No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

NOEL CANNING, INC., RESPONDENT

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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The signatories to this brief (listed in Appendix A) teach and write about constitutional law. They have an interest in the reasoning this Court uses in constitutional cases.[1] While the outcome of any particular recess appointments case may have short-term political implications, there is no long-term partisan interest in interpreting the Clause in one way or another.

STATEMENT

Especially in the absence of judicial precedent, disputes about the Constitution's meaning often reduce to disputes about interpretive methods. The interpretive tools are familiar: constitutional text, structure, historical context, early practice (which bears on original meaning), longstanding practice (which constitutes nonjudicial precedent), and pragmatic consequences. Disputes arise, however, over their relative force. For purposes of this brief, *amici* take no position on the relative weight or merit of these methodologies, except to say that the Court should: (1) take care to ensure that it relies on accurate and complete historical facts, (2) consider pragmatic consequences only as related to the purposes of the constitutional provision, and (3) apply the same methodology consistently to each of the sub-issues in the case.

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person other than amici curiae or their counsel (and hence, no party or its counsel) made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Under any plausible method of interpretation, consistently pursued, the President's recess appointments to the NLRB on January 4, 2012, are problematic.

1. The original meaning of the text of the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, empowered the President to fill vacancies only if they arise while the Senate is in recess. That clear original meaning is confirmed by the purpose of the Clause, and by both Presidential and Congressional practice during the Republic's early years. After some Presidents began to depart from this practice, the Senate resisted for almost a century.

2. Although the ordinary meanings of the terms "recess" and "session" are ambiguous, the purpose and structure of the Clause and long practice confirm that the "recess" is the formal recess that occurs between formal "sessions" of the Senate, not including adjournments while a session is in progress. In any case, if one abandons that formal definition of "recess," as has been common since 1905, consistency demands abandonment of the corresponding formal definition of "session," resulting in recess appointments that last for weeks, not years.

3. The text arguably has little to say about the validity of the Senate's "pro forma" sessions, although the Rules of Proceeding Clause, *id.* art. I, § 5, cl. 2 suggests that it is the Senate, not the President or this Court, that ought to judge their validity. In any case, longstanding modern practice treats pro forma sessions as valid for purposes of the Adjournments Clause, *id.*, art. I, § 5, cl. 4, and the Assembling Clause, *id.,* amend. XX, § 2, as well as to pass legislation. There is no logical reason to treat pro forma ses-

sions as nullities only under the Recess Appointments Clause.

No consistent application of any of these methodologies supports the Solicitor General's construction. If recent practice overrides original meaning and early practice, as would be necessary to reject the "arise" view, then there is no answer to consistent recent use of pro forma sessions for a variety of constitutional purposes, including avoiding a "recess" during which the President might make recess appointments. If "recess" is to be given a functional rather than a formal definition, so must "session." If the Court consistently applies a theory of constitutional interpretation to the three questions presented in this case, then the appointments are unconstitutional.

ARGUMENT

I. Under The Text and Original Meaning of the Recess Appointments Clause, The Office Must Fall Vacant During The Recess

The Recess Appointments Clause states 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." U.S. Const. art. II, § 2, cl. 3. The most obvious meaning of the word "happen" is to "occur" or "take place," and the most obvious meaning of the word "vacancy" is the event where an office becomes vacant. Cf. *id.* art. I. § 3, cl. 2 ("if [Senate] Vacancies happen by Resignation, or otherwise ..."). This implies that the President may fill a vacancy by recess appointment only if the office *arises* during the recess.

The Solicitor General's brief contends the word "happen" is ambiguous, and could mean that the vacancy merely *exists* during the recess. Even if there is some linguistic ambiguity, which we doubt, the "arise" interpretation is the best reading of the text, and is confirmed by the original history and primary purposes of the Clause. The "exist" reading rises or falls on an argument from longstanding practice—but this practice is not so longstanding or unchallenged as the Solicitor General's brief suggests.

A. The Text Requires The Vacancy To Arise During The Recess

The most straightforward reading of the Clause is that the President may fill offices that *became vacant* during the recess, through death, resig-

nation, or removal of the previous office holder, by conclusion of a fixed term, or (perhaps) by creation of the office.[2] Now as in 1787, this is the natural reading of the word "happen." The first American dictionary defined "to happen" as "to come by chance," "to fall out," "to come," or "to befall"—all definitions that emphasize the initial occurrence of an event. Noah Webster, *An American Dictionary of the English Language* (1828). Nearly every founding-era English language dictionary agreed. See Brief of Scholars of the Constitution's Original Meaning as Amici Curiae, at 5-7.

Even some of the executive opinions that developed the "exist" interpretation acknowledged that the "arise" reading was more consistent with the Constitution's text. Attorney General Wirt called it "most accordant with the letter of the Constitution," 1 Op. Att'y Gen. 631, 632 (1823). Similarly, in 1862, Attorney General Bates wrote to President Lincoln that "If the question were new, and now, for the first time, to be considered, I might have serious doubts" about the "exist[]" interpretation. 10 Op. Att'y Gen 356, 356 (1862).

B. The Clause's Purpose Supports the "Arise" Interpretation

The Clause's purpose, in the context of the Appointments Clause as a whole, confirms the most natural reading of the text. Outside of recess appointments, the Constitution requires the Senate's

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[2] There was some historical controversy over whether a vacancy "happens" when an office is first created. Note, Amelia Frenkel, *Defining Recess Appointments Clause "Vacancies,"* 88 N.Y.U. L. Rev. 729 (2013). The Court need not resolve that question in this case.

participation—direct or indirect—in all appointments. First, all judges and principal officers must be appointed "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. For inferior officers "Congress may by law" delegate the appointment power to the President or to others, without Senatorial confirmation. *Id.* Hence, in all regular appointments, the Senate must either consent to the nomination directly, or consent to a law that delegates the appointment. These provisions are an important check on the President's ability to staff the executive branch with "unfit characters," *The Federalist No. 76*, at 392 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Attorney General Edmund Randolph aptly observed: "The Spirit of the Constitution favors the participation of the Senate in all appointments." Edmond Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *Papers of Thomas Jefferson* 165 (Oberg & Looney eds., 2008).

The constitutional baseline indicates the proper scope of the Recess Appointments Clause. The Clause anticipates circumstances when the Senate cannot consent either directly or prospectively. In this sense the Clause is "to be considered as an exception to the general participation of the Senate. It ought too to be interpreted strictly." *Id.*

The "arise" interpretation is consistent with this view. Under the "arise" interpretation, the President may make an immediate recess appointment and forgo Senate confirmations when (but only when) there is no realistic chance for the Senate to participate. Under the "exist" interpretation, by contrast, Presidents can wait until a "recess" in Senate business (however defined) and then appoint officers, including judges, for terms as long as two years, with-

out troubling to obtain advice and consent. Worse yet, he can appoint officers already rejected by the Senate, which some Presidents have done.

The "arise" interpretation is admittedly not perfectly congruent with the evident purposes of the Clause. As a practical matter, the President may not be able to fill a vacancy that occurs very near the end of the session; conversely, there is no real need for recess appointments if the vacancy occurs shortly before the session begins. Attorney General Wirt relied on such pragmatic considerations for his nontextual interpretation in 1823. He worried about what would happen if a vacancy happened during the Senate's session, but was not discovered until after the Senate recessed, or about "the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions; a sudden and destructive pestilence, disabling or destroying a quorum of that body." Wirt, *supra*, 1 Op. Att'y Gen. at 633. Pragmatic considerations of this sort are a potential strike against the "arise" interpretation. But the Solicitor General's interpretation is far less tethered to the purposes of the Clause: the President can make appointments not just when the Senate is "unavailable" but when it disagrees with him. Moreover, the practical difficulties with the "arise" view can be avoided through the use of acting officers (in many cases) and by the President's constitutional power "on extraordinary Occasions," to call the Senate into session when it is in recess. U.S. Const. art. II, § 3.

A further difficulty with following the literal meaning of the Clause is that it might seem to allow Presidents to *make* recess appointments during the subsequent session so long as they *arose* during the recess. But this difficulty, if it is one, plagues the "ex-

ist" interpretation no less than the "arise" interpretation.

As a matter of practice, it is common ground among the various views that the vacancy must be "fill[ed]"—as well as "happen"—"during the recess of the Senate." That reading is supported by a practice more longstanding and unbroken than any other discussed in this case. Presidents have always made recess appointments *only* when they maintained that the Senate was in recess. *The Federalist* states flatly that under the Clause the President must make the appointment "during the recess." *The Federalist No. 67*, at 350 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

C. The Earliest Interpreters Endorsed the "Arise" Interpretation

In the Republic's early decades, Congress and the executive branch both maintained that an office must *become* vacant during the recess to trigger the recess appointment power. A 1791 statute established an office and provided that "[i]f the appointment ... shall not be made during the present session of Congress, the President may, and he is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Act of March 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. This provision would have been wholly redundant under the "exist" view of the Recess Appointments Clause.

The Washington Administration took the same view of the Clause. In the first formal executive opinion on the Clause, Attorney General Edmund Randolph confronted the executive branch's power to make a recess appointment to the office of "chief

Coiner" of the Mint—an office that had been created in April of 1792, a month before the Senate's recess began. Is it, Randolph asked, a "vacancy which has *happened* during the recess of the Senate?" Randolph, 24 *Papers of Thomas Jefferson*, *supra*, 165. No, he answered: "It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day." *Id*. Leading commentators on the Constitution, of both Federalist and Jeffersonian persuasions, agreed. See Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1482, 1518-1521 (2005) (quoting Hamilton, a Federalist, and Tucker, a Jeffersonian).

President Washington repeatedly confirmed Randolph's view of the Clause. Washington made recess appointments only when the office had become vacant during the recess. On several occasions Washington was confronted with vacancies late in the Senate session, when potential nominees could not be contacted before the end of the session. *Id.* at 1522. Washington and the Senate found a way to fill these offices consistent with the "arise" interpretation—the President would nominate an officer and the Senate would confirm him, all without the officer's consent. *Id*. After the session was over, if the officer refused to serve, Washington treated that as a resignation, which created a new vacancy *during the recess* and could then be replaced by a recess appointment.

The Solicitor General claims President Washington broke from this practice twice—when he appointed Robert Scot as Engraver of the Mint, and William Clarke as United States Attorney of Kentucky. U.S. Br. 39-40. The history, however, strongly suggests both vacancies arose during a recess.

Washington himself said they arose during a recess. He wrote: "I nominate the following persons [including Scot] to fill the offices annexed to their names respectively; to which, having *fallen vacant during the recess* of the Senate, they have been appointed." S. Exec. J., 3d Cong., 1st Sess. 142–43 (1793) (emphasis added). Likewise, "I nominate the following persons [including Clarke] to fill the offices annexed to their names, respectively, which *became vacant during the recess* of the Senate." S. Exec. J., 4th Cong., 2d Sess. 216-17 (1796) (emphasis added). Even if Washington misapprehended the facts, he apparently believed he was acting within the recess appointments power because he supposed that the offices "became vacant during" a recess.

Moreover, it is unlikely that Washington was mistaken on the facts. The Act of April 2, 1792, made it "lawful for the functions and duties of Chief Coiner and Engraver to be performed by one person." Act of April 2, 1792, ch. 16, § 3, 1 Stat. 246, 247. Henry Voigt therefore likely had been acting as Chief Coiner *and* Engraver. When he decided to extend the Engraver position to Scot, Washington likely created and filled that vacancy at once—during the recess.

As the Solicitor General's brief suggests, the United States Attorney vacancy filled by Clarke also probably arose during a recess. Clarke's predecessor, William McClung, "was confirmed on June 2, 1794. S. Exec. Journal, 3d Cong., 1st Sess. 160." U.S. Br. 40 n.31. The Senate recessed on June 9. S. Exec. J., 3d Cong., 1st Sess. 162. "McClung had declined that appointment by October 1794." U.S. Br. 40 n.31. The next Senate session began on November 21, 1794. S. Exec. J., 3d Cong., 2d Sess. 163. Unless McClung declined to serve during the seven-day window between his confirmation and the recess—a period shorter

than the time it would take for a message to get from New York City to Kentucky—then he must have declined his commission during the recess, rendering the office vacant.

The Clarke appointment thus does not violate the "arise" interpretation or support the "exist" interpretation. But it does present an oddity: because Washington waited until the recess of 1796 to make the Clarke appointment, it appears that Washington filled a vacancy that "happened" during the 1794 recess "during" the 1796 recess (unless there was another nomination and appointment between McClung and Clarke, which the sources do not rule out). See Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789-1816*, at 72 n.81 (suggesting that the post may have been filled, if briefly, by George Nicholas, in 1796). In a private letter, Washington indicates that he had simply forgotten about the appointment. Letter from George Washington to Timothy Pickering (Oct. 10, 1796).[3] No one appears to have commented on the aberration. But under no theory does the Clarke appointment support the Solicitor General's argument.

The Solicitor General makes a similarly unfounded claim that Thomas Jefferson's early appointments of several district attorneys and marshals filled vacancies that did not arise during the recess. U.S. Br. 41-42. The Solicitor General's evidence is that the offices were created by a statute on February 13, 1801, during the session. §§ 36-37, 2 Stat. 89, 99-100. But the very sections the Solicitor General cites provide that the previously-appointed marshals and district attorneys who lived in those districts would

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[3] Available at http://founders.archives.gov/documents/Washington/99-01-02-01011.

hold the new offices until the President removed them. *Id*. So the new offices were likely filled by the old district attorneys and marshal until Jefferson nominated their replacements, which he did during the recess.

Nor is there anything in Jefferson's letter to Wilson Nicholas, relied upon by the Solicitor General, U.S. Br. 42, suggesting he took a broad view of the recess appointment power. Though Jefferson described the Clause as "susceptible of both constructions," his chief concern seems to have been that some of the legal fictions used in the previous administrations were too broad. 36 *Papers of Thomas Jefferson* 433 (2009). He said: "if we find that any of our cases go beyond the limits of such a rule, we must consider what will be the best way of preventing their being considered as authoritative examples."[4] *Id.* There is no reason to think that Jefferson supported a *broader* view of the power than his predecessors had.

Madison's practice is somewhat less clear. His only articulated position on the question, in connection with his delayed appointment of Andrew Jackson to a generalship, see Resp. Br. 39, squarely embraced the "arise" view. But he made five appointments that may or may not have conformed to that view. Compare U.S. Br. 42-43 with Resp. Br. 44. One was the recess appointment of Theodore Gaillard to a judgeship vacated by the resignation by Dominic Hall. Hall's date of resignation is uncertain, but it may have been during the session. Compare Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev.

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[4] Available at http://founders.archives.gov/documents/Jefferson/01-36-02-0280.

377, 400-01 (2005) (arguing it was during the session) with Rappaport, *Original Meaning*, *supra*, at 1534 n.142 (arguing that this is not clear). In any case, Gaillard declined the recess appointment.

Two other appointments were to offices created on March 3, 1815, the last day of the Senate's session. On that day, Madison signed legislation creating two new offices, which he later filled by recess appointment. Looking solely at the Senate Journal, it appears that he signed the bill before the Senate recessed, but a comparison to the House's records in the Annals of Congress suggests that the Senate may have announced its recess before receiving the message from the Clerk of the House that Madison had signed the legislation. Compare S. Journal, 13th Cong., 3d Sess. 689-90 (Mar. 3, 1815) with 28 Annals of Cong. 1274 (Mar. 3, 1815) (House of Representatives).

Finally, Madison recess appointed the first U.S. Attorney and Marshal for the Territory of Michigan, although those offices were created during the session. U.S. Br. 43. We are not aware of any evidence that would square these two appointments with the "arise" view. Yet we are also less ready than the Solicitor General to infer that Madison supported the "exist" view. In none of these cases is there evidence that Madison actually considered (or was aware of) the dates of the vacancies, so we are inclined to think his explicit embrace of the "arise" view in the Jackson episode constitutes the better evidence of Madison's view of the Clause's meaning.

D. Modern Practice Has Diverged From The Original Meaning, But Not To The Extent The Government Claims

The only plausible argument against the original "arise" interpretation of the Clause is the claim that there has been a long contrary practice. Under the usual account, the "arise" interpretation was abandoned in an opinion by Monroe's Attorney General William Wirt in 1823. See Hartnett, *supra*, at 401.

But that account downplays a great deal of contrary evidence. First, the executive branch subsequently issued opinions that contradicted Attorney General Wirt's opinion. One later Attorney General opinion declared, "[i]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate." 4 Op. Att'y Gen. 361, 363 (1845) (Mason).

Several other Attorneys General expressed similar views, suggesting that the word "happen" meant that even if a vacancy need not arise during the recess, it nonetheless had to continue by chance and not design. 2 Op. Att'y Gen. 525, 528 (1832) (Taney) ("If it falls out that, from death, inadvertence, or mistake, an office ... is, in the recess, found to be vacant ... the President may fill it . ... But vacancies are not *designedly* to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate.") (emphasis in original); 3 Op. Att'y Gen 673, 674 (1841) (Legare) (acknowledging possibility that "happen" "impl[ies] something fortuitous and unexpected."); 4 Op. Att'y Gen. 523 (1846) (Mason); see also 3 Joseph Story, *Commentaries on the Constitution of the United States* 416-417, § 1553 (1st ed. 1833) ("The word 'happen' had relation to some casualty, not provided for by law"); Michael B. Rappaport, *Why Nonoriginalism Does Not Justify De-*

parting from the Original Meaning of the Recess Appointments Clause, at 19-20 (draft, Sep. 19, 2013).

On that view, a vacancy happened during the recess only if some unexpected occurrence caused the vacancy to go unfilled during the session. This view is inconsistent with the Solicitor General's account and its position in this case. There was nothing accidental or unexpected about these vacancies; nominations had been made during the session.

More importantly, the Senate has long contested the "exist" construction. In October of 1862, Attorney General Bates had written that he "might have serious doubts" about the "exist" interpretation as an original matter, but for the executive branch's contrary practice and the "unbroken acquiescence of the Senate." 10 Op. Att'y Gen. 356, 356. In December 1862, the Senate took issue with Bates's claim of acquiescence. After noting the increasing number of recess appointments, the Senate instructed the Judiciary Committee to investigate the constitutionality of recess appointments "which have not occurred during the recess of Congress, but which existed at the preceding session of Congress." Cong. Globe, 37th Cong., 3d Sess. 100 (Dec. 16, 1862).

On January 28, 1863, the Judiciary Committee concluded in strong terms that the practice was unconstitutional. Senator Howard reported: "We think the language too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun." See S. Rep. No. 80, at 3 (37th Cong., 3d Sess.) (Jan. 28, 1863). The Committee argued that a "construction" based on continued practice should guide constitutional interpretation only "in considering the meaning and intent of a *doubtful* clause." *Id*. at 7 (empha-

sis in original). The Recess Appointments Clause was unambiguous, while Wirt's interpretation was "only the invention of a phrase not contained in the text, giving it an effect which the text itself, by the ordinary rules of interpretation, forbids. No instrument could long endure such experiments." *Id*. at 5.

The same day, the Senate moved to implement the Judiciary Committee's constitutional objections. It passed a statute that eliminated salaries for all recess appointments "which vacancy existed while the Senate was in session." Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. In this statute, signed by President Abraham Lincoln, Congress endorsed the original "arise" view. Cong. Globe, 37th Cong., 3d Sess. 565 (January 28, 1863) (statements of Trumbull, Sherman, Fessenden); Rappaport, *Nonoriginalism*, *supra*, at 22-24. Shortly thereafter, two federal courts also rejected the executive branch's position.[5]

The pay statute's direct rejection of the "exist" view continued from 1863 to 1940, when it was amended to permit salaries to non-"arise" recess appointees in limited circumstances. Act of July 11, 1940, ch. 580, § 1761, 54 Stat. 751, 751, now codified at 5 U.S.C. § 5503. It is unclear whether the 1940 amendments reflect a twentieth-century change of heart on the constitutional question. The Senate report at that time noted only "that the law as it stands may cause serious injustice in preventing the payment of salary to those classes of appointees whose problems will be corrected by this amendment." S. Rep. No. 1079, at 2 (76th Cong., 1st sess. 1939); see

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[5] *Case of Dist. Attorney of United States*, 7 F. Cas. 731, 735-744 (E.D. Pa. 1868); Schenck v. Peay, 21 F. Cas. 672, 674-675 (C.C.E.D. Ark. 1869). But see *In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880) (concluding that "exist" view was settled by practice).

also H. Rep. No. 2646, at 1 (76th Cong., 3d Sess. 1940) (existing statute "from a practical standpoint frequently creates difficulties"). And in requesting the amendments, the executive branch did not even mention the constitutional objections that had originally motivated the statute, nor did it cite the Senate Judiciary report. See *Letter from Attorney General Frank Murphy*, printed in S. Rep. No. 1079 at 2.

Significantly, even the new statute does not allow recess appointees to be paid in all circumstances, as would be the case if Congress had completely acquiesced in the executive practice. This suggests that the Senate has never accepted the "exist" interpretation across the board. Rappaport, *Nonoriginalism*, *supra*, at 33-35.

All of that said, it is true that a long string of executive branch practice, and arguably Congress's role in liberalizing the 1940 pay statute, have reflected a broader construction of the word "happen." Yet this Court has recognized the authority of modern practice only in cases of ambiguity. See *Pocket Veto Cases*, 279 U.S. 655, 689-90 (1929); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-12 (1952) (Frankfurter, J., concurring). The Court has generally rejected the proposition that practice may displace text and original meaning where it is clear. *Myers v. United States*, 272 U.S. 52, 174-175 (1956); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970); *INS v. Chadha*, 462 U.S. 919, 944 (1983); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Printz v. United States*, 521 U.S. 898, 905 (1997).

Acceptance of the Solicitor General's view on the power of the President to make recess appointments to offices that became vacant while the Senate was in session would greatly increase the importance of modern practice for constitutional interpretation,

at the expense of text and early history. As will be seen, even the Solicitor General is unwilling to live with that approach on a consistent basis.

II. The Text Implies, and Long Practice Confirms, That Recesses Occur Between Sessions, Not During Them

The recent lower court decisions addressing the merits all conclude that Presidents may not use recess appointments to fill vacancies during so-called "intrasession recesses," regardless of how one interprets the word "happen." We acknowledge that the text of the Recess Appointment Clause standing alone does not *explicitly* preclude the concept of "intrasession recesses." Nonetheless, it is best read—in light of parliamentary practice and the purpose of the Clause—to *implicitly* foreclose such appointments. That this is the most natural meaning of the text is confirmed by long practice. If, however, the Court abandons the formal definition of "recess," it should likewise abandon a formal definition of "session," meaning that recess appointments will generally last for weeks, not years.

A. The Constitution's Text and Purpose Imply that Recess Appointments Are Limited To Intersession Recesses

It is something of a misnomer to refer to "intrasession" and "intersession" recesses, as the parties have done during this and other litigation. The reason that the Clause is best read as limited to so-called "intersession" recesses is because breaks in Senate proceedings while the Senate remains in session are not really recesses at all.

A natural reading of the text is that "the Recess" of the Senate and "the Session" of the Senate are mutually exclusive. Rappaport, *Original Meaning*, *supra*, at 1550. The Senate is either in session or in recess—not both. Recesses occur between sessions, not during them.[6] Although the ordinary language usage of "recess" can include breaks of any sort—such as a "recess" during the school day—the technical usage in Article II presumably comes from parliamentary practice. Parliament had the power to adjourn but not to end a session. The power to terminate a session, called "prorogation," belonged to the King. The Constitution gives both the adjournment power and the prorogation power to Congress. When the Constitution refers to a break during the Senate's session, it uses the word "adjourn." U.S. Const. art I, § 5, cl. 1 ("a smaller Number may adjourn from day to day"); *id*. cl. 4. ("Neither House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days . . ."); Rappaport, *Original Meaning*, *supra*, at 1557. Although the term was sometimes used loosely, as a legal matter, the term "recess" was typically reserved for the period of time between sessions.

In his discussion of the Clause in The Federalist, Hamilton noted 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"; and explained that the Clause was needed "as it would have been improper to oblige this body to be continually *in session* for the appoint-

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[6] The singular definite article "the" does not imply that there is only one recess between the two sessions of a two-year Congress. From the beginning, there have frequently been more than two sessions, and art II, § 3 explicitly contemplates special sessions, which necessarily will terminate the recess.

ment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay." *The Federalist No. 67*, *supra*, at 350 (Alexander Hamilton) (emphases added). Similarly, early statutes used the two terms exclusively. The First Congress passed a statute compensating a Senate clerk "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess." Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71. Another statute, dealing with duties inspectors, said that "if the appointment ... shall not be made *during the present session of Congress*, the President may, and he is hereby empowered to make such appointments *during the recess of the Senate*, by granting commissions which shall expire at the end of their next session." Act of March 3, 1791, § 4, 1 Stat. 199, 200 (emphases added).

The Constitution's structure and the Clause's purpose reinforce the conclusion that the Clause's authority was limited to "intersession" recesses. For many decades, the recess between sessions tended to last for several months; adjournments during the session of the Senate, by contrast, tended to be exceedingly brief. During the short adjournments, the Senate could "compel the Attendance of absent Members" to attend to deal with important business, U.S. Const. art. I, § 5, cl. 1; see also 2 Story, *Commentaries*, *supra*, at 297, § 834 (noting that this power may be used when there has been no "no legal dissolution of the body").

Giving the President the power to make recess appointments during the long recesses, but not the short breaks, was a way of ensuring that offices could be filled "which it might be necessary for the public service to fill without delay," *The Federalist No. 67*,

supra, at 350 (Alexander Hamilton), without allowing undue circumvention of the advice-and-consent process, as Attorney General Randolph warned, 24 *Papers of Thomas Jefferson* 165. There was no good reason to dispense with advice and consent during short breaks.

Moreover, if the Recess Appointments Clause extends to breaks during the session, then the text contains no obvious limiting principle to stop the President from making a recess appointment during a three-day break, a weekend, or even overnight. To be sure, the executive branch currently represents that it has "agreed" not to do so. U.S. Br. 45. That is better than nothing. But see *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly"). But the executive branch has sometimes suggested that the text would permit it to make appointments during shorter breaks, see *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, 9 n. 13 (Jan. 6, 2012);[7] Brief for the United States at 14-18, *Mackie v. Clinton*, No. 93-32 (D.D.C. 1993), and it is not clear why three days is the limit. In 1903 President Theodore Roosevelt made 173 recess appointments during a purely nominal break between sessions at noon on December 8. *Special Session Is Merged into Regular*, N.Y. Times, Dec. 8, 1903, at 1. This assertion of power was controversial and questionable, but at least it was limited to brief breaks *between sessions*, which serves as a limiting principle.

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[7] Available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

It seems unlikely that the Framers would have given the President power to make recess appointments during all breaks in Senate business without explicitly establishing any lower bound on the length of those breaks. It is thus far more probable that the Clause's reference to "the Recess of the Senate," excluded periods when the Senate was in session, especially given that the Clause was so understood by readers at the time of enactment.

One final incongruity that would be created by the Solicitor General's view of the word "recess" is that "intrasession" recess appointments would last up to twice as long as traditional "intersession" appointments. Because the appointments last until "the end of the Senate's *next* Session," U.S. Const. art. II, § 2, cl. 3 (emphasis added), an appointment made during an intersession recess will last for one session, at most about a year. An appointment made during a session, by contrast, will last for the rest of that session, plus another whole session.

For example, if the President had made these appointments one day earlier, during the technical break between sessions, they would have lasted only one year, instead of the two that he achieved by timing the appointments for the day after the new session began. There is no apparent reason why the Framers would have wanted appointments made during intrasession breaks to last twice as long as those made when the Senate was out of session, and hence reason to doubt that an intrasession break can be a "recess" in the sense the term is used in the Clause.

B. Long Practice Confirms That Recess Appointments Are Limited To Intersession Recesses

Whatever ambiguity may survive the textual and structural evidence of the original meaning of the word "recess," in the Constitution, the intersession-only meaning of "recess" is confirmed by long practice, even by the executive branch. First, it is generally uncontested that there were no known intrasession recess appointments during the first 73 years under the Constitution. The Solicitor General claims that the absence of intrasession recess appointments does not reflect a constitutional consensus against such a power, but rather the fact that there were very few intrasession recesses exceeding three days. U.S. Br. 21-22. But the current "agreement" not to make recess appointments during three-day recesses had not been hatched at the time; so the Solicitor General does not fully explain the absence of any attempt to make any recess appointments during any of the thousands of short intrasession adjournments from the Founding until the Civil War.

The Solicitor General also overstates the extent of intrasession recess appointments starting with Andrew Johnson. The Solicitor General claims that Johnson made 57 intrasession recess appointments during 1867 and 1868. U.S. Br. 22. But most of these appointments can be explained under the traditional intersession view.

The confusion arises because of an unexpected special session of the Senate in 1867. In March of that year, Congress had been in session, and taken the unusual step of scheduling a mid-summer adjournment from March 30 until July 3 of that year. However, President Johnson called the Senate into special session the next day, on April 1, in a session that lasted until April 20. Congress then recessed until July 3. The Solicitor General takes the view that appointments made before July 3 are examples of "in-

trasession" recess appointments, presumably because Congress did not officially terminate its session on March 30. But it is more likely that "the end of the special session on April 20 constituted a genuine intersession recess that allowed recess appointments to be made under the intersession view. Under this view, the special session would have ended the ordinary session that had begun at the start of March." Rappaport, *Nonoriginalism*, *supra*, at 27. This accords with Thomas Jefferson's Senate Manual. See *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* § LI (1812) ("The constitution authorizes the President 'on extraordinary occasions, to convene both Houses or either of them.' If convened by the President's proclamation, this must begin a new session, and of course determine the preceding one to have been a session.") (citation omitted). Similarly, there appears to be confusion about the break the Senate took in 1868 from July 27 to September 21, after acquitting President Johnson in his impeachment trial. The Solicitor General assumes that this was an "intrasession" recess, but the Congressional Globe indicates that "[t]he president pro tempore announced that the hour of twelve o'clock, fixed by the resolution of the two Houses *for closing the present session of Congress by a recess*, had arrived, and declared the Senate, in pursuance of the said resolution, adjourned until the third Monday in September next at twelve o'clock." Cong. Globe, 40th Cong., 2d Sess. 4518 (July 27, 1868); Rappaport, *Nonoriginalism*, *supra* at 28.

We do not know that every single example in the Solicitor General's brief can be similarly explained. But these examples are enough to show that the Solicitor General's view of the historical record is overstated, and that the Court should be wary of in-

ferring that a recess appointment broke historical tradition when there is no evidence that anybody at the time believed that to be happening.[8]

When the executive branch did finally address the question of intrasession recess appointments in 1901, Attorney General Knox dismissed Johnson's appointments, saying: "The public circumstances producing this state of affairs were unusual and involved results which should not be viewed as precedents." 23 Op. Att'y Gen. 599, 603 (1901). Instead, Knox explained, "an adjournment during a session of Congress means a merely temporary suspension of business ... whereas *the recess* means the period after the final adjournment of Congress for session, and before the next session begins." *Id.* at 601 (emphasis in original). The latter period "is *the recess* during which the President has power to fill vacancies" through recess appointment, and "intermediate temporary adjournments" are not. *Id.* That position was later abandoned by the Senate in 1905 and the Attorney General in 1921, in favor of a view that is equally inconsistent with the Solicitor General's current position.

C. Modern Practice Has Diverged From The Long Practice Under The Clause, But Not To The Extent The Government Claims

The Senate in 1905 and Attorney General Daugherty in 1921 concluded that it no longer made sense to interpret the term "recess" as referring to the period between the two formal "sessions" of a Con-

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[8] For example, many of the other appointments may have been valid under the "modified intersession view" discussed *infra* pp. 26-28.

gress. They agreed that "the recess" had to be a period long enough that the Senate was realistically unavailable to act on appointments. But the Senate and Attorney General did not abandon the fundamental concept that sessions and recesses are mutually exclusive. In adopting a functional definition of "recess," they adopted a functional definition of "session" as well—meaning that any recess ends one session and precedes another. See Michael Stern, *Burying the Multi-Session Recess Appointment Theory*, Point of Order Blog (May 3, 2012), http://www.pointoforder.com/2012/05/03/burying-the-multi-session-recess-appointment-theory/. Professor Rappaport calls this the "modified intersession view." Rappaport, *Nonoriginalism*, *supra*, at 29. By contrast, and without explanation, the Solicitor General insists on a functional definition of "recess" while retaining the formal definition of "session."

The Solicitor General claims that Attorney General "Daugherty rejected Knox's reasoning and concluded that intra-session recesses of sufficient length do trigger the Recess Appointments Clause." U.S. Br. 24-25 (citing 33 Op. Att'y Gen. 20, 21, 25 (1921)). Daugherty did indeed adopt a practical approach to determining *whether the Senate was in recess*, rather than a formal one that deferred to the Senate's nomenclature. But his opinion does not say that the Senate can be in recess and in session at the same time, and indeed his opinion repeatedly indicates that recess and session are mutually exclusive. E.g., 33 Op. Att'y Gen. at 21 ("the real question, as I view it, is whether in a *practical* sense the Senate is in session"); *id*. at 24 (recess is "the period of time when the Senate is not sitting in regular or extraordinary session"). So Daugherty's view actually entails the recognition of more recesses, but also more ses-

sions. Michael Stern, *Attorney General Daugherty and the "Intra-Session" Recess*, Point of Order Blog (March 30, 2012), http://www.pointoforder.com/2012/03/30/attorney-general-daugherty-and-the-intra-session-recess. There are no "intrasession recesses" under this view, but more numerous sessions broken by recesses.

Under Daugherty's view, recess appointments would generally be of significantly shorter duration, because they terminate at the end of the Senate's "next Session," U.S. Const. art. II, § 2, cl. 3, and each recess marks the end of a session. Indeed, recess appointments made in the few decades after Daugherty's opinion were held to expire relatively quickly, confirming that Daugherty's opinion reflects the "modified intersession view." Rappaport, *Nonoriginalism*, *supra*, at 31-32. For example, the recess appointment of John Esch in 1928, see U.S. Br. appx 10a, terminated after less than five months, rather than lasting another year as it would under the Solicitor General's view. Rappaport, *Nonoriginalism*, *supra*, at 31.

If this Court were to adopt Daugherty's view, the appointments at issue in this case would have expired after a few months, when the Senate adjourned for a period long enough to constitute a recess. Indeed, if a three-day break constitutes a recess and pro forma sessions are disregarded, as the Solicitor General proposes, the appointments expired on February 17, 2012, when the Senate took a 9-day break (punctuated by two pro forma sessions), 158 Cong. Rec. S1021 (daily ed. Feb. 17, 2012), which the Solicitor General would deem a recess.[9] In short, the Solicitor

[9] That might entail reversing the decision below, since the NLRB decision was February 8, 2012. But it would entail af-

General wants to have it both ways: "recesses" are functional and may be as short as three days (with pro forma sessions ignored), but "sessions" are formal and last the full year without break. We perceive no logic in this inconsistency.

III. Under Modern Practice and Pragmatic Construction, The Senate's Pro Forma Sessions Interrupt A Recess

The third consistent approach to interpreting the Recess Appointments Clause for purposes of this dispute would rely on longstanding, but more recent practice. For many decades, without objection or controversy, both Houses of Congress have employed "pro forma" sessions for several constitutional purposes. To promote structural consistency, the Court should recognize "pro forma" sessions as no less effectual under the Recess Appointments Clause. The effect is to make the breaks between those sessions in January 2012 merely three-days long. No recess appointment has ever been made during an "intrasession" recess that short.

While the OLC opinion and some previous government briefs had been cagey about whether a recess appointment could be made even during a three-day intrasession recess, the Government's brief in this case explicitly concedes that "such short intrasession breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the

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firming *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 615, 624 (4th Cir. 2013) (board decisions on April 18, and August 14, 2012) and *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 208, 218 (3d Cir. 2013) (recess appointment March 27, 2010; order August 26, 2011).

President's recess-appointment authority." U.S. Br. 18.

A. Under Modern Practice, Pro Forma Sessions Are Routinely Respected As Genuine

The Constitution provides that "each House may determine the rules of its proceedings," U.S. Const. art. I, § 5, cl. 2. Using that authority, the Senate frequently agrees that it will meet in "pro forma" session but not conduct business. On that day, one or more Senators will meet and typically promptly adjourn—though any Senator would be entitled to call for a quorum and summon the others, and the body may by unanimous consent transact business. The determination of the rules of each House is entrusted to that House alone, and it is suspect under the constitutional structure for the executive branch to assert a unilateral power to reject the Senate's chosen procedures as "a legal fiction." U.S. Br. 62.

In any event, the use of pro forma sessions to satisfy various constitutional purposes is soundly based in longstanding practice. To be sure, the use of pro forma sessions for the *avowed purpose* of thwarting recess appointments during adjournments dates back only until 2007, when the Senate (controlled by a Democratic majority) used pro forma sessions to preclude recess appointments by President Bush. Jeff VanDam, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 375 (2012). But pro forma sessions have been used to satisfy other formal requirements of the Constitution throughout the twentieth century and have been embraced and accepted by both parties and both branches.

1. Pro Forma Sessions Have Satisfied the Adjournments Clause

The Constitution provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. Throughout the twentieth century, Congress has used pro forma sessions to satisfy this requirement. In 1929, the House entered an order to meet for several weeks on Mondays and Thursdays at pro forma sessions at which "there shall be nothing transacted except to convene and adjourn; no business whatever." 71 Cong. Rec. 3228-29 (1929) (Rep. Tilson). Similarly, in 1950, the Senate scheduled several pro forma sessions "without the transaction of business of any nature" on Tuesdays and Fridays. 96 Cong. Rec. 16,980 (1950). Other examples abound. See Resp. Br. Appx. B. These pro forma sessions allowed the Houses to satisfy their constitutional obligation to remain in session even though they chose not to transact substantive business. If pro forma sessions satisfy one House's duty to be available to the other House for legislative purposes, they should likewise establish the Senate's availability to receive nominations from the President.

The Solicitor General points out that in 1876, some Senators objected to a proposed series of pro forma sessions on constitutional grounds. U.S. Br. 60-61. Apart from its merits, see Resp. Br. 51-52, 57-58, this argument raises a problem of methodological consistency. If the Solicitor General wishes to take the view that early understandings of the Constitution trump subsequently-established practices, then it will have a hard time defending its recess appointments against the early understandings of the "arise"

and "intersession" issues. The Solicitor General cannot have it both ways.

2. Pro Forma Sessions Have Satisfied the Assembling Clause

Congress has also used pro forma sessions to satisfy the Constitution's requirement that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2. This practice dates back to at least 1980. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (Dec. 21, 1979) (pro forma sessions for both houses). Indeed, one of the pro forma sessions in early 2012 was necessary to comply with the Assembling Clause. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (same).

It is not clear to us whether the Solicitor General disputes that the Assembling Clause is satisfied by such sessions, and if not, we do not understand the nature of its objection. U.S. Br. 61 n.60. But if such sessions were not valid for purposes of the Assembling Clause, why does the Solicitor General describe the period of time as a 20-day recess beginning on January 3, rather than a 38-day recess beginning on December 17? Apparently, the Solicitor General regards the pro forma session on January 3 as valid for purposes of the Assembling Clause. If so, why is it invalid for other comparable purposes, including the Recess Appointments Clause?

3. Pro Forma Sessions Have Been Used for Substantive Business

Finally, in recent years Congress has sometimes passed bills during pro forma sessions. For example, during a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). During a September 28, 2012 pro forma session, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). And on December 23, 2011, during a pro forma session, the Senate agreed to temporarily extend the payroll tax cut, which was the President's highest legislative priority at that time. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed all five bills into law. These pro forma sessions show that the Senate is capable of acting on business during its sequence of pro forma sessions. If it can vote on legislation, it can act on nominations.

The Solicitor General seems to recognize that it cannot logically maintain that these sessions were invalid. Instead it contends that if a pro forma session transacts business, it ceases to be a pro forma session. U.S. Br. 52-53. This is analogous to saying that wild animals cannot be captured, because if they are captured they are no longer wild.

The Solicitor General's only other response to this point is to deride these examples as "mere possibility." *Id.* at 52; see also *id.* ("A valid exercise of the recess-appointment power cannot be made to depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess.") (emphasis in original). But that would have been enough for Attorney General Daugherty, who thought the President could make recess appoint-

ments only when there was "a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." 33 Op. Att'y Gen. at 25. And on the issue of intrasession appointments, the Solicitor General is happy to rely on Daugherty's opinion. U.S. Br. 24-25.

B. As A Matter of Structure, Pro Forma Sessions Ought To Receive Uniform Treatment In Different Constitutional Provisions

Aside from its desultory argument that pro forma sessions do not in fact satisfy the Adjournments Clause or (maybe) the Assembly Clause, the Solicitor General's other claim is that pro forma sessions ought to be treated differently for some constitutional provisions than for others. It offers no persuasive basis for doing so. The general expectation is that "similarly phrased constitutional commands be read in pari materia." Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 794-95 (1999).

The Solicitor General's defense of this unusual position is brief:

> Even if the Court were to defer to the House and Senate's belief that a series of pro-forma sessions may satisfy their obligations to one another not to adjourn without the other's consent, such deference has no proper bearing on the meaning of the Recess Appointments Clause. Even assuming arguendo that the President has no direct interest in whether each House secures the other's consent for an adjournment (notwithstanding his role in the law-making process), he plainly has a direct interest in the balance that Article II strikes be-

> tween his need to secure the Senate's advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is not available.

U.S. Br. 61-62. This is wrong on two counts.

First, the pro forma sessions can be respected not simply out of "defer[ence]" to the House and Senate, but out of an independent judgment that modern practice, especially practice by coordinate branches of government, is relevant to constitutional meaning.

Second, as the Solicitor General almost acknowledges, the President's "interest" in each constitutional rule is somewhat similar. The President has an interest in the Adjournments Clause and the Assembly Clause both because of "his role in the lawmaking process," U.S. Br. 62, and because the President frequently may wish to exercise constitutional powers that require Congress's cooperation. He certainly had an "interest" in treating the pro forma session on Dec. 23, 2011, as constitutionally legitimate, in view of the fact that the Senate passed legislation that he signed into law without any qualm about the legitimacy of the pro forma session.

CONCLUSION

Each of the three approaches discussed here emphasizes a different set of interpretive tools. There are arguments for adopting any one of them. But none of these methodological approaches, consistently pursued, can ultimately sustain the Solicitor General's theory of the Recess Appointments Clause.

Respectfully submitted.

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APPENDIX A

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