

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL LABOR RELATIONS BOARD, :

4 Petitioners : No. 12-1281

5 v. :

6 NOEL CANNING, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Monday, January 13, 2014

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

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17 Petitioner.

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19 Respondents.

20 MIGUEL ESTRADA, ESQ., Washington, D.C.; for Senate
21 Republican Leader Mitch McConnell, et al., as amici
22 curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 12-1281, the
5 National Labor Relations Board v. Noel Canning.

6 General Verrilli?

7 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
8 ON BEHALF OF THE PETITIONER

9 GENERAL VERRILLI: Mr. Chief Justice, and
10 may it please the Court:

11 The interpretation of the Recess
12 Appointments Clause that Respondent urges would
13 repudiate the constitutional legitimacy of thousands of
14 appointments by presidents going back to George
15 Washington, and going forward, it would diminish
16 presidential authority in a way that is flatly at odds
17 with the constitutional structure the Framers
18 established.

19 Respondent simply has not advanced the
20 compelling case that would be needed to strip presidents
21 of their traditional authority to make appointments
22 during intra-session recesses and to fill preexisting
23 vacancies.

24 CHIEF JUSTICE ROBERTS: You say -- you say
25 that it would repudiate the constitutionality of

1 appointments. You don't suggest that those -- the
2 actions of those appointees would be invalid going back
3 however far you want to go back, do you?

4 GENERAL VERRILLI: No, but they -- no, I
5 don't, Mr. Chief Justice, but it certainly would
6 repudiate the legitimacy of those appointments.

7 JUSTICE SOTOMAYOR: Why not?

8 JUSTICE GINSBURG: How did it -- how did it
9 affect the -- how many board decisions will have to be
10 redone, or how did -- how is the board coping with that
11 problem?

12 GENERAL VERRILLI: Well, there are many
13 dozens of board decisions and, perhaps, many hundreds of
14 board decisions that are under a cloud as a result of
15 the D.C. Circuit's ruling in this case. And so, the
16 board will have a considerable amount of work to do
17 in -- if the D.C. Circuit's decisions were to be
18 affirmed.

19 Now, there would be issues about waiver,
20 there'll be issues about whether there -- there is
21 authority sufficient to justify what the board did under
22 other circumstances or apparent authority argument. So
23 that would all have to be sorted out with respect to the
24 board's --

25 JUSTICE SOTOMAYOR: What would happen, under

1 the reasoning of this case, what would happen to the
2 decisions of recess-appointed judges?

3 GENERAL VERRILLI: Well, I think that --

4 JUSTICE SOTOMAYOR: Of which there's been
5 quite a few.

6 GENERAL VERRILLI: I think that would be a
7 very serious question, Justice Sotomayor, and I think it
8 does point up the -- the difficulty with the position
9 Respondent is urging.

10 JUSTICE SCALIA: Well, surely, you would --
11 you would argue the de facto officer doctrine.

12 GENERAL VERRILLI: Yes, we would.

13 JUSTICE SCALIA: Of course you would.

14 GENERAL VERRILLI: Yes, we would.

15 JUSTICE SCALIA: And we've applied that in
16 innumerable cases. You don't really think we're going
17 to go back and rip out every decision made.

18 GENERAL VERRILLI: Well, I would certainly
19 hope not, Your Honor, but it certainly casts a serious
20 cloud over the legitimacy of all of those actions. And
21 it does point up the fact that the recess power,
22 including appointments during intra-session recesses and
23 to fill preexisting vacancies has been used to fill
24 offices of great importance.

25 JUSTICE SCALIA: You started off by saying,

1 you know, it would -- it would repudiate so many actions
2 that have been taken. I have a very, very stark
3 question: Suppose I agree with the court of appeals
4 that the only -- the only interpretation of -- of the
5 Constitution is that the vacancy must have arisen during
6 the recess, just by hypothesis. I agree with that,
7 okay?

8 What do you do when there is a practice
9 that -- that flatly contradicts a clear text of the
10 Constitution? Which -- which of the two prevails?

11 GENERAL VERRILLI: Now, I think the practice
12 has to prevail, Your Honor, but I do -- and I --

13 JUSTICE SCALIA: So if you ignore the
14 Constitution --

15 GENERAL VERRILLI: But I don't think --

16 JUSTICE SCALIA: -- often enough, its
17 meaning changes?

18 GENERAL VERRILLI: But, Your Honor, of
19 course, in this situation, the meaning of the clause
20 with respect to the timing of -- of the vacancy has been
21 a matter of contention since the first days of the
22 Republic.

23 JUSTICE SCALIA: Now, you're -- you're
24 questioning my hypothesis. You have to accept my
25 hypothesis.

1 GENERAL VERRILLI: Well, I think I've
2 answered the question accepting your hypothesis, but I
3 think --

4 JUSTICE SCALIA: Let's assume that the text
5 is clearly against you. Should I say, oh, yes, it -- it
6 says something else, but the practice for over 200 years
7 has been something different and it's the practice that
8 must prevail.

9 GENERAL VERRILLI: Well, the practice has
10 started with George Washington, and it has worked
11 through the --

12 JUSTICE SCALIA: Yes or no?

13 GENERAL VERRILLI: I think -- I think I've
14 already answered that.

15 JUSTICE SCALIA: Does the practice prevail
16 over the clear text --

17 GENERAL VERRILLI: The practice gives
18 meaning to the -- the practice gives meaning to the
19 Constitution --

20 JUSTICE SCALIA: You're questioning my -- my
21 hypothesis again.

22 GENERAL VERRILLI: No --

23 JUSTICE SCALIA: I am assuming a clear text
24 of the Constitution and a practice that is -- is
25 contrary to it.

1 GENERAL VERRILLI: It's extremely unlikely
2 that would arise if the text were so free of doubt. But
3 if --

4 JUSTICE SCALIA: You do not want to answer
5 my hypothesis.

6 GENERAL VERRILLI: No, I am -- I am
7 answering. I think I already answered it once,
8 Justice Scalia, but I'll answer it again. The answer is
9 I think, given this -- a practice going back to the
10 founding of the Republic, the practice should be -- the
11 practice should govern, but we don't have that here.
12 This provision has been subject to contention as to its
13 meaning since the first days of the Republic.

14 JUSTICE ALITO: Well, let me ask you about
15 the premise. A vacancy is something that begins at a
16 particular point in time and then it continues for some
17 period. And I was trying to think of some other things
18 that might fall into the same category. One would be an
19 appointment to a Federal office.

20 So you were appointed as Solicitor General
21 at a particular point in time, and the appointment
22 continues. Another example might be a marriage. It
23 happens at a particular point in time, and it continues
24 for a -- a period of time.

25 Now, would we say that your appointment as

1 Solicitor General is happening today and will happen
2 again tomorrow and happened yesterday? Is that the way
3 the English language is used?

4 GENERAL VERRILLI: But the word "happens"
5 may not always be an apt phrase, the phrase "may
6 happen," the constitutional phrase, but it is a natural
7 use. And if I may, Justice Alito, I'll give you a
8 counterexample. If Congress had enacted a statute in
9 the summer of 2008 that said the Federal Reserve is
10 invested with all powers necessary to deal with any
11 financial emergency that may happen in 2009, if that
12 emergency first arose in November of 2008 I don't think
13 anybody would interpret that statute as denying the
14 Federal Reserve the authority that Congress conferred.
15 And that's because "may happen" -- "may happen" won't
16 cover every situation of a persisting state, but it's
17 certainly a natural reading of it that covers some. And
18 as Jefferson said, it's certain -- in this context, it's
19 certainly susceptible of being interpreted to
20 mean --

21 JUSTICE GINSBURG: General Verrilli, we've
22 taken you off your starting point. Your starting point
23 was what is it -- what constitutes a recess. And your
24 position is that it can be an intra-session recess. But
25 if we look back historically, Congress met and they met

1 continuously. And then they went on horseback back home
2 and they were away for 6 months, even 9 months.

3 Today, there's nothing like that. The
4 inter-session -- the inter-session recess could be --
5 could be an hour. So what do we do with that? There
6 was the vision of a long recess running for months and
7 today, the inter-session recess might be momentary.

8 GENERAL VERRILLI: So I think I have two
9 points to make in response to the question of what to
10 do. The first one is that, with respect to the original
11 understanding, we do think that the term "recess" and
12 the phrase "the recess" certainly at the time of the
13 founding did encompass recesses that occurred during a
14 session of Congress, during a session of the
15 legislature, and not just in between sessions of the
16 legislature.

17 I would point the Court to Jefferson's
18 Manual of Parliamentary Procedure, which describes a
19 recess by adjournment as occurring within a session. I
20 would point to the Adjournment Clause itself, which says
21 if the -- one house of Congress wants to take a break of
22 longer than 3 days during the session, it needs the
23 consent of the other house, which indicates that the
24 Framers contemplated the possibility of a break longer
25 than 3 days.

1 I would point the Court to the parliamentary
2 practice of the House of Commons, where the speaker of
3 the House of Commons had authority to call elections
4 when a member died during the recess.

5 JUSTICE KENNEDY: Well, of course, Justice
6 Ginsburg's question points out that your argument is, it
7 seems to me, in search of a limiting principle. A lunch
8 break, a one-day break -- you've -- you've thought about
9 this -- a 3-day break, a 1-week break, a 1-month break;
10 how do you resolve that problem for us?

11 GENERAL VERRILLI: I think the -- the way we
12 resolve that problem is by looking to the Adjournment
13 Clause. We think if it's a break that is sufficiently
14 short, that it wouldn't require the -- wouldn't require
15 the one House to get the consent of the other, but
16 that's a de minimis recess and that's not a recess in
17 which the President would have authority --

18 JUSTICE SOTOMAYOR: Is that 3 days?

19 JUSTICE KENNEDY: And what about the pro
20 forma sessions, then? They don't -- or correct me if
21 I'm wrong. They don't require the consent of the other
22 house.

23 GENERAL VERRILLI: Well, but the problem
24 with the pro forma sessions, I think, Justice Kennedy,
25 is in thinking about the length of the recess. The

1 recess, we would submit, and this is based on the formal
2 dictionary definition of "recess" at the time of the
3 founding and now, which is "a suspension of business,"
4 the recess was from January 3 when the session started
5 until January 23. And the reason I think that --

6 JUSTICE KENNEDY: So -- so you think there's
7 no recess during pro forma sessions?

8 GENERAL VERRILLI: There is a recess. And
9 the reason is because the Senate has issued a formal
10 order that no business shall be conducted and that's a
11 formal --

12 CHIEF JUSTICE ROBERTS: Well, let's just
13 talk -- let's focus on that. What if, instead of saying
14 "No business shall be conducted," the order said, "It is
15 not anticipated that any business will be conducted."
16 Does that suffice to eliminate that period as a recess?

17 GENERAL VERRILLI: I think that it's a --
18 that's a different case and I think, concededly, a
19 significantly harder case for the Executive because
20 here --

21 CHIEF JUSTICE ROBERTS: Yeah. Well, it's
22 difficult and harder, but it also suggests that you're
23 just talking about a couple of magic words that the
24 Senate can just change at the drop of a hat. So maybe
25 the point is not that significant.

1 GENERAL VERRILLI: Well, I think it is
2 significant, Mr. Chief Justice. It's a formal action by
3 the Senate by rule saying that no business shall be
4 conducted. And then in addition, there are other formal
5 actions that the Senate took during this period that are
6 confirming indicia. The Senate passed -- the Senate
7 passed a resolution that gave committees the authority
8 to submit reports and report bills. They passed a
9 resolution giving the -- the President Pro Tempore the
10 power to sign enrolled bills. It passed --

11 JUSTICE KAGAN: General, I think you're --
12 you're not answering the real thrust of the Chief
13 Justice's question, which is that we could just be back
14 here if we -- if we said, well, they didn't phrase this
15 in the right way. Well, they'll phrase it differently
16 and we would be back here with the same essential
17 problem, that you're asking us to peg this on a
18 formality that the Senate could easily evade, and that
19 suggests that it real is the Senate's job to determine
20 whether they're in recess or whether they're not.

21 GENERAL VERRILLI: I think there has to be a
22 limit to that point, Justice Kagan, because, after all,
23 what we're talking about here is a power that the
24 Constitution gives to the President, the power in
25 Article II. And the President has got to make the

1 determination of when there's a recess.

2 JUSTICE SOTOMAYOR: But why? You're making
3 an assumption, which is that the Senate has to take a
4 recess. But the Senate could choose, if it wanted to,
5 and I think there might be some citizens that would
6 encourage it to, to never recess.

7 GENERAL VERRILLI: Sure. Of course, it
8 could.

9 JUSTICE SOTOMAYOR: And -- and to work every
10 day, which --

11 GENERAL VERRILLI: That's true.

12 JUSTICE SOTOMAYOR: -- lots of people do.

13 GENERAL VERRILLI: That's true. They
14 could -- they could decide not to take a recess.

15 (Laughter.)

16 JUSTICE SOTOMAYOR: So --

17 GENERAL VERRILLI: That's absolutely true.
18 But -- but it seems to me that that is the choice that
19 the Constitution puts --

20 JUSTICE BREYER: So what do you say about
21 the Twentieth Amendment, which says that that
22 January 3rd was a meeting? Are you saying they violated
23 the Twentieth Amendment? January 3rd. This says the
24 Congress of the United States shall meet on January 3rd
25 every year, unless they appoint a different day.

1 GENERAL VERRILLI: Yes.

2 JUSTICE BREYER: And they haven't. And,
3 therefore, they met in pro forma session. Or do you
4 think it wasn't a meeting? And what do you think about
5 the other part of the Constitution which says they can't
6 adjourn for more than 3 days without the approval of the
7 House, which they didn't have. So are you saying that
8 the Senate violated those other two amendments of -- the
9 two parts of the Constitution, or are you saying that
10 they have different meanings in the three parts?

11 GENERAL VERRILLI: I think our view is that
12 it's hard to see how the -- what the -- what the Senate
13 did with pro forma sessions complies with either and --

14 JUSTICE BREYER: Okay. So you're saying
15 they violated. But if that -- if they have pro forma
16 sessions on January 3rd, they violate the Twentieth
17 Amendment to the Constitution. You are saying that if
18 they had a pro forma session on January 3rd, that since
19 their meeting -- their recess was still on and lasted
20 more than 3 days, it was a violation of that Adjournment
21 Clause of the Constitution.

22 Now, that's one way to interpret it. Over a
23 long period of time, they have apparently met pro forma
24 on those days. Or we could try to make them mean the
25 same thing, which would mean it was up to the Senate.

1 They consider that a meeting, it's a meeting. What do
2 we do?

3 GENERAL VERRILLI: Or there is another
4 option, Justice Breyer.

5 JUSTICE BREYER: Would you write that
6 opinion, saying the Senate of the United States has
7 violated two -- two provisions of the Constitution?

8 GENERAL VERRILLI: No, no. I don't
9 think you need -- I don't think you need to write that
10 opinion.

11 JUSTICE BREYER: All right. Why not?

12 GENERAL VERRILLI: Because you might,
13 perhaps, give the Senate some deference with respect to
14 requirements that apply only internally to the Congress.
15 But when what you're talking about is the Senate's use
16 of pro forma sessions in a manner that deprives the
17 President of authority that Article II would otherwise
18 give --

19 JUSTICE BREYER: Would it -- would it -- I
20 mean, that's my basic question really. Why is this an
21 important case? I see what you're saying on this one.
22 That's fine for an answer. Thank you.

23 GENERAL VERRILLI: So why --

24 JUSTICE BREYER: What my really basic
25 question is why is this an important case, in your

1 opinion? Now, you've said, oh, because there are
2 thousands of recess appointments. Not on the happen
3 clause. You've listed 7600 or so, really, on the recess
4 part, but on the happen clause, you've only been able to
5 find 102. And moreover, we've had an example of --
6 where this Court, for better or for worse, said that two
7 members of the board is not a quorum, and we got some
8 more members, they dealt with the problem. They
9 ratified all those opinions, they dealt with it. It
10 didn't take them too much time.

11 So -- and we have different political
12 parties taking absolutely opposite sides, it seems to
13 me, or some members thereof, depending on the political
14 party of the President. And we have a clause that had
15 to do with the Constitution and the problem of intra --
16 inter-session recesses when they were 7 months and
17 nobody could meet. Okay, that isn't true anymore.

18 So, explain to me. I'm not saying you're
19 wrong. I just want to hear from your mouth why this is
20 an important case?

21 GENERAL VERRILLI: So it's important for
22 multiple reasons with respect to practicalities and
23 fundamental questions of constitutional structure.

24 Let me start with practicalities and with
25 the happens point, the "may happen" point, that our

1 appendix doesn't purport to be comprehensive or anything
2 like comprehensive. Part of the reason why it can't be
3 comprehensive is that there really aren't records of
4 when the vacancy first arose with respect to huge
5 numbers of recess appointments, and that's because, I
6 submit, it wasn't considered material.

7 But second, I can -- there are -- there are
8 numerous practical examples in our history of when it
9 made a very great deal of difference that the President
10 had the authority to make an appointment to a vacancy
11 that preexisted the recess. We have mentioned the 1948
12 example; the secretary of labor dies on the verge of a
13 very extended intra-session recess by the -- by the
14 Senate. They're going to be out for a month, back for
15 12 days, and then out all the way from June -- they go
16 out in June, they're out for a month, they are back for
17 12 days, and then they're out all the way until December
18 31st. The secretary of labor dies just in advance of
19 them going out in June, and this is -- remember, 1948 is
20 a period of significant labor unrest. We needed a
21 secretary of labor in place.

22 JUSTICE KAGAN: General, would you agree
23 that this clause now is not mostly used to deal with
24 emergencies arising from congressional absence? That
25 most modern Presidents -- and I say this sort of going

1 -- going back to President Reagan, Presidents of both
2 parties essentially have used this clause as a way to
3 deal, not with congressional absence, but with
4 congressional intransigence, with a Congress that simply
5 does not want to approve appointments that the President
6 thinks ought to be approved?

7 You know, absence in this day and age --
8 this is not the horse and buggy era anymore. There's no
9 real -- there's no such thing truly as congressional
10 absence anymore. And that makes me wonder whether we're
11 dealing here with what's essentially an historic relic,
12 something whose original purpose has disappeared and has
13 assumed a new purpose that nobody ever intended it to
14 have.

15 GENERAL VERRILLI: Well, two answers. I
16 don't think its original purpose has disappeared. I
17 mean, the NLRB was going to go dark. It was going to
18 lose its quorum.

19 JUSTICE KAGAN: Yes, as a result of
20 congressional refusal, not as a result of congressional
21 action.

22 GENERAL VERRILLI: And that gets to the
23 second point, which is that it may be true as a matter
24 of raw power that the Senate has the ability to sit on
25 nominations for months and years at a time, but that is

1 100 miles from what the Framers would have expected. If
2 you look at what Hamilton said in Federalist 76 about
3 the advice and consent role of the Senate, he said he
4 thought it would be a power that was rarely exercised
5 and would operate, if at all, invisibly or silently.
6 And in the early days of the Republic, it was -- advice
7 and consent was a matter of days.

8 JUSTICE ALITO: But you are making a very,
9 very aggressive argument in favor of executive power now
10 and it has nothing whatsoever to do with whether the
11 Senate is in session or not. You're just saying when
12 the Senate acts, in your view, irresponsibly and refuses
13 to confirm nominations, then the President must be able
14 to fill those -- fill those positions. That's what
15 you're arguing. I don't see what that has to do with
16 whether the Senate is in session.

17 GENERAL VERRILLI: Well, I do -- I think
18 this -- I think the recess power may now act as a safety
19 valve given that intransigence, and that is actually
20 quite consistent --

21 JUSTICE GINSBURG: But it isn't -- it isn't
22 tied then to the availability of the Congress,
23 availability of the Senate. I think you said throughout
24 your brief that the rationale for the recess power is
25 the President must be able to have the government

1 functioning and staffed even though -- although the
2 Senate isn't -- isn't around. But now the -- you seem
3 in your answers to be departing from the Senate not
4 available and making quite another justification for
5 this.

6 The Senate, I think to be candid, the Senate
7 is always available. They can be called back on very
8 short notice. So what is it that's the constitutional
9 flaw here? It isn't -- it isn't that the Senate isn't
10 available. The Senate is available. It can easily be
11 convened.

12 GENERAL VERRILLI: So let me take a half a
13 step back, if I could, Justice Ginsburg, and answer that
14 question in this way. You know, perhaps it sounds like
15 this is an aggressive assertion of executive authority,
16 but I'd ask the Court to think back to Federalist 51.
17 And what the Framers were most concerned about was that
18 Congress, in the separation of powers calculus, was
19 going to amass authority and drain authority and energy
20 from the Executive, and therefore, the Executive needed
21 to be fortified against those actions by Congress.

22 And one specific way in which the Framers
23 decided to fortify the Executive was by rejecting the
24 notion that the appointment power should reside with the
25 Senate. The Framers considered that and they rejected

1 it. And the reason they rejected it, as this Court
2 noted in its Edmund opinion, was -- was to protect the
3 Executive against encroachment by the legislature.

4 CHIEF JUSTICE ROBERTS: But the compromise
5 they settled on in moving away from that is that the
6 President will nominate and the Senate, if it so
7 chooses, can confirm a nominee. You spoke of the
8 intransigence of the Senate. Well, they have an
9 absolute right not to confirm nominees that the
10 President submits.

11 And it seems to me, following up on Justice
12 Kagan's point, you're latching on to the Recess
13 Appointment Clause as a way to combat that intransigence
14 rather than to deal with the happenstance that the
15 Senate is not in session when a vacancy becomes open.

16 GENERAL VERRILLI: Well, but those things --
17 there are often situations in which the Senate is not in
18 session when a vacancy becomes open or needs to be
19 filled, I guess would be the more accurate way to say
20 it. The examples -- I'll give you another example, if I
21 could, from the 1940s. Taft-Hartley gets enacted in
22 1947 in the summer. One requirement of Taft-Hartley is
23 that the general counsel of the NLRB must enforce the
24 ban on secondary boycotts within a fixed period of time,
25 30 or 60 days. Well, it turns out there is no general

1 counsel of the NLRB at that time, so President Truman --

2 CHIEF JUSTICE ROBERTS: Well, if the Senate
3 has -- the Congress and the Executive have come together
4 to address those sorts of problems in a vast number of
5 cases by providing that there can be an acting general
6 counsel of the NLRB to deal with that situation.

7 GENERAL VERRILLI: Well, actually,
8 Mr. Chief Justice, with respect to multi-member boards,
9 the Vacancy Act doesn't cover them. That's one reason
10 we have the problem here. But beyond that, the Framers
11 made a judgment that this wasn't going to be left to
12 congressional largesse. That's why there is a Recess
13 Appointment Clause, and it's not left to the Congress.

14 JUSTICE SCALIA: Well, let's -- let's go to
15 that 1948 emergency, the secretary of labor. There was
16 a vacancy in -- in that post. The President has the
17 authority to convene Congress. And whatever was the
18 case in 1948 or -- or in 1789, Congress can be back here
19 in one day.

20 Article II, Section 3 says, "He may, on
21 extraordinary occasions, convene both houses."

22 GENERAL VERRILLI: That's true,
23 Justice Scalia. But the --

24 JUSTICE SCALIA: So what's the problem? If
25 there is indeed this, you know, this terrible emergency

1 you're talking about, the President has the power to
2 call them back.

3 GENERAL VERRILLI: Well, I think it seems to
4 me the Framers made a different judgment, because they
5 gave the President both the power to call back in
6 extraordinary circumstances and the recess appointment
7 power. And if the Framers had intended the power to
8 call back to be the way to deal with vacancies during
9 absences of the Senate, then --

10 JUSTICE SCALIA: Yes, but my only point is
11 what -- what the recess appointment power consists of
12 cannot be determined on the basis that, well, there are
13 going to be terrible emergencies, so it must enable the
14 President to do this or that. Extraordinary emergencies
15 are handled in the Constitution. You don't have to
16 expand the -- the vacancy appointment power in order to
17 handle those.

18 GENERAL VERRILLI: So, what I would say
19 about this, and also to your point, Mr. Chief Justice,
20 is we have, I would submit, a stable equilibrium that
21 has emerged over the course of this country's history
22 between the two branches. After all, what we are
23 advocating for here is the status quo. It is the
24 equilibrium that has emerged since Congress -- since the
25 Senate started taking lengthy intra-session recesses,

1 Presidents started making recess appointments during
2 those recesses.

3 That began in the Civil War days. It's continued to the
4 present. The President --

5 JUSTICE KAGAN: General, I think that's a
6 really strong argument, but I have to say I'm not sure
7 it applies consistently throughout each of the three
8 claims that you make. Because if you are going to rely
9 on history and on the development of an equilibrium with
10 respect to what "happens" means, and if you are going to
11 do that again with respect to whether intra-session
12 recesses are included, then it seems to me you also have
13 to look to history and the development of an equilibrium
14 with respect to Congress's definition of its own power
15 to determine whether they are in recess or not.

16 In other words, your third argument about
17 pro forma sessions, the history is entirely on the
18 Senate's side, not on your side. And if we're going to
19 take a kind of continuing practice and the development
20 of equilibrium seriously, you might win on questions 1
21 and 2 and then lose on question 3.

22 GENERAL VERRILLI: Well, winning on
23 questions 1 and 2 would be of great importance to the
24 Executive, but we also should win on question 3, and
25 here's why: There isn't a long history reflecting

1 equilibrium with respect to the use of pro forma
2 sessions in order to restrict the President's ability to
3 use the recess appointment power. There really is no
4 history before 2007 of this daisy chaining of one pro
5 forma session after another after another in conjunction
6 with an order that no business shall be conducted.

7 JUSTICE ALITO: Well, there's no practice --
8 there is no long practice of doing it. There is also no
9 long practice of rejecting it.

10 But if I could take you back to that, you
11 said that the pro forma sessions may violate the
12 Adjournment Clause in the Twentieth Amendment. Would
13 you also say that they violate the Presentment Clause,
14 because the Senate has passed legislation during these
15 pro forma sessions and the President has signed that
16 legislation.

17 GENERAL VERRILLI: No, we don't. I think
18 the right way to think about that is the same way that
19 you would think about if the Senate declares that it's
20 in recess from August 1st until September 15th and then
21 comes back early because an emergency has happened, for
22 example, with Hurricane Katrina. Once they are back in
23 doing business, they are doing business.

24 Now, what the Senate did with respect to the
25 legislation Your Honor identified was they came out of

1 pro forma session, they passed legislation, and then
2 went back in to -- they went back in under the order of
3 pro forma session. So they take that action --

4 JUSTICE KENNEDY: But it seems -- it seems
5 to me that we're searching here for a proper
6 interpretation of the word "session," which, after all,
7 is in the provision that we are looking at. It talks
8 about "next session." And we have a long tradition of
9 Congress defining what that session is.

10 They have the first -- this is, what, the
11 113th Congress? I think something like that. And they
12 have the first and second session. That's how their
13 records are based. This is a considered judgment by
14 both houses of the Legislative Branch as to what
15 "session" means, and it seems to me that that has very
16 powerful bearing on the question of inter- and
17 intra-session appointments that we are arguing, forget
18 the -- when the vacancy happens to arise.

19 And so why don't -- why don't we defer to
20 Congress as to what the term "session" means and say
21 that this gives us guidance as to when the -- there is a
22 recess. There is a recess between those sessions.

23 GENERAL VERRILLI: I don't think that that's
24 an interpretation that really can be squared with the
25 body of contemporaneous evidence from the time of the

1 framing. And I would start with the text of the
2 Constitution itself and the Adjournment Clause, which is
3 at page 91a of the appendix to our brief.

4 And it -- one thing it says is that "Neither
5 house during the session of the Congress shall, without
6 consent of the other, adjourn for more than 3 days." It
7 seems clear from that language that "the session of the
8 Congress" is referring to the period that commences on
9 the constitutionally prescribed date and continues until
10 the Congress adjourns sine die, because otherwise these
11 recesses wouldn't be during the session of the Congress.

12 It's also clear from this language that the
13 framers at least contemplated the possibility of breaks
14 longer than 3 days within sessions because they provided
15 a mechanism to get permission to do it.

16 JUSTICE ALITO: But where does this 3-day
17 rule --

18 JUSTICE KENNEDY: But you are relying on
19 adjournment. That -- that -- that does not have the
20 word "recess."

21 GENERAL VERRILLI: No, that's right. But
22 I'm going back now to think about what "session" means
23 in the Recess Appointment Clause where "the session" is
24 also used. I would submit, Your Honor, that it means
25 the same thing as it means here, which is the full

1 session of the Congress.

2 JUSTICE SOTOMAYOR: If it means the same
3 thing, then you are tying the two together, which
4 actually might have some validity. But wouldn't that
5 require the definition of a recess to be a period in
6 which both houses have chosen to consent to an
7 adjournment?

8 GENERAL VERRILLI: No, I don't think so,
9 because the dictionary definition then and now of recess
10 is a suspension of business. And you could have
11 recesses of that kind, suspensions of business within
12 sessions. That's -- Jefferson's parliamentary manual
13 refers to recess by adjournment --

14 JUSTICE SOTOMAYOR: Can you have an
15 adjournment without a suspension of business? Aren't
16 the two the same?

17 GENERAL VERRILLI: Well, I'm just talking
18 now, Justice Sotomayor, if I may, about the
19 intra-session recess point.

20 JUSTICE SOTOMAYOR: But I'm talking about
21 tying the two together.

22 GENERAL VERRILLI: Right, but with respect
23 to -- putting the pro forma issue aside for a second,
24 with respect to intra-session recesses, the meaning of
25 the "session," it seems to me, is the session, the full

1 session, because you can have -- you can have recesses
2 by adjournment, as Jefferson's parliamentary manual
3 said. And as I think I said earlier, there is quite
4 substantial evidence that the term "the recess" at the
5 time of the framing could refer to a break during a
6 session and not just breaks between sessions. So I just
7 don't think there is contemporaneous evidence from the
8 framing generation that would lead you to conclude that
9 intra-session recesses are not within the meaning of the
10 word "recess."

11 JUSTICE KENNEDY: Well, where is this --

12 JUSTICE BREYER: The most surprising thing
13 to me that you have said, and it's important, is not
14 just the view of language at the time of the framing,
15 but what the purpose of this clause was. I mean, this
16 is a very well-briefed case, and I have looked at them.
17 I have read them, actually.

18 (Laughter.)

19 GENERAL VERRILLI: Okay.

20 JUSTICE BREYER: I cannot find anything, so
21 far, and I may have missed it -- I'm asking -- I can't
22 find anything that says the purpose of this clause has
23 anything at all to do with political fights between
24 Congress and the President. To the contrary, Hamilton
25 says that the way we're going to appoint people in this

1 country is Congress and the President have to agree.

2 Now, that's a political problem, not a
3 constitutional problem, that agreement. And it was just
4 as much true of President George Bush, who made six
5 appointments that happened previously, as it is with
6 President Obama, who's made four. All right?

7 So -- so where -- and he says this clause is
8 a supplement, a supplement, to the basic clause to take
9 care of the timing problem. So, what have I missed?
10 Where is it in the history of this clause, in its
11 origination, that it has as a purpose to allow the
12 President to try to overcome political disagreement?

13 GENERAL VERRILLI: I don't -- I don't think
14 that that's -- I don't think that that -- I don't think
15 that's its purpose, but it is in the Constitution. The
16 President has the authority to make appointments --

17 JUSTICE BREYER: Well, if it isn't a
18 purpose, can you give me an example where the language,
19 particularly that word "happen" -- I mean, your example
20 is a good one but I don't think it applies, but that's a
21 different matter. I can't -- the language is over here.
22 The number of appointments on "happen" is few. If you
23 are worried about James Tobin, Congress has passed a law
24 that can be taken as looking at a vacancy occurring when
25 it occurs within 30 days of the beginning of the recess,

1 which would have taken care of Tobin.

2 So look at the language difficulty. Look at
3 the comparatively small practice in that area. Look at
4 the other ways to get around the problem, and then give
5 me another example in the Constitution where you have
6 both language and purpose pointing one place and yet
7 this Court because of practice has come to the opposite
8 conclusion.

9 GENERAL VERRILLI: Well, I don't think that
10 language points unambiguously in one direction.

11 JUSTICE BREYER: "Happen?" Of course
12 battles happen. That's because battles occur over time.
13 Give me an example with the word "vacancy," where that
14 word "vacancy" is used with the word "is" but not
15 "occurred."

16 GENERAL VERRILLI: A vacancy is an enduring
17 state, and from the perspective of the --

18 JUSTICE BREYER: But just give me an English
19 example from its natural --

20 GENERAL VERRILLI: I tried with my statutory
21 example before, but from --

22 JUSTICE BREYER: Your statutory example has
23 to do with a battle, not a vacancy.

24 GENERAL VERRILLI: No, it was about an
25 emergency. It was the statutory example about a

1 financial emergency that may happen, which is state,
2 just like the vacancy.

3 JUSTICE BREYER: A financial emergency,
4 correct. I'm sorry. I'm asking you for an example with
5 the word "vacancy." That's what I am having trouble
6 with.

7 GENERAL VERRILLI: Well, a vacancy is an
8 enduring state. From the perspective of the --

9 JUSTICE BREYER: I'm not talking about -- I
10 just say, could you find an example, and I'm gathering
11 from my answer you couldn't.

12 GENERAL VERRILLI: Well, I think --

13 JUSTICE BREYER: And -- and I couldn't
14 either.

15 GENERAL VERRILLI: Your Honor, maybe this
16 statutory -- maybe the language in the Constitution
17 looks unambiguous to you now, but it has been the
18 subject of contention, it has been thought to be
19 ambiguous from the time of George Washington to the
20 president -- to the present.

21 And with respect to the question of the
22 practice and there being -- I don't think it's correct
23 to assume that because there are a certain number of
24 identified examples of preexisting vacancies being
25 filled in our appendix, that that's the sum total. I

1 think this is far, far less than the sum total.

2 JUSTICE SCALIA: Let me -- it's been assumed
3 to be -- it's been assumed to be ambiguous by
4 self-interested presidents.

5 (Laughter.)

6 JUSTICE SCALIA: Of course. Death is an
7 enduring state. But if someone dies in 1941, you don't
8 say he died in 1945. He's still dead.

9 (Laughter.)

10 GENERAL VERRILLI: The fact -- the fact
11 that -- the fact it happens --

12 JUSTICE SCALIA: But his death happened in
13 1941.

14 GENERAL VERRILLI: But the fact that "may
15 happen" is a phrase that isn't always apt to describe an
16 enduring state. It doesn't mean it's never apt to
17 describe an enduring state. It's what Jefferson
18 thought. It's what -- it's -- it has been the
19 understanding since the framing that there is ambiguity
20 here and there --

21 CHIEF JUSTICE ROBERTS: Your -- it's your
22 argument -- your friend on the other side says one flaw
23 with your argument is that it makes the words "it may
24 happen" or "happen during" superfluous, that the clause
25 would mean exactly what you say it means if you took

1 those words out. And your response, the only one I
2 could see on the reply -- your reply brief, page 13, is
3 that those words were put in there to quote, "Confine
4 the President to filling vacancies that actually exist
5 at the time of appointment."

6 Now, is that -- did you really think that
7 they put that language in there because they were afraid
8 the President would fill appointments that don't exist?

9 GENERAL VERRILLI: I don't know why they put
10 the language in there, Mr. Chief Justice, but it
11 doesn't -- it isn't superfluous because it does serve
12 that function, whatever their intent.

13 JUSTICE BREYER: One reason they could have
14 put the language in is because they were afraid
15 otherwise the president would have the power, simply,
16 when somebody died two or three years before and they've
17 had a big fight in Congress to save up all the
18 controversial nominations and then put them through as
19 recess appointments. That could be one thing they
20 didn't want to happen. I don't know. You see, it's the
21 same problem. Same problem.

22 JUSTICE GINSBURG: You do have -- you do
23 have the one that you relied on in your brief, and this
24 understanding goes back at least to 1823, and the -- the
25 Wirt letter, Attorney General Wirt said, on the

1 wording -- maybe on the wording, the case is not strong.
2 But the purpose, he said, you would be honoring the
3 letter and defying the spirit. That was the -- on the
4 question of the -- when the vacancy --

5 GENERAL VERRILLI: And we don't disagree
6 with that. We think it's just what Wirt said. It's --
7 does no violence to the language and is consistent with
8 the purpose of the -- of the clause. And from the --
9 from the perspective of the purpose of the clause, the
10 office is equally vacant, whether that vacancy arose the
11 day before or the day after the Senate went into recess.
12 The Senate is equally unavailable to act because they're
13 dispersed, whether the vacancy arose the day before or
14 the day after. And the public's need that the office be
15 filled so that the laws can be faithfully executed is
16 the same whether the vacancy arose the day before or the
17 day after.

18 JUSTICE GINSBURG: Before you -- before
19 you --

20 GENERAL VERRILLI: And so we do have that
21 very established practice that is completely in accord
22 with the purpose and the structure.

23 JUSTICE GINSBURG: The -- we sort of drifted
24 away from the new -- the new practice, the pro forma
25 session. And you were asked, suppose there was nothing

1 in the resolution about they would conduct no business.
2 It was an informal understanding that they wouldn't.
3 But there is no express agreement that they're not going
4 to conduct business. Then do you lose on that part of
5 the case?

6 GENERAL VERRILLI: I think that's a way
7 harder case for us. I would agree with that, Justice
8 Ginsburg, and -- but they're two things. One is that
9 formalities do matter; and two, going back to the point
10 you made earlier, Justice Kagan, I think it's not an
11 accident that there's a no-business order in place.
12 It's because that's what gives the Senators the
13 protection to know that they can leave town without
14 somebody else going to the court and saying to conduct
15 business.

16 JUSTICE KAGAN: Suppose it was -- suppose it
17 was the exact same no-business order, but the single
18 senator who was there got up and asked for unanimous
19 consent to name a post office, and every three days, he
20 got up and said unanimous consent to name a post office.
21 The post office is named.

22 So they can do, you know, trivial business
23 in each of these sessions. Would that make a
24 constitutional difference?

25 GENERAL VERRILLI: Well, I think if they did

1 business each of the three days, then you wouldn't have
2 a situation in which no business was conducted and you
3 wouldn't meet the definition of a recess. But that's a
4 different case than this one.

5 JUSTICE KAGAN: But that, again, suggests
6 that the rule that you're asking us to establish is --
7 is so easy to evade that why bother establishing it at
8 all. The fact that it's so easy to evade suggests that
9 this really is -- the question of how to define a recess
10 really does belong to the Senate.

11 GENERAL VERRILLI: No, I think the problem
12 with looking at it that way, Justice Kagan, is that
13 that's the end of the recess appointment power. You
14 write it out of the Constitution, if you look at it that
15 way, because all the Senate needs to do is stay in pro
16 forma session until 11:59 a.m. on January 3rd when that
17 term ends and the next term starts and then there are no
18 intercession recesses --

19 JUSTICE KAGAN: I totally take your point on
20 that. But what I'm suggesting is they can just come
21 back, and by naming post offices, have the same effect,
22 that they would write it out of the -- of the
23 Constitution as much as you say this does.

24 GENERAL VERRILLI: Well, this does. This
25 does. And whether something else might or might not, I

1 guess we could try to fight that out if the Senate were
2 ever to do it. But I assume, if this Court were to hold
3 that pro forma sessions of this kind are not real and
4 they don't defeat the President's recess appointment
5 power, that maybe the Senate would think twice
6 before doing something like that.

7 JUSTICE ALITO: Well, what is significant is
8 whether they're available to confirm nominees; isn't
9 that right?

10 GENERAL VERRILLI: Yes.

11 JUSTICE ALITO: So suppose they say, instead
12 of no business will be conducted, no nominations will be
13 considered.

14 GENERAL VERRILLI: That would be a different
15 case because they would be --

16 JUSTICE ALITO: Well, I know it would be a
17 different case, but --

18 GENERAL VERRILLI: -- they would be there --
19 they would be here. You know, they're not -- they're in
20 business for something.

21 JUSTICE ALITO: So what? The point of the
22 question is whether they're available to consider
23 nominations. So if they say, we'll do other business,
24 but no nominations will be considered, why isn't it
25 exactly the same for purposes of the Recess Appointments

1 Clause?

2 GENERAL VERRILLI: It's not, because the
3 recess -- or the definition of recess is when no
4 business shall be conducted. And that's exactly what
5 the Senate said. If I may reserve the balance of my
6 time.

7 CHIEF JUSTICE ROBERTS: Thank you, General.
8 Mr. Francisco?

9 ORAL ARGUMENT OF NOEL J. FRANCISCO
10 ON BEHALF OF THE RESPONDENTS

11 MR. FRANCISCO: Mr. Chief Justice, and may
12 it please the Court:

13 The Advice and Consent Clause imposes an
14 important check on executive power. Each of our three
15 arguments preserves that check, and provides a separate
16 and independent basis for affirming the court below.

17 The government's position, in contrast,
18 would eviscerate that check, creating a unilateral
19 appointment power available for every vacancy at
20 virtually any time with advice and consent to be used
21 only when convenient to the President.

22 JUSTICE GINSBURG: But your argument would
23 destroy the recess clause. There would be -- under your
24 argument, it is totally -- totally within the hands of
25 the Senate to abolish any and all recess appointments.

1 MR. FRANCISCO: Yes, Your Honor. And that
2 reflects the fact that the recess appointment power is a
3 contingent one. It arises only when the Senate chooses
4 to trigger it by ending its session and beginning its
5 recess. So the Senate always has the power to prevent
6 recess appointments.

7 The Constitution, however, gives the
8 President corresponding powers. If the President thinks
9 that the Senate is being derelict in its duties, he can
10 convene an emergency session, and he can force the
11 Senate to consider his nominees.

12 And if they refuse, he can subject them to
13 withering criticism for being derelict in their
14 responsibilities. But one -- the one thing that the
15 President may not do is force the Senate to act against
16 its will, nor should the President be permitted to do --
17 and run around the Senate's refusal to act, because that
18 conception of the Recess Appointments Clause is at war
19 with advice and consent itself.

20 JUSTICE ALITO: Can I ask you a variant of
21 the question that Justice Scalia asked General Verrilli.
22 Suppose we think that the language in the Constitution
23 is perfectly clear in some respect, but that there is a
24 200-year-old consistent practice, agreement by the
25 President, going back to Washington and by the Senate

1 that the language actually means something else. What
2 would we do in that situation?

3 MR. FRANCISCO: Your Honor, I think that the
4 language has to govern. And I would like to address the
5 issue about the consequences of a ruling in our favor in
6 this case. Of course, if you were to rule on the third
7 question presented, it wouldn't call into question any
8 past recess appointments at all, given the unprecedented
9 nature of the appointments at issue in this case.

10 But, frankly, if you ruled on the first two
11 questions, I don't think it would be particularly
12 disruptive in terms of calling it a question, the
13 decisions of past appointees.

14 Justice Sotomayor, to take the Article III
15 courts, for example, since 1960, there have only been
16 four potentially improper appointments to the Article
17 III court's recess appointments. Each of them served
18 approximately a year or less. Three were to the court
19 of appeals, one to a Federal district court judge in
20 1981.

21 JUSTICE KAGAN: Mr. Francisco, I'm sorry,
22 but could we go back to Justice Alito's question,
23 because I really have the same issue with your argument.

24 You know, suppose that on one -- let's say
25 the "happens" argument, that yours is at least the most

1 natural reading of the statute, at least the way we
2 understand the word "happen" today, and maybe a
3 compelled reading, but the history points so much in the
4 other direction; and that that history brings with it a
5 whole set of practices and traditions and ways of
6 dealing with each other that has grown around a certain
7 interpretation of what "happens" means, right?

8 The idea that we would wake up one fine
9 morning and chuck all of that because all of a sudden we
10 happened to read the clause, I mean, that at least needs
11 to be defended.

12 MR. FRANCISCO: Yes, Your Honor, and I
13 believe that the relevant history actually supports us,
14 that is the history at the time of the founding.

15 JUSTICE KAGAN: I know, but now, you're --
16 you're again -- I mean, assume that there is a
17 200-year-old established practice, everybody has agreed
18 to it, but the text, when you really look at it, points
19 the other way.

20 MR. FRANCISCO: Yes, Your Honor. I would
21 dispute the premises, but I will accept the premises for
22 the purposes of the question. The political branches of
23 the government have no authority to give or take away
24 the structural protections of the Constitution. They
25 don't exist to protect the Senate from the President or

1 the President from the Senate.

2 These are liberty-protecting provisions that
3 protect the people from the government as a whole. So
4 if the Constitution is quite clear as to what those
5 structural protections are, but the political branches,
6 assuming for the sake of argument, have conspired to
7 deplete them, that is illegitimate, and it should be
8 rejected by this Court.

9 JUSTICE SOTOMAYOR: But that -- but that
10 assumes something, which is --

11 MR. FRANCISCO: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: -- let's go back to the
13 "happenings" words -- that is so unambiguous, that they
14 knew it was unambiguous, but 200-year history, starting
15 with President Washington, who filled two vacancies that
16 occurred before the Senate broke, to every -- almost
17 every President thereafter has done the same.

18 So why should we conclude that today's
19 understanding is the same as the understanding of the
20 Founding Fathers? Why don't we take their unbroken
21 practice as giving us that definition?

22 MR. FRANCISCO: Yes, Your Honor, a couple of
23 different responses. First of all, we dispute the
24 government's historical account of President
25 Washington's and the first four Presidents' position --

1 actions. But even putting that aside here, everyone who
2 actually spoke to and addressed the issue at the time
3 agreed that the text means precisely what it says,
4 including President Madison, who refused to make a
5 recess appointment to Andrew Jackson, the hero of the
6 War of 1812, precisely because the vacancy had arisen
7 during the Senate's session and in its recess.

8 Second, we also don't have an unbroken and
9 never contested practice. Indeed, the Senate has
10 regularly resisted. In 1863, the Senate passed the Pay
11 Act, which prohibited pay to any appointee to a
12 preexisting vacancy. So you don't have a kind of
13 uniform -- uniformly-held practice.

14 JUSTICE KENNEDY: Let me ask you this.
15 Suppose that we were to conclude that the history is
16 simply too overwhelming to rule in your favor on the
17 "happens" problem. Could we still use history to say
18 that -- or overlook history to rule for you on the
19 inter/intra-session point?

20 MR. FRANCISCO: Yes, Your Honor.

21 JUSTICE KENNEDY: How do we do that?

22 MR. FRANCISCO: From the time of the
23 founding --

24 JUSTICE KENNEDY: Is it because of the
25 80 years or?

1 MR. FRANCISCO: I think it's longer than
2 that. From the time of the founding until, I would say,
3 1948, there was a uniform understanding that the recess
4 and the session as used in the clause were interchanging
5 periods. You were either in recess or you were in
6 session. And so an appointment made during the recess
7 lasted until the end of the next session.

8 Now, in 1921 Attorney General Doherty's
9 opinion kind of muddled things a bit because he assumed
10 that if you took a long break in the midst of a long
11 session, it broke that break into two recesses for the
12 purposes of the Recess Appointments Clause. But you
13 still had that dichotomous view subject to the arguable
14 and quite ambiguous exception of President Andrew
15 Johnson.

16 So what you see is from the time of the
17 founding until 1921 there were some 63 mid-session
18 breaks, all longer than 3 days, so all recesses under
19 the government's definition. Yet during that entire
20 period, with the arguable exception of Andrew Johnson,
21 no President ever attempted to make a recess
22 appointment.

23 JUSTICE KAGAN: Mr. Francisco, tell me if I
24 am wrong about this, but it seems to me that
25 intra-session recesses really only arose in the 1940s or

1 so, right? There is the period with Andrew Johnson and
2 Andrew Johnson used intra-recess -- intra-session
3 recesses to make a lot of appointments. Other than
4 that, intra-session recesses of more than 3 days that
5 are not Christmas simply do not exist.

6 So that assume that as intra-session
7 recesses came to be Presidents started making
8 appointments in them.

9 MR. FRANCISCO: Let me address it this way.
10 I'm not sure I agree with the factual understanding,
11 Your Honor. There were intra-session recesses longer
12 than 3 days prior to 1867. I think there were some 10
13 of them prior to 1867, including 7 that were longer than
14 10 days. And bear in mind, yes, they were Christmas
15 recesses, but so were the ones at issue in this case.
16 They were Christmas recess appointments.

17 But I do take your point that intra-session
18 recess appointments did not become very common, or I
19 should say it this way: Intra-session recess
20 appointments did not become very common until -- really
21 they started with Truman, but then they broke off for a
22 long time with three Presidents, Johnson, Kennedy, and
23 Ford, making no mid-session recess appointments.

24 Then beginning in the Carter and the Reagan
25 Administrations is when they became very common and

1 particularly a very common way to do an end-run around
2 advice and consent.

3 JUSTICE BREYER: What happened in that
4 period at around 1970 is that's about the first time
5 that you have intra-session -- an intra-session recess
6 that's longer than an inter-session recess.

7 And so now if we look from 1970 on, that's
8 fairly common. And so all that's happening is that the
9 Presidents are appointing recess appointees during
10 periods where they are out for a longer time. Now, how
11 are we supposed to go and say that this thing --
12 thousands of people on the recess part -- is
13 unconstitutional? I mean, it isn't unheard of. What
14 about the Due Process Clause? Does that easily cover
15 the language? Substantive due process?

16 What about the Interstate Commerce Clause
17 and the doctrine of, you know, the Implicit Clause
18 there? I mean, it isn't unheard of that over time
19 language in the Constitution takes on a somewhat
20 different meaning.

21 MR. FRANCISCO: Yes, Your Honor.

22 JUSTICE BREYER: How do we -- I mean,
23 probably different judges have different approaches.
24 But if I'm concerned about the basic practicality and
25 the basic objective here, why would I agree with you?

1 MR. FRANCISCO: Yes, Your Honor. I
2 certainly am not going to attempt to purport to resolve
3 this Court's differences on those issues, but on --

4 (Laughter.)

5 MR. FRANCISCO: -- unless you are not going
6 to let me off the hook, Your Honor.

7 JUSTICE SCALIA: The two examples that
8 Justice Breyer gives are examples where we gave it a
9 meaning that was different from what it said.

10 (Laughter.)

11 JUSTICE SCALIA: We don't have a case
12 involving this particular issue yet.

13 MR. FRANCISCO: That's precisely correct,
14 Your Honor. And it reflects the fact that the Recess
15 Appointments Clause and the Appointments Clause and all
16 of the structural protections, again, are not meant to
17 protect the branches against one another.

18 JUSTICE BREYER: What if I do place more
19 weight on this? Should we -- I mean, I do believe and
20 agree with you on this point that this is basically a
21 matter of politics for other branches basically. That
22 doesn't help me resolve this. But it does lead over to
23 this possibility. Congress did pass the No Pay Act.
24 Then it passed the Pay Act. And in that Pay Act on this
25 "happen" part, which I think is the strongest -- very

1 strong for your side, but it defines the vacancy in
2 terms of 30 days prior to the recess.

3 That would take care of most of these. You
4 see, if vacancy could be defined as something that
5 stretches, because Congress says it stretches in terms
6 of pay for 30 days.

7 MR. FRANCISCO: Right.

8 JUSTICE BREYER: What do you think of that?
9 And I would love to know what the SG thinks of that.

10 MR. FRANCISCO: Yes, Your Honor. A couple
11 of different responses. First, of course, the third
12 question calls into question no past recess appointees,
13 the third question.

14 JUSTICE BREYER: The third question, by the
15 way, and I just put in your mind, if you digress in your
16 answer, put in your mind what would have happened in
17 1830 if someone, when they had a 9-month recess, close
18 to 10 months, someone had the bright idea, well, you
19 live near Washington; go show up at wherever we are
20 holding our sessions and sit there for 5 minutes, and
21 we'll stop President Andrew Jackson from making recess
22 appointments. What would we be saying then?

23 MR. FRANCISCO: Sure. Well, I will put my
24 finger on that question and answer your first question
25 first as to the Pay Act in 1940. The Pay Act of 1940,

1 in our view, clearly repudiates the government's
2 inter-session view for the reason you put your finger
3 on. It ties pay to appointments being made either right
4 before or after the session ends. So most mid-session
5 recess appointees can't get paid under the Pay Act.

6 With respect to the second question
7 presented, at best it creates three exceptions to the
8 general rule against any pay to any preexisting
9 appointees, so you have got somewhat of a compromise. I
10 would say that is no more Senate acquiescence in the
11 President's position than the President's acquiescence
12 in the Senate's position when he signed that law. So to
13 me that's a jump ball.

14 Coming back to your historical example, I
15 think it reflects the fact that the Recess Appointments
16 Clause is not about timing, it's not a temporal issue;
17 it's about procedure. What it does is it creates a
18 contingent power that arises when the Senate decides to
19 trigger it. Back at the time of the founding, the
20 senators wanted to trigger that power. It was important
21 to trigger that power, because when they were gone, the
22 president needed to be able to act unilaterally, unless
23 they wanted to be subject to a recall in emergency
24 sessions every time he needed to confirm nominees. They
25 obviously didn't want that.

1 Today, the situation has changed; not the
2 principle, but the historical context. And today, the
3 Senators can get back to Washington, D.C. very easily.
4 They are there for much less --

5 JUSTICE GINSBURG: Suppose -- suppose we
6 have an inter-session break. It's three days. On your
7 reading of the Recess Clause, in that three days, the
8 president can fill up vacancies.

9 MR. FRANCISCO: Yes, Your Honor, because
10 under the second question presented, there would not be
11 very many vacancies in that context, because the vacancy
12 would have to --

13 JUSTICE GINSBURG: Well, leave out this
14 second question. Just on -- on the first question,
15 because it seems to me if the rationale was when
16 Congress was out of town for 6, 9 months, of course, the
17 president has to be able to make the government work.

18 But now you're saying that in that time,
19 it's only three days, they are going to be there
20 available very soon to confirm. And let's say
21 somebody -- somebody dies on day 1. The president puts
22 in -- makes an appointment on day 2. You would say
23 that's okay?

24 MR. FRANCISCO: Yes, Your Honor, but I --
25 first of all, I'd say I don't think you can really

1 separate it from the second question presented because
2 that's why -- it explains why it wouldn't have been much
3 of a problem. Very few vacancies would arise during a
4 3-day break, and so there wouldn't be that much of an
5 opportunity to make those kinds of appointments.

6 Let's put that aside. Let me assume you
7 reject my argument on the second question presented.
8 Then you're really in the world of the 1905 Senate
9 report when they were dealing with President Roosevelt's
10 midnight recess appointments, where he made them
11 in-between gavel drops.

12 If you reject their argument on the second
13 question, then I do think that you may need to confront
14 the notion that an inter-session recess is too short to
15 make recess appointments. Not at issue in this case,
16 because here the appointments came on January 4th, the
17 day after Congress commenced the second session. So by
18 anyone's definition, this was an intra-session recess
19 appointment, not an inter-session recess appointment.

20 And all of this really reflects the fact
21 that the Recess Appointments Clause is a contingent
22 power that arises only when the Senate triggers it,
23 which is what gives the Senate the power to prevent the
24 president from making recess appointments.

25 If I could turn back to the consequences --

1 CHIEF JUSTICE ROBERTS: Well, before you do
2 so, I mean, is the Senate's power, in your view, so
3 comprehensive that if they passed an order saying, we're
4 actually never in recess, people can be reached, you
5 know, we can call people back. So for purposes of the
6 Recess Clause, we are never in recess.

7 MR. FRANCISCO: Your Honor, under the first
8 question presented, I think the answer is, yes, they
9 could do that, because it really is the Senate's ability
10 to trigger the power.

11 It's -- in a sense, the Recess Appointments
12 Clause is of a piece with the Inferior Officer's Clause.
13 The Senate always has the power of advice and consent,
14 but what the president can do -- what the Senate can do
15 is authorize the president to act unilaterally in
16 certain circumstances.

17 It can authorize the president to act
18 unilaterally with respect to inferior officers and it
19 can authorize the president to act unilaterally in
20 certain time periods where it ends its session and
21 begins its recess. So it's always within the Senate's
22 power. And that's precisely why advice and consent
23 serves as an important check.

24 On the third question presented, I think --
25 where you're deciding whether or not a session is a real

1 session, then, no, I don't think the Senate could do
2 that. I think that it's for the Court to look at the
3 Senate's journal to see what the facts are, and those
4 facts must be taken by this Court as undisputed.

5 So if those facts show that there was a
6 Senator who actually gaveled them into session each day,
7 and that during that period they were capable of
8 conducting business, as they were here at every session
9 that they held every three days, then this Court would
10 have to take those facts as a given.

11 JUSTICE SOTOMAYOR: Could you -- could you
12 tell -- let's go back to this. What's your definition
13 of a recess? When the Senate actually says we're taking
14 a recess --

15 MR. FRANCISCO: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: -- whether it got the
17 consent of the House or not?

18 MR. FRANCISCO: It's when the Senate --
19 again, it depends on which question you're talking
20 about. On the first question presented, the recess of
21 the Senate is the period between when the Senate says
22 that it is ending its session through an adjournment
23 sine die, and the period when it begins its next
24 session, as the clause says.

25 JUSTICE SOTOMAYOR: Does it have to do that?

1 By what command does it have to do that?

2 MR. FRANCISCO: Sine die?

3 JUSTICE SOTOMAYOR: Yes.

4 MR. FRANCISCO: It does not --

5 JUSTICE SOTOMAYOR: No. Sine die or any --

6 MR. FRANCISCO: It does not have to adjourn
7 sine die. That, though, in this country, is the way
8 that the Senate has traditionally signaled to the
9 president that it was ending its session. And I think
10 that's what it would have to do.

11 JUSTICE SOTOMAYOR: Does it need the consent
12 of the House to do that?

13 MR. FRANCISCO: Yes, Your Honor, it does.

14 JUSTICE SOTOMAYOR: So -- so does it have to
15 do that in between the two congressional sessions?

16 MR. FRANCISCO: I don't -- I think -- no, I
17 don't think it has to. I think the Senate can adopt its
18 own rules for determining how it ends its session and
19 how it begins a new one. I think the important point,
20 though, is it has to communicate that to the president.

21 So, for example, during President Madison's
22 time, the tradition was the Senate would dispatch a
23 committee to the president to inform this president that
24 it had ended its session. So the president now knew
25 that it was in recess and the powers that imbue upon the

1 president during that recess had been triggered, the
2 recess appointment power.

3 Here, ruling on our -- in our favor on the
4 third question would, of course, call in the question no
5 past appointees. But I would like to --

6 JUSTICE ALITO: On the first question, does
7 your argument depend on the fact that -- on the
8 assumption that the -- the possibility of a lengthy
9 intra-session break was never even contemplated by those
10 who framed and -- and ratified the Constitution?
11 Because if they had thought about that, there's a real
12 chance the Senate may take a two-month break --

13 MR. FRANCISCO: Right.

14 JUSTICE ALITO: -- over Christmas. Would
15 there be any reason why they wouldn't have wanted the
16 recess appointment power to apply there as well as at
17 the end of the session?

18 MR. FRANCISCO: Your Honor, our argument
19 does not turn on that because to us, it is not a
20 temporal question; it's a procedural one. Back then,
21 the Senate had the power not to trigger the recess; just
22 like today, it has the power not to trigger the recess
23 appointments power.

24 The difference is not in principle; it's in
25 historical context. At the time of the framing, they

1 wanted to trigger the recess appointments power because
2 when they left during long periods of time, they wanted
3 the president to be able to act unilaterally since it
4 was very difficult for them to get back. And if they
5 didn't trigger the power, the only way the president
6 could act unilaterally would -- the only way the
7 president could confirm nominees would be by convening
8 an emergency session. Highly inconvenient.

9 The historical facts today have changed.
10 Not the principle, but the surrounding facts. And
11 today, it is very easy for the senators to get back to
12 Washington, D.C., and so they don't want to trigger a
13 unilateral power. They're perfectly willing to be
14 hailed back if necessary.

15 JUSTICE ALITO: I'm -- I'm not sure I
16 understand the answer. If the purpose is to permit the
17 president to fill vacancies when the Senate is
18 unavailable to consider nominations and the country
19 would be harmed by having these offices vacant for a
20 period of time, why would that not apply to any lengthy
21 break, whether it's at the end of the session or in the
22 middle of the session?

23 And so if you're arguing that it only
24 applies at the end of the session, doesn't that depend
25 on the assumption that they never thought about the

1 possibility that there would be a lengthy break in the
2 middle of the session?

3 MR. FRANCISCO: Your Honor, it is possible
4 that they never thought about it. But even if they had,
5 I don't think it would matter, because I think that --
6 that the purpose that you've laid out is not quite the
7 full purpose of the clause. The purpose was also to
8 ensure that the president could not easily do an end run
9 around advice and consent, which after all is the
10 principal method of appointment.

11 And so what they did, as they did with
12 respect to inferior officers, is they vested with the
13 Senate the power in certain circumstances to authorize
14 the president to act unilaterally. With respect to
15 recesses, that authority was triggered when the Senate
16 decided to end its session. The Senate did, for
17 example, take 7 mid session breaks of longer than 10
18 days prior to 1867. It is inconceivable to me that the
19 senators at that time believed that they were entering
20 into a recess that would have empowered the president to
21 make unilateral appointments during those 10-, 11-, or
22 12-day periods. And that reflects the fact that the
23 Recess Appointments Clause is a -- is a contingent one
24 that arises when the Senate triggers it.

25 JUSTICE KAGAN: Mr. Francisco, can I ask a

1 question about the second question presented, the
2 "happens" question?

3 MR. FRANCISCO: Yes, Your Honor.

4 JUSTICE KAGAN: And if you put aside all the
5 history and you look only at the language and you look
6 only at our own modern view of what happens, that surely
7 seems to favor your position.

8 But if, you know, given all the statements
9 in the founding period itself about how this is
10 ambiguous and it might have two meanings, if you look at
11 the dictionaries of that time -- so I went back and I
12 looked at the Oxford English Dictionary, and one of the
13 definitions of "happens" there is "chance to be,"
14 essentially the exact same definition that Thomas
15 Jefferson said made this ambiguous.

16 And we would never use "happens" in that way
17 now. If you look at the examples that the Oxford
18 English gives, they're laughable. Nobody would ever say
19 that now. But it just suggested to me that maybe what
20 we think is pretty clear is only pretty clear because
21 one meaning of happens has, you know, over 200 years --

22 MR. FRANCISCO: Sure.

23 JUSTICE KAGAN: -- lapsed.

24 MR. FRANCISCO: Well, Your Honor, I actually
25 think the word "happens" had the same meaning then as it

1 does now, which is why at the time of the framing
2 everyone who actually studied the issue -- Madison,
3 Hamilton, both of the first two attorneys general,
4 Edmund Randolph and Charles Lee -- agreed that it meant
5 what it said, as did even --

6 JUSTICE KAGAN: No, I don't think so.
7 Essentially, Thomas Jefferson says it could mean one
8 thing or the other, and the other thing that he said,
9 which is "happens to exist," is sort of exactly this old
10 definition, which is "happens" means "chance to be."

11 MR. FRANCISCO: And then Jefferson in his
12 other letters conceded that the Recess Appointments
13 Clause as it stood was going to frustrate his ability to
14 make appointments. And he therefore --

15 JUSTICE SCALIA: I -- I think "happens"
16 continues to mean "chances to be." We still use it that
17 way. But we only use it that way when it is followed by
18 an infinitive. "I happened to see him," it means a
19 chance that I saw him. Or -- you know, the 9/11, the
20 destruction of the Twin Towers happened to occur on
21 9/11. But you wouldn't say -- you wouldn't say it
22 happened on -- on 9/13, simply because it continued to
23 be destroyed.

24 I don't know what the OED examples that
25 Justice Kagan referred to were, but I bet they -- they

1 used "happen" followed by an infinitive, and I think we
2 still use it that way.

3 JUSTICE KAGAN: You know, I don't remember
4 them exactly. I just remember kind of laughing at them,
5 as things that --

6 (Laughter.)

7 JUSTICE BREYER: Actually, I think I
8 remember what they were --

9 JUSTICE KAGAN: -- nobody would say --

10 JUSTICE BREYER: -- and they were 1483 and
11 1490-something, and then there was an asterisk that said
12 "obsolete."

13 (Laughter.)

14 JUSTICE BREYER: And in fact -- in fact, I
15 couldn't figure out what they were talking about.

16 MR. FRANCISCO: And, yes, Your Honor, but in
17 addition, though, there -- there is not just the word
18 "happen." It's preceded by three other words, that --
19 "vacancies that may happen." And the only purpose that
20 those words serve is to constrain the universe of
21 vacancies that are eligible for a recess appointment.

22 JUSTICE KENNEDY: Well, the Constitution as
23 it -- as it first was has now been amended and it is no
24 longer a part of the Constitution, with reference to
25 appointment of Senate, uses the word "vacancy" in much

1 the same way as the clause we're discussing here, and I
2 think favors your position, because if a vacancy happens
3 by resignation during the recess of the legislature then
4 the governor can make the appointment. And you
5 certainly wouldn't think that that could happen over 3
6 days --

7 MR. FRANCISCO: Exactly, Your Honor --

8 JUSTICE KENNEDY: -- occur over -- I should
9 say occur over 3 days.

10 MR. FRANCISCO: And -- and it's even better
11 than that because at the time of the framing, a
12 legislator -- a governor tried to appoint somebody to
13 the Senate pursuant to the clause that had arisen --
14 where the vacancy had arisen during the legislative
15 session rather than during the legislative recess, and
16 the Senators actually refused to seat that individual.

17 So, yes, that further supports our position
18 on that.

19 JUSTICE BREYER: Do you want to say anything
20 before the -- about the -- the language on the "happen,"
21 I support you.

22 But the -- the practice, and in particular,
23 the practicalities, because you say, well, the President
24 can make an acting appointment, make a recess
25 appointment even. I mean, you know, they have much less

1 authority, somebody appointed in that way, much less
2 than a person who's been confirmed by the Senate. So if
3 the government won't grind to a halt, it still faces a
4 problem.

5 MR. FRANCISCO: And Your Honor --

6 JUSTICE BREYER: What do you want to say
7 about that?

8 MR. FRANCISCO: That's a consequence of
9 advice and consent. That problem arises not just when
10 the Senate takes breaks, but when the Senate is in
11 session. The senate could show up every day for an
12 hour, sit at their desks, and announce to the President:
13 We're not going to do anything, no nominations, no
14 legislation, because we don't like what you're doing.
15 And by the way, the only reason we're showing up here at
16 our desks and sitting here for one hour a day is because
17 we don't want you to be able to make recess
18 appointments.

19 Nobody would claim that the Senate was in
20 recess during those sessions. Well, that is effectively
21 what it was doing here.

22 I would, though, like to address the
23 practicality issue. I talked about how there have only
24 been four recess appointments to the Article III courts
25 that are potentially invalid since 1960. I likewise

1 don't think, if you were to rule in our favor on the
2 first two questions, that it would be particularly
3 disruptive to the Executive Branch either.

4 If you look at the government's appendix, I
5 would hazard to say that most of those officials
6 probably don't exercise much, if any, agency rule-making
7 or adjudicatory power at all. But as to those who do,
8 going forward the government can solve the problem
9 through agency ratification of past decisions. Going
10 backward, there are a variety of doctrines that would
11 limit anybody's ability to actually challenge those past
12 actions, including, for example, the APA's 6-year
13 statute of limitations on challenging final agency
14 action, various finality rules that would prohibit a
15 party from raising an issue that they could have but
16 failed to raise in an earlier proceeding, and various
17 justiciability doctrines, like mootness, standing, and,
18 Your Honor, the de facto officer doctrine, at least
19 outside of the context of direct appeal.

20 I think this constellation of issues
21 probably explains why this is the first time this issue
22 has reached this Court in 225 years. This is not to say
23 that a ruling in our favor on the first two questions
24 wouldn't have any past impact. It would undoubtedly
25 have some. But as this Court's decisions in cases like

1 Chada and Booker and Blakeley make clear, this Court has
2 never shied away from enforcing the strictures of the
3 Constitution simply because it could have some impact on
4 prior cases.

5 Here the structural protections of the
6 Constitution exist to protect the liberty of the people.
7 They were clearly transgressed with these unprecedented
8 appointments, and therefore we believe that the court
9 below should be affirmed.

10 I am happy to answer any additional
11 questions that Your Honors may have.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Estrada.

14 ORAL ARGUMENT OF MIGUEL ESTRADA,
15 FOR SENATE REPUBLICAN LEADER MITCH MCCONNELL, ET AL.,
16 AS AMICI CURIAE, SUPPORTING THE RESPONDENTS

17 MR. ESTRADA: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 As Justice Kagan recognized earlier in the
20 argument, this case fundamentally is about who gets to
21 decide whether the Senate is in recess, the Senate or
22 the President? Our submission today is that the Senate
23 gets to decide whether the Senate is in recess.

24 JUSTICE KAGAN: Mr. Estrada, you said in
25 your brief that that was true within wide limits. What

1 are the wide limits?

2 MR. ESTRADA: This is -- this is all about
3 how the Senate chooses to arrange its affairs, Justice
4 Kagan, under the Rules of Proceedings Act.

5 And what the Court said in the Ballin case
6 was that the exercise of rulemaking authority by
7 Congress was almost absolute and beyond the challenge of
8 any body or tribunal unless it usurped some independent
9 constitutional authority.

10 The only possible offer here that the
11 Solicitor General has as to how the Constitution could
12 have been violated by the actions of the Senate in
13 arranging its own affairs is the notion that this has
14 invaded the purported recess appointments power of the
15 President. And the reason, as we say in our brief, why
16 that is completely insubstantial is because, as the
17 Solicitor General recognizes in the closing two pages of
18 its brief, the Senate by the design of the Constitution,
19 the Appointment Clause, the primary method of
20 appointment, has an absolute veto over nominations.

21 The Framers could not have been more clear
22 that the standard power of appointment was a joint power
23 of appointment. And therefore, the Solicitor General is
24 forced to concede that this appointment power, this
25 right that the President is asserting here as a stop on

1 the exercise of the rulemaking authority, is a
2 subsidiary power that only arises if the government --
3 if the Senate, excuse me, chooses to recess.

4 JUSTICE KAGAN: Is the Chief Justice's
5 example before, if the Senate just said, we're -- we're
6 never in recess for purposes of appointments, would that
7 be permissible.

8 MR. ESTRADA: If the Senate says, we're
9 never in recess, and the Senate then is not in recess so
10 that it could exercise the duties of its office as it
11 does here, yes, it would be. If the Senate says, We're
12 checking out and going to Hawaii, we'll never again be
13 in Washington, Kona is very nice this time of year, that
14 would not be permissible, because, A, the Adjournment
15 Clause requires the consent of the House for the Senate
16 to be not only gone for 3 days but to be in a different
17 place. And -- and second, you know, the Senate cannot
18 leave, you know, the chamber, and -- other than with
19 the -- with the consent of the House. And maybe if the
20 Senate has effectively given up, you know, the business
21 of legislating, in that case, maybe the President could
22 say that it is, quote, a "recess."

23 Now, the fundamental problem with the
24 President's position here is twofold. We have Senate
25 records. There is -- the Journal Clause of the

1 Constitution directs each house of the Congress to have
2 a journal of its proceedings. The Journal of the
3 Senate, which is in relevant part printed in our
4 appendix, shows that on each of the disputed dates the
5 Senate was called to order and then adjourned. It is an
6 official record of the Senate. It says the Senate was
7 called to order and then adjourned.

8 It doesn't say: Two guys who happened to be
9 Senators met at a bar and had a beer. The official
10 records of the Senate say: The Senate was called to
11 order and adjourned. And under the Rules of Proceedings
12 Clause, that would be conclusive, full stop.

13 JUSTICE BREYER: That's the end of it,
14 exactly the same, if this all took place during the
15 9-month inter-session recess in 1835.

16 MR. ESTRADA: It would be the same unless
17 the Senate chooses to recess.

18 JUSTICE BREYER: No, no, no. Exactly, same
19 facts. Same facts.

20 MR. ESTRADA: Right.

21 JUSTICE BREYER: And, therefore, in your
22 view, the clause, even if they were all scattered to the
23 winds in 1835, there would have been not possible for
24 President Andrew Jackson, if I have that right, to make
25 the recess appointments.

1 MR. ESTRADA: Justice Breyer, the executive
2 at the time could have attempted to construct the same
3 type of argument that the executive is trying to
4 construct here --

5 JUSTICE BREYER: Yes. But your view would
6 be that the Court should reject it.

7 MR. ESTRADA: Yes. But -- but here, it is
8 even a weaker argument because one of the oddities of
9 the case is that as the Senate has -- and the country
10 have all moved into the modern age, the rules of the
11 Senate tend to provide for the Senate to be available at
12 the drop of a hat.

13 If you look, for example, at Rule 9, you can
14 always get, you know, the communications from Houses --
15 from the House or from the executive. If you look at
16 Rule 26 of the Senate, committees can meet whether or
17 not the chamber is actually in session.

18 You know, the business of the Senate is
19 ongoing; and therefore, in the modern world, it is even
20 much, much, much different than even the hypothetical
21 that you posited.

22 JUSTICE BREYER: You can say anything that
23 would -- on this, if you want to, that would turn it
24 back to the practicalities. Imagine, hypothetically,
25 that I would have thought President Theodore Roosevelt

1 acted unconstitutionally when he tried to make all of
2 his appointments, dozens and dozens, during a
3 two-second --

4 MR. ESTRADA: In 1903.

5 JUSTICE BREYER: Yes, yes --
6 inter-session --

7 MR. ESTRADA: Yes, constructive recess.

8 JUSTICE BREYER: Yes, yes.

9 MR. ESTRADA: Well --

10 JUSTICE BREYER: And by converse reasoning,
11 the Congress would not have been able, in 1835, to
12 prevent recess appointments simply by having a nearby
13 senator show up for a -- for one second, once every 3
14 days, over a 9-month period.

15 It seems to me what goes around comes around
16 in this -- in this --

17 MR. ESTRADA: Well, let me -- let me take
18 that as an opportunity because I think it does raise,
19 you know, the question to speak to the implication that
20 the Solicitor General makes in his brief, that the
21 Senate, as a body, doesn't have a view on whether it was
22 in recess or in session.

23 For the reason that I started out by
24 outlounging -- by outlining -- excuse me -- the Senate's
25 official records do show that the Senate was in session

1 on each date, and therefore, the Senate does have an
2 official view.

3 But from the practical point of view, we do
4 know that the Senate has a view on these things. And
5 how do we know? The president's party controls the
6 Senate. If the Senate wanted to recess, Rule 22nd of
7 the Senate says that's not a debatable proposition.

8 If a majority of the Senate wants to recess,
9 even before the evolution of the filibuster,
10 non-debatable proposition. So the Senate says, which is
11 controlled by the president's party, says, we want to
12 recess, we want to go away, we don't care if the
13 president has this power. They vote for that. House
14 says no. What happens then?

15 Article II, Section 3 of the Constitution,
16 the fight goes to the president, and it is in that event
17 that the president gets to adjourn them until such date
18 as he shall see proper.

19 So if the Senate had any view that it wanted
20 to recess, they could have had a vote, and the issue
21 would have ended up in the White House, in the lap of
22 the president. He had plenary constitutional power to
23 give himself an inter-session recess by terminating the
24 session and have a real recess appointment power if he
25 could find somebody whose vacancy had actually arisen at

1 the time.

2 But this is the cockeyed way of going about
3 the instruments of the Constitution. There is no power
4 in the Constitution to use the Recess Appointments
5 Clause to overcome the opposition of the Senate to the
6 president's nominees. And for all that we hear about
7 today, which has to do with how the heaven will fall,
8 and the parade of horrors, there is no parade, and
9 there is no horrible. The only thing that will happen
10 is that the president, heaven help us, will be forced to
11 comply with the advice and consent that the appointments
12 power -- excuse me -- the Appointments Clause actually
13 calls for. That was not viewed as an evil by the
14 Framers. That was what the Framers unanimously agreed
15 was going to be the principal means for appointments for
16 the principal officers of the union.

17 JUSTICE SOTOMAYOR: Mr. Estrada --

18 JUSTICE GINSBURG: If there is a 3-day
19 recess between sessions, then your argument is that --
20 that is a recess and the president can make -- can make
21 appointments in that time.

22 MR. ESTRADA: Justice Ginsburg, that is a
23 very interesting and somewhat difficult question. On
24 the facts of this case, there is a substantial question,
25 which no one really has litigated, as to whether there

1 was, in fact, an inter-session recess, whether the first
2 session of the 112th Congress ended on the morning of
3 January 3rd and therefore, we have the same Teddy
4 Roosevelt situation, or whether by adjourning on
5 December 30th and contemplating no further meetings
6 until January 3rd, whether that in effect -- in effect
7 was a sine die adjournment that ended the first session
8 of the Congress.

9 If the president had the same view about the
10 nature of the pro forma sessions, he could have taken
11 the view about the sessions between December 17th and
12 January 3rd and could have had a better legal argument
13 in attempting to claim that between December 30th and
14 January 3rd, there was at least an arguable
15 inter-session recess. And he did not do that.

16 Why didn't he? Because by waiting until the
17 convening of the first session -- of the second session
18 of the 112th Congress, by making an appointment on
19 January 4th instead of the morning of January 3rd, he
20 gives an extra year to his appointees to serve. That
21 shows that this is, indeed, the bottom of the slippery
22 slope on the Recess Appointments Clause. It is a
23 complete abuse of the process. It is being used for no
24 other purpose than to overcome the Senate opposition or
25 the Senate disinclination to agree with the president's

1 nominations.

2 What the Framers contemplated in coming up
3 with a joint power of appointment was you have to act
4 jointly. You have to play nice. And in a country of
5 300 million people, when the president wants a nominee
6 and the Senate does not agree, it is always possible for
7 the president to come up with another nominee who is
8 even more qualified and acceptable to the Senate. The
9 key here is acceptable to the Senate. He has to be able
10 to proffer someone to the Senate that the Senate is
11 willing to engage in a joint power of appointment for.

12 JUSTICE SOTOMAYOR: Mr. Estrada, in your
13 earlier example, you said that if the Senate decides to
14 recess and the House doesn't approve, that the president
15 can then do it.

16 Is it your belief that a recess is only
17 something that both Houses have agreed to? A break in
18 business that both Houses have agreed to?

19 MR. ESTRADA: I don't think so. It is
20 usually the case, Justice Sotomayor, but not
21 necessarily. The example I would give --

22 JUSTICE SOTOMAYOR: So what do you need --
23 why does the president have to adjourn the House in your
24 example?

25 MR. ESTRADA: No, I don't --

1 JUSTICE SOTOMAYOR: If the Senate votes
2 tomorrow to recess --

3 MR. ESTRADA: Yes.

4 JUSTICE SOTOMAYOR: -- can the president
5 appoint, at least in your view, any vacancy that occurs
6 during that recess?

7 MR. ESTRADA: If the Senate has been
8 recessed without days so that the session of the Senate
9 is over, even if the president, under Article II,
10 chooses to leave the House in session --

11 JUSTICE SOTOMAYOR: Why do you need a date?
12 What -- what -- in what rule makes a recess defined as
13 something without date?

14 MR. ESTRADA: This takes us back to the
15 first argument, and I think the contemplation was that
16 the recess would be the period of time that intervened
17 between the ending of a session of the Congress and the
18 beginning of the next. Here --

19 JUSTICE SOTOMAYOR: It always had a date,
20 because we knew January 3rd was a new session.

21 MR. ESTRADA: Well, that wasn't true until
22 the 20th Amendment. You know, the date was a much
23 different date in the original Constitution.

24 But to answer your earlier question, it is
25 usually the case that a recess is going to be longer

1 than 3 days, but it needn't be. If the Senate finished
2 all of its legislative business, for example, in this
3 year on December 30, 2011, and then voted to adjourn
4 sine die, and did not again meet until the beginning of
5 the second session of the Congress on January 3rd, that
6 would be an intra-session recess even though it would
7 not be one that would require consent of the House.

8 But in the usual case in which a recess is
9 taken for an extended period of time, it would be the
10 type of break that the Framers contemplated would need
11 the consent of the House.

12 And the reason for that should be obvious.
13 We have a system of a bicameral legislation. The houses
14 two are supposed to work together to accomplish the
15 business of the people. If the House is working on
16 something and the Senate wants to go away, or
17 visa-versa, they need the consent of each other because
18 they may need each other to frame out ongoing
19 legislative projects.

20 And if the House in its own judgment thinks
21 that the Senate is sufficiently available to the House
22 in our bicameral system so that it -- so that has been
23 is full compliance with the Adjournments Clause, it is
24 very difficult to see how in the agreement of both
25 houses of Congress that the Senate is in fact

1 effectively available, that is there with its full power
2 of unanimous consent every third day. If the House
3 thinks that that is adequate for the discharge of its
4 constitutional functions and the constitutional
5 functions of the Senate, it's very difficult to see how
6 the president gets to second-guess that.

7 One final point that has to do with the
8 Solicitor General's insistence on the no-business
9 language. Rules 5.1 of the Senate -- may I finish?

10 CHIEF JUSTICE ROBERTS: Yes.

11 MR. ESTRADA: -- makes very clear -- it's
12 also in our appendix -- that any business may
13 conducted -- be conducted at any time, without notice,
14 by unanimous consent. And so that effectively, what we
15 have here is merely an announcement by the Senate that
16 between December 17th and January 23rd, only unanimous
17 consent business would be agreed to.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 General Verrilli, 6 minutes.

20 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,

21 ON BEHALF OF THE PETITIONER

22 GENERAL VERRILLI: Thank you,
23 Mr. Chief Justice. Let me begin with a couple of points
24 on intra-session recesses. With respect to the question
25 that Justice Alito raised, it would have been perfectly

1 familiar to the Framers that a legislative body could
2 take an intra-session recess. Jefferson's parliamentary
3 manual written while he was Vice President and presiding
4 over the Senate specifically refers to recesses by
5 adjournment that occur within a session and the session
6 resumes when they are over.

7 The adjournment clause itself contemplates
8 the need for approval by the other branch for a period
9 longer than three days during the session. I think it's
10 difficult to imagine that if, as Justice Alito's
11 hypothetical suggested, that the Senate had in the first
12 years under President Washington decided to take a
13 two-month, intra-session break, that President
14 Washington wouldn't have been able to staff the offices
15 of the fledgling republic using the recess appointment
16 power.

17 JUSTICE ALITO: Well, if we agree with you
18 on the first question, then there either needs to either
19 be a number or a functional test. And I don't know
20 where the number would come from and I don't know how
21 the functional test would play out, so maybe you could
22 say just a word about that.

23 GENERAL VERRILLI: We think the number
24 should be -- should be the number in the Adjournments
25 Clause, 3 days or less. Now, presidents have exercised

1 restraint and there haven't been recess appointments in
2 periods below 10 days, but we think that would be the
3 line. Now --

4 JUSTICE ALITO: With respect to the presence
5 of that in the Adjournments Clause but the absence of
6 any number in the Recess Appointments Clause, how do you
7 explain that?

8 GENERAL VERRILLI: Well, I think that there
9 isn't really a need for explanation. A recess is a
10 suspension of business, and what the Adjournment Clause
11 says is if you are gone for 3 days or less you are not
12 really suspending your business, but if you are gone for
13 more than 3 days you are. And I think that is quite
14 consistent with the argument that my friends on the
15 other side are making.

16 Now, with respect to the history on
17 intra-session recess appointments, really if you look at
18 the congressional directory, which is a document that we
19 cite in our brief, and you look at the column that says
20 intra-session recesses, you will see page after page of
21 blank space until you get to the Civil War era when
22 intra-session recesses become more frequent. And
23 intra-session recess appointments really just precisely
24 parallel the increasing use by the Senate of
25 intra-session recesses.

1 CHIEF JUSTICE ROBERTS: Can you argue that
2 the Senate sort of acquiesced in that and everybody's
3 come together, but what would expect a Senator to do?

4 GENERAL VERRILLI: Well, if they --

5 CHIEF JUSTICE ROBERTS: You know, the
6 president appoints somebody during a recess contrary to
7 the Respondent's view, what's the Senator who objects to
8 that supposed to do?

9 GENERAL VERRILLI: Well, a couple of things
10 about that, Mr. Chief Justice. The Pay Act, of course,
11 was first enacted in this period, in the 1860s, when the
12 first intra-session recess appointments occurred, in
13 fact, even in its original form never said -- and since,
14 never said anything about trying to restrict
15 intra-session appointments. If the Congress felt that
16 these were improper, they could have done what they did
17 in the Tenure Of Office Act and passed a statute of
18 making it a crime for somebody to take one of these
19 appointments. But they didn't do anything like that.

20 CHIEF JUSTICE ROBERTS: Well, you would
21 object to that, wouldn't you?

22 GENERAL VERRILLI: Of course.

23 CHIEF JUSTICE ROBERTS: On the same grounds
24 that you're objecting here.

25 GENERAL VERRILLI: Well, we would. But in

1 terms of --

2 CHIEF JUSTICE ROBERTS: Well, then that's
3 not something that is effective for the --

4 GENERAL VERRILLI: But in terms of --

5 CHIEF JUSTICE ROBERTS: -- you think it's
6 unconstitutional.

7 GENERAL VERRILLI: In terms of an expression
8 of their disagreement as opposed to acquiescence it
9 would certainly be a question of disagreement, and it
10 didn't happen.

11 CHIEF JUSTICE ROBERTS: Well, the Senate
12 says we don't agree with the recess appointment, and you
13 say, well, it's too bad, the appointee is still in
14 office.

15 GENERAL VERRILLI: But they didn't, I guess,
16 would be, or the point being --

17 CHIEF JUSTICE ROBERTS: Well, some did --
18 Senator Byrd --

19 GENERAL VERRILLI: -- senators --

20 CHIEF JUSTICE ROBERTS: -- famously objected
21 to the president's assertion of that power.

22 GENERAL VERRILLI: Yeah, but he famously
23 objected to it, Mr. Chief Justice, by saying that the
24 intra-session recess ought to be 30 days or longer, not
25 that intra-session recesses are inappropriate as a

1 matter of constitutional power. So I actually think
2 that is just haggling about the length of the recess,
3 not about the existence of the power.

4 Now, if I can move to the question of --

5 CHIEF JUSTICE ROBERTS: No, I just want to
6 make sure I understand. Your idea is the Senator who
7 objects should do what?

8 GENERAL VERRILLI: Well, the Senator who
9 objects can say whatever the Senator wants, but we don't
10 have a historical record of objection. We have a
11 historical record of acquiescence.

12 CHIEF JUSTICE ROBERTS: But suppose the
13 Senator says, Look, I object to that, I think it's
14 unconstitutional, but I'm not going to -- what can I do?
15 The only think you can do is impeach the president,
16 right, for violating the Constitution. And he says it's
17 not worth it for the -- one of the offices --

18 GENERAL VERRILLI: Well, if the Congress as
19 a body thought that these were inappropriate they could
20 take legislative action to try to limit the president's
21 authority, and they just, they never have.

22 CHIEF JUSTICE ROBERTS: But would you say
23 that action would be totally ineffective?

24 GENERAL VERRILLI: Well, we'd agree on
25 the -- we'd certainly agree on the criminalizing point,

1 but in terms of the Pay Act, for example, they just
2 never in all their -- in their original consideration of
3 the Pay Act and subsequently, they never tried to
4 address this.

5 Now if I could turn to the --

6 JUSTICE KAGAN: But people object all the
7 time to things that in fact they can't do anything
8 about, right?

9 GENERAL VERRILLI: And, yes, Your Honor, and
10 of course -- and that's an individual objecting and it's
11 not the Senate objecting.

12 JUSTICE BREYER: The question of reports.
13 There were reports, remember? Sorry, I didn't mean
14 to -- your six minutes couldn't be up already.

15 CHIEF JUSTICE ROBERTS: Take a few more
16 minutes.

17 (Laughter.)

18 GENERAL VERRILLI: I was thinking the same
19 thing, Your Honor.

20 There were a couple of committee reports but
21 I believe those were on the "happen" issue, and let me
22 turn to that, if I could. Now Your Honor had pointed
23 out the number of -- happens number of appointments. As
24 I said, don't take that chart comprehensive. As we said
25 in our brief, it's not; we think there are many more,

1 and of course 39 presidents have made those
2 appointments.

3 Now, for purposes of the clause as we
4 discussed earlier, I think, are far better served by our
5 reading than the other side's. Jefferson gave a
6 reasonable textual reading, and then Your Honor asked
7 about the Pay Act. The Pay Act of course says if the
8 nomination -- if the vacancy arose within 30 days, but
9 it says something else, too, which is if a nomination is
10 pending --

11 JUSTICE BREYER: Yeah, but I'm focusing on
12 30 days and the reason I'm doing that is this seems to
13 me, hypothetically at least, a real matter for the
14 political branches to resolve among themselves.

15 Now, we have to decide this, so I thought,
16 well, why not look and see what Congress objects to the
17 least? And I got that 30-day thing from the Pay Act by
18 analogy.

19 GENERAL VERRILLI: I guess what I --

20 JUSTICE BREYER: So I want to get your view
21 on that.

22 GENERAL VERRILLI: Yes, of course. And what
23 I would point out by analogy also is that there is
24 another provision in the Pay Act, the very same statute,
25 that says so long as a nomination is pending, even if

1 the vacancy arose more than 30 days, that's the same
2 expression of Congress's views about what's appropriate.
3 What they care about is the chance to exercise their
4 advice against the --

5 JUSTICE SCALIA: Well, that was that Senate.
6 I mean, that's not the Senate that is sitting now. You
7 are attributing the views of one Senate to the Senate
8 over -- over time.

9 GENERAL VERRILLI: That is an expression of
10 the law of the United States that the Congress enacted.

11 JUSTICE BREYER: I'm really interested in
12 how you think the 30-day idea, if practical, plays out
13 in terms of your concerns.

14 GENERAL VERRILLI: Well, I think it, as I
15 said, I think there is an equilibrium here and the
16 30 days doesn't fully capture it. And let me just talk
17 about that if I could.

18 JUSTICE BREYER: Briefly.

19 CHIEF JUSTICE ROBERTS: Briefly.

20 GENERAL VERRILLI: Yes, thank you,
21 Mr. Chief Justice, briefly.

22 The vast majority of appointees are
23 submitted for advice and consent. That was true
24 historically; it's true now. The vast majority of
25 recess appointees are subsequently confirmed. So it's

1 just not the case that this is an end run around the
2 advice and consent role of the Senate. And there are
3 powerful reasons, of course, why presidents do that.
4 They don't want to have temporary appointments that they
5 have got to then deal with vacancies again, and they
6 don't want to unnecessarily create interbranch friction.

7 The real problem, I would submit here, is
8 that if you go with Respondents on the pro forma issue
9 or under the -- on the two underlying issues, the D.C.
10 Circuit ruling, you are really are writing the recess
11 appointment power out of the Constitution, and that's
12 antithetical to the liberty-enhancing properties of
13 separation of powers that Madison described in Federalists
14 51, because ambitions which counteract ambitions
15 shouldn't disarm one side.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, General.

18 The case is submitted.

19 (Whereupon, at 11:37 a.m., the case in the
20 above-entitled matter was submitted.)
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