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THE WALL STREET JOURNAL.
WSJ.com

OPINION | JANUARY 10, 2012

Democrats and Executive Overreach

It's a mistake to excuse Obama's disregard for the Constitution. Precedents set now will be exploited by the next administration.

By MICHAEL MCCONNELL

One reason so many Americans entrusted Barack Obama with the presidency was his pledge to correct the prior administration's tendency to push unilateral executive power beyond constitutional and customary limits.

Yet last week's recess appointments of Richard Cordray as the first chief of the Consumer Financial Protection Bureau and three new members to the President's National Labor Relations Board—taken together with other aggressive and probably unconstitutional executive actions—suggest that this president lacks a proper respect for constitutional checks and balances.

The Obama administration has offered no considered legal defense for the recess appointments. It even appears that it got no opinion from the Office of Legal Counsel in advance of the action—a sure sign the administration understood it was on shaky legal ground.

It is hard to imagine a plausible constitutional basis for the appointments. The president has power to make recess appointments only when the Senate is in recess. Several years ago—under the leadership of Harry Reid and with the vote of then-Sen. Obama—the Senate adopted a practice of holding pro forma sessions every three days during its holidays with the expressed purpose of preventing President George W. Bush from making recess appointments during intrasession adjournments. This administration must think the rules made to hamstring President Bush do not apply to President Obama. But an essential bedrock of any functioning democratic republic is that the same rules apply regardless of who holds office.

It does not matter, constitutionally, that congressional Republicans have abused their authority by refusing to confirm qualified nominees—just as congressional Democrats did in the previous administration. Governance in a divided system is by nature frustrating. But the president cannot use unconstitutional means to combat political shenanigans. If the filibuster is a problem, the Senate majority has power to eliminate or weaken it, by an amendment to Senate Rule 22. They just need to be aware that the same rules will apply to them if and when they return to minority status and wish to use the filibuster to obstruct Republican appointments and policies.

Moreover, in this case, two of the recess appointees to the National Labor Relations Board had just been nominated and sent to the Senate on Dec. 15—two days before the holiday. So it is simply not true that they were victims of Republican

AFP/Getty Images

President Obama alongside Richard Cordray, head of the Consumer Financial Protection Bureau, in Shaker Heights, Ohio, Jan. 4.

obstructionism, even if that mattered.

Some of the administration's supporters have tried to argue that the pro forma sessions are a sham and thus that the Senate has been in recess since Dec. 17. Aside from the fact that these sessions are not, in fact, a sham—the Senate enacted the payroll tax holiday extension, President Obama's leading legislative priority, on Dec. 23 during one of those pro forma sessions—the plain language of the Constitution precludes any such conclusion.

Article I, Section 5, Clause 4 requires the concurrence of the other house to any adjournment of more than three days. The Senate did not request, and the House did not agree to, any such adjournment. This means that the Senate was not in adjournment according to the Constitution (let alone in "recess," which requires a longer break).

Others have argued that the president can make recess appointments during any adjournment, however brief, including the three days between pro forma sessions. That cannot be right, because it would allow the president free rein to avoid senatorial advice and consent, which is a major structural feature of the Constitution. He could, for example, make an appointment overnight, or during a lunch break. In a brief in the Supreme Court in 2004, Harvard law professor Laurence Tribe dismissed as "absurd" any suggestion that a period of "a fortnight, or a weekend, or overnight" is a "recess" for purposes of the Recess Appointments Clause.

This is not the first time this administration has asserted unilateral executive power beyond past presidential practice and the seeming letter of the Constitution. Its slender justification for going to war in Libya without a congressional declaration persuaded almost no one, and its evasion of the reporting requirements of the War Powers Resolution—over the legal objections of Justice Department lawyers—was even more brazen. According to the administration, not only was our involvement in Libya not a "war" for constitutional purposes; it did not even amount to "hostilities" that trigger a reporting requirement and a 60-day deadline for congressional authorization.

Indeed, the Obama administration has admitted to a strategy of governing by executive order when it cannot prevail through proper legislative channels. Rather than work with Congress to get reasonable changes to President Bush's No Child Left Behind education law, it has used an aggressive interpretation of its waiver authority to substitute the president's favored policies for the law passed by Congress. When the president's preferred cap-and-trade legislation to limit carbon emissions failed in Congress, the Environmental Protection Agency announced it would proceed by regulation instead. And when Congress refused to enact "card check" legislation doing away with secret ballots in union elections, the president's National Labor Relations Board announced plans to impose the change by administrative fiat—one of the reasons Senate Republicans have tried to block appointments.

The English philosopher John Locke, who so influenced our Founding Fathers, wrote that a "good prince" is more dangerous than a bad one because the people are less vigilant to protect against the aggrandizement of power when they perceive the ruler as beneficent.

I fear many Democrats are falling into this trap. They like President Obama and his policies, and they are willing to look the other way when it comes to constitutional niceties. The problem is that checks and balances are important, precedents created by one administration will be exploited by the next, and not all princes are

good.

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