
REACTION
RECESS APPOINTMENTS AND
PRECAUTIONARY CONSTITUTIONALISM

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The *Canning* opinion is best viewed as an example of an approach to constitutional decisionmaking that we might call “precautionary constitutionalism.” And it illustrates the problems with precautionary constitutionalism quite nicely, the main problem being a myopic approach to the regulation of constitutional risks. (I explore these themes more fully in *The Constitution of Risk*, forthcoming from Cambridge University Press.)

Despite its prominent suite of textualist and originalist arguments, which have drawn the most attention, the opinion also contains a long, impassioned treatment of the functional effects and broad purposes of the constitutional structure. And here is the nub of the court’s reasoning: intrasession recesses must be excluded from the scope of the recess appointment power as a precaution against the risk of executive aggrandizement, or even presidential despotism. You will suspect me of exaggerating, but I am in fact faithfully reproducing the court’s own exaggerations:

To adopt the Board’s proffered intrasession interpretation of “the Recess” would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause. As the Supreme Court observed in *Freytag v. Commissioner of Internal Revenue*, “The manipulation of official appointments had long been one of the American revolutionary generation’s greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism.”

Now recess appointments are hardly the stuff of which tyranny is made, because of their inherently limited duration, expiring at the end of the next congressional session. So one might see all this talk of aggrandizement and despotism as a rhetorical flourish in support of the textual arguments. Yet the opposite is closer to the truth. The court is quite candid that the point of its textual arguments is to establish a clear rule as a precaution against presidential aggrandizement:

We must reject . . . vague alternative[s] in favor of the clarity of the intersession interpretation. As the Supreme Court has observed, when interpreting “major features” of the Constitution’s separation of powers, we must “establish[] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of inter-

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branch conflict.” . . . Allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.

Viewed in this light, *Canning* adopts a rigid and narrow interpretation of the recess appointment power, excluding all intrasession appointments, as a precaution against swelling presidential power. The judges were haunted by a slippery-slope risk — the risk that, unless a clear line were drawn, the President would end up with “free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction.” (Analytically, there is no necessary connection between precautionary arguments and slippery-slope arguments, as I explain in *The Constitution of Risk*, but the two often appear together, and this is another example.)

What, if anything, is wrong with the court’s approach? Nothing, in the abstract. Some slopes really are slippery, and sometimes precautionary and prophylactic rules are a good idea. But precautionary constitutionalism goes wrong when it rests upon myopic attention to constitutional risks. Myopic in the sense that the *Canning* court focuses selectively, even to the point of obsession, on a particular target risk, while ignoring countervailing risks, including risks generated by the precautions themselves.

One obvious countervailing risk is, in the words of the Eleventh Circuit, that the purpose of the Recess Appointments Clause is to “keep important offices filled and the government functioning.” *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004). That purpose has the same constitutional status as the purpose the D.C. Circuit focused on, the purpose of providing a senatorial check on appointments. If Congress as a whole has used its undoubted constitutional powers to create an office and mandates that it be filled; the President has tried to fill it; yet the tug-of-war over appointments within the Senate keeps the office empty for a protracted period, the result is a constitutional problem, not just a policy problem.

Furthermore, the only reason the recess appointments issue even arises is because of the interaction between appointments and the filibuster. If the Democratic majority in the Senate could just approve regular appointments, there’d be no problem. So the court’s narrow interpretation of the recess appointments power indirectly promotes the power of a blocking minority in the Senate. Madison assumed in *Federalist 10* that the risk of oppression by entrenched minorities was low, because “the republican principle . . . enables the majority to defeat [a minority faction’s] sinister views by regular vote.” But if that principle is disabled, the risk of presidential aggrandizement has to be weighed against the risk of minoritarian factional oppression. (We have learned since Madison’s time, of course, that it can be just as oppressive to prevent government from operating as to hijack its operation for factional

ends.) A very clear and narrow interpretation of the recess clause minimizes the aggrandizement risk, but also has the effect of increasing the risk of factionalism. Precautions on one margin can themselves create new risks on other margins.

But it might get even worse. From the point of view of the *Canning* court, the worst case would occur if the precaution actually turned out to be perverse, on the very same margin the court is worried about — that is, if the court's precaution against presidential aggrandizement actually increased the overall risk of presidential aggrandizement in the long run. How might this occur?

Suppose that the combination of the filibuster, pro forma recess games, other obstructionist tactics in the Senate, and decisions like *Canning* eventually produce so much pent-up demand for reform of the appointments process that the President offers some radical reinterpretation of the Constitution, one that gives him substantially increased discretion over appointments. Ingenious commentators will supply such reinterpretations. (For one possibility, see Matthew Stephenson's recent argument, in the *Yale Law Journal*, that the President may deem an appointment confirmed if the Senate fails to act within a certain time. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 *YALE L.J.* 940 (2013). In a passage I quoted above, the *Canning* court briefly mentions this possibility, but doesn't focus on whether its holding might actually make it more likely.)

Should the new interpretation stick, then — given the *Canning* court's own concern with safeguards against presidential power — the court might bitterly regret, ex post, that it threw up an obstruction that contributed to creating a backlash in the other direction. An enlightened decisionmaker will do well to consider the systemic, dynamic, and long-run effects of any given precaution, including the long-run risk of backlash resulting in perverse outcomes. True, where information is costly and time is limited a rational decisionmaker might decide to ignore all long-run effects, on the theory that the dynamic possibilities are so numerous and varied as to be essentially incalculable. But that would be a different, far more respectable and self-aware sort of myopia than the myopia on display in *Canning*.

So far I have criticized *Canning*'s holding, which excluded all intra-session recesses from the scope of the recess appointments power, as a myopic exercise in constitutional risk-management. But what about the court's slippery-slope concern? Surely the concern was valid in principle, at least for those who fear the remorseless expansion of presidential power.

Yet there were at least two other alternative constitutional rules that would also have provided feasible stopping points, rules that were far less cramped than the court's holding. (Or far less sweeping, depending on one's perspective.) These alternatives would plausibly optimize

across the relevant constitutional risks, or at least do better overall than the rule the court chose, while sufficiently accommodating the slippery-slope concern.

One alternative would be to say that historical practice has liquidated the duration of intrasession recesses within which an appointment may be made (ignoring pro forma sessions). The practice has varied somewhat, but there is a stable basin of attraction in the region of about ten days. Many intrasession appointments have involved longer recesses — *Canning* itself involved a twenty-day recess — while a few such appointments have fallen in recesses slightly shorter than ten days. But we simply do not observe Presidents making intrasession appointments when the Senate recesses for five days, let alone for a lunch break. Observable behavior suggests that the slope isn't very slippery after all.

If that alternative seems too vague or elastic, another possibility would be to tie recess appointments to the Adjournments Clause, which prohibits either house of Congress from adjourning for more than three days, during the session, without the other's consent. The law could say that any adjournment of longer than three days counts as a "recess" and thus enables a recess appointment, but that three days or less will not do. That would offer a perfectly determinate and enforceable line.

The *Canning* court rejected this because there is no explicit textual link between the recess appointments power and adjournments. So what? The point of the enterprise, after all, was to find a "clear distinction" that would prove "judicially defensible in the heat of interbranch conflict." The three-day line offers exactly that, but with reduced countervailing harms and risks, compared to the court's rule. I conclude that even if the court's concern with presidential despotism were well founded (and it wasn't), the court's highly precautionary holding represents a poor overall treatment of the relevant risks.