Unconstitutional Recess Appointments

by Phyllis Schlafly

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Barack Obama's latest unconstitutional action is his attempt to make four so-called recess appointments to high-level, well-paying jobs in the federal bureaucracy when the Senate was NOT in recess. He appointed three people to the National Labor Relations Board (NLRB), plus Richard Cordray to head the newly created Consumer Financial Protection Bureau even though the Senate had declined to confirm his nomination.



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Article II gives the President power "by and with the advice and consent of the Senate" to appoint public officials and judges, and also "to fill up all vacancies that may happen during the recess of the Senate." That provision was written to cover the long recesses that were common during the horse-and-buggy days, and was certainly not written to enable the President to defy the Senate and appoint persons whom the Senate would not confirm.

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Obama's action is clearly an attempt to circumvent the U.S. Constitution because the Senate was not in recess when he made these appointments. According to the Constitution, the Senate could not have been in recess when the appointments were made because Article I of the Constitution states that neither House can "adjourn for more than three days without the consent" of the other House, and the House did not consent to a Senate recess.

It seems reasonable that the Senate should have the authority to say whether or not it is in recess. Apparently, President Obama wants to make that a presidential decision.

Obama claims he can call it a recess because the Senate is merely conducting pro forma sessions (*i.e.*, having brief meetings and not doing anything important). In fact, the Senate did pass a bill on December 23 during one of those brief sessions and the President signed it into law, so it must have been important business.

Even if anyone accepts Obama's farfetched argument, that doesn't put him in compliance with the constitutional requirement that the Senate cannot be in recess unless the House has agreed. And the House absolutely did not agree to a recess.

We have a law on the books that requires the Attorney General to give the President legal advice on request. Funny thing, Obama won't say whether or not he asked the Justice Department for advice about the constitutional issue before making controversial recess appointments.

The head of the Justice Department's Office of Legal Counsel, Virginia Seitz, issued a statement, dated two days after the appointments were made, that presumes to okay the recess appointments. However, it did not refute the case against the legality of the appointments, and Senator Charles Grassley (R-IA) says this memo is "unconvincing."

The four positions that Obama filled with recess appointments are important and powerful jobs that should require Senate confirmation. Obama's actions should be struck down by the courts as unconstitutional when presented with legal challenges, and Speaker John Boehner (R-OH) is considering whether the House should pursue its own legal action.

The National Federation of Independent Business, the National Right to Work Foundation and the Coalition for a Democratic Workplace have already filed a lawsuit challenging Obama's so-called recess appointments. These organizations argue that the men illegally appointed by Obama should not be permitted to issue regulations or take other regulatory actions.

When we had Republican Presidents, the Democrats were very solicitous to prevent them from abusing the power to make recess appointments. The late Sen. Edward Kennedy (D-MA) filed an amicus brief in 2004 with the 11th U.S. Circuit Court of Appeals opposing President George W. Bush's appointment of Judge William Pryor Jr. to that court.

Kennedy's brief stated that the 10-day recess the Senate took for Presidents Day was not a recess sufficient to qualify under

the Recess Appointments Clause in the Constitution.

Mark Levin summed up the Obama Administration when he told CNSNews, "I believe to a great extent we now live in a post-constitutional country, where much of the Constitution is ignored or evaded." It's no wonder Gallup reports that the majority of Americans believe our country is moving in the wrong direction.