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Obama's Cordray Appointment Mocks the Constitution

By Phil Kerpen

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In 2008 candidate Sen. Barack Obama famously said: "This is part of the whole theory of George Bush that he can make laws as he is going along. I disagree with that. I taught the Constitution for 10 years. I believe in the Constitution and I will obey the Constitution of the United States. We are not going to use signing statements as a way of doing and end run around Congress."

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Now, we find that not only was he kidding about signing statements – he recently used one to ignore about 20 provisions of the omnibus spending bill – but Obama also believes he can decide for himself that the Senate is in recess when it is not, overturn at least a hundred years of precedent, and bypass the Constitution's advice and consent requirement.

Moreover, the president now considers it a political virtue that he is doing precisely what he criticized George Bush for doing: "make laws as he is going along." Obama now says: "I refuse to take 'No' for an answer... when Congress refuses to act in a way that hurts our economy and puts people at risk, I have an obligation as president to do what I can without them."

If he were acting within the confines of the law and the Constitution, the argument might make sense. But Obama has now adopted a theory of executive power so expansive that a reporter at a recent press conference understandably asked whether the president believes we have a virtual monarchy, a president of unlimited powers subject only to periodic elections but not to the rule of law.

According to a 1993 brief from the Clinton Justice Department, Congress must remain adjourned for at least three days before the adjournment constitutes a "recess" for the purposes the recess appointment power.

The origin of this three day period is Article I, Section 5 of the Constitution, which states: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."

In other words, the president can only recess appoint when the Senate has adjourned for more than three days, and the Senate cannot adjourn for more than three days without the consent of the House.

Speaker John Boehner has properly withheld that consent to prevent Obama from installing radical appointees into key positions.

There is recent precedent for this action and for its legitimacy. In fact, then-Obama Solicitor General Elena Kagan wrote to the Supreme Court on April 26, 2010: "Although a President may fill such vacancies through the use of his recess appointment power ... the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007."

Obama's attempt to "recess appoint" Richard Cordray while the Senate is in *pro forma* session is especially galling in light of the history of the new Consumer Financial Protection Bureau (CFPB) and the broad powers that Cordray – if Obama's sleight of hand is permitted by the courts – will wield over the United States economy.

The CFPB has the power to interfere with every consumer financial transaction in the economy. It is housed in the Federal Reserve and funded out of Fed operations, not congressional appropriations, avoiding effective congressional oversight.

All power is vested in one individual – now, presumably Cordray – with no board or commission. None of this was part of Elizabeth Warren's original design, which included a five-member commission that was funded and overseen by Congress. Senate Republicans have correctly called for reforms to make the new agency accountable before confirming a nominee and allowing it to begin writing rules that could have a major negative impact on the economy.

Obama doesn't care. He's making it up as he goes along. What a difference four years makes.

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and Bypassing Congress to Radically Transform America – and How to Stop Him.

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