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Symposium: The Challengingly Uncategorizable Recess Appointments Clause

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Symposium: The challengingly uncategorizable Recess Appointments Clause

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By [Michael Herz](#)

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This week we are hosting an online symposium on [National Labor Relations Board v. Noel Canning](#), in which the Court will consider the constitutionality of the president's recess appointments to the NLRB. Lyle summarized the issues in the case last week in a "[Made simple](#)" post.

The following contribution comes from Michael Herz, a professor at Benjamin N. Cardozo School of Law, Yeshiva University.

I fear that I am participating in this discussion under false pretenses, because I have no idea how the Court will decide [National Labor Relations Board v. Noel Canning](#). And the reasons go far beyond the fact that this is a case of first impression or the possibility that the whole thing is a nonjusticiable political question. I am not going to review the substantive arguments for and against the D.C. Circuit's ruling. Instead, I will touch on some other aspects of the recess appointments issue that make it a particularly hard one to guess about.

First, the attitudinal model does not help. It looks like it should, for the battle over the four January 2012 appointments is highly politicized. A Democratic president was stymied by the Republican minority in the Senate; the Republican majority in the House (!) sought to block even recess appointments through the stratagem of preventing the Senate from recessing; the contested appointments enabled agencies whose substantive missions were endorsed by Democrats and opposed by Republicans to get on with their work; the appointments were set aside by a unanimous panel of three Republican-appointed judges. Given all this, it feels as ideologically tinged – as likely to lead to ideological decision making – as [Bush v. Gore](#), and much of the popular coverage and discussion has treated the case that way.

Notwithstanding this background, I don't think that partisanship will dictate the outcome. The decision may be lopsided or it may be close, but I don't think it will break down along standard ideological lines. As I wrote some years ago:

In considering the scope of the [recess appointments] clause, . . . one is perforce behind a sort of Rawlsian veil of ignorance. A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes

in the short-term can more easily be set aside here than when considering many substantive constitutional issues.

Thus, the current battle is a rehash of fights during the George W. Bush administration, just with the party affiliations flipped, which was the last time a court of appeals ruled on whether intrasession recesses count (yes) and whether the vacancy must arise during the recess (no). In 2012, Solicitor General Donald Verrilli is defending intrasession recess appointments against attacks from the right. But in 2004, then-Acting Solicitor General Paul Clement was making the same arguments in defending President Bush's recess appointments against attacks from the left. In this case, it was Republican senators, represented by Miguel Estrada (who is said to have declined a recess appointment to the D.C. Circuit during the more than two-year battle over his ultimately unsuccessful nomination) who filed an *amicus* brief challenging intrasession recess appointments to vacancies that arose prior to the recess. But they are walking in the footsteps of their former colleague Ted Kennedy, represented by Larry Tribe, Marty Lederman, Tom Goldstein, and Amy Howe. With geese and ganders scattered about in this way, partisanship drops out. This particular dispute is highly politically charged; but the legal rule that will emerge from the decision will favor neither Democrats nor Republicans as such.

Second, biographical details don't give us much to go on. Tidbits might suggest that certain Justices would side with the President: Chief Justice Roberts worked in the White House; Justice Scalia headed the Office of Legal Counsel, which has always taken a broad view of the recess appointments power; Justice Kagan was the Solicitor General, the Chief Justice Principal Deputy Solicitor General, and Justice Alito an Assistant to the Solicitor General; Justice Scalia's son Eugene was himself the beneficiary of an intrasession recess appointment as Solicitor of Labor after his nomination had languished in the Senate for more than eight months; Clarence Thomas deemed his Senate confirmation process "a high-tech lynching"; the Chief Justice was nominated to the D.C. Circuit by the first President Bush but didn't get the job because the Senate never held a vote, while his ultimately successful nomination a decade later sat for months with the Democrats in control of the Senate.

Against this is the modest fact that Justice Breyer worked for the Senate. And perhaps the Chief's experience with a long-pending nomination cuts against the NLRB here precisely because *he*, like Estrada, did *not* get a recess appointment. But none of this seems especially compelling.

Third, the Justices' methodological commitments do not point a way through the thicket. The D.C. Circuit's opinion was self-consciously (a) textualist and (b) originalist, so Justices Scalia and Thomas in particular, but not exclusively, should in principle be sympathetic to its analysis and the four more liberal members dubious. But it is not at all clear that that is how the case will play out. For one thing, the D.C. Circuit upset long-standing settled understandings or the recess appointment power. Cass Sunstein has pointed out that, accepting *arguendo* the D.C. Circuit's view of the original understanding, this case creates a conflict between originalism and Burkeanism. Clarence Thomas is certainly an originalist

and not a Burkean, but most of his colleagues have elements of both. As for the textual arguments, almost no commentator has been very moved by the D.C. Circuit's reliance on "*the recess*" (singular), though other textual arguments are available and may be more convincing. On the exist-versus-arise issue, the textual argument in favor of the D.C. Circuit is much stronger; but so is the conflicting practice and understanding. In addition, arguments from purpose cut against the apparent meaning of "happen," since *when* the vacancy arose is irrelevant to the need to get it filled.

For the Justices more sympathetic to arguments from purpose, however, the Recess Appointments Clause creates a quandary. If the Senate is not around, the clause enables the president to make temporary appointments without Senate approval. Originally, allowing the president to proceed without the Senate ensures the continued smooth functioning of the federal government; making the appointment temporary ensures that the Senate maintains its position within the constitutional scheme. But modern transportation and the change in the frequency with which the Senate meets render the clause an anachronism. There is no longer any need to provide for situations in which the Senate is out of town. The problem is *never* that the Senate is not around; the Senate is never out of session long enough for a vacancy truly to need filling before its return. Every modern recess appointment has occurred at most a couple of weeks, and in some cases a couple of days, before the Senate's return – and usually after the nomination had been stalled for months. Any urgency has resulted not from the Senate's *absence* but from its imminent *return*.

This does not mean that vacant offices and unconfirmed nominees are not a problem. They absolutely are. And the Senate's failure or inability to confirm nominees *is* responsible for that problem. But the source of that failure or inability is not extended recesses, it is the pernicious combination of the filibuster, the anonymous hold, and deep partisan divides. The recess appointments power has become a tool to overcome Senate inaction on appointments, which was always its function. It's just that the inaction it combats has changed – it stems from the Senate's political inability to act, not its physical inability to do so. So the purposivist has to determine the level of generality at which the inquiry takes place – a notoriously unpredictable venture.

Fourth, there is one other quasi-methodological issue: the Roberts Court's inconsistent, but not nonexistent, commitment to judicial minimalism. The NLRB asked the Court to consider only two issues: whether intrasession recesses count and when the vacancy must occur. Noel Canning and the amicus brief from the forty-five current Republican senators suggested that the Court also consider whether the Senate was in recess at all when the President made the contested appointments since it was holding pro forma sessions every three days. The Court granted on all three issues. Did it do so because the pro forma sessions question is the narrowest way out, or because it wants to resolve every issue in sight?

If the Court reverses, it will have to decide all three issues. But if it affirms, any single issue would suffice to decide the case. Which of the three would the “minimalist” latch on to? Doctrinally, the pro forma sessions ground seems narrowest, allowing the Court to escape the broader issues by focusing on an idiosyncrasy of these particular appointments. On the other hand, in its practical effect accepting the pro forma sessions rationale could be the most consequential possible ruling, since it hands the Senate *or the House* (which can force the Senate not to recess by refusing its consent and holding pro forma sessions itself) the authority to eliminate recess appointments altogether. In short, not only is it impossible to predict when and whether the Court will be seized by minimalism, it is impossible to say what outcome that approach would dictate in this case.

At bottom, this is a case about what tools the president and Congress have in their ongoing battle. One way of characterizing the case is that it requires the Justices to determine the constitutional baseline. The D.C. Circuit thought that it was maintaining the constitutional baseline and preventing presidential over-reaching; the key point was that the Senate’s participation in the appointments process had to be preserved. But one might just as easily mark the baseline more in the president’s direction, given his general obligation to take care that the laws are faithfully executed and his express power to make recess appointments. Baselines, like beauty, are in the eye of the beholder.

So, who is obstructing whom? My own view is that Congress is obstructing the president. My guess is that a majority of the Court will see it that way as well, partly because it is a pro-president Court. As between, say, John Roberts and Elena Kagan, it is easy to say who is more pro-Obama, but awfully hard to say who is more pro-president. But I would be quick to acknowledge that I may just be assuming that reasonable people will see the issue as I do. It turns out there is no guarantee that that will happen.

Posted in [Symposium on recess appointments](#)

Cases: [National Labor Relations Board v. Noel Canning](#)

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