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The Supreme Court Considers the President's Power to Make Recess Appointments

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Abstract
The Recess Appointments Clause of the Constitution provides for the President to make temporary appointments when members of the Senate had returned to their home states. On January 4, 2012, President Barack Obama made four recess appointments while the Senate was conducting pro forma *sessions. A federal appellate court invalidated these appointments on the principal ground that they were made during a Senate session rather than "the Recess" within the meaning of the Constitution. The U.S. Supreme Court has never before considered the meaning or application of the Recess Appointments Clause, but it has agreed to review President Obama's recess appointments this term. This case could have significant ramifications for the balance of power between the President and the Senate with regard to the confirmation process.*

In its new term, the Supreme Court of the United States will consider *National Labor Relations Board v. Noel Canning*, a challenge to President Barack Obama's January 4, 2012, recess appointments to fill three National Labor Relations Board (NLRB) vacancies. At the time of these appointments, every three days, the Senate was conducting *pro forma* sessions during which no business is ordinarily conducted. This practice was widely believed to prevent the Senate from entering "recess" as defined by the Recess Appointments Clause and was used successfully during the prior Administration to prevent recess appointments from being made.

The U.S. Court of Appeals for the D.C. Circuit invalidated these recess appointments on two grounds not directly related to the use

Key Points

- The Constitution authorizes the President to make appointments without the advice and consent of the Senate when it is in "the Recess."
- This reflects the Framers' understanding that Congress would not be continually in session and allows the President to make temporary appointments when members of the Senate have returned to their home states.
- On January 4, 2012, President Obama made recess appointments while the Senate was conducting *pro forma* sessions.
- A federal appellate court invalidated these appointments principally because they were made during a Senate session rather than during "the Recess" within the meaning of the Constitution.
- The Supreme Court has never considered the meaning or application of the Recess Appointments Clause, but it has agreed to review President Obama's recess appointments this term.
- This case could have significant ramifications for the balance of power between the President and Senate with regard to the confirmation process.

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of *pro forma* sessions. First, the court held that the adjournment in question took place within a formal enumerated Senate session and therefore did not constitute "the Recess" of the Senate within the meaning of the Recess Appointments Clause. Second, a majority of the panel held that the vacancies in question did not "happen" during the recess and therefore could not be filled under the Clause at all.

The Supreme Court of the United States, which has never before considered the meaning or application of the Recess Appointments Clause, granted review of these two issues. It will also consider a third issue: whether the President may exercise his recess-appointment power when the Senate is convening every three days in *pro forma* sessions.

Historical Background of the Recess Appointments Clause

Article II, section 2, clause 3 of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." This method of appointing officers of the United States represents an exception to the general or ordinary method of appointment laid out in Article II, section 2, clause 2, under which the President nominates and, with the advice and consent of the Senate, appoints such officers.

Alexander Hamilton described the recess appointment power as "nothing more than a supplement" or an "auxiliary method of appointment," to operate "in cases to which the general method [of appointing officers] was inadequate."[1] He explained further:

> 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 [recess appointments] 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."[2]

Apart from Hamilton's brief explication, there is little direct evidence as to the Framers' intent in drafting and adopting the Recess Appointments Clause.[3] It is generally agreed, however, that this clause reflects their understanding that Congress would not be "continually in session" and that there would be significant periods of time during which Members of Congress would disperse to return to their home states. In the context of late 18th century transportation, it was not feasible for Members of Congress to travel frequently back and forth to their home states during the year, as is common today. The purpose of the clause, as explained by Hamilton, was to enable the President to make temporary appointments during these lengthy periods in which the Senate would not be "in session" and would not be available to act on vacancies that might need to be filled "without delay."

Notwithstanding the apparently straightforward language and purpose of the Recess Appointments Clause, two major controversies about its meaning developed over time.

The Meaning of "Happen." The first controversy regarding the Recess Appointments Clause related to what it means for a vacancy to "happen" during the recess of the Senate. The most natural reading of this language is that the President's power is limited to vacancies that occur or arise while the Senate is in recess and, implicitly, that the President may exercise the power only before the "next session" that

1. The Federalist No. 67 (Alexander Hamilton).

2. *Id.*

3. *See* Michael Herz, *Abandoning Recess Appointments: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 445 n. 4 (2005). It is speculated, however, that the Recess Appointments Clause was modeled on a provision of the North Carolina Constitution, which provided: "That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly." Noel Canning v. NLRB, 705 F.3d 490, 501 (D.C. Cir. 2013) (quoting N.C. Const. of 1776, art. XX).

follows the recess in which the vacancy occurs. This narrow interpretation of the clause seems to have been generally accepted during the early years of the Republic, including by Edmund Randolph, the first Attorney General.[4] Hamilton also had this view, writing in 1799 that "it is clear, that independent of the authority of a special law, the President cannot fill a vacancy that happens during a session of the Senate."[5]

In 1823, however, Attorney General William Wirt issued an opinion rejecting this position. Wirt addressed the question of filling a vacancy created as the result of the statutory expiration of the commission of the navy agent in New York. Although the vacancy arose while the Senate was in session, Wirt concluded that the President could fill the vacancy once the Senate was in recess. He began with an analysis of the word "happen":

> The most natural sense of this term is "*to chance*—to fall out—to take place by accident." But the expression seems not perfectly clear. It may mean "happen to take place:" that is, "*to originate*:" under which sense, the President would not have the power to fill the vacancy. It may mean, also, without violence to the sense, "happen to exist;" under which sense, the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the constitution; the second, most accordant with its reason and spirit.[6]

Wirt found that the "reason and spirit" of the Recess Appointments Clause should prevail, pointing out various untenable consequences that would result from a more literal reading of the clause. If a vacancy were to occur in a distant part of the country on the last day of the Senate's session but word did not reach the President until the Senate was in recess, the narrow construction of the clause would mean that the office could not be filled until the Senate's next session "however ruinous the consequences to the public."[7]

Subsequent Attorneys General followed Wirt's interpretation, but it was met with markedly less favor in the Senate. In 1863, during the Civil War, the Senate Judiciary Committee considered and rejected Wirt's view:

> When must the vacancy, which may thus be filled and the appointment to which is thus found to terminate, accrue or spring into existence? May it begin during the session of the Senate, or must it have its beginning during the recess? We think the language too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun. It cannot, we think, be disputed that the period of time designated in the clause as "the recess of the Senate," includes the space beginning with the indivisible point of time which next follows that at which it adjourned, and ending with that which next precedes the moment of the commencement of their next session.[8]

The committee concluded that the executive branch's position that a vacancy need not "accrue or spring into existence" during the recess was "forced and unnatural."[9]

Reflecting this view, Congress proceeded to enact a statute prohibiting payment "to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate." It is clear that this amendment was designed as a remedy for the unconstitutional practices identified by the Senate Judiciary Committee. As Senator William Fessenden of Maine remarked, "[i]t may not be in our power to prevent

4. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1518–38 (2005).
5. *Id.* at 1519–20 (quoting Letter from Alexander Hamilton to James McHenry (May 3, 1799)).
6. Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823) (emphasis in original).
7. *Id.* at 632.
8. S. Rep. No. 80, at 3 (37th Cong., 3d Sess. Jan. 28, 1863).
9. *Id.* at 6.

the appointment, but it is in our power to prevent the payment, and when payment is prevented, I think that will probably put an end to the habit of making such appointments."[10]

The statute, referred to as the Pay Act, may have discouraged recess appointments to fill vacancies that arose prior to the recess, but it did not end them. Eventually, Congress amended the Pay Act to allow recess appointees appointed under the Wirt interpretation to be paid under most circumstances.[11] Since these amendments in 1940, there has been relatively little controversy in Congress about the Wirt interpretation of "happen."

The Meaning of "Recess." The Constitution mandates that Congress assemble at least once a year and provides a specified date for this meeting.[12] To prevent either house from unilaterally going home before legislative work is completed, the Adjournment Clause in Article I, section 5 provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."

The expectation implicit in these constitutional provisions is that Congress normally would convene at the seat of government once a year, remain assembled there until both houses were satisfied that necessary legislative business had been conducted, and then adjourn until the constitutional meeting date of the following year. Accordingly, there would be a long stretch of time in which the Senate was not in session and thus was unable to fill any vacancies that might occur.[13]

Professor Michael Rappaport argues that the Framers' expectations regarding the congressional schedule reflected not only the realities of slow transportation, but a "republican political theory" which "required that legislatures remain in session only for a fraction of the year, thereby allowing the legislators to return to their homes and behave like ordinary citizens."[14] Hamilton's observation in *Federalist* No. 67 that it would be "improper" to require the Senate to remain "continually in session" supports this view.

In fact, for decades, actual congressional practice tracked closely with these expectations. Prior to the Civil War, "[t]he normal pattern was for Congress to hold a single session of between 3 and 5 months, followed by an intersession recess of between 7 and 9 months."[15] While Congress was in session, it was exceedingly rare for there to be an adjournment other than the day-to-day adjournments (not exceeding three days) that each house could take on its own.[16] No one appears either to have doubted that the Senate remained "in session" during these brief adjournments or to have suggested that recess appointments could be made during these times.

This lack of controversy, however, camouflaged a latent ambiguity in congressional practice. The periods during which the Senate was "in session" corresponded to the congressional practice of enumerating separate sessions that occurred within each Congress. But was the Senate in session simply because it designated itself to be or because it was actually assembled at the seat of government, with no adjournment long enough for Senators to return to their homes?

In 1867–1868, during the Administration of President Andrew Johnson, Congress for the first time took extended adjournments without adjourning *sine die* so as to end its enumerated session. In 1868, the 40th Congress adjourned for nearly two months, from July 27 to September 21, without ending its second enumerated session. During this

10. *See* Michael Stern, *The Recess Appointments Clause, the Civil War Congress, and Congressional "Acquiescence*," Point of Order (Feb. 24, 2012), http://www.pointoforder.com/2012/02/24/the-recess-appointments-clause-the-civil-war-congress-and-congressional-acquiescence/.

11. *See* 5 U.S.C. § 5503.

12. Under the original Constitution, the default meeting date was the first Monday in December. U.S. Const. art. I, § 4. Under the Twentieth Amendment, this changed so that Congress meets each January 3 at noon. U.S. Const. amend. XX, § 2. In either case, Congress could alter the time of meeting by law.

13. *See* Herz, *supra* note 3, at 379 ("Perhaps the clearest demonstration in the constitutional text that Congress would frequently not be in session is the power granted to the President to convene either or both Houses of Congress on 'extraordinary occasions.'").

14. Rappaport, *supra* note 4, at 1564.

15. *Id*. at 1501.

16. *Id*. (such adjournments occurred on only three occasions prior to the Civil War, and "then only for short periods lasting between 5 and 7 days").

adjournment, President Johnson made a number of recess appointments apparently without drawing any congressional protest. Although one should not read too much into this congressional silence (which may in part have reflected the unique circumstances of the times, including Johnson's impeachment trial earlier that year), there is reason to believe that both the Senate and the executive branch considered the July 27 adjournment to terminate the Senate's "session," suggesting that the congressional practice of enumerating sessions does not control for purposes of the Recess Appointments Clause.[17]

It was not until the 20th century, however, that the question of what constituted "the Recess" was subject to legal analysis. In 1901, Attorney General Philander Knox issued an opinion concluding that the President could not make a recess appointment when "the Senate had adjourned temporarily to a day certain."[18] Knox explained the parliamentary differences between a resolution for "final adjournment of Congress for the session" and "a merely temporary suspension of business from day to day or, when exceeding three days, for such brief periods over holidays as are well recognized and established and as are agreed upon by the joint action of the two Houses." While Knox acknowledged that the latter type of temporary adjournment might constitute "*a* recess in the general and ordinary use of that term," he denied that it could be "*the* Recess" as referenced in the Recess Appointments Clause.[19]

In 1921, Attorney General Harry Daugherty reached a different conclusion. Daugherty contended that the pertinent question for the application of the clause is "whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained."[20] To be sure, he acknowledged that the Senate could remain in session though it adjourned for a period of time. Noting that "neither house can adjourn for more than three days without the consent of the other," he stated that "no one...would for a moment contend that the Senate is not in session when an adjournment of [this duration] is taken."[21] While "the line of demarcation cannot accurately be drawn," he did not think "an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution."[22] An adjournment of sufficient length, however, such as the 28-day adjournment being considered by Daugherty, could constitute "the Recess" under the Recess Appointments Clause even though it was not a *sine die* or final adjournment.[23]

The executive branch has followed Daugherty's opinion ever since.[24] According to the Department of Justice, more than 500 recess appointments have been made pursuant to Daugherty's opinion.[25] However, although the executive branch once considered Daugherty's 10-day minimum adjournment as a constitutional floor that it was reluctant to approach or cross,[26] in the past 20 years, administrations have

17. *See* Michael Stern, *A Recess by Any Other Name*, Point of Order (Mar. 21, 2012), http://www.pointoforder.com/2012/03/21/a-recess-by-any-other-name/.

18. Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 603–04 (Dec. 24, 1901).

19. *See* Michael Stern, *Attorney General Knox and the Multi-Session Recess Appointment*, Point of Order (Mar. 27, 2012), http://www.pointoforder.com/2012/03/27/attorney-general-knox-and-the-multi-session-recess-appointment/.

20. Recess Appointments, 33 Op. Att'y Gen. 20, 21–22 (Aug. 27, 1921) (emphasis in original).

21. *Id*. at 25.

22. *Id*.

23. Daugherty identified certain factors that might help to determine whether an adjournment amounted to a constitutional recess: "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?" *Id*. at 25. It is difficult to see, however, how these factors distinguish one adjournment from another, apart from differences in duration.

24. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. Off. Legal Counsel __, at 5 (Jan. 6, 2012), http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (noting that the existence of a recess is determined "under a framework first articulated by Attorney General Daugherty in 1921, and subsequently reaffirmed by several opinions of the Attorney General and this Office.").

25. Petition for a Writ of Certiorari of the National Labor Relations Board at 17, NLRB v. Noel Canning (U.S. Sup. Ct.) (No. 12-1281) (cert. granted Jun. 24, 2013).

26. *See* Michael Stern, *Chief Justice Roberts and the Recess Appointments Clause*, Point of Order (Sept. 17, 2012), http://www.pointoforder.com/2012/09/17/chief-justice-roberts-and-the-recess-appointments-clause/.

been more aggressive.[27] Indeed, the Department of Justice has expressed the view that it is constitutionally permissible to make such appointments during any adjournment that exceeds the three days provided for in the Adjournment Clause.[28]

Daugherty's opinion is often cited for the proposition that recess appointments may be made during "intra-session recesses." This, however, is inaccurate. Nowhere in his opinion does the term "intra-session recess" or "intra-session" appear. To the contrary, Daugherty's view was that a constitutional recess began once the Senate was no longer in session. Thus, by definition, a recess was always "inter-session." Daugherty's opinion rather stands for the proposition that, for purposes of the Recess Appointments Clause, the extent of the session must be determined by practical considerations—rather than by the parliamentary formalities that mark an enumerated session.

It was not until 1948 that the executive branch first took the position that the Senate could be both in session and in recess at the same time for the purposes of the Recess Appointments Clause. Its position was based on two opinions of the Comptroller General that rather carelessly decided that recess appointments made during non-final Senate adjournments were "intra-session" and therefore would extend through the end of the next *enumerated* Senate session. Since 1948, executive branch practice has adhered to that interpretation.

As one federal appellate court noted, the executive branch "dramatically" increased the use of "intra-session recess" appointments during the Reagan Administration and subsequently.[29] Several factors likely contributed to this more aggressive approach, including changes in the congressional schedule reflecting more frequent intra-session breaks taken by Congress pursuant to the Adjournments Clause, delays in the Senate confirmation process, and increasing political controversies over particular nominees or the President's use of the appointment power.

In contrast to the Wirt interpretation, Congress has not accepted or endorsed the Daugherty interpretation or the gloss put on it by subsequent executive branch practice. To the contrary, the Senate has often pushed back against attempts to make recess appointments during non-final adjournments. For example, during the Reagan and Clinton Administrations, members of the Senate objected to executive branch practice under the Daugherty interpretation and sought assurances from the President that the Senate would be notified in advance of any planned recess appointments so that it could exercise the option of holding "*pro forma* sessions"—brief sessions at which no business is ordinarily conducted—in order to avoid adjournments of more than three days.[30]

In 1993, Senate Legal Counsel prepared a brief at the request of Senate Majority Leader George Mitchell regarding the executive branch's authority to make recess appointments during non-final adjournments. The brief argued that "the recess power exists only during the break between Congress's annual sessions, which is referred to as the 'intersession' recess or adjournment, not to the more numerous, and typically more abbreviated, 'intrasession' recesses or adjournments that occur over the course of each congressional session."[31] If the term "recess" is interpreted to encompass shorter breaks that occur within an enumerated Senate session, then the "session" in the Recess Appointments Clause "would need to be interpreted consistently as referring to only the reciprocal period, when the Senate is continuously sitting, before taking its next brief 'recess.'"[32]

***Pro Forma* Sessions.** The term "*pro forma*" session refers to "sessions held for the sake of

27. Henry B. Hogue, Cong. Research Serv., RS 21308, Recess Appointments: Frequently Asked Questions at 4 (June 7, 2013), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP%5CW%3B%20P%20%20%0A (noting a 1996 recess appointment during an adjournment of only 10 days).

28. 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), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993), pp. 25–26.

29. NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 240 (3rd Cir. 2013), *petition for reh'g pending* (filed July 1, 2013; stayed July 15, 2013).

30. *See* 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe).

31. 139 Cong. Rec. S8544, S8546 (Jul. 1, 1993). The brief was never submitted in court due to opposition from Republican Senators, but the Majority Leader ordered that it be printed in the Congressional Record.

32. *Id*.

formality," usually to comply with a constitutional requirement that the Senate (or House) assemble at a particular time.[33] Section 2 of the Twentieth Amendment to the Constitution requires Congress to assemble each year beginning at noon on January 3 unless Congress provides by law for meeting on a different day. Since 1980, the Senate has used *pro forma* sessions to meet this constitutional obligation on six occasions, including on January 3, 2012.[34]

As mentioned previously, the Senate began to consider using *pro forma* sessions as a means of preventing the exercise of the recess appointment power at least as early as the Reagan Administration. The theory is that so long as the Senate convened every three days, it would remain in session for purposes of the clause in accordance with Daugherty's dictum that "no one...would for a moment contend that the Senate is not in session when adjournment" of three days or less is taken. The three-day constitutional minimum, which has been endorsed (albeit sometimes tepidly) by the executive branch in more recent years, stems from the Adjournment Clause, which prohibits either house from unilaterally adjourning for more than three days "during the Session of Congress." A logical corollary of the Adjournment Clause is that a single house adjournment of three days or less cannot end the congressional session.[35]

On November 16, 2007, Senate Majority Leader Harry Reid announced that the Senate would "be coming in for *pro forma* sessions during the Thanksgiving holiday to prevent recess appointments."[36] The Senate continued to use *pro forma* sessions for the remainder of 2007 and throughout 2008. This practice "appeared to achieve its stated intent through the end of the Bush presidency: President Bush made no recess appointments between the initial *pro forma* sessions in November 2007 and the time he left office."[37]

During the first two years of the Obama presidency, the Senate did not routinely use *pro forma* sessions to prevent adjournments from exceeding three days. The Senate did, however, use a series of *pro forma* sessions for this purpose during the period leading up to the 2010 elections. No recess appointments were made during this period.[38]

In a June 15, 2011, letter to the House leadership, 78 Representatives asked 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."[39] For the remainder of that year, no attempts were made in either chamber to pass a concurrent resolution of adjournment (presumably because the House was not expected to consent). During periods longer than three days in which most members were expected to be absent, the Senate used *pro forma* sessions to ensure that no adjournment lasted more than three days.

On December 17, 2011, the Senate adopted a unanimous consent order that it would hold a series of *pro forma* sessions every three days beginning on December 20 and continuing until January 23, 2012. This included a *pro forma* session on January 3, 2012, at noon to comply with the meeting time established by the Twentieth Amendment. The order provided that there would be "no business conducted" during the *pro forma* sessions. Notwithstanding this order, the Senate passed a major piece of legislation, the Temporary Payroll Tax Cut Continuation Act of 2011, by unanimous consent at its December 23, 2011,

33. 157 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Congressional Research Service memorandum of Mar. 8, 2012, to the Senate Minority Leader); *see also* Michael Stern, *CRS on Pro Forma Sessions*, Point of Order (Aug. 22, 2012), http://www.pointoforder.com/2012/08/22/crs-on-pro-forma-sessions/.

34. *Id.* (CRS memorandum) ("CRS identified six Senate pro forma opening day sessions which satisfied the constitutional requirements for convening its session on the prescribed date.").

35. If it were otherwise, one house could end the congressional session by taking a short adjournment, and it would then be free to adjourn unilaterally for as long as it pleased. This would defeat the evident intent of the Adjournment Clause.

36. 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (quoted in Hogue, *supra* note 27, at 11 (June 7, 2013), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A).

37. Hogue, *supra* note 27, at 11.

38. *Id.* at 12.

39. Letter from Representative Jeff Landry to Speaker of the House John Boehner (June 15, 2011), *available at* http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf (quoted in Hogue, *supra* note 27, at 12 n.50).

pro forma session.[40] It appears to be undisputed that the Senate may conduct business by unanimous consent—including passing legislation and confirming nominees—at a *pro forma* session.[41]

President Obama's Recess Appointments and Subsequent Litigation

On January 4, 2012, President Obama acted to fill the three vacancies on the National Labor Relations Board on the basis of his authority under the Recess Appointments Clause.[42] The NLRB is a five-member body that adjudicates unfair labor practice cases and issues remedial orders under the National Labor Relations Act. Its members are appointed for staggered five-year terms, and without at least three members, the Board lacks a quorum and cannot exercise its statutory authorities.[43] President Obama appointed Terrence F. Flynn to fill a seat that had been vacant since August 27, 2010; Richard Griffin to fill a seat that had been vacant since August 27, 2011; and Sharon Block to fill a seat that had previously been filled by another recess appointee (Craig Becker) whose commission was due to expire.[44]

An Office of Legal Counsel opinion, dated January 6, 2012, justified the President's actions on the grounds that the Senate's *pro forma* sessions could be disregarded because the Senate, by its own declaration, was not intending to conduct business during these *pro forma* sessions. While acknowledging that "[t]he question is a novel one" with "substantial arguments on each side," the Office of Legal Counsel concluded that "while Congress can prevent the President from making any recess appointments by remaining continuously in session and available to act on nominations, it cannot do so by conducting *pro forma* sessions during a recess."

Noel Canning is a bottling company that was charged with engaging in an unfair labor practice by failing to execute a written collective bargaining agreement incorporating agreed-upon terms. An NLRB administrative law judge found against the company, which appealed to the Board. A three-member panel of the NLRB affirmed the administrative law judge's findings in a decision dated February 8, 2012. Noel Canning then challenged the NLRB's decision in the U.S. Court of Appeals for the D.C. Circuit. Among other things, Noel Canning contended that the NLRB lacked the authority to act because it had only two validly appointed members at the time the Board decision was made.

In an opinion written by Judge David Sentelle, the D.C. Circuit agreed with Noel Canning that when it acted on February 8, 2012, the NLRB lacked a quorum because the recess appointments of January 4, 2012, were invalid. This was so for two reasons. First, the court concluded that these appointments were not made during "the Recess" of the Senate within the meaning of the Recess Appointments Clause. The panel concluded that while an adjournment taken within a Senate session (i.e., within the Second Session of the 112th Congress that began on January 3, 2012) might constitute "a recess," it was

40. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The Senate had similarly passed a significant piece of legislation at its August 5, 2011, *pro forma* session. *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (passing the Airport and Airway Extension Act of 2011). In both cases, it acted by unanimous consent.

41. It has been less analyzed whether the Senate could act during a *pro forma* session if one or more members object. One commentator suggests that it could. 157 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS memorandum) ("Should the Senate choose to conduct legislative or executive business at a pro forma session, it could, provided it could assemble the necessary quorum or gain the consent of all Senators to act."). As a matter of raw power, this must be correct because a majority of Senators can overrule any objections that might be made based on the Senate's previous unanimous consent order. Whether such a ruling would be correct depends both on the proper interpretation of Senate rules and on whether there are any constitutional limitations on the ability of these rules to restrain a majority from acting. Assuming for the sake of argument that the Senate rules prohibit action at a *pro forma* session with less than unanimous consent and that there is no constitutional infirmity in those rules, the cause of the Senate's inability to act with less than unanimous consent would seem to stem not from the *pro forma* sessions per se, but from the constitutional authority given to each house to determine the "rules of its proceeding." U.S. Const. art. I, § 5, cl. 2.

42. He also made a fourth recess appointment of Richard Cordray to be the first director of the Consumer Financial Protection Board. That recess appointment is not involved in the *Noel Canning* litigation.

43. *See* New Process Steel L.P. v. NLRB, 130 S.Ct. 2635, 2644–45 (2010).

44. President Obama nominated Craig Becker on July 9, 2009, and again on January 10, 2010. After the Senate blocked this nomination in February 2010, President Obama recess-appointed Becker on March 27, 2010, during an adjournment of the Senate from March 26 to April 12. Although Becker's nomination was re-submitted to the Senate, he was never confirmed, and President Obama withdrew his nomination on December 15, 2011, shortly before the commission would have expired.

not "*the* Recess" referred to by the clause. The latter category, the court held, was limited to recesses that occur when the Senate adjourns *sine die* so as to terminate its enumerated session.[45]

As an alternative holding, the court found that the recess appointments were invalid because the vacancies on the NLRB did not "happen" during the recess of the Senate. Rejecting Wirt's long-standing interpretation, the panel majority found that the President's authority to make recess appointments is limited to filling vacancies that first arise or occur during that recess. Judge Thomas Griffith declined to join this part of the opinion.

The NLRB sought review in the Supreme Court, which granted certiorari on June 24, 2013.

Issues Before the Supreme Court

The Supreme Court granted certiorari on three issues in *Noel Canning*. A ruling on any of these issues would have important implications for the Senate and the President, but the nature and degree of those consequences will vary significantly depending on which issues the Court decides.

Issue #1: Does "Happen" Mean Arise or Exist? The broadest ground on which the Court could rule relates to the 1823 Wirt interpretation of the Recess Appointments Clause. Under this interpretation, a recess appointment is valid so long as it "happens to exist" during the recess in question.

There are strong textual grounds for questioning Wirt's interpretation. As a matter of original meaning, the clause might be better read as only authorizing the President to make recess appointments that actually "happen" (i.e., occur or arise) during that recess. Nonetheless, the Court will likely be reluctant to reject the Wirt interpretation at this late date.[46] Recess appointment practice has followed the Wirt interpretation for nearly two centuries, and Congress has not resisted this practice since at least 1940, when the Pay Act was amended to allow payment of salary for certain recess appointments under the Wirt interpretation. Although the Court has never addressed the issue, federal courts have long accepted Wirt's "happen to exist" view of the Recess Appointments Clause.[47] The D.C. Circuit majority in *Noel Canning* is the only court to reject that view.

Some have argued that long-standing executive practice should have only limited precedential weight.[48] Because overturning the Wirt interpretation would not cause "serious dislocations," there should be no barrier to returning to the original meaning of the clause. This assumes, however, that the Wirt interpretation is not deeply imbedded in current Senate and executive practice regarding appointments—an assumption that may be difficult to validate.[49]

If the Wirt interpretation were to be rejected, the President would lose any ability to make recess appointments for vacancies that first arise while the Senate is in session. This would represent a dramatic shift of power from the President to the Senate, but

45. Two other federal courts subsequently agreed with the D.C. Circuit on this issue. *See* NLRB v. Enterprise Leasing Co. Se., 722 F.3d 609 (4th Cir. 2013); *New Vista*, 719 F.3d 203. In *NLRB v. New Vista*, the Third Circuit found unconstitutional Craig Becker's March 27, 2010, recess appointment to the NLRB. The court considered three possible definitions of "recess": (1) only intersession breaks that follow a final adjournment; (2) all intersession breaks plus intra-session breaks of a significant duration; or (3) all periods during which the Senate is unavailable to provide advice and consent, regardless of the length of time involved. The court found the third definition to be the least plausible of the three, concluding that it was less supported either by the natural meaning of "recess" or by historical context or practice. Deciding between the first two definitions was a closer question, but the Third Circuit concluded that the textual context of the Recess Appointments Clause indicated that a "recess" was to consist solely of a period between sessions. *See id.* at 234 ("The expiration of these officers' terms at the end of the *next* session implies that their appointments were made during a period between sessions."). Moreover, the intersession break only definition was more consistent with the clause's evident intent that commissions expire once the Senate had a "single opportunity" to act on a nomination to fill an office, id., as well as with early historical practice. *Id.* at 263. Accordingly, the court found that Becker's recess appointment during an intra-session break was invalid.

46. *See generally*, Michael Stern, *What's Happening? Rerunning the Wirt–Rappaport Debate,* Point of Order (Mar. 5, 2012), http://www.pointoforder.com/2012/03/05/whats-happening-rerunning-the-wirt-rappaport-debate-on-the-recess-appointments-clause/.

47. *See* Evans v. Stephens, 387 F.3d 122, 1226–274 (11th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 942 (2005); United States v. Woodley, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Alloco, 305 F.2d 704, 709–15 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

48. Rappaport, *supra* note 4, at 1576–77.

49. It is worth noting that Judge Griffith, a former Senate Legal Counsel, declined to join the majority's opinion on this issue, noting that it should not "dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it."

it also might make it difficult for the Senate to recess before having acted on all of the President's outstanding nominations. Moreover, for those vacancies that do "happen" during the Senate's recess, the President would face a "use it or lose it" incentive to make recess appointments before the Senate returns. Regardless of whether these changes would be desirable, they certainly could be viewed as "serious dislocations" with respect to existing practice. These considerations suggest that the Court may be inclined to uphold the Wirt interpretation or to avoid the issue entirely.[50]

Issue #2: What Breaks in the Senate Count as Recesses? The Court could also invalidate the NLRB recess appointments on the grounds that they occurred while the Senate was in an intra-session recess—a period of time that did not terminate a formal or enumerated Senate session. The D.C. Circuit held that the Recess Appointments Clause only authorizes the President to make recess appointments in the period *between* enumerated Senate sessions, rejecting the executive position since the Daugherty opinion in 1921. Because the parties agreed that the NLRB recess appointments were made after the start of the second session of the 112th Congress—as opposed to between the first and second sessions—the *Noel Canning* court held them to be invalid. Two other federal appellate courts subsequently agreed with this position.

If the Court invalidates the NLRB recess appointments on this ground, presidential power to make such appointments will be at least somewhat curtailed. If both houses of Congress are in agreement, it will be relatively easy for them to block recess appointments by taking only intra-session adjournments and never adjourning *sine die*. Although Congress could achieve the same result through the use of *pro forma* sessions (assuming that such are valid), the latter may entail costs that Congress is reluctant to bear indefinitely.

On the other hand, if one house desires to adjourn *sine die*, it can force the other to remain in session (either the regular or *pro forma* type) until an agreement is reached. It may be argued, therefore, that limiting recess appointments to the period between final adjournment and the start of the next session does not significantly enhance Congress's ability to block recess appointments compared to the use of *pro forma* sessions, at least where Congress is divided on the issue.

In short, overturning the executive branch practice of making intra-session recess appointments is less likely to cause serious dislocations in current appointments practice than rejecting the Wirt interpretation would be. In addition, the Wirt interpretation is, as Judge Thomas Griffith noted, "more venerable than the much more recent practice of intrasession recess appointments."[51] Finally, Congress has never accepted executive branch practice under the Daugherty interpretation. These considerations make it more likely that the Court will reject the Daugherty interpretation rather than the Wirt interpretation.

There are, however, some countervailing considerations. To some extent, this case presents an odd fact pattern for consideration of the intra-session recess issue. The Senate began its series of *pro forma* sessions pursuant to a unanimous consent agreement on December 17, 2011. The agreement provided that the Senate would meet every three days in *pro forma* session though January 23, 2012.[52] Assuming for the moment that these *pro forma* sessions can be disregarded, it would seem arguable that the Senate was in an *intersession* recess from December 17, 2011, to January 23, 2012.

The Obama Administration maintains that the second session of the 112th Congress began on January 3, 2012, the annual meeting of Congress established by the Twentieth Amendment. Although the Senate met only in *pro forma* session (which the Administration contends is ineffective for other constitutional purposes), it viewed this meeting as sufficient to start a new Senate session. Because the recess appointments were not made until the next day (January 4), the Administration contends that they extended through the end of the Senate's

50. Even if the Wirt interpretation were rejected, the NLRB decision below would not necessarily be invalidated. This is because one of the three vacancies filled by President Obama arguably "happened" during the recess (assuming there was a recess). The question is whether the expiration of the previous recess appointment of Craig Becker, which occurred at the end of the Senate's session, thereby became vacant during that session or at the beginning of the recess.

51. *Noel Canning*, 705 F.3d at 515 (Griffith, J., concurring).

52. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).

next enumerated session, which did not begin until almost a full year later.

This position puts in stark relief one of the most troublesome aspects of the "intra-session recess" theory: Because the "next session" of the Senate would not begin until January 3, 2013, President Obama had little incentive to seek the Senate's advice and consent for the entirety of 2012 even though the Senate was indisputably assembled and capable of acting on nominations for most of that time.

Former Senate Legal Counsel Michael Davidson suggests that the Court may choose to avoid this problem by treating the January 4 recess appointments as intersession appointments that expired at the end of the second session of the 112th Congress (i.e., no later than January 3, 2013).[53] While this option is not entirely implausible, it suffers from the fact that it was not seriously explored by the court of appeals or presented by the parties below.

Issue #3: Can the President Disregard the Senate's *Pro Forma* Sessions? The narrowest ground on which the Court could invalidate the NLRB recess appointments would be to find that the Senate remained in session on January 4, 2012, because it had not adjourned for more than three days (or, more precisely, because the House and Senate had not agreed to an adjournment at all) under the Adjournment Clause. Because all parties concede that an ordinary day-to-day adjournment of three days or less cannot constitute "the Recess" of the Senate,[54] President Obama's exercise of the recess appointment power was invalid unless he was entitled to disregard the *pro forma* sessions that the Senate held every three days between December 17, 2011, and January 23, 2012.

The Office of Legal Counsel opined that "[t]he Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for *pro forma* sessions at which no business is to be conducted." This statement alludes to both the Senate's lack of availability to consider nominations and its intent not to consider nominations (or conduct any other business) at *pro forma* sessions.

The Court will have to consider what degree of Senate availability is mandated by the Constitution. The Constitution requires that Congress assemble once a year and provides that a majority of each house constitutes a quorum to conduct business. It does not, however, require that a majority be present at any particular time. To the contrary, Article I, section 5, clause 1 provides that "a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members." This language suggests both that the Senate continues to be in session even though less than a quorum is present and that it is up to the Senate when to compel the attendance of absent Senators.

It would be difficult to infer from these provisions any requirement that the Senate be available, in the sense of having present a majority capable of transacting business, at any particular time. Moreover, there appears to be no dispute that the Senate is capable of conducting business while it is in *pro forma* session. The Senate passed two significant pieces of legislation while in *pro forma* session during 2011. These measures were signed into law by the President, and no one appears to have questioned their validity.

The objection to *pro forma* sessions, therefore, must be that the Senate is less capable of providing advice and consent during a *pro forma* session than it would be in regular session. It is not clear, however, that this is true. The Congressional Research Service has noted that "a pro forma session is not materially different from other Senate sessions."[55] Although "the Senate has customarily agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction."[56] Thus, "[s]hould the Senate choose to conduct legislative or executive business at a pro forma session, it could, providing it could assemble the necessary

53. *Paul Saunders Web Forum: Why It Is Neither Necessary Nor Desirable to Go to Either of the Extremes Now Presented in NLRB v. Noel Canning*, The Constitution Project (Aug. 15, 2013), http://www.constitutionproject.org/wp-content/uploads/2013/08/Davidson-Post_8.15.2013.pdf.

54. *See* 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee) ("In making these appointments, the President did not state that he believes an intrasession recess of less than 3 days constitutes a recess….").

55. 157 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS memorandum).

56. *Id.*

quorum or gain the consent of all Senators to act."[57] As the Third Circuit found in the *New Vista* case, the Senate's actions at *pro forma* sessions in 2011 "reveal that it could have provided advice and consent during these pro forma sessions if it had desired to do so."[58]

Even assuming that Senate rules and practices prohibit confirming nominees during *pro forma* sessions without unanimous consent, this would seem to be problematic only under the theory that the Constitution limits the amount of minority obstruction that the Senate may tolerate. Variations of such a theory have been widely discussed in connection with the filibuster and its entrenchment. Most commentators agree, however, that this is a question for the Senate—not for other branches—to decide, and it seems unlikely that the Court will want to weigh in on this issue.[59] If the President were permitted to decide this issue, he could declare the Senate in recess any time he believed that the filibuster or some other Senate rule unreasonably restricted its ability to provide advice and consent—a dramatic shift of power from the Senate to the President.[60]

Because of these difficulties in arguing that the Senate is unavailable to give its advice and consent during *pro forma* sessions, the argument for disregarding *pro forma* sessions must rely heavily on the Senate's lack of *intent* to conduct business during those sessions. In most cases where it has adopted an order for *pro forma* sessions, including the order of December 17, 2011, the Senate has indicated that no business will be conducted. As shown by its passage of legislation on December 23, however, such expression of intent does not prevent the Senate from acting if it later chooses to do so.

The constitutional basis for connecting the President's recess appointments authority to the Senate's intent to conduct business is, to say the least, obscure. The Constitution does not require the Senate to have a quorum present to conduct business at any particular time; still less does it require that the Senate intend to conduct business while it is in session. If the President could disregard *pro forma* sessions because the Senate did not intend to conduct business, he would equally be able to disregard many regular Senate sessions. Moreover, if the Senate's intent to conduct business were relevant, the President could argue just as logically for disregarding any session in which the Senate did not intend to act on nominations or did not intend to act on the nomination for the particular vacancy that the President wishes to fill.

For the Court to invalidate the NLRB recess appointments on the ground that the President lacks the power to disregard the Senate's *pro forma* sessions would probably make the least dramatic change in the balance of power between the Senate and the President. The Court would confirm the Senate's ability to block recess appointments by remaining in *pro forma* session, but it is by no means clear that Congress is willing to incur the costs of using *pro forma* sessions on a long-term basis for that purpose. Moreover, if Congress did stymie the President's ability to make recess appointments over a long period of time, the effect might be to increase pressure on the Senate to act on the President's nominees on a timely basis.

In addition, the President has significant constitutional tools with which to respond to the use of *pro forma* sessions. If either house wishes to adjourn but the other refuses to consent, the President can use the power provided in Article II, section 3 to "adjourn them to such Time as he shall think proper." He may also "on extraordinary Occasions, convene both Houses, or either of them." The President can use this power to convene the Senate for the

57. *Id*.

58. *New Vista*, 719 F.3d at 231. Although the Becker recess appointment considered by the Third Circuit did not involve *pro forma* sessions, the NLRB argued that *pro forma* sessions illustrated the fact that the Senate could be "unavailable" even though formally convened. The Third Circuit, however, found this argument unpersuasive, noting that there was "no principled method of defining 'availability' apart from the fact that the Senate convenes." (Id. at 23l, n.23). It found this to be an additional reason for rejecting the NLRB's proffered definition of "recess" as any period during which the Senate was unavailable.

59. *See, supra*, note 41.

60. *See* 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee) ("It is for the Senate and not for the President of the United States to determine when the Senate is in session."); John Yoo, Obama Oversteps His Limits With Cordray Recess Appointment, Ricochet (Jan. 4, 2012), http://ricochet.com/main-feed/Obama-Oversteps-His-Limits-with-Cordray-Recess-Appointment, ("It is up to the Senate to decide when it is in session or not, and whether it feels like conducting any real business or just having Senators sitting around on the floor reading the papers. The President cannot decide the legitimacy of the activities of the Senate any more than he could for the other branches, and vice versa.").

purpose of acting on what he considers to be critical nominations.[61]

Conclusion

The Supreme Court's decision in *NLRB v. Noel Canning* could have significant ramifications for the balance of power between the President and the Senate—particularly with regard to the confirmation process. It may reasonably be anticipated that the Court will prefer to decide the case on the narrowest grounds possible, leaving the political branches to work out their disagreements with a minimum of judicial interference. This would most likely be accomplished by holding that the President cannot disregard the Senate's *pro forma* sessions.

However, the Court is also presented with the opportunity to determine whether the recess appointment power is limited to filling vacancies that arise during a recess and, further, during any recess or only during breaks between enumerated sessions of Congress. The Supreme Court has never before considered the meaning or application of the Recess Appointments Clause, and this case has the potential to alter a long-standing practice that has been accepted by the Senate and the executive branch for many years.

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61. He cannot, of course, force the Senate to act on his nominees, nor perhaps even to remain physically present at the seat of government. Convening the Senate would, however, place an enormous amount of political pressure on the Senate to act, assuming that the public supported the President's position. If it did not, the President might need to be more open to taking the Senate's "advice," as opposed to merely demanding its "consent."