

# THE CONSTITUTION AND ROLAND BURRIS

Breaking News – OUR LONG NATIONAL NIGHTMARE IS OVER:

USA Today relates that Harry Reid and the Senate Democrats have, predictably, caved:

Senate Democrats will allow Roland Burris to take the seat vacated by President-elect Barack Obama, the Associated Press reports.

this has been an Emptywheel Breaking News Update. Now back to your previously scheduled programming, er post, which describes exactly why Reid, Obama and the Senate Dems have engaged in one of the worst opening acts for an incoming US Congress ever. Fools on the Hill they are.

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Roland Burris went to the hill in Washington DC Tuesday to claim the Senate seat he has been appointed to; but, as Jane Hamsher reports:

The Secretary of the Senate turned Burris away.

Chris Cilizza is on my teevee saying "everything in the Senate is like high school."

No kidding. The optics of this are just awful.

Harry Reid and Senate Democrats, not to mention Barack Obama, have indeed ginned up an extremely ugly mess with their anti-Burris, at all cost, stance; but, as I have been pointing out from the start (see here and here), their little passion play is also unconstitutional. Preeminent Constitutional scholars Bruce Fein and Erwin Chemerinsky agree.

Many people have argued that the Constitution,

specifically Article I Section 5, gives Reid, Obama and the Senate Dems the leeway they need to exclude Burris. Not so fast says Fein:

In *Powell v. McCormack* (1969), the United States Supreme Court held that under Article 1, section 5, "in judging the qualifications of its members, Congress is limited to the standing qualifications [age, citizenship and residency] prescribed in the Constitution." The court made no distinction between representatives and senators, or between elected or appointed members of Congress. Speaking for the court, Chief Justice Earl Warren (whom President-elect Barack Obama admires) amplified that James Madison, father of the Constitution, and Alexander Hamilton in the *Federalist Papers*, were emphatic that Congress could not erect qualifications beyond the constitutional floor. Madison argued at the Constitutional Convention that it would be "an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Gov't and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." Hamilton echoed: "The qualifications of the persons who may choose or be chosen ... are defined and fixed in the Constitution, and are unalterable by the legislature."

I know nothing of Roland Burris, in fact had never heard of him prior to this affair. I wish the vacancy of Illinois' junior Senate seat could have been resolved much more cleanly, but Fein, and the authorities he cites, are dead on correct.

Oh, and Bruce has a bit to say about Harry Reid's charade Tuesday morning wherein he had

the Secretary of the Senate deny Burris' credentials:

Democrats plan to exclude Mr. Burris by enforcing a rule requiring that credentials presented by incoming senators be countersigned by both a state's governor and secretary of state. The rule, however, is unconstitutional as applied to senators from states that do not require countersignatures. The Illinois secretary, Jesse White, has asserted that he will not sign Mr. Burris' documents, but it is unclear whether Illinois law requires that endorsement or whether it may be arbitrarily withheld – questions currently before the Illinois Supreme Court.

If the countersignature strategy fails, Democrats plan to raise an objection to Mr. Burris' swearing in on the Senate floor and have his qualifications referred to the Rules Committee for up to 90 days. Democrats hope Mr. Blagojevich would have then been replaced by Mr. Quinn, who would be expected to revoke Mr. Burris' appointment.

Neither of these maneuvers to block Mr. Burris' appointment enjoys a crumb of legal constitutional standing.

Professor Erwin Chemerinsky, dean of the University of California Irvine Law School, concurs in every aspect of Fein's analysis (as well as mine) and states:

The problem here is that Burris unquestionably was lawfully selected. According to the 17th Amendment, "When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such

vacancies." Illinois law gives this power to the state governor, and that is Blagojevich until he is impeached and found guilty.

Allowing the Senate to exclude Burris on any except the narrowest of grounds would create a dangerous precedent. It could open the door to the Senate or the House overturning the will of the people and excluding representatives under one or another pretext. If Burris – whose appointment meets the legal test, no matter what you think of Blagojevich – is not seated, other properly elected (or appointed) representatives also are at risk.

The Supreme Court's conclusion could not be clearer or more on point: "In short, both the intention of the framers, to the extent that it can be determined, and an examination of basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."

Again, it may be uncomfortable, but this is exactly right. Has the irrefutable logic of the full panoply of legal authorities started to sink in to the high and mighty Democratic Senators who have feigned such outrage (shock I tell you, shock) at the thought of kindly 71 year old Roland Burris actually sitting with them in the august trappings of the ultimate club? At first blush, it appears that it may have. From the New York Times:

Mr. Burris, who was rebuffed by the Senate clerk earlier in the day, gained the support of Senator Dianne Feinstein of California, the chairman of the Rules Committee, who broke with many of her Democratic colleagues and said that Mr. Burris should be seated despite having been appointed by Gov. Rod R.

Blagojevich, who is facing corruption charges.

Regardless of the charges against him, the governor still has the right to fill the Senate vacancy, Ms. Feinstein said, and keeping Mr. Burris from taking his seat could have implications for appointments by other governors.

Now, of course, it is pretty good odds that Dianne Feinstein's sudden conversion to the Burris point of view (she was one of the fifty original signatories on Reid's initial anti-Roland Burris letter) is just catty payback to Obama for snubbing her on the Leon Panetta CIA Director appointment heads up, but it is what it is. In a hilarious sidelight, the Times gave an indelible example of the perils of stripping down your reporting and research staff to cut costs when they reported:

Ms. Feinstein's support is important because her committee has a say in whether Mr. Burris is qualified to serve.

Ahem, crack NYT reporters Carl Hulse and David Stout might want to take a look at the new configuration for the Senate for the 111th Congress that has Senator Feinstein as chair of the Senate Select Intelligence Committee, not the Rules Committee, her former post and which would have been critically involved in potential Burris fights carried on by Harry Reid. The Intel Committee, not so much. Nice angle while it lasted I guess, eh boys?

Back to the point, however, it is not just Constitutional scholars backing up the legitimacy of Burris' appointment from the outside, he has one inside, on his legal team, too. Former Baltimore Mayor, Rhodes Scholar and current Provost and Dean of Howard University Law School Kurt Schmoke. Kurt is one tenacious and brilliant advocate, and is representing

Roland Burris. Schmoke and Burris' other lead attorney, Tim Wright, appeared Tuesday on MSNBC's Hardball and made it quite clear that Burris will not back down and will not be intimidated by Harry Reid, Obama and the rest of the politically self serving Democratic Senators. The Burris team knows they have the legal and Constitutional arguments in their favor and they appear ready to back up their claims.

Irrespective of what one thinks of Mr. Burris, the more important principle by far is adherence to the letter and intent of the Constitution, as well as deference to the individual states', in this case Illinois, right to determine their own succession. As Fein notes:

The Senate leadership – both Majority Leader Harry Reid, Nevada Democrat, and Minority Leader Mitch McConnell, Kentucky Republican – are committed to flouting their constitutional obligation to seat Sen.-designate Burris. President-elect Obama, a former professor of constitutional law at the University of Chicago, concurs in their lawlessness. Political expediency is their common North Star.

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Neither of these maneuvers to block Mr. Burris' appointment enjoys a crumb of legal constitutional standing. That Mr. Blagojevich was under a dark criminal and impeachment cloud when he elevated Mr. Burris is beside the point. President William Jefferson Clinton did not forfeit his power to appoint, sign legislation or negotiate treaties during his impeachment ordeal. And Democrats are not questioning Mr. Blagojevich's general authority to discharge his gubernatorial responsibilities until or unless he is impeached, convicted and removed from office. Mr. Burris' appointment has been made a lone exception for partisan political

reasons, simpliciter. (emphasis added)

The extra-constitutional stance of Reid, Obama and the Senate Dems, out of sheer political expediency, sets a horrible standard, ripe for future abuse and mischief. Erwin Chemerinsky explains why:

Allowing the Senate to exclude Burris on any except the narrowest of grounds would create a dangerous precedent. It could open the door to the Senate or the House overturning the will of the people and excluding representatives under one or another pretext. If Burris – whose appointment meets the legal test, no matter what you think of Blagojevich – is not seated, other properly elected (or appointed) representatives also are at risk.

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But the taint of Blagojevich's alleged crimes does not justify ignoring the Constitution. For the last eight years, the Bush administration has ignored or twisted the Constitution to serve what it believed were higher ends. It would be an enormous mistake, as a new administration prepares to take charge, for Democrats to send the Senate down that same path. (emphasis added)

Once again, as painful as it may be, the Constitutional experts have hit the nail on the head here: Roland Burris and his esteemed legal team are correct; Burris is entitled to his seat in the United States Senate. On a positive note, with Inhofe, Cornyn and Kyl still around, Roland Burris will be far from the worse the Senate has to offer; and, unlike his new friend Dianne Feinstein, he hasn't personally underwritten the evisceration of the Fourth Amendment and establishment of a US torture regime. So he's got that going for him.

BREAKING UPDATE – JESSE WHITE CONFIRMS SCHOLARS,

## SAYS HAS BEEN USED BY REID

From WGN in Chicago Breaking News Desk:

Illinois Secretary of State Jesse White said this morning he has been made "the fall guy" by the U.S. Senate, which he said is using him as an excuse not to seat Roland Burris.

"They could have seated him without my signature; my signature is not required," he told WGN-720AM's John Williams.

The Senate barrred Burris Tuesday, saying he lacked proper credentials in that his appointment was not signed by White.

But White said today that "my signature is mostly ceremonial, rather than a point of law."

"They played a little bit of a game with him [Burris] yesterday," he added.

Asked by Williams if he had been made "the fall guy," White responded: "You're absolutely correct."

(For the full interview (audio), [click here.](#))

White said he had pledged, shortly after Gov. Rod Blagojevich was accused of trying to make a deal for his appointment to the Senate seat, not to sign off on anyone selected by Blagojevich. And he said he will continue to honor that pledge unless ordered otherwise by a court.

Yet at the same time he said he thought Burris should be admitted to the Senate and said he had the highest possible regard for him. He predicted Burris eventually will be seated.



If that is not about the last nail in the coffin of political opportunist shame for Harry Reid, the self important elitist Senate Democrats and, maybe worst of all, supposed Constitutional authority President-Elect Barack Obama, it is hard to imagine what would be. Real men of political genius.