DC CIRCUIT OVERTURNS PRESIDENT OBAMA'S POWER GRAB

Jan. 28, 2013 Trevor Burrus

Friday, in an important decision with far-reaching implications, the D.C. Circuit Court of Appeals ruled unconstitutional President Obama's appointment of three members to the National Labor Relations Board.

Slightly over a year ago, on January 4, 2012, President Obama appointed four people to high-level offices without the constitutionally required "advice and consent" of the Senate. Three of those appointees were placed on the NLRB, and the other was Richard Cordray, chosen to direct the Consumer Finance Protection Bureau, the "consumer watchdog" agency created by Dodd-Frank.

The appointments were one of the most significant power grabs by a president in recent memory. The Constitution requires that certain "officers of the United States," a category which indisputably includes NLRB board members and the director of the CFPB, be appointed by the president with the "advice and consent of the Senate." Like many constitutional provisions, this is a "checks and balances" requirement that helps ensure the president does not unilaterally control the executive branch for his own purposes.

As a precaution against crucial offices staying vacant while the Senate is not in session, the Framers included a clause that allows the president to temporarily circumvent the "advice and consent" requirement in order "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." At the time of the framing, as well as for many decades afterward, senators would usually spend six to nine months out of Washington. In those absences, it was left to the president to keep the government going, and the Recess Appointment Clause gives the president the power to make temporary appointments during those long periods when the Senate was simply unavailable.

Unfortunately, like so many constitutional provisions, the last 80 years have seen a gradual, bipartisan effort to whittle away the Recess Appointment Clause's function and to concentrate more power in the president. Initially, presidents began redefining what a "recess" is by asserting the power to appoint officers during "intrasession recesses"—that is, breaks within a formal session (e.g., holiday breaks)—rather than just during intersession recesses. After this precedent had been established by President Warren Harding, successive presidents began appointing officials during shorter and shorter intrasession recesses. President Clinton made a controversial appointment during a 10-day intrasession recess, and President George W. Bush followed suit.

In 2007, after Bush's controversial appointments, the Senate, led by Harry Reid, began holding "pro forma" sessions in order to block future appointments. Usually held every three days during intrasession recesses, pro forma sessions are often less than a minute long and held in a largely empty Senate chamber. Yet the sessions satisfy the constitutional definition of being "in session" and are often used by the Senate and House to satisfy the constitutional requirement that either chamber cannot adjourn for more than three days without the consent of the other.

Whereas previous presidents only had the gall to assert the power to determine what a recess was, President Obama's innovation in executive power grabs was to assert the power to determine whether or not a pro forma session is actually a session for the purposes of the Recess Appointment Clause. According to the Office of Legal Council, the president has the "discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess Appointments."

The OLC's argument "will not do," wrote Chief Judge David Sentelle in a stirring and chiding opinion rooted in constitutional originalism. He continued:

An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law.

As for whether or not the Senate's intentions for holding pro forma sessions permit the president to determine whether the Senate is actually in session, Judge Sentelle writes:

The Senate's desires do not determine the Constitution's meaning. The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. These structural provisions serve to protect the people, for it is ultimately the people's rights that

suffer when one branch encroaches on another. As Madison explained in Federalist No. 51, the division of power between the branches forms part of the "security [that] arises to the rights of the people."

After appointing Cordray and the NLRB board members, President Obama said he "refused to take no for an answer," and that he would "not stand by while a minority in the Senate puts party ideology ahead of the people they were elected to serve." The President's attorneys made a similar argument, claiming that the Senate was standing in the way of his duties as president. Sentelle's response:

It bears emphasis that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." … The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government.

The decision is an important step to reining in a long line of presidential abuses. If the court had upheld the appointments, Obama unquestionably would not have been the last to use this power. Moreover, the reasoning of the decision should directly apply to Richard Cordray of the constitutionally problematic CFPB. His days are numbered if the Supreme Court either upholds the decision or does not take the case.