No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's contention that the President has no authority to make recess appointments during intra-session recesses of the Senate would repudiate the constitutional legitimacy of thousands of appointments made by at least 14 Presidents since the 1860s. Pet. Br. 21-27. And respondent's contention that the President may not make an appointment during a recess if the vacancy did not first arise during that same recess would likewise repudiate countless appointments made by at least 39 Presidents, including Washington, Jefferson, Madison, and Monroe. *Id.* at 35-44. Throughout our history, Presidents have made appointments in these circumstances to fill offices temporarily when the Senate was unavailable to provide its advice and consent, thereby ensuring that the laws would be faithfully executed. The Officers of the United States who have received such appointments have led armies in war, exercised Article III judi-

cial power, and taken innumerable actions affecting the lives, liberty, and property of the people.

Respondent asks this Court to overturn the long-settled construction of the Clause—and the equilibrium between the political Branches it reflects—to avoid "a virtually unlimited unilateral appointments power" and a descent into "'despotism.'" Resp. Br. 1-2. But history refutes respondent's rhetorical suggestion that the settled construction of the Clause subverts the constitutional design. In practice, the Clause has long functioned just as the Framers envisioned: as an auxiliary power that coexists comfortably with the Senate's advice-and-consent role to "produce a judicious choice of [persons] for filling the offices of the Union," *The Federalist No. 76*, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), without diminishing the President's accountability to the public for his appointees. It would take an exceptionally strong reason to overturn this settled construction and the centuries of historical practice undertaken in reliance on it. Respondent's arguments fall far short of justifying such a radical departure.

Respondent's final contention—that the Senate may rely on fleeting "pro forma sessions" to deny the President the power to make recess appointments, even though the Senate's Members have returned to their constituents and the body has officially announced that "no business" may be conducted (Pet. App. 91a)—would also profoundly change the constitutional design. Whatever the views of individual Senators, the Senate itself has not opined that pro-forma sessions preclude exercise of the recess-appointment power. And it is inconceivable that the Framers would have intended an empty ritual of this kind to bar the President from filling offices after the Senate's Members had dispersed to their often-

distant States even for months at a time, if the President believed such appointments were necessary for the defense of the fledgling Nation and the sound operation of its Government.

A. The President's Recess-appointment Authority Is Not Confined To Inter-session Recesses

In the 1780s, the term "recess" applied whether a break occurred *between* legislative sessions (*i.e.*, an inter-session recess initiated by an adjournment *sine die*) or *during* such a session (*i.e.*, an intra-session recess to a date certain). Pet. Br. 12-18. Since the 1860s, when Congress first took lengthy intra-session recesses, Presidents have made recess appointments during the majority of such recesses, accounting for literally thousands of appointments. *Id.* at 21-27. Respondent's contention that intra-session recesses do not even exist for purposes of the Recess Appointments Clause is unsupported by the constitutional text, original understanding, or purposes, and belied by long-standing practice.

1. The Framers' understanding of "recess" encompassed breaks that did not directly precede a new session

Respondent's principal contention (Br. 10-11, 15-16, 31) is that the terms "recess" and "session" refer to mutually exclusive periods, precluding the recognition of any "recess" within a "session" of the Senate, no matter how long the Senate remains away. Nothing in the text or original understanding categorically sets the two terms apart in the manner respondent asserts.

a. Thomas Jefferson recognized that "a recess by adjournment" did not end a legislative session (Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 165 (2d ed. 1812) (*Jefferson's Manual*)), meaning it necessarily occurred during the "session." That was mani-

fest in British Parliamentary practice in the 1770s and 1780s, when the Speaker of the House of Commons used his statutory authority to issue warrants for replacing "such Members as shall die during the Recess of Parliament" even when deaths occurred during a recess-by-adjournment within a session.[1]

Respondent glimpses (Br. 21) its strict dichotomy between "the recess" and "the session" in Blackstone's explanation that a peer indicted for treason or felony would be tried by the Court of the Lord High Steward when Parliament was in recess but by the King in Parliament when it was in session. 4 William Blackstone, *Commentaries on the Laws of England* 258-260 (1769). But the Court of the Lord High Steward tried Lord Cornwallis for murder on June 30, 1678—during the recess that resulted when the House of Lords adjourned, without ending its session, from June 28 until July 1.[2] Blackstone's description therefore affirmatively supports the Executive's position here.

b. In America, when the Continental Congress took an intra-session recess in 1784, it exercised its authority to appoint the Committee of the States during "the recess of Congress." Pet. Br. 15. Respondent speculates (Br. 22 n.15) that Congress really meant to initiate an inter-session recess by adjourning to the date when the Articles of Confederation required a new session to begin. But Congress specified that it would reassemble two days sooner than that, "pursuant to" its adjourn-

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[1] See, *e.g.*, 35 H.C. Jour. 62 (1775); 38 *id.* at 100 (1781); 2 Sir Lewis Namier and John Brooke, *The House of Commons 1754-1790*, at 122, 216 (1964) (deaths of William Bromley Chester and Godfrey Bagnall Clarke).

[2] 7 T.B. Howell, *A Complete Collection of State Trials* 143 nn.* & † (1816); 13 H.L. Jour. 266 (1678).

ment resolution, not the Articles. 27 J. Continental Cong. 505 (Gaillard Hunt ed., 1928).

Respondent does not deny that on numerous occasions in the Founding era, including the Constitutional Convention itself, the terms "recess" and "the recess" were used to describe breaks following adjournments to dates certain, even in legislatures that had established practices of adjourning *sine die* (or leaving under equivalents). Pet. Br. 15-16.[3] Those examples are not undermined by occasional uses of "session" to refer colloquially to a group of daily meetings between lengthy adjournments to a date certain. Invoking such colloquial uses, respondent disregards the understanding that such recesses did not terminate the formal legislative session. See *Jefferson's Manual* § LI, at 166. And respondent erroneously attributes (Br. 22-23) that usage to legislatures that used a different term (like "sitting") to describe the meeting periods between lengthy adjournments. See, *e.g.*, N.J. Legis. Council J., 5th Sess. (1780-1781) (documenting several "sittings" within the annual "Session").[4]

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[3] See also, *e.g.*, 3 State Papers of Vermont 781 (P.H. Gobie Press, Inc., 1924) (1781 adjournment "without day"); 1 Journal of House of Representatives of Pennsylvania 390 (John Dunlap ed., 1782) (1779 legislature "rose without adjournment"); Massachusetts S. Journal, entry for July 6, 1781 (on file with Massachusetts Archives) (governor "prorogued" legislature).

[4] A similar informal usage underlies respondent's assertion that "'the phrase "the Recess" *always* referred to the gap between sessions.'" Resp. Br. 21 (quoting Robert G. Natelson, *The Origins and Meanings of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause* 20 (Sept. 15, 2013), draft available at http://ssrn.com/abstract=2257801). Respondent's source (at 18) concludes that a "session" ended when the legislature's adjournment was not "relatively short." Under that

c. Although decades passed before there were regular intra-session recesses (Pet. Br. 21-22), congressional debate from the era on which respondent relies also demonstrates that a "recess" can occur during a "session." For example, in 1812, Senators described a proposed lengthy adjournment "during the present session" as a "recess." See, *e.g.*, 23 Annals of Cong. 212-216 (1812). By contrast, the Senate floor statements from 1814, 1830, and 1867 that respondent quotes (Br. 19-20) did not address the question, which is unsurprising as they arose in other contexts, before Congress routinely took lengthy intra-session recesses.

Respondent similarly errs in declaring (Br. 32) that a 1905 Senate Judiciary Committee Report "rejects the Executive's position." As that report arose in response to inter-session appointments, its failure to "acknowledge[] the possibility of recesses during the Session" (*ibid.*) is unremarkable. But its animating logic—that the Senate is in session when it is available to participate as a body in making appointments, and in recess when it is not—provides no ground for distinguishing between inter- and intra-session recesses, as Attorney General Daugherty recognized in 1921. S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905) (*1905 Senate Report*); 33 Op. Att'y Gen. 20 (1921); Pet. Br. 24.[5]

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view (which respondent does not share), Congress has incorrectly numbered many sessions, and many extended Senate absences that have long been regarded as intra-session would be inter-session recesses. That view of "session" would validate the appointments here for at least a period long enough to sustain the Board decision at issue, if the Board prevailed on the other two questions presented. See Constitutional Law Scholars Amicus Br. 27 & n.9.

[5] As discussed in our opening brief (at 23-24), a 1901 opinion by Attorney General Knox concluded otherwise. 23 Op. Att'y Gen. 599. But his reasoning was expressly rejected by Daugherty. 33 Op.

2. Intra-session recess appointments serve the purposes of the Clause

Categorically excluding intra-session recesses—even when lengthy—from the scope of the Recess Appointments Clause would undermine its central purpose of ensuring that there will always be a mechanism to fill a vacancy and provide the President with the assistants he needs to execute the laws. Pet. Br. 19-20.

a. Because a recess commission is valid until the end of the Senate's "next Session," Art. II, § 2, Cl. 3, respondent contends (Br. 13) that intra-session recess appointments can be up to two years long, and that the ability to make such appointments would "render the advice-and-consent process a rarity for non-life-tenured positions." A two-year appointment, however, is possible only in unusual circumstances, when (1) the Senate takes a recess at the beginning of its session,[6] (2) the appointee is not confirmed and does not otherwise leave office, and (3) the Senate never adjourns its next session *sine die*. Assuming similar conditions, *inter*-session appointments

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Att'y Gen. at 21. Before Knox's opinion, the Solicitor of the Treasury had already opined that the President *could* make appointments during a holiday recess. See Letter to the Secretary of the Treasury from Maurice D. O'Connell, Dec. 21, 1901, Vol. 158, *Letters Sent, Jan. 1, 1821-Jan. 31, 1934* (Entry 67), Records of the Solicitor of the Treasury, 1791-1934, Record Group 206, National Archives College Park (NACP).

Respondent's quotations from other Attorney General opinions (Br. 16-19) are immaterial and taken from unrelated contexts.

[6] That unusual circumstance occurred here because the Twentieth Amendment independently started the session by providing that Congress's "meeting shall begin" on January 3. Amend. XX, § 2; see 75 Cong. Rec. 1373 (1932) (statement of Senator Norris, who proposed the Amendment: the "meeting referred to is the session").

could be almost as long.[7] Even taking the Senate's sessions as they actually occurred, inter-session recess appointments made in March 1849 or 1887 could have lasted more than 18 or 19 months, and those made in March 1793—and many other years—could have been at least 15 months.[8]

In any event, it is fanciful to suggest that allowing intra-session recess appointments would read the Appointments Clause out of the Constitution. Presidents have been making such appointments since the 1860s, and nobody believes the advice-and-consent process has ceased to be the principal means of appointing officers. Pet. Br. 20.

b. There is good reason for appointments to last until the end of the *next* session. When an intra-session recess falls shortly before the session's end, the Senate has little time to consider a nomination during that session. Permitting a temporary appointment to continue until the end of the next session ensures there is always one full session for the President and the Senate to engage in the nomination-and-confirmation process. See Pet. Br. 26 (discussing Senator Robert Taft's desire that a Secretary of Labor be recess appointed, to allow the nomination to be referred to committee). Congress took a similar approach with the first Militia Act of 1792, which was to remain in force for "two years, and from thence to the end of the next session of Congress thereafter." Act of May 2, 1792, ch. 29, § 10, 1 Stat. 265. The two-year peri-

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[7] An appointment made on March 4, 1823, would have lasted 643 days if the Senate never adjourned its next session *sine die*. See S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 523 (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.

[8] *Congressional Directory* 522-527.

od ended during one session, *Congressional Directory* 522, but the law remained effective during the following recess (when President Washington employed it to quell the Whiskey Rebellion) and into the next session (when it was expressly repealed).[9] Thus, the period until "the end of the next session" was *longer* because it started during a session—just as it may be under the Recess Appointments Clause.

3. Intra-session recesses of significant length have generally precipitated recess appointments

a. Nearly every President whose term included a lengthy intra-session recess has made intra-session recess appointments. That includes dozens of appointments in the 1860s; several in the 1920s; and thousands since the 1940s. Pet. Br. 21-23, 25-27; Pet. Br. App. 1a-64a. Moreover, by 1921, Attorney General Daugherty had determined, by applying the considerations articulated in the Senate Judiciary Committee's 1905 report, that intra-session recesses of sufficient length do trigger the Recess Appointments Clause. *1905 Senate Report* 2; 33 Op. Att'y Gen. at 25; Pet. Br. 24-25.

There is accordingly no basis for respondent's assertions (Br. 24, 25) that historical practice "overwhelmingly refutes the Executive's position," or that the Executive believes that "the Constitution's meaning has changed." The change has not been in the Constitution's meaning, but in the underlying circumstances. For as long as there were no intra-session recesses of apprecia-

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[9] Proclamation (Aug. 7, 1794), in 33 *The Writings of George Washington* 459-460 (John C. Fitzpatrick ed., 1940); see also Letter from Henry Knox to Washington (Aug. 4, 1794), http://founders.archives.gov/documents/Washington/05-16-02-0354; Act of Feb. 28, 1795, ch. 36, § 10, 1 Stat. 425.

ble length, there were no intra-session recess appointments. But that changed in the 1860s, and especially after 1943, because lengthy intra-session recesses became more common.

b. There is no merit to respondent's belief that President Lincoln's 1862 and 1863 brigadier-general appointments were "unofficial[]" because the Army issued only "letters of appointment." Br. 25 (citations omitted). That was the "form then used for recess appointments to the Army." *O'Shea* v. *United States*, 28 Ct. Cl. 392, 401 (1893). Moreover, the recipients executed the oath of office that was required "to accompany the acceptance of every commissioned officer appointed or commissioned by the President."[10]

c. Respondent suggests (Br. 17-18 & n.12) that President Johnson may have thought his 1867 and 1868 appointments were made during inter-session recesses, viewing the multiple convenings of the Senate during those years as separate "sessions." But the Executive obviously believed otherwise. When one 1867 appointee was not confirmed, his appointment lasted well into 1868, because it was understood that the "next Session" was the next session following an adjournment *sine die*. *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884).

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[10] *E.g.*, Letter from James H. Ledlie to L. Thomas, Dec. 27, 1862, *Letters Received by the Adjutant General's Office, 1861-1870* (National Archives Microform Publication M619, roll 114, file L675), Records of the Adjutant General's Office, 1762-1984, Record Group 94, National Archives Building, Washington, D.C. (NAB). Other records indicate the appointments expired "by constitutional limitation" at the conclusion of a Senate session when they were not confirmed. See, *e.g.*, Adjutant General Office Letter, Oct. 24, 1888, Claim of Widow of James H. Ledlie, Application 363,518, Certificate 253,231, 19th New York Infantry, Pension Records, Record Group 15, NAB.

Similarly, a number of 1868 appointees served until the next full session ended; when President Grant nominated their replacements, he said Johnson's appointments had expired on March 4, 1869. S. Exec. Journal, 41st Cong., 1st Sess. 15, 25, 30 (1869).[11]

d. While respondent does not dispute the extensive evidence of intra-session recess appointments since 1921, it contends (Br. 27) that Congress has "consistent[ly]" "resist[ed]" them. But respondent identifies no institutional action indicating that intra-session recess appointments are categorically unconstitutional. Indeed, the resolution Senator Byrd proposed in 1984 would have approved appointments during intra-session recesses "longer than 30 days." 130 Cong. Rec. 23,234; cf. Senate Rule XXXI(6) (providing that pending nominations lapse if they are not acted upon "during the session" or "if the Senate shall adjourn or take a recess for more than thirty days"); 150 Cong. Rec. 5373-5374 (2004) (Senator Cornyn defending constitutionality of intra-session recess appointment).

This Court should confirm that future Presidents may, like so many of their predecessors, make recess appointments during intra-session recesses of the Senate.

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[11] Some of respondent's amici contend that the nature of some of the Senate's 1867 and 1868 adjournments is unclear. During each of the recesses accounted for in our examples, the Senate intended to return, and did return, on a date certain, making them unlike adjournments *sine die*. *E.g.*, Cong. Globe, 40th Cong., 1st Sess. 458, 463 (1867); *id.*, 2d Sess. 4519 (1868). Even if the Court disregards appointments made during the April–July 1867 and July–September 1868 recesses, Johnson still made a substantial number of appointments during other, uncontested intra-session recesses. See Pet. Br. App. 4a-5a, 8a-9a.

B. The President May Fill Any Vacancy Existing During A Recess, Including One That First Arose Before That Recess

Since the Monroe administration, the Executive has repeatedly and openly construed the Recess Appointments Clause to authorize the President to fill vacancies that exist during a Senate recess, even if they did not first arise during that recess. Pet. Br. 29-38. Nearly every President in the last 190 years is known to have made appointments that would have been unconstitutional under respondent's contrary reading. Pet. Br. App. 68a-89a. Even before Monroe, the ambiguity of the Clause's text was acknowledged, and Presidents Washington, Jefferson, and Madison each made appointments that were inconsistent with respondent's reading. Pet. Br. 38-44.

1. Early debate and practice show that the Clause's text does not compel respondent's reading

a. Respondent contends (Br. 32-33) "[t]here is no serious question that [the Recess Appointments Clause] was originally understood" to apply only when a vacancy first arose "during the Recess." That is simply untrue. When President Washington's Attorney General adopted respondent's reading, he found it necessary to say the Clause should "be interpreted strictly," and his construction of "vacancy" differed from Alexander Hamilton's.[12]

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[12] Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti ed., 1990). Randolph believed an office was vacant upon its creation. *Ibid.* Hamilton believed it must be filled before it could become vacant. Letter from Hamilton to James McHenry (May 3, 1799), in 23 *The Papers of Alexander Hamilton* 94 (Harold C. Syrett ed., 1976).

President Adams disagreed with his own Secretary of War about it. Pet. Br. 40-41. And President Jefferson recognized that the text "is *certainly* susceptible of [two] constructions," because it may refer to "'vacancies that may happen to *be*' or [those that] 'may happen to *fall*'" during the recess.[13]

b. The question was settled for the Executive by Attorney General Wirt's 1823 opinion, which acknowledged the ambiguity but explained that the "happen to exist" reading was "the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language." 1 Op. Att'y Gen. 631, 633-634.

Respondent asserts (Br. 35) that the Executive's reading fails to give effect to the phrase "that may happen." Yet, those words confine the President to filling vacancies that actually exist at the time of appointment. Pet. Br. 30-31. The Executive therefore gives meaning to all terms in the Clause, without requiring—as respondent would (Br. 36 n.26)—that the prepositional phrase "during the Recess" perform double duty by modifying "both" a noun phrase ("all Vacancies that may happen") and a verb phrase ("shall have Power to fill up").

Respondent's comparison (Br. 33-34) to the similar, but not identical, language in the Senate Vacancies Clause (Art. I, § 3, Cl. 2) does not eliminate ambiguity, because the Senate continued to debate that Clause for more than a century. In 1900, Senators relying on Wirt's recess-appointments opinion lost the election dispute

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[13] Letter from Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), in 36 *The Papers of Thomas Jefferson* 433 (Barbara B. Oberg ed., 2009) (emphases added).

about Matthew Quay by only one vote in the Senate.[14] The majority did not argue that Wirt's by-then long-settled interpretation was wrong, but rather that "there is no analogy" between the two Clauses.[15]

c. Even before 1823, three of the first four Presidents made appointments inconsistent with respondent's view. Pet. Br. 39-40, 41-44. Respondent's quibbles with the historical record are unavailing.

Respondent repeats the unpersuasive theory that President Washington followed a "convoluted" process of making quick appointments during a session that could be declined during a recess, creating new vacancies. Compare Resp. Br. 37, with Teamsters Local 760 Resp. Br. 20-22 (recounting the "historical truth [that] refutes rather than supports that hypothesis").

Respondent also suggests (Br. 44) that Washington thought, counter-factually, that his appointees as Engraver of the Mint and District Attorney for Kentucky filled recently created vacancies because the general language at the top of the lists transmitting recess-appointed nominees to the Senate referred to the offices as "having fallen vacant during the recess of the Senate." Yet, the Engraver and District Attorney entries differ from every other item on those lists by failing to name the officer being replaced. See S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793); *id.*, 4th Cong., 2d Sess. 216-217 (1796). And the actual commissions did not say the two positions *became* vacant during the recess, but

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[14] 33 Cong. Rec. 4612-4613 (1900); S. Rep. No. 153, 56th Cong., 1st Sess. 15-24 (1900); *id.* at 18 ("[W]e affirm with great confidence that the phrase used in the Constitution is employed * * * to describe a continuing condition without reference to the time or method of its origin.").

[15] *Id.* at 6.

merely that they were "at present vacant," which is consistent with our view.[16]

Respondent doubts (Br. 44) four appointments by President Jefferson, contending that the applicable statute "left then-existing officeholders in their offices until President Jefferson removed them." In fact, the cited section provided that Marshals and Attorneys would holdover only "for those districts * * * *within which they respectively reside*." Act of Feb. 13, 1801, ch. 4, § 36, 2 Stat. 99 (emphasis added); see *id.* § 37, 2 Stat. 100. Potomac was carved out of the Maryland and Virginia districts, *id.* § 21, 2 Stat. 96, but Congress did not contemplate that two officials would thereafter *jointly* hold the same office in Potomac. Thus, after Jefferson removed the holdover Marshals for the new Eastern District of Virginia and reduced District of Maryland, he noted that their successors *in those districts* were recess-appointed "vice" the prior incumbents.[17] In Potomac, however, he considered the Marshal and District Attorney positions "unfilled" before his recess appointments.[18] And respondent's holdover theory cannot account for Jefferson's appointments in the District of Ohio (Pet. Br. App. 66a), which lacked incumbents because the

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[16] See Commission of Robert Scot, Nov. 23, 1793, Vol. 1, p. 30, *Temporary Presidential Commissions* (Entry 773), Records of the Department of State, 1763-2002, Record Group 59, NACP; Commission of William Clarke, Oct. 13, 1796, Vol. 1, p. 49, *id.*

[17] S. Exec. Journal, 7th Cong., 1st Sess. 403 (1802); List of Appointments and Removals (May 1802), in 33 *The Papers of Thomas Jefferson* 668 (Barbara B. Oberg ed., 2006).

[18] List of Appointments and Removals (after 10 May 1803), in 33 *Jefferson Papers* 671; Pet. Br. 41-42 & nn.38-39.

Northwest Territory had never had federal marshals or attorneys.[19]

Respondent ignores three appointments by President Madison (Pet. Br. App. 67a). In contesting two others, respondent simply errs (Br. 44) in speculating that Madison "likely waited" until after the Senate recessed before signing legislation passed on the last day of its session. See S. Journal, 13th Cong., 3d Sess. 689-690 (1815) (stating the "President of the United States this day approved and signed" the relevant act before noting the Senate adjourned *sine die*). Even so, the mere fact that a difference of a few hours would have required Madison to wait nine months before filling the Northern District of New York positions vividly demonstrates how contrary respondent's construction is to the Clause's purposes.

Thus, the first three decades of actual appointments by Presidents of the United States under the Constitution contradict respondent's assertion (Br. 36) that "the Executive Branch consistently agreed that the Clause was limited to those vacancies that arise during the recess."

2. The Executive Branch's interpretation has openly held sway since 1823

a. Respondent does not seriously contest that the Executive Branch's construction is of long standing. It identifies only one partially-contrary executive-branch opinion since 1823 (4 Op. Att'y Gen. 361 (1845)), but the same Attorney General effectively reversed himself the next year (4 Op. Att'y Gen. 523 (1846)). And there is no basis for respondent's suggestion (Br. 41 n.30) that President Lincoln's recess appointment of Justice David

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[19] See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50-53 (reaffirming the Northwest Ordinance).

Davis to fill a pre-existing vacancy on this Court was concealed from the Senate. Not only was the appointment publicized, the Clerk of the Court also published the order allotting the Court's Members (including Davis) among the circuits.[20]

b. Respondent relies "[f]oremost" (Br. 45) on many statutes enacted before 1866 providing that the President could fill certain offices during the Senate's recess. Those statutes do not bear upon the longstanding practice of presidential appointments directly under the Recess Appointments Clause, because the appointments on which we rely (Pet. Br. App. 65a-89a) were to offices not covered by such statutes. Respondent nonetheless infers that Congress would not have enacted such statutes if it believed the President had constitutional authority to fill vacancies arising before a recess. But some of the statutes addressed offices that would first exist *during a recess*, making them redundant even under respondent's view of the Constitution.[21] Moreover, almost all of the statutes were enacted in conjunction with Congress's creation of new offices, Resp. Br. App. 1a-17a, and may have been intended to address a question—inapplicable here—about whether an office could be "vacant" when it was never previously filled. See note 12, *supra*. And many of the statutes purported to impose a condition not contained in the Constitution (that the recess-appointee be nominated for advice-and-consent). Resp. Br. App. 8a-17a. Regardless, this Court has previously held that the President had constitutional powers even when that made statutory grants of power redun-

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[20] Daily National Intelligencer (D.C.), Oct. 30, 1862, p. 3, cols. A, C.

[21] See Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 550; Act of Mar. 2, 1819, ch. 49, §§ 1, 9, 3 Stat. 493-494, 495; Act of July 30, 1852, ch. 75, § 4, 10 Stat. 26.

dant. See *Myers* v. *United States*, 272 U.S. 52, 145-146 (1926); *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856); *id.* at 322 (McLean, J., dissenting).

c. Respondent also points (Br. 40-41) to objections by various nineteenth-century Senators. Such objections, however, neither show that the constitutional text is unambiguous nor undermine the importance of 190 years of appointments by the President supported by numerous Attorney General opinions. See *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989).

Moreover, senatorial objections to the Executive Branch's interpretation largely subsided long ago. With the Pay Act in 1863, Congress explicitly contemplated recess appointments to vacancies that existed before the recess in which the appointments were made. See Pet. Br. 37. Respondent's assertion (Br. 46) that the Pay Act was predicated on the perceived unconstitutionality of such appointments is unavailing. By authorizing back pay for recess appointees who were later confirmed (see 9 Comp. Gen. 190, 190 (1929); 16 Op. Att'y Gen. 522, 531 (1880)), Congress gave Presidents an incentive to nominate appointees, but it could hardly have intended to pay for service it considered unconstitutional. Shortly thereafter, Congress *criminalized* the acceptance of other recess appointments it (wrongly) deemed unconstitutional. See Tenure of Office Act of 1867, ch. 154, § 5, 14 Stat. 431.

Even before the Pay Act, senatorial disapproval was not as uniform as respondent suggests. In responding to Senator Gore's failed attempt to censure President Madison for certain recess appointments in 1814, Senators Bibb and Horsey urged that the President was owed deference in his exercise of the recess-appointment power. See 26 Annals of Cong. 697 (1814); *id.* at 707-708.

3. Respondent's reading of "happen" would frustrate the Clause's purposes

Respondent nowhere explains why the Framers would have considered it necessary to permit the President to fill vacancies that arise during a particular recess, but not vacancies that remain unfilled (or are not yet known to exist) when the Senate recesses. Whether a vacancy first occurs before or during a particular recess, the demands of government may require it to be filled. Thus, the Executive's interpretation has long been acknowledged to accomplish the "whole purpose" of the Constitution. 1 Op. Att'y Gen. at 633; Pet. Br. 31-33. Respondent's position does not.

Respondent dismisses (Br. 47) this basic defect in its position by asserting that it would cause only "minor inconveniences" and suggesting that the President could invoke his power to convene the Senate "on extraordinary Occasions," U.S. Const. Art. II, § 3. But the Constitution's own architecture suggests otherwise. Vesting the President with *both* the power to recall the Senate *and* the power to make appointments during its recess indicates that the President need not declare an "extraordinary Occasion[]" to fill vacant offices. After Congress first authorized the rank of rear admiral in the Navy, one day before the Senate adjourned *sine die* in July 1862, President Lincoln recess-appointed four active-list rear admirals, including David G. Farragut.[22] In promoting the hero who had recently captured New Orleans, Lincoln should not have had to choose between recalling the Senate and waiting four months for its return.

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[22] Act of July 16, 1862, ch. 183, § 7, 12 Stat. 584; *News From Washington*, N.Y. Times, July 31, 1862, at 1.

C. The Senate Is In "Recess" Under The Recess Appointments Clause When Its Order Provides That, For 20 Days, It Will Hold Only Fleeting "Pro Forma" Sessions At Which "No Business" Is To Be Conducted

Respondent and its amici do not dispute that, if an intra-session recess triggers the President's Recess-Appointments-Clause authority, a 20-day recess suffices. Here, the Senate's December 17, 2011 order publicly assured its Members and informed the President that, over a 20-day period in January 2012, the Senate would hold only "pro forma" sessions (*i.e.*, sessions held merely for form) at which there would be "no business conducted." Pet. App. 91a. The President took the Senate at its word. And rightly so. No business was in fact conducted during the Senate's five pro-forma "sessions," each lasting between 28 and 30 seconds. Pet. Br. 48-49 & n.48. Nor, in the nearly two years since, has the Senate as a body taken any action indicating that the President mistook the situation by making recess appointments. The Court should reject respondent's contention that those avowedly "pro forma" sessions prevented the Senate's 20-day absence from being a "recess" for purposes of the Recess Appointments Clause.

1. The Senate declared itself unavailable to do business for 20 consecutive days

a. As explained in our opening brief (at 47-51), the period between January 3 and January 23, 2012, bore the hallmarks of a single 20-day recess, during which no work was done, no messages were laid before the Senate, and its Members were dispersed. Yet respondent contends (Br. 58-60) that the pro-forma sessions were business-as-usual for the Senate, because the Senate presumes a quorum (until a quorum call shows otherwise) and because the Senate conducts much of its busi-

ness by unanimous consent anyway. But the presumed presence of what the Constitution calls "a Quorum *to do Business*" (Art. I, § 5, Cl. 1 (emphasis added)) was irrelevant under an order that "no business" be conducted.

Respondent maintains (Br. 60) that the Senate was nonetheless "fully capable of doing business" during the pro-forma sessions, because "the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power." But respondent overlooks the Senate practices preventing a superseding unanimous-consent order from being adopted without confirmation that absent members did not object. See Pet. Br. 54 n.53 (describing clearance process preceding presentation of bill, resolution, or nomination on Senate floor). As respondent's Senator amici explain (Br. 20-21), although no formal rule prohibited a lone Senator from going rogue, there was still no actual risk that nominees would be considered at the pro-forma sessions, in light of "the Senate's traditions" and "the universal recognition that political Armageddon would ensue." See also 111 Cong. Rec. 26,465 (1965) (explaining that "a pro forma meeting is to meet and then adjourn as quickly as the Presiding Officer can put down the gavel, without any speeches and without any opportunity to be heard").

b. Respondent also relies (Br. 53-54) on the fact that, before the period in question, the Senate had twice passed legislation in sessions originally designated as pro forma. On those occasions, however, the decision to conduct business fundamentally transformed the session. What began as nothing but a matter of form ceased to be merely "pro forma" when the Senate unanimously

agreed to change course and act as a body, rather than simply adjourn.

Although the Senate *could* have similarly converted any of its January 2012 pro-forma sessions into one in which actual business was conducted, that theoretical possibility cannot be enough to deny the existence of a recess, because the same possibility is present whenever the Senate is in recess—even an inter-session recess—under a conditional adjournment resolution. Such resolutions often provide that congressional leadership may require the resumption of business during the recess if the public interest warrants. Pet. Br. 52-53. Respondent and its amici do not dispute that the unanimous-consent nature of the "no business" order here established an even higher hurdle to overcome than does a typical resolution to adjourn *sine die* (which everyone concedes would create a recess under the Recess Appointments Clause). *Id.* at 54.

The President accordingly had every reason to conclude, on the basis of the "no business" order, that the Senate was unavailable as a body to "receive communications from the President or participate as a body in making appointments," *1905 Senate Report* 2—classic indications that it was in recess. Cf. *The Pocket Veto Case*, 279 U.S. 655, 683 (1929) (under Art. I, § 7, Cl. 2, a vetoed bill may be returned to the originating House only when it is "sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill," and "no return can be made to the House when it is not in session as a collective body and its members are dispersed").[23]

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[23] Respondent's amici Senators suggest (Br. 25) that it sufficed for the Secretary of the Senate to receive presidential messages. But

2. There is no historical pedigree for using a long series of pro-forma sessions to avoid a recess

Respondent contends (Br. 50-58) there is a long pedigree for Senate use of pro-forma sessions "for various purposes." But the vast majority of the isolated sessions respondent identifies are markedly different from the string at issue here. The historical roots of the practice in question here extend no farther than 2007, which marked the first time a daisy-chain of pro-forma sessions was purported to prevent a recess.

Before 2007, according to respondent's list (Br. App. 18a-30a), nearly every previous purportedly pro-forma session was an isolated event. Indeed, respondent identifies only a handful of back-to-back pro-forma sessions and only two occasions before 2007 on which there were as many as three consecutive pro-forma sessions (from January 8 to 15, 1981; and from October 21 to November 8, 2002). Because so few of the resulting periods between business sessions were at least ten days long (*i.e.*, the length of the *shortest* intra-session recess in which any President has made a recess appointment[24]), it is unsurprising that no previous President "attempted to make recess appointments during [pro-forma] sessions" (Resp. Br. 54).

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that routinely happens during recesses, and the fact that messages received on January 12 and 18 were not formally laid before the Senate until it resumed business on January 23 (see 158 Cong. Rec. S37 (daily ed. 2012)) indicates that it was unavailable to act in the interim. Cf. *The Pocket Veto Case*, 279 U.S. at 683-684 (holding delivery of bill to Senate "officer or agent" when it was not in session was constitutionally inadequate).

[24] See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, at 7 n.9 (Jan. 6, 2012), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

Even aside from the question of length, many of the previous sessions that respondent identifies materially differ from the January 2012 period. For instance, the earliest resolutions were not binding unanimous-consent orders to do no business for a period. They were instead informal agreements that assumed, without ordering in any binding way, that no business would be done. See, *e.g.,* Cong. Globe, 33d Cong., 1st Sess. 1347 (1854) (Senator Stuart: "Gentlemen may come here disposed to do business, and I will come here too. I will come with the expectation that we shall be obliged to adjourn without a quorum."); 22 Cong. Rec. 841 (1890) (Senator Hoar: "I understand [that] * * * there is an understanding—an informal understanding, but I suppose it will be respected by every Senator—that at that time the Vice President shall adjourn the Senate until Monday at 12 o'clock.").[25] Furthermore, during several sessions cited by respondent, the Senate did not wholly cease business, instead continuing more functions than the no-business order at issue here allowed. See, *e.g.*, 30 Cong. Rec. 842 (1897) (receiving messages from the President and the House before adjourning); 98 Cong. Rec. 3955 (1952) (authorizing Presiding Officer to sign enrolled bills); 126

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[25] In 1876, multiple Senators objected to a formal, binding resolution to meet in a series of sessions without doing any business, concluding that such a resolution would violate the Adjournment Clause. Pet. Br. 60-61; see 5 Cong. Rec. 334 (1876) (Senator Anthony: "I propose that we shall do it informally because it does not seem to us to be in our constitutional power to make such a form of adjournment formally."). Contrary to respondent's suggestion (Br. 57-59) that a resolution like the unanimous-consent order here would have satisfied those Senators, their constitutional concerns were ultimately assuaged only by a resolution with no such binding requirement. Pet. Br. 61.

Cong. Rec. 2574 (1980) (allowing committees to file bills during an otherwise pro-forma session).

3. The Rules of Proceedings Clause does not permit the Senate to alter the balance between the Appointments and Recess Appointments Clauses

Respondent's appeal to the Senate's historical use of pro-forma sessions suffers from another flaw: It assumes that, if the Senate may resort to a fictitious "session" to meet constitutional requirements dealing with internal legislative procedures, then it is equally free to use the same legislative fiction to manipulate the President's authority under the Recess Appointments Clause. That is a non sequitur. Whatever leeway the Senate may enjoy when governing its own affairs, it cannot exploit that leeway to limit the President's constitutional authority or visit adverse consequences on the people protected by the duly-enacted laws the officers would be appointed temporarily to administer. Pet. Br. 61-64. The Court emphasized in *INS* v. *Chadha*, 462 U.S. 919 (1983), that the Rules of Proceedings Clause (Art. I, § 5, Cl. 2) provides each House with authority to establish rules governing its *internal* processes but "only empowers Congress to bind itself." 462 U.S. at 956 n.21. The Senate cannot, through that circumscribed authority, unilaterally control the interpretation of the Recess Appointments Clause. See *United States* v. *Ballin*, 144 U.S. 1, 5 (1892) (explaining that the Rules of Proceedings Clause "may not" be invoked to "ignore constitutional restraints"); *United States* v. *Munoz-Flores*, 495 U.S. 385, 392 n.4 (1990) ("Where, as here, a constitutional provision is implicated, [*Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892),] does not apply.").

Respondent's invocation of the Rules of Proceeding Clause is also flawed on a more basic level. The question

before the Court in *Ballin*—whether the House of Representatives possessed a quorum when it passed certain legislation—was conclusively answered by a formal quorum call entered into the House Journal. 144 U.S. at 2-3. In that context, the Clause allows each House to prescribe how to establish that it "is in a condition to transact business." *Id.* at 6. In contrast, the Senate here did not issue a formal rule or resolution stating it regarded itself as not being in recess under the Recess Appointments Clause. To the contrary, the orders adopted by the Senate on December 17, 2011, support the conclusion that it was in recess.[26] Moreover, a hypothetical Senate view of its orders' effect (a view the Senate has not offered in this litigation) could not control the interpretation of the Recess Appointments Clause.[27] Otherwise, no principle would limit the Senate's ability to disrupt the balance regarding appointment of federal officers—a balance heretofore achieved through centuries of Senate–Executive interactions.

The Senate's choice remains the same it has faced since the earliest days of the Republic: remain in session for the conduct of business or depart for an extended

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[26] See 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (asking and obtaining "unanimous consent that *notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters on Friday, January 13, 2012, from 10 a.m. to 12 noon") (emphasis added); *ibid.* (authorizing Senate leadership's appointment authority "notwithstanding the upcoming recess or adjournment of the Senate").

[27] The amicus brief filed by 45 individual Senators is, of course, not a statement of the *Senate's* position. See *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between individual views of Members of Congress and those "authorized to represent their respective Houses"); 2 U.S.C. 288b(c) (requiring Senate resolution for Senate Legal Counsel to appear as amicus curiae on Senate's behalf).

period with the knowledge that the President may temporarily fill vacant offices in order to carry out his responsibilities under the Take Care Clause. Because the Senate cannot simultaneously do both, this Court should sustain the validity of his appointments to the Board.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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