Canning.[10] The company then petitioned the D.C. Circuit for review.[11] Citing the Supreme Courtôs 2010 ruling in *New Process Steel*,[12] Noel Canning argued the Board lacked a quorum due to the fact that the three ñrecessò appointments were invalid because the Senate was never actually in recess when the President made the appointments,[13] and, accordingly, the Boardôs ruling itself was invalid.[14]

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,[15] and prior to the D.C. Circuitôs opinion in *Noel Canning*, only a few cases involving the Clause had come before the United States Courts of Appeal.[16] Of the three prior appellate cases, only one decided what constitutes a ñrecess.ò In *United States v. Allocco*, 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.[17] 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.[18] Twenty-two years later in *United States v. Woodley*, the United States Court of Appeals for the Ninth Circuit also upheld the Presidentôs power to recess appoint ñjudicial officers.ò[19]

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 15ï16.

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 ruled that ñrecessò extended to intrasession recesses.[20] In *Evans*, the petitioner claimed 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.[21] The petitioner argued, inter alia, that an intrasession recess does not qualify as a recess under the Clause.[22]

very broad ruling.[29]

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.[40] However, as Judge Griffith noted in his concurrence, the court did not need to decide this second matter since the first issue was dispositive.[41]

A few months after the D.C. Circuitôs opinion in *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*.[42] Like the D.C. Circuit, in *New Vista*, the Third Circuit held that ñthe Recessò referred only to intersession breaks.[43] In *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.[44] The Administration argued that the standard allowed appointments during short intrasession breaks.[45] However, the court was unpersuaded that Daughertyôs standard was the proper one to use. The court found that an examination of Founding Era state constitutions with similar clauses suggested that the United States Constitutionôs Recess Appointments Clause applied to only either intersession or long intrasession breaks.[46] Additionally, the court reached the same conclusion when it looked to the context of the Recess Appointments court rea

particular length of time.[49] The court rejected any link with the Adjournment Clause[50] ð which requires either chamber of Congress to get the otherôs consent before adjourning for more than three days ð and noted that there was ñno constitutional basis for any sort of durational limit on what constitutes óthe Recess.îò[51] Second, the Third Circuit found the Clauseôs provision requiring that recess-appointed officersô terms expire at the end of the next Senate session suggested that the Clause applied to only intersession recesses. It noted that there was common agreement that a Senate ñsessionò begins with the first convening of the Senate and ends when the Senate adjourns *sine dine* or when its term automatically expires on January 3 of any year.[52] The court found that the Clauseôs requirement that recess-appointed officersô terms expire at the end of the next Senate session suggested that their appointments were understood to be made between separate Senate sessions.[53]

Finally, in holding that ñthe Recessò refers only to intersession breaks, the Third Circuit discarded the Administrationôs arguments regarding historical executive practice. The court found that for the first 100 years after the framing, ñrecessò was generally understood to mean only intersession breaks.[54] In examining the historical practice of presidents, it found that the use of the recess appointment power during intrasession breaks was a relatively recent development, and that such a use of the power was in the sole interest of the President.[55] The court found that such a recent practice was not worthy of deference by the Judiciary.[56]

The last United States Circuit Court of Appeal to decide the meaning of ñthe Recessò before the United States Supreme Court took up the issue, was the Fourth Circuit in *NLRB v. Enterprise Leasing Co. Southeast*.[57] Here, again, the Administration argued for an ñopen for businessò standard of determining when the Senate is in recess,[58]

court found that each time the term ñadjournò or ñadjournmentò appears in the Constitution, it refers to an intrasession break.[61] The court placed significance on the use of ñrecessò solely in the Recess Appointments, when the Framers could have used ñadjournò and found that this suggested that ñthe Recessò referred to intersession breaks.[62]

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 Constitutionôs ratification was around six to nine months, wherein which time the Senate would be unable to perform its advice and consent function.[63] 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 Administrationôs standard.[64]

In addition to finding that the historical record of presidential practice does not indicate an ñis andaMon

intersession and intrasession breaks.[80] Additionally, by pointing to other areas of the Constitution using the definite article ñthe,ò Breyer also discounted the notion that the Recess Appointments Clauseôs use of ñtheò suggests it applies only to intersession recesses.[81] Therefore, Justice Breyer found the Clauseôs text ambiguous and then turned to executive practice where the Court placed ñsignificant weight.ò[82] In fact, the Court used historical practice as its primary means of support in

Clause to apply to new circumstances that correspond with the purpose of the Clause and are consistent with its language.[91]

The second argument the Courtôs majority sought to refute was the assertion that the intrasession interpretation allows ñthe President to make óillogic[ally]ô long recess appointmentsò due to the portion of the Clause allowing a recess appointee to serve until the end of the next Senate session.[92] 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.[93]

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.[94]

After concluding that ñrecessò included intrasession breaks, in arguably a move of raw judicial power, the Court placed a floor on how long the Senate must not be in session in order to qualify as ñthe Recess of the Senateò under 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, finding that ñ[j]udicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.ò[98]

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 onlyF1 6.96 Tfhe64-33(a)-

noted the Clauseôs use of the word ñrecessò as opposed to the word ñadjournò and asserted that the provisions of the Constitution using ñadjournò referred to intrasession breaks.[107] Since the Framers used a different term in the Clause,

1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties.[116]

III. ANALYSIS

In analyzing the Supreme Courtôs opinion, Professor Michael Rappaportôs three possible interpretations of ñthe Recessò are helpful.[117] These three interpretations are: the intersession interpretation ð where a recess appointment can only be made during the recess between two congressional sessions; the all intrasession recess (or all-recesses) interpretation ð where ñrecessò includes all intrasession recesses irrespective of length; and the practical intrasession interpretation ð where appointments may be made during intrasession recesses that are greater than a certain set length.[118]

The opinions by the D.C. Circuit and Justice Scalia in the *Noel Canning* case and by the Third and Fourth Circuits in *New Vista* and *Enterprise Leasing*, all interpreted the Clause as having the intersession-only meaning. On the other hand, the Eleventh Circuit in *Evans v. Stephens* took the all-recesses view, and Justice Breyerôs majority opinion for the Supreme Court applied the practical interpretation. This Note sets out to demonstrate that those opinions taking the intersession-only view of the Clause have the proper interpretation. It does so by analyzing the text of the Clause, examining how the Clause fits within the Constitutionôs structure of separation of powers, evaluating the relevant executive practice, and finally demonstrating the issues with the Supreme Courtôs practical interpretation.

A. Text

When interpreting a provision of the Constitution, the proper place to begin is ñwith its text.ò[119] An examination of the Clause, within the context of both the time of its writing and the Constitution as a whole, demonstrates ñthe Recessò to have the intersession-only meaning.

Before demonstrating the ways in which the Constitutionôs text evidences that the Recess Appointments Clause holds the intersession-only meaning, it is first important to show the ways in which it does *not* so demonstrate, such as arguments regarding the definite article ñthe.ò The D.C. Circuit, in its opinion in *Noel Canning*, placed great emphasis on the fact that the Recess Appointments Clause uses the definite article ñtheò in ñthe Recessò as opposed

116. *Id.* at 2605.

117. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1547 (2005).

118. *Id.*

119. NLRB v. New Vista Nursing and Rehab., 719 F.3d 203, 221 (citing City of Boerne v. Flores, 521 U.S. 507, 519 (1997)).

to ñaò or ñan.ò This argument resembles one made by Michael Carrier.[120] Carrier argued that the use of the definite article ñtheò in the phrase ñthe Recessò as opposed to the indefinite article ñaò indicates that the Clause is referring to the single intersession recess.[121] He asserted that the use of ñtheò indicates ñthe singular form of Recess,ò while ñthe use of [an] indefinite article . .

The words of a constitutional provision should be read in the context of the entire text,[129] and an intratextual[130] analysis of the five clauses, which use the term ñadjournmentò compared to the use of ñrecessò in the Recess Appointments Clause, demonstrates the words to have the all-recesses and intersession-only meanings, respectfully. Professor Rappaport demonstrated that these constitutional provisions using ñadjournmentò ñexhibit[] a pattern,ò indicating that the ñall-recessesò meaning is implicated when ñadjournmentò is used.[131] He found that ñadjournmentò or ñadjournò in the Presentment Clause,[132] Three-Day Adjournment Clause,[133] Presidential Adjournment Clause,[134] and the Orders Presentment Clause[135] referred to the equivalent of both intersession and intrasession recesses.[136] He also found that ñadjournò in the Day-to-Day Adjournment Clause[137] refers to ñextremely short intrasession recesses,ò but could also possibly refer to an intersession recess.[138] Therefore, the fact that the Recess Appointments Clause uses ñrecessò instead of ñadjournò is important because the use of differing terms within a legal text suggests differing meanings for those terms.[139] Since the ñall-recessesò

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

130. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (ñIn 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.ò).

131. Rappaport, *supra* note 117, at 1557ï59.

132. The relevant portion of the clause states: ñIf 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.ò U.S. CONST. art. I, § 7, cl. 2.

133. ñ

meaning is included in the Constitutionôs use of ñadjournment,ò then ñrecessò

Likewise, if the Senate rejects a good nominee, it takes the blame.[152] Finally, if the President nominates and the Senate confirms a bad appointment, both

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and air travel. Though it should not be written out of the Constitution,[169] the text of the Clause should not be given a meaning it cannot naturally bear,[170] 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 clause where ñits only remaining use is the ignoble one of enabling the President to circumvent the Senateôs role in the appointment processò?[171]

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.[172] Prior to the Civil War, intrasession recesses of Congress were rare.[173] The first intrasession recess appointments came in 1867 under President Andrew Johnson.[174] From the Civil War until World War I, President Calvin Coolidge made the only other intrasession recess appointments.[175] However, Theodore Roosevelt caused controversy in 1903 when, as President, he made appointments to vacancies during what Roosevelt termed a ñconstructive recess.ò[176] On December 7 of that year, the Senate ended a special session and then immediately convened into a regular session.[177] Roosevelt argued ñthat a split second separated the two sessions,ò which created a recess that enabled him to make recess appointments.[178] The Senate Judiciary Committee subsequently issued a report rejecting Roseveltôs assertion that a recess had occurred,[179] but took no other retaliatory action.[180]

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

169. *Id.*
170. *Id.*
171. *Id.*
172. Carrier, *supra* note 120, at 2209ï11 (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.[182] President Dwight Eisenhower made nine intrasession appointments; however, neither Presidents John F. Kennedy nor Lyndon Johnson made any.[183] President Richard Nixon made eight intrasession appointments; President Gerald Ford made zero; and President Jimmy Carter made seventeen intrasession recess appointments.[184] 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.[185] Many of Reaganôs appointments were made in order to ensure the appointment of controversial nominees by avoiding the Senateôs advice and consent role.[186] President George H.W. Bush, though not wielding his recess appointment power as controversially as Reagan, made thirty-seven intrasession recess appointments.[187] President Bill Clinton made fifty-three intrasession recess appointments;[188] President George W. Bush made 141;[189] and President Obama had made twenty-six intrasession recess appointments as of June 3, 2013.[190]

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.[191] Prior to that time, no president had made an intrasession recess appointment during a Senate break lasting less than ten days.[192] 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 2212ï13.

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 1981ï2013, 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 2214ï15.

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, 2001ïOCTOBER 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 ñsignificant controversy.ò[193] Such *pro forma* sessions, typically, are very short ð sometimes lasting only seconds ð and require the presence of only one or two Senators.[194] 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.[195] The Senate did not use *pro forma* sessions during President Obamaôs first year in office, but began the practice again in 2010 and continued using such sessions through January 2012.[196] At that time, the President went against the Senate and refused to acknowledge the *pro forma* sessionsô restraint on his recess appointment power.[197]

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 constituting a ñrecessò under the Recess Appointments Clause. Early executive interpretations of the Clause found that the recess appointment power extended only to intersession recesses.[198] For example, in 1901, Attorney General Philander Knox issued an opinion to President Theodore Roosevelt advising him against making an intrasession recess appointment.[199] Knox asserted that any temporary break within a regular session of the Senate was not a recess referred to by the Recess Appointments Clause.[200] He argued that this pre*ed98 417.91TBT138.98 445(m)17(ent)6(3005f462.55 461.5823(et)(si)8(on)-79(r)-7(eces)ent)6en

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

D. The Practical Interpretation

The Supreme Court ultimately adopted a practical interpretation of ñthe Recess,ò holding a Senate break of less than three days was not long enough to trigger the Clause, and a break shorter than ten days was *presumptively* too short. In so holding, the Court examined two possible standards, which included Attorney General Daughertyôs standard and the three-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.[229] 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 ñrecess.ò The Court was mistaken to do so, however, since the two clauses 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.[230] 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 ñauxiliaryò method of appointment to be used when the Senate cannot fulfill its 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 adjournment definition of ñthe Recess,ò the President could make a recess 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.[231] Under this definition of ñrecess,ò 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 Executive has been ñall over the placeò in what it has traditionally viewed as

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Only time will truly tell whether the Courtôs ruling severely hampers the use of recess appointments to circumvent the Senateôs 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 Administrationôs standard, thereby expanding the power of the Executive at the expense of the Legislature.

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