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**CONSTITUTIONAL EXAPTATION, POLITICAL
DYSFUNCTION, AND THE RECESS APPOINTMENTS
CLAUSE**

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The so-called Recess Appointments Clause of the Constitution 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.”¹ As of only a few years ago, I considered this clause so minor and quirky that I included it in a book about ten of the Constitution’s “oddest” clauses, right alongside such clearly weird provisions as the Title of Nobility Clause and the Third Amendment.² Though I recognized that the Recess Appointments Clause was probably the least odd of all the clauses in the book in the sense that it has in fact played an important role over the course of the nation’s history, I still felt that it had received such little attention in the courts and among commentators that it would hardly be unreasonable to include it. After all, at the time, I could only find three law review articles that were devoted to discussing its history and meaning.³ The Recess Appointments Clause has become a lot less obscure, however, since January 2013, when the D.C. Circuit invalidated President Obama’s recess appointments to the National Labor Relations Board (NLRB) in *Noel Canning v. NLRB* (and, by implication, his more controversial appointment of Richard Cordray to the Director of the Consumer Financial Protection Bureau).⁴ In the wake of the D.C. Circuit’s decision in *Canning*, still at this writing awaiting a

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¹ U.S. CONST. art. II, § 2, cl. 3.

² See JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* 39-56 (2011) (discussing the “odd” nature of the Recess Appointments Clause).

³ See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *CARDOZO L. REV.* 377 (2005); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 *CARDOZO L. REV.* 443 (2005); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. REV.* 1487 (2005).

⁴ *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), *cert. granted*, 80 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281).

decision by the Supreme Court, nearly every constitutional law scholar in the United States has written an article about the clause.⁵

In *Canning*, the NLRB brought an unfair labor practice action against an employer.⁶ After an Administrative Law Judge (ALJ) found in favor of the NLRB, the employer appealed to a panel of three members of the Board itself, which affirmed the ALJ's decision.⁷ The employer then appealed to the D.C. Circuit, arguing that the NLRB had lacked authority to render a decision because President Obama had improperly appointed two of the three NLRB members that heard the case under the Recess Appointments Clause.⁸ The President had appointed both NLRB members during a short, intrasession break of the Senate (as opposed to the intersession break that occurs between two sessions of Congress) in which the Senate was nonetheless holding "pro forma" sessions for the purpose of blocking any recess appointments.⁹ Importantly, the positions in question had become vacant prior to the beginning of the recess during which they were filled.¹⁰ Relying primarily on textual arguments, the D.C. Circuit unanimously interpreted the Recess

⁵ Granted, this may be an exaggeration, but *many* scholars have written about the issue in the past year. See, e.g., Ryan D. Doerfler, *Go Big or Go Home: The Constitutionality of Recess Appointments Following Pro Forma Sessions of the Senate*, 65 ADMIN. L. REV. 101 (2013); Robert G. Natelson, *The Origins and Meaning of "Vacancies That May Happen During the Recess" in the Constitution's Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL'Y 199 (2014); Nicole Schwartzberg, *What Is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J.L. & POL. 231 (2013); Peter Strauss, *The Pre-Session Recess*, 126 HARV. L. REV. F. 130 (2013); Cass R. Sunstein, *Originalism v. Burkeanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 126 (2013); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013); Alexander M. Wolf, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 FORDHAM L. REV. 2055 (2013); Norman Ornstein, *Ornstein: Court Ruling on Recess Appointments Is an Exercise of Judicial Overreach*, ROLL CALL (Feb. 6, 2013, 6:05 PM), http://www.rollcall.com/news/ornstein_court_ruling_on_recess_appointments_is_an_exercise_of_judicial-222-215-1.html, archived at <http://perma.cc/F8VV-92EK>; Jeffrey Toobin, *A Judicial Atrocity*, NEW YORKER (Jan. 29, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/the-awful-recess-appointment-ruling-in-canning-v-national-labor-relations-board.html>, archived at <http://perma.cc/8HBJ-UK99>; Elizabeth Wydra, *Symposium: The Constitution's Framers Gave the President Recess Appointment Power to Foster Functional Government*, SCOTUSBLOG (July 17, 2013, 12:33 PM), <http://www.scotusblog.com/2013/07/symposium-the-constitutions-framers-gave-the-president-recess-appointment-power-to-foster-functional-government>, archived at <http://perma.cc/6RHF-WB58>.

⁶ *Canning*, 705 F.3d at 492.

⁷ *Id.* at 493.

⁸ *Id.*

⁹ *Id.* at 498-99 (discussing the Senate's use of pro forma sessions where, for the most part, no official business was taking place).

¹⁰ See *id.* at 498 (describing the timeline of Board vacancies and appointments).

Appointments Clause narrowly, concluding that the President may only make a recess appointment during the *intersession* break,¹¹ and then only to fill vacancies that have arisen during the break itself.¹² Because the appointments were made during an *intrasession* break to positions that had become vacant prior to that break, the court held that President Obama's recess appointments were invalid. Other circuits reached similar holdings, based on similar analyses.¹³

Why would the lower courts have engaged in such an ultra-textual approach to interpreting the Recess Appointments Clause, as opposed to a more functional or pragmatic approach? In my view, one possibility has to do with a fairly unique and interesting feature of the Clause, namely that its original function has been rendered entirely unnecessary by developments subsequent to its ratification. Back in the early days of the republic, transportation and communication were slow and difficult, and the Senate took breaks that tended to be far longer than they are today.¹⁴ There was a significant possibility that the Senate would be unable to convene for a long period of time, thus preventing the President from filling a vacancy through the default process of Senate confirmation under the regular Appointments Clause. Moreover, vacancies were arguably more problematic in the eighteenth and nineteenth centuries, as the number of people who worked for any particular federal department was far fewer than it would become with the growth of the administrative state in the early twentieth century.¹⁵ At the time, then, the Recess Appointments Clause performed an essential function – allowing the President to make temporary appointments in the quite likely case that he could not reasonably wait until the Senate returned to Washington to confirm an appointee.

Now, though, none of this is really a concern. The Senate does not break for long periods of time and it can easily reconvene in the case of an emergency. All it takes is an email and a plane trip and a Senator can be back in Washington at a moment's notice. I think it is safe to say that if we were to write the Constitution anew today, we would not see any need to include a provision like the Recess Appointments Clause to deal with the problem of an absent Senate. It is for this reason that I once referred to the Clause as the

¹¹ *Id.* at 506.

¹² *Id.* at 514 (“[T]he President must make the recess appointment during the same intersession recess when the vacancy for that office arose.”).

¹³ See, e.g., *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 221-43 (3d Cir. 2013) (endorsing *Canning*'s analysis to support a narrow reading of the Recess Appointments Clause based on textual and historical arguments); *NLRB v. Enter. Leasing Co. Se. LLC*, 722 F.3d 609, 647-52 (4th Cir. 2013) (adopting the reasoning in *Canning* and *New Vista* to find the President's appointments to the NLRB unconstitutional).

¹⁴ See Turley, *supra* note 5, at 1533 (explaining that early congressional recesses lasted an average of seven months).

¹⁵ See *id.* at 1533-34. For example, in 1790 the executive branch consisted of “only about one thousand nonmilitary employees.” *Id.* at 1533.

“oddest clause of all.”¹⁶ To borrow a concept from biology, we might say that the Clause is vestigial. It is, in other words, the tonsils of the Constitution, or perhaps its appendix.

Despite the fact that the Clause seems to be largely vestigial, courts have nonetheless been called on to interpret it. But what a strange exercise it must be to interpret a legal provision that no longer has any legitimate function. This is obviously so for the typical interpreter who will go beyond the text to figure out which interpretation of the provision best serves the provision’s purpose. And, although I have no personal experience as a textualist interpreter, I would have to imagine that interpreting a purposeless provision must strike even a textualist as a highly odd enterprise. Sure, the purpose or function of the Clause may not play a role in such a judge’s evaluation, but would the judge not want to know – would he or she not be curious, at least – how his or her favored interpretation either furthers or impedes the provision’s function?

Even though the Clause stopped serving its original function long ago, Presidents have, of course, used it consistently over the course of modern history. This fact leads us to consider whether the provision performs some other legitimate function in furthering our constitutional democracy. A cynical observer would undoubtedly say no; Presidents simply use the power conferred upon them by the Clause to play hardcore politics and gain any kind of advantage they can over the opposing party. But perhaps this is not the only way to look at it. Maybe instead there is at least some truth to the following proposition: When the typical appointments process has become dysfunctional, as it quite arguably has been for many years,¹⁷ the Recess Appointments Clause allows the President to avoid this dysfunctional process and restore some functionality to a broken system.

Returning to the world of biology, then, the Recess Appointments Clause may be less “vestigial” and more appropriately an example of what we might call “constitutional exaptation.” In evolutionary biology, the term “exaptation,” introduced by legendary evolutionary biologist Stephen Jay Gould and coauthor Elisabeth Vrba, refers to an anatomical structure or behavior that originally served one function but now serves a different function.¹⁸ The most well-known examples of exaptation are feathers, which first served to regulate the body temperature of dinosaurs and later allowed birds to fly,¹⁹ and the

¹⁶ See Jay Wexler, *Might the Recess Appointments Clause Be the Oddest Clause of All?*, AM. CONST. SOC’Y BLOG (Jan. 5, 2012), <http://www.acslaw.org/acsblog/might-the-recess-appointments-clause-be-the-oddest-clause-of-all>, archived at <http://perma.cc/MSH5-PDES>.

¹⁷ Now, perhaps, the appointments process may not be as dysfunctional, since the filibuster rule has been abandoned for most appointments. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1.

¹⁸ Stephen Jay Gould & Elisabeth S. Vrba, *Exaptation—a Missing Term in the Science of Form*, 8 PALEOBIOLOGY 4, 6 (1982) (“We suggest that such characters, evolved for other usages (or for no function at all), and later ‘coopted’ for their current role, be called *exaptations*.”).

¹⁹ *Id.* at 7 (comparing the way early dinosaurs may have used feathers to the current role

lungs of some early fish, which evolved into gas bladders that help modern fish remain buoyant.²⁰ In the years since Gould and Vrba's original article, scientists have characterized a wide range of animal behaviors and traits as exaptations, from insects that remove their own wings²¹ to blennies that care for their offspring in rocky intertidal habitats²² to giant water bugs that can escape from flash floods.²³ Under this theory, the Recess Appointments Clause is an example of constitutional exaptation. Though the Clause originally served the purpose of allowing the President to appoint officers when the Senate was truly absent, its current function is to allow the President to appoint officers when the default appointments process has become dysfunctional.

Although this is the first article, as far as I know, to use the phrase "constitutional exaptation," the field of Constitutional Exaptation Studies (or "CES," if you will) was in fact inaugurated by Cornell's Michael Dorf in his lecture, "Spandrel or Frankenstein's Monster? The Vices and Virtues of Retrofitting in American Law," delivered at the William and Mary Law School and subsequently published in the *William and Mary Law Review*.²⁴ In his lecture, Professor Dorf refers to exaptation as biology's version of retrofitting,²⁵ which in the legal context refers to "[l]egal institutions, doctrines, and texts that were originally thought to serve one purpose [but] come to serve quite different purposes."²⁶ Dorf chooses the Second Amendment as his example of legal retrofitting rather than the Recess Appointments Clause, arguing that under the Supreme Court's decision in *Heller*, the purpose of the

that feathers play in flight). Other examples from Gould and Vrba's article include mammalian lactation and sexual mimicry in hyenas. *Id.* at 8-10.

²⁰ Sarah Longo et al., *Homology of Lungs and Gas Bladders: Insights from Arterial Vasculature*, 274 J. MORPHOLOGY 687, 687 ("The gas bladder has long been regarded as an evolutionary modification of lungs.").

²¹ Derek A. Roff, *Exaptation and the Evolution of Dealation in Insects*, 2 J. EVOLUTIONARY BIOLOGY 109, 109-11 (1989) ("[W]inged insects are likely (preadapted) to evolve the behavioral trait of dealation resulting in enhanced reproduction . . .").

²² Vitor C. Almada & Ricardo Serrão Santos, *Parental Care in the Rocky Intertidal: A Case Study of Adaptation and Exaptation in Mediterranean and Atlantic Bennies*, 5 REVIEWS FISH BIOLOGY & FISHERIES 23, 31-33 (1995) ("The prevalence of parental care in rocky intertidal species is to be viewed as an exaptation because it is present in species related to each intertidal resident species but living in other places.").

²³ David A. Lytle & Robert L. Smith, *Exaptation and Flash Flood Escape in the Giant Water Bugs*, 17 J. INSECT BEHAV. 169, 169 (2004) (explaining "rainfall response behavior" of insects as either an "addition exaptation" or a "transfer exaptation").

²⁴ Michael C. Dorf, *Spandrel or Frankenstein's Monster? The Vices and Virtues of Retrofitting in American Law*, 54 WM. & MARY L. REV. 339, 340 (2012).

²⁵ See *id.* at 340-41 & n.9 (discussing the phenomenon of exaptation in his introduction to legal retrofitting).

²⁶ *Id.* at 341.

Second Amendment would seem to have morphed almost completely from protection of state militia to protection of firearms for self-defense.²⁷

Like I have here, Professor Dorf limits his analysis of legal retrofitting (or constitutional exaptation) to the descriptive realm, stopping short of developing any sort of normative argument in favor of interpreting constitutional provisions to further their new functions. We will have to wait and see whether such a normative argument can be developed. Who knows? Perhaps this will turn out to be the next significant project within the field of CES. If it turns out that someone can indeed craft a normative argument for interpreting constitutional provisions to promote their new, “exapted” purposes, perhaps that argument will be able to serve as the basis of a legitimate functional critique of (or, alternatively, as providing further support for) the judiciary’s ultimate interpretation of the Recess Appointments Clause in *Canning* and beyond. Only time will tell.

²⁷ *Id.* at 365-66 (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). Dorf also explains the phenomena of judicial review and political parties as examples of legal retrofitting, but these examples are, in my view, too general to be the proper focus of constitutional exaptation studies (might this be the first intrafield split in the history of CES?). *See id.* at 360-64.