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## Recess Is Over: Narrowing the Presidential Recess Appointment Power in *NLRB v. Noel Canning*

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## RECESS IS OVER: NARROWING THE PRESIDENTIAL RECESS APPOINTMENT POWER IN *NLRB v. NOEL CANNING*

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.<sup>1</sup>

### INTRODUCTION

Recently, the Recess Appointments Clause<sup>2</sup> (the Clause) has engendered substantial controversy in the legal and political world. In the case of *NLRB v. Noel Canning*,<sup>3</sup> the Clause was the center of one of the United States Supreme Court's most high profile cases in its October 2013 term. The case was of great interest to many, not only because it presented a matter of first impression to the Court on a constitutional issue, but also because it pitted a small company against the Executive Branch in a battle over presidential power.

In *Noel Canning*, the Supreme Court held that certain recess appointments made by President Barack Obama in 2011 were invalid because the President had overstepped the power given to him under the Clause. In so doing, the Court upheld the judgments of most United States Circuit Courts of Appeal that had ruled on the issue. However, while the circuit courts took a narrow view of the President's power to make recess appointments, the Supreme Court interpreted the Clause "practically" and took a broader view. The Court issued three holdings. First, "the Recess," as used in the Clause, referred to Senate breaks occurring within single sessions of the Senate known as "intrasession" recesses, as well as to breaks occurring between two formal Senate sessions, known as "intersession" recesses. The Court held that in order to trigger the recess appointment power, however, the Senate break must be greater than ten days. Second, the Court held that "vacancies that may happen" included not only vacancies arising during a recess, but also vacancies arising while the Senate was still in session and continuing to exist into the recess. Third, the Court held that *pro forma* Senate sessions qualified as actual sessions of the Senate sufficient to prevent the chamber from going into a recess.

This Note analyzes only the issue raised in the Court's first holding—the meaning of the term "the Recess" as used in the Recess Appointments

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1. U.S. CONST. art. II, § 2, cl. 3.

2. *Id.*

3. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Clause—and argues that the term should only be interpreted to apply to intersession recesses. Since the recess appointments at issue were made during intrasession recesses, if the Court had held that the term “the Recess” refers to intersession recesses, it would not have had to decide the other two issues.

Part I of the Note provides the background facts of the case. Part II sets forth the relevant precedent in the United States Circuit Courts and then discusses the majority opinion of the Supreme Court in *Noel Canning* as well as Justice Scalia’s concurrence. Finally, Part III provides an analysis of the Clause’s text and structure, and argues why the “practical” interpretation set down by the Court is inferior to the intersession interpretation.

### I. BACKGROUND

*Noel Canning*’s tale begins with the National Labor Relations Board (NLRB or the Board). The National Labor Relations Act (the Act) states that the NLRB is to be comprised of five members, of whom three “constitute a quorum,” appointed by the President with the “advice and consent of the Senate.”<sup>4</sup> In 2010, the Supreme Court ruled that the Act required a quorum in order for the Board to issue binding rulings.<sup>5</sup>

On December 17, 2011, the United States Senate had agreed by unanimous consent to conduct only short *pro forma* sessions every three days, with “no business” being conducted.<sup>6</sup> On January 3, 2012—a day the Senate held a *pro forma* session—due to the expiration of a previous recess appointment, the Board had only two members.<sup>7</sup> The next day, on January 4, President Obama purported to exercise his recess appointment power and argued that the Senate was in recess.<sup>8</sup> In claiming the right to exercise this constitutional appointment power, the President appointed Sharon Block, Terence F. Flynn, and Richard Griffin to the three vacant spots on the Board.<sup>9</sup>

In February, after the President’s appointments, the Board, with its newly appointed members, issued a ruling against a bottling company named Noel

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4. 29 U.S.C. §§ 153(a)–(b) (2012).

5. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010).

6. DAVID H. CARPENTER ET AL., CONG. RESEARCH SERV., R42323, PRESIDENT OBAMA’S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES 2 (2012).

7. *Id.* at 1–2; Joint Brief for Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace at 7, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (No. 12-1115) [hereinafter Joint Brief].

8. Joint Brief, *supra* note 7, at 11–12.

9. Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012) [hereinafter White House Recess Appointments Announcement], available at <http://www.whitehouse.gov/the-press-of-vice/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

Canning.<sup>10</sup> The company then petitioned the D.C. Circuit for review.<sup>11</sup> Citing the Supreme Court's 2010 ruling in *New Process Steel*,<sup>12</sup> Noel Canning argued the Board lacked a quorum due to the fact that the three "recess" appointments were invalid because the Senate was never actually in recess when the President made the appointments,<sup>13</sup> and, accordingly, the Board's ruling itself was invalid.<sup>14</sup>

## II. PRECEDENT AND THE *NOEL CANNING* OPINION

### A. *Precedent*

Until recently, courts had provided very little judicial precedent involving the Recess Appointments Clause. The issue was a matter of first impression for the Supreme Court,<sup>15</sup> and prior to the D.C. Circuit's opinion in *Noel Canning*, only a few cases involving the Clause had come before the United States Courts of Appeal.<sup>16</sup> Of the three prior appellate cases, only one decided what constitutes a "recess." In *United States v. Allocco*, the United States Court of Appeals for the Second Circuit rejected a challenge by a criminal defendant to the authority of a district court judge who had been appointed during a Senate recess.<sup>17</sup> In rejecting the challenge, the appeals court held that the Recess Appointments Clause gave the President the power to recess appoint federal judges and to fill vacancies that actually arose while the Senate was in session but continued to exist during a recess.<sup>18</sup> Twenty-two years later in *United States v. Woodley*, the United States Court of Appeals for the Ninth Circuit also upheld the President's power to recess appoint "judicial officers."<sup>19</sup>

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10. Joint Brief, *supra* note 7, at 13. The company was involved in a labor dispute with a local labor union. *Id.*

11. *Id.* at 14.

12. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

13. Joint Brief, *supra* note 7, at 15–16.

14. *Id.* at 16.

15. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

16. Memorandum from the Office of Legal Counsel on the Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 8 (2012) [hereinafter OLC Memo], available at <http://www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion.pdf>. At least two lower courts have taken up the issue, however, and ruled that the President could make intrasession recess appointments. *Id.*

17. *United States v. Allocco*, 305 F.2d 704, 705–06 (2d Cir. 1962).

18. *Id.* at 709–10, 712.

19. *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc).

In the third case, *Evans v. Stephens*, the United States Court of Appeals for the Eleventh Circuit ruled that “recess” extended to intrasession recesses.<sup>20</sup> In *Evans*, the petitioner claimed that a judge appointed to the Eleventh Circuit lacked the authority to sit on the panel because he had been appointed by President George W. Bush during an intrasession recess.<sup>21</sup> The petitioner argued, inter alia, that an intrasession recess does not qualify as a recess under the Clause.<sup>22</sup> The court, however, found that an intrasession break fit the eighteenth century dictionary definition of “recess” and that “the text of the Constitution does not differentiate expressly between inter-and intrasession recesses for [the Clause].”<sup>23</sup> It discounted the argument that the use of the word “the” in the phrase “the Recess” utilized in the Clause indicated that the Clause references a single recess at the end of the Senate’s session and found that the phrase could refer “to any one . . . of the Senate’s acts of recessing,” whether intrasession or intersession.<sup>24</sup> The court also rejected the argument that the use of the word “adjournment” in three other clauses of the Constitution limits the use of “recess” to only an intersession break.<sup>25</sup> Rather than “describing a block of time,” the court found that “adjournment” could describe the action of Congress taking a break.<sup>26</sup> Finally, the court looked to traditional presidential practice and noted that presidents had made recess appointments during shorter intrasession breaks.<sup>27</sup> The court ultimately held that “given the words of the Constitution and the history,” it was not persuaded “by the argument that the recess appointment power may only be used in an intersession . . . but not an intrasession recess.”<sup>28</sup>

In 2013, the United States Court of Appeals for the District of Columbia Circuit then issued its opinion in *Noel Canning* and held that the Clause referred only to intersession recesses. In doing so, the D.C. Circuit issued a

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20. *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004). There were two dissents; however, neither one addressed the intersession versus intrasession issue. *Id.* at 1228 (Barkett, J., dissenting); *id.* at 1238 (Wilson, J., dissenting).

21. *Id.* at 1221–22 (majority opinion).

22. *Id.* at 1224.

23. *Id.* The court cited to a 1755 dictionary that defined “recess” “as ‘retirement; retreat; withdrawing; secession’ or ‘remission and suspension of any procedure.’” *Id.*

24. *Id.* at 1224–25.

25. *Evans*, 387 F.3d at 1225.

26. *Id.* The Eleventh Circuit also addressed the fact that in *Wright v. United States*, 302 U.S. 583 (1938), the Supreme Court suggested that “adjournment” signified a period over which a break is taken. The Eleventh Circuit found that even if applying this usage, “adjournment” would describe only an intersession break, while a “recess” could occur intrasession. *Id.*

27. *Id.* at 1225. The Eleventh Circuit also noted that in the past, “[t]welve Presidents have made more than 285 intrasession recess appointments.” *Id.* at 1226.

28. *Id.*

very broad ruling.<sup>29</sup> In fact, in siding with Noel Canning, the court's ruling went even further than the company had requested. While Noel Canning had requested the court to hold that intrasession breaks lasting less than three days did not constitute a "recess," the court ruled that no intrasession breaks whatsoever constituted a "recess" under the Clause.<sup>30</sup> Therefore, the court held that the appointments at issue were improper, thereby invalidating the ruling against Noel Canning because the Board lacked a quorum.<sup>31</sup> In ruling that only intersession recess appointments were constitutional, the court was able to avoid the task of having to decide whether a *pro forma* session constituted an actual Senate session.

In its ruling, the D.C. Circuit placed heavy reliance on the fact that the Framers used the definite article "the" in "the Recess"<sup>32</sup> and claimed that its usage suggested the intersession interpretation.<sup>33</sup> The court also argued that the intrasession interpretation did not fit with the structure and purpose of the Recess Appointments Clause.<sup>34</sup> In its structural analysis, the D.C. Circuit pointed to an analysis of the Clause by Alexander Hamilton in *The Federalist* 67, which noted that a recess appointment is the "auxiliary method" of executive appointments.<sup>35</sup> After discussing that analysis, the court argued that it does not make sense to extend the "auxiliary" method of appointment to an intrasession break.<sup>36</sup> If it were so extended, argued the court, then the "auxiliary" recess appointment method could "swallow the 'general' route of advice and consent."<sup>37</sup>

Finally, the D.C. Circuit also discounted the presidential practice of intrasession recess appointments.<sup>38</sup> It noted the lack of intrasession recess appointments in the first 150 years of the Republic and also refused to give weight to recent presidential practices. The court argued that such an absence of intrasession appointments in the Republic's early years "suggests an assumed *absence* of [the] power' to make such appointments."<sup>39</sup>

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29. John Elwood, *DC Circuit Strikes Down President Obama's Recess Appointments*, VOLOKH CONSPIRACY (Jan. 25, 2013, 11:24 AM), <http://www.volokh.com/2013/01/25/dc-circuit-strikes-down-president-obamas-recess-appointments/>.

30. Joint Brief, *supra* note 7, at 29; Noel Canning v. NLRB, 705 F.3d 490, 499, 506 (D.C. Cir. 2013).

31. *Noel Canning*, 705 F.3d at 506–07.

32. *Id.* at 500.

33. *Id.*

34. *Id.* at 501.

35. *Noel Canning*, 705 F.3d at 502–03.

36. *Id.* at 503.

37. *Id.*

38. *Id.* at 502.

39. *Id.*

After holding that the Clause applies only to intersession recesses, the D.C. Circuit also held that the recess appointment power applies only to vacancies that actually come into existence during an intersession recess.<sup>40</sup> However, as Judge Griffith noted in his concurrence, the court did not need to decide this second matter since the first issue was dispositive.<sup>41</sup>

A few months after the D.C. Circuit's opinion in *Noel Canning*, the United States Court of Appeals for the Third Circuit issued its own ruling on the Recess Appointments Clause in *NLRB v. New Vista Nursing and Rehabilitation*.<sup>42</sup> Like the D.C. Circuit, in *New Vista*, the Third Circuit held that "the Recess" referred only to intersession breaks.<sup>43</sup> In *New Vista*, the Obama Administration (the Administration) argued heavily for a standard advocated by Attorney General Harry Daugherty for determining when the Senate is unavailable, and therefore, when the President may exercise his recess appointment power.<sup>44</sup> The Administration argued that the standard allowed appointments during short intrasession breaks.<sup>45</sup> However, the court was unpersuaded that Daugherty's standard was the proper one to use. The court found that an examination of Founding Era state constitutions with similar clauses suggested that the United States Constitution's Recess Appointments Clause applied to only either intersession or long intrasession breaks.<sup>46</sup> Additionally, the court reached the same conclusion when it looked to the context of the Recess Appointments Clause within the scheme of the separation of powers.<sup>47</sup> The court found that using the Daugherty standard to determine when the Senate was in recess would "eviscerate the divided-powers framework the two Appointments Clauses establish."<sup>48</sup>

After discarding the Daugherty standard, the Third Circuit then set its sights on determining whether "the Recess" referred to only intersession breaks, or whether it included long intrasession breaks. The court found that two aspects of the Clause demonstrated that it referred only to intersession breaks. First, the court noted that there was no link between "the Recess" and a

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40. *Noel Canning*, 705 F.3d at 503, 506.

41. *Id.* at 515 (Griffith, J., concurring) ("The majority acknowledges that our holding on intrasession recess appointments is sufficient to vacate the Board's order . . . and I would stop our constitutional analysis there.").

42. *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203, 207 (3d Cir. 2013).

43. *Id.* at 208.

44. Under Attorney General Daugherty's standard, the Senate is in recess when it adjourns such that (1) Senators "owe no duty of attendance"; (2) the chamber is empty; and (3) the Senate cannot "receive communications from the President or participate as a body in making appointments." Brief for the National Labor Relations Board at 29, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (No. 12-1153).

45. *New Vista*, 719 F.3d at 220.

46. *Id.* at 226.

47. *Id.* at 242.

48. *Id.* at 230.

particular length of time.<sup>49</sup> The court rejected any link with the Adjournment Clause<sup>50</sup>—which requires either chamber of Congress to get the other’s consent before adjourning for more than three days—and noted that there was “no constitutional basis for any sort of durational limit on what constitutes ‘the Recess.’”<sup>51</sup> Second, the Third Circuit found the Clause’s provision requiring that recess-appointed officers’ terms expire at the end of the next Senate session suggested that the Clause applied to only intersession recesses. It noted that there was common agreement that a Senate “session” begins with the first convening of the Senate and ends when the Senate adjourns *sine dine* or when its term automatically expires on January 3 of any year.<sup>52</sup> The court found that the Clause’s requirement that recess-appointed officers’ terms expire at the end of the next Senate session suggested that their appointments were understood to be made between separate Senate sessions.<sup>53</sup>

Finally, in holding that “the Recess” refers only to intersession breaks, the Third Circuit discarded the Administration’s arguments regarding historical executive practice. The court found that for the first 100 years after the framing, “recess” was generally understood to mean only intersession breaks.<sup>54</sup> In examining the historical practice of presidents, it found that the use of the recess appointment power during intrasession breaks was a relatively recent development, and that such a use of the power was in the sole interest of the President.<sup>55</sup> The court found that such a recent practice was not worthy of deference by the Judiciary.<sup>56</sup>

The last United States Circuit Court of Appeal to decide the meaning of “the Recess” before the United States Supreme Court took up the issue, was the Fourth Circuit in *NLRB v. Enterprise Leasing Co. Southeast*.<sup>57</sup> Here, again, the Administration argued for an “open for business” standard of determining when the Senate is in recess,<sup>58</sup> but like the circuit courts deciding *Noel Canning* and *New Vista*, the *Enterprise Leasing* court held that the President was limited to making recess appointments only during intersession recesses.<sup>59</sup>

The Fourth Circuit placed importance on the fact that the Framers used the word “recess” in the Clause rather than “adjourn” or “adjournment.”<sup>60</sup> The

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49. *Id.* at 233.

50. U.S. CONST. art. I, § 5, cl. 4.

51. *New Vista*, 719 F.3d at 234.

52. *Id.*

53. *Id.*

54. *Id.* at 239.

55. *Id.*

56. *New Vista*, 719 F.3d at 240–41.

57. *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 612–13 (4th Cir. 2013).

58. *Id.* at 647.

59. *Id.* at 652.

60. *Id.* at 654.



court found that each time the term “adjourn” or “adjournment” appears in the Constitution, it refers to an intrasession break.<sup>61</sup> The court placed significance on the use of “recess” solely in the Recess Appointments, when the Framers could have used “adjourn” and found that this suggested that “the Recess” referred to intersession breaks.<sup>62</sup>

The court also examined the context of the Clause within the time of the Framing. It noted the length of Congressional breaks during the time of the Constitution’s ratification was around six to nine months, wherein which time the Senate would be unable to perform its advice and consent function.<sup>63</sup> The court found that this context indicated that the Clause referred to long breaks, and not short or weekend breaks, which would arguably be covered by the Administration’s standard.<sup>64</sup>

In addition to finding that the historical record of presidential practice does not indicate an “intrasession meaning,” the Fourth Circuit found that the Administration’s standard offered little guidance to the President in determining when the Senate was in recess.<sup>65</sup> The court indicated that the separation of powers demands clarity in determining when the Senate is in recess, and that drawing a line between intersession and intrasession breaks better provides such clarity than the “unavailable-for-business” standard.<sup>66</sup>

#### B. *The United States Supreme Court’s Opinion in Noel Canning*

Of the last three circuit court cases pertaining to the Recess Appointments Clause, *Noel Canning* was the first one appealed to the United States Supreme Court. When the Court issued its opinion in June 2014, it upheld the *Noel Canning*, *New Vista*, and *Enterprise Leasing* courts’ judgments that the President’s January 2011 recess appointments were invalid, but it provided a vastly different rationale.

While the Court’s judgment was unanimous, only five justices joined Justice Breyer’s majority opinion.<sup>67</sup> Justice Scalia issued an opinion concurring in the judgment that Chief Justice Roberts, Justice Thomas, and Justice Alito joined.<sup>68</sup>

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61. *Id.* at 642.

62. *Enter. Leasing*, 722 F.3d at 648.

63. *Id.* at 649.

64. *Id.*

65. *Id.* at 650.

66. *Id.* at 651.

67. Jonathan H. Adler, *All Nine Justices Reject Recess Appointments in Noel Canning Case*, WASH. POST (June 26, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/26/another-unanimous-opinion/>.

68. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014) (Scalia, J., concurring).

Justice Breyer began the majority opinion by stating that the Court considered three questions regarding the Recess Appointments Clause.<sup>69</sup> The first was whether the Clause applied to solely intersession recesses or whether it included intrasession recesses as well.<sup>70</sup> Breaking from the recent opinions of the courts of appeal, Breyer held that the Clause applies to both types of recesses.<sup>71</sup> Second, the Court considered whether the words “vacancies that may happen” as found in the Clause refer solely to vacancies that come into existence during a recess, or whether vacancies occurring prior to a recess but still existing during the recess also qualify.<sup>72</sup> The Court held that the Clause referred to both types.<sup>73</sup> Finally, the Court had to determine how long a Senate recess must occur before the President may exercise his recess appointment power.<sup>74</sup> In deciding this matter, the Court had to determine whether *pro forma* sessions qualify as actual sessions of the Senate, sufficient to keep the Senate from going into recess.<sup>75</sup> Breyer and the majority held that such sessions do qualify as real sessions, and, therefore, the Senate was in the midst of a three-day recess when President Obama made the appointments at issue.<sup>76</sup> The majority held that three days was too short a time for the President to exercise his recess appointment power.<sup>77</sup> Since the focus of this Note is on the meaning of the word “recess,” the summary of the Court’s opinion and Justice Scalia’s concurrence will focus mainly on that aspect of the respective opinions.

Justice Breyer began the majority’s analysis by noting the Recess Appointments Clause’s role as a secondary method of appointment to the “norm” of the general appointments method; however, he also noted the “tension” between the President’s need for “the assistance of subordinates” with the Senate’s practice, in its early years, of meeting for a single brief session each year.<sup>78</sup> With this framework established, interestingly, the Court indicated that it sought to “interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.”<sup>79</sup>

Justice Breyer began the Court’s analysis of the text by looking to founding era dictionary definitions of “recess,” which he found to include both

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69. *Id.* at 2556 (majority opinion).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Noel Canning*, 134 S. Ct. at 2556.

74. *Id.*

75. *Id.* at 2557.

76. *Id.*

77. *Id.*

78. *Noel Canning*, 134 S. Ct. at 2558–59 (internal quotation marks omitted).

79. *Id.* at 2559.

intersession and intrasession breaks.<sup>80</sup> Additionally, by pointing to other areas of the Constitution using the definite article “the,” Breyer also discounted the notion that the Recess Appointments Clause’s use of “the” suggests it applies only to intersession recesses.<sup>81</sup> Therefore, Justice Breyer found the Clause’s text ambiguous and then turned to executive practice where the Court placed “significant weight.”<sup>82</sup> In fact, the Court used historical practice as its primary means of support in its ruling, and in doing so, noted its hesitation in upsetting the “working arrangements” that the Legislative and Executive branches had reached in regards to recess appointments.<sup>83</sup>

In examining historical practice, the Court discounted the early lack of intrasession recess appointments, noting that the lack of intrasession breaks themselves would prevent intrasession appointments.<sup>84</sup> It looked to nineteenth century opinions issued by United States attorneys general and other executive advisors and asserted that the available opinions of presidential legal advisors are essentially unanimous in taking the position that the Clause allows for intrasession appointments.<sup>85</sup> The Court also placed weight on the fact that, when including military appointments, Presidents have made thousands of intrasession recess appointments.<sup>86</sup>

The Court also looked at the Senate’s historical actions regarding the Clause. It found that to the extent that the Senate or a committee had expressed a view, the view “favored a functional definition of ‘recess,’” which includes intrasession recesses.<sup>87</sup> The Court asserted that the Senate had not fought back against presidential uses of recess appointments during intrasession breaks for at least seventy-five years.<sup>88</sup>

After providing its initial rationale as to its holding, the Court then set about attempting to refute three important arguments to the contrary. First, the Court tackled the assertion that the Framers intended the Clause to apply only to intersession breaks because they were hardly aware of intrasession recesses.<sup>89</sup> Instead of intending the Clause to apply only to the type of recess they knew, the Founders, the Court claimed, knew that they were writing a document that was designed to apply to changing times.<sup>90</sup> Taking a living constitutionalist view, the majority held that the Framers likely intended the

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80. *Id.* at 2561.

81. *Id.*

82. *Id.* at 2559, 2561.

83. *Noel Canning*, 134 S. Ct. at 2560.

84. *Id.* at 2562.

85. *Id.*

86. *Id.*

87. *Id.* at 2563.

88. *Noel Canning*, 134 S. Ct. at 2564.

89. *Id.* at 2564–65.

90. *Id.* at 2565.

Clause to apply to new circumstances that correspond with the purpose of the Clause and are consistent with its language.<sup>91</sup>

The second argument the Court's majority sought to refute was the assertion that the intrasession interpretation allows "the President to make 'illogic[ally]' long recess appointments" due to the portion of the Clause allowing a recess appointee to serve until the end of the next Senate session.<sup>92</sup> The Court claimed that this provision of the Clause allows the President and the Senate to always have at least one full session with which to undertake a complete confirmation process.<sup>93</sup>

Finally, the Court tackled the argument that its intrasession interpretation of the Clause would render the Clause vague. The Court responded, however, that vagueness was unavoidable and was arguably present no matter which interpretation one accepted.<sup>94</sup>

After concluding that "recess" included intrasession breaks, in arguably a move of raw judicial power, the Court placed a floor on how long the Senate must not be in session in order to qualify as "the Recess of the Senate" under the Clause. Instead of looking to the three-day provision in the Adjournment Clause, the Court again looked to historical practice and indicated that it had not found even one example of a recess appointment made during an intrasession break shorter than ten days.<sup>95</sup> Therefore, the Court held:

[A] recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.<sup>96</sup>

As previously indicated, the Court also decided the issues of when a vacancy must come into being in order for it to be filled by a recess appointment and whether *pro forma* sessions of the Senate constitute actual sessions sufficient to prevent the Senate from going into recess. In regards to the former issue, the Court found the text ambiguous and, again, relying on historical practice, concluded that the Clause includes vacancies coming into existence while the Senate is in session.<sup>97</sup> In deciding the latter issue, the Court deferred to the Senate's determination of whether a *pro forma* session qualifies

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91. *Id.*

92. *Id.*

93. *Noel Canning*, 134 S. Ct. at 2565.

94. *Id.*

95. *Id.* at 2566–67.

96. *Id.* at 2567. "Political opposition in the Senate would not qualify as an unusual circumstance." *Id.*

97. *Id.* at 2573.

as an actual Senate session. The Court refused to determine whether Senators were present on the floor of the chamber during particular *pro forma* sessions, finding that “[j]udicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.”<sup>98</sup>

Since *pro forma* sessions qualify as actual sessions of the Senate and because the Senate had been convening *pro forma* every three days, at the time the President made the recess appointments at issue, the Senate was in the middle of only a three-day recess.<sup>99</sup> Therefore, under the new ten-day standard established by the Court, three days was not enough to trigger the President’s recess appointment power, and the individuals in question were not validly appointed.<sup>100</sup>

### C. Justice Scalia’s Concurrence

In response to Justice Breyer’s majority opinion, Justice Scalia penned a concurrence that reads more like a dissent. Scalia agreed only with the judgment of the Court and took great issue with its rationale. Scalia would find that “the Recess” includes only breaks occurring between separate formal sessions of the Senate.<sup>101</sup>

Justice Scalia began his concurrence by pointing out the importance of the constitutional scheme of separation of powers. He argued that the Constitution’s structural provisions are just as important as the Bill of Rights in protecting individual rights.<sup>102</sup> Justice Scalia asserted the Court, therefore, has an important duty to preserve the structural separation established by the Constitution and that it should not “defer to the other branches’ resolution of such controversies,” nor acquiesce in an encroachment by one branch upon the other simply because the encroached-upon branch approves.<sup>103</sup>

Justice Scalia’s analysis began with an examination of the plain meaning of the text of the Clause. He noted that the Clause uses “recess” in contradistinction with “session.”<sup>104</sup> Since neither the Administration nor the majority opinion argued that “session” has colloquial meaning, it is taken that it means a formal session.<sup>105</sup> Therefore, “the Recess” must refer to the break between formal sessions, i.e., an intersession recess.<sup>106</sup> Further, Justice Scalia

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98. *Noel Canning*, 134 S. Ct. at 2576.

99. *Id.* at 2573–74.

100. *Id.* at 2574.

101. *Id.* at 2592 (Scalia, J., concurring). Justice Scalia also would have held that vacancies that “may happen during the Recess of the Senate” refers only to vacancies that come into being during an intersession recess. *Id.*

102. *Id.*

103. *Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring).

104. *Id.* at 2595.

105. *Id.* at 2596.

106. *Id.*

noted the Clause's use of the word "recess" as opposed to the word "adjourn" and asserted that the provisions of the Constitution using "adjourn" referred to intrasession breaks.<sup>107</sup> Since the Framers used a different term in the Clause, they, therefore, must not have been referring to intrasession breaks.<sup>108</sup>

Justice Scalia argued that through its rationale, the majority was attempting to ensure a "prominent role for the recess-appointment power in an era when its influence is far more pernicious than beneficial."<sup>109</sup> He asserted that the need for the Clause no longer existed, and that its use now is mainly relegated to allowing the President to circumvent the Senate's advice and consent function.<sup>110</sup>

A significant amount of Justice Scalia's concurrence was also spent refuting the majority's reliance upon historical practice. Justice Scalia acknowledged that a widespread and unchallenged practice occurring from the early days of the Republic should guide the Court's interpretation of a constitutional provision that is ambiguous.<sup>111</sup> However, "past practice does not, by itself, create power."<sup>112</sup> Regardless, Justice Scalia argued the history does not support the interpretation set forth by the majority.

Upon meticulously going through the relevant history, Justice Scalia concluded that roughly ninety percent of intrasession recess appointments were made since 1945.<sup>113</sup> Further, he pointed out that the first attorney general opinion on the matter, by Attorney General Philander Knox, expressly indicated that the President could make recess appointments only during intersession breaks of the Senate, and it was not until 1921 before a presidential legal adviser would embrace the majority's interpretation of "the Recess."<sup>114</sup> Justice Scalia also noted that the increased number of intrasession recess appointments in the twentieth century elicited bi-partisan criticism from numerous senators, including amicus curiae briefs filed in recent cases from Senator Edward M. Kennedy and Senator Mitch McConnell.<sup>115</sup> Justice Scalia summed-up the meaning of this history quite succinctly:

Intrasession recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until

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107. *Id.*

108. *Noel Canning*, 134 S. Ct. at 2596 (Scalia, J., concurring).

109. *Id.* at 2598.

110. *Id.*

111. *Id.* at 2594. Justice Scalia argued that the text was not ambiguous in the first place. *Id.* at 2600.

112. *Id.* at 2594.

113. *Noel Canning*, 134 S. Ct. at 2604 (Scalia, J., concurring).

114. *Id.* at 2602–03.

115. *Id.* at 2604–05.

1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties.<sup>116</sup>

### III. ANALYSIS

In analyzing the Supreme Court's opinion, Professor Michael Rappaport's three possible interpretations of "the Recess" are helpful.<sup>117</sup> These three interpretations are: the intersession interpretation—where a recess appointment can only be made during the recess between two congressional sessions; the all intrasession recess (or all-recesses) interpretation—where "recess" includes all intrasession recesses irrespective of length; and the practical intrasession interpretation—where appointments may be made during intrasession recesses that are greater than a certain set length.<sup>118</sup>

The opinions by the D.C. Circuit and Justice Scalia in the *Noel Canning* case and by the Third and Fourth Circuits in *New Vista* and *Enterprise Leasing*, all interpreted the Clause as having the intersession-only meaning. On the other hand, the Eleventh Circuit in *Evans v. Stephens* took the all-recesses view, and Justice Breyer's majority opinion for the Supreme Court applied the practical interpretation. This Note sets out to demonstrate that those opinions taking the intersession-only view of the Clause have the proper interpretation. It does so by analyzing the text of the Clause, examining how the Clause fits within the Constitution's structure of separation of powers, evaluating the relevant executive practice, and finally demonstrating the issues with the Supreme Court's practical interpretation.

#### A. Text

When interpreting a provision of the Constitution, the proper place to begin is "with its text."<sup>119</sup> An examination of the Clause, within the context of both the time of its writing and the Constitution as a whole, demonstrates "the Recess" to have the intersession-only meaning.

Before demonstrating the ways in which the Constitution's text evidences that the Recess Appointments Clause holds the intersession-only meaning, it is first important to show the ways in which it does *not* so demonstrate, such as arguments regarding the definite article "the." The D.C. Circuit, in its opinion in *Noel Canning*, placed great emphasis on the fact that the Recess Appointments Clause uses the definite article "the" in "the Recess" as opposed

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116. *Id.* at 2605.

117. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1547 (2005).

118. *Id.*

119. NLRB v. New Vista Nursing and Rehab., 719 F.3d 203, 221 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)).

to “a” or “an.” This argument resembles one made by Michael Carrier.<sup>120</sup> Carrier argued that the use of the definite article “the” in the phrase “the Recess” as opposed to the indefinite article “a” indicates that the Clause is referring to the single intersession recess.<sup>121</sup> He asserted that the use of “the” indicates “the singular form of Recess,” while “the use of [an] indefinite article . . . would not limit as explicitly the meaning of *Recess* to the intersession recess.”<sup>122</sup> The argument is problematic, however, and is ultimately weakened when examined against other uses of the definite article “the” in similar contexts in the Constitution. For example, Article I, Section 3, Clause 5 discusses “the Absence of the Vice President” regarding the Senate’s choosing of a President pro tempore.<sup>123</sup> Though the clause says “the Absence,” it does not make sense to suggest that it refers to “one absence per session or year.”<sup>124</sup> Therefore, it is not wise to rely upon the use of the definite article “the” to determine whether “the Recess” includes intrasession breaks.

Other textual and historical evidence, however, demonstrates that the Recess Appointments Clause refers only to intersession recesses. For instance, though Professor Rappaport, in his seminal article on the Clause, noted that the 1828 edition of the Webster’s Dictionary defines “recess” as a “[r]emission or suspension of business or procedure,” and noted that this definition could conform with the “all-recesses” interpretation, he argued that “recess” also has a more specialized meaning that is ultimately consistent with the intersession interpretation.<sup>125</sup> He pointed to the power under English law known as “prorogation” that allowed a king to end a session for both houses of the English Parliament.<sup>126</sup> In adapting English parliamentary practice to the new Congress, the Framers did away with monarchical prorogations, and, instead, gave the right to end sessions to the Houses of Congress.<sup>127</sup> The Framers used the term “adjourn” to describe this power, and in a departure from English law, the use of “adjourn” in the Constitution describes both intersession and intrasession breaks.<sup>128</sup>

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120. Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2204 (1994).

121. *Id.* at 2219.

122. *Id.*

123. U.S. CONST. art. I, § 3, cl. 5. The full clause reads: “The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.” *Id.*

124. Rappaport, *supra* note 117, at 1561 n.225.

125. *Id.* at 1550 & n.191.

126. *Id.* at 1550–51.

127. *Id.* at 1551 (citing U.S. CONST. art. I, § 5, cl. 4).

128. *Id.* at 1551 n.198.



The words of a constitutional provision should be read in the context of the entire text,<sup>129</sup> and an intratextual<sup>130</sup> analysis of the five clauses, which use the term “adjournment” compared to the use of “recess” in the Recess Appointments Clause, demonstrates the words to have the all-recesses and intersession-only meanings, respectfully. Professor Rappaport demonstrated that these constitutional provisions using “adjournment” “exhibit[] a pattern,” indicating that the “all-recesses” meaning is implicated when “adjournment” is used.<sup>131</sup> He found that “adjournment” or “adjourn” in the Presentment Clause,<sup>132</sup> Three-Day Adjournment Clause,<sup>133</sup> Presidential Adjournment Clause,<sup>134</sup> and the Orders Presentment Clause<sup>135</sup> referred to the equivalent of both intersession and intrasession recesses.<sup>136</sup> He also found that “adjourn” in the Day-to-Day Adjournment Clause<sup>137</sup> refers to “extremely short intrasession recesses,” but could also possibly refer to an intersession recess.<sup>138</sup> Therefore, the fact that the Recess Appointments Clause uses “recess” instead of “adjourn” is important because the use of differing terms within a legal text suggests differing meanings for those terms.<sup>139</sup> Since the “all-recesses”

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129. See *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (asserting that, in constitutional interpretation, “a fair construction of the whole instrument” must be given); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998) (book review) (noting the “truism that interpreting a text requires context”).

130. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”).

131. Rappaport, *supra* note 117, at 1557–59.

132. The relevant portion of the clause states: “If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.” U.S. CONST. art. I, § 7, cl. 2.

133. “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.” U.S. CONST. art. I, § 5, cl. 4.

134. The relevant portion states that, “in case of Disagreement between [the two Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper.” U.S. CONST. art. II, § 3.

135. The relevant portion provides: “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States.” U.S. CONST. art. I, § 7, cl. 3.

136. Rappaport, *supra* note 117, at 1558–59.

137. The relevant part of the clause states: “[A] Majority of each [House of Congress] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day.” U.S. CONST. art. I, § 5, cl. 1.

138. Rappaport, *supra* note 117, at 1559.

139. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (explaining the canon of the “Presumption of Consistent Usage”: “[a] word or

meaning is included in the Constitution's use of "adjournment," then "recess" must have either the intersession or the practical meaning.<sup>140</sup> However, "the closer the practical interpretation is to the all-recesses interpretation, the less support the pattern provides to the practical interpretation."<sup>141</sup> In other words, under the practical interpretation, the fewer the minimum number of days (or amount of time) that the Senate would be required to be in an intrasession break in order for it to be in a "recess," the "less reason for the Framers to have gone to the trouble of distinguishing between recesses and adjournments."<sup>142</sup> This fact, therefore, suggests that the intersession interpretation, and not the "all-recesses" or a practical interpretation, like the one adopted by the Supreme Court, is the more logical interpretation of "recess."<sup>143</sup>

### B. *The Clause and the Structure of Separation of Powers*

As Justice Scalia has argued repeatedly, the Constitution's scheme of separation of powers is just as important, if not more important, than the Bill of Rights in protecting individual liberty.<sup>144</sup> The presidential appointments method is an important part of the separation of powers scheme and plays an important role in protecting the liberties of the people. The General Appointments Clause states that the President:

[S]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.<sup>145</sup>

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phrase is presumed to bear the same meaning throughout a text; *a material variation in terms suggests a variation in meaning.*" (emphasis added).

140. Rappaport, *supra* note 117, at 1559–61.

141. *Id.* at 1561.

142. *Id.*

143. *Id.* Rappaport further backs up his assessment by pointing to the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1792, both of which used "recess" to refer to an intersession break. *Id.* at 1552.

144. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 710–11 (1988) (Scalia, J., dissenting). In making this argument, Justice Scalia frequently notes that to the Framers, "the Bill of Rights was an afterthought," and that the structure of government is the best protector of liberty, asserting that "every tin-horn dictator in the world today has a bill of rights." See, e.g., The National Press Club, *The Kalb Report—Ruth Bader Ginsburg & Antonin Scalia*, YOUTUBE (Apr. 17, 2014), [https://www.youtube.com/watch?v=z0utJAu\\_jG4](https://www.youtube.com/watch?v=z0utJAu_jG4).

145. U.S. CONST. art. II, § 2, cl. 2. The same provision also allows Congress to "vest the Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* In regard to *Noel Canning*, in passing the National Labor Relations Act, Congress did not vest the appointment of members of the NLRB in the President alone or in any other body. 29 U.S.C. § 153(a) (2012).

As explained by Alexander Hamilton, there are two main benefits of the Senate's check on executive appointments: (1) The check leads to better individuals serving in the Executive Branch; and (2) it allows for more transparency in the process of selecting appointments and, therefore, more accountability. In *The Federalist No. 76*, Hamilton explained how Senate confirmation of executive appointments provides an incentive for the President to take care in appointing executive officials. He stated that Senate confirmation "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."<sup>146</sup> Hamilton argued that the "possibility of rejection would be a strong motive to care in proposing."<sup>147</sup> Essentially, Hamilton argued that the fact that presidential appointments must pass Senate muster requires the President to be more thoughtful about his appointments. With the Senate scrutinizing nominees, appointments are more likely to be based on skill and merit as opposed to merely being the result of personal or political favors or familial relations. The scheme, therefore, leads to better nominees and better individuals working in the Executive Branch, and, in turn, a better-functioning government.

In *The Federalist No. 77*, Hamilton also suggested that the requirement of Senate confirmation for executive appointments brings the process into the open and allows for more accountability. He argued that Senate confirmation allows for public scrutiny of the nominee and requires the Executive to set forth his rationale for appointing the individual.<sup>148</sup> If the appointment were left to the Executive, or to a council of appointments within the Executive Branch, it would be unknown to the public whether the Executive was appointing the person because of his merit:

Or whether he prostitutes that advantage to the advancement of persons, whose chief merit is their implicit devotion to his will, and to the support of a despicable and dangerous system of personal influence . . . .<sup>149</sup>

These questions, under such a scheme, would "be the subjects of speculation and conjecture" among the public.<sup>150</sup> Additionally, Hamilton argued that the Constitution's appointments process allows for proper accountability. If a nomination is rejected because the nominee is unqualified or is an otherwise bad nomination, the blame falls squarely on the President.<sup>151</sup>

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146. THE FEDERALIST NO. 76, at 463 (Alexander Hamilton) (Garry Wills ed., 2003).

147. *Id.* at 464.

148. THE FEDERALIST NO. 77, at 468 (Alexander Hamilton) (Garry Wills ed., 2003).

149. *Id.*

150. *Id.*

151. *Id.* at 467.

Likewise, if the Senate rejects a good nominee, it takes the blame.<sup>152</sup> Finally, if the President nominates and the Senate confirms a bad appointment, both would, as Hamilton put it, “participate . . . in the opprobrium and disgrace.”<sup>153</sup>

In order to examine the role of the Recess Appointments Clause within this scheme, and what it suggests as the proper interpretation of “the Recess,” it is instructive to again look to Hamilton and his early analysis of the Clause in *The Federalist No. 67*. In writing *The Federalist No. 67*, Hamilton was not discussing what the Clause means by “the Recess;” rather, his purpose was to refute the notion that the Recess Appointments Clause allowed the President to make appointments to vacant Senate seats during a Senate “recess.”<sup>154</sup> The essay is important, however, due to the structural analysis Hamilton set forth.

Hamilton gave several reasons why the Clause does not give the President the power to make appointments to vacant Senate seats. He attached importance to the relationship between the Recess Appointments and the General Appointments Clauses.<sup>155</sup> Hamilton said that the recess appointment power is “nothing more than a supplement to the other.”<sup>156</sup> Further, Hamilton asserted that the Recess Appointments Clause was intended “for the purpose of establishing an auxiliary method of appointment in cases, to which the general method was inadequate.”<sup>157</sup> Hamilton continued, writing that:

The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments . . . .<sup>158</sup>

In concluding his argument, Hamilton claimed that since the recess appointment power is a “supplement,” and is “auxiliary” to the general appointment power, then the scope of offices that the President can fill with a recess appointment is limited to the offices that the General Appointments Clause allows, and that clause does not allow for the filling of Senate

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152. *Id.*

153. THE FEDERALIST NO. 77, *supra* note 148, at 467.

154. THE FEDERALIST NO. 67, at 411–12 (Alexander Hamilton) (Garry Wills ed., 2003).

155. *Id.* The General Appointments Clause states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2.

156. THE FEDERALIST NO. 67, *supra* note 154, at 411.

157. *Id.*

158. *Id.*

vacancies.<sup>159</sup> Though Hamilton did not provide an explanation of what constitutes a “recess” for purposes of the Recess Appointments Clause, *The Federalist No. 67* provides an excellent structural analysis of the Clause.

Having examined the purpose of the Recess Appointments Clause within separation of powers as understood by the Founders, this purpose can be used to determine the meaning of the Clause. The Clause’s “auxiliary” nature drives the analysis. It does not make sense to extend the “auxiliary” method of appointment to an intrasession break and allow any vacancy to be filled during this time regardless of when the vacancy arose. Such an extension, as the D.C. Circuit found, could enable the “auxiliary” method of recess appointments to “swallow the ‘general’ route of advice and consent.”<sup>160</sup>

Under the Supreme Court’s holding, however, the President is given an extraordinary amount of appointment power if he can make intrasession recess appointments to vacancies that come into being at any time regardless of whether the Senate is in session.<sup>161</sup> Under this interpretation, if the President cannot get an appointment approved by the Senate, he need only wait until the Senate goes into one of its many intrasession breaks and then make a recess appointment. Such a situation occurred when President George W. Bush appointed John Bolton to the position of United States Ambassador to the United Nations. President Bush formally nominated Bolton, but when the Senate Foreign Relations Committee refused to send the nomination to the floor for a full up or down vote, the President waited until Congress took an intrasession break and then appointed Bolton.<sup>162</sup> This use of the Recess Appointments Clause to circumvent the advice and consent function of the Senate does not conform with a power that is “auxiliary” in nature. The recess appointment power should be invoked “in cases to which the general method . . . [is] inadequate.”<sup>163</sup> The general method is not failing in instances where the Senate is blocking an executive appointment. It is of course perfectly within the Senate’s purview to block presidential appointments. When the Senate does so, it is refusing to give its consent to the presidential appointment

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159. *Id.* Hamilton further pointed out that, at that time, the Constitution required the state legislatures to make appointments to vacancies in the Senate, and that if a state legislature was in recess when a vacancy arose in the national Senate, then a temporary appointment was to be made by the state executive. *Id.*; see also U.S. CONST. art. I, § 3, cl. 1 *superseded by* U.S. CONST. amend. XVII; U.S. CONST., art. I, § 3, cl. 2 *superseded by* U.S. CONST. amend. XVII.

160. Noel Canning v. NLRB, 705 F.3d 490, 503 (D.C. Cir. 2013).

161. Rappaport, *supra* note 117, at 1489–90.

162. Helene Cooper, *Bolton to Leave Post as U.S. Envoy to United Nations*, N.Y. TIMES (Dec. 4, 2006), <http://www.nytimes.com/2006/12/04/world/05boltoncnd.html>; Elwood, *supra* note 29.

163. THE FEDERALIST NO. 67, *supra* note 154, at 411.

as is allowed by the Constitution in its scheme of checks and balances.<sup>164</sup> If the advice and consent requirement is to act as a real check upon the Executive, then it makes no sense for the President to be allowed to make intrasession recess appointments assuming he is not constrained by the time at which the vacancy was created.

Finally, the context of the time in which the Constitution was adopted also demonstrates its “auxiliary” role. Since its inception, Congress has traditionally held one legislative session per year, with an intersession recess between the end of one session and the beginning of the next session the subsequent year.<sup>165</sup> In the early days of the Republic, Congress held one legislative session lasting anywhere from three to six months, and then would adjourn into an intersession recess that would last from six to nine months.<sup>166</sup> If an important pressing appointment needed to be made, due to the slow nature of transportation in those days, it could take a long time for Senators to reassemble to Washington, D.C. from their respective states. The long travel time, as well as the fact that most members of Congress had other jobs and duties to attend to in their home states, would have made it impractical to keep the Senate in constant session year-round. Therefore, the solution to this problem, as Hamilton indicated, is the scheme established by the Recess Appointments Clause: when the Senate is in recess, the President can make temporary appointments to posts that are otherwise subject to Senate approval.

Justice Joseph Story supports Hamilton’s analysis. In his *Commentaries on the Constitution*, Justice Story says, in regards to the power given the President under the Clause:

The propriety of this grant is so obvious, that it can require no elucidation. There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject. The former course would have been at once burthensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security.<sup>167</sup>

Therefore, as Justice Scalia noted in his concurrence, the Recess Appointments Clause is largely an anachronism.<sup>168</sup> It is a relic of the horse and buggy era and serves little use in the modern era of electronic communication

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164. See U.S. CONST. art. II, § 2, cl. 2 (establishing that the President shall make appointments “with the *Advice and Consent* of the Senate”) (emphasis added).

165. Rappaport, *supra* note 117, at 1500.

166. *Id.* at 1500–01.

167. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1551 (1833), available at [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_2-3s58.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html).

168. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2598 (2014) (Scalia, J., concurring).

and air travel. Though it should not be written out of the Constitution,<sup>169</sup> the text of the Clause should not be given a meaning it cannot naturally bear,<sup>170</sup> especially if such a reading is simply for the sake of keeping the Clause relevant. Even if one subscribes to the living constitutionalist interpretation of the Clause taken by the majority, what is the point of giving new meaning to a clause where “its only remaining use is the ignoble one of enabling the President to circumvent the Senate’s role in the appointment process”?<sup>171</sup>

### C. *Executive Practice*

In issuing its ruling, the Supreme Court relied heavily upon executive practice. It is clear, however, that the practice of intrasession recesses is neither as longstanding nor as worthy of judicial deference as indicated by the Court.

Presidents utilized the recess appointment power infrequently in the early days of the Republic, and the recess appointments that were made were intersession appointments.<sup>172</sup> Prior to the Civil War, intrasession recesses of Congress were rare.<sup>173</sup> The first intrasession recess appointments came in 1867 under President Andrew Johnson.<sup>174</sup> From the Civil War until World War I, President Calvin Coolidge made the only other intrasession recess appointments.<sup>175</sup> However, Theodore Roosevelt caused controversy in 1903 when, as President, he made appointments to vacancies during what Roosevelt termed a “constructive recess.”<sup>176</sup> On December 7 of that year, the Senate ended a special session and then immediately convened into a regular session.<sup>177</sup> Roosevelt argued “that a split second separated the two sessions,” which created a recess that enabled him to make recess appointments.<sup>178</sup> The Senate Judiciary Committee subsequently issued a report rejecting Roosevelt’s assertion that a recess had occurred,<sup>179</sup> but took no other retaliatory action.<sup>180</sup>

In the modern era, Congress began taking more intrasession recesses, a pattern which produced more intrasession recess appointments by Presidents.<sup>181</sup> This trend began in 1947 with President Harry S. Truman who

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169. *Id.*

170. *Id.*

171. *Id.*

172. Carrier, *supra* note 120, at 2209–11 (1994); Rappaport, *supra* note 117, at 1572.

173. Rappaport, *supra* note 117, at 1501.

174. *Id.* at 1572; OLC Memo, *supra* note 16, at 6.

175. Carrier, *supra* note 120, at 2212.

176. *Id.* at 2211.

177. *Id.* at 2212.

178. *Id.*

179. *Id.*

180. Carrier, *supra* note 120, at 2212.

181. *Id.*; Rappaport, *supra* note 117, at 1501.

made twenty such appointments over four intrasession recesses.<sup>182</sup> President Dwight Eisenhower made nine intrasession appointments; however, neither Presidents John F. Kennedy nor Lyndon Johnson made any.<sup>183</sup> President Richard Nixon made eight intrasession appointments; President Gerald Ford made zero; and President Jimmy Carter made seventeen intrasession recess appointments.<sup>184</sup> Presidents began using intrasession recess appointments in much greater number beginning with President Ronald Reagan. Reagan vastly increased the number of intrasession recess appointments compared to his predecessors by making roughly seventy intrasession appointments.<sup>185</sup> Many of Reagan's appointments were made in order to ensure the appointment of controversial nominees by avoiding the Senate's advice and consent role.<sup>186</sup> President George H.W. Bush, though not wielding his recess appointment power as controversially as Reagan, made thirty-seven intrasession recess appointments.<sup>187</sup> President Bill Clinton made fifty-three intrasession recess appointments;<sup>188</sup> President George W. Bush made 141;<sup>189</sup> and President Obama had made twenty-six intrasession recess appointments as of June 3, 2013.<sup>190</sup>

Likely in response to the large number of recess appointments made by President George W. Bush, in 2007 the Democratic Senate began utilizing short *pro forma* sessions during intrasession Senate breaks.<sup>191</sup> Prior to that time, no president had made an intrasession recess appointment during a Senate break lasting less than ten days.<sup>192</sup> Therefore, the idea was to use the *pro forma* sessions to divide long Senate breaks into breaks of only three or four days in an attempt to prevent the President from issuing recess

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182. Carrier, *supra* note 120, at 2212–13.

183. *Id.* at 2213.

184. *Id.*

185. Carrier says that Reagan made seventy-three intrasession recess appointments, while the Congressional Research Service states the number is seventy-two. *Id.* at 2214; Memorandum, Cong. Research Serv., *The Noel Canning Decision and Recess Appointments Made from 1981–2013*, at 4 (Feb. 4, 2013) [hereinafter CRS *Noel Canning Memo*], available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf>.

186. Carrier, *supra* note 120, at 2214–15.

187. *Id.* at 2215.

188. CRS *Noel Canning Memo*, *supra* note 185.

189. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001–OCTOBER 31, 2008, at 3 (2008) [hereinafter CRS REPORT ON BUSH RECESS APPOINTMENTS].

190. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 5 (2013).

191. Alex N. Kron, Note, *The Constitutional Validity of Pro Forma Recess Appointments: A Bright-Line Test Using a Substance-over-Form Approach*, 98 IOWA L. REV. 397, 405 (2012).

192. CARPENTER, *supra* note 6, at 15 n.97.



appointments; or, if an appointment was still made, at least make it the subject of “significant controversy.”<sup>193</sup> Such *pro forma* sessions, typically, are very short—sometimes lasting only seconds—and require the presence of only one or two Senators.<sup>194</sup> Unlike President Obama who has argued that the *pro forma* sessions do not limit his recess appointment power, President Bush did not attempt to make any recess appointments while the Senate utilized *pro forma* sessions.<sup>195</sup> The Senate did not use *pro forma* sessions during President Obama’s first year in office, but began the practice again in 2010 and continued using such sessions through January 2012.<sup>196</sup> At that time, the President went against the Senate and refused to acknowledge the *pro forma* sessions’ restraint on his recess appointment power.<sup>197</sup>

The Supreme Court also looked to opinions of the Executive Branch over the years; however, the Executive has not been consistent in what it has viewed as constituting a “recess” under the Recess Appointments Clause. Early executive interpretations of the Clause found that the recess appointment power extended only to intersession recesses.<sup>198</sup> For example, in 1901, Attorney General Philander Knox issued an opinion to President Theodore Roosevelt advising him against making an intrasession recess appointment.<sup>199</sup> Knox asserted that any temporary break within a regular session of the Senate was not a recess referred to by the Recess Appointments Clause.<sup>200</sup> He argued that this prohibition against intrasession appointments extended even to long intrasession breaks, and that no discernible line could be derived from the Constitution sufficient to demonstrate how long an intrasession break must be in order for an appointment to be made.<sup>201</sup>

The intersession-only view changed in 1921 with Attorney General Harry Daugherty, however. Daugherty took a practical view of what constitutes a Senate recess,<sup>202</sup> and concluded that “the President is necessarily vested with a

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193. Kron, *supra* note 191.

194. OLC Memo, *supra* note 16, at 2. Alex Kron described a *pro forma* session during George W. Bush’s Presidency:

(1) Senator Jim Webb called the Senate to order; (2) the legislative clerk read a letter from Senator Robert Byrd, the President Pro Tempore, appointing Senator Webb as Acting President Pro Tempore for the session; and (3) Senator Webb announced that the Senate would adjourn on recess until the next *pro forma* session.

Kron, *supra* note 191, at 406.

195. Kron, *supra* note 191, at 406.

196. *Id.* at 406–07.

197. *Id.* at 407.

198. Carrier, *supra* note 120, at 2233.

199. *Id.* at 2234.

200. *Id.*

201. *Id.*

202. Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 21–22 (1921) [hereinafter Daugherty Opinion].

large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”<sup>203</sup> Daugherty took the position that the recess appointment power extended to intrasession recesses; however, the power did not extend to short breaks.<sup>204</sup> In fact, he maintained that even an adjournment for up to ten days would not “constitute the recess intended by the Constitution.”<sup>205</sup> In Daugherty’s view no single bright line determined when the Senate is in recess.<sup>206</sup> Rather, he adopted a standard from a Senate Judiciary Report: “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?”<sup>207</sup> It is this standard which the Administration pointed to in support of its position in *Noel Canning*.

Since the Executive’s adoption of the intrasession view of “the Recess,” the minimum number of days it has recognized for a Senate break to constitute a “recess” has grown smaller and smaller. In 1960, Acting Attorney General Lawrence Walsh<sup>208</sup> found that a thirty-six-day break was sufficient;<sup>209</sup> however, in 1992, the Office of Legal Counsel suggested that an eighteen-day break was sufficient.<sup>210</sup> President George W. Bush made recess appointments during intrasession breaks lasting as few as ten days.<sup>211</sup> In January 2012, in accordance with President Obama’s controversial recess appointments, the Office of Legal Counsel (OLC) issued a memo recognizing the ability of the President to make recess appointments during intrasession breaks of the Senate lasting twenty days.<sup>212</sup> However, the OLC also argued that *pro forma* sessions of the Senate do not qualify as actual Senate sessions that interrupt an extended Senate break.<sup>213</sup> Therefore, the OLC found, the President could “conclude that the Senate is unavailable for the overall duration of the recess” even while the Senate is holding *pro forma* sessions.<sup>214</sup>

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203. *Id.* at 25.

204. *Id.* at 24–25.

205. *Id.* at 25.

206. *Id.*

207. Daugherty Opinion, *supra* note 202, at 25.

208. William Rogers was the United States Attorney General in 1960; however, the recess appointments opinion was signed under Lawrence Walsh as Acting Attorney General. *William Pierce Rogers*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/ag/bio/rogers-william-pierce> (last visited Apr. 24, 2015); *Recess Appointments*, 41 U.S. Op. Att’y Gen. 463, 480 (1960).

209. *Carrier*, *supra* note 120, at 2236.

210. *Id.* at 2238.

211. CRS REPORT ON BUSH RECESS APPOINTMENTS, *supra* note 189, at 7.

212. OLC Memo, *supra* note 16, at 9.

213. *Id.*

214. *Id.*

Though the OLC expressly asserted that the President may make recess appointments during a twenty-day intrasession Senate break, the practical implications of the memo, if adopted, would arguably allow the President to make appointments during a Senate break of any length. If the Executive is permitted to choose what sessions of the Senate it finds sufficient to constitute actual sessions that prevent the Senate from going into a “recess,” then ultimately the Executive is determining unilaterally when the Senate is in a “recess.”<sup>215</sup> Arguably, the President could then recognize short adjournments such as lunch and weekend breaks.<sup>216</sup>

In sum, the practice of intrasession recess appointments, though first used in the nineteenth century, developed into consistent use more recently, and only the last few Presidents have used the practice with any regularity. This history shows that the traditional view by the Executive on what constitutes a “Recess of the Senate” has been “all over the place.”<sup>217</sup>

History demonstrates that intrasession recesses were very rare in the early years of the Republic,<sup>218</sup> and, therefore, early presidents would not have had many opportunities to test the constitutional waters and make intrasession recess appointments. On the other hand, the argument can be made that the lack of intrasession breaks in the first place suggests the Recess Appointments Clause was never understood to apply to such breaks. Therefore, the argument regarding early tradition is inconclusive at best.

Regardless, the use of intrasession recess appointments is a recent practice. As Justice Scalia noted, of all intrasession recess appointments made, ninety percent were made since 1945. Even then, intrasession recess appointments arguably were not consistently made until under President Reagan.<sup>219</sup> Therefore, the practice is not a longstanding “systematic, unbroken, executive practice . . . [that] may be treated as a gloss on ‘executive Power,’”<sup>220</sup> and, thus entitled to great deference. Rather, given the implications of the Clause’s text and structure, the nature of such recent presidential practices is not sufficient to discard the intersession interpretation.

Further, the Executive has a self-interest in securing as broad a recess appointment power as possible. Therefore, the opinions of executive advisors and the historical practice should certainly be given less weight than the textual

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215. Noel Canning v. NLRB, 705 F.3d 504 (D.C. Cir. 2013).

216. *Id.*

217. Transcript of Oral Argument at 4, Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) (No. 12-1115).

218. Carrier, *supra* note 120, at 2209–11; Rappaport, *supra* note 117, at 1572.

219. Carrier, *supra* note 120, at 2214.

220. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

and structural aspects of the Clause, which suggest the clause holds the intersession-only meaning.

*D. The Practical Interpretation*

The Supreme Court ultimately adopted a practical interpretation of “the Recess,” holding a Senate break of less than three days was not long enough to trigger the Clause, and a break shorter than ten days was *presumptively* too short. In so holding, the Court examined two possible standards, which included Attorney General Daugherty’s standard and the three-day standard derived from the Adjournment Clause. The former standard is unworkable, while the latter is without a basis in the Constitution.

In *Noel Canning*, the Board asked the court to adopt the standard set forth by Attorney General Daugherty in determining whether the Senate was in recess. Under this standard, the Senate is in recess when it adjourns such that (1) Senators “owe no duty of attendance”; (2) the chamber is empty; and (3) the Senate cannot “receive communications from the President or participate as a body in making appointments.” The court, however, rejected this test.

When the D.C. Circuit examined the test, it found that the vagueness of the Daugherty standard “counsel[ed] against” its adoption,<sup>221</sup> and that courts “must ‘establish high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.’”<sup>222</sup>

The Daugherty standard is so vague that, as Professor Rappaport pointed out, the features used to determine whether the Senate is in recess, in reality, “do not operate to clarify when there is a recess.”<sup>223</sup> The standard operates under the assumption that when the Senate takes a recess, it completely shuts down.<sup>224</sup> This assumption is wrong, even when the Senate takes a long break.<sup>225</sup> During a recess, the Senate may hold committee meetings, which thereby create a duty of attendance for certain Senators.<sup>226</sup> Not only can Senate committees meet during a recess, but since such a break does not affect the committees’ powers, they can also begin the confirmation process of presidential nominees during a recess.<sup>227</sup> Further, during a Senate break, the Senate can also leave personnel who are available to receive communications from the President.<sup>228</sup> In previous years, the Secretary of the Senate has been

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221. *Noel Canning*, 705 F.3d at 504.

222. *Id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

223. Rappaport, *supra* note 117, at 1554.

224. *Id.*

225. *Id.*

226. *Id.*

227. Carrier, *supra* note 120, at 2243.

228. Rappaport, *supra* note 117, at 1554.

given the authority to receive presidential messages, including nominations for appointments, during a recess.<sup>229</sup> Therefore, the Court was correct to reject the Daugherty standard in *Noel Canning*, since the features it describes cannot be adequately ascribed to a Senate recess.

The Court, however, looked to the Adjournment Clause in holding that any Senate break less than three days is without question too short to constitute a “recess.” The Court was mistaken to do so, however, since the two clauses serve different functions and, therefore, operate differently.

The Adjournment Clause prevents one house from unilaterally taking a sustained break, which could prevent the passage of important legislation while Congress is in session.<sup>230</sup> Therefore, the three-day provision, as part of the Adjournment Clause, makes sense: it allows one house to take a short break from business, while preventing that house from using the break to unilaterally hold up legislation. The Recess Appointments Clause, on the other hand, is an “auxiliary” method of appointment to be used when the Senate cannot fulfill its advice and consent role. Therefore, the two clauses have different purposes and appear to have little relation to one another.

An examination of the practical implications of applying the three-day adjournment provision to the Recess Appointments Clause demonstrates further the unrelated nature of the two clauses. Under the three-day adjournment definition of “the Recess,” the President could make a recess appointment during any Senate break lasting longer than three days; however, this makes little practical sense. A floor of three days hardly seems a sufficient amount of time to warrant allowing the President to use the auxiliary method of appointment.<sup>231</sup> Under this definition of “recess,” a break lasting three days and one minute would be sufficient for the President to exercise his recess appointment authority, and it seems unlikely that a situation would arise whereby a vacant position would need to be filled within such a short amount of time. This argument is likely one of the reasons the Court held that a break less than ten days, and not just three, was presumptively too short, barring some extenuating circumstances. This ten-day standard was based on executive practice and the fact that no prior President had made an intrasession appointment over an intrasession break of less than ten days. However, as previously discussed, a great deal of weight should not be placed on executive practice in this area, not only because it is recent, but also because the Executive has been “all over the place” in what it has traditionally viewed as

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229. Carrier, *supra* note 120, at 2241.

230. Rappaport, *supra* note 117, at 1556.

231. *Id.*

constituting a recess.<sup>232</sup> Therefore, the Court would have no consistent executive view from which it could derive a standard.<sup>233</sup>

Finally, the Court gives little guidance as to what constitutes an extenuating circumstance sufficient to overcome the ten-day presumption. Even if such a circumstance were to arise, whatever it may be, there are, in the event of most vacancies, laws and regulations in-place, which allow for temporary acting appointments for certain positions to essentially fill the vacancy.<sup>234</sup> When a position becomes vacant for which Congress has provided an acting appointment, typically, a subordinate to that position fills the position in an acting capacity and assumes the position's duties.<sup>235</sup> Therefore, not only do the differing contexts of the two clauses suggest that they do not inform one another, but also, Congress has already acted to insure, in many instances, that the duties of vacant positions will still be carried out until an appointment is made.

#### CONCLUSION

Perhaps the title of this Note should have a question mark added to the end. There is no doubt that the D.C. Circuit's ruling in *Noel Canning* significantly narrowed the presidential recess appointment power; however, when the Supreme Court issued its subsequent ruling, it took the scope of that power back to where it existed before the disputed appointments. Rather than truly narrowing the power, the Court found the furthest extent of the scope previously reached by a President, and told the Executive from there, "you shall not pass."<sup>236</sup> Nonetheless, Presidents had been pushing the envelope over the years as they began making recess appointments during smaller and smaller intrasession breaks, and it was only a matter of time before a President went too far, only to suffer some kind of rebuke.<sup>237</sup>

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232. Transcript of Oral Argument, *supra* note 217.

233. The Executive also has a vested interest in a standard consisting of a small number of days. The shorter the length of a Senate recess in which the President can make an appointment, the greater the President's recess appointment power will be. However, the smaller the number, the less the standard fits with the text and purpose of the Clause. Rappaport, *supra* note 117, at 1545.

234. *Id.* at 1514.

235. *Id.*

236. MOVIECLIPS, *You Shall Not Pass – The Lord of the Rings: The Fellowship of the Ring (7/8) Movie CLIP (2001) HD*, YOUTUBE (May 26, 2011), <https://www.youtube.com/watch?v=VlaiBeLrntQ>.

237. See John Yoo, Op-Ed., *Diminishing the Presidency*, WALL ST. J. (Jan. 30, 2013, 6:59 PM), <http://www.wsj.com/articles/SB10001424127887323375204578271681410646810> (arguing that by claiming "the right to judge the legitimacy of the other branches' proceedings" by refusing to acknowledge pro forma sessions, President Obama went too far and suffered a rebuke resulting in the loss of his intrasession recess appointment power).

Only time will truly tell whether the Court's ruling severely hampers the use of recess appointments to circumvent the Senate's advice and consent function. It could be that the holding regarding *pro forma* sessions will allow the Senate to maintain an effective check on presidential appointments. The Constitution establishes a government of co-equal branches, and the legislative advice and consent function serves as a major check upon the Executive. This check is part of a structural scheme implemented by the Framers to protect the liberties of Americans. Though the Court may not have provided the best interpretation, the *Noel Canning* decision is important in that it prevents the President from effectively negating this check altogether. Such would have been the effect of the Administration's standard, thereby expanding the power of the Executive at the expense of the Legislature.

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