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ANALYSIS

SCOTUS and the Future of the Recess Appointment Power

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INTRODUCTION

In *National Labor Relations Board v. Noel Canning*, the Supreme Court will opine on a constitutional provision with important implications for the functioning of our democracy. At issue is the scope of the president's power under the Constitution's "Recess Appointments Clause," through which the president can make temporary executive and judicial appointments during Senate recesses, without Senate confirmation. These temporary appointments expire either at the end of the Senate's next session, or when a nominee is confirmed by the Senate and receives a commission from the president.

The recess appointment power has played an important role in our nation's history by helping keep the government running smoothly when the Senate was unable to provide its advice and consent on nominations, for reasons ranging from lengthy holidays to minority obstruction through the filibuster. In a recent decision, the U.S. Court of Appeals for the D.C. Circuit interpreted the Recess Appointments Clause narrowly, dramatically limiting the president's recess appointment power and undoing long-standing and settled expectations about its scope. If the D.C. Circuit's decision is upheld by the Supreme Court, the loss of this important tool would profoundly alter the balance of power between the president and the Senate.

A complex case that raises knotty issues of constitutional interpretation — and defies easy ideological categorization — *Noel Canning* could upend generations of practice. If the Supreme Court adopts the D.C. Circuit's reasoning, thousands of temporary appointments — from Thurgood Marshall to Alan Greenspan — would have been illegal. And vital agencies, such as the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC), would have faced lengthy periods without a quorum.

Though the risk of future Senate obstruction has been tempered by recent changes to the filibuster rules for presidential nominees (excluding Supreme Court justices), new hurdles to the confirmation process are already emerging. Likewise, a future Senate majority hostile to the president could dramatically impede the confirmation process for nominated executive officials and judges, regardless of their qualifications. As has been true throughout history, the Recess Appointments Clause thus plays an important role as a backstop to ensure functioning government. In *Noel Canning*, the Supreme Court will decide whether to preserve this role or to dramatically circumscribe it.

The Recess Appointments Clause (Article II, § 2, cl. 3):

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.

I. CASE BACKGROUND

Noel Canning stems from a collective bargaining dispute between the Noel Canning corporation, a bottler and distributor of Pepsi products, and the International Brotherhood of Teamsters Local 760. But the constitutional issues raised by the case regard the legality of three recess appointments to the five-member National Labor Relations Board in January 2012.

In February 2012, a three-member panel of the Board unanimously affirmed an administrative law judge's decision that the Noel Canning corporation had engaged in unfair labor practices.¹ Noel Canning appealed the ruling to the D.C. Circuit, arguing that the recess appointments to the NLRB were illegal under the Constitution. If the recess appointments were illegal, the NLRB's ruling against Noel Canning would lack legal force because the Board would have lacked the statutorily-required quorum when it made its decision.²

Court observers expected a legal challenge to these NLRB appointments, but not for the reasons ultimately identified by the D.C. Circuit. Rather, at the time of the appointments, all eyes were on the Senate's novel use of "*pro forma*" sessions during the holiday recess, raising the question of whether these sessions could block the president from making recess appointments. For more than a month, pursuant to a Senate order that "no business" be conducted, every three or four days a senator would gavel an almost vacant chamber into session, wait no more than 30 seconds, then gavel the session closed.³ The use of *pro forma* sessions itself was not unprecedented — for example, such sessions had been used in the past to comply with the Senate's constitutional obligation to meet at noon on January 3.⁴ However, the Senate had never sought to use *pro forma* sessions to interfere with the president's recess appointment power until 2007, when Majority Leader Sen. Harry Reid (D-Nev.) first introduced the tactic in an effort to block recess appointments by President George W. Bush.

If Democrats Controlled the Senate and the White House, Why Did the Senate Hold *Pro Forma* Sessions?

In short, House Republicans forced the Senate's hand. The Constitution's "adjournment clause" prohibits either house of Congress from adjourning for more than three days without the consent of the other.⁵ Because the Republican-controlled House refused to give such consent, the Senate chose to hold *pro forma* sessions where no business was to be conducted. The House's refusal followed earlier requests by 20 Republican senators to House Speaker John Boehner asking him "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term."⁶ That request was followed by a letter from 77 representatives to Speaker Boehner requesting that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress."⁷

This procedural trick was part of a long pattern of obstruction, by both Democrats and Republicans, around NLRB nominations, in an effort to deny the agency a quorum. Sen. Lindsey Graham (R-S.C.) spoke favorably

of this state of affairs, noting, “the NLRB as inoperable could be considered progress.”⁸ President Barack Obama, maintaining that Senate sessions that existed in name only could not deprive him of his recess appointment power, appointed the three new NLRB members during this period.

In ruling in favor of Noel Canning, the D.C. Circuit brushed aside the *pro forma* sessions question to issue a far more sweeping decision. Breaking with long historical practice and judicial precedent to the contrary, the D.C. Circuit held that the president’s recess appointment power is far narrower than had been commonly understood (and used by presidents of both parties). Interpreting the meaning of the phrase “Vacancies that may happen during the Recess of the Senate,” the court based its decision on what it described as the “natural meaning of the text as it would have been understood at the time of the ratification of the Constitution.”⁹ The court ruled that Obama’s January 2012 NLRB appointments were illegal for two reasons. First, the appointments were made during a recess that took place *during* a Senate session (called an *intrasession* recess) rather than *between* Senate sessions (called an *intersession* recess). Second, the vacancies that were filled did not arise *during* the Senate’s recess.

In other words, the D.C. Circuit placed two very limited conditions on recess appointments. First, the Senate had to be in recess between sessions, and second, the vacancy the president was filling had to arise during this period. The Supreme Court agreed to review the ruling, as well as the original question of whether the president’s recess appointment power may be exercised during a period when the Senate is holding *pro forma* sessions.

Nuts and Bolts: The Three Issues Before the Supreme Court

There are three questions before the Supreme Court. For the NLRB recess appointments to be found constitutional, the Court must answer yes to each question.

1. Can the president use the recess appointment power during intrasession recesses?

The Senate has two types of recesses: *intersession* and *intrasession*. The first question before the Court is whether *intrasession* recesses qualify as a “recess” for purposes of the Recess Appointments Clause, or if only *intersession* recesses qualify.

Intersession recesses are those that take place *between* the annual sessions of Congress. In recent decades, congressional sessions have typically lasted from January 3 until sometime in the fall or winter.¹⁰ Consequently, each Congress has usually consisted of two sessions of nine to twelve months each, with an *intersession* recess in the middle.¹¹ The break between the second session of the outgoing Congress and the first session of the incoming Congress is also an *intersession* recess.¹² There is no dispute that the president can make recess appointments during *intersession* recesses.

Intrasession recesses are those that take place *during* a Senate session. Recently, Congress has typically had from five to eleven *intrasession* recesses (of more than three days in length) per session, usually around national holidays.¹³ The Court must determine whether the president can make recess appointments during these *intrasession* recesses.

Significantly, the Senate can manipulate its calendar so that all of its holiday time qualifies as an *intrasession* recess to try to prevent recess appointments. For example, there was no *intersession* recess between the 2011 and 2012 Senate sessions in which Obama made the recess appointments at issue in this case. A decision barring *intrasession* recess appointments would therefore potentially eliminate the president's power to make recess appointments at all.

2. Can the president use the recess appointment power when the Senate is holding regular *pro forma* sessions during a recess?

If the Supreme Court decides that the president can make *intrasession* recess appointments, the Court must also decide whether the 2011-2012 holiday recess that included the *pro forma* sessions qualifies as a "recess" under the Recess Appointments Clause. If the *pro forma* sessions prevented a recess from occurring, the president could not have invoked his recess appointment power. Since *pro forma* sessions can be chained together indefinitely to repeatedly interrupt a Senate recess, if this tactic is accepted by the Court, it would give the Senate the power to nullify the president's recess appointment power altogether.

3. Is a vacancy that opened before a Senate recess eligible for a recess appointment?

The Court will also consider whether the president can make appointments during a recess for any then-existing vacancies or only those that opened *during* the recess itself. The question concerns how to interpret the phrase "Vacancies that may happen during the Recess."¹⁴ Under the narrower constitutional interpretation by the D.C. Circuit, a vacancy that arose before the Senate entered a recess could not be filled by the president through the recess appointment power. Instead, only a vacancy that began during the recess could be filled.

A decision upholding the D.C. Circuit's interpretation would profoundly weaken the president's appointment power, stripping the president of the ability to fill long-standing vacancies even if they opened without sufficient time for the Senate to consider them or were blocked due to Senate obstruction.

II. INTERPRETING THE RECESS APPOINTMENTS CLAUSE

Noel Canning raises challenging interpretative issues for the Supreme Court. The text of the Recess Appointments Clause can be plausibly read to support either the broad or the narrow interpretation put forward in this case, as illustrated by scholarly debates about the meaning of the clause,¹⁵ conflicting readings by the lower courts,¹⁶ and the briefs of the parties.¹⁷

The “intent” of the clause is no less ambiguous in today’s world, which bears little similarity to the time the Constitution was written. In the nation’s early history, the Senate typically took long intersession recesses to give senators time to travel home. Changes in communications and transportation, along with a constitutional amendment that moved the start of the Senate’s term from March to January,¹⁸ led to significant changes in the traditional Senate calendar, including the rise of intrasession recesses.¹⁹ The modern hyper-partisanship surrounding presidential nominations was likewise never envisioned by the Framers.

As the Brennan Center argued in an amicus brief filed with the Supreme Court,²⁰ under these circumstances, the best reading of the Recess Appointments Clause is the one that preserves the president’s recess appointment power — and with it, the ability to ensure functioning agencies and courts if the Senate fails to fulfill its advice and consent duties, for whatever reason. As President James Polk’s Attorney General John Mason observed in 1846: “The constitution . . . requires that the President shall take care that the laws be faithfully executed. . . . Offices without officers are useless to the public; and the constitution may fairly receive such a construction as will accomplish its ends without doing violence to its terms.”²¹

The president’s long-standing practice of utilizing a broad interpretation of the Recess Appointments Clause further supports this interpretation. As Justice Felix Frankfurter wrote in 1952, “Deeply embedded traditional ways of conducting government cannot supplant the Constitution . . . but they give meaning to the words of a text or supply them.”²²

III. THE D.C. CIRCUIT'S RADICAL DEPARTURE

The D.C. Circuit invoked a narrow interpretation of the Recess Appointments Clause in rejecting wholesale the long-standing understanding about the meaning and scope of the president's recess appointment power. Presidents have extensively used this power throughout the nation's history, both for vacancies that pre-dated a recess and during intrasession recesses.

The recess appointment power has been used by every president except William Henry Harrison, who died a month after taking office.²³ While incomplete record-keeping makes it impossible to determine exactly how many of these appointments would have been illegal under the reasoning of the D.C. Circuit, the total easily reaches into the thousands, according to research conducted by the solicitor general for this case.²⁴

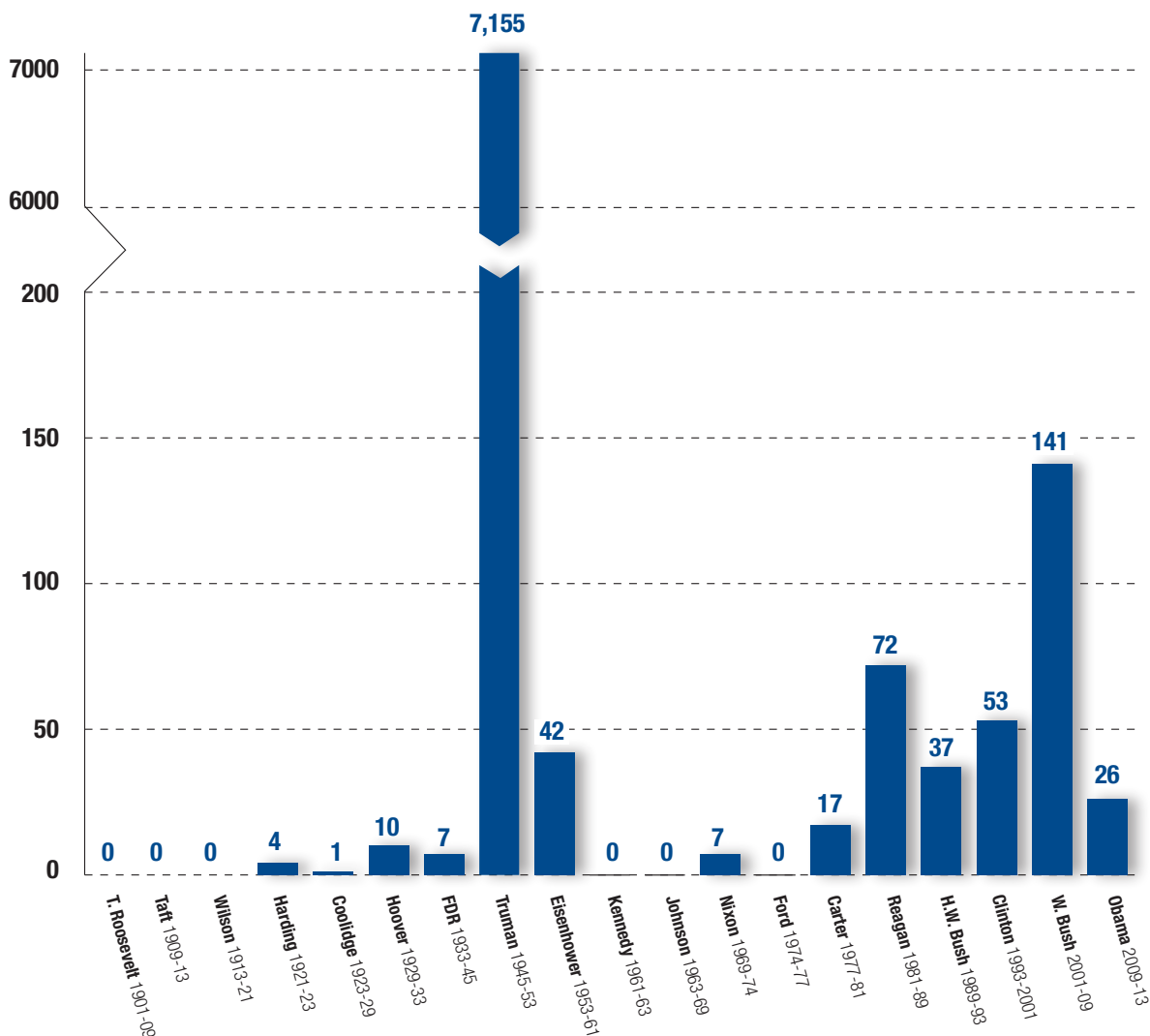
As early as 1823, President James Monroe's attorney general issued an opinion that the president could use the recess appointment power to fill vacancies that arose *before* a Senate recess, a practice that the D.C. Circuit decision held was unconstitutional.²⁵ Although the early historical record is murky, there is some evidence that the practice dates all the way back to George Washington (though Washington's attorney general expressed the position that such appointments were not permitted).²⁶ John Adams expressed the view that the timing of the vacancy did not matter for purposes of making recess appointments,²⁷ and there is also strong evidence that James Madison, the principal author of the Constitution, used recess appointments to fill vacancies that opened during Senate sessions.²⁸

Since 1823, at least 35 of Monroe's 38 successors have filled vacancies that opened prior to the recess in which the appointment occurred.²⁹ Recess appointees include David Davis as a Supreme Court Justice (1862), Benjamin Bristow as Solicitor General (1870), Charles Edison as Secretary of the Navy (1939), Thurgood Marshall as a Judge on the Court of Appeals for the Second Circuit (1961), Irving Kristol as a Member of the Corporation for Public Broadcasting (1972), and Lawrence Eagleburger as Secretary of State (1992).³⁰

Past presidents have also repeatedly made intrasession recess appointments, another practice deemed illegal under the D.C. Circuit's reasoning. Intrasession recess appointments have been documented as early as 1867 — the first time there was an intrasession recess of 20 days or longer. Indeed, before the Civil War, only five intrasession recesses exceeded three days.³¹

At least 14 presidents have collectively made at least 600 civilian recess appointments during intrasession recesses.³² While there are fewer records regarding military appointments, it is well-established that President Harry Truman made more than 5,000 military intrasession recess appointments in order to comply with statutory deadlines for commissioning and promoting officers.³³ Since Truman, every president but Kennedy, Johnson, and Ford has made intrasession appointments. Since 1981, there have been 329 intrasession recess appointments, with Presidents Ronald Reagan and George W. Bush relying on them most.³⁴

Intrasession Recess Appointments Since 1901³⁵



Individuals who received intrasession recess appointments include Dwight Eisenhower as a Major General of the U.S. Army (1943), Dean Acheson as Under Secretary of State (1945), Roscoe Hillenkoetter as Director of Central Intelligence (1947), Neil Goldschmidt as Secretary of Transportation (1979), Jeane Kirkpatrick as United Nations Representative (1981), Alan Greenspan as Federal Reserve Chair (1991), and John Bolton as U.S. Representative to the United Nations (2005).³⁶ Intrasession recess appointments have been used to appoint at least:

- 2 U.S. court of appeals judges;
- 12 U.S. district court judges;
- 39 ambassadors;³⁷
- 4 cabinet members;
- 2 SEC commissioners;
- 5 EEOC commissioners; and
- 19 NLRB members.

With respect to the final question before the Supreme Court, whether a period with *pro forma* sessions qualify as recesses, there is of course no long historical record to discuss because the practice was first utilized only seven years ago. Yet any common sense definition of recess would surely include the period that included these brief sessions, which were created by an order that stated that there would be “no business conducted.” The *Congressional Record* also referred to this period as a “recess.”³⁸ To accept that the *pro forma* sessions prevented the Senate from recessing would give the Senate the power to eliminate recess appointments altogether.

IV. RECESS APPOINTMENTS HAVE PLAYED A VITAL ROLE IN ENSURING A FUNCTIONING GOVERNMENT

The president has the constitutional duty to “take Care that the Laws be faithfully executed.”³⁹ But as the Supreme Court has explained, “the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”⁴⁰ In the normal course of events, the president nominates these subordinates and the Senate either confirms or rejects them. Judicial vacancies are filled the same way.

Reality has not played out so neatly. During the nation’s history, circumstances have arisen which have made expeditiously filling presidentially-appointed positions difficult, impractical, or impossible. For this reason, a robust recess appointment power has been a crucial tool in ensuring the government’s ability to function effectively. Since at least the early 19th century, temporary recess appointments have been used to fill vacancies that opened shortly before the end of the Senate’s session — something that would be illegal under the narrow approach adopted by the D.C. Circuit, and which could leave important posts unfilled for months.⁴¹ For example, in 1813, President Madison used a recess appointment to fill a district court vacancy that opened shortly before the Senate recessed.⁴² Again in 1815, Madison filled two new positions created shortly before the Senate recessed.⁴³ In the absence of recess appointments, the two posts would have gone unfilled for at least eight months.⁴⁴

Appointments made during intrasession recesses — also illegal according to the D.C. Circuit — have become increasingly important as the Senate’s calendar has evolved to include often-lengthy within-session recesses. Truman, for example, appointed thousands of Army and Air Force officers, along with the Director of Central Intelligence and the Secretary of the Air Force, while the Senate was in a nearly four-month recess from July 27 through November 17, 1947. These actions would have been illegal under the D.C. Circuit’s cramped interpretation of the recess appointment power.⁴⁵

A strong recess appointment power has also been important in enabling government functionality in the face of Senate obstruction of the confirmation process, such as the use of the filibuster and other parliamentary maneuvers to block or delay the consideration of nominees.

When President John F. Kennedy nominated Thurgood Marshall to the Second Circuit Court of Appeals, a group of Southern senators blocked a vote on his nomination for nearly a year. A recess appointment enabled him to serve on the court during this time. Marshall, who later became the first African-American Supreme Court justice, was subjected to four months of hearings in which he was accused of participating in illegal activities when he served as head of the NAACP Legal Defense and Educational Fund, engaging with Communist groups, and committing ethical improprieties while drafting his brief for *Brown v. Board of Education*. None of these accusations were ever proven.⁴⁶ Because Marshall’s recess appointment filled a new seat that was created while the Senate was in session, the D.C. Circuit’s constrained reading would have made it illegal.

More recently, the filibuster emerged as a powerful tool for the Senate minority to effectively veto nominees without providing an opportunity for an up-or-down vote. According to the Congressional Research Service, nearly half of all cloture motions ever filed or reconsidered on nominations were made from 2009-2013.⁴⁷

The experiences of recent NLRB nominees are a prime example of Senate obstruction. If the president had not repeatedly exercised the recess appointment power to maintain a quorum at the NLRB, a Senate minority would have paralyzed the agency's operations from August 2011 to August 2013. In fact, but for recess appointments, the NLRB would have been without a quorum for a total of 2,885 days since 1988 — almost eight years.⁴⁸ Instead, during these periods, the NLRB issued 4,240 decisions.⁴⁹ Since the creation of the agency in 1935, recess appointments have filled 32 board vacancies, with 19 of those positions having been filled by intrasession appointments (59 percent).⁵⁰

The Consumer Financial Protection Bureau (CFPB) would have similarly been immobilized in the absence of its director's recess appointment. The CFPB was created in 2011 in the wake of the financial crisis to protect consumers' interests, and much of its enforcement authority is contingent on the appointment of a director. Among other duties, the CFPB director regulates nondepository institutions, such as mortgage companies, and payday and private education lenders.

After Obama nominated Richard Cordray to be the first CFPB director, a group of 44 senators vowed to block his nomination, not because of Cordray's background or qualifications, but because of objections to the agency's structure. The senators announced they would “not confirm any nominee, regardless of party affiliation.”⁵¹

Seeing no movement from the Senate from the time of Cordray's nomination in July 2011, the president appointed Cordray during an *intrasession* recess on January 4, 2012, while continuing to seek confirmation through the Senate.⁵² The president re-nominated Cordray during the next Senate term, where he continued to face opposition until he was eventually confirmed in July 2013 as part of a temporary Senate deal to preserve the filibuster for executive nominations.⁵³ Had Obama not exercised his recess appointment power to appoint Cordray while his nomination was pending, key functions of the CFPB would have been paralyzed for a year and a half.

Other agencies would also have lost their quorums in the absence of recess appointments.⁵⁴ Since 1981, the EEOC would have lacked a quorum for at least 270 days,⁵⁵ during which it issued 3,479 decisions.⁵⁶ The Occupational Safety and Health Review Commission, which is in charge of resolving disputes related to OSHA citations, would have lacked a quorum for at least 1,113 days.⁵⁷ While recess appointments to judicial offices have been less common, since 1981, three recess-appointed judges participated in 147 reported appellate decisions and many other unreported decisions.⁵⁸

Implications of an Adverse Decision

If the Supreme Court affirms the D.C. Circuit's decision, the NLRB's decision against the Noel Canning company would be invalidated. This raises the question of what would happen to the decisions of the other recess appointees from over the centuries whose appointments would also be improper under the D.C. Circuit's reasoning. Would all of their previous actions be invalidated as well, resulting in a tremendous upheaval of previously settled matters?

Although a ruling affirming the D.C. Circuit decision may well prompt significant litigation, judicial precedents suggest that most previous decisions would likely stand. Under the *de facto* officer doctrine, the actions of an individual who seemed to hold a position properly, but in fact held it improperly, generally cannot be challenged.⁵⁹ The doctrine protects reasonable reliance upon these officials' acts and preserves the orderly progress of society generally.⁶⁰

However, while this *de facto* officer doctrine would insulate many of the past decisions made by recess appointees, the Supreme Court has ruled that this doctrine does not apply to "timely" challenges to the constitutional validity of an appointment.⁶¹ While the scope of this exception is unsettled, it is likely that recent actions still eligible for appeal could be challenged.⁶²

The consequences for President Obama and future presidents could also be dire. Through effective calendar manipulation, an uncooperative Senate could eviscerate the recess appointment power, preventing executive officials and judges from ever taking their seats.

To be sure, the Senate is not alone in abusing the confirmation process — the president's recess appointment power has also been used improperly in the past. Prof. Michael Rappaport of the University of San Diego School of Law explained a prime example from Theodore Roosevelt's presidency:

In 1903, the Senate ended its old session and began its new session on the same day. The presiding officer struck the gavel down once to end the old session and then immediately did so again to start the new session. Thus, the "intersession recess" lasted only for the brief instant between the two gavel strikes. President Theodore Roosevelt, however, argued that there was nonetheless an intersession recess at the moment between the two sessions that allowed him to make a recess appointment.⁶³

Roosevelt appointed more than 160 people between the gavel strikes, mostly military officers.⁶⁴

While Roosevelt's actions stretched the Recess Appointments Clause past its breaking point, it also illustrates the way the political branches have interacted to maintain an appropriate balance of power regarding recess appointments. Fourteen months after Roosevelt's appointments, the Senate Judiciary Committee "emphatically rejected Roosevelt's action,"⁶⁵ and such an action has not been attempted by a president since.⁶⁶

Indeed, because the president is accountable to the public in ways that a collective body like the Senate is not, this kind of presidential abuse can be quickly identified and exploited by the opposing party to the president's disadvantage. The Constitution further protects against abuse by making recess appointments temporary, thus limiting the benefits of presidential gamesmanship.

Of course, the dynamics of the nomination and confirmation process dramatically changed in November 2013 due to changes to the Senate's filibuster procedure. In response to continued obstruction of presidential nominees, Senate Democrats changed the filibuster procedure to require only a majority vote to end debate regarding executive and judicial nominees (other than Supreme Court justices). Yet recess appointments continue to be important for overcoming obstruction.

New obstruction tactics have already taken hold in the Senate to slow down confirmations. For example, Senate Republicans recently relied upon a rule providing for up to 30 hours of debate on most nominees — frequently waived as a courtesy in the past — as a way to delay votes on nominees.⁶⁷ A custom that home state senators must consent before a judicial nominee can be considered by the Judiciary Committee has also taken on increased importance.⁶⁸ Beyond this, the filibuster of nominees may return in a new incarnation in a future Senate term, perhaps as part of a broader compromise on the filibuster rule. Likewise, a hostile Senate majority may one day play a similar role in refusing to put nominees to a vote, based not on their qualifications, but in an effort to sideline the president's capacity to execute the law.

CONCLUSION

Noel Canning will have important implications for the functioning of the government and the balance of power between the political branches. Should the Supreme Court follow the D.C. Circuit and substantially narrow the president's recess appointment power, our democracy will lose an important tool for ensuring a functioning government.

ENDNOTES

- ¹ Noel Canning, 358 N.L.R.B. No. 4 (2012), *vacated by* Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).
- ² 29 U.S.C. §153(b). In order to act at all, the NLRB must have at least three members. Without the three recess appointments, the Board would not have had a quorum. In addition, the panel that adjudicated the dispute contained two recess appointees.
- ³ Brief for the Petitioner at 2-3, NLRB v. Noel Canning, No. 12-1281 (U.S. Sept. 13, 2013) [hereinafter NLRB Merits Brief]. Technically, this period was broken into two distinct parts because the 111th Congress ended and the 112th Congress began at noon on January 3, 2012; Congress is constitutionally required to meet at that time. U.S. CONST. amend. XX, § 1, *amending* U.S. CONST. art. I, § 4, cl. 2. The Senate also passed the Temporary Payroll Tax Cut Continuation Act of 2011 on December 23, 2011 through a unanimous consent agreement. 157 CONG. REC. S8789.
- ⁴ U.S. CONST. amend. XX, § 1, *amending* U.S. CONST. art. I, § 4, cl. 2; CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., MEMORANDUM RE: CERTAIN QUESTIONS RELATED TO PRO FORMA SESSIONS OF THE SENATE, 158 CONG. REC. S5954-55 (daily ed. Aug. 2, 2012).
- ⁵ U.S. CONST. art. I, § 5, cl. 4.
- ⁶ Maya Jackson Randall, *GOP Senators Turn to Boehner to Stop Recess Appointment*, WALL ST. J. WASH. WIRE (May 26, 2011, 12:16 PM), <http://blogs.wsj.com/washwire/2011/05/26/gop-senators-turn-to-boehner-to-stop-recess-appointment/>.
- ⁷ Binyamin Appelbaum, *House Republicans' Solution to Recess Appointments? No Recess*, N.Y. TIMES (June 20, 2011, 6:26 PM), <http://thecaucus.blogs.nytimes.com/2011/06/20/house-republicans-solution-to-recess-appointments-no-recess/>.
- ⁸ Melanie Trottman, *High Hurdles for Labor Board Nominees*, WALL ST. J. WASH. WIRE (May 16, 2013, 6:06 PM), <http://blogs.wsj.com/washwire/2013/05/16/high-hurdles-for-labor-board-nominees/>.
- ⁹ Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013). *See also infra* note 16 (listing judicial precedent on this issue).
- ¹⁰ HENRY B. HOGUE, CONG. RESEARCH SERV., RS21309, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS, at 2 (June 7, 2013), *available at* <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP\W%3B%20P%20%20%0A>.
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ U.S. CONST. art. II, § 2, cl. 3.
- ¹⁵ *See, e.g.*, Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005).

- ¹⁶ Compare *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) with *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *United States v. Alocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). In the recent Third Circuit decision agreeing with the D.C. Circuit’s interpretation of “the recess,” the majority nonetheless acknowledges that either interpretation would fit within a natural reading of the text and dictionaries contemporaneous with the Founding, *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 221 (3d Cir. 2013), while the dissent held that “the recess” encompassed intrasession recesses, *id.* at 270 (Greenway, J., dissenting) (“The inclusion of intrasession recesses in the ambit of the Recess Appointments Clause is the interpretation most faithful to the text of the Constitution, the intent of the Framers, the purpose of recess appointments, and the tradition and practice of both the President and the Senate.”). See also *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609 (4th Cir. 2013), and the conflicting interpretation of the majority and the dissent there.
- ¹⁷ All Supreme Court briefing is available at National Labor Relations Board v. Noel Canning, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/>.
- ¹⁸ U.S. CONST. amend. XX, § 1, *amending* U.S. CONST. art. I, § 4, cl. 2.
- ¹⁹ Brief of Respondent Noel Canning at 68, *NLRB v. Noel Canning*, No. 12-1281 (U.S. Nov. 18, 2013).
- ²⁰ Brief for the Brennan Center for Justice as Amicus Curiae Supporting Petitioner and Reversal, *NLRB v. Noel Canning*, No. 12-1281 (U.S. Sept. 20, 2013), 2013 WL 5316699, *available at* <http://www.brennancenter.org/sites/default/files/legal-work/NLRB%20v.%20Canning%20Brennan%20Center%20amicus%20brief.pdf>.
- ²¹ Powers of the President to Fill Offices During the Recess of the Senate, 4 Op. Att’y Gen. 523, 525-26 (1846) (Att’y Gen. Mason).
- ²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).
- ²³ See *NLRB Merits Brief*, *supra* note 3, at 65a-89a (listing illustrative intersession recess appointments and identifying recess appointments for every president but John Adams, Andrew Jackson, William Henry Harrison, and Franklin Pierce); *Biographical Directory of Federal Judges, 1789-present*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (identifying examples of recess appointments made by Adams (Justice Bushrod Washington), Jackson (Judge Philip Pendelton Barbour), and Pierce (Judge William Fell Giles)).
- ²⁴ See *NLRB Merits Brief*, *supra* note 3, at 1a-64a (listing approximately 7,623 known recess appointments that would have been illegal under the D.C. Circuit’s reasoning).
- ²⁵ Executive Authority to Fill Vacancies, 1 Op. Att’y Gen. 631, 632-33 (1823) (Att’y Gen. Wirt).
- ²⁶ *NLRB Merits Brief*, *supra* note 3, at 38-42; see also Hartnett, *supra* note 15, at 388-90 (discussing the unclear historical record and arguing that George Washington and John Adams both may have made recess appointments to vacancies that opened prior to the recess at issue). *But see* Brief for the Constitutional Law Scholars as Amicus Curiae Supporting Respondent at 8-13, *NLRB v. Noel Canning*, No. 12-1281 (U.S. Nov. 25, 2013), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/Constitutional-Law-Scholars-amicus-brief-NLRB-v.-Noel-Canning-U.S.-Supreme-Court.pdf> (arguing that George Washington and Thomas Jefferson accepted a narrow interpretation of the recess appointment power).
- ²⁷ *NLRB Merits Brief*, *supra* note 3, at 41 (citing Letter from Adams to McHenry (Apr. 16, 1799), in *THE WORKS OF JOHN ADAMS* 632-33 (Charles Francis Adams ed., 1853)).

28 NLRB Merits Brief, *supra* note 3, at 42-43; *see also* Hartnett, *supra* note 15, at 400 (expressing “confiden[ce]” that Madison used recess appointments to fill vacancies that opened during a Senate session); Brief for the Constitutional Law Scholars as Amicus Curiae Supporting Respondent at 13, *N.L.R.B. v. Noel Canning*, No. 12-1281 (U.S. Nov. 25, 2013) (conceding that Madison made recess appointments for the first U.S. Attorney and Marshall for the Territory of Michigan, two positions that were created during a Senate session).

29 NLRB Merits Brief, *supra* note 3, at 12.

30 *Id.* at 71a-86a.

31 *Id.* at 21-22.

32 *Id.* at 8. The number is significantly higher if military recess appointments are included; President Truman recess appointed 6,998 military officers during his time in office. *See id.* at 17a, 18a, 23a.

33 *Id.* at 25-26.

34 HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., MEMORANDUM RE: THE NOEL CANNING DECISION AND RECESS APPOINTMENTS MADE FROM 1981-2013, at 4 (Feb. 4, 2013).

35 *See* NLRB Merits Brief, *supra* note 3, at 1a-89a (listing all known intrasession recess appointments); HOGUE ET AL., *supra* note 34, at 4.

36 NLRB Merits Brief, *supra* note 3, at 11a, 12a, 15a, 34a, 40a, 58a.

37 Includes 6 appointees to the comparable positions of Envoy Extraordinary and Minister Plenipotentiary, Prussia; Consul, Taranto; Consul, Mecklenburg Schwerin; Envoy/Minister to Venezuela; Envoy/Minister to Syria; and U.S. Special Representative to the Provisional Government of Israel.

38 157 CONG. REC. S8783-84 (daily ed. Dec. 17, 2011).

39 U.S. CONST. art. II, § 3.

40 *Myers v. United States*, 272 U.S. 52, 117 (1926).

41 Recess appointments also allow positions to be temporarily filled while the Senate deliberates the merits of nominees. The Senate has no power to temporarily fill spots while it deliberates — this power lies solely with the President. Once a nominee is confirmed by the Senate, removal of the official by the Senate is impossible other than through an impeachment trial (the charges of which must have first been brought by the House). For example, in 1948, the secretary of labor died shortly before a Senate recess. When the Senate returned, Senator Robert Taft suggested that precisely this procedure should be used to allow the position to be filled but also allow the Senate to follow its full confirmation process. President Truman obliged by making a recess appointment, preventing the position from being vacant for the next four and a half months. This procedure has been used on many other occasions. NLRB Merits Brief, *supra* note 3, at 32-33.

42 *Id.* at 42.

43 *Id.* at 43.

44 *Id.* There is also at least one occurrence where news of the death of an executive officer reached the President only after the Senate had recessed. Under the narrow interpretation of the Recess Appointments Clause, the President would have been powerless to fill the position. *Id.* at 32, 69a. As one law professor succinctly explained, “If the president needs to make an appointment and the Senate is not around, when the vacancy arose hardly matters; the

point is that it must be filled now.” Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (And Others)*, 26 CARDOZO L. REV. 442, 445-46 (2005).

⁴⁵ NLRB Merits Brief, *supra* note 3, at 25-26.

⁴⁶ Richard L. Revesz, *Thurgood Marshall’s Struggle*, 68 N.Y.U. L. REV. 237, 238-46 (1993).

⁴⁷ RICHARD S. BETH & ELISABETH RYBICKI, CONG. RESEARCH SERV., MEMORANDUM RE: NOMINATIONS WITH CLOTURE MOTIONS, 2009 TO THE PRESENT, at 1-2, Nov. 21, 2013, *available at* <http://democrats.senate.gov/wp-content/uploads/2013/11/CDM-cloture-on-noms-113-to-nov20-11-21-13.pdf>.

⁴⁸ Recess appointments were taken from NLRB Merits Brief, *supra* note 3, at 1a-89a, and cross-checked with other sources. *See* HOGUE ET AL., *supra* note 34; *Members of the NLRB since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Jan. 3, 2014) (failing to mention the four recess appointments from 1935 to 1980); *NLRB Trivia*, NLRB, <http://www.nlr.gov/75th/trivia.html> (click “Check the Answer” for very last question on the page) (last visited Jan. 2, 2014) (indicating Abe Murdock and J. Copeland Gray were recess appointees in 1947); *Board Members Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Jan. 3, 2014) (listing John Truesdale as a recess appointee in 1980). John M. Houston’s recess appointment in 1948 was counted because it was listed in the NLRB’s Supreme Court merits brief, but the fact of his recess appointment could not be independently verified or disproven.

⁴⁹ The number of decisions was derived from Westlaw database searches restricted to the dates during which the NLRB had a quorum but would have lacked a quorum if seats filled by recess appointments were considered vacant instead.

⁵⁰ *See supra* note 48.

⁵¹ News Release, Sen. Richard Shelby, 44 U.S. Sens. to Obama: No Accountability, No Confirmation (May 5, 2011), *available at* <http://www.shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation>.

⁵² Press Release, Office of the Press Secretary, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. This appointment was during the same break at issue in *Noel Canning*.

⁵³ U.S. Senate, Vote Summary on the Nomination (Confirmation Richard Cordray, of Ohio, to be Director of the Bureau of Consumer Financial Protection), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00174. *See also* 159 CONG. REC. S5715 (daily ed. July 16, 2013) (noting confirmation of Cordray to be director of the CFPB).

⁵⁴ The recess appointments described in this paragraph include both intra- and intersession appointments. All of the intrasession recess appointments would have been illegal under the D.C. Circuit’s decision. With respect to the intersession recess appointments, it is likely that in many cases the relevant vacancy opened prior to the recess, rendering them illegal as well under the D.C. Circuit’s reasoning.

⁵⁵ The recess appointments followed a period in which the EEOC had only two commissioners. During this period, the EEOC purported to delegate decision-making authority to these two commissioners, and issued decisions according to this delegated authority despite not having a quorum. *See* EEOC v. Aerotek, Inc., 498 Fed. Appx. 645, 647 (7th Cir. 2013) (describing this practice). While the EEOC would have continued to act according to this delegated authority absent the recess appointments, the legality of this practice is uncertain in light of the

Supreme Court's ruling in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), which held that a similar delegation by the NLRB was not permitted by the relevant statute. See *Aerotek*, 498 Fed. Appx. at 648 (“[W]e save the issue of whether the EEOC may conduct its business without a three-member quorum for another day.”).

⁵⁶ Appointment dates were taken from HOGUE ET AL., *supra* note 34. Confirmation and departure dates were derived from *Commissioners of the EEOC*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/history/commissioners.html> (last visited Jan. 3, 2014) and Jessica L. Herbster, *Recess Appointees to NLRB and EEOC Take Office*, SCHWARTZ HANNUM PC LEGAL UPDATES, June 2010, <http://shpclaw.com/Schwartz-Resources/recess-appointees-to-nlr-and-eeoc-take-office/>. The number of decisions was derived from Westlaw database searches restricted to the dates during which the EEOC had a quorum but would have lacked a quorum if seats filled by recess appointments were considered vacant instead (namely, from March 27, 2010 until December 22, 2010).

⁵⁷ The list of recess appointees was taken from HOGUE ET AL., *supra* note 34. Term dates were taken from *Agency Chairmen and Commissioners*, OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, <http://www.oshrc.gov/about/agency-chairmen.html> (last visited Jan. 3, 2014). Senate confirmation dates were taken from the Occupational Safety and Health Review Commission website and the *Congressional Record* (on file with Brennan Center).

⁵⁸ The three judges are Roger L. Gregory (appointed December 27, 2000 and received his commission July 25, 2001), William H. Pryor (appointed February 20, 2004 and received his commission on June 10, 2005), and Charles W. Pickering (appointed January 16, 2004, retired December 8, 2004, and was never confirmed). Westlaw searches for these judges show they participated in 15, 80, and 52 reported cases, respectively, during the duration of their temporary appointments.

⁵⁹ “The de facto officer doctrine confers validity upon acts performed by a person acting under color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.” *Ryder v. United States*, 515 U.S. 177, 180 (1995) (citing *Norton v. Shelby County*, 118 U.S. 425, 440 (1886)). See also Rose E. Davies, *William Cushing, Chief Justice of the United States*, 37 U. TOL. L. REV. 597, 644 (2006).

⁶⁰ Davies, *supra* note 59, at 627.

⁶¹ *Ryder*, 515 U.S. at 182-83.

⁶² See *Nguyen v. United States*, 539 U.S. 69, 78 (2003); Rappaport, *supra* note 15, at 1577 & n.257.

⁶³ Rappaport, *supra* note 15, at 1555 n.209.

⁶⁴ T.J. HALSTEAD, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 10 (July 26, 2005).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Of course, a full debate of nominees by the Senate ought to be encouraged, with both sides being given a full and fair opportunity to express their views. The reality, however, is that senators have primarily spent this time “attacking the president’s healthcare law or criticizing the rule changes” rather than “discussing the merits of the nominees.” Michael A. Memoli, *After Filibuster Rule Change, More Delay Tactics Bog Down Senate*, L.A. TIMES, Dec. 12, 2013, <http://www.latimes.com/nation/la-na-senate-nominations-20131213,0,3426342.story>.

⁶⁸ Charlie Savage, *Despite Filibuster Limits, A Door Remains Open to Block Judge Nominees*, N.Y. TIMES, Nov. 28, 2013, <http://www.nytimes.com/2013/11/29/us/politics/despite-filibuster-limits-a-door-remains-open-to-block-judge-nominees.html>.

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