
REACTION

THE PRE-SESSION RECESS

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In the brief remarks following, I do not address the Burkean argument Professor Sunstein so persuasively suggests, that practice has established the permissibility of recess appointments during the week-or-more adjournments of Congress that modern transportation modalities permit. We can perhaps let President Eisenhower's recess appointments of Chief Justice Warren, Justice Brennan, and Justice Stewart stand witness to that understanding. Rather, I want to suggest flaws in the originalist analysis used by the *Canning* court and in the Senate's ruse of meeting every three days over the winter period of 2011–12 that many take to place the January 4, 2012 recess appointments President Obama made to the NLRB and to the Consumer Financial Protection Bureau outside that practice.

If one is going to approach the Constitution as an originalist, as the *Canning* court so emphatically did, one might at least explore the meaning a clause would have been understood to have at the time of its adoption. All three judges of the D.C. Circuit understood the use of the definite article “the” to signal that the only qualifying recess during which recess appointments could be made was at the conclusion of a session when Congress had adjourned “*sine die*,” that is, to await the commencement of the next session for which the Constitution provided. Two of them held, further, that the only possible recess appointments were those that arose during those singular recesses. Neither interpretation is credible given the realities of the eighteenth century.

At the time the Recess Appointment Clause was written, the Constitution anticipated that the Senate might not sit until December. Article I, Section 4, Clause 2 provides “The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law [i.e., with the President's approval] appoint a different Day.” The natural implication here is that there could readily be more than one recess (“meet at least once”), and that a recess was as likely to precede as to follow (or both) a period of assembly. Given the realities of transportation and communication, and the likely need of many members to be home for planting and harvesting seasons, it must have been anticipated that recess appointments would often be made — and some of them, to positions that had become va-

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cant too late in a congressional sitting for the Senate to have been able to receive a nomination, consider, and consent to it. News of vacancies occurring during a session might very well not even reach the President until after the Congress had risen.

The first five Congresses met for two-year terms that uniformly ended in early March (when a presidential inauguration might occur). Save for the first Congress, however, their initial meetings occurred substantially later in the year — October 24, 1791 for the Second; December 2, 1793 for the Third; December 7, 1795 for the Fourth; and May 15, 1797 for the Fifth. Each of these Congresses adjourned “*sine die*” only at the end of its elected life — i.e., in March of 1791, 1793, 1795, 1797, and 1799. There were lengthy adjournments between nominal sessions of each — for example, September 29, 1789 to January 4, 1790 and August 12, 1790 to December 6, 1790 in the First; July 10, 1797 to November 13, 1797 and July 16, 1798 to December 3, 1798 in the Fifth. These adjournments were not “*sine die*,” however, but to fixed dates — that is, they were what the majority characterizes as mere adjournments. In the travel circumstances of the time, short recesses were not likely; as Professor Sunstein remarks, nominal intrasession recesses did not even occur until after the Civil War, when the nation’s rail system had matured. And transparently, during these lengthy breaks — all of them, whether adjournment was *sine die* or to a fixed date of return — the possibility of making recess appointments necessarily applied. And it necessarily was there, too, to fill vacancies that, whenever occurring, had not become known to the President until Congress had adjourned or had become known too late for its action upon a nomination.

The *Canning* court did not bother to acquaint itself with these realities. But, in my judgment, understanding the original constitutional text in terms of the nation’s original circumstances quite destroys both elements of the *Canning* majority’s formalistic opinion — that “the Recess” is a singular time necessarily occurring only on adjournment *sine die* of a given Congress’s “session” following rather than preceding its assembling, and that a qualified vacancy must happen during that very recess.

This does not resolve the stalemate questions underlying Professor Vermeule’s persuasive concerns with precautionary constitutionalism. These could arise if a President failed to submit a nomination while there was time for the Senate to consider it (which he might decide not to do just in order to create a recess appointment opportunity for himself once the Senate rose), if the Senate simply declined to consider an appointment timely submitted (as with Mr. Cordray), or if the Senate created nominal meetings at which real business could not be transacted in order to defeat the possibility of recess appointments (as has happened here, and earlier in the Bush Administration). Unilateral behaviors on either side intended to frustrate the Constitution’s provisions

(and in the Senate's case, to frustrate the effective functioning of lawful government by denying leadership to ordained agencies) deserve harsh condemnation, as he suggests. That does not render them legally ineffective but it does create a certain vector of movement.

Consider, in this light, Section 2 of the Twentieth Amendment, which since 1933 has provided "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall *by law* appoint a different day." (Emphasis added.) Unless there was such a law, then, the second "session" of the 112th Congress began on January 3, 2012 — the day before the challenged recess appointments were made. The pagination and titling of the Congressional Record confirms this understanding. There is a more important possible consequence of the President's having delayed the recess appointments to January 4, 2012 than the one widely credited as the reason for it (that is, so that he could earn an extra year for the appointments' validity).

The more important possible consequence, in my judgment, was to place them within the first "recess" of the 112th Congress's second session, one that lasted from January 3 at least until January 17, when the House first assembled a quorum ready for business, and so well within the "liquidated practices" Professor Vermeule evokes. Whatever we may think of the disreputable resolutions by which House and Senate pretended to meet during the final days of its first session, from mid-December until January 2, they were resolutions of that session, and not laws. It is transparent from the Congressional Record of January 3, 2012, that the Congress did *not* "assemble" on that day — or any other day until much later in the month. Should the first sessions' resolutions, which are not "law," be treated as binding the second session? And if not, was the second session's Senate not in recess from January 3 on, until it actually did "assemble"?

Here's a congressional practice liquidated under the Twentieth Amendment that strikes me as arguably determinative in this case, and that could provide the Supreme Court with its own opportunity to address Professor Vermeule's "countervailing risks" and their implications. Ever since 1934, newly elected Congresses regularly have assembled on or near the third of January; when they have, they just as regularly have sent a communication to the President informing him that a quorum is present and they are ready to do business. And a quick march through the Congressional Record reveals that second sessions sent the same communications in *every even-numbered year* from 1934 through the end of the millennium, as soon as the second session had actually assembled. This did not always occur on or about the third of January, but it constitutes an impressive show of understanding what it means to obey the Constitution's command to "assemble." (Just as invariably, the Congressional Record has begun renumbering for the second session on January 3, as it did in 2012.) After 2000, the second session practice be-

came more sporadic, but the Congressional Record for January 17, 2012 shows that the House adopted such a communication that day, when it first assembled. No such communication was sent (or honestly possible) by the second session of the 112th Congress on January 3, 2012, the day before the challenged appointments were made.

Might the Court, apprised of this history, find in its manifested understanding of what the command to “assemble” connotes a means of repudiating the Senate’s destructive, unilateral behavior? From the moment the Constitution took effect, it has been clear that the period prior to assembly *must* be a time when recess appointments can be made. One session’s resolution how it will go about its business, not being a “law,” cannot effectively delay the obligation to assemble that, by the Constitution, marks the beginning of the next “session.” So one has a two week period, January 3–January 17, 2012, during which the second session of the 112th Congress existed but Congress had not yet assembled — a relatively lengthy recess during which recess appointments might be made.