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Symposium: Justice Breyer's dowsing rod finds a limit to the Recess Appointments Clause

By Trevor Burrus
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As many people predicted, the Supreme Court unanimously struck down President Obama's recess appointments to the National Labor Relations Board (NLRB). By declaring that he has the power to determine when the Senate is in session, President Obama demonstrated a degree of executive overreach that could not garner a single vote of support from the Justices.

This is a welcome victory for good governance and a partial victory for the Constitution. While Justice Stephen Breyer was correct to hold that the president cannot determine when and if the Senate is in session, he incorrectly ignored the original public meaning of the Constitution, as well as a common-sense reading of the text, in order to endorse an ad hoc and baseless theory of recess appointments.

In one way this is just another scathing rebuke of the administration by the Court. From property rights (*e.g.*, *Sackett v. EPA*) to religious freedoms (*e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*), the Obama administration has a surprisingly bad record before the Court. Although President Obama's tenure in office has been just the latest iteration in the time-honored American tradition of executive overreach, his attempts to push three members onto the NLRB were far more than a slight stretching of existing executive practices. Had the Court upheld the appointments, the result would have been a categorical change in relations between the Senate and the president in the matter of appointments.

It's not surprising that the administration failed to convince a single Justice. The justifications for the appointments offered first by the OLC and then later by the Solicitor General were breathtaking in the level of discretion they gave the president. Even looking at the array of *amicus* briefs on each side, we see that only three *amici* supported of the government – the Constitutional Accountability Center, the Brennan Center, and Professor Victor Williams of Catholic University – as compared to twenty-five in support of respondent Noel Canning. In short, it was clear to most people, and eventually to nine Justices, that the administration's case was quite weak.

This was obvious from the moment the OLC memo was released, which purported to justify the president's recess appointments. Not only does the memo laughably say that the Senate's best option to block presidential recess appointments is to be "continuously in session," but the memo continually treats the recess appointments power as if it were a core presidential power rather than as "*a subsidiary, not a primary, method for appointing officers of the United States*." That line was so important to Justice Breyer's majority opinion that he felt it needed to be italicized. In other words, emphasis in the original.

But one passage from the OLC memo particularly stands out for its endorsement of unfettered executive discretion:

In our judgment, the President *may properly rely on the public pronouncements of the Senate that it will not conduct business* (including action on nominations), in determining whether the Senate remains in recess, regardless of whether the Senate has disregarded its own orders on prior occasions. Moreover, *even absent a Senate pronouncement that it will not conduct business, there may be circumstances in which the President could properly conclude* that the body is not available to provide advice and consent for a sufficient period to support the use of his recess appointment power.

In comparing the emphasized portions, we see the true breadth of presidential discretion endorsed by the OLC. A rule that the president can rely on the public pronouncements of the Senate would still be unconstitutional, but it would at least cabin the president's discretion to some degree. Yet in the very next sentence the OLC made it clear that the president would not even concede that the Senate's determinations were dispositive.

Each president starts from the baseline created by their predecessors and then invariably pushes presidential power just a little further. As a consequence, undeclared wars have become the norm, administrative agencies over-reach more than they under-reach, and executive discretion now nullifies laws duly passed by Congress.

For two hundred years, we've seen a similar pattern in the matter of recess appointments. As Congress has grown more recalcitrant, presidents have become wilier in their recess appointment machinations. The Senate has countered with "pro forma sessions," when a lone senator calls to order an empty Senate chamber, which were innovated by Harry Reid to block recess appointments during the Bush years. Ever since President Harding's Attorney General Harry Daugherty endorsed the practice of intra-session recess appointments, the only remaining question has been "how low can you go?" – that is, how short can the intra-session recess be in order to trigger the recess appointment power?

And today we have an answer, divined by the I-know-it-when-I-see-it jurisprudence of Justice Breyer: Three days is definitely too low, and ten days is probably the limit. Why? Unclear, but it has something to do with past practices and the Solicitor General's concessions and essentially nothing to do with the text of the U.S. Constitution. Justice

Breyer's judicial dowsing rod found its way to a line of best fit, and not coincidentally it was the line that had been drawn by two hundred years of executive encroachment.

That the Court had never heard a case on the Recess Appointments Clause makes this type of judicial acquiescence all the more distasteful. Generally speaking, originalists prefer to enforce the original public meaning of the Constitution and ignore governmental practice (there are, of course, many exceptions). Yet in areas where past Courts have weighed in – such as, for example, the meaning of the Privileges or Immunities Clause – even Justice Scalia will concede, as he did in *McDonald v. City of Chicago*, that a sufficiently long tradition of erroneous past decisions can trump reinterpreting the Constitution according to its proper, original meaning. Those past Courts, even when they got it wrong, at least enjoy the presumption that they earnestly and impartially interpreted the Constitution as best they were able.

Yet when no past Supreme Court had heard a Recess Appointments Clause case, and the entire corpus of "jurisprudence" on recess appointment questions has been written by attorneys general and OLC memos, it is difficult to fathom why that history deserves deference.

Attorneys general and the OLC have almost always unsurprisingly decided that their president's attempt to stretch the clause a little further is constitutionally justified. It is unquestionably a bad idea to treat a history of self-aggrandizing, unreviewed over-reach as highly relevant, if not dispositive, of an important constitutional issue. Nevertheless, this is precisely how Justice Breyer and four Justices – Kennedy, Ginsburg, Sotomayor, and Kagan – interpret the Recess Appointments Clause. As Justice Breyer wrote, "We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."

Two branches of government cannot "compromise" away a constitutional stricture, and a "working arrangement" deserves little or no respect in matters of constitutional interpretation. This is, as Scalia said, "an adverse-possession theory of executive authority."

Justice Scalia rightly and vigorously jumped on Breyer's strange concession to the interpretations of executive officials and the quiescence of Congress. Although Breyer's and Scalia's opinions feature much sparring over original meanings and historic practices, Justice Breyer is unable to counter one of Scalia's most basic and compelling points: If we're going to play fast and loose with the definition of "recess," then why do we adhere to the clear original meaning of the word "session?"

The Clause provides that recess appointments "shall expire at the End of their [the Senate's] next Session." This language has been interpreted by everyone to mean until the end of the formal session. "And if 'the next Session' denotes a *formal* session," Scalia writes, "then 'the Recess' must mean the break *between* formal sessions. . . . It is linguistically impossible to suppose—as the majority does—that the Clause uses one of

those terms (‘Recess’) informally and the other (‘Session’) formally in a single sentence, with the result that an event can occur during both the ‘Recess’ *and* the ‘Session.’”

Yet, to Justice Breyer’s credit, he did see through the administration’s most egregious claim, that the president can determine if the Senate is “actually” in session, and correctly held that President Obama’s recess appointments were unconstitutional. The previously non-controversial rule is restored: “[W]e conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.”

The result is a return to the status quo ante: A silly cat-and-mouse game in which a lone senator gavels to order an empty Senate chamber and then closes the session a minute later. It may be silly, but at least it is now a more constitutionally justified type of silly. Plus, who ever said that politics is dignified?

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