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Defending the Senate's Constitutional Duty to Advise and Consent to Presidential Appointments

The Honorable Mike Lee

Abstract

President Barack Obama's purported recess appointments in January 2012 violate the Senate's duty to advise and consent to presidential appointments. Except for when the Senate is in recess, the Constitution requires the Senate's advice and consent to approve nominations. Never before had a President presumed to have the authority to tell the Senate when it was in recess, and President Obama's unilateral recess appointments were a flagrant abuse of that power. The Senate could have united to defend its institutional prerogatives but instead is relying on the Supreme Court to resolve the matter. Yet each branch has an independent duty to defend and look out for the Constitution.

I'm very grateful for the opportunity to speak about the Recess Appointments Clause today. In the small town of Alpine, Utah, where I live, we speak of little else. It is of great interest to those of us who watch the Supreme Court to see this case get teed up.

I was very happy, of course, when the Supreme Court of the United States granted certiorari to review this case. I've been concerned ever since the recess appointments of January 4, 2012, occurred. I'm an obsessive, almost lifelong Supreme Court watcher, so I look forward to seeing this case get briefed and argued before the Court and ultimately decided.

It may therefore seem odd to some of you what I'm about to say, which is that in some respects, I wish that it were not necessary that this case were even before the Court. It should never have had to have gone that far to begin with, and the fact that it got to where it is today represents, to some degree, a breakdown of our constitutional

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- Between December 17, 2011, and January 23, 2012, the U.S. Senate held regularly scheduled sessions every three days at which it could, and in some instances did, conduct substantive legislative business.
- On January 4, 2012, President Obama announced that he considered the Senate to be in recess and that he would unilaterally make four appointments under the Recess Appointments Clause, three to the NLRB and one to the Consumer Financial Protection Bureau.
- The President thus circumvented the Senate and the Constitution's structure, which places in the Senate the discretionary right to advise and consent to these nominees.
- Each branch has an independent duty to defend and look out for the Constitution, but rather than unite to defend its institutional prerogatives, the Senate is relying on the Supreme Court to resolve the matter.

system: a breakdown that I would like to remedy, a breakdown that I would like to see no longer exist within our federal system.

It's a wonderful thing, of course, that we have an independent judiciary. Our judicial system in the United States, while not perfect and while it sometimes results in decisions that I really don't like and heavily criticize, is nonetheless the envy of the developed world. It does an excellent job of independently deciding cases, and the way our system is set up really does work in a pretty good judicial system.

So I'm happy that we have that. I sometimes worry, however, that the fact that we have a judiciary is sometimes used as a crutch by others operating within our system of government, a crutch that can cause us to allow our own constitutional muscles to atrophy.

Members of Congress, including both Senators and members of the House of Representatives, are required by Article VI of the Constitution to take an oath when we take office. Article VI requires us to take an oath to uphold the Constitution. In particular, our oath, the current text of which was enacted in 1884, says that we "will support and defend the Constitution of the United States against all enemies, foreign and domestic," and "will bear true faith and allegiance to the same."

A Government That Checks Itself

To truly defend, uphold, and protect the Constitution against all enemies, foreign and domestic, means more than refraining from taking actions that patently violate its terms as that document has been construed by courts. It requires that we do much more than that, as I see it. It also means that we need to take steps necessary to protect it, to protect its meaning, regardless of what the courts might have said and regardless of how permissive the courts might be in allowing us to contravene its meaning.

In fact, I think what lies at the heart of our constitutional system of government is the willingness of hardworking men and women to serve as constitutional officers and, in so doing, to take upon themselves the obligations of defending that document and the principles underlying it: defending it regardless of whether any court might act and defending it even when it makes us less powerful, even when it makes us more powerful and we don't want to exercise that power. Regardless, the obligation is there.

Our Constitution in this respect envisions a government that checks itself. It has checks and balances. This has become so common in utterance that it's almost a cliché to say that our system relies on checks and balances, but to have checks and balances that really function, we need each branch of government to be vigilant in looking out for the Constitution, and that includes looking out for the institutional prerogatives of its own sphere of authority.

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As James Madison explained in *Federalist* 51, "The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others." Among these necessary constitutional means is the Constitution itself. As Madison explained elsewhere, "Each [branch] must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it"—according, in other words, to that branch's own interpretation of the Constitution.

Preventing "A Despotic Branch"

Jefferson made a somewhat similar point and emphasized that our reliance on the judiciary alone to interpret and defend the Constitution would result inevitably in a form of tyranny or at least in a form of government that we would find unacceptable: less than ideal, certainly. He explained that the Constitution "meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."

I don't think Jefferson was saying, "People in the political branches, you are free to ignore the interpretations of the law and the Constitution rendered by the judiciary." I don't think that's what he was saying at all. I think what he was saying was that the judiciary does have the power to render those interpretations in making decisions in cases and controversies properly within their jurisdictional scope, properly brought before the court's jurisdiction, but that it is not the case and can never be the case that whenever there is a question of constitutional dimension, that question is uniquely for the judicial branch and not for anyone else, not for any other officer in either of the other two branches.

Abraham Lincoln echoed some of these same sentiments. In his first inaugural address, he stated that:

> If the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

President Andrew Jackson also made similar comments. He said:

> The Congress, and the executive, and the court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the president to decide upon the constitutionality of any bill or resolution which may be presented to them for the passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.

The Constitution's Role: Restraining Government

So it is not for the Supreme Court alone to interpret the Constitution, and we cannot and must not rely on the Supreme Court alone to protect us from constitutional violations by this Administration or by any other presidential Administration, whether they be under the direction of a President who is a Democrat or a Republican or a Bull Moose or any other type of party that might one day evolve. Each branch has an independent duty to defend and look out for the Constitution.

Sometimes this feels perplexing to people. Sometimes, when they hear these quotes, they are tempted to think that perhaps this means they're suggesting that members of other branches of government are free to disregard the constitutional opinions, the interpretations, or the particular judgments rendered by the Court. This is not the case.

We have to remember that the Constitution's role is first and foremost to restrain government, and it's in restraining government that the Constitution has its meaning.

We have to remember that the Constitution's role is first and foremost to restrain government, and it's in restraining government that the Constitution has its meaning. So I'm not suggesting that once the Supreme Court has said that a particular act of surveillance violates the Fourth Amendment that the executive branch is free to disregard that and say, "That's okay, because Jefferson and Madison and Jackson and Lincoln all said that they believe in coordinate branch construction." That's not what I'm saying at all.

What I am saying is that, in particular decisions, the Court may issue a judgment, and with that judgment will come an interpretation of the constitutional provision in question. That can be viewed perhaps as a constitutional ceiling, but sometimes that ceiling ought to be lower than what is actually established by the Court. And members of the Senate, members of the House, and the President himself all ought to be guided by that other standard and willing to lower that ceiling based on their own reading of the Constitution, with the understanding that the Constitution's most important role is as a constraint.

With this in mind, I want to briefly go over what happened that led up to the point at which the Supreme Court of the United States granted certiorari to review the D.C. Circuit's relatively recent opinion invalidating President Obama's purported

recess appointments to the National Labor Relations Board (NLRB).

"...with the Advice and Consent of the Senate"

The Constitution plainly places in the Senate the duty and the responsibility to give advice and consent to the President's judicial and executive nominees. Article II, Section 2 provides that the President "shall nominate, and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States...." The only exceptions, of course, to this general rule apply with respect to certain inferior executive officers not at issue here and for certain appointments made during a recess. As to this latter exception, under Article II, Section 2, Clause 3, the Constitution provides certain constraints. Recess appointments may be made, if at all, only "to fill up all Vacancies that may happen during the Recess of the Senate."

I would also note that the Constitution expressly grants to the Senate the power to determine the rules of its proceedings. The Supreme Court has stated that although Congress cannot, by its own rules and through its own rulemaking power, ignore constitutional restraints or violate fundamental rights, within these limitations all matters of method are open to determination of the house in question, and it is no impeachment of the rules to say that some other way would be better, more accurate, or even more just. In other words, each house of Congress—the Senate and the House—may determine its own rules. Regardless of how foolish or wise they may be, it is for each house of Congress to decide the rules of its proceedings.

Between December 17, 2011, and January 23, 2012, the Senate held regularly scheduled sessions every three days at which it could, and in some instances actually did, conduct substantive legislative business. For example, on December 23, 2011, the Senate passed H.R. 3765 to extend the payroll tax holiday. Notwithstanding that session of Congress and notwithstanding the fact that just a few days later the Senate officially began the second session of the 112th Congress with a *pro forma* session on January 3, 2012, on January 4, 2012, President Obama announced that he considered the Senate to be in recess and that he therefore would unilaterally make four appointments under the Recess Appointments Clause, three to the NLRB and one to the Consumer Financial Protection Bureau (CFPB).

To be clear, in previous decades, as many people have been eager to point out, other Presidents in both political parties have made recess appointments, but no President had ever done anything similar to what President Obama did here. No President had ever made a recess appointment during a two-day intra-session recess, nor had any President ever presumed to have the authority to tell the Senate when it was in recess and when it was not.

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In other words, the Senate, by its own rules, by its own declarations, by its own operation according to its own calendar, was not in recess at the moment these recess appointments were made. In that respect, these recess appointments were truly without precedent.

The Justice Department Memorandum

In attempting to justify these rather alarming appointments, the President relied on a memorandum prepared by the Department of Justice's Office of Legal Counsel. Although it was very well written and very well researched, I respectfully and very strongly disagree with its conclusions.

The memorandum chiefly relied on a prior opinion rendered by the executive branch itself, which had taken a predictably broad view of the executive branch's power to make recess appointments. That opinion, rendered in 1921 by then-Attorney General Harry Daugherty, who was at the time President Warren G. Harding's Attorney General and was later Calvin Coolidge's Attorney General, eschewed the plain text in the original meaning of the Constitution of the Recess Appointments Clause and instead gave a "practical construction," asserting that the "touchstone" for determining when the Senate is in session for purposes relevant to the Recess Appointments Clause is "its practical effect; viz. whether or not

the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations."

Ironically, even under this "practical" construction of the Constitution, President Obama's recess appointments in this circumstance were unconstitutional because the Senate was in fact conducting business during two *pro forma* sessions in the same general time frame in which these appointments were made. The NLRB nominees had in fact been advanced to the Senate only a couple of weeks before they were recess-appointed, and the Senate had already affirmatively rejected President Obama's nominee to head the Consumer Financial Protection Bureau.

President Obama's recess appointments were unconstitutional because the Senate was in fact conducting business during two *pro forma* sessions in the same general time frame in which these appointments were made.

So the President was not in fact facing a situation in which the Senate was unavailable. Rather, he was facing a situation in which the Senate, exercising its constitutional duty to provide advice and consent on nominees, was rejecting his nominees. The President thus made these recess appointments to circumvent the Senate and, in that process, to circumvent the Constitution's structure, which places in the Senate this discretionary right to advise and consent to these nominees.

The Senate Fails to Act

In light of this rather flagrant, blatant, glaring violation of the Constitution and this affront to the Senate's own prerogatives—to set the rules of its own operation, to decide when it is and is not in fact in recess—the public was right to expect Congress to respond. So I'm going to review all the actions that Congress took in order to defend its own institutional prerogatives, in order to protect the Constitution, in order to make clear to the executive branch that the Senate's constitutional right to advise and consent to executive branch nominees must not be ignored.

And that is the end of that portion of the speech. You see, we didn't do anything. We did nothing. Nothing at all.

I often think of people who remain silent when the Constitution is violated, and I think that we're even worse than the unarmed English bobby who, upon seeing the commission of a crime, famously calls out, "Stop, or I'll yell stop again." We didn't even yell stop. We just did nothing.

So why is it that Congress didn't really respond in any meaningful way to President Obama's rather blatant violation of the Constitution?

As the D.C. Circuit put it in its opinion concluding that these recess appointments were in fact unconstitutional, "Allowing the president to define the scope of his own appointments power would eviscerate the Constitution's separation of powers." The court added that "[a]n interpretation of 'the Recess' that permits the president to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the president free rein to appoint his desired nominees at any time he pleases.... This cannot be the law."

I did everything within my power to make clear how I felt about the President's actions in this case. I was not widely praised for doing so in the media, either locally or in my home state's media. I nonetheless stand by my decision to speak out as I did, which I tried to do rather tirelessly. I spoke out against these appointments in meetings of the Senate Judiciary Committee on which I sit, in countless speeches on the Senate floor, and in a hearing before the House Committee on Oversight and Government Reform.

Then, in addition to that, in protest of these appointments in order to continue to draw attention to what I perceived as a really significant affront to the Constitution itself, I changed the manner in which I approached President Obama's judicial nominees. I had to find an appropriate response that would continue to draw attention to what had changed, because up until that point, although some would regard me as a pretty conservative member of the Senate, I had given the President my almost complete cooperation, voting to confirm almost every one of his judicial nominees, even those with whom I had very, very serious disagreements on matters of constitutional interpretation, on jurisprudential philosophy, and on questions of background.

This changed at this moment. It had to change, and for a period of many months I voted against all of President Obama's judicial nominees for this very reason, because I had to find some way to signal my disapproval of what he did. I continued this practice up until we invoked the Leahy–Thurmond rule in the late summer of 2012, when it became unnecessary to continue beyond that point.

However, far from doing anything to make clear to the President that he should fear a response not only from the judiciary, but also from the Senate for his constitutional violations, we've since given the President what he wanted. We confirmed members to the NLRB. One of those members was the same member that he appointed then. Two others replaced two of the NLRB appointees unconstitutionally recess-appointed by the President.

On February 1, 2013, Senate Minority Leader Mitch McConnell and 42 other Republicans, including myself, sent a letter to the President stating that "we have serious concerns about the lack of congressional oversight of the CFPB and the lack of normal, democratic checks on its sole director." In 2011, we had sent a similar letter indicating that we would not allow anyone to be confirmed to that position regardless of how great they might be, regardless of how well educated, well intentioned, well groomed, well mannered, or well anything else, unless or until we put in place adequate measures to see to it that the CFPB had some meaningful oversight.

CFPB, of course, is embedded within the Federal Reserve. We don't even have control over its funding mechanism, and we have granted basically wholesale lawmaking power to do almost anything that the CFPB deems necessary and appropriate to protect consumers. So on that basis, we had objected to these nominees. Nonetheless, on July 16, 2013, the Senate approved Richard Cordray to head the CFPB by a vote of 66 to 34.

What the Senate Could Have Done

What should the Senate have done? Well, during the August recess of the Senate in 1985, President Reagan made several recess appointments. These were hardly as novel or as unconstitutional as those made by President Obama in January 2012. Nonetheless, former Senate Democratic Leader Robert Byrd, although in the minority at the time, held up more than 70 nominations in every area of the government, including ambassadors, assistant secretaries, federal circuit and district court judges, and members of many agencies, commissions, and boards. Moreover, he also put a hold on the promotions of more than 5,000 military personnel. Senator Byrd told President Reagan at the time that the President's interpretation of the Recess Appointments Clause could be seen as a deliberate effort to circumvent the constitutional responsibility of the Senate to advise and consent to such appointments.

> "Allowing the president to define the scope of his own appointments power would eviscerate the Constitution's separation of powers."

In the end, Senator Byrd extracted an important commitment from Reagan, a commitment in writing that President Reagan would not make any recess appointments and that if it should become necessary because of the extraordinary circumstances they were confronting to make recess appointments, he would have to give the list of any recess appointments to be made to the Majority Leader in sufficient time and in advance so that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in *pro forma* session so the recess appointments could not take place.

It's important that Senator Byrd did not accomplish this on his own. His fellow Democrats helped him enforce this protest, and they stood solidly together in order to protect what they perceived as a significant, legitimate, institutional prerogative of the Senate.

Some Senators, who were there at the time that this occurred, some Senators who joined in that, you might have expected would have joined me in my efforts to raise this rallying cry against what President Obama did on January 4, 2012, especially considering that in my opinion this was a whole order of magnitude more severe than any other type of recess appointment, even other intra-session recess appointments like those made by President Reagan in the summer of 1985. You would have thought that at least one of them would have jumped to my aid, would have said something publicly. It did not happen.

I did, however, experience something interesting. Several of my colleagues, some of my Democratic colleagues, pulled me aside privately just outside the Senate chamber—of course in the absence of any members of the press—and told me, "I really sympathize with what you're doing. I actually think that you're on to something here, and I think we have a duty to stand up for our institutional prerogative as the Senate, which I think has probably been manipulated here. I think it has been handled in an inappropriate way. I'm glad you're doing this, but I won't be joining you publicly."

It reminds me a little bit of what Martin Van Buren told some of my ancestors when they were being persecuted for their religious beliefs 170 years ago. He wrote them a letter that said, "Your cause is just, but I can do nothing for you." That's how we ended up making it to what's now called Utah, so in that respect, it had a happy ending.

But had we unified, I think we could have taken any number of actions to make clear to President Obama that his rather flagrant abuse of the recess appointments power would not be tolerated. We could have halted the confirmations of nominees or halted consideration of presidentially supported legislation altogether. It wouldn't really matter what the particulars of that opposition might have consisted of so long as we sent the message that we were unified, or at least that a significant number of us were unified, even if it was a significant minority of us who were unified, and that we made the President feel some real, tangible consequence for his action, for his rather open flouting of this provision of the Constitution.

The Broader Problem

This still reflects a much broader problem, one that I hope we can unite to confront as Democrats and as Republicans. It is a problem that results from the manifest lack of interest in coordinate branch construction of the Constitution, coordinate branch interpretation of the understanding that each of us must stand up for the Constitution, understanding that it is first, last, and foremost a limiting document. It protects the people in their rights by limiting the powers of government, recognizing that government is run by fallible, mortal human beings and that from time to time, those fallible, mortal human beings might do things that are wrong. The best way that we can check that power is to limit that power and to put it in conflict with people in other branches of government who can check us and stop us when we err.

People either say, number one, "This particular decision was made by a member of my political party or was made in an area in which I happen to agree on matters of policy, so I will say or do nothing about the constitutional infraction involved," or, number two, "Yes, this is a constitutional problem, and it happens to be a constitutional problem that I'm concerned about, but I will nonetheless stay my hand because when the Constitution is violated, we can say to ourselves, 'Somebody will challenge this in court, and that's why we have courts. The Constitution is there for the courts. The Constitution will be interpreted by the courts, and it's not for me to say whether or not this is constitutional.'"

We cannot—we must not—rely on the judiciary alone to interpret the Constitution, in part because in many instances, a case might not even be brought.

Both of those are equally injurious to the U.S. Constitution. Both of those prove to us that we cannot—we must not—rely on the judiciary alone to interpret the Constitution, in part because in many instances, a case might not even be brought. In the vast majority of disputes surrounding questions of constitutional interpretation, a case will never even be brought in the first place.

Even when one is brought, the case might be defective for one reason or another. The person might not have standing to challenge the action in question. The case might end up being dismissed as moot before it can be settled. Or, for whatever reason, the parties to that litigation might just decide not to bring suits altogether. Or they might settle before it can be resolved. One way or another, the vast majority of constitutional questions that arise within our federal government will never be litigated at all, much less be litigated all the way up to the Supreme Court of the United States. So this is a burden that we have to carry together. It's a burden that we must not shift over to the Supreme Court.

Finally, I would note that the Court doesn't always get it right. We've seen that the Court has

been very, very permissive of what Congress wants to do, sometimes far too permissive. Sometimes in the name of being deferential to a coordinate branch of government, the Court will go so far as to say, "Yeah, this doesn't really pass the smell test, but in deference to you, Congress, we're going to let this pass." Sometimes, engaging in activity that can actually be described as rewriting statutory text in order to allow it to survive, the Supreme Court will let something go through.

All of this harkens back to a line of precedent starting in the mid to late 1930s that we've been stuck with ever since. The Supreme Court decided it was not going to determine exactly how far Congress's power extends and instead established a relatively easy threshold that Congress must satisfy in order for the Court to uphold legislation in certain areas—leaving the rest of the constitutional question up to Congress. Thus, the Court mostly leaves it up to Congress to decide whether an act is properly within its power to regulate interstate commerce, or its power to tax, or its power to spend.

Of course, that hasn't happened. We have continued with a trend of Congress saying, "This means that there is no constitutional impediment to what we're doing," which in turn perpetuates other constitutional infirmities.

So this problem is by no means isolated to the recess appointments problem, nor will it be resolved when the Supreme Court ultimately rules, as I expect it to rule, that this was in fact an unconstitutional series of recess appointments. We've got to work together to push through the idea that defending, protecting, and honoring the Constitution means more than waiting to see what the Supreme Court says.

*—**The Honorable Mike Lee** represents Utah in the United States Senate, where he serves on the Judiciary, Energy and Natural Resources, and Armed Services Committees as well as the Joint Economic Committee.*