CANNING v. NATIONAL LABOR RELATIONS BOARD
United States Court of Appeals
District of Columbia Circuit
705 F.3d 490
January 25, 2013

How should the Supreme Court rule when over 200 years of actual practice directly contradicts the clear wording of the Constitution? This case presents us with high drama as we await its outcome in the Supreme Court. I Ellionize this case as of February 9, 2014. I will put the High Court's decision on our website when it is rendered. What do you think the outcome will be?

Here is slightly more than a hint of what the outcome was in this D.C. Circuit. I quote directly from this opinion: "**The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government...We hold that the President may only make recess appointments to fill vacancies that arise during the recess."** In other words, President Obama's recess appointments in the matter were voided by the D.C. Circuit. That opinion follows. We await the outcome of the administration's appeal to the Supreme Court from this decision.

OPINION: SENTELLE... Noel Canning (Canning) petitions for review of a National Labor Relations Board (Board) decision finding that Canning violated...the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement reached with Teamsters Local 760. The Board cross-petitions for enforcement of its order. On the merits of the Board decision, Canning argues that the Board did not properly follow applicable contract law in determining that an agreement had been reached and that therefore, the finding of unfair labor practice is erroneous. We determine that the Board issuing the findings and order could not lawfully act, as it did not have a quorum, for reasons set forth more fully below.

So far, this case sounds rather boring. Hang on to your seats. This case has huge ramifications for balance-of-power principles embedded in our Constitution. So far, we know that the Board ruled against the employer, Noel Canning, and Canning appealed to this court, the Court of Appeals for the District of Columbia. Canning first argues that the Board incorrectly ruled that an agreement had been reached between Canning and the Teamsters and, therefore, Canning is not in violation of any statute. That issue does not raise a constitutional question and, since the Court rarely will determine a constitutional question if the answer to a non-constitutional issue disposes of the dispute between the parties, they address those issues first. If, after addressing those concerns, a dispute still exists, they will then address the constitutional questions. You are correct, we wouldn't be looking at this case if the Court had dealt with it prior to reaching the constitutional questions. Those will be stated shortly.

I. Introduction

At its inception, this appears to be a routine review of a decision of the Board over which we have jurisdiction...While the posture of the petition is routine, as it developed, our review is not. In its brief before us, Canning...questions the authority of the Board to issue the order on two constitutional grounds. **First, Canning asserts that the Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative [presumed] recess appointments which were made when the Senate was not in recess. Second, it asserts that the vacancies these three members purportedly filled did not "happen during the Recess of the Senate," as required for recess appointments by the Constitution. U.S. Const. art. II, § 2, cl. 3. Because the Board must have a quorum in order to lawfully take action, if Canning is correct in either of these assertions, then the order under review is void [from the beginning]...**

We must...decide whether Canning is entitled to relief on the basis of its nonconstitutional arguments before addressing the constitutional question. Canning raises two statutory arguments. First, it contends that the ALJ's conclusion that the parties in fact reached an agreement at their final negotiation session is not supported by substantial evidence. Second, it argues that even if such an agreement were reached, it is unenforceable under Washington law. We address each argument in turn.

A. The Sufficiency of the Evidence

[This Court finds that the evidence was sufficient for the Board to have concluded that an agreement between Canning and the Teamsters had been reached. But, hold on. That doesn't end the case.]

B. The Enforceability of the Contract

We also agree with the Board that we lack jurisdiction to consider Canning's choice of [Washington] law argument [because the objection was waived by Canning].

Ok...so I have saved you lots of reading. Because this court decided against Canning on both non-constitutional issues, it is now necessary to address the serious constitutional questions.

Because we agree that Canning is correct in both of its constitutional arguments, we grant the petition of Canning for review and deny the Board's petition for enforcement.

This Court has not yet let us in on what the constitutional questions are, but they are letting us know, up front, that the outcome of the constitutional questions favors Canning and, therefore, the ruling of the Board against Canning is overturned.

II. Jurisdiction

[The Court finds they have jurisdiction to hear case.]

III. The Underlying Proceedings

Petitioner is a bottler and distributor of Pepsi–Cola products and is an employer within the terms of the National Labor Relations Act. As discussed, a Board administrative law judge concluded that Canning had violated the NLRA. After Canning filed exceptions to [those] findings, a three-member panel of the Board, composed of Members Hayes, Flynn, and Block, affirmed those findings in a decision dated February 8, 2012. On that date, the Board purportedly had five members. Two members, Chairman Mark G. Pearce and Brian Hayes, had been confirmed by the Senate on June 22, 2010. It is undisputed that they remained validly appointed Board members on February 8, 2012.

The other three members were all appointed by the President on January 4, 2012, purportedly pursuant to the **Recess Appointments Clause** of the Constitution, U.S. Const. art. II, §2, cl. 3. The first of these three members, Sharon Block, filled a seat that became vacant on January 3, 2012, when Board member Craig Becker's recess appointment expired. The second of the three members, Terence F. Flynn, filled a seat that became vacant on August 27, 2010, when Peter Schaumber's term expired. The third, Richard F. Griffin, filled a seat that became vacant on August 27, 2011, when Wilma B. Liebman's term expired. **At the time of the President's purported recess appointments of the three Board members, the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in *pro forma* sessions every three business days from December 20, 2011, through January 22, 2012. The agreement stated that "no business would be conducted" during those sessions.**

During the December 23 *pro forma* session, the Senate overrode its prior agreement by unanimous consent and passed a temporary extension to the payroll tax. During the January 3 *pro forma* session, the Senate acted to convene the second session of the 112th Congress and to fulfill its constitutional duty to meet on January 3. See U.S. Const. amend. XX, §2 ("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.")

Canning asserts that the Board did not have a quorum for the conduct of business on the operative date, February 8, 2012. Citing *New Process Steel, L.P. v. NLRB* (2010), which holds that the Board cannot act without a quorum of three members, Canning asserts that the Board lacked a quorum on that date [because] the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution. **Because we agree that the appointments were constitutionally invalid and the Board therefore lacked a quorum, we grant the petition for review and vacate the Board's order.**

This court, by this ruling, is saying that President Obama exceeded his constitutional authority by making these three appointments; therefore, the two appointees that purportedly rounded out a quorum of three for the purpose of ruling on this dispute, were without authority to act. Therefore, the Board decision against Canning must be and is reversed. Folks, this Court of Appeals is telling this over-reaching President (who has shown zero respect for his constitutional limits) that he was out-of-bounds --- he was without the power he either thought he had or the power he outright took. We now explore the court's reasoning.

IV. Analysis

It is undisputed that the Board must have a quorum of three in order to take action. It is further undisputed that a quorum of three did not exist on the date of the order under review unless [the disputed members]...were validly appointed. It is further agreed that the members of the Board are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution, which provides 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**, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, §2, cl. 2. Finally, it is undisputed that the purported appointments of the three members were not made "by and with the Advice and Consent of the Senate."

This does not, however, end the dispute. The Board contends that despite the failure of the President to comply with Article II, Section 2, Clause 2, he nonetheless validly made the appointments under a provision sometimes referred to as the "Recess Appointments Clause," which provides that "the President shall have 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." **Canning contends that the putative recess appointments are invalid and the Recess Appointments Clause is inapplicable because the Senate was not in the recess at the time of the putative appointments and the vacancies did not happen during the recess of the Senate.** We consider those issues in turn.

Now, the fight is on! The Constitution giveth (the President has power to nominate Board members), then taketh away (the nominations must be confirmed by the advice and consent of the Senate), then giveth back (the President can make such appointments for vacancies "that may happen during the recess"). When the President wants to nominate people of an ideology that he reasonably predicts the Senate will not confirm (here, even when his own party was in the majority), can he overcome that nasty confirmation requirement by recess appointments? Was the Senate "in recess" when these appointments were made? Did the vacancies "happen" during a recess? **This is the very first time these issues have reached the Supreme Court!** Stay tuned.

Please allow me to introduce you to **The Appointments Clause** (Article II, §2, cl. 2): "[...The President] shall nominate, and by and with the **Advice and Consent of the Senate**, shall appoint...all other Officers of the United States..."

And, while we are at it, I present **The Recess Appointments Clause** (Article II, §2, cl. 3): "The President shall have Power to full 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."

A. The Meaning of "the Recess"

Canning contends that the term "the Recess" in the Recess Appointments Clause refers to the **intersession recess of the Senate**, that is to say, **the period between sessions of the Senate** when the Senate is by definition not in session and therefore unavailable to receive and act upon

nominations from the President. The Board's position is much less clear. It argues that the alternative appointment procedure created by that Clause is available during **intrasession "recesses" or breaks in the Senate's business when it is otherwise in a continuing session**. The Board never states how short a break is too short, under its theory, to serve as a "recess" for purposes of the Recess Appointments Clause. **This merely reflects the Board's larger problem: it fails to differentiate between "recesses" and the actual constitutional language, "the Recess."**

It is this difference between the word choice "recess" and "the Recess" that first draws our attention. When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. *District of Columbia v. Heller* (2008). Then, as now, the word "the" was and is a definite article. Unlike "a" or "an," that definite article suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said "the Recess," what they really meant was "a recess." This is not an insignificant distinction. In the end it makes all the difference.

Six times the Constitution uses some form of the verb "adjourn" or the noun "adjournment" to refer to breaks in the proceedings of one or both Houses of Congress. Twice, it uses the term "the Recess": once in the Recess Appointments Clause and once in the Senate Vacancies Clause, U.S. Const. art. I, §3, cl. 2. Not only did the Framers use a different word, but none of the "adjournment" usages is preceded by the definite article. **All this points to the inescapable conclusion that the Framers intended something specific by the term "the Recess," and that it was something different than a generic break in proceedings.**

The structure of the Clause is to the same effect. The Clause sets a time limit on recess appointments by providing that those commissions shall expire "at the End of their [the Senate's] next Session." Again, the Framers have created a dichotomy. The appointment may be made in "the Recess," but it ends at the end of the next "Session." The natural interpretation of the Clause is that the Constitution is noting a difference between "the Recess" and the "Session." Either the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in "the Recess."

It is universally accepted that "Session" here refers to the usually two or sometimes three sessions per Congress. Therefore, "the Recess" should be taken to mean only times when the Senate is not in one of those sessions...Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate's engrossing clerk "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess."

Not only logic and language, but also constitutional history supports the interpretation advanced by Canning...When the Federalist Papers spoke of recess appointments, they referred to those commissions as expiring "at the end of the ensuing session." The Federalist No. 67. For there to be an "ensuing session," it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session—that is, when it was in "the Recess." Thus, background documents to the Constitution, in addition to the language itself,

suggest that "the Recess" refers to the period between sessions that would end with the ensuing session of the Senate...

The Board argues that "Canning's view would...upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments." However, the Board's view of "the established constitutional balance" is neither so well established nor so clear as the Board seems to think. In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent.

The interpretation of the Clause in the years immediately following the Constitution's ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a "critical tool of constitutional interpretation" because it reflects the "public understanding" of the text "in the period after its...ratification." With respect to the Recess Appointments Clause...**The first intrasession recess appointment probably did not come until 1867, when President Andrew Johnson apparently appointed one district court judge during an intrasession adjournment.** It is not even entirely clear that the Johnson appointment was made during an intrasession recess.

Presidents made only three documented intrasession recess appointments prior to 1947, with the other two coming during the presidencies of Calvin Coolidge and Warren Harding.

Whatever the precise number of putative intrasession recess appointments before 1947, it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare...We conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic "suggests an assumed *absence* of the power" to make such appointments. Though it is true that intrasession recesses of significant length may have been far less common in those early days than today, it is nonetheless the case that the appointment practices of Presidents more nearly contemporaneous with the adoption of the Constitution do not support the propriety of intrasession recess appointments. Their early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage.

While the Board seeks support for its interpretation in the practices of more recent administrations, we do not find those practices persuasive. We note that in *INS v. Chadha,* when the Supreme Court was considering the constitutionality of a one-house veto, it considered a similar argument concerning the increasing frequency of such legislative veto provisions. In rejecting that argument, the *Chadha* Court stated that "our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency...." Like the Supreme Court in *Chadha,* we conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers...

The Constitution's overall appointments structure provides additional confirmation of the intersession interpretation. **The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent.** Hamilton wrote in *Federalist No. 67* that advice and consent "declares the general mode of appointing officers of the United States," while the Recess Appointments Clause serves

as "nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67. The "general mode" of participation of the Senate through advice and consent served an important function: "It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76.

A check on power preserves liberty of the people.

Nonetheless, the Framers recognized that they needed some temporary method for appointment when the Senate was in the recess. At the time of the Constitution, intersession recesses were regularly six to nine months and senators did not have the luxury of catching the next flight to Washington. To avoid government paralysis in those long periods when senators were unable to provide advice and consent, the Framers established the "auxiliary" method of recess appointments. But they put strict limits on this method, requiring that the relevant vacancies happen during "the Recess." It would have made little sense to extend this "auxiliary" method to any intrasession break, for the "auxiliary" ability to make recess appointments could easily swallow the "general" route of advice and consent. **The President could simply wait until the Senate took an intrasession break to make appointments, and thus "advice and consent" would hardly restrain his appointment choices at all.**

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."** In short, the Constitution's appointments structure—the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent—makes clear that **the Framers used "the Recess" to refer only to the recess between sessions.**

Confirming this understanding of the Recess Appointments Clause is the lack of a viable alternative interpretation of "the Recess." **The first alternative interpretation is that "the Recess" refers to all Senate breaks.** But no party presses that interpretation, and for good reason. [The Board concedes that "a routine adjournment for an evening, a weekend, or a lunch break occurring during regular working sessions of the Senate does not constitute a 'Recess of the Senate' under the Recess Appointments Clause".] As discussed above, the appointments structure would have been turned upside down if the President could make appointments any time the Senate so much as broke for lunch. This interpretation also cannot explain the use of the definite article "the," the singular "Recess" in the Clause, or why the Framers used "adjournment" differently from "Recess."

The second possible interpretation is that "the Recess" is a practical term that refers to some substantial passage of time, such as a ten- or twenty-day break. Attorney General

Daugherty seemed to abandon the intersession interpretation in 1921 and adopted this functional interpretation, arguing that "to give the word 'recess' a technical and not a practical construction, is to disregard substance for form." Daugherty refused to put an exact time on the length of the break necessary for a "Recess," stating that "in the very nature of things the line of demarcation can not be accurately drawn."

We must reject Attorney General Daugherty's vague alternative 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 interbranch conflict." *Plaut v. Spendthrift Farm, Inc.* (1995). Thus, the inherent vagueness of Daugherty's interpretation counsels against it. Given that the appointments structure forms a major part of the separation of powers in the Constitution, the Framers would not likely have introduced such a flimsy standard. Moreover, the text of the Recess Appointments Clause offers no support for the functional approach. Some undefined but substantial number of days-break is not a plausible interpretation of "the Recess."

A third alternative interpretation of "the Recess" is that it means any adjournment of more than three days pursuant to the Adjournments Clause. U.S. Const. art. I, §5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days...."). This interpretation lacks any constitutional basis. The Framers did not use the word "adjournment" in the Recess Appointments Clause. Instead, they used "the Recess." The Adjournments Clause and the Recess Appointments Clause exist in different contexts and contain no hint that they should be read together. Nothing in the text of either Clause, the Constitution's structure, or its history suggests a link between the Clauses. Without any evidence indicating that the two Clauses are related, we cannot read one as governing the other. We will not do violence to the Constitution by ignoring the Framers' choice of words.

The fourth and final possible interpretation of "the Recess," advocated by the Office of Legal Counsel, is a variation of the functional interpretation in which the President has discretion to determine that the Senate is in recess...This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as "self-executing safeguards against the encroachment or aggrandizement of one branch at the expense of the other." **An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President 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. This cannot be the law. The intersession interpretation of "the Recess" is the only one faithful to the Constitution's text, structure, and history.**

The Board's arguments supporting the intrasession interpretation are not convincing. The Board relies on an Eleventh Circuit opinion holding that "the Recess" includes intrasession recesses. *See Evans v. Stephens* (11th Cir.2004), *cert. denied* (2005). The *Evans* court explained that contemporaneous dictionaries defined "recess" broadly as "remission and suspension of any procedure." The court also dismissed the importance of the definite article "the," discounted the

Constitution's distinction between "adjournment" and "Recess" by interpreting "adjournment" as a parliamentary *action,* and emphasized the prevalence of intrasession recess appointments in recent years.

While we respect our sister circuit, we find the *Evans* opinion unconvincing. Initially, we note that the Eleventh Circuit's analysis was premised on an incomplete statement of the Recess Appointments Clause's purpose: "to enable the President to fill vacancies to assure the proper functioning of our government." This statement omits a crucial element of the Clause, which enables the President to fill vacancies *only when the Senate is unable to provide advice and consent.* ("The recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments."). As we have explained, the Clause deals with the Senate's being unable to provide advice and consent only during "the Recess," an intersession recess. As written, the Eleventh Circuit's statement disregards the full structure of the Constitution's appointments provision, which makes clear that the recess appointments method is secondary to the primary method of advice and consent. The very existence of the advice and consent requirement highlights the incompleteness of the Eleventh Circuit's broad statement of constitutional purpose.

Nor are we convinced by the Eleventh Circuit's more specific arguments. First, the natural meaning of "the Recess" is more limited than the broad dictionary definition of "recess." In context, "the Recess" refers to a specific state of the legislature, so sources other than general dictionaries are more helpful in elucidating the term's original public meaning. *See Virginia* ("The meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used."). Indeed, it is telling that even the Board concedes that "Recess" does not mean *all* breaks which is the interpretation suggested by the dictionary definition.

Second, the Eleventh Circuit fails to explain the use of the singular "Recess," and it underestimates the significance of the definite article "the" preceding "Recess" by relying on twentieth-century dictionaries to argue that "the" can come before a generic term. Contemporaneous dictionaries treated "the" as "noting a *particular* thing."

Third, as the Eleventh Circuit acknowledged, the Supreme Court has suggested that the Constitution does not in fact only use "adjournment" to denote parliamentary action.

In fact, the Constitution uses "adjournment" to refer generally to legislative breaks. It uses "the Recess" differently and then incorporates the definite article. Thus, the Eleventh Circuit's interpretation of "adjournment" fails to distinguish between "adjournment" and "Recess," rendering the latter superfluous and ignoring the Framers' specific choice of words. *Cf. Holmes v. Jennison* (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."); *Marbury v. Madison* (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect....")...

Finally, we would make explicit what we have implied earlier. The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments. Recent Presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their

understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law.

As Chief Justice Marshall made clear in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." In *Marbury*, the Supreme Court established that if the legislative branch has acted in contravention of the Constitution, it is the courts that make that determination. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court made clear that the courts must make the same determination if the executive has acted contrary to the Constitution. That is the case here, and we must strike down the unconstitutional act.

In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated.

B. Meaning of "Happen"

Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order,...we also agree that the petitioner is correct in its understanding of the meaning of the word "happen" in the Recess Appointments Clause. The Clause permits only the filling up of "Vacancies **that may happen** during the Recess of the Senate." U.S. Const. art. II, §2, cl. 3. Our decision on this issue depends on the meaning of the constitutional language "that may happen during the Recess." Canning contends that "happen" means "arise" or "begin" or "come into being." The Board, on the other hand, contends that the President may fill up any vacancies that **"happen to exist" during "the Recess."**

Wow! That is just laughable, but it doesn't surprise me. This president will do anything and everything to avoid his constitutional limitations.

It is our firm conviction that the appointments did not occur during "the Recess." We proceed now to determine whether the appointments are also invalid as the vacancies did not "happen" during "the Recess."

In determining the meaning of "happen" in the Recess Appointments Clause, we begin our analysis as we did in the first issue by looking to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. Upon a simple reading of the language itself, we conclude that the word "happen" could not logically have encompassed any vacancies that happened to exist during "the Recess." If the language were to be construed as the Board advocates, the operative phrase "that may happen" would be wholly unnecessary. Under the Board's interpretation, the vacancy need merely exist during "the Recess" to trigger the President's recess appointment power. The Board's interpretation would apply with equal force, however, irrespective of the phrase "that may happen." Its interpretation therefore deprives that

phrase of any force. By effectively reading the phrase out of the Clause, the Board's interpretation once again runs afoul of the principle that every phrase of the Constitution must be given effect. *Marbury* ("It cannot be presumed that any clause in the constitution is intended to be without effect....").

For our logical analysis of the language with respect to the meaning of "happen" to be controlling, we must establish that it is consistent with the understanding of the word contemporaneous with the ratification. Dictionaries at the time of the Constitution defined "happen" as "to fall out; to chance; to come to pass."...A vacancy happens, or "comes to pass," **only when it first arises**, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess. The term "happen" connotes an event taking place—an action—and it would be plainly incorrect to say that an event happened during some period of time when in fact it happened before that time.

...There is ample other support for this conclusion. First, we repair again to examination of the structure of the Constitution. If we accept the Board's construction, we eviscerate the primary mode of appointments set forth in Article II, Section 2, Clause 2. **It would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose. A President at odds with the Senate over nominations would never have to submit his nominees for confirmation. He could simply wait for a "recess" (however defined) and then fill up all vacancies...**

That seems to me to be so very clear. The requirement of "advice and consent" exists for a reason - to check the power of the executive branch. If all the president must do is wait for a recess to fill vacancies that occur during a session, "advice and consent" becomes meaningless.

As with the first issue, we also find that evidence of the earliest understanding of the Clause is inconsistent with the Board's position. It appears that the first President, who took office shortly after the ratification, understood the recess appointments power to extend only to vacancies that arose during senatorial recess. More specifically, President Washington followed a practice that strongly suggests that he understood "happen" to mean "arise." If not enough time remained in the session to ask a person to serve in an office, President Washington would nominate a person without the nominee's consent, and the Senate would confirm the individual before recessing. Then, if the person declined to serve during the recess, thereby creating a new vacancy during the recess, President Washington would fill the position using his recess appointment power. If President Washington and the early Senate had understood the word "happen" to mean "happen to exist," this convoluted process would have been unnecessary.

In 1792, Edmund Randolph, the first Attorney General, addressed the issue of an office that had become vacant during the session when the Secretary of State sought his view. Addressing the vacancy, concluding that it did not "happen" during the recess, and thereby rejecting the "exist" interpretation, Randolph wrote: "But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd of April 1792. It commenced therefore on that day or may be said to have *happened* on that day."

Alexander Hamilton, similarly, wrote that "it is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." See The Federalist No. 67 (explaining the purpose of the Clause by stating that "vacancies might happen *in their recess*"). In March 1814, Senator Christopher Gore argued that the Clause's scope is limited to "vacancies that may happen during the recess of the Senate": "If the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well-established maxim *Expressio unius est exclusio alterius*." *See United States v. Wells Fargo Bank* (1988) (defining the interpretive canon of "expressio unius est exclusio alterius" as "the expression of one is the exclusion of others").

Additional support for the "arise" interpretation comes from early interpreters who understood that the Clause only applied to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created. Justice Joseph Story explained that "the word 'happen' had relation to some casualty," a statement consistent with the arise interpretation.

We recognize that some circuits have adopted the "exist" interpretation...Those courts, however, did not focus their analyses on the original public meaning of the word "happen." In arguing that happen could mean "exist," the *Evans* majority used a modern dictionary to define "happen" as "befall," and then used the same modern dictionary to define "befall" as "happen to be." As the *Evans* dissent argued, "this is at best a strained effort to avoid the available dictionary evidence." A modern cross-reference is not a contemporary definition. The Board has offered no dictionaries from the time of the ratification that define "happen" consistently with the proffered definition of "happen to exist."

The *Evans* majority also relied on a handful of recess appointments supposedly made by Presidents Washington and Jefferson to offices that became vacant prior to the recess. Subsequent scholarship, however, has demonstrated that these appointments were "in fact examples of the practice of appointing an individual without his consent and then, if he turns down the appointment during the recess, making a recess appointment at that time." Again, as with the appointments by President Washington referenced above, the use of this convoluted method of appointment demonstrates that early interpreters read "happen" as "arise."

The *Evans, Woodley,* and *Allocco* courts all relied on supposed congressional acquiescence in the practice of making recess appointments to offices that were vacant prior to the recess because 5 U.S.C. §5503 permits payment to such appointees in some circumstances. S*ee* 5 U.S.C. §5503 (denying recess appointees payment "if the vacancy they filled existed while the Senate was in session," subject to certain exceptions).

Section 5503 was passed in 1966. Its similar predecessor statute was passed in 1940. The enactment of statutes in 1940 and 1966 sheds no light on the original understanding of the Constitution. This is particularly true as prior statutes refused payments of salaries to all recess appointees whose vacancies arose during the session. *See* Act of Feb. 9, 1863 (stating that no "money shall be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate,

until such appointee shall have been confirmed by the Senate"). We doubt that our sister circuits are correct in construing this legislation as acquiescent. The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist "the overgrown prerogatives of the other branches of government." The Federalist No. 58. The 1863 Act constitutes precisely that: **resistance to executive aggrandizement**. In any event, if the Constitution does not empower the President to make the appointments, "neither Congress nor the Executive can agree to waive... structural protections" in the Appointments Clause. *Freytag*; *cf. Chadha* ("The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.").

As we recalled in our analysis of the first issue, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury*. The Senate's desires do not determine the Constitution's meaning. **The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. These structural provisions serve to protect the *people,* for it is ultimately the people's rights that suffer when one branch encroaches on another.** As Madison explained in *Federalist No. 51,* the division of power between the branches forms part of the "security that arises to the rights of the people." The Federalist No. 51. Or as the Supreme Court held in *Freytag,* "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." In short, nothing in 5 U.S.C. §5503 changes our view that the original meaning of "happen" is "arise."

Our sister circuits and the Board contend that the "arise" interpretation fosters inefficiencies and leaves open the possibility of just what is occurring here—that is, a Board that cannot act for want for a quorum. The Board also suggests more dire consequences, arguing that failure to accept the "exist" interpretation will leave the President unable to fulfill his chief constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, §3, and even suggests that the interpretation we adopt today could pose national security risks. But if Congress wished to alleviate such problems, it could certainly create Board members whose service extended until the qualification of a successor, or provide for action by less than the current quorum, or deal with any inefficiencies in some other fashion. And our suggestion that Congress can address this issue is no mere hypothesis. The two branches have repeatedly, and thoroughly, addressed the problems of vacancies in the executive branch. Congress has provided for the temporary filling of a vacancy in a particular executive office by an "acting" officer authorized to perform all of the duties and exercise all of the powers of that office, including key national security positions. Moreover, Congress statutorily addressed the filling of vacancies in the executive branch not otherwise provided for.

Congress has also addressed the problem of vacancies on various multimember agencies, providing that members may continue to serve for some period past the expiration of their commissions until successors are nominated and confirmed. And we have cited only a fraction of the multimember boards for which Congress has provided such potential extensions.

Admittedly, Congress has chosen not to provide for acting Board members. But that choice cannot support the Board's interpretation of the Clause. **We cannot accept an interpretation of**

the Constitution completely divorced from its original meaning in order to resolve exigencies created by—and equally remediable by—the executive and legislative branches. And as the Supreme Court expressly noted in *New Process Steel,* in the context of the Board, "if Congress wishes to allow the Board to decide cases with only two members, it can easily do so."

In any event, if some administrative inefficiency results from our construction of the original meaning of the Constitution, that does not empower us to change what the Constitution commands. As the Supreme Court observed in *INS v. Chadha,* "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." It bears emphasis that "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of "happen" was "arise," we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

Applying this rule to the case before us, we further hold that the relevant vacancies did not arise during the intersession recess of the Senate. The three Board seats that the President attempted to fill on January 4, 2012, had become vacant on August 27, 2010, August 27, 2011, and January 3, 2012, respectively. On August 27, 2010, the Senate was in the midst of an intrasession recess, so the vacancy that arose on that date did not arise during "the Recess" for purposes of the Recess Appointments Clause. Similarly, the Senate was in an intrasession recess on August 27, 2011, so the vacancy that arose on that date also did not qualify for a recess appointment.

The seat formerly occupied by Member Becker became vacant at the "End" of the Senate's session on January 3, 2012—it did not "happen during the Recess of the Senate." First, this vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.

It has long been the practice of the Senate, dating back to the First Congress, to conclude its sessions and enter "the Recess" with an adjournment *sine die.* The Senate has followed this practice even for relatively brief intersession recesses.

Indeed, various acts of Congress refer to the adjournment *sine die* as the conclusion of the session...We find a recent example of this longstanding practice, with dates nearly identical to those in this case, to be particularly instructive. On December 31, 2007, the Senate met in *pro forma* session and concluded the First Session of the 110th Congress, and entered "the Recess," with an adjournment *sine die. See* Congressional Directory for the 112th Congress (confirming that the First Session of the 110th Congress ended on December 31, 2007); 153 Cong. Rec. 36,508 (2007) (adjourning Senate *sine die*). It then convened the Second Session of the 110th Congress with a *pro forma* session on January 3, 2008. *See* Congressional Directory for the 112th Congress (confirming that the Second Session of the 110th Congress began on January 3, 2008); 154 Cong. Rec. 2 (2008) (convening Second Session).

Because, in this case, the Senate declined to adjourn *sine die* on December 30, 2011, it did not enter an intersession recess, and the First Session of the 112th Congress expired simultaneously with the beginning of the Second Session. *See* 86 Cong. Rec. 14,059 (1941) (noting that, in the absence of an adjournment *sine die* on January 3, 1941, "the third session of the Seventy-sixth Congress expired automatically, under constitutional limitation, when the hour of 12 o'clock arrived).

Although the December 17, 2011, scheduling order specifically provided that the Second Session of the 112th Congress would convene on January 3, 2012, it did not specify when the First Session would conclude. And, at the last *pro forma* session before the January 3, 2012, session, the Senate adjourned to a date certain: January 3, 2012. Because the Senate did not adjourn *sine die*, it did not enter "the Recess" between the First and Second Sessions of the 112th Congress. Becker's appointment therefore expired at the end of the First Session on January 3, 2012, and the vacancy in that seat could not have "happened" during "the Recess" of the Senate.

Second, in any event, the Clause states that a recess appointment expires "at the End of the Senate's next Session," U.S. Const. art. II, §2, cl. 3, not "at the beginning of the Senate's next Recess." Likewise, the structure of Article II, Section 2 supports this reading, for "it makes little sense to allow a second consecutive recess appointment for the same position, because the President and the Senate would have had an entire Senate session during the first recess appointment to nominate and confirm a permanent appointee." The January 3, 2012, vacancy thus did not arise during the recess, depriving the President of power to make an appointment under the Recess Appointments Clause. **Because none of the three appointments were valid, the Board lacked a quorum and its decision must be vacated.**

Even if the "End" of the session were "during the Recess," meaning that the January 3, 2012, vacancy arose during some imaginary recess, we hold that the appointment to that seat is invalid because the President must make the recess appointment during the same intersession recess when the vacancy for that office arose. The Clause provides that a recess appointee's commission expires at "the End of the Senate's next Session," which the Framers understood as "the end of the *ensuing* session." The Federalist No. 67.

Consistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it, the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose. There is no reason the Framers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations. The earliest authoritative commentary on the Constitution explains that the purpose of the Recess Appointments Clause was to give the President authorization "to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject."

As with the first issue, we hold that the petitioner's understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void...

Conclusion

For the reasons set forth above, we grant the petition of Noel Canning and vacate the Board's order. We deny the cross-petition of the Board for enforcement of its invalid order.

So ordered.

CONCURRENCE: GRIFFITH [Not provided.]

The Supreme Court heard oral argument in this case on January 13, 2014. As of this date (February 8, 2014), of course, we await the outcome. I believe they will affirm the D.C. Circuit. President Obama needs to understand that his office does not come with a crown!