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The Myth of the Anti-Government Constitution

The Supreme Court should overturn a circuit-court ruling in *Noel Canning v. NLRB* that would hamstring the president's ability to make recess appointments.

PETER M. SHANE

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Last November, I got a preview of the oral argument for *National Labor Relations Board v. Noel Canning*, the case about recess appointments that the Supreme Court will hear Monday. Noel Francisco, the attorney who will represent the Noel Canning company in challenging those appointments, was my debate opponent at my local Federalist Society chapter. I'm an academic on the progressive end of the spectrum with expertise in separation of powers law; I'd been invited as I sometimes am by conservative colleagues to represent that perspective with noted legal figures aligned with their point of view.

Francisco proved a powerful and congenial advocate. What intrigued me most was the clever narrative with which he framed his defense of the D.C. Circuit result. This narrative, I think, should be called the Myth of the Anti-Government Constitution.

The justices must decide whether Obama's three January 2012 appointments to the National Labor Relations Board properly fell within the president's constitutional 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." The D.C. Circuit [overturned the Obama appointments](#) for two reasons, both supposedly rooted in the original meaning of this constitutional clause.

First, according to the court, the text would have been understood in 1787 to authorize presidential appointments only during breaks between sessions of the Senate, not breaks *during* sessions of the Senate. The disputed Obama appointments occurred on January 4, 2012, a day after a session of the Senate had formally convened but during a hiatus of three or 20 days—the scope of the relevant break is itself a matter of legal dispute—when the Senate was adjourned.

Second, two of three judges concluded that the president's power applies only to offices that actually become vacant during such an intersession Senate break. It would not apply to the National Labor Relations Board vacancies Obama filled in 2012—and assuredly not to many, if any, of the hundreds of other vacancies that, according to the Congressional Research Service, presidents have filled with recess appointees since 1981.

In defense of the Obama appointments, I argued that [the D.C. Circuit's opinion](#) has two glaring problems. First, a 2013 Third Circuit opinion, which held another NLRB recess appointment invalid on other grounds, conclusively demonstrated that the D.C. Circuit's textual analysis on the first point was wrong. State legislative practice around the time of the founding, the Third Circuit made clear, routinely understood "recess" to mean intrasession, as well as intersession breaks in legislative business.

Second, the D.C. Circuit's limitation of the clause to vacancies that first open up during a recess has not been followed since the 1820s. That limitation is so obviously impractical that I foresee no real prospect that the Supreme Court will endorse it.

But as Francisco told the story during our debate, the case has little to do with practicality and much to do with freedom. Making appointments a joint responsibility of president and Senate, he told the audience, reflected the Framers' belief that dividing power between the branches protects liberty by making it hard for government to act quickly or decisively. The "recess appointment" power is an afterthought, thrown into the Constitution to accommodate a problem that no longer exists—the long breaks between Senate sessions in the nation's new capital, and the difficulty, in an age of horses and buggies, of calling an emergency session. Hence, Francisco concluded, the power of making recess appointments should be defined narrowly in favor of maintaining the liberty-protecting system of Senate review of presidential nominations. It should not be an excuse for the president to usurp the power of the Senate.

There is nothing liberty-protecting in the capacity of the Senate to undermine public administration by stonewalling the nominations of perfectly qualified government officers.

Such is the Myth of the Anti-Government Constitution. In Francisco's narrative, it is not merely that the Framers wanted to avoid re-creating a monarchy. They

actually *sought* to make it difficult for government to function. If the Senate can't come to terms with the president, then liberty demands that the government be paralyzed.

Judge David Sentelle's opinion for the D.C. Circuit dismissed the possibility that his interpretation might impede the president in his constitutional obligation to "take Care that the Laws be faithfully executed." He writes: "[I]f 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."

The anti-government myth, however, is at best only part of the story. And that is the side I tried to present as a counter to Francisco's narrative. The Framers' institutional design was intended to create an effective government. "[T]he true test of a good government," Alexander Hamilton wrote in *Federalist* 68, "is its aptitude and tendency to produce a good administration."

In April, 1787, in preparation for the Philadelphia Convention, James Madison prepared a document listing eleven "Vices of the Political System of the United States." The first seven of these defects—including "[w]ant of concert in matters where common interest requires it"—speak directly to the efficacy of government. Only the last three vices in his list had any sort of anti-government cast. The Framers, in John Marshall's words, "had experienced the embarrassments" of government under the Articles of Confederation. They wanted a government that worked.

Seen in this light, the narrow reading of the Recess Appointments Clause is perverse. There is nothing liberty-protecting in the capacity of the Senate to undermine public administration by stonewalling the nominations of perfectly qualified government officers. Senators did not object to the Obama NLRB nominees on the basis of qualifications. A minority—still equipped with the filibuster—wanted only to hamstring the NLRB.

The Framers intended the president to take the leading role in staffing the executive branch. Urging New Yorkers to support the Constitution, Alexander Hamilton explained the design of the appointments process: “[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 Senate was given a role in the appointments process not to impede the president’s policy agenda but to prevent 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.”

Protecting the Senate’s confirmation role at the expense of the president’s appointments responsibility turns the constitutional design on its head.

Next week, Francisco will likely point out that we are no longer living in a horse-and-buggy world; the Framers could not have foreseen a Senate that can meet on a few hours’ notice. Giving the Recess Appointments Clause its logical scope is no longer needed to overcome the inefficiencies of a legislative body difficult to reconvene.

But the Framers also did not foresee a Senate that would refuse even to *debate*, much less confirm, routine appointments. Giving the Recess Appointments Clause its logical scope addresses this problem directly. Luckily, the Framers did not write language addressing only 1787 issues. Instead, they gave us a text we can and should apply to the needs of our time.

ABOUT THE AUTHOR

PETER M. SHANE is the Jacob E. Davis and Jacob E. Davis II chair in law at the Ohio State University's Moritz College of Law.