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Brief of Political Scientists and Historians as Amici Curiae in Support of Respondent, National Labor Relations Board, Petitioner v. Noel Canning, No. 12-1281, United States Supreme Court (Nov. 25, 2013)

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No. 12-1281

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF POLITICAL SCIENTISTS AND HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. The questions presented are:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

Amici are academics, political scientists, and historians who focus their work on understanding the Constitution of the United States and conveying its meaning and underpinnings to students, fellow academics, and the courts.[1] These *amici* focus their work on the original understanding of the Constitution at the time of the founding and write books and articles that draw attention to that meaning. This allows judges and litigators to wrestle with an understanding of the document as adopted—the meaning that secures the text's legitimacy as fundamental law.

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief with the written consent from all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of the professors' intention to file this brief.

Joseph M. Bessette is the Alice Tweed Tuohy Professor of Government and Ethics at Claremont McKenna College. He has a B.S. from Boston College and an M.A. and Ph.D. from the University of Chicago. Professor Bessette served as both a Deputy Director (1985-1988) and an Acting Director (1988-1990) in the U.S. Department of Justice. His expertise covers the Presidency and American Constitutionalism and his publications include *Executive Power and the American Founding* in SEPARATION OF POWERS AND GOOD GOVERNMENT (1994) and editing THE PRESIDENCY IN THE CONSTITUTIONAL ORDER: AN HISTORICAL EXAMINATION (2010) AND THE CONSTITUTIONAL PRESIDENCY (2009).

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(forthcoming 2014), ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006), THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION (1981), and multiple volumes of the casebook AMERICAN CONSTITUTIONAL LAW.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Recess Appointments Clause does not permit the unilateral appointments to the NLRB made by the President in this case. Those appointments—made during a three-day "intra-session" break when the Senate was meeting *pro forma*—are unique in the history of the Republic. They are also the culmination of unnecessary and inappropriate Executive overreaching. This overreaching has undermined a valuable Senate prerogative in a manner unfathomable to the Founders and inconsistent with the design of the Constitution.

The primary purpose of this brief is to show that adhering to the original meaning of the Recess Appointments Clause has not and will not disrupt the orderly governance of the Nation. The constitutionally prescribed modes of appointment worked perfectly well for a very long time, and modern circumstances make it even easier to continue using the Constitution's procedures. Whether the clear text, structure, purpose, and history of the Constitution should give way to "practical" considerations of the modern

administrative state therefore cannot even be considered an issue in this case.

Notwithstanding a few relatively minor deviations from the constitutional design, Presidents throughout the first 160 years of our Nation's history largely, and certainly without insurmountable difficulties, adhered to the textual and structural confines of the Appointments Clause and the Recess Appointments Clause with which it is closely related. Their ability to abide by the Constitution, even in sometimes very difficult situations, provides a ready model for exercising the Presidential-appointment power today.

ARGUMENT

The National Labor Relations Board (NLRB) invites this Court to sanction an unprecedented expansion of the President's recess-appointments power. The Court should decline that invitation for several reasons.[2]

[2] The D.C. Circuit concluded, primarily for textual reasons, that both the vacancy and the appointment must take place between the adjournment *sine die* (signaling the end of a Session) and the beginning of the next Session. Pet. App. 51a-52a. The two textual cues on which the D.C. Circuit focused are "the Recess"—an apparent singling out of the one "inter-session" recess—and "happen"—indicating that the vacancy must also come about during the recess. *Amici* will not address those rulings in detail because the parties (and no doubt other *amici*) will do so extensively.

First, the expansion is impermissible, *inter alia*, because of the importance of maintaining the structural checks imposed by the general Appointments Clause. Second, historical practice—even considering the recent expansion of the President's recess-appointment power that has accelerated over the last 30 years—further illustrates that the appointments in question were *ultra vires*. Third, comparisons of historical and current practice underscore that concerns about the practicality of enforcing the original limits on the recess-appointment power—to the extent such concerns may even be relevant—are entirely misplaced. Enforcing the Recess Appointments Clause as written and as the Founders intended will hardly lead to a crisis in government. To the contrary, Presidents successfully governed under those constraints for the bulk of our Nation's history—and, if anything, could more easily do so today.

I. The Structure Of The Constitution Demonstrates That The President's Intra-Session Recess Appointments Were Unconstitutional

The Appointments Clause provides that the President "shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. The Recess Appointments Clause, in contrast, simply allows the President to "fill up all Vacancies that may happen during the Recess of the Senate." U.S. CONST. art. II, § 2, cl. 3. The Appointments

Clause is the rule. The Recess Appointments Clause is the exception. The exception was used here merely to circumvent the rule.

A. The Recess Appointments Clause Must Be Read Together With The Appointments Clause

The NLRB's request for an exceedingly broad construction of the Recess Appointments Clause focuses extensively on the exception to the rule without confronting the rule itself. Pet. Br. 7, 19-20. But the Recess Appointments Clause cannot be understood outside the larger context of appointments generally. U.S. CONST. art. II, § 2, cl. 2, 3. The Recess Appointments Clause immediately follows the general Appointments Clause in the Constitution as a narrow alternative to the generally prescribed method, not as a separate track for political nominees whom the President does not wish to put before the Senate.

B. The Appointments Clause Restrains The Executive From Exercising Unfettered Power Over Appointments

Throughout the Constitutional Convention, the Framers sought to provide the government with sufficient energy to deal with national concerns, but, at the same time, they devised a number of checks to limit the possibility of governmental corruption, self-dealing, and favoritism. The Framers showed

particular concern with Executive abuses in the appointments process. See, e.g., Luther Martin, *Genuine Information*, MARYLAND GAZETTE, Jan. 29, 1788, *reprinted in* FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 90 (John P. Kaminski and Richard Leffler eds., 1998) ("[T]he person who *nominates*, will always in reality *appoint*, and that this was giving the president a power and influence which together with the other powers, bestowed upon him, would place him above all restraint and controul."). Thus understandably, they immediately rejected a proposal during the Constitutional Convention to provide the appointment power to the President alone. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 116 (2005) ("First, they voted on vesting the appointment power solely in the Executive. The motion failed.").

The Appointments Clause alleviated concerns over Executive abuse by reining in Executive power in appointments. The Framers settled on a system where the President selected officials who were nonetheless subject to senatorial confirmation. Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 MICH. L. REV. 2204, 2225 (1993) (noting "[t]he Framers heatedly debated the general power of appointment" and "voiced great distrust of the executive and expressed the need for checks and balances to counteract the power of the President"). Alexander

Hamilton explained in THE FEDERALIST NO. 76 that the purpose of requiring the Senate's advice and consent is that "the necessity of their concurrence would have a powerful, though, in general, a silent operation" in that it would be "an excellent check upon a spirit of favoritism" of the President. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Structurally, appointments were never intended to be a unilateral endeavor. The Constitution explicitly "confided to the President and Senate *jointly*" the power of appointment. THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). In penning that description, Hamilton was responding to Anti-Federalists who claimed that the appointment power would lead to abuse. *Id.* at 405 ("There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgment."). His goal was to highlight a limitation on Executive power. If the Senate appears to some Presidents as "obstructionist" on appointments at times, that was the point.

C. The Recess Appointments Clause Is A Narrow Exception Originally Designed For Temporary Appointments Necessitated By Extremely Lengthy Delays Between Congressional Sessions

The Recess Appointments Clause was designed as a narrow exception to regular appointments to address the specific problem of lengthy recesses between sessions at the Founding. *Id.* at 408 ("[A]s 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*, * * * the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments 'during the recess of the Senate, by granting commissions which shall expire at the end of their next session.'" (emphasis in original)). In the early years under the Constitution, the nature of the country and the technology of the time made travel and communication difficult. "[I]ntersession recesses typically lasted between six and nine months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long periods." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1491 (2004) (hereinafter Rappaport, *Original Meaning*).

This exception to the appointment process was never intended to swallow the rule. Significantly, the Framers adopted the Recess Appointments Clause without debate. Carrier, 92 MICH. L. REV. at 2225.

In contrast, the general Appointments Clause was the subject of intense scrutiny during the public debates over ratification. Alexander Hamilton responded directly to its critics who charged that the President had unchecked appointment powers, countering that "writers against the Constitution" tend to "misrepresent[ ]" such powers in order to prey on "the aversion of the people to monarchy * * * * " FEDERALIST NO. 67, at 405.

Hamilton went on to explain that "[t]he relation in which [the Recess Appointments] clause stands to the [Appointments Clause], which declares the *general mode* of appointing officers of the United States, denotes it to be *nothing more than a supplement* to the other for the purpose of establishing *an auxiliary* method of appointment, in cases to which the general method was inadequate." *Id*. at 408 (emphasis added). Hamilton made clear that the Recess Appointments Clause "is to be considered as supplementary" to the Appointments Clause. *Ibid.*

Debates over the Senate's role in advising and consenting to Presidential nominees remained an important, unresolved issue even after ratification. The First Congress debated vigorously whether the President had the power to remove a Presidential appointee without the Senate's consent. The Senate "jealously guarded its prerogatives" and "[m]any senators simply assumed that because they consented to the appointment of executive officers they likewise had to consent to their removal." GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC,

1789-1815, 87-88 (2009). "The Senate was evenly divided on the issue; only after Vice-President Adams's tie-breaking vote did it concede the *right of the* president to remove executive officials without its advice and *consent*." *Ibid*. (emphasis added).

In this historical context of vigorous debate over the necessity and scope of the general Appointments Clause, it is unimaginable that the Framers would have enacted the Recess Appointments Clause—without any debate—while simultaneously intending that it provide an enormously broad grant to the President to evade the advice-and-consent requirement. That scenario would have run counter to the very purpose of the Appointments Clause.

II. The NLRB Appointments Are Fundamentally Inconsistent With Historical Practice

The history of Presidential exercise of the recess-appointments power does not support the NLRB appointments in this case. Far from it. Instead, it shows a long tradition of virtually uniform adherence to the original meaning of the Recess Appointments Clause—with Presidents regularly departing from that tradition only over the past 30 years or so.

A. Recess Appointments From 1789-1823: Strict Adherence To Original Meaning

During the founding era of the Republic, the original meaning of the Recess Appointments Clause,

informed by the Appointments Clause, controlled its use by the Executive Branch. Presidents used the recess-appointment power to fill vacancies that arose during the inter-session recess, and any recess appointments occurred during that time as well. This was confirmed by the earliest official opinion to be offered on the subject.

In 1792, the first Attorney General of the United States concluded that a vacancy occurred when Congress created a new office but that, since the vacancy arose during the session of Congress (not the recess), it could not be filled with a recess appointment. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 165-67 (John Catanzariti et al. eds., 1990). The authoritativeness of Randolph's views is only enhanced by the role he played in drafting and ratifying the Constitution. President Washington relied upon Randolph's interpretation in making his own appointments, noting that the recess appointments he made were for "offices having become vacant since [the Senate's] last session." Exec. S. Journal, 2d Cong., 1st Sess. 86 (1791); see also *id.* at 38 (1790) (listing vacancies that occurred "during the late recess of the Senate").

Alexander Hamilton, too, wrote that "[i]t is clear * * * the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976). This confirmed his

previous position that the "auxiliary method of [recess] appointment" was available to the Executive only because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers [but] vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay." FEDERALIST NO. 67, at 408 (emphasis in original). At their inception, then, recess appointments were at most a stop-gap measure for dealing with narrow circumstances in which they are "necessary for the public service." As the language of the Constitution clearly implies, they were not understood to be tools for avoiding the advice-and-consent requirement whenever the President found that requirement inconvenient.

Indeed, early Presidents viewed Senate confirmation as an integral part of the vetting process itself—not something to circumvent. George Washington evidenced this in his first nomination after becoming President (as recorded in the Senate Executive Journal): William Short as a temporary replacement for Thomas Jefferson as Minister at the Court of France. Washington sent a letter to the Senate cordially requesting "advice on the propriety of appointing [Short]" and offering "papers which [would] acquaint [Senate members] with [Short's] character." Exec. S. Journal, 1st Cong., 1st Sess. 6 (1789).

And while the Senate regularly consented to Washington's nominations, it was not the "rubber stamp" one might imagine. One of President Washington's earliest nominees—Benjamin Fishbourn,

nominated for Naval Officer of the Port of Savannah—was rejected by the Senate even though he was someone about whom the President felt quite strongly. See *id.* at 16-17 (1789). In keeping with his understanding of the joint nature of appointments, Washington then sent a letter about Fishbourn, suggesting that the Senate permit him to provide further information moving forward in situations "where the propriety of nominations appear questionable to you." *Id.* at 16.

It is also clear that early Presidents did not use recess appointments to by-pass the Senate when consent would be lacking. When it came to recess appointments, Washington viewed them merely as a temporary measure that, if possible, would be permanently fixed as soon as the Senate was back in session. Thus in informing the Senate of the very first set of recess appointments in the Nation's history, President Washington was quick to point out that "[t]hese appointments will expire with your present session, and indeed *ought not to last longer than until others can be regularly made*." *Id.* at 38 (1790) (emphasis added).

Between 1789 and 1823, Presidents Washington, Adams, Jefferson, Madison, and Monroe together made well over 4,000 recess appointments.[3] The

[3] Unfortunately, it is impossible to compile a complete and wholly accurate record of recess appointments before 1965. See generally Carrier, 92 MICH. L. REV. at 2209 n.31. Between 1789 and 1823, for example, recess appointments were not recorded in

(Continued on following page)

Recess Appointments Clause was used only to fill vacancies that arose during an inter-session recess and no appointments were made during intra-session adjournments.[4]

The Madison Administration's use of recess appointments is particularly powerful historical evidence that enforcing the Recess Appointments Clause's limitations on Executive power will not lead to any breakdown in governance. President Madison faced an unprecedented challenge during the War of 1812—a conflict in which British troops not only occupied Washington, D.C., but also burned the

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the Senate Executive Journal unless the President chose to nominate the recess appointee for a regular appointment once the Senate was back in session. See, e.g., Exec. S. Journal, 2d Cong., 1st Sess. 66-67 (1791). Additionally, in the early years of the Republic, the President was occasionally ambiguous in his messages to Congress regarding recess appointments. Thus, while there are notices accompanying groups of nominations stating that certain recess appointments were made during the last recess of the Senate, it is not always clear whether all of the nominations in the group were given recess appointments. See, e.g., Exec. S. Journal, 3d Cong., 2d Sess. 164 (1794) ("I nominate the following persons to fill the offices respectively annexed to their names, some of which became vacant during the recess of the Senate.").

[4] The first intra-session break took place December 23-30, 1800, during the Second Session of the Sixth Congress. *2012 Congressional Directory* 522. During that break, President Adams made one nomination—Louis Tousard, to be Inspector of Artillery—on Christmas Eve, December 24th. Upon returning, the Senate treated it as a December 30th nomination and confirmed Tousard on December 31st. Exec. S. Journal, 6th Cong., 2d Sess. 364 (1800).

Executive Mansion and the Capitol. Nonetheless, Madison made all necessary appointments without using recess appointments while the Senate was in session. Madison made over 3,000 inter-session recess appointments, including more than 2,500 military appointments and promotions, and handled other appointments via advice and consent. See Exec. S. Journal, 11th Cong., 1st Sess. 123 (1809) through 18th Cong., 2d Sess. 71 (1817). Madison's example confirms that even under extraordinary circumstances, enforcing the original meaning of the Recess Appointments Clause is entirely consistent with the Executive's responding effectively to complex and demanding challenges.

B. Recess Appointments From 1823-1921: Positions Vacated Before The Recess

1. Rise Of The "Happen to Exist" Construction

The first shift away from the original meaning of the Recess Appointment Clause came in 1823 with an opinion by Attorney General William Wirt. Wirt was tasked with addressing when a vacancy must "happen" to come under the Recess Appointments Clause. From a textual standpoint, he admitted that the vacancy should "arise" during the recess. His opinion, however, was based on what he thought was required by the "reason and spirit" of the Constitution—and he concluded that the vacancy could be one that "happen[ed] to exist" during the recess. Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632 (1823)

(hereinafter Wirt Op.). In Wirt's view, the vacancy could potentially arise at any point before the recess and still be eligible for Executive appointment without Senate confirmation—a perfect contradiction of Attorney General Randolph's opinion just 30 years earlier.

In the century after this first interpretive stretching of the Recess Appointments Clause, thousands of recess appointments were made to fill vacancies that occurred both during and before the recess of the Senate. Importantly, however, the recess-appointment power was still not used—with two notable exceptions discussed in the next section—to make appointments during intra-session adjournments.

In reality, though, it is unclear that the "happen to exist" interpretation offered by General Wirt was widely accepted over the "happen to arise" interpretation that previously governed. It appears to have been a disputed issue both at that time and for at least another century. For example, just two years after Wirt's opinion, the Senate considered a resolution:

> That the President of the United States does not, constitutionally, possess either the right or the power to appoint ambassadors, or other public ministers, but with the advice and consent of the Senate, except when vacancies may happen in the recess.

Exec. S. Journal, 19th Cong., 1st Sess. 467 (1825). The resolution's language is close to the text of the

Recess Appointments Clause itself, but the use of "***when*** vacancies may happen in the recess" (as opposed to "all Vacancies that may happen during the Recess") arguably points to the Senate continuing to subscribe to the "happen to arise" construction.

Further evidence of the disputed nature of General Wirt's interpretation may be seen in the first version of 5 U.S.C. § 5503—the statute limiting the conditions under which recess appointees may be paid—that was passed in 1863. The limitations it enforces make it "appear[] that this statute was enacted based on the Senate's view that the Constitution adopted the arise interpretation." Rappaport, *Original Meaning*, at 1543 n.173. A Senate report from that same Congress also defended the "arise" view. *Ibid.* As recently as 1940, Congress was still using this statute to implicitly rebut the presumption that recess appointments could be made to fill vacancies that occurred during a session of the Senate. Michael B. Rappaport, *Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, SOC. SCI. RES. NETWORK (www.ssrn.com) (forthcoming late 2013) (hereinafter Rappaport, *Nonoriginalism*). Additionally, key Attorney General opinions throughout the Nineteenth Century and court cases in the 1860s strongly support the original "happen to arise" construction. *Ibid.*

Structurally, the shift from "happen to arise" to "happen to exist" may be less problematic than the Executive's later claim of a power to make

intra-session recess appointments. See Part II.C. *infra*. General Wirt argued that the "substantial purpose of the [C]onstitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." Wirt Op. 632. True enough, but the Constitution was designed to protect the people from dubious appointments, not just to keep offices filled with whomever a President most prefers. That is why the Recess Appointments Clause was written to protect the normal advice-and-consent requirement of the Appointments Clause.

That said, Wirt's "happen to exist" interpretation at least seems to involve less of a purposeful dodge of Senate confirmation than making recess appointments while the Senate is still very much in session. Nevertheless, straying from the constitutional text in this respect only made it that much easier for later Presidents to expand the recess-appointment power well beyond textual, structural, and historical bounds—culminating in the unprecedented appointments at issue in this case.

2. Continued Rejection Of Intra-Session Recess Appointments

Even while the meaning of "happen" was being debated, recess appointments continued to be made only during inter-session recesses. The two exceptions that prove the rule also occurred during this period.

First are President Johnson's 1867-1868 recess appointments during extended intra-session breaks of the Senate. Although Johnson's appointments run contrary to the text, original meaning, and purpose of the Clause, they should be viewed as anomalies rather than any sort of general shift in the separation-of-powers firmament. Indeed, they are *sui generis* in the first 130 years of the Republic.

In 1867, Congress was in session from March 4th until December 1st but took a two-and-a-half month break from late April to early July and a four-month break from late July to late November. Congress followed a similar schedule the next year, taking several longer intra-session breaks. Before that time, however, Congress had only taken eleven intra-session breaks of more than three days in the entire history of the Nation. Each break occurred around Christmas time and none was longer than a few weeks.

The "intra-session" breaks taken by the 40th Congress likely appeared to President Johnson as actual recesses of the Senate. Indeed, the first of the lengthy intra-session adjournments began when a Special Session, called during April of 1867, adjourned *sine die*, the normal signal for the end of a congressional session. Additionally, after Johnson's impeachment and trial in 1868, the president pro tempore used language to begin an adjournment that sounded like the language normally used to end a session. Rappaport, *Nonoriginalism*.

This also explains Johnson's actions with regard to Secretary of War Edwin Stanton. Indeed, one of the articles on which President Johnson was impeached dealt with his treatment of Stanton. See Article I, Proceedings of the Senate Sitting for the Trial of Andrew Johnson.[5] President Johnson suspended Stanton during Congress's second long adjournment of 1867. But according to a provision of the Tenure of Office Act—a law designed specifically to protect Stanton—the President could only suspend cabinet members without congressional approval when Congress was out of session. Tenure of Office Act, 14 Stat. 430 (1867). Johnson later removed Stanton from office so that he could challenge the constitutionality of the Act. Although the second long break in 1867 did not begin with "session-ending" language, Johnson's actions—i.e., suspending Stanton and recess-appointing William Gould as paymaster of the Army—may simply signal that Johnson viewed the unusual breaks taking place during those years as inter-session recesses.[6]

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[5] *Available at* http://www.nps.gov/anjo/historyculture/article-i.htm.

[6] Johnson made the appointment during the second long break without reference to the adjournment being intra-session. The Court of Claims later held that Gould had been validly appointed during what it called an intra-session recess. *Gould* v. *United States*, 19 Ct. Cl. 593 (1884). That language, however, was admittedly dicta, *id.* at 596, and Attorney General Knox later concluded that Gould's appointment should not be taken as precedential. President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 602-03 (1901).

Perhaps the strongest reason for treating Johnson's recess appointments as anomalous is that there is no indication that anyone debated the constitutionality of the appointments at that time—and that is striking when one considers the hostilities that were taking place between Congress and the President.

The unusual nature of President Johnson's appointments was not addressed until 30 years later when Attorney General Philander Knox considered the question of intra-session recess appointments in 1901. He stated simply that "[t]he public circumstances surrounding [the 1867-1868] state of affairs were unusual and involved results which should not be viewed as precedents." 23 Op. Att'y Gen. at 603. In General Knox's view, the appointments were contrary to both "the uniform practice of the Executive and the various opinions of [his] predecessors." *Ibid.* General Knox highlighted the difference in the Constitution between "the Recess" and an intra-session "adjournment" in setting forth the "irresistible" conclusion that "the President is not authorized" to make an intra-session appointment. *Id.* at 604. Furthermore, he confirmed that "[a]ny immediate temporary adjournment is not [a constitutional] recess, although it may be a recess in the general and ordinary use of that term." *Id.* at 601.

The second set of exceptions that prove the rule are President Theodore Roosevelt's on December 7, 1903. The Senate ended a special session that day and then immediately began a regular session. President Roosevelt caused a good deal of controversy

by claiming that the very short period of time between the two sessions amounted to a "constructive recess" and making recess appointments based on that assumption. *The Infinitesimal Recess*, N.Y. TIMES, Dec. 8, 1903, at 8. His actions prompted the Senate Judiciary Committee to prepare a report on what constitutes a recess of the Senate in which it soundly rejected any notion of a "constructive recess." S. Rep. No. 4389, 58th Cong., 3d Sess., *reprinted in* 39 Cong. Rec. 3823, 3824 (1905). It is not only the immediate backlash to his actions, though, that show how political actors interpreted the Recess Appointments Clause at that time. It is also the fact that President Roosevelt at least evidenced a regard for the understood meaning of the rule in his formalistic attempt to dodge the textual mandate by styling the break as a "constructive recess." One thing remained clear: intra-session recess appointments were anathema.

C. Recess Appointments From 1921-2012: The Executive's Shift Toward Intra-Session Recess Appointments

After 132 years of settled opinion on the matter, Attorney General Harry Daughtery adopted a novel interpretation of the Recess Appointments Clause in 1921, advocating a "practical" interpretation of "recess." Contrary to General Knox's earlier opinion, Daughtery interpreted the 1905 Senate report to conclude that advice and consent need not be obtained when the Senate is "absent so that it cannot

receive communications from the President or participate as a body in making appointments." Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 25 (1921). While the Senate had appeared to indicate that functional inability to respond to the President was a necessary condition for a recess, Daughtery appeared to take it as a sufficient one. Thus for the first time in the Nation's history, there was a legal opinion suggesting Presidents might make "intra-session recess appointments" if the Senate took an extended break.[7]

But with the exception of President Harding's four appointments in reliance on the Daughtery opinion, the practice of recess appointments did not change significantly until many years later.[8]

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[7] It is possible that Daughtery may actually have been arguing for a "modified intersession" recess in which any lengthy period during which the Senate cannot offer advice and consent becomes a functional intersession recess. Understanding those long breaks as legitimate recesses, much as it seems President Johnson interpreted Congress's actions in 1867-1868, would be supported by the length that the recess appointee stayed in office. In the years following Daughtery's opinion, the recess appointment would only last until the end of the session when the Senate returned, not the end of some future session. This lends credence to the idea that both the Executive Branch and Congress viewed these "intra-session" appointments, Pet. Br. at 9a-12a, as "inter-session" even though there was no *sine die* adjournment. Rappaport, *Nonoriginalism*.

[8] Even Daughtery concluded that no one would think a two- or three-day adjournment constituted a practical recess. In fact, he thought a break of even five to ten days would probably not meet the "practical" test he invented. 33 Op. Att'y Gen. at 25.

In 1928, President Coolidge did appoint John Esch as commissioner of the Interstate Commerce Commission during a 13-day recess.[9] Notably, the Senate rejected Esch's nomination during the following session and his commission ended at the end of the formal session—an indication that the adjournment during which Esch was appointed was treated as an inter-session recess. Clarence A. Miller, *The Interstate Commerce Commissioners: The First Fifty Years*: *1887-1937*, 5 GEO. WASH. L. REV. 580, 665 (1936).

Thus from 1789 to the 1940s, there were virtually no intra-session recess appointments, and the few that were made each had unusual facts: (1) Johnson's during the controversies of 1867-1868; (2) Harding's short appointments in 1921 that were quickly confirmed; and (3) Coolidge's appointment of Esch and Hoover's promotions and appointments, which appear to have been viewed as inter-session appointments.

It was not until 1947 that Presidents began making intra-session recess appointments with more regularity. President Truman made 20 recess appointments over four intra-session adjournments.

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[9] Several officers received promotions—technically these are new appointments—under President Hoover, and he also made some appointments to the Federal Farm Board in 1929. These appointments, however, took place during a special Executive-called session and so might also have been considered to be outside the normal session of Congress. If so, it was functionally an inter-session recess.

President Eisenhower followed his lead, making nine appointments during intra-session adjournments. President Nixon made eight such appointments, President Carter made 17, and President Reagan made 73. Presidents since Reagan have made intra-session recess appointments with more or less frequency.

Importantly, however, there has been no congressional acquiescence in this practice. On the contrary, Congress has attempted to rein in Presidents' ultra vires exercise of the recess-appointment power by taking such steps as limiting the circumstances under which appointees get paid and using *pro forma* sessions to block appointments. On the whole, the Senate appears zealous—and indeed part of Petitioners' argument is that the Senate is too zealous—to guard its advice and consent role.

In 1823, Attorney General Wirt—who presided over the first expansion of the Clause—speculated that the exception would swallow the rule only if one "imput[ed] to the President a degree of turpitude entirely inconsistent with the character which his office implies." Wirt Op. 634. Wirt was mistaken. The acceleration in intra-session recess appointments over the last 30 years shows the need, instead, to heed Madison's admonition: "If men were angels, no government would be necessary * * * * [But] in framing a government which is to be administered by men over men, the great difficulty lies in * * * oblig[ing] it

to control itself." THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

The appointments at issue here—made during *pro forma* sessions of the Senate—although unprecedented, are nonetheless symptomatic of the expansion of the recess-appointments power that has primarily occurred over the past 30 years. Seizing upon the language of the Daughtery opinion, the Office of Legal Counsel informed President Obama in early 2012 that "the convening of periodic *pro forma* sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause." Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, ___ Op. O.L.C. ___, 2012 WL 168645, at *19 (Jan. 6, 2012) (hereinafter OLC Memo).

Pro forma sessions have been historically understood to defeat recess appointments. Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Congressional Research Service, 10 (Jan. 9, 2012) (noting the Senate's use of its power to "determine the Rules of its Proceedings"—under Article I, § 5, clause 2 of the Constitution—to conduct *pro forma* sessions that would frustrate President George W. Bush's use of the recess-appointments power). Congress is in session and, therefore, neither

chamber can be absent for more than three days without the consent of the other.[10]

Acting on the advice of the OLC Memo, President Obama made recess appointments during one of the three-day *pro forma* sessions. Thus for the first time in the Nation's history, a President made intra-session recess appointments even though the Senate was "in session" in a manner that made the members of Congress believe the Adjournments Clause was satisfied.

III. History Confirms That Adhering To The Original Meaning Of The Recess Appointments Clause Is No Barrier To Good Governance

This Court has repeatedly explained that the original meaning of the Constitution at the time of ratification is the guide for its interpretation today. *District of Columbia* v. *Heller*, 554 U.S. 570, 634-35 (2008) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."); *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 721 (1838) (recognizing that the meaning of

[10] In this instance, Senate leaders asked the House to prevent the appointments by not agreeing to the Senate's adjournment. This did not allow for an amount of time to pass that would traditionally be understood as long enough to count as a functional recess. Pet. Br. 56. The appointments here were thus unprecedented even under Petitioners' theory of recess appointments.

the Constitution "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions * * * in the several states").

Some have objected, however, that fidelity to original meaning must yield to the exigencies of a changing world. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). In the instant case, however, that debate is beside the point. If anything, it is even easier today for the Executive to operate within the constitutional constraints imposed by the Founders than it was in earlier times. Even then, Presidents managed to govern effectively within those constraints—sometimes under trying circumstances, as discussed above. And not a single one of the Executive departures from the Constitution's requirements can plausibly be seen as necessary for the public good.

To be sure, in the modern administrative state, the number of political appointments requiring Senate confirmation has increased. But at the Founding, too, Presidents were responsible for an exceedingly large number of appointments—and still managed to make them when the Senate was in session (under the Appointments Clause) or between sessions when a vacancy arose (under the Recess Appointments Clause). President Washington, for example, appointed numerous ensigns and other low-level officers

with which a modern President is not concerned.[11] The process was streamlined for Washington by the Secretary of War presenting Washington with long lists of officer nominations that could then be offered to the Senate for consideration without much effort. Even so, the appointments were not left solely to Executive Branch discretion—not all of the streamlined nominations were approved. See Part II.A. *supra*.

To allow modern Presidents to do an end-run around the original meaning of the Appointments Clause (and thus to evade its constraints) threatens the very dangers that concerned the Founders and that consumed the ratification debates. And it is unnecessary besides. If anything, there is even less reason today than at the Founding to be concerned with the workability of enforcing the limits reasonably imposed by the Founders on the President's recess-appointment power.

First and foremost, it is simply much easier in our time to convene the Senate. Today's Senate meets regularly and can reconvene on very short notice if necessary. Furthermore, the Secretary of the Senate can receive messages concerning nominations from the President at any point during a Congress and deal with them appropriately. See, e.g., 149 Cong. Rec. S8 (Jan. 7, 2003). If it was unnecessary

[11] See 10 U.S.C. § 624 (allowing O1-O3 commissions to operate outside the advice and consent of the Senate).

for President Adams to recess appoint his nominee during the first intra-session break in the Senate's history—when the Senate could not be called upon for advice and consent—it is unnecessary for a modern nomination to be forced through when the Senate could be called upon to act. The nominee can easily be considered upon the Senate's return. See note 4 *supra*.

Second, the Senate's vetting process can be expedited considerably in the modern age because candidates can be available by telephone or email in an instant, and can usually interview in person almost immediately. Nominations must simply be made far enough in advance to ensure a hearing while the Senate is in session (or non-controversial enough to be expedited quickly near the end of a session). Indeed, the current Administration has already selected a nominee to fill a U.S. District Court position in Maryland even though that position will not be vacant until February of next year.[12] But vacancies can languish for extended periods before the President makes a selection for the office. On average, a modern President will take 5 to 6 months to make a nomination; some positions wait for a nominee for 15 months or more. Rappaport,

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[12] See Press Release, White House, President Obama Nominates Two to Serve on the United States District Courts (Sept. 25, 2013) (*available at* http://www.whitehouse.gov/the-press-office/2013/09/25/president-obama-nominates-two-serve-united-states-district-courts).

Nonoriginalism, at 13-14. This contrasts with early Presidents working to prevent gaps—even to the point of obtaining pre-recess advice and consent for individuals uninformed of their own nomination. With advance planning, the Senate could be called upon to expedite appointments once again.[13]

Third, individuals may be appointed—with the consent of Congress—to serve temporarily in a position if the need is urgent. Federal Vacancies Reform Act, 5 U.S.C. § 3345 (2012). Someone from within the department can occupy a vacancy for a short time until an actual appointment is made. In this way, Congress allows for the government to continue operating even in emergency or unforeseeable situations—and Presidents can keep offices filled whatever the Senate's reasons are for not confirming nominees.[14]

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[13] Further evidence is the Senate's recent decision to disallow filibusters for Presidential nominations except to this Court. THE WASHINGTON POST, "Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees," *available at* http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html. Whatever the merits or ramifications of that decision, it shows that the political branches have room to maneuver within constitutional confines when it comes to appointments.

[14] For example, President Obama has already filled 560 vacancies using the Act. See U.S. Gov't Accountability Office, Federal Vacancies Submissions, http://www.gao.gov/legal/fedvac/searchcurr.html (search by administration to locate specific results).

That Congress did not provide for acting NLRB members, see 5 U.S.C. § 3349c(1)(a), cannot, of course, justify departing from the original meaning of the Recess Appointments Clause. If anything, it only confirms that Congress can, when it chooses, act to streamline the appointments process. After all, other multi-member bodies have received congressional approval for the appointment of acting members. Congressional inaction with respect to the NLRB, in particular, implies that Congress viewed the advice and consent requirement for that body as of higher importance than the "need" to fill spots on the Board. Given the highly political nature of the NLRB, it is unsurprising that Congress would want to ensure that its members were subject to Senate approval.

Today, it is difficult to conceive of any emergency that would necessitate an intra-session appointment. And this is true even if the Senate were prevented, for some reason, from reconvening or considering a nominee for a few days. Suppose a sudden death presented a vacancy in the armed services or in the ranks of an agency that needed to act in a time-sensitive manner. A successor from within the ranks—as a temporary or acting appointment—could be appointed to ensure the continuity of the organization. The reality, however, is that the recess-appointments power has been used (inappropriately) to by-pass the advice-and-consent requirement to fill vacancies that have been open for months or even years—belying any argument that an expansive

interpretation of the Recess Appointments Clause is necessary to prevent a breakdown in governance.

In sum, if President Madison could keep vacancies filled during the War of 1812 when a foreign power captured the capital (and burned much of it) without resort to intra-session recess appointments, today's Presidents can certainly do the same. Not only is the original meaning of the Recess Appointments Clause practicably enforceable today, but the concerns about executive irresponsibility that motivated the Framers have hardly faded into oblivion.

Consider the events now infamously known as the Saturday Night Massacre. On October 20, 1973, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus both resigned rather than carrying out President Nixon's order to fire independent special prosecutor Archibald Cox. Richardson and Ruckelshaus had given assurances to the House Judiciary Committee that they would not interfere with Cox's work. More specifically, Richardson promised the Senate—in his confirmation hearings—that he would only fire the special prosecutor for malfeasance in office. That sort of oversight of appointments thus played a direct and substantial role in the events that unfolded—and the absence of such oversight, which always occurs with recess appointments, might have retarded the unraveling of the Watergate scandal.

Thus to whatever extent enforcing fidelity to the original meaning of the Recess Appointments Clause would require changing current practice, the Founders would likely view such changes as entirely salutary. And they would be right. The Constitution was not designed to make life as easy as possible for Presidents. The fact that Presidents in the last few decades have tried to read the Constitution to increase their own power does not make it so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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