
No. 12-1281

In the
Morris Tyler Moot Court of Appeals at Yale

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

NOEL CANNING, ET AL.,
RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1) Whether the President's recess appointment power may be exercised to fill any vacancies that exist during a recess, or is instead limited to vacancies that actually arose during that recess; and

2) Whether the President's recess appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the International Brotherhood of Teamsters Local 760 is also a party to the proceeding. It was an intervenor in the court of appeals.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was issued on January 25, 2012. Petitioner filed a petition for a writ of certiorari on April 25, 2013. The Supreme Court granted the petition on June 24, 2013. The Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Article II, § 2 of the Constitution provides, in relevant part, that

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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.

STATEMENT

The Framers intended for appointments to important government positions to be made jointly by the President and the Senate, except in circumstances when such collaboration was, as a practical matter, impossible. To address the situations in which the executive and legislature could not both participate in the appointments process, the Framers created a mechanism by which the President could temporarily fill urgent vacancies: the Recess Appointments Clause. This case concerns whether President Obama exceeded the intended scope of that mechanism when he made three recess appointments to the National Labor Relations Board on January 4, 2012. The controversy surrounding the appointments centers on two facts: First, two of the vacancies the President filled did not arise during the purported “recess” in which President Obama made

his appointments, but rather had been vacant for quite some time. Second, at the time the President made his January 4 appointments, the Senate was actually meeting every three days in pro forma sessions. This case asks the Court to determine whether a recess appointment can properly be made under such circumstances.

The Appointments Clause and the Recess Appointments Clause

The Appointments Clause of the Constitution divides the ordinary power to appoint important government personnel between the President, who “shall nominate” candidates, and the Senate, which provides “advice and consent” on prospective officials. U.S. CONST. art. II, § 2, cl. 2. Splitting the appointment power between the executive and the legislature was a conscious choice designed to avoid the mistakes of other governments. Many of the framers were understandably reluctant to place the appointment power solely in the hands of the executive. After all, “[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism.” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotations and citations omitted). But the Framers were also aware that entrusting the appointment power to the legislature alone had proven disastrous for many of the fledging states of the new Union. *See Weiss v. United States*, 510 U.S. 163, 184 (1994) (Souter, J., concurring) (“[B]y the time of the [Constitutional] Convention the lodging of exclusive appointing authority in state legislatures had become the principal source of division and faction in the states.”). The compromise reflected in the Appointments Clause was intended to take the best, and mollify the worst, of both approaches. *See THE FEDERALIST NO. 76* (Hamilton).

Yet this elegant collaborative solution could not function all year round. In the early days of the republic, the Senate typically recessed for much longer blocks of time than it does today. Whereas a long recess now might last just a few weeks, before the Civil War, the Senate would typically convene for anywhere from three to eight months, and then recess for four to nine months at a time. *See Sessions of the Congress of the United States*, THE GREEN PAPERS, <http://www.thegreenpapers.com/soc/>.

During a recess of such length, the Senate could not approve nominations as the Appointments Clause required. Therefore, the Framers also created an “auxiliary method of appointment” to “supplement” the usual appointment power: the Recess Appointments Clause. THE FEDERALIST NO. 76 (Hamilton). The Recess Appointments Clause gave the President the discretion 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. As Hamilton clarified in *Federalist 67*, the Clause was intended to “supplement” the “general mode of appointing officers,” and would only come into play when that general mode was “inadequate”—i.e., “during the recess of the Senate.” *Id.* The Clause represented a concession to the fact that “it might be necessary to fill without delay” certain offices, which would have been impossible under a regime that relied solely on advice and consent given that “it would have been improper to oblige [the Senate] to remain continuously in session.” *Id.* The Clause was not supposed to diminish the legislature’s ability to participate in the appointments process. Indeed, Hamilton was quick to note that the recess appointment power was only an “auxiliary method of appointment,” and should not be construed to challenge the “ordinary power of appointment,” which remained with “the President and the Senate jointly.” *Id.*

The combination of the Appointments Clause and the Recess Appointments Clause thus struck an impressive balance: it minimized the power of any one branch to act unilaterally by requiring the executive and the legislature to agree on appointments whenever possible, but also made a practical accommodation for times when this more involved process was not available.

Interpretation of the Recess Appointments Clause

Early use of the Recess Appointments Clause seemed to respect the Framers' intention that unilateral appointments be made only when necessary. President Washington, for example, went to great lengths to ensure that he only made recess appointments to fill vacancies that actually arose during the recess of the Senate, and did not deploy the recess appointment power to fill vacancies that had arisen while the Senate was in session. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1512 (2005).

Subsequent Presidents interpreted the clause differently, however, and by the time of the Monroe Administration many were recess-appointing individuals to vacancies that arose during prior recesses or while the Senate was in session. *See id.* at 1540-42. As the decades went on, Presidents only interpreted the recess appointment power more and more expansively, using it as a political tool rather than as a means of appointing critical officers during long Senate absences. President Carter recess appointed a nominee to the Federal Election Commission who had twice been rejected by the Senate. Michael A. Carrier, Note, *When Is the Senate in Recess for the Purposes of the Recess Appointments Clause*, 92 MICH. L. REV. 2204, 2213 (1994). President Reagan used the recess appointment power to place controversial individuals unlikely to be confirmed otherwise to top positions in the Federal Reserve and the Nuclear Regulatory Commission. *Id.* at 2212-16. President George W. Bush made 171 recess appointments over his two terms, including 141 appointments during intrasession recesses whose average duration was

just twenty-five days. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL 33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH 7 (2008).

Beginning in the mid-1980s, Congress took action to limit the expansion of the recess appointment power. During negotiations with President Reagan in 1985, the Senate threatened to remain continuously in session by holding pro forma sessions—short Senate sessions usually attended by only a few members and conducted pursuant to a revocable order that no business will take place—in order to keep the President from making recess appointments. *See* 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe) (describing the negotiation). In late 2007, the Senate actually put this technique into practice, scheduling pro forma sessions once every three days during its Thanksgiving break in order to prevent any recess appointments from President Bush. 153 Cong. Rec. S14609 (Nov. 16, 2007). Since then, conducting pro forma sessions to stave off possible recess appointments has been a staple of Senate practice. *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RS 21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 11-12 (2013).

For years, the executive branch accepted that the Senate was not in recess when conducting pro forma sessions, and therefore refrained from making recess appointments during such periods. Indeed, President Bush, who made 171 recess appointments during the first six and a half years of his presidency, made zero after the Senate commenced its practice of remaining in pro forma session rather than recessing in 2007. HOGUE & BEARDEN at 2. President Obama adopted a similar position during the first two years of his administration, and affirmed that stance before this Court in 2010, when Solicitor General Elena Kagan wrote that “the Senate may act to foreclose [the recess appointment power] by declining to recess for more than two or three days at a time” and explicitly cited the Senate’s 2007 pro forma sessions as an example of

this. Letter to William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (Apr. 26, 2010), *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457).

The January 4 NLRB Appointments

However, on January 4, 2012, President Obama made three recess appointments to the National Labor Relations Board while the Senate was meeting in pro forma sessions: Terrence F. Flynn, Richard F. Griffin, and Sharon Block. Two of these seats had been vacant for some time: Member Flynn filled a vacancy that had been created on August 27, 2010, and Member Griffin filled a seat that had been vacant since August 27, 2011. 158 Cong. Rec. S582–83 (2012); 157 Cong. Rec. S8691 (2011). Naturally, during that time, the Senate had held many sessions and confirmed many nominees. As recently as December 17, 2011, the Senate had confirmed over fifteen executive branch appointees, including Assistant Secretaries of State and Defense and the Ambassador to the Russian Federation, plus more than one hundred appointments to the military, Foreign Service, and Public Health Service. 157 Cong. Rec. S8784-85 (2011). The third seat, to which Member Sharon Block was appointed, had become vacant on January 3, 2012, when the temporary appointment of Member Craig Becker—a previous recess appointee—expired at the end of the first session of the 112th Congress. 157 Cong. Rec. S8691 (2011).

President Obama had originally nominated Mr. Griffin and Ms. Block to the NLRB just a few weeks earlier on December 15, 2011. *Id.* Mr. Flynn had not previously been nominated. None of the three appointees had completed the usual committee questionnaire or background check that the Senate generally requires before it will act on a nomination. *See* Press Release, President Abandons Constitution’s Advice and Consent Mandate (Jan. 4, 2012), <http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb>.

When the President made his appointments, the Senate was conducting pro forma sessions every three days. *See* 157 Cong. Rec. S8783 (2011). In fact, it held one session the day before, and another just two days after, the President's January 4 appointments. 158 Cong. Rec. S3 (Jan. 6, 2012) ; 158 Cong. Rec. S1 (Jan. 3, 2012). Furthermore, while the body had made an earlier agreement that no business would be conducted at these sessions, it had in fact accomplished a great deal during its supposed winter break: It had passed a bill. 157 Cong. Rec. S8789 (Dec. 23, 2011). It had entered an order agreeing to set up a conference committee. *Id.* It had satisfied its constitutional obligation to meet on January 3. 158 Cong. Rec. S1 (January 3, 2012). And it had ended the first session of the 112th Congress and begun the second. *See id.*; 157 Cong. Rec. S8793 (December 30, 2011). President Obama's decision to make a recess appointment while the Senate was conducting these pro forma sessions marked the first time in history that any President had ever done so. HOGUE, FREQUENTLY ASKED QUESTIONS at 11-12.

The Board's Finding Against Noel Canning

About a month after the three new NLRB Members took office, Noel Canning, a division of the Noel Corporation, appealed a decision of an administrative law judge to the NLRB. *Noel Canning, A Div. of the Noel Corp. & Teamsters Local 760*, 358 N.L.R.B. No. 4 (Feb. 8, 2012). A three-member panel of the Board affirmed the ALJ's finding that Noel Canning had violated the National Labor Relations Act by "refusing to reduce to writing and to execute a collective-bargaining agreement reached with the union, including payment of a retroactive bonus." *Id.* at 1.

The Panel that found against Noel Canning comprised three members: Thomas Hayes, Richard F. Flynn, and Sharon Block. Member Hayes joined the Board after being confirmed by the Senate in June of 2010. Members Flynn and Block were purportedly recess appointed by President Obama on January 4, 2012.

Noel Canning appealed the Board's decision to the United States Court of Appeals for the District of Columbia Circuit. In addition to challenging the substantive grounds of the Board's decision, Noel Canning argued that at the time of the Board's decision, the Board did not possess a quorum because Members Flynn and Block were appointed in violation of the Recess Appointments Clause. The Court of Appeals agreed. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 493 (D.C. Cir. 2013). It found that the Recess Appointments Clause only allows a President to make a recess appointment to fill a vacancy that arises during a recess. *Id.* at 507. The Court held that "a simple reading of the language itself," logically compelled this result. *Id.* It also looked to the relationship between the Appointments Clause and the Recess Appointments Clause and concluded that "[i]t would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose." *Id.* at 508. The Court additionally relied on the early practice of President Washington, and the contemporaneous interpretations of Framers like Alexander Hamilton and Edmund Randolph, each of whom endorsed the Court's view. *Id.* at 508-09. The Court also found that the executive must make a recess appointment during the same recess in which the vacancy he is filling arises. *Id.* at 514. In other words, if a vacancy arises while Congress is in session, or during a prior recess, then it must be filled through the normal appointment process, not through the use of a recess appointment. *Id.*¹ The Court accordingly concluded that President Obama's January 4 NLRB appointments were made in violation of the Recess Appointments Clause. *Id.* at 513.

The NLRB petitioned for certiorari, and this Court granted the petition. *N.L.R.B. v. Noel Canning*, 133 S.Ct. 2861.

¹ The Court of Appeals additionally found that because the Clause refers to "the Recess," rather than "a recess," the vacancy must arise during the recess between two sessions of Congress, not during an "intrasession" recess during a session of Congress. *Noel Canning*, 705 F.3d at 500. That issue is not presented on review in this case.

SUMMARY OF ARGUMENT

I. The Constitution’s text, structure, and history clearly indicate that the President may only use his recess appointment power to fill vacancies that arise during the same recess in which he makes an appointment.

A. The plain text of the Constitution confines the President’s recess appointment power to vacancies that occur during a recess. Dictionaries from the founding period consistently define “to happen” as “to occur by chance.” As a result, the Recess Appointments Clause’s mention of “vacancies that happen during the recess of the Senate,” U.S. CONST. art. II, § 2, cl. 3, most naturally refers only to vacancies that *arise* during the recess of the Senate. Interpreting “happen” to instead mean “exist,” as Petitioner suggests, effectively writes the phrase “that may happen” out of the Constitution entirely. The “arise” interpretation is also more consistent with the Constitution’s other uses of the word “happen” in the House and Senate Vacancies Clauses. U.S. CONST. art. I, § 2, cl. 2, 4, where context clearly suggests that “happen” refers to an event, not a state of being.

B. The “arise” interpretation is further supported by founding era practice. Edmund Randolph, the First Attorney General, issued an opinion in 1792 holding that the Recess Appointments Clause did not permit the President to make appointments to vacancies that arose during the Senate session. Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, at 165-67 (John Catanzariti et al. ed., 1990). His understanding was reflected in the behavior of George Washington and the first Congresses, as well as in the writings of many founding-era luminaries such as Alexander Hamilton, Joseph Story and St. George Tucker.

C. Furthermore, the “arise” interpretation is more consistent with the purpose of the Recess Appointments Clause. The purpose of the Clause was to accommodate situations in which it was impossible for the Senate to confirm nominations. Interpreting “happen” to mean “arise” confines the recess appointment power to the type of vacancies it was intended to address—those that could not be filled during the Senate session.

D. The executive branch has admittedly engaged in appointments behavior consistent with the “exist” interpretation for many years. But frequent usage cannot sanctify a clearly unconstitutional practice. *I.N.S. v. Chadha*, 462 U.S. 919, 944-56 (1983). The current executive interpretation is inconsistent with practice at the time the Recess Appointments Clause was adopted, and rests on an unpersuasive reading of the constitutional text. As there are no significant reliance interests that counsel against rejecting this misguided practice, the Court should not hesitate to do so.

E. Once the Court accepts that the Recess Appointments Clause only applies to vacancies that arise during the recess of the Senate, it is a natural inference that recess appointments must occur during the same recess as the vacancies they fill. If the purpose of the Clause is to provide an appointment method for times when the Senate is unable to provide advice and consent, then it cannot be read to allow the President to sit on a vacancy that arises during one recess during an entire Senate session, only to make a recess appointment during a subsequent recess.

II. The President also may not make recess appointments while the Senate is meeting every three days in pro forma session. As long as the Senate remains in session, the President must follow the Appointments Clause process of advice and consent. Petitioner asserts that the Senate is “effectively” in recess even when it meets in pro forma sessions, but this argument

ignores the reality of pro forma sessions, which are formally and functionally equivalent to regular Senate meetings.

A. Pro forma sessions are sessions of the Senate. Pro forma sessions are procedurally identical to regular sessions and have been used by the Senate for decades to accomplish a variety of legislative, parliamentary, and constitutional purposes. Pro forma sessions can be—and have been—used to pass legislation, satisfy constitutional requirements under the Adjournments Clause and the Twentieth Amendment, avoid procedural rules governing the return of executive nominations during long recesses, and serve as days of legislative session under dozens of “fast-track” statutes. This long history of practice militates against calling pro forma sessions anything but real sessions of the Senate.

B. The executive urges that the Court look instead to whether the Senate is truly “available to give advice and consent to executive nominations” when it is meeting in pro forma sessions. *Lawfulness of Recess Appointments*, 36 Op. O.L.C. 1, 13 (2012). Yet the government’s position fares just as poorly under this “practical construction.”

The Senate’s procedures and history leave no doubt that the body is capable of “exercising its constitutional function of advising and consenting to executive nominations,” 41 Op. Att’y Gen. 463, 467 (1960), when meeting in pro forma sessions. While pro forma sessions may often be short, poorly attended, and held pursuant to orders that no business will be conducted, none of these features actually presents an obstacle to conducting business under Senate procedure. Indeed, the Senate has successfully passed legislation in pro forma session on multiple occasions. If the Senate can pass a bill in a pro forma session, then surely it can approve a nominee as well. As a result, the body is functionally available to provide advice and consent on nominations while meeting in pro forma session.

C. In light of the formal and functional equivalence between pro forma and regular sessions, the Senate’s own determination that it is not in recess while meeting in pro forma sessions deserves respect. Congress has considerable constitutional authority to define when it is in session. *See* U.S. CONST. art. I, § 5, cl. 2; *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Marshall Field Co. v. Clark*, 143 U.S. 649, 671 (1892). While the executive claims that the Senate’s opinion on pro forma sessions is nonetheless invalid because it would “unilaterally prevent the President from exercising his authority under the [Recess Appointments] Clause,” 36 Op. O.L.C. at 20, this assertion is a fallacy. The Senate’s position merely requires the President to obtain senatorial advice and consent as long as the Senate remains available to provide it.

The Senate’s use of pro forma sessions undoubtedly makes it more difficult for the President to get his preferred nominees confirmed, but charges of Congressional uncooperativeness are for the voters, not the courts, to adjudicate. *See Edmond v. United States*, 520 U.S. 651, 660 (1997). As long as the Senate meets in sessions that leave it capable of advising and consenting on nominations, the President cannot resort to “recess appointments” that do not deserve the name.

ARGUMENT

I. THE RECESS APPOINTMENTS CLAUSE ONLY ALLOWS THE PRESIDENT TO FILL VACANCIES THAT ARISE DURING THE RECESS IN WHICH HE MAKES THE APPOINTMENT

The Recess Appointments clause empowers the President “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. The plain meaning, purpose, and early interpretations of this Clause all indicate that it only allows the President to unilaterally fill vacancies that arise during the same recess in which he makes the appointment.

A. The text of the Constitution makes clear that vacancies that “may happen during the Recess” are vacancies that arise during a recess

1. The plain meaning of the Recess Appointments Clause suggests that the word “happen” means “arise”

In construing the meaning of the Constitution, this Court looks first to the plain meaning of the text. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). That plain meaning depends on what voters at the time of the ratification would have understood as the ordinary meaning of the words. *D.C. v. Heller*, 554 U.S. 570, 576 (2008) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

The meaning of the phrase “Vacancies that may happen during the Recess of the Senate” depends first on the meaning of the word “happen.” Both modern and contemporary dictionaries confirm that “happen” means “arise” rather than “exist” in this context. Webster’s defines “happen” as: 1) “to occur by chance, often used with *it* (‘it so happens I’m going your way’)” and 2) to “come into being or occur as an event, process, or result.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (2003). Founding-era definitions from the time of the Constitution define the word much the same way. Samuel Johnson’s *Dictionary of the English Language* (1775) defines “happen” as “to fall out; to chance; to come to pass;” others define it as “to come to pass; to light on,” and “to fall out by chance; to light on by accident.” *See* William Perry’s *Royal Standard English Dictionary* (1775), Thomas Sheridan’s *Complete Dictionary of the English Language* (1780); *see also* *Evans v. Stephens*, 387 F.3d 1220, 1230 n. 4 (11th Cir. 2004) (Barkett, J., dissenting) (compiling many contemporary dictionaries with similar definitions). These definitions indicate that the phrase “vacancies that may happen during the Recess” most naturally means “vacancies that may *arise* during the recess,” not “vacancies that may *happen to exist* during the Recess.” A vacancy that arises during the recess is one that, “come[s] to pass” or

“occur[s] by chance” or “fall[s] out by chance” during the recess. In contrast, a vacancy that merely exists during “the Recess” but that arose at another time does not “come to pass” or “occur by chance” “during the recess.”

“Happen” can, at least in modern parlance, in some contexts refer to a situation that has been present for some time (particularly when following the word “it,” as in, “it just so happens I’m going to the concert, too). But that is not how the recess appointments clause is phrased. The clause says that the President may fill vacancies that “may happen during the Recess.”

Construing the clause to refer to any vacancy that exists during the Recess reads the phrase “that may happen” out of the Constitution entirely. Had the Framers meant to indicate that President may fill any vacancies that exist during a recess, they would not have chosen the word “happen” and given it the meaning of “happen to exist.” More likely, they would have eliminated the phrase “that may happen” entirely: “The President shall have Power to fill up all Vacancies during the Recess of the Senate.” Including the phrase “that may happen” would have been entirely superfluous. This Court, of course, does not assume that any clause in the Constitution is entirely superfluous. It assumes that every phrase adds some meaning to the text. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect,”); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) (plurality opinion). Here, the meaning that is added by the phrase “that may happen” is that the vacancy must arise during the recess of the Senate.

2. *Understanding “happen” to mean “arise” is most consistent with the two other uses of the word “happen” in the Constitution*

This Court also presumes that when the Framers used the same word in more than one section of the Constitution, they intended the meaning of the word to remain consistent throughout the document. See *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587

(1949) (construing the word “state” to have the same meaning in Article III as it had in Article I). Here, the Recess Appointments Clause is not the only place in which the Framers used the word “happen.” Both the House and Senate Vacancies clauses use the word to explain how vacancies among seats in Congress are to be filled. See U.S. CONST. art. I, § 3, cl. 2; *id.* at § 2 cl. 4. In both cases, the word “happen” clearly means “occur,” not “happen to exist.” The House Vacancies Clause provides that “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” U.S. CONST. art. I, § 2, cl. 4. The language here is mandatory. The executive of the applicable state “*shall* issue Writs of Elections.” *Id.* (emphasis added). This forecloses the possibility that an executive could be filling a vacancy that had “existed” for any significant length of time. As soon as the vacancy “happen[s],” the executive is expected to issue a writ of election.

When “happen” is used in the Senate Vacancies Clause, the language is even clearer: “[I]f Vacancies happen *by Resignation, or otherwise*, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.” *Id.* at art. I, § 3, cl. 2 (emphasis added). Under the original constitution, Senators were elected by their respective state legislatures. *See id.* at art. I § 2 cl. 1. Of course, a Senate seat might become vacant while a state legislature is in Recess. In that eventuality, the Constitution provided that the executive of the applicable state may make a temporary appointment, and the state legislature shall make a more permanent appointment at its “next Meeting.” *See Id.*² If one construes the word “happen” here to mean “exist,” then the phrase “by Resignation, or otherwise” makes little sense. The use of that modifier indicates that “happen” refers to an event (i.e., the vacancy arising), not a state of being (i.e., the vacancy

² This clause was eventually replaced by the Seventeenth Amendment. See U.S. CONST. Amd. XVII. Nonetheless, its inclusion in the original constitution makes it a useful reference point for understanding the Recess Appointments Clause.

existing), and therefore cannot mean “exist.” The Fourth Congress adopted this interpretation in 1794 when it refused to seat a Senator appointed by his governor to a seat that had become vacant while the state legislature was in session. *See* Rappaport at 1525, citing 4 ANNALS OF CONG. 78 (1849).

Thus, to read the word “happen” consistently throughout the Constitution, one must ascribe to it the meaning of “arise,” or “occur,” not “exist.”

B. Early practice and early interpretation of the Recess Appointments Clause adopted the “arise” interpretation

This Court has held that examining legal texts and other sources from the time of the ratification of the Constitution is a “critical tool of constitutional interpretation. *D.C. v. Heller*, 554 U.S. 570, 605 (2008). It is therefore telling that many of the earliest interpreters of the Constitution, and some of the nation’s first public officials, adopted the “arise” interpretation. President Washington went to great lengths to deploy his recess appointment power in a manner consistent with the “arise” interpretation, not the “exist” interpretation. If a vacancy arose near the end of the Senate’s session, President Washington would nominate an individual without knowing whether the individual would agree to serve in the post. After the Senate confirmed the nomination and adjourned for its recess, the President would offer his candidate the position. If the nominee refused the office, then his resignation would produce a vacancy that arose during the Senate’s recess, allowing President Washington to make a recess appointment. Rappaport at 1512. Had President Washington believed in the “exist” interpretation, there would have been no need to go through such an exercise; he could have simply appointed his choice during the Recess.

The nation’s first attorney general, Edmund Randolph, explicitly endorsed the “arise” interpretation. In 1792, Secretary of State Thomas Jefferson asked Randolph whether the

Constitution gave the President the power to fill a vacancy that arose during a session of the Senate. Randolph was of particular authority on the topic of constitutional powers. Not only had he been a delegate at the Constitutional Convention, he had also served on the Committee on Detail, “one of the most important groups of the Constitutional Convention.” *Executive Overreach: The President’s Unprecedented “Recess” Appointments: Hearing Before the H. Comm. On the Judiciary*, 112th Cong. 37 (statement of Jonathan Turley, Law Professor, George Washington University). In response to Jefferson’s question, Randolph rejected the “exist interpretation,” concluding that the President has no power to make a recess appointment to fill a vacancy that arose during the session of the Senate. He wrote that the recess appointment power must be “interpreted strictly,” because it is “an exception to the general participation of the Senate.” Randolph at 165-67.

The nation’s first Congress even passed a statute that indicated that its members also held the “arise” view. In 1791, Congress permitted the President to make recess appointments for inspectors of surveys whose offices came into existence during the session of the Senate. Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. Such a grant of authority would have been entirely superfluous had the President already possessed such power through the Recess Appointments Clause.

Alexander Hamilton likewise adopted the “arise” interpretation. In a 1799 letter, he wrote that “it is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.” Alexander Hamilton, *Letter to James McHenry (May 3, 1799)*, in 23 THE PAPERS OF ALEXANDER HAMILTON, 94 (1976). Other prominent commentators held the same interpretation. See 3 JOSEPH STORY, COMMENTARIES ON

THE CONSTITUTION § 1553 (1833); ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 279-80 (Liberty Fund 1999) (1803).

C. The purpose of the Clause is most consistent with the “arise” interpretation

The plain text and contemporary interpretations of the Appointments and Recess

Appointments Clauses argue so forcefully for the “arise” interpretation that a court could rely on them exclusively. But in addition, the purpose of the Clauses also compels the “arise” interpretation. The purpose of the two clauses was to split the appointments power between the executive and legislative branches, while accommodating the possibility that the Senate might at times be unavailable to advise and consent. Interpreting the Recess Appointments Clause to mean that the executive may fill any vacancy that happens to exist during a recess of the Senate would expand the executive’s power to unreasonable proportions. If a vacancy need merely exist during the Recess in order for the executive to fill it unilaterally with a recess appointment, then the executive need never go through the trouble of obtaining Senate confirmation of any of his nominees. Any president could bypass the legislature’s check on his appointment power by simply waiting until the Senate went into recess, and then making a recess appointment.

The Framers’ objectives in writing the Appointments and Recess Appointments Clauses contradict that interpretation. The Framers were wary of entrusting what Alexander Hamilton called “the absolute power of appointment” to any one branch of government. THE FEDERALIST NO. 76 (Hamilton). Giving such power exclusively to the executive had produced near tyranny in monarchies; giving the power exclusively to the legislature had ben problematic for many of the states. *See Freytag*, 501 U.S. at 883; *Weiss v. United States*, 510 U.S. 163, 184 (1994); *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976).

The Framers thus created a system that largely attempted to minimize the opportunities for any one branch to exercise unilateral appointment power: Presidential nomination and Senate

confirmation. The President would nominate all superior officers, but those appointments would be subject to Senate confirmation. U.S. CONST. art. II, § 2, cl. 2. Likewise, the Senate would have the power to confirm all appointments of inferior officers. Only those inferior officers as to whom Congress expressly relinquished its confirmation power could the executive appoint unilaterally. *Id.* The clause thus prevented either branch from wielding a problematic amount of appointment power, serving as “a bulwark against one branch aggrandizing its power at the expense of another branch.” *Ryder v. United States*, 515 U.S. 177, 182 (1995).

But since the Framers lived in a world in which the Senate regularly recessed for anywhere from four to nine months per year, the Framers needed to accommodate those instances where it would be impossible to obtain the advice and consent of the Senate. *See* Rappaport at 1500; *Sessions of the Congress of the United States*, THE GREEN PAPERS, <http://www.thegreenpapers.com/soc/>. The Recess Appointments Clause was the mechanism that the Framers created to deal with such situations. The clause was intended simply to allow the government to fill time-sensitive positions that became vacant while the Senate was unavailable to advise and consent. Alexander Hamilton explained that the Recess Appointments clause is “nothing more than a supplement” to the Appointments clause, designed to avoid requiring the Senate “to be continually in session for the appointment of officers.” THE FEDERALIST No. 67 (Hamilton). The Clause is not a panic button for presidents to utilize when the Senate refuses to confirm a nominee. Rather, the Clause preserves the balance of power between the Senate and the executive by limiting the time at which the executive can make unilateral appointments (only during the Recess of the Senate) and the duration of those appointments (lasting only until the end of the next session of Congress).

The “exist” interpretation contradicts this purpose. It imagines a Constitution in which the Framers created the careful balance of power in the Appointments Clause, then rendered that clause practically moot by giving the President the power to make unilateral appointments by simply waiting for a recess. It would shift the careful balance of power that the Framers achieved between the executive and the legislature to the President’s unilateral discretion. The better interpretation is that the Framers meant to limit the President’s unilateral appointment power to situations in which the Senate was, as a practical matter, unable to act on nominations.

D. This Court should not defer to Executive practices consistent with the “exist” interpretation

Petitioner and some courts of appeals have placed great emphasis on the practice of the executive branch with respect to recess appointments. *See, e.g., United States v. Woodley*, 751 F.2d 1008, 1011 (9th Cir. 1985). It is true that several (though not all) attorneys general have adopted the “exist” interpretation, and that many Presidents subsequent to President Washington have made appointments in keeping with that interpretation. *See* VIVIAN S. CHU, CONG. RESEARCH SERV., RL 33009, Recess Appointments: A Legal Overview 4-6 (2011) and attorney general opinions cited. But the fact “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.” *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). This Court should not afford any special deference to the Executive Branch’s interpretation of the Recess Appointments Clause because its reasoning is unpersuasive. Nor should the Court characterize Congress’s response to the executive’s practice as somehow “acquiescing” in the “exist” interpretation.

1. The justifications the executive branch has offered for its past practice are unpersuasive

This Court does not allow the unconstitutional practice of one branch of government to continue simply because that practice has become common. In *I.N.S. v. Chadha*, 462 U.S. 919

(1983), this Court found that the legislative veto violated the Constitution even though since 295 legislative veto provisions had been inserted into 16 different statutes over 50 years of legislating before the decision was handed down. *Id.* at 944-45. Indeed, the *Chadha* Court wrote that “our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes...” *Id.* at 944. Likewise, for 170 years after the adoption of the Constitution, Congress and the courts operated a government in which congressional districts were not equally apportioned according to population. But the Court nonetheless ruled that districts must be reapportioned after each census in *Reynolds v. Simms*, 377 U.S. 533 (1964).

Rather than simply deferring to the executive, this court should consider the opinions of Attorneys General and the actions of prior executives only insofar as their reasoning is persuasive. Here, the Executive’s interpretation is anything but persuasive. A long line of attorney general opinions have all suffered from the same problems, dating back to the first attorney general opinion to adopt the “exist” interpretation in 1823. *See* 1 Op. Att’y Gen. 631 (1823). That original opinion, authored by William Wirt, conceded that the text of the constitution was more consistent with the arise interpretation. *See Id.* at 632 (admitting that the arise interpretation “seems to me most accordant with the letter of the Constitution.”). Rather than honoring the plain meaning of the text, however, Wirt based his interpretation on the notion that the “substantial purpose” of the Recess Appointments Clause was “to keep these offices filled.” *Id.* Adopting the “exist” interpretation, he argued, would most easily allow the president to fill vacant offices. Wirt’s interpretation oversimplifies the goal of the Recess Appointments Clause. As is clear from simply reading the Recess Appointments Clause in conjunction with the Appointments Clause, the purpose of the Clause was, at the very least, to fill time-sensitive

vacancies only when the Senate was unable to act on nominations, while minimizing the possibility of unilateral action by the executive. *See* S. Rep. No. 37-80 (1863) (“If it be true that the substantial purpose of the Constitution was to keep these offices filled, it is equally true that its substantial purpose required that they be filled by competent and fit persons, and that to insure this result the opinion of the Senate must be appealed to and taken in all cases except vacancies which occur during the recess, when, of course, they cannot...be consulted.”); Rappaport at 1494. Wirt was also oddly trusting that no President would abuse the recess appointment power, even if that power was broadened by the “exist” interpretation: “The construction which I prefer is perfectly innocent. It cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies, as well as with the high responsibility and short tenure annexed to that office.” 1 Op. Att’y Gen. at 634. *See also* 19 Op. Atty Gen. 261, 263-64 (1889) (Attorney General Miller making the same point). History has not borne out Wirt’s optimism. President Carter recess appointed a nominee to the Federal Election Commission who had twice been rejected by the Senate. Carrier at 2213. President Reagan used the recess appointment power to place controversial individuals unlikely to be confirmed otherwise to top positions in the Federal Reserve and the Nuclear Regulatory Commission. *Id.* at 2212-16.

Nor should the Court be dissuaded from adopting the “arise” interpretation by the inconvenience that the ruling might cause. The Court can minimize the effect of its ruling on the functioning of the government. For instance, this Court can rely on its decision in *Buckley v. Valeo* to hold that regulations previously issued by improperly appointed officers will remain valid going forward. In *Buckley*, the Court found that the members of the Federal Election Commission were improperly appointed. *Buckley*, 424 U.S. at 141. Nonetheless, the Court

decided that its holding “should not affect the validity of the Commission's administrative actions and determinations to this date... The past acts of the Commission are therefore accorded de facto validity.” *Id.* at 142. The Court has extended the same “de facto validity” to acts of legislatures found to be elected through unconstitutional apportionment plans. *Connor v. Williams*, 404 U.S. 549, 550-51 (1972). The Court can apply the same principle here.

With respect to litigants, like Respondents, who have pending claims challenging the validity of officials recess appointed under the “exist” interpretation, this Court should grant the relief sought. This Court’s “general practice is to apply the rule of law we announce in a case to the parties before us.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). *See also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989) (“The general rule of long standing is that the law announced in the Court's decision controls the case at bar”). In addition, applying its reasoning to Respondents would reward those litigants who brought an appointments challenge. *See, e.g., Rutherford Educ. Ass'n v. Bd. of Educ. of Borough of Rutherford, Bergen Cnty.*, 99 N.J. 8, 26 (explaining that “those responsible for effecting a change in the law should benefit from their efforts.”); *Lau v. Nelson*, 92 Wash. 2d 823, 825 (1979).

Furthermore, any danger that adopting the “arise” interpretation might cause time-sensitive vacancies to remain vacant can easily be addressed by Congress itself. Congress can create “holdover provisions,” under which, an officer stays in office after her term expires until her successor is named. *See, e.g.,* 7 U.S.C. § 4a(a)(1)(ii) (Commodity Futures Trading Commission); 12 U.S.C. § 242 (Federal Reserve System Board of Governors); 15 U.S.C. § 41 (Federal Trade Commission); 15 U.S.C. § 78d (Securities and Exchange Commission); 19 U.S.C. § 1330(b)(2) (International Trade Commission); 49 U.S.C. §§ 10101-02 (Interstate Commerce Commission). For situations in which an office becomes vacant unexpectedly,

Congress can allow for “acting” executives to take over until a more permanent replacement is named. *See, e.g.*, 28 U.S.C. § 508 (permitting acting appointments for Attorney General); 29 U.S.C. § 552 (Secretary of Labor), 10 U.S.C. § 132(b) (Secretary of Defense); *id.* § 154(d), (e) (Chairman, Joint Chiefs of Staff); 50 U.S.C. § 403–3a(a) (Director of National Intelligence); *id.* § 403–4c(b)(2) (Director of Central Intelligence Agency).

Adopting the “arise” interpretation would require the re-appointment of any currently-sitting officers or judges whose recess appointment did not comply with the “arise” interpretation. However, this is likely to be rather a small group of officials. Recess appointments last only until the end of the next session of the Senate. *See* U.S. CONST. art. II, § 2, cl. 3. As of June 2013, the Congressional Research Service reported that (not including the four January 4, 2012 appointments) President Obama had made 28 recess appointments, all taking place in 2010. HENRY HOGUE, CONG. RESEARCH SERV., R42329, *RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA* 3 (2013). Nineteen of those officials were subsequently confirmed by the Senate. *Id.* at 6. The temporary terms of any officials appointed in 2010 would have expired by now.

2. *Congress has not acquiesced in the Executive’s adoption of the “exist” interpretation*

Congress has not acquiesced in the executive’s adoption of the “exist” interpretation, despite the fact that some courts have suggested otherwise. *See, e.g., Evans*, 387 F.3d at 1226. As early as 1863, a Senate Judiciary Committee Report flatly rejected the “exist” interpretation, providing a point-by-point refutation of the Attorney General opinions of Wirt and others. *See* S. Rep. No. 37-80 (1863). Congress again rejected the “exist” interpretation through a Judiciary Committee Report in 1905. S. Rep. No. 58-4389, at 2 (1905). While Congress has no power to invalidate recess appointments that it considers unconstitutional, Congress has enacted statutes designed to discourage the executive from exercising the “exist” interpretation. For instance, in 1863

Congress enacted a statute forbidding the Treasury to pay a salary to any officer appointed to a position that was vacant while the Senate was in session. *See* 37 Cong. Ch. 26, 12 Stat. 646 (1863). Some courts of appeal have relied on the 1924 and 1940 amendments to that statute, in which Congress created three narrow exceptions to that general rule, to conclude that Congress had acquiesced to the “exist” interpretation. *See* 76 Cong. Ch. 580, July 11, 1940, 54 Stat. 751, codified at 5 U.S.C. §§ 5503 a-c. But the accommodations of Congresses in 1924 and 1940, contradicting the judgment of the Congress in 1863, shed little, if any, light on the meaning of the Recess Appointments Clause.

Moreover, the notion that Congress can acquiesce to an executive power broader than that provided by the Constitution is mistaken to begin with. *See Freytag*, 501 U.S. at 880 (“Neither Congress nor the Executive can agree to waive [the] structural protection” of the Appointments Clause. “The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”).

E. To comply with the Recess Appointments Clause, the executive must fill a vacancy in the same recess in which the vacancy arose

Once we understand why the recess appointments clause must apply only to vacancies that arise during a recess, it is clear that it must also apply only to vacancies that are filled during the same recess in which they arose. If the Clause does not allow the President to use a recess appointment to fill a vacancy that arose during a session of the Senate, it would make little sense for the Clause nonetheless to allow him to fill a vacancy that arose during a prior recess. In neither case can it be said that the Senate has been unavailable to provide advice and consent on the President’s nominee. It would be illogical for the Framers to care only that the vacancy arose during a recess if the appointment could be made in a subsequent recess ten years later. As a result it is unsurprising that the Court of Appeals, after adopting the “arise” interpretation,

needed just two paragraphs to conclude that by extension, a vacancy must be filled in the same recess in which it arises. *See Noel Canning*, 705 F.3d at 514.

Like the “exist” interpretation generally, allowing the President to fill vacancies that arose during a prior recess would discourage the President from working to obtain Senate confirmation of a nominee. Once a president fails to make a recess appointment during the recess in which the vacancy arises, he has little incentive to subject his nominee to the tribulations of Senate confirmation if he knows that he can simply wait until the next recess and install the individual of his choice.

Early authorities who adopted the “arise” interpretation agreed that it logically entailed that a vacancy must not only arise during a recess, but must also be filled during that same recess. *See, e.g., Joseph Story, Commentaries on the Constitution*, § 1553, in 4 THE FOUNDERS’ CONSTITUTION, Article 2, Section 2, Clauses 2 and 3 (Kurland, Lerner 2000). Attorney General John Mason, who adopted the “arise” interpretation, likewise believed that an appointment must be made in the same recess in which the vacancy arose. “If 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.” 4 Op. Att’y Gen. 361, 363 (1845).

Because a recess appointment must fill a vacancy in the same recess in which the vacancy arose, the President’s January 4 recess appointments violated the Recess Appointments Clause. Members Flynn and Griffin filled vacancies that arose in August of 2010 and August of 2011, respectively. Since the Senate had been in session numerous times since those vacancies arose, the President’s their appointments are invalid.

II. THE PRESIDENT MAY NOT MAKE RECESS APPOINTMENTS WHILE THE SENATE IS MEETING EVERY THREE DAYS IN PRO FORMA SESSIONS

No one seriously suggests that the President can make “recess appointments” at any time simply because he prefers that mode of appointment to the cumbersome process of senatorial advice and consent. Rather, as the name suggests, “recess appointments” are only in order when the Senate is not in session. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 228 (3d Cir. 2013) (“[T]he power given to the President in the Recess Appointments Clause . . . explicitly allows him to fill vacancies only ‘during the Recess of the Senate.’” (quoting U.S. CONST. art. II, § 2, cl. 3)).

This intuitive limitation on the recess appointment power precludes the President from making recess appointments while the Senate is meeting every three days in pro forma sessions. It borders on self-evident that the three-day break between two pro forma sessions is not itself a recess during which the president is authorized to make unilateral appointments, and holding otherwise would contradict generations of executive branch commentators, *see, e.g., Executive Power—Recess Appointments*, 33 Op. Att’y Gen. 20, 25 (1921) (“[A]n adjournment of 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”), and presidential practice, *see HOGUE, FREQUENTLY ASKED QUESTIONS* at 10 (noting that since the Reagan Administration, no President has made a recess appointment during a recess of less than ten days); *HOGUE & BEARDEN, OBAMA RECESS APPOINTMENTS* at 13 (finding that no President in history has ever made an intrasession recess appointment during a break of less than three days). As a result, Petitioner is forced to assert that pro forma sessions are not “real” sessions, and that the Senate is incapable of performing its advice and consent function when conducting them. This line of argument makes for a good Zen koan—when is a session not a session?—but is deeply flawed. A closer inspection of the Senate’s procedures and history reveals that pro forma

sessions *are* sessions of Congress, *can* be used to provide advice and consent, and *cannot* be ignored by the President.

A. Pro forma sessions are sessions of Congress

Far from being exotic creatures, pro forma sessions are formally identical to regular sessions and have been used by the Senate for decades to accomplish a variety of legislative, parliamentary, and constitutional purposes. This long history of practice clarifies that pro forma sessions are in every way “real” sessions of Congress.

The considerable fuss over pro forma sessions, *see, e.g.* Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 5, 2012, at A25, makes it easy to lose sight of a simple fact: “a pro forma session is not materially different from other Senate sessions.” 158 Cong. Rec. S5954 (Aug. 2, 2012). Characterizing a Senate session as “pro forma” does not make it categorically distinct from other sessions any more than calling it “short” or “uneventful” would.

The Senate Glossary defines a pro forma session as simply “a brief meeting of the Senate (sometimes only a few minutes in duration).” *U.S. Senate Glossary*, http://www.senate.gov/reference/glossary_term/pro_forma_session.htm (last visited Nov. 25, 2013). There is no special procedure for invoking a pro forma session. In fact, the words “pro forma” do not appear a single time in the Senate’s Standing Rules (even though the Rules do make particular mention of other special session types, such as closed sessions, *see* SENATE RULE XXI, and executive sessions, *see* SENATE RULE XXIX).

More importantly, “a session may function for the same purposes whether or not it is described as ‘pro forma.’” RICHARD S. BETH & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 13 (2013). Pro forma sessions can be—and have been—used to pass legislation, satisfy constitutional requirements under the Adjournments Clause and the Twentieth Amendment, avoid procedural rules governing the

return of executive nominations during long recesses, and serve as days of legislative session under dozens of “fast-track” statutes. It is accordingly difficult to see why they should be considered anything but sessions of Congress under the Recess Appointments Clause. *See Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 619 (1929) (“The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the houses of Congress, when acting upon matters within their constitutional authority.”).

1. *Pro forma sessions count as sessions under the Adjournments Clause and Twentieth Amendment of the Constitution*

Pro forma sessions are already widely held to satisfy the Senate’s constitutional obligations to convene under the Adjournments Clause and the Twentieth Amendment. The Adjournments Clause mandates 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. I, § 5, cl. 4. It is longstanding and well-established Senate (and House) practice to use pro forma sessions to divide periods of adjournment that would otherwise exceed the three-day constitutional limit into shorter breaks. *See BETH & TOLLESTRUP* at 13. Indeed, the Senate has engaged in this type of scheduling for more than sixty years. *See, e.g.*, 96 Cong. Rec. 7769 (May 26, 1950); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 95 Cong. Rec. 12,586 (Aug. 31, 1949).

Congress has also repeatedly used pro forma sessions to meet the Twentieth Amendment’s requirement that “Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January.” U.S. CONST. amend. XX. Congress first conducted a pro forma session to satisfy its Twentieth Amendment obligations in 1980, and has repeated this practice six times in total, most recently on January 3, 2012, the day before

President Obama's NLRB recess appointments. *See, e.g.*, 157 Cong. Rec. S8783 (Dec. 17, 2011).³

The Senate's Adjournments Clause and Twentieth Amendment practices rely on the fact that pro forma sessions are sessions for the purposes of these constitutional provisions. And if the Senate is in session under some constitutional clauses while conducting pro forma sessions, then the Court should be loath to conclude that it is not in session under others. *See Tidewater Transfer*, 337 U.S. at 587 (“[I]nconsistency [within the Constitution] is to be implied only where the context clearly requires it.”).

2. *The Senate has used pro forma sessions to pass legislation*

The fiction that pro forma sessions are not actual sessions is especially hard to sustain in light of the fact that the Senate sometimes passes legislation while meeting in pro forma session. During a pro forma session on August 5, 2011, for example, the Senate passed the Airport and Airway Extension Act of 2011 by unanimous consent. 157 Cong. Rec. S5297 (Aug. 5, 2011). Similarly, on December 23, 2011—while operating under the very same adjournment order that gave rise to the President's January 4, 2012 recess appointments—Congress passed H.R. 3765, the Temporary Payroll Tax Continuation Act of 2011, and also entered an order agreeing to an anticipated House conference request concerning H.R. 3639, the Middle Class Tax Relief and Job Creation Act of 2012. 157 Cong. Rec. S8789 (Dec. 23, 2011).

In both cases, the President signed the resulting bills into law without complaint. In fact, President Obama actively *encouraged* Congress to pass the Temporary Payroll Tax Continuation Act of 2011 while meeting in pro forma session, rather than wait for regular sessions to

³ The executive branch evidently agrees with the Senate's understanding that pro forma sessions satisfy the requirements of the Twentieth Amendment, for the NLRB vacancy to which President Obama appointed Member Griffin only arose because Congress successfully ended the first, and commenced the second, session of the 112th Congress during its pro forma session on January 3, 2012.

recommence. *See* Press Briefing by Press Secretary Jay Carney (Dec. 21, 2012), <http://www.whitehouse.gov/photos-and-video/video/2011/12/21/press-briefing#transcript>. Surely the President cannot call upon the Senate to pass legislation during a pro forma session on one day and then maintain that the body is in recess on the next. Rather, if pro forma sessions allow the Senate to engage in active lawmaking, then they are presumptively sessions of the Senate.

3. *The Senate has used pro forma sessions to break up recesses in order to avoid returning nominations to the President*

Pro forma sessions have also functioned as sessions for the purpose of managing presidential appointments. Under Senate Rule XXXI, if the Senate adjourns for more than thirty days, all pending nominations must be returned to the President. SENATE RULE XXXI(6). On several occasions, however, the Senate has held only pro forma sessions during periods longer than thirty days, but has nonetheless kept pending nominations active. *See* 158 Cong. Rec. S5955 (Aug 2, 2012) (identifying a 34-day period from August 2 to September 6, 2011, a 47-day period from September 29 to November 15, 2010, a 31-day period from August 1 to September 8, 2008, a 46-day period from October 2 to November 17, 2008, and a 43-day period from November 20, 2008 to January 3, 2009, during which the Senate only met in pro forma session but did not return pending nominations to the President). This practice indicates a clear understanding on the part of Congress—which the executive is aware of and has declined to contest—that pro forma sessions serve to divide longer recesses into shorter breaks.

4. *Pro forma sessions count as regular sessions for the purposes of legislative day counting under a variety of “fast-track” statutes*

Dozens of statutes create “fast-track” procedures that limit debate on particular types of resolutions to a certain number of “days of Senate session” or “days of continuous session.” These statutes generally count pro forma sessions as equivalent to other sessions. Indeed, the

Congressional Research Service has identified twenty-two different statutes that treat pro forma sessions as days of Senate session or days of continuous session for the purposes of their time limits. 158 Cong. Rec. S5955-56 (Aug. 2, 2012).

5. *Pro forma sessions are used for a variety of parliamentary functions*

Finally, the Senate has employed pro forma sessions to serve a wide range of parliamentary functions. It has used pro forma sessions to hear addresses, *see, e.g.*, 139 Cong. Rec. 3039 (1993), to enter formal messages into the Congressional Record, *see, e.g.*, 157 Cong. Rec. S8789-90 (2011), to change the future schedule of the Senate, *see, e.g.*, 127 Cong. Rec. 263 (1981), and to allow cloture motions to ripen, *see, e.g.*, 133 Cong. Rec. 15,445 (1987); *see also* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 330-31 (1992) (noting that a pro forma session is counted as a session day, whereas “[d]ays on which the Senate is not in session are not counted”).

In sum, the myriad ways in which pro forma Senate sessions are treated as, and function equivalently to, all other Senate sessions undermine any claim that they are not “real” meetings of Congress.

B. The Senate is fully capable of offering advice and consent during pro forma sessions

Petitioner asserts that the Senate’s long history of using pro forma sessions to accomplish a variety of legislative and constitutional purposes attests only to a superficial resemblance between pro forma sessions and their “genuine” counterparts. According to the executive, the relevant inquiry is not whether a pro forma session walks, talks, and acts like any other session, but instead whether the Senate is truly “available to give advice and consent to executive nominations” when it is meeting in pro forma sessions. 36 Op. O.L.C. at 13.

Yet this “practical” approach does nothing to salvage the Petitioner’s position. The Senate’s procedures and history leave no doubt that the body is capable of “exercising its

constitutional function of advising and consenting to executive nominations,” 41 Op. Att’y Gen. at 467, while meeting in pro forma sessions.

1. Senate procedures allow the body to act on nominations while meeting in pro forma session

Pro forma sessions may appear suspect because they are often short and poorly attended, and because they usually take place under unanimous consent agreements stipulating that no business will be conducted. *See* 36 Op. O.L.C. at 13-15 (disparaging Senate pro forma sessions because they often “have lasted only a few seconds,” contain only a “single convening members,” and are conducted pursuant to an order that “there is to be ‘no business conducted’ during the ensuing sessions”). Yet none of these features actually stands in the way of the Senate’s ability to give advice and consent during a pro forma session.

While pro forma sessions often turn out to be brief, there is nothing that prevents them from lasting longer. For that matter, little time is needed to confirm executive nominees when the Senate is operating under a unanimous consent agreement—the procedure by which most nominations are approved. *See* ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 9 (2013) (noting that the process is “rarely lengthy”).

Lackluster attendance is also no great obstacle under Senate rules. While a quorum in the Senate consists of “a majority of the Senators duly chosen and sworn,” Senate Rule VI, Senate precedent holds that “the Senate operates on the presumption that a quorum is present at all times, under all circumstances, unless the question to the contrary is raised.” RIDDICK’S SENATE PROCEDURE at 1041-42. As a result, “even if only a few Senators are present, a measure may be passed or a nomination agreed to.” *Id.* at 1038.

Additionally, if the Senate wishes to confirm a nominee during pro forma session, it will

not be hampered by previous agreements to conduct no business. Senate precedent clearly establishes that “a unanimous consent agreement can be set aside by another unanimous consent agreement.” *Id.* at 1313. As a result, a Senate meeting in pro forma session may adopt a new unanimous consent agreement allowing it to do business in spite of any earlier pronouncements. *See* 158 Cong. Rec. at S5954 (“While . . . the Senate has customarily agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction Even in cases in which the Senate has agreed not to conduct business at a pro forma session, it could subsequently adopt a second consent agreement which would permit them to do so.”).⁴

2. *The Senate’s history of passing legislation during pro forma sessions leaves little doubt that it could provide advice and consent on nominations during a pro forma session*

Conducting legislative business during a pro forma session is not just a procedural possibility; it is also a historical reality. The multiple recent occasions on which the Senate has passed legislation in pro forma sessions make it exceedingly difficult to understand how the chamber is incapable of “participat[ing] as a body in making appointments,” 33 Op. Att’y Gen. at 21-22, during these very same sessions.

Twice in the six months leading up to President Obama’s January 4 recess appointments, the Senate passed significant pieces of legislation in pro forma session. *See* 157 Cong. Rec. S8789 (Dec. 23, 2011) (Temporary Payroll Tax Continuation Act of 2011); 157 Cong. Rec. S5297 (Aug. 5, 2011) (Airport and Airway Extension Act of 2011). Both times, the Senate was operating under a unanimous consent order that stipulated that no business would be conducted.

⁴ The Senate’s ability to override an agreement to conduct no business at pro forma sessions is quite different from Congress’s generic ability to end a recess in which no sessions are scheduled by simply deciding to reconvene (an option that is frequently left open in adjournment resolutions, *see, e.g.*, H.R. Con. Res. 361, 108th Cong. (2004) (adjourning to a set date unless “the Speaker of the House and the Majority Leader of the Senate . . . shall notify the Members of the House and Senate, to reassemble at such a place and time as they may designate.”)). When the Senate adopts a unanimous consent agreement governing pro forma sessions, it does not merely retain the ability to pull itself out of recess by scheduling additional sessions. Rather, it never enters into a recess in the first place because it is capable of deciding to conduct business in any of the sessions it has *already scheduled*.

See 157 Cong. Rec. S8783 (Dec. 17, 2011); 157 Cong. Rec. S5292 (August 2, 2011). Both sessions were exceedingly short, and neither seems to have been well-attended. *See* 157 Cong. Rec. S8789 (Dec. 23, 2011) (recording that the session lasted 1 minute and 25 seconds and noting the presence of two Senators); 157 Cong. Rec. S5297 (Aug. 5, 2011) (recording that the session lasted 59 seconds and also noting the presence of two Senators). Yet in both cases the Senate was nonetheless able to conduct legislative business through unanimous consent.

If the Senate can pass a law in pro forma session, then surely it can approve a presidential nominee as well, especially since the majority of nominees are confirmed through unanimous consent. MICHAEL L. KOEMPEL & JUDY SCHNEIDER, CONGRESSIONAL DESKBOOK § 10.80 (5th ed. 2007); *see, e.g.*, 157 Cong. Rec. S7874-75 (daily ed. Nov. 18, 2011); 157 Cong. Rec. S4303 (daily ed. June 30, 2011); 156 Cong. Rec. S587 (daily ed. Feb. 11, 2010). The process would only be simplified by the fact that Senate committees often review presidential nominees while the Senate is in intrasession recess. *See* Carrier at 2242 (noting that Senate committees considered nearly all of President-elect Clinton’s cabinet nominees during an intrasession recess in January of 1993).

There have admittedly been few instances of actual Senate lawmaking in pro forma session (though the House engages in legislative business during pro forma session quite regularly, *see* 158 Cong. Rec. S5954 (2012)). Yet the executive’s preferred inquiry is whether the Senate is *able* to offer advice and consent in pro forma session, not whether it is *probable* that it will do so. *See, e.g.*, 33 Op. Att’y Gen. at 21-22 (“[T]he real question . . . is whether in a practical sense the Senate is in session so that its advice and consent *can* be obtained.” (emphasis added)); 41 Op. Att’y Gen. at 467 (asking “whether or not the Senate is *capable* of exercising its constitutional function of advising and consenting” (emphasis added)); S. Rep. No. 58-4389, at 2

(1905) (defining a recess as a time when the Senate “*can not . . .* participate as a body in making appointments” (emphasis added)).⁵ It is, no doubt, more difficult to evaluate nominees when the Senate is meeting in pro forma session than when it congregates in other formats. These difficulties probably explain why the Senate prefers to invoke a special procedure for appointing its own officers while conducting pro forma sessions. *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). Yet the President has no constitutional right to an easy advice and consent process and the Senate is permitted to do any number of things to make it difficult for the President’s nominees to be confirmed, including, of course, rejecting them outright by vote. Mere Senate obstinacy does not trigger the recess appointment power.

C. Since the Senate can provide advice and consent in pro forma sessions, its determination that it is not in recess when conducting pro forma sessions should not be challenged

The formal and practical equivalence between pro forma and regular sessions makes it inappropriate to override the Senate’s own determination that it is not in recess when conducting pro forma sessions. Congress’s constitutional authority to “determine the rules of its proceedings,” U.S. CONST. art. I, § 5, cl. 2, gives the Senate considerable leeway to decide what qualifies as one of its own sessions. *See Ballin*, 144 U.S. at 5 (“[A]ll matters of method are open to the determination of the [Senate], and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.”); *Clark*, 143 U.S. 671 (finding that matters related to Congress’s proceedings not explicitly specified in the Constitution should be “left to the discretion of the respective houses of congress”). To allow the President to reject the

⁵ This point also refutes the executive’s claim that it “may properly rely on the public pronouncements of the Senate that it will not conduct business.” 36 Op. O.L.C. at 21. If the test is whether the Senate is *able* to approve nominations, then the simple fact that the Senate expresses that it does not *intend* to approve nominations is of no consequence. The President could not make a recess appointment during the middle of a Senate term simply because Senate leaders issued a press release saying that they thought they would be too busy with legislation to address any nominations for the next several weeks, for example.

Senate’s eminently reasonable decision to count a pro forma session as a session under the Recess Appointments Clause—even though pro forma sessions function as sessions for a variety of other purposes and do not prevent the Senate from providing advice and consent on nominees—would break with this Court’s tradition of giving “great weight” to the Senate’s “construction of its own rules,” *United States v. Smith*, 286 U.S. 6, 33 (1932), and undermine the Senate’s “natural right of governing itself, and consequently of fixing its own times and places of meeting,” which the Framers held so dear. Thomas Jefferson, *Constitutionality of Residence Bill of 1790* (July 15, 1790), in 2 THE FOUNDERS’ CONSTITUTION, Document 14 (Phillip B. Kurland & Ralph Lerner eds., 2000).

The Senate’s repeated use of pro forma sessions to avoid recess appointments illustrates the body’s clear determination that it is not in recess for the purposes of the Recess Appointments Clause while conducting pro forma sessions. *See, e.g.*, 153 Cong. Rec. S14609 (Nov. 16, 2007) (Sen. Reid) (explaining that the Senate would be “be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments”).⁶ This understanding dates back to at least the 1980s, when Senator Robert Byrd leveraged the possibility of conducting pro forma sessions to reach a compromise with President Reagan over recess appointments. *See* 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe) (describing the negotiation). Since 2007, when Majority Leader Harry Reid first used pro forma sessions to prevent President Bush from making recess appointments, conducting pro forma sessions to avoid entering into

⁶ Some commentators have tried suggest that the fact that some Senators will casually refer to a period punctuated by pro forma sessions as a single recess, *e.g.*, 154 Cong. Rec. S7984 (daily ed. Aug. 1, 2008) (statement of Sen. Hatch) (referring in a speech to an upcoming “5-week recess” in spite of the fact that pro forma sessions would be held), or that a calendar on the Senate website suggests the same, indicates that the body does not really believe that pro forma sessions interrupt a recess. *See, e.g.*, 36 Op. O.L.C. at 3. Yet these types of informal pronouncements cannot possibly contravene the Senate’s repeated decision to enter into pro forma session for the express purpose of avoiding recess appointments. *See, e.g.*, 154 Cong. Rec. S7558 (daily ed. July 28, 2008) (statement of Sen. Reid).

recess has been a staple of Senate practice. *See* HOGUE, FREQUENTLY ASKED QUESTIONS at 11-12.

For years, the executive branch also accepted the Senate’s understanding of what qualified as one of its own sessions. Until President Obama’s recess appointments on January 4, 2012, no President had ever made a recess appointment while the Senate was meeting in pro forma session. It is therefore unsurprising that Solicitor General Elena Kagan told this Court in 2010 that “the Senate may act to foreclose [the recess appointment power] by declining to recess for more than two or three days at a time” and specifically cited the Senate’s 2007 pro forma sessions as an example of this. Letter to William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (Apr. 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (2010) (No. 08-1457).

The President’s newfound position—that he may override the Senate’s own determination of when it is in session—rests on the executive’s claim that the Senate may not say that pro forma sessions are sessions, because doing so would “unilaterally prevent the President from exercising his authority under the [Recess Appointments] Clause.” 36 Op. O.L.C. at 20. It is doubtless correct that Congress “may not by its rules ignore constitutional restraints or violate fundamental rights.” *Ballin*, 144 U.S. at 5. Yet the Senate does nothing of the kind when it rightfully declares that its sessions are sessions.

After all, the Senate can “prevent the President from exercising his authority under the Recess Appointments Clause” at any time by simply remaining in session. *See* 36 Op. O.L.C. at 1 (“The Senate could remove the basis for the exercise of the President’s exercise of his recess appointment authority by remaining continuously in session.”). Blocking the exercise of the recess appointment power only amounts to actual infringement on the President’s constitutional

authority if it occurs while the Senate is not simultaneously conducting sessions. *See Staebler v. Carter*, 464 F. Supp. 585, 598 (D.D.C. 1979) (“[Precluding] the President from making a recess appointment . . . *during a Senate recess* . . . would seriously impair his constitutional authority and should be avoided if it is possible to do so.” (emphasis added)). It is entirely innocuous for the Senate to rule out recess appointments as long as it *does* meet, and thereby allows the president to make nominations through the conventional Appointments Clause process. Therefore, if the Senate can provide advice and consent during pro forma sessions—and as discussed above, it assuredly can—then it does not infringe on the President’s constitutional prerogatives by categorizing its pro forma sessions as sessions.

The Senate’s use of pro forma sessions does undeniably make it more difficult for the President to appoint his preferred nominees. But this type of interbranch conflict is an inherent consequence, rather than a perversion, of the appointments process created by the Constitution. *See THE FEDERALIST NO. 51* (Madison) (discussing how the animating principle of the separation of powers is that “ambition must be made to counteract ambition”).

When the Framers selected a “principle of limitation by dividing the power to appoint the principal federal officers . . . between the Executive and Legislative branches,” *Freytag*, 501 U.S. at 884, they accepted the fact that “convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.” *Chadha*, 462 U.S. at 944. Using parliamentary procedure to oppose a coordinate branch’s preferred policies is therefore no “constitutional infringement”—it is rather the very essence of democratic politics. If the President believes that Congress is being unreasonably obstructionist by deciding to meet in pro forma sessions and thereby rendering itself less likely (though still entirely able) to confirm his preferred nominees, the Constitution expects him to take his complaints to the voters, not the

courts. *See Edmond*, 520 U.S. at 660 (“By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.”); THE FEDERALIST NO. 77 (Hamilton) (“The censure of rejecting a good [nomination] would lie entirely at the door of the Senate . . .”). Allowing the President to instead use the recess appointment power to circumvent the messiness of the political process whenever he believed the Senate was standing in his way would do violence to the separation of powers rationale that underlies our hybrid appointment system.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully Submitted.

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December 2, 2013