



Obama Considering Recess Appointment

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The Washington Post is now reporting that the “White House left open the remote possibility that the president might sidestep a confirmation fight by making a rare recess appointment. . . . White House officials did not dismiss the idea that the president could use the recess maneuver if the Senate fails to hold hearings and a vote on the nomination Obama has promised to send to the Senate.”

Meanwhile, a small but growing chorus of legal and other scholars are urging that President Obama should consider making a recess appointment to fill the Supreme Court vacancy created by Antonin Scalia’s death, either by itself – to move the Court sharply towards the left until the end of 2016 – or as part of an overall strategy towards filling the spot permanently, says public interest law professor John Banzhaf.

Banzhaf was one of the first to suggest a recess appointment as a way around the unwillingness of the Republican-controlled Senate to accept – and perhaps even to permit a vote on – any nominee President Barack Obama is likely to offer, noting that there is both historical and legal precedent for it.

Moreover, Banzhaf said that Obama may have to act very quickly because the window to make such appointments now is about to close, and the Senate, anticipating just such a maneuver by Obama, might try to slam that narrow window shut even more quickly.

First, law professor Jonathan Adler (of Case Western University of Law’s Center for Business Law and Regulation) suggested that Obama could use his recess appointment power to temporarily bring onto the Court, not someone new and untested, but rather one of the three retired Supreme Court justices (Stevens, Souter, or O’Connor).

Since all three were GOP nominees, are clearly not the kind of liberal justice Obama would certainly wish to nominate to permanently fill the vacancy, and have known moderate voting records, such an appointment might be more acceptable to Republicans than long bitter battles over a permanent nominee.

Then law professors Michael Froomkin (U of Miami School of Law) and David Post (currently at the Center for Democracy and Technology, and the Cato Institute) propose that Obama make a recess appointment to add to the Court someone with impeccable legal credentials but so liberal that he or she would be totally unacceptable to the Republican-dominated Senate.

This would help to assure that vital current cases now before the Court would be decided more to Obama's liking. More importantly, according to Froomkin and Post, such a recess appointment would provide a very strong incentive for the Senate to confirm any highly qualified more-middle-of-the-road permanent nominee Obama might propose, even if he or she is far less conservative than anyone who might be nominated next year should a Republican be elected president.

Banzhaf notes it's clear that presidents can make recess appointments to the Supreme Court, just as they can to lower courts and to many agencies. William J. Brennan originally joined the Supreme Court as the result of a recess appointment, and went on to become one of its longest serving justices.

He also cites legal precedent, noting that the newest and most relevant legal precedent is a 2014 Supreme Court decision upholding the President's power to make recess appointments when the Senate is in recess. But the Court also held that the Senate can largely control when it is regarded as being in recess.

The majority wrote that, under the Constitution, "the Senate is in session when it says it is."

To remain in session, the Senate apparently must come in from time to time during that recess to take some kinds of legislative action, even those of little consequence.

The Senate is currently in a recess which began on Friday, and runs until February 22, under an adjournment resolution adopted on Friday. The adjournment resolution provides for "pro forma sessions only, with no business being conducted on the following dates . . ."

So, whether a recess under which no business will be conducted would arguably permit Obama to make a recess appoint under the Supreme Court's 2014 decision; whether the Republican majority will try to alter the current status (e.g., by scheduling some minimal business) in an effort to make such appointments more difficult; whether the Senate Democrats can and will try to block any such Republican maneuver, etc. are important and complicated questions probably being researched by both sides today.

There are many important reasons of policy why the President should not try to bypass the Senate by making a recess appointment, but there are also arguments that the Senate should not arbitrarily block Scalia's replacement for almost a year, especially given the many very important cases already before the Supreme Court which many believe are now likely to split the Court 4-4, argues Banzhaf.

Any such 4-4 vote allows the lower court decision to remain in effect, but creates no precedent.

As Prof. Froomkin reminds us, “For the next few days – and only for the next few days – President Obama (arguably) has the right to make a recess appointment to the Supreme Court” – citing no less an authority as Lyle Denniston.

Prof. Banzhaf suggests that President Obama consider using a recess appointment.

It’s not a good strategy, he notes, but it might be much better than the alternative; letting major Supreme Court cases on issues including abortion rights, affirmative action, voting rights, the power of labor unions, and President Obama’s health care and immigration policies be decided with no precedent while Democrats seek to make political capital on the Republicans’ unwillingness to confirm an Obama nomination to permanently replace Scalia.