

United States Senate

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PORTMAN JOINS SENATE COLLEAGUES ASKING MAJORITY LEADER REID TO CLARIFY HIS POSITION ON UNCONSTITUTIONAL RECESS APPOINTMENTS

WASHINGTON – Today, U.S. Senator Rob Portman (R-Ohio) joined a group of 34 Senators, led by Sen. Orrin Hatch (R-Utah) in writing to Senate Majority Leader Harry Reid (D-Nevada) to ask that he clarify “serious inconsistencies” in his past statements about the use of recess appointments. In January, President Obama circumvented the Constitution and the Senate by appointing Richard Cordray to the Consumer Financial Protection Bureau (CFPB) and three new members of the National Labor Relations Board (NLRB) despite the fact that the Senate was in legislative session.

In the letter, the Senators note that “it was under [Majority Leader Reid’s] leadership that the Senate first began to use pro forma sessions to shorten recess periods in order to prevent President George W. Bush from making recess appointments beginning in November 2007,” and that “this became the standard practice for the Senate during the rest of President Bush’s term in office, during which time no recess appointments were made.”

However, the letter notes that on several occasions Majority Leader Reid publicly supported ignoring the Constitution and Senate precedent that, the Senators note, Majority Leader Reid created, and supported President Obama’s decision to bypass the Senate and make these recess appointments.

The Senators add that it “appears that [Majority Leader Reid] believe[s] the importance of preserving Senate’s constitutional role in the nomination and appointment process varies depending on the political party of the President,” and outlined specific questions they would like Majority leader Reid to answer to clarify his position on President Obama’s unconstitutional appointments.

A signed copy of the letter can be viewed [HERE](#) and the full text of the letter is below:

February 2, 2012

*The Honorable Harry Reid
Senate Majority Leader
United States Senate
Washington, DC 20510*

Dear Majority Leader Reid,

In light of President Obama's recent decision to break with precedent regarding the use of recess appointments, we are writing to inquire about your views on the matter so as to clear up what appear to be serious inconsistencies on your part. We hope you will provide a complete and candid response.

On January 4, 2012, the President announced his intent to recess appoint Richard Griffin, Sharon Block, and Terence Flynn to serve on the National Labor Relations Board (NLRB) and Richard Cordray to serve as head of the Consumer Financial Protection Bureau (CFPB). Pursuant to a Unanimous Consent agreement, the Senate was to go into pro forma session every three days between December 17, 2011 and January 23, 2012. However, the President, in a controversial turn of events, determined that the Senate's use of periodic pro forma sessions was insufficient to prevent him from exercising his recess appointment power under Article II of the Constitution.

As you are surely aware, it was under your leadership that the Senate first began to use pro forma sessions in order to prevent President George W. Bush from making recess appointments beginning in November 2007. With very few exceptions, this became the standard practice for the Senate during the rest of President Bush's term in office, during which time no recess appointments were made. And, though you discontinued this practice when President Obama first took office, the procedure was reinstated last year.

Furthermore, in deciding whether to make these appointments, the President reportedly relied on the opinion of the Office of Legal Counsel which argued that, because no business was to be conducted during the scheduled pro forma sessions, the President could consider the Senate unavailable to provide advice and consent and exercise his power to make recess appointments.^[1] Yet, on December 23, 2011, one of the days scheduled for a pro forma session, you, yourself, went to the floor and conducted

business to provide for the Senate passage of the Temporary Payroll Tax Cut Continuation Act of 2011 (H.R. 3765)[2], clearly undermining any claim that the Senate is unavailable to perform its duties during a pro forma session.

However, despite the fact that you were indisputably the author of what became the routine use pro forma sessions to prevent recess appointments and even though you are obviously well aware that the Senate is able to conduct significant business during a scheduled pro forma session, you have, on multiple occasions, publicly expressed your support for President Obama's efforts to bypass the Senate with regard to these nominations. For example, while appearing on the January 15, 2012 edition of "Meet the Press," you stated unequivocally that the President "did the right thing" in making these appointments. And, while you did acknowledge in the interview that it was you who established the procedure of using pro forma sessions, you also stated that "President Bush didn't have to worry about recess appointments because [you] were working with him," and that "[you] believed then, [you] believe now, that a president has a right to make appointments." You made similar arguments this week on the Senate floor.[3]

This purported explanation directly contradicts remarks you made on the Senate floor during the Bush Administration wherein you explicitly indicated that the purpose of the pro forma sessions was to prevent President Bush from making recess appointments. On November 16, 2007, you stated that "the Senate would be coming in for pro forma sessions during the Thanksgiving Holiday to prevent recess appointments," and that you had made the decision to do so because "the administration informed [you] that they would make several recess appointments." [4] On December 19, 2007, you stated that "we are going into pro forma sessions so the President cannot appoint people we think are objectionable..." [5] After reading these statements, it is clear that, under the Bush Administration, you believed that the use of pro forma sessions was sufficient to prevent the President from making recess appointments and that the practice was undertaken specifically because you were unable to reach an agreement with the President regarding specific nominees.

This apparent shift in your position raises a number of concerns. Most specifically, it appears that you believe the importance of preserving Senate's constitutional role in the nomination and appointment process varies depending on the political party of the President. Because we hope that this is not the case and because we hope that you, as the Senate Majority Leader, have taken seriously your responsibility to protect and defend the rights of this chamber, we hope you will answer the following clarifying questions:

1. In your view, what specific limitations does the Senate's use of pro forma sessions place on the President's power to make recess appointments under the Constitution?

2. *Would it have been constitutional, in your view, for President Bush to have made recess appointments during the time the Senate, under your leadership, was using pro forma sessions? If so, for what purpose did you establish the practice of using pro forma sessions in the first place? If not, why do you now believe it is constitutional for President Obama to make recess appointments under similar circumstances?*

3. *In your view, did the Senate's passage of the Temporary Payroll Tax Cut Continuation Act of 2011 comply with the constitutional requirements for the passage of legislation? If so, do you disagree with the President's argument that the Senate was "unavailable" to perform its advice and consent duties during the recent adjournment?*

Needless to say, these are very serious matters. While there are many issues that divide the two parties in the Senate, including the very appointments at issue here, we hope that you share our view that neither party should undermine the constitutional authority of the Senate in order to serve a political objective.

Thank you for your attention regarding this matter.

Sincerely,

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[1] Office of Legal Counsel, "Lawfulness of Senate Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions," January 6, 2012.

[2] Sen. Harry Reid, "Unanimous Consent Agreement – H.R. 3765," remarks in the Senate, Congressional Record, daily edition, vol. 157 (November 16, 2007), p. S8789.

[3] Sen. Harry Reid, "Bipartisan Cooperation," remarks in the Senate, Congressional Record, daily edition, vol. 158 (January 30, 2012), p. S140.

[4] Sen. Harry Reid, "Recess Appointments," remarks in the Senate, Congressional Record, daily edition, vol. 153 (November 16, 2007), p. S14609.

[5] Sen. Harry Reid "Order of Business," remarks in the Senate, Congressional Record, daily edition, vol. 153 (December 19, 2007), p. S15980.

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