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II. Congress & the Obama White House

In This Section:

Zivotofsky v. Kerry

13-628

Ruling Below: Zivotofsky v. Secretary of State, 725 F.3d 197 (D.C. Cir. 2013), *cert granted* 134 S.Ct. 1873 (2014).

Three-year-old child, through his United States citizen parents, brought action for declaratory and injunctive relief against Secretary of State, alleging that child, who was born in Jerusalem, was entitled pursuant to the Foreign Relations Authorization Act to have "Jerusalem, Israel" listed as his place of birth on his U.S. passport. The United States District Court for the District of Columbia granted Secretary's motion to dismiss. Child appealed. The Court of Appeals reversed and remanded for further development of the record, in light of child's amendment of the claim for injunctive relief, to seek "Israel" as designated place of birth. On remand, Secretary renewed the motion to dismiss or for summary judgment and child cross-moved for summary judgment. The District Court granted motion to dismiss. Child appealed. The Court of Appeals affirmed, and denied rehearing en banc. Certiorari was granted. The Supreme Court vacated and remanded.

Question Presented: Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

Menachem Binyamin ZIVOTOFSKY, by his Parents and Guardians Ari Z. and Naomi Siegman ZIVOTOFSKY, Appellant
v.
SECRETARY OF STATE, Appellee.

United States Court of Appeals, District of Columbia Circuit

Decided on July 23, 2013

[Excerpt; some footnotes and citations omitted.]

HENDERSON, Circuit Judge

Section 214(d) of the Foreign Relations Authorization Act, requires the Secretary (Secretary) of the United States Department of State (State Department) to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian so requests. The Secretary has not enforced the provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign

nations. We agree and therefore hold that section 214(d) is unconstitutional.

I. BACKGROUND

The status of the city of Jerusalem is one of the most contentious issues in recorded history. For more than two millennia, the city has been won and lost by a host of sovereigns. The controversy continues today as the state of Israel and the Palestinian people both claim sovereignty over the city. It is against this background that the dispute in this case arises.

Since the middle of the twentieth century, United States Presidents have taken a position of strict neutrality on the issue of which sovereign controls Jerusalem. After Israel declared its independence in 1948, President Harry S. Truman promptly recognized it as a foreign sovereign. Nevertheless, Presidents from Truman on have consistently declined to recognize Israel's — or any country's — sovereignty over Jerusalem… As the Secretary summarized in response to interrogatories proposed in this case:

> Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel.

The State Department's Foreign Affairs Manual (FAM) contains passport administration rules that reflect the policy of neutrality. The FAM first directs in detail how the applicant's birthplace is to be stated on his passport. "As a general rule, enter the country of the applicant's birth in the [place of birth field on the] passport." If, however, the applicant was born "in territory disputed by another country, the city or area of birth may be written" in lieu of the country. Similarly, an applicant may request that his passport list the "city or town, rather than the country, of [his] birth." Regarding Jerusalem, the FAM sets forth a detailed policy:

> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation. . . .

The FAM specifically provides that, for an applicant born in Jerusalem: "Do not write Israel or Jordan" on his passport and, further, that Israel "[d]oes not include

Jerusalem. . . ." In sum, the State Department must record "Jerusalem" — not "Jerusalem, Israel" or "Israel" — as the place of birth on the passport for an applicant born in Jerusalem after 1948.

Recently, the Congress has attempted to alter the Executive branch's consistent policy of neutrality. In 1995, it enacted the Jerusalem Embassy Act, which provides that "Jerusalem should be recognized as the capital of the State of Israel"; [and] "the United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999"… During the Congress's consideration of the legislation, the Executive branch communicated with the Congress regarding its constitutionality. The United States Department of Justice (DOJ) via an assistant attorney general wrote to the White House Counsel: "It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States," that "the President's recognition power is exclusive" and that "[t]he proposed bill would severely impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations." The DOJ official explained that his conclusions were "not novel"… Similarly, the then-Secretary expressed opposition to the legislation in a letter to the Senate Majority Leader. The Secretary explained that … "any effort by Congress to bring [Jerusalem] to the forefront is ill-advised and potentially very damaging to the success of the peace process." He echoed the DOJ official's doubts regarding the bill's constitutionality. Ultimately, the Congress enacted the legislation with a waiver provision authorizing the President to suspend the funding restriction for six-month periods to "protect the national security interests of the United States."

On September 30, 2002, President George W. Bush signed into law the Foreign Relations Authorization Act. Section 214(d) is the provision at issue and it provides:

> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. — For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

When the President signed the Act, however, he also issued a signing statement, noting that "the Act contains a number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs," including section 214:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international

> affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

Menachem Zivotofsky (Zivotofsky) is a United States citizen born in 2002 in Jerusalem to parents who are United States citizens. In 2002, Zivotofsky's mother applied for a United States passport for Zivotofsky, listing his birthplace as "Jerusalem, Israel." The State Department, however, following its Jerusalem policy set forth in 7 FAM 1383.5-6, issued a passport in Zivotofsky's name listing "Jerusalem" as his place of birth.

On September 16, 2003, Zivotofsky, "by his parents and guardians, Ari Z. and Naomi Siegman Zivotofsky," brought suit against the Secretary, seeking, inter alia, declaratory relief and a permanent injunction ordering the Secretary to issue him a passport listing "Jerusalem, Israel" as his place of birth. The litigation has been up and down the appellate ladder. First, on September 7, 2004, the district court dismissed the case, concluding that Zivotofsky lacked Article III standing and, alternatively, that the case presented a nonjusticiable political question. We subsequently reversed and remanded, holding that Zivotofsky had standing… We "remand[ed] the case to the district court so that both sides may develop a more complete record relating to these and other subjects of dispute."

On September 19, 2007, the district court again dismissed the case, once more deciding it presented a nonjusticiable political question. We affirmed, concluding that "[b]ecause the judiciary has no authority to order the Executive Branch to change the nation's foreign policy in this matter, this case is nonjusticiable under the political question doctrine."

The United States Supreme Court vacated and remanded, holding that the case does not present a political question. The Court explained that "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches. . . . [i]nstead, Zivotofsky requests that the courts enforce a specific statutory right." Given that the parties do not dispute the substance of section 214(d), that is, its requirement that "Israel" be recorded on the passport as the applicant's birthplace at his request, "the only real question for the courts is whether the statute is constitutional," which requires "deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution." The Court further explained that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers."

II. THE MERITS

Before addressing the merits, we address two preliminary matters. First, … Zivotofsky maintains that we should not reach the Secretary's constitutional defense because section 214(d) constitutes permissible passport legislation. But Zivotofsky's proposed solution — that we hold in effect that the President's constitutional recognition power is not so

broad as to encompass section 214(d) — is a constitutional holding. We would not avoid "pass[ing] upon a constitutional question" by resolving the case in that manner; instead we would give the President's constitutional power the narrow construction Zivotofsky presses…

Second, in *Youngstown Sheet & Tube Company v. Sawyer*, Justice Jackson set forth a tripartite framework for evaluating the President's powers to act depending on the level of congressional acquiescence. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." … Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." … Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Both parties agree that this case falls into category three. In this category the President may nonetheless exercise — and the Congress cannot invade — the President's "exclusive power." The question here is whether exclusive Executive branch power authorizes the Secretary to decline to enforce section 214(d).

A. The Recognition Power

Recognition is the act by which "a state commits itself to treat an entity as a state or to treat a regime as the government of a state." "The rights and attributes of sovereignty belong to [a state] independently of all recognition, but it is only after it has been recognized that it is assured of exercising them." Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[] to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." …

A government typically recognizes a foreign state by "written or oral declaration." Recognition may also be implied…

As noted earlier, the Supreme Court has directed us to examine the "textual, structural, and historical evidence" the parties have marshaled regarding "the nature . . . of the passport and recognition powers." We first address the recognition power and, in particular, whether the power is held exclusively by the President.

B. The President and the Recognition Power

Text and Originalist Evidence

Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power. In support of his view that the recognition power lies exclusively with the President, the Secretary cites the "receive ambassadors" clause of Article II, Section 3 of the Constitution, which provides, inter alia, that the President

"shall receive Ambassadors and other public Ministers." But the fact that the President is empowered to receive ambassadors, by itself, does not resolve whether he has the exclusive authority to recognize foreign nations…

Originalist evidence also fails to clarify the Constitution's text…

The President's power to receive ambassadors may of necessity mean that he has the power not only to "receive" a foreign ambassador but also to decide whether and when to receive him…

There is little [] ratification-era evidence regarding the recognition of foreign governments. In fact, "there is no record that the subject of recognizing foreign states or governments ever came up in the [Constitutional] Convention." … In other words, the Framers apparently were not concerned with how their young country recognized other nations because the issue was not important to them at the time of ratification.

Post-ratification History

Both parties make extensive arguments regarding the post-ratification recognition history of the United States. As the Supreme Court has explained, longstanding and consistent post-ratification practice is evidence of constitutional meaning. We conclude that longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power.

Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations… In 1817, President James Monroe prevailed in a standoff with Speaker of the House Henry Clay over the recognition power… In 1864 and, again, 1896, the Executive branch challenged the individual houses of the Congress for intruding into the realm of recognition, which eventually led the Congress to refrain from acting… In 1919, the Congress once again relented in response to the President's assertion of exclusive recognition power…

Zivotofsky marshals several isolated events in support of his position that the recognition power does not repose solely in the Executive but they are unconvincing…

Supreme Court Precedent

It is undisputed that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" While the President's foreign affairs powers are not precisely defined, the courts have long recognized the President's presumptive dominance in matters abroad. Thus, the Court, echoing the words of then-Congressman John Marshall, has described the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations."

The Supreme Court has more than once declared that the recognition power lies exclusively with the President. To be sure,

the Court has not held that the President exclusively holds the power. But, for us — an inferior court — "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."

In *Williams v. Suffolk Insurance Company*, the issue before the Court was whether "the Falkland islands . . . constitute any part of the dominions within the sovereignty of the government of Buenos Ayres." The Court decided that the President's action in the matter was "conclusive on the judicial department."

...

Similarly, in *Banco Nacional de Cuba v. Sabbatino*, without determining whether the United States had derecognized Cuba's government under Fidel Castro, the Court explained that "[p]olitical recognition is exclusively a function of the Executive." …

President Franklin D. Roosevelt's 1933 recognition of the Soviet Union led to three eases supporting the conclusion that the President exclusively holds the recognition power…

In *Belmont*, the Court held that New York State's conflicting public policy did not prevent the United States from collecting assets assigned by the Litvinov Assignment. It noted that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts." But the Court then more specifically explained that "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction" and plainly "within the competence of the President."…

In *Guaranty Trust*, the Court held that a United States claim for payment of funds held in a bank account formerly owned by Russia was barred by New York State's statute of limitations. In so doing, it relied on the Executive branch's recognition determination…

Finally, the Supreme Court in *Pink*, following *Belmont*, held that New York State could not "deny enforcement of a claim under the Litvinov Assignment because of an overriding [state] policy." The Court defined the recognition power broadly and placed it in the hands of the President…

The Court also treated the recognition power as belonging exclusively to the Executive in *Baker v. Carr*. It explained that "recognition of [a] foreign government[] so strongly defies judicial treatment that without executive recognition a foreign state has been called a republic of whose existence we know nothing." …

Zivotofsky relies on *United States v. Palmer*, where the Court stated that "the courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." But this observation simply means that the judiciary will not decide the question of recognition. When the High Court has discussed the recognition power with more specificity, as it did in the above-cited cases,

it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the exclusive authority. In addition, Zivotofsky's reliance on *Cherokee Nation v. Georgia*, is misplaced as the case dealt with the recognition of Indian tribes which, the Cherokee Nation opinion itself explains, are materially distinct from foreign nations.

Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post-ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign.

C. Section 214(d) and the "Passport Power" vis-à-vis the Recognition Power

Having concluded that the President exclusively holds the recognition power, we turn to the "passport power," pursuant to which section 214(d) is alleged to have been enacted. We must decide whether the Congress validly exercised its passport power in enacting section 214(d) or whether section 214(d) "impermissibly intrudes" on the President's exclusive recognition power.

Zivotofsky first contends that section 214(d) is a permissible exercise of the Congress's "passport power." In its remand to us, the Supreme Court directed that we examine, inter alia, the parties' evidence regarding "the nature of . . . the passport . . . power[]." Neither party has made clear the textual source of the passport power in the Constitution, suggesting that it may come from the Congress's power regarding immigration and foreign commerce. Nonetheless, it is clear that the Congress has exercised its legislative power to address the subject of passports. It does not, however, have exclusive control over all passport matters. Rather, the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated… After the first passport law was enacted in 1856, "[t]he President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds." And once the Congress enacted the Passport Act of 1926, each successive President interpreted the Act to give him the authority to control the issuance of passports for national security or foreign policy reasons…

Zivotofsky relies on Supreme Court precedent that, he contends, shows the Executive cannot regulate passports unless the Congress has authorized him to do so. In both cases cited, the Court held that the Executive branch acted properly once the Congress had authorized it to so act. But in neither case did the Court state that the Congress's power over passports was exclusive. Indeed, in *Haig*, the Court made clear that it did not decide that issue. Likewise, in *Zemel*, the Court in effect rejected the dissenters' statements implying that the Congress exclusively regulates passports. Instead, the Court emphasized that the "Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas." Thus, while the Congress has the power to enact passport

legislation, its passport power is not exclusive…

The question we must answer, then, is whether section 214(d) — which speaks only to passports — nonetheless interferes with the President's exclusive recognition power. Zivotofsky contends that section 214(d) causes no such interference because of its limited reach, that is, it simply regulates one detail of one limited type of passport. But the President's recognition power "is not limited to a determination of the government to be recognized"; it also "includes the power to determine the policy which is to govern the question of recognition." Applying this rule, the *Pink* Court held that New York State policy was superseded by the Litvinov Assignment when the policy — which declined to give effect to claims under the Litvinov Assignment — "collid[ed] with and subtract[ed] from the [President's recognition] policy" by "tend[ing] to restore some of the precise impediments to friendly relations which the President intended to remove" with his recognition policy.

With the recognition power overlay, section 214(d) is not, as Zivotofsky asserts, legislation that simply — and neutrally — regulates the form and content of a passport. Instead, as the Secretary explains, it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem… The State Department FAM implements the Executive branch policy of neutrality by designating how a Jerusalem-born citizen's passport notes his place of birth. For an applicant like Zivotofsky, who was born in Jerusalem after 1948, the FAM is emphatic: denote the place of birth as "Jerusalem." In his interrogatory responses, the Secretary explained the significance of the FAM's Jerusalem directive: "Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." Thus, "[w]ithin the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." … We find the Secretary's detailed explanation of the conflict between section 214(d) and Executive recognition policy compelling, especially given "our customary policy to accord deference to the President in matters of foreign affairs." By attempting to alter the State Department's treatment of passport applicants born in Jerusalem, section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power.

Our reading of section 214(d) as an attempted legislative articulation of foreign policy is consistent with the Congress'

characterization of the legislation. By its own terms, section 214 was enacted to alter United States foreign policy toward Jerusalem. The title of section 214 is "United States Policy with Respect to Jerusalem as the Capital of Israel." Section 214(a) explains that "[t]he Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President . . . to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." … Various members of the Congress explained that the purpose of section 214(d) was to affect United States policy toward Jerusalem and Israel.

Moreover, as the Secretary averred earlier in this litigation, the 2002 enactment of section 214 "provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that "U.S. policy regarding Jerusalem has not changed." For example, various Palestinian groups issued statements asserting that section 214 "undermine[d] the role of the U.S. as a sponsor of the peace process," "undervalu[ed] . . . Palestinian, Arab and Islamic rights in Jerusalem" and "rais[ed] questions about the real position of the U.S. Administration vis-à-vis Jerusalem." As in *Pink*, the Secretary's enforcement of section 214(d) "would collide with and subtract from the [President's] policy" by "help[ing] keep alive one source of friction" between the United States and parties in conflict in the Middle East "which the policy of recognition was designed to eliminate."

Zivotofsky argues that the Secretary has not suffered — and will not suffer — adverse foreign policy consequences by issuing him a passport that lists his place of birth as Israel. He asserts that the Secretary has admitted that, from time to time, the State Department has inadvertently issued passports with "Israel" as the place of birth to citizens born in Jerusalem and that there is no evidence that the issuance of the passports resulted in harm to the United States's foreign policy interests… Likewise, Amicus Zionist Organization of America exhaustively catalogues official United States websites that contained "Jerusalem, Israel" before recent revisions… Zivotofsky also contends that the Secretary's fear of harm is exaggerated because section 214(d)'s passport directive is not unlike its Taiwan directive that allows an applicant born in Taiwan to specify as his birthplace "Taiwan" rather than "China," which directive has been peacefully implemented.

Nonetheless, we are not equipped to second-guess the Executive regarding the foreign policy consequences of section 214(d). As the Executive — the "sole organ of the nation in its external relations" — is the one branch of the federal government before us and both the current Executive branch as well as its predecessor believe that section 214(d) would cause adverse foreign policy consequences (and in fact presented evidence that it had caused foreign policy consequences), that view is conclusive on us. Moreover, Zivotofsky's reliance on the State Department's earlier, incidental references to "Jerusalem, Israel" or inclusion of "Israel" on the passports of United States

citizens born in Jerusalem is entirely misplaced. The controversy does not arise because a website or passport at one time included a reference connecting Jerusalem and Israel. Rather, the unconstitutional intrusion results from section 214(d)'s attempted alteration of United States policy to require the State Department to take an official and intentional action to include "Israel" on the passport of a United States citizen born in Jerusalem…

D. Zivotofsky's Remaining Arguments

Zivotofsky challenges the Secretary's decision declining to enforce section 214(d) on two additional grounds but we find both grounds without merit.

First, Zivotofsky contends that section 214(d) remedies the State Department's discriminatory policy against supporters of Israel. He notes that an individual born in Tel Aviv or Haifa after 1948 may list as his place of birth either "Israel" or his local birthplace if he objects to including "Israel." An individual born in Jerusalem after 1948, as we have discussed, may not choose between a country and a locality; rather, his place of birth must be listed as "Jerusalem." Zivotofsky laments that "[n]o matter where in Jerusalem an American citizen may be born . . . he or she does not have the option given to American citizens born in Tel Aviv or Haifa to choose whether to record the country or city of birth." We do not decide the merits of this contention because Zivotofsky did not make it in district court and it is therefore waived.

Second, Zivotofsky argues that President George W. Bush's signing statement — indicating that section 214 is, in his view, unconstitutional — is invalid because he should have instead vetoed the enactment to register his objection. The signing statement is irrelevant…

For the foregoing reasons, we affirm the judgment of the district court dismissing the complaint on the alternative ground that section 214(d) impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him under the Constitution and is therefore unconstitutional.

So ordered.

TATEL, Circuit Judge, concurring:

Although I concur fully in the court's opinion, I write separately to elucidate my thinking about the important and novel separation-of-powers question this case presents. The Secretary's argument that Section 214(d) is unconstitutional turns on two subsidiary arguments: first, that the power to recognize foreign sovereigns belongs to the President alone; and second, that Section 214(d) interferes with the President's exclusive exercise of that power. But I think it best to begin with an issue that underlies and helps frame these recognition power questions, namely, Congress's so-called passport power.

I.

It is beyond dispute that Congress's immigration, foreign commerce, and

naturalization powers authorize it to regulate passports. Zivotofsky would have us stop there. He reasons that because Congress has the power to regulate passports and because Section 214(d) is passport legislation, the statute is constitutional. This argument, however, overlooks the independent limitations the Constitution imposes even on legislation within Congress's enumerated powers… For example, the Commerce Clause authorizes Congress to regulate interstate communications, but a communications statute may nevertheless run afoul of the First Amendment.

The fact that Congress has affirmative authority to regulate passports thus does not resolve the question of whether Section 214(d) comports with the separation of powers… Congress has authority to regulate passports; we need only decide whether this particular exercise of that authority, Section 214(d), infringes on the Executive's recognition power.

II.

As I noted at the outset, in order to demonstrate that Section 214(d) is unconstitutional the Secretary must begin by establishing that the recognition power in fact inheres exclusively in the President. This is because, as the court explains, a President may "take[] measures incompatible with the expressed . . . will of Congress" only when he acts pursuant to an "exclusive" Executive power. If the Constitution entrusts the recognition power exclusively to the President, as the Secretary claims, there remains the even more difficult question of whether Section 214(d) intrudes upon his exercise of that power. In resolving both questions, we find ourselves in relatively uncharted waters with few fixed stars by which to navigate.

A.

I have little to add to the court's thorough discussion of whether the Constitution endows the President with exclusive power to recognize foreign sovereigns. As the court details, there is scant constitutional text to guide us and little contemporaneous evidence of the Framers' intent… To be sure, throughout our history Congress has often acquiesced in a President's unilateral recognition of a foreign sovereign… But neither party (nor any of the amici) points to any time in our history when the President and Congress have clashed over an issue of recognition.

Given all that, it is unsurprising that the Supreme Court has had no occasion to definitively resolve the political branches' competing claims to recognition power. True, the Court has consistently and clearly stated that *courts* have no authority to second-guess recognition decisions. And in so doing, it has often referred to the recognition power as inhering exclusively in the Executive. That said, the Court has also occasionally suggested that Congress and the President share that power. Significantly for our purposes, the Court has made many more statements falling in the former category than in the latter…

To say that the question has yet to be conclusively answered, however, is not to say — at least from the perspective of this "inferior" court — that the answer is unclear. All told, given the great weight of historical and legal precedent and given that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," we are compelled to conclude that "[p]olitical recognition is exclusively a function of the Executive."

B.

The critical question, then, is whether Section 214(d) in fact infringes on the President's exclusive authority to recognize foreign sovereigns. The Secretary's position is straightforward: By preventing passport holders from identifying a place of birth that conflicts with the President's recognition determinations, the Secretary's place-of-birth policy implicates recognition. This is all the more evident in the context of Jerusalem. As Judge Edwards put it, "The Secretary's rules regarding the designation of Jerusalem on passports . . . plainly implement the Executive's determination not to recognize Jerusalem as part of any sovereign regime." Given that the Secretary's place-of-birth policy implicates the recognition power and given that Section 214(d) displaces that policy, the Secretary reasons, the statute unconstitutionally intrudes on the President's recognition power.

Zivotofsky sees things differently. His first and broadest contention is that the President's recognition power, even if exclusive, does not include the power to determine whether certain territory belongs to a particular foreign state. The recognition power may give the President authority to decide whether to recognize a foreign entity as a sovereign, he argues, but it includes no authority to determine that sovereign state's territorial boundaries. This line of argument falls well short of its mark. The power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place. For instance, recognizing an established sovereign's former colony as a new, independent sovereign seems a straightforward exercise of what even Zivotofsky would concede to be the recognition power. But such recognition necessarily entails a boundary determination — the colony, once formally recognized as part of one sovereign's territory, is effectively recognized as belonging to another. Indeed, precedent binding on this court confirms that the recognition power includes authority to determine territorial boundaries.

Zivotofsky's narrower argument, powerfully developed in amicus briefs submitted by members of Congress and the Anti-Defamation League, is much stronger. Letting Jerusalem-born individuals choose to designate "Israel" as their place of birth, he contends, neither effects a recognition of Israel's sovereignty over Jerusalem nor otherwise interferes with the President's recognition power. As he emphasizes, nothing in Section 214(d) requires the Secretary to list "Israel" as the place of birth

for all Jerusalem-born U.S. citizens. Rather, it merely enables those Jerusalem-born citizens who support Israel to choose to designate their place of birth consistently with that view. Aside from the Secretary's say-so, Zivotofsky goes on to argue, there is simply no reason to conclude that the statute's limited interference with the way the Secretary records a passport holder's place of birth implicates the recognition power. Nor is there reason to believe that implementing Section 214(d) would adversely affect foreign policy. Because affected passports would list "Israel" — not "Jerusalem, Israel" — observers would discern no U.S. policy identifying Jerusalem as part of Israel.

What makes this case difficult is that Zivotofsky is partly right. As the Secretary concedes, a primary purpose of the place-of-birth field is to enable the government to identify particular individuals — *e.g.*, by distinguishing one Jane Doe from another born the very same day. And the fact that the Secretary permits individuals to choose to list a city or area of birth instead of a country of birth does tend to suggest that its place-of-birth policy is also about personal identity.

That the Secretary's policy is about identification and personal identity, however, does not mean that it does not also implicate recognition. In fact, it clearly does. Over the years, the Secretary has been incredibly consistent on this point: in no circumstances — including circumstances beyond the Jerusalem issue — can an individual opt for a place-of-birth designation inconsistent with United States recognition policy. For example, because the United States never recognized the Soviet Union's annexation of Latvia, Lithuania, and Estonia, the Secretary "did not authorize entry of 'U.S.S.R.' or the 'Soviet Union' as a place of birth" for people born in these areas. Zivotofsky identifies no deviation from this policy, nor am I aware of one. The Taiwan directive to which Zivotofsky repeatedly points only underscores the Secretary's consistency. Because the United States recognizes Taiwan as an area within China, permitting individuals to list "Taiwan" as their place of birth comports with the Secretary's general policy. Moreover, one cannot possibly read the Foreign Affairs Manual's application of that policy to Jerusalem as anything but an attempt to maintain consistency between the place-of-birth field and the President's decision to recognize no sovereign's claim to that city.

That the Secretary accommodates identity preferences to the extent they are consistent with recognition policy does little to undermine his position that the place-of-birth field in fact implicates recognition. The Secretary has consistently walked a careful line, permitting individual choice where possible while still ensuring consistency with foreign policy. Because the Secretary's policy is about *both* identification and recognition, Congress could probably pass some laws about the place-of-birth field that do not interfere with the recognition power. For instance, Congress might be able to do little things, like require that the place of birth be listed in a particular font. It might

even be able to do bigger things, like eliminate the place-of-birth field all together. Although doing so would inhibit identification of passport holders, it would not seem to interfere with the President's recognition power.

But in enacting Section 214(d), Congress did intrude on the recognition power. The statute seeks to abrogate the Secretary's longstanding practice of precluding place-of-birth designations that are inconsistent with U.S. recognition policy. According to the Secretary, Section 214(d) would also have consequences for the President's carefully guarded neutrality on the question of Jerusalem. Although Zivotofsky challenges the President's judgment that adverse foreign policy consequences would flow from implementing Section 214(d), he offers no reason why the President's exercise of his constitutional power to recognize foreign sovereigns should hinge on a showing of adverse consequences. Even more importantly, courts are not in the business of second-guessing the President's reasonable foreign policy judgments, and this one is perfectly reasonable. After all, "[a] passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer." And it is certainly plausible, as the Secretary insists, that American-issued passports listing "Israel" as the place of birth for Jerusalem-born citizens could disrupt decades of considered neutrality on the Jerusalem question.

If this were all we had — only the Secretary's reasonable judgment that Section 214(d) infringes on the Executive's exclusive recognition power — it might well be enough. After all, the Supreme Court has held that the recognition power "includes the power to determine the policy which is to govern the question of recognition." But there is more. As it turns out, this is not a case in which we must choose between the President's characterization of a statute as implicating recognition and Congress's contrary view. Indeed, Congress was quite candid about what it was doing when it enacted Section 214(d). That subsection is part of a provision titled "United States policy with respect to Jerusalem as the capital of Israel." The other sections under that heading are not about passports, they are about recognizing Jerusalem as part of — indeed, as the capital of — Israel. And the legislative history makes doubly clear that recognition was Congress's goal.

So in the end, this is a separation-of-powers dispute in which both branches involved in the struggle actually agree. Congress intended Section 214(d) to alter recognition policy with respect to Jerusalem, and the President sees it the same way. Our decision makes us the third and final branch to reach this conclusion. And because the recognition power belongs exclusively to the President, that means Section 214(d) is unconstitutional.

III.

Although the foregoing analysis largely resolves this case, there is one loose end I think merits mention: Zivotofsky's argument that the Secretary's place-of-birth policy discriminates against supporters of Israel. In

its most effective formulation, I take the point as follows: Under the Secretary's policy, supporters of Palestine born in Tel Aviv can use their passports to signal their rejection of Israel's claim to sovereignty by choosing to list "Tel Aviv" instead of "Israel" as their place of birth. By contrast, supporters of Israel born in Jerusalem cannot use their passports to signal their view that Jerusalem is part of Israel. Thus, the policy discriminates against Israel supporters, and Section 214(d) remedies that discrimination.

To the extent this is an independent claim that the Secretary's policy is discriminatory, I agree it is waived. To the extent the argument is that Section 214(d) is constitutional because it remedies unlawful discrimination, such argument cannot overcome the recognition power problem for the same reason the passport power argument cannot: legislation Congress would otherwise have authority to enact may still run afoul of an independent constitutional restraint on congressional action.

I nonetheless think it important to note that the policy is not discriminatory. Indeed, unlike Section 214(d), which permits Jerusalem-born Israel supporters to list "Israel" as their place of birth but allows no parallel option for Jerusalem-born Palestine supporters, the State Department's Foreign Affairs Manual establishes a facially neutral policy that permits individuals to list their city or area of birth in lieu of their country of birth. The policy applies universally — not just in the context of Jerusalem — and treats Israel and Palestine supporters identically. Jerusalem-born Americans, whether supporters of Israel or supporters of Palestine, may not use their passports to make a political statement. And that is because permitting a Jerusalem-born individual to list "Israel" or "Palestine" would contradict the President's decision to recognize neither entity's sovereignty over Jerusalem.

True, as Zivotofsky emphasizes with his Tel Aviv example, individuals born within territory the United States has recognized as belonging to Israel can choose either to list "Israel" as their place of birth or instead to list a city or area of birth. Israel supporters may list "Israel," and Palestine supporters may list something more specific. But although the political nature of the latter choice may be clearer insomuch as it marks a deviation from the default country-of-birth rule, that is an unintended consequence of a neutral policy. Indeed, were the United States to recognize the West Bank as the sovereign state of Palestine, the same would be true of Israel supporters born therein. That is, Palestine supporters could list "Palestine," and Israel supporters could make the more obviously political choice to list their city or area of birth. It is only because the United States has not recognized any Palestinian territory that there currently exists no clear analogy to Zivotofsky's Tel Aviv scenario.

“U.S. Supreme Court to Review Jerusalem Birthplace Law”

Reuters
Lawrence Hurley
April 21, 2014

The U.S. Supreme Court on Monday agreed to weigh the constitutionality of a law that was designed to allow American citizens born in Jerusalem - the historic holy city claimed by Israelis and Palestinians - to have Israel listed as their birthplace on passports.

The case concerns a long-standing U.S. foreign policy that the president - and not Congress - has sole authority to state who controls Jerusalem. Seeking to remain neutral on the hotly contested issue, the U.S. State Department allows passports to name Jerusalem as a place of birth, but no country name is included.

The State Department, which issues passports and reports to the president, has declined to enforce the law passed by Congress in 2002, saying it violated the separation of executive and legislative powers laid out in the U.S. Constitution.

In court papers, President Barack Obama's administration said taking sides on the issue could "critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process."

The government has noted that U.S. citizens born in other places in the region where sovereignty has not been established, including the West Bank and the Gaza Strip, are similarly prevented from stating a country of birth on their passports.

In 2003, Ari and Naomi Zivotofsky, the parents of U.S. citizen Menachem Zivotofsky, who was born in Jerusalem in 2002, filed a lawsuit seeking to enforce the law. They would like their son's passport to say he was born in Israel.

Since the founding of Israel in 1948, U.S. presidents have declined to state a position on the status of Jerusalem, leaving it as one of the thorniest issues to be resolved in possible future Israeli-Palestinian peace talks.

When Republican President George W. Bush signed the 2002 law as part of a broader foreign affairs bill, he said that if construed as mandatory rather than advisory, it would "impermissibly interfere" with the president's authority to speak for the country on international affairs.

The issue reached the U.S. Supreme Court in 2012 on the preliminary question of whether it was so political that it did not belong in the courts. The high court ruled 8-1 that the case could proceed, setting up a July 2013 ruling by the U.S. Court of Appeals for the District of Columbia Circuit that struck the law down.

An estimated 50,000 American citizens were born in Jerusalem and could, if they requested it, list Israel as their birthplace if the law was enforced.

While Israel calls Jerusalem its capital, few other countries accept that status. Most, including the United States, maintain their embassies to Israel in Tel Aviv. Palestinians want East Jerusalem, captured by Israel in a 1967 war, as capital of the state they aim to establish alongside Israel in the West Bank and Gaza Strip.

Oral arguments and a decision are due in the court's next term, which begins in October and ends in June 2015.

The case is *Zivotofsky v. Kerry*, U.S. Supreme Court, 13-628.

“Law Giving Jerusalem-Born U.S. Citizens an Israeli Birthplace Under Review”

CNN
Bill Mears
April 21, 2014

The U.S. Supreme Court will take another look at an 11-year-old boy's request to have Israel listed as his place of birth on his U.S. passport.

The justices announced Monday they would review a federal law giving that special right to those like young Menachem Zivotofsky, who were born in Jerusalem.

But that is a disputed region in the eyes of the Obama administration, which said the larger issue should be resolved by bilateral negotiations, not by a 2002 congressional action favoring the family and the more than 50,000 other Americans born in the holy city.

Oral arguments by the high court will be held in the fall.

At issue is whether the statute interferes with the president's power to recognize an independent sovereign.

The case is a classic fight between congressional and executive authority, with foreign policy the source of the current controversy.

U.S. policy does not recognize any country as having sovereignty over Jerusalem. Two years ago, the justices allowed the family's federal lawsuit to proceed.

The city is home to Ari and Naomi Zivotofsky. The couple and their two oldest children were born in the United States, but the family migrated to West Jerusalem more than a dozen years ago, and in 2002 the youngest, Menachem Binyamin, was born.

The boy's mother made the "Israel" request about two months after his birth, but embassy officials refused. The disputed passport shows his round, innocent face, and "Jerusalem" is listed as his place of birth.

"We're very proud of the fact that he was born in Israel and that we live in Israel and it's the modern state of Israel," Ari Zivotofsky told CNN in 2012. "Religiously and historically, that's very significant."

Just three weeks before Menachem was born, the U.S. Congress gave American citizens born in Jerusalem the individual discretion to ask that Israel be listed on passports and consular reports, where it says "Place of Birth." President George W. Bush signed the bill but issued an executive "signing statement" indicating he would not comply.

It is not the first time Congress and the White House have clashed over the region. The U.S. Embassy remains in Tel Aviv, over U.S. lawmakers' objections.

The government is thinking of the bigger picture. State Department officials would not comment on the record on a pending case, but President Barack Obama has acknowledged the stalled peace process has created divisions in that region and in the United States.

The high court case is *Zivotofsky v. Kerry*, but the key player in this dispute is perhaps the most famous city in the world, and one of the oldest human settlements still in existence: Jerusalem. Its name translates as "City of Peace" to some, "Holy Sanctuary" to others. Jerusalem is Israel's largest city, and the nation calls it its capital, though that is not recognized by the United Nations and most of the world community.

Divided into East Jerusalem (populated mostly by Muslims) and West Jerusalem (populated mostly by Jews), the city spans over 48 square miles (124 square kilometers), with about 775,000 people.

The terms "East" and "West" come layered with political, social, religious and geographic questions -- amorphous, often misleading terms, symbolic of the larger struggle for control and recognition of all that this city represents. Some use the terms "Jewish" or "Arab" Jerusalem to refer to the sections.

The Old City is the heart of the region, a holy symbol to the three major Abrahamic religions: Christianity, Islam and Judaism. That tiny area -- just a third of one square mile -- contains the Temple Mount, Western Wall, Church of the Holy Sepulcher, Dome of the Rock and al-Aqsa Mosque.

The case is *Zivotofsky v. Kerry* (13-628).

“Court Bars 'Jerusalem, Israel' as Birthplace on American Passports”

LA Times
Alexei Koseff
July 23, 2013

American citizens born in Jerusalem cannot claim Israel as their place of birth on their passports, a federal appeals court in Washington ruled Tuesday.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously declared unconstitutional a 2002 law that required the State Department to record Israel as the birthplace of Jerusalem-born citizens despite a long-standing position in the executive branch of strict neutrality toward sovereignty of the disputed city.

At stake in the case was a question of governmental authority over foreign policy: Does the president have the sole right to decide on what terms foreign nations are recognized?

Though the United States has recognized the sovereignty of Israel since it declared independence in 1948, no president has ever taken a position on Jerusalem. Israel considers the city its political and spiritual capital, while Palestinians seek to make East Jerusalem the capital of a future country.

The case was brought by the family of Menachem Binyamin Zivotofsky, now 10, born to American parents in Jerusalem. When his mother applied for a passport for him with the birthplace as "Jerusalem, Israel," the U.S. Consulate listed only "Jerusalem."

Zivotofsky was born weeks after Congress passed the passport provision in September 2002 as part of a foreign relations appropriations bill.

But when President George W. Bush signed the law, he issued an executive statement asserting that the policy on Jerusalem, if construed as mandatory rather than advisory, would "impermissibly interfere" with the president's constitutional authority in matters of foreign affairs.

The Secretary of State has never enforced the policy, arguing that it intrudes upon presidential powers.

The Court of Appeals agreed in its ruling, stating that the law was a political act that infringed upon the president's exclusive recognition power in the Constitution.

The law "is not, as Zivotofsky asserts, legislation that simply — and neutrally — regulates the form and content of a passport," Circuit Judge Karen Henderson wrote in her opinion. "Congress plainly intended to force the State Department to deviate from its decades-long position of neutrality" toward Jerusalem.

Several groups swiftly decried the decision.

The Anti-Defamation League, which combats anti-Semitism, wrote in a statement that it was "deeply disappointed" by the news.

"The court has effectively given a stamp of approval to the offensive State Department policy that singles out Israel for 'special' treatment," it wrote.

In a statement, the Orthodox Union, an umbrella group of Orthodox Jewish congregations, called Jerusalem "the eternal and indivisible capital of the State of Israel" and said it would support an appeal of the ruling to the Supreme Court.

Congress has long demanded recognition of Israel's sovereign control over Jerusalem. In 1995, it passed a law requiring that the United States move its embassy from Tel Aviv to Jerusalem, an act that has since been suspended on a semiannual basis by the president for national security reasons.

NEW TOPIC: CONGRESS & THE OBAMA WHITE HOUSE

"Supreme Court Rebukes Obama on Right of Appointment"

New York Times
Adam Liptak
June 26, 2014

The Supreme Court issued a unanimous rebuke to President Obama on Thursday, saying he had overreached in issuing recess appointments during brief breaks in the Senate's work.

Mr. Obama violated the Constitution in 2012, the justices said, by appointing officials to the National Labor Relations Board during a break in the Senate's work when the chamber was convening every three days in short pro forma sessions in which no business was conducted. Those breaks were too short, Justice Stephen G. Breyer wrote in a majority opinion joined by the court's four other more liberal members.

At the same time, the court largely reinstated an uneasy, centuries-long accommodation between the executive branch and the Senate, in which recess appointments were allowed during more substantial breaks. Justice Breyer said such appointments generally remained permissible so long as they were made during breaks of 10 or more days.

Although there may be few immediate practical consequences of the ruling, given the recent overhaul of the Senate's filibuster rules, the decision was nonetheless momentous, involving a constitutional adjudication of the balance of power between the president and the Senate.

Just how to strike that balance was the subject of a heated dispute between the court's more liberal members and its more conservative ones.

The practical impact of the ruling over time "remains to be seen," Justice Antonin Scalia said in a concurrence. Many experts say that if either house of Congress is controlled by the party opposed to the president, lawmakers can effectively block recess appointments by requiring pro forma sessions every three days. The Constitution says that each house must get the approval of the other chamber to adjourn for more than three days.

But Justice Scalia was skeptical, noting that the president had the constitutional power to set adjournments when the chambers disagreed.

What was certain, he said, was that the court had endorsed a vast expansion of executive power. Chief Justice John G. Roberts Jr. and Justices Clarence Thomas and Samuel A. Alito Jr. joined the concurrence, which was caustic and despairing.

“The court’s decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need,” Justice Scalia wrote, “into a weapon to be wielded by future presidents against future Senates.”

If it was hard to assess the immediate consequences, there was no question that Mr. Obama narrowly avoided a far broader loss, one that could have limited recess appointments to breaks between Congress’s formal annual sessions, and even then to vacancies that arose during those breaks. That was the approach embraced by the court’s four most conservative members.

“The majority practically bends over backwards to ensure that recess appointments will remain a powerful weapon in the president’s arsenal,” Justice Scalia said from the bench.

The decision affirmed a broad ruling last year by a federal appeals court in Washington that had called into question the constitutionality of many recess appointments by presidents of both parties. But the Supreme Court majority rejected the appeals court’s reading of the constitutional text, relying instead on historical practices and pragmatic considerations.

Josh Earnest, the White House Press Secretary, expressed dismay and satisfaction in equal measure. “We’re of course deeply disappointed in today’s decision,” he said. But Mr. Earnest added that the White House was “pleased that the court recognized the president’s executive authority as exercised by presidents going all the way back to George Washington.”

Miguel Estrada, a lawyer for Senator Mitch McConnell of Kentucky, the Republican leader, said the decision was a victory for the Senate and the separation of powers. “The Supreme Court reaffirmed the Senate’s power to prescribe its own rules, including the right to determine for itself when it is in session, and rejected the president’s completely unprecedented assertion of unilateral appointment power,” he said.

The issue of recess appointments and what they are meant to accomplish — installing a controversial nominee by circumventing the confirmation process — is largely a moot one on Capitol Hill. Because Senate Democrats late last year changed the rules governing how nominees are approved and made it far easier for the president to get his officials confirmed, there is not much need for a recess appointment for now.

The Constitution’s recess-appointments clause says, “The president shall have power to fill up all vacancies that may happen during the recess of the Senate.”

Analyzing that language, a three-judge panel of the appeals court said that presidents may bypass the Senate only during the recesses between formal sessions of Congress. Two of the judges went further, saying that presidents may fill only vacancies that came up during that same recess.

The case arose from a labor dispute involving a soft-drink bottling company,

Noel Canning. The labor board ruled against the company, saying it had engaged in an unfair labor practice by refusing to enter into a collective bargaining agreement.

The company appealed, arguing that the labor board had been powerless to rule because a majority of its members had been appointed during a 20-day stretch when the Senate was convening every three days in pro forma sessions without conducting business. Mr. Obama, who viewed the sessions as a tactic to keep the Senate open so he could not make recess appointments, made the appointments anyway.

Since three members of the board — Sharon Block, Terence F. Flynn and Richard F. Griffin Jr. — had not been properly appointed, the company argued, its ruling was void.

In asking the Supreme Court to review the appeals court's ruling in the case, *National Labor Relations Board v. Noel Canning*, No. 12-1281, the Obama administration sought answers to only the broader questions decided by the appeals court. But the Supreme Court agreed to answer a narrower question, too: whether the president may make recess appointments when the Senate is convening every three days in pro forma sessions.

That was the question on which the administration lost.

The board issued 436 decisions during the 18 months when Mr. Obama's improperly appointed employees worked there. Gregory J. King, a spokesman for the labor board, said there remained about 100 cases on hold in federal appeals courts awaiting a Supreme Court decision about the legitimacy of the recess appointees. In those cases, the appellants are challenging decisions from when the board had the contested appointees; they assert that the board did not have a legitimate quorum to issue those decisions.

The great majority of those board decisions may be negated by Thursday's ruling by the Supreme Court. At the request of the litigants, many of those cases will be returned to — and reviewed by — the current board, which has a full contingent of five members duly confirmed by the Senate. Because the board has a 3-2 Democratic majority, the current board is likely to affirm nearly all or all of the rulings, legal experts said.

Both sides in Thursday's decision relied heavily on history. Justice Breyer noted many examples of recess appointments made during formal sessions of the Senate, some of which filled vacancies that had arisen before the break in question. "Justice Scalia would render illegitimate thousands of recess appointments reaching all the way back to the founding era," Justice Breyer wrote.

But he added that the earlier breaks were not as brief as the ones at issue. "We have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days," Justice

Breyer wrote in explaining why the court had adopted that criterion.

The 10-day rule was not absolute, he added, as a national emergency might require faster action. But he said that "political opposition in the Senate would not qualify as an unusual circumstance."

Justice Scalia said all of this was arbitrary. "These new rules have no basis whatsoever in the Constitution," he said from the bench. "They are just made up."

"What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice," he wrote. "What it has is clear text and an at-best-ambiguous historical practice."

“The Supreme Court’s Noel Canning Decision and the NLRB’s Response”

Mondaq
Mark L. Shapiro, David Santeusanio & Brian M. Doyle
July 17, 2014

The U.S. Supreme Court affirmed a decision by the D.C. Circuit Court of Appeals on June 26, 2014, invalidating President Obama's appointment in January 2012 of three members to the National Labor Relations Board (NLRB or "board"). *National Labor Relations Board v. Noel Canning*, No. 12-1281 (June 26, 2014). The decision raises uncertainty concerning the validity of NLRB decisions, rulings and administrative actions issued since President Obama made the appointments. Since the Supreme Court's decision, NLRB has taken quick action to address the decision, including setting aside certain board decisions on appeal to the federal circuit courts and filing motions in other cases asking the courts to vacate and remand the cases to the board. This alert describes the Supreme Court's decision and the NLRB's initial response.

Noel Canning Case Background

The Noel Canning Corporation, a Washington state bottling company, first raised the issue of the authority of the recess appointments in connection with its defense of an unfair labor practices charge. The NLRB concluded that Noel Canning committed an unfair labor practice, and Noel Canning appealed the decision to the D.C. Circuit, arguing that the board lacked the authority to issue the ruling because it was not comprised of constitutionally appointed board members. At that time, the board consisted of three members appointed by President Obama in January 2012 pursuant to the Recess Appointments Clause of the U.S. Constitution.

In January 2013, the D.C. Circuit issued its decision in *Noel Canning v. NLRB*, ruling that President Obama's "recess appointments" to the NLRB were unconstitutional. The court concluded that the three "recess" appointments made by the president in January 2012 were invalid on two grounds.

- First, the court held that recess appointments may only be made during the recess between each session of Congress (an intersession recess, which happens only once per year), rather than on a break in Congress that occurs while Congress is still in session (an intrasession recess, which occurs rather frequently, such as during holidays).

- Second, the court held that recess appointments can be made to fill only those positions that become vacant during the recess, such that the president cannot make recess appointments to fill preexisting or long-standing vacancies. The NLRB appealed the decision to the Supreme Court, which issued its unanimous decision on June 26, 2014, affirming the opinion of the D.C. Circuit.

The Supreme Court affirmed the D.C. Circuit's judgment, but its reasoning was different.

- First, and contrary to the D.C. Circuit's opinion, the Supreme Court held that the Recess Appointments Clause empowers the president to fill any existing vacancy during any recess of sufficient length – regardless of whether it is intrasession or intersession.

- Second, and also contrary to the D.C. Circuit's opinion, the Supreme Court held that the phrase "vacancies that may happen during the recess of the Senate" includes both vacancies that arise while the Senate is in recess and vacancies that already exist at the time the Senate goes into recess.

Despite disagreeing with the reasoning of the D.C. Circuit's opinion, the Supreme Court ultimately affirmed the decision on a separate basis. The Supreme Court concluded that for purposes of the Recess Appointments Clause, the Senate is in session when it says that it is, provided that, under its own rules, the Senate is able to conduct Senate business. However, the Senate was not, in fact, in a "recess" when the president invoked the Recess Appointments Clause in January 2012. Instead, the Senate had passed a resolution providing for a series of pro forma sessions in which it decided that it would not transact any business, although, as the Supreme Court concluded, it remained capable of doing so. The president made his appointments during a three-day break between two of the pro forma sessions, which the Supreme Court ruled was presumptively too short a period of time to bring the recess within the scope of the Recess Appointments Clause.

Impact on Board Decisions and the NLRB's Response

The Supreme Court's decision has an immediate impact in favor of Noel Canning, which invalidates the adverse board decision finding that Noel Canning engaged in an unfair labor practice. The decision also has an immediate impact on the board decisions – including high-profile and controversial decisions – that the board decided between Jan. 4, 2012 (the day of the recess appointments), and Aug. 5, 2013 (the day the Senate confirmed nominations for the three board positions). Many of those cases are currently working their way through the federal court system. As for those board decisions that are not currently pending in federal court, it is not immediately clear how this decision will affect those proceedings.

Since the Supreme Court's decision, NLRB has taken steps in response. On the day the Supreme Court decided the case, NLRB Chairman Mark Gaston Pearce issued a statement saying that the board is "analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated." He further stated that the board "is committed to resolving any cases affected by today's decision as expeditiously as possible."

Then, at a July 9, 2014, ABA webinar, NLRB General Counsel Richard Griffin explained the actions the board had taken in response to the decision. He stated that in the federal appeals courts, there were 98

cases involving the recess appointees. In 43 of those cases, the board had not yet filed the records of NLRB proceedings. Section 10(d) of the National Labor Relations Act states that until the record of the case is filed in the court, "the Board may at any time, upon reasonable notice and in such manner as it deems proper, modify or set aside, in whole or in part, any findings or order made or issued by it." Griffin explained that under Section 10(d), the NLRB will modify or set aside the orders in those cases. Of the remaining 55 cases (in which the board record has already been filed with the court), the board has filed motions in 49 of the cases asking the court to vacate and remand the cases to the board.

Griffin further explained that other cases affected by the Noel Canning decision had not proceeded to the court of appeals. Of those cases, the general counsel may seek to return some of those cases to the NLRB or, if the parties have no interest in having the NLRB further address the dispute (because for example, the dispute was resolved), the cases would not return to the board and no further action would be taken. He also explained that the board is still addressing the issue of the board's appointment of regional directors and the validity of their actions. The board will continue to address the short-term and long-term consequences of the Noel Canning decision.

The decision and the board's initial response show the complexities and administrative burdens associated with this issue. This is not the first time that the board has confronted a similar issue. After the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, in which the Court concluded that the board lacked authority to issue decisions without a quorum of at least three members, the board simply re-issued the decisions that were previously rendered by a delegated two-member panel, after it obtained quorum. Given the composition of the current board – three pro-labor members on a five-member board – it is likely that any decisions revisited by the board will be affirmed.

Questions Remain About the Validity of Other NLRB Actions

Practically, many of the board's decisions have resulted in orders that have already been implemented for over two years, including the negotiations of contracts and the hiring of workers. It would be difficult to undo what has already been done. But the Supreme Court's decision raises questions as to the validity of other actions taken by the board, including the appointment of those regional directors who were appointed during the relevant time and the promulgation of new rules. In addition, there may be arguments that decisions rendered by a regional director appointed by an unconstitutional board are also invalid. Given the administrative burdens associated with addressing the effects of the *Noel Canning* decision, case backlogs and related delays will likely occur at NLRB in the near future.

Although the Supreme Court's decision has provided clarity to Noel Canning and resulted in immediate action by NLRB in

those cases currently pending in federal court, there remain questions that employers should assess with counsel concerning the reach of the decision. There is also the political question of what happens the next time there is a vacancy on the board and opposite parties control the White House and the Senate. The next board vacancy will occur on Dec. 16, 2014 (when the term of Democrat member Nancy Schiffer will expire), leaving a two-two split between Democratic and Republican board members. In connection with that upcoming vacancy, President Obama on July 10, 2014, re-nominated Democrat Sharon Block, one of the three recess appointments invalidated by the Noel Canning decision. Political maneuvering on the vacancy, coupled with the current fallout of the Noel Canning decision, will likely continue to affect the NLRB.

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"Counsel Rests"

Slate
Neal Devins
January 13, 2014

At oral arguments Monday on President Obama's recess appointment power, Senate Republicans locked horns with Obama's Department of Justice. The Office of Senate Legal Counsel is not participating in the suit, even though it involves the Senate directly. Instead, the justices agreed to a request by Senate Minority Leader Mitch McConnell to participate in the oral argument.

Last year, it was House Republicans locking horns with the Obama Justice Department. In defending the constitutionality of the Defense of Marriage Act before the Supreme Court, the House Bipartisan Legal Advisory Group actually spoke only for House Republicans. Indeed, 132 House Democrats filed an amicus brief in that appeal, arguing both that DOMA was unconstitutional and that the House counsel did not "speak for a unanimous House on this issue."

In Monday's recess appointment case, why would the Senate's own lawyer sit on his hands while the minority leader purports to speak for the Senate? And why were House Republicans Congress's only voice in oral arguments in the DOMA case? The answer lies in the differences in the ways the House and Senate can participate in litigation—differences exacerbated by the polarization of Democrats and Republicans in both the House and Senate.

The Office of Senate Legal Counsel can only participate in litigation with broad bipartisan support. By statute, counsel representation of the Senate requires two-thirds support of a leadership group made up of four members of the majority party and three members of the minority party. This supermajority requirement made perfect sense back when the office was created in 1978. Reflecting both Senate norms favoring bipartisanship and Senate desires to defend its institutional prerogatives in the wake of Watergate, the Office of Senate Legal Counsel was created to speak the Senate's collective voice in disputes with the executive branch.

Throughout the 1980s, the Office of Senate Legal Counsel defended the constitutionality of federal statutes in several high-profile disputes with the executive branch. In cases involving the constitutionality of the legislative veto, deficit-reduction legislation, independent counsel investigations of high-ranking executive officials, and race preferences in broadcasting, the Senate counsel defended Congress' institutional prerogatives before the Supreme Court. In some of these cases, Republican Ronald Reagan was president, and the Senate majority was also Republican. In other words, 1980s Republicans were willing to stand up to a Republican president to

advance the institutional interests of the Senate.

The recess appointment appeal being heard Monday is precisely the type of case Congress had in mind when it created the Office of Senate Legal Counsel. The case concerns the president's power to fill vacancies in the executive or judicial branches, when the Senate is "in recess"—and thus unable to hold a confirmation hearing. The president, not surprisingly, has a broad view of what constitutes a Senate recess—to curb restraints on his power to make recess appointments. In the abstract, the Senate would be expected to have a somewhat narrower view of what constitutes a recess—so as to expand its own role in confirmations. But in today's polarized Congress, Democrats and Republicans did not come together to assert a shared institutional view of what might constitute a Senate recess. In particular, whereas Senate Republicans are eager to assert their institutional prerogatives against the president, Senate Democrats seem altogether unwilling to challenge Obama's efforts to use recess appointments to get his nominees through the Senate.

The inability of Senate Republicans and Democrats to come together is not completely new. Since the 1995 Republican takeover of Congress, the Senate counsel has not participated in a single case in which the Department of Justice has refused to defend a federal statute. Indeed, I am aware of no recent Senate–executive branch dispute in which the Senate counsel has gone to court to assert Senate prerogatives. Instead, reflecting ever-increasing party polarization in Congress, the Senate counsel has been absolutely unable to speak with a bipartisan voice in disputes with the executive. In a 1993 lawsuit over a recess appointment by then–lame duck President George H.W. Bush, minority party Senate Republicans blocked the filing of a brief that would have defended the Senate's confirmation power.

The recess appointment case currently before the Supreme Court takes matters one step further. Instead of simply blocking participation by the Senate counsel, Senate Republicans banded together to defend Senate prerogatives by limiting the scope of presidential recess appointments. Ironically, these same Senate Republicans set in motion the very dispute now before the court. Following a practice utilized by Senate Democrats during the George W. Bush administration, Senate Republicans sought to block Obama recess appointments to the National Labor Relations Board and other government agencies by making use of so-called pro forma sessions—minutelong sessions where a single lawmaker would periodically gavel the Senate into session during a break. In January 2012, President Obama, claiming that the Senate was in recess during one of these pro forma sessions, made three recess appointments to the NLRB. For the Obama administration, these pro forma sessions were intended to disrupt the constitutional balance of powers between Senate and president; Senate Republicans, instead, argue that the president is simply seeking to "evade the advice and consent protocol at his pleasure."

That the justices will hear only from the Senate minority and not from the Senate itself is truly unfortunate. The case, of course, has extremely serious implications for the balance of power between the president and Senate. Given the recent fights over the appointments process and the use of the nuclear option, the Supreme Court's understanding of the real-world dynamic between the Senate and president on recess appointments might impact its final ruling in the case. The fact that the Supreme Court will hear only from the Senate minority could shape the court's understanding of this dynamic.

And even if that is not the case, it is certainly true that the justices will not know whether the Senate itself thought it was in session at the time of these appointments. When the case was argued in the U.S. Court of Appeals for the District of Columbia Circuit, circuit judge and former Senate counsel Thomas Griffith lamented the fact that Senate counsel did not participate for this very reason. As Griffith put it at the time, "How do we know what the Senate's view is about the meaning of recess in terms of the recess appointments clause? We don't."

When it comes to the House, majority rules. The House counsel essentially works for the speaker of the House. The so-called Bipartisan Legal Advisory Group that authorizes House counsel action is largely a sham. In the DOMA case, for example, BLAG divided along strictly partisan lines to authorize House intervention in the case. Likewise, BLAG divided along partisan lines in 2000 when defending a federal statute overturning *Miranda v. Arizona*.

In both cases, Democratic members filed competing briefs to make clear that the House BLAG was both wrong on the merits and spoke only for the majority party. BLAG's own filings likewise acknowledged that it represented only the views of the majority party, stating that although it "seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents."

Differences between today's House and Senate are also revealed in the willingness for the House, but not the Senate, to go to court to assert its institutional prerogatives against the executive. With House rules allowing a simple majority to invoke both the contempt power and the filing of lawsuits by the House counsel, the House is likely to be a vigorous proponent for congressional prerogatives when the opposition party controls the White House. In an ongoing dispute between the House and Attorney General Eric Holder about the "Fast and Furious" gun-running operation, the Republican majority is seeking judicial enforcement of a subpoena against the attorney general. During the George W. Bush administration, Democrats were in the majority and similarly sought judicial enforcement of subpoenas in a 2007 dispute over the firing of U.S. attorneys.

Party polarization and House-Senate differences are now a fact of life and, apparently, so is the strange spectacle of the Supreme Court hearing oral arguments from

the House majority in the DOMA case and the Senate minority in the recess appointment case. Indeed, the bipartisanship requirement that now makes it impossible for the Senate counsel to participate in litigation that divides the parties is statutorily mandated, from a time when we could imagine a Senate that could sometimes agree.

It is even more urgent, therefore, that the justices hearing the recess appointments case recognize that they are only hearing from the Senate minority —not the House, not the Senate, and certainly not the entire Congress.

“House Votes to Authorize Boehner to Sue Obama”

Wall Street Journal
Michael R. Crittenden & Colleen McCain Nelson
July 20, 2014

House lawmakers voted Wednesday to authorize Speaker John Boehner to file suit against President Barack Obama on a complaint that he had overstepped his legal authority, setting up a possible constitutional test and giving both parties a potent campaign issue to take home for the five-week congressional recess.

In a 225-201 vote, the House told Mr. Boehner (R., Ohio) to move ahead with the suit. House GOP leaders have said they would focus the suit on the White House's decision last year to give employers a one-year reprieve on enforcing a requirement under the Affordable Care Act that they offer health coverage or pay a penalty. The requirement was delayed until 2015, and the White House then revised the health law further by saying employers with between 50 and 99 full-time workers wouldn't have to comply or pay a fee until 2016.

Five Republicans joined Democrats in voting against pursuing the lawsuit. No Democrats voted to move forward with the suit.

Mr. Boehner, speaking just before the vote, said Congress needed to assert its authority under the Constitution to combat executive overreach. "This isn't about Republicans and Democrats. It's about defending the Constitution we swore an oath to uphold," he said.

Mr. Obama, speaking to a friendly crowd in Kansas City ahead of the vote, said that suing him wasn't a productive thing to do.

"Everybody recognizes this is a political stunt," he said of the lawsuit. "But it's worse than that, because every vote they're taking like that means a vote they're not taking to actually help you."

The legal and political fallout from the decision to pursue the lawsuit remains largely unclear. Many legal experts have questioned whether the courts would take up such a suit, suggesting that lawyers representing the House could face significant hurdles.

A court could question whether the House has met the standard of showing that it has been harmed by the president's actions, particularly because lawmakers are suing him for not enforcing a law they have repeatedly sought to repeal. Another question is whether the House, in acting without the Senate, has standing to sue the White House.

Moreover, said College of William and Mary law professor Tara Grove, courts have repeatedly avoided arbitrating political

disputes between the executive and legislative branches.

"We're in uncharted waters, and I think any judicial court would want to avoid weighing in," Ms. Grove said. "I'd be very surprised if the court grants standing."

Proponents of a suit have argued there is precedent for the legislative branch suing the executive, and that lawmakers can argue that they have been harmed by the White House's taking away their constitutional authority to legislate.

Candidates from both parties are likely to use the suit as a political touchstone as they head to their districts this week to campaign ahead of the midterm elections. Republicans who have long criticized the White House and Mr. Obama for executive overreach on issues such as immigration and the health law plan to use the suit to show their base that they are resolved to rein in the president.

"While there is at least one political branch willing to enforce the law, we will not fail to act through whatever means of which we can successfully avail ourselves," Rep. Bob Goodlatte (R., Va.), chairman of the House Judiciary Committee, said during floor debate.

Democrats say the lawsuit helps them make the argument to voters that Republicans care more about attacking Mr. Obama than legislating. "While it was intended to rev up their base, it has had the unintended consequence of revving up ours," Rep. Steve Israel (D., N.Y.), who heads the House Democrats' campaign arm, said in an interview.

The Democratic Congressional Campaign Committee has been bringing up the lawsuit, and asserting that the GOP-led House plans to impeach Mr. Obama, while asking for donations. The group raised $1 million on Monday alone, and a total of $7.6 million since Mr. Boehner first announced the lawsuit in late June.

The lawsuit has led to increasingly contentious exchanges between the White House and House Republican leaders, particularly over whether the lawsuit is a prelude to the House seeking to impeach Mr. Obama. Mr. Boehner on Tuesday said any talk of impeachment was a "scam" started by the White House. "They are trying to rally their people to give money and show up in this year's election," Mr. Boehner said.

While Mr. Boehner had said there are no plans to seek impeachment, some more conservative lawmakers have suggested it remains an option.

The House GOP lawsuit isn't the only new legal challenge facing the Obama administration. On Tuesday, West Virginia filed suit against the administration, challenging its decision to allow insurance commissioners to choose whether to let insurers temporarily to continue to sell policies that don't comply with the Affordable Care Act.

The suit, filed against the Department of Health and Human Services in the U.S. District Court for the District of Columbia,

argues that the extension allowing state insurance commissioners to reinstate such policies placed a burden on the states.

West Virginia Attorney General Patrick Morrisey said the delay in cancellations shifted political accountability and discretion over enforcement of certain federal laws to the states. "The president cannot pick and choose which laws to follow and which to ignore on the basis of political convenience," Mr. Morrisey said.

"Constitution Check: Could the House Sue the President for Refusing to Carry Out the Laws?"

Constitution Daily
Lyle Denniston
June 24, 2014

THE STATEMENTS AT ISSUE:

"Presidents must exercise some discretion in interpreting laws, must have some latitude in allocating finite resources to the enforcement of laws and must have some freedom to act in the absence of law. Obama, however, has perpetrated more than 40 suspensions of laws. Were presidents the sole judges of the limits of their latitude, they would effectively have plenary power to vitiate the separation of powers, the Founders' bulwark against despotism. Congress cannot reverse egregious executive aggressions such as Obama's without robust judicial assistance. … It would be perverse for the courts to adhere to a doctrine of congressional standing so strict that it precludes judicial defense of the separation of powers."

– Syndicated columnist George F. Will, in *The Washington Post* on June 22, praising efforts in the House of Representatives to pass legislation that would allow the House to sue President Obama with a claim that he is unconstitutionally refusing to carry out laws passed by Congress. By "congressional standing" he meant the right to file a lawsuit.

"Obama has worked around Congress with breathtaking audacity… So much for the separation of powers. In a desperate attempt to stem the hemorrhaging of legislative power, members of Congress are turning to the court to enforce their constitutional prerogative."

WE CHECKED THE CONSTITUTION, AND…

The Constitution has nothing to say about ways to cure the kind of gridlock that now exists in the national government in Washington. There is frustration in the White House as President Obama finds himself unable to get much of his legislative program through Congress, and there is frustration in Congress – especially in the Republican-controlled House of Representatives – whenever the President takes unilateral action to put some of his policies into effect without legislative approval.

Neither side seems willing to yield, and the Constitution – based as it is on the benign assumption that those in national leadership will always find ways to govern, more or less successfully – has no specific provision to force compromise. The checks-and-balances written into the division of government powers can turn out to barriers to action, especially in circumstances like those that now prevail in the nation's capital.

It is perhaps tempting to think, as the commentary by columnist George Will suggests, that this is a problem that ought to be handed over to the courts: get them involved to enforce the lines of demarcation between what Congress does and what presidents are allowed to do.

However, there is, and has long been, a constitutional barrier to the courts acting as an arbiter of inter-branch disputes between Congress and the White House. Its origin is in the Constitution's Article III, and its meaning comes from the way the courts have interpreted the limitation spelled out there. "The judicial power," it says, "shall extend to all cases…and controversies." A "case or controversy" means, in this context, a live lawsuit, with those on each side having something genuinely in dispute, and that something is capable of being decided by the use of rules of law.

The courts, in short, will not decide mere abstract legal controversies, and they will not hand out advisory opinions on how the laws or the Constitution are to be interpreted. Courts have a number of ways of showing respect for those restrictions on their power, and one of them is to refuse to decide what is called a "political question." In this sense, "political" does not mean a partisan issue; it means an issue that the courts find has to be decided, if it is decided at all, only by the "political" branches: Congress and the Executive Branch.

Time after time, when members of Congress have sued in the courts, because the Executive Branch did something that they believe frustrated the will of Congress, they have been met at the door of the courthouse with a polite refusal to let them in. Failing to get their way in the skirmishing with the White House does not give members of Congress a right to take their grievance into court. Frustration does not make a real lawsuit, according to this notion.

Some lawyers and scholars, however, have from time to time wondered if this situation has to continue unchanged. Since the Constitution also gives to Congress the authority to define the jurisdiction of the federal courts, what cases they can and cannot decide, why couldn't Congress just pass a law declaring that one house or some of the members of Congress do have a right to sue the President over a legitimate inter-branch dispute, in order to protect the legislative prerogative of that part of the government? Wouldn't that work to get such a lawsuit past the door of the courthouse?

It is a plausible argument, and columnist George Will found it entirely persuasive in the column quoted above. There is a catch, though: expanding the jurisdiction of the courts to hear what are, at their core, political disputes would still be an attempt to create a "case or controversy" that satisfied Article III's requirements. In other words, the constitutionality of such an expansion of court authority would itself be a constitutional issue that the courts would have the authority to decide.

The courts can be jealous guardians of their notion of what the Constitution allows, or does not allow, in terms of judicial review.

The resistance to resolving political disputes is quite deeply set. One might suggest that it would take an inter-branch controversy of monumental proportions to cause them to give up that reluctance. Is the feud over President Obama's use of his White House powers of that dimension? That may well be debatable.

"The Supreme Court's Powerful New Consensus"

New York Times
Neal K. Katyal
June 26, 2014

For years, particularly after the 2000 election, talk about the Supreme Court has centered on its bitter 5-to-4 divisions. Yet it is worth reflecting on a remarkable achievement: The Court has agreed unanimously in more than 66 percent of its cases this term (and that figure holds even if Monday's remaining two cases, on the Affordable Care Act's contraceptive coverage and on public-sector unions, are not unanimous). The last year this happened was 1940.

The justices' ability to cross partisan divides and find common ground in their bottom-line judgment in roughly two-thirds of their cases — including the two decisions handed down Thursday, restricting the president's ability to issue recess appointments during brief breaks in the Senate's work, and striking down a Massachusetts ban on protests near abortion clinics — should remind us that even in this hyperpartisan age, there is a difference between law and politics.

Unanimity is important because it signals that the justices can rise above their differences and interpret the law without partisanship. The best illustration of this in the modern era is *Brown v. Board of Education*, in which the court unanimously declared racial segregation in education to be unconstitutional. When the justices forge common ground, it signals to the nation the deep-seated roots of what the court has said and contributes to stability in the fabric of the law.

The court has not always valued consensus so highly. At the nation's founding, the justices each wrote separate opinions — leaving lawyers, and indeed the nation, to guess what the court was actually saying as a whole. It took Chief Justice John Marshall's leadership, at the start of the 19th century, to bring the court together and to establish the practice of writing a single opinion for the court. Marshall was not above using hard and soft persuasion, going so far as to invite his colleagues to live together in a Washington boardinghouse, where they bonded and discussed cases over Madeira. Disagreement on the court in that century was rare, with dissents occurring only roughly 10 percent of the time. Chief Justice William H. Taft, in the first decades of the 20th century, reportedly talked his colleagues out of more than 200 dissenting votes with his formidable political skills.

But the modern era has been something of a disaster for unanimity. Chief Justice Earl Warren was able to achieve unanimity only 36.1 percent of the time; Chief Justice Warren E. Burger, a scant 35.8 percent. One of Chief Justice William H. Rehnquist's final public acts was to express exasperation

at the fractured court. In 2005, on the final day of his final term, a frail Rehnquist described his last majority opinion by first outlining his views, then the three concurrences filed, and then the three dissents filed, and joking, "I didn't know we had that many people on our court." Compare that talk, and those numbers, to what Chief Justice John G. Roberts Jr. achieved this year with his colleagues.

People remember Chief Justice Roberts's 2005 confirmation hearing for his statement that his job would be to call balls and strikes. But something else he said is worth remembering: that he would try to bring about "a greater degree of coherence and consensus in the opinions of the court." He pointed to Warren's leadership in Brown as an example.

Unanimity, of course, would mean little if it were reserved only for minor things. But the court was unanimous this term in cases that posed big central questions, like whether the government could search your cellphone without a warrant, whether software could be patented, whether the rules for class-action securities lawsuits should change, and many others. Those cases were not easy ones. In the cellphone case, the government made forceful points about the ways in which those searches were permissible, and indeed necessary, for law enforcement. The software industry and its foes argued vociferously about whether software patents were destroying the economy or creating it. And so on. What's more, the court wasn't unanimous because the justices sat on their hands; to the contrary, they reversed the lower court 74 percent of the time this year.

Many justices have pointed out the importance of published dissent. There is no doubt that dissents can serve a useful role by explaining when a justice thinks the majority has gone off the deep end. But unanimity also sends its own powerful message — one that might be eclipsed in the headlines by a sensational dissent, but could ultimately have a greater impact. Take the abortion decision on Thursday, which was unanimous in its bottom line, but not in its reasoning. Chief Justice Roberts joined four justices appointed by Democratic presidents — the same lineup that saved the Affordable Care Act two years ago, that time for a liberal result, unlike Thursday's.

This path, of trying to forge places of agreement even among people who are inclined to disagree, is the essence of what the American experiment is all about. In an era when the leadership of the House of Representatives is suing the president, when people across the aisle cannot even be in the same room with one another, the modesty and cultivated collegiality of the nine members of the Supreme Court this year remind us all that there is another way.

Instead of worrying about balls and strikes, Chief Justice Roberts has shifted his efforts to a new focus: making all nine justices play ball for the same team. The country, and the rule of law, are better off for it.

"With Filibuster Threat Gone, Senate Confirms Two Presidential Nominees"

New York Times
Jeremy W. Peters
December 10, 2013

The Senate slowly began working its way through a backlog of presidential nominees on Tuesday now that Republicans are virtually powerless to block confirmations, approving a once-stalled judge to a powerful appeals court and a new director for the agency that oversees federal home lending.

But Republicans, still seething over a power play last month by Democrats to curtail the filibuster significantly, have settled on a strategy for retribution: Make the confirmation process as time-consuming and painful as possible for Democrats.

"There's a price that has to be paid when people abuse the rules," said Senator Orrin G. Hatch, Republican of Utah. "And let's face it. These guys have completely obliterated the rules."

And so the tone was set for the final days of the 2013 Senate session, a period that promises to be longer on acrimony than on productivity.

With little actual legislation expected as the Senate winds down before its Christmas recess in less than two weeks, Democrats, who control the action on the floor, have decided to use their new power to push through dozens of presidential nominees for everything from high-profile positions like the secretary of homeland security to more obscure ones like ambassador to Albania.

But the two-century-old Senate rule book still offers the minority party plenty of avenues to stall even if the filibuster is not an option. Like a losing team using up all its timeouts before the end of a game, Republicans have started to take advantage of those alternatives and vowed on Tuesday to continue doing so as long as they could.

"It's very important that we do what we think is necessary to bring home the point that they broke the rules," said Senator John McCain, Republican of Arizona. "They have basically violated everything I've known of as a member of the United States Senate. For us to say that's fine, business as usual, is not something that we could possibly do."

Senator Mitch McConnell of Kentucky, the Republican leader, said flatly, "If the majority can't be expected to follow the rules, then there aren't any rules."

Republicans have employed several tactics already, including one on Tuesday that forced the abrupt adjournment of the confirmation hearing for President Obama's choice to lead the Internal Revenue Service, John A. Koskinen. They also forced the Senate to burn through all four hours of mandatory debate time on the nomination of Representative Melvin Watt, the North Carolina Democrat picked to head the Federal Housing Finance Agency. Often

senators will reach an agreement to yield that time.

Mr. Watt's nomination was ultimately confirmed Tuesday by a vote of 57 to 41. The nomination of Patricia Ann Millett to the United States Court of Appeals for the District of Columbia Circuit also cleared the Senate, 56 to 38.

Democrats said they saw Republican efforts to slow down the confirmation process as an exercise in venting frustration. "It's retaliatory," said Senator Tom Harkin, Democrat of Iowa. "It's revenge," he added, noting that Democrats had a way of making things unpleasant themselves: by forcing Republicans to be on the Senate floor while they draw things out.

"They're going to have to keep speaking for four hours or eight hours at a time," Mr. Harkin said. "And I don't think they'll have the stomach to do that on Fridays and Saturdays."

Some Republicans are reluctant to dwell on nominations too long out of fear that it will distract from their efforts to focus attention on the problems with the Affordable Care Act.

Senator Harry Reid of Nevada, the majority leader, has vowed to keep the Senate in session right up until Christmas if he needs to. But Republicans have shown no signs that they are bluffing. Many of them are still in shock that Mr. Reid resorted to the rule change — so divisive it is known as the nuclear option — when he used a parliamentary tactic to alter the filibuster rules with a simple majority vote. Ordinarily, Senate rules changes require a two-thirds majority, or 67 votes.

"I don't think I've ever felt any worse about the institution as I do today," said Senator Lindsey Graham, Republican of South Carolina, who said Republicans should make their displeasure as clear as they could. "I don't know where this all ends," he added.

“Senate Confirms Obama Nominee Under New Filibuster Rules, World Doesn’t End”

Huffington Post
Jennifer Bendery
December 10, 2013

Senate Republicans warned Democrats of the grave consequences of going "nuclear" with filibuster rules, saying it would destroy comity and come back to haunt them when they're in the minority.

But Democrats went ahead and changed the rules anyway, and now we're seeing what a nuclear explosion looks like in the Senate: a noncontroversial judge was approved Tuesday by a majority vote, 56-38.

Patricia Millett's confirmation to the U.S. Court of Appeals for the D.C. Circuit makes her the first nominee to move forward in a post-filibuster reform world. Democrats have plenty of other nominees lined up behind her now that it only takes 51 votes to advance executive and judicial nominees (except for Supreme Court nominees, who still require 60 votes).

A senior Democratic aide said the Senate will vote on about a dozen nominees before adjourning for the year, including some, like Millett, who Republicans previously filibustered for reasons that have nothing to do with their credentials. They include two other D.C. Circuit nominees, Janet Yellen for the Federal Reserve and Mel Watt for the Federal Housing Finance Agency. All are expected to get confirmed this time around, many with GOP support.

President Barack Obama praised the Senate's action and noted that Millett's vote passed with some GOP support. Sens. Lisa Murkowski (R-Alaska) and Susan Collins (R-Maine) voted for her confirmation.

"I'm pleased that in a bipartisan vote, the Senate has confirmed Patricia Millett to be a judge on the U.S. Court of Appeals for the District of Columbia Circuit, filling a vacancy that has been open since 2005," Obama said in a statement. "She has served in the Department of Justice for both Democratic and Republican Presidents. I'm confident she will serve with distinction on the federal bench."

But just because it's easier for Democrats to move nominees on the Senate floor doesn't mean Republicans won't continue holding them up at other stages of the confirmation process.

In addition to GOP senators simply not making recommendations for nominees to fill court vacancies in their home states, The Huffington Post has counted at least 13 nominees currently stalled in the Senate Judiciary Committee because of nine Republicans (and one Democrat) refusing to put forward "blue slips," or a tradition in the committee that allows senators to advance or

block judicial nominees from their home state.

Many of the stalled nominees hail from Arizona, with Sen. Jeff Flake (R-Ariz.) being the top offender in not submitting blue slips. Sen. Marco Rubio (R-Fla.) is refusing to submit a blue slip for his own nominee, William Thomas, who would be the first openly gay black male federal judge if confirmed. Sen. Richard Burr (R-N.C.) is withholding a blue slip for another key nominee, Jennifer May-Parker, who would fill the longest standing district court vacancy in the country.

Sen. Patrick Leahy (D-Vt.), the committee chairman, seems content to keep the blue slip rule in place for now.

"I assume no one will abuse the blue slip process like some have abused the use of the filibuster to block judicial nominees on the floor of the Senate," Leahy said in a statement after the Senate changed its filibuster rules. "As long as the blue slip process is not being abused by home-state senators, then I will see no reason to change that tradition."

But Michelle Schwartz of Alliance for Justice, a left-leaning association of more than 100 organizations focused on the federal judiciary, said GOP senators are already misusing the blue slip rule and her group is prepared to pressure Democrats to nix the tradition if things get any worse.

"We have seen Republicans withhold blue slips from qualified nominees and there is serious concern that they will only intensify that practice now that another means of obstruction has been foreclosed," Schwartz said. "If Republicans abuse the blue slip courtesy as they abused the filibuster, then we will ask the Senate to reform that process as well."