**Court Rejects Obama Move to Fill Posts**

**By** [**CHARLIE SAVAGE**](http://topics.nytimes.com/top/reference/timestopics/people/s/charlie_savage/index.html) **and** [**STEVEN GREENHOUSE**](http://topics.nytimes.com/top/reference/timestopics/people/g/steven_greenhouse/index.html)January 25, 2013

WASHINGTON — In a [ruling](http://www.documentcloud.org/documents/562023-recess-appointments-ruling.html) that called into question nearly two centuries of presidential “recess” appointments that bypass the Senate confirmation process, a federal appeals court ruled on Friday that [President Obama](http://topics.nytimes.com/top/reference/timestopics/people/o/barack_obama/index.html?inline=nyt-per) violated the Constitution when he installed three officials on the [National Labor Relations Board](http://topics.nytimes.com/top/reference/timestopics/organizations/n/national_labor_relations_board/index.html?inline=nyt-org) a year ago.

The ruling was a blow to the administration and a victory for Mr. Obama’s Republican critics — and a handful of liberal ones — who had accused him of improperly asserting that he could make the appointments under his executive powers. The administration had argued that the president could decide that senators were really on a lengthy recess even though the Senate considered itself to be meeting in “pro forma” sessions.

But the court went beyond the narrow dispute over pro forma sessions and issued a far more sweeping ruling than expected. Legal specialists said its reasoning would virtually eliminate the [recess appointment](http://topics.nytimes.com/top/reference/timestopics/subjects/r/recess_appointments/index.html?inline=nyt-classifier) power for all future presidents at a time when it has become increasingly difficult to win Senate confirmation for nominees.

“If this opinion stands, I think it will fundamentally alter the balance between the Senate and the president by limiting the president’s ability to keep offices filled,” said John P. Elwood, who handled recess appointment issues for the Justice Department during the administration of President George W. Bush. “This is certainly a red-letter day in presidential appointment power.”

The Constitution, written at a time when it could take weeks for members of Congress to get to the capital, allows presidents to fill vacancies temporarily during recesses for positions that would otherwise require Senate confirmation. In recent years, as senators have frequently balked at consenting to executive appointments, that authority has served as a safety valve for presidents of both parties.

Mr. Obama has made about 32 such appointments, including that of [Richard Cordray](http://topics.nytimes.com/top/reference/timestopics/people/c/richard_cordray/index.html?inline=nyt-per), as director of the Consumer Financial Protection Bureau. President Bill Clinton made 139, while Mr. Bush made 171, including those of John R. Bolton as ambassador to the United Nations and two appeals court judges, William H. Pryor Jr. and Charles W. Pickering Sr.

Nearly all of those appointments would be unconstitutional under the rationale of the United States Court of Appeals for the District of Columbia Circuit. It ruled that presidents may bypass the confirmation process only during the sort of recess that occurs between formal sessions of Congress, a gap that generally arises just once a year and sometimes is skipped, rather than other breaks throughout the year. Two of the three judges on the panel also ruled that presidents may fill only vacancies that arise during that same recess.

Presidents have used recess appointments to fill vacancies that opened before a recess since the 1820s, and have made recess appointments during Senate breaks in the midst of sessions going back to 1867. But the three judges, all appointed by Republicans, said the original meaning of the words used in the Constitution clashed with subsequent historical practices.

Jay Carney, the White House press secretary, said: “The decision is novel and unprecedented. It contradicts 150 years of practice by Democratic and Republican administrations. So we respectfully but strongly disagree with the ruling.” Mr. Carney did not say whether the Justice Department would appeal it.

The current dispute can be traced back to 2007, when Democrats took control of the Senate. Hoping to block Mr. Bush from making any more unilateral appointments, they did not formally recess before going home for Thanksgiving. Instead, they held pro forma sessions, meaning a member came into the nearly empty chamber every third day and banged the gavel. The idea was that the novel tactic would legally break up the long recess into a series of short ones believed to be too brief for recess appointments.

Senate Democrats repeated the move for the rest of the Bush presidency, and Mr. Bush did not challenge it. Under Mr. Obama, Republicans turned the tables by using the power of the House to block the Senate from adjourning for more than three days. But last January, Mr. Obama decided to challenge the new tactic by declaring the pro forma sessions a sham and appointing the three labor board members, along with Mr. Cordray.

The court rejected the Justice Department’s argument in brief but scathing language.

“An interpretation of ‘the recess’ that permits the president to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the president free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction,” wrote Judge David B. Sentelle. “This cannot be the law.”

Republicans, who have portrayed Mr. Obama’s four appointments as a power grab, quickly celebrated the outcome. The Senate minority leader, Mitch McConnell, Republican of Kentucky, said the ruling “reaffirmed that the Constitution is not an inconvenience but the law of the land.”

[**http://www.nytimes.com/2013/01/26/business/court-rejects-recess-appointments-to-labor-board.html?\_r=0&pagewanted=print**](http://www.nytimes.com/2013/01/26/business/court-rejects-recess-appointments-to-labor-board.html?_r=0&pagewanted=print)

**Obama asks Supreme Court to uphold recess appointments**

Richard Wolf, USA TODAY4:32 p.m. EDT April 25, 2013

 President Obama appointed three new members in January 2012 to the five-member National Labor Relations Board, which had been stymied following Senate Republicans' refusal to consider two of his nominees.

WASHINGTON -- A major Supreme Court battle over presidential powers loomed closer Thursday as the Obama administration asked the justices to uphold appointments made without the Senate's consent. The long-expected Justice Department request is almost certain to make its way on to the court's calendar later this year or in 2014, since lower courts have issued split decisions on the issue.

At stake is whether Obama can circumvent Republican filibusters of his nominees by appointing them while senators are out of town -- even though, in this case, the Senate reconvened every few days in "pro forma" sessions where no business was conducted. The case could impact all presidents and Congresses, regardless of political party, depending on the scope of the high court's eventual ruling.

Obama appointed three new members in January 2012 to the five-member National Labor Relations Board, which had been stymied following Senate Republicans' refusal to consider two of his nominees. The administration argued he had that authority because the Senate was not in session. But the federal appeals court for the District of Columbia ruled this past January that Obama lacked the authority to make the appointments in the middle of the 112th Congress, and to fill vacancies that had long existed. It reasoned that Obama's action was a way around the Senate's advise-and-consent role.

"The Court of Appeals' decision would dramatically curtail the scope of the president's authority under the recess appointments clause," the Justice Department argued Thursday.

"It would deem invalid hundreds of recess appointments made by presidents since early in the nation's history. It potentially calls into question every order issued by the National Labor Relations Board since Jan. 4, 2012, and similar reasoning could threaten past and future decisions of other federal agencies."

The Congressional Research Service found that hundreds of appointments dating back to Ronald Reagan's presidency would have been deemed unconstitutional under the appeals court's ruling.

One of the most recent was Obama's appointment of Richard Cordray to head the Consumer Financial Protection Board created by the financial overhaul bill in 2010 -- an appointment Senate Republicans blocked throughout 2011.

<http://www.usatoday.com/story/news/politics/2013/04/25/supreme-court-recess-appointments-obama-nlrb/2113153/>

1. What was the court’s ruling in this case?
2. What body must approve of presidential appointments? (If you cannot determine this from the reading, check textbook or other source.)
3. What was the original purpose of allowing a President to have the recess appointment power?
4. Have the recess appointments been more of a tactic of Democratic or Republican Presidents or has it been used by both parties? **Provide evidence**.
5. What is the response from the White House on the court’s ruling?
6. List 3 potential effects of this court ruling.

A)

B)

C)

1. What is President Obama hoping happens next with this case?