AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Separation of Powers/Appointment and Removal Powers

**National Labor Relations Board v. Canning** (2014)

*With increasingly polarized political parties, the president and the Senate have often found it difficult to reach agreement when they must look across a partisan divide. One consequence has been a growing gridlock in Senate confirmation of presidential nominations to judicial and executive offices. Presidents have sometimes responded by using “recess appointments” to put favored individuals into executive office without the consent of the Senate. The Constitution allows the president 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.” Presidents have sometimes attempted to use the recess appointments power to clear part of the backlog of unconfirmed nominations. Presidents have recently interpreted “recess” broadly in order to fill executive offices whenever the Senate has adjourned for an extended period of time. In response, the Senate has begun holding “pro forma” sessions during extended adjournments, during which it does not normally conduct any business but emphasizes that the body is not in recess.*

*While the Congress was away for Christmas holidays in the winter of 2011-12, President Obama made recess appointments to fill three vacant seats on the five-member National Labor Relations Board (NLRB). President Obama filled the other two seats in 2010 with nominees who were confirmed by the Senate. These additional appointments gave the NLRB enough members to make a quorum and conduct business after a long period of inactivity. Shortly thereafter, the NLRB met and issued an order finding that Noel Canning, a Pepsi bottler, had violated the National Labor Relations Act by refusing to recognize a collective bargaining agreement with the Teamsters union. Canning appealed to the Court of Appeals for the District of Columbia, arguing both that the order was mistaken as a matter of substantive law and that the NLRB did not have a valid quorum to issue the order. A three-judge panel of the circuit court agreed and overturned the order, concluding that “recess” had a technical meaning that referred to the separation between congressional sessions rather than a broader pragmatic reference to other breaks in the meetings of the legislature.*

*The administration appealed to the U.S. Supreme Court, which reached a unanimous decision upholding the lower court. Justice Breyer wrote the opinion of the Court, joined by the three other members of the liberal wing of the Court and Justice Kennedy. Justice Scalia wrote a concurring opinion, which was joined by the other three members of the conservative wing of the Court.*

*What sorts of arguments does the Court use to reach his conclusion? What is the likely purpose of the recess appointments provision? Does expanding the use of recess appointments have implications for the balance of powers? Should courts take into account the implications of partisan polarization and gridlock for the confirmation process when interpreting the clause? Is the idea of Senate confirmation of executive officials obsolete? Should the court intervene in these sorts of interbranch disputes? What would count as judicial restraint in a case like this? Why would the Court have produced these two opinions, joined by these sets of justices?*

JUSTICE BREYER, delivered the opinion of the Court.

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Office[r] of the United States.” U. S. Const., Art. II, §2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the 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.” Art. II, §2, cl. 3. . . .

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. . . [W]hen the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

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Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States” (emphasis added).

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Second, in interpreting the Clause, we put significant weight upon historical practice. . . .

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There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

The first question concerns the scope of the phrase “the recess of the Senate.” Art. II, §2, cl. 3 (emphasis added). The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an “inter-session recess.” . . . The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will “adjourn sine die,” i.e., without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such “intra-session recess” by adopting a resolution stating that it will “adjourn” to a fixed date, a few days or weeks or even months later. All agree that the phrase “the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.” . . . The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. . . .

The constitutional text is thus ambiguous. And we believe the Clause’s purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

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In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. . . . And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments. . . .

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The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to “great weight in a proper interpretation” of the constitutional provision.

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The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a “recess”? The Clause itself does not say. And Justice Scalia claims that this silence itself shows that the Framers intended the Clause to apply only to an inter-session recess.

We disagree. For one thing, the most likely reason the Framers did not place a textual floor underneath the word “recess” is that they did not foresee the need for one. . . . The Framers’ lack of clairvoyance on that point is not dispositive. Unlike Justice Scalia, we think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

. . . . The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. . . .

In sum, we conclude that the phrase “the recess” applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, §5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well.

The second question concerns the scope of the phrase “vacancies that may happen during the recess of the Senate.” Art. II, §2, cl. 3 (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

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The Clause’s purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them. . . .

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At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to “fill up all vacancies” that occur before, and continue to exist during, the Senate’s recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might thereby routinely avoid the constitutional need to obtain the Senate’s “advice and consent.”

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While we concede that both interpretations carry with them some risk of undesirable consequences, we believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant. Overall, like Attorney General Wirt, we believe the broader interpretation more consistent with the Constitution’s “reason and spirit.”

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. . . .

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In our view, however, the pro forma sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

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. . . . *Affirmed*.

JUSTICE SCALIA, with whom CHIEF JUSTICE ROBERTS, JUSTICE THOMAS, and JUSTICE ALITO joined, concurring.

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Today’s Court agrees that the appointments were in-valid, but for the far narrower reason that they were made during a 3-day break in the Senate’s session. On its way to that result, the majority sweeps away the key textual limitations on the recess-appointment power. It holds, first, that the President can make appointments without the Senate’s participation even during short breaks in the middle of the Senate’s session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not “upset the compromises and working arrangements that the elected branches of Government themselves have reached.”

The Court’s decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority’s insistence on deferring to the Executive’s untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court’s role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

Today’s majority disregards two overarching principles that ought to guide our consideration of the questions presented here.

First, the Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights. . . .

Second and relatedly, when questions involving the Constitution’s government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch “ ‘to say what the law is.’ ” . . . This Court does not defer to the other branches’ resolution of such controversies; as Justice Kennedy has previously written, our role is in no way “lessened” because it might be said that “the two political branches are adjusting their own powers between themselves.” . . . Since the separation of powers exists for the protection of individual liberty, its vitality “does not depend” on “whether ‘the encroached-upon branch approves the encroachment.’ ” . . .

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Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision. . . . But “ ‘[p]ast practice does not, by itself, create power.’ ” That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.

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In the founding era, the terms “recess” and “session” had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments “sine die,” that is, without a specified return date. . . . As one scholar has thoroughly demonstrated, “in government practice the phrase ‘the Recess’ always referred to the gap between sessions.” . . . By contrast, other provisions of the Constitution use the verb “adjourn” rather than “recess” to refer to the commencement of breaks during a formal legislative session.

. . . . As every commentator on the Clause until the 20th century seems to have understood, the “Recess” and the “Session” to which the Clause refers are mutually exclusive, alternating states. . . .

Besides being linguistically unsound, the majority’s reading yields the strange result that an appointment made during a short break near the beginning of one official session will not terminate until the end of the following official session, enabling the appointment to last for up to two years. . . .

. . . . The notion that the Constitution empowers the President to make unilateral appointments every time the Senate takes a half-hour lunch break is so absurd as to be self-refuting. But that, in the majority’s view, is what the text authorizes.

The boundlessness of the colloquial reading of “the Recess” thus refutes the majority’s assertion that the Clause’s “purpose” of “ensur[ing] the continued functioning of the Federal Government” demands that it apply to intra-session breaks as well as inter-session recesses. The majority disregards another self-evident purpose of the Clause: to preserve the Senate’s role in the appointment process—which the founding generation regarded as a critical protection against “‘despotism,’ ” by clearly delineating the times when the President can appoint officers without the Senate’s consent. Today’s decision seriously undercuts that purpose. In doing so, it demonstrates the folly of interpreting constitutional provisions designed to establish “a structure of government that would protect liberty,” on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible. “Convenience and efficiency,” we have repeatedly recognized, “are not the primary objectives” of our constitutional framework.

Relatedly, the majority contends that the Clause’s supposed purpose of keeping the wheels of government turning demands that we interpret the Clause to maintain its relevance in light of the “new circumstance” of the Senate’s taking an increasing number of intra-session breaks that exceed three days. Even if I accepted the canard that courts can alter the Constitution’s meaning to accommodate changed circumstances, I would be hard pressed to see the relevance of that notion here. The rise of intra-session adjournments has occurred in tandem with the development of modern forms of communication and transportation that mean the Senate “is always available” to consider nominations, even when its Members are temporarily dispersed for an intra-session break. The Recess Appointments Clause therefore is, or rather, should be, an anachronism—“essentially an historic relic, something whose original purpose has disappeared.” The need it was designed to fill no longer exists, and its only remaining use is the ignoble one of enabling the President to circumvent the Senate’s role in the appointment process. That does not justify “read[ing] it out of the Constitution” and, contra the majority, I would not do so; but neither would I distort the Clause’s original meaning, as the majority does, to ensure a prominent role for the recess-appointment power in an era when its influence is far more pernicious than beneficial.

To avoid the absurd results that follow from its colloquial reading of “the Recess,” the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase’s colloquial meaning—are simply “too short to trigger the Recess Appointments Clause.” But it identifies no textual basis whatsoever for limiting the length of “the Recess,” nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate. . . . Yet on the majority’s view, when the first Senate considered taking a 1-month break, a 3-day weekend, or a half-hour siesta, it had no way of knowing whether the President would be constitutionally authorized to appoint officers in its absence. And any officers appointed in those circumstances would have served under a cloud, unable to determine with any degree of confidence whether their appointments were valid.

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Even if the many questions raised by the majority’s failure to articulate a standard could be answered, a larger question would remain: If the Constitution’s text empowers the President to make appointments during any break in the Senate’s proceedings, by what right does the majority subject the President’s exercise of that power to vague, court-crafted limitations with no textual basis? The majority claims its temporal guideposts are informed by executive practice, but a President’s self-restraint cannot “bind his successors by diminishing their powers.”

An interpretation that calls for this kind of judicial adventurism cannot be correct. Indeed, if the Clause really did use “Recess” in its colloquial sense, then there would be no “judicially discoverable and manageable standard for resolving” whether a particular break was long enough to trigger the recess-appointment power, making that a nonjusticiable political question.

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The first intra-session recess appointments in our history almost certainly were made by President Andrew John-son in 1867 and 1868. That was, of course, a period of dramatic conflict between the Executive and Congress that saw the first-ever impeachment of a sitting President. . . .

More than half a century went by before any other President made an intra-session recess appointment, and there is strong reason to think that during that period neither the Executive nor the Senate believed such a power existed. For one thing, the Senate adjourned for more than 3 days 45 times during that period, and 43 of those adjournments exceeded 10 days (and thus would not even be subject to the majority’s “presumption” against the availability of recess appointments). Yet there is no evidence that a single appointment was made during any of those adjournments or that any President before the 20th century even considered making such appointments.

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What does all this amount to? In short: Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends “strong support,” to its interpretation of the Recess Appointments Clause. And the majority’s contention that recent executive practice in this area merits deference because the Senate has not done more to oppose it is utterly divorced from our precedent. “The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic,” and the Senate could not give away those protections even if it wanted to. . . .

Moreover, the majority’s insistence that the Senate gainsay an executive practice “as a body” in order to prevent the Executive from acquiring power by adverse possession, will systematically favor the expansion of executive power at the expense of Congress. . . . [W]hen the President wants to assert a power and establish a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process. The majority’s methodology thus all but guarantees the continuing aggrandizement of the Executive Branch.

The second question presented is whether vacancies that “happen during the Recess of the Senate,” which the President is empowered to fill with recess appointments, are (a) vacancies that arise during the recess, or (b) all vacancies that exist during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here—which undisputedly filled pre-recess vacancies—are invalid for that reason as well as for the reason that they were made during the session. The Court’s contrary conclusion is inconsistent with the Constitution’s text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority’s conclusion on this issue.

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[N]o reasonable reader would have understood the Recess Appointments Clause to use the word “happen” in the majority’s “happen to be” sense, and thus to empower the President to fill all vacancies that might exist during a recess, regardless of when they arose. For one thing, the Clause’s language would have been a surpassingly odd way of giving the President that power. The Clause easily could have been written to convey that meaning clearly. . . .

For another thing, the majority’s reading not only strains the Clause’s language but distorts its constitutional role, which was meant to be subordinate. . . .

If, however, the Clause had allowed the President to fill all pre-existing vacancies during the recess by granting commissions that would last throughout the following session, it would have been impossible to regard it—as the Framers plainly did—as a mere codicil to the Constitution’s principal, power-sharing scheme for filling federal offices. On the majority’s reading, the President would have had no need ever to seek the Senate’s advice and consent for his appointments: Whenever there was a fair prospect of the Senate’s rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on ad infinitum. . . . It is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates.

The original understanding of the Clause was consistent with what the majority concedes is the text’s “most natural meaning.” . . .

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In sum: Washington’s and Adams’ Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of “historical practice”—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch.

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a consistent and unchallenged practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution’s original meaning. There is thus no ground for the majority’s deference to the unconstitutional recess-appointment practices of the Executive Branch.

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