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No. 12-1281

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

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

BRIEF OF RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

The President purported to make three "recess" appointments to fill preexisting vacancies on the National Labor Relations Board on January 4, 2012, the day after the Senate convened to commence the Second Session of the 112th Congress, and two days before the Senate convened in another Senate session. The questions presented are therefore:

1. Whether the President's recess-appointment power may be exercised during a break that occurs during the Senate's Session, or is instead limited to "the Recess of the Senate" that occurs between each enumerated Session.

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

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

RULE 29.6 DISCLOSURE

Respondent Noel Canning is a division of The Noel Corporation. Noel Canning has no other parent corporations, and no other publicly held company has a 10% or greater ownership interest in Noel Canning. Noel Canning is engaged in the bottling and distribution of soft drinks in Central and Eastern Washington and Northern Oregon.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The framers believed the unilateral power to appoint officers was the most "powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). To cabin that power, they created an Appointments Clause that "bespeaks a principle of limitation," "dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Id.* at 884. This division ensures that both political branches must generally endorse senior officials before those officials may wield federal power. In doing so, it supplies "structural protection[] against abuse of power" that is "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

The Recess Appointments Clause (the "Clause"), by contrast, was adopted without debate as a "supplement" to this power for "cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961) ("*Federalist 67*"). When Senators dispersed by horseback across the nation after the Session each year, the Clause ensured that the President could fill unexpected vacancies with "temporary appointments . . . which should expire[] when the senate should have had an opportunity to act on the subject." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551 (1833).

The Executive Branch (the "Executive") asks this Court to expand that subsidiary power to the point that it completely overwhelms the general. In this single case, it attempts to eradicate all meaningful limitations on the President's recess-appointment power, asserting authority to make recess

appointments: (1) *whenever* the President deems appropriate, so long as he believes there has been a "cessation" in the Senate Session (or, perhaps, a cessation exceeding three days); (2) to fill *whatever* office the President chooses, no matter how long vacant; and (3) *regardless* of whether the Senate is convening regularly. Taken together, the Executive's contentions yield a virtually unlimited unilateral appointments power.

The Constitution does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is inconceivable that this narrow "supplement" supplies the extravagant power the Executive now claims.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App. C, *infra*, 31a-41a.

STATEMENT OF THE CASE

On January 4, 2012, the President purported to "recess" appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board (the "Board"), even though (1) the Senate had convened the day before to commence the Second Session of the 112th Congress, (2) the Senate convened another session two days later, and (3) the vacancies to which these individuals were appointed arose prior to the supposed "recess" between those sessions. In so doing, the President, for the first time in history, attempted to make mid-Session "recess" appointments during a three-day break in Senate business.

1. Under 29 U.S.C. § 153(b), the Board must have a quorum of three lawfully appointed members. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). Prior to January 3, 2012, the Board had two Senate-confirmed members and a third—Craig Becker—who had been "recess" appointed on March 27, 2010, during a 17-day mid-Session break, *see* 156 Cong. Rec. D355 (daily ed. Mar. 26, 2010). If valid, Becker's appointment expired by January 3, 2012, when the first Session of the 112th Congress concluded. *See* Art. II, § 2, cl. 3. By January 3, 2012, the Board undisputedly lacked a quorum.

2. At that time, the Senate was operating under a December 17, 2011, adjournment order.

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro forma session the Senate adjourn until the following pro forma session.

Pet.App.91a. Thereafter, the Senate convened short, formal sessions on the specified days, including one where it passed the Temporary Payroll Tax Cut Continuation Act of 2011 and did other Senate business, and another where it satisfied its constitutional obligation under the Twentieth Amendment to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2.

Nevertheless, on January 4, 2012, the President unilaterally asserted that the Senate was in "recess" and proceeded to make the appointments at issue,

including for two nominees—Block and Griffin—whose nominations had been submitted to the Senate less than three weeks earlier and for whom committee questionnaires and background checks had not yet been submitted.[1] The next week, the Department of Justice's Office of Legal Counsel ("OLC") released a memorandum concluding that the President, in his "discretion," may determine that the Senate is in "the Recess" because it is unavailable to "'receive communications from the President or participate as a body in making appointments.'" *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. slip op. at 5 (Jan. 6, 2012) ("*OLC Memo*"). Key to this conclusion was OLC's assertion that pro forma sessions are constitutional nullities. *Id.* at 9.

3. Noel Canning is a family-owned soft drink bottling and distributing company in Yakima, Washington. In September 2011, an Administrative Law Judge ruled that it violated the National Labor Relations Act by refusing to execute a collective bargaining agreement it allegedly agreed to with Teamsters Local 760. Pet.App.2a. Noel Canning filed exceptions before the Board and briefing was completed on December 27, 2011, eight days before the "recess" appointments at issue. Resp. C.A. App. A3. The Board—in a panel featuring two of the "recess" appointees, Block and Flynn—issued its decision against Noel Canning on February 8, 2012,

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[1] *See* Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, *NLRB Recess Appointments Show Contempt for Small Businesses* (Jan. 4, 2012), http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb.

after which Noel Canning promptly filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit challenging the validity of the "recess" appointments. Pet.App.2a.

4. The parties proceeded to brief and argue in the court of appeals, with the Executive conceding at argument that, if the court "decide[s] that the Constitution gives the President this authority only in intersession," then "we lose." C.A.Tran. 45. Following argument, the court of appeals granted the Petition, holding that the January 4, 2012 appointments were invalid because (1) the Clause applies only to the break *between* the Senate's enumerated Sessions, and (2) the President may fill only those vacancies which arise during "the Recess." Pet.App.18a-52a. The panel did not address Noel Canning's separate argument that the recess appointments were also invalid because the Senate was convening "pro forma" sessions every three days.

SUMMARY OF ARGUMENT

"This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (quoting *Morrison v. Olson*, 487 U.S. 654, 694 (1988)). This case confronts that separation's greatest threat: "a gradual concentration of the several powers in the same department." *The Federalist No. 51*, at 321 (Madison) (Clinton Rossiter ed., 1961).

Over time, the Executive has rejected each of the textual limitations on the Clause. Here, it requests not only judicial ratification of those prior erosions, but also an additional, extraordinary expansion of the recess-appointment power that would enable the

President to make recess appointments even when the Senate is actively meeting. This unprecedented assertion of presidential power should be rejected.

1. On the first question, the Clause empowers the President to fill vacancies "during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. By linking "the Recess" to the "next Session," the Clause makes clear that the President may make unilateral appointments only during "the Recess" between enumerated Senate "Sessions."

The Executive, by contrast, seeks to give "the Recess" its colloquial meaning (every short break, rather than the formal, between-Session recess), while giving "next Session" its formal meaning (the enumerated Session, rather than every daily session). Executive Brief 7 n.3, 13 ("Br."). That makes no sense. The Clause is clear that "the Recess" and the "Session" are alternating states, as every executive or congressional official to construe the Clause prior to 1948 clearly recognized. If, as the Executive asserts, "the Recess" is the period between daily "sessions," then the "Session" should be the daily session between each "Recess." But since all agree that "next Session" refers to the formal Session, it follows that "the Recess" must likewise refer to the formal Recess. The Executive's schizophrenic construction serves no purpose other than to expand Executive power by increasing recess appointees' terms for up to a year.

2. On the second question, the Clause states that the President may make recess appointments only to fill "Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. As the uniform understanding of this provision at the founding and for decades after

confirms, the text means what it says: The vacancy must "happen during"—*i.e.*, arise during—the Recess. The Executive claims that "may happen during" actually means "happen to exist," Br. 6, but that construction erases "may happen during" from the Clause, while contravening the uniform understanding of the framers.

3. The answer to the third question is also clear. The Executive agrees that Senate breaks "of three days or less 'during the Session of Congress,' . . . are effectively *de minimis* and do not trigger the President's recess-appointment authority." Br. 18. Here, however, the Senate convened sessions every three days throughout the supposed recess. It therefore was not in "the Recess of the Senate" under the Executive's own test. The Executive urges that the Senate's sessions—at which the Senate could and did conduct official business—were constitutional nullities, but the Senate, not the President, determines the Rules of its Proceedings. And here, it determined that it was in session every three days.

4. These limitations on the President's unilateral recess-appointment power accord with the Clause's limited purpose. As much as Presidents may desire an escape-hatch from Senate confirmation, the Constitution does not supply one. What the Constitution *does* provide is a "general method" of appointment with advice and consent, *Federalist 67*, at 409, that serves to "check" presidential power. *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961) ("*Federalist 76*"). The Clause also supplies an "auxiliary method," but limits it to making "temporary appointments" in certain circumstances during "'the recess of the Senate.'"

Federalist 67, at 409-10. It does not, as the Executive claims, provide presidential power to make two-year, unilateral appointments during every Senate break.

ARGUMENT

"The ordinary power of appointment is confided to the President and Senate *jointly*." *Federalist 67*, at 409-10. The Constitution's Appointments Clause thus provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

Art. II, § 2, cl. 2. The Recess Appointments Clause then provides:

> 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.

Id. § 2, cl. 3.

The framers discussed the Appointments Clause's advice-and-consent requirement extensively at the constitutional convention, debating "whether the [appointment] power should be vested in the entire legislature, as proposed in the original Virginia Plan; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate." Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* 16-17 (2000). Later, during ratification, Hamilton

vigorously defended the assignment of this power "to the President and Senate *jointly*," *Federalist 67*, at 409-10, explaining that it would impose "an excellent check upon a spirit of favoritism in the President." *Federalist 76*, at 457.

The Recess Appointments Clause, by contrast, was introduced at the end of the Convention and was adopted unanimously, without debate—treatment befitting its modest role. *See* James Madison, *Notes of Debates in the Federal Convention of 1787* (Sept. 7, 1787).[2] Hamilton later explained that this "auxiliary method of appointment" was necessary because the Senate could not be "continually in session for the appointment of officers, and as vacancies might happen *in their recess*," the "general method" of appointment would sometimes be "inadequate." *Federalist 67*, at 409-10. As Edmund Randolph, the nation's first Attorney General reasoned: The recess-appointment power "is to be considered as an exception to the general participation of the Senate" so "[i]t ought to[] be interpreted strictly." Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 *The Papers of Thomas Jefferson* 165, 166 (John Catanzariti et al. eds., 1990) ("Randolph Opinion").

The Constitution thus contains a primary mode of appointing officers (the Appointments Clause) and an "auxiliary"—*i.e.,* "subsidiary"[3]—method (the Recess Appointments Clause). These provisions supply "structural protections against abuse of power," which is the Constitution's principal means of

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[2] http://teachingamericanhistory.org/convention/debates/0907-2/.

[3] Noah Webster, *An American Dictionary of the English Language* 64 (3d ed. 1830).

"preserving liberty." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010).

Particularly against this backdrop, the Constitution's text, structure, and history repudiate the Executive's attempts to elevate the "auxiliary" appointments method over the "general" one for Presidents weary of compromising with the Senate.

I. The Recess-Appointment Power Is Limited To The Recess Between Senate Sessions.

Two possible constructions of the Clause are offered. The first is that "the Recess of the Senate" refers to the period between the Senate's enumerated "Sessions." The Executive's view, by contrast, is that "the Recess of the Senate" refers to every "period of cessation from usual work." Br. 7. The Executive's view is incorrect.

A. Text And Structure.

The Clause does not refer to "recesses" in a vacuum. Rather, it empowers Presidents to fill vacancies "during *the Recess of the Senate*, by granting Commissions which shall expire at the End of *their next Session*." Art. II, § 2, Cl. 3 (emphases added). The Clause thus ties "the Recess of the Senate" directly to "their next Session," establishing a dichotomy between the two. Recess appointments last until the end of the Senate's "next Session" because that "next Session" always comes right after "the Recess." The founding-era definition of "[s]ession" was, after all, "[t]he space for which an assembly sits, without intermission or recess." 2 Samuel Johnson, *Dictionary of the English Language* (1755).

The Clause's use of the definite article "the" confirms it has a specific sort of recess in mind—the class of formal recesses that correspond to the Senate's formal Sessions. There is only one "Recess of the Senate" per "Session." Had the Clause captured every generic "recess," the framers would have empowered Presidents "to fill up all Vacancies that may happen during *a* Recess of the Senate."[4] They did not. Instead, they tied "the Recess of the Senate" directly to the "next Session," making clear that these were alternating, mutually exclusive states. And because "the Session" plainly means enumerated Sessions, rather than every daily session—as the Executive notes, Br. 17, and as the Adjournments Clause's reference to adjournments "during the Session of Congress," Art. I, § 5, cl. 4, confirms—"the Recess of the Senate" likewise refers to the formal Recesses between enumerated Sessions.

The Executive disagrees, contending that "the Recess of the Senate" refers, not to the formal recess *between* formal Sessions, but to every colloquial "recess"—*i.e.*, each short cessation of work—occurring *throughout* each Session. Br. 13. Its construction, however, depends on giving the word "Session" conflicting meanings, both of which expand Executive power. On the one hand, the Executive claims that every "cessation from usual work" is "the Recess," Br. 13, such that the end of each daily or afternoon "Session" commences "the Recess of the Senate." On the other, the Executive claims that the "Session"

[4] The Constitution's reference to appointing a President pro tempore "in the Absence of the Vice President," Art. I, § 3, cl. 5; Br. 16-17, is in accord. That "the" likewise refers to a specific class of Vice Presidential absences—absences from the Senate, as opposed to generic absences from any place.

demarcating how long recess appointees serve is the formal, enumerated Senate Session.[5] The Executive never addresses this inconsistency—wherein the recess-commencing "session" is different from the recess-appointment-terminating "session"—but it flows inevitably from its contention that Presidents can make recess appointments during every short break, which then last up to two years.

Indeed, if the Executive's colloquial construction were correct, it would make far more sense to give both "recess" and "session" their informal meanings, such that "the Recess" is the period that occurs between "sessions," and "the Session" is the period that occurs between "recesses." If read in isolation—as the Executive does with "recess"—the word "session" is just as susceptible of this informal construction as "recess," with early Congresses frequently calling daily or evening meetings a "session," often in conjunction with "recess." *See, e.g.*, 1 Reg. Deb. 738 (1825) ("[R]ecess till 6 o'clock. EVENING SESSION—6 o'clock."). This construction provides the Executive the emergency power it claims it needs, but any emergency appointments then expire following the next "period of usual work." Here, that was the Senate's January 6, 2012 daily session—long before the Board issued its decision. There is, however, *no* plausible basis for construing "the Recess" as referring to all colloquial recesses whereas the "next Session" refers solely to the Senate's formal, enumerated Session.

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[5] This is why the appointees here purported to serve two-year terms. *See* Br. 7 n.3; NLRB, *Board Members Since 1935* (appointees served until their successors were confirmed a Session-and-a-half later), http://www.nlrb.gov/who-we-are/board/board-members-1935.

Further illustrating the practical illogic of the Executive's construction, it means that mid-Session recess appointees serve twice as long as between-Session appointees. But there is no textual or historic justification for empowering Presidents to obtain double-length terms for certain recess appointees through strategic timing. Indeed, it is implausible that the Clause provides two-year terms to *any* recess appointees. Two years is half a presidential term, a full term for a member of the House, and nearly as long as most Senate-confirmed officers serve. *See, e.g.*, Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees*, 1989–2009, 39 PRES. STUD. Q. 432, 436 (2009) (Senate-confirmed officers in recent Administrations served for a median 2.5 years). The Executive provides no explanation for why mid-Session recess appointees should serve for as long as House Members. Nor could it, as recess appointments "should expire[] when the senate should have had an opportunity to act on the subject." 3 Story, *supra,* § 1551.

It is, moreover, inconceivable that the framers would have required the Senate-confirmation procedure of the "general" Appointments Clause if the recess-appointment power were as robust as the Executive claims. Were the President permitted to make two-year appointments during every "cessation from usual work," the recess-tail would not only wag the appointments-dog, it would completely devour the dog and render the advice-and-consent process a rarity for non-life-tenured positions. That expansion of "an exemption" beyond circumstances "plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the

announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

To avoid that facially absurd outcome, the Executive is forced to conjure a "de minimis" exception to its "plain meaning" construction that arbitrarily exempts mid-Session breaks of "three days or less." Br. 18. But the Executive does not even *pretend* to base this exception in law, citing merely its own "long" understanding to support it. *Id.*[6] And even that is inaccurate: three days is simply the latest dividing line the Executive has imagined to avoid midnight-appointment absurdity. *See infra* at 26-27. The Executive's need to adopt ever-changing "de minimis" exceptions confirms that its "plain meaning" argument is untenable. It also highlights the textual swamp into which the Executive seeks to send the judiciary—leaving courts to spend years deciding future disputes over how many days a break must last before it becomes "the Recess of the Senate."

Finally, the framers dispelled any lingering textual doubt by referring to "the Recess" rather than "an adjournment." The Constitution uses "adjourn" or "adjournment" in five other provisions. *See* Art. I, § 5, cl. 1; *id.* § 5, cl. 4; *id.* § 7, cl. 2; *id.* § 7, cl. 3, Art. II, § 3. Unlike "the Recess," the word "adjournment" *does* refer to short breaks between daily sessions: "AN adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a

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[6] Oddly, the Executive refuses to embrace the Adjournments Clause, which is the only principled basis for a "de minimis" exception. *See infra* at 49-50.

fortnight or a month together, as at Christmas or Easter." 1 William Blackstone, *Commentaries on the Laws of England* 179 (1st ed. 1765). The framers knew that the Senate would not work seven days a week and were capable of writing the every-cessation-from-usual-work provision the Executive requests—*i.e.*, one that applies during every "adjournment." They did not, instead confining the power to "the Recess of the Senate."[7]

B. Original Understanding.

Although the text is clear and therefore dispositive, the original understanding fully supports it. Every known executive and congressional discussion until 1948 recognized that "the Recess" and "the Session" were alternating states: the Senate cannot be in "the

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[7] The Executive argues that "'adjournment' typically referred to the act of adjourning, while 'recess' referred to the resulting *period* of cessation from work." Br. 17. But at the founding, the word "adjournment" meant both "[t]he act of adjourning" and "[t]he state of being adjourned." 1 *Oxford English Dictionary* 157 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (seventeenth century usage). For example, under the Articles of Confederation, "adjournment" referred to mid-Session breaks. *See, e.g.*, 27 Journals of the Continental Congress 576 (July 8, 1784) (report dispatches received "during the adjournment or sitting"); 7 Journals of the Continental Congress 168 (Feb. 27, 1777) (similar); 3 Journals of the Continental Congress 426-27 (Dec. 13, 1775) (similar); *see also, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787), *in* 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., 1911) ("during the adjournment of the Convention"); Luther Martin, *Genuine Information* (1787), *in* 3 *The Records of the Federal Convention of 1787*, *supra*, at 191 (similar), http://www.consource.org/document/luther-martin-genuine-information-1787-12-28/.

Recess" and "the Session" at the same time.[8] This understanding flows through the writings of the framers, countless Attorneys General, innumerable Senators, multiple founding-era commentators, and parallel founding-era provisions in the States. There is therefore no question that the Clause was long understood as limited to the formal Recess between enumerated Sessions.

1. Hamilton could hardly have been clearer in explaining that recess appointments "expire at the end of the ensuing session of the national Senate." *Federalist 67*, at 410. Given that the word "ensue" means "[t]o follow in a train of events" or "to come after,"[9] that explanation makes sense only if the "next Session" occurs immediately after "the Recess of the Senate." No "session of the national Senate" "comes after" a *mid*-Session break.

2. Every executive opinion on the recess-appointment power prior to the mid-twentieth century—beginning with the first two Attorneys General—likewise recognized that "the Recess" and "the Session" were mutually exclusive, such that "the Recess" falls between each "Session."

In the first opinion to interpret the Clause, Attorney General Randolph analyzed its operation for "a person appointed *during the Session* [who] shall not notify his refusal to accept, *until the recess*,"

[8] In 1948, the Comptroller General, with little analysis, asserted that appointments can be made mid-Session and then last up to two years. *See* 28 Comp. Gen. 121, 127 (1948). Twelve years later, the Executive Branch likewise began contending that "the Recess" can occur during "the Session." *See* 41 Op. Att'y Gen. 463, 471 (1960).

[9] Noah Webster, *An American Dictionary of the English Language* 301 (3d ed. 1830).

Randolph Opinion at 166 (emphases added), making clear that the two could not happen simultaneously.[10] Thirty years later, Attorney General William Wirt agreed, explaining that "the President shall have the power" to make recess appointments "to continue only until the Senate shall have passed upon it; or, in the language of the constitution, till the end of the next session." 1 Op. Att'y Gen. 631, 632 (1823). By conflating "the next session" with the Senate's first opportunity to "pass upon" an appointment, Wirt made clear that "the Recess" occurs only between "Sessions." Fifty years later, nothing had changed. *See* 16 Op. Att'y Gen. 522, 524 (1880) (Devens) (contrasting "vacancies which have occurred subsequently to the adjournment of the Senate" with vacancies that "existed during its session").[11]

Even when expanding the recess-appointment power, the Executive acknowledged this distinction. As the Executive notes, President Andrew Johnson made recess appointments during breaks in two enumerated sessions. Johnson's Attorney General, William Evarts, however, described these appointments as *between*-Session appointments rather than appointments *during* the Session. His opinions refer to the portion of the Session before the break as the "late session," thus suggesting that the portion of the Session after the break would

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[10] Same for President Washington's second Attorney General. *See To George Washington from Charles Lee*, 7 July 1796, Founders Online, National Archives (recess appointments last "until the end of the *next session after* the appointment" (emphasis added)).

[11] The Opinions over the intervening 50 years are in accord. *See, e.g.*, 2 Op. Att'y Gen. 336 (1830); 4 Op. Att'y Gen. 523, 527 (1846); 12 Op. Att'y Gen. 32, 38-39 (1866).

constitute "the next Session."[12] 12 Op. Att'y Gen. 469, 470 (1868); *see also* 12 Op. Att'y Gen. 449, 451 (1868) (similar); 12 Op. Att'y Gen. 455, 456 (1868) (similar). A district court that assessed one of those appointments likewise viewed them as between-Session appointments, explaining that the Senate's first meeting afterward was the "next Session" that terminated them (so long as the Senate had the formal ability to act on nominations). *See In re Dist. Att'y of U.S.*, 7 F. Cas. 731, 744 (E.D. Pa. 1868).

It is, therefore, no surprise that the first Executive opinion to directly consider mid-Session appointments rejected them. Attorney General Knox found it "irresistible" that the President cannot make recess appointments during mid-Session breaks. 23 Op. Att'y Gen. 599, 604 (1901). "[T]he phrase" in the Clause is "'*the* recess.'" *Id.* at 600. The "period following the final adjournment for the session" is "*the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.* at 601. A mid-Session break, by contrast, "is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* "Congress 'adjourns' in either case, but in the one temporarily, so as merely to suspend an existing session for a short

[12] This understanding reflects the Senate's unique practice in that time. The year Johnson made his first appointments, the Senate took multiple "adjourned sessions." The meeting in July of 1867 was the "First adjourned session of the Fortieth Congress, commencing July 3d, 1867," 17 *J. Exec. Proceedings* 785 (1867), and the November meeting was the "Second adjourned session of the Fortieth Congress, commencing November 21, 1867." *Id.* at 859; *see also* Cong. Globe 40th Cong., 1st Sess. 753-54 (1867) (Howard and Nye referring to the 1867 meetings as separate sessions).

time; and in the other, finally, so as to terminate the existing session." *Id.*[13]

Not even Attorney General Daugherty, in the first opinion to approve mid-Session appointments, endorsed the Executive's current contention that "the Recess" can occur during "the Session." To the contrary, his opinion accords with General Evarts' opinions, suggesting that the period of Senate business following "the Recess" constitutes "their next Session." As he wrote: "Is the Senate in session? Then [the President] must make a nomination to that body," 33 Op. Att'y Gen. 20, 22 (1921) (quoting General Wirt), and "[i]f the Senate is not in session, the President fills the vacancy alone," *id.* at 23 (quoting General Stanberry).

3. Senators throughout the nineteenth century agreed. "The time of the Senate consists of two periods, *viz.*: their session and their recess." 26 Annals of Cong. 748 (1814) (Gore). A few other examples:

- In 1814, Senator Horsey: "If [] the occasion [to fill an office] arises *whilst the Senate are in session*, the office must be consummated by the concurrent act of the President and the Senate. If it arises *during the recess* of the Senate, it may be consummated by the act of the

[13] General Knox also distinguished the nineteenth century Court of Claims decision the Executive invokes. Br. 23-24 (*Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884)). As Knox explained, that court had "in view the officer's right to receive pay rather than the power of the President," and, moreover, had "some residuum of doubt, for it expressly [held] that it is immaterial whether the claimant was legally in office or not." 23 Op. Att'y Gen. at 603.

President alone." 26 Annals of Cong. 712-13 (1814) (emphases added).

- Senator Clayton, a decade-and-a-half later, explained the "happen to exist" view (which he rejected) as: "[W]hen we . . . shall have *adjourned without day*, he may fill the vacancies then existing." 6 pt. 1 Cong. Deb. 239 (1830) (emphasis added).
- Following the Civil War, the Senate debated "happen during," yet nobody suggested the possibility of recess appointments during the Session. Rather: "[The vacancy] must happen between the moment of the adjournment of the Senate and the moment of the commencement of its next session." Cong. Globe, 39th Cong., 2d Sess. 407 (1867) (Howard).

Thus, when the Senate Judiciary Committee issued a Report protesting recess appointments to preexisting vacancies, it framed the question as: "When must the vacancy . . . and the appointment to which is thus found to terminate, accrue or spring into existence?" S. Rep. No. 37-80, at 3 (1863). The answer foreclosed mid-Session appointments: "[T]his period must have its inceptive point after one session has closed and before another session has begun." *Id.* Nobody disagreed.

4. Early commentators, too, shared this understanding. For example: "The appointments made, and commissions issued during the recess of the senate, are in force only till the end *of the ensuing session*." William Rawle, *A View of the Constitution of the United States* (2d ed. 1829), *reprinted in* 4 *The Founders' Constitution* 114, 115 (emphasis added). St. George Tucker likewise noted

that "the person appointed by [the President] during the recess of the senate would continue to hold his commission, until the end of their session: so that the vacancy would happen a second time during the recess of the senate." St. George Tucker, 4 *Blackstone's Commentaries* 342-43 (1803). Founding-era sources from England likewise make clear that "the Recess" cannot happen during "the Session." *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* 260 (1st ed. 1769) ("During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward . . . . But in the court of the lord high steward, which is held in the recess of parliament . . . .")); John Wesley, *Free Thoughts on the Present State of Public Affairs* 26 (1770) (referring to "[t]he last recess of Parliament" and "the Session").

5. Finally, the Executive's position contravenes countless ratification-era provisions. As one commentator recently explained: "[I]n government practice the phrase 'the Recess' *always* referred to the gap between sessions."[14]

Under the Articles of Confederation, for example, "the recess" could not occur during "the Session." *See, e.g.*, 28 Journals of the Continental Congress 101, 104 (motion of James Madison, Feb. 25, 1785) (congressional secretary "shall attend Congress during their session, and in their recess the Committee of the States"). Nor did the Confederation

[14] Robert G. Natelson, *The Origins and Meaning of 'Vacancies that may happen during the Recess' in the Constitution's Recess Appointments Clause*, 37 Harvard J.L. & Pub. Pol'y (forthcoming 2014), at 19 ("Natelson"), http://ssrn.com/abstract =2257801.

Congress exercise the power to appoint a Committee of the States in "the recess," Br. 15, during its mid-Session breaks. *See, e.g.*, 25 Journals of the Continental Congress 803, 807 (22-day adjournment from November 4 to November 26) (1783); 27 Journals of the Continental Congress 706, 710 (18-day adjournment from December 24 to January 11) (1784-85). The only time it did so was *between* Sessions.[15]

The various pre-ratification state legislative practices the Executive invokes are in accord. Br. 15-16. In each of those examples, the relevant "recesses" occurred *between* separate legislative sessions or sittings. For example, in 1786, the Journal of the New Hampshire House of Representatives reported the reading of public letters "received in the recess of" the legislature. Br. 16. When the New Hampshire legislature reconvened, however, it was for a separate "Session begun and holden" on "the first day of February A.D. 1786." 20 *Early State Papers of New Hampshire* 488 (Albert Stillman Batchellor ed.,

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[15] The Executive disagrees, calling the Confederation Congress's recess "a scheduled intra-session recess." Br. 15. But that is misleading. The Articles provided that Congress would convene its new Session "on the first Monday in November," Articles of Confederation of 1777, art. V, para. 1. In the cited instance, Congress "adjourned" on June 3, 1784 "to meet at Trenton on the 30th day of October next"—a Saturday. 27 Journals of the Continental Congress 555-56. Congress did not reconvene until commencing its new Session on the following Monday—"the first Monday in November"—just as the Articles provided. *See id.* at 641. The five-month recess was, therefore, between separate Sessions, as the Confederation Congress plainly would have known from the outset. Further, the Committee of the States governed in Congress's absence and was therefore not a "legislative committee[]." Br. 15 n.7.

1891). Its "recess" had thus fallen between "Sessions."

The Vermont, Pennsylvania, and New Jersey examples are similar. The title page of the cited volume for Vermont, for example, refers to the "February, April and June Sessions, 1781,"[16] reflecting multiple sessions throughout the year. Pennsylvania's legislature, for its part, referred to the period ending in May as "the last sitting" and the period beginning in August as "this sitting."[17] New Jersey's legislature, too, sat for multiple formal "sittings" punctuated by recesses.[18] *See also* 2 *A Documentary History of the English Colonies in North America 1800* (Peter Force ed., 1839) (describing the new "meeting of a Provincial Congress" in New York following the recess).

Other legislatures similarly took between-Session recesses after adjourning to a date certain. That includes, for example, North Carolina[19] and

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[16] 1 *Journals and Proceedings of the General Assembly of the State of Vermont*, *reprinted in* 3 *State Papers of Vermont* (1924).

[17] Proceedings (Aug. 10, 1778), 1 *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 213, 214 (John Dunlap ed., 1782).

[18] *See Votes and Proceedings of the Fifth General Assembly of the State of New Jersey*, 5th Sess., 1st Sitting 1 (1780); *id.*, 5th Sess., 2d Sitting 1; *id.,* 5th Sess., 3d Sitting 1.

[19] Pet.App.21-a-22a; 16 *The State Records of North Carolina* 177 (Walter Clark ed., 1895) (1782-83 sessions) ("The business of the Session being ended . . . the House Adjourned till the first Monday in November next.").

Massachusetts.[20] Similar founding-era examples abound. *See* Natelson at 20-35.

C. Historical Practice.

Historical practice, too, overwhelmingly refutes the Executive's position.

Over the 133 years before General Daugherty's opinion, there were thousands of periods of "cessation from usual work," Br. 7, during the Senate's Sessions. *See generally* S. Pub. 112-12, *Official Congressional Directory, 112th Congress* (2011) ("Congressional Directory").[21] At least 62 of these mid-Session breaks exceeded three days. *See id.* at 522-27. Yet over this lengthy period, the only appointments made before adjournment *sine die* were Andrew Johnson's ambiguous appointments. *Supra* at 17-18. None of the other 27 Presidents who served from 1789 until 1921 even attempted to exercise this supposed "power," strongly suggesting its "assumed *absence*." *Printz v. United States*, 521 U.S. 898, 908 (1997).

For example, in three of the four years Abraham Lincoln was President, the Senate took mid-Session breaks exceeding three days (1862-63, 1863-64, and 1864-65), in addition to hundreds of shorter ones. *See* Congressional Directory at 525. Despite (1) those many supposed opportunities to make recess appointments; (2) the fact that he was presiding over the Civil War; and (3) his expansive view of executive power—President Lincoln never attempted to make recess appointments during these breaks.

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[20] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1552-53 (2004-2005) ("Rappaport").

[21] http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.

The Executive's contrary suggestion that President Lincoln "appears" to have made mid-Session recess appointments of Brigadier Generals is incorrect. Br. 22 & n.15. The letters the Executive invokes were not recess appointments but, rather, acting appointments "carried unofficially . . . pending the legal outcome of confirmation." John H. Eicher & David H. Eicher, *Civil War High Commands* 31 (2001) (providing sample appointment letter). That is why each letter explains that "[s]hould the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly,"[22] whereas recess appointments are conferred "by granting Commissions." Art. II, § 2, cl. 3; *see also* Cong. Globe, 37th Cong., 3d Sess. 565 (1863) (Wilson) ("[A] very large portion of these general officers have received letters of appointment, not commissions."). That is also undoubtedly why a "similarly phrased appointment" was issued "while the Senate was in session." Br. 22 n.15.

D. The Executive's Contrary Arguments.

The Executive's principal argument—that the Constitution's meaning has changed because of Senate acquiescence—is incorrect. So too are its various historical arguments.

1. The Executive argues that "the authority to make intra-session recess appointments has been accepted by both political branches for nearly a century." Br. 20. Even if true, that would be

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[22] *E.g.*, Appointment Letter of Thomas G. Stevenson, Dec. 24, 1862, 6 Letters of Army Appointments 1829-1945, at 224 (Entry 314), Records of the Adjutant General's Office, 1762-1984, Record Group 94 (RG 94), National Archives Building (NAB), Washington, D.C.

irrelevant given the clarity of the text and original understanding. Whatever the "perceived necessity" of the moment, licensing "extraconstitutional government . . . would, in the long run, be far worse." *New York v. United States*, 505 U.S. 144, 187-88 (1992). The "separation of powers protect[s] the individual," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), and the political branches can no more bargain it away than they can abandon the Bill of Rights.

But regardless, this "authority" has not been "accepted" for past 100 years. The Executive's current position is simply the latest in a string of increasingly aggressive assertions of mid-Session recess-appointment power. Because the Executive's position has consistently evolved, there has not even been an opportunity to acquiesce.

a. In 1921, Attorney General Daugherty rejected the Executive's construction. In his view, an "adjournment for 5 or even 10 days" cannot "be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. 20, 25. It needed to be "impossible" to obtain advice and consent before recess appointments were permitted. *Id.* That view prevailed for the next 72 years. *See, e.g.*, 3 Op. O.L.C. 314, 315-16 (1979); 6 Op. O.L.C. 134, 149 (1982); 13 Op. O.L.C. 271, 273 n.2 (1989); 16 Op. O.L.C. 15, 15 (1992) (noting "[t]he longstanding view . . . that the term 'recess' includes intrasession recesses if they are of substantial length").

The Executive began changing course in a 1993 district court filing. *See, e.g.*, Defs.' Mot. S.J. Count II Am. Compl. 14-18, *Mackie v. Clinton*, No. 1:93-cv-00032-LFO, June 21, 1993, ECF No. 30 ("[T]here is

no lower time limit that a recess must meet."). Shortly thereafter, it disparaged General "Daugherty's caution" as non-binding "dictum," and began asserting "that 'recess appointments during a 10-day intrasession recess would be constitutionally defensible.'" *OLC Memo* at 9 n.13 (quoting Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Ass't Att'y Gen., O.L.C., *Re: Recess Appointments* (May 29, 1996) ("Quinn Memo")). But even then, the Executive did not contend that "the Recess of the Senate" exists during *any* "period of cessation from usual work," subject to a nebulous "de minimis" exception. Br. 18. That sweeping position appears to have been minted in this litigation. *Id.*

b. Nor can the Executive take refuge in post-1921 practice generally. Mid-Session appointments did not become common until the late 1970s and, even then, there was consistent congressional resistance.

After General Daugherty's opinion, Presidents Harding, Coolidge, Hoover, and Franklin Roosevelt collectively made just 22 mid-Session appointments. Br. 9a-12a. And even after President Truman made many more, President Lyndon Johnson refused to make any despite the Senate's taking 12 mid-Session breaks exceeding three days, Congressional Directory at 529, as did President Ford despite 16 such breaks, *id.* at 529-30. The practice of those Presidents is particularly telling, given Johnson's prior service as Senate Majority Leader and Ford's as House Minority Leader.

The end of the Carter Administration appears to mark the beginning of mid-Session recess appointments "expressly to avoid the Senate's advice

and consent," Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2213 (1993-1994), when President Carter purported to recess appoint John McGarry to the Federal Election Commission after the Senate twice failed to confirm him. *See* Sara Fitzgerald, *The Price of Being Tip O'Neill's Friend*, Nat'l J., Nov. 4, 1978, at 1786. The practice then "grew dramatically under President Ronald Reagan." *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 240 (3d Cir. 2013).

Both before and after this escalation, the Senate resisted. To be sure, it did not shut down the government or demand impeachment. But it did take numerous steps demonstrating its refusal to acquiesce in the President's ever-expanding conception of the Clause.

For example, Congress amended the Pay Act in 1940 to permit paying recess appointees who fill preexisting vacancies in only three circumstances, each linked directly to "the termination of the session of the Senate." 54 Stat. 751.[23] These amendments—each of which turns on the "termination of the session of the Senate"—would have made little sense if Congress had meant to endorse recess appointments *during* the Session.[24]

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[23] The materially identical modern Pay Act is codified at 5 U.S.C. § 5503.

[24] The Executive, however, promptly interpreted Congress's limitations into irrelevance. In a single Memorandum, the Executive adopted contradictory constructions of the same language in the Clause and the Act. The Executive—purporting to partially channel the Comptroller General—(1) interpreted "their next Session" in the Clause as referring solely to formal Sessions, (2) interpreted "termination of the session" in the Pay

Senators also forcefully pushed back in other ways as Presidents became increasingly aggressive in making mid-Session recess appointments. For example, in 1984, when President Reagan made a mid-Session appointment to the Federal Reserve Board, Senator Sarbanes objected that the appointment was "a stretching of the recess appointment power beyond constitutionally permissible limits." 130 Cong. Rec. 22768 (Aug. 8, 1984). The next day, Senator Byrd introduced a resolution "[s]upported by a large number of [his] colleagues" which urged "that recess appointments be avoided except where there has been a formal termination of a session of the Senate or where the Senate will be in recess for longer than 30 days." *Id.* at 23234 (Aug. 9, 1984).

Three years later, Senator Byrd upped the ante, threatening to "'have pro forma sessions'" to block recess appointments. John Hanrahan, *Washington News*, U.P.I. (Oct. 7, 1987). And toward the end of the Clinton Administration, Senator Inhofe "vowed to hold up [ ] nominations" unless "the White House agreed to strict limitations on the use of a constitutional device allowing appointments to be made during Congressional recesses." Philip Shenon, *In Protest, Senator Blocks All Nominations*, N.Y. Times, June 9, 1999.

(continued…)

Act to mean temporarily entering any break throughout the formal Session, and (3) concluded that "'commencement of the next succeeding session of the Senate'" in the Pay Act refers "to the reconvening of the Senate after any adjournment" during its formal Session. 41 Op. Att'y Gen. at 469-77.

The Senate has continued to resist aggressive mid-Session appointments in the past decade. When President Bush made a mid-Session recess appointment of John Bolton as his envoy to the United Nations, Senator Lautenberg called it an example of a President who "'bends the rules and circumvents the will of Congress.'" Elisabeth Bumiller & Sheryl Stolberg, *Bush Appoints Bolton as U.N. Envoy, Bypassing Senate*, N.Y. Times, Aug. 1, 2005. The Senate soon thereafter began using "pro forma" sessions to resist further encroachment. *See, e.g.*, 153 Cong. Rec. S14,609 (daily ed. Nov. 16, 2007) ("pro forma sessions during the Thanksgiving holiday to prevent recess appointments") (Reid). And following President Bush's mid-Session appointment of Judge William Pryor, Senator Kennedy filed amicus briefs in the Eleventh Circuit and this Court (authored by Professors Lawrence Tribe and Martin Lederman) arguing that "[t]he text, structure, purpose, function, and pre-1921 history of the Recess Appointments Clause all confirm Attorney General Knox's 'irresistible' conclusion that the President may not make recess appointments during intra-session Senate breaks." Reply Br. Amicus Curiae Sen. Edward M. Kennedy, *Stephens v. Evans*, No. 02-16424, at 8 (11th Cir. Aug. 24, 2004), 2004 WL 3589829, at *8.

2. The Executive's remaining historical arguments are equally mistaken. The Executive claims that "the phrase 'the recess' was, by 1787, regularly used to describe the equivalent of intra-session breaks." Br. 7. That is incorrect. *See supra* at 15-24. Its smattering of additional evidence—from English Parliament and an irrelevant Senate report—only undermine its position.

a. Ratification-era parliamentary practice confirms that "the Recess" and "the Session" were mutually exclusive.

Parliament had "three types of breaks in legislative proceedings": (1) "an adjournment," which "was a break in the business of a house that occurred during the legislative session" and which "was called by a house and could be of extremely short duration"; (2) "a prorogation," which "was an order by the King that would end the session for both houses," to "eventually be followed by a new session"; and (3) "a dissolution," which "would end the Parliament and require elections for a new Parliament," and could be ordered by the King or occurred after seven years. *Rappaport* at 1550-51 (citing sources).

The framers adapted these practices for republican government. That meant retaining "adjournments" (which remained under the control of the legislature), eliminating the executive's role from dissolution (by creating terms of office and biennial elections), and eliminating prorogations by the monarch—shifting the power to terminate the Session to Congress itself. *Id.* at 1551. The framers did not use the term "prorogue," however, instead using "recess" to "refer to breaks between sessions," consistent with usage under the Articles of Confederation and in state practice. *See supra* at 21-24. Using "the Recess" to describe the break following termination of "the Session" thus evolved logically from parliamentary practice.

The Executive's only counter-evidence is two stray instances in the 1600s ostensibly describing a mid-Session break as a "recess." Br. 14. But two colloquial references to "recesses" 150 years before

ratification are obviously less probative than Parliament's formal procedures in the late 18th century.

b. The Executive also erroneously claims that a 1905 Senate Committee Report endorsed its every-break construction. Br. 24-25. In fact, the 1905 Report rejects the Executive's position: "The theory of 'constructive recess' constitutes a heavy draft upon the imagination, for it involves a constructive *ending of one* session, a constructive *beginning of another*, and a constructive recess *between the two*." S. Rep. No. 58-4389, at 3 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (emphases added). The Report never acknowledges the possibility of recesses during the Session.

Moreover, the Senate issued its Report to protest recess appointments during a supposed between-Session recess lasting less than a second. *See, e.g.*, Vivian S. Chu, Cong. Research Serv., RL33009, *Recess Appointments: A Legal Overview* 8 (2011). No President had previously asserted the power to make mid-Session recess appointments, with Attorney General Knox rejecting it four years earlier, explaining that a mid-Session break is not "*the* Recess." 23 Op. Att'y Gen. at 601. The Committee plainly was not endorsing a power the Executive had just rejected.

II. The Recess-Appointment Power Is Limited To Filling Vacancies That "Happen During" The Recess.

The Clause empowers the President to "fill up all Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. There is no serious question that this text was originally understood to authorize a

unilateral appointment only where the vacancy arises during the Recess. Every known analysis prior to 1822 reaches that conclusion, as does every analysis by a neutral arbiter (including three courts) prior to the 1880s. By contrast, the Executive's claim that Presidents may use recess appointments to fill all "vacancies that *exist*," Br. 8, "require[s] a total perversion of the language used." *People ex rel. Ewing v. Forquer*, 1 Ill. 104, 107 (1825).

A. Text And Structure.

No English speaker would use the words the Constitution uses to describe an appointments power extending to all extant vacancies, whenever they first arose. The Clause empowers the President to "fill up all Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. In 1789, "happen" was—as it still is—a verb that expresses the sudden occurrence of an event. *See, e.g.*, 1 Samuel Johnson, *Dictionary of the English Language* (1755) ("[h]appen" means "[t]o fall out; to chance; to come to pass"); Natelson at 36-37 (similar definitions). Similarly, the word "may" meant "[t]o be by chance." 2 Samuel Johnson, *supra* at 1273. These words make clear that the Clause authorizes recess appointments only to "fill up all Vacancies that [by chance come to pass] during the Recess of the Senate."

The original Senate Vacancies Clause contains similar language: "[I]f Vacancies *happen by Resignation, or otherwise, during the Recess* of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." Art. I, § 3, cl. 2 (emphasis added). By describing *how* vacancies "happen"—"by Resignation

or otherwise"—this provision reinforces the inference that vacancies "happen" *when* they arise. *See* Rappaport at 1505; Natelson at 41-45 (additional examples).

That is why, in 1794, the Senate refused to seat a would-be Senator appointed to fill a vacancy that preexisted the legislature's recess. *See* 4 Annals of Cong. 77-78 (1794). The phrase "happen during the Recess" does not mean different things in different provisions.

The Executive disagrees, contending that "[a] vacancy is not just an event of an instant," but rather "was understood as a continuing 'state.'" Br. 29-30. But that proposition only refutes the Executive's construction. The potential breadth of "vacancy" is *why* the framers specified that the vacancy must "happen during the Recess." "A vacancy that happens during a recess is not the same as an office that happens to be vacant." David P. Currie, *The Constitution in Congress: The Jeffersonians 1801-1829*, at 188 (2001).

The Executive also attempts to conflate a passive condition (vacancy) with an active, ongoing event (World War II). Br. 30. But the two are plainly different. Events like wars "happen" every day they continue; soldiers are shooting as much on day 100 as on day one. Vacancy, by contrast is a passive status—like death—that "happens" just once on the day it arises and then continues. It would be nonsensical to say that someone's death in 1939 "happened during" the 1940s, even though the person's "state of [death] persists." *Id.*

But regardless, the most basic impediment to the Executive's construction is that, as this Court has

long recognized, "[i]t cannot be presumed[] that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). Had the Clause authorized unilateral appointments to fill all "vacancies that *exist* during the recess," Br. 8, it would be written this way: "The President shall have Power to fill up all Vacancies ~~that may happen~~ during the Recess of the Senate." That phrasing would accomplish precisely what the Executive seeks with greater economy of words. If "may happen during" just means "happens to exist during," then the extra words supply nothing but ambiguity.

The Executive counters that the true purpose of "that may happen" is to prevent Presidents from filling "a known future vacancy" during the Recess. Br. 31. But a "known future vacancy" is not an *actual* "vacancy" that may be "fill[ed] . . . during the Recess." Absent a current vacancy, there would be nothing to "fill," so it never would have dawned on anyone to insert "that may happen" to prevent some future Executive from adopting an implausible interpretation. The Clause could be interpreted to include "known future vacancies" only after adding extra words that fundamentally change the meaning—*i.e.*, the sorts of textual contortions the Executive deploys here.[25] In any event, the Executive's construction does not even avoid the supposed textual problem it identifies. The Clause could just as easily "be thought to permit" filling

[25] That the Appointments Clause is sometimes used to fill future vacancies, Br. 31 n.21, accords with that provision, which speaks not of "vacancies" but of "appointments."

"known future vacancies" that "exist" during the Recess, as ones that "arise."[26]

B. Original Understanding And Historical Practice.

The historical record further refutes the Executive's view. The Nation's first four Presidents understood the Clause's textual limitations, as did the Senate and numerous courts until the late nineteenth century. The Executive Branch's inconsistent and self-serving departure decades after ratification cannot alter the Constitution's balance of power.

1. Although some Presidents resented the Clause's restrictions, for over three decades, the Executive Branch consistently agreed that the Clause was limited to those vacancies that arise during the recess.

a. Washington. Edmund Randolph, the nation's first Attorney General and a leading member of the constitutional convention, articulated the founding-era view in the first opinion to interpret the Clause. General Randolph framed the question as whether there was "a vacancy which has *happened* during the recess of the Senate?" *Randolph Opinion* at 166. There was not, he explained, because "[i]t is now the same and no other vacancy, than that, which

[26] The Executive no longer claims that if "that may happen" modifies "vacancies," then "it would not limit the *time* when the President may exercise" the recess-appointment power, such that "the President would retain his power to fill a vacancy that arose during a recess even after the Senate returned." Pet'n 27. And for good reason. The word "during" limits both the time when that Power exists ("the Recess of the Senate") and the types of vacancies it can be used to fill (those which "happen during the Recess").

existed [on a date during the Session.] It commenced therefore on that day or may be said to have *happened* on that day." *Id.*; *see also* To George Washington from Charles Lee, 7 July 1796, Founders Online, National Archives (similar opinion by Washington's second Attorney General, Charles Lee).[27]

Washington, moreover, regularly followed a procedure in which he would nominate someone without their consent and obtain that person's confirmation before the Recess. *See* Rappaport at 1522. If the person subsequently declined the commission, Washington would treat the ensuing vacancy as one which "happened" during the recess. *Id.* Had President Washington "understood the word 'happen' to mean 'happen to exist,' this convoluted process would have been unnecessary." Pet.App.39a.

b. Adams. The Adams Administration shared this view. To be sure, President Adams resented the Clause's limits. But as the Executive concedes, he never violated them, no doubt because everyone he consulted understood that vacancies had to arise during the recess.

Adams's query began with his Secretary of War, James McHenry, who solicited Hamilton's views: "It would seem, that under this Constitutional power, the President cannot alone make certain appointments or fill up vacancies that may happen during a session of the senate." Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), *in* 23 *The Papers of Alexander Hamilton* 69, 70 (Harold C. Syrett ed., 1976). Hamilton agreed: "It is clear,

[27] http://founders.archives.gov/documents/Washington/99-01-02-00702.

that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 *The Papers of Alexander Hamilton, supra*, at 94. Attorney General Lee, held over from Washington, likewise affirmed that "an office created during the session of the Senate . . . [was] a vacancy happening during the session, which the President cannot fill, during the recess . . . ." Letter from John Adams to J. McHenry (May 16, 1799), *in* 8 *The Works of John Adams* 647, 647 n.1 (Charles Francis Adams ed., 1853).

c. Jefferson. Thomas Jefferson, too, begrudgingly agreed. Shortly before becoming President, Jefferson wrote a letter to James Monroe lamenting that he had "reason to expect in the outset the greatest difficulties as to nominations." Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), *in* 9 *The Works of Thomas Jefferson* 178, 179 (Paul Leichester Ford ed., 1905). "The late incumbents running away from their offices & leaving them vacant[] will prevent my filling them without the *previous* advice of the Senate." *Id.* Or as he later remarked: "I shall be embarrassed by finding the offices vacant, which cannot be even temporarily filled *but with advice of Senate* . . . ." Letter from Thomas Jefferson to Tench Coxe (Feb. 11, 1801), *in* 3 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson* 459, 459 (1829) (emphasis added).[28]

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[28] The letters the Executive invokes simply highlight Jefferson's frustration with the Clause's limitations. Br. 41-42. Tellingly, however, Jefferson never adopted the Executive's construction, instead recognizing that the Clause must be construed to

d. Madison. Madison also agreed. For example, after the United States won the War of 1812, he sought to reward General Andrew Jackson for his victory at the Battle of New Orleans. Madison could not issue a promotion during the Senate's recess, however, because the generalship he sought to give Jackson had become vacant during the Session. Madison's Secretary of War thus informed Jackson that "[t]he vacancy produced by General Hampton's resignation not having been filled during the late session of the Senate, cannot be supplied constitutionally during the recess of that body." *James Madison: Paper on relations with Andrew Jackson*, *December 1823*, Founders Online, National Archives.[29]

e. Not until three decades after ratification, in 1823, did Attorney General William Wirt (who did not participate in the Constitutional Convention) deviate from this interpretation. Even then, however, he acknowledged that "[t]he most natural sense of [happen] is 'to chance—to fall out—to take place by accident.'" 1 Op. Att'y Gen. at 631. That undoubtedly explains why subsequent Attorneys General reverted back to the Washington-Jefferson-Adams-Madison position, *see* 4 Op. Att'y Gen. 361, 363 (1845) (Mason) ("[i]f vacancies are known to exist during the session of the Senate, and

(continued…)

"restrain the Executive within limits which might admit mischief." Letter to Wilson Cary Nicholas (Jan. 26, 1802), *in* 36 *The Papers of Thomas Jefferson* 433, 433 (Barbara B. Oberg ed., 2009).

[29] http://founders.archives.gov/documents/Madison/99-02-02-0103.

nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate"), and, *even when* they followed the Wirt opinion, questioned its soundness, *see* 10 Op. Att'y Gen. 356, 356 (1862) (Bates) (advising that, but for prior broad constructions, there would be "serious doubts" about the every-vacancy construction).

2. The contemporaneous views of the Senate likewise confirm that "may happen during the Recess" was understood to encompass only those vacancies that arise during the Recess.

Justice Story has recounted the Senate's understanding that the Clause describes "vacancies occurring from death, resignation, promotion, or removal." 3 Story, *supra*, § 1553. As he explained, if "offices are created by law" but not "filled" during the Session, the President "cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate." *Id.*; *see also* Thomas Sergeant, *Constitutional Law* 361 (1822) (similar).

And the Senate did, indeed, believe that "[i]f the vacancy happened at another time, it is not the case described by the Constitution." 26 Annals of Cong. 653 (1814) (Gore). For example, in 1822, the Senate Committee on Military Affairs issued a report explaining that the President cannot fill vacant military offices created during the Session "because the vacancies did not *happen* in the recess of the Senate." 38 Annals of Cong. 500 (1822). Five years later, Senator Chambers warned that "if the President does, by war, acquire a right to fill vacancies to offices which do not 'happen' in the recess, I would not give the snap of my finger for your

liberties." 5 Cong. Deb. 89 (1829). And the following year, Senator John Clayton noted that "[i]t has never been pretended that the President alone could fill, by one of these temporary appointments, a vacancy happening during the session." 6 pt. 1 Cong. Deb. 240 (1830).

Even during the Civil War, the Senate stuck to this position. In 1863, the Senate Judiciary Committee issued a 12-page report analyzing whether a vacancy may "begin during the session of the Senate, or must it have its beginning during the recess?" S. Rep. No. 37-80, at 3. The Committee thought "the language too clear to admit of reasonable doubt" that "this period must have its inceptive point after one session has closed and before another session has begun." *Id.* As for General Wirt's opinion, the Committee was "unable to see its correctness, or to concur in its conclusion," rejecting "the artificial interpretation he gives to the language." *Id.* at 4. "To say that an event which is to 'happen' during a given period of time may logically be an event which does not happen during that period, but during another and an anterior period, seems to us to be a perversion of language." *Id.* at 5.[30]

3. All three courts to interpret the text prior to 1880 agreed. In 1825, the Supreme Court of Illinois interpreted similar language in an Illinois law,

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[30] The Executive makes much of President Lincoln's "recess appointment of David Davis as a Justice on this Court." Br. 35. But tellingly, Lincoln did not inform Congress about it, *see* S. Exec. Journal, 37th Cong., 3d Sess. 127 (1863), an omission inconsistent with contemporaneous nominations which *did* note that the nominees "were commissioned during the recess of the Senate," *id.* Further, Davis did not actually take his seat until after he was confirmed. *See* 7 F. Cas. at 739.

concluding: "The words [ ] of this section, appear so clear, and so devoid of ambiguity, that it seems a useless waste of time to look further than to the clause itself, for its true meaning." *Forquer*, 1 Ill. at 107. In 1868, the Eastern District of Pennsylvania, in the first federal opinion construing the Clause, held that the Executive's "construction is not conformable to either the literal or the ordinary import of the words 'may happen.'" *In re Dist. Att'y*, 7 F. Cas. at 735. "[T]he existence of the power in question has not been legislatively recognised, has been denied by the senate, has been practically asserted by presidents only, and has not been exercised without constantly recurring suggestions by [those presidents] of doubts of its existence under the constitution: opinions of attorney-generals have been its only support; and in these opinions, other jurists of eminence have not concurred." *Id.* at 744. One year later, the Eastern District of Arkansas agreed, holding that an office "created by an act of congress two years prior to his appointment . . . may have existed, but did not happen, during the recess of the senate." *Schenck v. Peay*, 21 F. Cas. 672, 674 (C.C.E.D. Ark. 1869).

4. Finally, "scores of Founding-Era legal materials" provide "illustrations of what it meant for a vacancy to 'happen,'" all of which referred to "discrete events" and "none" to "continuance of a pre-existing vacancy." Natelson at 42-47 (citing examples). For example, in the late 1770s, Thomas Jefferson introduced Virginia legislation providing that members of a "Board of War" "may be removed . . . by joint vote of both Houses, and thereupon, as also on the death, resignation or refusal to act, of any member, they shall proceed to

chuse another." *A Bill Establishing a Board of War*, 18 June 1779, Founders Online, National Archives.[31] The bill provided that "if either of these events happen during the recess of Assembly, the Governor and Council may appoint some person to act in the said office until the end of the next session of Assembly." *Id.* By enumerating "death, resignation or refusal to act" as things which "happen during the recess," Jefferson's bill confirms that vacancies "happen" when they arise.

C. The Executive's Contrary Arguments.

Here too, the Executive's historical arguments fail, as does its contention that, regardless of what the Clause was originally supposed to mean, longstanding practice and purported acquiescence have changed that meaning.

1. The Executive's principal historical argument is that, while Presidents Washington, Adams, Jefferson, and Madison publicly adhered to the "arise" interpretation, they secretly believed it was wrong and occasionally acted accordingly. To this end, the Executive purports to have unearthed a handful of appointments to vacancies which supposedly arose while the Senate was in session. Br. 65a-89a. This effort fails.

Foremost, the Executive does not dispute that all four of these Presidents publicly adhered to the "arise" interpretation. Its evidence, rather, consists of inchoate retracing of ancient vacancies and appointments, unaccompanied by contemporaneous explanation. That cannot overcome the evidence that all founding-era analysts—attorneys general,

[31] http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0008.

framers, senators, and commentators—agreed that vacancies must arise during "the Recess." As an 1822 Senate Report explained: "[N]o instance has before occurred, within the knowledge of the committee, where the President has felt himself authorized to fill [preexisting] vacancies, without special authority by law." 38 Annals of Cong. at 500.

The Executive's examples, moreover, highlight its overreach. For example, President Washington, in the two appointments the Executive cites, informed the Senate: "I nominate the following persons 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. Journal, 3d Cong., 1st Sess. 142-43 (1793) (announcing appointment of Robert Scott) (emphasis added); *see also* S. Journal, 4th Cong., 2d Sess. 216-17 (1796) (William Clark).

Similarly, Jefferson's appointments were made pursuant to a statute that left then-existing officeholders in their offices until President Jefferson removed them. *See* Act of Feb. 13, 1801, ch. 4, § 37, 2 Stat. 89, 99-100. Jefferson likely thus removed the incumbent officers during "the Recess," causing the vacancies to "happen during" the recess. As for Madison, his appointments of Roger Skinner and John Livingston were to offices created by legislation he signed on the day that the Third Session of the 37th Congress terminated. *See* Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, 235 ("APPROVED, March 3, 1815"); S. Journal, 13th Cong., 3d Sess. 628 (1815) (end of session). Madison likely waited until "the Recess" had begun to sign the legislation, so that those vacancies, too, would "happen during the Recess."

In short, none of the first four presidents of the United States—founders and framers all—adopted the Executive's interpretation, even though it would have expanded their power. That is far more persuasive evidence than decades-later, self-serving executive opinions.

2. Because the text and original understanding rebut its argument, the Executive suggests that longstanding practice and Senate acquiescence have changed the Clause's meaning. But again, the political branches cannot bargain away (or squander) the Constitution's structural protections. In any event, however, the Executive Branch's position has been more equivocal than it lets on, while the Senate's resistance more robust.

a. Foremost, between the founding and 1866, Congress passed and the President signed at least 52 statutes empowering the President to make recess appointments to preexisting vacancies during the recess. *See* Appendix A. A typical statute provided that if offices were not filled "during the present session of Congress," then the President is "empowered, to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82.

78 years of Congresses and Presidents would not have bothered to provide this "special authority by law," 38 Annals of Cong. at 500, unless they thought it necessary. "The express grant of power by these enactments implies that, in the opinion of congress, the constitution had not given the power to [the President], or, to say the least, indicates the constant doubt of congress on the subject." *In re Dist. Att'y*, 7

F. Cas. at 743; *see also, e.g.*, *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("[T]he cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant."). And because numerous Presidents signed these statutes, each represents a choice to acquiesce in Congress's ability to prevent (or authorize) recess appointments to preexisting vacancies. To the extent there is any doubt about the "assumed *absence*" of this "power," *Printz*, 521 U.S. at 908, these enactments dispel it.[32]

b. In addition, Congress enacted the Pay Act on February 9, 1863, which prevented the payment of any salary to persons appointed to preexisting vacancies unless the Senate later confirmed them. *See* 12 Stat. 642, 646 (1863). The Executive makes the Orwellian assertion that "the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies" constitute "a form of congressional acquiescence in such appointments." Br. 36-37. But the power of the purse is Congress's principal weapon and this legislation exemplifies its use: "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments." Cong. Globe, 37th Cong., 3d Sess. 565 (1863) (Fessenden).

This statute thus embodies consistent disapproval of the Executive's construction until 1940, when Congress added the exceptions discussed *supra* at 28.

[32] Congress could not have dispensed with advice-and-consent for principal officers, so it likely believed that each of these statutes concerned inferior officers. But regardless, all that matters here is that Congress believed this legislation necessary to permit recess appointments to preexisting vacancies.

And as also noted above, the Senate has continued to fight back in other ways, including by placing blanket holds on nominations, convening pro forma sessions, and participating in litigation. *Supra* at 28-30.

3. Finally, the Executive invokes a few situations (deaths of officers where notice arrives late in the recess, vacancies arising late in the Session, offices created late in the Session) that it believes justify the supposedly "sensible" practice of unilateral appointments to every vacancy. Br. 32-34. But none of these unusual circumstances justify an unbounded power to fill longstanding vacancies during every short break with appointments lasting up to two years. As between minor inconveniences and an expansive unilateral appointments power, the framers would have been far more concerned about the latter (subject to abuse, as history confirms) than the former (by definition infrequent). Moreover, the President already has a constitutional tool to address such contingencies—he can keep the Senate in session to consider nominations pursuant to Art. II, § 3.

In any event, each of these entirely predictable possibilities existed at the founding and the framers were fully aware of them. Some States, like Massachusetts, expressly provided for such contingencies: "[I]n case a vacancy shall happen . . . in the recess of the General Court, *or at so late a period in any session* of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof . . . ." 1782-83 *The Acts and Resolves of the Commonwealth of Massachusetts Bay* 523 (reprinted 1890) (emphasis

added). The framers were capable of including a similar caveat.

But they did not. Their solution was, rather, to let Congress pass statutes, when appropriate, that authorized the President to make recess appointments to preexisting vacancies—just as Congress often did in the century following ratification. *See* Appendix A. In addition, Congress has long provided for acting officers, such that "whenever a vacancy or non-occupancy shall occur during the session in any important office," the President may "order the duties to be performed by some public officer to whose appointment the Senate has already consented." S. Rep. No. 37-80, at 7-8; *see also* 5 U.S.C. § 3345 (contingency arrangements when officers are "unable to perform" their "functions and duties"). Legislation and political compromise—not Presidential arrogation of a sweeping unilateral appointments power—are how the Constitution leaves these isolated impracticalities to be resolved.

Moreover, preventing "impractical" situations is *never* a reason to reallocate formal powers. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). Rather, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to

concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

III. The President Cannot Make Recess Appointments When The Senate Is Convening Pro Forma Sessions Every Three Days.

The Executive concedes that, if mid-Session recess appointments are allowed, Senate breaks must have some minimum duration to avoid the absurdity of lunchtime "recess" appointments. Although the Executive refuses to articulate any principled basis for its "de minimis exception"—invoking only its own "long" understanding, Br. 18—the only conceivable constitutional basis resides in the Adjournments Clause, which provides that neither House of Congress shall "adjourn for more than three days" without the other's consent. Art. I, § 5, cl. 4. As then-Assistant Attorney General William Barr testified with respect to the Pocket Veto Clause: "Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and not adjourned." *Hearing on H.R. 849 Before the Subcomm. on the Legislative Process of the H. Comm. on Rules* 58, 101st Cong. (1989).[33]

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[33] This does not mean that over-three-day adjournments are "the Recess of the Senate" (if mid-Session breaks ever qualify). As General Daugherty explained, "an adjournment for 5 or even 10 days" likely would not count. 33 Op. Att'y Gen. at 25; see also 16 Op. O.L.C. at 15. But at an absolute minimum, the Senate is not in "the Recess" when it has not adjourned "for more than three days" under the Adjournments Clause. Art. I, § 5, cl. 4.

Here, the Senate never adjourned for more than three days.[34] Instead, on December 17, 2011, it adjourned pursuant to an order providing that it would "convene for pro forma sessions only, with no business conducted." *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (Wyden). The Senate thereby stated its intent to "convene" in "sessions" and did, in fact, convene sessions every three days.[35] That should be conclusive.

The Executive, however, claims these sessions were constitutional nullities. *See* Br. 47-51. That is plainly incorrect. The Senate has used pro forma sessions for various constitutional purposes since at least the 1850s. That longstanding practice is proper, given that the Senate is fully capable of conducting Senate business at each pro forma session. It is, moreover, the Senate, not the President, that has constitutional authority to decide whether or not it is in session, and the Senate explicitly concluded it was in session here.

A. Pro Forma Sessions Have Long Been Used For A Variety Of Constitutional Purposes.

The Senate has used pro forma sessions—formal sessions at which the Senate can, but generally does not intend to, conduct business—hundreds of times

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[34] Sundays have always been a *dies non* in congressional parlance. *See, e.g.*, *Jefferson's Manual and Rules of the House of Representatives* § 83 (GPO 2007); Floyd M. Riddick, *Riddick's Senate Procedure* 15-16, 1265 (Alan S. Frumin ed., 1992) ("Riddick's"). This practice does not matter here, though, because the January 4 appointments were between sessions on January 3 and January 6—a three-day break by any measure.

[35] *See* 158 Cong. Rec. S1 (Jan. 3, 2012); *id.* at S3 (Jan. 6, 2012); *id.* at S5 (Jan. 10, 2012); *id.* at S7 (Jan. 13, 2012); *id.* at S9 (Jan. 17, 2012); *id.* at S11 (Jan. 20, 2012).

and for various purposes since 1854. Yet until now, no president ever attempted to make recess appointments while the Senate was convening such sessions. That "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Pocket Veto Case*, 279 U.S. 655, 689 (1929).

1. Pro forma sessions date to at least 1854 when the Senate needed to undertake a "RENOVATION OF THE HALL." Cong. Globe, 33d Cong., 1st Sess. 1347 (1854). Because the House had not agreed to adjourn for more than three days—yet the renovators needed access to the Chamber—the Senate agreed to convene two short, formal sessions with no business conducted. *Id.* Those sessions were indistinguishable from the pro forma sessions here:

> IN SENATE
>
> Thursday, June 1, 1854
>
> The Journal of yesterday was read and approved.
>
> On motion by Mr. STUART,
>
> The Senate adjourned.
>
> Pursuant to a resolution passed yesterday, the Senate will not meet again until Monday.

Id. at 1353; *id.* (June 5, 1854) (similar). The Senate repeated this practice in later decades, including during the Pierce,[36] Benjamin Harrison,[37] McKinley,[38] and Wilson Administrations.[39]

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[36] Cong. Globe, 34th Cong., 1st Sess. 1368 (1856).

[37] 22 Cong. Rec. 843 (1890).

[38] 30 Cong. Rec. 842 (1897).

[39] 50 Cong. Rec. 2314–15 (1913).

Congress has convened hundreds of similar sessions since the 1850s to likewise discharge its constitutional obligations. *See, e.g.*, Appendix B. This longstanding practice is significant, because the Adjournments Clause ensures that both Houses of Congress are available to do business, including, *e.g.*, passing legislation and providing advice and consent. "[I]t would be very exceptionable to allow the senators, or even the representatives, to adjourn, without the consent of the other house, at any season whatsoever, without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 368 (Jonathan Elliott ed., 2d ed. 1891) (Madison). Likewise, the Twentieth Amendment's annual-meeting requirement seeks "[t]o prevent those inconveniencies which might arise from the national legislatures omitting to assemble as often as the affairs of the nation require." St. George Tucker, 1 *Blackstone's Commentaries* 206 (1803).[40] Surely the Senate cannot be in "session" under these provisions while in "recess" under others.

Congress has also used pro forma sessions to pass legislation. Indeed, Congress did precisely that under the same adjournment order in place when the President made the appointments here. At its December 23, 2011, pro forma session, the Senate passed a two month extension of the Temporary Payroll Tax Cut Continuation Act of 2011. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And at an indistinguishable August 5, 2011, pro forma session, the Senate passed Part IV of the Airport and Airway Extension Act of 2011. *See* 157 Cong. Rec. S5297

[40] Tucker was referring to Article I, Section 4.

(daily ed. Aug. 5, 2011). The Senate passed these bills by unanimous consent during pro forma sessions no longer lasting or more elaborate than other pro forma sessions. *See id.* (59 seconds); 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011) (1 minute, 25 seconds).

Moreover, since at least the early 1980s—around when Presidents began aggressively using mid-Session recess appointments to circumvent Senate advice and consent—the Senate has relied on pro forma sessions to resist improper recess appointments. Senator Robert Byrd, for example, threatened to use them during the Reagan Administration. *See* 145 Cong. Rec. 29,915 (1999) (Inhofe) (explaining as much). As Senator Byrd stated, if President Reagan attempted to recess appoint a Supreme Court Justice, "he would not formally adjourn the Senate for the remainder of the year" and instead would "'have pro forma sessions.'" Hanrahan, *supra* (quoting Byrd). Subsequent Senates used pro forma sessions to prevent President George W. Bush and, later, President Obama, from making recess appointments.

2. No President has previously questioned the validity of these sessions. To the contrary, Presidents have demonstrated their agreement that these sessions are valid in numerous ways.

First, they have done so by signing—rather than vetoing—legislation that the Senate passed during pro forma sessions. Thus, on December 23, 2011, President Obama signed Temporary Payroll Tax Cut Continuation Act,[41] and, on August 5, 2011, he signed

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[41] *See* White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 3765* (Dec. 23, 2011),

the Airport and Airway Extension Act.[42] He never questioned either's validity.

Second, presidents have historically refrained from recess appointments where, as here, the Senate was convening regular pro forma sessions. For example, surveying recent Presidents, the Senate declined to adjourn for more than three days by convening at least:

- 13 pro forma sessions during the Carter Administration;
- 18 pro forma sessions during the Reagan Administration;
- 31 pro forma sessions during the George H.W. Bush Administration;
- 24 pro forma sessions during the Clinton Administration;
- 78 pro forma sessions during the George W. Bush Administration;
- and 39 pro forma sessions during the Obama Administration prior to January 4, 2012.

See App. B, *infra* at 20a-29a. Yet none of those Presidents attempted to make recess appointments during these sessions, even though all of them constituted "the Recess" under the Executive's construction. That "assumed absence" of this

(continued…)

http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765.

[42] *See* White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 2553* (Aug. 5, 2011), http://www.whitehouse.gov/the-press-office/2011/08/05/statement-press-secretary-hr-2553.

"power," *Printz*, 521 U.S. at 908—over four decades and five administrations of both parties—is highly probative.[43]

Third, just three years ago, the current Administration expressly recognized that pro forma sessions preclude recess appointments. As it told this Court: "Although a President may fill [Board] vacancies through the use of his recess appointment power . . . the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period." Letter from Solicitor General to William K. Suter, Clerk, Supreme Court of the United States 3 (Apr. 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("SG Letter"). The Administration emphasized that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," *id.*, including during a period when it was convening pro forma sessions "with no business conducted," 153 Cong. Rec. S14,661 (daily ed. Nov. 16, 2007) (Webb).[44]

Finally, the Executive previously acknowledged that pro forma sessions count under the Clause. The OLC Memorandum authorizing the appointments

[43] The Executive suggests that the Bush Administration believed otherwise, citing a 2010 newspaper editorial. Br. 58 n.57. The editorial, however, does not purport to reveal the Administration's position and, indeed, acknowledges that the pro forma sessions successfully "prevent[ed] a recess appointment." Steven G. Bradbury & John P. Elwood, *Recess Is Canceled*, Wash. Post, Oct. 15, 2010.

[44] The Executive tries to brush its prior statement aside as supported by little "analysis" in a "letter principally addressed to other subjects." Br. 58-59. The Executive, however, does not dispute that the letter squarely concluded that pro forma sessions "foreclose" the recess appointment "option," *SG Letter* at 3—hardly a novel position at the time, *see supra* at 53-55.

asserted that the "recess" began "on January 3, 2012, [when] the Senate convened one such pro forma session to begin the second session of the 112th Congress." *OLC Memo* at 1; *see also, e.g.*, 16 Op. O.L.C. 15, 15 n.1 (1992) (similar). It did so because the January 4 appointments were mid-Session appointments only if the Second Session of the 112th Congress began on January 3 (by virtue of the pro forma session). Taking the position that these were mid-Session appointments meant the appointees served until the end of both that Session *and* the "next Session"—a full two years.[45] Had the appointments been made before the new Session began, by contrast, the appointees would have served only until the end of the ensuing Session—just one year. It cannot be, however, that pro forma sessions count only when they *increase* executive power.

Recognizing the flaws in this pretzeled logic, the Executive has abandoned OLC's reasoning and now claims that the January 3 session did not commence the Second Session of the 112th Congress after all. Instead, the Executive invokes the supposedly-self-executing nature of the Twentieth Amendment, which it claims triggers each new Session of Congress *automatically*, "whether or not Congress in fact 'assemble[s]' on this date." Pet.C.A.Br. 54; Br. 48. The Twentieth Amendment, however, does not use the word "session" at all, and certainly does not provide that "a new enumerated annual session of Congress begins at noon on January 3" regardless of whether Congress assembles. Pet. 3 n.2. Instead, it says: "The Congress *shall assemble* at least once in every year, and *such meeting* shall begin at noon on

[45] *See supra* n.5.

the 3d day of January." U.S. Const. amend. XX, § 2 (emphases added).

Consequently, as the Executive previously conceded, Congress's Session commenced on January 3 only if Congress actually "assemble[d]." Congress did "assemble"—in a pro forma session—and *that* is why the Second Session of the 112th Congress began on January 3, 2012.

3. Notwithstanding the above, the Executive makes the unprecedented claim that pro forma sessions do not satisfy the Adjournments Clause. Br. 60-61. But the Senate has been using pro forma sessions since at least 1854 without objection. That "[l]ong settled and established practice" is entitled to "great weight." *Pocket Veto Case*, 279 U.S. at 689.

Moreover, the only contrary evidence the Executive offers—an 1876 Senate debate—in fact proves the opposite. In that debate, the Senators discussed an adjournment order similar to the one here, in which the Senate would adjourn every three days with no expectation of doing business. Senator Conkling, upon whom the Executive chiefly relies, objected to the resolution because he believed it would mean "no Senator appears, no quorum appears, no action is taken, and another three days elapse in the absence of the Senate." 5 Cong. Rec. 335 (1876). He did not object, however, to having one or a few senators gavel the Senate into session with a "general understanding" that no business would be conducted. On the contrary:

> If it be the pleasure of a majority of the Senate to take a vacation over the holidays, the mode of doing it is so very simple,—by adjourning for three days with a general understanding among

> Senators that they are not to expect each other to attend at the next meeting and that at that time, there will be doubtless somebody here to move an adjournment from day to day.

Id. at 336 (Conkling).

The Senate did as Conkling suggested, adjourning for three days "with the general understanding . . . that when we meet again on the 26th we shall adjourn over until the 29th, and on the 29th to the 2d of January." *Id.* at 337 (Morrill). Like the pro forma sessions here, the Senate could convene these sessions with an assumed quorum, *infra* at 59, 62-63, with one Senator expressing his "faith that the point of the absence of a quorum will not be raised after a general understanding has been had that the Senate proposes . . . to transact no business." *Id.* at 336 (Morrill).[46]

B. Pro Forma Sessions Are Actual Senate Sessions.

It is clear, moreover, that pro forma sessions are fully functional sessions. At each, the presiding Senator is capable of exercising the full power of the Senate by simply acting through unanimous consent.

The Senate "operates on the absolute assumption that a quorum is always present until a point of no quorum"—*i.e.*, a quorum call—"is made," *Riddick's* at 1038, and thus possessed a formal quorum at each pro forma session. Unless and until a Senator makes a quorum call, this "absolute assumption" that a quorum is present enables the body to do business.

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[46] One Senator announced his intention to come and make quorum calls, 5 Cong. Rec. 338 (1876) (Edmunds), but did not follow through at the next session. *Id.* at 375 (Dec. 26).

The Executive's repeated assertions that the Chamber was "virtually empty," Br. 48, are based solely on conjecture and irrelevant C-SPAN videos. Unless Congress provides otherwise, the Senate's official record of its proceedings is contained in the Senate Journal and reflected in the Congressional Record.[47] Those sources say *nothing* about how many Senators attended each pro forma session and the courts surely cannot conduct fact-finding missions about how many Senators were in the chamber or standing ready in the cloakroom. Quorum calls are the only mechanism for ascertaining Senate attendance; unless one is made, actual attendance is unknown.

Even if it *were* possible to determine how many Senators attended each pro forma session, however, it would not matter. It is "unusual for as many as 51 Senators to be present on the floor at the same time,"[48] such that the Senate rarely has an actual quorum. The Senate's "absolute assumption" of a quorum nonetheless enables it to do business. *Riddick's* at 1038. That assumption means that whenever the Senate lacks a quorum (*i.e.*, most of the time), a single Senator can prevent the Senate from conducting business by making a quorum call. The Senate is thus effectively limited to doing business by unanimous consent most of the time.

The Senate is, moreover, "fundamentally a 'unanimous consent' institution." Walter J. Oleszek,

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[47] 44 U.S.C. § 903; Art. I, § 5, cl. 3.

[48] Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2D4QLO9%0A.

Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate* 1 (rev. 2001). For instance, "[i]n the last ten Congresses, 110th-101st, an average of 93 percent of approved measures did not receive roll call votes and in the 111th Congress through February 1, 2010, 94 percent of approved measures were approved without a roll call vote." 156 Cong. Rec. S7137-38 (daily ed. Sept. 15, 2010); *Riddick's* at 1311 ("Much of the routine activity on the Senate floor occurs as a result of simple unanimous consent agreements."). Most nominations, too, "are brought up by unanimous consent and approved without objection." Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013).[49]

Accordingly, the Senate was fully capable of doing business at its pro forma sessions on January 3 and 6, 2012. The Chamber may have been full or it may have been mostly empty—the Senate's official records do not say. But either way, the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power—just like at any other Senate session.

C. The President Does Not Have "Discretion" To Second-Guess Senate Procedures.

Because the Senate can, in fact, do substantial business at pro forma sessions by unanimous consent, the Executive is reduced to attacking the

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[49] http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*P%5C%3F3%22P%20%20%0A. The Senate has developed an informal system to facilitate the effective use of this tool. *See* Br. 54 n.53.

legitimacy of that procedure. The Executive contends that the Senate was in "recess" because "the remote possibility" of obtaining unanimous consent "cannot suffice to prevent an extended break from being a 'recess.'" Br. 52. But the Senate—not the President—is master of how the Senate will conduct business. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."); Laurence H. Tribe, *American Constitutional Law* § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself"). After all, the Rules of Proceedings Clause empowers each House to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business" and "it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *Ballin v. United States*, 144 U.S. 1, 5-6 (1892).

The Executive, therefore, may not nullify Senate sessions because it finds the Senate's rules too cumbersome. Presidents have discretion to decide whether to make recess appointments, and to select whom to appoint. But they may not *also* determine when that power is available. That decision is for the Senate alone.

D. The Executive's Contrary Arguments.

The Executive raises a series of counter-arguments, all erroneous.

1. The Executive contends that pro forma sessions do not count because "the Senate's 'members owe no

duty of attendance.'" Br. 45 (quotation omitted); *id.* at 3 (claiming that only the presiding Member must attend). But as explained above, the attendance obligation is irrelevant. "[T]he Senate operates on the absolute assumption that a quorum is always present." *Riddick's* at 1038. Whether there are one, five, or 55 Senators, it is absolutely assumed that the Senate has a quorum until its absence is shown.

Moreover, the Executive is wrong. Senators have the same attendance obligation at pro forma sessions as any other session. "Under Senate Rule VI, paragraph 2, Senators are required to attend all sessions of the Senate unless they are excused." *Riddick's* at 214; *see also* Senate Rule VI ("No Senator shall absent himself from the service of the Senate without leave."). Here, no Senator was "excused" from these sessions, and nothing in the December 17, 2011, adjournment order suspended Senate Rule VI. At any of these sessions, therefore, a Senator could have demanded a quorum call, "ascertained that a quorum is not present," Senate Rule VI, and made "a motion to direct the Sergeant at Arms to request the attendance of absent Senators," which motion would "generally" be "adopted." *Riddick's* at 214, 215, 217. If some Senators ignored their formal attendance obligation, that does not distinguish pro forma sessions from most sessions, which generally feature few Senators in the chamber.

Respondent International Brotherhood of Teamsters Local 760 (the "Union") attempts to avoid Rule VI by arguing that the adjournment order's prediction that no business would be conducted made quorum calls out of order. Union Br. 25 (citing

Riddick's at 1042). The Union is wrong. Quorum calls were in order at each pro forma session because each was a separate session punctuated by an adjournment and nothing in the Adjournment Order precluded quorum calls. "Upon the convening of the Senate following an adjournment or recess a quorum must be called upon demand." *Riddick's* at 1063. Any Senator could request a quorum call at any pro forma session, triggering the enforcement mechanisms for attendance.

2. The Executive likewise argues that this period of pro forma sessions was tantamount to a protracted break when leadership retains the power to "require either or both Houses to resume business during the recess if the public interest warrants." Br. 53. But the difference is obvious. When the Senate is in recess subject to being called back, it is in recess. It cannot act without first convening a session.

When the Senate is convening pro forma sessions, by contrast, it is in session and capable of doing business. The presiding Senator is empowered to read presidential messages, confirm nominees, recite the pledge of allegiance, offer a prayer, or do any of the other things the Executive latches onto in attempting to explain why these sessions are not "real" Senate sessions. That is precisely why the Senate was able to take official action on August 11, December 23, and January 3, and potentially on January 6. At each of those sessions, moreover, any Senator was free to enter the chamber, make a quorum call, and enforce the attendance obligation without any "public interest" trigger or hypothetical "reconvening."

3. The Union similarly contends that the Senate needed to "override" its adjournment order to do business. Union Br. 26 n.9. That is both incorrect and irrelevant. On the many occasions when the Senate has done business in pro forma sessions, it has never "overridden" anything. Instead, the Senate simply convenes and the presiding Senator requests and receives unanimous consent that "the bill be considered read three times and passed." 157 Cong. Rec. S8789 (Reid); 157 Cong. Rec. S5297 (Webb) (same). That is what happens whenever the Senate acts by unanimous consent. *See, e.g.*, Oleszek, *Unanimous Consent*, at 1 ("[T]he rules and precedents of the Senate are set aside regularly by the unanimous consent of the membership."). "The way the Senate conducts its business hour after hour, day after day, week after week, year after year, is Senators voluntarily waive the rights which they possess under the rules." *Id.* The Senate returns to its prior state when these temporary agreements expire. But regardless, whether or not the Senate "overrides" its prior agreement when it does business, its ability to do so simply confirms that the Senate is fully capable of doing business.

4. Finally, the Executive makes the convoluted argument that, because the Senate authorized actions during the series of pro forma sessions that are permitted while it is in session, that proves it was actually in recess. Br. 50-51. This strained inference cannot be drawn here, however, as the relevant authorizations are necessary during recesses *or adjournments*.

Here, the Senate took a series of short adjournments between each pro forma session. The

Orders the Executive invokes enabled certain actions during those adjournments. *Riddick's* is explicit about this for two of the examples. *See Riddick's* at 1193 (authorization for "committees to file reports during the recess *or adjournment*" (emphasis added)); *id.* at 830 (signing of "enrolled bills during the recess of the Senate, or *during an adjournment* to a day certain" (emphasis added)). And for the third, the Senate Order itself said "notwithstanding the upcoming recess *or adjournment* of the Senate . . . ." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (Reid) (emphasis added).

Confirming that nobody believed these Orders created "the Recess," Majority Leader Reid entered indistinguishable Orders when he initiated pro forma sessions to prevent recess appointments. *See, e.g.*, 154 Cong. Rec. S8077 (daily ed. Aug. 1, 2008). Reid nonetheless made clear that the Senate was not entering "the Recess." *See* 154 Cong. Rec. S7558 (daily ed. July 28, 2008) ("[T]here will be no recess. We will meet every third day pro forma.").

Finally, to the extent the Executive finds it significant that Reid "characterized" the series of pro forma sessions as a "recess," Br. 51, that proves far too much. Senators routinely refer to short breaks—during which not even the Executive would claim recess appointments are permitted—as "recesses" or "the recess."[50] Moreover, Senator Reid also referred to the summer 2008 pro forma sessions—which he convened to successfully block recess appointments—as a "recess." *See* 154 Cong. Rec. S8077 ("[I]t stand[s]

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[50] *See, e.g.*, 158 Cong. Rec. S3388 (daily ed. May 21, 2012) ("recess from 12:30 until 2:15 p.m."); 158 Cong. Rec. S3154 (daily ed. May 15, 2012) (similar).

in recess and convene[s] for pro forma sessions."). The word "recess" is plainly not an incantation that animates the Clause whenever uttered.

* * *

In sum, the Executive's position appears to be that one "recess" began when the Senate adjourned on December 17, continued unbroken through a string of pro forma sessions, with the possible exception of the December 23 session wherein the Senate was actively passing legislation, until the Senate's pro forma session on January 3, when the first "recess" ended, but only by operation of the Twentieth Amendment (regardless of whether the Senate actually met), after which the Senate entered a second "recess" that persisted unbroken through another string of pro forma sessions until January 23, 2012, when the Senate reconvened to commence a Session that had officially begun twenty days earlier due to the Twentieth Amendment.

Reciting this rendition suffices to defeat it. Here, the Senate convened sessions every three days. It was therefore not in "the Recess of the Senate" when the President purported to make recess appointments.

IV. Enforcing The Clause's Limitations Comports With Its Limited Purpose.

"The Spirit of the Constitution favors the participation of the Senate in all appointments." *Randolph Opinion*, at 166. The framers greatly preferred the "general method" of appointment with Senate confirmation, *Federalist 67*, at 409, because it provided "an excellent check upon a spirit of favoritism in the President." *Federalist 76*, at 457. The Constitution thus requires Presidential and

Senate agreement before senior officials may wield the awesome power of the federal government. Consequently, the framers limited the "auxiliary method" to "temporary appointments 'during the recess of the Senate.'" *Federalist 67*, at 409-10. The central purpose of that authorization was to provide an emergency power in narrow circumstances, not to supply an all-purpose tool for installing difficult-to-confirm nominees. The Clause's limitations are fully in keeping with that limited purpose.

1. The Executive laments the Senate's ability to "strip" the President of his "constitutional authority to make recess appointments" by refraining from taking between-Session recesses. Br. 20. But of course the Senate can prevent recess appointments. The appointments power is "confided to the President and Senate *jointly*." *Federalist 67,* at 409-10. The Constitution itself requires compliance with the Appointments Clause whenever possible.

The Senate has the constitutional responsibility to insist upon advice and consent. Should the Senate do as the Executive fears, that is an inevitable corollary to the Constitution's advice-and-consent requirement. Moreover, should the Senate depart on a lengthy mid-Session break, and should the President need to install nominees, the Constitution supplies the proper tool. Presidents have the power to cancel Senate breaks and convene the Senate for the purpose of confirming nominees. *See* Art. II, § 3. What the President cannot do, however, is declare the Senate in "the Recess" because it is *unwilling* to confirm certain nominees.

Moreover, the Executive concedes that the Senate could "strip" it of this power by remaining

"continually in session for the appointment of officers." Br. 63-64. But if that is not what the Senate did here—convening "continually" in sessions where it could and did do official business—then it is impossible to know what passes muster. After all, the Senate is often "in session" with few Senators present, and it routinely confirms nominees by unanimous consent with an assumed quorum.

2. The Executive also claims that the President needs "officers to execute the laws" and thus needs a robust recess-appointment power in the face of the modern proliferation of mid-Session breaks. Br. 19-20. But the march of history rebuts that assertion. The modern Senate takes frequent mid-Session breaks only because technology enables it to do so without disrupting the nation's business. The early Senates refrained from such breaks precisely because nineteenth-century modes of transportation and communication would have rendered it unavailable to do the nation's business.

For that same reason, Senators are now perpetually available to address presidential requests. With internet, email, videoconferencing, and the like, unilateral appointments should be *less* common rather than *more*. Yet the opposite has happened—a trend the Executive seeks to accelerate by massively expanding the unilateral appointments power. *See Chadha*, 462 U.S. at 944 (the "inquiry is sharpened rather than blunted by the fact that [the challenged practice is] appearing with increasing frequency").

Moreover, if the Executive were actually concerned about making short-term appointments in exigent circumstances, then its construction would be

adapted to that concern. The Executive would, for instance, agree with Attorney General Evarts that "their next Session" refers to the period of Senate business between each recess, or with Attorney General Wirt that the appointment should "continue only until the Senate shall have passed upon it." 1 Op. Att'y Gen. at 632. But of course, the Executive does not take these narrower positions. It instead seeks to forge a powerful weapon for combating Senate refusal to confirm the President's preferred nominees.

3. Finally, the Executive claims that "history belies" the concern that its construction would enable the President "to evade the Senate's advice-and-consent role." Br. 20. History, however, shows the opposite, with this case as a marquee example. The same day that the President purported to appoint the Board members here, he "recess" appointed Richard Cordray as the head of the Consumer Financial Protection Bureau ("CFPB"). In doing so, the President stated: "[W]hen Congress refuses to act . . . I have an obligation as President to do what I can without them."[51] As he declared: "I refuse to take no for an answer." *Id.* There is thus no question that—in this very case—the President exercised his recess-appointment power "to evade the Senate's advice-and-consent role." Br. 20.

Moreover, limiting "litigation risk" has been a central factor in modern presidential restraint. *See, e.g.*, *Quinn Memo* (noting that "recess appointments

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[51] The White House, *Remarks by the President on the Economy*, http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript.

during [a] 10-day intrasession recess would . . . pose significant litigation risks"); *OLC Memo* at 4 ("[T]he substantial arguments on each side create some litigation risk."). This Court can be sure, however, that if it eliminates the "litigation risk," presidential restraint will disappear too. And vanishing along with it will be one of the "structural protections against abuse of power" "critical to preserving liberty." *Free Enter. Fund*, 130 S. Ct. at 3157.

* * *

Recent events confirm that our government functions best when constitutional provisions, such as the Recess Appointments Clause, are applied according to their terms. Last summer, after three courts of appeals enforced the Clause and voided the January 4 appointments, "the Senate confirmed four new Board members." Br. 7 n.3. The Senate confirmed those members pursuant to a political compromise with the President,[52] and, thanks to that process, the Board now has a Senate-confirmed quorum and the CFPB has a Senate-confirmed head. These events confirm the wisdom of this Court's aphorism that: "[T]he doctrine of separation of powers is a . . . prophylactic device, establishing high walls and clear distinctions." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). There is no reason, legal or practical, for the Court to short-circuit this laudable process by granting the President untrammeled power to make two-year, unilateral appointments whenever he pleases.

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[52] *See, e.g.*, Michael Memoli, *Senate confirms Obama choices for National Labor Relations Board*, L.A. Times, July 30, 2013.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX A

STATUTES GRANTING THE PRESIDENT AUTHORITY TO MAKE RECESS APPOINTMENTS TO FILL VACANCIES THAT DID NOT "HAPPEN DURING" THE RECESS

Commissions Expire at the End of the Next Session

Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200

> "That if the appointment of the inspectors of surveys, or any part of them, 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 June 5, 1794, ch. 49, § 1, 1 Stat. 378, 379

> "That if the appointment of such supervisors and inspectors cannot 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 will expire at the end of their next session."

Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550

> "[T]hat if the President of the United States should find it most expedient to establish this government in the recess of Congress, he shall nevertheless have full power to appoint and commission all officers herein authorized; and their commissions shall continue in force until the end of the session of Congress next ensuing the establishment of the government."

Act of July 9, 1798, ch. 70, § 3, 1 Stat. 580, 584

> "That there shall be one commissioner appointed for each of said divisions, who shall reside within the same; and if the appointment of said commissioners, or any number of them, shall not be made during the present session of Congress, the President of the United States shall be, and he is hereby empowered to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Act of Mar. 2, 1799, ch. 22, § 17, 1 Stat. 627, 639

> "And in case the appointment of the several collectors and surveyors for the new districts or ports established, or authorized to be established hereby, shall not be made during the present session of Congress, the President of the United States 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 May 7, 1800, ch. 41, § 3, 2 Stat. 58, 59

> "[T]hat the President of the United States shall have full power, in the recess of Congress, to appoint and commission all officers herein authorized; and their commissions shall continue in force until the end of the next session of Congress."

Act of Mar. 3, 1803, ch. 27, § 14, 2 Stat. 229, 234

> "That the President of the United States shall have full power to appoint and commission the surveyor, registers of the land-offices, and receivers of public monies above mentioned, in the recess of Congress, and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of Mar. 16, 1804, ch. 24, § 2, 2 Stat. 270, 270

> "That the President of the United States be, and he hereby is authorized to make the appointment of the said commissioners and agent, during the recess of the Senate, and to grant to the persons thus appointed, commissions which shall remain in force until the end of the next session of Congress, and no longer."

Act of Mar. 26, 1804, ch. 35, § 16, 2 Stat. 277, 282-83

> "That the President of the United States shall have full power to appoint and commission the several registers and receivers of public monies of the land-offices established by this act, in the recess of Congress; and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of Mar. 3, 1807, ch. 49, § 4, 2 Stat. 448, 448-49

> "That the President of the United States, in the recess of Congress, shall have full power to appoint and commission the registers and receivers of public monies of the land-offices established by this act, and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of July 22, 1813, ch. 16, § 2, 3 Stat. 22, 25-26

> "[A]nd if the appointment of the said collectors or any of them, shall not be made during the present session of Congress, the President of the United States shall be, and is hereby empowered to make such appointment during the recess of the Senate, by granting commissions, which shall expire at the end of their next session."

Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82

> "That if the appointment of said collectors, or any of them shall not be made during the present session of Congress, the President shall be, and is hereby empowered to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Act of Jan. 9, 1815, ch. 21, § 37, 3 Stat. 164, 178

> "That in cases where principal assessors have not been, or shall not, during the present session of Congress, be appointed, and in cases where vacancies shall occur in the office of principal assessor, the President of the United States is hereby authorized to make appointments during the recess of the Senate, by granting commissions, which shall expire at the end of the next session."

Act of Apr. 20, 1818, ch. 79, § 9, 3 Stat. 433, 436

> "And the President of the United States is hereby authorized, in the recess of the Senate, to appoint the appraisers of the said ports, which appointment shall continue in force until the end of the next session of Congress."

Act of Mar. 2, 1819, ch. 49, § 9, 3 Stat. 493, 495

> "That the President shall have full power, during the recess of the Senate, to commission all or any of the said officers, until the end of the session of Congress next succeeding the date of the commission."

Act of Mar. 3, 1819, ch. 93, § 2, 3 Stat. 523, 524

> "[A]nd the President of the United States shall be, and he is hereby, authorized, within the term aforesaid, to establish such districts, for the collection of the revenue, and, during the recess of Congress, to appoint such officers, whose commissions shall expire at the end of the next session of Congress . . . ."

Act of Mar. 3, 1821, ch. 39, § 3, 3 Stat. 637, 639

> "That the President of the United States be, and he is hereby, authorized to appoint, during the recess of the Senate, a commissioner and surveyor, whose commissions shall expire at the end of the next session of Congress . . . ."

Act of May 7, 1822, ch. 62, § 7, 3 Stat. 684, 684

> "But the President, in the recess of the Senate, may make temporary appointments of any such collector or surveyor, whose commission shall expire in forty days from the commencement of the next session of Congress thereafter."

Act of Mar. 1, 1823, ch. 21, § 16, 3 Stat. 729, 735-36

> "[A]nd the President of the United States is hereby authorized, in the recess of the Senate, to appoint the appraisers for the ports provided for in this section, which appointments shall continue in force until the end of the session of Congress thereafter."

Act of Mar. 3, 1823, ch. 29, § 1, 3 Stat. 754, 754-55

> "[T]he President is hereby authorized, in the recess of the Senate, to appoint three commissioners, which appointments shall be of force until the end of the next session of Congress thereafter . . . ."

Act of July 30, 1852, ch. 75, § 4, 10 Stat. 25, 26

> "And in case it shall be found necessary or expedient to establish said districts, or either of them, during the recess of Congress, the President shall be, and he is hereby authorized to appoint the necessary officers during such recess, and until the end of the next session of Congress . . . ."

Act of July 1, 1862, ch. 123, 12 Stat. 498, 498-99

> 'That the President be, and is hereby, authorized to appoint, by and with the advice and consent of the Senate, or during the recess thereof and until the end of its next session after such appointment, an agent for the Grand River and Wintah bands of Indians . . . ."

Act of July 3, 1866, ch. 164, § 2, 14 Stat. 82, 83

> "That the President is hereby authorized to appoint, by and with the advice and consent of the Senate, or during the recess thereof, and until the end of the next ensuing session, a register and receiver for said land district . . . ."

Appointments Must Be Submitted to the Senate

Act of July 1, 1797, ch. 7, § 9, 1 Stat. 523, 525

> "That the appointment of the officers to the frigates may be made by the President alone in the recess of the Senate; and their commissions, if so appointed, shall continue in force till the advice and consent of the Senate can be had thereupon at their next meeting which may happen thereafter."

Act of May 28, 1798, ch. 47, § 2, 1 Stat. 558, 558

> "That the President be, and he is hereby authorized to organize, . . . the said troops into corps of artillery, cavalry and infantry, as the exigencies of the service may require; and in the recess of the Senate, alone to appoint the commissioned officers. The appointment of the field officers to be submitted to the advice and consent of the Senate, at their next subsequent meeting."

Act of Mar. 2, 1799, ch. 31, § 2, 1 Stat. 725, 725

> "[T]hat the general and field officers who may be appointed in the recess of the Senate, shall, at the next meeting thereof, be nominated and submitted to them for their advice and consent."

Act of Mar. 26, 1804, ch. 38, § 6, 2 Stat. 283, 284

> "The governor, secretary, judges, district attorney, marshal, and all general officers of the militia, shall be appointed by the President of the United States, in the recess of the Senate; but shall be nominated at their next meeting for their advice and consent."

Act of Mar. 2, 1805, ch. 23, § 1, 2 Stat. 322, 322

> "That the President of the United States be, and he is hereby authorized to establish within the territory of Orleans, a government in all respects similar, . . . to that now exercised in the Mississippi territory; and shall, in the recess of the Senate, but to be nominated at their next meeting, for their advice and consent, appoint all the officers necessary therein . . . ."

Act of Mar. 2, 1805, ch. 26, § 3, 2 Stat. 324, 326

> "That for the purpose of more conveniently ascertaining the titles and claims to land in the territory ceded as aforesaid, the territory of Orleans shall be laid off into two districts, in such manner as the President of the United States shall direct; in each of which, he shall appoint, in the recess of the Senate, but who shall be nominated at their next meeting, for their advice and consent, a register . . . ."

Act of Mar. 3, 1805, ch. 31, § 8, 2 Stat. 331, 332

> "That the governor, secretary, and judges, to be appointed by virtue of this act, and all the additional officers authorized thereby, or by the act for erecting Louisiana into two territories, and providing for the temporary government thereof, shall be appointed by the President of the United States, in the recess of the Senate, but shall be nominated at their next meeting for their advice and consent."

Act of Apr. 12, 1808, ch. 43, § 8, 2 Stat. 481, 483

> "That in the recess of the Senate the President of the United States is hereby authorized to appoint all or any of the officers, other than the general officers, proper to be appointed under this act, which appointments shall be submitted to the Senate, at the next session, for their advice and consent."

Act of Mar. 3, 1809, ch. 28, § 3, 2 Stat. 535, 536

> "[T]hat the President may, and he is hereby authorized, in the recess of the Senate, to appoint all or any of such agents, which appointments shall be submitted to the Senate at their next session, for their advice and consent . . . ."

Act of May 1, 1810, ch. 44, § 2, 2 Stat. 608, 608

> "[T]hey shall respectively be appointed by the President of the United States, by and with the advice and consent of the Senate; but in the recess of the Senate, the President is hereby authorized to make such appointments, which shall be submitted to the Senate at the next session thereafter, for their advice and consent . . . ."

Act of Jan. 2, 1812, ch. 11, § 5, 2 Stat. 670, 670

> "That in the recess of the Senate, the President of the United States is hereby authorized to appoint all the officers proper to be appointed under this act; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Mar. 28, 1812, ch. 46, § 20, 2 Stat. 696, 699

> "That the President may, and he hereby is authorized in the recess of the Senate, to appoint the quartermaster general, deputy quartermasters, commissary general, and deputy commissaries, or any of them; which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of July 6, 1812, ch. 137, § 2, 2 Stat. 784, 785

> "[T]hat the President of the United States be, and he is hereby authorized to appoint any of the officers named in this act during the recess of the Senate, to be submitted to the Senate at their next meeting, for their advice and consent."

Act of July 6, 1812, ch. 138, § 3, 2 Stat. 785, 785

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint all the officers authorized by this act; which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of Jan. 29, 1813, ch. 16, § 4, 2 Stat. 794, 795

> "That it shall be lawful for the President of the United States in the recess of the Senate to appoint such of the officers authorized by this act, as may not be appointed during the present session; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Mar. 3, 1813, ch. 48, § 6, 2 Stat. 816, 817

> "That the superintendent general of military supplies shall be appointed by the President, with the advice and consent of the Senate; but the President is hereby authorized to make the appointment during the recess of the Senate, which appointment shall be submitted to the Senate at their next meeting for the advice and consent."

Act of Mar. 3, 1813, ch. 52, § 9, 2 Stat. 819, 820

> "But all other new appointments authorized by this act shall be made by the President of the United States, with the advice and consent of the Senate: *Provided*, that during the recess of the Senate such appointments may be made by the President alone, in which case the same shall be laid before the Senate at their next session for their advice and consent."

Act of July 26, 1813, ch. 27, § 6, 3 Stat. 47, 48

> "That in the recess of the Senate, the President of the United States is hereby authorized to appoint all the officers proper to be appointed under this act, which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Aug. 2, 1813, ch. 45, § 1, 3 Stat. 74, 74-75

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint such of the officers of the five regiments authorized by the act, entitled . . . and the act supplementary thereto, passed the fifth day of July, one thousand eight hundred and thirteen, as may not be appointed during the present session; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Apr. 16, 1814, ch. 58, § 4, 3 Stat. 124, 124-25

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint any of the officers authorized by this act; which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of Apr. 16, 1814, ch. 59, § 3, 3 Stat. 125, 125

> "That it shall be lawful for the President of the United States to appoint, in the recess of the Senate, any of the officers authorized by this act, which appointments shall be submitted to the Senate at their next session."

Act of Apr. 18, 1814, ch. 67, § 2, 3 Stat. 128, 128

> "That the President of the United States shall have power to appoint any officer authorized by this act, during the recess of the Senate, to be submitted to them for their advice and consent, at their next session."

Act of Mar. 3, 1817, ch. 65, § 3, 3 Stat. 376, 377

> "That the President of the United States may, in the recess of the Senate, appoint any of the officers authorized by this act, which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of Mar. 3, 1819, ch. 100, § 13, 3 Stat. 528, 532

> "That the President shall have power to appoint the register and receiver of public moneys for the said districts in the recess of the Senate, who shall be nominated to them at their next meeting."

Act of Mar. 3, 1823, ch. 36, § 2, 3 Stat. 769, 769

> "And the President shall have power, in the recess of the Senate, to make the appointments authorized by this act; but all appointments, so made, shall be submitted to the Senate at their next session, for confirmation."

Act of June 15, 1832, ch. 131, § 5, 4 Stat. 533, 533

> "That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint all the officers proper to be appointed under this act; which appointments may be made during the recess of the Senate, but shall be submitted to the Senate at their next session, for their advice and consent . . . ."

Act of June 30, 1834, ch. 132, § 7, 4 Stat. 712, 713

> "That the commissions of the officers now in the marine corps shall not be vacated by this act, and that the President of the United States may, during the recess of the Senate, first by promotions according to rank and then by selections, appoint the officers hereby authorized, which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of July 25, 1861, ch. 19, § 2, 12 Stat. 275, 275

> "That the commissions of the officers now in the marine corps shall not be vacated by this act; and that the President of the United States may, during the recess of the Senate, first by promotions, and then by selections, appoint the officers hereby authorized, which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of Mar. 3, 1863, ch. 79, § 20, 12 Stat. 744, 753

> "That, in order to allow time for their thorough examination, the President may appoint the officers authorized by this act during the recess of Congress; which appointments shall be submitted to the Senate at their next session for their advice and consent."

APPENDIX B

ILLUSTRATIVE LIST OF SHORT, FORMAL SENATE SESSIONS IN THE MODERN ERA[1]

81st Congress

9/3/1949	95 Cong. Rec. 12600
5/29/1950	96 Cong. Rec. 7821
12/26/1950 – 1/1/1951	96 Cong. Rec. 17020, 17022

82nd Congress

3/26/1951	97 Cong. Rec. 2898
9/4/1951	97 Cong. Rec. 10956
4/14/1952	98 Cong. Rec. 3998–99

84th Congress

4/4/1955	101 Cong. Rec. 4293

85th Congress

7/5/1957	103 Cong. Rec. 10913

[1] Because pro forma sessions date to at least the mid-nineteenth century, this is a non-comprehensive list of pro forma sessions beginning at the time that Presidents began making frequent mid-Session recess appointments.

88th Congress

5/31/1963	109 Cong. Rec. 9896
7/5/1963	109 Cong. Rec. 12143
8/30/1963	109 Cong. Rec. 16181
11/29/1963	109 Cong. Rec. 22941

89th Congress

4/19/1965	111 Cong. Rec. 8105
5/31/1966	112 Cong. Rec. 11792
9/2/1966	112 Cong. Rec. 21738–39
10/8/1966	112 Cong. Rec. 25869

91st Congress

7/2/1970	116 Cong. Rec. 22619

92nd Congress

4/7/1971	117 Cong. Rec. 10161
4/21/1972	118 Cong. Rec. 13893

93rd Congress

3/2/1973	119 Cong. Rec. 6259

95th Congress

10/21/1977	123 Cong Rec. 34768
11/18/1977	123 Cong. Rec. 37781
12/12/1977	123 Cong. Rec. 38908

96th Congress

1/19/1979	125 Cong. Rec. 654
1/3/1980	126 Cong. Rec. D1
2/11/1980 – 2/14/1980	126 Cong. Rec. D130, D132, S1382
2/22/1980	126 Cong. Rec. D192, D193
3/3/1980	126 Cong. Rec. D256, D257
3/7/1980	126 Cong. Rec. D311, D312

97th Congress

1/8/1981 – 1/15/1981	127 Cong. Rec. D12, D19, S129
1/23/1981	127 Cong. Rec. D52
2/20/1981	127 Cong. Rec. D130

3/6/1981	127 Cong. Rec. D205
3/13/1981	127 Cong. Rec. D249
6/25/1982	128 Cong. Rec. D839
12/22/1982	128 Cong. Rec. D1496

98th Congress

4/8/1983	129 Cong. Rec. D436
4/25/1983	129 Cong. Rec. D533
5/4/1984	130 Cong. Rec. D597

99th Congress

1/28/1985	131 Cong. Rec. D26
2/4/1985	131 Cong. Rec. D44
3/4/1985	131 Cong. Rec. D144
3/11/1985	131 Cong. Rec. D187
3/22/1985	131 Cong. Rec. D257
10/11/1985	131 Cong. Rec. D1186
11/8/1985	131 Cong. Rec. D1346

100th Congress

2/27/1987	133 Cong. Rec. D219
6/15/1987	133 Cong. Rec. D817

101st Congress

1/27/1989	135 Cong. Rec. D31
2/3/1989	135 Cong. Rec. D53
2/21/1989	135 Cong. Rec. D86
2/27/1989	135 Cong. Rec. D115
3/13/1989	135 Cong. Rec. D200
5/5/1989	135 Cong. Rec. S4945
6/12/1989	135 Cong. Rec. D628
9/8/1989	135 Cong. Rec. D967
2/23/1990	136 Cong. Rec. D142

102nd Congress

1/8/1991	137 Cong. Rec. D46
1/18/1991	137 Cong. Rec. D78
1/25/1991	137 Cong. Rec. D97

2/1/1991	137 Cong. Rec. D122
3/1/1991	137 Cong. Rec. D218
3/8/1991	137 Cong. Rec. D264
3/15/1991	137 Cong. Rec. D318
4/15/1991	137 Cong. Rec. D403
4/19/1991	137 Cong. Rec. D450
5/13/1991	137 Cong. Rec. D571
6/10/1991	137 Cong. Rec. D719
10/11/1991	137 Cong. Rec. D1228, D1244
10/18/1991	137 Cong. Rec. D1276, D1278
11/8/1991	137 Cong. Rec. D1398, D1400
1/3/1992	138 Cong. Rec. D1
2/11/1992 – 2/14/1992	138 Cong. Rec. D92, D96
2/28/1992	138 Cong. Rec. D182
3/6/1992	138 Cong. Rec. D230
4/3/1992	138 Cong. Rec. D403

5/1/1992	138 Cong. Rec. D493
5/8/1992	138 Cong. Rec. D538
5/15/1992	138 Cong. Rec. D582
6/1/1992	138 Cong. Rec. D643
6/5/1992	138 Cong. Rec. D678

103rd Congress

1/22/1993	139 Cong. Rec. S641
2/22/1993	139 Cong. Rec. D127
3/1/1993	139 Cong. Rec. D156
4/23/1993	139 Cong. Rec. D397
5/14/1993	139 Cong. Rec. D522
6/18/1993	139 Cong. Rec. D682
9/16/1993	139 Cong. Rec. S11945
4/15/1994	140 Cong. Rec. D389
4/29/1994	140 Cong. Rec. D464
9/15/1994	140 Cong. Rec. D1071

104th Congress

2/5/1996	142 Cong. Rec. D61
2/13/1996 – 2/16/1996	142 Cong. Rec. D77, D80
3/4/1996	142 Cong. Rec. D132

105th Congress

1/27/1997	143 Cong. Rec. D49
2/3/1997	143 Cong. Rec. D68
4/21/1997	143 Cong. Rec. D364
5/27/1997 – 5/30/1997	143 Cong. Rec. D543, D545
2/13/1998	144 Cong. Rec. D97
9/4/1998	144 Cong. Rec. D938
10/19/1998	144 Cong. Rec. D1182

106th Congress

1/12/1999	145 Cong. Rec. D17
1/29/1999 – 2/2/1999	145 Cong. Rec. D89
3/1/1999	145 Cong. Rec. D188
9/17/1999	145 Cong. Rec. D1004

11/12/1999	145 Cong. Rec. D1299

107th Congress

2/5/2001	147 Cong. Rec. D95
2/12/2001	147 Cong. Rec. D116
5/18/2001	147 Cong. Rec. D477
9/17/2001	147 Cong. Rec. D903
9/28/2001	147 Cong. Rec. D949
10/5/2001	147 Cong. Rec. D984
10/26/2001	147 Cong. Rec. D1061
10/21/2002 – 11/8/2002	148 Cong. Rec. D1107, D1109, D1112, D1116, D1120, D1124, D1128

108th Congress

1/24/2003	149 Cong. Rec. D54–55
1/29/2004	150 Cong. Rec. D39
9/16/2004	150 Cong. Rec. D905

109th Congress

1/3/2006	152 Cong. Rec. D1

1/20/2006 – 1/24/2006	152 Cong. Rec. D10, D14

110th Congress

9/14/2007	153 Cong. Rec. D1198
11/9/2007	153 Cong. Rec. D1505
11/20/2007 – 11/29/2007	153 Cong. Rec. D1549, D1551, D1553, D1555
12/21/2007 – 1/18/2008	153 Cong. Rec. D1663, D1665, D1667, D1669; 154 Cong. Rec. D1, D3, D5, D7, D9, D25
2/15/2008 – 2/22/2008	154 Cong. Rec. D153, D155, D159
3/18/2008 – 3/27/2008	154 Cong. Rec. D329, D331, D333, D335
5/23/2008 – 5/29/2008	154 Cong. Rec. D663, D665, D667
6/30/2008	154 Cong. Rec. D837
7/27/2008	154 Cong. Rec. D961
8/5/2008 – 9/5/2008	154 Cong. Rec. D1017, D1019, D1021, D1023, D1025, D1027, D1029, D1031, D1033, D1035.

10/6/2008 – 11/13/2008	154 Cong. Rec. D1239, D1241, D1243, D1245, D1247, D1249, D1252, D1255, D1257, D1259, D1261, D1263, D1266,
11/24/2008 – 12/5/2008	154 Cong. Rec. D1291, D1293, D1295, D1297, D1300
12/12/2008 – 1/2/2009	154 Cong. Rec. D1323, D1325, D1327, D1329, D1331, D1333, D1335

111th Congress

8/10/2009	155 Cong. Rec. D997
10/9/2009	155 Cong. Rec. D1163
1/5/2010	156 Cong. Rec. D2
1/19/2010	156 Cong. Rec. D15
10/1/2010 – 11/12/2010	156 Cong. Rec. D1050, D1055, D1057, D1059, D1061, D1063, D1065, D1067, D1069, D1072, D1073, D1075, D1077, D1079

112th Congress

5/27/2011 – 6/3/2011	157 Cong. Rec. D573, D577, D598

7/1/2011	157 Cong. Rec. D721
8/5/2011 – 9/2/2011	157 Cong Rec. D897, D901, D903, D905, D907, D909, D911, D913, D915
9/29/2011	157 Cong. Rec. D1027
10/7/2011	157 Cong. Rec. S6357
10/24/2011 – 10/27/2011	157 Cong. Rec. S6893, D1149
11/22/2011 – 11/25/2011	157 Cong. Rec. D1259, D1261
12/20/2011 – 1/20/2012	157 Cong. Rec. D1392, D1398, D1401, D1404; 158 Cong. Rec. D2, D5, D7, D9, D12, D21
2/21/2012 – 2/24/2012	158 Cong. Rec. D141, D143
5/25/2012 – 5/31/2012	158 Cong. Rec. D526, D529, D537
8/3/2012	158 Cong. Rec. D825
9/17/2012	158 Cong. Rec. S6391

9/25/2012 – 11/9/2012	158 Cong. Rec. D911, D913, D915, D917, D919, D921, D923, D925, D927, D929, D931, D933, D935, D937
11/16/2012	158 Cong. Rec. S6875
12/24/2012	158 Cong. Rec. D1069

113th Congress

4/26/2013 – 5/3/2013	159 Cong. Rec. D387, D391, D393
7/19/2013	159 Cong. Rec. D729

APPENDIX C

United States Constitution, art. 1, § 5, cl. 1 provides:

§ 5, Clause 1. Legislative Proceedings; Each House as Judge of Qualifications and Election of Its Members; Quorum; Adjournments; Compelling Attendance of Members

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

United States Constitution, art. 1, § 5, cl. 2 provides:

§ 5, Clause 2. Rules; Punishment and Expulsion of Members

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

United States Constitution, art. 1, § 5, cl. 3 provides:

§ 5, Clause 3. Journal; Publication; Recording of Yeas and Nays

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

United States Constitution, art. 1, § 7, cl. 3 provides:

§ 7, Clause 3. Approval or Veto of Orders, Resolutions, or Votes; Repassage Over Veto

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

United States Constitution, art. 2, § 2, cl. 3 provides:

§ 2, Clause 3. Recess Appointments

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.

United States Constitution, art. 2, § 3 provides:

§ 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

The Articles of Confederation, art. 5, para. 1 provides:

Art. 5. § 1.

For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

Act of Feb. 13, 1801, ch. 4, § 37, 2 Stat. 89, 99-100, provides:

Sec. 37.

And be it further enacted, That there shall be appointed for each of the districts hereby established, a person learned in the law, to act as attorney for the United States within such district, and in the circuit and district courts which may be holden therein; which attorney shall take an oath or affirmation for the faithful performance of the duties of his office, and shall prosecute, in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions or suits in which the United States shall be concerned, except actions or suits in the supreme court of the United States; and shall be entitled to, and receive, for their services, such compensations, emoluments, and fees, as by law are or shall be allowed, to the district attornies [sic] of the United States: *Provided always*, that the district attornies [sic] now in office shall, severally and respectively, be attornies [sic] for those districts hereby established, until removed by the President of the United States; and shall perform the duties, exercise the power, and receive the emoluments, hereby directed to be performed, exercised, and received, by the attorney of the United States therein.

Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82, provides:

Sec. 2.

And be it further enacted, That the President of the United State be, and he is hereby authorized to divide respectively the several territories of the United States and the District of Columbia into convenient districts for the purpose of collecting the internal duties above specified, and to nominate and by and with the advice and consent of the Senate appoint a collector for every such district: *Provided*, That any of the said territories, as well as the District of Columbia, may, if the President shall think it proper, be erected into one collection district only: *And provided also*, That if the appointment of the said collectors, or any of them shall not be made during the present session of Congress, the President shall be, and 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 Mar. 3, 1815, ch. 95, 3 Stat. 235, 235, provides:

Chap. XCV.—*An Act supplementary to an act, entitled "An act for the better organization of the courts of the United States, within the state of New York."*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States, by and with the advice and consent of the Senate, be, and hereby is authorized to appoint

one person as marshal, and one as district attorney for the northern judicial district of the United States within the state of New York, created by the act to which this act is a supplement, bearing the date the ninth day of April, in the year one thousand eight hundred and fourteen; and that the terms of appointment and service, together with the duties, responsibilities and emoluments of the said marshal and district attorney, respectively, for the district aforesaid, be in all respects the same within their said district, as the terms of appointment and service, the duties, responsibilities and emoluments of all other marshals and district attorneys, respectively, within their respective districts, in the United States of America.

Act of Feb. 9, 1863 (1863 Pay Act), ch. 25, § 2, 12 Stat. 642, 646, provides:

Sec. 2.

And be it further enacted, That no money shall be paid from the Treasury of the United States to any person acting or assuming to act as an officer, civil, military, or naval, as salary, in any office, which office is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law, nor shall any money be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate.

Act of July 11, 1940 (1940 Pay Act), ch. 580, 54 Stat. 751, 751, provides:

Sec. 1761.

No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) hereof, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

5 U.S.C. § 5503 (Modern Pay Act) provides:

§ 5503. Recess appointments

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a

vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

5 U.S.C. § 3345 provides:

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if-

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

44 U.S.C. § 903 provides:

§ 903. Congressional Record: daily and permanent forms

The public proceedings of each House of Congress as reported by the Official Reporters, shall be printed in the Congressional Record, which shall be issued in daily form during each session and shall be revised, printed, and bound promptly, as directed by the Joint Committee on Printing, in permanent form, for distribution during and after the close of each session of Congress. The daily and the permanent Record shall bear the same date, which shall be that of the actual day's proceedings reported. The "usual number" of the Congressional Record may not be printed.