

# THE LEGALITY OF THE 2012 OBAMA RECESS APPOINTMENTS

---

Peter M. Shane

Jacob E. Davis & Jacob E. Davis Chair in Law

Moritz College of Law

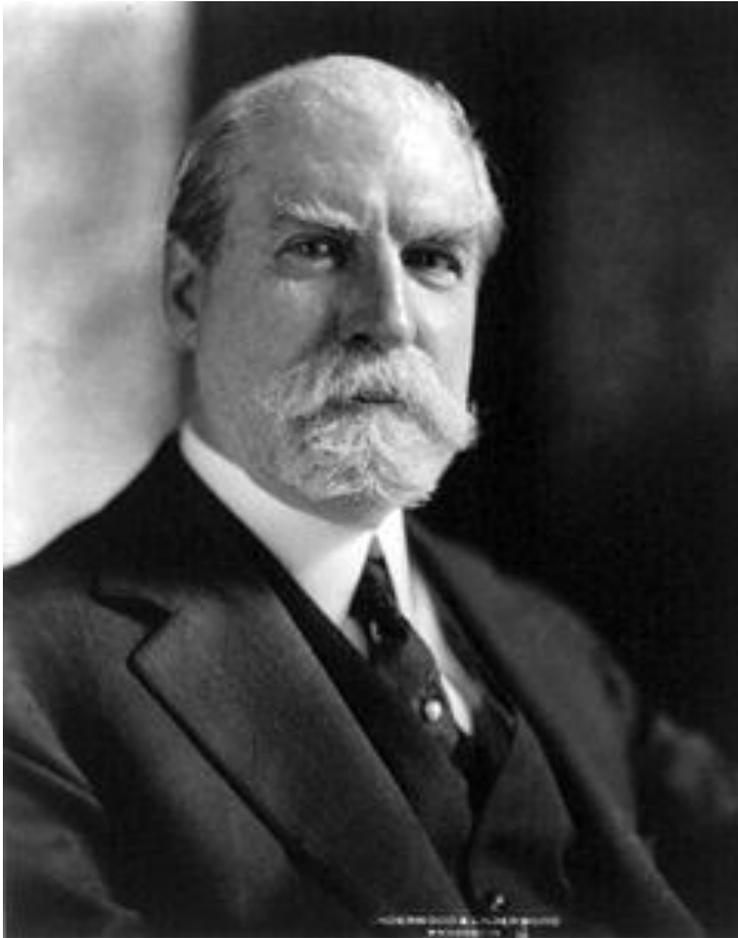
The Ohio State University

## The Text at Issue

“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

U.S. CONST., Art. II, § 2, ¶ 3.

# My Premise



“Behind the words of the constitutional provisions are postulates which limit and control.”

*Monaco v. Mississippi*,  
292 U.S. 313, 322 (1934).

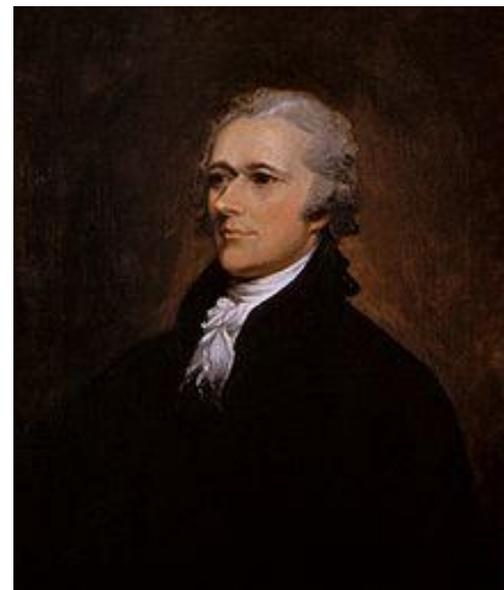
# The Relevant Postulates -1

- **The Constitution intends that the President take the leading role in staffing the executive branch:** “[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.” The Federalist, No. 76 (Hamilton).
- **The Nomination and Appointment Powers are critical to the President’s capacity to “To take care that the Laws be faithfully executed.”**  
U.S. Const., Art. II, § 3.

# The Relevant Postulates – 2

- **The anxiety that produced the Senate’s role in the appointments process was not policy, but corruption:**

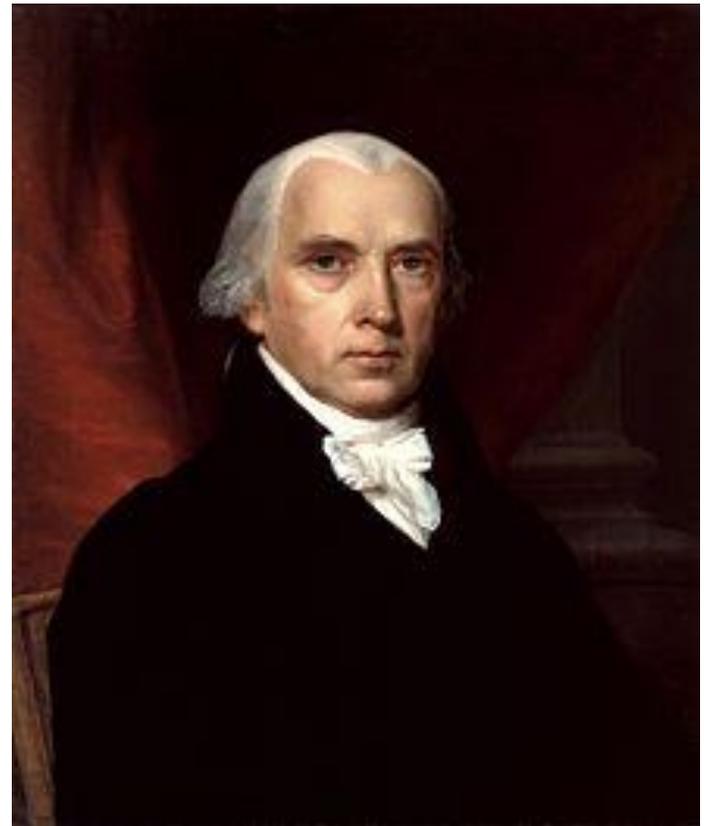
“[The Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”



The Federalist, No. 76 (Hamilton).

# The Relevant Postulates - 3

- “[N]one of [the three branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”  
The Federalist, No. 48  
(Madison).



# The Record (1): Obama Restraint

**Table I. Total Number of Documented Intrasession and Intersession Recess Appointments since January 20, 1981, by President**

<b>Administration</b>	<b>Intrasession recess appointments (estimate)</b>	<b>Intersession recess appointments (estimate)</b>	<b>Total documented recess appointments</b>
Ronald W. Reagan	72	160	232
George H. W. Bush	37	41	78
William J. Clinton	53	86	139
George W. Bush	141	30	171
Barack H. Obama	26	6	32
<b>Total</b>	<b>329</b>	<b>323</b>	<b>652</b>

**Source:** Table created by CRS based on data provided in **Tables 2-11**.

**Note:** This table is based on information collected from the sources specified in **Tables 2-11**. Comprehensive information about recess appointments and the precise dates on which they occurred is not publicly available. Consequently, although this table reflects all recess appointments since January 20, 1981, that have been documented by CRS to date, it may not reflect all recess appointments that actually occurred during that period. Similarly, because precise appointment dates could not be verified in all instances, some intersession recess appointments may have been miscategorized as intrasession or vice versa, so totals provided here are characterized as estimates.

- Source: Henry Hogue, et al., *The Noel Canning Decision and Recess Appointments Made from 1981-2013* (CRS Feb. 4, 2013)

# The Record (2): Senate Delay

	Percentage of Senate-Confirmed Agency Officials in Place	Average # of Days to Nominate Candidates	Average Number of Days to Confirmation
George H.W. Bush	80.1	144.2	51.5
Clinton	69.8	145.2	48.9
George W. Bush	73.8	142.3	57.9
Obama	64.4	130.5	60.8

## Status of Agency Nominees After First Year in Office

Source: Anne Joseph O'Connell, *Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process* (Center for American Progress, April 2010)

# The Disputed Appointments

Four Recess Appointments on January 4, 2012

- Richard Cordray, to head the Consumer Financial Protection Bureau – nominated July 18, 2011
- For the National Labor Relations Board
  - Terrence F. Flynn – nominated January 5, 2011
  - Sharon Block – nominated December 14, 2011
  - Richard F. Griffin Jr. – nominated December 14, 2011

Background: Craig Becker nominated to NLRB on 7/9/09; recess appointment, 3/28/10; resubmitted, 1/26/2011; withdrawn, 12/14/2011.

# The Procedural Context

- Because GOP House disagreed to adjournment of the Senate, it adopted the following order:

Mr. WYDEN. Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn and **convene for pro forma sessions only, with no business conducted** on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Tuesday, December 20, at 11 a.m.; Friday, December 23, at 9:30 a.m.; Tuesday, December 27, at 12 p.m.; Friday, December 30, at 11 a.m.; and that the second session of the 112<sup>th</sup> Congress convene on Tuesday, January 3, at 12 p.m. for **a pro forma session only, with no business conducted**, and that following the pro forma session the Senate adjourn and convene for **pro forma sessions only, with no business conducted** on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Friday, January 6, at 11 a.m.; Tuesday, January 10, at 11 a.m.; Friday, January 13, at 12 p.m.; Tuesday, January 17, at 10:15 a.m.; Friday, January 20, at 2 p.m.; and that the Senate adjourn on Friday, January 20, until 2 p.m. on Monday, January 23 . . .

157 Cong. Rec. S8783 (Dec. 17, 2011).

# Which is the Relevant Recess?

- OLC adopted AG Daugherty view of “recess,” itself based on a 1905 Senate Report:

“Recess” is a word “of ordinary, not technical signification” to mean when the Senate is not assembled “to receive communications from the President or participate as a body in making appointments”
- Three possible “recesses” –
  - January 3-January 23, 2012 [the focus of the OLC opinion]
  - January 3-January 6, 2012 [three-day interval between pro forma sessions]
  - December 17, 2011 – January 23, 2012 [the de facto intersession recess]

# Issue 1: The “Happens” Issue

- **Is the President’s recess power triggered only when a vacancy first arises during a recess?**
- *Noel Canning*: Yes, allegedly based on the understanding of the word “to happen” at the time of ratification as “arising” or “coming into being”
- *But*:
  - The word was also understood at the time to mean “happen to exist”
  - Even George Washington made appointments to vacancies that came into being when the Senate was in session
  - Executive construction of “to happen” has been consistent since the 1820s
  - Congress has ratified that position in 5 USC § 5503

# 5 USC § 5503

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—

- (1) if the vacancy arose within 30 days before the end of the session of the Senate;
- (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
- (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

## Issue 2: Intra-session Appointments

- **May a recess appointment be made during a recess that occurs *within* a single “Session” of the Senate, rather than *between* sessions?**
  - NB, not a problem if December 17, 2011 – January 23, 2012 is treated as a de facto intersession recess
- *Noel Canning*: No:
  - The Constitution speaks of “the recess”
  - “Recess” is singular
  - The Constitution implicitly refers to “adjourn” rather than “recess” to mean generic breaks in proceedings
  - The overall clause implies there is but one recess per session

# Bad Textualism

- “The” could be used, even at the Framing, to refer generically to a type of thing, not just a particular thing, e.g., “The sun comes up in the morning.”
- The Constitution uses “the” when we would say, “a,” in other contexts, e.g., “Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . .” U.S. Const., Art. 1, § 5.
- The Constitution almost certainly uses the word “adjourn” as a verb, rather than recess, not because periods of adjournment are different from recesses, but because “recess” was hardly ever used as a verb in the late 18<sup>th</sup> Century
- Consider: “The wine is the best part of the meal.”

[Thanks to Neal Goldfarb and the LAWnlinguistics Blog]

But what if the Framers DID draft their language contemplating that each single “session” of Congress would be followed by months of “recess” when people were back on their farms and shops?

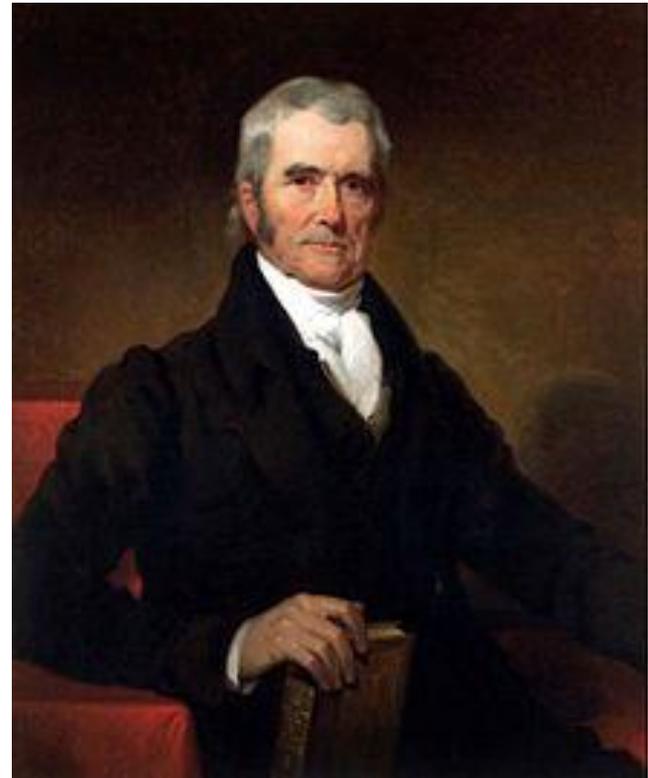


# Getting Back to Those “Postulates”

- Why should we be bound by the world as *they* experienced it when:
  - We live in a dramatically different institutional world AND
  - The language of the Clause permits more than one coherent interpretation
- We should interpret the Recess Appointments Clause:
  - (a) To recognize the President’s leading role in the appointments process
  - (b) Enable the President to execute the laws
  - (c) Protect the Senate’s capacity to vote “no” when called for
  - (d) Respect the institutional parity of co-equal branches
- Allowing intrasession recess appointments honors these objectives

“[I]t is a *Constitution* we are expounding.”

- “This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”
- *McCulloch v. Maryland*  
17 U.S. (4 Wheat.) 159  
(1819)



## Issue 3: What's a Recess?

- The Court should either say 3 days is the limit or treat the question as “political”
  - 3 days is the maximum Senate may go into recess without House consent
  - Possibility of Presidential appointments over lunch counterbalanced by Senate's discretion to delay confirmations indefinitely
  - Each should be left to its own competing institutional incentives
  - Obama showed restraint
    - No judicial appointments
    - Executive appointments only when necessary for agencies to function

# Senate Rulemaking Power

- Cooper: “A threshold reason to conclude that the Senate’s pro forma sessions interrupted its holiday adjournment is that the Senate says so.”
- But Houses of Congress may not use rulemaking authority to violate the Constitution, e.g., “Upon receipt of a presidential veto message, two-thirds of the Members shall be deemed to have voted for reenactment unless, within 5 legislative days, objections are heard from ninety percent of all Members.”
- That pro forma adjournments satisfy **Congress** with regard to its internal obligations is irrelevant when the rules impinge on **presidential** authority

# Didn't the Senate conduct business?

- Cooper cites “a single inconvenient truth: while holding a pro forma session on December 23, the Senate passed a bill—a two month extension of the payroll tax cut—which the President promptly signed into law.”
- But President is entitled to take the Senate at its word, e.g., that it would “convene for pro forma sessions only, with no business conducted”
- Senate’s 1905 report refers to a recess as a time “when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not . . . participate as a body in making appointments”

# Practical Consequences

## *If Noel Canning Stands*

### A Disabled Executive!

- If even a minority of senators sits on a nomination and refuses to bring it to a vote – no matter how disabling to the President or the execution of the laws – he can do nothing.

## *If the Obama Position is Upheld*

### Checks and Balances!

- The Senate will have to count on the President not to abuse his Recess Appointments Power *and*
- The President will have to count on the Senate not to abuse its discretion to delay confirmation votes.

# My Recommendation

- Reverse *Noel Canning* on the “Happens” Issue
- Uphold intrasession appointments
- Hold that 3 days is a recess of constitutionally sufficient length OR
- Treat the “length of recess” as a political question