No. **12-1281**

IN THE

MORRIS TYLER MOOT COURT OF APPEALS AT YALE LAW SCHOOL

NATIONAL LABOR RELATIONS BOARD.,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Whether the Senate's suspension of business, procedure, and receipt of nominations for thirty-seven days constitutes a recess notwithstanding periodic pro forma sessions.

(2) Whether the President may make recess appointments to fill vacancies that first arose before the recess.

PARTIES TO THE PROCEEDINGS

The parties are named in the caption with the exception of the International Brotherhood of Teamsters Local 760, who intervened in the court below.

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The opinion of the court of appeals is available at 705 F.3d 490. The order of the NLRB affirming the opinion of the administrative law judge is available at 358 N.L.R.B. No. 4. This Court granted certiorari. 133 S.Ct. 2861.

STATEMENT OF JURISDICTION

The D.C. Circuit issued its ruling on January 25, 2013. This Court granted certiorari on June 24, 2013. This Court has jurisdiction under 28 U.S.C. § 1254 (1) (2012).

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

See Appendix A.

STATEMENT OF THE CASE

On December 17th, 2011, the Senate adjourned "for pro forma sessions only, with no business conducted" until January 23rd, 2012.[1] These pro forma sessions took place every three business days.[2] The record reflects the presence of only one senator in each pro forma session except for the one on December 23rd, when two senators were present and a payroll tax holiday extension was passed.[3] In contrast, ninety-nine senators were present in the last session before the Senate adjourned on December 17th. 157 Cong. Rec. S8, 748-49. Ninety were present when the Senate returned on January 23rd. 158 Cong. Rec. S27. The pro forma sessions lasted an average of thirty-seven seconds; none lasted longer than ninety seconds. *See* Pro Forma Records. None of the pro forma sessions included the Senate's morning business procedures. These procedures are mandatory (unless they are specifically waived) and include the consideration of presidential and other executive communications, the receipt of House messages, and the

[1] 157 Cong. Rec. S8, 783 (daily ed. Dec. 17, 2011).
[2] 157 Cong. Rec. S8, 787 (daily ed. Dec. 20, 2011); 157 Cong. Rec. S8, 789 (daily ed. Dec. 23, 2011); 157 Cong. Rec. S8, 791 (daily ed. Dec. 27, 2011); 157 Cong. Rec. S8, 793 (daily ed. Dec. 30, 2011); 158 Cong. Rec. S1 (daily ed. Jan 3, 2012); 158 Cong. Rec. S3 (daily ed. Jan. 6, 2012); 158 Cong. Rec. S5 (daily ed. Jan. 10, 2012); 158 Cong. Rec S7 (daily ed. Jan. 13, 2012); 158 Cong. Rec. S9 (daily ed. Jan. 17, 2012); 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) (hereinafter collectively "Pro Forma Records").
[3] 157 Cong. Rec. S8, 789 (daily ed. Dec 23, 2011);

introduction of bills and resolutions.[4] During the period marked by pro forma sessions, the President made multiple nominations to positions that require Senate confirmation. *See Obama nominates two to Fed board*, AFP, Dec. 27, 2011. None of these nominations were laid before the Senate during the pro forma sessions. *See* Pro Forma Records. This and several other mandatory procedures were not followed, and there is no indication that these rules were waived.[5] Despite the order that no business occur, during December 23rd's eighty-five-second pro forma session two senators passed a bill with no vote, no debate, and no reference to the presence or absence of a quorum. 157 Cong. Rec. S8, 789.

During these pro forma sessions, the Senate produced documents indicating the Senate was in fact in recess. On December 17th, the Senate approved a motion to authorize committee activities in the first half of January "notwithstanding the Senate's recess," 157 Cong. Rec. S8, 783, and the Senate's business calendar designated the first twenty-two days of January as a "scheduled non-legislative period."[6] The Senate defines scheduled non-legislative periods as "days that the Senate will *not be* in session."[7]

On January 4th, 2012, the President made three appointments to the National Labor Relations Board, *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 498 (D.C. Cir. 2013), invoking his authority to "fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The executive branch believed the Senate was in recess, because it could not "receive communications from the President or participate as a body in making appointments." 36 Op. O.L.C. 1, 5 (2012).

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[4] Martin B. Gold, *Senate Procedure and Practice* 20 (2008); see also Senate Rule VII, reprinted in Senate Manual, S. Doc. No. 112–1, at 6 (2011).
[5] *See* Pro Forma Records; *see also* 157 Cong. Rec. S8, 783-84.
[6] Kathleen Alvarez Tritak, *Calendar of Business*, Senate of the United States 112th Congress at 3 (Jan 3, 2012), http://www.gpo.gov/fdsys/pkg/CCAL-112scal-2012-01-03/pdf/CCAL-112scal-2012-01-03-pt0.pdf.
[7] Tentative 2013 Legislative Schedule, 113th Congress, 1st Session, United States Senate, available at http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/2013_schedule.htm (emphasis in original).

The NLRB requires three of five members to be present to conduct business, *see New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010), but at the time of these appointments, three of the Board's seats were vacant. Board member Peter Schaumber's term had previously expired on August 27th, 2010, leaving a vacancy; board member Wilma Liebman's term expired on August 27th, 2011, leaving a second; Craig Becker's recess appointment expired on January 3rd, 2012, leaving a third. *See Noel Canning*, 705 F.3d at 498. Since the Board had only two members in place before these appointments, it became inoperative on January 3rd, when Mr. Becker's appointment expired. Long before making these recess appointments, the President nominated each of his eventual appointees for the positions: Mr. Flynn on January 5th, 2011, Ms. Block and Mr. Griffin on December 15th, 2011.[8] The Senate never acted on these nominations. All three nominations were still pending at the time of the appointments. After the January 4th appointments, the Board was once again able to act on its statutory mandate.

On February 8th, 2012, a three-member panel of the Board (including Mr. Flynn and Ms. Block) affirmed an administrative law judge's ruling that Noel Canning had violated the National Labor Relations Act. *Noel Canning, A Div. of the Noel Corp. & Teamsters Local 760,* 358 N.L.R.B. No. 4 (Feb. 8, 2012). Respondents petitioned for review of the Board's decision in the D.C. Circuit, arguing that the board lacked a quorum because the January 4th appointments were invalid under the Recess Appointments Clause. *See Noel Canning*, 705 F.3d at 499.

The court of appeals ruled in favor of Noel Canning, justifying its ruling in several ways. First, the court argued that the recess appointments clause empowers the President to act only during the recess *between* sessions of Congress (*inter*session recesses), not during recesses within a session (*intra*session recesses). *Id*. at 500. Second, the court of appeals ruled that the

[8] *See* Holly Rosenkranz, *Obama Nominates Republican Terence Flynn to National Labor Relations Board*, Bloomberg, Jan. 5, 2011; White House Press Secretary, *Presidential Nominations and Withdrawal Sent to the Senate*, The White House, Dec. 15, 2011.

President could not fill positions that first became vacant while the Senate was in session, because the words "vacancies that may happen during the recess of the Senate"[9] indicate that vacancies must arise during the recess. *Id.* at 503. Third, the court held that the Senate was not in recess on January 4th because it had not adjourned sine die. *Id*. at 513.

Judge Griffith concurred in part and dissented in part. He would not have reached the question of whether pre-existing vacancies may be filled during a recess. *Noel Canning*, 705 F.3d at 515 (Griffith, J., concurring) ("We should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it."). The NLRB petitioned for certiorari, and this Court granted the writ.

SUMMARY OF ARGUMENT

I. THE SENATE WAS IN RECESS NOTWITHSTANDING THE PRO FORMA SESSIONS.

The January 4th appointments were valid exercises of the President's recess appointment authority: The plain meaning of "recess" constrains the procedures available to the Senate, which was recognizably closed for business at the time. Since the early 17th century, the term "recess" has been used to mean a temporary suspension of business or procedure. On December 17th, the Senate passed an order to suspend all business until January 23rd. In the intervening period, nearly all procedure was suspended as well. No more than two senators were ever present, and these pro forma sessions lasted a cumulative six minutes and seven seconds. Statements by senators during this period and official Senate documents establish that many within the Senate thought the time surrounding January 4th was a recess.

The thirty-seven-day period also meets the historical definitions of the Senate's recess developed by the Senate Judiciary Committee and the executive branch. Critically, the procedures allowing executive nominations to be brought to the floor were suspended, disabling

[9] U.S. Const. art. II, § 2, cl. 3.

the Senate's ability to give advice and consent. The President in fact did make nominations during these pro forma sessions; the Senate was unable to receive or act on them. The purpose of the recess appointments clause is to allow the President to fill vacancies when the Senate is absent, and the Senate was absent as a body from December 17th to January 23rd.

The court of appeals' definition of recess as sine die adjournment is historically inaccurate and undermines the Constitution's balance of powers. For decades, many of the first Congresses adjourned for intersession recesses but did not adjourn sine die. These earliest Congresses used sine die adjournments only to begin recesses between *Congresses*, not between *sessions of the same Congress*. Furthermore, the constitutional definition of "recess" cannot rest solely on the Senate's invocation of a phrase. The substance of the Senate's actions must define the recess. Under a formal definition such as sine die adjournment, the Senate could abdicate its duty to advise and consent for months at a time and the President could not fill important government positions. When the framers adopted the Constitution, they envisioned recesses that would last longer than the sessions. The recess appointment power was thus a firmly integrated component of government functioning; the Senate cannot preclude it without staying in session.

While the Constitution gives each house of Congress the authority to determine its internal procedural rules, this Court has limited such rules when they conflict with the plain meaning of other terms in the Constitution. Because the sine die adjournment rule conflicts with reasonable, historically accepted understandings of the word "recess," the ordinary understanding of the Constitution must trump the Senate's procedural innovation.

II. THE PRESIDENT MAY FILL VACANCIES THAT AROSE BEFORE THE RECESS.

The text of the Recess Appointments Clause permits the President to fill vacancies only during the recess of the Senate, but it does not specify when those vacancies must arise: The

phrase "during the recess" modifies "President shall have the power," not "vacancies that may happen." "During the recess" cannot modify *only* "vacancies that may happen," because such a reading would allow the President to fill vacancies unilaterally *during the Senate session* so long as those vacancies first arose during a recess. "During the recess" cannot modify *both* phrases, because that violates basic syntax rules and because allowing such constructions would undermine other provisions in the Constitution. The fact that "during the recess" comes after an intervening clause is unusual, but not determinative. This Court has read sentences that way in the past; some other Constitutional clauses *must* be read that way. The phrase "that may happen" is not superfluous because it prevents the President from preemptively filling future vacancies with recess appointments, as he routinely does with nominations.

At the very least, the text is ambiguous and the Court should look to the clause's purpose and to history; both clearly support the practice. The purpose of the clause is to ensure there is always *some* method available to fill a vacancy; the exact moment a vacancy arises is irrelevant to achieving that purpose. During the Senate recess, advice and consent is impossible. At such times, a recess appointment is the only way to fill a vacancy and ensure the continued functioning of the government. The President's power to recall the houses is no substitute for the recess appointment power, and acting officials are no replacement for full officers of the United States. Because the President nominated the NLRB members before the recess, the one structural concern created by this reading (that the President will forego nominations in lieu of appointments) is not present here.

Since the Washington administration, Presidents have used the recess appointment process in the same way that President Obama did here. The court of appeals erred by overlooking Washington's two appointments to fill pre-existing vacancies. This is a serious

omission since the Washington appointments confirm that there has been a "systematic, unbroken, executive practice," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring), of using recess appointments to fill vacancies that arose before the recess. Since 1823, the Attorneys General have unanimously supported this practice; every other circuit court that has considered the question upheld the appointments; and Congress has validated this practice by authorizing funds to pay these appointees, placing the President's actions clearly in Justice Jackson's "zone one." *Id.* at 635 (Jackson, J., concurring). This practice has become "part of the fabric of our society," *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), and should not be disturbed.

Indeed, disturbing that fabric now would create far-reaching consequences whose exact scope is difficult to predict. Since the time of Washington, hundreds of people in both the executive and judicial branches have wielded governmental power under a recess appointment made to fill a pre-existing vacancy. Holding this practice unconstitutional would void their appointments, and their decisions, *ab initio*, casting doubt on 200 years of judicial decisions, administrative rulemaking, and executive action. This would invite substantial litigation in the years to come. Such a potentially destabilizing decision should only be made when the Constitution's text or grave structural concerns clearly require it. This is not such a case.

ARGUMENT

I. THE SENATE WAS IN RECESS ON JANUARY 4TH 2012; THE PLAIN MEANING OF THE CONSTITUTION SHOULD NOT BE OVERRIDDEN BY THE SENATE'S PROCEDURAL RULES.

(a) The Senate's suspension of business and procedure created a recess under the word's ordinary meaning

The use of the word "recess" to mean a "temporary suspension of work or activity" in formal proceedings such as treaty negotiations or legislative sessions dates back to at least

1603.[10] Founding-era dictionaries define recess as "remission or suspension of business or procedure," *Webster's Dictionary* (1st ed. 1828), "departure," Nathan Bailey, *The Universal Etymological English Dictionary* (1776), and "suspension of procedure." William Perry, *The Royal Standard English dictionary* (1795). The Constitution's words are "always to be given the meaning they have in common use, unless there are very strong reasons to the contrary." *State of Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886).

Except for a total of six minutes and seven seconds, the Senate was silent from December 17th, 2011 to January 23rd, 2012. *See* Pro Forma Records. For these thirty-seven days, the Senate was not doing business, was not receiving messages from the President, and was not even observing the procedures required by its own rules during real sessions. *Id.* For thirty-seven days, the chamber was almost always empty, and senators had no duty to be in Washington. Under an understanding of recess as departure, going away, suspension of business, or suspension of procedure, the Senate was in recess on January 4th, 2012.

(i) **During a session of the Senate, the Senate conducts routine business and follows its own rules governing sessions; here, the Senate did neither.**

On December 17th, 2011, the Senate entered a period of "pro forma sessions only," 157 Cong. Rec. S8, 783 (daily ed. Dec. 17, 2011). The words "pro forma" themselves suggest an absence of substantive activity. To make that point even more clear, when the Senate adjourned on December 17th, it did so under an order declaring that there would be "no business conducted" until January 23rd. *Id.* Moreover, the Senate's Calendar of Business for January 3rd, 2012, prepared under the direction of the Secretary of the Senate, designated the first twenty-two days of that January as a "scheduled non-legislative period."[11] Since the Senate defines

[10] *See, e.g.*, *recess, n.*, OED Online, (September 2013), http://www.oed.com/view/Entry/159456.
[11] Kathleen Alvarez Tritak, *Calendar of Business*, Senate of the United States 112th Congress at 3 (Jan 3, 2012), http://www.gpo.gov/fdsys/pkg/CCAL-112scal-2012-01-03/pdf/CCAL-112scal-2012-01-03-pt0.pdf

scheduled non-legislative periods as "days that the Senate *will not* be in session,"[12] this is substantial evidence that even the Secretary of the Senate believed this was a recess. Similarly, before entering the pro forma sessions, the Senate authorized certain continuing committee activities "notwithstanding the Senate's recess." 157 Cong. Rec. S8, 783. Any reasonable observer would conclude that the Senate had communicated, both to itself and to the public, that it was simply not going to be in business during these days.

In one of the pro forma sessions, two senators were present; during every other pro forma session, the record reflects the presence of only one senator. *See* Pro Forma Records. The average length of the pro forma sessions was thirty-seven seconds; none lasted longer than ninety seconds, and they lasted for a combined total of six minutes and seven seconds. *Id.* In stark contrast, during the Senate's December 17th meeting, ninety-nine senators were present, 157 Cong. Rec. S8, 748-49, during the January 23rd meeting, ninety senators were present, 158 Cong. Rec. S27 (daily ed. Jan. 23, 2012), and during the convening of the 111th Congress in January of 2011, ninety senators were present. 157 Cong. Rec. S5 (daily ed. Jan 5, 2011). These sessions lasted for six hours and thirty-three minutes, four hours and fifty-six minutes, and seven hours and twenty-nine minutes, respectively. *See* 157 Cong. Rec. S8, 745-84; 158 Cong. Rec. S13-48; 157 Cong. Rec. S1-68.

In addition to suspending all business, the Senate also did not observe the procedures that its own rules require during actual sessions. While the Senate is in session, "the Journal of the preceding day shall be read unless by nondebatable motion the reading shall be waived." Senate Rule IV, reprinted in Senate Manual, S. Doc. No. 112–1, at 4 (2011). The Senate did not waive the reading of the Journal for any of the pro forma sessions before adjourning for those sessions.

[12] United States Senate, *Tentative 2013 Legislative Schedule* (Nov 30, 2012), http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/2013_schedule.htm

157 Cong. Rec. S8, 783 (daily ed. Dec 17, 2011). During the pro forma sessions, the Journal was not read nor was the Journal-reading requirement waived for the subsequent pro forma sessions.

This was not the only violation of the Senate's own rules governing actual sessions. Senate rules also require that business take place after a prayer by the Chaplain and the reciting of the Pledge of Allegiance. Senate Rule IV, reprinted in Senate Manual, S. Doc. No. 112–1, at 4 (2011). None of the pro forma sessions included either a prayer or the Pledge of Allegiance. *See* Pro Forma Records. While the prayer and the pledge are not substantively necessary for the Senate's business, their absence further indicates that even the Senate did not believe this was an actual session.

Finally, when the Senate is in an actual session (and adjourning only from day to day), a set of procedures known as morning business "occurs automatically as part of the Morning Hour." Martin B. Gold, *Senate Procedure and Practice* 20 (2008); *see also* Senate Rule VII, reprinted in Senate Manual, S. Doc. No. 112–1, at 6-7 (2011). These procedures are important: "If morning business does not take place, the Senate cannot receive presidential and other executive communications, nor can it receive House messages that include House-passed bills. Bills and resolutions cannot be introduced, committee reports cannot be filed, and petitions and memorials cannot be received and referred." Gold, *supra* at 20. Morning business did not occur during any of the pro forma sessions. *See* Pro Forma Records. Because it did not, the Senate could not receive presidential communications, including any presidential nominations to fill the NLRB vacancies. Because the Senate cannot confirm nominees if they cannot receive nominations, advice and consent during this period was therefore simply not possible.

These differences between actual and pro forma sessions are striking. Neither a layperson nor someone familiar with the Senate could confuse them; nobody would think that these pro forma sessions were actual meetings of the United States Senate.

(ii) **These thirty-seven days constitute a recess under the uses of the word developed since the founding.**

The definition of "recess" at the founding, the definition offered by the executive, and the definition offered in the past by the Senate itself all make clear that the Senate was in a recess—not in session—when the President made these appointments.

The thirty-seven-day period between December 17th and January 23rd was a recess even according to the definition that the Senate itself has offered in the past. In a 1905 report, the Senate Judiciary Committee advocated for a functionalist test of whether the Senate was in recess. *See* 39 Cong. Rec. S3, 823.[13] The Committee's report explicitly rejected the notion that there was such a thing as a "constructive session," which is essentially what a pro forma session is. To define when the Senate is in recess, the Committee listed a series of factors: "when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." *Id.* (emphasis in original). The Senate Judiciary Committee's test indicates that the period surrounding January 4th, 2012, is best construed as a recess.

[13] This report was issued in response to President Roosevelt's invocation of the recess appointment power to make appointments in a constructed "split second" between sessions. *See* Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2212 (1994). The Senate Judiciary Committee disapproved of President Roosevelt's actions. The fact that the Committee's report was a list of factors designed to constrain the executive makes executive action which passes their test all the more persuasive.

First, the term "pro forma session" itself indicates that that the Senate did not consider these meetings to be regular sessions. Second, the pro forma sessions also were clearly not extraordinary sessions, which require action by the president.[14] Third, Senators owed no duty of attendance. While Congressional leadership has the legal authority to compel members' attendance during all recesses (even intersession recesses),[15] the Senate's order providing that no business shall be conducted, combined with the near total absence of Senate members in the chamber, establishes that members understood that they had no duty to attend. On January 23rd, the Senate majority leader welcomed members back "after the long break we had," 158 Cong. Rec. S13 (daily ed. Jan. 23, 2012), further indicating that members owed no duty of attendance during this "long break," a synonym for "recess."

The executive branch has developed its own definition of when the Senate is in recess. Endorsing the Senate Judiciary Committee's test, the executive adopted a similar set of criteria to determine when the Senate is in recess: "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?" 33 Op. Att'y Gen. 20, 25 (1921). This last question has emerged as the executive branch's definitive test. *See, e.g.*, 13 Op. O.L.C. 271, 272 (1989) (referring to this question as "the constitutional test for whether a recess appointment is permissible"); *see also* 36 Op. O.L.C. 1 (2012) (applying this test). The Senate could not receive communications or participate in the appointments process during this period.

[14] *See, e.g.*, United States Senate, *Sessions of the Senate*, http://www.senate.gov/general/Features/Sessions.htm ("[A]n extraordinary session occurs when the president exercises his constitutional authority to call Congress back into session during a recess or after a sine die appointment.").
[15] *See, e.g.*, H.R. Con. Res. 336, 111th Cong. §2 (2010) (providing for Congressional leadership to call Congress back into session during a sine die adjournment between sessions).

As discussed above, the chamber was empty for all but six minutes of the thirty-seven days that elapsed between December 17th and January 23rd. Because no morning business was conducted during the pro forma sessions, no messages from the president could be presented to the Senate. Gold, *supra* at 20. Because the chamber was nearly always empty, if a nomination did somehow make it to the floor, the Senate was still far short of the number of members required for a quorum. U.S. Const. art. I, § 5, cl. 1. The President did in fact nominate additional persons to positions requiring Senate confirmation on December 27th,[16] but these nominations were not laid before the Senate until it resumed its actual sessions. *Compare* Pro Forma Records (containing no executive communications), *with* 158 Cong. Rec. S78 (daily ed. Jan 24, 2012) (containing the nominations made during the pro forma sessions). No nominations—and no executive communications of any form—were laid before the Senate during the pro forma sessions.

By the test of how "recess" was understood at the founding, by the executive branch's test, and by the Senate's own test, the Senate was in recess. The same would be true of any test that "look[s] beyond form to the substance of what Congress has done." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854 (1986) (internal quotation marks omitted). The Senate could have stayed in Washington, conducted business, received nominations, and thereby prevented recess appointments by the President. But it did not do so. Instead, it voted by unanimous consent to adjourn with no business to be conducted for over a month, referring at times to the period as a "recess" when it was "not in session." It was understood, internally and publicly, that senators would owe no duty of attendance and nothing of substance would happen. The intervening pro forma sessions abandoned regular Senate procedures, with no order providing for a replacement procedure to receive executive communications. There was no

[16] *See, e.g., Obama nominates two to Fed board*, AFP, Dec. 27, 2011.

action on presidential nominations, nor could there have been under the pro forma sessions' procedures. Under any meaningful definition, the Senate was in recess on January 4th, 2012.

(iii) **The passage of a bill during one of the pro forma sessions does not transform the recess into a session.**

During the December 23rd pro forma session, two Senators passed an act to extend the payroll tax holiday.[17] But that bill's passage does not transform the entire thirty-seven-day period into a series of real sessions. It is merely evidence that the Senate can interrupt a recess to conduct business—as it sometimes does—and then resume the recess. The Supreme Court can issue orders and decisions during the summer months,[18] but it is still in recess during the summer. Similarly, the Senate can and does engage in occasional ad hoc measures during recesses, but this kind of isolated action does not negate the existence of a recess.

First, even during *intersession* recesses, congressional leaders can call members back to Washington to conduct legislative business if they deem it in the public interest.[19] The mere possibility that action can occur during a given period of time does not mean it is not a recess. Second, during intrasession recesses, the Senate often empowers Senate leadership to conduct business. The payroll tax holiday extension was signed pursuant to one such order passed at the beginning of the 112th Senate. 157 Cong. Rec. S8, 790 (daily ed. Dec. 23, 2011); *see also* 157 Cong. Rec. S14 (daily ed. Jan. 5, 2011) (authorizing the President pro tempore and Acting President pro tempore to sign bills "when the Senate is in recess," and noting that such an order is "routine."). It is expected that individual, ad hoc items of business may need to be attended to during a recess. For instance, on August 12th, 2010, the House and Senate were in recess pursuant to a concurrent resolution passed by the Senate on August 5th, 2010, that was

[17] 157 Cong. Rec. S8, 789 (daily ed. Dec 23, 2011). The act was passed by unanimous consent, a procedure wherein consent is presumed unless someone present objects. *See, e.g.*, Naftali Bendavid, *How to Fix a Dysfunctional Senate: Cut 98 Senators*, Wall St. J., Aug. 13, 2010.
[18] *See, e.g.*, *Quintanilla v. Stephens*, 13-5316, 2013 WL 3716524 (U.S. July 16, 2013).
[19] *See, e.g.*, H.R. Con. Res. 336, 111th Cong. § 2 (2010)

designated to last until September 13th, 2010. 156 Cong. Rec. S6, 982. Nonetheless, two senators convened a session and passed the Emergency Border Security Supplemental Appropriations Act.[20] The Senate then resumed the recess until September 13th, pursuant to the August 5th order. 156 Cong. Rec. S7, 001 (Daily ed. Aug. 12, 2010). The carrying out of occasional business did not invalidate that recess, and neither should the nearly identical procedure that occurred during the midst of the pro forma sessions.

Finally, even after the payroll tax holiday act extension was passed, the Senate's Calendar of Business continued to list the first twenty-two days of January as a "scheduled non-legislative period,"[21] which the Senate defines as times when the Senate "will *not be* in session."[22] The preceding and remaining pro forma sessions were held pursuant to the initial order that no business be conducted; no members attended other than the officer who convened each session, and the procedural regularities of a normal session were not observed. *See* Pro Forma Records.

(b) The court of appeals erred in defining a recess as the Senate's adjournment sine die between sessions

(i) **The sine die definition is not historically accurate.**

"Sine die" is not the *sine qua non* of a Senate recess, and it never has been. Thus, while the Constitution itself does not offer a definition of the "the recess,"[23] the court of appeals' definition cannot be the right one. The court of appeals defines "the recess" by the words used to

[20] 156 Cong. Rec. S6995 (daily ed. Aug. 12, 2010). This measure was also passed by unanimous consent. *See also* Bendavid, *supra* note 10.
[21] Kathleen Alvarez Tritak, *Calendar of Business*, Senate of the United States 112th Congress at 3 (Jan 3, 2012), http://www.gpo.gov/fdsys/pkg/CCAL-112scal-2012-01-03/pdf/CCAL-112scal-2012-01-03-pt0.pdf
[22] United States Senate, *Tentative 2013 Legislative Schedule* (Nov 30, 2012), http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/2013_schedule.htm
[23] The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The word "recess" appears only one other time in the Constitution as originally ratified: the provision allowing state executives to temporarily fill vacancies that arise "during the Recess of the Legislature" of their state. U.S. Const. art. I, § 3, cl. 2, *superseded by* U.S. Const. amend. XVII.

adjourn the Senate: if the Senate say *sine die* when it adjourns, it is in "the recess." If not, it is not. In support of this point, the court argued that "[i]t has long been the practice of the Senate, dating back to the First Congress, to conclude its sessions and enter 'the Recess' with an adjournment *sine die*." *Noel Canning*, 705 F.3d at 512. This, however, is not so. For decades, the first Congresses regularly adjourned between sessions without use of the terms "sine die" or the English equivalent "without day." *See, e.g.*, 1 Annals of Cong. 96 (1789) (concluding First Session of 1st Congress with non-sine die adjournment); 3 Annals of Cong. 140 (concluding First Session of 2d Congress with non-sine die adjournment); 18 Annals of Cong. 382 (1808) (Concluding First Session of 10th Congress with non-sine die adjournment). The court of appeals is actually referring to adjournments between *Congresses*, as between the First and the Second Congress, rather than between the *sessions* of each of those Congresses. *See, e.g.*, *Noel Canning v. N.L.R.B.*, 705 F.3d 512 n.1. In the past, the Senate entered recesses between the sessions (unarguably intersession recesses) without anyone uttering the words sine die or without day.

Under the court of appeals' definition of recess as sine die adjournment, appointments made by early presidents including George Washington during these *inter*session recesses would be unconstitutional.[24] "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Pocket Veto*, 279 U.S. at 689. The actions of founding-era presidents indicates a recess can exist, sine die or no sine die.

Historical sources confirm that the sine die definition has not prevailed in the past. Thomas Jefferson's *A Manual of Parliamentary Practice: for the use of the Senate of the United States* (1801) does not contain the phrase "without day" at all; "sine die" occurs only once and in

[24] *See, e.g.*, Stuart Buck, et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society, Jan. 9, 2004, at 26 (listing two such recess appointments by George Washington)

an unrelated context.[25] *See also Senate Manual, containing the standing rules and orders of the United States Senate,* 1905 (containing no occurrences of "without day" and only the same single usage of "sine die"). A similar absence is found in the Senate Judiciary Committee's 1905 report on "what in its opinion constitutes a recess of the Senate under the provisions of Article II, section 2, of the Constitution." 39 Cong. Rec. S3, 823-24. The report states that "the word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." *Id*. The report does not say that the existence of a recess depends on the words used before the Senate adjourns. *Id.* There are other affirmative indications that the words sine die are not decisive. For example, the Senate's current definition of an extraordinary session is one that occurs "when the president exercises his constitutional authority to call Congress back into session during a recess *or* after a sine die adjournment."[26] But if only the words "sine die" can create a recess, this phrasing makes little sense.

(ii) **The sine die definition jeopardizes the separation of powers.**

In addition to its historical implausibility, the definition of recess as a sine die adjournment raises a significant separation of powers issue. The sine die definition allows the Senate to enter a recess while evading the executive's recess appointment powers—it just needs to adjourn without saying the magic words. Such an arrangement would subvert an important Constitutional safeguard. In the Senate Judiciary Committee's appraisal, if the Executive were to be unable to fill up vacancies while the Senate is not in session, it would risk "grave inconvenience and harm to the public." 39 Cong. Rec. 38, 24. During the founding era, the Senate's recess was expected to be longer than its sessions: "[T]he Framers envisioned that

[25] In reference to the continuance of a legal suit sine die. *Id.* at Sec. XXXIII.
[26] *See* United States Senate, *Sessions of the Senate*, http://www.senate.gov/general/Features/Sessions.htm (emphasis added).

Congress would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year." *Barnes v. Kline*, 759 F.2d 21, 38-39 (D.C. Cir. 1984).[27] While the advice and consent of the Senate would be the "general mode" of appointment under the Constitution, *see Noel Canning*, 705 F.3d at 503, the Framers expected that executive recess appointments would be a substantial, permanent fixture in the relationship of the coordinate branches. In contrast, the sine die definition ensures that the Senate "[f]eels no check but its own will." *I.N.S. v. Chadha*, 462 U.S. 919, 950 (1983) (quoting J. Story, *Commentaries on the Constitution of the United States* (1858)).

(c) The Senate cannot use its rules to override the plain language of the Constitution.

A house of Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892). While the Constitution provides that "[e]ach House [of Congress] may determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, these rules are still subject to the substantive constraints of the Constitution's plain language. Words used by the Constitution "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816); *see also D.C. v. Heller*, 554 U.S. 570, 576 (2008) ("[T]he Constitution['s]. . . words and phrases were used in their normal and ordinary as distinguished from technical meaning."). Congress may not override those words with its rules. If the plain meaning of constitutional language cannot set boundaries on allowable congressional procedures, many restraints on Congress's power would be toothless. As discussed above, under any ordinary definition of recess, the Senate was in recess on January 4th, 2012. A plain reading of the Constitution's use of recess should constrain the allowable procedures available to the Senate.

[27] *Vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *see also* Carrier, *supra*, at 2247 (suggesting that "the Framers anticipated that recesses might exceed six months").

For example, the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. But for this prohibition to have any restraining force, the words used (especially "Consent," "adjourn," and "three days") must have an independent constitutional meaning that one house's procedural rule cannot override. Otherwise, one house could decide that "the Consent of the other" requirement is satisfied by a statement made by a single member of the other house, or it could define "days" as "legislative days."[28] But this cannot be, for ordinary understanding of constitutional language trumps Congress's procedural creations. *See Pocket Veto*, 279 U.S. 655, 679 (1929) (rejecting the argument that the use of "legislative days" could trump the "ordinary and common usage" of "days," meaning calendar days, in the Constitution).[29] Similarly, where the Constitution requires the President to "return" a bill within ten days if he or she objects to it, U.S. Const. art. I, §7, neither house may keep the bill "in a state of suspended animation" by adopting procedures governing such return that prevent "certain knowledge on the part of the public" as to whether the bill has been returned or not.[30]

In *Powell v. McCormack*, 395 U.S. 486 (1969), the Court rejected the argument that Congress could override these constitutional restrictions with its own rules of procedure. In *Powell*, the House of Representatives voted to exclude an elected representative on grounds other than those specified in the Constitution: age, citizenship, and residence. U.S. Const. art. I, Sec. 2. The Court would not allow the House alone to be the sole judge of the relevant constitutional terms, for that would allow the House to expel members "under the guise of judging qualification

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[28] A technical term for the time between adjournments which can last for days, weeks, or months. *See generally* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004)

[29] *cf.* United States Senate, *Enactment of a Law*, http://www.senate.gov/legislative/common/briefing/Enactment_law.htm ("As used in the Rules of the Senate, a day generally is recognized as a legislative day unless specified as a calendar day.").

[30] *Pocket Veto*, 279 U.S. at 684 (noting that, for instance, the House could not designate receipt of a returned bill to an agent who does not make a legislative record of its delivery).

. . . effectively nullify[ing]" the higher bar the Constitution sets for expulsions. *Powell*, 395 U.S. at 547. The *Powell* Court further rejected the House's argument that an "exclusion" was an "expulsion."[31] As the court said, "[e]xclusion and expulsion are not fungible proceedings." *Powell*, 395 U.S. at 511-12. The Court forbade the House from creating the new procedural vehicle of "expulsion-by-exclusion," because it would erase the distinction the Constitution makes between expulsion and judging qualifications.

Just as "days" and "expel" have independent constitutional meanings that one house cannot override via its rules, so too do the terms "recess" and "session". A legislative day is not a day; a motion to exclude is not a motion to expel; a pro forma session is not a session. The Constitution describes only three states of the Senate: that it is doing business, that it is in recess, or that it is in an adjournment of up to three days.[32] As such, the Constitution gives the Senate a choice: remain available to consider the President's nominations, or allow the President to make recess appointments. It does not allow the Senate to "conceal faults and destroy responsibility," The Federalist No. 70 (Alexander Hamilton), by choosing neither.

While the Constitution grants the Senate the general authority "to determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, these rules are limited by the plain meaning of the Constitution's text. Just as the Senate could not prevent appointments by recessing while declaring "during this recess, the President shall make no recess appointments," neither should it be able to use its internal rulemaking ability to achieve exactly the same purpose. Consider a scenario in which the Senate created a six-month period of absence that it called "departure,"

[31] Because the *exclusion* vote passed by a super-majority, the Speaker argued it was valid under the Constitutional authority given "solely to [the] discretion" of each house to expel a member with a two-thirds vote. Brief for Respondents at 95, Powell v. McCormack, 395 U.S. 486 (1969) (No. 138), 1969 WL 136796.

[32] The three day adjournment period is not an arbitrary figure. The Constitution specifies that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. 1 sec. 5.

stating explicitly that it was neither an adjournment for purposes of the adjournments clause nor a recess for purposes of the recess clause. There are many other procedural techniques the Senate might employ to achieve a substantively identical outcome: preventing the President from making recess appointments without making available the only other method for filling governmental posts—advice and consent by vote of the Senate as a body. The Constitution should be read to prevent such gimmicks. This Court sometimes must "interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell*, 395 U.S. at 549. This is such a case.

II. TEXT, STRUCTURE, AND HISTORY ALL INDICATE THE PRESIDENT MAY FILL VACANCIES THAT AROSE BEFORE THE RECESS OF THE SENATE.

President Washington made at least two recess appointments to fill posts that became vacant while the Senate was still in session.[33] In the two centuries since then, Presidents have followed Washington's lead and done the same, including Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, John F. Kennedy, Lyndon Johnson, and all of the last six Presidents.[34] Since 1823, opinions of the Attorney General have unanimously supported this practice,[35] and since 1940, Congress has specifically authorized funds to pay officials appointed in this way.[36] Poor record-keeping in earlier periods makes it difficult to know exactly how many times the President has used this method of appointment, but it is surely

[33] In 1793, Robert Scot was appointed Chief Engraver of the Mint. *See* S. Exec. J., 3d Cong., 1st Sess., 142–43 (1793); 27 *The Papers of Thomas Jefferson* 191-92 (John Catanzariti, ed. 1990). In 1796, William Clarke was appointed U.S. Attorney for Kentucky. *See* S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789–1816*, at 65–73 (1979).

[34] *See* Stuart Buck, et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society, Jan. 9, 2004, at 17; Lincoln Caplan, *Recess Appointments: An Alternative History*, N.Y.Times, Feb. 5, 2013.

[35] *See, e.g.*, *Exec. Auth. to Fill Vacancies*, 1 Op. Att'y Gen. 631 (1823); *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32 (1866); *Appointments Made During the Recess of the Senate*, 16 Op. Att'y Gen. 522 (1880). There are many more such Attorney General opinions, as discussed below.

[36] *See* 5 U.S.C. § 5503 (a) (2012) (providing for the payment of recess appointees to fill pre-existing vacancies if: (1) the vacancy arose 30 days before the end of the Senate session; or (2) the President previously made a still-pending nomination to fill that vacancy; or (3) the Senate rejects a nomination within 30 days of the recess and the President appoints someone else to fill the vacancy.).

in the hundreds.[37] This Court should disturb such a long-standing and congressionally-approved practice only when the unambiguous text of the Constitution or grave structural concerns clearly require it. This is not such a case. Here, presidential practice is supported by both the Constitution's text and its structure.

(a) The text of the Constitution permits recess appointments to fill pre-existing vacancies; the court of appeals focused its textual analysis on the wrong words.

The Recess Appointments Clause of the Constitution states: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. As the court of appeals rightly points out, this case turns on the words "that may happen during the Recess." *Noel Canning*, 705 F.3d at 507. But the court erred in focusing on the meaning of the word "happen" in that phrase. The court's analysis skips a threshold issue: what does "during the recess" *modify*? Is it "shall have the power" or "vacancies that may happen?" Because "during the recess" can only be read intelligibly as a restriction on when the President can make appointments (not as a specification of when the vacancy must arise) the D.C. Circuit's argument about the meaning of the word "happen" attacks a straw man. "Happen" may mean "arise." It may mean "exist." But either way, since the President *exercised his power* "during the recess," these appointments are valid.

(i) **The phrase "during the recess of the Senate" is a temporal restriction on the President's power, not a specification of when the vacancy must arise.**

The phrase "during the recess" can be read in one of only three possible ways: (a) to modify *only* "President shall have the power"; (b) to modify *only* "vacancies that may happen"; or (c) to modify *both* clauses. Interpretation (a) is the only one that does not lead to illogical results. The phrase was included in the Constitution to forbid appointments while the Senate is

[37] President Roosevelt alone made 167 recess appointments to fill pre-existing vacancies in the span of seconds. *See* Vivian S. Chu, *Recess Appointments: A Legal Overview*, Cong. Research Serv., RL33009, at 12 (2011).

in session, not to specify when the vacancy must arise. *See* 1 Op. Att'y Gen. 631 (1823) ("The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act."). Though this modifier admittedly shows up late in the sentence, this is still the only sensible reading.[38] Alexander Hamilton's notes from the Constitutional Convention suggest it is the right one: "In the recess of the Senate he may fill vacancies in offices by appointments to continue in force until the end of the next Session of the Senate."[39]

(ii) **"During the recess" cannot modify *only* "vacancies that may happen."**

Reading "during the recess" to modify *only* "vacancies that may happen" would leave the President's power temporally unrestricted: The President could make appointments to fill a vacancy *while the Senate is in session*, so long as the vacancy *first arose* during some past recess. *See* 12 Op. Att'y Gen. 32 (1866) (arguing that if "during the recess of the Senate" indicates *only* when a vacancy must happen, "such a vacancy may be filled by the President without the consent of the Senate whilst the Senate is in session"). No one, to our knowledge,

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[38] The fact that the modifier comes late in the sentence is not determinative. For example, if one says "the detective investigated the crime against his wife's wishes," it is clear that the *crime* is not against his wife's wishes; the *investigation* is. This is true even though "against his wife's wishes" comes immediately after "the crime."

In fact, this Court has in the past read sentences in this way in order to give a sentence its proper interpretation. In *In re Sixty Pipes of Brandy*, 23 U.S. 421 (1825), the Court held that the phrase "casks containing distilled spirits, which ought to be marked and accompanied with certificates" required the casks (but not the spirits) to be accompanied with certificates, even though the spirits were the last items mentioned before the modifier. *See also* 73 Am. Jur. 2d Statutes § 129 ("Qualifying words, phrases, and clauses are *ordinarily* confined to the last antecedent . . . . This rule of statutory construction, however, is *not controlling or inflexible*. The rule is not applicable where a further extension or inclusion is clearly required by the intent and meaning of the context or disclosed by the entire act.") (collecting cases) (emphasis added).

To take a constitutional example, each house of Congress may "compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. Const. art. I, § 5. In this sentence, the phrase "in such Manner" modifies the method of compelling, not the method of attendance. The Senate may specify how absent members will be compelled to attend (perhaps letters, visits from the U.S. Marshals, or other penalties); the Senate may not compel absent members to *attend* the Senate in a certain manner or under certain penalties (only while kneeling, only under cover of nightfall, only while wearing a hat). But this would be the result if constitutional clauses could *only* modify the immediately preceding word or clause. *See generally* Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 Const. Comment. 7 (1999).

[39] 1 Alexander Hamilton, *The Works of Alexander Hamilton* 360 (Henry Cabot Lodge, ed., 1904).

has ever suggested such a reading. *See* 12 Op. Att'y Gen. 32 (1866) ("All admit that whenever there is a vacancy existing during the session, whether it first occurred in the recess or after the session began, the power to fill requires the concurrent action of the President and Senate."); Michael B. Rappaport, *The Original Meaning of the Recess Appointment Clause*, 52 U.C.L.A. L. Rev. 1487, 1539 (2005) (arguing such an interpretation is "nonsensical as a matter of structure and purpose.").

(iii) **"During the recess" cannot modify *both* "shall have the power" *and* "vacancies that may happen."**

A prepositional phrase can modify only one preceding phrase, not multiple ones. If this were not so, students would find it very difficult to diagram a sentence. *See* Cindy Vitto, GRAMMAR BY DIAGRAM 53, 55 (2006) ("If the prepositional phrase is an adverb, it is diagramed beneath the verb . . . [D]iagram the adverb beneath the verb [it modifies]."). For example, the sentence "The man killed the king with a knife" can mean either (a) "The man used a knife to kill the king" or (b) "The man killed the king who had a knife." But it cannot mean "The man used a knife to kill the king who also had a knife." The phrase "with the knife" cannot modify both "killed" and "king."[40] That is not how English syntax works, *see* Andrew Carney, *Syntax: A Generative Introduction* 87-89 (2012) (using this same example to illustrate the point), nor did it work that way at the time of the founding.[41] Just as "with a knife" cannot specify the murder weapon but also define the victim's possessions, neither can "during the recess of the Senate" define when the President may exercise this power but also specify when the vacancy must arise.

[40] In this example, "with a knife" is technically acting as an adverbial phrase in (a) and an adjectival phrase in (b), but the point applies to modifiers generally, regardless of what part of speech they are. The sentence "The man killed the king who was sitting with a knife" illustrates the same result when "with the knife" is acting as an adverbial phrase in both interpretations.

[41] A contemporaneous grammar book makes the point clear: "[Adverbs] are ufed to qualify the meaning of *the word* to which they are joined." Caleb Alexander, *A Grammatical System of the English Language: Comprehending a Plain and Familiar Scheme, of Teaching Young Gentlemen and Ladies the Art of Speaking and Writing Correctly Their Native Tongue* 44 (1792) (emphasis added) (anachronistic spelling and usage in original).

There is good reason to follow the guidance of the schoolbooks and the linguists when interpreting the Constitution: allowing adverbs to modify multiple preceding phrases creates serious mischief elsewhere in the text.

Article II provides that "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President." U.S. Const. art. II, § 1. Reading "at the time of the Adoption of this Constitution" to modify multiple preceding clauses (to specify when one must have been a "Citizen of the United States" but also when one must have been a "natural born Citizen") would limit the Presidency to those already born by the year 1789.[42]

The Fifth Amendment provides that no person shall "be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. If "without due process of law" can be read to modify multiple preceding clauses (to specify both when one may be "deprived" and when one may be "compelled") it would allow forced self-incrimination so long as due process is provided.[43]

Article I § 3 provides that "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years." If "for six years" can modify not only "chosen" but also "composed," then the Senate was constitutionally in session for only the six years after the founding and has been defunct ever since. [44]

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[42] *See* John Paul Stevens, *Five Chiefs* 41 (2011) (arguing that this cannot be the proper interpretation). *But see* Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure* Really *Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 Tex. L. Rev. 237, 243-46 (1995) (facetiously arguing that "there has been no legitimate president of the United States since Zachary Taylor").

[43] *See* Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 Fla. L. Rev. 667, 668 (2007) (pointing out this interpretive problem if multiple modifiers are allowed).

[44] Amendment XVII mirrors this language and suffers from the same problem if multiple modifiers are allowed. *See* Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were A Strict Textualist?*, 16 Const. Comment. 7, 15 (1999) (noting this reading of either provision leads to a "built-in six-year sunset clause" for the Senate). Such a reading would be an alternative ground for reversal in this case (if the Senate has been in a constitutionally-mandated recess since 1796, these vacancies both

These examples are merely illustrative—there are more.[45] "During the recess" should not be read to modify both "shall have the power" and "vacancies that may happen." A rule of construction that allowed phrases to modify multiple preceding ones would be unsustainable in light of the Constitution's other provisions.

(iv) **Reading "during the recess" to modify both clauses would still allow the President to fill vacancies that arose in previous recesses.**

Even if "during the recess of the Senate" *could* modify both "shall have the power" and "vacancies that may happen," such a reading would lead to a very strange result. Under this construction, the President could fill vacancies that became vacant in *some recess* (even if that recess is long in the past; even if the Senate was in session for many months in between these recesses). It is difficult to imagine why a President should be able to fill a vacancy that arose during some long-past recess (when he had the opportunity to submit a nomination during the intervening sessions) but not to fill a vacancy that arose the night before the current recess began (when he had no such opportunity).

(v) **Reading "during the recess" to specify only when the President may make appointments avoids these results without adding absent language into the text.**

To avoid these results, Respondents must make substantial line edits to the Constitution, rendering the clause as: "The President shall have the power [during the recess of the Senate] to fill vacancies that may [first] happen during ~~the~~ [that same] recess of the Senate." These words are not in the text, and this Court has refused to insert similarly absent modifiers into the Constitution. *See, e.g.*, *Pocket Veto*, 279 U.S. 655, 679 (1929) (declining to read a "qualifying adjective" into the constitutional text). "During the recess" specifies only when the President

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arose and were filled during "the Recess of the Senate"), but such a read would likely invite some additional litigation.

[45] *See generally* David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 Tenn. L. Rev. 687 (2012).

may act, not when the vacancy must happen, just as Hamilton's notes from the constitutional convention suggest. *See* Hamilton, *supra* ("In the recess of the Senate he may fill vacancies in offices by appointments to continue in force until the end of the next Session of the Senate.")

(vi) **Allowing the President to fill pre-existing vacancies does not make the phrase "that may happen" superfluous.**

The court of appeals below erred when it concluded that allowing the President to fill pre-existing vacancies "deprives that phrase ["that may happen"] of any force." *Noel Canning*, 705 F.3d at 507. This is simply not so. The phrase "that may happen" limits the President's power. Without it, he could fill vacancies that were scheduled to arise in the future—perhaps by resignation—as he routinely does via nomination and confirmation.[46] The phrase "that may happen" forecloses this result and only allows the President to fill vacancies that *already* exist. Additionally, while "[i]t cannot be presumed that any clause in the constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), the Constitution can still have a similar meaning if some of its words are removed. The framers were efficient drafters, but there are still some non-essential words. For example, Congress has the power "to make Rules concerning Captures on Land and Water." U.S. Const. art. 1, § 8, cl. 11. In the absence of air travel, the clause would have similar meaning without the words "land and water." But that does not mean this Court must imbue those three words with some additional significance to ensure

[46] For example, on May 1, 2009, Justice Souter notified President Obama that he would retire at the beginning of the Court's summer recess in June 2009. Letter from David Souter to Barack Obama, May 1, 2009, available at http://graphics8.nytimes.com/packages/pdf/politics/20090501_Souter.pdf. On May 26, 2009, President Obama nominated Sonia Sotomayor to fill the vacancy which had not yet "happen[ed]." *See* Jeff Zeleny, *Obama Chooses Sotomayor for Supreme Court Nominee*, N.Y. Times, May 26, 2009. Similarly, on November 15, 2004, Secretary of State Colin Powell announced he would resign when his replacement was confirmed. *See* Elisabeth Bumiller, *Powell Resigns From Cabinet; Rice Is Said to Be His* Successor, N.Y. Times, Nov. 16, 2004. The next day, Bush nominated Condoleeza Rice to fill the position. She was confirmed on January 26, 2005, Secretary Powell resigned, and Secretary Rice was sworn in that same day. *See* Sheryl Stolberg, *Rice Is Sworn In as Secretary After Senate Vote of 85 to 13*, N.Y. Times, Jan. 27, 2005.

that the entire meaning of the clause would change if they were removed. The same is true of the three words "that may happen."

(vii) **If this Court finds the text to be open to multiple interpretations, it should turn to structure and historical practice, both of which support the appointments.**

At the very least, Petitioner's reading is one of many fair interpretations. To interpret ambiguous clauses, this Court has turned to two other methods for guidance. At times, it has looked to the purpose of the clause. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6–7 (2009); *Maryland v. Craig*, 497 U.S. 836, 849 (1990) ("We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes."). At other times, it looks to history—to how the three branches have interpreted the text in the past. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 398 (1989); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928); *Stuart v. Laird*, 5 U.S. 185, 191 (1803). In this case, neither purpose nor history is ambiguous. Both support the NLRB members' appointments.

(b) Allowing the President to fill pre-existing vacancies fulfills the purpose of the clause: keeping the government functioning during the Senate's recess.

While the legislature and judiciary take scheduled recesses, the President is always on duty, and he cannot faithfully execute the laws all by himself. When the Senate is not in session, recess appointments are the only way to keep critical jobs filled. *See* 2 Op. Att'y Gen. 525, 526 (1832) ("It was the intention of the constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or at all events, that the vacancy should not be a protracted one."). Since the purpose of the clause is to avoid the situation where a vacancy is *impossible* to fill, the exact moment a vacancy arose is irrelevant.

(i) Since advice and consent is unavailable during the recess, appointments must be allowed to fill vacancies that exist during the recess.

Once a recess begins, a vacancy is a vacancy, whether it arose during the recess or before it. Neither can be filled by nomination and confirmation; both equally hamper the functioning of the government. If the Secretary of Defense[47] dies on the eve of a wartime recess, and the President does not learn of it until the recess begins, Respondents would require the office to lie vacant until the Senate reconvened, however far in the future that may be. Respondent's interpretation would leave the President in a "Catch-22" during every recess: unable to appoint because the vacancy arose before the recess, unable to nominate because the Senate is absent, unable (by any method) to keep the government staffed. Because the Constitution is "not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting), it should be read, when possible, to avoid such potentially dangerous situations.

(ii) The President's ability to reconvene the houses is no substitute for his recess appointment power.

While the President has the power, in "extraordinary occasions," to reconvene the houses of Congress,[48] the vacancies he must fill are too numerous to allow the reconvening power to serve as a substitute for the recess appointment power. Hundreds of recess appointments are made during the course of a single administration.[49] Use of the reconvening power in lieu of recess appointments would require the Senate to sit perpetually in session. This is not the result

[47] Or the Secretary of State, or the Chairman of the Joint Chiefs of Staff, or any of the combatant commanders, to name just of a few of the more critical vacancies that might arise, especially during wartime.
[48] U.S. Const. art. II, § 3.
[49] President Clinton made 139; President George W. Bush made 171; as of June 2013, President Obama had made 32. Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Congressional Research Service, June 7, 2013.

the framers intended. *See* The Federalist No. 67 (Alexander Hamilton) ("It would have been improper to oblige [the Senate] to be continually in session for the appointment of officers.").

(iii) Acting officials are not substitutes for duly appointed ones.

It is no answer to say that "acting" officials may perform the duties of the vacant office until the Senate reconvenes and confirms a nominee. First, not all offices can be filled by subordinates or "acting" officials. Only a judge can judge: Law clerks and other subordinates may not sit as an "acting federal judge." *See Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 61 (1982). Second, not all of the duties of an office can be performed by acting officials: Only the Chief Justice himself can preside over Presidential impeachments. *See* U.S. Const. art. I, § 3 ("When the President of the United States is tried, the Chief Justice shall preside."). Third, the very existence of the recess appointment clause implies that acting officials are no substitute for a filled position. If the framers were comfortable with long-term reliance on acting officials, nomination and confirmation would be the only method for filling offices.

(iv) The one structural concern suggesting a restrictive interpretation is not present.

Allowing the President to fill pre-existing vacancies raises only one structural concern: if an office becomes vacant during the session, the President could refuse to submit a nominee to the Senate and wait until the recess to make appointments. *See* 2 Op. Att'y Gen. at 528 ("[V]acancies are not designedly to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate."). The court of appeals placed great weight on this hypothetical result. *See Noel Canning*, 705 F.3d at 508 ("A President at odds with the Senate over nominations would never have to submit his nominees for confirmation. He could simply wait for a 'recess' (however defined) and then fill up all vacancies."). But these are not the facts

of this case. Here the President *did* nominate the NLRB members before he appointed them, making this a very different situation from the one the court of appeals imagines. The Attorneys General and Congress have long distinguished between these two cases. *See* 4 Op. Att'y Gen. 361, 363 (1845) ("[I]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate."); 5 U.S.C. § 5503 (a) (2) (agreeing to pay appointees if a nomination was pending before the recess; refusing to pay if not). This Court should distinguish them as well.

This Court has long stated that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Whether a President may refrain from nominating during the session only to appoint during the ensuing recess is not a question posed by these "precise facts." The time may come for this Court to decide that question. It is a more challenging one, because Congress has refused to pay such appointees.[50] The time may also come for this Court to rule on other aspects of the recess appointment power—whether it may be used during "constructive intersession recesses,"[51] whether it may be used to appoint Article III judges,[52] and whether Congress's refusal to pay some recess

[50] In most circumstances. *See* 5 U.S.C. § 5503 (2012).

[51] In 1903, President Roosevelt made 167 recess appointments during the two seconds that elapsed between the gaveling out of one session of Congress and the gaveling in of the next session, claiming the appointments were made in a "constructive intersession recess." Edmund Morris, *Theodore Rex* 301 (2001). The Senate was displeased, *see, e.g.*, S. Rep. No. 58-4389, at 3 (1905), but never challenged the appointments in the federal courts.

[52] The recess appointment of judges raises its own structural concerns since it allows federal law to be interpreted by those who do not have life tenure. *Compare United States v. Woodley*, 726 F.2d 1328,1339 (9th Cir. 1983), *reversed en banc*, 751 F.2d 1008 (9th Cir. 1985) (holding the recess appointment of Article III judges unconstitutional); *with United States v. Allocco*, 305 F.2d 704, 708–10 (2d Cir. 1962) (upholding the practice). *See generally* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377 (2005).

appointees is constitutional.[53] But, like the court of appeals' imagined scenario, those are other cases, not this one. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 687-88 (1981) (emphasizing that the narrow decision did not foreclose future attacks on the President's power to settle claims against foreign entities in other circumstances). Here, the only structural concern that the court of appeals cites—that the President will refrain from nominations altogether—is not present.

(c) Since the founding, Presidents have filled pre-existing vacancies; the court of appeals' history of early executive practice is inaccurate.

This is not a case where the coordinate branches have historically expressed a view that a practice is unconstitutional,[54] nor a case where the original understanding of a clause was subsequently abandoned.[55] The earliest understanding of this practice is the same as the modern one and its constitutionality has never been disputed by either political branch.

(i) This practice has been approved by Presidents since the founding, the Attorneys General since 1823 and every other circuit court that has considered the question.

In December of 1792, while the Senate was still in session, William Murray resigned as United States Attorney for Kentucky. In September of 1796, the Senate went into recess, and George Washington appointed William Clarke to fill the vacancy.[56] In the 217 years since, Presidents have routinely made recess appointments to government posts that became vacant

[53] *See Staebler v. Carter*, 464 F. Supp 585, 596 n.24 (D.D.C. 1979) ("[I[f any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 . . . might also be invalid. That question, however, is not before the Court in this case.").

[54] *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("[E]leven Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge Congressional vetoes as unconstitutional."); John B. Henry, Jr., *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv.J. on Legis. 735, 737–738 n.7 (1979) ("Every President since Woodrow Wilson has questioned the constitutionality of the legislative veto.")

[55] *Compare* Michael W. McConnell, et al., *Religion and the Constitution* 74 (2006) (arguing that the original purpose of the Establishment Clause was to prevent congressional interference with the state churches), *with Everson v. Board of Education*, 330 U.S. 1 (1947) (incorporating the Establishment Clause against the states). *See also* Stephen Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986).

[56] In the interim, four others were offered the job; all refused. Depending on how these are counted, Washington made between one and five recess appointments before the vacancy was filled. *See* Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789–1816*, at 65–73 (1979) (detailing the events of this period).

before the recess: to executive agencies,[57] to cabinet positions,[58] to federal judgeships,[59] and to this Court.[60]

In 1823, Attorney General William Wirt advised President Monroe that the President could fill all vacancies that exist during a recess, *see* 1 Op. Att'y Gen. 631 (1823), and since then, every Attorney General confronted with the question has taken the same position.[61] Before this case, every circuit court decision on point upheld the practice. *See Evans v. Stephens*, 387 F.3d 1220, 1226–27 (11th Cir. 2004) (en banc) (upholding the practice); *United States v. Woodley*, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc) (upholding the practice); *United States v. Allocco*, 305 F.2d 704, 709–15 (2d Cir. 1962) (upholding the practice). The Third and Fourth Circuits, ruling after the D.C. Circuit, did not reach this question. *See N.L.R.B. v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 675-76 (4th Cir. 2013); *NLRB v. New Vista Nursing and Rehabilitation, LLC*, 719 F.3d 203 (3d Cir. 2013). Against the practice of the Presidents since the founding, the opinions of the Attorneys General since 1823, and the opinions of every circuit court that has considered the question, the D.C. Circuit stands alone.

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[57] For example, on June 15, 2005, Bradley Smith resigned from the FEC, leaving three vacancies open during the session of the Senate. On January 4th, 2006, President Bush recess appointed Robert Lenhard, Steven Walther, and Hans Von Spakovsky to fill these vacancies. *See* Thomas B. Edsall, *Bush Appointments Avert Senate Battles*, Washington Post, January 5, 2006.

[58] For example, on August 23, 1992, James Baker resigned as Secretary of State. *See* George Bush, *Letter Accepting the Resignation of James A. Baker III as Secretary of State*, August 13, 1992. The Senate was still in session at the time. On October 9th, 1992, the Senate went into recess. On December 8th, President Bush appointed Lawrence Eagleburger to fill the vacancy. *See* George Bush, *Recess Appointment of Lawrence S. Eagleburger as Secretary of State*, December 8, 1992.

[59] For example, on December 18, 2000, Judge Cox on the Eleventh Circuit assumed senior status, creating a vacancy on that court. Four years later, during a Senate recess, President Bush appointed William Pryor to the court. *See Evans v. Stephens*, 387 F.3d. 1220 (11th Cir. 2004).

[60] For example, Abraham Lincoln appointed Justice David Davis to this Court during the Senate's recess in October 1862. Justice Campbell had resigned during the preceding session of the Senate and his seat was not filled before the Senate recessed. Similarly, Justice Davis resigned on the first day of the 45th Congress (March 4, 1877) and President Hayes appointed John Marshall Harlan (Senior) during the ensuing recess (March 29, 1877). *See* Stuart Buck, et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society, Jan. 9, 2004, at 17-22.

[61] *See, e.g.*, 2 Op. Att'y Gen. 525 (1832); 3 Op. Att'y Gen. 673 (1841); 4 Op. Att'y Gen. 523 (1846); 10 Op. Att'y Gen. 356 (1862); 12 Op. Att'y Gen. 32 (1866); 12 Op. Att'y Gen. 449 (1868); 12 Op. Att'y Gen. 455 (1868); 12 Op. Att'y Gen. 469 (1868); 14 Op. Att'y Gen. 562 (1875); 16 Op. Att'y Gen. 522 (1880); 16 Op. Att'y Gen. 538 (1880); 17 Op. Att'y Gen. 521 (1883); 18 Op. Att'y Gen. 28 (1884); 19 Op. Att'y Gen. 261 (1889); 30 Op. Att'y Gen. 314 (1914); 41 Op. Att'y Gen. 80 (1960).

Because the "[t]raditional ways of conducting government . . . give meaning" to the Constitution, *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring), this Court should give considerable weight to this "systematic, unbroken, executive practice." *Id.* at 610-11. *See also Pocket Veto*, 279 U.S. at 688-90. ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that a practice's lengthy history made it "part of the fabric of our society."). The practice of filling pre-existing vacancies has the same historical pedigree that has legitimated many governmental practices that are now seemingly beyond question, including extrajudicial service,[62] congressional eminent domain,[63] and judicial review itself.[64] These "traditional ways of conducting government" have become part of the "fabric" of our society. So has this. It should not be disturbed.

(ii) The court of appeals erred in overlooking President Washington's practice of filling pre-existing vacancies using recess appointments.

The court of appeals places great weight on the fact that "the first President, who took office shortly after the ratification, understood the recess appointments power to extend only to vacancies that arose during senatorial recess." *Noel Canning*, 705 F.3d at 508. This would be weighty evidence if it were true. But it is not. As detailed above, President Washington made recess appointments to fill at least two offices—the Engraver of the Mint and United States Attorney for Kentucky—which had become vacant during the session of the Senate. Nor were

[62] *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.").
[63] *Compare Kohl v. U.S.*, 91 U.S. 367 (1875) (upholding eminent domain power in part due to its historical pedigree) *with* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738 (2013) (doubting its ironclad textual basis).
[64] *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 38 (4th ed. 2011) ("[T]he power of judicial review is firmly established and is an integral part of American government, even though it is not expressly authorized in the text.")

these appointments made via the "convoluted process" the court of appeals describes.[65] President Washington used that process, indeed convoluted, to appoint Cyrus Griffin and Thomas Bee to fill federal judgeships. *See* Rappaport, at 1522 n.97. But he did not use that process to appoint William Clarke to be U.S. Attorney and Robert Scot to be Chief Engraver of the Mint. President Washington appointed those two officers in the same way that President Obama appointed the NLRB members.

The court of appeals relies on Professor Rappaport's assertion that "President George Washington . . . adopted the arise interpretation." *Id.* But the court of appeals does not mention William Clarke or Robert Scot; this Court will search in vain for their names in the opinion below.[66] Given the weight the D.C. Circuit places on the (mistaken) fact that President Washington did not make such appointments, it is a striking omission. The Second, Ninth, and Eleventh Circuits upheld the appointments, and the Third and Fourth Circuits did not reach this question. Thus, the only court of appeals that has ever held unconstitutional the practice of filling pre-existing vacancies—the D.C. Circuit—did so with a flawed set of facts and with a mistaken understanding of executive practice in the early republic.

(iii) Because Attorney General Randolph's interpretation was ignored by President Washington, it is not evidence of early executive practice.

The court of appeals' reliance on Attorney General Edmund Randolph's interpretation is misplaced, because President Washington rejected that interpretation. True, Randolph believed

[65] *See Noel Canning*, 705 F.3d at 508 ("If not enough time remained in the session to ask a person to serve in an office, President Washington would nominate a person without the nominee's consent, and the Senate would confirm the individual before recessing . . . Then, if the person declined to serve during the recess, thereby creating a new vacancy during the recess, President Washington would fill the position using his recess appointment power.").

[66] Parties in this case were forbidden by Court order to consult briefs in this and related cases. It is possible that the parties below did not brief the D.C. Circuit on the existence of William Clarke and Robert Scot (otherwise, that court's historical oversight is difficult to explain). It is likely that the parties before the Fourth Circuit *did* brief that court on these facts, since they are cited by Judge Diaz in dissent. This may explain why the D.C. Circuit reached the question of preexisting vacancies, and the Fourth Circuit majority did not. (None of the Third Circuit judges reach this question at all, making it difficult to speculate about what facts that court had before it.)

that the President should not fill pre-existing vacancies with recess appointments, and he so advised his President. But Washington ignored his Attorney General and made the appointments.[67] Edmund Randolph's interpretation of the clause is not good evidence of past executive practice, because George Washington ignored that interpretation, as should this Court.

(d) By failing to contest this method of appointment and by agreeing to pay officials appointed in this way, Congress has validated this practice.

In 1862, Attorney General Bates advised President Lincoln that the power to fill pre-existing vacancies has been "sanctioned . . . by the unbroken acquiescence of the Senate." 10 Op. Att'y Gen. 356, 356 (1862). That was true then, it was true in 1960, *see* 41 Op. Att'y Gen. 463, 466 (1960) ("[i]n view of this congressional acquiescence, you have, without any doubt, the constitutional power to make recess appointments to fill any vacancies which existed while the Senate was in session."), and it has been true in the 53 years since. While Congress has in the past limited payment for some recess appointees, and some individual members of Congress have questioned the practice, neither house of Congress as a body has ever contested its constitutionality.[68] This Court has long recognized that this kind of congressional acquiescence is sufficient to validate executive action. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915) (recognizing "an implied grant of power" from Congress because the President's orders "were known to Congress, as principal, and in not a single instance . . . disapproved.");

[67] This is perhaps not surprising. Edmund Randolph refused to sign the Constitution *at all* because of his aversion to the recess appointments clause. *See* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 Wis. L. Rev. 965, 983 n. 99. It is therefore understandable that Washington might not have been eager to defer to Randolph on the clause's proper construction.

[68] *See* Vivian S. Chu, *Recess Appointments: A Legal Overview*, Cong. Research Serv., RL33009 at 10 (2013) ("[W]hile congressional statements disputing the prevailing interpretation have been made during periods of controversy surrounding recess appointments, such statements have been made by 'individual members of the senate . . . but not the senate itself.'" (quoting *In re Farrow*, 3 F. 112, 115 (N.D. Ga. 1880)).

Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice.").

Further, this is not a case where congressional acquiescence must be inferred from silence alone: Congress has explicitly agreed to pay these three NLRB members. *See* 5 U.S.C. § 5503 (2012). Specifically agreeing to finance Presidential action is strong evidence that Congress does not disapprove of it.

Before the *Steel Seizure* case arose, Congress proposed an amendment to an appropriations bill providing that no funds could be expended to carry out the seizure.[69] If they had passed that amendment, it would have made *Youngstown* a much easier case, for it would have put President Truman's seizure firmly in Justice Jackson's "zone three," where the President's power is at its "lowest ebb." *Youngstown*, 343 U.S. at 635. But if Congress had instead passed a bill appropriating funds to carry out the seizure, *Youngstown* would likely have come out very differently.[70] The same is true here. Because Congress specifically agreed to pay the salaries of these recess appointees, the President acted with all the power "that he possesses in his own right plus all that Congress can delegate," Justice Jackson's "zone one," where the President's power is "at its maximum." *Id.*[71]

While it is true that "[p]ast practice does not, by itself, create power," *Dames & Moore*, 453 U.S. at 686, there is a "presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." *Midwest Oil Co.*, 236 U.S. at 472-

[69] *See* Brief for Plaintiffs Companies at 48, reprinted in 48 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 441 (1975).

[70] Justice Black's opinion of the Court emphasizes the fact that Congress did not approve funds for the seizure. *See Youngstown*, 343 U.S. at 585.

[71] This is not to say that congressional acquiescence (or Justice Jackson's *Youngstown* analysis) can give the President powers that he cannot constitutionally wield. Congress could not agree to pay for presidential "recess appointments" made during a Senate session (even though he would be acting in "zone one"). Conversely, a congressional act forbidding the President from making all recess appointments would not prevent him from doing so (even though he would be acting in "zone three"). It is only when the exact scope of the President's power is at least ambiguous, as it is here, that the Court should consider the extent of congressional acquiescence.

73. As this Court put it more recently, where "the President acts pursuant to an express or implied authorization from Congress . . . the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Hamdi v. Rumsfeld*, 542 U.S. 507, 584 (2004) (citations omitted).

(e) Holding this method of filling vacancies unconstitutional would invalidate two centuries of executive and judicial decisions.

Many important decisions have been made by those appointed during a recess to fill pre-existing vacancies: those made by Judge Pryor on the Eleventh Circuit,[72] Judge Pickering on the Fifth,[73] then-Judge Thurgood Marshall on the Second,[74] Justices Davis and Harlan on this Court,[75] the members of the Federal Housing Finance Board,[76] OIRA Administrator Susan Dudley,[77] U.N. Ambassador John Bolton,[78] the first Solicitor General,[79] and the ministers who ended the War of 1812,[80] to name just a few of hundreds. Holding this appointment method unconstitutional would render all of their legal actions void *ab initio*. *See, e.g.*, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) ("[W]e hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision."). While there may be equitable methods for limiting parties' ability to attack these decisions, because there is no "statute of limitations for interpreting and enforcing the

[72] *See Evans*, 387 F.3d. at 1220.
[73] *See* Jeff Van Dam, Note, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 375 n.101 (2012).
[74] *See Stuart Buck, et al.*, Judicial Recess Appointments: A Survey of the Arguments, Federalist Society, Jan. 9, 2004, at 18.
[75] *Id.* at 23-24
[76] *See* 15 Op. O.L.C. 91 (1991).
[77] *See* Jim Rutenberg, *Bush Uses Recess to Fill Envoy Post and 2 Others*, N.Y. Times, April 5, 2007.
[78] *See* Henry B. Hogue, *Recess Appointments Made by President George W. Bush*, Congressional Research Service, RL33310, at 13, 18 (2008).
[79] *See Office of the Solicitor General: Benjamin Bristow*, Department of Justice, available at http://www.justice.gov/osg/aboutosg/osghistpage.php?id=0
[80] *See* Amelia Frankel, Note, *Defining Recess Appointments Clause Vacancies*, 730 N.Y.U. L. Rev. 729, 751 (2013).

Constitution," *Evans*, 387 F.3d at 1237 (Barkett, J., dissenting), all of these decisions would be at least presumptively invalid.

It would be difficult for this Court to grant relief to Noel Canning, but deny relief to a company who challenges regulations promulgated by similarly-appointed FEC board members[81] or EPA officials,[82] or to grant relief here but deny relief to an individual challenging a court of appeals rulings in which Judges Pryor, Pickering, and Marshall provided a determinative vote. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (per curiam) ("When the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."). This Court's current retroactivity doctrine would seem to allow litigants to challenge all of these decisions, and countless more. *See Harper*, 509 U.S. at 94 ("Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.'" (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910))).

It is hard to predict exactly how far-reaching the effects would be, but there is little doubt that striking down this method of appointment would, at the very least, force this Court to explore the frontiers of its retroactivity doctrine in a wide range of legal contexts. Faced with a similar decision to hold unconstitutional a large amount of past governmental action, this Court in *Luther v. Borden* wisely avoided such a result:

> "[If Rhode Island's government were held unconstitutional], then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals. When the decision of this court might lead to such results, it

[81] *See supra*, note 29, and accompanying text.
[82] In August 2004, President Bush appointed Stephen L. Johnson to be the deputy EPA administrator. The position first became vacant on July 11, 2004, when the Senate was in session. *See* Press Release, Environmental Protection Agency, *U.S. Senate Confirms Four EPA Appointees* (Nov. 23, 2004).

> becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

Luther v. Borden, 48 U.S. 1, 38-39 (1849).

This court should only make such destabilizing decisions when absolutely necessary. "Fiat justitia ruat caelum," as one advocate before this court once said[83]: Let justice be done if the heavens should fall. Perhaps so, and perhaps this Court will one day hear the case that requires it to test the wisdom of that maxim. But given the text of the clause, Congress's implicit approval, and long-standing executive practice, this is, fortunately, not that case.

CONCLUSION

The judgment of the Court of Appeals for the D.C. Circuit should be REVERSED.

Respectfully submitted,

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December 2, 2013

[83]Transcript of Oral Argument, Oct. 9, 1961, at 76-77, *Baker v. Carr*, 369 U.S. 186 (1962), reprinted in 56 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 692 (1975).

APPENDIX A—STATUTES AND CONSTITUTIONAL PROVISIONS

(I) Constitutional provisions

"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." U.S. Const. art. II, § 2, cl. 3.

"No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States." U.S. Const. art. II, § 1.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

"The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one Vote." U.S. Const. art. I, § 3.

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. Const. art. I, § 5.

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" U.S. Const. art. 1, § 8.

"When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. Const. art. I, § 3.

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. Const. art. I, § 5.

(II) Statutory provisions

"(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply--

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate."

5 U.S.C. § 5503 (2012).