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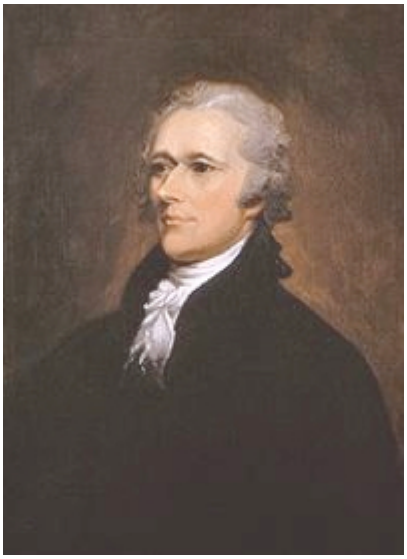
# Is the Blocking of Recess Appointments Unconstitutional?



A recent article in the Washington Post posited that the obstruction by the Congress of presidential recess appointments is unconstitutional. This debate emerged in light of the fact that currently, there is a backlog of presidential appointments. There are two explanations for this. First, President Obama has yet to nominate people to fill various executive and judicial branch openings. For example, a new chairman of the Council of Economic Advisers has yet to be named and there are two empty seats on the Federal Reserve board. The second reason behind the logjam is the Senate's reluctance to confirm those nominees already submitted by the President for that body's approval.

There is, however, a third less obvious factor slowing the appointment process. Using a potent parliamentary tactic, the House of Representatives has acted to keep both houses of the legislative branch in "pro forma" session throughout the August break in order to prevent President Obama from bypassing the advice and consent of the Senate by making what is known as recess appointments.

First, one must understand the notion of the Congress being in session "pro forma." According to the parliamentary rules governing the business of Congress, either or both houses of that body may hold a "pro forma" session during which no formal business is conducted. There are a couple of primary reasons why this would be desirable. First, such sessions may be necessary to fulfill the constitutional stricture that:

> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting. (Article I, Section 5)

Additionally, Congressional leadership often employs this gambit as a delay tactic in order to foil presidential attempts to execute a pocket veto of a bill, to call a special session of Congress, or to make recess appointments in the executive or judicial branches as per the authority given the President in Article II.

The next step in the analysis of whether recess appointments are constitutionally sound is to examine the constitutional basis for the practice. Article II, Section 2 of the U.S. Constitution states:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The plain language of that clause seems to authorize the making of what we call recess appointments. That is to say, 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.

To constitutionalists, an important next step in the analysis would be to discover the intent of the Founders regarding their inclusion of this clause in the Constitution. In the early days of the Republic, the recess periods between congressional sessions lasted months, sometimes as many as nine. Such lengthy breaks made the use of recess appointments necessary in order to prevent necessary offices from remaining unfilled for so long a period.

For example, George Washington took advantage of this authority when in 1795 he appointed John Rutledge of South Carolina to the Supreme Court during a congressional recess. Upon returning to work, the Senate rejected Rutledge, exercising its own right to exercise advice and consent over the nomination of federal officers.

By contrast, President Obama has made frequent and controversial use of the recess appointment clause since taking office in 2009. He has made at least 29 recess appointments during his administration. Several of these have been thereafter confirmed by the Senate, while many (including the controversial naming of Donald Berwick to be the Administrator of the Centers for Medicare and Medicaid Services), have not.

Now on to the notion that Senate "pro forma" sessions are obstructionist and unconstitutional. In Federalist Number 68, Alexander Hamilton (pictured above) writes of 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? Again, we turn to the *Federalist Papers* and Alexander Hamilton:

> 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 favouritism 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.

In the preceding quotes from the *Federalist Papers*, Hamilton makes it clear that while the President is able to make appointments without the advice and consent of the Senate during recesses, there is greater wisdom to be found (and safety for our Republic) in placing the Senate as a check on the "spirit of favoritism" on the part of the President.

A subsequent and important question would be, then, has the current President displayed that spirit of favoritism in his nominations to fill vacancies, particularly those made during Senate recesses? Given the number of rejections of those nominees, it would certainly seem that if nothing else he has displayed a zeal for naming potential appointees who are very unlikely to be approved by the full Senate. This would seem to indicate an understanding on the part of the President that the only way to get such persons into office and allow them to make official acts according to their own or the President's controversial agenda is to appoint them during recesses.

Detractors disagree. According to the *Washington Post*, "Obama should recess-appoint a substantial number of nominees during the next series of Senate breaks, not only to fill important offices, but also to re-establish constitutional order."

As set forth above, however, there is no constitutional prohibition on "pro forma" sessions of Congress, and given the President's predilection for making extremely dubious nominations during Senate recesses, it seems consistent with "constitutional order" and with the intent of the Founders to allow the Senate to continue to use all constitutionally sound means to block this scheme and to prevent "the appointment of unfit characters" to fill federal vacancies.