Presidential Power and the Dysfunctional Congress

Introduction

- Partisan Polarization
- Congressional Dysfunction
  - Split Between Chambers (Until 2014)
  - Legislative Procedures and Bottlenecks
- Obama Administration’s Unilateral Actions
  - Build on Prior Practices and Precedents
  - Test Outer Reaches of Presidential Authority
- Today’s Discussion
  - Focus on Appointments, Immigration, Iran
  - Start with Basic Separation of Powers Principles
Separation of Powers Principles

• Legislative vs. Executive Power
  – Legislative Power to Make the Law
  – Executive Power to Enforce the Law

• Sources of Presidential Power
  – Statutory Delegations (Bound by Law)
  – Independent Authority
  – Justice Jackson’s Three Tiers

• Domestic (Limited Independent Power)
  – Control of Officers (Appoint, Oversee, Remove)
  –Prosecutorial Discretion & Pardon Power

• Foreign Relations (Broad Independent Powers)
  – Diplomacy, Treaties/Agreements, Comm. in Chief

Recess Appointments
The Curious Case of the NLRB

• The Appointments Clause(s) (link)
  – Classes of Officers & Means of Appointments
  – Recess Appointments

• Stalemate at the NLRB
  – Loss of Quorum & Inability to Conduct Business
  – Use of Recess Appointments to Fill Vacancies

• Noel Canning
  – Recess: Not Limited to Formal, Intersession
  – May Happen: Includes Extending Into
  – But: On Facts Senate Break was Not a Recess
Immigration & Prosecutorial Discretion

• Immigration Law and Deferred Status
  – Immigration Reform Gridlock
  – Homeland Security Memos (DACA & Extension)
• Litigation
  – Standing Issues
  – APA (Texas v. U.S.)
  – SOP Discussion (U.S. v. Juarez–Escobar)
• Scope of Presidential Discretion
  – Statutory Interpretation (Action Mandatory?)
  – Legal Effects of Order (New Immigration Status?)

Possible Executive Agreement w/Iran

• Foreign Policy and Partisan Polarization
  – Senators’ Letter to Iran
  – Unusual & Arguably Improper
  – Power to Enter Such an Agreement
• History of Sanctions Against Iran
  – Statutory Framework
  – Agreement Consistent with Required Findings?
  – Implications for Authority (Jackson’s Tiers)
• Executive Agreement Authority
  – Cases (Bellmont/Pink, Dames & Moore, Garamendi)
  – Sufficiently Important to Require Treaty?
Conclusion

• Presidential Self-Help
  – Justified?
  – Tools & Limits

• Differences of Degree or Kind?
  – Build on Prior Practices and Precedents
  – Extend Scope, Effects, and Subjects
  – Itself a Matter of Partisan Polarization (link)

• The Future
  – Obama Administration
  – Outcome of 2016 Election

Article II, § 2, Cl. 2 & 3:

[2] . . . [The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[3] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.
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