rejection. But the recess-appointment power claimed by the White House already renders the filibuster irrelevant.

III. The President's Unconstitutional Actions Have Cast An Ominous Shadow of Uncertainty on American Businesses

The appointments power had been governed by rules and standards long understood and respected by both branches. Indeed, when Senate Majority Leader Reid announced in 2007 that the Senate would no longer recess, in order to prevent President Bush from recess-appointing officers, President Bush's response was not to unilaterally appoint officers, but rather to respect the Senate's constitutional check against his own authority. But President Obama chose the other course of action, shattering those understandings and undermining the rule of law.

This action is not with costs, and first among them are the costs of uncertainty. As Justice Scalia wrote years ago in his essay, "The Rule of Law as a Law of Rules," one of the virtues of government constrained by law is "predictability": throughout modern history, "uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[5]

By declaring that he no longer considers himself bound by constitutional limits on his appointment power, the President has eliminated all predictability from the nomination-and-confirmation process. Neither the Senate nor the public knows what principles the President will follow in determining who gets a recess appointment. We also do not yet know *how* the Senate itself will respond, but we do know *that* it likely will respond by finding other means by which to achieve the checks and balances that previously were achieved by withholding consent for nominations. And this response will in turn have its own effects, anticipated and unanticipated.

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[5] 56 U. Chi. L. Rev. 1175, 1179 (1989).

But even setting aside this overarching uncertainty between the branches, the President's appointments impose uncertainty upon the public at large, especially for American industry. In taking the step of unilaterally appointing officers to the CFPB and the NLRB, the President did not tell the public why he chose them and not others. Was the choice related to the scope of their power over the economy? I have discussed the unlimited power of the CFPB. NLRB's own powers are no less dramatic and, at their worst, no less arbitrary, as we saw in the NLRB's attempt to use litigation to block Boeing's production of the 787 Dreamliner in South Carolina.

The agencies' capacity for disrupting the economy would be worrisome enough in and of itself; but having removed the check and balance of Senate confirmation from the appointment process, the regulators appointed by President Obama will be even less accountable, and therefore even more likely to assert their powers on American companies.

Generally speaking, uncertainty has an inhibiting effect on economic growth. The president of the Cleveland Federal Reserve Bank, Sandra Pianalto, stressed this in a speech last month:

> Uncertainty also plays a key role in holding back growth. I spend a lot of time talking with business leaders. Almost without exception, they tell me that uncertainty is making them more cautious. There are uncertainties regarding the resolution of federal, state, and local budget problems, which will translate into tax and spending issues. Then there are also regulatory

> uncertainties: healthcare, environmental, and financial reform, to name just a few.[6]

Analyzing this issue more systematically, a team of Chicago and Stanford professors recently concluded that "U.S. policy uncertainty" is at "historically high levels," and cited the NLRB's recent Boeing complaint, among other policy disputes, as having "injected another source of uncertainty into business investment decisions."[7] Abandoning the confirmation process is almost certain to add to the existing regulatory drag on the economy.

Congress cannot rely exclusively on the courts to solve these problems by overturning the recess appointments. For even if the courts ultimately overturn these recess appointments, it is possible that they would stop short of vacating all actions taken by the unconstitutionally appointed agencies. One would assume that an unconstitutionally appointed regulator's actions would be null and void; indeed, that was the course recently taken by the courts after the Supreme Court held in *New Process Steel v. NRLB* that the NLRB lacked a quorum when only two of its five seats were filled.[8] But it is at least possible that the courts would allow the CFPB's and NLRB's post-appointment actions to stand even if their leaders were

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6 http://www.clevelandfed.org/For_the_Public/News_and_Media/Speeches/2012/Pianalto_20120110.cfm

7 *See* Scott R. Baker, Nicholas Bloom, and Steven J. Davis, *Policy Uncertainty is Choking Recovery*, Bloomberg.com (Oct. 5, 2011) (summarizing their study's conclusions). The full study, *Measuring Economic Policy Uncertainty*, is available at http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

8 *New Process Steel, L.P. v. NRLB*, 130 S. Ct. 2635 (2010). After that decision, some federal courts vacated actions taken by the NLRB. *See, e.g.*, *N.Y. and Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 728 (D.C. Cir. 2011); *County Waste of Ulster, L.L.C. v. NLRB*, 385 F. Appx. 11, 12 (2d Cir. 2010).

unconstitutionally appointed; that is precisely what the Supreme Court did in *Buckley v. Valeo*, when it held that Federal Election Commission members were unconstitutionally appointed yet it allowed the prior FEC's actions to stand.[9]

Because Congress cannot be sure that the courts will retroactively correct the CFPB's and NLRB's exercise of unconstitutional power even if they have been unconstitutionally staffed, it is all the more incumbent upon Congress to explore whatever checks and balances are available to pressure the Administration not to repeat its unconstitutional appointments, and to nominate a new CFPB Director and NLRB members who would secure the Senate's advice and consent.

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Because these issues raise so many questions of constitutional first principles, I conclude by returning to one of the earliest scholars of American constitutional law, Chancellor James Kent. In his seminal *Commentaries on American Law*, Chancellor Kent reflected on the rule of law, and the need for stability and predictability in the enforcement of law. Although Kent, like Justice Scalia above, was referring first and foremost to judicial precedents, his analysis holds no less true for the precedents governing the relations between the Branches. And his analysis reiterates the need for clear rules and precedents directing and limiting agency power, which are absent from the CFPB and, as the Boeing incident demonstrates, from the NLRB.

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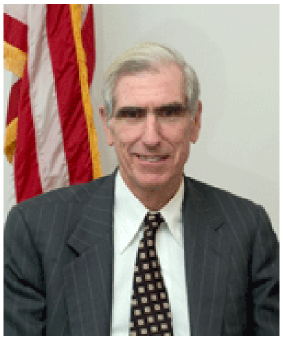
9 *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976).

Specifically, Kent warned that once the law had been established "upon solemn argument and mature deliberation, the presumption is in favour of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and their contracts by it." The absence of such certainty would be "extremely inconvenient to the public, because it is "by the notoriety and stability of such rules, that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy, and to trust, and to deal with each other." If rules of law are "lightly disregarded, we should disturb and unsettle the great landmarks of property." This is but another elegant way of describing the adverse impact of uncertainty on economic growth and job creation.



C. Boyden Gray

C. Boyden Gray, of the District of Columbia, is the former Ambassador to the European Union (2006-2007) and former Special Envoy for Eurasian Energy Diplomacy (2008-2009). He also served as former Special Envoy for European Union Affairs (2008-2009) and as White House Counsel in the administration of President George H.W. Bush (1989-1993).

Prior to his appointment as Special Envoy, Mr. Gray served as U.S. Ambassador to the European Union in Brussels from 2006 to 2007. From 1969 to 1981 and 1993 to 2005, Mr. Gray was a partner in the Wilmer, Cutler, Pickering, Hale and Dorr law firm in Washington. He served as White House Counsel in the administration of President George H.W. Bush (1989-1993) and served as Legal Counsel to Vice President Bush (1981-1989). Mr. Gray also served as counsel to the Presidential Task Force on Regulatory Relief during the Reagan Administration.

While working for Vice President Bush, Mr. Gray began to focus on clean air issues, including the Clean Air Act (CAA). In his role as Counsel to President Bush, Mr. Gray became one of the principal architects of the 1990 Clean Air Act Amendments, and is widely credited with having triggered the CAA acid rain emissions trading system. He was also involved in the creation of the Energy Policy Act of 1992, which aimed to decrease American dependence on foreign oil, protect our environment, and promote economic growth. He has a long history of involvement with clean fuels and reformulated gasoline, extensive experience with the use of market incentives to achieve environmental goals, and is widely credited with having triggered the use of market incentives in connection with the phaseout of CFCs under the Montreal Protocol.

At the law firm of Wilmer, Cutler, Pickering, Hale and Dorr, his practice focused on a range of regulatory matters, with an emphasis on environment, energy, antitrust, public health, and information technology.

Mr. Gray was born in Winston-Salem, North Carolina. He earned his Bachelor's degree magna cum laude from Harvard University and his Juris Doctor with high honors from the Law School of the University of North Carolina at Chapel Hill, where he was editor-in-chief of the Law Review. Following his graduation from university, he served in the U.S. Marine Corps. After law school, he clerked for Earl Warren, Chief Justice of the United States Supreme Court (1968-69).

Mr. Gray has served on the boards of numerous charitable, educational, and professional organizations. He has been a member of Harvard University's Committee to Visit the College and of the Committee on University Development. He is the recipient of the Presidential Citizens Medal and the Distinguished Alumnus Award of the University of North Carolina Law School.

Committee on Oversight and Government Reform
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Name: C Boyden Gray

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

I certify that the above information is true and correct.
Signature: C B Gray

Date: 1/31/2012