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No, Mr. President, You Can't Do Whatever You Want

By: Ilya Shapiro
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Much as it might frustrate Barack Obama, there's no "if Congress won't act, the president gets extra powers" clause in the Constitution. The latest confirmation of that truism comes in the *unanimous* Supreme Court ruling in *National Labor Relations Board v. Noel Canning*, which invalidated the appointments our constitutional-scholar-in-chief made to the NLRB in January 2012. It turns out, the *unanimous* Court ruled, that the presidential power to make recess appointments—to avoid getting the Senate's "advice and consent" on federal offices—is only triggered when the Senate is actually in recess.

And so, for the 13th time since those ill-fated NLRB nominations, the Obama Justice Department has lost *unanimously* at the Supreme Court. In each of those cases, the government argued for a radically expansive federal—and especially executive—power and in each case not a single justice agreed. In areas of law ranging from criminal procedure (as in Wednesday's cell-phone-search ruling) to securities regulation, immigration to religious liberty, President Obama couldn't even get the votes of the justices he himself appointed, Sonia Sotomayor and Elena Kagan.

As Miguel Estrada commented when summarizing the solicitor general's abysmal performance last term—a win rate of 40 percent, against a historical norm of about 70 percent—"when you have a crazy client who insists you make crazy arguments, you're gonna lose some cases."

In *Noel Canning*, all the justices agreed that the Senate gets to determine when it's in session and when it's not. (That's an argument that Miguel Estrada made on behalf of all 45 Republican senators—you'll recall that Estrada himself declined a recess appointment to the D.C. Circuit after Democrats filibustered him for being Hispanic—and it's also what Cato argued in the brief we filed). And that's no surprise: based on oral argument, everyone was expecting the government to lose here, and lose big.

Unfortunately, the conventional wisdom (which I shared) about a narrow ruling was also proven correct. The only "rule" that emerges from Justice Breyer's controlling opinion is that a three-day recess, the longest the Senate can adjourn without the House's consent, isn't long enough to

enable recess appointments. And that a recess of between three and ten days is also "presumptively" too short. That's a pragmatic decision that ratifies recent executive practice, at least that before the White House's current occupant.

It also lacks any connection to what the Constitution actually says, as Justice Scalia pointed out in a concurrence joined by Chief Justice Roberts and Justices Thomas and Alito. The best reading of constitutional text and structure is that only recesses between Senate sessions—not when, say, Congress takes a few weeks off to watch the World Cup—count for purposes of activating the recess-appointment power. Moreover, that power is only justified to fill vacancies that arise during the recess itself—the clause refers to "vacancies that may happen during the Recess of the Senate"—not openings that the president didn't get around to filling while the Senate was sitting.

And that makes eminent sense: The purpose of the recess-appointment power isn't to make life easier for the president, but to ensure that the government can function should high officials die or resign while the Senate is unavailable to confirm their replacements. In a world of instant communication and air travel, the Recess Appointments Clause is essentially obsolete because it's never the case that senators are unreachable out in the sticks such that they can't be called back for urgent business.

In other words, Justice Breyer's unprincipled opinion, while limiting recent presidential practice, cements a much more expansive reading of that power than the Constitution allows. Instead of having to deal with a Senate controlled by the other party—as Obama may have to soon—the president can simply wait till the next recess.

Except that Breyer's constitutional innovation will be matched by a political one. For practical purposes, we'll now see many more "pro forma" Senate sessions and also the empowerment of those who control the House—because, again, the Senate can't recess without the House's consent. Speaker Boehner, call your (or my) office.

To be sure, this ruling is a strong rebuke to this administration in this case, but the most that can be said for it more broadly is what Justice Scalia did in reading his concurrence from the bench: "The Court's decision will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers."

Not that this president needs any help defying the Constitution.

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