Prepared Floor Statement of Senator Chuck Grassley

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On The Nomination of John Gerrard and

President Obama’s Four Recent “Recess” Appointments

Monday, January 23, 2012

Mr. President,

Just over a month ago, on December 17, the Senate entered into a unanimous consent agreement to consider the nomination of John M. Gerrard, of Nebraska, to be United States District Judge for the District of Nebraska.

We are proceeding with this nomination, which I will support, despite the President's actions on his so-called recess appointments. I note that during the last session we acted responsibly in considering the President's nominees. Even the Majority Leader acknowledged this. He stated, "We have done a good job on nominations the last couple of months. Actually, in the last 3 months, we have accomplished quite a bit."

I will have more to say about the recess appointments.

But with regard to this nomination I hope my colleagues understand that even though we are proceeding under regular order today, it is only because this unanimous consent agreement was locked in before the President demonstrated his monarchy mentality by making those appointments. I am not going to hold this nominee accountable for the outrageous actions of the President.

However, as this is a matter of concern to my Republican colleagues, as it should be for all Senators, we must consider how we will respond to the President and restore a constitutional balance.

As I stated, since the adoption of the unanimous consent agreement governing the nomination before us, President Obama has upset the nominations process. Article II, Section 2 of the Constitution provides for only two ways in which Presidents may appoint certain officers.

First, it provides that the President nominates, and by and with the advice and consent of the Senate, appoints various officers. Second, it permits the President to make temporary appointments when a vacancy in one of those offices happens when the Senate is in recess. On January 4, the President made four appointments. They were purportedly based on the Recess Appointments Clause. He took this action even though the Senate was not in recess. This action is of the utmost seriousness to all Americans.

These appointments were blatantly unconstitutional. They were not made with the advice and consent of the Senate. And they were not made "during the recess of the Senate."

Between the end of December and today, the Senate has been holding sessions every three days. It did so precisely to prevent the President from making recess appointments. It followed the same procedure as it had during the term of President Bush. President Bush declined to make recess appointments during these periods.

But President Obama chose to attempt to make recess appointments despite the existence of these Senate sessions.

In addition to being unconstitutional, these so-called recess appointments break a longstanding tradition. They represent an attempted presidential power grab against this body.

A President has not attempted to make a recess appointment when Congress has not been in recess for more than three days in many decades. In fact, for decades, the Senate has been in recess at least 10 days before the President has invoked this power.

Other parts of the Constitution beyond Article II, Section 2 show that these purported appointments are invalid. Article I, Section 5 provides, “Each House may determine the Rules of its Proceedings….”

In December and January, we provided that we would be in session every three days. The Senate was open and provided the opportunity to conduct business.

That business included passing legislation and confirming nominations. In fact, the Senate did pass legislation, which the President signed. According to the Constitution – each House – not the President
determines whether that House is in session. The Senate said we were in session. The President recognized that fact by signing legislation passed during the session.

Article I, Section 5 also states, ”Neither House, shall, during the session of Congress, without the consent of the other, adjourn for more than three days….”

The other body did not consent to our recess for more than three days. No concurrent resolution authorizing an adjournment was passed by both chambers. Under the Constitution, we could not recess for more than three days. We did not do so. The President's erroneous belief that he can determine whether the Senate was in session would place us in the position of acting unconstitutionally.

If he is right, we recessed for more than three days without the consent of the other body. By claiming we were in recess, the President effectively dares us to say that we failed to comply with our oath to adhere to the Constitution. Yet, it is the President who made appointments without the advice and consent of the Senate while the Senate was in session. It is the President who has violated the Constitution.

Of course, the President does not admit that he violated the Constitution. He has obtained a legal opinion from the Office of Legal Counsel at his own Department of Justice.

That opinion reached the incredible conclusion that the President could make these appointments, notwithstanding our December and January sessions.

That opinion is entirely unconvincing. For instance, to reach its conclusion that the Senate was not available as a practical matter to give advice and consent, it relies on such unpersuasive material as statements from individual senators.

The text of the Constitution is clear.

It allows no room for the department to interpret it in any so-called "practical" way that departs from its terms.

The Justice Department also misapplied a Judiciary Committee report from 1905 on the subject of recess appointments. That report said that a Senate "recess" occurs when "the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary

session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments." Obviously, that report does not support the Department of Justice. During these days, the Senate was sitting in session. It could discharge executive functions. The chamber was not empty. It could receive communications. It could participate as a body in making appointments. In fact, it sat in regular session and passed legislation.

There is nothing in the 1905 report that justifies the President substituting his judgment for the Senate's regarding whether the Senate is in session. In any event, a Senate Judiciary Committee report from 1905 does not govern the United States Senate in 2012. The Senate as constituted today decides its Rules and Proceedings.

The Department is on shaky legal ground when it claims that "whether the House has consented to the Senate's adjournment of more than three days does not determine the Senate's practical availability during a period of pro forma sessions and thus does not determine the existence of a 'Recess' under the Recess Appointments Clause." There is no basis – none -- for treating the same pro forma sessions differently for the purposes of the two clauses. The department simply cannot have it both ways.

And the Justice Department's opinion contains other equally preposterous arguments. For instance, the opinion claims that the Administration's prior statements to the Supreme Court -- through former Solicitor General Elena Kagan -- that recess appointments can be made only if the Senate is in recess for more than three days are somehow distinguishable from its current opinion. Or that the pocket veto cases do not apply.

Or even if they did, the "fundamental rights" of individuals that the courts described in those cases include the right of the President to make recess appointments.

There was a time when Presidents believed that they could take action only when the law gave them the power to do so. They obtained advice from the Justice Department on the question whether there was legal authority to justify the action they wished to take. But Theodore Roosevelt started to change the way Presidents viewed power.

He believed that the President could do anything so long as the Constitution did not explicitly preclude him from acting. When he used that theory to create wildlife refuges against a rapidly expanding industrial base, there was no objection. But a dangerous precedent was set. When he claimed that he could make recess appointments during a "constructive recess" of the Senate, the Senate rejected this view in that 1905 report.

When a President thinks he can do anything the Constitution does not expressly prohibit, the danger arises that his advisers will feel pressure to say that the Constitution does not stand in the way.

At that point, a President is no longer a constitutional figure with limited powers as the founders intended. Quite the contrary, the President looks more and more like a king that the Constitution was designed to replace.

This OLC opinion reflects the changes that have occurred in the relationship between the Justice Department and the President on the question of presidential power. Formerly, the Justice Department gave legal advice to the President based on an objective reading of texts and judicial opinions. It was not an offshoot of the White House Counsel's office. This more objective view of the limits of presidential power also provided a level of protection for individual liberty, the principle at the core of our constitutional separation of powers. The President might refuse to accept the advice.

He might choose to fire the officer who gave him advice with which he disagreed. He could seek to appoint a new officer who would provide the advice he preferred. But he risked paying a political price for doing so. An official who thought that loyalty to the Constitution exceeded his loyalty to the President could refuse to comply, at great personal risk. That is what Elliot Richardson did during the Saturday Night Massacre of the Watergate era.

During the Reagan Administration, OLC issued opinions that concluded that the President lacked the power to undertake certain acts to implement some of his preferred policies. The President did not undertake those unilateral actions.

President Obama originally submitted a nominee for OLC that was wholly objectionable. The Senate had good reason to believe that she would not interpret the law without regard to

ideology. We refused to confirm her.

The President ultimately withdrew her nomination and nominated instead Virginia Seitz. We asked important questions at her confirmation hearing and through questions for the record. Ms. Seitz responded that OLC should adhere to its prior decisions in accordance with the doctrine of stare decisis. And she stated that if the Administration contemplated taking action that she believed was unconstitutional, she would not stand idly by. Relying on those assurances, the Senate confirmed Ms. Seitz.

Mr. President, Ms. Seitz is the author of this wholly erroneous opinion that takes an unprecedented view of the Recess Appointments Clause. And I suppose it is literally true that Ms. Seitz did not stand idly by when the Administration took unconstitutional action: rather, she actively became a lackey for the Administration. She wrote a poorly reasoned opinion that placed loyalty to the President over loyalty to the rule of law.

That opinion, and her total deviation from the statements she made during her confirmation process, show extreme disrespect for the institution of the Senate and the constitutional separation of powers. I gave the President and Ms. Seitz the benefit of the doubt in voting to confirm her nomination. However, after reading this misguided and dangerous legal opinion, I'm sorry the Senate confirmed her. It's likely to be the last confirmation she ever experiences.

Mr. President, the Constitution outlines various powers that are divided among the different branches of our federal government. Some of these powers are vested in only one branch, such as granting pardons or conducting impeachment proceedings. Other powers are shared, such as passing and signing or vetoing bills. The appointment power is a shared power between the President and the Congress. When one party turns a shared power into a unilateral power, the fabric of the Constitution is itself violated. And a response is called for.

In Federalist 51, Madison wrote that the separation of powers is more than a philosophical construct. He wrote that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." The Framers of the Constitution wrote a document that originally contained no Bill of Rights. They believed that liberty would best be protected by preventing government from harming liberty in the first place. That was the reason for the separation of powers.

And they designed a working separation of powers through checks and balances to ensure a limited government that protected individual rights. Madison wrote, “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”

That is what the Framers intended in a case such as this. When the President unconstitutionally usurped the power of the Senate, the Senate’s ambition would check the President’s. In this way, the Constitution is preserved. The power of the government is limited. And the liberties of the people are protected.

But the Framers did not anticipate the modern Presidency. It took Justice Jackson’s famous concurrence in the Youngstown case to address presidential powers in today’s world. When the Judiciary Committee held its confirmation hearings on President Bush’s Supreme Court nominations, my friends on the other side of the aisle posed many questions about the Jackson concurrence. That opinion sheds light on these so-called recess appointments.

For instance, President Obama argued in a nationally televised rally that his actions were justified because “[e]very day that Richard [Cordray] waited to be confirmed . . . was another day when millions of Americans were left unprotected. . . . And I refuse to take ‘no’ for an answer.”

Justice Jackson anticipated these hyperbolic statements. He wrote: “The tendency is strong to emphasize the transient results upon policies….and lose sight of enduring consequences upon the balanced power structure of our Republic.”

President Obama has definitely let transient policy goals overtake the Constitution. His argument is that the end justifies the means.

His argument is that he can say no to the Constitution. Or, in essence, that the Constitution does not apply to him. But the Constitution demands that the means justify the ends, and that adherence to established procedure is the best protection for liberty. A monarch or a king could say “no” to the Constitution. But under our Constitution, the President may not.

It is the Constitution, and not the President, that refuses to take 'no' for an answer.

Justice Jackson was also aware that the modern President's actions "overshadow any others [and] that, almost alone, he fills the public eye and ear." By virtue of his influence on public opinion, he wrote, the President "exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness."

Some people believe that President Obama challenged the Senate for partisan purposes. But Justice Jackson understood the true partisan dynamic that is now playing out. He recognized that the President's powers are political as well as legal. Many presidential powers derive from his position as head of a political party. Jackson wrote,

"Party loyalties and interests sometimes more binding than law, extend his effective control into branches of government other than his own, and he often may win, as a political leader, what he cannot command under the Constitution." Finally, he concluded, "[O]nly Congress itself can prevent power from slipping through its fingers."

Mr. President, outside these walls, in the reception room, are portraits of great senators of the past. The original portraits were selected by a committee that was headed by then Senator John F. Kennedy. They included such figures as Webster, Clay, Calhoun, LaFollette, and Taft. Yes, these senators were partisans. But they were selected because of the role they played in maintaining the unique institution that is the Senate in our constitutional system. In particular, they protected the Senate and the country from the excessive claims of presidential power that were made by the chief executives of their time. Where are such members today?

Where is a member of the President's party today who is like a more recent Senate institutionalist, Robert C. Byrd? He defended the powers of the Senate when Presidents overreached, even Presidents of his own party. Where are the members who recognized that our sessions every three days rightly prevented President Bush from making recess appointments but who stand idly by as President Obama makes recess appointments without a recess?

I remind my colleagues of my experiences as chairman or ranking member of the Finance Committee. I refused to process nominees to positions that passed through that committee to

whom President Bush gave recess appointments. That is how I used the authority that I had to protect the rights of the Senate.

Mr. President, I do not believe that we should let the powers vested in the elected representatives of the American people slip through our fingers because we place partisan interests above the Constitution. I have shown how the Framers understood that supposedly expedient departures from the Constitution risked individual liberty. The constitutional text in this situation is clear. It must be upheld. We must take appropriate action to see that it is done.

Nor should we wait for the courts.

Although the NLRB appointments are already the subject of litigation, we should take action ourselves rather than rely on others. The stakes are too high. On the other hand, even the OLC opinion recognizes, as it must, the litigation risk to the President.

For more than 200 years, Presidents have made very expansive claims of power under the Recess Appointments Clause. The President and the Senate have worked out differences to form a working government.

Now, the Obama Administration seeks to upend these precedents and that working relationship. It may well find, as did the Bush Administration, that when overbroad claims of presidential power find their way to court, that not only does the President lose, but that expansive arguments of presidential power that had long been a part of the public discourse can no longer be made.

Although I believe that this ironic result will ultimately occur here as well, the Senate must defend its constitutional role on its own, as intended by the framers of the Constitution that we all swore an oath to uphold.

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