

# VIRGINIA LAW REVIEW

## ONLINE

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VOLUME 99

MAY 2013

NUMBER 1

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### *ESSAY*

#### *NOEL CANNING V. NLRB* – ENFORCING BASIC CONSTITUTIONAL LIMITS ON PRESIDENTIAL POWER

*Noel Francisco\** and *James Burnham\*\**

#### INTRODUCTION

ON January 4, 2012, President Obama purported to make three “recess” appointments to fill preexisting vacancies on the National Labor Relations Board (“NLRB”). The President made these appointments despite the Senate’s convening the day before to begin the Second Session of the 112th Congress, and despite the Senate’s convening again two days later for a session on January 6, 2012. Because the so-called “recess” was actually just a three-day break during the Senate’s session, the appointments were immediately controversial. That controversy prompted numerous legal challenges, including our case, *Noel Canning v. NLRB*,<sup>1</sup> in which the U.S. Court of Appeals for the D.C. Circuit issued an opinion last January holding that the appointments contravened two of the Constitution’s basic limitations on the recess appointments power and were thus invalid. The executive branch recently announced its intention to seek certiorari from the D.C. Circuit’s decision, and so *Noel Canning* looks like it is headed for the Supreme Court.

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\* Noel J. Francisco is a partner in the Washington, D.C., office of Jones Day and a former Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel. He can be reached at [njfrancisco@jonesday.com](mailto:njfrancisco@jonesday.com). The views expressed in this Article are solely those of the authors.

\*\* James M. Burnham is an associate in the Washington, D.C., office of Jones Day and can be reached at [jmburnham@jonesday.com](mailto:jmburnham@jonesday.com).

<sup>1</sup> *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

At the outset, we would like to address a common misconception about the power to make recess appointments. Many commentators have approached this issue with the premise that the recess appointments power is an important presidential power that must be shielded from Senate infringement. It is not. The historical record is clear that the appointments power is not a presidential prerogative. Quite the contrary. Angry about the monarch's widespread abuse of appointments, the Founders created a joint appointment power that was to be shared between the President and the Senate. As Alexander Hamilton wrote in *The Federalist No. 67*, "The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate."<sup>2</sup> Recess appointments were a creature of necessity, impelled by the primitive modes of communication and transportation available at the time. The "auxiliary" recess appointment power thus existed solely to keep the government running during the Senate's lengthy, annual intersession break. It was never intended to provide the very "absolute power of appointment" that the Founders abhorred and had explicitly rejected.<sup>3</sup>

With that background in mind, we will now provide a brief overview of the three basic, independent reasons why the President's January 4, 2012, "recess" appointments were invalid.

#### I. THE SENATE WAS NOT IN "RECESS" ON JANUARY 4, 2012, UNDER ANY REASONABLE CONSTITUTIONAL CONSTRUCTION

Perhaps the plainest reason the President's appointments were invalid is one that the D.C. Circuit did not address.<sup>4</sup> Since the Founding, no President has ever attempted to make recess appointments during a break in the Senate's session of less than three days—that is, during a period where, as here, the Senate was meeting regularly and was continuously available to do Senate business. Such short breaks do not constitute "the Recess" within the meaning of the Constitution. Otherwise, every weekend, night, or lunch break would be "the Recess" too. If accepted, that policy—effectively enabling Presidents to make "recess" appointments at their convenience—would upend the appointments process by expand-

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<sup>2</sup> *The Federalist No. 67*, at 411 (Alexander Hamilton) (Bantam Classic ed., 2003).

<sup>3</sup> *The Federalist No. 76*, at 462 (Alexander Hamilton) (Bantam Classic ed., 2003).

<sup>4</sup> The D.C. Circuit opted to invalidate the appointments on the two other bases addressed below, both of which have a sounder basis in the Constitution's text and original public meaning.

ing the Recess Appointments Clause into the primary method of appointment, rather than the “auxiliary” method it was intended to be.

Because it has long been agreed that the recess appointments power must have some limit, this practical limitation has long been followed by even the most aggressive Presidents. Attorney General Harry Daugherty first articulated this limit in an opinion otherwise seeking to expand the President’s recess appointments power. Attorney General Daugherty argued that “no one . . . would for a moment contend that the Senate is not in session” unless it adjourns for more than three days.<sup>5</sup> As Attorney General Daugherty explained:

Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term ‘recess’ must be given a practical construction. And looking at the matter from a practical standpoint, *no one*, I venture to say, *would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.*<sup>6</sup>

Attorney General Daugherty thus reasoned that the Adjournment Clause sets a constitutional baseline for a Senate “recess” of, at the least, an adjournment exceeding three days. The executive branch has reaffirmed this limitation ever since<sup>7</sup> and appears to have followed it scrupulously.<sup>8</sup>

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<sup>5</sup> Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 25 (1921).

<sup>6</sup> Id. at 24–25 (emphasis added).

<sup>7</sup> See, e.g., Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 9 n.13 (2012) [hereinafter O.L.C. Memo] (quoting Memorandum from Jack L. Goldsmith III, Assistant Att’y Gen., Office of Legal Counsel for Alberto R. Gonzales, Counsel to the President, on Recess Appointments in the Current Recess of the Senate 3 (Feb. 20, 2004)) (“[T]he three days set by the Constitution as the time during which one House may adjourn without the consent of the other, U.S. Const. art. I, § 5, cl. 4, is also the length of time amounting to a ‘Recess’ under the Recess Appointments Clause.”); O.L.C. Memo, supra, at 9 n.13 (citing Memorandum from Leon Ulman, Deputy Assistant Att’y Gen., Office of Legal Counsel for John W. Dean III, Counsel to the President, on Recess Appointments 3–4 (Dec. 3, 1971)); Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314, 315–16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970). The executive branch has likewise taken this position in litigation at all levels of the judiciary. See, e.g., Reply Brief for Intervenor United States at 20–21, *Evans v. Stephens*, 407 F.3d 1272 (2005) (No. 02-16424) (citing “extensive evidence suggesting that ‘adjournment’ and ‘recess’ are constitutionally equivalent”); Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457) (opining that for the President to make a recess appointment “the recess has to be longer than 3 days”).

<sup>8</sup> In the past thirty years—the full period in which the Congressional Research Service has carefully tracked this information—the shortest recess during which any President attempted

In the case of the “recess” appointments here, there is no dispute that the Senate had not “adjourn[ed] for more than three days” on January 4, 2012. Nor has the executive branch disavowed its longstanding adherence to the three-day rule. Rather, here, the executive branch has sought to justify the January 4, 2012, appointments by arguing that the Senate’s sessions did not count because they were “pro forma” sessions. That is mistaken. “[A] pro forma session is not materially different from other Senate sessions.”<sup>9</sup> The distinction the executive branch seeks to draw between regular Senate sessions (which apparently have constitutional significance) and pro forma Senate sessions (which apparently do not) has no basis in the Constitution’s text, historical practice, or common sense.

Historically, pro forma sessions have been used to keep a House of Congress in session in order to comply with the Adjournment Clause, which states “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.”<sup>10</sup> And dating back to at least 1985, the Senate has used pro forma sessions for the specific purpose of preventing recess appointments. As Senator Inhofe has recounted:

[Senator Robert Byrd] extracted from [President Reagan] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would have to give the list to the majority leader . . . in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place.<sup>11</sup>

Implicit in President Reagan’s compromise, therefore, was the shared premise that the Senate could have prevented him from making any recess appointments by convening pro forma. The Senate revived this practice toward the end of the George W. Bush Administration, again using

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to make a recess appointment was ten days. See, e.g., Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama 12 (2012)* (“Between the beginning of the Reagan presidency in January 1981 and the end of December 2011, it appears that the shortest intersession recess during which a president made a recess appointment was 11 days, and the shortest intrasession recess during which a president made a recess appointment was 10 days.”).

<sup>9</sup> 158 Cong. Rec. S5954 (Aug. 2, 2012) (quoting Congressional Research Service Memorandum).

<sup>10</sup> U.S. Const. art. I, § 5, cl. 4.

<sup>11</sup> 145 Cong. Rec. 29,915 (Nov. 17, 1999) (statement of Sen. Inhofe).

such sessions for the explicit purpose of preventing recess appointments.<sup>12</sup>

Preventing recess appointments is, of course, the Senate's prerogative. The Senate possesses half of the "joint" appointments power and is fully entitled to insist that all appointments receive its advice and consent. And notably, President Bush, no shrinking violet when it came to executive power, respected the Senate's power to prevent such appointments, never attempting to make one when the Senate was convening in regular sessions.<sup>13</sup>

The executive branch has claimed that pro forma sessions are shams and has justified that claim by asserting that the Senate is incapable of doing Senate business at those sessions.<sup>14</sup> The evidence, however, shows otherwise. Indeed, on December 23, 2011, during a pro forma session in the same series of pro forma sessions that spanned the "recess" appointments here, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011 by unanimous consent and the president promptly signed it into law.<sup>15</sup> The Senate could have, had it chosen, likewise confirmed or rejected all pending nominations at its pro forma sessions. It merely needed to do so by unanimous consent, which is how the Senate does virtually all of its business.<sup>16</sup>

Nor does it matter that there is typically only a single Senator present during pro forma sessions. "It is unusual for as many as 51 Senators to be

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<sup>12</sup> See, e.g., Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 8 (2012).

<sup>13</sup> See *id.* ("The Senate pro forma session practice appears to have achieved its stated intent: President Bush made no recess appointments between the initial pro forma sessions in November 2007 and the end of his presidency.").

<sup>14</sup> See O.L.C. Memo, *supra* note 7, at 14 ("[T]he President could properly consider the pertinent intrasession recess period to be one during which the Senate is not genuinely capable of exercising its constitutional function of advising and consenting to executive nominations.").

<sup>15</sup> See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765).

<sup>16</sup> See, e.g., Valerie Heitshusen & Elizabeth Rybicki, Cong. Research Serv., *Disposition of Measures in the Senate Without a Roll Call Vote, 1989–February 1, 2010*, at 1 (2010), available at [http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=6449067f-5d71-4907-bce0-20338f080e26](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=6449067f-5d71-4907-bce0-20338f080e26) ("[I]n the last ten Congresses, an average of 93% of approved measures did not receive a roll call vote."); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* 1311 (1992) ("Much of the routine activity on the Senate floor occurs as a result of simple unanimous consent agreements."). This includes confirming nominees. Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013), available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C\\*P%3F3%22P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%3F3%22P%20%20%0A) ("Most nominations are brought up by unanimous consent and approved without objection.").

present on the floor at the same time,”<sup>17</sup> meaning the Senate rarely has a quorum. The Senate is nonetheless able to function fully because its rules presume a quorum in the absence of a quorum call.<sup>18</sup> The single presiding Senator at each pro forma session could, if he chose, simply confirm all pending nominees by unanimous consent—just like the presiding senator at any Senate session.

Nor are Senators any less obligated to attend pro forma sessions than any other session. As Riddick’s explains, “Under Senate Rule VI, paragraph 2, Senators are required to attend all sessions of the Senate unless they are excused.”<sup>19</sup> Neither Riddick’s nor the Senate Rules make any distinction for attendance at pro forma sessions. Senators are routinely absent from Senate sessions of all stripes—pro forma or not—for all sorts of reasons. And while quorum calls may be less likely during pro forma sessions as a practical matter, there is no impediment to any Senator requesting a quorum call at any pro forma session. The attendance obligation is thus identical.

In short, the Senate was convening regularly during the supposed “recess.” It passed a bill, it convened to commence the Second Session of the 112th Congress, and it was fully available to confirm the President’s nominees. For this simple reason, there was no “recess” and the so-called “recess” appointments were invalid.

## II. THE PRESIDENT MAY MAKE RECESS APPOINTMENTS ONLY DURING “THE RECESS” OF THE SENATE RATHER THAN DURING INTRASESSION BREAKS

In addition to contravening the pragmatic understanding of the Recess Appointments Clause that has governed between the political branches for the past several decades, the President’s January 4, 2012 appointments violated two clear textual limitations in the Recess Appointments Clause. The first is the clause’s limitation to “the Recess” of the Senate—that is, the break the Senate takes between separate sessions of Congress. The Recess Appointments Clause was historically understood as applying only during *intersession* recesses (those occurring between sessions) rather than during *intrasession* recesses (those occurring during

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<sup>17</sup> Betsy Palmer, Cong. Research Serv., 96-452, Voting and Quorum Procedures in the Senate 1 (2010), available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26\\*2D4QLO9%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2D4QLO9%0A).

<sup>18</sup> See Riddick & Frumin, *supra* note 16, at 1038 (“Until a point of no quorum has been raised, the Senate operates on the assumption that a quorum is present.”).

<sup>19</sup> *Id.* at 214.

a single session).<sup>20</sup> This construction flows directly from the clause's history, text, and structure.

First, the history. Intersession “recess” appointments are a relatively modern invention. “There were no intrasession recess appointments for the first seventy-five years under the Constitution. Then, until after World War I, only a limited number of these appointments were made during the troubled presidency of Andrew Johnson.”<sup>21</sup> The first executive branch opinion to consider the legality of intersession recess appointments—issued in 1901—squarely rejected them. There, Attorney General Philander Knox wrote: “The conclusion is irresistible to me that the President is not authorized to appoint an [officer] . . . during the current [intrasession] adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate . . . .”<sup>22</sup> This opinion was not reversed until the 1921 opinion by President Warren Harding’s Attorney General, Harry Daugherty,<sup>23</sup> discussed above, and it was not entrenched in the executive playbook until the Carter Administration.<sup>24</sup>

Further, the text of the clause is clear. The Recess Appointments Clause states: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>25</sup> At the time

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<sup>20</sup> See, e.g., Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 1549 (2005) (“[T]he evidence from text, structure, purpose, and history strongly favors the intersession interpretation.”).

<sup>21</sup> *Id.* at 1572. Given that President Andrew Johnson was impeached over appointments issues, his attempt at intersession recess appointments should receive little weight. Indeed, “the Johnson Administration issued no written opinions that argued for the constitutionality of intrasession recess appointments.” *Id.*

<sup>22</sup> *President—Appointments of Officers—Holiday Recesses*, 23 *Op. Att’y Gen.* 599, 604 (1901).

<sup>23</sup> In addition to being known for this opinion, Attorney General Daugherty is perhaps most well known for being forced from office amidst accusations of corruption, including involvement in the infamous Teapot Dome scandal. See Katy J. Harriger, *The History of the Independent Counsel Provisions*, 49 *Mercer L. Rev.* 489, 492 (1998). Attorney General Daugherty is even featured as a character in the HBO series *Boardwalk Empire*, where he is depicted in his role as Warren G. Harding’s 1920 campaign manager and, later, his scandal-tinged attorney general. See John Cloud, “*Boardwalk Empire* Watch: A Chaos of Spoils,” *TIME*, Sept. 24, 2012, <http://entertainment.time.com/2012/09/24/boardwalk-empire-recap-a-chaos-of-spoils>; *Boardwalk Empire: Season 1 Ep. 8—Hold Me in Paradise: Synopsis*, <http://www.hbo.com/boardwalk-empire/episodes/01/08-hold-me-in-paradise/synopsis.html>.

<sup>24</sup> See Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 *Mich. L. Rev.* 2204, 2213 (1994) (“President Carter may have been the first modern president to utilize the clause expressly to avoid the Senate’s advice and consent.”).

<sup>25</sup> U.S. Const. art. II, § 2, cl. 3.

of ratification, “as now, the word ‘the’ was and is a definite article.”<sup>26</sup> The Constitution refers six times to generic adjournments, never using a definite article. And in the most well known of those uses—the Adjournment Clause—the Constitution even uses the definite article to distinguish between generic adjournments (which can happen anytime) and “the” session of Congress (which is a specific event): “Neither House, during *the* Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . .”<sup>27</sup> When it comes to “recess,” by contrast, the Constitution uses the word only twice, both times using “the Recess” to refer to the single recess of a legislative body following each session (state legislatures<sup>28</sup> and the Senate<sup>29</sup>).

The structure of the clause dispels any doubt about this straightforward interpretation. By authorizing appointments during “the Recess,” which expire “at the End of [the Senate’s] next Session,”<sup>30</sup> the clause creates a clear symmetry between “Recesses” and “Sessions.” It contemplates that each recess will precede a session and that the ensuing session will then delineate the length of any recess appointment. Each recess appointee serves the same amount of time—a full Senate session. This makes sense, of course, because it permits recess appointments when the Senators are absent from Washington for their annual recess and then gives the Senate a full session (its “next Session” after “the Recess”) to consider whether to confirm or reject the president’s nominees. Once the Senate has had that opportunity to act, the need for recess appointments disappears.

In *Noel Canning* and elsewhere, the executive branch has maintained the implausible position that recess appointments can be made during any break at any time, but then last until the end of *both* the Senate’s *current* session *and* the Senate’s “next Session.” That means recess appointments made during an intrasession break generally last twice as long as those made during an intersession break. The terms of recess appointees installed during, say, a February 4, 2012 intrasession recess would thus last through both 2012 and 2013, until the end of the Senate’s “next” annual session in December of 2013 (two years), while recess appointees installed during a December 28, 2011 intersession recess would

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<sup>26</sup> *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013) (citing 2 Samuel Johnson, *A Dictionary of the English Language* (London, W. Straham 1755) (defining “the” as an “article noting a particular thing”).

<sup>27</sup> U.S. Const. art. I, § 5, cl. 4 (emphasis added).

<sup>28</sup> U.S. Const. art. I, § 3, cl. 2.

<sup>29</sup> U.S. Const. art. II, § 2, cl. 3.

<sup>30</sup> *Id.*



expire in December 2012 at the end of the Senate's "next Session" (one year). This divergence in term-length for different recess appointees makes no sense, as the executive branch itself long ago concluded in its opinion rejecting the broad power that it now claims.

Moreover, if the executive branch is correct that "the Recess" means any short break or mid-day recess during the Senate's session, then "their next Session" should likewise mean any session of the Senate—that is, every morning, afternoon, and daily session of the Senate rather than the Senate's single, annual, formal session. The word "session" is no less malleable than the word "recess," and so if "the Recess" means "any Recess," the phrase "their next Session" should likewise mean "any Session."<sup>31</sup> There is no textual or logical basis for breaking the clear parallelism between these terms. On this reading, the President's January 4, 2012 recess appointments were valid, but they expired following the Senate's January 6, 2012 session.

Thus, "the Recess" is plainly not the same thing as "any Recess." Rather, the former refers to a specific recess: the recess that happens every year before the Senate's "next Session." Because the January 4, 2012 "recess" appointments were made during the Second Session of the 112th Congress—commenced just the day before—those appointments were invalid.

### III. THE PRESIDENT MAY MAKE RECESS APPOINTMENTS TO FILL ONLY THOSE VACANCIES THAT "HAPPEN DURING" THE SENATE'S RECESS

Finally, the second textual limitation on the Recess Appointments Clause, also contravened here, is the clause's limitation of recess appointments to fill only those "Vacancies that may happen during the Recess of the Senate."<sup>32</sup> As both a textual and historical matter, it is virtually indisputable that this limitation precludes recess appointments to fill preexisting vacancies.

There is nothing ambiguous about the phrase "Vacancies that may happen during the Recess of the Senate." At the time of the Founding, the word "happen" had three standard definitions: (1) "[t]o come by chance; to come without one's previous expectation;" (2) "[t]o come; to befall;" (3) "[t]o light; to fall or come unexpectedly."<sup>33</sup> Each of these def-

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<sup>31</sup> Indeed, if anything, the word "Session" is more susceptible to the "any" interpretation because it, unlike "the Recess," is never limited by the definite article.

<sup>32</sup> U.S. Const. art. II, § 2, cl. 3.

<sup>33</sup> 1 Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828).

initions is fundamentally the same—“happen” means to “come unexpectedly” or “by chance.” In the context of the clause, the only possible way a vacancy could “come unexpectedly” or “by chance” “during the Recess of the Senate” would be if the vacancy were to arise during that recess. Ongoing vacancies do not continue to exist by chance. Thus, if a vacancy arises prior to the recess, then it does not “happen during” the recess, and recess appointments cannot be used to fill it.

The executive branch has rejected this plain reading of the text, contending instead that “happen during” really means “happen to exist.”<sup>34</sup> But in addition to being textually implausible, this strained interpretation would turn the phrase “may happen during” into meaningless window dressing. If the phrase “happen during” really meant “happen to exist” then the phrase adds nothing to the clause and has no textual purpose other than to create ambiguity. After all, had the Founders intended for recess appointments to be available for filling all vacancies—whenever the vacancies arose—then they would have written the provision as follows: “The President shall have Power to fill up all Vacancies ~~that may happen~~ during the Recess of the Senate.” This is, perhaps, why Attorney General William Wirt, the first to adopt the executive branch’s atextual interpretation, readily conceded that the arise-during interpretation “is, perhaps, more strictly consonant with the mere letter [of the Constitution].”<sup>35</sup>

History further confirms that the Founders meant what they wrote. The nation’s first Attorney General, Edmund Randolph, authored an opinion denying the President’s authority to fill vacancies that arose during a Senate session and continued into its subsequent recess.<sup>36</sup> President Washington, whom Attorney General Randolph was advising, strove to follow that advice. When he notified the newly-reconvened Senate of appointments made during its recess, President Washington was careful to state that “I nominate the following persons to fill the offices annexed to their names, respectively, *which became vacant during the recess of the Senate.*”<sup>37</sup> Even Alexander Hamilton—perhaps the most vociferous defender of executive power among the Founders—flatly rejected presidential power to use recess appointments to fill preexisting vacancies. As

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<sup>34</sup> Executive Authority to Fill Vacancies, 1 Op. Att’y Gen. 631, 633–34 (1823).

<sup>35</sup> *Id.*

<sup>36</sup> 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) (explaining that the recess appointments clause must be “interpreted strictly” because it serves as “an exception to the general participation of the Senate”).

<sup>37</sup> S. Exec. J., 4th Cong., 2d Sess. 216 (1796) (emphasis added).

Hamilton wrote in response to a letter from Secretary of War James McHenry (who shared Hamilton's understanding) inquiring on behalf of President John Adams: "The phrase 'Which may have happened' . . . implies casualty—and denotes such Offices as having been once filled, have become vacant by accidental circumstances. . . . It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate."<sup>38</sup>

For this reason, too, the President's January 4, 2012 appointments were invalid. Two of the vacancies had been around for several years, and the other had been filled by an invalid intrasession recess appointment which, even if valid, had undisputedly expired prior to the supposed January 2012 "recess" here.

#### CONCLUSION

This issue is not an abstract dispute in which practicality—the president has to keep the government running!—is being sacrificed at the altar of empty formalism. To the contrary, the Founders were acutely aware of the importance of Senate confirmation to ensuring fair and effective government. As Alexander Hamilton wrote in *The Federalist* No. 76, "the necessity of [the Senate's] concurrence would have a powerful, though, in general a silent operation" on the President's selection of nominees.<sup>39</sup> "It would be an excellent check upon a spirit of favoritism in the president, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."<sup>40</sup> Hamilton understood that:

[A] man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the legislature.<sup>41</sup>

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<sup>38</sup> Letter from Alexander Hamilton to James McHenry (May 3, 1799), 23 *The Papers of Alexander Hamilton* 94, 94 (Harold C. Syrett ed., 1976); see also, e.g., Rappaport, *supra* note 20, at 1518–38 (2005) ("A wide range of leading figures from the Framers' generation read the Recess Appointments Clause to [authorize only the filling of vacancies that arise during recesses].").

<sup>39</sup> *The Federalist* No. 76, at 463 (Alexander Hamilton) (Bantam Classic ed., 2003).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 463–64.

Senate confirmation thus provides “an efficacious source of stability in the administration.”<sup>42</sup> The boundless construction of the Recess Appointments Clause urged by the executive branch in our case—pursuant to which the recess-appointment exception would swallow the advice-and-consent rule—would turn these structural benefits on their head.

These clear benefits, moreover, far outweigh the asserted convenience of a near-absolute appointments power. True emergencies always ease governmental gridlock, while partisan disputes are not true emergencies. And indeed, here, there plainly was no crisis that necessitated immediate “recess” appointments. At the time of the President’s “recess” appointments, the nominations of the NLRB members were very recent. The President nominated the two Democratic nominees, Ms. Block and Mr. Griffin, on December 15, 2011, less than three weeks before the recess appointments and just two days before the Senate supposedly went into recess.<sup>43</sup> On January 4, neither nominee’s required committee application and background check had been submitted to the Senate,<sup>44</sup> which is generally a prerequisite to any Senate action on a nomination. The President thus did not even attempt to get his nominees confirmed by the Senate. If that was a valid exercise of the “auxiliary” recess appointments power, then recess appointments as a first option, rather than an emergency measure, will quickly become the norm.

In sum, the President’s January 4, 2012 “recess” appointments are triply flawed, violating the two textual limitations in the Recess Appointments Clause, and likewise violating the modern consensus between the political branches. It is no surprise, therefore, that they have been unanimously invalidated in the only judicial decision to consider them on the merits.

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<sup>42</sup> *Id.* at 463.

<sup>43</sup> Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012), available at <http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb>.

<sup>44</sup> *Id.*