

## **Did you know that President Obama can still appoint Merrick Garland to the Supreme Court, here's how:**

Under the Constitution (Article II, §2, clause 2), the President and the Senate share the power to make appointments to high-level policy-making positions in federal departments, agencies, boards, and commissions. Generally, the President nominates individuals to these positions, and the Senate must confirm them before he can appoint them to office. However, The Constitution provides an exception to this process. When the Senate is in recess, the President may make a temporary appointment, called a recess appointment, to any such position without Senate approval (Article II, §2, clause 3).

Currently, the Time of Senate inaction since the nomination of Merrick Garland to the Supreme Court is 271 days. However, President Obama still has until January 20 to try to save Judge Garland's chances to serve on the Supreme Court — assuming that Obama does nothing between election day and January 3, when the new Congress, including the new Senate, arrives promptly in Washington.

If the usual happens, the new Senate will organize itself, and then recess until presidential inauguration day. The empty seat on the Supreme Court is still empty and the Constitution's Article II's grant of authority to the president to "fill up all vacancies that may happen during the recess of the Senate" comes right back into play! If President Obama were to invoke that authority, he could "Seat" Judge Garland on the Supreme Court during the month of January, without having in any way, shape or form to consult the Senate; Then, Garland would hold the seat at least until the end of the Senate's "next session," as the Constitution says. If "next" means the session after the one beginning January 3, "Justice" Garland could stay on the Court — at a minimum — until January 3, 2019. (A few Justices in history have served less time than that.)

But, with the help of the Supreme Court two years ago, the new Senate, still led by Republicans, could frustrate President Obama in making such an appointment. Under the *National Labor Relations Board v. Noel Canning* decision, a Senate recess must last a minimum of ten days before the President's authority kicks in, and the Senate leaders could arrange to come into session every 3 days to frustrate any attempt made by President Obama to place Garland in that seat. How so? The Senate would come back from recess - NOT to do any real business but simply hold a "pro forma" session that interrupts the recess. Still, with a targeted adjournment date of January 3, 2017 and tentative return date of January 20th there's time, there's time, for lots of Washington Politics that is!