



Written by [Raven Clabough](#) on May 29, 2013

Senate Asks Supreme Court to Consider Obama's Recess Appointments

Senate Republicans are calling upon the Supreme Court to [rein in](#) President Obama's use of recess appointments — appointments made when Congress is not in session — asserting that they are perfect examples of Obama's "power grab."

The focus is specifically on recess appointments, a process that permits presidents the power to temporarily fill government positions when the Senate is not available to confirm presidential nominees.



Both Republican and Democratic presidents have been accused of abusing the recess appointment. George W. Bush made 171 recess appointments over the course of his two terms, while Bill Clinton used 139. Thus far, President Obama has made 32.

At issue are President Obama's appointments to the National Labor Relations Board (NLRB). Fox News [reports](#):

All 45 Republican senators filed a brief with the Supreme Court on Tuesday which argued Obama went too far in appointing members to the National Labor Relations Board in January 2012. That board has been behind a host of union-friendly decisions, and the dispute over Obama's appointees threatens to upend those rulings — as well as stall the board itself.

In the brief, filed by attorney Miguel Estrada, a former assistant to the solicitor general, the senators ask the Supreme Court to rule on the validity of Obama's 2012 recess appointments.

"The president's decision to circumvent the American people by installing his appointees at a powerful federal agency while the Senate was continuing to hold sessions, and without obtaining the advice and consent of the Senate, is an unprecedented power grab," Senate Republican Leader Mitch McConnell said in a written statement. "We will demonstrate to the Court how the president's unconstitutional actions fundamentally endanger the Congress' role in providing a check on the excesses of the executive branch." Estrada wrote that Obama's actions "would radically reshape the constitutional structure" if they are permitted to stand.

"If he can override Senate procedures and second-guess its account of its actions, there is no telling what mischief he can achieve," he wrote.

"Recess appointments have become a means to sidestep Senate confirmation," the [brief](#) declared. "In any case, the President himself has made clear that he will resort to recess appointments, and indeed has done so, precisely to circumvent perceived Senate opposition."

Earlier this year, the U.S. Court of Appeals for the D.C. Circuit ruled that the president's appointments to the National Labor Relations Board were made while the Senate was not in recess, and therefore invalidated the appointments of NLRB members Sharon Block and Richard Griffin. The court ruled that the president cannot use recess appointments during pro-forma sessions, when the Senate meets



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briefly, without holding debate or votes.

That decision came from a legal challenge filed by Noel Canning, one of the Chamber's member companies.

The Obama administration argues that during "pro-forma" sessions, Congress is not truly in session.

The Hill addresses the implications that upholding the appeals' court's decision would have:

There are currently two vacancies on the five-member NLRB. Without the presence of those appointed in 2012, the board would have been unable to form a quorum. As such, the appeals court's ruling casts doubt on the legality of all the board's recent actions.

The ruling also calls into question President Obama's appointment of Richard Cordray, director of the Consumer Financial Protection Bureau, who was appointed at the same time.

Likewise, another appeals court determined that an NLRB appointment from 2010 was also made when the Senate was not technically in recess, but merely adjourned. Again, that appointment was [invalidated](#).

The U.S. Court of Appeals for the Third Circuit found that President Obama's appointment of Craig Becker during a 2010 Senate break was also unconstitutional. The court ruled 2-1 that recess appointments can be made only between Senate sessions at the end and beginning of each year.

"We, as federal judges, are not empowered to regulate, recommend, or comment on how the two other branches of the federal government should use the powers the Constitution allocates between them — not because we can-but-chose-not-to, but because we lack the factual record, institutional tools, and constitutional authority to evaluate which branch is more or less likely to abuse the powers given to them," Circuit Judge D. Brooks Smith wrote in the opinion. "We can, however, and indeed we must, decide what powers each branch has and when they may use them."

Without Becker's appointment, there would not have been enough NLRB members to form a quorum. Therefore, the court has also determined that orders passed by the NLRB during that time are also invalid.

According to the Obama administration, invalidating these appointments ultimately invalidates recess appointments going back over 100 years.

"That decision repudiates understandings of the Recess Appointments Clause that have been maintained and relied on by the Executive for most of the Nation's history," [wrote](#) U.S. Solicitor General Donald Verrilli. "The limitations imposed by the court of appeals would render many of the recess appointments since the Second World War unconstitutional. The decision also threatens a significant disruption of the federal government's operations."

In addition to the senators' brief, the U.S. Chamber of Commerce filed a [brief](#) with the court last week also asserting that the appointments are invalid.

"The D.C. Circuit got it right — these so-called recess appointments are unconstitutional," said Tom Donohue, the Chamber's president and CEO, in a statement.

"The President's unprecedented abuse of the recess power left the NLRB in a legal limbo, causing major confusion for both employers and employees alike. We continue to support our member, Noel Canning, at the Supreme Court with all the legal firepower needed to defend the company and to help restore the proper constitutional balance," Donohue said.



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Meanwhile, President Obama has renominated Block and Griffin for the labor board, along with a number of other nominees. Labor unions are campaigning for the appointments to be approved before August, since that is when NLRB Chairman Mark Pearce will be stepping down, leaving the NLRB with just two members and no quorums to issue decisions, as the Supreme Court has previously held that fewer than three members is insufficient to form a quorum to decide cases.

Photo of U.S. Supreme Court building



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