…and outsource it to Scott Lemieux of *Lawyers, Guns, and Money,* who sets forth succinctly the meaning of Neoconfederate David Sentelle's DC Circuit opinion today regarding recess appointments. Specifically, this controversy concerned recess appointments to the National Labor Relations Board, and the right-wing Republican panel struck them all down, which I am sure is completely coincidental. But obviously it has vast implications for environmental law, especially if (as seems likely) Senate Republicans will filibuster any appointments to EPA and Energy, and perhaps to Interior as well. "Enjoy."

Neoconfederate Judges Rule NLRB Recess Appointments Unconstitutional

Oh, great. The opinion is an atrocity, classic "hack originalism for dummies," relying heavily on the fact that recess appointments during nominal sessions of the Senate are a relatively recent phenomenon (although there's precedent going back to 1867, and "[t]he last five Presidents have all made appointments during intrasession recesses of fourteen days or fewer"), without considering that the Senate systematically refusing to consider presidential nominees is *also* a contemporary phenomenon. The "pro forma" sessions the D.C. Circuit sees as breaking the constitutional "Recess" are intended solely to prevent the president from exercising the recess appointment power, the very check that the framers included to counteract the possibility that the Senate would obstruct the functioning of government by serially refusing to consider nominees. Separation of powers analysis that refuses to acknowledge how the government actually functions provides a clinic in the limitations of law-office history.

And the hackishness is also obvious — one branch is allowed to push the constitutional envelope as far as it wants while the other is unable to respond using the tools the framers explicitly made available because 18th century presidents didn't have to use this power in the same way because they had no reason to. Loose construction for me, implausibly arid formalism for thee, and it defeats the purpose of the recess power appointment, which if it means anything should allow the president to stop the minority party in one house of Congress from thwarting the functioning of regulatory bodies. And — what are the odds?

— it just happens that the result coincides with the policy preferences of the Republican author of the opinion, who considers the 20th century regulatory state unconstitutional. The implications of this decision are far-reaching, as it would invalidate the good decisions the NLRB has made during this period and (because of a recent Supreme Court decision requiring a quorum of three) effectively stop the NLRB from operating until the minority party in the Senate chooses to allow it do so.

Of course, also important here that between Obama's strange inattention to federal judicial appointments and Republican filibusters he's the first president in at least 50 years not to get a single nominee confirmed to the D.C. Circuit.