

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., *et al.*,

Respondents.

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

**BRIEF OF *AMICUS CURIAE*
INDEPENDENCE INSTITUTE IN SUPPORT
OF RESPONDENT NOEL CANNING
AND AFFIRMANCE**

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INTEREST OF THE AMICUS CURIAE¹

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. It believes, as relevant here, that the Recess Appointments Clause should be interpreted consistently with the framers' understanding. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts. Its amicus briefs in District of *Columbia v. Heller* and *McDonald v. Chicago* (under the names of lead amicus ILEETA, the International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Alito, Breyer, and Stevens. The Independence Institute's briefs in *NFIB v. Sebelius* explicated the original constitutional structure of federalism.

SUMMARY OF THE ARGUMENT

Both “the Recess” and close variants of “Vacancies that may happen” were standard terms in Founding-Era legislative practice, and appear copiously in legislative records. Those records inform us that “the Recess” means only the inter-session recess and that a vacancy “happens” only when it first arises. This brief collects and briefly discusses those records for the convenience of the Court.

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

The content of this brief is derived from a forthcoming law review article: Robert G. Natelson, *The Origins and Meaning of ‘Vacancies that May Happen During the Recess’ in the Constitution’s Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL’Y (forthcoming 2014) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257801).

ARGUMENT

I. INTRODUCTION

The Constitution’s Recess Appointments Clause provides that “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. CONST. art. II, § 2, cl. 3. The D.C. Circuit below held that certain members of the NLRB had not been validly appointed under that Clause for two independent reasons. *See Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2013). First, it held that the appointments took place while the Senate was in a “pro-forma” session, and that the Recess Appointments Clause only empowers the President to make recess appointments during an inter-session recess. *Id.* at 499-507. Second, the Circuit Court held that the Recess Appointments Clause requires that the vacancy arise during a recess, and not simply continue into a recess. *Id.* at 507-14.

Although the D.C. Circuit’s conclusions are consistent with the original understanding of the Recess Appointments Clause, the opinion cited only two pre-ratification sources: a snippet from Federalist 67 and a provision of the 1776 North Carolina constitution. *See id.* at 500-01. This lack of pre-ratification support is representative of most writing

that has been done on the Recess Appointments Clause, which tends to focus on textual analysis of the Clause's language or post-ratification practice. *See, e.g.*, 1 U.S. Op. Atty. Gen. 631 (1823) (stating that "happen" may mean "happen to exist"). One reason for this is a paucity of discussion on the Recess Appointments Clause in familiar sources such as *The Federalist*. *See, e.g., Wilkinson v. Legal Services Corp.*, 865 F.Supp. 891, 897 (D. D.C. 1994) (stating, "It is difficult to ascertain the Framers' true intention in drafting the Recess Appointments Clause. There was little discussion and no debate on this provision at the Constitutional Convention. . . The only references to this Clause are Alexander Hamilton's comments [in FEDERALIST No. 67] that it should be used for 'temporary appointments' when 'it might be necessary for the public service to fill [a vacancy] without delay' and that it was intended as a 'supplement' to the Appointments Clause.").

Fortunately, there are plentiful pre-ratification materials probative of original understanding and original meaning. The Framers of the Constitution did not invent the phrases "the Recess" and "Vacancies that may happen." Both the first phrase and close variants of the second were stock terms from legislative and other governmental practice. Contemporaneous governmental records are powdered with them. Those records also disclose the meanings of both phrases to a high degree of certainty. Anyone with experience with contemporaneous legislatures would have known what they meant.

The legislature whose proceedings served as the source for legislatures in America was the British Parliament, particularly the House of Commons. PEVERILL SQUIRE, *THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES,*

TERRITORIES, AND STATES, 1619-2009 46 (2012) (“The rules and procedures initially used by the [colonial] assemblies were taken from English parliamentary practices.”). Several founders, such as Benjamin Franklin and John Dickinson, had been directly exposed to Parliament’s proceedings.² Books discussing parliamentary practice were freely available in America, among them Blackstone’s Commentaries, DeLolme’s Constitution of England, and popular English law books, such as Giles Jacob’s New Law-Dictionary. See Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 803-05 (2006), and sources cited therein.

Because American colonial legislative procedures were based on those of the House of Commons, they tended to be similar from state to state. Jack P. Greene, *The Role of the Lower Houses of Assembly in Eighteenth-Century Politics*, 27 J. SOUTHERN HISTORY 451, 458 (1961) (explaining the reasons for similarity in development of colonial legislatures) & 466 (lower houses of colonial legislatures often justified their actions by claiming that they were “agreeable to the practice of the House of Commons”). Those procedures tended to govern also the Continental Congresses (September 5, 1774 to March

2. Franklin served in London as colony agent to the British government. J. A. Leo Lemay, Franklin, Benjamin, AMERICAN NATIONAL BIOGRAPHY ONLINE, at <http://www.anb.org.weblib.lib.umt.edu:8080/articles/01/0100298.html?a=1&n=Franklin%2C%20Benjamin&ia=-at&ib=bib&d=10&ss=0&q=5>.

Dickinson had studied at the Middle Temple in London, where he attended parliamentary debates. H. Trevor Colbourn (ed.), *A Pennsylvania Farmer at the Court of King George: John Dickinson’s London Letters, 1754-1756*, 86 PA. MAGAZINE OF HISTORY & BIOGRAPHY 241 & 417 (1962).

1, 1781) and the Confederation Congress (March 2, 1781 to March 2, 1789), nearly all of whose members came from the legislatures of individual colonies and states. 26 J. CONT. CONG. 287-88 (U.S. Gov. Printing Off., 1937). Similar procedures governed the many inter-colonial and interstate conventions held during the Founding Era. See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013).

The records of these assemblies largely survive. As elucidated below, those records provide clear answers to the questions: (1) Does “the Recess” include intra-session breaks? and (2) does a vacancy arising during a session but continuing into “the Recess” thereby “happen” during the Recess? As explained below, the answer to both questions is “no.”

II. THE MEANING OF “THE RECESS”

In common use, the term “recess” (without “the”) meant only “A retreat, a withdrawment; a place of retirement, a secret abode; remission, a suspension of any procedure. . . .” JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (defining “recess”). In legislative practice, “recess” (without “the”) could refer to any time when legislature not physically sitting, including intra-session breaks, and apparently even a noon recess. 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 322 (Allen D. Candler, ed., 1908) (“This, the first legislature under the [state] constitution, was in session almost continuously, with an occasional recess, ‘till the middle of September”). See also 1784-85 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE

PROVINCE OF MASSACHUSETTS BAY, at 818-19 (referring to “a short recess”); 3 LEGISLATIVE JOURNALS OF THE COUNCIL OF THE COLONY OF VIRGINIA 1336 (H. R. McIlwaine, ed., 1918) (Dec. 21, 1764) (reproducing the governor’s message that he suggested “a recess” by adjournment rather than prorogation since he was “unwilling to impede the Business of the Session”).

In contrast, in government practice the phrase “the Recess” always referred to the gap between sessions.

Numerous references in eighteenth century records support this conclusion. The sources refer to “the recess” specifically as the period between legislative sessions.

References to the period between sessions as “the Recess”

The Founding-Era record contains various references to “the Recess” as necessarily meaning the period between sessions, and in sharp contradistinction to the time the legislature was in session. William Blackstone wrote that “During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward. . . But in the court of the lord high steward, *which is held in the recess of parliament*, he is the sole judge in matters of law. . .” 4 BLACKSTONE’S COMMENTARIES *260 (emphasis added). Blackstone also wrote of a grievance committee “established, lest there should be a defect of justice for want of a supreme court of appeal, *during the intermission or recess of parliament*; for the statute farther directs, that if the difficulty be so great, that it may not well be determined with the assent of parliament, it shall be brought by the said prelate, earls,

and barons unto the next parliament, who shall finally determine the same.” 3 BLACKSTONE’S COMMENTARIES *57 (emphasis added). So according to Blackstone “the recess” was the time between “parliaments”—or, more precisely, parliamentary sessions. “The recess” did not denote times within a particular session. Similarly, another English writer observed that “The last recess of Parliament was a period filled with unprecedented troubles: and the Session opened in the midst of tumults.” JOHN WESLEY, FREE THOUGHTS ON THE PRESENT STATE OF PUBLIC AFFAIRS 26 (1770).

In 1765, American lawmakers were asked to send delegates to what was later called the Stamp Act Congress. Lawmakers in some colonies were frustrated, however, because their governors had prorogued their assemblies. On September 6, 1765, Alexander Wyllys of Connecticut told a correspondent, “The General Assembly of this Province Stands Prorogued to the Twenty second day of October. . . it being in the recess of the General Assembly. . . .” *Quoted in* C.A. WESLAGER, THE STAMP ACT CONGRESS WITH AN EXACT COPY OF THE COMPLETE JOURNAL, 215-16 (Univ. Del. Press 1976). Thus, the prorogation, necessarily the end of the session, triggered “the recess.” In Delaware, an informal caucus of lawmakers appointed their state’s delegates because they did not have “it in our Power to Convene as a House” although they were “sensible of the impropriety of Assuming the Functions of Assembly Men, during the Recess of Our House. . . .” *Id.* at 92. In other words, during “the recess” the legislators were out of session.

The 1784 New Hampshire Constitution referred to the period since the last session as “the Recess”:

The President, with the advice of Council shall have full power and authority in the recess of the General-Court [legislature], to prorogue the same from time to time, not exceeding ninety days in any one recess of said Court; and during the session of said Court, to adjourn or prorogue it to any time the two houses may desire, and to call it together sooner than the time to which it may be adjourned, or prorogued

N.H. CONST. (1784) (article entitled “The Executive Power: President”).

The legislative journals contain many references by which “the recess” is distinguished from the legislature’s “sessions.” For example, the New York legislative records report the phrase “the Recess” being employed exclusively to refer to periods when the legislature was not in session. *See, e.g.*, 1774 N.Y. J. GEN. ASSEM. at 84 (Mar. 7, 1774) (reciting an order “That the said Bill be postponed till the next Session; and that the Clerk of this House do in the Recess thereof . . . furnish the Parties Interested [certain documents]”). Similarly, the 1778 journal of the Virginia House of Delegates, tells us that the house

Ordered, That the delegates for the several counties consult with their constituents, during the recess of Assembly, on the justice and expediency of passing [a designated] bill . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates *at their next session.*

1778 JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 123 (Dec. 18, 1778) (emphasis added).

A resolution of the Massachusetts legislature adopted September 9, 1779 referred to “the Recess” of the state constitutional convention as the time after the convention’s “late session.” 21 MASS. COLONIAL RESOLVES 125 (reproducing the resolutions for adjourning the sessions of the superior Court, which referred to “said Convention at their late Session . . . [and a] Committee is enjoined to sit upon that Business on Monday next, and to compleat their Work during the Recess of the said Convention”). On March 24, 1788, the same legislature authorized a payment to a committee “appointed in the last Session . . . to sit in the recess.” 1786-87 MASS. COLONIAL RESOLVES 855 (“Resolved, that there be allowed and paid out of the publick Treasury of this Commonwealth, to the Committee of Finance, appointed in the last Session of the General Court [the Massachusetts legislature], to sit in the recess”). A Massachusetts enactment providing for a vacancy appointment during “the Recess” explicitly referred to that period as occurring after the session. *Id.* at 523 (“in case a vacancy shall happen . . . in the recess of the General Court, or at so late a period in any session of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof ”). A Rhode Island legislative resolution also referred to the time following the session as “the recess.” 10 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 122.

The legislative journals of New Hampshire are replete with legislative resolutions authorizing work to be done

“during the recess” with directions that the result of the work should be produced “before this house at the next session.” *E.g.*, 8 DOCUMENTS AND RECORDS RELATING TO THE STATE OF NEW HAMPSHIRE DURING THE PERIOD OF THE AMERICAN REVOLUTION FROM 1776 TO 1783 469 (Jan. 18, 1777) (providing for committee to draw up fee schedule for officers during the recess, with production for the next session); 20 *id.* at 141 (Nov. 3, 1784) (referring to committee report recommending inquiry “in the recess” with a report “at the next session”); *id.* at 181 (Feb. 24, 1785) (same), 200 (Feb. 17, 1785) (providing for revision of fees “in the recess” with a report at “the next session”). Similar references appear at *id.* at 220, 506, 662 & 664 and 21 *id.* at 187, 222, 504, 562, 569-70, 604, 619, 721 & 730. Likewise, the period immediately before a new session was referred to as “the last recess.” 8 *id.* at 768 (Feb. 13, 1778) (mentioning “the last recess” as the period immediately before the session, which had just obtained a quorum the day before). The New Hampshire records also refer to a petition being “be put over to the next Session of the General Court [legislature] and if the parties should not settle in the recess that [the petitioner] have leave to bring in a Bill at said next Session.” 21 *id.* at 503-04 (Feb. 5, 1789). From references like these, it is clear that “the recess” represented the period between sessions and was clearly distinguished from them.

III. VACANCIES AND THE MEANING OF “HAPPEN”

A. The Use of “Vacancies That May Happen” Language in the Founding Era

The long-standing controversy involving the phrase “Vacancies that may happen” centers on the meaning of

the word “happen.” Specifically, must the vacancy arise during the “the Recess” to “happen” then, or does it also “happen” if it arises during a session but extends into the recess? In other words, does “happen” mean not merely “arise” but also “happen to exist?”

In answering this question, an obvious place to start is with a full survey of Founding-Era dictionary definitions of “happen.” This survey reveals that the “arise” meaning of “happen” is far more likely to be correct. William Perry’s *Royal English Dictionary, American edition*, defined “happen” as “to come to pass; to light on”—phrases that certainly imply a discrete event rather than a continuing condition. WILLIAM PERRY, *ROYAL STANDARD ENGLISH DICTIONARY* (1st American edition, 1778). Similarly, Francis Allen’s dictionary described “happen” as to “fall out, to come to pass, to light upon or meet with by chance.” FRANCIS ALLEN, *A COMPLETE ENGLISH DICTIONARY* (1765). John Ash’s compendium stated, “To fall out, to come to pass, to light on by accident.” JOHN ASH, *THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775). Nathan Bailey and Edward Cocker offered only “to fall out.” See NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (25th ed. 1783); EDWARD CROCKER, *A NEW ENGLISH DICTIONARY* (1713). Frederick Barlow’s entry recited, “to fall out. To come to pass without being designed. To light upon or meet with by chance, or meer accident.” FREDERICK BARLOW, *THE COMPLETE ENGLISH DICTIONARY* (1772-73). Comparable definitions—all implying a discrete event rather than a continuing situation—were reported by Alexander Donaldson, Samuel Johnson, William Kenrick, and Thomas Sheridan. See ALEXANDER DONALDSON, *AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE* (1763) (“to fall out; to chance; to

come to pass. To light; to fall by chance”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th Ed. 1786) (“1. To fall out; to chance; to come to pass. 2. To light; to fall by chance.”); WILLIAM KENDRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (1773) (“To fall out; to chance; to come to pass—To light; to fall by chance.”); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (“To fall out by chance, to come to pass; to light on by accident”). The only arguably-dissenting work was that by Thomas Dyche and William Pardon, which gave as a secondary definition (after “to come to pass”) the phrase “to be.” THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1777).

What, then, of other documentary Founding-Era sources? In a very short examination of those sources, the D.C. Circuit wrote that the “North Carolina Constitution [contained] the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause’s model.” 705 F.3d at 501.

Actually, the North Carolina language was not much like the Recess Appointments Clause: It neither referred to “the Recess” nor used any variant of the phrase “Vacancies that may happen:”

That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly

N.C. CONST., art. XX (1776). Several other state constitutions contained provisions for filling vacancies whose language was at least as similar to the Recess Appointments Clause: the constitutions of Georgia, Maryland, Massachusetts, New Hampshire (1784), Pennsylvania (1776), and South Carolina (1776 and 1778).

Like the North Carolina language, the provisions in the constitutions of Georgia, and South Carolina mentioned neither “the Recess” nor “Vacancies that may happen.” *See* GA. CONST. (1777), art. XXI (“The governor, with the advice of the executive council, shall fill up all intermediate vacancies that shall happen in offices till the next general election; and all commissions, civil and military, shall be issued by the governor, under his hand and the great seal of the State.”); S.C. CONST. (1776), art. XXIV (“in case of vacancy in any of the offices above directed to be filled by the general assembly and legislative council, the president and commander-in-chief, with the advice and consent of the privy council, may appoint others in their stead, until there shall be an election by the general assembly and legislative council to fill their vacancies respectively.”). S.C. CONST. (1778), art. XXXI (same, with minor wording changes).

The Maryland instrument mentioned “the recess,” but did not use the term “happen.” *See* MD. CONST. (1776). art. XIII (stating that if there is a vacancy in one of the two treasurers’ offices, “in the recess of the General Assembly, the governor, with the advice of the Council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the next General Assembly”); art. XLI (providing the same as to the register of wills); cf. art. XLVII (providing

for appointments of judges to fill certain vacancies, although legislative recess is not a triggering factor). The Massachusetts and 1784 New Hampshire instruments employed variants on the phrase “vacancies that may happen,” but did not refer specifically to “the recess.” *See* MASS. CONST. (1780), ch. 1, § 2, art. 4 (“and in like manner all vacancies in the senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen.”); N.H. CONST. (1784) (unnumbered part entitled “The Senate”) (“and in like manner all vacancies in the Senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be after such vacancies happen”). N.H. CONST. (1784) (unnumbered part entitled “The Senate”). The Pennsylvania section authorizing the executive to fill vacancies in offices used neither the word “recess” nor “happen,” but the section authorizing filling vacancies in the executive council did feature a variant of “vacancies that may happen.” *Compare* PA. CONST. (1776), § 20 (“The president . . . shall supply every vacancy in any office, occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution.”) *with* § 19 (“All vacancies in the council that may happen by death, resignation, or otherwise”).

Although none of the state constitutions provided a direct model for the Recess Appointments Clause Founding-Era legislative records are replete with other provisions for filling vacancies, including grants of vacancy-filling authority during “the recess.” They certainly were common enough to be familiar to anyone with any exposure to the legislative process. Specimens are extant from the Continental Congress. *See, e.g.*, 4 J.

CONT. CONG. 14 (Jan. 1, 1776) (resolving “That, in case of vacancy occasioned by the death or removal of a colonel or inferior officer, the provincial Congress of North Carolina, or, in their recess, the provincial Council, appoint another person to fill up such vacancy, until a commission shall issue from this Congress”).

In addition, provisions exist for most of the states. For example:

- Connecticut: 2 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 525 (1943) (granting power to the governor “by and with the advice of the Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by death or refusal of any commissary or commissarys appointed under this act”); 3 *id.* at 386 (1781 law stating that “That his Excellency the Governor be and he is hereby authorized and requested to fill up all vacancies which may happen by the refusal or resignation of any one of the committee appointed by this Assembly in their present sessions”); 5 *id.* at 37 (providing for collectors of duties to be “appointed by the General Assembly or in their Recess by the Governor and Council of this State”).
- Delaware: MINUTES OF THE COUNCIL OF THE DELAWARE STATE, FROM 1776 TO 1792 1084 (1886) (“That in case of the death, inability, or refusal to act of the said Eleazar McComb, as State Commissioner as aforesaid, it is the opinion of the General Assembly that his Excellency the President, in their recess, appoint some other

suitable person to act as State Commissioner in the business”).

- Georgia: 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 345 (1908) (“that in case any of the Commissioners appointed . . . shall die, or resign their appointment, refuse or neglect to Act in the recess of the Legislature then the Governor and Council for the time being, are hereby Authorized and empowered to appoint some proper and discreet person or persons to act in the room or stead of any such person or persons, who shall or may die, or resign, refuse or neglect to Act as aforesaid”).
- Massachusetts: 20 MASS. COLONIAL RESOLVES 646-47 (“the Honorable Council until the next sitting of the General Court, be and they hereby are fully authorized and impowered to nominate and appoint, as occasion may require, such commissioned officers . . . whose places by death or otherwise are or may in the recess of the General Court become vacant”); *id.* at 224, 540 & 717; 21 *id.* at 229 & 363 (all reproducing similar resolutions).
- New Jersey: LAWS OF THE STATE OF NEW JERSEY 102 (William Paterson, ed., 1800) (1790 statute empowering the governor to appoint U.S. Senators “during the recess of the legislature”).
- North Carolina: 12 THE STATE RECORDS OF NORTH CAROLINA 99, 100 (1895) (“It is further Resolved that the Governor be impowered to

appoint at his discretion, officers to fill up such vacancies as may happen in the Continental Army aforesaid”); 24 *id.* at 443 (“That in case of the resignation or death of the comptroller, the supreme executive are hereby authorised and impowered to nominate a person to exercise the powers, and perform the duties of comptroler, during the recess of the General Assembly”); 24 *id.* at 553 (authorizing recess appointments of port collectors); *id.* at 654 (authorizing recess appointment of state treasurer).

- Pennsylvania: 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 131 (Mar. 20, 1777) (authorizing president and council to make recess appointments).
- Virginia: 1777-78 VA. J. SENATE 8 (Oct. 21, 1778) (referring to a previous “appointment of the Governor and Council, made during the recess of the General Assembly”).

Besides addressing vacancies that might occur during the recess, state legislatures sometimes enacted omnibus resolutions granting certain authority for “the recess.” *E.g.*, 21 MASS. COLONIAL RESOLVES 122-23 (granting the executive council “until the next Sitting of the General Court,” [the state legislature] the power to “nominate and appoint, as occasion may require . . . Officers in any of the Land Forces, armed Vessels or Vessels of War in the Service and Pay of this State, and also in the Militia, whose Places by Death or otherwise, are or may in the Recess of the Court become vacant”).

The Constitution’s expression “Vacancies that may happen” was but one variant of a group of stock phrases employed in these provisions. Although some do not tell us much about the meaning of “happen,” many others do.

These documents confirm that “happen” always signified a discrete event. When legislators wished to designate a continuing vacancy rather than the creation of one, they did not use the unadorned word “happen.” They resorted to phrases such as “during the Vacancy,” 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 4, “are at present vacant,” 12 STATE RECORDS OF NORTH CAROLINA 79, “if there be a vacancy,” 12 STATE RECORDS OF NORTH CAROLINA 493, and “if at any Time . . . by Death or otherwise, the Offices . . . shall be vacant.” 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 27.

B. How Founding-Era Documents Illustrate the Meaning of “Happen”

The Constitution itself offers an example of what it meant for a vacancy to “happen.” This is located in Article I, Section 3: “if Vacancies happen by Resignation, or otherwise.” Under the *ejusdem generis* rule of construction, the events contained in “otherwise” are presumed to be of the same kind as the example given (“Resignation”)—that is, a discrete event. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”). This is only one of scores of Founding-Era legal materials reciting illustrations of what it meant for a vacancy to “happen.” All the illustrations discovered are discrete events—none represents continuance of a pre-existing vacancy.

Just as the U.S. Constitution cites the example of resignation, a Pennsylvania legislative resolution cites the example of death:

Resolved, That where vacancies by death or otherwise may happen in any offices which ought to be filled by this house, during their recess, the president and council be hereby empowered to appoint suitable persons to fill the said offices till the same shall be appointed by the house.

1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 131. Similar language appears in a 1777 Rhode Island resolution entrusting the electorate with the choice of that state’s delegates to the Continental Congress. 8 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 179 (providing for popular election, but adding that “in case any vacancy shall happen, by death, or otherwise, the General Assembly shall fill up such vacancy for the remainder of the year.”).

Other legislative measures provide multiple illustrations of how a vacancy might “happen.” The Pennsylvania constitution offers two: “All vacancies in the council that may happen by death, resignation, or otherwise, shall be filled at the next general election. . . .” PA. CONST. (1776), § 19. A Connecticut resolution also has two:

And be it further enacted, That his Excellency [the governor] be and he is hereby desired and impowered, by and with the advice of the

Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by *death or refusal* of any commissary or commissarys appointed under this act

2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 525 (italics added). Another Connecticut resolution lists four: “Provided always, That in case of death, resignation, refusal or revocation, the General Assembly may supply such vacancy as may so happen.” *Id.* at 264. A 1784 message from the governor of Massachusetts had two examples: “During the recess of the General Court, there have happened [not “are happening”] two vacancies in the revenue department; one by death, and the other by resignation.” 1784-85 MASS. COLONIAL RESOLVES 824.

Several 1785 South Carolina statutes set forth instances of “happen.” These also were limited to discrete events. A measure addressing the county courts provided that “if any vacancies shall happen by the death, resignation or removal out of the county of any of the said justices,” then the remaining justices may “fill up such vacancies.” THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 366 (John Faucheraud Grimke, ed. 1790). Another measure provided for the appointment of loan-office commissioners “if any vacancy shall happen by the death, resignation, or removal out of state” occurring “in the recess of the General Assembly.” In such case, the governor with the advice of the Privy Council could “fill up such vacancy until the next meeting and sitting” of the legislature. *Id.* at 398. Still another enactment addressed vacancies among road commissioners that “shall happen . . . by refusal to act, death, removal out of the parish or district, or otherwise.” *Id.* at 444.

Additional examples abound:

- Connecticut: 1 ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 39 (1786) (“That in Case of Death, Resignation, Refusal or Revocation, the General Assembly may supply such Vacancy as may so happen”).
- Delaware: 2 LAWS OF THE STATE OF DELAWARE 851 (1797) (reproducing a 1786 law that has no “catchall” provision, but refers to “vacancy or vacancies that may happen by reason of such death or refusal to act.”); *id.* at 893 (power to fill vacancies from death or resignation given to state president “in the recess of the General Assembly”).
- New Hampshire: THE PERPETUAL LAWS OF THE STATE OF NEW-HAMPSHIRE, FROM THE SESSION OF THE GENERAL-COURT JULY 1776 TO THE SESSION IN DECEMBER 1788, CONTINUED TO THE PRESENT YEAR 1789 171 (JOHN MELCHER, 1789) (law adopted Feb. 7, 1789 referring to (“all vacancies . . . that shall happen by death, resignation, or otherwise”); 21 DOCUMENTS AND RECORDS RELATING TO THE STATE OF NEW HAMPSHIRE DURING THE PERIOD OF THE AMERICAN REVOLUTION FROM 1776 TO 1783 878 (1788 law providing for “if a Vacancy shall happen” due to an electoral defect).
- North Carolina: 19 THE STATE RECORDS OF NORTH CAROLINA 543 (1784 legislative committee report recommending “That this State annually appoint their delegates to serve in Congress for one year. .

. and when vacancies shall happen by the removal or resignation of any of the said Delegates within the year, this State shall appoint others in their stead”).

- Pennsylvania: MINUTES OF THE PENNSYLVANIA GENERAL ASSEMBLY 1784-1788 413 (as paginated in supplement entitled “Laws Enacted in the Second Sitting of the Twelfth General Assembly of the Commonwealth of Pennsylvania commenced Feb. 19, 1787”) (“That whenever any vacancy shall happen by death, refusal to serve, or other removal of one or more of the said trustees”).

The foregoing examples illustrate that, at the time of the drafting and ratification of the Constitution, the framers intended, and the public likely understood, the word “happen” in the Recess Appointments Clause to refer to a discrete, rather than continuing event. Therefore, for a vacancy to “happen” during a recess, it must arise during that recess.

CONCLUSION

Founding-Era legislative and other governmental records tell us that the Constitution’s phrase “the Recess” refers only to the formal recesses of the Senate between sessions. “The Recess” does not include other intermissions, pro forma or not. The records also inform us that for a vacancy to “happen” in “the Recess of the Senate,” the vacancy must have arisen during that period. In other words, the predecessor’s death, resignation, removal, retirement, or expiration-of-term must have occurred during the inter-session recess. If it occurs while the Senate is in session (pro forma or not), then the President may appoint only with the consent of the Senate.

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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