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Canning.<sup>10</sup> The company then petitioned the D.C. Circuit for review.<sup>11</sup> Citing *New Process Steel*,<sup>12</sup> Noel Canning argued were invalid because the Senate was never actually in recess when the President made the appointments,<sup>13</sup> *cpf.* was invalid.<sup>14</sup>

## II. PRECEDENT AND THE *NOEL CANNING* OPINION

### A. *Precedent*

Until recently, courts had provided very little judicial precedent involving the Recess Appointments Clause. The issue was a matter of first impression for the Supreme Court,<sup>15</sup> only a few cases involving the Clause had come before the United States Courts of Appeal.<sup>16</sup> Of the three prior appellate cases, only one decided what the United States Court of Appeals for the Second Circuit rejected a challenge by a criminal defendant to the authority of a district court judge who had been appointed during a Senate recess.<sup>17</sup> In rejecting the challenge, the appeals court held that the Recess Appointments Clause gave the President the power to recess appoint federal judges and to fill vacancies that actually arose while the Senate was in session but continued to exist during a recess.<sup>18</sup> Twenty-two years later in *United States v. Woodley*, the United States Court of Appeals for the Ninth Circuit

10. Joint Brief, *supra* note 7, at 13. The company was involved in a labor dispute with a local labor union. *Id.*

11. *Id.* at 14.

12. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

13. Joint Brief, *supra* note 7, at 15616.

14. *Id.* at 16.

15. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

16. Memorandum from the Office of Legal Counsel on the Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 8 (2012) [hereinafter O.C-147(oET(O))-17-101(P)-6(e)7(r)-4(i)-3(oc152.18 293)-6(e)7(r)-4(i)--4(I9(o)7(f63T159.02 JETBTA

In the third case, *Evans v. Stephens*, the United States Court of Appeals for the Eleventh Circuit held that a judge appointed to the Eleventh Circuit lacked the authority to sit on the panel because he had been appointed by President George W. Bush during an intrasession recess.<sup>21</sup> The petitioner argued, inter alia, that an intrasession recess does not qualify as a recess under the Clause.<sup>22</sup>

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very broad ruling.<sup>29</sup>

After holding that the Clause applies only to intersession recesses, the D.C. Circuit also held that the recess appointment power applies only to vacancies that actually come into existence during an intersession recess.<sup>40</sup> However, as Judge Griffith noted in his concurrence, the court did not need to decide this second matter since the first issue was dispositive.<sup>41</sup>

A hgy" o qpvju" chvgt" vjg" F0E0" Ektewkvøu" qrlpkqp" kp" *Noel Canning*, the United States Court of Appeals for the Third Circuit issued its own ruling on the Recess Appointments Clause in *NLRB v. New Vista Nursing and Rehabilitation*.<sup>42</sup> Like the D.C. Circuit, in *New Vista*, the Third Circuit held vjcv" ðvjg" Tgegüö" tghgttgf" qpn{" vq" kpvgtug" dtgcmu" States *New Vista*, the Obama Administration (the Administration) argued heavily for a standard advocated by Attorney General Harry Daugherty for determining when the Senate is unavailable, and therefore, when the President may exercise his recess appointment power.<sup>44</sup> The Administration argued that the standard allowed appointments during short intrasession breaks.<sup>45</sup> However, the court ycu" wprgtuwcfgf" vjcv" Fcwijgtv{øu" uvcpfctf" ycu the proper one to use. The court found that an examination of Founding Era state constitutions with ukokmct" encwugu" uwiiguvgf" vjcv" vjg" Wpkvgf" Uvcvgu" Eqpuvkvvkkppøu" Tgegüü" Appointments Clause applied to only either intersession or long intrasession breaks.<sup>46</sup> Additionally, the court reached the same conclusion when it looked to the context of the Recess Appointments court reao.0003>169pR



court found that the Clause of the Constitution, it refers to an intrasession break.<sup>61</sup> The court placed significance on the fact that the Clause of the Constitution referred to intersession breaks.<sup>62</sup>

The court also examined the context of the Clause within the time of the Framing. It noted the length of Congressional breaks during the time of the Framing was around six to nine months, wherein which time the Senate would be unable to perform its advice and consent function.<sup>63</sup> The court found that this context indicated that the Clause referred to long breaks, and not short or weekend breaks, which would arguably be covered by the Clause.<sup>64</sup>

In addition to finding that the historical record of presidential practice does not support the argument that the Clause referred to short or weekend breaks,







Clause to apply to new circumstances that correspond with the purpose of the Clause and are consistent with its language.<sup>91</sup>

Vjg" ugeqpf" ctiwogpv" vjg" Eqwtvøu" oclqtkv{" uqwijv" vq" tghwvg" ycu" vjg" cuugtvkqp" vjcv" vjg" kpvtcuguukqp" kpvgrtrtgvckqp" cnnqyu" ðvjg" Rtgukfgpv" vq" ocmg" ÷knnqike]cnn{\_ø" nqpi" tgeguu" crrqkpvogpvuö" fwg" vq" vhe portion of the Clause allowing a recess appointee to serve until the end of the next Senate session.<sup>92</sup> The Court claimed that this provision of the Clause allows the President and the Senate to always have at least one full session with which to undertake a complete confirmation process.<sup>93</sup>

Finally, the Court tackled the argument that its intrasession interpretation of the Clause would render the Clause vague. The Court responded, however, that vagueness was unavoidable and was arguably present no matter which interpretation one accepted.<sup>94</sup>

Chygt" eqpenwfkpi" vjcv" ðtgeguuö" kpenwfgf" kpvtcuguukqp" dtgcmu." kp" ctiwcdn{" c" move of raw judicial power, the Court placed a floor on how long the Senate o wuv" pqv" dg" kp" uguukqp" kp" qtfgt" vq" swcnkh{" "cu" ðvjg" Tgeguu" qh" vjg" Uggpcvgö" wpfgt" the Clause. Instead of looking to the three-day provision in the Adjournment

as an actual Senate session. The Court refused to determine whether Senators were present on the floor of the chamber during particular *pro forma* sessions, *hkp fkp i "v j cv" ð ] l \_ w f k e k c n " g h h q t v u " v q " g p i c i g " k p " v j g u g " m k p f u " q h " k p s w k t k g u " y q u l d r i s k w p f w g " l w f k e k c n " k p v g t h g t g p e g " y k v j " v j g " h w p e v k q p k p i " q h " v j g " N g i k u n c v k x g " D t c p e j 0 6*<sup>98</sup>

Since *pro forma* sessions qualify as actual sessions of the Senate and because the Senate had been convening *pro forma* every three days, at the time the President made the recess appointments at issue, the Senate was in the middle of only a only F1 6.96 T f h e 6 4 - 3 3 ( a ) -

pqvfg"vjg"Encwugøu"wug"qh"vjg"yqtf"õtgeguuö"cu"qrrqugf"vq"vjg"yqtf"õcflqwtpö"  
cpf"cuugtvgf"vjcv"vjg"rtqkukqpu"qh"vjg"Eqpukvwvkqp"wukpi"õcflqwtpö"tghgttgf"vq"  
intrasession breaks.<sup>107</sup> Since the Framers used a different term in the Clause,



vq" öcö" qt" öcpö" Vjku" ctiwogpv" tgugodngu" qpg" ocfg" d{" Okejcn" Ecttkgt<sup>120</sup>  
 Ecttkgt" ctiwgf" vjcv" vjg" wug" qh" vjg" fghkpv" ctkeng" övjgö" kp" vjg" rjtcug" övjg"  
 Tgeguuö" cu" qrrqgf" vq" vjg" kpfghkpv" ctkeng" öcö" kpfkecvgu" vjcv" vjg" Encwug" ku"  
 referring to the single intersession recess.<sup>121</sup> Jg" cuugtvf" vjcv" vjg" wug" qh" övjgö"  
 kpfkecvgu" övjg" ukpiwct" hqto" qh" Tgeguu.ö" yjkg" övjg" wug" qh" ]cp] indefinite  
 article . .

The words of a constitutional provision should be read in the context of the entire text,<sup>129</sup> and an intratextual<sup>130</sup> analysis of the five clauses, which use the *vgt o" õcflqwt p o g p v ö" eq o r c t g f" v q" v j g" w u g" q h" õ t g e g u u ö" k p" v j g" T g e g u u" A p p o i n t m e n t s C l a u s e*, demonstrates the words to have the all-recesses and intersession-only meanings, respectfully. Professor Rappaport demonstrated *v j c v" v j g u g" e q p u v k v w k q p c n" r t q x k u k q p u" w u k p i" õ c f l q w t p o g p v ö" õ g z j k d k v ] \_" c" r c w g t p . õ" k p f k e c v k p i" v j c v" v j g" õ c n n - t g e g u u g u ö" o g c p k p i" k u" k o r n k e c v g f" y j g p" õ c f l q w t p o g p v ö" k u" u s e d .*<sup>131</sup> *J g" h q w p f" v j c v" õ c f l q w t p o g p v ö" q t" õ c f l q w t p ö" k p" v j g" R t g u g p v o g p v" C l a u s e ,*<sup>132</sup> *Three-Day Adjournment Clause,*<sup>133</sup> *Presidential Adjournment Clause,*<sup>134</sup> and the *Orders Presentment Clause*<sup>135</sup> referred to the equivalent of both intersession and intrasession recesses.<sup>136</sup> *J g" c n u q" h q w p f" v j c v" õ c f l q w t p ö" k p" t h e D a y - t o - D a y A d j o u r n m e n t C l a u s e*<sup>137</sup> *t g h g t u" v q" õ g z v t g o g n { " u j q t v" k p v t c u g u k q p" t g e g u u g u . õ" d w v" e q w n f" c n u q" r q u u k d n { " t g h g t" v q" c p" k p v g t u g u k q p" t g e g u u l*<sup>138</sup> Therefore, *v j g" h c e v" v j c v" v j g" T g e g u u" C r r q k p v o g p v u" E n c w u g" w u g u" õ t g e g u u ö" k p u v g c f" q h" õ c f l q w t p ö" k u" k o r q t v c p v" d g e c w u g" v j g" u s e o f d i f f e r i n g t e r m s w i t h i n a l e g a l t e x t s u g g e s t s d i f f e r i n g m e a n i n g s f o r t h o s e t e r m s .*<sup>139</sup> *U k p e g" v j g" õ c n n - t g e g u u g u ö"*

129. See *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (asserting that, in constitutional interpretation, ða fair construction of the whole instrumentð must be given); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998) (book review) (noting the ðtruism that interpreting a text requires contextð).

130. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (ðIn deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.ð).

131. Rappaport, *supra* note 117, at 1557659.

132. The relevant portion of the clause states: ðIf any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.ð U.S. CONST. art. I, § 7, cl. 2.

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o gc p k i " k u " k p e n w f g f " k p " v j g " E q p u k v w k q p ø u " w u g " q h " ö c f l q w t p o g p v . ö " v j g p " ö t g e g u u ö "



Likewise, if the Senate rejects a good nominee, it takes the blame.<sup>152</sup> Finally, if the President nominates and the Senate confirms a bad appointment, both





and air travel. Though it should not be written out of the Constitution,<sup>169</sup> the text of the Clause should not be given a meaning it cannot naturally bear,<sup>170</sup> especially if such a reading is simply for the sake of keeping the Clause relevant. Even if one subscribes to the living constitutionalist interpretation of the Clause taken by the majority, what is the point of giving new meaning to a

encwug" y jgtg" ðkvu" qpn{" tg ockpkpi" wue is the ignoble one of enabling the  
Rtgukf gpv"vq"ektew o xgpv"vjg"Ugpcvgøu"tqng"kp"vjg"cr r qkpvo gpv"rtqeguüö<sup>171</sup>

### C. Executive Practice

In issuing its ruling, the Supreme Court relied heavily upon executive practice. It is clear, however, that the practice of intrasession recesses is neither as longstanding nor as worthy of judicial deference as indicated by the Court.

Presidents utilized the recess appointment power infrequently in the early days of the Republic, and the recess appointments that were made were intersession appointments.<sup>172</sup> Prior to the Civil War, intrasession recesses of Congress were rare.<sup>173</sup> The first intrasession recess appointments came in 1867 under President Andrew Johnson.<sup>174</sup> From the Civil War until World War I, President Calvin Coolidge made the only other intrasession recess appointments.<sup>175</sup> However, Theodore Roosevelt caused controversy in 1903 when, as President, he made appointments to vacancies during what Roosevelt

vgto gf" c" ðeqpuvtwevkxg" tgeguüö<sup>176</sup> On December 7 of that year, the Senate ended a special session and then immediately convened into a regular session.<sup>177</sup> Tqqugxgnv"cti wgf"ðvjcv" c"urnkv"ugeqpf"ugrctcvgf"vjg"vyq"uguukqpu.ö" which created a recess that enabled him to make recess appointments.<sup>178</sup> The Senate Judiciary Committee subsequently kuuwgf" c"tgrqtv"tglgvki" Tqqugxgnvøu" assertion that a recess had occurred,<sup>179</sup> but took no other retaliatory action.<sup>180</sup>

In the modern era, Congress began taking more intrasession recesses, a pattern which produced more intrasession recess appointments by Presidents.<sup>181</sup> This trend began in 1947 with President Harry S. Truman who

169. *Id.*

170. *Id.*

171. *Id.*

172. Carrier, *supra* note 120, at 2209611 (1994); Rappaport, *supra* note 117, at 1572.

173. Rappaport, *supra* note 117, at 1501.

174. *Id.* at 1572; OLC Memo, *supra* note 16, at 6.

175. Carrier, *supra* note 120, at 2212.

176. *Id.* at 2211.

177. *Id.* at 2212.

178. *Id.*

179. *Id.*

180. Carrier, *supra* note 120, at 2212.

181. *Id.*; Rappaport, *supra* note 117, at 1501.

made twenty such appointments over four intrasession recesses.<sup>182</sup> President Dwight Eisenhower made nine intrasession appointments; however, neither Presidents John F. Kennedy nor Lyndon Johnson made any.<sup>183</sup> President Richard Nixon made eight intrasession appointments; President Gerald Ford made zero; and President Jimmy Carter made seventeen intrasession recess appointments.<sup>184</sup> Presidents began using intrasession recess appointments in much greater number beginning with President Ronald Reagan. Reagan vastly increased the number of intrasession recess appointments compared to his predecessors by making roughly seventy intrasession appointments.<sup>185</sup> Many of these appointments ensure the appointment of judges to the federal judiciary.<sup>186</sup> President George H.W. Bush, though not wielding his recess appointment power as controversially as Reagan, made thirty-seven intrasession recess appointments.<sup>187</sup> President Bill Clinton made fifty-three intrasession recess appointments;<sup>188</sup> President George W. Bush made 141;<sup>189</sup> and President Obama had made twenty-six intrasession recess appointments as of June 3, 2013.<sup>190</sup>

Likely in response to the large number of recess appointments made by President George W. Bush, in 2007 the Democratic Senate began utilizing short *pro forma* sessions during intrasession Senate breaks.<sup>191</sup> Prior to that time, no president had made an intrasession recess appointment during a Senate break lasting less than ten days.<sup>192</sup> Therefore, the idea was to use the *pro forma* sessions to divide long Senate breaks into breaks of only three or four days in an attempt to prevent the President from issuing recess

182. Carrier, *supra* note 120, at 2212613.

183. *Id.* at 2213.

184. *Id.*

185. Carrier says that Reagan made seventy-three intrasession recess appointments, while the Congressional Research Service states the number is seventy-two. *Id.* at 2214; Memorandum, Cong. Research Serv., *The Noel Canning Decision and Recess Appointments Made from 1981 to 2013*, at 4 (Feb. 4, 2013) [hereinafter CRS *Noel Canning Memo*], available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf>.

186. Carrier, *supra* note 120, at 2214615.

187. *Id.* at 2215.

188. CRS *Noel Canning Memo*, *supra* note 185.

189. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001 to OCTOBER 31, 2008, at 3 (2008) [hereinafter CRS REPORT ON BUSH RECESS APPOINTMENTS].

190. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 5 (2013).

191. Alex N. Kron, Note, *The Constitutional Validity of Pro Forma Recess Appointments: A Bright-Line Test Using a Substance-over-Form Approach*, 98 IOWA L. REV. 397, 405 (2012).

192. CARPENTER, *supra* note 6, at 15 n.97.

appointments; or, if an appointment was still made, at least make it the subject of a recess appointment.<sup>193</sup> Such *pro forma* sessions, typically, are very short and sometimes lasting only seconds and require the presence of only one or two Senators.<sup>194</sup> Unlike President Obama who has argued that the *pro forma* sessions do not limit his recess appointment power, President Bush did not attempt to make any recess appointments while the Senate utilized *pro forma* sessions.<sup>195</sup> The Senate did not use *pro forma* sessions during President Clinton's term but began the practice again in 2010 and continued using such sessions through January 2012.<sup>196</sup> At that time, the President went against the Senate and refused to acknowledge the *pro forma* sessions.<sup>197</sup>

The Supreme Court also looked to opinions of the Executive Branch over the years; however, the Executive has not been consistent in what it has viewed as recess appointments. In *Cheney v. United States District Court*,<sup>198</sup> executive interpretations of the Clause found that the recess appointment power extended only to intersession recesses.<sup>198</sup> For example, in 1901, Attorney General Philander Knox issued an opinion to President Theodore Roosevelt advising him against making an intrasession recess appointment.<sup>199</sup> Knox asserted that any temporary break within a regular session of the Senate was not a recess referred to by the Recess Appointments Clause.<sup>200</sup> He argued that this precluded the President from making such appointments.







and structural aspects of the Clause, which suggest the clause holds the intersession-only meaning.

*D. The Practical Interpretation*

Vjg"Uwrtgog"Eqwtv"wnvkocvgn{"cfqrvgf" c" rtcevkecn" kpvgrtrgvckqp"qh" ÷vjg" Tgeguu.öjqnfkpi" c"Ugpcvg"dtgcm"qh"nguu"vjcp"vjtg"fc{u"ycu"pqv"nqpi"gpqwi j"vq" trigger the Clause, and a break shorter than ten days was *presumptively* too short. In so holding, the Court examined two possible standards, which kpenwfgf" Cwqtpg{ " Igpctn" Fcwijgtv{øu" uvcpfctf" cpf" vjg" vjtg" day standard derived from the Adjournment Clause. The former standard is unworkable, while the latter is without a basis in the Constitution.

In *Noel Canning*, the Board asked the court to adopt the standard set forth

given the authority to receive presidential messages, including nominations for appointments, during a recess.<sup>229</sup> Therefore, the Court was correct to reject the Daugherty standard in *Noel Canning*, since the features it describes cannot be adequately ascribed to a Senate recess.

The Court, however, looked to the Adjournment Clause in holding that any Senate break less than three days is without question too short to constitute a serve different functions and, therefore, operate differently.

The Adjournment Clause prevents one house from unilaterally taking a sustained break, which could prevent the passage of important legislation while Congress is in session.<sup>230</sup> Therefore, the three-day provision, as part of the Adjournment Clause, makes sense: it allows one house to take a short break from business, while preventing that house from using the break to unilaterally hold up legislation. The Recess Appointments Clause, on the other hand, is an advice and consent role. Therefore, the two clauses have different purposes and appear to have little relation to one another.

An examination of the practical implications of applying the three-day adjournment provision to the Recess Appointments Clause demonstrates further the unrelated nature of the two clauses. Under the three-day appointment during any Senate break lasting longer than three days; however, this makes little practical sense. A floor of three days hardly seems a sufficient amount of time to warrant allowing the President to use the auxiliary method of appointment.<sup>231</sup> Under this definition of a recess, a break lasting three days and one minute would be sufficient for the President to exercise his recess appointment authority, and it seems unlikely that a situation would arise whereby a vacant position would need to be filled within such a short amount of time. This argument is likely one of the reasons the Court held that a break less than ten days, and not just three, was presumptively too short, barring some extenuating circumstances. This ten-day standard was based on executive practice and the fact that no prior President had made an intrasession appointment over an intrasession break of less than ten days. However, as previously discussed, a great deal of weight should not be placed on executive practice in this area, not only because it is recent, but also because the



Only time will truly tell whether the Court's ruling severely hampers the use of recess appointments to circumvent the Senate's advice and consent function. It could be that the holding regarding *pro forma* sessions will allow the Senate to maintain an effective check on presidential appointments. The Constitution establishes a government of co-equal branches, and the legislative advice and consent function serves as a major check upon the Executive. This check is part of a structural scheme implemented by the Framers to protect the liberties of Americans. Though the Court may not have provided the best interpretation, the *Noel Canning* decision is important in that it prevents the President from effectively negating this check altogether. Such would have been the effect of the Administration's standard, thereby expanding the power of the Executive at the expense of the Legislature.

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\* J.D., 2014, Saint Louis University School of Law. I would like to thank Professors Joel K. Goldstein and Karen Speiser Sanner for their valuable advice and encouragement both in writing this article and in law school. I would also like to thank my friends and family for their help and support in getting me to where I am today.