Written by **Joe Wolverton, II, J.D.** on January 18, 2012

Two Pro-business Groups File Legal Challenge to Obama's Recess Appointments

Both groups have previously filed suit in response to the mandate issued by the National Labor Relations Board that employers inform all employees of their right to unionize. The regulation requires that this notice be prominently displayed in all workplaces.

A press released issued by the NFIB revealed that lawyers for the organization have amended their original complaint in order to add additional arguments that the NLRB is not legally authorized to enforce the new rules. One of the reasons provided to prove this point mentions the illegality of the President's recent recess appointments.

With regard to the assertion that the new regulations cannot be legally enforced, the *Washington Post* quotes Mark Mix, president of the NRWF, as saying, "The rule can't be implemented and enforced without a functioning board. We believe the validity of these appointments is in question."

The amended complaint states:

> The President's action was a surprise and terrible disappointment to small-business owners throughout the country who have suffered under the unabashedly pro-union rule-makings handed down by the NLRB. These alleged recess appointments are a brazen circumvention of the Congressional appointment process and raise serious legal concerns that cannot be ignored. The outrage amongst members of the small-business community is severe, and NFIB takes this action today to ensure that its members are protected from unconstitutional acts that exacerbate the NLRB's devolution from a neutral arbiter between labor and employers to a pro-union government agency.

The impetus for this rash of litigation was President Obama's recent disregard of Congress and the Constitution in unilaterally filling seats on the National Labor Relations Board and appointing former Ohio Attorney General Richard Cordray to be the head of the Consumer Financial Protection Bureau.

In defense of his controversial appointments, President Obama insists that they were made in complete compliance with the Constitution's grant of such power to the President in Article II. Is the President's interpretation of Article II correct?

To answer that question, one must first look to the text being cited as a justification for the appointments. 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 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.

An additional analysis of the black letter of 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.

There is no provision in the Constitution even hinting at the right of the President to use trickery to create artificial breaks in congressional sessions in order to forcibly impose his will in defiance of express senatorial opposition to it.

Not surprisingly, the Obama Department of Justice (DOJ) defended the President's appointments. In a memo dated January 6, 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.

In summary, the Department of Justice 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 begun by the vote to adjourn taken on December 17, 2011.

This argument was echoed in a piece recently published 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 II, Section 2 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 *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 *Federalist*, No. 68, Alexander Hamilton 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.

Finally, a quote from an article published by the *San Francisco Chronicle* online 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 have said Obama made the appointments because Senate Republicans have been unfairly blocking Senate confirmation of nominees as a way to limit the power of agencies they oppose.