



Written by [Bob Adelman](#) on March 29, 2010

Recess Appointments and the Constitution

“Side-stepping Senate confirmation,” declared the New York Times. “This is going to make problems worse,” exclaimed Lindsey Graham (R-S.C.). “What this is going to do is cause the election of a lot more Republicans ... in November who are determined to come in and provide some checks and balances in Washington to stop the overreaching of the government,” hollered Lamar Alexander, (R-Tenn.).



On Saturday, March 27, President Obama used “recess appointments” to fill 15 administration positions because he couldn’t get them past the Senate’s constitutional requirement to give the appointments its Advice and Consent. Obama said, “The United States Senate has the responsibility to approve or disapprove of my nominees.” On that point, the President is exactly correct. Here is the language from the Constitution under Article II, Section 2, Clause 2:

He [the President] shall have power ... to ... nominate, and by and with the advice and consent of the Senate, shall appoint ... other public ministers ... and all other officers of the United States.

But the President then [stretched](#) the clear language of that clause by adding, “But if ... the Senate refuse[s] to exercise that responsibility, I must act in the interest of the American people and exercise my authority to fill these positions on an interim basis.”

All 41 Republican Senators wrote the President a letter last week urging him not to use “recess appointments” to circumvent the Senate. The U.S. Chamber of Commerce also wrote the President a letter on behalf of 20 various business groups that also opposed Obama’s use of “recess appointments” to fill various positions. The President responded by saying, “I simply cannot allow partisan politics to stand in the way of the basic functioning of government.”

Senator Jim DeMint (R-S.C.) [stated](#), “His recess appointments belie the fact that hundreds of his nominations have [already] been confirmed unanimously by the Senate. But he has had mixed in with these batch of appointments some pretty radical folks ... all we had asked for was some debate and vote.... He decided to circumvent Congress again, which has become his style on so many issues and just [make the appointments] while we were out of town.” [Mitch McConnell](#) (R-Ky.) called the recess appointments “yet another episode of choosing a partisan path despite bipartisan opposition.” Senator John McCain expressed his disapproval as well: “Once again the administration showed that it had little respect for the time honored constitutional roles and procedures of Congress.”

So far these pronouncements and denunciations neatly avoid the fact that President George W. Bush



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used “recess appointments” more than 170 times in his administration, and President Bill Clinton used that same strategy to fill nearly 140 positions during his administration.

And while much has been written about the 15 appointees (mostly lawyers or government bureaucrats, some with truly [radical agendas](#)), a careful look at the Constitution reveals that the purpose of the Advice and Consent clause was to restrict the power of the presidency. In an [analysis](#) by the Heritage Foundation,

Since [the President] possesses the greatest discretion, the political process fastens upon him the greatest accountability. However, when a substantial number of Senators assert that there are strong and compelling political reasons to reject a nominee ... the Constitution’s structure ensures a confirmation battle. As such, the Constitution contains mechanisms designed to contain conflict within the republican process in order to protect against the degeneration of the Republic’s original ideals and thus ensure the Republic’s stability. The Appointments Clause is a prime example of such a mechanism. It structures the confirmation process so that when two of the Republic’s national governing branches are in fundamental disagreement, there will be a struggle to persuade the people of the correctness of their respective positions.

The authors of the clause in question [specifically included](#) the language “as part of a delicate compromise concerning the balance of power in the federal government. Many delegates preferred to develop a strong executive control vested in the President, while others, worried about authoritarian control, preferred to strengthen the Congress. Requiring the President to gain the advice and consent of the Senate achieved both goals.”

Where did this idea of “recess appointments” come from? It is embedded in the last paragraph of Clause 2: “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 the [Congress’] next session.” However, over time the original intent of “that may happen” has been greatly expanded.

In a paper entitled “[The Original Meaning of the Recess Appointments Clause](#),” Professor Michael B. Rappaport of the University of San Diego School of Law wrote: “The Clause permits recess appointments only when an office becomes vacant during a recess and when the recess appointment is made during that recess. Thus, if an office was vacant while Congress was in session — either because the vacancy arose during a session or a vacancy that arose during a recess continued into the session — the President could not fill that office with a recess appointment.”

However, Rappaport continued: “The prevailing interpretation of the clause ... permits the President to make recess appointments so long as the recess appointment is made during a recess, whether or not the vacancy existed when Congress was in session. Thus, the President can always make a recess appointment for any office so long as he waits until there is a recess to do so.”

Once again, then, here is more evidence of the degrading and abrogation of the clear meaning and intent (and limitations) provided by the Constitution. And, once again, it emphasizes the importance of electing representatives who understand and support those limitations, rather than looking for a way out from under them.

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