Getting our Minds around *Noel Canning v. NLRB:* An Exchange

Sanford Levinson and Jack Balkin

Sandy Levinson:

In *Noel Canning v. NLRB,* the DC Circuit Court of Appeals invalidated three recess appointments to the National Labor Relations Board made (or, it is now perhaps more accurate to say, purported to have been made) by President Obama. The 45-page opinion is in many ways reminiscent of Justice Black's opinion in the *Steel Seizure Case* or Justice Southerland's opinion in the equally canonical *Blaisdell* case. That is, Judge Sentelle adopts a rigorously (some might say "relentlessly" or even "mindlessly") textual/originalist approach that argues first that the words "the recess" in the Recess Appointment Clause—"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"—refer exclusively to "inter-session" recesses and not to "intra-session" recesses that occur within a given session of Congress. (That is, we do say that the current Congress is in its "third or fourth session" because, as a matter of fact, it might have taken several recesses during what we denominate either as its "first" or "second" session.) Moreover, and to many equally surprising, was the determination that the words "may happen *during* the Recess" refers exclusively to vacancies that first occur while the Senate is in an inter-session recess. This invalidates, for example, what has become the widespread practice, in administrations of both parties, of presidents making "recess appointments" during inrra-session recesses with

regard to vacancies that might well have initially occurred while the Senate was in session.

For what it is worth, President Clinton made 139 recess appointments during his years in office, 95 of them full-time positions, while his successor, George W. Bush, made 171 recess appointments (of which 105 were to full-time positions). And they were building on precedents established by their own predecessors. The DC Circuit declared forthrightly that relatively recent practices were irrelevant and that the case was controlled by the clear text and what they claimed were the original understandings of the Clause. Among their sources, incidentally, was George Washington, who, the majority argued, made recess appointments only when the vacancy had indeed arisen during an intersession recess. Though they did not cite Akhil Amar's new book on *The Unwritten Constitution,* one might note that Amar relies extensively on early practice, especially that by George Washington.

The decision has been widely derided, but one wonders exactly why. As it happens, one of us (Levinson) is writing these remarks just before teaching *Chisholm v. Georgia* in a course he is teaching on federalism, and four of the five justices in that case make explicit appeals to the text of Section 2 of Article III—"The judicial power shall extend to all cases . . between a state and citizens of another state…." As with all instances of textual argument, the crushing question is "what part of 'all cases between a state and citizens of another state' do you not understand, just as Justice Sutherland in *Blaisdell* asked the same question about what it was so difficult to understand that "no state shall pass any law impairing the obligation of contracts" just meant that "no state shall pass any law impairing the obligation of contracts." And, although we invoke Justice

Black's opinion in the *Steel Seizure Case*—largely because, like *Noel Canning*, it involved what the court determined was an episode of executive overreaching—one could cite a host of Black's First Amendment opinions that ultimately take the form of "what part of 'no law" do you not understand?"

Unless one rejects any and all textual argument out of hand as impossibly naïve and unsophisticated—but what about the Inauguration Day Clause and its stupidly assuring that a rejected incumbent will be able to maintain office for eleven weeks following defeat by the ostensibly sovereign "We the People"?—it is difficult simply to dismiss *Noel Canning* if all one does is to read the opinion and evaluate the arguments.

Perhaps the point, though, is that one can't understand *Noel Canning* by remaining within the text of the opinion any more than one can understand Black's opinion in *Steel Seizure*, Sutherland's opinion in *Blaisdell*, or the most hoary of all constitutional chestnuts, *Marbury v. Madison*, simply by reading the opinion and the arguments made therein. To take the easiest case, it is impossible to understand (or to evaluate) *Marbury* without putting it within the context of the election of 1800 and the "revolution" effectuated by the replacement of Federalists by Jeffersonians. Marshall did his best to discredit his hated fellow-Virginian, but he ultimately capitulated by manufacturing an argument that the Court had no jurisdiction to hear the case. *Blaisdell* is a case about what was perceived as the greatest sustained emergency, save for the Civil War, in American history, and, therefore, about the powers of government during an emergency. *Youngstown Steel* is not only about supplying American armed forces during the Korean War, but, just as importantly, about the patently political actions of a widely unpopular President—his approval rating at the

time of the decision was 22%--who had unilaterally gone to war without congressional authorization (a fact highlighted in the concurring opinions of Justices Frankfurter and Jackson).

So what is the context of *Noel Canning*? It is, one can be confident, a political reality that certainly did not, and probably could not, in terms of sociology of knowledge, have occurred to any of the vaunted "Framers": The development of a virulent polarized party system—appropriate, as Thomas Mann and Norman Ornstein have argued, to a parliamentary system, but one that creates havoc within the separation of powers and therefore "divided government" system chosen in 1787—was something that none of them could have expected.[1] Whatever explains the Recess Appointment Clause, it was surely not motivated by the desire to make sure that the Chief Executive could triumph in any dispute with a highly-partisan Senate that had every incentive to do whatever it could to assure lack of success by the President (especially if a first-term President contemplating re-election) with regard to any major programs. It was, we can be confident, a "good government" measure designed to alleviate a real problem, i.e., vacancies arising during the very long times during which Congress was in recess between its regular first and second sessions that really needed to be filled before they got back to New York (or, later, Washington) and could scrutinize the President's choices.

If one ignores the subsequent development of American politics following 1787, then the Court's opinion in *Noel Canning* makes perfectly good sense. Indeed, I would expect the Court that properly found federal

[1] It may be an exaggeration to say that the Founders could not have imagined a "virulent" party system, in part because to many of them *all* party systems would justify that adjective. To a significant extent, though, the Constitution was designed with the hope—and perhaps even expectation?—that the national government, at least, would be in the hands of relatively virtuous elites committed to the common good rather than the malign interests of their own "faction," a/k/a "political party."

jurisdiction in *Chisholm*, on the basis of plain text, to have been equally critical had even George Washington decided that he wanted to appoint someone to fill a vacancy that had arisen while the Senate was still in session even during an inter-session recess. The idea of an "intra-session" recess, one might note, probably made no more sense to the Founding Generation than did the possibility of jet planes. And, of course, it is precisely the creation of modern transportation, plus the more recent creation of the "permanent campaign" that has made "intra-session" recesses part of our political reality.

So on what basis does one evaluate *Noel Canning*? Is there any "principled" basis to reject what many no doubt views as its wooden analysis in favor of a more functionalist account that pays full heed to the modern reality of frustrated Presidents facing virulently oppositionist Senates? And even if one adopts functionalism over text as the correct approach, is there any reason, beyond one's own political support for the President in question, for preferring a pro-presidential answer over a pro-Senate answer to the question as to the circumstances under which a President can make a Recess Apportionment.[2] Perhaps this is just another way of asking whether one can separate a "legal" analysis of the Clause from a profoundly political determination that, at least, one prefers to privilege one branch over another, or, even more pointedly, that one simply wants to help out Barack Obama in circumstances where one might easily describe George W. Bush as overreaching (given the fact that the Senate claimed *not* to have been even in an "intra-session recess" inasmuch as it

[2] Perhaps the correct term here is "pro-obstructive minority of senators," given that recess appointments would be totally unnecessary if the Senate moved with alacrity to vote presidential nominees up or down. This in turn raises two questions: Are filibusters *always* malign? And are there implicit limits on the ability of the Senate (like the House) to make its own rules of procedure, which, of course, currently validate the filibuster?

adopted a ploy, first initiated by Democrats during the Bush Administration, of holding pro-forma convenings of the Senate where literally only a handful of Senators were present and where assurances had been given that no genuine Senate business would be conducted).

Jack Balkin:

Noel Canning occurs within the confluence of two long-term political trends. The first is extreme party polarization, with the Republicans in particular having become hostage to the party's most radical elements.

The second event, not unrelated to the first, is our country's position in what Stephen Skowronek calls "political time." I believe that we are either at the very end of the Reagan regime or, more likely, at the beginning of a new one, in which Barack Obama has turned out to be a reconstructive president after all. In this new political reality the Republican Party is gradually discovering that it is no longer the dominant party.

Political dysfunction is heightened during such periods of regime transition. There are two reasons for this. The first is that the formerly dominant party cannot keep its coalition together, its coalition has been superseded by a new ascendant one associated with the opposition party, or both. The second is that, although on the rise, the newly ascendant party (in this case, the Democrats) has not yet been able to establish its political hegemony, especially in the courts.

If the formerly dominant party is in power during a time of regime transition, as the Democrats were during the Carter years, it is no longer able to work together effectively, leaving an opening for an oppositional party to engage in divide-and-conquer strategies.

On the other hand, if the previously dominant party no longer holds the presidency as a new regime is forming, the party may become increasingly radical and intransigent. That is what we are seeing today. The defenders of the old regime are doing almost anything they can think of to hold off and obstruct the incipient Obama regime.

The Obama Administration's response to this strategy has changed over time. At first, Obama acted like a preemptive president, trying to govern on a terrain largely dictated by his political opponents. He attempted various forms of bi-partisan compromise; he also tried, in the fashion of the last preemptive Democrat, Bill Clinton, to triangulate, and to take the best ideas of conservatives, rework them slightly, and claim them for himself. Obama may have been convinced that he had to make compromises in order to keep the economy afloat to ensure his reelection. This helps explains the April 2011 budget accord as well as the Budget Control Act that ended the 2011 debt ceiling crisis.

This strategy of triangulation and conciliation had only limited success, and Obama was all but politically humiliated in the debt ceiling crisis of 2011. But he was able to keep the economy expanding slowly, and he was reelected by a healthy margin, in large part because by 2012 the Republican Party was greatly weakened and its increasingly radical views had turned off enough members of the public.

The Obama administration has gradually figured out that its best strategy is not Clintonian-style triangulation and compromise, but rather to lay out what it regards as reasonable policies, even if they are deemed quite liberal, and to provoke the most extreme elements of the Republican Party to act out, and further delegitimate the Reagan regime and the mainstream Republican Party. Put another way, the Obama Administration has

gradually learned how to practice a left-wing form of wedge politics. Its success in doing so is further evidence that Obama is now behaving like a reconstructive president, and that we are transitioning from an older and exhausted political regime into a new one.

Obama's success as a reconstructive president is hardly guaranteed. His presidency so far has been largely scandal free, but scandal is a persistent problem for second-term presidents, especially oppositional leaders. The second term of the last Democrat in the Reagan regime, Bill Clinton, was overwhelmed by the Lewinsky scandal (and Clinton was eventually impeached). The last preemptive Republican president in the New Deal/Civil Rights regime, Richard Nixon, resigned in disgrace as a result of the Watergate scandal.

Not surprisingly, the Republican Party is busily looking for a scandal to slow down or halt Obama, with the hope that this can prevent a new Democratic regime from taking root. This strategy helps explain repeated attempts to discover a Watergate-style scandal in the attack on the U.S. diplomatic mission in Benghazi, Libya.

Because we are in a period of transition, in which the old order is attempting to prevent the birth of a new one that will displace it, we are seeing, to use an expression of Adrian Vermeule and Eric Posner, a series of constitutional showdowns. At this point, the old regime has only the House, the use of the filibuster and hold rules in the Senate, and a significant segment of the federal courts. Each of these elements has become increasingly radicalized; and Republicans in the House and Senate have become increasingly intransigent.

Everything we have seen in the past four years, from the tea party uprising to the debt ceiling crisis of 2011, to attempts at voter suppression in

the 2012 election, to the pitched battle over Obamacare, and the current challenges to the Voting Rights Act and affirmative action, is an increasingly desperate attempt to hold off, or at least slow down, the birth of a new constitutional regime. Although I believe that the new regime is actually upon us, it may take many more years for things to be settled-- for example the Republicans still control the House and probably will for many years. Indeed, if historical trends continue, they will probably increase their membership in the House and Senate in the 2014 elections. This likely political victory will give them additional incentives to believe that they can stop a new regime from forming. As a result, we should expect more of the same for a while.

The last dying days of the old regime, and the birth pangs of the new regime, have helped create a remarkably dysfunctional Congress. I do not claim that this is the only cause of our present dysfunction, merely a major factor. Indeed, I am willing to go out on a limb and predict that when the new regime is more fully in place, people will stop complaining that the country is dysfunctional (With the exception of Sandy Levinson, who has other reasons for complaint). During the late 1970s, many people believed that the national government was too big for any one person to run. By 1984, few people thought that any more. The reason was that the New Deal/Civil Rights regime had cratered, and a new regime was ascendant. This is, I submit, what is going on today. The difference between Reagan and Obama's situation is that, in Obama's case, it took much longer for the dominant regime to fall apart. Obama spent most of his first term acting like a preemptive president in the Clinton mold. Only after the debt ceiling crisis of 2011—the key turning point in his presidency—did his political posture change. In the past year he has begun to take on the mantle of a

reconstructive presidency. He is now behaving like a reconstructive leader, although, ironically, his opportunities for genuine domestic reform are more limited than they were in the first two years of his presidency.

What is the relationship between this transitional period and executive power? When Congress becomes dysfunctional—unable or unwilling to act constructively—this empowers the executive. More correctly, it increases the executive's incentives to develop end-runs that allow it to act without fresh approval from Congress or cooperation with Congress. For example, the executive may develop provocative theories of executive power, or it may read previous Congressional grants of power liberally or expansively so that it can claim that Congress has already approved its actions.

The Obama Adminstration's reading of "hostilities" in the War Powers Resolution is an example of the latter strategy. The Administration's increasing use of drones as a substitute for the preventive detention system created by George W. Bush, and the systematic use of recess appointments are examples of the former strategy. When Congress attempted to prevent intra-session recess appointments, President Obama tried to work around those, leading to the *Noel Canning* dispute.

Ultimately, a dysfunctional Congress, rather than blocking a president successfully, actually undermines its own authority and drives the executive to increasingly far-fetched interpretations of law that undermine structural values of separation of powers and checks and balances.

In *Noel Canning*, a conservative judiciary allied with the old regime stepped in on the side of conservative Republicans in Congress. The fact that the D.C. Circuit chose such radical reasoning is evidence of the kind of decisions that affiliated judicial actors make in the last stages of a political regime. (The Obamacare debate is another example.)

Normally, the courts will avoid resolving these sorts of inter-branch conflicts, but there was precedent for treating this one as justiciable. After all, the NLRB makes decisions that directly affect people's economic interests. The courts are somewhat less likely to intervene on Congress's behalf in foreign policy issues like the construction of the War Powers Act (although the Supreme Court did intervene in *Boumedienne* when it saw that its own jurisdiction was threatened.) If *Noel Canning* had been a case about national security, even conservative judges might have looked at it differently.

Noel Canning has a *Bush v. Gore* like quality about it. It seems to enforce "low" politics—the politics of partisan advantage—rather than "high" politics—the politics of constitutional principle. It is difficult to believe that if President Bush's recess nominations to various executive departments had been challenged by liberals, this particular panel of the D.C. circuit would have taken the opportunity to outlaw intra-session appointments once and forever. (Sandy points out, quite correctly, that John Bolton's nomination to the U.N. Ambassadorship might have been upheld on the narrower grounds that no one had individual standing to object to it.)

One important difference between *Noel Canning* and *Bush v. Gore* is that the *Noel Canning* opinion is *designed* to have precedential weight. It seems to say that from now on no president—Democrat or Republican—can make intrasession appointments if the vacancy did not occur and was not filled during "the" recess of the Senate. This, I think, stems from the way that ideological commitments limit the ways that affiliated judges can operate. And the textualist strategy that the two member majority employed gave them somewhat less room to argue in *Noel Canning* as the Supreme Court did in *Bush v. Gore*, that "Our consideration is limited to the present

circumstances, for the problem of equal protection in election processes generally presents many complexities."

The litigation over the NLRB appointment in question appears to be a stalking horse for another highly ideologically charged controversy. The current controversy over President Obama's recess appointments arises in the context of Senate Republicans' attempt to effectively shut down a new consumer protection agency created in the Dodd-Frank bill. They have attempted to make the agency a nullity by refusing to appoint anyone to head it. This led to the recess appointment of Richard Cordray (with Obama taking the very aggressive position that, because of the date on which he was nominated, Cordray may serve for two years instead of one.) Republican opposition to appointing a head of the agency is not to the qualifications of any of President Obama's nominees, including Cordray. It is to the consumer protection bureau itself. Even if Jesus Christ himself were nominated the GOP would vote against it. (They might also worry, of course about certain statements in the Gospels in which Jesus appears to be socialist and engaged in class warfare against the rich. But I digress.).

For this reason, I regard *Noel Canning* as a rear guard action during a time of regime transition. It features members of a conservative judiciary affiliated with the old regime coming to the aid of Senate Republicans. These Republicans are attempting to hold off the operation of an agency associated with the new regime, and, more generally, are attempting to cripple the new regime by denying it the ability to staff a wide range of executive and judicial positions. It will be very interesting to see what happens with the next Supreme Court appointment.

Sandy Levinson:

I think this is a terrific example of the difference between old-fashioned "internalist" analysis and the insights provided by a more "externalist" focus. This difference in perspectives is clearly with us quite literally from the very beginning: Do we take *Marbury* seriously as legal analysis in its own terms, with its strained, if not dishonest, interpretations of Section 13 of the Judiciary Act and then Article III of the Constitution, or do we necessarily have to understand it within the context of the great political shootout ("showdown/hardball") generated by the Election of 1800? I do not disagree with a word of Jack's analysis, but I don't know that he truly answers the question of how we *as lawyers* (assuming that notion itself makes any real sense in the now century-long Realist and post-Realist age) assess the arguments proffered in *Noel Canning.*

After all, even with *Bush v. Gore,* the epitome for many of us of a low, dishonest, politically-driven decision, much of the criticism focuses on what might be termed "insincerity": I.e,, as Richard Posner, the most persuasive defender of the Supreme Court's intervention, readily conceded, it is inconceivable that at least three of the justices in the majority believed the arguments of the *per curiam* that they signed, inasmuch as they depended entirely on giving full weight to Warren-Court precedents that they despised and had attacked in other cases. *Noel Canning,* of course, basically cites no cases at all, and instead adopts a textualist/originalist approach that one must presume the DC Circuit Court conservatives genuinely believe (whatever that precisely means).

And a problem with the "political question" argument, which surely would have applied to John Bolton, say, who was merely the ambassador and could make no decisions legally enforceable against others, is that it has

little purchase with regard to an agency like the NLRB, which *does* issue enforceable orders. Noel Canning is entitled, under any plausible notion of "rule of law," to a determination whether the decision-maker attempting to coerce the company is legitimate, and the Court, of course, said it was not for failure to achieve the required quorum. How could the Court have refused to decide the issue? The objection to *Noel Canning* has to be on the merits, I think, *not* on the Court's taking the case in the first place.

In any event, there is much to look forward to with regard to the twists and turns of the Supreme Court justices when they hear *Noel Canning* on appeal. Will textualism triumph over support for a strong executive on the part of Antonin Scalia, for example. Or will everything turn on a formalist reading of what counts as even an "intra-session recess"? In answering that question, incidentally, should it matter that the phenomenon of the "not-open-for-business-but-still-in-session" of the Senate was begun by Democrats eager to limit the power of a Republican President and not (unlike, say, the "Hastert Rule" that turns the Speaker of the House into a Party apparatchnik instead of a truly "public" official) invented by Republicans who recognize, a la Jack's analysis, that their days are numbered?