

✖ President Obama's announcement today [making three nominations to the National Labor Relations Board](#) should remind us that [the GOP is the party of permanent constitutional crisis](#). It has been quite clear from the beginning of the Obama Administration that the Republicans simply have no interest in allowing the NLRB to function. That shouldn't be much of a surprise: it's what you believe if you are a plutocrat. Besides, it's nothing new: [Republicans have explicitly stated that they will not allow any nominee to head the Consumer Financial Protection Bureau to come to a vote unless the statute is changed](#). Legal Planet readers should not be surprised to see similar things occur with Gina McCarthy's nomination to EPA, perhaps Sally Jewell's nomination to Interior and a host of critical sub-Cabinet appointments. (In fairness, James Inhofe [has announced his support of McCarthy](#)).

But it seems to me that this attitude has a constitutional dimension.

Article II of the Constitution not only vests "executive power" in the President, but [it commands him to "take care that the laws be faithfully executed."](#) The problem is that the President cannot do this if the Senate will not confirm any of his nominations. And make no mistake: that's the Republican goal here. It does not want the CFPB or the NLRB to operate; it does not want the law to be faithfully executed. But the Senate has the constitutional power to reject nominations. So the clauses conflict — a quite common feature of the founding charter. Does the Constitution contradict itself? Very well, then it contradicts itself. It is not large, but it contains multitudes.

Is there anything that the law can do about this? On the most basic level, I think that the answer is no. When it comes to the CFPB, the Republicans might be opening themselves up to criticism for violating the Constitution, but if anything would be a political question, it would be this. I cannot imagine any court trying to review the intentions of Senators about why they vote against nominees: that would be the paradigmatic political question.

Nevertheless, I do believe that it makes the *filibuster* of executive branch nominations constitutionally suspect. First, we should not read the Constitution to magnify opportunities for one branch to deny the other its core powers. Second, we should not read the Constitution to enhance interbranch conflict: there is enough of it built into the document already. Third, we *should* read the Constitution to enhance public accountability — one of the framers' central goals — and the filibuster of executive branch nominations undermines it: the law isn't being faithfully executed, and everyone is pointing fingers at everyone else. Finally, the Constitution should not permit the empowerment of "false conflicts" between branches, and the filibustering of an executive branch nomination is not really an interbranch conflict at all: it represents a conflict between the President and a minority of

one of the houses of Congress.

Yes, I know: Article I Section 5 gives each House the power to “determine the rules of its Proceedings.” But this is not an absolute rule. Obviously, it would be unconstitutional for a House to refuse to seat someone because of his race, but there is nothing in the text of the Constitution that would forbid it. (The Equal Protection Clause applies only to the states, not the federal government: applying it to the federal government took a Supreme Court decision with a fairly shaky doctrinal basis). We would probably not allow the Senate to remove an impeached official by flipping a coin. Ironically enough, the decision giving the Senate wide latitude in impeachments, [\*Nixon v. United States\*](#), (not about the 37th President!), hung much of its decision on the Constitution’s granting the “sole” power of removal to the Senate. But of course the power to determine rules is *not* “sole.”

I emphasize that the foregoing applies only to **executive branch** nominations. I don’t see it as applying to judicial branch nominations because those do not implicate the Take Care Clause. And it does not implicate other congressional actions that impede Presidential execution of the laws, such as refusing appropriations, because the power of the purse is as core to legislative power as execution of the laws is to executive power: preventing filibusters in such cases might disrupt the balance of power between branches.

In an era where virtually everything is partisan, this should not be. It should apply to President Obama with a Republican Senate minority and to a President Jindal (God help us) with a Democratic Senate minority. There is enough severe political and ideological conflict in this country that threatens the basic functioning of the government. Surely it makes sense to help the Constitutional framework function as effectively as possible.