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The Recess Appointment Power After *Noel Canning v. NLRB*: Constitutional Implications

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Summary

Under the Appointments Clause, the President is empowered to nominate and appoint principal officers of the United States, but only with the advice and consent of the Senate. In addition to this general appointment authority, the Recess Appointments Clause permits the President to make temporary appointments, without Senate approval, during periods in which the Senate is not in session. On January 4, 2012, while the Senate was holding periodic “pro forma” sessions, President Obama invoked his recess appointment power and unilaterally appointed Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB) and Terrence F. Flynn, Sharon Block, and Richard F. Griffin Jr. as Members of the National Labor Relations Board (NLRB).

The President’s recess appointments were ultimately challenged by parties affected by actions taken by the appointed officials, and on January 25, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) became the first court to evaluate the merits of the President’s appointments. In a broad decision entitled *Noel Canning v. National Labor Relations Board*, the court invalidated the appointment of all three NLRB Board Members. In reaching its decision, the D.C. Circuit concluded that under the Recess Appointments Clause, the President may only make recess appointments during a formal intersession recess (a recess between the end of one session of Congress and the start of another), *and* only to fill those vacancies that arose during the intersession recess in which the appointment was made.

Although the D.C. Circuit’s actual order in *Noel Canning* directly applies only to the NLRB’s authority to undertake the single action at issue in the case, the court’s interpretation of the President’s recess appointment authority could have a substantial impact on the future division of power between the President and Congress in the filling of vacancies. If affirmed by the Supreme Court, the likely effect of the reasoning adopted in *Noel Canning* would be a shift toward increased Senate control over the appointment of government officials and a decrease in the frequency of presidential recess appointments.

This report begins with a general legal overview of the Recess Appointments Clause and a discussion of applicable case law that existed prior to the D.C. Circuit’s decision in *Noel Canning*. The report then analyzes the *Noel Canning* opinion and evaluates the impact the case could have on the roles of the President and Congress in the appointments context. A companion report, CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey, provides a detailed discussion of the impact the *Noel Canning* decision may have on the functioning of the NLRB and the CFPB.

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Introduction

The U.S. Constitution allocates specific roles to both the President and the Senate in the appointment of government officials. Under the Appointments Clause, the President is empowered to nominate and appoint principal officers of the United States, but only with the advice and consent of the Senate.¹ In addition to this general appointment authority, the Recess Appointments Clause permits the President to make temporary appointments, without Senate approval, during periods in which the Senate is not in session.² This constitutionally established appointment process, whether executed pursuant to the Appointments Clause or the Recess Appointments Clause, has often served as a source of political conflict between the President and Congress.³ This tension between the branches is perhaps most acute when the Senate perceives the President as circumventing the Senate’s constitutional “Advice and Consent” role by unilaterally appointing officials pursuant to the Recess Appointment Clause, or, conversely, when the President perceives the Senate as obstructing his appointment power by refusing to confirm nominees the President feels are qualified.

The unique facts underlying President Obama’s recess appointments of Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB) and Terrence F. Flynn, Sharon Block, and Richard F. Griffin Jr. as Members of the National Labor Relations Board (NLRB, or Board) have brought the inherent tensions of the appointments process into stark focus. Although the President had formally nominated all four officials for confirmation by the Senate during the first session of the 112th Congress, the Senate—as is its prerogative—did not confirm the President’s nominees. After adjourning on December 17, 2011, the Senate agreed to hold a series of “pro forma” sessions to occur periodically until January 23, 2012.⁴ Citing Senate inaction, asserting that the Senate was in recess despite the pro forma sessions, and stressing the need for a fully functioning CFPB and NLRB, on January 4, 2012, the President exercised his recess appointment power and announced the appointment of all four officials.⁵

The President’s recess appointments were challenged through various lawsuits filed by parties affected by actions taken by either the CFPB or the NLRB.⁶ The plaintiffs generally argued that

¹ The Supreme Court has distinguished “principal officers,” who must be appointed by the President with the advice and consent of the Senate, from inferior officers, whose appointment Congress may vest solely in the President, the judiciary, or a head of a department. U.S. Const. art. II, §2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.”).

² U.S. Const. art. II, §2, cl. 3.

³ CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu, at 2 (citing numerous examples of contentious recess appointments).

⁴ 157 CONG. REC. S883-S8784 (daily ed. December 17, 2011). Under the Twentieth Amendment, each new session of Congress is required to begin “at noon on the 3d day of January, unless [Congress] shall by law appoint a different day.” U.S. Const. Amend XX §2.

⁵ *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, January 4, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

⁶ See Lyle Denniston, *Spreading challenge to appointment power (UPDATED)*, SCOTUSblog, January 28, 2013, available at <http://www.scotusblog.com/2013/01/spreading-challenge-to-appointment-power/>; Complaint, State Nat’l Bank of Big Spring v. Geithner, Case No. 1:12-cv-01032 (D.C. September 20, 2012), available at http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/statenationvcfpb--amendedcomplaint.pdf; Opposition to Receiver’s Second Request for Payment, Consumer Fin. Prot. Bureau v. Gordon,

because Cordray, Flynn, Block, and Griffin Jr. were not validly appointed, neither the CFPB nor the NLRB had authority to act. On January 25, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) became the first court to evaluate the merits of these challenges. In a case entitled *Noel Canning v. National Labor Relations Board*, the circuit court issued a broad decision invalidating the appointment of all three NLRB Board Members.⁷ The court concluded that under the Recess Appointments Clause, the President may make recess appointments only during a formal intersession recess (a recess between the end of one session of Congress and the start of another), *and* only to fill those vacancies that arose during the intersession recess in which the appointment was made.⁸ Although the decision directly applies only to the NLRB's authority to undertake the single action at issue in the case, the legal reasoning, if adopted by other courts or affirmed by the Supreme Court, would cast serious doubt not only upon an array of previous actions by the Board and its ability to function in the future, but also upon the validity of the President's appointment of Director Cordray; the validity of various actions already undertaken by the CFPB; and the authority of the CFPB to function going forward.⁹

This report begins with a general legal overview of the Recess Appointments Clause and a discussion of applicable case law that existed prior to the D.C. Circuit's decision in *Noel Canning*. The report then analyzes the *Noel Canning* opinion and evaluates the impact the case could have on the roles of the President and Congress in the appointments context. A companion report, CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey, provides a detailed discussion of the impact the *Noel Canning* decision may have on the functioning of the NLRB and the CFPB.

The Recess Appointments Clause

The Constitution establishes two methods by which the President may make appointments. The Appointments Clause, which establishes the principal method of appointment, requires that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law ..."¹⁰

Thus, while the Appointments Clause authorizes the President to nominate principal officers of the United States, a nominee cannot assume the powers of the office for which she has been nominated until confirmed by the Senate.¹¹ In addition to this general provision, the Constitution also provides an alternative method of appointment that may be exercised only "during the Recess of the Senate." The Recess Appointments Clause (Clause) establishes that "The President

Case No. CV12-6147-RSWL(MRWx), (C.D.Cal. July 18, 2012), available at <http://www.cfpbmonitor.com/files/2013/02/CGCFPB-Opp-Rec-Req-2.pdf>.

⁷ No. 12-115 (D.C. Cir., January 25, 2013) (hereinafter *Noel Canning*) available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/\\$file/12-1115-1417096.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf).

⁸ *Id.* at 30, 44.

⁹ Taken to its logical limits, the reasoning of the opinion could create uncertainty as to the validity of hundreds of other recess appointments made across the government in recent years. Consideration of these appointments is beyond the scope of this report.

¹⁰ U.S. Const. art. II, §2, cl. 2.

¹¹ Once confirmed by the Senate, an officer is not formally appointed until his commission is signed by 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.”¹²

The formative constitutional period provides only limited evidence of the intended meaning of the Clause.¹³ In arguing for the Constitution’s ratification by the states, however, Alexander Hamilton broadly characterized the Clause as a complement to the general appointment power that would allow the President to make temporary appointments during a Senate recess, without Senate confirmation, to offices that needed to be filled without delay.¹⁴ Hamilton articulated the purpose of the Clause in Federalist 67, stating that the Clause was

nothing more than a supplement to the [Appointments Clause], for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments, “during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”¹⁵

Although the precise contours of the Recess Appointments Clause remain unclear, a consensus appears to have developed with respect to certain principles. For example, the Clause does not establish a lesser form of appointment. Courts that have considered the question have noted that, as a constitutional matter, a recess appointee possesses the same legal authority as a Senate confirmed appointee. Article II “neither distinguishes nor limits the powers that a recess appointee may exercise while in office.”¹⁶ As such it is widely accepted that during his term, a recess appointee “is afforded the full extent of authority commensurate with that office.”¹⁷

It is also generally understood that, pursuant to the express terms of the Clause, the commission of a recess appointee expires at the conclusion of the Senate’s “next Session” following the appointment.¹⁸ Therefore, the point at which an individual is appointed may determine how long the officer serves. If an officer receives a recess appointment during either the first session of a Congress, or the period between the first and second sessions, the officer would serve until the end of the second session of that Congress. If an officer is appointed during the second session of a Congress, she would serve until the end of the first session of the next Congress.

¹² U.S. Const. art. II, §2, cl. 3.

¹³ M. Ferrand, *Records of the Federal Convention of 1787*, at 533, 540, 574, 600 (rev. ed. 1966). The Clause does not appear to have been discussed during the Constitutional Convention. The language was first drafted in Hamilton’s plan of government, adopted upon the motion of Richard Spaight of North Carolina, and left unchanged by the Committee of Style. *Id.* Moreover, “the contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause.” *U.S. v. Woodley*, 751 F.2d 1008, 1017 (9th Cir. 1985).

¹⁴ The Federalist, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

¹⁵ Hamilton addressed the purpose of the Clause in response to an assertion that the language authorized the President to fill vacancies of the Senate. *Id.*

¹⁶ *Evans v. Stephens*, 387 F.3d 1220, 1223 (11th Cir. 2004).

¹⁷ *Id.* See also *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) (“There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment ...”).

¹⁸ See 41 Op. A.G. 463, 470-471 (1960); 28 Comp. Gen. 121 (1948). In contrast, a confirmed appointee will serve at the pleasure of the President or subject to the term of office prescribed by statute. CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

Absent these few generally established principles, the Recess Appointments Clause is typically characterized as containing a number of inherent ambiguities. Most prominent among these lingering questions is the proper interpretation of the two phrases that form the very foundation of the Clause: “Vacancies that may happen during” and “the Recess of the Senate.” With respect to the former phrase, must the vacancy *arise* during the recess in which the President exercises his appointment authority, or is it sufficient that the vacancy merely *exist* at the time the Senate is in recess and the appointment made? Regarding the latter, what is meant by “the Recess”? Specifically, is the President’s recess appointment authority triggered only during intersession recesses (recesses *between* sessions of Congress) or may he also exercise his authority during intrasession recesses (recesses that occur *within* a session of Congress)?¹⁹ Or, to the contrary, is it the *duration*, rather than the form, of a recess that triggers the President’s authority?

The executive branch and Congress have given some of these questions consideration in Attorneys General opinions²⁰ and committee reports, respectively.²¹ The courts, however, have rarely engaged in any significant interpretive analysis of the Clause. The Supreme Court, for example, has never considered when the President’s appointment authority is triggered under the Clause, and prior to the D.C. Circuit’s decision in *Noel Canning*, only three federal courts of appeals had engaged in such analyses. All three decisions arguably interpreted the Clause broadly, that is, in a manner that imposed limited restrictions on the President’s exercise of the recess appointment authority.²² These cases are discussed in greater detail below.

The Second Circuit: *United States v. Allocco*

In the 1962 decision of *United States v. Allocco*,²³ the U.S. Court of Appeals for the Second Circuit (Second Circuit) considered a challenge to President Eisenhower’s appointment of John M. Cashin as a federal judge. The position to which Judge Cashin was appointed became vacant on July 31, 1955. The Senate was in session at the time, and remained so until August 2, when it adjourned *sine die*. President Eisenhower made his appointment on August 17 during the resulting intersession recess.²⁴

In determining that the President’s appointment was valid, the three-judge panel unanimously held that the Recess Appointments Clause permits the filling of vacancies that “happen to exist” at the time of a recess and rejected the argument that the President cannot fill those vacancies that arise while the Senate is in session.²⁵ Focusing on the practical difficulties of the rejected approach, the court determined that to have adopted the more restrictive interpretation would require that offices which became vacant “on the day the Senate adjourns ... remain vacant until

¹⁹ It should be noted that prior to the Civil War intrasession recesses were relatively uncommon as Congress generally met for relatively short sessions followed by long intersession recesses of six to nine months.

²⁰ For example, aspects of the recess appointments power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19th century on recess appointments, the earliest written in 1823. CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

²¹ See, e.g. S.Rept. 58-4389 at 2 (1905) (“[Recess] means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress ...*; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not [*sic*] receive communications from the President or participate as a body in making appointments.”) (emphasis in original).

²² All three cases arose in the context of judicial appointments, and all three courts also held that the Recess Appointments Clause authorized the President to fill judicial vacancies.

²³ 305 F.2d 704 (2nd Cir. 1962).

²⁴ *Id.* at 705.

²⁵ *Id.* at 710-13.

the Senate reconvenes and has the opportunity to fill them.”²⁶ This delay would create a “manifestly undesirable situation,” “frustrate the commendable objective sought by the drafters,” and “do violence to the orderly functioning of our complex government.”²⁷ The court noted that its interpretation was “not without precedent,” citing the “long and continuous line” of Attorneys General opinions determining that “the recess power extends to vacancies which arise while the Senate is in session” as well as the “widespread acceptance of [the] practice followed since the earliest days of the Republic.”²⁸ The Second Circuit declared: “In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘Executive Power’ vested in the President by §1 of Art. II.”²⁹

The Ninth Circuit: *United States v. Woodley*

More than 20 years after the Second Circuit’s decision, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) heard a similar recess appointment challenge in *United States v. Woodley*.³⁰ President Carter had nominated Walter Heen to be a federal district court judge on February 28, 1980. Although the Senate Judiciary Committee took up consideration of the Heen nomination, the full Senate adjourned *sine die* on December 16, 1980, without holding a confirmation vote. During the subsequent intersession recess, President Carter appointed Judge Heen pursuant to the Recess Appointments Clause on December 31, 1980.³¹

The *Woodley* court concurred with the reasoning applied in *Allocco* and held that a vacancy need not arise during a Senate recess in order to fall within the scope of the Clause.³² In adopting the “happen to exist” interpretation of the Clause, the court noted that embracing an interpretation that did not permit the President to fill “all vacancies” that exist during a recess would lead to “absurd result[s]” and “conflict with a common sense reading of the word *happen*, as well as the construction given to this word by the three branches of our government.”³³ Furthermore, a restrictive interpretation would defeat the purpose of the Clause, which the court identified as assuring to the President “the capacity for filling vacancies at any time to keep the government running smoothly.”³⁴ Like the opinion in *Allocco*, the Ninth Circuit cited historical evidence suggesting that the executive branch has “consistently construed” the Clause as providing the President with the authority to fill any vacancy that existed at the time of the Senate recess.³⁵

²⁶ *Id.* at 710.

²⁷ *Id.* The court also recognized that the entire process from selection to confirmation “frequently consumes many months.” If the President was only able to fill vacancies that arose during a Senate recess, the process of selecting and confirming a nominee for a vacancy that arose near the end of a Senate session would have to be “telescoped into whatever time remains in a session....” *Id.* at 711-12.

²⁸ *Id.* at 713.

²⁹ *Id.* at 714 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring)).

³⁰ 751 F.2d 1008 (9th Cir. 1985)

³¹ *Id.* at 1009.

³² 751 F.2d 1008 (9th Cir. 1985).

³³ *Id.* at 1012.

³⁴ *Id.* at 1013 (citing *Allocco*, 305 F.2d at 712).

³⁵ *Id.* Although 11 of the 15 judges involved in the en banc appeal joined the majority opinion, four judges issued a dissent that strongly criticized the majority’s “reliance upon the executive’s practice” in interpreting the meaning of the Clause. *Id.* at 1015 (Norris, J. dissenting).

The Eleventh Circuit: *Evans v. Stephens*

Whereas the appointments in *Allocco* and *Woodley* were made during intersession recesses, the appointment challenged in *Evans v. Stephens*³⁶ was made during an intrasession recess of the Senate. On February 12, 2004, the Senate adjourned until February 23 for a “President’s Day recess.” During this break, President George W. Bush exercised his recess appointment power to appoint William H. Pryor to the federal bench.³⁷

Citing to both *Allocco* and *Woodley*, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) interpreted the Recess Appointments Clause to “mean[] that, if vacancies ‘happen’ to exist during a recess, they may be filled on a temporary basis by the President.”³⁸ The court determined that such an interpretation was “consistent with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence.”³⁹ The court also noted that early Presidents “made recess appointments to fill vacancies that originated while the Senate was in Session.”⁴⁰

In addition, because the appointment in question had not occurred during an intersession recess, the Eleventh Circuit also became the first appellate court to hold that the Recess Appointments Clause authorized the President to make appointments during an *intrasession* recess of the Senate. The court expressly rejected the argument that the Clause “limits the opportunity to make recess appointments to one particular recess: the recess at the end of a session.”⁴¹ In adopting its interpretation, the court noted that the text of the Clause “does not differentiate expressly between inter- and intrasession recesses ...” and therefore determined that “‘the Recess,’ originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate’s acts of recessing ...”⁴²

The Eleventh Circuit also looked to historical practice for support, noting that 12 Presidents have made over 285 intrasession recess appointments.⁴³ Moreover, the court identified the main purpose of the Clause as enabling “the President to fill vacancies to assure the proper functioning of our government.”⁴⁴ Given this concern over administrative continuity, the court gave greater weight to the duration of the Senate recess as opposed to whether it was intersession or intrasession. The court did not, however, establish a minimum recess period required “to give legal force” to the President’s recess appointment power, instead only noting that Presidents previously had made recess appointments during recesses of similar length.⁴⁵

³⁶ 387 F.3d 1220 (11th Cir. 2004).

³⁷ *Id.* at 1222. Judge Pryor was appointed to the U.S. Court of Appeals for the Eleventh Circuit and recused himself from review of his own appointment.

³⁸ *Id.* at 1225.

³⁹ *Id.* at 1226.

⁴⁰ *Id.* The court specifically highlighted appointments made by Presidents Washington and Jefferson.

⁴¹ *Id.* at 1224.

⁴² *Id.* at 1224-25.

⁴³ *Id.* at 1226 (“Twelve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate. So, given 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.”).

⁴⁴ *Id.* The court added: “The purpose of the Clause is no less satisfied during an intrasession recess than during a recess of potentially even shorter duration that comes as an intersession break.” *Id.*

⁴⁵ *Id.* at 1225. In dissent, Judge Barkett determined that “the plain meaning of the Recess Appointments Clause directly, expressly, and unambiguously requires that before a vacancy can be filled through the recess appointment power, that

Thus, prior to *Noel Canning*, three federal courts of appeals had held that the President may fill any vacancy that “happens to exist” at the time of a recess, and one had concluded that the President’s recess appointment authority extends to both inter- and intrasession recesses.⁴⁶ Although acknowledging that the Clause was subject to different textual interpretations, all three cases appear to have concentrated on a concern that a narrower interpretation would undermine what they identified as the overall purpose of the Clause, evidence of historical practice, and congressional acquiescence.

The January 4 Appointments

Due principally to the implementation of the aforementioned “pro forma” sessions, President Obama’s recess appointments at issue in *Noel Canning* present a unique set of facts not entirely parallel to the appointments considered in *Allocco*, *Woodley*, and *Evans*. As such, prior to discussing the D.C. Circuit’s decision, it is necessary to detail the January 4 appointments.

President Obama formally nominated Richard Cordray to be the first Director of the CFPB on July 18, 2011.⁴⁷ On October 6, 2011, the Senate Committee on Banking, Housing, and Urban Affairs approved Cordray’s nomination for a full vote of the Senate.⁴⁸ However, on December 8, 2011, the Senate fell 7 votes shy of the 60-vote threshold necessary to reach cloture and move to a vote on the nomination.⁴⁹

The NLRB, an agency with certain powers to investigate and adjudicate unfair labor practices, consists of a board of up to five officials appointed by the President with the advice and consent of the Senate.⁵⁰ Obtaining Senate confirmation of Board nominees has been difficult in recent years.⁵¹ Accordingly, there have been long periods during the presidencies of both George W. Bush and Obama in which the Board has had vacancies, including a period of more than two years in which the Board operated with only two Members. In 2011, the Board had only three Members—the minimum number of Members required for a quorum⁵²—with one of the three

vacancy must have occurred during a Senate recess.” Although he would not have reached the question of whether “the Recess” encompasses both intersession and intrasession recesses, Judge Barkett suggested that “the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only intersession recesses.”

⁴⁶ There also have been several district court opinions on the topic. See, e.g., *Staebler v. Carter*, 464 F.Supp.585 (D.D.C. 1979); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884).

⁴⁷ 157 CONG. REC. S4646 (daily ed. July 18, 2011). Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act established the CFPB and provided the independent agency with rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that provide them.

⁴⁸ *Johnson Statement on Committee Approval of Richard Cordray’s Nomination to Lead the CFPB*, S. Comm. on Banking, Hous., and Urban Affairs, Press Release, October 6, 2011, available at http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17.

⁴⁹ 157 CONG. REC. S8429 (daily ed. December 8, 2011). In May 2011, 44 Senators signed a letter to the President stating that they would oppose the confirmation of any nominee to serve as CFPB Director until substantive changes to the structure of the Bureau were enacted into law. *44 U.S. Sen. to Obama: No Accountability, No Confirmation*, Sen. Richard Shelby, News Release, May 5, 2011, available at <http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation>.

⁵⁰ 29 U.S.C. §153.

⁵¹ Indeed, five of the last seven appointments to the Board have been recess appointments. See *Members of the NLRB since 1935*, available at <http://www.nlr.gov/members-nlr-1935>.

⁵² In 2010, the Supreme Court ruled that the National Labor Relations Act prevents the NLRB from exercising rulemaking powers without having three or more acting Members. *New Process Steel v. Nat’l Labor Relations Bd.*, 130 S. Ct. 2635 (2010).

scheduled to vacate his seat by the end of the first session of the 112th Congress. In an effort to prevent membership from dropping below the minimum quorum required for the Board to fully conduct business, President Obama nominated Terrence F. Flynn for a seat on the Board on January 5, 2011.⁵³ The President formally nominated Sharon Block and Richard F. Griffin Jr. for positions on the Board on December 15, 2011.⁵⁴ Two days later, the Senate adopted a unanimous consent agreement in which the body adjourned, but scheduled a series of “pro forma” sessions every three to four days to occur from December 20, 2011, until January 23, 2012. The unanimous consent agreement established that “no business” would be conducted during the pro forma sessions and that the second session of the 112th Congress would begin at 12:00 p.m. on January 3, 2012, as required by the Constitution.⁵⁵

The Senate, at various times during recent Congresses, has held periodic “pro forma” sessions to “break up” what otherwise would have been a sustained adjournment. These sessions typically have been held every three or four days and are often governed by unanimous consent agreements that prohibit the chamber from conducting any formal business.⁵⁶ The sessions generally consist of a single Senator simply convening the session, assuming the chair, and then adjourning.⁵⁷

The modern use of pro forma sessions was initially instituted in 2007 by the Senate to avoid a sustained recess with the apparent intent of preventing the President from exercising his recess appointment powers.⁵⁸ Although the purpose of the pro forma sessions has not changed, during the 112th Congress, the House began to play an active role in the implementation of the sessions. Pursuant to the Adjournments Clause, “[n]either House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days.”⁵⁹ Generally then, unless both houses agree to an extended recess, neither body is constitutionally permitted to adjourn. In a June 2011 letter to House Leadership, numerous Members of the House requested that “all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress.”⁶⁰ By refusing its

⁵³ 157 CONG. REC. S68 (daily ed. January 5, 2011).

⁵⁴ 157 CONG. REC. S8691 (daily ed. December 15, 2011). President Obama had nominated Craig Becker on January 26, 2011, to retain the seat on the Board that he had previously held by recess appointment. That nomination was withdrawn on December 15, 2011. *Id.*

⁵⁵ 157 CONG. REC. S883-S8784 (daily ed. December 17, 2011). The unanimous consent agreement stated that the Senate would “adjourn and convene for pro forma sessions only, with no business conducted” on December 20, 23, 27, and 30; that the second session of the 112th Congress would convene on January 3 at noon “for a pro forma session only, with no business conducted;” and that the Senate would then convene for pro forma sessions “with no business conducted” on January 6, 10, 13, 17, and 20, 2012.

⁵⁶ Despite the agreement that no business would be conducted, the Senate approved the Temporary Payroll Tax Cut Continuation Act of 2011 by unanimous consent on December 23, 2011. 157 Cong. Rec. S8789 (daily ed., December 23, 2011).

⁵⁷ Pro forma sessions are generally short in duration, often lasting no more than a few minutes. See 158 CONG. REC. S1 (daily ed. January 3, 2012).

⁵⁸ In November 2007, the Senate Majority Leader announced that the Senate would “be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments” as it was thought that a recess of three days or less was insufficient to trigger the President’s recess authority. 153 CONG. REC. S14698 (daily ed., November 16, 2007). The development of this practice is perhaps informed by existing statements of the Department of Justice that link the Recess Appointments Clause to the Adjournment Clause. However, it also appears that the use of pro forma sessions to prevent recess appointments was at least contemplated as early as the 1980s. See CRS Congressional Distribution Memorandum, “Efforts to Prevent Recess Appointments through Congressional Scheduling and Historical Recess Appointments During Short Intervals Between Sessions,” by Henry Hogue and Richard Beth (October 24, 2011) (hereinafter CRS Recess Appointments Memorandum).

⁵⁹ U.S. Const. art. I, §5, cl. 4.

⁶⁰ *Letter to the Speaker of the House John Boehner, et al.*, June 15, 2011. Neither the House nor the Senate had

consent to a Senate adjournment, the House has been able to prevent the Senate from entering into an extended recess thought necessary to trigger the President's recess appointment authority.

None of the President's four nominees were confirmed before the end of the first session of the 112th Congress. On January 4, the President, understanding the Senate to be in a recess, asserted his authority under the Recess Appointments Clause and announced his appointment of Cordray, Block, Flynn, and Griffin.⁶¹

D.C. Circuit: *Noel Canning v. NLRB*

Acting with its newly appointed Members, the NLRB issued an administrative decision against Noel Canning (a Pepsi distributor and bottler) in February 2012, ruling that the company had violated the National Labor Relations Act by failing to reduce to writing a collective bargaining agreement with a local Teamsters Union. Noel Canning challenged the NLRB's decision in the D.C. Circuit, claiming that three Members of the Board were invalidly appointed and that, as a result, the Board lacked a quorum to issue the decision.⁶²

A unanimous three-judge panel held that the President's three recess appointments to the Board were constitutionally invalid. The opinion rested on two alternative justifications. First, the court held that "the Recess," for purposes of the Clause, refers only to an intersession recess entered into at the end of a session of Congress pursuant to a *sine die* adjournment.⁶³ Second, a two-judge majority⁶⁴ held that the President may make recess appointments only to fill vacancies that arise during the intersession recess in which the appointment is made.⁶⁵ The President's recess appointments were neither made, nor did the vacancies arise, during "the Recess."

Before proceeding to a detailed discussion of the case, it may be useful to identify three key themes that appear to pervade the court's opinion. First, the opinion favors a strict textualist constitutional interpretation and endeavors to ascertain the public meaning of the Recess Appointments Clause at the time it was adopted.⁶⁶ Second, rather than adopting the historical evidence embraced in *Allocco*, *Woodley*, and *Evans*, the opinion reassessed, and arguably

introduced a concurrent resolution of adjournment from May 12, 2011, until January 3, 2012. A similar letter addressed to House leadership was signed by a group of Senators on May 25, 2011. *Vitter, DeMint Urge House to Block Controversial Recess Appointments*, U.S. Sen. David Vitter, Press Release, May 25, 2011.

⁶¹ *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, January 4, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. The appointments occurred in the time between pro forma sessions on January 3 and January 6, 2012.

⁶² *Noel Canning v. National Labor Relations Bd.*, No. 12-1115 (D.C. Cir. January 25, 2013).

⁶³ *Id.* at 16-30. It should be noted that the court's discussion of the importance of a *sine die* adjournment, although applicable to both parts of the opinion, occurred within the portion of the opinion that Judge Griffith did not find necessary. *Id.* at 40-43.

⁶⁴ Noting that the "intersession recess" holding was sufficient to invalidate the appointments, Judge Griffith did not join the court's holding that a vacancy also must arise during "the Recess." *Id.* at 47 (Griffith, J. concurring) ("I agree that the Executive's view that the President can fill vacancies that 'happen to exist' during 'the Recess' is suspect, but that position dates back to at least the 1820s, making it more venerable than the much more recent practice of intrasession recess appointments. We should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it.") (internal citations omitted).

⁶⁵ *Id.* at 30-39.

⁶⁶ See, e.g., *id.* at 17 ("When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution.").

revalued, the historical use of recess appointments.⁶⁷ Third, the opinion invokes *Marbury v. Madison* to support the conclusion that the judiciary is the proper and ultimate arbiter for this type of constitutional dispute.⁶⁸

“the Recess”

In holding that the President’s authority to make recess appointments extends only to intersession recesses of the Senate, the D.C. Circuit placed significant importance on the Framers’ choice of the phrase “the Recess,” as opposed to “a recess,” the plural “recesses,” or the even broader “adjournment.”⁶⁹ Looking to the “natural meaning of text as it would have been understood at the time of the ratification of the Constitution,” the court found that the use of “the Recess,” “points to the inescapable conclusion” that the Framers must have intended the Clause to mean something other than a “generic break in proceedings.”⁷⁰ Moreover, the court also determined that the Clause creates a dichotomy between “the Recess” and “Session,” resulting in the conclusion that “[e]ither the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session it is not in ‘the Recess.’”⁷¹ The court concluded that the only time that the Senate is not in “Session,” and therefore is in “the Recess,” is during the period between the termination of one session and the beginning of another.⁷²

The D.C. Circuit also concluded that historical practice “strongly supports the intersession interpretation” of “the Recess.”⁷³ However, in evaluating the historical use of the Clause, the court made clear that the “early understanding of the constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage.”⁷⁴ The court was not swayed by the prevalence of intrasession recess appointments made by recent Presidents, but rather accorded significant weight to the fact that only three intrasession recess appointments were made before 1947 and that “no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified.”⁷⁵ The court concluded that “the infrequency of intrasession recess appointments during the first 150 years of the Republic ‘suggests an assumed *absence* of [the] power’ to make such appointments.”⁷⁶

⁶⁷ See, e.g., *id.* at 19-20 (“In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent.”); *id.* at 21 (“[W]e conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.”).

⁶⁸ See, e.g., *id.* at 29 (“While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law.”).

⁶⁹ *Id.* at 16-18.

⁷⁰ *Id.* at 17.

⁷¹ *Id.* at 17-18.

⁷² *Id.* at 18 (“It is universally accepted that ‘Session’ here refers to the usually two or sometimes three sessions per Congress. Therefore, ‘the Recess’ should be taken to mean only times when the Senate is not in one of those sessions.”).

⁷³ *Id.* at 20.

⁷⁴ *Id.* at 21, 29 (“The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments.”).

⁷⁵ *Id.* at 20.

⁷⁶ *Id.* at 21 (emphasis in original). Although the court acknowledged that the hardships of travel made intrasession recesses of any significant length quite rare in early Congresses, the court nonetheless asserted that “the appointment practices of Presidents more nearly contemporaneous with the adoption of the Constitution do not support the propriety

The Court also held that the context and purpose of the Clause buttressed its intersession interpretation. The court noted that the Clause was meant only as an appointment “stopgap” for the six- to nine-month intersession recesses of the Senate which were common at the time of the Constitution’s ratification.⁷⁷ The Framers, however, placed “strict limits” on the use of the Recess authority by requiring that the appointments only be made during “the Recess.”⁷⁸ “It would have made little sense to extend this ‘auxillary’ method to any intrasession break,” held the court, “for the ‘auxillary’ ability to make recess appointments could easily swallow the ‘general’ route of advice and consent.”⁷⁹

“Vacancies that may Happen during the Recess of the Senate”

Although the D.C. Circuit’s holding that recess appointments may only be made during intersession recesses was sufficient to invalidate the President’s appointments, a two-judge majority also held that the President’s recess appointments were invalid because the vacancies that were filled did not “happen during the Recess of the Senate.”⁸⁰

The Court determined that the Clause authorizes the President to fill only those vacancies that “come into being” or “arise” during an intersession recess, rather than those that “happen to exist” during an intersession recess.⁸¹ Moreover, the court held that the recess appointment must occur “during the same intersession recess when the vacancy for that office arose.”⁸² The court arrived at this construction because a plain reading of “that may Happen” could not properly be interpreted to encompass all vacancies in existence, otherwise, the court argued, “the operative phrase ... would be wholly unnecessary.”⁸³ The court acknowledged that this interpretation directly conflicted with the decisions in *Allocco*, *Woodley*, and *Evans*, but criticized those decisions for relying on modern dictionaries to define “happen,” rather than contemporary 18th century dictionaries that would define the term as understood during the time of ratification.⁸⁴

In support of its holding, the court also noted that a broader interpretation of “happen during the Recess” would “eviscerate the primary mode of appointments set forth in Article II, Section 2, Clause 2.”⁸⁵ The court reasoned that it “would have made little sense” to impose advice and consent restrictions in the Appointments Clause when “[a] President at odds with the Senate over nominations would never have to submit his nominees for confirmation. He could simply wait for a ‘recess’ (however defined) and then fill up all vacancies.”⁸⁶

The court also determined that early historical commentary by Attorney General Edmund Randolph, Alexander Hamilton, and Joseph Story suggested an early understanding that “happen”

of intrasession recess appointments.” *Id.*

⁷⁷ *Id.* at 22.

⁷⁸ *Id.* at 23.

⁷⁹ *Id.*

⁸⁰ *Id.* at 30-44. The court began its analysis “by looking at the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution.” *Id.* at 30-31.

⁸¹ *Id.* at 30-31. (“Upon a simple reading of the language itself, we conclude that the word ‘happen’ could not logically have encompassed any vacancies that happened to exist during ‘the Recess.’”).

⁸² *Id.* at 43-44.

⁸³ *Id.* at 31.

⁸⁴ *Id.* at 35-36.

⁸⁵ *Id.* at 32.

⁸⁶ *Id.*

meant “arise.”⁸⁷ In addition, the court noted President Washington’s practice at the end of a session to obtain confirmation for a nominee, without the nominee’s consent, before the Senate recess so that if the official later declined the office during the recess, the President could then fill the resulting vacancy through a recess appointment.⁸⁸

Sine Die Adjournment

Finally, the court held that the existence of an intersession recess can be identified by the *sine die* adjournment of the Senate. Literally translated as “without day,” *sine die* is a term used to describe an adjournment in which the Senate has not set a day for its next meeting⁸⁹ and is, therefore, not scheduled to meet again until the day set by the Constitution (or by law)⁹⁰ for its next session to convene.⁹¹ These adjournments are the formal means by which Congress ends a session and are generally agreed to by *both* the House and the Senate through a concurrent resolution that explicitly characterizes the adjournment as “*sine die*.”⁹²

The court noted that “it has long been the practice of the Senate, dating back to the first Congress, to conclude its sessions and enter ‘the Recess’ with an adjournment *sine die*.”⁹³ The decision would appear to suggest that a *sine die* adjournment is *necessary* to trigger the President’s recess authority. The court expressly held that “[b]ecause the Senate did not adjourn *sine die*, it did not enter ‘the Recess’ between the First and Second Sessions of the 112th Congress.”⁹⁴ Notably, the Court made clear that when the Senate declines to adjourn *sine die* by resolution, and instead remains in session until the start of the next session of Congress, the previous session “expire[s] simultaneously with the beginning of the” next session.⁹⁵ Consequently, it would appear that under *Noel Canning* the President’s recess authority is triggered only during an intersession recess initiated pursuant to a *sine die* adjournment of the Senate.

⁸⁷ *Id.* at 33-35.

⁸⁸ *Id.* at 33 (“If President Washington and the early Senate had understood the word ‘happen’ to mean ‘happen to exist,’ this convoluted process would have been unnecessary.”).

⁸⁹ For a more detailed discussion of *sine die* adjournment and Senate scheduling practices implemented to prevent presidential recess appointments, see CRS Recess Appointments Memorandum, *supra* note 58. See also CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Richard S. Beth and Jessica Tollestrup, at 10-11.

⁹⁰ 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.”).

⁹¹ The opinion did not address the effect a conditional *sine die* adjournment would have on the President’s authority to make recess appointments. Under this type of adjournment, the Senate adjourns *sine die*, but leaves open the possibility that the body will choose to reconvene at some point prior to the scheduled start of the next session.

⁹² For a discussion of the rare instances since the ratification of the Twentieth Amendment in which a session of the Senate was finally adjourned without a concurrent resolution of *sine die* adjournment, see CRS Recess Appointments Memorandum, *supra* note 58.

⁹³ *Noel Canning*, No. 12-115, at 40.

⁹⁴ *Id.* at 43.

⁹⁵ *Id.* at 42 (“Because, in this case, the Senate declined to adjourn *sine die* on December 30, 2011, it did not enter an intersession recess, and the First Session of the 112th Congress expired simultaneously with the beginning of the Second Session.”).

Conflicts Between *Noel Canning* and *Allocco*, *Woodley*, and *Evans*

The D.C. Circuit's decision in *Noel Canning* contrasts with *Allocco*, *Woodley*, and *Evans* in a number of ways. Most prominently, of course, are the conflicts created by *Noel Canning*'s two chief holdings.⁹⁶ Whereas the Second, Ninth, and Eleventh Circuits had previously determined that the Clause authorized the President to fill any vacancy that “happens to exist” at the time of a recess, regardless of when the vacancy arose, the *Noel Canning* court took a more restrictive view of the Clause, holding that the President may only fill those offices that first become vacant during the recess in which the appointment is made. In addition, the D.C. Circuit's holding that the President's recess appointment authority is only triggered during an intersession recess differs from the Eleventh Circuit's holding in *Evans* that the President may make recess appointments during both intersession and intrasession recesses. These differences are substantial and may provide a strong justification for the Supreme Court to grant review of this case.⁹⁷

However, the disagreements between *Noel Canning* and the three previous appellate decisions extend beyond the ultimate scope of the President's authority under the Recess Appointments Clause. Indeed, the opinions fundamentally diverge on a number of important interpretive and practical issues. Some of these distinctions are briefly highlighted below.

Approach to Constitutional Interpretation

The opinions differed in their overall approaches to constitutional interpretation. In *Noel Canning*, the D.C. Circuit employed a formalistic textualist approach, invoking “cold, unadorned logic,” in interpreting the language of the Recess Appointment Clause.⁹⁸ Seeking the plain logical meaning of the Clause, the court characterized its search as one for the “natural meaning of the text as it would have been understood at the time of the ratification of the Constitution.”⁹⁹ Although also beginning with an evaluation of the Clause's text, the decisions in *Allocco*, *Woodley*, and *Evans* arguably engaged in a more functional, purpose-driven interpretation—focusing on the practical impact of a more restrictive interpretation of the Clause; its effect on the President's ability to ensure continuity of government; and the potential that a such an interpretation would “frustrate the commendable objective sought by the drafters.”¹⁰⁰

Purpose of the Clause

The decisions differed in their characterizations of the basic purpose of the Clause. Whereas the earlier decisions characterized the Clause as ensuring that the President be able to fill vacancies to avoid administrative inefficiency, the *Noel Canning* court viewed the Clause primarily as a “stopgap” establishing a limited exception to the general requirement that nominees be approved

⁹⁶ It should be noted that the decisions of other circuits have no binding precedential effect within the D.C. Circuit. As such the court was under no obligation to give weight to the conclusions of the Second, Ninth, and Eleventh Circuits.

⁹⁷ The NLRB has announced its intent to appeal the decision to the Supreme Court. NLRB To Seek Supreme Court Review in *Noel Canning v. NLRB*, NLRB News Release March 12, 2013.

⁹⁸ *Noel Canning*, No. 12-115 at 17.

⁹⁹ *Id.* at 30.

¹⁰⁰ See, e.g., *Allocco*, 305 F.2d at 710 (“If we were to adopt the petitioner's interpretation, by reading the word ‘happened’ as if it is suspended in space without any history, context, or purpose, we would frustrate the commendable objective sought by the drafters.”).

by the Senate.¹⁰¹ Indeed, *Evans*, *Woodley*, and *Allocco* all referenced the importance of preventing “executive paralysis” or “atrophy” so as to ensure smooth functioning of government.¹⁰² *Evans* expressly identified the purpose of the Clause as “enabl[ing] the president to fill vacancies to assure the proper functioning of our government” and “to keep important offices filled and the government functioning.”¹⁰³ *Noel Canning* criticized that characterization of the Clause’s purpose for “omitt[ing] a crucial element of the Clause, which enables the President to fill vacancies *only when the Senate is unable to provide advice and consent*.”¹⁰⁴ Moreover, the D.C. Circuit noted that any “inefficiencies” that arise as a result of the court’s interpretation can be “alleviate[d]” by Congress through holdover provisions or by authorizing “acting” officers.¹⁰⁵

Historical Practice

In *Allocco*, the Second Circuit supported its conclusion that a vacancy need not arise during a recess with an evaluation of historical practice. The court noted that “we find widespread acceptance of [that] practice followed since the earliest days of the Republic.”¹⁰⁶ The *Evans* court agreed, noting that “as we understand the history, early Presidents [] made recess appointments to fill vacancies that originated while the Senate was in session.”¹⁰⁷ As an example, the court specifically cited to an appointment made by George Washington to a vacancy that the court asserted arose while the Senate was in session.¹⁰⁸ *Evans* also cited historical practice in support of the conclusion that the President can make intrasession recess appointments, identifying 12 more recent Presidents that had made in excess of 285 intrasession appointments.¹⁰⁹

Noel Canning’s evaluation of historical practice led that court to the opposite conclusion on both fronts. The court determined that in fact, “historical practice strongly supports the intersession interpretation” of the Clause.¹¹⁰ The court found that the first intrasession appointment did not occur until 1867, and only three such appointments were made prior to 1947. In fact, the court noted that no President had attempted an intrasession recess appointment for the republic’s first 80 years and that it has only been administrations of a “more recent vintage” that have regularly made intrasession recess appointments.¹¹¹ “The dearth of intrasession appointments in the years and decades following the ratification of the Constitution” concluded the court, “speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments.”¹¹²

Noel Canning also contested *Evans*’s use of historical evidence as a basis for its conclusion that Presidents may make recess appointments to any vacancy, regardless of when it arose. The D.C.

¹⁰¹ *Noel Canning*, at 22.

¹⁰² *Evans*, 387 F.3d at 1235; *Woodley*, 751 F.2d at 1013 (“The clause prevents the Executive from being incapacitated during the recess of the Senate.”); *Allocco*, 305 F.2d at 712.

¹⁰³ *Evans*, 387 F.3d at 1226.

¹⁰⁴ *Noel Canning*, at 26 (emphasis in original).

¹⁰⁵ *Id.* at 37-38.

¹⁰⁶ *Allocco*, 305 F.2d at 713.

¹⁰⁷ *Evans*, 387 F.3d at 1226.

¹⁰⁸ *Id.* at 1226.

¹⁰⁹ *Id.* (“Twelve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate.”).

¹¹⁰ *Noel Canning*, at 20.

¹¹¹ *Id.* at 21

¹¹² *Id.* at 29.

Circuit challenged *Evans*'s reliance on "a handful of recess appointments supposedly made by Presidents Washington and Jefferson to offices that became vacant prior to the recess," asserting that "[s]ubsequent scholarship has demonstrated" that the cited vacancies did not actually arise while the Senate was in session.¹¹³

Congressional Acquiescence

Finally, the courts are in direct conflict over the import of the enactment of 5 U.S.C. §5503 and its predecessor statutes. This statutory provision, as it currently exists, provides that "[p]ayment for services *may not* be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session...."¹¹⁴ The provision, however, establishes three broad exceptions to this general rule.¹¹⁵

Allocco, *Woodley*, and *Evans* all identified this statute as a basis for implying congressional approval of the President's authority to fill vacancies that arise while the Senate is still in session. In *Allocco*, the court stated that "Congress has implicitly recognized the President's power to fill vacancies which arise when the Senate is in session by authorizing payment of salaries to most persons so appointed under the recess power."¹¹⁶ In *Woodley*, the court cited to the statute in reasoning that "[b]oth Houses of Congress have apparently recognized the soundness of this construction of the recess power" by "provid[ing] for payment of recess appointees ... whose nominations were pending at the time of the Senate's recess."¹¹⁷ Likewise in *Evans*, the court explained: "That Congress is willing, under certain circumstances to pay recess appointees filling vacancies that have existed while the Senate was in session suggests to us that it is the view of the majority of Congress that the President's making of such appointments is likely not unconstitutional."¹¹⁸

The D.C. Circuit adopted a different interpretation in *Noel Canning*, concluding that the statute neither amounted to congressional acquiescence, nor provided any insight into the proper interpretation of the scope of the Recess Appointments Clause. The court questioned whether "our sister circuits are correct in construing this legislation as acquiescent," and instead concluded that the pay statute, which was first enacted in 1940 "sheds no light on the original understanding of the Constitution."¹¹⁹

¹¹³ *Id.* at 35 (citing Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1522, n.97 (2005)).

¹¹⁴ 5 U.S.C. §5503 (emphasis added).

¹¹⁵ The provision does not apply: "(1) if the vacancy arose within 30 days before the end of the session of the Senate; (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment." 5 U.S.C. §5503(a).

¹¹⁶ *Allocco*, 305 F.2d at 714.

¹¹⁷ *Woodley*, 751 F.2d at 1013.

¹¹⁸ *Evans*, 387 F.3d at 1227, n.11.

¹¹⁹ *Noel Canning*, at 36. Another court, however, has noted that "[t]he origins of the modern Vacancies Act go back to the beginning of the nation." *Doolin Sec. Sav. Bank, F.S.B v. Office of Thrift Supervision*, 139 F.3d 203, 209-210 (D.C. Cir. 1998).

Noel Canning's Potential Impact on the Relationship Between the President and Congress

Although the D.C. Circuit's actual order in *Noel Canning* directly implicates only one specific action, against one specific party, within one specific circuit,¹²⁰ the court's interpretation of the President's recess appointment authority could have a substantial impact on the future division of power between the President and Congress in the filling of vacancies. If affirmed by the Supreme Court,¹²¹ the likely effect of the reasoning adopted in *Noel Canning* would be a shift toward increased Senate control over the appointment of government officials and a decrease in the frequency of presidential recess appointments.¹²² Most prominently, the President would no longer be permitted to make intrasession recess appointments. Since 1981, 329 appointments—more than half of all recess appointments made during that period—have been made during *intrasession* recesses of the Senate.¹²³ In addition, the President would no longer be permitted to exercise his recess appointment authority to fill vacancies that arose while the Senate was in session, or that arose during a different intersession recess. Although CRS has not been able to determine the precise number of appointments that would have fallen into this category, it would appear that few of the 323 *intersession* recess appointments made since 1981¹²⁴ filled vacancies that arose during the intersession recess in which the appointment was made.¹²⁵ Vacancies in positions requiring Senate confirmation that no longer qualify for a recess appointment under *Noel Canning* would need to be filled through the general process of presidential nomination and Senate confirmation. Thus, by limiting both the periods in which a President may make recess appointments, and the vacancies that may be filled by such appointments, the decision likely would strengthen the Senate's "Advice and Consent" role, while restricting the President's authority to make unilateral appointments.

Moreover, the interpretation established in *Noel Canning* likely would provide Congress with nearly complete control over whether the President's recess authority is triggered in the future. Under the decision, it would appear that the necessary predicate for the President to make a recess appointment (an intersession recess) must be initiated by a *sine die* adjournment of the Senate.¹²⁶

¹²⁰ The decision carries precedential value only within the D.C. Circuit and in no way binds other federal courts outside of the circuit. In making future recess appointments, the Obama Administration—which has stated that it disagrees with the *Noel Canning* decision—may not feel bound by the restrictions established by the circuit court until the Supreme Court takes a position on the issue. See e.g., Donovan Slack, *White House Blasts Recess Appointments Ruling*, Politico, January 27, 2013. However, a plaintiff challenging a future recess appointment to a position located within the District of Columbia would likely have the choice of filing that lawsuit in the D.C. Circuit where *Noel Canning* would be accorded significant precedential weight.

¹²¹ The NLRB has stated that it intends to file a petition for certiorari with the Supreme Court by April 25, 2013. *NLRB To Seek Supreme Court Review in Noel Canning v. NLRB*, NLRB News Release March 12, 2013.

¹²² For a discussion of the decision's potential impact on the functioning of the NLRB and the CFPB, see CRS Report R43032, *Practical Implications of Noel Canning on the NLRB and CFPB*, by David H. Carpenter and Todd Garvey.

¹²³ See CRS Congressional Distribution Memorandum, *The Noel Canning Decision and Recess Appointments Made from 1981-2013*, by Henry B. Hogue, Maeva P. Carey, Michael W. Greene, and Maureen Bearden (February 4, 2013).

¹²⁴ *Id.* ("Preliminary research suggests ... that many of the intersession recess appointments listed in this memorandum might have been precluded.")

¹²⁵ This limitation also would appear to preclude two common types of recess appointments that generally do not fill vacancies that arise during the same recess in which the President makes the appointment: successive recess appointments to a single office; and the replacement of a "holdover" official with a recess appointee. See CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

¹²⁶ *Noel Canning*, at 42 ("Because the Senate did not adjourn *sine die*, it did not enter 'the Recess' between the First

As previously noted, whether the Senate enters a *sine die* adjournment is a decision left to that body—in cooperation with the House—and one in which the President has no direct role.¹²⁷ Therefore, the Senate¹²⁸ may effectively control whether the condition necessary to trigger the President’s authority to make recess appointments actually transpires. Indeed, if the Senate chooses not to adjourn *sine die* during a given Congress—a decision well within the Senate’s discretion and authority—under *Noel Canning* no recess appointments may be made. This notion of Senate control over the constitutional contingency necessary to trigger the President’s recess appointment authority is not, in and of itself, exceptional. In light of the conditional nature of the Clause, even the executive branch has acknowledged that “Congress can prevent the President from making any recess appointments by *remaining continuously in session and available to receive and act on nominations ...*”¹²⁹ The disagreement, however, is over how to distinguish when the Senate is in “session” and when it is in “recess.” The executive argues that it is within the President’s power to determine when the Senate is in “recess” for purposes of the Clause and unable to act on nominations.¹³⁰

Under the standards established in *Noel Canning*, the Senate would also appear free to enter extended intrasession recesses without the risk of triggering the President’s recess authority.¹³¹ Neither the *duration* of a recess nor the Senate’s ability to receive and weigh nominations were factors in the D.C. Circuit’s consideration of what constituted “the Recess” for purposes of the Clause.¹³² Instead, the court limited its evaluation only to establishing a distinction between the *form* of the recess—concluding that intersession recesses trigger the President’s authority and intrasession recesses do not. As a result, it could be argued under *Noel Canning* that while the President is not permitted to make a recess appointment during a multi-month intrasession recess, he may make a recess appointment during even a momentary intersession recess—assuming that the vacancy to be filled arose during that recess.¹³³

and Second Sessions of the 112th Congress.”).

¹²⁷ See the discussion of Article II, §3 *infra* note 143.

¹²⁸ Although the Senate may avoid an intersession recess through proper scheduling, in order to actually enter an intersession recess of more than three days, the body would need to obtain the consent of the House.

¹²⁹ 36 Op. O.L.C., at 17 (emphasis added) (“We conclude that while Congress can prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations, it cannot do so by conducting pro forma sessions during a recess.”).

¹³⁰ See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 6 Op. O.L.C. 1, 9 (2012) (“We believe that Congress’s provision for pro forma sessions of this sort does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause and that the President may properly conclude that the Senate is unavailable for the overall duration of the recess.”); *Executive Power-Recess Appointments*, 33 Op. Att’y Gen. 20, 25 (1921) (“I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”).

¹³¹ Pursuant to the Adjournments Clause (discussed below), the Senate would need to obtain the consent of the House before adjourning for an intrasession recess that lasts more than three days. However, if it is determined that the President cannot make appointments during intrasession recesses, the House may be more willing to consent to such recesses.

¹³² *Noel Canning*, at 30 (“In short, we hold that “the Recess” is limited to intersession recesses.”).

¹³³ The facts underlying the *Noel Canning* decision did not require a holding regarding the requisite duration of a recess. If the appropriate facts underlying a subsequent challenge to a recess appointment were to come before the D.C. Circuit, the court very well may elaborate on whether the duration of the recess is a factor in considering whether the Senate is in “the Recess.” It may be instructive, however, that unlike the *Evans* opinion, the *Noel Canning* opinion did not raise or identify the durational requirement in any manner.

For example, *Noel Canning* would appear to suggest that the President would not be authorized to make recess appointments during a three-month summer intrasession recess. The same would also appear to be true for a properly scheduled extended intrasession recess held at the end of a session. The Senate could, for instance, adjourn on December 1st with an agreement to return on January 2.¹³⁴ Upon returning, perhaps for a pro forma session, the Senate could then adjourn that *pro forma* session, but without adjourning *sine die*. Under Senate precedent, in the absence of an explicit *sine die* adjournment, the current session of Congress would remain in being until noon on January 3, at which point *Noel Canning* makes clear that the current session would automatically “expire[] simultaneously with the beginning of the [next] session.”¹³⁵ Under such a scenario the Senate would not have entered an intersession recess, and thus the President would have no opportunity to make a recess appointment.¹³⁶

In addition to simply avoiding intersession recesses, Congress also may discourage future presidential recess appointments by structuring the terms of newly created fixed term offices in a way that decreases the likelihood that they will become vacant during an intersession recess. For example, as opposed to tying the term to the date in which the officer was appointed, Congress could establish a term of service that expires during the middle of the calendar year when the Senate is unlikely to be in an intersession recess.¹³⁷

An argument may be forwarded that, by permitting the Senate to use scheduling practices, including pro forma sessions, to consistently prevent the President from making recess appointments, the restrictive interpretation adopted in *Noel Canning* tends to undermine the President’s appointment power in a way that could give rise to constitutional concerns under the separation of powers. It would appear unlikely that the D.C. Circuit, which views the Clause as establishing a purely conditional auxiliary power, would be moved by such an argument.¹³⁸ Under its formalistic approach, the purpose of the Clause would not be frustrated simply because the required constitutional condition, identified by the Framers as necessary to trigger the President’s power, does not occur. As such, the separation of powers simply is not implicated.

By contrast, a court that adopts a more functional interpretation and identifies the primary purpose of the Clause as ensuring the President’s ability to maintain the continuity of administrative government and avoid “executive paralysis” may be more receptive to such an argument.¹³⁹ A court adopting this view may consider the Senate’s failure to act on nominations, coupled with a restrictive interpretation of the President’s authority to make recess appointments,

¹³⁴ Such a recess would again require House consent. If, however, the House refused its consent, the Senate could hold pro forma sessions every three days from the date of adjournment until January 2.

¹³⁵ *Noel Canning*, at 42.

¹³⁶ The DOJ identified this point in a brief to the U.S. Court of Appeals for the Third Circuit: “... under *Noel Canning*, whether the President may act depends on how the Senate frames its adjournment, empowering the Senate unilaterally to eliminate the President’s recess appointment authority even when it is unavailable to advise and consent. If the Senate adopts a resolution adjourning *sine die* ..., the adjournment ends the Senate’s enumerated session, and the ensuing recess is an intersession one lasting until the start date set by law for the next session—usually January 3. If the Senate adjourns for the same period, but the resolution instead specifies a return date for that session that is immediately before the next session (say January 2), the adjournment does not end the session, and the recess is intrasession.” *DOJ Supplemental Letter Brief, Nat’l Labor Relations Bd. v. New Vista Nursing and Rehabilitation*, Nos. 11-3440, 12-1027, 12-1936, at 10 (3rd Cir. February 28, 3013) (internal citations omitted).

¹³⁷ Notably, this approach would not be applicable to federal judges or other executive branch officers, such as cabinet officials, who serve at the pleasure of the President for indefinite terms.

¹³⁸ *Noel Canning*, at 22-23,

¹³⁹ *Evans*, 387 F.3d, at 1235.

as unduly obstructing the President’s ability to “take Care that the Laws be faithfully executed”¹⁴⁰ and frustrating what some courts have identified as the overriding objective of the Clause: to allow the President to “fill vacancies to assure the proper functioning of our government.”¹⁴¹

In discussing the boundaries of the constitutional roles of each branch, it should be noted that recess appointments have been governed by a delicate balance of power precisely because the Clause establishes a unique affirmative grant of constitutional power to one branch that is conditional upon the occurrence of a specific action of another. The structure of the appointment process, and the ability of either branch to exercise its enumerated authority in a manner that frustrates the powers of the other branch, has resulted in a framework traditionally governed by political checks and balances, rather than strict legal standards, and is perhaps why substantial ambiguity as to the scope of the Clause persists to this day. Any judicial decision providing additional legal clarity to the question of who determines whether the Senate is in “the Recess” runs the risk of upsetting this balance of power. If the authority to make this determination is accorded to the President, the resulting dynamic could significantly undermine the Senate’s advice and consent role under the Appointments Clause. If the decision-making power is accorded to the Senate, the President conceivably could be prevented from making any recess appointments, regardless of the resulting impact on the functioning of the executive branch. If the former would “eviscerate the Constitution’s separation of powers,” as the *Noel Canning* court concluded, it would seem the same argument could be made of the latter.¹⁴²

Finally, it should be noted that although the President has very little control over when and whether the Senate enters an intersession recess of the type required in *Noel Canning*,¹⁴³ he may be able to influence the timing of certain executive branch vacancies. For example, if the Senate enters an intersession recess, the President may attempt to create a vacancy during that period by encouraging certain officers who have determined to leave the administration to time their resignations to coincide with the Senate recess. In addition, depending on the statutory protections afforded a given office, the President could remove an officer during the intersession recess, thus creating a vacancy that could be filled via a recess appointment.¹⁴⁴ Of course, this

¹⁴⁰ U.S. Const. art. II §3.

¹⁴¹ *Evans*, 387 F.3d, at 1225.

¹⁴² *Noel Canning*, at 25.

¹⁴³ An argument could be forwarded that in order to counter a Senate that scheduled its recesses in a manner that prevented recess appointments, the President could exercise the authority vested in him by the Constitution to force an adjournment of the Senate and, thereby, create an intersession recess during which the President could make recess appointments. Although it appears that this adjournment power has never been exercised, Article II, §3 provides that the President “may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper....” An attempt by the President to force a Senate recess in order to make recess appointments would raise a plethora of constitutional questions, including how, and by whom, it is determined that the House and Senate are in “disagreement ... with respect to the Time of Adjournment.” These questions notwithstanding, two points gleaned from *Noel Canning* are worth noting in relation to this argument. First, the decision drew a clear distinction between an “adjournment” and “the Recess”: the former constituting a general term referring to any “legislative break,” and the latter a specific type of adjournment between legislative sessions triggering the President’s recess appointment authority. *Noel Canning*, at 27-8. If the President were to “adjourn” the Senate, the resulting “adjournment” would not necessarily constitute “the Recess” for purposes of the Clause. Moreover, *Noel Canning* suggests that the required intersession recess must be triggered by a *sine die* adjournment of the Senate. *Noel Canning*, at 40-2. Although a forced Senate adjournment pursuant to Article II would create an intersession recess, it would appear to be an open question as to whether the *Noel Canning* court would consider the resulting recess one sufficient to trigger the President’s recess appointment power.

¹⁴⁴ Life-tenured judges and officers who enjoy removal protections likely could not be removed in such a manner.

method would allow the President to create a vacancy only in an already occupied office and would have no impact on offices that are *already* vacant or newly established.¹⁴⁵

The Adjournments Clause and the Role of the House

The *Noel Canning* decision also could impact the House's ability to influence the President's recess appointment authority. As previously discussed, the Adjournments Clause establishes that "neither House, during the Session of Congress, shall without the consent of the other, adjourn for more than three days."¹⁴⁶ By withholding its consent to an extended Senate recess in recent years, the House has effectively prevented the Senate from entering a recess of a length generally thought sufficient to permit the President to exercise his recess appointment authority.

Prior to *Noel Canning* it was generally thought that a recess of some appreciable length likely was necessary to trigger the President's recess appointment authority.¹⁴⁷ At the very least, the executive branch has drawn from the Adjournments Clause to assert that a recess would likely need to be "longer than 3 days" in order for a recess appointment to be made, although early legal opinions favored a longer period.¹⁴⁸ Given this perceived durational requirement, the Adjournments Clause arguably prevented the Senate from entering a recess of sufficient length to trigger the President's recess authority without the consent of the House. *Noel Canning* appears to suggest that this perception was in error. Not only did the circuit court explicitly determine that the asserted "link" between the Adjournments Clause and the Recess Appointments Clause "lack[ed] any constitutional basis," nothing in the opinion suggested that "the Recess" needs to be

¹⁴⁵ "It should be noted that one potential result of narrowing the President's recess appointment authority could be greater reliance on the Vacancies Reform Act, which authorizes the President to fill many advice and consent positions (though, notably, not those on collegial bodies such as boards and commissions) on a temporary basis. The executive branch may also increasingly rely on specific statutory provisions that permit a government official, who has not received Senate confirmation for that position, to perform the functions of an office on an acting basis. See CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue. For example, in the absence of a Senate confirmed director, Edward DeMarco has served as the acting director of the Federal Housing Finance Agency since the former Director resigned in 2009. See, 12 U.S.C. §4512(f) ("In the event of the death, resignation, sickness, or absence of the Director, the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director until the return of the Director, or the appointment of a successor pursuant to subsection (b).").

¹⁴⁶ U.S. Const. art. I, §5, cl. 4.

¹⁴⁷ Recess appointments have, however, previously been made during short intersession recesses in at least two situations. President Truman made a recess appointment to the Civil Aeronautics Board during a three-day intersession recess in 1949. In a more controversial action, President Theodore Roosevelt made over 160 recess appointments during the "brief pause" between the end of the first session of the 58th Congress and the start of the second session in 1903. In response, the Senate Committee on the Judiciary issued a report in 1905 objecting to the appointments. S.Rept. 58-4389. For additional information on these appointments, see CRS Recess Appointments Memorandum.

¹⁴⁸ See Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-26, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993) ("If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives. It might be argued that the Framers did not consider one, two and three day recesses to be constitutionally significant."); 33 Op. Atty. Gen. 20, 24 (1921) (While declaring that the President had the authority to make a recess appointment during an intrasession recess of 29 days, Attorney General Daugherty explained his opinion did not imply that "the power exists if the adjournment is for only 2 instead of 28 days.... Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution."). Notwithstanding these statements, the OLC in its January 2012 opinion noted: "This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make recess appointment." 36 Op. O.L.C. *9, n.13 (2012).

of some minimum duration for recess appointments to be made.¹⁴⁹ Regardless of the length of a recess, so long as it is intersession (adjourned *sine die*), *Noel Canning* suggests that the President’s recess appointment authority is triggered.

Given these new developments, it can be argued that the House’s ability to influence the President’s authority to make recess appointments in the future could be weakened were the Senate willing to break from its tradition of obtaining the House’s consent for a *sine die* adjournment.¹⁵⁰ The Adjournments Clause requires the Senate to obtain the consent of the House only to “adjourn for more than three days.” Thus, there does not appear to be any constitutional reason why the Senate would not be free to unilaterally enter an intersession recess within three days of the convening of the next session without the consent of the House. In practice, this is not an action the Senate has historically taken,¹⁵¹ and indeed would appear to be contrary to Senate precedent.¹⁵² Nevertheless, under *Noel Canning*, this short intersession recess would appear to be sufficient to trigger the President’s recess appointment power.

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¹⁴⁹ *Noel Canning*, at 25 (“Nothing in the text of either Clause, the Constitution’s structure, or its history suggests a link between the Clauses.”).

¹⁵⁰ See CRS Recess Appointments Memorandum (noting that “it appears ... that an adjournment of this nature would be outside the usual practices of the Senate.”).

¹⁵¹ On at least one occasion, the Senate has unilaterally adjourned *sine die* and entered an intersession recess of less than three days without the consent of the House. In 1996, the Senate entered a three-minute intersession recess between the first and second sessions of the 104th Congress without adopting a concurrent resolution. *Id.* at 10-11.

¹⁵² See CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Richard S. Beth and Jessica Tollestrup, at 11. (“The Senate has explicitly established that, except at the point when the following session is immediately going to convene, a daily adjournment never brings about a *sine die* adjournment de facto, even if it occurs within three days of the convening of the next session and the body has agreed not to meet again until that next session convenes. In such a case, the Senate treats its previous session as remaining in being until the point at which the chair declares the new session to have convened. It is not clear whether, in similar circumstances, the House might by daily adjournment achieve an adjournment *sine die* at any earlier point within three days.”).