

As I said last week, I believe the beginning of a second term actually presents a real opportunity to change course, to do the work so many have refused to do for the past 4 years. This is our chance. This is our chance to prove the pundits wrong and actually get something accomplished.

Let's be clear about something up front: Solving our debt problem isn't about austerity, it is about opportunity. It is not about austerity, it is about opportunity. It is about creating some space for businesses to grow and for our rising generation of Americans to feel as though they can look to the future with optimism rather than with dread. But that only comes after some hard work on the debt is done. Let's get to work.

Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Tennessee.

Mr. ALEXANDER. It seems lately that I come to the floor when the Republican leader is making especially reasonable, sensible proposals. I heard him say the same thing last week, and I agree with him.

I saw a number of my Democratic friends this weekend in different places, and I said: Look, the President has been elected. He deserves credit for that, and he now has a chance to define his legacy. He told us what that is in his inaugural address. Isn't this the right time to get out of the way this difficult problem of dealing with entitlements that every single one of us knows we have to do? Hasn't the House of Representatives actually given us an unexpected 3 or 4 months in which we can do it?

If President Obama wants, as I am sure he must, to begin to work on the other issues he talked about in his inaugural address—immigration, for example, and his other important issues—why would we not go to work right now, as the Republican leader says, and deal with the runaway, out-of-control entitlement spending that is going to bankrupt the program the seniors depend upon to pay their medical bills? We know that is going to happen. The Medicare trustees have said it is going to happen in 12 years, and we have all made speeches saying what we should do with it. Let's just do it. As the Republican leader says, this isn't about austerity.

The Australian Foreign Minister came to this country about a month ago, and in his first address—he is a great friend of America's. He said the United States of America is one budget agreement away—one budget agreement away—from reasserting its global preeminence. That is his view from Down Under. Looking at Asia, looking at China, looking at Japan, he wants us to succeed. He thinks that if we succeed, Australia succeeds. He wants us to get this done.

Average families want us to get this done. They don't know why we don't get it done. They understand we can't keep spending money we don't have.

We have had recommendations from the President's debt commission, from the Domenici-Rivlin group, and from the Ryan-Wyden proposal. We have had all of these different ideas. We know exactly what to do, and suddenly we have 3 months to do it. I urge the President to make a proposal, show us what to do. There are 40 or 50—there might be 60 or 70 of us here on both sides of the aisle ready to go the work and to do it now.

I congratulate the Republican leader for his reasonableness and his comments, and I hope he continues to offer this. I might say, without trying to embarrass him, that every time we have had a crisis we need to solve, it has been the Republican leader and the White House that have gotten it done. So why don't they try again? Why don't they try again? That is my wish.

I came here to talk about something else today, but I am glad I was here to hear that, and I congratulate the Republican leader.

Mr. MCCONNELL. Would the Senator yield?

Mr. ALEXANDER. I yield to the Senator.

Mr. MCCONNELL. As we have discussed before, and I think it is worth repeating, divided government is actually the best time to do difficult things. We have had four excellent examples in the last 25 years: Ronald Reagan and Tip O'Neill raised the age of Social Security, which saved that important program for another generation. Ronald Reagan and Tip O'Neill did the last comprehensive tax reform. Bill Clinton and the Republicans did welfare reform and actually balanced the budgets, believe it or not, in the late 1990s.

There is ample evidence that divided government is the best time to do really difficult things. When you join hands and do it, the American people understand that surely it must have been something we needed to do because these guys actually were able to agree on it.

I hope we won't miss another opportunity. Sometimes I think we are a little bit like the early Israeli Foreign Minister, Abba Eban, who said of the Palestinians that they "never miss an opportunity to miss an opportunity." It appears as if we have rarely missed an opportunity to miss an opportunity. Hopefully, we won't miss this one as well.

I thank my friend from Tennessee.

Mr. ALEXANDER. I thank the Senator from Kentucky.

As we spoke on the floor, another example is President Johnson and Everett Dirksen on civil rights. That would not have happened if the government hadn't been divided, and it wouldn't have been as easily accepted by the American people if it had not been divided.

If the Republicans and the Democrats—if this Democratic President and this mixture of Republicans and Democrats in Congress say to the American

people: We have a real fiscal cliff for you; all the programs you depend upon to pay your medical bills aren't going to have enough money to pay them, and we are going to have to make some changes to deal with that, people will accept that, especially if it comes from both of us.

As far as who is supposed to propose it, well, Senator CORKER and I have proposed it. We proposed what to do, but we are not President. We are not President. I don't know what the experience of the Governor of Virginia was, but if in Tennessee I had waited around for the legislature to come up with a road program, we would still be driving on dirt roads.

The President has to lay it out there and say: Let's do it this way. Then the legislators, all 535 of us, will say: No, Mr. President, we couldn't possibly do it that way. Let's do it a little bit differently, and we will come to a result. That is the way our system works. We have 3 months to do it, and I hope the Republican leader will continue to make his point.

RECESS APPOINTMENTS

Mr. ALEXANDER. Mr. President, last Friday a three-judge Federal appellate court made an important decision. It said that the President of the United States, President Obama, on January 4, 2012, made some recess appointments when the Senate wasn't in recess. In other words, they were constitutionally invalid.

The President made four appointments on January 4, 2012—three to the National Labor Relations Board and one to the consumer finance agency. He did it under his so-called recess appointment authority, which is defined in article II of the Constitution.

But the Court said: No, Mr. President. The Senate wasn't in recess. The only time you can make those appointments is between the annual sessions of Congress, and the Constitution also says that those vacancies to which you appoint have to happen during that recess.

The Chairman of the National Labor Relations Board made a remarkable response to the order of the Court. The order of the Court, by the way, vacated an important decision the Board made and said the two remaining NLRB members who are still on the Board are unconstitutionally there, so they vacated the order. Instead of recognizing the authority of the Court, the NLRB Chairman said, in effect: I am going to hang up a sign that says "Open for business. We have important work to do." And they are going to keep going despite the fact that the NLRB has made 219 decisions with these two unconstitutionally appointed members since the month of January 2012, all of which, I would say, are invalid because the members who voted on the decisions were unconstitutionally appointed.

I am here today to call for Sharon Block and Richard Griffin—the two

members of the National Labor Relations Board who were unconstitutionally appointed by the President according to the Federal appellate court—calling on them to resign their positions and calling on the President of the United States to nominate a full slate of members to the National Labor Relations Board, and then let's do what the Constitution says we are supposed to do.

The best known authority of this body, the Senate, is likely to be the advice and consent provisions of the Constitution. Article II, section 2: With the advice and consent of the Senate, the President shall appoint Ambassadors and others. There are about 1,100 of those whom the President appoints.

Two years ago and then just last week, we streamlined the confirmation process a little bit to narrow the focus on the most important appointees and make it easier to get them confirmed. Those are the checks and balances the Constitution meant to establish. They did that so we would have liberty from a tyrannical executive branch, which is what the Founders were worried about. The Court has said the President has exceeded that. Therefore, these two remaining members of the NLRB should resign immediately and pack their bags and go home with our thanks for their hard work, despite the fact that the 219 cases they voted on ought to be vacated and probably will be when someone challenges those cases.

A new sign needs to go up at the National Labor Relations Board. Take down the sign that says "Open for business" and put up a sign that says "Help wanted. Nominations accepted."

The three-judge court of appeals did an interesting thing: They actually read the Constitution in its plain English. Here is what the Constitution says:

The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate.

Now, what is the recess of the Senate? Well, let's go back to the beginning of our country and for many years thereafter.

Sam Houston, Senator Sam Houston of Texas, had to go from Texas to New Orleans, get on a boat, come up the Mississippi River, and then ride a horse and take a stagecoach to get here. It took him weeks—same to go home.

James K. Polk of Tennessee, Speaker of the House, would take a stagecoach up to Pennsylvania and then follow the road or go on the river up to Pennsylvania and follow the road to the House of Representatives.

At one time, President Polk, after he became the President, had a vacancy in the Attorney General's Office, and he wrote to some person up in New Hampshire and asked him to take the job. It took 2 or 3 weeks to receive the letter, and it took 2 or 3 weeks to get the answer, and the answer was no.

In those days, there were long, extended periods in this country between the annual sessions of the Congress,

when the Members of Congress were spread all over the country. The Founders anticipated that, and they wisely put into the Constitution a provision that said that during those times, the President may make a recess appointment while the Senate is in recess. And that person may hold the position until the end of the session.

Well, over the years, that has changed. Various Presidents have tried various ways to fill vacancies during a recess, and that has become something different in the last while. This hasn't been just Democratic Presidents who have done it. Presidents have become frustrated because sometimes Senators don't give their advice and consent. I know about that; I was nominated by President Bush the first to be the Education Secretary, and the Senator from Ohio at the time thought I needed a little examination and held me up for 3 months. Finally, the Senate agreed to my confirmation unanimously.

But that is what we are for. We are supposed to consider the President's nomination of Senator KERRY to be Secretary of State, as we are. We are supposed to consider the nomination of Senator Hagel as Secretary of Defense. And according to the law, we are supposed to consider the President's nominees for the very important National Labor Relations Board. But what the President did was to make three appointments to the Board the day after we went into our annual session. We went into session on January 3, 2012, and he made these appointments on January 4.

The court said the Senate was clearly in session—clearly in session. So if the President disagrees with the Senate, if he is afraid he is about to nominate somebody who the Senate won't like, well, then, he had better get somebody the Senate will approve or else he is not going to get that nominee. But the President said: No, I am going to do it my way, so I will try to change this recess appointment and do it in a way that is more extreme than has ever been done before.

I want to hasten to add there is no excuse here that if the President hadn't acted in this way the Senate might have held up the nomination for too long. Of course, the Senate has that right, if it chooses to do so. But in this case the nominations only arrived 3 weeks before the President made his appointments. So we have a straight-out set of facts here, says the court. According to the Constitution, valid appointments may only be made during the recess between annual sessions of Congress, and these were not. Secondly, it may only be made to a vacancy that occurred during the recess, and two of the three vacancies which we are talking about occurred months before the recess.

The Chairman of the National Labor Relations Board effectively says "open for business." In fact, the board should not be open for business, because the

board only has one member who has been constitutionally appointed and confirmed, unanimously by the Senate. So the board, without a full quorum of three members, which it does not have—two are unconstitutionally appointed—can't issue regulations and can't decide cases, including appeals of decisions of unfair labor practices.

Let me give an example that might affect the State of Tennessee. We were very concerned last year—I was; Tennesseans were—when a complaint began to make its way through the National Labor Relations Board affecting the Boeing Company and its decision to put a plant in South Carolina. In other words, Boeing, from a State that does not have a right-to-work law, wanted to put a new plant in a State that does have a right-to-work law, and a complaint was filed, which, on the face of it, made it look like as if, in trying to do that, it is *prima facie* evidence they were violating national labor laws. That is a very expensive delay for the Boeing Company—or any company. Well, that eventually got settled after a lot of expense.

But let's say we have a small supplier in the State of Illinois, which is not a right-to-work State, that might want to work in Tennessee or Virginia, which are, and someone files a complaint. Do we want a board there that is unconstitutionally placed that might rule that is a *prima facie* violation of Federal law? To have members of the NLRB who are not confirmed by the U.S. Senate raises the prospect that would undermine the right-to-work law in Tennessee and Virginia and all the other States that have chosen to have one.

So this has very practical, everyday application in the State of Tennessee.

But even though the board can't issue regulations or decide cases, the rest of the NLRB can be open for business while the President makes nominations and the Senate considers those nominations under regular order. For example, the NLRB could conduct elections, it could investigate allegations of unfair labor practices, it could issue a complaint, administrative law judges could hold hearings, regional directors can settle cases, the general counsel may seek to enforce orders, and the general counsel could issue enforcement guidance memoranda.

They are all open for business, but the National Labor Relations Board is not open for business. Its "open for business" sign needs to come down, and a new one needs to go up that says: Help wanted. Nominations accepted.

Finally, there is a larger issue here. At the beginning of last year, I visited Mount Vernon. I mentioned it in the 2 minutes I had at the President's inaugural last week, because it made such an impression on me. I was reminded that the American Revolution was about tyranny by a king. That was the danger. That was what caused people to sacrifice their lives.

I saw in the National Archives this weekend the oath of allegiance signed

by George Washington and his troops, which swore allegiance to a country that was not even formed yet—an allegiance that would have caused him to be executed if we had lost the American Revolution. So there was a lot at stake when our country was founded, and so much of it was about liberty and about an ability to resist a king or an imperial leader.

George Washington himself imposed his own character upon the American character by his modesty and restraint, by his decision to step down as general of the American army. He could have been general for the rest of his life. He made the decision to step down as President of the United States after two terms. He could have been President for the rest of his life. But at the beginning of our country, liberty, to many people, meant avoiding an executive that was too strong, that didn't have proper checks and balances. And our Founders put into our Constitution checks and balances with the court and with the legislature.

Of course, as we like to point out, article 1 is about the Congress, about the legislature. And as I said earlier, perhaps the best known function the Senate has is the ability to advise and consent. The President may nominate, but those important people—men and women—may not take their offices until they have been confirmed by the Senate.

This administration, I am sorry to say, has not respected those checks and balances, as I had hoped it would. I would suggest maybe a retreat to Mount Vernon for President Obama and the White House staff. The Obama administration has appointed more czars than the Romanovs. We have always had some czars, such as the drug czars, but they have three dozen—three dozen who aren't subject to the usual restrictions that we have through the appropriations process.

The most blatant example of the imperial Presidency are the recess appointments at a time when the Senate, according to this court, was not in recess, in order to put into those positions men and women with whom the Senate would not agree. If the President could do what the President did on January 4, 2012, on a regular basis, we might take a recess break for lunch and come back and find we have a new Supreme Court Justice.

I am here to suggest the right thing to do would be to respect the tradition of checks and balances that is built into our Constitution. It is at work here, because the President took an action, we didn't like it, and the third branch of government has made a decision the President was wrong. The way to go forward is for the two remaining members of the National Labor Relations Board who were appointed unconstitutionally to resign their position and for the President to nominate as rapidly as he can men or women to fill the remaining vacancies on the board. And to the extent the committee on

which I am the ranking Republican, which oversees labor matters, has anything to do with that, I will pledge speedy consideration of those nominees.

Let's get the National Labor Relations Board back in business. But it cannot be open for business today. It cannot be properly open for business today. Those two members should resign their positions and recognize the court has said we still have in America a Constitution that provides checks and balances. So take down the sign that says: Open for business, and put up the sign that says: Help wanted. Nominations accepted.

Mr. President, I commend my colleagues to read my floor remarks of February 2, 2012, about recess appointments, which I made following the President's so-called recess appointments and following my visit to Mount Vernon.

I yield the floor, and I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

UNANIMOUS CONSENT AGREEMENT—H.R. 152

Mr. WHITEHOUSE. Mr. President, I ask unanimous consent that no points of order be in order to the Lee amendment or H.R. 152, prior to a vote on passage of the bill.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

HEALTH CARE COSTS

Mr. WHITEHOUSE. Mr. President, we are now entering a postfiscal cliff phase of budget negotiations, and a troubling but familiar refrain is already beginning to echo through this Chamber which goes something like this: In order to fix our deficit, we must cut Medicare and Medicaid benefits. This is wrong. This is flatout wrong and it is factually wrong.

A recent Providence Journal editorial touched on the dangers of that misguided approach. The editorial read: We need a better run Medicare and Medicaid, not one that covers fewer people. Quality can be improved and costs contained without throwing people off the rolls and into the streets and back into the free care of emergency rooms mandated for the uninsured and into expensive private insurance. In the end, we all pay in some way, in quality of life and in money, for the gaps we tolerate in our health care system.

Attacking Medicare and Medicaid is consistent with a particular political

ideology—it has been part of that political ideology for decades now—but it is not consistent with the facts. It ignores the fact that our health care spending problem is systemwide, not just in Federal programs. It ignores the fact that we operate in this country a wildly inefficient health care system. It is not just Medicare.

For example, Secretary of Defense Robert Gates said, in reference to the defense budgets: We are being eaten alive by health care.

New data from the Centers for Medicare and Medicaid Services shows our national health care spending increased to \$2.7 trillion in 2011, which is about 18 percent of America's gross domestic product. This is more than three times what it was in 1992, and it is about 100 times what it was back in 1960. The Presiding Officer, the new Senator from Virginia, and I were probably around in 1960. So in our lifetime it has gone up 100 times.

At this rate, by 2020, \$1 out of every \$5 in this country will go toward health care. This is a rocketing pace of increase.

In 1979, the year after I graduated from college, \$221 billion; 1987, \$519 billion; 1992, \$857 billion; and now \$2.7 trillion. Anybody looking at that graph of our exploding national health care costs who can think that Medicare is the problem simply does not have a grasp of the facts.

Let's compare U.S. spending to other developed countries. This is us, "pre" the last report when we were still at 17.6 percent of GDP. The next least efficient developed country is the Netherlands at 12 percent of GDP in 2010. Germany and France were at 11.6 percent of GDP.

This margin right here is the margin by which we are more inefficient than the least efficient of our industrialized competitors—\$800 billion a year. We could save \$800 billion a year on our national health care system just by becoming as efficient as the least efficient of our national competitors.

For all of this extra spending, the extra \$800 billion a year, one might expect that we would have paid for and earned longer and healthier lives, but that is not the case. Our National Institute of Medicine recently compared the United States to 17 peer countries. We were worst for prevalence of diabetes among adults among those 17 countries, worst for obesity across all age groups of those 17 countries, and had the worst infant mortality of all 17 countries. We suffer higher death rates and worse outcomes for conditions such as heart disease and chronic lung disease.

This chart from that National Institute of Medicine report shows all these dots of the other countries grouped around cost—expenditure per capita—and life expectancy. That is the United States of America, the dot with the red circle around it. We are an outlier, below virtually all of these countries