CASE NOTE

THE FUTURE OF RECESS APPOINTMENTS AFTER THE DECISION OF THE D.C. CIRCUIT IN *NOEL CANNING V. NLRB*

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INTRODUCTION

President Obama outraged congressional Republicans in early 2012 when he used his recess appointment power to name the first Director of the Consumer Financial Protection Bureau (CFPB) and three new members to the National Labor Relations Board (NLRB).[1] The President made the appointments despite pro forma Senate sessions specifically designed to prevent him from filling the positions.[2] Partisans from both sides of the aisle immediately jumped in. Were these intrasession recess appointments an example of the President "arrogantly circumvent[ing] the American people . . . . [in] a sharp departure from a longstanding precedent"?[3] Or were the pro forma sessions nothing more than a "gimmick" created to

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1 *See* Press Release, Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012) [hereinafter Recess Appointment Press Release], *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. Senator Mitch McConnell called the move "unprecedented" and argued that it placed the appointees "in uncertain legal territory." Laura Meckler, *Obama Appoints Cordray to Lead Consumer Bureau*, WALL ST. J. (Jan. 4, 2012), http://online.wsj.com/article/SB10001424052970203471004577140552133809784.html.

2 *See* Meckler, *supra* note 1.

3 *Id.* (quoting Senator McConnell).

threaten "the President's constitutional authority to make appointments to keep the government running"?[4]

Barely a year later, the D.C. Circuit Court of Appeals waded into the debate when it decided *Noel Canning v. NLRB*.[5] In a "bombshell"[6] ruling that has been described as "surprisingly broad,"[7] the panel unanimously declared the President's appointments to the NLRB unconstitutional.[8] Of the three other federal appellate courts to consider the scope of the recess appointment power, all have reached conclusions wholly opposite to that of *Noel Canning*.[9] The reasoning of the D.C. Circuit's decision would have invalidated the majority of recess appointments made by U.S. presidents from Ronald Reagan forward.[10]

President Obama's recess appointments were politically controversial, but all then-existing case law suggested they were constitutional. Still, the Supreme Court had never clarified the precise parameters of the Recess Appointments Clause.[11] Private litigants relied on that gray area to challenge the official acts of recess appointees. This case began as a run-of-the-mill labor dispute, but took on greater significance when Noel Canning challenged the recess appointments and the NLRB's authority. On appeal before the D.C. Circuit, the validity of the appointments became the central issue.

Acknowledging its departure from the reasoning of its sister circuits, a panel of the D.C. Circuit unanimously declared the President's appointments unconstitutional because it interpreted the Recess Appointments Clause as

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4 Dan Pfeiffer, *America's Consumer Watchdog*, WHITE HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog.

5 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013).

6 Carrie Johnson, *Court Ruling Upsets Conventional Wisdom on Recess Appointments*, NPR (Jan. 25, 2013), http://www.npr.org/blogs/itsallpolitics/2013/01/25/170293179/court-ruling-upsets-conventional-wisdom-on-recess-appointments.

7 Aruna Viswanatha & Terry Baynes, *U.S. Court Rules Obama's Appointments Unconstitutional*, REUTERS (Jan. 25, 2013), http://www.reuters.com/article/2013/01/25/usa-obama-appointments-idUSL1N0AU68520130125.

8 *Noel Canning*, 705 F.3d at 506-07.

9 *Id.* at 509 (acknowledging contrary holdings in the Second, Ninth, and Eleventh Circuits).

10 Of the 652 recess appointments made since January 20, 1981, roughly 329 would be invalidated for having occurred during intrasession recesses. Congressional Distribution Memorandum from Henry B. Hogue et al., Cong. Research Serv., on the *Noel Canning* Decision and Recess Appointments Made from 1981-2013, at 4 tbl.1 (Feb. 4, 2013) [hereinafter Hogue Memo], *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf. The Congressional Research Service estimates that "many" of the intersession recess appointments would also be void because they filled vacancies that arose prior to the recess during which the appointments were made. *See id.* at 3.

11 *See infra* text accompanying note 17.

permitting appointments only during *inter*session—not *intra*session—recesses.[12] Two judges went further, and invalidated the appointments under the alternative theory that the President can only use the recess appointment power to fill positions that become vacant during the recess in which the appointments are made.[13] The decision appeared to hamstring the NLRB and the newly formed CFPB.

The logic of *Noel Canning*, which draws heavily on a formalistic reading of the original meaning and purpose of the power, significantly narrows the scope of the Recess Appointments Clause in a manner that could "virtually eliminate the recess appointment power for all future presidents at a time when it has become increasingly difficult to win Senate confirmation for nominees."[14] Previous courts placed greater value on the functional, government-enabling benefits of an expansive reading of the clause. Both interpretations are reasonable, but they also reflect the differing value judgments of the deciding courts.

Noel Canning created a clear circuit split on a critical constitutional issue, and the Supreme Court recently granted certiorari.[15] Now the Court must balance the same values and make its own determination as to the future of recess appointments. The outcome of *Noel Canning* is incredibly difficult to predict. The Court could resolve the case in a number of different ways, and the various fundamental issues at stake cannot be divided easily along ideological lines.

Part I of this Note explores how courts have interpreted the Recess Appointments Clause in the past. Part II recounts the underlying facts of *Noel Canning* and outlines the arguments of the D.C. Circuit's majority and concurring opinions. Part III considers the implications of the D.C. Circuit's ruling for the NLRB and CFPB, and discusses the Supreme Court's decision to grant certiorari in this case.

I. JUDICIAL TREATMENT OF THE RECESS APPOINTMENTS CLAUSE BEFORE *NOEL CANNING*

The Constitution provides two methods by which the President may appoint officers of the United States. Under the first, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

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12 *Noel Canning*, 705 F.3d at 505-07.

13 *Id.* at 514; *see also id.* at 515 (Griffith, J., concurring).

14 Charlie Savage & Steven Greenhouse, *Court Rejects Obama Move to Fill Posts*, N.Y. TIMES (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/business/court-rejects-recess-appointments-to-labor-board.html.

15 NLRB v. Noel Canning, 133 S. Ct. 2861 (2013).

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."[16] The second method, known as the Recess Appointments Clause, follows the first and provides, "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[17]

These provisions appear straightforward on their face, but they are surprisingly open-textured.[18] One scholar aptly observed that the Recess Appointments Clause hits a sort of constitutional sweet spot: "There are stakes, but they are not too high; there is substantial text to work with, but no shortage of interpretive issues."[19]

Three questions shape the interpretive debate. First, what does the term "Recess" mean? Specifically, does it include only breaks between sessions (*inter*session recesses) or are breaks within a given session (*intra*session recesses) encompassed as well? Second, does the phrase "Vacancies that may happen" mean that the President can fill positions that happen to be vacant during the recess or only vacancies that come into existence during the recess? Finally, does the clause permit recess appointments to Article III courts? Earlier appellate court opinions consistently favored the broader reading of the clause on each of these issues.[20]

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16 U.S. CONST. art. II, § 2, cl. 2.

17 U.S. CONST. art. II, § 2, cl. 3.

18 For the origins of the concept of open texture in the law, see H.L.A. HART, THE CONCEPT OF LAW 124-29 (2d ed. 1994). For a useful treatment of the concept, see Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 984 (1995). Professor Sunstein explains,

> [R]ules have an "open texture," stemming from two factors: the rule-makers' ignorance of fact and the rule-makers' indeterminacy of aim. No law is issued with full knowledge of the factual situations to which it will be applied, and no law is enacted with full understanding of or agreement on its animating purposes.

Id. (footnote omitted).

19 Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 443 (2005).

20 *See* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding the intrasession appointment of a circuit court judge); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc) (upholding the intersession appointment of a district court judge to a vacancy that existed before the recess began); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962) (same); *In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880) (upholding the recess appointment of a federal appellate judge to a vacancy that arose when the Senate was in session).

Prior to *Noel Canning*, only one court had directly considered the validity of recess appointments made during intrasession recesses.[21] In *Evans v. Stephens*, the Eleventh Circuit upheld the intrasession recess appointment of Circuit Judge Pryor, in an opinion built upon respect for the executive branch's longstanding interpretation of the Recess Appointments Clause; the clause's plain meaning; historical use of intrasession appointments; and the pragmatic, government-facilitating purpose of the provision.[22] The court argued that the pragmatic purpose of the clause is simply to allow the President to make appointments when the Senate's advice is unavailable, regardless of the type of recess.[23] This interpretation is supported by scholars who view the recess power in a similarly pragmatic light,[24] or who believe political forces are sufficient to check presidential overreach.[25] The opposing view—that the Constitution only allows for recess appointments between official sessions of Congress—had never been expressed in a majority opinion, but a vigorous dissent in *Evans* presaged the reasoning of *Noel Canning*.[26] Some scholars also challenged the *Evans* decision by presenting alternative interpretations of the clause's purpose, complicating the historical record relied on by the *Evans* majority, and calling for greater attention to the original intent of the Framers.[27]

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21 *See Evans*, 387 F.3d at 1221, 1224 (determining the constitutionality of a recess appointment made during a two-week break in the Senate's session).

22 *See id.* at 1226 ("[G]iven the words of the Constitution and the history, we are unpersuaded by the argument that the recess appointment power may only be used in an intersession recess, but not an intrasession recess. Furthermore, what we understand to be the main purpose of the Recess Appointments Clause—to enable the President to fill vacancies to assure the proper functioning of our government—supports [our conclusion].").

23 *See id.* This is particularly persuasive in light of the fact that intrasession recesses may actually be longer than their intersession counterparts. *See id.* at n.10 (noting that intersession recesses have been as short as zero days, while some intrasession recesses have lasted several months).

24 *See, e.g.*, Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 427-41 (2005) (adopting a functional perspective on the Recess Appointments Clause and arguing for a broad interpretation); Herz, *supra* note 19, at 456-58 (exploring the difficulty of interpreting the clause in light of conflicting purposes, but ultimately rejecting those arguments based solely on original purpose).

25 *See* Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 252-56 (2008) (noting that political checks on the President may be the most effective limitation on the recess appointment power).

26 *See Evans*, 387 F.3d at 1228-38 (Barkett, J., dissenting).

27 *See, e.g.*, Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1547-73 (2005) (employing extensive historical research to argue for a limited reading of the Recess Appointments Clause that would not permit intrasession appointments); Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2230 (1994) (objecting to intrasession recess appointments as inconsistent with original intent).

Turning to the second constitutional question, federal appellate courts consistently have held that vacancies need not arise during the recess to be properly filled by recess appointments.[28] Again, these courts have been motivated by pragmatic realities—if you want a functioning government, why should it matter whether a vacancy begins on the last day of a session or the first day of a recess?[29] Each court also draws on "written executive interpretations from as early as 1823, and legislative acquiescence" in the President's broad exercise of the recess appointment power.[30] Commentators who support an expansive view of the first constitutional question also tend to support appointments that fill vacancies that "happen to exist"—as opposed to only those that fill vacancies that "happen to arise"—for similar practical and structural reasons.[31] This view is not universal, however. A dissenting opinion on this question criticized the *Evans* majority's reliance on a single statute to demonstrate congressional acquiescence and argued that the majority interpretation of the Recess Appointments Clause threatened to swallow the primary method of Senate confirmation.[32] Scholars have also conducted extensive historical research to make a legitimate case that the executive branch's view of this issue has not been as consistent as the majority perspective suggests.[33] At least one nineteenth-century court held that the President could fill a vacancy only when it arose during the recess,[34] further complicating the narrative of the majority view. Still,

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28 *See, e.g.*, *Evans*, 387 F.3d at 1226-27; United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 709-15 (2d Cir. 1962); *In re* Farrow, 3 F. 112, 115-16 (C.C.N.D. Ga. 1880).

29 *See, e.g.*, *Woodley*, 751 F.2d at 1012 (asserting that adopting the "happen to arise" interpretation "would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes"); *Allocco*, 305 F.2d at 712 (arguing that restricting the President's recess power to "vacancies which arise while the Senate is away" would lead to "Executive paralysis and do violence to the orderly functioning of our complex government").

30 *Evans*, 387 F.3d at 1226 (citing *Woodley*, 751 F.2d at 1012; *Allocco*, 305 F.2d at 709-15; and *Farrow*, 3 F. 112).

31 *See, e.g.*, Hartnett, *supra* note 24, at 381-407 (providing an extensive argument in favor of a "happen to exist" interpretation and critiquing opponents' use of early historical sources); Herz, *supra* note 19, at 445-47 (arguing that although the text may support a "happen to arise" interpretation, because of the text's ambiguity, "considerations of purpose become critical and are sufficient to trump the text"); *see also* Hein, *supra* note 25, at 258-60 (summarizing the arguments in favor of the "happen to exist" interpretation).

32 *See Evans*, 387 F.3d at 1235-36 (Barkett, J., dissenting).

33 *See, e.g.*, Rappaport, *supra* note 27, at 1501-38 (using historical research to support a more restrictive reading of "happen"). For some of the strongest early sources corroborating this position, see *infra* notes 125-28 and accompanying text.

34 *See In re* Dist. Attorney of U.S., 7 F. Cas. 731, 736, 744 (E.D. Pa. 1868) (No. 3924) (invalidating recess appointment of U.S. Attorney because the vacancy did not arise during the recess).

before *Noel Canning*, no appellate court had ever accepted the "happen to arise" interpretation.

Finally, courts have unanimously held that Article III judges can be appointed through the recess appointment mechanism.[35] This question is not at issue in *Noel Canning*, but the D.C. Circuit's narrow reading of the Recess Appointments Clause could reinvigorate existing resistance to such appointments. The Supreme Court has never reached this issue, but at least one former Justice has hinted at his displeasure with the recess appointments of Article III judges.[36] The Constitution states that the President shall appoint "Judges of the supreme Court, and all other Officers of the United States" through Senate confirmation,[37] but may also "fill up *all* Vacancies" through recess appointments.[38] This clear statement is bolstered by the reality that Presidents from Washington onward have made more than 300 recess appointments to Article III courts.[39] Still, dissenting judges[40] and a spirited group of commentators[41] allege that the practice conflicts with the guarantee of judicial independence found in Article III.[42] At least some anecdotal evidence suggests that Article III judges who reach the bench through recess appointments occasionally feel political pressure during either their recess appointments or subsequent confirmation proceedings.[43]

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35 *See, e.g.*, *Evans*, 387 F.3d at 1222; *Woodley*, 751 F.2d at 1009-10; *Allocco*, 305 F.2d at 708-09.

36 *See* Evans v. Stephens, 544 U.S. 942, 942-43 (2005) (Stevens, J., respecting the denial of certiorari) (noting the "significant constitutional questions regarding the President's intrasession appointment of Judge William H. Pryor, Jr.," and stating that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies").

37 U.S. CONST. art. II, § 2, cl. 2.

38 U.S. CONST. art. II, § 2, cl. 3 (emphasis added).

39 *See* Herz, *supra* note 19, at 448-49. Professor Herz calls the textual case for judicial recess appointments "awfully clear," especially when "matched by a consistent practice" reaching back to Washington. *Id.*

40 *See Woodley*, 751 F.2d at 1033 (Norris, J., dissenting) ("The fundamental principle of separation of powers must prevail over a peripheral concern for governmental efficiency, and core constitutional values must prevail over uncritical acceptance of historical practice.").

41 *See, e.g.*, Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 757 (2009) (using a dynamic view of the Constitution to argue that Article III judges should not receive recess appointments because of changed realities in the federal judiciary); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 518 (2004) (arguing that the power of the executive to make recess appointments should by trumped by the right of litigants to be free from judges who may not be truly independent).

42 *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

43 *See, e.g.*, *Nomination of William J. Brennan, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 85th Cong. (1957), *available at*

Some commentators believe it may be technically constitutional but unwise to read the Recess Appointments Clause broadly.[44] Others argue that the clause provides a much needed safety valve against government gridlock, especially in light of Senators' frequent threats to filibuster Presidential nominees.[45] The relative lack of case law addressing these questions has also prompted some fairly creative interpretations of the clause and imaginative suggestions as to how it can be manipulated.[46]

The courts that had addressed these questions, however, had *consistently* determined that the recess appointment power could be used to fill vacancies during both intrasession and intersession recesses, to fill vacancies that existed prior to the start of the recess in which the appointment was made, and to fill vacancies on Article III courts. In a dramatic departure from the decisions of those courts—with respect to the two most controversial issues—the *Noel Canning* court held the opposite.

II. THE CASE: *NOEL CANNING V. NLRB*

Chief Judge Sentelle, writing for the majority, acknowledged the surprising outcome of the case when he wrote, "[w]hile the posture of the petition is routine, as it developed, our review is not."[47] The case may have

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http://www.princeton.edu/aci/cases-pdf/aci3.brennanhearings.pdf (detailing the difficult questions about communism that recess appointee Justice Brennan received from Senator Joseph McCarthy during his confirmation hearings); JACK BASS, UNLIKELY HEROES 164 (1981) (noting that 1960s recess appointees to the Fifth Circuit avoided race-related cases until they were confirmed by the Senate).

44 *See, e.g.*, Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1676 (2011) ("The constitutionality of recess appointments of Article III judges does not, however, render them wise."); Note, *Recess Appointments to the Supreme Court—Constitutional but Unwise?*, 10 STAN. L. REV. 124, 146-47 (1957) (arguing that recess appointments to the Supreme Court are constitutional, but that the President should make them "only in cases of clearest emergency").

45 *See, e.g.*, Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y REV. 255, 288 (2011) (arguing for an expansive reading of the recess appointment power to combat the existing paralysis in Senate advice and consent).

46 *See, e.g.*, Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 946 (2013) (making the novel argument that if the Senate fails to act on an important executive branch nomination—never actually voting the nominee up or down—it consents to that nominee taking office); Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82, 83 & n.8 (2007) (proposing a mechanism by which a Senate that wanted to curtail a recess appointee's time in office could simply "convene, immediately terminate its session, and then reconvene instantly"). *But see* Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88, 89-92 (2007) (suggesting that Tillman's proposal would be inconsistent with the spirit of the Constitution and easily circumvented by the President).

47 Noel Canning v. NLRB, 705 F.3d 490, 493 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013).

originated as a standard labor dispute, but it ultimately came to encompass a deeply divisive political quarrel over unanswered questions of executive power. If the outcome of *Noel Canning* stands, it will significantly narrow the President's power to appoint officers.

A. *Controversy Caused by President Obama's January 14, 2012 Recess Appointments*

Every President has used recess appointments to fill official vacancies over the past few decades, but President Obama has exercised the power far less frequently than his predecessors. Over the course of his time in office, President Reagan invoked the recess appointment power 232 times; President George H. W. Bush, 78 times; President Clinton, 139 times; President George W. Bush, 171 times; and President Obama, just 32 times.[48] The magnitude of the controversies surrounding these appointments has depended on the positions being filled and the partisan balance of the political branches at the time of appointment. Presidents as diverse as Reagan, George H. W. Bush, and Obama have jealously defended their constitutional right to make these appointments.[49]

Recently, the President's ability to make recess appointments has been complicated by Congress's use of pro forma sessions. During these sessions, one member enters the chamber to formally gavel in the day's session, but no actual legislative work is done.[50] Pro forma sessions previously had been used to satisfy the formal requirements of the Adjournments Clause,[51] but were first used to prevent recess appointments in 2007, when Senate

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48 *See* Hogue Memo, *supra* note 10, at 4 tbl.1.

49 *See, e.g.*, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012) [hereinafter 2012 OLC Memo], *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (asserting the President's right to ignore pro forma sessions in the Senate and make recess appointments); Statement on Signing the Energy Policy Act of 1992, 2 PUB. PAPERS 1962, 1963 (Oct. 24, 1992) (arguing that amendments to the Atomic Energy Act of 1954 "must be interpreted so as not to interfere with [the President's] authority under Article II, section 2 of the Constitution to make recess appointments"); Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1985, 2 PUB. PAPERS 1210, 1211 (Aug. 30, 1984) (explaining that pending legislation designed to restrict the authority of recess appointees would raise "troubling constitutional issues with respect to my recess appointments power").

50 For a brief explanation of the evolution of pro forma sessions in this context, see Jeff VanDam, Comment, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 NW. U. L. REV. 361, 374-78 (2012).

51 *See* U.S. CONST. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . .").

Democrats became angered by President Bush's use of the power.[52] President Bush accepted the Democratic Senate's continued use of this tactic and was prevented from making a single additional recess appointment for the remainder of his term.[53]

During the early years of the first Obama Administration, the Democratic Senate avoided pro forma sessions. In 2010, however, Democrats decided to hold pro forma sessions that they believed would preclude recess appointments, but would also prevent Senate Republicans from rejecting nominees President Obama had already named.[54] Eventually, Republicans in the House of Representatives began holding their own pro forma sessions,[55] which forced the Senate to follow suit due to the formal requirements of the Adjournments Clause.

This state of affairs continued through the end of 2011. On December 17, 2011, the Senate adopted a unanimous consent agreement that "no business" would be conducted until January 23, 2012, but that pro forma sessions would be scheduled every three days, including on January 3, 2012.[56] On January 4, 2012, President Obama ignored the pro forma sessions and made four recess appointments, including three to the NLRB, which are at issue in *Noel Canning*.[57] The President also released an opinion from the Office of Legal Counsel justifying his decision.[58] Just eleven months later, President Obama's decision to make the appointments came before the D.C. Circuit for constitutional review.

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52 *See* Erin P. Billings, *Reid to Keep Senate in Session to Prevent Recess Appointments*, ROLL CALL (Nov. 16, 2007), http://www.rollcall.com/news/-21044-1.html ("Senate Majority Leader Harry Reid . . . has decided to keep the chamber in session over the Thanksgiving break to block President Bush from making any unsavory recess appointments while Senators are out of town.").

53 *See* Hogue Memo, *supra* note 10, at 21-27 tbls.8 & 9 (demonstrating that President Bush made no recess appointments—intersession or intrasession—after April 2007).

54 David M. Herszenhorn, *A Rush to Legislate, and to Maneuver*, N.Y. TIMES (Sept. 30, 2010), http://www.nytimes.com/2010/10/01/us/politics/01cong.html.

55 *See* Jonathan Allen, *Senators Ask John Boehner to Help Block Obama Recess Appointments*, POLITICO (May 25, 2011), http://www.politico.com/news/stories/0511/55723.html; Peter Schroeder, *GOP Freshmen: Stop Recess Appointments by Stopping Recess*, THE HILL (June 13, 2011, 2:47 PM), http://thehill.com/blogs/on-the-money/banking-financial-institutions/166097-gopfreshmen-no-obama-recess-appointments (explaining the thinking of House Republicans in preventing Congressional recesses).

56 157 CONG. REC. S8783-84 (daily ed. Dec. 17, 2011). The Senate's January 3, 2012 session was constitutionally mandated. *See* U.S. CONST. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

57 *See* Recess Appointment Press Release, *supra* note 1.

58 *See* 2012 OLC Memo, *supra* note 49.

B. *Factual and Procedural Background*

The disagreement at the core of the case arose from a labor dispute between Noel Canning, a Pepsi-Cola bottler and distributor, and the local Teamsters union.[59] The union claimed Noel Canning engaged in unfair labor practices and violated federal law when it refused to execute a verbally agreed-upon collective bargaining agreement.[60] The Administrative Law Judge (ALJ) agreed and ruled for the union.[61] On February 8, 2012, little more than a month after the President's recess appointments of the three new NLRB members, the NLRB affirmed the decision of the ALJ.[62] Noel Canning petitioned for review in the D.C. Circuit and the NLRB cross-petitioned to guarantee enforcement of its order.[63] Before the D.C. Circuit, Noel Canning stated its constitutional objections to the recess appointments of three of the NLRB's members. Because the Supreme Court has held that the NLRB must have a quorum of three of its five members to issue valid decisions, a successful challenge to the three recess appointments would invalidate the NLRB's ruling.[64]

C. *Opinion of the D.C. Circuit*

Chief Judge Sentelle, writing for the court, first had to perform a "routine review" of the two statutory claims raised by the Noel Canning company.[65] The court rejected Noel Canning's claim that the NLRB's factual finding of an agreement between the union and the company was not supported by substantial evidence, citing the deference owed to an ALJ on questions of creditability.[66] The court also refused to consider Noel Canning's argument that the ALJ erred by declining to apply Washington state law to determine

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59 *See* Noel Canning, a Div. of the Noel Corp., 358 N.L.R.B. No. 4, at 3 (Feb. 8, 2012), *vacated*, Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

60 *Id.* The union claimed Noel Canning violated section 8(a)(1) and (5) of the National Labor Relations Act (NLRA). *See* 29 U.S.C. § 158(a)(1), (5) (2006) (declaring that it is an unfair labor practice to, among other things, "interfere with, restrain, or coerce employees in the exercise of" their statutory rights or "to refuse to bargain collectively with the representatives of" the employees).

61 *Noel Canning*, 358 N.L.R.B. No. 4 at 8.

62 *Id.* at 1.

63 *Noel Canning*, 705 F.3d at 492.

64 *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2644 (2010) (holding that the NLRB could not exercise its authority once its membership had fallen to two and noting, "we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import").

65 *See Noel Canning*, 705 F.3d at 493 (noting that courts must avoid deciding a constitutional question "if there is also present some other ground upon which the case may be disposed of" (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

66 *See id.* at 493-96.

whether the contract could be enforced.[67] Because the company had not raised this issue as an exception before the NLRB, the court found that it lacked jurisdiction "to hear any 'objection that has not been urged before the Board.'"[68] After finding that the case could not be resolved on either of the statutory points, Chief Judge Sentelle turned to the constitutional questions.

Noel Canning had not raised its constitutional claims before the NLRB either, however. Normally this defect would have deprived the court of jurisdiction, but it found that the company's failure to raise the constitutional claims fell within the exception for "extraordinary circumstances" provided by section 10(e) of the NLRA.[69] The court noted the "serious argument" against its jurisdiction,[70] but reasoned that the constitutional claims "raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns."[71] The opinion cites Supreme Court dicta to support its argument that "'if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce,' a reviewing court can not enter an order of enforcement."[72] If there is no quorum, the NLRB's orbit of authority shrinks to nothing and any act is beyond its proper scope.

After establishing that it had jurisdiction, the court reached the core of the case. The court chose to answer two constitutional questions. First, for the purposes of the Recess Appointments Clause, what does "the Recess" mean? Second, does the clause mean that the President can fill vacancies that "happen to exist" during the recess or only those that "happen to arise" during this period?

1. The Meaning of "the Recess"

First, the court considered the language and structure of the Recess Appointments Clause to determine whether "the Recess" allows appointments during *intra*session recesses or only during *inter*session breaks.

The court began its analysis of this issue by noting the "difference between the word choice 'recess' and 'the Recess,'"[73] the latter having been selected by the Framers. The court found this "not an insignificant distinction"

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67 *Id.* at 496.

68 *Id.* (quoting 29 U.S.C. § 160(e) (2006)).

69 *See id.* (quoting 29 U.S.C. § 160(e), which notes that the failure to raise an objection before the Board may "be excused because of extraordinary circumstances").

70 *Id.*

71 *Id.* at 497.

72 *Id.* (quoting NLRB v. Cheney Cal. Lumber Co., 327 U.S. 385, 388 (1946)).

73 *Id.* at 500.

because the use of a definite article suggests that the Constitution is referring to "'a *particular* thing.'"[74] The court was careful to use contemporaneous dictionaries to reach this conclusion, because it believed proper constitutional interpretation "must look to the natural meaning of the text as it would have been understood at the time of the ratification."[75]

The court then drew a distinction between the Constitution's use of the terms "adjourn" or "adjournment"—meaning a break in congressional proceedings generally—and the more selective use of "the Recess"—meaning something special and specific, more than a simple adjournment.[76] This distinction is further emphasized by the court's next point. It argued that the clause's statement that recess appointments expire "at the End of [the Senate's] next Session" implies a structural dichotomy.[77] Either the Senate is in "the Recess" or it is in "Session," suggesting that intrasession breaks, no matter how long, fall outside the meaning of the clause. Here the court provided contemporaneous support in the form of a bill from the First Congress that set pay for a clerk at "two dollars per day during the session, with the like compensation . . . while he shall be necessarily employed in the recess."[78]

After finding that the language and structure of the clause suggest a specific, narrow reading of "the Recess," the court turned to Founding-era history. Few sources are directly on point, but the court pointed to Alexander Hamilton's statement in the *Federalist Papers* that recess appointments terminate "at the end of the ensuing session."[79] In the court's view, "[f]or there to be an 'ensuing session,' it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session."[80] Because of the scarcity of Founding-era writings on the meaning of the Recess Appointments Clause, the court examined interpretations of similar state constitutional provisions.[81] The court argued that the

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74 *Id.* (alteration in original) (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2041 (1755)).

75 *Id.* (citing District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008)).

76 *Id.* In addition to the Recess Appointments Clause, "the Recess" appears in only one other place—the Senate Vacancies Clause. *See* U.S. CONST. art. I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

77 *Noel Canning*, 705 F.3d at 500 (quoting U.S. CONST. art. II, § 2, cl. 3).

78 *Id.* (quoting Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71).

79 *Id.* (quoting THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

80 *Id.* at 500-01.

81 For the court's justification of this interpretive approach, see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2802 (2008), in which the Supreme Court confirmed its interpretation of the Second Amendment through a review of "analogous arms-bearing rights in state constitutions," and *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), where the Court observed that "[s]everal early

North Carolina Constitution is similar in language and structure,[82] and that an 1819 decision from the North Carolina Supreme Court "implies that the provision was seen as differentiating between 'the session of the General Assembly' and 'the recess of the General Assembly.'"[83] Notably, however, that case did not attempt to define the meaning of "recess"; instead it addressed the question of whether the governor could fill a position if the vacancy arose while the state's general assembly was in session.[84]

Although the NLRB framed its arguments in light of presidents' frequent use of recess appointments, both intrasession and intersession, the court maintained that "the historical role of the Recess Appointments Clause is neither clear nor consistent."[85] By focusing its analysis on the practice and interpretation "in the years immediately following the Constitution's ratification,"[86] the court was able to disregard the prolific use of both intrasession and intersession recess appointments in more recent times. The court noted that the first intrasession appointment was not made until 1867,[87] and that only three such appointments were made before 1947.[88] The fact that the executive rarely filled vacancies during intrasession recesses "'suggests an assumed *absence* of [the] power' to make such appointments."[89]

The court drew on *INS v. Chadha*[90] to strengthen its refusal to consider the behavior of recent administrations.[91] While invalidating the use of the

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State Constitutions . . . appear to have been a basis for the Framers' understanding of the [Ex Post Facto Clause]."

82 *See Noel Canning*, 705 F.3d at 501. To support this claim, the court cites Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1770-72 (1984), which argues that a provision of the North Carolina Constitution served as the model for the Recess Appointments Clause.

83 *Noel Canning*, 705 F.3d at 501 (quoting Beard v. Cameron, 7 N.C. (3 Mur.) 181, 184-85 (1819) (opinion of Taylor, C.J.)).

84 *See Beard*, 7 N.C. (3 Mur.) at 181. Notably, the North Carolina Constitution did not use a definite article before "recess." *See* N.C. CONST. of 1776, art. XX (giving the governor recess appointment power "in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant"), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978).

85 *Noel Canning*, 705 F.3d at 501.

86 *Id.*

87 *Id.* (citing Hartnett, *supra* note 24, at 408-09).

88 *Id.* at 502 (citing Carrier, *supra* note 27, at 2209-12, 2235). Of course, the lack of intrasession recess appointments may simply be the result of the rarity of intrasession recesses in the early years of the Republic. *See* Rappaport, *supra* note 27, at 1565 ("[Before the Civil War,] Congress rarely took an intrasession recess, doing so only in 1800, 1817, and 1828, each time for at most one week.").

89 *Noel Canning*, 705 F.3d at 502 (alteration in original) (quoting Printz v. United States, 521 U.S. 898, 908 (1997)).

90 462 U.S. 919 (1983).

one-house veto, the *Chadha* Court said, "our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency."[92] The court in *Noel Canning* framed its conclusion in the same way—historical acquiescence to an unconstitutional practice does not make the practice permissible.[93]

Next, the court attempted to situate the Recess Appointments Clause in its broader view of the proper separation of powers, calling recess appointments a "stopgap."[94] This characterization is based on Hamilton's explanation that Senate confirmation "declares the general mode of appointing officers of the United States," while recess appointments are "nothing more than a supplement" or an "auxiliary method."[95] This stopgap method was necessary when intersession recesses "were regularly six to nine months."[96] Allowing the auxiliary path to swallow the general process would violate the "careful separation of powers structure reflected in the Appointments Clause."[97] The opinion points to the Supreme Court's observation that the "manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power" to support its separation-of-powers argument that the Recess Appointments Clause should be read narrowly to apply to intersession recesses only.[98]

The court then considered and rejected four alternative explanations for what "the Recess" might mean. The first, that recess appointments are constitutionally permitted during any break of the Senate, even for the weekend or for lunch, was rejected out of hand because it would turn the normal process "upside down."[99] The court also rejected a second alternative which would allow recess appointments during any "substantial passage of time, such as a ten- or twenty-day break"[100] because that definition is

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91 *See Noel Canning*, 705 F.3d at 502.

92 462 U.S. at 944. The Ninth Circuit also considered the effect of *Chadha* when it analyzed the use of intrasession recess appointments, but tempered *Chadha*'s effect with the Supreme Court's contemporaneous decision *Marsh v. Chambers,* 463 U.S. 783 (1983), in which the Court used longstanding history as a guide to the Constitution's meaning. *See* United States v. Woodley, 751 F.2d 1008, 1011-12 (9th Cir. 1985) (en banc) (quoting *Marsh*, 463 U.S. at 792). *But see id.* at 1024-26 (Norris, J., dissenting) (taking issue with the majority's treatment of *Chadha* and *Marsh*).

93 *See Noel Canning*, 705 F.3d at 502.

94 *Id.*

95 *Id.* at 502-03 (quoting THE FEDERALIST NO. 67, *supra* note 79, at 408).

96 *Noel Canning*, 705 F.3d at 503 (citing Rappaport, *supra* note 27, at 1498).

97 *Id.*

98 *Id.* (alteration in original) (quoting Freytag v. Comm'r, 501 U.S. 868, 883 (1991)).

99 *Id.*

100 *Id.* at 503-04. The court attributes this definition of an acceptable recess to former Attorney General Harry M. Daugherty. *See* Exec. Power—Recess Appointments, 33 Op. Att'y Gen. 20, 22 (1921).

"flimsy"[101] and fails to "establish[ ] high walls and clear distinctions," which are necessary to police "the heat of interbranch conflict."[102] Third, the court rejected an approach that links an appropriate recess to "any adjournment of more than three days pursuant to the Adjournments Clause,"[103] because the two clauses "exist in different contexts and contain no hint that they should be read together."[104] Finally, the court rejected the "functional interpretation in which the President has discretion" to determine when an appropriate recess exists, because it would "demolish the checks and balances inherent in the advice-and-consent requirement."[105]

The court put a final punctuation mark on this portion of its analysis by reminding the other branches of government that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[106] The court has decided that the original language and purpose of the Recess Appointments Clause do not allow for appointments during intrasession recesses, and no amount of executive practice or congressional acquiescence can alter that meaning.

2. The Meaning of "Happen"

It is absolutely clear that President Obama's January 4, 2012 recess appointments to the NLRB occurred during an intrasession recess, so the court could have resolved the dispute and ended the case here.[107] The majority acknowledged that its "holding on the first constitutional argument . . . is sufficient to compel a decision vacating the Board's order," but addressed the second question, nonetheless.[108]

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101 *Noel Canning*, 705 F.3d at 504.

102 *Id.* (alteration in original) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)).

103 *Id.* (citing U.S. CONST. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . .")).

104 *Id.*

105 *Id.* The Court attributes the proposed functional interpretation to the 2012 OLC memo that President Obama relied on to make the recess appointments at question in this case. *See* 2012 OLC Memo, *supra* note 49, at 13 ("[W]e conclude that the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause.").

106 *Noel Canning*, 705 F.3d at 506 (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The court also cited *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for the proposition that "the courts must make the same determination [as to the operation of conflicting laws] if the executive has acted contrary to the Constitution." *Noel Canning*, 705 F.3d at 506.

107 This concern was raised by Judge Griffith in his concurring opinion. *See infra* Part II.D.

108 *Noel Canning*, 705 F.3d at 507.

The NLRB argued that "Vacancies that may happen during the Recess"[109] encompass vacancies that "happen to exist" during the Recess, while Noel Canning urged the court to read the clause as referring to vacancies that "arise," "begin," or "come into being" during the Recess.[110] The majority sided with the company.

As with the first issue, the court's analysis began with a consideration of the "natural meaning of the text as it would have been understood at the time of the ratification."[111] The court first reasoned that interpreting "happen" to mean "happen to exist" would make the entire phrase inoperative and superfluous; had that meaning been intended, the Recess Appointments Clause could have been simplified to allow the filling of Vacancies during the Recess.[112] The court noted the well-established principle that "every phrase of the Constitution must be given effect."[113]

The court then looked to dictionaries from the era of the Founders to support its interpretation.[114] It found support in one definition of "happen" as "[t]o fall out; to chance; to come to pass."[115] This definition suggests an action actively occurring, which led the court to conclude that only vacancies that *arise* during the recess can validly be filled through recess appointments.

Next, the court restated its structural separation-of-powers argument. If the President can fill any existing vacancy, he or she can simply wait for the Senate to recess (whatever meaning that term is given) and short-circuit "the primary method of appointment," that is, "the cumbersome advice and consent procedure."[116]

The Constitution contains another use of the term "happen." Before Senators were directly elected by voters, the Senate Vacancies Clause read, "and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary

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109 U.S. CONST. art. II, § 2, cl. 3.

110 *See Noel Canning*, 705 F.3d at 507 (internal quotation marks omitted).

111 *Id.* (citing District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008)).

112 *Id.*

113 *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)).

114 *See id.* The court cites *Evans v. Stephens*, 387 F.3d 1220, 1230 & n.4 (11th Cir. 2004) (en banc) (Barkett, J., dissenting), with approval of the dissenting judge's examination of contemporaneous dictionaries. For an argument in favor of the use of dictionaries in statutory interpretation, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 415-24 (2012). *But see* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 264-276 (1999) (critiquing certain judicial methods of using dictionaries).

115 *Noel Canning*, 705 F.3d at 507 (alteration in original) (quoting 1 JOHNSON, *supra* note 74, at 965).

116 *Id.* at 508.

Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[117]

The court reasoned that this clause is only intelligible if "happen" means "arise."[118] Because similar terms in the Constitution should be treated consistently whenever possible, "happen" must also mean "arise" for the purposes of the Recess Appointments Clause."[119]

Here, the court was able to draw support for its interpretation from contemporaneous explanations of the clause. The court pointed to Edmund Randolph,[120] who addressed this question as early as 1792, while serving as the first U.S. Attorney General.[121] Randolph rejected the "exist" reading, asking of a potential recess appointment: "But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day."[122] As the court noted,[123] Hamilton seemed to reach a similar conclusion, writing, "[i]t is clear, that independent of authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate."[124]

The court quite honestly admitted that several other circuits had rejected the "arise" interpretation in favor of one that would allow the President to fill vacancies that happen to "exist."[125] The court discounted those decisions for a number of reasons. First, at least one of those courts had used a contemporary dictionary to determine the meaning of "happen," which is anathema to the D.C. Circuit's originalist perspective.[126] The court also relied on a recent historical study to counter the Eleventh Circuit's finding that Presidents Washington and Jefferson both made appointments to

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117 U.S. CONST. art. I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

118 *Noel Canning*, 705 F.3d at 508.

119 *Id.* (citing Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949)).

120 *Id.* at 508-09.

121 *See* Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 165, 165-67 (John Catanzariti et al. eds., 1990).

122 *Id.* at 166.

123 *See Noel Canning*, 705 F.3d at 509.

124 Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 94, 94 (Harold C. Syrett ed., 1976).

125 *Noel Canning*, 705 F.3d at 509 (citing Evans v. Stephens, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (en banc); United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); and United States v. Allocco, 305 F.2d 704, 709-15 (2d Cir. 1962)).

126 *See id.* at 509 (criticizing *Evans*).

vacancies that did not arise during the relevant recess.[127] Next, the court criticized the Second, Ninth, and Eleventh Circuits for their consideration of a federal statute that permits payment to certain recess appointees who have filled vacancies that arose while the Senate was in session.[128] Those circuits treated the statute as an example of congressional acquiescence to recess appointments filling existing vacancies, but *Noel Canning* rejected that argument because the statute is too recent and an older version of the same statute entirely forbade payments to that type of appointee.[129] The court characterized this older statute as Congress's attempt to use the power of the purse to curb a practice it found improper or unconstitutional.[130]

The majority opinion in *Noel Canning* is most forceful when it returns to its separation-of-powers argument. If the Constitution does not allow the filling of vacancies that arise sometime other than during the recess, "'[n]either Congress nor the Executive can agree to waive . . . structural protection[s]' in the Appointments Clause."[131] In the court's view, constitutional boundaries are not affected by prior practice, especially because "structural provisions serve to protect the *people*."[132] Allowing the President to fill vacancies that only "exist" threatens this structure and, according to the court, could therefore threaten the people through executive aggrandizement.

The court admitted that its decision may lead to inefficiency,[133] but it clearly prioritized its originalist view of the Recess Appointments Clause by countering that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[134] And of course, reasoned the court, if Congress wanted to make the process more efficient,

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127 *See id.* at 509-10 (noting that the Presidents' practice was to appoint an individual without his consent, making a recess appointment if the individual turned down the appointment during the recess (citing Rappaport, *supra* note 27, at 1522 n.97)).

128 *See id.* at 510 (citing 5 U.S.C. § 5503 (2006)).

129 *See id.* The current statutory language of § 5503 became law in 1966. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 475. Chief Judge Sentelle pointed to an earlier iteration of the statute which forbid payment

> 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.

Noel Canning, 705 F.3d at 510 (quoting Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646).

130 *See Noel Canning*, 705 F.3d at 510.

131 *Id.* (alteration in original) (quoting Freytag v. Comm'r, 501 U.S. 868, 880 (1991)).

132 *Id.*

133 *See id.* at 511 ("Our sister circuits and the Board contend that the 'arise' interpretation fosters inefficiencies and leaves open the possibility of just what is occurring here—that is, a Board that cannot act . . . .").

134 *Id.* (alternation in original) (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).

it could provide for acting members on the NLRB[135] or allow exiting members to continue serving until a replacement is properly appointed.[136]

The court's decision appears to be driven by its choice to treat the separation of powers—as it believes the Founders understood that concept—as the ultimate touchstone. The fact that the court's holding on this second constitutional question, when paired with its holding on the first, threatens to completely obliterate recess appointments does not matter. The values of pragmatism and efficiency are dramatically lesser concerns. Because the court held that the Recess Appointments Clause only allows the President to fill vacancies that "happen to arise" during the recess, each of President Obama's three appointments to the NLRB was invalidated on a second ground.[137]

D. *Judge Griffith's Concurrence*

Judge Griffith filed a short, but important concurrence in the case.[138] Although he concurred in the judgment and agreed with the majority opinion's rejection of intrasession recess appointments, Judge Griffith would not have reached the issue of when vacancies must "happen." He pointed out that the majority "acknowledges that our holding on intrasession recess appointments is sufficient to vacate the Board's order"[139] and

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135 *See id.* (pointing to a number of examples where Congress has permitted an acting agency head (citing 10 U.S.C. § 132(b) (2006) (Secretary of Defense); *id.* § 154(d), (e) (Chairman, Joint Chiefs of Staff); 28 U.S.C. § 508 (2006) (Attorney General); 29 U.S.C. § 552 (2006) (Secretary of Labor); 50 U.S.C. § 403-3a(a) (2006) (Director of National Intelligence); and *id.* § 403-4c(b)(2) (Supp. IV 2011) (Director of the Central Intelligence Agency))).

136 *See id.* (noting several instances in which Congress has permitted this mechanism (citing 7 U.S.C. § 2(a)(2)(A) (2006) (Commodity Futures Trading Commission); 15 U.S.C. § 78d(a) (2006) (Securities and Exchange Commission); 42 U.S.C. § 7171(b)(1) (2006) (Federal Energy Regulatory Commission); and 47 U.S.C. § 154(c) (2006) (Federal Communications Commission))).

137 The court went on to apply its newly created definition of "happen" to each of the three NLRB appointees. Two had filled vacancies created during intrasession recesses several months before the recess during which they were appointed. *See id.* at 512 (citing U.S. GOV'T PRINTING OFFICE, OFFICIAL CONGRESSIONAL DIRECTORY, 112TH CONGRESS 538 (2011)). The vacancy filled by the third appointee is more complicated. That individual filled a vacancy created by the expiration of a separate, earlier recess appointment. *See id.* at 498, 512. The Senate "declined to adjourn *sine die*[, officially ending the session]," so the First Session of the 112th Congress ended at the same time the Second Session began, with no intersession recess. *Id.* at 513. The court was therefore forced to engage in logical gymnastics to argue that "the Clause states that a recess appointment expires 'at the End of [the Senate's] next Session,' not 'at the beginning of the Senate's next Recess'" to reach the conclusion that the vacancy did not arise during a recess. *Id.* (alteration in original) (quoting U.S. CONST. art. II, § 2, cl. 3). Whether the Founding Fathers would have acknowledged this fine distinction is unclear.

138 *Id.* at 515 (Griffith, J., concurring).

139 *Id.*

argued, "[i]f we need not take up a constitutional issue, we should not."[140] Although Judge Griffith found the government's position that the President could fill vacancies that "happen to exist" during a recess "suspect," he noted that the practice traces back to the 1820s and the judiciary "should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it."[141] If the Supreme Court wants to limit the President's power to grant recess appointments without completely neutering the clause, Judge Griffith's concurrence provides one path to that result.

III. IMPLICATIONS OF THE DECISION

The impact of *Noel Canning* is significant, but its ultimate reach is unclear. The Supreme Court's reasoning could soon supplant the D.C. Circuit's decision. Although the opinion only binds cases in the D.C. Circuit, the organic statutes of a number of federal agencies, notably the NLRB, create rights of appeal to that court.[142] The decision has drawn particular attention because it appears to undermine the authority of the Consumer Financial Protection Bureau (CFPB) by invalidating the appointment of the agency's first Director, Richard Cordray,[143] who was appointed the same day as the NLRB members involved in *Noel Canning*.[144] Senators eventually reached an agreement to confirm Cordray[145] and members of the NLRB[146] in

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140 *Id.* (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); Dames & Moore v. Regan, 453 U.S. 654, 660-61 (1981); and Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)).

141 *Id.*

142 *See, e.g.*, 29 U.S.C. § 160(f) (2006) (granting "[a]ny person aggrieved by a final order of the [NLRB]" the right to appeal that order to the D.C. Circuit).

143 *See* Savage & Greenhouse, *supra* note 14 ("The decision also casts a cloud over Mr. Cordray's appointment.").

144 *See* Recess Appointment Press Release, *supra* note 1.

145 *See* Danielle Douglas, *Senate Confirms Cordray to Head Consumer Financial Protection Bureau*, WASH. POST (July 16, 2013), http://articles.washingtonpost.com/2013-07-16/business/40608755_1_senate-republicans-consumer-financial-protection-bureau-richard-cordray.

146 *See* Michael A. Memoli, *Senate Confirms Obama Choices for National Labor Relations Board*, L.A. TIMES (July 30, 2013), http://www.latimes.com/news/politics/la-na-pn-nlrb-senate-votes-20130730,0,2102979.story (noting the confirmation of nominees Kent Hirozawa and Nancy Schiffer). None of the three recess appointees that figured in *Noel Canning* remain on the Board, however: the White House withdrew the nominations of Richard Griffin and Sharon Block, while Terence Flynn, the President's third NLRB recess appointee, resigned in May 2012. *See* Steven Greenhouse, *Labor Board Member Resigns Over Leak to G.O.P. Allies*, N.Y. TIMES (May 27, 2012), http://www.nytimes.com/2012/05/28/business/gop-labor-board-member-terence-flynn-quits-over-leak.html; Josh Hicks, *How Obama's NLRB Nominees Became Central to Senate Filibuster Debate*, WASH. POST (July 17, 2013), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/17/how-obamas-nlrb-nominees-became-central-to-the-senates-filibuster-deal.

exchange for leaving the filibuster rules in place.[147] These confirmations ended a political crisis, but legal questions about the preconfirmation acts of the CFPB and NLRB must be resolved by the Supreme Court or in subsequent litigation.

A. *Impact on the NLRB*

The day *Noel Canning* was decided, the NLRB issued a defiant statement "respectfully disagree[ing]" with the ruling and promising to "continue to perform our statutory duties and issue decisions."[148] White House Press Secretary Jay Carney echoed the NLRB's sentiment, criticized the opinion, and said, "It's one court, one case, one company."[149] Although Carney's statement is technically true, it dramatically understates the potential ramifications for NLRB actions if *Noel Canning* remains the law.

The National Labor Relations Act (NLRA) grants aggrieved parties a right to appeal all decisions of the NLRB to the D.C. Circuit.[150] Because future panels of the D.C. Circuit will be bound by the legal reasoning of the *Noel Canning* court,[151] all NLRB actions that took place after the recess appointments in January 2012 and before the Senate confirmed NLRB members in July are vulnerable to litigation. Companies across the country have relied on *Noel Canning* to challenge or ignore the NLRB.[152] The clear circuit split created by the D.C. Circuit's decision also provides strong incentives for forum shopping.[153] The NLRA allows parties to appeal either to the D.C. Circuit or to any "circuit wherein the unfair labor practice in

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147 *See* Memoli, *supra* note 146.

148 Press Release, Mark Gaston Pearce, Chairman, NLRB, Statement on Recess Appointment Ruling (Jan. 25, 2013), *available at* http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling.

149 Donovan Slack, *White House Blasts Recess Appointments Ruling*, POLITICO (Jan. 27, 2013), http://www.politico.com/story/2013/01/wh-blasts-recess-appointments-ruling-86737.html.

150 *See* 29 U.S.C. § 160(f).

151 *See* 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3981.1 (4th ed. 2008) ("The courts of appeals generally follow a practice that one panel is bound by the holdings in a prior decision of another panel of that court.").

152 *See* Melanie Trottman & Kris Maher, *Companies Challenge Labor Rulings*, WALL ST. J. (Mar. 8, 2013), http://online.wsj.com/article/SB10001424127887324034804578346700152526718.html (noting that since the D.C. Circuit's ruling, "at least 87 companies and three unions have cited the decision in cases at varying stages within the agency").

153 *See* Joel Barras, *Coin Toss May Decide New Appeals of NLRB Decisions*, FORBES (Feb. 25, 2013), http://www.forbes.com/sites/theemploymentbeat/2013/02/25/coin-toss-may-decide-new-appeals-of-nlrb-decisions ("If the circuit courts differ on the validity of the NLRB recess appointees, an employer's appeal of an NLRB decision may turn solely on the circuit court that decides the appeal . . . .").

question was alleged to have been engaged in or wherein such person resides or transacts business,"[154] but it also allows the NLRB to seek enforcement of its decisions in those same courts.[155]

Both dissatisfied parties and the NLRB have strong incentives to forum shop, which has particularly perverse consequences in this context. When "proceedings are instituted in two or more courts of appeals with respect to the same order,"[156] there are a number of possible outcomes. The process favors early filers,[157] but the strangest case occurs when multiple petitions for review are filed in different circuits within ten days of the order. Then, the agency sends the case to the Judicial Panel on Multidistrict Litigation, which chooses a circuit "by means of random selection."[158] The decision to enforce or invalidate an NLRB order could, quite literally, be determined by the flip of a coin.

A party's failure to raise the constitutional recess appointments claim in prior proceedings before an ALJ or the NLRB is unlikely to bar relief. The Noel Canning company did not raise its challenge to the NLRB's quorum until it was before the D.C. Circuit, where the Court held that "failure to urge the objection before the Board comes within the exception for 'extraordinary circumstances.'"[159]

The NLRB may attempt to defend its actions with the de facto officer doctrine, which confers legitimacy on actions of officers acting under apparent authority, even when it is later discovered that their election or appointment was improper.[160] But, the Supreme Court has significantly narrowed the reach of that doctrine. In *Ryder v. United States*,[161] the Court considered a criminal conviction before the Coast Guard Court of Military Review where the appointment of two of the panel's judges had failed to

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154 29 U.S.C. § 160(f).

155 *See id.* § 160(e) ("The Board shall have power to petition any court of appeals of the United States . . . .").

156 28 U.S.C. § 2112(a) (2006); *see also* UAW v. NLRB, 677 F.3d 276, 277 (6th Cir. 2012) (laying out the § 2112(a) procedure).

157 If only one party files for appeal within ten days of a decision, the appeal will be heard in the venue chosen by the filer. *See* 28 U.S.C § 2112(a)(1). If no appeal is filed within ten days, the first party to file after that point chooses the venue. *Id.*

158 *Id.* § 2112(a)(3).

159 Noel Canning v. NLRB, 705 F.3d 490, 496 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013) (quoting 29 U.S.C. § 160(e)); *see also supra* notes 69-72 and accompanying text.

160 *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 441-42 (1886) ("The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity . . . . It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.").

161 515 U.S. 177 (1995).

meet the requirements of the Appointments Clause. The majority held that the de facto officer doctrine did not apply because the defendant's claim "is based on the Appointments Clause of Article II of the Constitution—a claim that there *has* been a 'trespass upon the executive power of appointment.'"[162]

Almost immediately after the *Noel Canning* ruling, at least one hospital chain based in California announced that it would ignore decisions issued by the NLRB during the period when three of the Board's members served due to recess appointments.[163] If *Noel Canning* remains the law of the land, all NLRB decisions issued between January 4, 2012 and July 30, 2013 appear subject to challenge.

B. *Impact on the Consumer Financial Protection Bureau*

As soon as *Noel Canning* was decided, media and critics of the CFPB questioned the legitimacy of Richard Cordray's recess appointment.[164] Senate Minority Leader Mitch McConnell argued that the "decision now casts serious doubt on whether the President's 'recess' appointment of Richard Cordray to the Consumer Financial Protection Bureau . . . is constitutional."[165] White House Press Secretary Jay Carney maintained that the ruling "has no bearing on Richard Cordray,"[166] but Cordray, like the NLRB members, is clearly an "Officer[] of the United States"[167] under the

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162 *Id.* at 182 (quoting McDowell v. United States, 159 U.S. 596, 598 (1895)).

163 *See* Terry Baynes, *Exclusive: Hospital Chain Defies NLRB Rulings After Court Decision*, REUTERS (Jan. 31, 2013), http://www.reuters.com/article/2013/02/01/us-nlrb-hospital-idUSBRE91001320130201.

164 *See, e.g.*, Robert Barnes & Steven Mufson, *Court Says Obama Exceeded Authority in Making Appointments*, WASH. POST (Jan. 25, 2013), http://articles.washingtonpost.com/2013-01-25/politics/36541588_1_recess-appointments-richard-cordray-president-obama ("The ruling also raises questions about the recess appointment of former Ohio attorney general Richard Cordray to head the fledgling Consumer Financial Protection Bureau and about the actions taken by the agency during his tenure . . . ."); Press Release, Eric Cantor, Majority Leader, U.S. House of Representatives, Leader Cantor: A Step Closer to Achieving Transparency & Oversight of NLRB & CFPB (Jan. 25, 2013), *available at* http://majorityleader.gov/newsroom/2013/01/leader-cantor-a-step-closer-to-achieving-transparency-oversight-of-nlrb-cfpb.html (asserting that the D.C. Circuit's opinion declared President Obama's appointment of Cordray unconstitutional).

165 Press Release, Mitch McConnell, Minority Leader, U.S. Senate, Court Rules President Obama's NLRB 'Recess' Appointments Are Unconstitutional (Jan. 25, 2013), *available at* http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=ea415ca6-0919-4f34-95ec-e9d0d812fc20.

166 *See* Peter Schroeder, *McConnell: NLRB Ruling Casts 'Serious Doubt' on Cordray Appointment*, THE HILL (Jan. 25, 2013, 2:00 PM), http://thehill.com/blogs/on-the-money/banking-financial-institutions/279349-mcconnell-nlrb-ruling-casts-serious-doubt-on-cordray (quoting Carney).

167 U.S. CONST. art. II, § 2, cl. 2.

Constitution, and there is no obvious reason why *Noel Canning*'s logic would not apply to his appointment.

The CFPB was created by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[168] Congress fashioned the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[169] It was a response to the financial distress wreaked on many citizens by consumer financial products during the recent economic crisis.[170]

Republicans have criticized the CFPB since it came into existence.[171] President Obama's decision to appoint Cordray through a recess appointment was prompted by a Republican filibuster of Cordray's nomination.[172] In 2012, Cordray's appointment and other sections of the Dodd-Frank Act were challenged in a lawsuit filed by a Texas bank and two Washington, D.C.-based business interest groups.[173] Several state attorneys general subsequently joined as plaintiffs.[174] Although the district court ultimately dismissed plaintiffs' claims on standing and ripeness grounds,[175] if the Texas bank (on appeal) or some other plaintiff eventually reaches the merits of Cordray's appointment, it will likely prevail.

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168 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5301 *et seq.*) [hereinafter Dodd-Frank Act]; *see also* Linda Singer et al., *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER & COM. L. 2 (2010) (providing a detailed exploration of Dodd-Frank).

169 Dodd-Frank Act § 1011(a) (to be codified at 12 U.S.C. § 5491(a)).

170 *See* Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1144-45 (2012) (describing the financial crisis as the impetus for the creation of the CFPB).

171 *See, e.g.*, Raghav Ahuja, Comment, *Constitutional in Name: The Bureau of Consumer Financial Protection and the Obama Administration's Treatment of the Nondelegation Principle and the Appointments Clause*, 14 U. PA. J. CONST. L. 271, 272 (2011) ("Republicans in the House of Representatives have introduced at least four bills aimed at limiting the Bureau's powers, and numerous Republican Senators have threatened to filibuster the appointment of a permanent Bureau director." (footnotes omitted)).

172 *See* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES (Jan. 4, 2012), http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html.

173 *See* Complaint for Declaratory and Injunctive Relief ¶¶ 1-7, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032 (D.D.C. June 21, 2012), *decided sub nom.* State Nat'l Bank of Big Spring v. Lew, 2013 WL 3945027 (D.D.C. Aug. 1, 2013) (presenting several arguments, among them that the CFPB violates the constitutional nondelegation doctrine and that Cordray's appointment was unconstitutional). *But see* Ahuja, *supra* note 171, at 272 (arguing that Congress's delegation of power to the CFPB and President Obama's recess appointment of Elizabeth Warren as Special Advisor for the CFPB were constitutional, even if questionable).

174 *See* First Amended Complaint for Declaratory and Injunctive Relief ¶¶ 23-28, *State Nat'l Bank*, No. 1:12-cv-01032 (D.D.C. Sept. 20, 2012).

175 *See State Nat'l Bank*, 2013 WL 3945027, at *7-8.

The result of that hypothetical challenge to CFPB action is somewhat more complex than the result of the NLRB challenge. The CFPB is empowered to both take over the consumer protection duties of existing financial regulatory agencies[176] and to exercise new powers created by Dodd-Frank.[177] Until a Director takes control of the Bureau, the Secretary of the Treasury is authorized to exercise the powers transferred to the CFPB from other agencies.[178] The Inspectors General of the Federal Reserve and Department of Treasury found that those powers transferred to the CFPB on July 21, 2011.[179] These transferred powers included the authority to issue rules, orders, and guidances that could have been made by the transferring agencies, but did not include the authority to "prohibit unfair, deceptive, or abusive acts or practices" under Dodd-Frank's new coverage of consumer financial products or to ensure that features of those products "are fairly, accurately, and effectively disclosed" by providers.[180] The CFPB would also be prevented from regulating nondepository institutions until a Director took power.[181]

The CFPB's actions since January 4, 2012 are thus challengeable for two reasons. First, the exercise of the CFPB's new powers will be voidable because the congressional delegation of that authority was dependent on the lawful appointment of a Director. Second, any CFPB actions that *could have been made* by the Secretary of the Treasury in the interim period before a Director took office will be voidable because those actions were taken by Cordray, not the Secretary. It will also be impossible for the CFPB to claim that its actions were made by an acting director, because Dodd-Frank requires the holder of that position to "be appointed by the Director,"[182] who, under *Noel Canning*'s logic, was never properly appointed himself.

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176 Specifically, the CFPB assumed all consumer protection functions of the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Deposit Insurance Corporation, as well as some responsibilities of the Federal Trade Commission and the Department of Housing and Urban Development. *See* Dodd-Frank Act § 1061(b)(1)-(7) (to be codified at 12 U.S.C. § 5581(b)(1)-(7)).

177 At the core of its authority, the CFPB is empowered to issue regulations and take enforcement action to prevent "an unfair, deceptive, or abusive act or practice . . . in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." Dodd-Frank Act § 1031(a) (to be codified at 12 U.S.C. § 5531(a)).

178 *See* Dodd-Frank Act § 1066(a) (to be codified at 12 U.S.C. § 5586(a)).

179 BD. OF GOVERNORS OF THE FED. RESERVE SYS. & BUREAU OF CONSUMER FIN. PROT., OFFICES OF INSPECTOR GEN., DEP'T OF THE TREASURY, REVIEW OF CFPB IMPLEMENTATION PLANNING ACTIVITIES 2-4 (2011), *available at* http://www.federalreserve.gov/oig/files/OIG_2011_Review_of_CFPB_Implementation_Planning_Activities.pdf.

180 *Id.* at 3-4.

181 *Id.* at 4.

182 Dodd-Frank Act § 1011(b)(5) (to be codified at 12 U.S.C. § 5491(b)(5)).

If *Noel Canning* remains law, all of the CFPB's actions since Cordray's recess appointment could potentially be vulnerable to challenge. Despite initial signs that Republicans would continue to prevent the appointment of a Director,[183] the Senate's official confirmation of Cordray in July 2013 should insulate future CFPB action from attack.

C. *Potential Impact on the Federal Judiciary*

Of course, *Noel Canning* did not directly address the recess appointment of Article III judges, but the decision's reasoning would seem to apply with equal force in that context. Since the Reagan Administration, only three Article III judges have taken the bench through recess appointments,[184] but more than 300 such appointments have been made throughout the history of the United States.[185]

President Clinton appointed Judge Roger Gregory to a position on the Fourth Circuit during an intersession recess in December 2000.[186] Gregory was later nominated to the same seat by President George W. Bush and confirmed by the Senate,[187] but because he was appointed to a newly created seat[188] that had been vacant long before the recess began, his service in the interim would be unconstitutional under *Noel Canning*. President Bush's intersession recess appointment of Judge Charles W. Pickering to the Fifth Circuit would be unconstitutional for the same reason.[189] Judge William H.

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183 *See* Michael R. Crittenden, *Nomination Revives Fight over Consumer Bureau*, WSJ.COM WASH. WIRE (Feb. 13, 2013, 4:28 PM), http://blogs.wsj.com/washwire/2013/02/13/nomination-revives-fight-over-consumer-bureau (noting "no willingness" from Republicans to approve Cordray's nomination because "[t]hey simply don't want that kind of Wall Street oversight" (internal quotation marks and citation omitted)).

184 *See* Hogue Memo, *supra* note 10, at 20, 22, 27 (noting the recess appointments of U.S. Court of Appeals Judges Roger Gregory, William H. Pryor, and Charles W. Pickering).

185 Herz, *supra* note 19, at 449.

186 Hogue Memo, *supra* note 10, at 20. *See generally* Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 40-42 (2003) (explaining the Clinton Administration's procedure and rationale for appointing Judge Gregory).

187 *See* Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES (July 21, 2001), http://www.nytimes.com/2001/07/21/us/senators-confirm-3-judges-including-once-stalled-black.html.

188 The seat was created by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a)(2), 104 Stat. 5089, 5099 (codified as amended at 28 U.S.C. § 44(a) (2006)). The *Noel Canning* court did not directly address the issue of recess appointments to a newly created position, but its logic suggests no reason to treat those positions differently.

189 *See* Hogue Memo, *supra* note 10, at 27. The seat had been vacant since Judge Henry A. Politz assumed senior status in 1999. *See Biographical Directory of Federal Judges: Politz, Henry Anthony*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=1902 (last visited Sept. 19, 2013). Judge Pickering was nominated for a permanent position by President Bush, but because the Senate refused to confirm him, he resigned as his recess appointment was about to expire. *See*

Pryor's intrasession recess appointment was upheld in an en banc decision of the Eleventh Circuit,[190] but would be doubly damned under *Noel Canning* because the vacancy existed before the start of the recess[191] and the recess occurred in the middle of a session. Eventually, President Bush officially nominated Judge Pryor and he was confirmed roughly sixteen months after his recess appointment.[192] Any ruling he made in the interim period could potentially be challenged.[193]

If the rationale of *Noel Canning* becomes binding law nationwide, it could contribute to the already disastrous problem of judicial vacancies. Notably, the "nuclear option" threatened by Senate Majority Leader Harry Reid would not have altered Senators' ability to filibuster judicial nominees.[194] Under *Noel Canning*, a dedicated minority of forty-one Senators could theoretically filibuster all judicial nominees and maintain pro forma sessions to foreclose any recess appointments. This hypothetical is hardly far-fetched considering the recent behavior of both Republican and Democratic Senate leaders.[195] President George W. Bush promised to cease further judicial recess appointments in exchange for confirmation of twenty-five of his judicial nominees.[196] Especially in light of the new forces pulling federal judges away from the bench,[197] might the effective repeal of the Recess Appointments Clause exacerbate the existing vacancy crisis in the

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Adam Liptak, *A Judge Appointed by Bush After Impasse in Senate Retires*, N.Y. TIMES (Dec. 10, 2004), http://www.nytimes.com/2004/12/10/politics/10pickering.html.

190 *See* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (en banc) (finding Judge Pryor's recess appointment constitutional and dismissing the reasoning that now forms the basis of the decision in *Noel Canning*).

191 The seat had been vacant since Judge Emmett R. Cox assumed senior status in 2000. *See Biographical Directory of Federal Judges: Cox, Emmett Ripley*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=522 (last visited Sept. 19, 2013).

192 *See Biographical Directory of Federal Judges: Pryor, William Holcombe Jr.*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=3050 (last visited Sept. 19, 2013).

193 See *supra* notes 160-62 and accompanying text for a discussion of the de facto officer doctrine.

194 Senator Reid had threatened to change the Senate's filibuster rules for executive branch nominees to allow for confirmation by a simple majority of fifty-one votes, but the filibuster rules for legislation and judicial appointments would have remained unaffected. *See* Manu Raju et al., *Senate Heads Toward 'Nuclear Option,'* POLITICO (July 16, 2013), http://www.politico.com/story/2013/07/senate-nears-nuclear-option-showdown-94156.html.

195 *See* Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 772-73 (2010) (exploring the role of increased partisan politics in slowing confirmations of judicial nominees).

196 *See* Neil A. Lewis, *Deal Ends Impasse over Judicial Nominees*, N.Y. TIMES (May 19, 2004), http://www.nytimes.com/2004/05/19/us/deal-ends-impasse-over-judicial-nominees.html.

197 *See* Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 12-19 (2012) (studying the forces that tend to push federal judges to leave the bench).

federal judiciary?[198] This is a particularly serious policy concern because increased workloads may already be reducing the rigor of judicial review,[199] and Republicans in the Senate continue to filibuster Obama nominees to the federal courts.[200]

D. *Supreme Court Review and Other Litigation*

The NLRB and the Obama Administration did not petition the D.C. Circuit to rehear the case en banc.[201] Challengers to President Obama's recess appointments were emboldened by *Noel Canning*, but by the time the case was decided, similar cases were already pending in a majority of the other circuits.[202] In deciding those cases, two additional circuits embraced the reasoning of the D.C. Circuit's *Noel Canning* opinion.[203] In a similar case, a nursing home asked the Supreme Court to stay a district court order enforcing an NLRB injunction, or in the alternative, to grant certiorari and review the issue itself.[204] The Court declined.[205] Still, most commentators

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198 A diverse collection of legal organizations agrees that prolonged vacancies on federal courts pose a threat to effective and efficient justice. *See, e.g.*, Russell Wheeler, *Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?* (discussing the current judicial vacancy crisis and proposing possible solutions), *in* TOWARD A MORE PERFECT UNION: A PROGRESSIVE BLUEPRINT FOR THE SECOND TERM (Am. Constitution Soc'y ed., 2013), *available at* http://www.acslaw.org/sites/default/files/Wheeler_-_Filling_Judicial_Vacancies.pdf; *Judicial Vacancies Slow the Wheels of Justice*, PRWEB (July 12, 2010), http://www.prweb.com/releases/2010/07/prweb4248044.htm (expressing the ABA President's displeasure at widespread judicial vacancies); *see also* Reid Alan Cox et al., *Filibusters and the Constitution*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. (2007), *available at* http://www.fed-soc.org/doclib/20070325_Filibusters.pdf (addressing the constitutional issues raised by the common practice of filibustering judicial nominations in the Senate).

199 *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1127-37 (2011) (using an empirical analysis to argue that overburdened circuit courts necessarily treat appeals with diminished scrutiny).

200 *See* Carl Hulse, *Blocked Bids to Fill Judgeships Stir New Fight on Filibuster*, N.Y. TIMES (Mar. 8, 2013), http://www.nytimes.com/2013/03/09/us/politics/filibuster-stirs-a-new-battle-on-us-judges.html (discussing the continued filibuster of the President's D.C. Circuit nominees).

201 Charlie Savage, *Recess Appointments Ruling to Be Appealed*, N.Y. TIMES (Mar. 12, 2013), http://www.nytimes.com/2013/03/13/us/politics/obama-to-appeal-ruling-curbing-recess-appointments.html.

202 *See* Lyle Denniston, *Spreading Challenge to Appointment Power*, SCOTUSBLOG (Jan. 28, 2013, 4:30 PM), http://www.scotusblog.com/2013/01/spreading-challenge-to-appointment-power (noting that the constitutional controversy over the President's recess appointments had spread to "all but three of the federal courts of appeals").

203 *See* NLRB v. Enter. Leasing Co. Se., 722 F.3d 609, 647 (4th Cir. 2013) ("[T]he term 'the Recess' means the intersession period of time between an adjournment *sine die* and the start of the Senate's next session."); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 208 (3d Cir. 2013) ("We hold that 'the Recess of the Senate' in the Recess Appointments Clause refers to only intersession breaks.").

204 Petition for Writ of Certiorari at 1-2, HealthBridge Mgmt., LLC v. Kreisberg, 133 S. Ct. 1002 (2013) (No. 12A769), 2013 WL 417696.

205 *See HealthBridge Mgmt.*, 133 S. Ct. at 1002 (denying application for stay and denying certiorari).

agreed that the Court would eventually have to settle the conflict between the circuits.[206] Even respondent Noel Canning agreed that the Court should grant certiorari to settle "a constitutional question of extreme importance."[207]

On June 24, 2013, the Supreme Court granted certiorari to review the D.C. Circuit's decision during October Term 2013.[208] Petitioners, the NLRB and the Solicitor General, asked the Court to consider two questions:

> 1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.
>
> 2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.[209]

In granting certiorari, the Court added an additional question for deliberation. The Court asked the litigants to consider "[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions."[210] The Court's decision to present a third question suggests it might consider following a narrower path toward invalidating President Obama's recess appointments.

Noel Canning has attracted significant coverage in the academic and popular press.[211] Despite the breadth and depth of analysis, however, the outcome

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206 *See, e.g.*, TODD GARVEY & DAVID H. CARPENTER, CONG. RESEARCH SERV., R43030, THE RECESS APPOINTMENT POWER AFTER *NOEL CANNING V. NLRB*: CONSTITUTIONAL IMPLICATIONS 13 (2013), *available at* http://www.fas.org/sgp/crs/misc/R43030.pdf ("These differences [among various circuits' interpretations] are substantial and may provide a strong justification for the Supreme Court to grant review of this case." (footnote omitted)); Lyle Denniston, *Broad Limit on Appointments Urged*, SCOTUSBLOG (May 23, 2013, 5:21 PM), http://www.scotusblog.com/2013/05/broad-limit-on-appointments-urged ("There has been no doubt that the Justices would eventually take on the dispute, which would lead the Court into a fundamental inquiry about constitutional meaning.").

207 Brief of Respondent Noel Canning at 9, NLRB v. Noel Canning, 133 S. Ct. 2861 (2013) (No. 12-1281), 2013 WL 2279703.

208 *Noel Canning*, 133 S. Ct. at 2861.

209 Petition for a Writ of Certiorari at I, *Noel Canning*, 133 S. Ct. 2861 (No. 12-1281), 2013 WL 1771081.

210 *Noel Canning*, 133 S. Ct. at 2862.

211 *See, e.g.*, Nicole Schwartzberg, *What Is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J.L. & POL. 231 (2013) (providing a thorough analysis of the proper interpretation of "the Recess"); Peter Strauss, Reaction, *The Pre-Session Recess*, 126 HARV. L. REV. F. 130, 130-31 (2013) (rejecting the formalism of the D.C. Circuit's opinion given the practical realities of the Founding era); Cass R. Sunstein, Reaction, *Originalism v. Burkeanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 126 (2013) (analyzing the case through a hypothetical dialogue between the two interpretive philosophies); Adrian Vermeule, Reaction, *Recess Appointments*

of the case before the Supreme Court is unpredictable. A superficial view of the case suggests that the issue might be decided along purely partisan lines. Over the long run, however, it is not clear which party would benefit from a more expansive reading of the Recess Appointments Clause.[212] There are a number of additional ideological divides at the core of *Noel Canning*. Should the Court view the issues through a purely originalist lens, or follow a Burkean approach based on the practices of the last two centuries?[213] The case also asks the Justices to calibrate the balance of power between the executive and legislative branches—an issue that divides the Court, but not necessarily along predictable partisan lines.[214] Such crosscutting interests complicate efforts to predict the outcome of the case.

Prognosticators face an additional challenge because the Supreme Court might resolve the case in a number of different ways. At the extremes, the Court could affirm the D.C. Circuit's opinion in its entirety or reverse and espouse the reasoning of *Evans v. Stephens*. Embracing either of these options would do the most to settle the meaning of the Recess Appointments Clause. Because the D.C. Circuit's opinion rests on alternative grounds and because the Supreme Court granted certiorari on an additional question, the Court would have to rule in the NLRB's favor on each of the three questions presented in order to reverse the D.C. Circuit.

The Court has a number of more subtle options as well. It could follow Judge Griffith's concurrence and reach only the first constitutional question, which would be sufficient to affirm the decision below.[215] The Court could also

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and Precautionary Constitutionalism, 126 HARV. L. REV. F. 122, 122-23 (2013) (arguing that the D.C. Circuit was overly concerned about the risks posed by a broad recess appointment authority); Gerard Magliocca, *Symposium: Listen to the Senate's Recess Bell*, SCOTUSBLOG (July 16, 2013, 2:06 PM), http://www.scotusblog.com/2013/07/symposium-listen-to-the-senates-recess-bell ("The Justices should decide [the case] by deferring to the Senate's interpretation of its rules and practices governing recesses."). The SCOTUSblog symposium provides a great deal of insightful analysis in posts by Elizabeth Wydra and Professors James Flug, Edward Hartnett, Michael Herz, and Victor Williams, among others. *See* Symposium, *National Labor Relations Board v. Noel Canning*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/ (last visited Sept. 19, 2013).

212 Presidents from both parties have used the power aggressively. *See supra* note 48 and accompanying text. Intelligent political actors should realize that they are "behind a sort of Rawlsian veil of ignorance" because of the reality that "[a] given interpretation may be good for your team at one point in history and bad at another." Herz, *supra* note 19, at 443.

213 *See* Sunstein, *supra* note 211 (providing a thorough exploration of this dichotomy through a hypothetical dialogue).

214 For instance, Justices Scalia and Kagan disagree on many issues, but both worked in the White House and have argued for relatively tight presidential control over independent agencies. *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488-89 (2011).

215 *See supra* Part II.D.

take a minimalist approach and skirt the core constitutional issues. It could defer to the Senate's constitutional power to set its own rules,[216] and find that the pro forma sessions were sufficient to block any recess appointments, without reaching the more sweeping conclusions of the D.C. Circuit.[217]

Some commentators have urged the Court to determine that the issues are nonjusticiable political questions.[218] After all, the Senate eventually confirmed President Obama's nominee, Richard Cordray, as CFPB Director. Perhaps the Supreme Court acts most "wisely" when it steps back and permits the other branches' "political and institutional incentives and disincentives to operate, as they were intended, to curb overreach by [an]other branch."[219]

The current quorum at the NLRB suggests yet another potential minimalist resolution. The subsequent nomination and confirmation of NLRB members did not render *Noel Canning* moot, because the NLRB loses jurisdiction to resolve a case once the record transfers to a federal court.[220] In an interesting twist, then-Solicitor General Elena Kagan addressed this mootness question and reached the same conclusion in a letter written while the Supreme Court was considering the issue of whether the NLRB could act without a three-person quorum.[221] Solicitor General Kagan argued that the case was not moot, but that it remained "unclear whether the Board has the authority to 'ratify' the two-member decisions *en masse* without reconsidering each case individually."[222] Although the then-Solicitor General counseled against a blanket ratification,[223] some commentators believe the Supreme Court could remand *Noel Canning* to the NLRB, which could then take "official notice" of the original proceedings before the Board

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216 *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

217 *See* Magliocca, *supra* note 211 (providing a careful explanation of this argument).

218 *See, e.g.*, Peter M. Shane, *In NLRB Recess Appointments Case, Roberts Court Can Now Show It Knows How to Exercise Judicial Restraint*, BLOOMBERG BNA DAILY REP. FOR EXECUTIVES 1, 3 (July 29, 2013), http://shanereactions.files.wordpress.com/2013/07/peter-shane-argument-for-judicial-restraint-in-recess-appointments-cases.pdf (encouraging the Court to find that the case presents "questions that the Court regards as constitutionally left to the elected branches of government to decide for themselves").

219 *Id.*

220 *See* John Elwood, *Could Senate Action After Cloture Reform Moot* Noel Canning*?*, VOLOKH CONSPIRACY (July 12, 2013, 11:52 AM), http://www.volokh.com/2013/07/12/could-senate-action-after-cloture-reform-moot-noel-canning (citing 29 U.S.C. § 160(e)).

221 *See* Letter from Elena Kagan, Solicitor Gen., to William K. Suter, Clerk, U.S. Supreme Court (Apr. 26, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf (arguing *New Process Steel, L.P. v. National Labor Relations Board*, 130 S. Ct. 2635 (2010), had not been rendered moot by the subsequent appointment of two additional members to the NLRB).

222 *Id.* at 2.

223 *See id.*

and reaffirm the Board's decision.[224] This solution would allow the Court to completely avoid the thorny constitutional issues at play. Yet these minimalist approaches would leave the definition of the Recess Appointments Clause unclear and subject to further intercircuit conflict.

Each of these paths leads to markedly different practical results for the President's power to fill vacancies.

CONCLUSION

The *Noel Canning* decision is well reasoned and well researched. It presents a convincing argument for the original purpose of the Recess Appointments Clause in light of the Founders' intent. But it also contradicts the decisions of three federal courts of appeals, a long history of executive practice, and at least some congressional acquiescence. *Noel Canning* is motivated by intense dedication to separation of powers, originalism, and the judiciary's role as referee of constitutional boundaries. It conflicts with court decisions and commentators who value pragmatic, functional government.

Both sides appeal to what they believe is the ultimate purpose of the Recess Appointments Clause. Supporters of *Noel Canning*'s reasoning point to the original purpose of the clause as a secondary backstop in a time when the Senate was in recess more than it was in the capital. Opponents point to the clause's general purpose as a lubricant to facilitate the smooth functioning of government. Although the *Noel Canning* debate is often framed in partisan terms—three judges appointed by Republican presidents invalidating President Obama's labor appointments[225]—it is worth remembering that in the span of a single decade, Democrats and Republicans have both objected to, and defended, the Recess Appointments Clause.

The Supreme Court now faces the same choice between competing values. The Court's decision will have significant consequences for the future of presidential power, governmental efficiency, and the Recess Appointments Clause itself.

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224 *See* Shane, *supra* note 218, at 1.

225 *Cf.* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645 (2010) (arguing, in the context of presidential control over agencies, that "[j]udgments about policy outcomes not surprisingly affect judgments about presidential power[:] . . . [a]lthough partisans invoke the Constitution to bolster their claims, ultimately politics underlies criticisms of Presidents for exercising too much power").