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President Obama's Unconstitutional "Recess" Appointments

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Abstract
President Barack Obama has stated that he made his "recess" appointments to the Consumer Financial Protection Bureau and National Labor Relations Board pursuant to the Constitution's Recess Appointments Clause, but this ignores the history, purpose, and original meaning of the constitutional provision upon which he has relied. In unilaterally making appointments to the CFPB and NLRB while the Senate was holding pro forma sessions, President Obama has attempted to fabricate a constructive, inferred, or imputed recess. Not only are President Obama's January 4, 2012, appointments unconstitutional, but the justification for those actions does great violence to the Constitution's separation of powers and system of checks and balances.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1202**

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Today I want to speak about the Constitution. I realize this is obvious to most of you, since the title for this conference is "President Obama's Unconstitutional 'Recess' Appointments." But I begin my remarks this way because, over the last few weeks, every time I have raised the issue of the President's unconstitutional appointments, President Obama's supporters have made a concerted effort to direct the conversation away from the Constitution.

They don't want to talk about the Senate's Article II, Section 2 Advice and Consent function. They don't want to talk about the Constitution's separation of powers. They don't want to talk about the institutional prerogatives of the Senate, including the constitutional provision that authorizes the Senate to determine its own rules. And they have no interest in discussing the constitutional system of checks and balances and overlapping powers that ensure that no branch oversteps its constitutional bounds.

In fact, even though President Obama stated that he made the appointments to the Consumer Financial Protection Bureau and National Labor Relations Board pursuant to the Constitution's Recess

Talking Points

- The key conclusion of the Department of Justice memorandum on which President Obama has relied is that the President may unilaterally conclude that "pro forma" sessions do not constitute sessions of the Senate for purposes of the Recess Appointments Clause.
- Under the procedures set forth in the Constitution, it is for Congress, not the President, to determine when Congress is in session. Indeed, the Constitution expressly grants the Senate power to "determine the Rules of its Proceedings."
- President Obama has thus encroached on the Senate's prerogatives and violated the Constitution's separation of powers. That principle can mean little to the legislative branch if the executive branch is allowed to deprive the Senate of its constitutional right to make its own rules and determine for itself when it is in recess.

Appointments Clause, Democrats won't even discuss that provision of the Constitution—its history, purpose, and original meaning.

Needless to say, despite the plainly constitutional nature of the dispute surrounding the President's January 4, 2012, appointments, we aren't spending much time discussing the *Federalist Papers*, the *Records of the Federal Convention of 1787*, the Framers' debates, or even the Constitution itself.

This is not due to a lack of effort on my part. In opposing President Obama's appointments to the CFPB and NLRB, I have repeatedly made clear that this is a constitutional issue. Each time I have spoken out—and I have done so on numerous occasions, including in an executive business meeting of the Senate Judiciary Committee, on the floor of the U.S. Senate, in a hearing before the House Committee on Oversight and Government Reform, and in countless interviews in the press—I have set forth in detail the legal and constitutional reasons why President Obama's purported recess appointments are unprecedented and unconstitutional.

I have also made absolutely clear that my opposition to President Obama's appointments is not partisan and that I will hold a Republican President equally accountable should he ever make a similarly unconstitutional claim of power.

Refusing to Engage on the Substance

Nonetheless, Democrats have refused to engage on the substance. Instead, they change the subject to partisan politics, the nominations process, and Richard Cordray's qualifications.

Even worse, and despite my repeatedly making clear that I would hold a Republican President to the same standard and that the institutional prerogatives of the Senate—not the interests of any political party—are at stake, Democrats, including the President himself, have accused me of playing politics. In his weekly radio address on January 28, President Obama singled me out, stating that I was "gumming up" the government process. The President even presumed to lecture the Senate about its responsibility with respect to his nominees and suggested that the Founding Fathers did not envision Senators blocking his nominees.

THE UPSHOT OF THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL MEMORANDUM ON WHICH PRESIDENT OBAMA RELIED IN MAKING HIS UNCONSTITUTIONAL APPOINTMENTS IS TO VALIDATE THE PRESIDENT'S CLAIM OF UNILATERAL AUTHORITY TO DETERMINE WHEN THE SENATE IS IN RECESS.

Tellingly, throughout the discussions regarding President Obama's appointments, no one has disputed the actual substance of the arguments I am making. In response to my substantive legal and constitutional arguments, many Democrats have in fact conceded that I may be correct or have pled a kind of ignorance, stating that it is a close call and they are not sure how they come down on the matter.

Of course, few of the Democrats I have spoken to have read or have any idea what is contained in the Department of Justice Office of Legal Counsel memorandum on which President Obama relied in making his unconstitutional appointments. And they seem surprised and even consternated when I explain that the upshot of that memorandum is to validate the President's claim of unilateral authority to determine when the Senate is in recess.

Moreover—and this is what is truly troubling—despite acknowledging that there are serious constitutional issues with respect to President Obama's appointments, Democrats have not stopped to consider their obligation to consult the Constitution, determine whether it has been violated, and take proper institutional recourse. Rather, they have gone on arguing that this is somehow all about partisan politics. In so doing, they treat the Constitution as if it were just another argument, or as if the document were merely advisory—a kind of road sign that we are free to breeze by on the road to more government.

Senate's Advice and Consent Role

I am saddened that my Democratic colleagues in the Senate are not more jealous of our body's rightful constitutional prerogatives. As they well know, the Constitution's protections do not belong to any one party, and its structural separation of powers is meant to protect against the abuses (and future abuses) of Presidents of both parties. Acquiescing to the President in the moment may result in temporary political gain for the Democrats, but relinquishing this important piece of the Senate's constitutional role has lasting consequences for both Republicans and Democrats.

The Senate's Advice and Consent role is grounded in the Constitution's system of checks and balances. In *Federalist* 51, James Madison wrote that "the great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those

who administer each [branch] *the necessary constitutional means* and personal motives to resist encroachments of the others." Among those constitutional means is the Senate's ability to withhold its consent for a nominee, forcing the President to work with Congress to address that body's concerns.

In discussing the method for appointment of judicial and executive officers at the Philadelphia Convention in the summer of 1787, some believed the legislature alone should have the appointment power. Others would have vested that power entirely in the executive.[1] The result, a compromise, was to authorize the President to nominate judges and executive officers, but only with the advice and consent of the Senate.[2]

This choice was, of course, deliberate.[3] The Framers reasoned that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." And they noted that it would not be wise "to grant so great a power to any single person," as "[t]he people will think we are leaning too much towards Monarchy."[4] The Framers thus avoided, as Alexander Hamilton put it, the "several disadvantages which might attend [placing] the absolute power of appointment in the hands [of the President alone]."[5]

The Framers also noted the general characteristics of the Senate that made it a proper body in which to vest the Advice and Consent role. James Madison considered placing the entire appointment power in the Senate, noting that its representatives are "sufficiently stable and independent to follow their deliberate judgments."[6] Similarly, in *Federalist* 76, Alexander Hamilton stated that requiring the cooperation of the Senate "would be an excellent check upon a spirit of favoritism in the President...[and] would be an efficacious source of stability in the administration."

Misunderstanding the Recess Appointments Clause

Because, at the time of the nation's founding, Congress routinely recessed for six to nine months at a time, the Framers also authorized the President to "fill up all Vacancies that may happen during the Recess of the Senate."[7] As Alexander Hamilton explained in *Federalist* 67, the Framers allowed for recess appointments only because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers." But the Recess Appointments Clause was meant "to be nothing more than a supplement [to the normal method of appointment]," which required the Senate's advice and consent.

An important report from the Senate Judiciary Committee makes this same point. During a seconds-long intersession recess in 1903, President Theodore Roosevelt made over 160 recess appointments. In response, the Senate Judiciary Committee issued a report condemning the notion that the President can unilaterally make appointments during such a "constructive recess." The report explains that:

> [The Recess Appointments Clause] was carefully devised so as to accomplish the purpose in view [filling vacancies occurring while the Senate was in recess], without in the slightest degree changing the policy of the Constitution, that such

1. 1 Max Farrand, *The Records of the Federal Convention of 1787*, 119–20 (1911).
2. *See id.* at 41.
3. "Since the Framers had before them a range of different appointment methods, including appointment by the executive alone, *see* 1 William Blackstone, Commentaries on the Laws of England at *271–*73 (1822) (describing appointment by the King of England), by the legislature alone, see N.C. Const. of 1776, art. XIII, XIV, and by the executive with a council, see N.Y. Const. of 1777, art. XXIII, they must be presumed to have made an informed choice. One thus must conclude the Framers believed that a system where the President had the primary role in selecting officers, but was subject to a senatorial check, was superior to the available alternatives." Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLS L. Rev. 1487 at n. 26 (2005).
4. 1 Max Farrand, *The Records of the Federal Convention of 1787*, 119 (1911).
5. *The Federalist* No. 76.
6. 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 120; *See also*, Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204 at n. 111 (1994) ("The debate on which branch would appoint judges reveals the power the Framers intended for the Senate. Although a few wished the Executive to enjoy the sole power of appointment [(James Wilson and Gouverneur Morris)], many desired that the Senate would unilaterally appoint judges [(James Madison, Alexander Martin, Roger Sherman, Gunning Bedford, Edmund Randolph, Oliver Ellsworth, and Charles Pinckney)]. Although the debate ended in the compromise of presidential nomination and Senate confirmation, it demonstrates the Framers' belief in the strengths of including the Senate in the process. This branch of the legislature provides stability and information in the appointment process, and supplies a needed check on the powers of the President.") (internal citations omitted).
7. U.S. Const. Art. II, Sec. 2.

> appointments are only to be made with the participation of the Senate.[8]

The report further makes clear that by providing for recess appointments, "[t]he framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one."[9]

In unilaterally making appointments to the CFPB and NLRB while the Senate was holding pro forma sessions, President Obama has attempted to fabricate a constructive, inferred, or imputed recess. Not only are President Obama's January 4, 2012, appointments unconstitutional, but the justification for those actions does great violence to the Constitution's separation of powers and system of checks and balances.

The key conclusion of the DOJ OLC memorandum on which President Obama has relied is that the President may unilaterally conclude that the Senate's "pro forma" sessions do not constitute sessions of the Senate for purposes of the Recess Appointments Clause.[10] If allowed to stand, this deeply flawed assertion would upend an important element of the Constitution's separation of powers.

Under the procedures set forth in the Constitution, it is for Congress, not the President, to determine when Congress is in session. Indeed, the Constitution expressly grants the Senate power to "determine the Rules of its Proceedings."[11] Commenting on this provision in his authoritative constitutional treatise, Joseph Story noted that "[t]he humblest assembly of men is understood to possess [the power to make its own rules,] and it would be absurd to deprive the councils of the nation of a like authority."[12] And yet this is precisely the result of President Obama's attempt to tell the Senate when it is in recess.

NOT ONLY ARE PRESIDENT OBAMA'S JANUARY 4, 2012, APPOINTMENTS UNCONSTITUTIONAL, BUT THE JUSTIFICATION FOR THOSE ACTIONS DOES GREAT VIOLENCE TO THE CONSTITUTION'S SEPARATION OF POWERS AND SYSTEM OF CHECKS AND BALANCES.

President Obama has thus encroached on the Senate's prerogatives and violated the Constitution's separation of powers. As the Supreme Court has noted, the principle of separation of powers is "not simply an abstract generalization in the minds of the Framers: it [is a principle] woven into the document that they drafted in Philadelphia in the summer of 1787."[13] But that principle can mean little to the legislative branch if the executive branch is allowed to deprive the Senate of its constitutional right to make its own rules and determine for itself when it is in recess.

OLC's Flawed Analysis

In justifying an improperly expansive reading of the executive's authority under the Recess Appointments Clause, the OLC memorandum makes a number of mistakes, a few of which merit special mention.

First and foremost, the OLC memorandum employs an unsound interpretative methodology. Instead of engaging with the text, purpose, and original meaning of the Constitution's Recess Appointments Clause, OLC's memorandum engages in a kind of "functional" analysis of the Constitution. Relying on a prior opinion rendered by Attorney General Harry Daugherty in 1921, OLC's memorandum asserts that the Recess Appointments Clause must be given a "practical construction" and that the "touchstone" for determining when the Senate is in session is "its *practical effect*: *viz.*, whether

8. S. Rep. No. 4389, at 2 (1905).
9. *Id.*
10. *See* Memorandum Opinion for the Counsel to the President, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel 1 (2012) ("OLC Memorandum").
11. U.S. Const. art. I., § 5, cl. 2.
12. *See also* Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, Document 14 ("Each house of Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by... the Constitution.").
13. *See INS v. Chadha*, 462 U.S. 919, 945 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[It was] the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *The Federalist* No. 47 (Madison) (stating, with respect to the principle of separation of powers, that "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.").

or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations."[14]

The OLC memorandum thus ignores what *Federalist* 67 makes clear: namely, that "[t]he ordinary power of appointment is confined to the President and Senate JOINTLY," and the President's power to appoint nominees absent Senate approval is but a small exception to that rule for cases in which a significant recess of the Senate requires a position "in the public service to [be] fill[ed] without delay."

THE OFFICE OF LEGAL COUNSEL'S ARGUMENT BOILS DOWN TO AN UNTENABLE ASSERTION THAT BECAUSE THE SENATE HAS CHOSEN NOT TO ACT ON PRESIDENT OBAMA'S NOMINATIONS DURING ITS SESSIONS, IT WAS INCAPABLE OF DOING SO.

The OLC memorandum's functionalist argument also fails on its own terms. During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent. Notably, at one such pro forma session on December 23, 2011, the Senate passed a significant piece of legislation, the payroll tax cut extension, demonstrating that it is capable of conducting business at such sessions.[15]

The OLC memorandum nonetheless argues that the Senate is not capable of exercising its advice and consent function at pro forma sessions because little or no business has generally been conducted during such sessions and because the Senate has made statements suggesting that it intends not to conduct business at such sessions.[16] But regardless of how much business the Senate conducts during pro forma sessions or how much business it indicates in statements that it intends to conduct at such sessions, the Senate has been and continues to be *capable* of conducting business at such sessions—including advising and consenting to nominations—should it decide to do so. Specifically, throughout the time it held pro forma sessions, the Senate was capable of acting on President Obama's nominations by unanimous consent, the method by which the Senate in fact confirms most presidential nominees. OLC's argument thus boils down to an untenable assertion that because the Senate has chosen not to act on President Obama's nominations during its sessions, it was incapable of doing so.

Indeed, in making its variety of functional arguments, OLC's memorandum essentially concedes that its own argument fails. Having set up its entire construct on the premise that, even while conducting pro forma sessions, the Senate was "in practice…not available to provide advice and consent,"[17] the memorandum at another point expressly "recognize[s] that, *as a practical matter*, neither the scheduling order nor the quorum requirement will always prevent the Senate from acting without a quorum through unanimous consent."[18] If the "in practice" logic is good enough for the President, it is good enough for the Senate. Because the OLC memorandum concedes that the Senate, as a practical matter, is in session during pro forma sessions, there remain no logically consistent grounds on which OLC can assert that the President may make recess appointments at those times.

THE RECESS APPOINTMENTS CLAUSE WAS NEVER INTENDED TO OBVIATE THE SENATE'S PARTICIPATION IN APPOINTMENTS, AND YET THAT MAY WELL BE THE RESULT OF PRESIDENT OBAMA'S UNCONSTITUTIONAL ACTIONS AND THE FLAWED OLC MEMORANDUM USED TO JUSTIFY THOSE ACTIONS.

Finally, OLC's assertion that pro forma sessions are not cognizable for purposes of the Recess Appointments Clause violates past constitutional practice and tradition. In separate provisions, the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days"[19] and that, "unless [Congress] shall by law appoint a different day," Congress

14. OLC Memorandum at 12 (quoting Daugherty Memorandum at 2).

15. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). As noted by Charles Cooper in his February 7, 2012, testimony before the House Committee on Education and the Workforce, "[t]his was not the first time that the Senate had passed legislation during a pro forma session." *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act during pro forma session).

16. OLC Memorandum at 13–14.

17. *Id.* at 20.

18. *Id.* at 14, n. 17 (emphasis added).

19. U.S. Const. art. 1, § 5, cl. 4.

shall begin each annual session by meeting "at noon on the 3d day of January."[20] The Senate has commonly, and without objection, used pro forma sessions to fulfill both constitutional requirements, evidencing a past consensus that such sessions are of constitutional significance. President Obama's novel assertion that such sessions no longer count for purposes of the Recess Appointments Clause thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution.

In sum, the result of OLC's position is that of allowing an exception (the Recess Appointments Clause) to swallow the constitutional rule (the Appointments Clause). The Recess Appointments Clause was never intended to obviate the Senate's participation in appointments, and yet that may well be the result of President Obama's unconstitutional actions and the flawed OLC memorandum used to justify those actions.

Conclusion

We cannot lose sight of what is at stake here. This is not just another issue of partisan politics. This is about the Constitution, and I have frankly had enough of the Democrats' misdirection on this issue. What President Obama did on January 4, 2012, was unprecedented and unconstitutional, and it cannot be allowed to stand. Since the time President Obama took these unconstitutional actions, I have increased my opposition to his nominations, and I will continue to do so until either the President or the Senate takes steps to ensure that the Senate's constitutional Advice and Consent role is respected.

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20. *Id.* at amend. XX, § 2