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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Landmark Legal Foundation, is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the D.C. Circuit's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether the Executive Branch can evade the Constitution's clear design for a shared appointment power of federal officers and judges by reading the exception to the power so broadly that the Senate's role is effectively nullified. *Amicus Curiae*, Landmark Legal Foundation, respectfully requests this Court to uphold the decision of the D.C. Circuit Court in full.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The purported recess appointments to the National Labor Relations Board ("NLRB") at issue in this case are constitutionally invalid because they did not occur during an intersession recess of the Senate and the vacancies they filled had not arisen during an intersession recess of the Senate. An *intersession* recess is the break between sessions of Congress, whereas an *intrasession* recess is a temporary break or adjournment within the session. The end of the Senate's legislative session is normally marked by a specific adjournment – an adjournment *sine die*. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 218-219 (3d Cir. 2013). "An intersession break is the period between an adjournment *sine die* and the start of the next session." Id. By contrast, "An intrasession break is demarked by a Senate adjournment of any type – other than adjournment *sine die* – and lasts until the next time the Senate convenes, which is set by the motion to adjourn." Id. at 219.

The Constitution created a shared system of the appointment power between the Senate and the President in Article II of the Constitution: the Appointments Clause.[2] Under this Clause, the President

[2] [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

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may nominate individuals for certain positions within the Executive and Judicial Branches, subject to Senatorial appointment. An exception to this system of shared power immediately follows: The Recess Appointments Clause. The Recess Appointments Clause states, "The President shall have power to fill *vacancies that may happen during the Recess* of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3 (emphasis added).

The Executive Branch claims that the words of the Recess Appointments Clause are pliable and create a broad power for the executive. The Executive Branch does so primarily in reliance on the select opinions of past Attorneys General – the Presidents' own lawyers. Accordingly, there are two fundamental questions at hand. First, what does "the Recess" mean? Does it mean solely the Recess between sessions of Congress or does it apply more broadly to the frequent and often shorter periods of adjournment within sessions? Second, what does "happen" mean in the context of vacancies? Does it mean only those vacancies that arose during the Recess or does it apply more broadly to vacancies that occurred at some point during the prior legislative session and that continue to exist in the Recess? The answers to these questions are not found in the self-interested

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in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2, cl. 2.

opinions of the Executive Branch, but in an analysis of the Constitution itself.

ARGUMENT

An examination of the text of the Recess Appointments Clause, its relation to other provisions within the Constitution, its historical context, purpose, and practical experience all lead to the conclusion that the Clause refers only to intersession recesses and only to vacancies arising during intersession recesses. To read "the Recess" or "happen during the Recess" as broadly as suggested by the Executive Branch provides no principled limits to the President's appointment power, allowing him to make appointments for longstanding vacancies whenever the Senate adjourns for lunch. See *NRLB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 230 (3d Cir. 2013). The Government's arguments to this Court thus would make the Appointments Clause a virtual nullity, tearing down the bulwark that "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878 (1991).

I. Recess Appointments Are Only Constitutionally Permissible During Intersession Recesses Of Congress.

A. The Meaning of "the Recess," As Demonstrated by Pre-Ratification Sources, Supports a Limited Interpretation.

As Judge Thomas M. Cooley wrote, "the meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 54 (1868). The meaning of the Clause, and specifically its terms "the recess" and "happen," should thus be examined for how they were commonly understood at the time of the Constitution's ratification. Using the modern understanding of words to interpret a document written over two hundred years ago often leads the analysis astray. For example, reading the phrase "natural born Citizen" in Article II, Section 1, Clause 5, using only current usage could lead to the absurd conclusion that prospective presidents must be born to mothers who did not use anesthesia during childbirth. Edward Whelan, *Are You An Originalist?*, National Review Online (July 13, 2005), available at http://www.eppc.org/publications/are-you-an-originalist/.

Dictionaries from the period before the Constitution's ratification provide numerous definitions for the word "recess." Samuel Johnson's lists retirement, retreat, withdrawing, recession; departure; place of

retirement, place of secrecy, private abode; departure into privacy; remission or suspension of any procedure; and removal to distance.[3] Admittedly, these definitions do not all indicate a formal suspension of procedure, as distinct from an informal or temporary one. In legislative practice in the pre-ratification era, furthermore, the word "recess" by itself was used to describe intra-session breaks and even short breaks within a single day. Robert G. Natelson, *The Origins and Meaning of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause*, p. 20 (forthcoming publication at Harvard Journal of Law and Public Policy, Vol. 37, No. 1 (2014)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257801. This colloquial understanding of "recess" as a short break continues in the present day.

The inquiry does not stop there, however. Numerous sources indicate a distinct meaning in the pre-ratification era when "the recess" as opposed to "recess" alone was used. Blackstone's Commentaries from 1765-1769 uses the term "the recess" and does

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[3] Johnson provides: "1. Retirement; retreat; withdrawing; recession. 2. Departure. 3. Place of retirement; place of secrecy; private abode. 4. [Recez, Fr.] Perhaps an abstract of the proceedings of an imperial diet. 5. Departure into privacy. 6. Remission or suspension of any procedure. 7. Removal to distance. 8. Privacy; secrecy of abode. 9. Secret part." Samuel Johnson, 2 *A Dictionary of the English Language* 469 (6th ed. 1785). Another contemporaneous dictionary defines "Recess and Recession" as "retreating or withdrawing; a Place of Retreat or Retirement." Nathan Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763).

so in a way to describe the period *between* sessions of Parliament. For example, within discussions of "Public Wrongs," he writes of "the recess" of parliament as distinct from "the session" of parliament.

> During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last-mentioned, of our lord the king in parliament. . . . But in the court of the lord high steward, which is held in *the recess* of parliament, he is the sole judge in matters of law. . . . William Blackstone, 4 *Commentaries on the Laws of England* (1st ed. 1765) at 260.

Moreover, it is critical to note that the Constitution uses the term "the Recess" when examining the text. The Constitution does not state that the recess appointment power exists "during a Recess" or "during Recesses." The notion that the definite article limits the scope of applicable recesses is supported by Professor Robert G. Natelson, who after exhaustive research of the pre-ratification era determined that "in government practice the phrase 'the Recess' *always* referred to the gap between sessions." Natelson, *supra*, at 20. State legislative journals, gubernatorial reports and other documents show that "the Recess" was used frequently to refer exclusively to periods of time between legislative sessions and not while the legislature was currently in session – in other words, intersession recesses as opposed to intrasession recesses. Id.

New Hampshire's Constitution of 1784, which referred to the executive branch as the "President" and the legislative branch as the "General Court," gave the executive different powers at different times – during "the recess" of the legislature and during the "session" of the legislature:

> The President, with the advice of Council shall have full power and authority in *the recess* of the General-Court, to prorogue the same from time to time, not exceeding ninety days in any one recess of said Court; and during the session of said Court, to adjourn or prorogue it to any time the two houses may desire and to call it together sooner than the time to which it may be adjourned or prorogued. . . . N.H. Const., Part Second, Art. 50 (1784) (emphasis added).

The Massachusetts Constitution of 1780 also gave the state governor different powers depending on whether the legislature was in "session" or in "recess." Mass. Const. of 1780, Pt. 2, Ch. 2, Sec. 1, Art. 5.

New Hampshire's legislative journals show that the state followed this practice of using the term "the recess" to indicate periods when the legislature was not in session. Natelson, at 24. In Virginia, state legislators were once ordered to "consult with their constituents, during the recess of Assembly, on the justice and expediency of passing the bill . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates at their next session." Journal

of the House of Delegates of the Commonwealth of Virginia (1777-1781) (Thomas W. White, 1827) 123 (Dec. 18, 1778). New York's legislative journal from 1766 to 1776 includes frequent references to "the recess of this house" or "the recess of the house" that unequivocally refer to periods when the legislature was not in session.[4] The legislatures of Massachusetts and Rhode Island also used "the recess" in this way. See Natelson, at 23-24.

There are many more examples in the states where "the recess" was not so explicitly referring to the gap between sessions, but can be inferred easily from context. State legislatures frequently created committees or delegated power to the executive branch to act during the recess, suggesting at the very least a substantial period of time was contemplated. The legislatures of Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York,

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[4] E.g., "Resolved, . . . That the consideration of the prayer of the petition of Ryer Schermerhorn and others, for a bill to appoint commissioners to settle the said controversy . . . be postponed till the next sessions. And that this house recommends to the parties to agree among themselves, during the recess thereof, on amicable terms for settling the said controversy." January 29, 1773. Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York (1820) 38; and "Ordered, That the said bill be postponed till the next session; and that the clerk of this house do, in the recess thereof, (on application to him made) furnish the parties . . . with certified copies of the said bill. . . ." March 7, 1773. Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York (1820) 83.

North Carolina, Pennsylvania, Rhode Island and South Carolina all provide examples of such delegations of power. Natelson, at 25-28. In fact, some states customarily passed an omnibus bill near the end of the session that listed the various powers delegated to the state's executive branch in "the recess" or "until the next Setting." Id. at 28 (citing 19 *The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright and Potter Printing Co. 1918) at 720-21 and at 812).

The legislature's delegation of power to act during the recess may also be found in The Articles of Confederation of 1781:

> The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction. Arts. Confed. art. IX.[5]

[5] The powers of the Committee of the States were further provided for in Article X: "The Committee of the States, or any nine of them, shall be authorized to execute, *in the recess of Congress*, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of

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The Executive Branch argues that the only time the Congress invoked this power was during an intrasession recess in 1784. Petitioner's Brief, p. 15. That is not correct. According to Natelson, "The intermission actually lasted from June 3, 1784 to the first Monday in November (that is, November 1, 1784), the date designated by the Articles of Confederation for the beginning of the next term of office. Thus it was necessarily an inter-session recess." Natelson, at 30.

The Executive Branch, in the Court below, has also pointed to an instance post-ratification in which the Senate sat a New Jersey Senator supposedly appointed during an intrasession break, despite this Clause likewise being limited to "the Recess." See 8 Annals of Cong. 2197 (Dec. 19, 1798). State legislatures at that time, however, had multiple "sittings" throughout the year. So while they did not adjourn *sine die* between each, they took intersession recess repeatedly. Again, the Executive Branch's example thus is mistaken, as the New Jersey Legislature had multiple "sittings" throughout the year and took "the recess" between each of those "sittings," enabling this appointment. See New Jersey Legis. Counsel Journal, 23rd Sess., 1st Sitting 1, 20 (1798); New Jersey Legis. Counsel Journal, 23rd Sess., 2d Sitting 21 (1799). Nevertheless, even if it is assumed that the Executive Branch can point to individual instances of

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nine States in the Congress of the United States assembled be requisite." Id. (emphasis added).

intrasession recess appointments among thirteen states with varying degrees of effective record-keeping, it does not disprove the larger point. The breadth of usage of "the recess" to mean intersession recesses throughout the United States in the ratification era strongly supports that it was a common understanding of the term.

B. A Textual Analysis of the Clause and its Relation to Other Parts of the Constitution Indicates That "the Recess" Means Intersession Recess.

A textual analysis of the Recess Appointments Clause indicates that it applies only to intersession recesses. First, as noted earlier, the singular term "Recess," as opposed to "Recesses," suggests the Framers intended limiting the use of recess appointments for the intersession recess only. The Framers understood that Congress would enter recesses during sessions as evinced by Article I's language pertaining to instances where one "House of Congress adjourns 'during the Session of Congress.'" Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 Mich. L. Rev. 2204, 2211 (1994). These recesses, however, were comparatively brief and rare. Id. at note 36 (citing U.S. Gov't Printing Office, 1993-1994 Official Directory, 103d Congress at 580-81 (1993)). The Framers did not use the plural "Recesses" which would have any clearly and without question granted the power during any and all recesses. Instead, they used the

singular "Recess" because they were referring to the break between sessions of Congress.

Second, the Recess Appointments Clause's use of the definite article "the" demonstrates that the Framers intended limiting this power to intersession recesses, under the textual canon of the rule against surplusage. There was a reason why the Framers chose "the" instead of "a" or "any." The use of the definite article before Recess thus indicates that the Framers were creating a limitation on which recesses were contemplated. See *Freytag*, 501 U.S. at 902 (Scalia, J., concurring) (arguing that the use of the definite article in the conferral of authority in Appointments Clause to "the Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution.").

This interpretation of "the Recess" was adopted by President Theodore Roosevelt's Attorney General, Philander C. Knox, on the propriety of appointing an appraiser to the port of New York during the December 1901 holiday adjournment. Knox noted, "It will be observed that the phrase is 'the recess.'" 23 Op. Att'y Gen. 599, 1901 U.S. AG LEXIS 1, at *3. At the time, intrasession recesses were rare. Knox, in distinguishing the terms, noted that "adjournment" "means a merely temporary suspension of business from day to day" where "the recess means the period after the final adjournment of Congress for the session, and before the next session begins." Id. at *5. He concluded, "[T]his period following the final adjournment for the session which is the recess during which the

President has power to fill vacancies by granting commissions which shall expire at the end of the next session." Id. at *6. Thus, "any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term." Id.

Finally, the Constitution's use of the terms "recess" and "adjournment" suggests the Framers intended the term "recess" to mean intersession recess. Returning to textual canons, it is presumed that the use of different words demonstrates the intent to convey different meanings. Appearing in five clauses in the Constitution, the term "adjournment" refers to both intersession and intrasession recesses. For example, the reference to "adjournment" in the presentment clause refers to all recesses as both types could interfere with "the President's constitutional right to take 10 days to return a bill to the Congress." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1558 (2005). Article I, Section 5's language referencing the "Three Day Adjournment" refers to intrasession recesses and can also be applied to intersession breaks. "If a proposed adjournment were to end the session and bring about an intersession recess, that would presumably also be covered by the Clause, as an adjournment 'during the session . . . for more than three days.'" Id.

The usage of the term "recess" within the constitution does not apply to both adjournments and

recesses. "Adjournment" applies to both intersession and intrasession recesses. Unlike the meaning of "adjournment," recess does not necessarily encompass intrasession and intersession breaks. This indicates the Framers believed recess to apply in a more narrow context. Id. at 1559-60.

C. The Purpose of the Recess Appointments Clause Supports a Narrow Reading of "the Recess."

The purpose of the Recess Appointments Clause is best understood not only in conjunction with the Appointments Clause but as part of the overall system of separation of powers in the Constitution. In this way, it supports a limited sense of "the Recess" to intersession breaks so that the integrity of the Appointments Clause is preserved.

The Appointments Clause confers appointment power upon the President and the Senate. U.S. Const. art. II, § 2, cl. 2. Envisioned as a joint power, the Framers believed it would be dangerous to vest complete appointment power with one person. Even Alexander Hamilton, a proponent of strong presidential authority, acknowledged the benefits of obligating the consent of the Senate: "[the cooperation of the Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice." Hamilton, *The Federalist* No. 76. In his opinion, giving the Senate a role in making

appointments "would be an efficacious source of stability in the administration." Id. Thus, the Executive and Legislative Branches have a specific role in filling the ranks of executive officers and judges. The division of the appointments power "accomplished two goals: responsibility – from the President's power of nomination; stability – from the Senate's power of confirmation." Carrier, 92 Mich. L. Rev. at 2225.

Furthermore, the need for an exception to the Appointments Clause was evident in an era of very long intersession recesses. The Framers understood that it would be improper to obligate the Senate to be in continual session. As intersession recesses sometimes lasted as long as nine months, the Framers drafted the Recess Appointments Clause to ensure vacancies would not result in crucial offices being left empty. Rappaport, 52 UCLA L. Rev. at 1491; *Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993) ("It is apparent that the purpose of the Recess Appointments Clause was to prevent disruptions in the functioning of the government occasioned by periods in which the Senate is unable to perform its role of advice and consent.") Indeed, the purpose of the Recess Appointments Clause was not to grant the President a tool to evade the confirmation process. Rather, the power ensured that critical offices would not be left vacant during the long intersession recesses regularly occurring during the Framer's era. Moreover, the Framers intended the recess appointments power "to be nothing more than a supplement to the other, for the purpose of establishing an

auxiliary method of appointment, in cases to which the general method was inadequate." Hamilton, *The Federalist* No. 67.

Commentators contrast the extensive debates surrounding the general appointment power with the lack of debate regarding the recess appointments power and have logically concluded the recess appointments power to be "auxiliary in nature and that [the Framers] believed it would not affect the Constitution's meticulously developed system of checks and balances." Carrier, 92 Mich. L. Rev. at 2225. If the Framers had intended an expansive reading of the term recess, they would have engaged in more extensive debate concerning the issue. Id. ("[To give the President this power] seems unlikely in light of the minimal impact the Framers intended the clause to have on the system of checks and balances.")

Moreover, permitting intrasession recess appointments can result in appointments for exceptionally extended periods, possibly twice as long as intersession recess appointments, based on Article II's language that recess appointments "shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Such a reading undermines the checks and balances built into the process because it provides incentives for the President to bypass the Senate whenever possible.

In summary, by the Recess Appointments Clause's own words, its history, purpose and context within the Constitution, the President may only make

appointments during *intersession* and not *intrasession* recesses.

II. Recess Appointments Are Only Constitutionally Permissible For Vacancies That "Happen" During the Recess of the Senate.

The recess appointments at issue in this case are also invalid because the NLRB vacancies the President attempted to fill in January 2012 did not "happen" during a Senate recess. Accordingly, those preexisting vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointments power to be used only when the vacancy actually "happens" or arises during a recess, not whenever a vacancy "happens to exist" during a recess. Once again, the Government has advocated a broader meaning of words to support broader executive power.

A. The Meaning of "Happen," As Demonstrated by Pre-Ratification Sources, Supports a Limited Interpretation of "Vacancies That Happen During the Recess of the Senate."

Returning to the dictionaries from the period before the Constitution's ratification, they overwhelmingly establish that "happen" signifies a sense of "arise" rather than "happen to exist." Samuel Johnson provides "1. To fall out; to chance; to come to

pass. 2. To light; to fall by chance." Samuel Johnson, 1 *A Dictionary of the English Language* 929 (6th ed. 1785). Numerous other dictionaries provide similar phrases that suggest a discrete event, as opposed to an ongoing event or condition. In fact, Professor Natelson conducted a survey of nearly a dozen pre-ratification era dictionaries that produced only a single example of "to be" and that was a secondary definition after "to come to pass." Natelson, at 37-38. In short, the suggestion that "happen" in the Recess Appointments Clause would have been commonly understood to mean "happen to exist" during the ratification era is clearly false.

B. A Textual Analysis of the Clause and its Relation to Other Parts of the Constitution Suggest a Limited Meaning to "Happen During the Recess."

Returning again to the text, the Recess Appointments Clause states: "[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." U.S. Const., art. II, § 2, cl. 3 (emphasis added). The clause does not say that the President may fill all "vacancies that may happen to exist" whenever a Senate recess occurs. The Constitution's plain text states that a vacancy can only be filled by a recess appointment if the vacancy actually occurred "during the Recess of the Senate," such as through death or

resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose months or longer before the purported Senate recess. As they did not "happen" during any recess, the appointments are unlawful.

As in other cases, "[t]he words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary." *The Pocket Veto Case*, 279 U.S. 655, 679 (1929), citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). The words in the Constitution are clear: only "Vacancies that may happen during the Recess" can be filled without the Senate's advice and consent. The words do not contemplate the filling of vacancies "that may happen to exist" during a recess.

To read "happen" to mean "happen to exist" violates the textual canon of the rule against surplusage. It creates a redundancy for no purpose. The Framers could have written: "The President shall have Power to fill up all Vacancies during the Recess of the Senate . . . " or "The President shall have Power, during the Recess of the Senate, to fill up all Vacancies . . . " To add "happen" to mean "happen to exist" only creates ambiguity.

C. The Purpose of the Recess Appointments Clause Supports a Narrow Reading of "Happen During the Recess."

As stated earlier, the purpose of the Recess Appointments Clause is best understood not only in conjunction with the Appointments Clause but as part of the overall system of separation of powers in the Constitution. In this way, it supports a limited sense of "happen" to mean only those vacancies that arise during the Recess so that the integrity of the Appointments Clause is preserved. Indeed, an interpretation of the Recess Appointments Clause that allows the filling of any "Vacancies that may happen to exist" defeats our constitutional system of checks and balances and negates the joint power of appointment vested in the Executive and Legislative Branches. A "happen to exist" interpretation allows a President to wait for an inevitable recess, and then unilaterally appoint nominees seriatim, thereby permanently writing the Senate out of the confirmation process. This is something the Framers surely opposed. See generally *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986) (discussing importance of separation of powers and checks and balances). Precisely because the Framers wanted to diffuse governmental power and ensure the Senate's check on the President's appointments power, they did not grant the President the broad power to fill any vacancies that "may happen to exist" during a recess.

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate's advice and consent: 1) Congress may authorize the appointment of inferior officers by other governmental branches; and 2) the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. Precisely because these are exceptions to the normal joint power of appointment preferred by the Founders, they must be narrowly construed. Rappaport, 52 UCLA L. Rev. at 1501-46.

The nation's first Attorney General, Edmund Randolph, authored an opinion denying the President's authority to fill vacancies that arose during a Senate session and continued into its subsequent recess. See Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson*, 165-67 (John Catanzariti et al. ed., 1990) (explaining that the Recess Appointments Clause must be "interpreted strictly" because it serves as "an exception to the general participation of the Senate"). Furthermore, Randolph concluded that the power must "be considered as an exception to the general participation of the Senate" because the "[s]pirit of the Constitution favors the participation of the Senate in all appointments." Id. Alexander Hamilton likewise believed "[i]t is clear [that] . . . the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), 23 *The Papers of Alexander Hamilton* 94 (Harold C. Syrett ed., 1976). See also *The Federalist* No. 67 (Alexander

Hamilton) ("vacancies might happen in their recess, which it might be necessary for the public service to fill without delay.")

III. The Exercise of the Recess Appointments Clause Shows The Inevitable Problems When the Text of the Constitution is Abandoned.

In the years immediately following the Constitution's ratification, the limited sense of both terms, "the Recess" and "happen" largely prevailed. Similar to the state practice of state governors in the pre-ratification era, President George Washington's annual messages to Congress included references to "your recess" twice and "the recess of Congress," suggesting their distinction from temporary breaks.[6]

[6] In 1791, he wrote, "In the interval of *your recess* due attention has been paid to the execution of the different objects which were specially provided for by the laws and resolutions of the last session." Third Annual Message of George Washington, October 25, 1791 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs03.asp. In 1793, he wrote, "An anxiety has been also demonstrated by the Executive for peace with the Creeks and the Cherokees. The former have been relieved with corn and with clothing, and offensive measures against them prohibited during *the recess of Congress*." Fifth Annual Message of George Washington, December 3, 1793 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs05.asp. (Congress' prior session had ended March 4, 1793 and had only resumed on December 2, 1793.) Finally, in 1794, he wrote, "When we call to mind the gracious indulgence of Heaven by which the American people became a nation; . . . with the deepest regret do I announce to you that during *your*

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Washington also developed a practice to address late session vacancies whereby he would nominate someone without knowing if they would consent, and seek their appointment by the Senate. If they later declined the appointment, this created a vacancy during the recess, allowing him to make a proper recess appointment. 52 UCLA L. Rev. at 1522-23. This suggests he agreed with the limited sense of "happen," as in "happen to arise." As shown earlier, President Washington's Attorney General advocated for the limited, not broad, reading of the Clause as well.

In fact, for most of the nation's history, recess appointments were generally limited to intersession recesses. Carrier, *supra*, at 2210. During the first 150 years of this nation's history, there are only two documented cases of a President making an intrasession recess appointment. Id. at 2209. Prior to 1901, the only intrasession recess appointments were during President Andrew Johnson's term – an administration that issued no written opinions arguing for the constitutionality of intrasession recess appointments. Rappaport, 52 UCLA L. Rev. at 1572.

Unfortunately, however, the seeds were planted for a purposive, in contrast to a textual, interpretation of the Clause by President James Monroe's

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recess some of the citizens of the United States have been found capable of insurrection." Sixth Annual Message of George Washington, November 19, 1794 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs06.asp.

Attorney General William Wirt. Wirt was the first major proponent of the "happen" as "happen to exist" argument. Wirt pointed to situations where he believed the President's Recess Appointments powers are unnecessarily constrained – as when a late session vacancy arises or when the Legislature might recess abruptly – such as after invasion. He argued that "the substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." 1 Op. Att'y Gen. 631, 632 (1823). Of course, Wirt only focused on one purpose of the Appointments Power. Wirt assumed the filling of vacancies was paramount, and ignored the other purposes as outlined by Hamilton in the Federalist Papers – to ensure that those with "unfit character" were not appointed to the government and to promote the government's "stability."

The purposive approach to the Recess Appointments Clause, thus, is an excuse to ignore its terms and the compromise between the Legislative and Executive Branch inherent in the Appointments Clause. See *Federal Reserve Sys. v. Dimension Fin. Corp*., 474 U.S. 361, 374 (1986) (per Burger, C.J.) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise."). The purposive interpretation of the Recess Appointments Clause, furthermore, has created a steady erosion of the separation of powers principle undergirding it at the expense of the Senate.

President Harding's Attorney General, Harry M. Daugherty, adopted Wirt's expansive approach in 1921, this time to the meaning of recess, and parsed the purpose of the clause to his ends as the President's lawyer. Daugherty advocated for a practical approach. He argued that "the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained." 33 Op. Att'y Gen. 20, 21 (1921). To Daugherty, therefore, it did not matter whether the Senate was adjourned or in recess. "[T]he real question . . . is whether in a practical sense the Senate is in session so that its advice and consent can be obtained. To give the word 'recess' a technical and not a practical construction is to disregard substance for form." Id. at 21-22.

There is substance behind the form of the Recess Appointments Clause, however. It was designed to be an exception to a larger system requiring cooperation among branches in appointments, as discussed earlier. To allow the President to decide for himself when practice suited him is to ignore that substance. Another inherent problem with Daugherty's argument, moreover, is its failure to provide any principled minimum time limit to the Senate's absence. Daugherty feebly attempted to argue that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of [three days] is taken" but that, as practice has since shown, was

false bluster. Id. at 25. As he admits, "In the very nature of things the line of demarcation can not (sic) be accurately drawn." Id. Once the lines of demarcation created by the Constitution are abandoned, as we have seen, it is difficult to redraw them convincingly. For example, some have attempted to set the minimum adjournment time by the three days of the Adjournments Clause, despite the fact that "[n]othing in the text of either Clause, the Constitution's structure, or its history suggests a link between the Clauses." *Noel Canning v. NLRB*, 705 F.3d 490, 504 (D.C. Cir. 2013).

Proponents of expanded executive power have also pointed to an opinion from a purported legislative source that acquiesces to the interpretation of the President's Attorney General at the Senate's expense. 28 Comp. Gen. 30, B-77963, 1948 WL 512 (Comp. Gen.). The Executive Branch cites the Comptroller General as a "legislative officer" who adopted the Daugherty opinion as "the accepted view" of the Recess Appointments Clause. Petitioners Brief at 26. It should be noted, however, that Comptroller General Warren, the issuer of the opinion, had been appointed by a Democratic President, Franklin Roosevelt, and the position he took in the opinion generally supported the recess appointments of Democratic President Harry Truman, who had bitter relations with a Republican-controlled Senate.

The Government's reliance on the Comptroller General, past Attorneys General and the Department of Justice's Office of Legal Counsel raises several

issues. First, the Executive Branch cites the weight of administrative and not judicial opinion. This body of administrative opinion is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), nor is it particularly persuasive. The President's lawyers (and appointees) are likely to adopt an expansive, rather than narrow, interpretation of executive power. As Justice Scalia wrote in the context of an Attorney General's opinion of a criminal statute:

> Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion – assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. *Crandon v. United States*, 494 U.S. 152, 177-178 (1990) (Scalia, J., concurring).

Unfortunately, however, the courts have only recently begun to correct the erroneously broad view of the Recess Appointments Clause. This lack of judicial opinion is due in part to the lack of legal challenges to recess appointments. This is certainly understandable, given the potential roadblocks preventing cases from ever coming to the bar: standing,

political question, the natural reluctance to ask a judge to invalidate the opinions of a sitting judge. After reviewing the Executive Branch's appendix of purported intrasession appointments, one might ask, who would have had standing to challenge the appointment of the Secretary of Legation to Prussia in 1867? Petitioner's Brief at 2a. Which American citizen would have wanted to challenge Dwight D. Eisenhower's promotion to Major General in 1943? Id. at 11a. Furthermore, how often would a lawyer representing an aggrieved client suggest they ask a judge to overturn the appointment of a fellow judge? The case at bar highlights the unusual facts necessary to a clearly justiciable controversy – an entire quorum of an administrative board was appointed under dubious circumstances. It is no wonder that there has been such a paucity of judicial opinion on the issue of recess appointments. The Executive Branch's long record of erroneous practice should thus have little bearing on the Court's analysis of the constitutional issues at hand.

Certainly, the Senate has had powers to push back against dubious recess appointments, but history has shown that the institution has had a shifting perspective that seems to arise with changes in partisan affiliation. Furthermore, any attempt by the Senate to counter improper recess appointments by legislation would require cooperation from the House and the President himself for enactment.

The Executive Branch has now taken the extreme position of making a recess appointment while

the Senate was in *pro forma* session. The instant case is the inevitable culmination of the abandonment of the Recess Appointments Clause's clear boundaries. The Executive Branch has gone beyond dubious constitutional interpretations and has now even assumed the role for itself of judging the Senate's own rules. This Court should not allow the Executive Branch to continue its flouting of the Constitution at the Senate's expense.

CONCLUSION

For the foregoing reasons, the Recess Appointments Clause's text, context, history and purpose, the NLRB's appointments in the instant case were constitutionally invalid. The D.C. Circuit's decision should be affirmed in full and the recess appointment power restored to its properly limited exercise.

Respectfully submitted,

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