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Obama: I am the law

By Gene Healy - 12/4/2012

"The president is not going to negotiate with himself," White House spokesman Dan Pfeiffer insisted last week. As Tom Friedman, the New York Times' Maestro of Mixed Metaphors, might put it, it's hardball time, the clock is ticking, and the GOP had better come to the table before we go over the fiscal cliff.

The good news for the Republicans is that President Obama is probably overinterpreting his "mandate." The bad news is, as Obama has shown over the last four years, he's willing to work his will unilaterally and has nearly unprecedented powers to do so. Never mind "negotiating with himself"; increasingly, this president won't even negotiate with Congress.

"We can't wait for an increasingly dysfunctional Congress to do its job," Obama announced late last year. By "do its job" he actually meant "agree with the president and pass laws authorizing him to act." He let loose with a flurry of executive orders -- special breaks for debt-addled students and homeowners, and unilateral revision of immigration laws and welfare work requirements -- all via royal dispensation.

As part of that offensive, in January, Obama invoked the Constitution's recess appointments clause to fill several top federal posts, including three members of the National Labor Relations Board. On Friday, the U.S. Court of Appeals for the Seventh Circuit heard oral arguments in the first of several pending cases challenging that move.

The Constitution gives the president the power "to fill up all vacancies that may happen during the recess of the Senate" by granting temporary commissions. But that clause was an "auxiliary method of appointment," Alexander Hamilton explained in Federalist 67, designed for a situation where, say, the secretary of war drops dead during one of the six-to-nine-month hiatuses common in early Congresses. It was never meant to allow the president to routinely bypass the Senate, ramming through top executive appointments whenever the gavel drops for a momentary recess.

Obama isn't the first president to abuse the clause to appoint nominees that the Senate wouldn't confirm. He is, however, the first to invoke the power when the

Senate was -- according to its own rules -- actually in session. The White House called the "pro forma" sessions adopted by then-Senate Majority Leader Harry Reid "a procedural trick" aimed at unjustly stifling his ability to bypass Senate confirmation.

Forty-two Senate Republicans have signed an amicus brief in another challenge to Obama's recess appointments pending before the D.C. Circuit. The author of the brief is Miguel Estrada, who earlier withdrew his nomination for a federal judgeship when Senate Democrats delayed his confirmation for two years.

If the president has the power to decide when the Senate is "really" open for business, Estrada points out, he could do the same "whenever the chamber does not swiftly rubber-stamp his nominees." He could declare "the Senate 'unavailable' to approve appointments because it is preoccupied with other business" or paralyzed by "partisan divisions." He could thereby fill any federal office he chose for up to two years at a time without the inconvenience of the Senate's constitutional consent. The power the president imagines, Estrada writes, would "severely undermine the separation of powers."

Ignoring those considerations, at the time, the Washington Post editorial board called Obama's gambit "a justifiable power grab." In a similar vein, last month, the New Republic ran a piece helpfully (and brazenly) titled "Eight Ways Obama Can Jam Through His Agenda Without Congress." (Recess appointments are on the list.)

The liberal press is apparently uninterested in the rule of law and the separation of powers. Let's hope those principles have better defenders in Congress and the courts.

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