THE LID IS OFF

Appeals Court Slams Obama For Violating Constitution

by Edward Spannaus

Jan. 28—President Obama's second term got off with a bang on Jan. 25, when the second-most powerful court in the land declared that he had abused his authority in a manner that would "eviscerate" the Constitution's separation of powers provisions.

In declaring the President's January 2012 recess appointments to be unconstitutional, the U.S. Court of Appeals for the D.C. Circuit issued a ruling with far-reaching implications for redressing Obama's widespread abuses of power and his flagrant violations of the U.S. Constitution.

"Finally, there is a fight," Lyndon LaRouche said on hearing the news. Calling this "a qualitative shift in the political situation inside the United States," LaRouche noted that there has not been a real fight over Obama's illegalities up to this point, but that "now, with this out, the lid is off."

Congress is now confronted with something they didn't have the guts to say, LaRouche added, with the Court issuing a plain, outright denunciation of Obama. Somebody has now set fire to the joint, he noted, and it's going to be very hard to put it out, or to reverse the effects of the court's action.

'Just Like Hitler'

As background to the Circuit Court's ruling, we must go back to January 2012, to the point when Obama made a series of recess appointments as implementation of his newly announced policy of ruling by degree, irrespective of the U.S. Congress. At the end of December 2011, White House deputy press secretary Josh Earnest said that, with the budget crisis temporarily resolved, Obama was going to have "a larger playing field," and elaborated: "If that includes Congress, all the better, but that's no longer a requirement. The President is no longer tied to Washington." Concretely, the White House confirmed that the President would be guided by the slogan, "We can't wait."

On Jan. 4, 2012, the same day he made the now-invalidated recess appointments, Obama stated the following while speaking in Cleveland: "But when Congress refuses to act, and as a result, hurts our economy and puts our people at risk, then I have an obligation as President to do what I can without them. I've got an obligation to act on behalf of the American people. And I'm not going to stand by while a minority in the Senate puts party ideology ahead of the people that we were elected to serve. Not with so much at stake.... We're not going to let that happen."

On that same day, Obama made four recess appointments—three to the National Labor Relations Board (NLRB), and one to the newly created Consumer Financial Protection Bureau. Obama did this *despite* the fact that the Senate was *not* in recess (under the Constitution, the Senate cannot adjourn for more than three days without the consent of the House), and it had not

White House/Pete Souza

Obama should look worried: The walls are closing in on him, as his anti-Constitutional actions are slapped down by one of the highest courts in the land.

only been meeting every three days in pro forma sessions, but it had conducted business over the previous two weeks.

Two days later, LaRouche pointed out that Obama's actions were "just like Hitler." LaRouche was referring to the parallels with Hitler's *Ermächtigungsgesetz*—the notorious "Enabling Act"—which was passed by the German Reichstag on March 23, 1933, and which gave Hitler the right to govern *on his own*, in contravention of the Weimar Constitution, without consulting parliament.

Shortly after the passage of Hitler's Enabling Act, Crown Jurist Carl Schmitt publicly defended it, declaring that the Executive prerogative now included the power for the Executive to pass laws on its own. Schmitt wrote that "the present government wants to be the expression of a unified political will which seeks to put to an end the methods of the plural party state which were destructive of the state and the Constitution."

As we will see, Obama's rationale—identical in all crucial respects to that of Schmitt—was explicitly struck down by the D.C. Circuit's recent ruling.

'This Will Not Do'

The Jan. 25 ruling by a three-judge panel of the D.C. Circuit Court of Appeals was the outgrowth of a petition brought by a Washington State bottling firm against the NLRB, challenging a Feb. 8, 2012 NLRB order on the grounds that the Board lacked the quorum required to conduct business, because three of its five members were never validly appointed, those being Obama's putative "recess appointments." A few weeks after that, the bottler, known as Noel Canning, filed a petition for review. The Jan. 25 opinion was the result of the court's review of that NLRB order.

Signalling the momentous nature of the ruling it was about to make, the Court panel noted, "While the posture of the petition is routine, as it developed, our review is not." And indicating where they were going, the Court stated that the questions before it "implicate fundamental separation of power concerns."

After conducting an exhaustive "originalist" analysis of the Constitution's Recess Appointments Clause (Art. II, Sec. 2, Clause 3), the Court concluded that the Senate clearly was not in recess within the meaning of that clause of the Constitution, and furthermore, that it is not up to the President—as Obama had asserted—to make the determination as to whether the Senate is, or is not, in session.

Referring to a Justice Department Office of Legal Council memorandum, which claimed that "the President therefore has 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 Court replied bluntly:

"This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution placed on each branch of government serve as 'self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other'.... 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."

Back to Constitutional Basics

But the Court didn't stop there. Addressing the Administration's argument that a "recess" includes any break during a Congressional session (these days, there are two sessions for each two-year term of Congress), and their argument that recent Presidents have all claimed this power, the panel wrote:

"The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments.... Recent presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law."

To emphasize the point that the Judiciary—not the Executive—has the final say as to the interpretation of the Constitution, the panel went back to fundamentals, quoting from Chief Justice John Marshall in his seminal 1803 *Marbury v. Madison* ruling, in which Marshall established the principle of judicial review of acts of Congress and actions of the Executive (of then-President Thomas Jefferson, in that particular matter):

"It is emphatically the province and duty of the judicial department to say what the law is" [Marshall wrote]. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operations of each."

The D.C. Circuit panel continued:

"In *Marbury*, the Supreme Court established that if the legislative branch has acted in contravention of the Constitution, it is the courts that make that determination. In *Youngstown Sheets & Tube Co. v. Sawyer*[1] the Supreme Court made it clear that the court must make the same determination if the executive has acted contrary to the Constitution. That is the case here, *and we must strike down the unconstitutional act*" (emphasis added).

'Efficiency' vs. the Constitution

We noted above the parallels between Obama's "We can't wait" argument for bypassing Congress, and Carl Schmitt's claims that the inefficiencies of the "plural party state" and the parliamentary system, required firm executive action. (This "Schmittlerian" notion finds its present-day embodiment in the Nazi-like doctrine of the "unitary executive.")

In its own fashion, the Appeals Court quickly dispensed with Obama's "efficiency" argument, writing:

"We cannot accept an interpretation of the Constitution completely divorced from its original meaning in order to resolve exigencies created by—and equally remediable by—the executive and legislative branches.... In any event, if some administrative inefficiency results from our construction of the original meaning of the Constitution, that does not empower us to change what the Constitution commands. As the Supreme Court observed in *INS v. Chadha*, 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.' It bears emphasis that '[c]onvenience and efficiency are not the primary objectives or the hallmarks of democratic government.'"

Not only the White House, but most observers, were stunned by the scope of the D.C. Circuit's ruling.

The White House, obviously reeling from the ruling, called it "novel and unprecedented," and insisted that it had no broader application. "It's one court, one case, one company," White House spokesman Jay Carney flippantly declared.

Others disagreed, noting that the D.C. Circuit Court of Appeals, as the appellate court that hears the most cases involving government powers, including appeals from decisions of regulatory agencies, carries a lot of clout. Moreover, the ruling potentially invalidates not just Obama's recess appointments, but calls into question the validity of actions taken by recess appointees of previous Presidents.

The Capitol Hill newspaper *Politico* noted that Obama had taken a "big gamble" by making recess appointments during a three-day break of the Senate,

1. In *Youngstown*, also known as the *Steel Seizure Case*, the Supreme Court struck down President Truman's Executive Order taking over the major steel mills in order to head off a threatened labor strike. It is the standard modern precedent for overturning an abuse of Executive power.

and cited legal experts as saying that Obama "almost certainly did not anticipate the gamble going as spectacularly sour as it did Friday when a federal appeals court not only invalidated the three NLRB appointments but cut the heart out of the recess appointment power presidents of both parties have wielded for two centuries."

Former Justice Department lawyer Bruce Fein was quoted by *Politico* saying that the Administration is "far worse off than before, because the lines are drawn much more narrowly in terms of what anyone thought were [the President's] abilities previous to this ruling.... It's an overreach, and he ends up now worse off than where he began."

"The loss is way bigger than the battle he thought he was fighting," said Denise Keyser, a labor lawyer with the New Jersey Ballard Spahr law firm, also quoted by *Politico*: "I don't think anybody, when he [Obama] made the appointments, foresaw that the court would do this."

The scope of this defeat for Obama was also highlighted by a number of Senators:

Sen. Bob Corker (R-Tenn.), appearing on Fox News on Jan. 28, said the ruling "was a huge victory for anybody who believes in balance of power and the Constitution," adding, "And I could not have been more excited and came up off the floor when I saw that that had happened, and hopefully the Supreme Court will uphold it." Corker called what Obama had done "one of the most abusive cases ever."

Sen. Orrin Hatch (R-Utah) said, as reported by Associated Press: "With this ruling, the D.C. Circuit has soundly rejected the Obama Administration's flimsy interpretation of the law, and [it] will go a long way toward restoring the constitutional separation of powers."

Sen. Chuck Grassley (R-Iowa) issued a statement on Jan. 26 saying: "This decision is good news for checks and balances, an essential factor in our system of government that safeguards we the people against unchecked government power.... The Framers of the Constitution feared the history of tyranny that arose from executive power. The Constitution provides for presidential nomination and Senate confirmation of appointees for this reason. The limited exception of recess appointments is a victory for freedom and a lesson to the President to respect legal constraints on his expansive claims of executive power."

Impeachment Now on the Agenda

But the implications of the Court's ruling extend far beyond just the issue of recess appointments. It puts on the table the entire range of Obama's abuse of power and his violations of the Constitution, which fully merit his impeachment by the Congress. For example, there is the question of Obama's violations of the War Powers Resolution and the Constitution's mandate that only Congress can declare war. This is the subject of House Concurrent Resolution No. 3, now pending in Congress, which, according to its lead sponsor, Rep. Walter Jones (R-N.C.), "basically says that any President—without provocation—that bypasses Congress to bomb a foreign country, can be and should be impeached."

Adding to the Watergate atmosphere, on Feb. 7, the Federal District Court in Washington, part of the D.C. Circuit, is scheduled to hear the Department of Justice's motion to dismiss the House of Representatives' case against Attorney General Eric Holder's stonewalling of Congressional subpoenas in the "Fast and Furious" gun-running matter, in which the Administration is asserting "Executive privilege."

More importantly, both the judicial and political implications of the ruling will put pressure on other courts and on Congress to wake up to the threat to the nation posed by Obama, and should embolden other institutions to take urgent action to remove him from office.

It should not be overlooked that Chief Judge David Sentelle, who wrote the panel's opinion, certainly understands, if anyone does, the political implications of his ruling. It was the same David Sentelle who in 1994, headed the special judicial panel of the D.C. Circuit Court that dismissed the first Whitewater independent counsel, Robert Fiske, and replaced him with partisan activist Kenneth Starr—an act which led directly into the 1998 impeachment of President Bill Clinton.

Obama's Justice Department has not yet announced how it will proceed in the face of the Jan. 25 ruling. Its options are: 1) to ask for a rehearing by the same three-judge panel; 2) to seek an *en banc* hearing by the entire D.C. Circuit; or, 3) to go directly to the Supreme Court, where it would be taking an even bigger gamble than before. When dealing with the courts, there are of course no guarantees of an outcome, but nonetheless, Barack Obama should be very afraid at this point.