Written by **Joe Wolverton, II, J.D.** on January 26, 2013

Obama Violated Constitution With Recess Appointments, Appeals Court Rules

On Friday, a federal appeals court ruled that President Obama's 2012 recess appointments to the National Labor Relations Board (NLRB) were unconstitutional.

Specifically, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the recess appointments violated the Article II, Section 2 of the Constitution, the so-called Appointments Clause.

This article grants the president power to "nominate, and by 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

Just over a year ago, President Obama used recess appointments to fill three seats on the National Labor Relations Board, arguing that the appointments were made in complete compliance with his Article II powers.

The majority of the D.C. Appeals Court disagreed, writing:

> The [NLRB] conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated. [Citations contained in the opinion have been omitted in this article.]

The case came to the Appeals Court from an appeal of a lower court ruling in a case filed in 2011 by the Noel Canning Company in Yakima, Washington. In that year, Noel was hammering out a contract with Teamsters Local 760. The Teamsters claimed that they entered into a valid verbal agreement with the company. The company denied this claim and subsequently, a administrative law judge ruled in favor of the union.

On February 8, about a month after President Obama's controversial recess appointments to the NLRB, that board upheld the administrative law judge's decision and requested that a federal court order the decision to be executed.

Noel Canning responded, asking the court to overturn the decision, arguing that the president's appointments to the NLRB were unconstitutional because the Senate was not in recess. Therefore, Noel Canning claims, there was no legally required quorum in the NLRB decision, thus it is unlawful.

The Obama administration based its argument in favor of the recess appointments on an alternate —

and now rejected — interpretation of the Appointments Clause.

The plain language of that clause authorizes recess appointments. If the Senate is in recess, then the president is within the sphere of his constitutionally enumerated powers to fill a vacancy that will be valid until the end of the next congressional session.

Article II makes it clear that the Senate must already be in recess in order for an appointment made in its absence to be valid.

Not surprisingly, the Obama Department of Justice defended the president's appointments. In a memo dated January 6, 2012, DOJ officials cited various scholarly and bureaucratic interpretations of the so-called Recess Appointment Clause of Article II in order to buttress their opinion:

> This Office has consistently advised that "a recess during a session of the Senate, at least if it is sufficient length, can be a 'Recess' within the meaning of the Recess Appointments Clause" during which the President may exercise his power to fill vacant offices.
>
> Although the Senate will have held pro forma sessions regularly from January 3 through January 23, in our judgment, those sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to "'receive communications from the President or participate as a body in making appointments.'
>
> Thus, the President has the authority under the Recess Appointments Clause to make appointments during this period.

The Justice Department memo argues that the business conducted by the Senate between January 3 and 23 was conducted pro forma and thus does not qualify as an interruption of the recess started by the vote to adjourn taken on December 17, 2011.

This argument was echoed in a piece written by David Arkush, director of Public Citizen's Congress Watch division. In his paper, Arkush posits two constitutional pretexts allowing the president to place someone in office whose nomination has already been blocked by the Senate.

First, Arkush insists that Article 2, Section 3, of the U.S. Constitution authorizes the president to force the House and Senate to adjourn. Then, once Congress has obeyed that presidential mandate, the president may then lawfully make a "recess appointment."

Next, Arkush argues that the 20th Amendment orders Congress to assemble at least once a year, with each session beginning on January 3. Arkush says that in order to be able to start a session on January 3, Congress would have to have ended a previous session, thus leaving a gap between the last session and the current session during which the president may squeeze in and make "recess appointments," obviating the requirement of senatorial advice and consent.

The Founders felt otherwise. In *The Federalist*, No. 76, Alexander Hamilton explains that the Constitution "requires" the cooperation of the Senate in appointments in order to "check" the president and "to prevent the appointment of unfit characters"; and that "the necessity of its [the Senate's] co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate [the president]."

Addressing the issues underlying the current constitutional crisis specifically, in *The Federalist* No. 68, Hamilton discussed the Recess Appointment Clause:

> The ordinary power of appointment is confided to the president and senate jointly, and can

> therefore only be exercised during the session of the senate; but, as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the president, singly, to make temporary appointments "during the recess of the senate, by granting commissions which should expire at the end of their next session.

What, then, was the role the Senate was designed to play in the nomination and appointment process? Alexander Hamilton wrote in *The Federalist*:

> To what purpose then require the co-operation of the senate? I answer, that the necessity of their concurrence would have a powerful, though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connexion, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

A quote from an article published online by the *San Francisco Chronicle* hints that while the president understands that the Senate has a constitutional duty to check his power, he will not allow the exercise of such to impede the growth of government. "Administration officials and lawyers insist President Obama made the appointments because Senate Republicans were unfairly blocking Senate confirmation of nominees as a way to limit the NLRB's power," the *Chronicle* wrote.

Perhaps, but opposition doesn't qualify as recess.

Not even President Obama's immeasurable regard for his own moral, legal, and intellectual superiority can convert Senate reluctance into Senate recess.

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