

Recess Appointments by Dan Jacoby

Is the “recess appointment” of John Bolton as Ambassador to the United Nations unconstitutional?

The last clause of Article II, Section 2 of the U.S. Constitution says, “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 framers of the Constitution believed that Congressional sessions would only last a few months. The rest of the time, Senators would be in their home states, where it would be, practically speaking, impossible to get them all together in a hurry (there were no airplanes, cars, or even trains, back then). So when a vacancy occurred while the Senate is in recess, they decided to let the President make a temporary appointment. Then, when the Senate returned, he could formally nominate someone, who would then go through the process of Senate confirmation.

Waiting until the Senate happens to be recessed, and making appointments then, is clearly not what the framers had in mind.

Furthermore, the prevailing view that John Bolton’s appointment lasts until the end of next year – that is, until the end of the current Congress – is also mistaken. Using the same logic, it is obvious that “the End of their next Session” means the next time the Senate is in session, when the President has to send an actual nomination to the Senate.

For some reason, however, Presidents started making appointments during a recess that had originally occurred while the Senate was in session. President Reagan averaged about 30 such appointments a year. President Bush (the 1st) averaged about 20 per year, and President Clinton only averaged about 8 per year.

So do all these appointments serve as a legal precedent?

They do not. Until the U.S. Supreme Court rules on the constitutionality of such appointments, there is no true precedent. And the Supreme Court won’t rule on this issue until someone brings it before them – in other words, someone has to challenge one of these appointments.

And someone should.

Let’s use a process known in logical circles as *reductio ad absurdum* – Latin for “reduction to the absurd” – to see what happens if Presidents start to use this process to make recess appointments for all Senate-confirmable positions.

When the new President takes office, he simply waits for the next Senate recess, then appoints all new judges, ambassadors, representatives, cabinet positions, and so forth. These new people serve until after the midterm elections, when the President does the same thing all over again. What happens then?

First of all, there will be a period of time every other year from late December (the “end of the session”) until the next Senate recess, when there will be nobody filling these positions. As a result, there will be weeks, or even months, when no federal cases can be tried (there are no judges). It will be just as long into each President’s term before the cabinet can begin their work. Our entire diplomatic corps will be helpless during that time. Agencies will have no direction. In short, what happens is disaster.

Also, every federal judge will serve at the pleasure of the President, destroying the independence of the entire judiciary. Supreme Court decisions would be reversed just by electing a new President – and re-reversed four years later. The result would, quite simply, be chaos.

Of course, the Congress could impeach any President who tried this, simply on the grounds that by putting the entire United States system in jeopardy the President is guilty of “high crimes and misdemeanors”. But this is rapidly getting absurd.

We need to prevent this absurdity before it begins. The time has come to challenge a clearly unconstitutional “recess appointment”. Let’s start with someone who is clearly unfit for the position to which he was – supposedly – appointed.

Let’s get rid of John Bolton.

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