No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

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

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. The questions presented are:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the International Brotherhood of Teamsters Local 760 is also a party to the proceeding. It was an intervenor in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 705 F.3d 490. The decisions and orders of the National Labor Relations Board (Pet. App. 56a-63a) and the administrative law judge (Pet. App. 63a-90a) are reported at 358 NLRB No. 4.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. The petition for a writ of certiorari was filed on April 25, 2013, and granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Recess Appointments Clause (Art. II, § 2, Cl. 3) provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the

Senate, by granting Commissions which shall expire at the End of their next Session." Other pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 90a-96a.

STATEMENT

1. The National Labor Relations Board administers the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The Board consists of five members who serve five-year terms and are appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(a). Three members constitute a quorum, 29 U.S.C. 153(b), and when three positions on the Board become vacant, it cannot adjudicate cases involving alleged unfair labor practices, see *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640-2645 (2010).

In August 2011, the Board's membership fell to three members, one of whom had been appointed by the President during a 2010 recess of the Senate. Because that member's long-pending nomination was withdrawn after Senate inaction, it was understood that his term would expire at the end of the First Session of the 112th Congress. Pet. 3; Pet. App. 15a. That session ended at noon on January 3, 2012, when the Second Session began by operation of Section 2 of the Twentieth Amendment. See Pet. 3-4 & n.2.

Approximately two weeks earlier, the Senate had adjourned pursuant to an order adopted by unanimous consent. Pet. App. 91a-92a. That order provided that the Senate would reconvene "for pro forma sessions only, with no business conducted," on four dates between December 17 and the First Session's end on January 3. *Id.* at 91a. Each "pro forma session" was to be followed immediately by another adjournment. *Ibid.* The Senate's order further provided that after the Second Ses-

sion of the 112th Congress commenced at noon on January 3, the Senate would again adjourn, reconvening only for pro-forma sessions, "with no business conducted," on five specified dates from January 6 to January 20. *Ibid.* Once again, the order provided that each pro-forma session would be followed immediately by another adjournment. *Ibid.* The order further provided that the Senate would resume business on January 23. *Id.* at 91a-92a. In another order entered the same day, the Senate referred to its impending absence as a "recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

By virtue of the Senate's order, the Second Session of the 112th Congress began with a period of nearly three weeks, from January 3 to 23, 2012, in which the Senate had provided that "no business [would be] conducted," and during which no Senators were required to attend other than the one who gaveled in and out each pro-forma session. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, at 2, 13 (Jan. 6, 2012) (*OLC Pro Forma Op.*), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

In view of the Senate's explicit cessation of business for the period from January 3 to January 23, 2012, the President invoked the Recess Appointments Clause and appointed three new Board members on January 4, one day after the Board lost its quorum. Pet. App. 15a.

2. This case involves a final order the Board issued shortly after those appointments. In September 2011, an administrative law judge had found that respondent Noel Canning (hereinafter, respondent) had committed an unfair labor practice. Pet. App. 63a-90a. On February 8, 2012, a three-member panel of the Board—which included two members appointed during the January

2012 recess—affirmed the administrative law judge's findings and conclusions and adopted his proposed order with minor modifications. *Id.* at 15a-16a, 56a-63a.

Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-petition for enforcement of the order. Pet. App. 2a; see 29 U.S.C. 160(e) and (f). Respondent contested the Board's order on the merits and also contended, for the first time, that the order was invalid because the Senate was purportedly not in recess when the President made his appointments to the Board. Pet. App. 2a-3a. Respondent claimed that the Senate's periodic "pro forma sessions" transformed what would otherwise have been a 20-day recess into a series of three-day adjournments, each too brief to constitute a recess for purposes of the Recess Appointments Clause. Resp. C.A. Br. 29-36.

3. The court of appeals granted respondent's petition for review and vacated the Board's order. Pet. App. 1a-55a. The court considered and rejected respondent's nonconstitutional challenges to the merits of the Board's order. *Id.* at 3a-10a. It also concluded it had jurisdiction to address respondent's constitutional challenge, which had not been raised before the Board. *Id.* at 11a-13a.[1]

Turning to the constitutional merits, the court held that the President's appointments to the Board were not authorized by the Recess Appointments Clause. Pet.

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[1] The Eighth Circuit recently held that a recess-appointments challenge must be exhausted with the Board. See *NLRB* v. *RELCO Locomotives, Inc.*, No. 12-2111, 2013 WL 4420775, at *28-*31 (Aug. 20, 2013). The Board has not taken that position in cases where it would have been powerless to do something to avoid the challenge (such as convene a three-member panel that included no challenged appointee).

App. 17a-52a. The court did not, however, rely on, or even discuss, respondent's principal contention that the Senate's pro-forma sessions prevented its 20-day break from being a "recess" for purposes of the Clause. Instead, the court based its decision on two broader grounds.

a. The court first held that the Recess Appointments Clause applies only to *inter*-session recesses of the Senate (*i.e.*, recesses that occur between the end of one enumerated session of Congress and the beginning of the next) and not to *intra*-session recesses (*i.e.*, recesses that take place during the course of such a session).[2] Pet. App. 18a-35a. The court inferred that limitation principally from the Clause's authorization for the President to fill vacancies during "the Recess" of the Senate. The court reasoned that the use of a definite article ("the," rather than "a") and a singular noun ("Recess," rather than "Recesses") indicated an intention to confine the power to a specific recess rather than to recesses as a class. *Id.* at 19a. The court surmised that the specific recess the Framers contemplated was the recess that occurs between enumerated sessions of the Senate. *Id.* at 20a-21a. The court recognized that Presidents had long interpreted the Clause to apply to both inter- and intra-session recesses, and had made numerous appointments based on that understanding. But the court deemed it more significant that there had been no documented intra-session recess appointments before 1867,

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[2] The court of appeals referred to the "two or sometimes three sessions per Congress." Pet. App. 20a. Since 1934, such sessions have all been separately numbered, though many earlier Senate "sessions" received the label "special," without any number. S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-538 (2011).

and that the court itself had identified only a few such appointments before World War II. *Id.* at 23a.

b. Although that holding was "sufficient to compel a decision vacating the Board's order," Pet. App. 35a, a majority of the court of appeals also held that, even during an inter-session recess, the President may not fill a vacancy unless it first arose during that same recess. *Id.* at 35a-52a. The court rejected the Executive's long-standing position, on which numerous appointments had rested, that in the context of the Recess Appointments Clause, the term "happen" is properly understood to mean "happen to exist," rather than "happen to arise." *Id.* at 35a-37a. The court read the early history of recess appointments as supporting its view that only vacancies arising during a recess may be filled by appointments during that recess. *Id.* at 38a-41a.

c. Because none of the vacancies on the Board had arisen during an inter-session recess and been filled during that recess, the court held that the Board lacked a valid quorum when it issued its order in this case and vacated that order. Pet. App. 34a-35a, 46a-47a, 52a, 53a.

d. Judge Griffith concurred in part and concurred in the judgment, agreeing that the Recess Appointments Clause is confined to inter-session recesses, but declining to decide whether it is limited to vacancies that first arise during the same recess. Pet. App. 54a-55a.

4. The Board sought certiorari, presenting the two questions that had been decided by the court of appeals. In its order granting certiorari, the Court directed the parties also to address "[w]hether the President's recess-appointment power may be exercised when the Senate is

convening every three days in *pro forma* sessions." 133 S. Ct. 2861-2862.[3]

SUMMARY OF ARGUMENT

A. The court of appeals erred in holding that the Recess Appointments Clause does not authorize presidential appointments during intra-session recesses. The plain meaning of the term "recess"—a period of cessation from usual work—applies to both inter- and intra-session recesses. The court of appeals thought the Clause refers to "the" (rather than "a") recess in order to refer to one recess, which it further surmised must be an inter-session recess. But the definite article "the" is commonly used—including in the Constitution itself—to refer to a category of events, and the phrase "the recess" was, by 1787, regularly used to describe the equivalent of intra-session breaks of the British Parliament, of state legislatures, of the Continental Congress, and of the Constitutional Convention itself.

Excluding intra-session recesses from the scope of the Recess Appointments Clause would undermine its central purposes, because it would prevent the President from being able to fill offices, and exercise his constitutional responsibility to take care that the laws be faithfully executed, even when the Senate is unable, for a significant period of time, to give its advice and consent to appointments.

The court of appeals believed there were only a handful of intra-session recess appointments before 1943, indicating that the Executive had theretofore assumed it

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[3] On July 30, 2013, the Senate confirmed four new Board members, and confirmed Member Pearce for an additional term. 159 Cong. Rec. S6049-S6051 (daily ed.). Those appointments do not affect the decision below, which pertained to the Board's prior configuration.

lacked power to make them. In fact, Presidents made intra-session recess appointments in every year before 1943 in which there was an intra-session recess of significant duration. At least fourteen Presidents have, collectively, made at least 600 civilian appointments (and thousands of military ones) during intra-session recesses, and that practice was expressly endorsed in a 1921 Attorney General opinion and described as "the accepted view" of the Clause by a 1948 Comptroller General opinion. The court of appeals' reasoning would dramatically upset that long-settled equilibrium between the political Branches.

B. The court of appeals further erred in holding that the Clause allows the President to fill only those vacancies that first arise during the recess in question. The ambiguous nature of the Clause's reference to "Vacancies that may happen during the Recess of the Senate" was recognized by President Jefferson in 1802 and by Attorney General Wirt in 1823, and the Clause's purposes are best served by allowing the President to fill vacancies that *exist* during the recess, because that ensures a genuine opportunity at all times for vacancies to be filled, even if only temporarily. Otherwise, important offices would remain vacant solely because prior occupants died or resigned—or those offices were first established—shortly before, rather than shortly after, a recess began.

Since 1823, a long series of Attorney General opinions (and every court-of-appeals decision before the one below) had repeatedly sustained the President's authority to use recess appointments to fill vacancies that preexisted the recesses during which those appointments were made. Indeed, the court of appeals' contrary reading is such a dramatic break with long-settled practice that records have not even been kept in a fashion that

consistently shows whether it was satisfied. Even so, nearly all Presidents have demonstrably made at least some, and often many, appointments that the court of appeals would deem unconstitutional. And, although the court of appeals believed that its view was consistent with the "earliest understanding of the Clause" (Pet. App. 38a), there was in fact no such settled understanding before 1823. There was instead continued debate, and there were indications from each of the first four Presidents—including actual appointments by Washington, Jefferson, and Madison—that recess appointments can indeed be used to fill vacancies that pre-existed the recess.

C. As an alternative ground for affirmance, respondent contends that the Senate was not in recess on January 4, 2012, for purposes of the Recess Appointments Clause, because the "pro forma" sessions it was holding every three days transformed what would have been a 20-day recess into a series of breaks too short to constitute a recess under the Clause. The Court should reject that contention. The Senate expressly ordered that it would conduct "no business" during the entire 20-day period between January 3 and 23, 2012, and it proceeded to do exactly that. It cannot, through the stratagem of seriatim pro-forma sessions, extinguish the President's express constitutional authority to make recess appointments while simultaneously being unavailable itself to provide advice and consent.

Since 1905 and 1921, respectively, the Senate and the Executive have formally recognized that a "recess" for purposes of the Clause exists during a period of time when the Senate's members owe no duty of attendance and when, because of its absence, the Senate cannot receive communications from the President or partici-

pate as a body in making appointments. That was true throughout the 20-day period here, notwithstanding the periodic pro-forma sessions that were being held merely as a matter of form.

Respondent notes that, at any pro-forma session, the Senate might have overturned its unanimous-consent order directing that "no business" be conducted. But the mere possibility that the Senate might be recalled early cannot prevent a substantial break from being a recess for recess-appointments purposes, because that would make the Clause inapplicable even during traditional recesses pursuant to conditional adjournment resolutions, which typically reserve to congressional leadership the power to recall either or both Houses if the public interest warrants.

Respondent attempts to manufacture at least some pedigree for the pro-forma-session stratagem, claiming that Presidents Reagan and George W. Bush acknowledged its legitimacy as a means of preventing recess appointments in 1985 and 2007. But there were no such acknowledgments, which makes it impossible for respondent to rely on any settled practice or Executive acquiescence.

Respondent separately contends that, for several decades, the House of Representatives and the Senate have used pro-forma sessions to comply with the Adjournment Clause, which prevents either House from adjourning for more than three days without the consent of the other. The better view, however, is that pro-forma sessions do not satisfy the Adjournment Clause. But even if they could—assuming arguendo that Congress would likely receive sufficient deference in construing a provision insofar as it principally involves internal legislative affairs—no such deference would be applicable in

this circumstance. The deployment of pro-forma sessions in an effort to avoid application of the Recess Appointments Clause would disrupt the balance that Article II strikes between the President and the Senate. When the Senate is absent in fact but present only by virtue of a legal fiction, the President may use the auxiliary method of appointment that the Constitution expressly provides for circumstances when the Senate is unavailable to provide its advice and consent and there are vacancies that the public interest requires to be filled, even if only on a temporary basis.

ARGUMENT

The court of appeals recognized (Pet. App. 30a, 41a) that both of its constitutional holdings were contrary to the only other court-of-appeals decisions that had addressed those questions. See *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1227 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005); *United States* v. *Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).[4] Both holdings would eviscerate long-established practice under the Constitution and upend the separation-of-powers equilibrium that practice reflects. Thousands of intra-session recess appointments have been made, collectively, in the 1860s and by almost every President since 1921. And the court of appeals' construction of "happen" has been repeatedly rejected in a series of Attorney General opinions begin-

[4] After the decision below, two other circuits held that the President cannot make recess appointments during intra-session recesses. See *NLRB* v. *Enterprise Leasing Co. Se.*, 722 F.3d 609 (4th Cir. 2013); *NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013), petition for reh'g pending (filed July 1, 2013; stayed July 15, 2013).

ning in the Monroe administration. It is also inconsistent with appointments by, or the expressed views of, all four of Monroe's predecessors, and inconsistent with appointments by at least 35 of his 38 successors. Those deeply engrained practices stand in vivid contrast to the lack of any historical pedigree for respondent's view that the Senate may use the pro-forma-session stratagem to block the President from exercising his Article II authority to make appointments during a 20-day period when its members will not assemble and are scheduled to "conduct[]" "no business" (Pet. App. 91a), and are therefore unable to perform their constitutional role of providing advice and consent. This Court should sustain the validity of the President's January 2012 appointments to the Board.

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

A legislative body like the Senate characteristically begins a recess, whether long or short, in one of two ways. By adjourning *sine die* (*i.e.*, without specifying a day for its return), it ends its current session, and the ensuing recess, which lasts until the beginning of the next session, is commonly known as an *inter*-session one. See Pet. App. 47a-49a. By adjourning, instead, to a specified time or date, the body typically resumes the business of its current session when it reconvenes, and the intervening recess is commonly known as an *intra*-session one.[5]

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[5] If there is no adjournment *sine die*, a session will end automatically at the time appointed by law for the start of a new session. See Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 166 (2d ed. 1812) (*Jefferson's Manual*).

The text and purposes of the Recess Appointments Clause, as well as long-established practice, cut decisively against excluding intra-session recesses from the scope of the Clause.

1. The constitutional text authorizes appointments during intra-session recesses

The Recess Appointments Clause authorizes the President to make temporary appointments "during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. That unqualified reference to "the Recess of the Senate" attaches no significance to whether a recess occurs during a session or between sessions.

a. As understood both at the time of the Framing and today, a "recess" is a "period of cessation from usual work." 13 *Oxford English Dictionary* 322-323 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); see 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) ("[r]emission or suspension of business or procedure"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. "recess" (1755) ("remission or suspension of any procedure"); Thomas Sheridan, *A General Dictionary of the English Language* s.v. "recess" (1780) (similar). That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

The Third Circuit has suggested that other, less-apposite definitions of "recess" "contain some connotation of permanence or, at least, longevity." *New Vista*, 719 F.3d at 221-222 (citing "'[r]etirement; retreat; withdrawing; secession,' as well as '[d]eparture' and '[r]emoval to distance'") (citation omitted). But that connotation cannot possibly support a categorical distinction between inter- and intra-session recesses for purposes of

the Clause. The Senate has had many inter-session recesses that were zero, one, or two days long (*e.g.*, in March 1791, 1793, 1797, 1801, 1867, 1877, 1881, 1885, 1897, 1903, 1905, 1909, 1913, 1917, 1921, and 1925; in December 1903 and 1922; in January 1941, 1942, 1980, 1992, and 1996). S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-535 (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.[6] Intra-session recesses are often much longer than that. The Senate's first intra-session recess of more than three days took place between December 23 and 30, 1800; many intra-session recesses since 1867 have been several weeks or even months long. *Id.* at 525-538.

b. In the legislative context, the Founding generation understood that the term "recess" applies to breaks both during and between sessions. The term described both kinds of breaks in British Parliamentary practice. See, *e.g.*, 13 *OED* 323 (quoting House of Commons request about an impending "Recess of this Parliament" that was during a session) (citing 3 H.L. Jour. 61 (1620)); 33 H.L. Jour. 464 (Nov. 26, 1772) (King's reference to a "Recess from Business" that was between sessions); *Jefferson's Manual* § LI, at 165 (describing procedural consequences of "recess by adjournment," which did not end a parliamentary session); 1 Richard Chandler, *The History and Proceedings of the House of Commons from the Restoration to the Present Time* 50 (1742) (noting "the Recess" for three weeks in December 1661-January 1662 that occurred within Parliament's Second Session).

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[6] Parliament's inter-session recesses were "sometimes only for a day or two." 1 William Blackstone, *Commentaries on the Laws of England* 180 (1765).

American legislative practice in the Founding era conformed to that understanding. The Articles of Confederation authorized Congress to convene a "Committee of the States" during "the recess of Congress." Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1. The only time Congress invoked that power was for a scheduled intra-session recess. See Pet. 14 & n.3.[7] Similarly, when the Constitutional Convention of 1787 adjourned on July 26 until August 6, delegates, including George Washington, referred to that intra-session break as "the recess," although the Convention did not adjourn *sine die* until September 17.[8]

State legislatures in the 1770s and 1780s also used "the recess" to refer to breaks brought about by adjournments to a date certain. In 1775, New York's Provincial Congress appointed a "Committee of Safety" to act "during the recess," which was a 14-day intra-session recess.[9] In 1781, New Jersey's legislature directed an official to purchase ammunition "during the recess of the

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[7] The Third Circuit dismissed this example because Congress ultimately failed to reconvene, as scheduled, before the session otherwise terminated by operation of law. See *New Vista*, 709 F.3d at 226 n.18. But that eventuality was unknown when the Committee was appointed, and Congress presumably expected an intra-session recess, because legislative committees were traditionally understood to be *prohibited* from meeting between sessions. See *Jefferson's Manual* § LI, at 165.

[8] 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1966) (*Farrand*) (letter from Washington to John Jay); 3 *Farrand* 191 (speech of Luther Martin); 2 *Farrand* 128 (July 26 adjournment), 649 ("Adjournment sine die").

[9] 2 *A Documentary History of the English Colonies in North America* 1346-1348 (Peter Force ed., 1839).

legislature," which was an intra-session break.[10] In 1783, a committee appointed to act "in the recess of the" Massachusetts legislature performed its duties during the equivalent of an intra-session break.[11] In 1786, the Journal of the New Hampshire House of Representatives reported the reading of public letters "received in the recess of" the legislature, referring to a period that followed an adjournment to a date certain.[12] Revolutionary-era constitutions in Pennsylvania and Vermont authorized the Executive to issue trade embargoes "in the recess" of the legislature, and those powers were exercised during intra-session breaks in 1778 and 1781.[13]

c. Those examples refute the court of appeals' assumption that the Constitution's contemporaneous use of a definite article in the phrase "the Recess" necessarily connotes a recess at the end of a legislative session. Pet. App. 19a, 27a, 32a. So do other provisions of the Constitution itself, which repeatedly use a singular noun in conjunction with "the" when referring to types of events that will happen on multiple occasions. See 17 *OED* 879 (noting "the" can "refer[] to a term used generically or universally"). For example, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, Cl. 5

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[10] New Jersey Legis. Council Journal, 5th Sess., 1st Sitting 70 (1781); *id.*, 2d Sitting 9.

[11] Massachusetts S. Journal, entries for July 11 and October 18, 1783 (on file with Massachusetts State Archives) (documenting Committee's appointment; legislature's adjournment from July 11 to September 24, 1783; and delivery of Committee's report).

[12] 20 *Early State Papers of New Hampshire* 452, 488 (Albert Stillman Batchellor ed., 1891).

[13] See Pet. 14 & n.4 (discussing applications of Pa. Const. of 1776, § 20, and Vt. Const. of 1777, Ch. II, § XVIII).

(emphasis added)—a directive that necessarily applies to all Vice Presidential absences rather than any one absence or special kind of absence. Similarly, the Adjournment Clause provides that neither the House nor the Senate may adjourn for more than three days "during *the Session* of Congress" without the consent of the other body. Art. I, § 5, Cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress (see Art. I, § 4, Cl. 2; Amend. XX, § 2), the reference to "the Session" cannot refer to only a single one. And indeed the Appointments Clause refers to "the Advice and Consent of the Senate," obviously referring to something that would occur multiple times. Art. II, § 2, Cl. 2.

Precisely because there were multiple sessions per Congress, the Framers knew there would usually be multiple inter-session recesses during a single Congress. See, *e.g.*, *Congressional Directory* 522 (noting three or more sessions in each of the first five Congresses). That further vitiates the court of appeals' attempt to distinguish between "the Recess" and "recesses." Pet. App. 19a, 22a, 27a, 32a.

d. The court of appeals also noted that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." Pet. App. 19a-20a. As an historical matter, however, "adjournment" typically referred to the *act* of adjourning, while "recess" referred to the resulting *period* of cessation from work—a distinction reflected in the Constitution itself.[14] When the Continental Congress

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[14] Compare, *e.g.*, 1 *OED* 157 (using "adjournment" to refer to the "act of adjourning"), and U.S. Const. Art. I, § 7, Cl. 2 (Pocket Veto Clause) ("unless the Congress by their Adjournment prevent its

convened a committee "during the recess" in 1784, it did so following an intra-session "adjournment." 27 *J. Continental Cong. 1774-1789*, at 555-556 (Gaillard Hunt ed., 1928).

Even if the Constitution were thought to use "adjournment," like "recess," to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive's position is entirely consistent with a distinction between a recess covered by the Recess Appointments Clause and an adjournment. The Adjournment Clause makes clear that the taking of a legislative break of three days or less "during the Session of Congress" is still an "adjourn[ment]," Art. I, § 5, Cl. 4, but the Executive has long understood that such short intra-session breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the President's recess-appointment authority. See, *e.g.*, 33 Op. Att'y Gen. 20, 24-25 (1921); 16 Op. O.L.C. 15, 15-16 (1992); see also *Wright* v. *United States*, 302 U.S. 583, 593-596 (1938) (making similar point in construing Pocket Veto Clause).

Return, in which Case it shall not be a Law"), with 13 *OED* 322 (using "recess" to refer to the "period of cessation from usual work"), and U.S. Const. Art. II, § 2, Cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate"); see Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LAWnLinguistics.com, Feb. 19, 2013 (explaining that "recess" was generally not used as a verb because that function was performed by "adjourn"), http://lawnlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1.

2. Intra-session recess appointments are necessary to serve the purposes of the Recess Appointments Clause

Excluding intra-session recesses from the scope of the Recess Appointments Clause would undermine its central purposes.

a. The Recess Appointments Clause ensures that vacant offices may be filled, albeit only temporarily, when the Senate is unavailable to offer its advice and consent; and it simultaneously frees the Senate from the obligation of being "continually in session for the appointment of officers." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause enables the President to meet his continuous responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, which necessarily requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135 (Jonathan Elliot ed., 2d ed. 1836) (Archibald Maclaine) (explaining that the power "to make temporary appointments * * * can be vested nowhere but in the executive, because he is perpetually acting for the public").

Those purposes apply without regard to whether a recess occurs during a session or between sessions. The Senate is no more available to provide its advice and consent during an intra-session recess than it is during an inter-session recess. The President is no less in need of officers to execute the laws. And, for the Nation, it will often be equally "necessary for the public service to fill [certain vacancies] without delay." *Federalist No. 67*, at 455. Indeed, the need to fill vacancies may be greater during intra-session recesses, which have often, especially in modern Senate practice, accounted for more of the

Senate's absences than have inter-session recesses. See *Congressional Directory* 529-538.

Excluding intra-session recesses from the President's recess-appointment authority would create periods during which there is no power to fill vacant offices, even temporarily, no matter how long the recess or how great the need. The Recess Appointments Clause was adopted for the very purpose of preventing such disabling lacunae.

b. The court of appeals expressed concern that Presidents could use intra-session recess appointments to evade the Senate's advice-and-consent role. Pet. App. 26a. But history belies that concern. As explained below, the authority to make intra-session recess appointments has been accepted by both political Branches for nearly a century. Yet Presidents routinely seek Senate confirmation when filling vacant offices—and of course have strong practical incentives to do so, because recess appointments are only temporary and because seeking Senate consent alleviates inter-Branch friction.

The court of appeals' position, by contrast, would permit the Senate unilaterally to strip the President of his constitutional authority to make recess appointments despite its unavailability to give advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain near the constitutionally mandated end of the session. See Pet. 23; Amend. XX, § 2. The Framers could not have contemplated that the President could thus be disabled from filling important positions when the Senate is concededly unavailable.

3. Long-standing practice supports intra-session recess appointments

a. There are no comprehensive records of all recess appointments made throughout the Nation's history, and information regarding recess appointments to military positions is particularly difficult to ascertain. See Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 1-2 (Apr. 23, 2004). It is nevertheless apparent that, since the 1860s, at least 14 Presidents have made more than 600 civilian appointments and thousands of military appointments during intra-session recesses of the Senate. See App., *infra*, 1a-64a (identifying known intra-session recess appointments).

The court of appeals dismissed the significance of that historical practice on the grounds that no President made such an appointment "for at least 80 years after the ratification" and that "such appointments were exceedingly rare" "for decades thereafter." Pet. App. 23a-24. In its view, "the infrequency of intrasession recess appointments during the first 150 years of the Republic 'suggests an assumed *absence* of [the] power' to make such appointments." *Id.* at 24a (quoting *Printz* v. *United States*, 521 U.S. 898, 908 (1997)) (alterations in original). But that inference is incorrect because it does not account for the fact that the rise of intra-session recess appointments closely tracked the rise of intra-session recesses, and therefore suggests no assumed absence of power.

Before the Civil War, only five intra-session recesses (in 1800, 1817, 1828, 1857, and 1859) exceeded three days; each was less than two weeks long and confined to the period around Christmas and New Year's Day. See *Congressional Directory* 522-525. Beginning in Decem-

ber 1862, short holiday recesses of less than 20 days became fairly common, but until 1943 there were only four years with longer intra-session recesses (at a different time of year): 1867, 1868, 1921, and 1929. *Id.* at 525-527. In every one of those four years, the President made intra-session recess appointments. President Andrew Johnson made at least 32 such appointments in 1867, and at least 25 in 1868. See App., *infra*, 1a-9a. President Harding made at least four such appointments in 1921. *Id.* at 9a. President Hoover appointed eight members of the new Federal Farm Board and two generals in 1929. *Id.* at 10a-11a.

Nor were the Senate's holiday recesses understood to be excluded from the President's power. President Lincoln appears to have made recess appointments of several Brigadier Generals during holiday recesses in 1862 and 1863.[15] During the 1927-1928 holiday recess, Presi-

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[15] See, *e.g.*, Appointment Letter of Thomas G. Stevenson, Dec. 24, 1862, Vol. 6, p. 224, *Letters of Army Appointments 1829-1945* (Entry 314), Records of the Adjutant General's Office, 1762-1984, Record Group 94 (RG 94), National Archives Building (NAB), Washington, D.C. (informing Stevenson of presidential appointment, during Senate's recess, as Brigadier General and noting that "[s]hould the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly"); Appointment Letter of James H. Ledlie, Dec. 24, 1862, Vol. 6, p. 225, Entry 314, RG 94, NAB (same); Letter from William A. Pile to C.W. Foster, Jan. 7, 1864, *Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870* (National Archives Microform Publication M1064, roll 48, file P399), RG 94, NAB (acknowledging receipt and acceptance of the "communication of December 29th 1863 enclosing my appointment"); see also John H. Eicher & David J. Eicher, *Civil War High Commands* 342, 430, 511, 724, 726, 729 (2001); but cf. Appointment Letter of Daniel Ullmann, Jan. 13, 1863, Vol. 6, p. 230, Entry 314, RG 94, NAB (issuing similarly phrased appointment to Ullmann as Brigadier General while the Senate was in session).

dent Coolidge appointed a member of the Interstate Commerce Commission. App., *infra*, 10a. And in December 1897, it was reported that President McKinley would make "[n]o appointments * * * during the holiday recess of Congress except in case of emergency." *Only Necessary Appointments*, N.Y. Times, Dec. 21, 1897, at 3.

As that sentiment demonstrates, the six dozen known intra-session appointments before 1943 cannot be explained by any assumed absence of power. Instead, they reflect repeated appointments by the President during the few longer intra-session recesses.

To be sure, for a relatively brief period beginning in 1901, the Executive Branch took a different view. An opinion by Attorney General Knox concluded that "the Recess" did not include intra-session recesses, in large part because he could otherwise "see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday." 23 Op. Att'y Gen. 599, 600, 603 (1901). In doing so, however, Knox had to reject the only judicial precedent on point, since the Court of Claims had held in 1884 that it had "no doubt" about the validity of one of

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Stevenson, Ledlie, and others were not confirmed—apparently because the Senate believed there were not enough vacancies to begin with, not because Lincoln had acted during an intra-session recess. See S. Exec. Journal, 37th Cong., 3d Sess. 128-129 (1863) (rejecting nominations of multiple appointees on the ground that there had been "no law authorizing said appointments"); Exec. Doc. No. 29, 37th Cong., 3d Sess. 1-2 (January 29, 1863 letter from Secretary of War, responding to Senate resolution, including both inter- and intra-session recess appointees in list of brigadier generals whose positions the War Department believed were "necessarily implied" by a law authorizing the increase of the volunteer and militia force).

Andrew Johnson's 1867 intra-session appointments. *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596. Knox also overlooked the fact that three 1868 Attorney General opinions (12 Op. Att'y Gen. 449; 12 Op. Att'y Gen. 455; 12 Op. Att'y Gen. 469) did not "mention any distinction between intrasession and intersession recesses," even though those opinions pertained to appointments made during an intra-session recess. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 410 (2005). In any event, Knox's approach was short-lived.

In 1905, after a set of controversial appointments made during a putative *inter*-session recess, the Senate charged its Judiciary Committee with determining "[w]hat constitutes a 'recess of the Senate'" for recess-appointment purposes. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (*1905 Senate Report*). The committee concluded that the word "recess" is used "in its common and popular sense" and means

> the period of time when the Senate is *not sitting in regular or extraordinary session* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 1, 2. Per Senate precedent, that report remains an authoritative construction of the term "recess." See S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 947 & n.46 (1992). In 1921, Attorney General Daugherty relied on that report and recognized the same considerations for determining whether a "recess" exists for purposes of the Clause. 33 Op. Att'y Gen. at 24-25. Daugherty rejected Knox's reasoning and concluded that intra-session re-

cesses of sufficient length do trigger the Recess Appointments Clause. *Id.* at 21, 25.

b. The frequency of intra-session recesses—and appointments—increased dramatically during World War II and the beginning of the Cold War. In 1943, 1944, 1945, 1947, and 1948, there were months-long intra-session recesses (often during the summer), see *Congressional Directory* 528, and multiple recess appointments were made in each of those years. App., *infra*, 11a-18a.

For instance, on August 31, 1943—two weeks before the end of a 2½-month intra-session recess and two weeks after the "conquest of Sicily"—President Roosevelt invoked the Recess Appointments Clause to commission Dwight Eisenhower as a permanent Major General in the United States Army.[16] And, on August 16, 1945, two days after the surrender of Japan, President Truman invoked the Clause during an intra-session recess to appoint Dean Acheson as Under Secretary of State.[17]

When the Senate was in intra-session recess between July 27 and November 17, 1947 (*Congressional Directory* 528), President Truman made recess appointments of thousands of officers in the Army and Air Force, in order to comply with December 31, 1947, statutory deadlines.[18]

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[16] *The Public Papers and Addresses of Franklin D. Roosevelt, 1943*, at 370-371 (Samuel I. Roseman ed., 1950); *Congressional Directory* 528.

[17] Robert L. Beisner, *Dean Acheson: A Life in the Cold War* 24 (2006).

[18] See Officer Personnel Act of 1947, ch. 512, § 509(m), 61 Stat. 897 (setting deadline for certain officer promotions); *id.* §§ 502(g), 505(f), 506(g), 507(d), 61 Stat. 884, 890, 892, 894-895 (superseding, effective Dec. 31, 1947, prior procedures for integrating active-duty officers

In 1947, Truman also made intra-session recess appointments of the Director of Central Intelligence, the Secretary of the Air Force, the General Counsel of the National Labor Relations Board, and more than 50 other officers. App., *infra*, 12a-18a.

In 1948, the Senate was in intra-session recess for all but 12 days between June 20 and December 31. *Congressional Directory* 528. During that 12-day window, President Truman nominated Maurice Tobin to replace the Secretary of Labor who had recently died. 94 Cong. Rec. 10,187 (Aug. 7, 1948). The Senate Minority Leader (Alben Barkley) sought to have the Senate consider the nomination without referring it to committee, but Senator Robert Taft successfully opposed that effort. *Ibid.* Taft said there was no reason to depart from the usual practice of referring the nomination to committee, because the President could "make a recess appointment on Monday." *Ibid.* And, Truman in fact made an intra-session recess appointment of Tobin, as well as of 897 Regular Army Medical Department officers and at least five dozen others that year. App., *infra*, 18a-24a. The same year, the Comptroller General (a legislative officer) described the President's ability to make intra-session appointments as "the accepted view" of the Recess Appointments Clause. 28 Comp. Gen. 30, 34 (1948).

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into the Regular Army); *New Permanent Career Officers Selected for Army and Air Force*, Army & Navy Journal, Oct. 11, 1947, at 146 (listing 5885 recess appointments granting "commissions in the Regular Army and Regular Air Force" to "officers and former officers of the National Guard, Officers Reserve Corps and Army of the United States"); *Officer Procurement Program*, Army & Navy Journal, Nov. 22, 1947, at 300 (reporting 216 more "recess appointments" as part of "[t]he final integration of" the Regular Army and Regular Air Force).

Since then, nearly all of President Truman's successors have made, collectively, hundreds of additional intra-session recess appointments. App., *infra*, 27a-64a. The only apparent exceptions are President Kennedy, whose term included no intra-session recesses (*Congressional Directory* 529), and Presidents Johnson and Ford. Throughout that period, opinions of the Attorney General, the Office of Legal Counsel, and the en banc Eleventh Circuit reaffirmed the validity of intra-session appointments. See *Evans*, 387 F.3d at 1224-1226; *OLC Pro Forma Op.* 5 (citing 1960 Attorney General opinion and OLC opinions from 2004, 1992, 1989, and 1979); 20 Op. O.L.C. 124, 161 (1996); 6 Op. O.L.C. 585, 585 (1982).

c. Such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). Especially in the separation-of-powers context, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *id.* at 690 ("[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.") (internal quotations marks and citation omitted). As Justice Frankfurter explained, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution," effectively makes "such exercise of power part of the structure of our government."

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring).[19]

The court of appeals' reasoning would dramatically upset the long-settled equilibrium between the political Branches, implicating profound reliance interests both within the government and far beyond it. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915) ("[O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department."). The Court should restore that equilibrium and confirm that future Presidents may, like so many of their predecessors, make recess appointments during intra-session recesses of the Senate.

B. The President May Fill Any Vacancy That Exists During The Recess Of The Senate

The court of appeals majority also erred in holding that the Recess Appointments Clause allows the President to fill only those vacancies that first arise during the recess in question. Pet. App. 35a-52a. Under that interpretation, a vacancy that comes into being the day after the Senate adjourns for a recess may be filled immediately, but a vacancy that arises the day before the recess cannot be filled *at all* until the Senate returns—regardless of how long the recess or how urgent the need. That interpretation is not required by the constitutional text and is inconsistent with the Clause's purposes. Since 1823, it has been formally and repeatedly rejected by the Executive. Nor does it bear the historical imprimatur that the court of appeals believed.

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[19] *INS* v. *Chadha*, 462 U.S. 919, 944 (1983), is not to the contrary. Unlike here, there had been a long and repeated history of *objection* to the practice at issue. See *id.* at 942 n.13 (noting eleven Presidents had objected to the legislative veto).

1. The reference to "Vacancies that may happen during the Recess" can be reasonably read as including vacancies that exist during the recess

The Recess Appointments Clause provides the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, Cl. 3. Respondent contends (Cert. Resp. 22) that the language "could not be clearer" in specifying that the President cannot fill a vacancy "that arose during the Senate's session and continued into the recess." But the language is far from unambiguous.

a. President Jefferson recognized in 1802 that the Clause "is *certainly susceptible* of [two] constructions," because it "may mean 'vacancies that may happen to *be*' or 'may happen to *fall*'" during the recess.[20] That conclusion follows from the plain meanings of the terms "happen" and "vacancy."

Respondent contends (Cert. Resp. 23) that "'happen' was (as it still is) a verb that expresses the sudden occurrence of an event." In respondent's view, an event occurs, or "'come[s] to pass,' only when it first arises." *Ibid.* (quoting Pet. App. 36a-37a). It is true that "happen" means to "come to pass," "take place," or "occur." 6 *OED* 1096; see 1 Webster, *American Dictionary* s.v. "happen" ("To come; to befall."); Noah Webster, *A Compendious Dictionary of the English Language* 139 (1806) ("to fall out, come to pass, chance"); 1 Johnson, *Dictionary* s.v. "happen" (similar).

But respondent elides the nature of the relevant subject—which is a "vacancy." A vacancy is not just an

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

event of an instant. It is, rather, "[t]he fact *or condition* of an office or post *being*, becoming, or falling vacant." 19 *OED* 383 (emphases added). In 1787, a vacancy was understood as a continuing "state." 2 Johnson, *Dictionary* s.v. "vacancy" ("State of a post or employment when it is unsupplied."); 2 Webster, *American Dictionary* s.v. "vacancy" ("The state of being destitute of an incumbent; want of the regular officer to officiate in a place."). Given that understanding, the state of being vacant is something that "may happen," and continue happening, as long as the office in question remains vacant. Even when the "fact" of "becoming[] or falling vacant" occurs before a recess begins, the "condition" of "being" vacant may continue to happen during the recess itself. 19 *OED* 383. Just as World War II, which began in 1939, can be said to have happened in the 1940s, so too does a vacancy happen for as long as the office's state of being vacant persists.

For those reasons, Attorney General Wirt noted in 1823 that the reference to "'vacancies that may *happen* during the recess of the Senate'" "seems not perfectly clear." 1 Op. Att'y Gen. 631, 631. On one hand, "[i]t may mean 'happen to take place:' that is, '*to originate*.'" *Ibid.* On the other, it may also mean "'happen to exist.'" *Id.* at 632. Wirt observed that the former reading "is, perhaps, more strictly consonant with the mere letter" of the Clause, but he concluded that the latter is "the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language." *Id.* at 633-634.

b. Respondent contends (Cert. Resp. 23) that reading the word "happen" to mean "happen to exist" has the same effect as removing the phrase "that may happen"

from the Recess Appointments Clause. That is not true. Without that phrase, the Clause would give the President power to "fill up all Vacancies during the Recess of the Senate." It could then be thought to permit the President to act during a recess to fill a known *future* vacancy that results when a fixed term will expire or when an official tenders a resignation before its effective date. Construing the text to refer to vacancies that "happen to exist" (1 Op. Att'y Gen. at 633) during the recess confines the President to filling vacancies that actually do exist during the recess, and thus avoids giving him a unilateral power he has never been thought to possess.[21]

2. The Clause's purposes are best served by allowing the President to fill a vacancy that exists during a recess

As the foregoing discussion shows, the court of appeals erred in concluding that the Executive's long-standing construction is foreclosed by the constitutional text. Pet. App. 36a-37a. Attorney General Wirt and his successors have recognized that the underlying purposes of the Recess Appointments Clause supply compelling reasons to resolve its ambiguity in favor of allowing the President to fill vacancies that exist during a recess.

a. Most fundamentally, the "happen to exist" reading furthers the Recess Appointment Clause's basic object of ensuring a genuine opportunity at all times for vacancies to be filled, even if only temporarily. See 1 Op. Att'y Gen. at 633 (explaining that "the whole purpose of the

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[21] The advice-and-consent process can be used to fill future vacancies. See, *e.g.*, 61 Cong. Rec. 5724 (Sept. 21, 1921) (nomination of replacement for U.S. Attorney whose resignation was "effective October 1, 1921"); *id.* at 5737 (Sept. 22, 1921) (Senate confirmation); see also 10 Op. O.L.C. 108, 110-111 (1986) (describing nominations for prospective judicial vacancies).

constitution is completely accomplished" by reading "happen" to mean "exist"). If an unanticipated vacancy first arises on the eve of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination before the recess.

Moreover, the relatively slow speed of long-distance communication in the eighteenth century meant that the President might not have even learned of a vacancy until after the Senate's recess had already begun. If an ambassador died while abroad, the Framers could not have intended for that office to remain vacant during a months-long recess merely because news of the death did not reach the President until the Senate was already in recess. See App., *infra*, 69a (noting David Porter's death near Constantinople less than one day before recess); 1 Op. Att'y Gen. at 632 (examining the problem of a "vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session," if the Senate adjourns "[b]efore the vacancy is made known to the President"). "If the [P]resident needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 445-446 (2005).

Nor has the underlying problem been eliminated by high-speed communications. In June 1948, the Secretary of Labor died ten days before the Senate began a five-week intra-session recess.[22] When the Senate returned for 12 days, President Truman promptly nominated a successor, but Senator Taft opposed a confirmation vote

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[22] *Lewis Schwellenbach Dies at 53*, N.Y. Times, June 11, 1948, at 1; *Congressional Directory* 528.

in August, even though the Senate was on the eve of recessing again until December 31. See p. 26, *supra*. Taft explained that a recess appointment would allow the office to be filled while the Senate followed its usual process of referring the nomination to committee. 94 Cong. Rec. at 10,187. Under the court of appeals' decision, that sensible course was unconstitutional, and the office would have had to remain vacant for the next 4½ months.[23]

b. The court of appeals' construction would also prevent the President from being able to fill offices created shortly before the Senate begins a recess. For instance, the Department of Justice and the office of the Solicitor General came into existence on July 1, 1870, only 14 days before the Second Session of the 41st Congress concluded.[24] The first Solicitor General, Benjamin Bristow, began his tenure as a recess appointee on October 11, 1870, even though that vacancy pre-existed the recess during which he was appointed.[25] Similarly, the office of the Chief of Naval Operations was established on March 3, 1915, the day before the Senate recessed *sine die*, and its first occupant was recess appointed by President Wilson on May 11, 1915, more than six months before the Senate returned.[26] The Federal Farm Board was established on June 15, 1929, four days before an intra-session recess,

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[23] The nominee was ultimately confirmed on January 31, 1949—four weeks into the Senate's next session. See 95 Cong. Rec. 718.

[24] See Act of June 22, 1870, ch. 150, §§ 2, 19, 16 Stat. 162, 165; *Congressional Directory* 525.

[25] 79 U.S. (12 Wall.) iii (1872).

[26] See Act of Mar. 3, 1915, ch. 83, 38 Stat. 929; 52 Cong. Rec. 5509; 22 Comp. Treas. 530, 531 (1916).

and President Hoover recess appointed its first eight members on July 15 and 30, 1929.[27]

c. The court of appeals suggested that the problems associated with vacancies that cannot be filled for significant periods would be ameliorated if Congress were to provide more broadly than it has for officials to serve in an "acting" capacity or be held over beyond the end of their terms until successors are confirmed. Pet. App. 44a-45a. But hold-over provisions are useless in the case of death or resignation, and the very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some offices, such as Article III judgeships, cannot be performed on an acting basis at all. And it may be impractical to rely for significant periods of time on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced. Especially in agencies with few political appointees, relying exclusively on acting officials would impinge on the President's ability to have persons of his own choosing in important positions and in that respect limit political accountability to the President. Cf. *Free Enter. Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3139, 3155-3157 (2010).

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[27] See ch. 24, § 2, 46 Stat. 11; 9 Comp. Gen. 190, 191 (1929); see also 9 Comp. Gen. 60, 60 (1929) (noting the positions "became vacant" on June 15).

3. Since the 1820s, the vast majority of Presidents have made recess appointments to fill vacancies that arose before a particular recess but continued to exist during that recess

a. Given the need to ensure that vacant offices can be filled when the Senate is unavailable to provide its advice and consent to nominations, Attorney General Wirt's conclusion that the President may fill vacancies that "happen to exist" during a recess has been repeatedly reaffirmed by his successors. In 1832, Attorney General Taney concluded that "[t]here is no reason" to distinguish between vacancies that occur shortly before a recess begins and those that occur during the recess, and that "the words used in the constitution do not, I think, by any fair construction, require a distinction to be taken." 2 Op. Att'y Gen. 525, 528. Similar conclusions followed in 1841 and 1846. 3 Op. Att'y Gen. 673; 4 Op. Att'y Gen. 523.

By 1862, Attorney General Bates advised President Lincoln that the question was "settled in favor of the power [to fill a vacancy existing during a recess], as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." 10 Op. Att'y Gen. 356, 356. On October 17, 1862, Lincoln made a recess appointment of David Davis as a Justice on this Court, filling a slot that had remained vacant throughout three sessions of the 37th Congress.[28]

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[28] Brian McGinty, *Lincoln and the Court* 117 (2008) (commission date); Federal Judicial Center, *Biographical Directory of Federal Judges,* entry for John Archibald Campbell, available from www.fjc.gov/public/home.nsf/hisj (predecessor's April 30, 1861, resignation); *Congressional Directory* 525 (intervening sessions).

In 1880, a few months before he became a member of this Court, then-Judge Woods held that the President had the constitutional power to appoint a U.S. Attorney "notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session." *In re Farrow*, 3 F. 112, 116 (C.C.N.D. Ga.). He acknowledged a contrary opinion by one district judge, but found that it could not "outweigh the authority of [ten Attorney General opinions], and of the practice of the executive department for nearly 60 years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress." *Id.* at 115 (discussing *Case of the Dist. Att'y of the United States*, 7 F. Cas. 731 (E.D. Pa. 1868) (No. 3924)). That same year, when Attorney General Devens issued a lengthy opinion sustaining the practice (16 Op. Att'y Gen. 522), it was reported that President Hayes had made "quite a number of [recess] appointments" to vacancies that preexisted the recess. *Recess Appointments*, Wash. Post, July 7, 1880, at 1.

Since then Attorneys General (and Assistant Attorneys General) have repeatedly endorsed Wirt's reasoning and conclusion, as have the Second, Ninth, and Eleventh Circuits. See *Evans*, 487 F.3d at 1226-1227 (11th Cir.) (en banc); *Woodley*, 751 F.2d at 1012-1013 (9th Cir.) (en banc); *Allocco*, 305 F.2d at 709-715 (2d Cir.); see also, *e.g.*, 41 Op. Att'y Gen. at 468 (1960); 30 Op. Att'y Gen. 314 (1914); 26 Op. Att'y Gen. 234 (1907); 17 Op. Att'y Gen. 521 (1883); 20 Op. O.L.C. at 161 (1996); 13 Op. O.L.C. 271, 272 (1989); 6 Op. O.L.C. at 586 (1982); 3 Op. O.L.C. 314 (1979).

b. As *Farrow* indicated, the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies have long been seen

as a form of congressional acquiescence in such appointments, because those restrictions are predicated on the existence of the underlying presidential power to make the appointments. See *Farrow*, 3 F. at 115 (discussing 1863 statute); see also 41 Op. Att'y Gen. at 466 (noting that the 1863 statute "implicitly assumed that the power [to fill preexisting vacancies] existed"); 16 Op. Att'y Gen. at 531 ("This legislation * * * must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution."). The original Pay Act postponed the payment of recess appointees who filled vacancies that first arose while the Senate was in session, deferring their salaries until confirmation. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. But Congress later relaxed the statute to provide conditions under which even such appointees are to be paid before confirmation. See Act of July 11, 1940, ch. 580, 54 Stat. 751. Had it believed such appointments were unconstitutional, Congress presumably would have tried to go much further to restrict them. Cf. Tenure of Office Act, ch. 154, § 3, 14 Stat. 430-431 (purporting to limit recess-appointment power to vacancies that happen "by reason of death or resignation").

c. The practice of making an appointment during a recess to fill a vacancy that pre-dated that recess is so well and long established that it is impossible to determine how many such appointments have occurred in the last 190 years. Indeed, both before and after Wirt's 1823 opinion for President Monroe, records were not ordinarily kept in a fashion that clearly establishes when the underlying vacancies first arose. When Presidents nominated recess appointees, their nominations often, but not always, indicated who previously occupied the posi-

tion, but they almost never indicated when the predecessor had vacated the office. See, *e.g.*, S. Exec. Journal, 2d Cong., 2d Sess. 125-126 (1792); *id.*, 7th Cong., 2d Sess. 400-404 (1802).

Nevertheless, we may confidently say that at least 35 of President Monroe's 38 successors have, consistent with the long-standing views of their Attorneys General, made some recess appointments to fill offices that were vacant before the recesses in which they acted. See App., *infra*, 67a-89a (identifying illustrative appointments). The list includes every President since Buchanan.

The court of appeals erred in failing to give any weight to 190 years of Executive practice, in which the Legislature has been seen as acquiescing for nearly 150 years. As discussed above, the long-held positions of the political Branches on a matter of constitutional interpretation are entitled to substantial respect under this Court's precedent, particularly when related to separation of powers. See *Mistretta*, 488 U.S. at 401. As with all "constitutional provision[s] the phraseology of which is in any respect of doubtful meaning," the construction of the Recess Appointments Clause should now be strongly informed by those many decades of "settled and established practice." *The Pocket Veto Case*, 279 U.S. at 689-690 (internal quotation marks omitted).

4. Before 1823, there was no settled understanding that the President was precluded from filling vacancies during a recess that first arose before that recess began

The court of appeals believed its departure from long-established practice was justified by "evidence of the earliest understanding of the Clause," Pet. App. 38a, which it found in a 1792 opinion of Attorney General Randolph, a 1799 letter of Alexander Hamilton, and floor

statements from a single Senator in 1814, *id.* at 38a-40a. There was, however, no such settled "earliest understanding," and therefore nothing that could suffice to outweigh the deeply engrained practice discussed above. To the contrary, the issue was repeatedly subject to debate or uncertainty during the administrations of all four of Monroe's predecessors. And each of those Presidents made appointments, or expressed views, that were inconsistent with the court of appeals' categorical conclusion that a vacancy cannot be filled if it first arose before that recess.

a. During the Washington administration, Attorney General Randolph expressed the position that, even though the office of Chief Coiner of the Mint was vacant, the President could not make a recess appointment because the vacancy had "commenced" or "may be said to have *happened*" on April 2, 1792, when the office was created, and Congress had remained in session between then and May 8.[29]

Yet, within the next five years, President Washington himself made at least two recess appointments to fill vacancies that had first arisen before the recesses in which they were filled. On November 23, 1793, Washington commissioned Robert Scot as the first Engraver of the Mint—a position that had been created in 1792 by the same statute Randolph had addressed but had never been filled.[30] And on October 13, 1796, Washington re-

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[29] Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers Of Thomas Jefferson* 166 (John Catanzariti ed., 1990).

[30] See Monroe H. Fabian, *Joseph Wright: American Artist, 1756-1793*, at 61-62 (1985) (explaining that Joseph Wright was performing some engraver duties, but was never commissioned before his death in September 1793); 27 *The Papers of Thomas Jefferson* 192 (John

cess-appointed William Clarke to be the United States Attorney for Kentucky, an office that had been vacant, even under Randolph's reasoning, for two years.[31]

b. In the Adams administration, the question recurred, when Secretary of War James McHenry expressed doubts about whether the President could, in the absence of express statutory authority, make recess appointments for certain offices in the Army that had not been filled while the Senate was in session.[32] Alexander Hamilton responded that newly created offices were not "vacanc[ies]" at all, because they had not previously been filled, and also that "the President cannot fill a vacancy which happens during a session of the Senate."[33] Attorney General Lee concluded that there was statutory

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Catanzariti ed., 1997) (noting Scot's commission); S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793) (naming no predecessor in Scot's nomination); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246.

[31] U.S. Dep't of State, *Calendar of the Miscellaneous Letters Received By The Department of State* 456 (1897); S. Exec. Journal, 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 70-73 (1978). As the court of appeals noted (Pet. App. 38a-39a), Randolph considered a vacancy as arising anew if someone who had been confirmed and commissioned declined to accept the commission, but that theory would not support Washington's appointments of Scot and Clarke. The Senate Executive Journal reflects no nominations for the Engraver's position before Scot's appointment, and no nominations for the Kentucky position after William McClung was confirmed on June 2, 1794. S. Exec. Journal, 3d Cong., 1st Sess. 160. McClung had declined that appointment by October 1794. Tachau, *Federal Courts* at 72.

[32] Letter from McHenry to Hamilton (Apr. 26, 1799), in 23 *The Papers of Alexander Hamilton* 69-71 n.1 (Harold C. Syrett ed., 1976).

[33] Letter from Hamilton to McHenry (May 3, 1799), in *id.* at 94-95.

authority to make the appointment.[34] President Adams himself, however, indicated a contrary view, writing that his authority stemmed not from a statute but from "the Constitution itself. Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution. * * * I have no doubt that it is my right and my duty to make the provisional appointments."[35] A month later, given the "difference of opinion concerning the construction of the constitution," Adams concluded that there was "no necessity for an immediate appointment" and agreed "to suspend it for the present, perhaps till the meeting of the Senate."[36] Later, however, Jefferson said Lee had informed him that, in the Adams administration, "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of inquiring for a proper character, they let it lie always till recess"[37]—a view that cannot be reconciled with the decision below.

c. President Jefferson appears to have made recess appointments to vacancies first arising before the recess in which he was acting. For instance, in 1801, he recess-appointed Walter Jones, Jr., as the District Attorney for the District of the Potomac and George Dent as the Marshal for the same district.[38] Those positions had been

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[34] *Id.* at 95 n.2.

[35] Letter from Adams to McHenry (Apr. 16, 1799), in 8 *The Works of John Adams* 632-633 (Charles Francis Adams ed., 1853).

[36] Letter from Adams to McHenry (May 16, 1799), in *id.* at 647.

[37] 36 *Jefferson Papers* at 433 (letter to Nicholas).

[38] See S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802) (noting commission issued to Jones during "the late recess"); Letter from Levi Lincoln to Jefferson (Apr. 9, 1801), in 33 *The Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting Dent's acceptance of Marshal position); U.S. Marshals Service, *State-by-State*

created during the prior Session of Congress.[39] The same is true for Jefferson's recess appointments of the District Attorney and Marshal for the District of Ohio.[40] And Jefferson may have made additional appointments inconsistent with the decision below.[41]

In any event, there is no evidence that Jefferson viewed the construction of the Clause as settled, much less that he deemed Randolph's opinion as authoritative. Rather, Jefferson acknowledged that the Clause "is certainly susceptible of both constructions" discussed above; he suggested that his administration should eventually attempt to "establish a correct & well digested rule," but he concluded, in January 1802, that it was "better to give the subject a go-by for the present."[42]

d. President Madison also filled several pre-existing vacancies during recesses. In 1813, a district judge left office shortly before the end of the Senate's session; Madison then issued a commission to Theodore Gaillard

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Chronological Listing of United States Marshals: Washington, D.C. 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent's April 4, 1801 recess appointment).

[39] See Act of Feb. 13, 1801, ch. 4, §§ 21, 36-37, 2 Stat. 96-97, 99-100. In the "key" that he created for his January 6, 1802, list of nominees, Jefferson included Jones and Dent's recess-appointed successor (William Baker) in the group of appointees for "vacancies *unfilled*, or newly occurring"—a category separate from those for "resignation, declining or death," "midnight appointments" (that Jefferson had revoked), and "removals." 36 *Papers of Thomas Jefferson* 328, 332 (emphasis added).

[40] *Id.* at 328, 331, 332 (including "William Mc.Millan" and "James [T]indlaye" in the "vacancies unfilled" portion of the key and noting recess appointments); Act of Feb. 13, 1801, ch. 4, §§ 4, 36-37, 2 Stat. 89-90, 99 (creating positions on February 13, 1801).

[41] Hartnett, 26 Cardozo L. Rev. at 391-400.

[42] 36 *Jefferson Papers* at 433 (letter to Nicholas).

to fill that vacancy during the recess.[43] On March 3, 1815, before the Senate adjourned *sine die*, President Madison signed a statute that created new positions for the District Attorney and Marshal for the Northern District of New York. Ch. 95, 3 Stat. 235; S. Journal, 13th Cong., 3d Sess. 689-690 (1815). Although those vacancies first arose while the Senate was in session, Madison made recess appointments to fill both of them. See S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointments of Roger Skinner and John W. Livingston). Otherwise, the new positions would have gone unfilled for at least eight months, until the Senate returned. See *Congressional Directory* 523. Madison also recess appointed the first United States Attorney and Marshal for the Territory of Michigan in 1815—more than *two years* after those positions were created.[44]

The court of appeals quoted an 1814 Senate floor debate that followed Madison's recess appointments of three ministers to participate in negotiations in Russia to end the War of 1812—ministers whose offices had not been established by statute. Pet. App. 40a. Senator Christopher Gore argued that there was no "vacancy" for the President to fill when an office had never previously been occupied. 26 Annals of Cong. 651 (1814). In the course of debate, he stated that the Recess Appointments Clause "specifies the precise space of time wherein the vacancy must happen." *Id.* at 653. But Gore was vigorously opposed by Senators William Bibb and Outerbridge Horsey, and Gore's resolution to denounce the President's appointments was not adopted. *Id.* at 694-

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[43] Hartnett, 26 Cardozo L. Rev. at 400-401.

[44] Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816).

722, 741-759. Thus, the debate hardly shows that the Senate's view differed from the President's.

e. The court of appeals thus erred in believing that the overwhelmingly predominant reading of the Recess Appointments Clause since 1823 could be rejected on the premise "that early interpreters read 'happen' as 'arise.'" Pet. App. 42a. There was no such consensus among early interpreters. There were instead repeated indications—including actual appointments—that early Presidents were amenable to the view that later swept the field.

This Court should reverse the court of appeals' holding that recess appointments cannot be made to fill a vacancy that first arises before the recess in which the President acts.

C. The Senate Is In "Recess" For Purposes Of The Recess Appointments Clause When, For 20 Days, A Senate Order Provides For Only Fleeting, Concededly "Pro Forma" Sessions At Which "No Business" Is To Be Conducted

As an alternative ground for affirming the judgment below, respondent contends (Cert. Resp. 29-33) that the Senate was not in recess on January 4, 2012, for purposes of the Recess Appointments Clause, because its pro-forma sessions transformed what would have been a 20-day recess into a series of three-day breaks (not counting Sundays), each of which was, in isolation, too short to constitute a recess covered by the Clause.[45] Yet re-

[45] Sundays are expressly "excepted" from the Pocket Veto Clause (Art. I, § 7, Cl. 2), but not from other provisions that specify a certain number of days. See Art. I, § 5, Cl. 4 (Adjournment Clause); Amend. XXV, § 4 (Presidential Inability). Congress has nevertheless excluded Sundays from many of its calculations, which accounts for respondent's description of the three- and four-day breaks here as three days. Cert. Resp. 3 n.1.

spondent does not and cannot dispute the essential facts supporting the President's conclusion that the Senate was in recess under the ordinary and traditional understanding of the Recess Appointments Clause: throughout the 20-day period, the Senate had undertaken to conduct "no business" and was no more available to sit as a body than it is during a traditional intra-session recess. Contrary to respondent's view, the Senate cannot thus unilaterally extinguish the President's constitutional authority to make recess appointments while simultaneously shirking its constitutional responsibility to be available to provide advice and consent.

1. The Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process

Respondent has not disputed that a 20-day recess would, under long-accepted standards, be a sufficient break in the Senate's ability to provide advice and consent to enable the President to make recess appointments. See Resp. C.A. Br. 30-35 (arguing that, to be in recess, the Senate must, at a minimum, adjourn for more than three days). For more than 90 years, the Senate and the Executive have agreed on a functional understanding, under which short intra-session breaks of three or fewer days do not trigger the Recess Appointments Clause, but longer breaks can do so.

As discussed above (see p. 24, *supra*), the Senate Judiciary Committee explained in 1905 that, for Recess-Appointments-Clause purposes, a "recess" exists during "the period of time when" the Senate's "members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." *1905 Senate Report* 2. The committee

thus rejected the proposition that there had been a "constructive" inter-session recess when the Senate was in active session at noon on December 7, 1903, and by operation of law one session automatically terminated and the next was initiated. *Id.* at 3. There had in fact been "no time" in which the Senate was not "in session to receive any nomination or message [the President] might communicate," and therefore no recess. *Ibid.* Just as there was no such thing as a "constructive session" of the Senate, the committee said there could be no such thing as a "constructive recess." *Id.* at 2.

In 1921, Attorney General Daugherty relied on that report, and the same factors, to conclude that the President may make recess appointments during a 28-day intra-session recess. 33 Op. Att'y Gen. at 24-25. He concluded it was reasonable for the President to determine that "there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." *Id.* at 25. In a passage that he described as "unnecessary" to his decision, Daugherty also suggested that an "adjournment for 5 or even 10 days" would not constitute a qualifying recess. *Id.* at 24, 25. Daugherty's analysis has continued to govern the Executive's approach, providing the basis for appointments by multiple Presidents during intra-session recesses as short as ten days. See *OLC Pro Forma Op.* 5-9; *id.* at 7 (noting that the last five Presidents have all made appointments during intra-session recesses of 14 or fewer days).

In 1929, this Court adopted a similar approach with respect to the Pocket Veto Clause (Art. I, § 7, Cl. 2), which addresses circumstances in which Congress renders itself unavailable to participate in the legislative process before the end of the ten-day period that the Constitution affords the President to review a bill. The

Court held that the President is required to return a bill to the relevant House of Congress only when that House is "sitting in an organized capacity for the transaction of business." *The Pocket Veto Case*, 279 U.S. at 683. As the Court explained, the House is not available in the constitutionally relevant sense "when it is not in session *as a collective body* and its members are dispersed." *Ibid.* (emphasis added).[46]

2. Despite the pro-forma sessions, the 20-day period at issue here bore the hallmarks of a recess

Respondent contends (Cert. Resp. 31) that the January 2012 pro-forma sessions were materially indistinguishable from the Senate's regular sessions. But that is plainly not so. As the pro-forma moniker indicates, the sessions were "[h]eld, made, or done (merely) as a matter of form." *Oxford English Dictionary* s.v. "pro forma" (3d ed. June 2007), www.oed.com/view/Entry/238153; see 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Congressional Research Service report describing "'pro forma' sessions" as "held for the sake of formality"). In actuality, the entire period from January 3 to 23, 2012, bore the hallmarks of a single 20-day recess during which no work was done, no messages were laid before the Senate, and its members were dispersed.

a. The December 17, 2011, unanimous-consent order (Pet. App. 91a-92a) addressed two periods: one at the end of the First Session of the 112th Congress, and one

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[46] The Court later held that an adjournment of only three days did not make the Senate unavailable for purposes of the Pocket Veto Clause. See *Wright* v. *United States*, 302 U.S. 583 (1938). But it stressed that the bill in question had in fact been "laid before the Senate" two days after the President returned it and that the Court's holding did not apply to an adjournment for longer than three days. *Id.* at 593, 598.

at the beginning of the Second Session. The division between the First and Second Sessions was effectuated by Section 2 of the Twentieth Amendment at noon on January 3, 2012. See *Jefferson's Manual* § LI, at 166. The Senate's order expressly provided that, throughout both periods, the Senate would "convene for pro forma sessions only, with no business conducted," at specified times on each Tuesday and Friday between December 19, 2011, and January 20, 2012. Pet. App. 91a. Then, according to the order, the Senate would convene on January 23, 2012, in a session that would include "the prayer and pledge," "leader remarks," "morning business," and "executive session." *Id.* at 91a-92a. As relevant here, the December 17 order barred the Senate as a body from conducting any business—including providing advice and consent on Presidential nominations—for the entire 20-day period between the start of the Second Session of the 112th Congress at noon on January 3 and the Senate's next regular session on January 23.

During that 20-day period, the Senate conducted no business whatsoever. It considered no bills, passed no legislation, and voted on no nominees.[47] No speeches were made, and no debates were held. Each pro-forma session lasted no more than 30 seconds. For instance, on January 6, 2012, a virtually empty chamber was gaveled into pro-forma session by Senator Webb; the assistant bill clerk read a one-sentence letter from the President pro tempore directing Senator Webb to "perform the duties of the Chair"; and Senator Webb immediately adjourned the Senate until January 10. See 158 Cong. Rec. S3 (daily ed.). The entire "session" lasted 29 se-

[47] As discussed below (see p. 52 & n.49, *infra*), the Senate did pass legislation in the First Session on a day when it had been scheduled to hold a pro-forma session.

conds, *ibid.*, and, as far as the video reveals, no other Senator was present, see *Senate Pro Forma Session, Jan. 6, 2012*, C-SPAN, www.c-spanvideo.org/program/303538-1. The next four pro-forma sessions followed the same pattern and ranged from 28 to 30 seconds.[48]

When the Senate finally convened for a regular session on January 23, it began with a prayer and the Pledge of Allegiance. 158 Cong. Rec. S13 (daily ed.). The Acting President pro tempore recognized the Majority Leader, who "welcome[d] everyone back after the long break we had." *Ibid.* The Senate engaged in morning business and executive session, during which it confirmed a judicial nominee. *Id.* at S13-S48. Messages from the President and the House of Representatives that had arrived on January 12 and January 18 were formally laid before the Senate, as were committee reports that had been submitted on January 13. *Id.* at S37, S41.

Thus, just as its order had prescribed, before January 23, the Senate spent 20 days conducting "no business." Pet. App. 91a. That period not only satisfied the plain meaning of the term "recess": a "period of cessation from usual work" (13 *OED* 322-323), or a "suspension of business" (2 Webster, *American Dictionary* s.v. "recess"). It also satisfied the test discussed above, because Senators evidently understood that they "owe[d] no duty of attendance" and they were unable as a body to "receive communications from the President or participate as a body in making appointments." *1905 Senate Report* 2.

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[48] See 158 Cong. Rec. S5 (daily ed. Jan. 10, 2012) (28 seconds); *id.* at S7 (Jan. 13) (30 seconds); *id.* at S9 (Jan. 17) (28 seconds); *id.* at S11 (Jan. 20) (29 seconds).

b. The Senate's own rules and procedures reinforce the conclusion that the pro-forma sessions were a stratagem to paper over what was in substance a continuous Senate recess of 20 days. Senate Rule IV, para. 1(a), requires the recitation of a prayer and the Pledge of Allegiance at the start of each "daily session[]," but neither was said at the pro-forma sessions. Similarly, under the terms of the Senate's usual standing order, the Secretary of the Senate is authorized "to receive messages from the President of the United States" when "the Senate is in recess or adjournment." 157 Cong. Rec. S14 (daily ed. Jan. 5, 2011); see also *ibid.* (similar order for certain messages from the House). Messages are laid before the Senate only when it returns. Here, the Secretary invoked the standing order to receive messages from the President and the House on January 12 and 18, and those messages were not laid before the Senate as a body until January 23 (see 158 Cong. Rec. at S37), indicating that the intervening pro-forma sessions had been indistinguishable from—rather than interruptions of—an ongoing recess.

Other orders the Senate adopted on December 17, 2011, further support the conclusion that the pro-forma sessions did not interrupt the Senate's ongoing recess. By rule and practice, it is only while the Senate is in session in its chamber that Senate committees may report bills and submit reports to the full Senate for placement on the legislative calendar, that the Senate may make legislative appointments to certain boards and commissions, and that the President pro tempore may sign enrolled bills. Before lengthy recesses, however, the Senate regularly adopts orders allowing such acts to occur while the Senate is away. See *Riddick's Senate Procedure* at 925, 1193 (committee reports); *id.* at 427 (legisla-

tive-appointment authority); *id.* at 830, 1023 (signing of enrolled bills). On December 17, 2011, the Senate adopted such orders, notwithstanding the fact that it was planning to hold several pro-forma sessions over the next 36 days. See 157 Cong. Rec. at S8783. And other orders tellingly characterized the upcoming break as "the Senate's recess" (*i.e.*, as a unitary recess, rather than a series of three-day breaks). *Ibid.* (asking and obtaining "unanimous consent that *notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters on Friday, January 13, 2012, from 10 a.m. to 12 noon.") (emphasis added); see *ibid.* (authorizing Senate leadership to exercise legislative-appointment authority "notwithstanding the upcoming recess or adjournment of the Senate"). If respondent were correct that pro-forma sessions are "not materially different from other Senate sessions" (Cert. Resp. 31 (citation omitted)), those orders would have been unnecessary, because committees could have reported, and legislative appointments could have been made, during the period of pro-forma sessions without any need for a special dispensation.

c. Under the circumstances, it was entirely reasonable for the President to rely on the Senate's order that no business would be conducted during its 20-day January break and its repeated descriptions of that impending break as "the Senate's recess." See *United States* v. *Smith*, 286 U.S. 6, 35-36 (1932) (explaining that "[i]t is essential to the orderly conduct of public business * * * that each branch be able to rely upon definite and formal notice of action by another"; warning against the "uncertainty and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of a Senate communication).

3. The mere possibility that the Senate might suspend its "no business" order during the 20-day period did not prevent that period from constituting a recess

Respondent notes (Cert. Resp. 31-32) that, at any one of its pro-forma sessions, the Senate might have overturned its unanimous-consent order directing that "no business" be conducted before January 23, 2012. In particular, respondent stresses (*ibid.*) that the Senate did conduct business, by passing a bill, during a December 2011 session, which, in the same order, had been scheduled to be a pro-forma session. But the remote possibility that unanimous consent to conduct business would be obtained, despite the December 17 order, cannot suffice to prevent an extended break from being a "recess" in the relevant sense, because the possibility of reconvening early exists during traditional intra-session—and even inter-session—recesses that take place pursuant to concurrent resolutions.[49]

A valid exercise of the recess-appointment power cannot be made to depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess. Indeed, the Senate ordinarily retains the potential to conduct business before the end of recesses effectuated by concurrent resolutions of adjournment.[50] Such resolutions typically provide—even

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[49] The Congressional Research Service identified 114 pro-forma meetings between January 4, 2005, and March 8, 2012, and found only "two at which legislative business appears to have been conducted." 158 Cong. Rec. at S5954; see 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act of 2011); *id.* at S8789 (daily ed. Dec. 23, 2011) (passing Temporary Payroll Tax Cut Continuation Act of 2011).

[50] See, *e.g.*, H.R. Con. Res. 225, 109th Cong. (July 28, 2005) (providing for adjournment between July 29 and September 6, 2005, but

for adjournments *sine die*—that the congressional leadership may require either or both Houses to resume business during the recess if the public interest warrants; those are, in legislative parlance, "conditional adjournment resolutions."[51] In addition, the President may always require the Senate to terminate its recess and resume regular business "on extraordinary Occasions." U.S. Const. Art II, § 3. But the mere possibility that congressional leadership or the President might require the Senate to resume business cannot mean that the Senate is not in recess, for then it could *never* be in recess.

Despite respondent's efforts to mask the substance of the Senate's actions, the traditional and established understanding of the Recess Appointments Clause applies with equal force in this setting. The Senate here had unequivocally ordered a cessation of business between January 3 and January 23. To the extent the Senate had the ability to conduct emergency business during its break, it was not because the Senate expressed any in-

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allowing for early recall); 151 Cong. Rec. 19,417 (2005) (reconvening early from intra-session recess after Hurricane Katrina); 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010) (passing concurrent resolution giving Senate majority leader power to reassemble the Senate); *id.* at S6995, S6996-S6999 (daily ed. Aug. 12, 2010) (Majority Leader exercising recall authority to permit Senate to pass an emergency border security appropriation); *Riddick's Senate Procedure* at 1082-1083 (listing instances when "[b]y order, adopted by unanimous consent, the Senate has transacted * * * business during recess").

[51] See H.R. Doc. No. 111-157, John V. Sullivan, *Constitution, Jefferson's Manual & Rules of the House of Representatives*, § 84, at 38 (2011) ("A concurrent resolution adjourning both Houses for more than three days, or sine die, normally includes joint leadership authority to reassemble the Members whenever the public interest shall warrant it.").

tent to do so, or because of anything distinctive about the pro-forma sessions. Rather, that result was merely a function of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent. The December 17 order thus created a state of affairs in the Senate identical to those produced by a conditional adjournment resolution: the Senate was in recess, but might have resumed business if the public interest required.

In fact, resuming business under unanimous-consent orders is likely to be more difficult than doing so under the usual terms of a conditional adjournment resolution. The latter can be done by Senate leadership, or Senate and House leadership acting together, even in the face of objecting members, while the former could be blocked by a single Senator.[52] In practice, a Senator need not even be in the Senate chamber to block a proposed unanimous-consent agreement.[53] That attribute of the December 17 order was likely essential for its adoption,

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[52] See Martin B. Gold, *Senate Procedure & Practice* 24 (2d ed. 2008).

[53] Before a bill, resolution, or nomination is presented on the Senate floor for unanimous consent, it customarily passes through an extensive clearance process. See Christopher M. Davis, Cong. Res. Serv., *Memorandum re: Calling Up Measures on the Senate Floor* (2011); Gold, *Senate Procedure & Practice* at 15 & 236 n.12. Among other things, the Senate Majority Leader contacts each Senator's office through "a special alert line called 'the hotline' that provides information on [the measure] the leader is seeking to pass through unanimous consent." Sen. Tom Coburn, *Holding Spending*, www.coburn.senate.gov/public/index.cfm/holdingspending. A Senator can invoke "his unilateral ability to object to unanimous consent requests" by imposing a "hold" on a measure or matter "in advance and without having to do so in person on the floor." Gold, *Senate Procedure & Practice* at 84-85 (citation omitted).

because it gave Senators some assurance that they could leave Washington, D.C., without concern that any business would be conducted without their consent.

4. Historical practice does not support the use of pro-forma sessions to prevent the President from making recess appointments

a. Respondent notes that there is prior history of the Senate's using pro-forma sessions for short periods in an attempt to avoid adjourning for more than three days without the consent of the House of Representatives, as a means of complying with the Twentieth Amendment's requirement to assemble when a new session begins on January 3, and to achieve other purposes wholly internal to the Legislative Branch. See, *e.g.*, Cert. Resp. 3 n.2 (citing 1949 pro-forma session); 133 Cong. Rec. 15,445 (1987) (scheduling a single pro-forma session to allow a cloture vote to ripen); 158 Cong. Rec. at S5954-S5955 (summarizing reasons for some prior pro-forma sessions).[54]

Since 2007, however, the Senate has often used pro-forma sessions to paper over substantial breaks in Senate business, including at times (like the winter holidays and August) when, as a matter of traditional practice, there would have been a concurrent resolution of adjournment authorizing the Senate to cease business. See 158 Cong. Rec. at S5955 (describing breaks of 31, 34, 43, 46, and 47 days that included pro-forma sessions); *Congressional Directory* 537-538. In such instances, the pro-forma-session device has become an alternative means by which the Senate as a body ceases business—including the giving of advice and consent to appoint-

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[54] As discussed below, whatever the force of such sessions for those purposes, they cannot control the authority of the other Branches.

ments—for an extended and continuous period, enabling Senators to return to their States without concern that business will be conducted in their absence without their consent.

b. In respondent's view, the "explicit purpose" of the pro-forma sessions in December 2011 and January 2012 was not an internal legislative one, but a desire to deny the President the authority to make recess appointments. Resp. C.A. Br. 59; *id.* at 8-9 (citing letter from 20 Senators asking the Speaker of the House to prevent the Senate from adjourning for more than three days, and letter from 78 Representatives urging prevention of recess appointments); cf. *OLC Pro Forma Op.* 2 (citing statements from Senator Reid attributing that purpose to pro-forma sessions in 2007 and 2008).[55]

Respondent attempts (Cert. Resp. 30) to trace the use of recess-appointment-preventing pro-forma sessions back to 1985, contending that "Presidents Reagan and [George W.] Bush recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions, as did President Obama at the beginning of his Administration."

There is no basis for concluding that President Reagan recognized the validity of such a gambit. Respondent invokes (Cert. Resp. 4) a 1999 floor statement by Senator Inhofe purporting to describe the parameters

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[55] To the extent that Members of the House of Representatives sought to prevent the President from making recess appointments, that only increases separation-of-powers concerns, as the Constitution gives the House no share of the appointment power. See *The Federalist No. 77*, at 519 (Hamilton) (the House's "unfitness" for participating in the "power of making [appointments]" "will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons").

of a 1985 compromise, in which President Reagan agreed to give the Senate leadership advance notice of recess appointments. See generally 131 Cong. Rec. 27,686-27,689 (1985) (Sen. Byrd). But the agreement was not, as respondent believes, intended to give the Senate an opportunity to block the recess appointments "by not going into recess and staying in pro forma." Cert. Resp. 4 (quoting 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe)). Instead, as indicated by contemporaneous documents that are now publicly available, the President "agreed only to advise [Senate leaders] of recess appointments before they were made, *not* before the Senate adjourned."[56] Thus, the arrangement did not reflect any acknowledgment that the Senate could legitimately use pro-forma sessions to block recess appointments.

Respondent's assertion (Cert. Resp. 30) that President George W. Bush "recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions" is likewise flawed. The fact that President Bush did not make recess appointments while the Senate was holding pro-forma sessions merely reflects the truism that the advice-and-consent process engages political leaders in a long course of repeated interactions, in which short-term compromises can be made despite

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[56] Memorandum from Fred F. Fielding, Counsel to the President, to M.B. Oglesby, Jr., Assistant to the President, Dec. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf; see also Memorandum for the Files from Max L. Friedersdorf & Fred F. Fielding, Oct. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf ("At no time did we pledge to advise Senator Byrd of plans to recess appoint *before* the recess occurs. We did indicate that he (Byrd) would be advised *at the time* of the recess appointment.").

disagreements.[57] Thus, after the recess appointments at issue here (but before the decision below), the President and the Senate reached another inter-Branch accommodation, in which the Senate agreed "to approve a slate of nominees," while the President "promis[ed] not to use his recess powers" during the Easter recess. Stephen Dinan, *Congress Puts Obama Recess Power to the Test*, Wash. Times, Apr. 2, 2012, at A3. And, in July 2013, another political compromise led to the confirmation of nominees for all five positions on the Board. See note 3, *supra*.

Respondent also relies (Cert. Resp. 4-5, 30) on a post-argument letter that the Solicitor General filed in this Court in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (filed Apr. 26, 2010) (No. 08-1457). That letter principally explained that, for a variety of reasons, then-recent recess appointments did not affect prior Board decisions and orders and thus did not render the case moot. *Id.* at 1-3. The letter added that the Board might again have only two members at some point, making "the need for prospective guidance" from the Court important. *Id.* at 3. The letter observed that the Senate might foreclose the President's use of recess-appointment authority by declining to go into recess for more than three days. *Ibid.* As an example, it added—in one sentence and without further analysis—that the Senate declined to recess for more than three days for an extended period beginning in late 2007, in evident refer-

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[57] In October 2010, a former Acting Assistant Attorney General and Deputy Assistant Attorney General in the Bush administration wrote that "the Senate cannot constitutionally thwart the president's recess power through pro forma sessions." Steven G. Bradbury & John P. Elwood, *Recess is canceled: President Obama should call the Senate's bluff*, Wash. Post, Oct. 15, 2010, at A19.

ence to the Senate's practice of convening pro-forma sessions during that period. *Ibid.* That observation, in the course of a letter principally addressed to other subjects, was not aimed at definitively resolving the issue in this case. Since then, the Office of Legal Counsel conducted a thorough examination of the implications of the Senate's efforts to convene pro-forma sessions at which no business is to be conducted, and it concluded that such sessions do not interrupt a Senate recess for purposes of the President's recess-appointment power. *OLC Pro Forma Op.* 9-23. The Board's position here is consistent with that analysis.

In any event, the short period between the Solicitor General's April 2010 letter and the President's January 2012 appointments furnishes scarce material for the historical mantle that respondent attempts to don. To the contrary, this is an instance in which the Senate's previous and "prolonged reticence" to assert that the President's recess-appointment power could be so easily nullified would be "amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

5. Even assuming the pro-forma sessions could satisfy the Senate's other constitutional obligations, they impermissibly disrupt the balance struck by Article II

Finally, respondent contends (Cert. Resp. 3-4, 32) that the Senate has used pro-forma sessions in efforts to comply with its obligation under the Adjournment Clause (Art. I, § 5, Cl. 4) not to adjourn for more than three days without the House's consent. Respondent apparently believes that, if pro-forma sessions count for purposes of the Adjournment Clause, they must count for purposes of the Recess Appointments Clause. Yet the better view is that pro-forma sessions do not comply

with the Adjournment Clause. And, even if they do, the deference that Congress may receive on that question, which is principally related to its internal matters, is inapplicable to the Recess Appointments Clause, which allocates power between the Senate and the Executive.

a. The Adjournment Clause furnishes each House of Congress with the power to ensure the simultaneous presence of the other House so that they can together conduct legislative business.[58] Insofar as the matter concerns solely the interaction of the two Houses, we may assume arguendo that they have some leeway to determine whether a particular practice comports with the Clause. And in any event each House has the ability as a practical matter to respond to, or overlook, an infringement by the other.[59]

At least, in the absence of considerable deference to Congress, however, a string of pro-forma sessions at which no business will be conducted for 20 days cannot be seen as meaningfully compliant with the Adjournment Clause. Indeed, the Senate appears to have concluded as much in December 1876. Senator Henry Anthony pro-

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[58] See Jefferson's Opinion on the Constitutionality of the Residence Bill (July 15, 1790), in 17 *The Papers of Thomas Jefferson* 195-196 (Julian P. Boyd ed., 1965) (explaining that the Adjournment Clause was "necessary therefore to keep [the Houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will").

[59] When the Senate used a unanimous consent resolution to adjourn from a Saturday until a Thursday in 1916, "it was called to the attention of the House membership but nothing further was ever done about it." *Riddick's Senate Procedure* at 15. But see *United States* v. *Munoz-Flores*, 495 U.S. 385, 395-396 (1990) (finding Origination Clause claim justiciable; stating that "[p]rovisions for the separation of powers within the Legislative Branch," like those "concerning relations between the branches," "safeguard liberty").

posed to have the Senate meet every three days "[w]ithout the transaction of any business" so as to permit a nine-day holiday "recess." 5 Cong. Rec. 333 (1876). Even after Senator Anthony agreed to put the proposal in an informal and non-binding manner, Senator Roscoe Conkling objected:

> [H]ow can it be that by an indirection so slight as that now proposed we can circumvent the [Adjournment Clause]? Obviously, the same power which permits an adjournment in that mode for nine days, in that same mode would permit an adjournment for ninety days. * * * I have a very fixed opinion that this is beyond any suggestion of power heretofore made.

Id. at 335; see also *id.* at 336 (Sen. Hamlin) ("If that is not in contravention of the plain meaning and intent of the Constitution, then I do not understand the force of language."). The resolution was altered to avoid Conkling's objection. *Id.* at 336, 337-338.[60]

b. Of course, even if the Court were to defer to the House and Senate's belief that a series of pro-forma sessions may satisfy their obligations to one another not to adjourn without the other's consent, such deference

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[60] Respondent also contends (Cert. Resp. 3, 32) that the Senate has recently used pro-forma sessions to comply with its obligation under Section 2 of the Twentieth Amendment to "begin" its annual "meeting" at noon on January 3 (unless that date has been changed by law). It is not clear whether a pro-forma session is adequate to that purpose, as Congress has long regarded that requirement (and its predecessor in Art. I, § 4, Cl. 2) as being fulfilled even when it fails to attain a quorum on that date. See, *e.g.*, 6 Annals of Cong. 1517 (1796); 8 *id.* at 2189 (1798); 9 *id.* at 2417-2418 (1798). But a pro-forma session with a single member could hardly suffice to satisfy Congress's other obligation under Section 2 of the Twentieth Amendment: to "assemble at least once in every year."

has no proper bearing on the meaning of the Recess Appointments Clause. Even assuming arguendo that the President has no direct interest in whether each House secures the other's consent for an adjournment (notwithstanding his role in the law-making process), he plainly has a direct interest in the balance that Article II strikes between his need to secure the Senate's advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is not available.

Thus, even assuming that the pro-forma sessions prevented the Senate from violating its obligation to secure the House's consent to an adjournment, the Senate still entered an order that "no business" be conducted for 20 days and characterized the resulting cessation of business as "the Senate's recess"—a conclusion consistent with the plain meaning of the term "recess." Moreover, throughout that time, the Senate's members were dispersed and unavailable to consult as a body, and messages from the President were not laid before it. Under the century-old test applied by the Executive and the Senate itself, that period was a recess.

c. Respondent's contrary view—under which the Senate may be absent in fact while present only by virtue of a legal fiction—would upset the balance struck in Article II between the Appointments Clause and the "auxiliary method of appointment" that applies when the Senate is unavailable to provide its advice and consent but there are vacancies "which it might be necessary for the public service to fill without delay." *Federalist No. 67*, at 455.

As discussed above, since 2007, the Senate has used pro-forma sessions to string together breaks in business lasting as long as 47 days, see 158 Cong. Rec. at S5955,

and respondent's position provides no stopping point. See *New Vista*, 719 F.3d at 261 (Greenaway, J., dissenting) ("[W]hat if the Senate remained in pro forma sessions while it broke for six to nine months, as was its routine at the time of ratification, hoping that this would prevent the President from making recess appointments?"). The Framers could not have anticipated or desired such a result. Nor is it justified by anything in the first two centuries of practice under the Appointments and Recess Appointments Clauses.

d. The significant separation-of-powers concerns raised by respondent's position are illustrated by this case. If, as respondent urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, the Board, by virtue of losing its quorum, would have been disabled from carrying out significant portions of its statutory mission, thus preventing the execution of a duly passed Act of Congress and the performance of the functions of an office "established by Law," U.S. Const. Art. II, § 2, Cl. 2. That result would directly undermine the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3—which necessarily requires the "assistance of subordinates." *Myers*, 272 U.S. at 117.

In contrast, upholding the Board members' appointments will not vitiate the Senate's powers or the ordinary process of advice and consent. The recess appointments were only temporary; the commissions were to "expire at the End of [the Senate's] next Session." Art. II, § 2, Cl. 3. The Senate retained authority to vote on the President's nominees when it returned. More fundamentally, the Senate retains the choice it has always had: to remain "continually in session for the appoint-

ment of officers," *Federalist No. 67,* at 455, thereby removing the constitutional predicate for the President's recess appointment power, or to cease temporarily the conduct of business (and potentially leave the capital) knowing that the President may make temporary appointments during that period. Because the Senate cannot choose to do both at the same time, the Court should reject respondent's request to "disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2013

APPENDIX A

APPOINTMENTS CURRENTLY KNOWN TO HAVE BEEN MADE DURING INTRA-SESSION RECESSES OF THE SENATE, BY APPOINTMENT DATE

Intra-session Appointments by Andrew Johnson[1]

Samuel Blatchford, District Judge, S.D.N.Y.	5/3/1867
George Bancroft, Envoy Extraordinary and Minister Plenipotentiary, Prussia[2]	5/14/1867
Andrew J. Baker, Deputy Postmaster, Seymour, Ind.[3]	5/17/1867
John Hay, Secretary of Legation, Austria[4]	5/20/1867
Hattie C. Fay, Deputy Postmaster, Rochester, Minn.[5]	5/21/1867

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[1] Except where indicated, the source for all listed appointments by President Johnson is Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 5 (Apr. 23, 2004) (*Hogue Intrasession*).

[2] Appointment Record of George Bancroft, *Card Record of Appointments Made from 1776 to 1960* (Entry 798), Records Relating to Appointments and Commissions, Records Relating to Various Functions 1764-1979, General Records of the Department of State, Record Group 59 (RG 59), National Archives College Park (NACP).

[3] Appointment Record of Andrew J. Baker, Entry 798, RG 59, NACP.

[4] Appointment Record of John Hay, Entry 798, RG 59, NACP.

[5] Appointment Record of Hattie C. Fay, Entry 798, RG 59, NACP.

John S. Walton, Treasurer of the Branch Mint and Assistant Treasurer of the United States, New Orleans, La.[6]	5/28/1867
William Silvey, Collector of Customs, Newark, N.J.[7]	5/30/1867
Orrin J. Rose, Consul, Taranto[8]	5/30/1867
Alexander Bliss, Secretary of Legation, Prussia[9]	6/10/1867
John Cleghorn, Register of Land Office, Sioux City, Iowa	between 3/30/1867 & 7/3/1867
Frank Cowan, Secretary to the President (patent signing)	between 3/30/1867 & 7/3/1867

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[6] Appointment Record of John S. Walton, Entry 798, RG 59, NACP.

[7] Commission of William Silvey, May 30, 1867, Vol. 35, p. 9, *Commissions Issued To Major Treasury Officers ("Presidential Appointments"), 1791-1909* (Entry 234), Records Relating to Appointments and Commissions, Records of the Division of Appointments, 1791-1945, General Records of the Department of the Treasury, Record Group 56 (RG 56), NACP.

[8] Appointment Record of Orrin J. Rose, Entry 798, RG 59, NACP.

[9] Appointment Record of Alexander Bliss, Entry 798, RG 59, NACP.

Edward S. Davis, Register of Land Office, Austin, Nev.	between 3/30/1867 & 7/3/1867
Stephen S. Fenn, Receiver of Public Moneys, Idaho Territory	between 3/30/1867 & 7/3/1867
David D. Hitchcock, Pension Agent, Ft. Gibson, Cherokee Nation	between 3/30/1867 & 7/3/1867
Richard Hurley, Receiver of Public Moneys, Idaho Territory	between 3/30/1867 & 7/3/1867
William N. Johnson, Register of Land Office, Sacramento, Cal.	between 3/30/1867 & 7/3/1867
James Lutterill, Receiver of Public Moneys, Fair Play, Colorado Territory	between 3/30/1867 & 7/3/1867
Nicholas H. Owings, Register of Land Office, Fair Play, Colorado Territory	between 3/30/1867 & 7/3/1867
Benjamin Thompson, Indian Agent, Dakota Territory	between 3/30/1867 & 7/3/1867
Jefferson J. Works, Receiver of Public Moneys, Austin, Nev.	between 3/30/1867 & 7/3/1867

William G. Wilson, Deputy Postmaster, La Fayette, Ind.[10]	8/8/1867
John S. Walton, Treasurer of the Branch Mint, New Orleans, La.[11]	8/10/1867
William J. Clark, Surveyor of Customs, Middletown, Conn.[12]	8/10/1867
Joseph S. Collins, Deputy Postmaster, Fort Randall, Dakota Territory[13]	8/20/1867
Charles H. Thompson, Deputy Postmaster, Shreveport, La.[14]	8/20/1867
F.J. Sherman, Deputy Postmaster, Chicago, Ill.[15]	8/27/1867
Oscar Minor, Collector of Customs, D. Tex.[16]	8/30/1867

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[10] Commission of William G. Wilson, Aug. 8, 1867, Vol. 4, p. 338, *Temporary Commissions of Deputy Postmasters, 1837-1873* (Entry 792), RG 59, NACP.

[11] Appointment Record of John S. Walton, Entry 798, RG 59, NACP.

[12] Commission of William J. Clark, Aug. 10, 1867, Vol. 35, p. 10, Entry 234, RG 56, NACP.

[13] Commission of Joseph S. Collins, Aug. 20, 1867, Vol. 4, p. 339, Entry 792, RG 59, NACP.

[14] Commission of Charles H. Thompson, Aug. 20, 1867, Vol. 4, p. 340, Entry 792, RG 59, NACP.

[15] Commission of F.J. Sherman, Aug. 27, 1867, Vol. 4, p. 341, Entry 792, RG 59, NACP.

Orrin J. Rose, Consul, Mechlenburg Schwerin[17]	9/25/1867
William Hefner, Deputy Postmaster, Shreveport, La.[18]	9/26/1867
J. Warren Bell, Collector of Customs, Corpus Christi, Tex.[19]	10/1/1867
William P. Gould, Additional Paymaster of Volunteers[20]	10/18/1867
Thomas N. Lee, Deputy Postmaster, Hancock, Mich.[21]	10/22/1867
James Hare, Deputy Postmaster, Hays City, Kan.[22]	7/30/1868
George W. Colby, Collector of Internal Revenue, 2nd Dist. of Ala.[23]	8/6/1868

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[16] Commission of Oscar Minor, Aug. 30, 1867, Vol. 35, p. 11, Entry 234, RG 56, NACP.

[17] Appointment Record of Orrin J. Rose, Entry 798, RG 59, NACP.

[18] Commission of William Hefner, Sept. 26, 1867, Vol. 4, p. 342, Entry 792, RG 59, NACP.

[19] Commission of J. Warren Bell, Oct. 1, 1867, Vol. 35, p. 12, Entry 234, RG 56, NACP.

[20] *Gould* v. *United States*, 19 Ct. Cl. 593, 595 (1884).

[21] Commission of Thomas N. Lee, Oct. 22, 1867, Vol. 4, p. 343, Entry 792, RG 59, NACP.

[22] Commission of James Hare, July 30, 1868, Vol. 4, p. 345, Entry 792, RG 59, NACP.

[23] Commission of George W. Colby, Aug. 6, 1868, Vol. 35, p. 122, Entry 234, RG 56, NACP.

Andrew J. Goss, Collector of Customs, St. Augustine, Fla.[24]	8/12/1868
Solomon Glose, Assessor of Internal Revenue, 8th Dist. of Pa.[25]	8/12/1868
Clara W. Drake, Deputy Postmaster, Westfield, N.Y.[26]	8/18/1868
Isaac W. Webster, Deputy Postmaster, Kenosha, Wis.[27]	8/18/1868
Hiram Ketchum, Jr., Collector of Customs, D. Alaska[28]	8/20/1868
Joseph E. Smith, Collector of Customs, Wiscasset, Me.[29]	8/22/1868
John P. O'Neill, U.S. District Attorney, E.D. Pa.[30]	8/22/1868

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[24] Commission of Andrew J. Goss, Aug. 12, 1868, Vol. 35, p. 15, Entry 234, RG 56, NACP.

[25] Commission of Solomon Glose, Aug. 12, 1868, Vol. 35, p. 138, Entry 234, RG 56, NACP.

[26] Commission of Clara W. Drake, Aug. 18, 1868, Vol. 4, p. 346, Entry 792, RG 59, NACP.

[27] Commission of Isaac W. Webster, Aug. 18, 1868, Vol. 4, p. 347, Entry 792, RG 59, NACP.

[28] Commission of Hiram Ketchum, Jr., Aug. 20, 1868, Vol. 35, p. 15, Entry 234, RG 56, NACP.

[29] Commission of Joseph E. Smith, Aug. 22, 1868, Vol. 35, p. 14, Entry 234, RG 56, NACP.

[30] *Case of the Dist. Att'y of the United States*, 7 F. Cas. 731, 732 (E.D. Pa. 1868) (No. 3924).

Perry Fuller, Collector of Customs, New Orleans, La.[31]	8/26/1868
Lloyd D. Waddell, Assessor of Internal Revenue, 1st Dist. of Ga.[32]	8/26/1868
Otis H. Russell, Collector of Internal Revenue, 4th Dist. of Va.[33]	8/28/1868
Conduce G. Megrue, Assessor of Internal Revenue, 2d Dist. of Ohio[34]	9/2/1868
Rene J. Fougeray, Assessor of Internal Revenue, 4th Dist. of Pa.[35]	9/2/1868
Charles C. Dane, Collector of Internal Revenue, 5th Dist. of Mass.[36]	9/3/1868
Orton Hackett, Deputy Postmaster, Baton Rouge, La.[37]	9/8/1868

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[31] Commission of Perry Fuller, Aug. 26, 1868, Vol. 35, p. 16, Entry 234, RG 56, NACP; see 12 Op. Att'y Gen. 449 (1868).

[32] Commission of Lloyd D. Waddell, Aug. 26, 1868, Vol. 35, p. 123, Entry 234, RG 56, NACP.

[33] Commission of Otis H. Russell, Aug. 28, 1868, Vol. 35, p. 124, Entry 234, RG 56, NACP.

[34] Commission of Conduce G. Megrue, Sept. 2, 1868, Vol. 35, p. 125, Entry 234, RG 56, NACP.

[35] Commission of Rene J. Fougeray, Sept. 2, 1868, Vol. 35, p. 126, Entry 234, RG 56, NACP.

[36] Commission of Charles C. Dane, Sept. 3, 1868, Vol. 35, p. 127, Entry 234, RG 56, NACP.

[37] Commission of Orton Hackett, Sept. 8, 1868, Vol. 4, p. 348, Entry 792, RG 59, NACP.

A.J. Simmons, 9/28/1868
Collector of Internal Revenue, D. Mont.[38]

Albert G. Ryan, 9/30/1868
Collector of Internal Revenue, 1st Dist. of Ark.[39]

Samuel Babcock, 10/1/1868
Collector of Internal Revenue, 2d Dist. of Conn.[40]

William A. Wisong, 10/14/1868
Collector of Internal Revenue, 3d Dist. of Md.[41]

John Williams, 10/16/1868
Collector of Internal Revenue, 2d Dist. of Tenn.[42]

Thomas A. Burditt, 10/23/1868
Assessor of Internal Revenue, 1st Dist. of Miss.[43]

James A. Maryman, 10/24/1868
Surveyor of Customs, Llewellensburg, Md.[44]

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[38] Commission of A.J. Simmons, Sept. 28, 1868, Vol. 35, p. 128, Entry 234, RG 56, NACP.

[39] Commission of Albert G. Ryan, Sept. 30, 1868, Vol. 35, p. 129, Entry 234, RG 56, NACP.

[40] Commission of Samuel Babcock, Oct. 1, 1868, Vol. 35, p. 130, Entry 234, RG 56, NACP.

[41] Commission of William A. Wisong, Oct. 14, 1868, Vol. 35, p. 131, Entry 234, RG 56, NACP.

[42] Commission of John Williams, Oct. 16, 1868, Vol. 35, p. 132, Entry 234, RG 56, NACP.

[43] Commission of Thomas A. Burditt, Oct. 23, 1868, Vol. 35, p. 136, Entry 234, RG 56, NACP.

[44] Commission of James A. Maryman, Oct. 24, 1868, Vol. 35, p. 17, Entry 234, RG 56, NACP.

Charles R. Levenwell, U.S. Marshal, D.N.J.[45]	10/29/1868
Robert K. Byrd, Collector of Internal Revenue, 2d Dist. of Tenn.[46]	11/6/1868

Intra-session Appointments by Warren G. Harding

Mabel Walker Willebrandt, Assistant Attorney General, Dep't of Justice[47]	8/29/1921
John W.H. Crim, Assistant Attorney General, Dep't of Justice[48]	8/29/1921
J.T. Williams, U.S. Attorney, N.D. Cal.[49]	8/29/1921
Irving Smith, Register of Land Office, Seattle, Wash.[50]	8/30/1921

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[45] Commission of Charles R. Levenwell, Oct. 29, 1868, Vol. 1, *Temporary Marshals' Commissions, Apr. 20, 1829-Nov. 30, 1887* (Entry 787), RG 59, NACP.

[46] Commission of Robert K. Byrd, Nov. 6, 1868, Vol. 35, p. 135, Entry 234, RG 56, NACP.

[47] *California Woman to be Assistant to Daugherty*, Wash. Times, Aug. 29, 1921, at 1.

[48] *Annual Report of the Attorney General of the United States for the Fiscal Year 1921*, at 93 (1921).

[49] *California Woman to be Assistant to Daugherty*, Wash. Times, Aug. 29, 1921, at 1.

[50] *Hogue Intrasession* 7.

Intra-session Appointment by Calvin Coolidge

John J. Esch, Member, Interstate Commerce Commission[51]	1/3/1928

Intra-session Appointments by Herbert Hoover

Ralph H. Van Deman, Major General, U.S. Army[52]	6/25/1929
George C. Shaw, Brigadier General, U.S. Army[53]	6/25/1929

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[51] *Ibid.*

[52] *Van Deman Raised To Be Maj. General*, Army & Navy Journal, June 29, 1929, at 881 (reporting Van Deman's promotion to fill vacancy created by death of Maj. Gen. Harry Smith); Draft Nomination Submission, Sept. 4, 1929, Box 5, *Nomination & Senate Confirmations Relating To Promotions Of Brigadier Generals And Other General Officers, 1914-51*, Records of the Adjutant General's Office, Record Group 407, NACP (bearing handwritten notations that Van Deman was recess appointed, but that he then retired and was never nominated).

[53] *Van Deman Raised To Be Maj. General*, Army & Navy Journal, June 29, 1929, at 881 (reporting Shaw's promotion to fill vacancy created by Van Deman's promotion); Draft Nomination Submission, Sept. 4, 1929 (handwritten "R" signifying Shaw was recess appointee).

C.B. Denman, Alexander Legge, William F. Schilling, James C. Stone, Charles C. Teague, Carl Williams, and Charles S. Wilson, Members, Federal Farm Board[54]	7/15/1929
Samuel Roy McKelvie, Member, Federal Farm Board[55]	7/30/1929

Intra-session Appointments by Franklin D. Roosevelt[56]

Oliver P. Hopkins, Assistant Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Raymond C. Miller, Assistant Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Amos E. Taylor, Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Dwight D. Eisenhower, Major General, U.S. Army[57]	8/30/1943

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[54] 9 Comp. Gen. 190, 191 (1929); 71 Cong. Rec. 3403 (1929).

[55] *Ibid.*; *M'Kelvie Is Named To Farm Board*, N.Y. Times, July 31, 1929, at 3.

[56] Except where indicated, the source for listed appointments by President Roosevelt is *Hogue Intrasession* 8.

James F. Byrnes, Director, War Mobilization and Reconversion Office	10/3/1944
Richard McElligott, Register, Land Office at Roseburg, Or.	10/24/1944
Brig. Gen. Frank T. Hines, Administrator, Retraining & Reemployment Administration	between 9/21/1944 & 11/14/1944

Intra-session Appointments by Harry Truman[58]

Dean G. Acheson, Under Secretary of State	8/16/1945
Frank McCarthy, Assistant Secretary of State	8/21/1945
Spruille Braden, Assistant Secretary of State	8/25/1945
Robert N. Denham, General Counsel, NLRB	7/31/1947
J. Copeland Gray, Member, NLRB	7/31/1947
Abe Murdock, Member, NLRB	7/31/1947

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[57] *The Public Papers and Addresses of Franklin D. Roosevelt, 1943*, at 370-371 (1950).

[58] Except where indicated, the source for listed appointments by President Truman is *Hogue Intrasession* 9-15.

John T. Jarecki, Collector, Internal Revenue, 1st Dist. of Ill.	8/1/1947
John R. Alison, Assistant Secretary of Commerce	8/4/1947
Charles Oliphant, Assistant General Counsel, Bureau of Internal Revenue	8/6/1947
Roy W. Harper, District Judge, E.D. & W.D. Mo.	8/7/1947
J. Alston Adams, Member, Federal Home Loan Bank Board	8/11/1947
Cyrus S. Ching, Member, Federal Mediation and Conciliation Service	8/11/1947
Nathaniel Dyke, Jr., Member, Federal Home Loan Bank Board	8/11/1947
John H. Fahey, Member, Federal Home Loan Bank Board	8/11/1947
Raymond M. Foley, Administrator, Housing and Home Finance	8/11/1947
Dillon S. Myer, Commissioner, Public Housing Administration	8/11/1947
Franklin D. Richards, Commissioner, Federal Housing Administration	8/11/1947
Theodore B. Werner, U.S. Marshal, S.D.	8/12/1947

Oscar R. Ewing, Federal Security Administrator	8/20/1947
Watson B. Miller, Commissioner, Immigration and Naturalization Service	8/20/1947
John L. Sullivan, Secretary of the Navy[59]	8/22/1947
Kenneth C. Royall, Secretary of the Army[60]	8/22/1947
Lawrence C. Kingsland, Commissioner of Patents	8/23/1947
James Boyd, Director, Bureau of Mines (Interior)	8/26/1947
William H. Draper, Jr., Under Secretary of the Army	8/29/1947
John H. Hilldring, Alternate Representative, U.N. General Assembly[61]	9/15/1947
W. John Kenney, Under Secretary of the Navy[62]	9/19/1947

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[59] Walter H. Waggoner, *Royall Appointed Army Secretary; Sullivan for Navy*, N.Y. Times, Aug. 22, 1947, at 1.

[60] *Ibid.*

[61] 93 Cong. Rec. 11,030 (1947); *Miss Gildersleeve Quits*, N.Y. Times, Sept. 16, 1947, at 10.

[62] Anthony Leviero, *Defense Command Filled as 2 More Take Service Oath*, N.Y. Times, Sept. 19, 1947, at 1; *Kenney Takes Oath of Higher Navy Post*, N.Y. Times, Sept. 20, 1947, at 10.

Paul H. Alling, Ambassador to Pakistan	9/20/1947
Walter J. Donnelly, Envoy/Minister to Venezuela	9/20/1947
Arthur M. Hill, Chairman, National Security Resources Board	9/20/1947
Roscoe H. Hillenkoetter, Director of Central Intelligence	9/20/1947
H. Freeman Matthews, Ambassador to Sweden	9/20/1947
W. Stuart Symington, Secretary of the Air Force	9/20/1947
Thomas P. Thornton, U.S. Attorney, E.D. Mich.	9/22/1947
Gordon Gray, Assistant Secretary of the Army	9/24/1947
Vannevar Bush, Chairman, Research and Development Board	9/25/1947
Thomas J. Hargrave, Chairman, Munitions Board	9/26/1947
John E. Parks, Judge, 1st Circuit, Territory of Hawaii	9/27/1947
Nathaniel P. Davis, Ambassador to Costa Rica	9/30/1947
David R. Heath, Ambassador to Bulgaria	9/30/1947

John T. Kmetz, Assistant Secretary of Labor[63]	9/30/1947
Frank Porter Graham, Representative to the Good Offices Committee of the Security Council of the United Nations on Indonesia[64]	10/1/1947
Arthur S. Barrows, Under Secretary of the Air Force	10/2/1947
Cornelius V. Whitney, Assistant Secretary of the Air Force	10/2/1947
Eugene M. Zuckert, Assistant Secretary of the Air Force	10/2/1947
William Benton, Laurence Duggan, Milton S. Eisenhower, Reuben G. Gustavson, and Helen C. White, Representatives, UNESCO General Conference[65]	10/7/1947

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[63] *Truman Picks Kmetz, Lewis Aide, As Assistant Secretary of Labor*, N.Y. Times, Oct. 1, 1947, at 24.

[64] 93 Cong. Rec. 10,723 (1947); *Educator to Represent U.S. in Indonesian Case*, N.Y. Times, Oct. 2, 1947, at 10.

[65] 93 Cong. Rec. 11,030 (1947); Appointment Records of Laurence Duggan, Reuben G. Gustavson, and Helen C. White, Entry 798, RG 59, NACP.

Detlev W. Bronk, Charles S. Johnson, George D. Stoddard, and Howard E. Wilson, Alternate Representatives, UNESCO General Conference[66]	10/7/1947
James H. Keeley, Jr., Envoy/Minister to Syria	10/8/1947
5885 officers in the Regular Army and Regular Air Force, comprising 294 Majors, 928 Captains, 4165 1st Lieutenants, and 498 2nd Lieutenants[67]	10/10/1947
Paul Aiken, Second Assistant Postmaster General	10/14/1947
J. Klahr Huddle, Ambassador to Burma	10/17/1947
George R. Humrickhouse, U.S. Attorney, E.D. Va.	10/22/1947
Joe E. Daniels, Assistant Commissioner of Patents (Commerce)	10/30/1947
Sylvester J. Ryan, District Judge, S.D.N.Y.	11/1/1947

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[66] 93 Cong. Rec. 11,030 (1947); Appointment Records of Charles S. Johnson, George D. Stoddard, and Howard E. Wilson, Entry 798, RG 59, NACP.

[67] *New Permanent Career Officers Selected for Army and Air Force*, Army & Navy Journal, Oct. 11, 1947, at 146 (listing 5885 "officers and former officers of the National Guard, Officers Reserve Corps and Army of the United States" who received recess "commissions in the Regular Army and Regular Air Force").

Louise Leonard Wright, Alternate Representative, UNESCO General Conference[68]	11/4/1947
Alan G. Kirk, Representative to the Balkan Committee[69]	11/5/1947
General Carl Spaatz, Chief of Staff of the Air Force	11/5/1947
216 officers in the Regular Army and Regular Air Force[70]	11/14/1947
John J. Fitzpatrick, Collector, Internal Revenue, D. Conn.	6/22/1948
George B. Gillin, Superintendent of the Mint, San Francisco	6/22/1948
Byron B. Harlan, Judge, Tax Court of the United States	6/22/1948
Roy W. Harper, District Judge, W.D. Mo.	6/22/1948
Marion J. Harron, Judge, Tax Court of the United States	6/22/1948

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[68] Appointment Record of Louise Leonard Wright, Entry 798, RG 59, NACP.

[69] 93 Cong. Rec. 10,723 (1947); *Kirk to View Balkans*, N.Y. Times, Nov. 6, 1947, at 2.

[70] *Officer Procurement Program*, Army & Navy Journal, Nov. 22, 1947, at 300 (reporting "[t]he final integration of 216 officers into the Regular Army and Regular Air Force through recess appointments approved 14 Nov. by President Truman").

Samuel H. Kaufman, District Judge, S.D.N.Y.	6/22/1948
William Marvel, U.S. Attorney, Del.	6/22/1948
Paul P. Rao, Judge, Court of Customs	6/22/1948
Gilroy Roberts, Engraver of the Mint, Philadelphia	6/22/1948
Edward A. Tamm, District Judge, D.D.C.	6/22/1948
Milton S. Eisenhower, Waldo G. Leland, and Anne O'Hare McCormick, Representatives, UNESCO General Conference[71]	6/24/1948
Frank Capra, William H. Hastie, Kathleen N. Lardie, W. Albert Noyes, Jr., and George F. Zook, Alternate Representatives, UNESCO General Conference[72]	6/24/1948

[71] 94 Cong. Rec. 9509 (1948); Appointment Records of Waldo G. Leland and Anne O'Hare McCormick, Entry 798, RG 59, NACP.

[72] 94 Cong. Rec. 9509 (1948); Appointment Records of Frank Capra, Kathleen N. Lardie, and George F. Zook, Entry 798, RG 59, NACP.

Albert J. Loveland, Under Secretary of Agriculture	6/26/1948
David J. Coddaire, Member, U.S. Maritime Administration	6/29/1948
James G. McDonald, U.S. Special Rep. to Provisional Government of Israel	6/29/1948
A. Miles Pratt, Collector of Customs, Dist. 20, New Orleans	6/29/1948
Myron M. Cowen, Ambassador to Australia[73]	7/1/1948
Carl H. Fleckenstine, U.S. Marshal, W.D. Pa.	7/2/1948
Alfred J. Plowden, Jr., U.S. Marshal, E.D.S.C.	7/2/1948
Lester Luther, U.S. Attorney, Kan.	7/2/1948
Kehoe C. Shannon, U.S. Marshal, W.D. Tex.	7/2/1948
Stanton Griffis, Ambassador to Egypt	7/6/1948
Waldemar J. Gallman, Ambassador to Poland	7/6/1948

[73] *Cowen, GOP New Deal Enemy, Made Ambassador By Truman*, Wash. Post, July 2, 1948, at 5.

B. Harvie Branscomb, Member, U.S. Advisory Commission on Educational Exchange[74]	7/12/1948
Edward H. Foley, Under Secretary of the Treasury	7/13/1948
John S. Graham, Assistant Secretary of the Treasury	7/13/1948
Thomas C. Buchanan, Member, Federal Power Commission	7/14/1948
Loy W. Henderson, Ambassador to India	7/14/1948
Maj. Gen. Lewis B. Hershey, Director, Selective Service System	7/17/1948
W. Averell Harriman, Representative, Economic Commission for Europe, Economic and Social Council of the United Nations[75]	between 6/20/1948 & 7/26/1948
Karl T. Compton, Harold W. Dodds, Martin P. McGuire, and Mark Starr, Members, U.S. Advisory Commission on Educational Exchange[76]	between 6/20/1948 & 7/26/1948

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[74] Appointment Record of B. Harvie Branscomb, Entry 798, RG 59, NACP.

[75] 94 Cong. Rec. 9509 (1948).

[76] *Ibid.*

William E. Willett, Member of the Board of Directors, Reconstruction Finance Corporation[77]	between 6/20/1948 & 7/26/1948
Warren R. Austin, John Foster Dulles, Anna Eleanor Roosevelt, and Phillip C. Jessup, Representatives, U.N. General Assembly[78]	8/11/1948
Benjamin V. Cohen, Ray Atherton, Willard L. Thorp, Ernest A. Gross, and Francis B. Sayre, Alternate Representatives, U.N. General Assembly[79]	8/11/1948
Henry F. Grady, Chief, American Aid Mission to Greece[80]	8/11/1948
David N. Edelstein, Assistant Attorney General for Customs[81]	8/11/1948
Maurice Tobin, Secretary of Labor[82]	8/13/1948

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[77] *Id.* at 9510.

[78] *U.N. Assembly Group Renamed By Truman*, N.Y. Times, Aug. 12, 1948, at 3.

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

897 officers in the Medical Corps, Dental Corps, and Medical Service Corps of the Regular Army, comprising 12 Colonels, 307 Lieutenant Colonels, 378 Majors, and 200 Captains[83]	between 8/7/1948 & 8/14/1948
John H. Houston, Member, NLRB	8/20/1948
Frank C. Squire, Member, Railroad Retirement Board[84]	8/26/1948
David E. Henderson, District Judge, W.D.N.C.	9/1/1948
George Kenneth Holland, Representative, UNESCO General Conference[85]	9/14/1948
Albert J. Loveland, Ralph S. Trigg, Glenn R. Harris, and L. Carl Fry, Members, Commodity Credit Corporation[86]	10/1/1948

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[82] *Tobin Takes Oath As Secretary of Labor*, N.Y. Times, Aug. 14, 1948, at 5.

[83] *Medical Department Promotions*, Army & Navy Journal, Aug. 14, 1948, at 1377 (reporting "recess appointments" in light of President Truman's approval of "[p]ermanent promotion for 897 Regular Army Medical Officers").

[84] *Squire Renamed to Rail Board*, N.Y. Times, Aug. 27, 1948, at 28.

[85] Appointment Record of George Kenneth Holland, Entry 798, RG 59, NACP.

[86] 95 Cong. Rec. 15,007 (1949).

H. Van Zile Hyde, Representative, Executive Board, World Health Organization[87]	10/18/1948
Ralph Wright, Assistant Secretary of Labor[88]	10/31/1948
Joseph Rosier, Alternate Representative, UNESCO General Conference[89]	11/13/1948
Joseph B. Keenan, Representative, U.N. Conciliation Commission for Palestine[90]	12/29/1948
James G. MacKey, U.S. Attorney, Guam	9/26/1950
Chuck Mau, 2nd Judge, 1st Circuit, Circuit Court of Hawaii	9/26/1950
Paul D. Shriver, District Judge, D. Guam	9/26/1950
William M. Byrne Sr., District Judge, S.D. Cal.	9/27/1950
Oliver J. Carter, District Judge, S.D. Cal.	9/27/1950

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[87] *Hyde Gets Health Post*, N.Y. Times, Oct. 19, 1948, at 19.

[88] *Veteran Unionist Named To Labor Department Post*, N.Y. Times, Nov. 1, 1948, at 16.

[89] Appointment Record of Joseph Rosier, Entry 798, RG 59, NACP.

[90] Appointment Record of Joseph B. Keenan, Entry 798, RG 59, NACP.

George J. Bott, General Counsel, NLRB	9/28/1950
H. Tucker Gratz, Collector of Customs, Dist. 32, Hawaii	9/28/1950
V. Allan Hubbard, Collector of Customs, Dist. 45, St. Louis	9/28/1950
Albert H. Kleffman, Collector of Customs, Dist. 35, Minneapolis	9/28/1950
Richard M. Bissell, Jr., Deputy Administrator, Economic Cooperation Administration	9/29/1950
William C. Foster, Administrator, Economic Cooperation Administration	9/29/1950
Robert A. Lovett, Deputy Secretary of Defense	9/29/1950
Walter E. Cosgriff, Member, Reconstruction Finance Corporation	9/30/1950
W. Elmer Harber, Member, Reconstruction Finance Corporation	9/30/1950
C. Edward Rowe, Member, Reconstruction Finance Corporation	9/30/1950
Stephen J. Spingarn, Member, Federal Trade Commission	10/20/1950
Walter M. Bastian, District Judge, D.D.C.	10/23/1950

Peter C. Brown, Member, Subversive Activities Control Board	10/23/1950
David J. Coddaire, Member, Subversive Activities Control Board	10/23/1950
Chalres M. LaFollette, Member, Subversive Activities Control Board	10/23/1950
Kathryn McHale, Member, Subversive Activities Control Board	10/23/1950
Seth W. Richardson, Member, Subversive Activities Control Board	10/23/1950
Andrew J. Howard, Jr., Judge, Municipal Court, D.C.	11/2/1950
Anna M. Rosenberg, Assistant Secretary of Defense	11/11/1950
Henry G. Bennett, Administrator, Technical Corporation (State)	11/15/1950
Howard H. Tewksbury, Ambassador to Paraguay	11/18/1950
Robert T. Creasey, Assistant Secretary of Labor	between 9/23/1950 & 11/27/1950
John A. Remon, Member, D.C. Redevelopment Land Agency	between 9/23/1950 & 11/27/1950

John D. Small, Chairman, Munitions Board	between 9/23/1950 & 11/27/1950

Intra-session Appointments by Dwight D. Eisenhower[91]

Carl J. Stephens, Member, Commodity Credit Corporation	between 7/3/1960 & 8/8/1960
Albert J. Hayes, Member, National Security Training Commission	8/28/1954
G. Joseph Minetti, Member, Federal Maritime Board	8/28/1954
Lamar R. Cecil, District Judge, E.D. Tex.	8/31/1954
Phil M. McNagny, Jr., U.S. Attorney, N.D. Ind.	8/31/1954
Philip A. Ray, General Counsel, Commerce Dep't	8/31/1954
Norman Armour, Ambassador to Guatemala	9/15/1954
Jack K. McFall, Ambassador to Finland	9/15/1954
John E. Peurifoy, Ambassador to Thailand	9/15/1954

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[91] The source for all listed appointments by President Eisenhower is *Hogue Intrasession* 17-19.

Edward T. Wailes, Ambassador to Union of South Africa	9/15/1954
Walter M. Bastian, Judge, U.S. Court of Appeals for the D.C. Circuit	9/20/1954
Russell R. Bell, U.S. Marshal, S.D. W. Va.	9/20/1954
Carter L. Burgess, Assistant Secretary of Defense	9/20/1954
Albert Pratt, Assistant Secretary of the Navy	9/20/1954
Irl E. Thomas, U.S. Marshal, N.D. W. Va.	9/20/1954
John A. Hall, Director, Locomotive Inspection, Interstate Commerce Commission	9/25/1954
Robert C. Hill, Ambassador to El Salvador	9/25/1954
George C. McConnaughey, Member, Federal Communications Commission	9/25/1954
John L. Tappin, Ambassador to Libya	9/25/1954
Robert F. Woodward, Ambassador to Costa Rica	9/25/1954
Hawthorne Arey, Member, Board of Directors, Export-Import Bank	9/27/1954

Glen E. Edgerton, President, Export-Import Bank	9/27/1954
Brig. Gen. Charles G. Holle, Member, Mississippi River Commission	9/27/1954
Brig. Gen. William E. Potter, Member, Mississippi River Commission	9/27/1954
Lynn U. Stambaugh, First Vice President, Export-Import Bank	9/27/1954
Willard F. Libby, Member, Atomic Energy Commission	10/1/1954
Leon P. Miller, U.S. Attorney, Virgin Is.	10/1/1954
John R. Morris, U.S. Attorney, N.D. W. Va.	10/1/1954
M. Frank Reid, U.S. Marshal, W.D.S.C.	10/1/1954
Vance Brand, Member, Board of Directors, Export-Import Bank	10/11/1954
Gerald A. Drew, Ambassador to Bolivia	10/11/1954
David S. Smith, Assistant Secretary of the Air Force	10/19/1954
Carlton G. Beall, U.S. Marshal, D.C.	10/22/1954
John Von Neumann, Member, Atomic Energy Commission	10/23/1954

Byron D. Woodside, Member, Securities and Exchange Commission	7/9/1960
Robert A. Bicks, Assistant Attorney General, Dep't of Justice	7/12/1960
Charles H. King, Member, Federal Communications Commission	7/12/1960
Paul A. Sweeney, Member, Federal Power Commission	7/12/1960
Harold R. Tyler, Jr., Assistant Attorney General, Dep't of Justice	7/12/1960
Henry S. Villard, Ambassador to Mali	7/18/1960
Christian M. Ravndal, Ambassador to Czechoslovakia	7/21/1960
Tom Killefer, First Vice President, Export-Import Bank	7/22/1960
Carl J. Stephens, Member, Commodity Credit Corporation	between 7/3/1960 & 8/8/1960

Intra-session Appointments by Richard M. Nixon[92]

Andrew E. Gibson, Assistant Secretary of Commerce	10/21/1970
C. Langhorne Washburn, Assistant Secretary of Commerce	10/21/1970

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[92] Except where indicated, the source for listed appointments by President Nixon is *Hogue Intrasession* 21.

Hubert B. Pair, Judge, D.C. Ct. App.[93]	10/24/1970
Gerard D. Reilly, Judge, D.C. Ct. App.[94]	10/24/1970
J. Walter Yeagley, Judge, D.C. Ct. App.[95]	10/24/1970
Robert C. Mardian, Assistant Attorney General, Dep't of Justice	11/7/1970
Philip A. Loomis, Jr., Member, Securities and Exchange Commission	8/13/1971

Intra-session Appointments by Jimmy Carter[96]

Neil Goldschmidt, Secretary of Transportation	8/10/1979
John C. Sawhill, Chairman, U.S. Synthetic Fuels Corporation	10/5/1980

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[93] Statement Announcing the Recess Appointment of Three Judges to the District of Columbia Court of Appeals, Pub. Papers 939 (Oct. 24, 1970).

[94] *Ibid.*

[95] *Ibid.*

[96] Except where indicated, the source for listed appointments by President Carter is *Hogue Intrasession* 22.

Catherine B. Cleary, John D. DeButts, Lane Kirkland, and Frank Savage, Members, Board of Directors, U.S. Synthetic Fuels Corporation[97]	10/5/1980
Laird F. Harris, Assistant Director, Community Services Administration	10/17/1980
Harold L. Thomas, Assistant Director, Community Services Administration	10/17/1980
Alex P. Mercure, Under Secretary of Agriculture	10/23/1980
John Truesdale, Member, NLRB	10/23/1980
Hannah Atkins, Donald F. McHenry, William J. vanden Heuvel, Representatives to the U.N. General Assembly[98]	between 10/2/1980 & 11/12/1980

[97] Synthetic Fuels Corporation, 3 Pub. Papers 2074 (Oct. 5, 1980).

[98] Digest of Other White House Announcements, 3 Pub. Papers 2069 (Sept. 30, 1980); 126 Cong. Rec. 29,392 (1980).

Nathan Landow, H. Carl McCall, Barbara Newsom, and Richard W. Petree, Alternate Representatives to the U.N. General Assembly[99]	between 10/2/1980 & 11/12/1980

Intra-session Appointments by Ronald Reagan[100]

Terry Chambers, Alternate Federal Co-Chairman of eight Regional Commissions: Coastal Plains, Four Corners, New England, Old West, Ozarks, Pacific Northwest, Southwest Border, and Upper Great Lakes	8/7/1981
John R. Van de Water, Member, NLRB	8/13/1981
Robert P. Hunter, Member, NLRB	8/13/1981
Richard M. Murphy, Ambassador to Saudi Arabia	8/19/1981
Darrell Trent, Member, Board of Directors, Amtrak	9/8/1981
John M. Fowler, Member, Board of Directors, Amtrak	9/8/1981

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[99] *Ibid.*

[100] The source for all listed appointments by President Reagan is Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made from 1981-2013*, at 5-7 (Feb. 4, 2013) (*Hogue 1981-2013*).

Lee L. Verstandig, Member, Board of Directors, Amtrak	9/8/1981
Arthur E. Teele, Member, Board of Directors, Amtrak	9/8/1981
Charles Swinburn, Member, Board of Directors, Amtrak	9/8/1981
Mark S. Knouse, Member, Board of Directors, Amtrak	9/8/1981
Jeane J. Kirkpatrick, Representative, U.N. General Assembly Session	9/8/1981
Kenneth L. Adelman, Representative, U.N. General Assembly Session	9/8/1981
Andy Ireland, Representative, U.N. General Assembly Session	9/8/1981
Benjamin A. Gilman, Representative, U.N. General Assembly Session	9/8/1981
John Sherman Cooper, Representative, U.N. General Assembly Session	9/8/1981
Charles M. Lichenstein, Alternate Representative, U.N. General Assembly Session	9/8/1981
Jose S. Sorzano, Alternate Representative, U.N. General Assembly Session	9/8/1981
William Courtney Sherman, Alternate Representative, U.N. General Assembly Session	9/8/1981

Bruce Caputo, Alternate Representative, U.N. General Assembly Session	9/8/1981
George Christopher, Alternate Representative, U.N. General Assembly Session	9/8/1981
Richard V. Backley, Member, Federal Mine Safety and Health Review Commission	9/7/1982
L. Clair Nelson, Member, Federal Mine Safety and Health Review Commission	10/6/1982
Martin S. Feldstein, Member, Council of Economic Advisors	10/14/1982
Orville G. Bentley, Assistant Secretary – Science and Education, Dep't of Agriculture	10/14/1982
William Gene Lesher, Member, Board of Directors, National Consumer Cooperative Bank	10/22/1982
Caroline H. Hume, Member, National Museum Services Board	10/22/1982
Frank J. Donatelli, Member, Board of Directors, Legal Services Corporation	10/23/1982
Daniel M. Rathburn, Member, Board of Directors, Legal Services Corporation	10/23/1982

Manuel H. Johnson Jr., Assistant Secretary – Economic Policy, Dep't of the Treasury	11/2/1982
Edward A. Knapp, Director, National Science Foundation	11/2/1982
Donald P. Hodel, Secretary of Energy	11/5/1982
Martha O. Hesse, Assistant Secretary – Management and Administration, Dep't of Energy	11/10/1982
Mastin Gentry White, Judge, U.S. Claims Court	11/10/1982
James Daniel Phillips, Alternate Representative, UNESCO General Conference	11/19/1982
Jean Broward Shelvin Gerard, Representative, UNESCO General Conference	11/19/1982
Milton M. Masson, Member, Board of Directors, Legal Services Corporation	1/21/1983
Robert E. McCarthy, Member, Board of Directors, Legal Services Corporation	1/21/1983
Donald Eugene Santarelli, Member, Board of Directors, Legal Services Corporation	1/21/1983

E. Donald Shapiro, Member, Board of Directors, Legal Services Corporation	1/21/1983
Linda Chavez Gersten, Staff Director, Commission on Civil Rights	8/16/1983
J. William Middendorf II, Member, Board of Directors, Inter-American Foundation	9/6/1983
Langhorne A. Motley, Member, Board of Directors, Inter-American Foundation	9/6/1983
William Lee Hanley Jr., Member, Board of Directors, Corporation for Public Broadcasting	9/12/1983
Erich Bloch, Director, National Science Foundation	7/2/1984
Robert N. Broadbent, Assistant Secretary of the Interior	7/2/1984
Melvin A. Ensley, Member, Federal Farm Credit Board, Farm Credit Administration	7/2/1984
Marianne M. Hall, Commissioner, Copyright Royalty Tribunal	7/2/1984
Dodie Truman Livingston, Chief, Children's Bureau, Dep't of Health and Human Services	7/2/1984

Martha R. Seger, Member, Board of Directors, Federal Reserve System	7/2/1984
William Barclay Allen, Member, National Council on the Humanities	7/2/1984
Mary Josephine Conrad Cresimore, Member, National Council on the Humanities	7/2/1984
Leon Richard Kass, Member, National Council on the Humanities	7/2/1984
Kathleen S. Kilpatrick, Member, National Council on the Humanities	7/2/1984
Robert Laxalt, Member, National Council on the Humanities	7/2/1984
James B. Schall, Member, National Council on the Humanities	7/2/1984
Helen Marie Taylor, Member, National Council on the Humanities	7/2/1984
Donald I. MacDonald, Administrator, Alcohol, Drug Abuse and Mental Health Administration	7/3/1984
Lando W. Zech Jr., Member, Nuclear Regulatory Commission	7/3/1984
Carol Gene Dawson, Commissioner, Consumer Products Safety Commission	7/5/1984

Robert A. Rowland, Assistant Secretary – Occupational Safety and Health, Dep't of Labor	7/20/1984
John A. Bohn, First Vice President, Export-Import Bank	1/21/1985
Richard H. Hughes, Member, Board of Directors, Export-Import Bank	1/21/1985
Vance L. Clark, Administrator, Farmers Home Administration	8/8/1985
Thomas John Josefiak, Member, Federal Election Commission	8/8/1985
Raymond D. Lett, Assistant Secretary of Agriculture	8/8/1985
Hugh Montgomery, Alternate Representative for Special Political Affairs, United Nations	8/8/1985
Herbert Stuart Okun, Deputy Representative to the United Nations	8/8/1985
Robert E. Rader Jr., Member, Occupational Safety and Health Review Commission	8/8/1985
John R. Wall, Member, Occupational Safety and Health Review Commission	8/8/1985
Robert Bigger Oakley, Ambassador to Pakistan	8/26/1988

John E. Higgins Jr., Member, NLRB	8/29/1988
Wilford W. Johansen, Member, NLRB	8/29/1988

Intra-session Appointments by George H.W. Bush[101]

Alan Greenspan, Chair, Board of Governors, Federal Reserve System	8/10/1991
Mary F. Wieseman, Special Counsel, Office of Special Counsel	8/21/1991
Ford B. Ford, Member, Federal Mine Safety and Health Review Commission	9/4/1991
Norman D. Shumway, Board Member, Legal Services Corporation	9/5/1991
Albert V. Casey, CEO, Resolution Trust Corporation	1/9/1992
Daniel F. Evans Jr., Director (designated Chair), Federal Housing Finance Board	1/9/1992
Lawrence U. Costiglio, Director, Federal Housing Finance Board	1/9/1992
William C. Perkins, Director, Federal Housing Finance Board	1/9/1992

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[101] The source for all listed appointments by President George H.W. Bush is *Hogue 1981-2013*, at 13-14.

Marilyn R. Seymann, Director, Federal Housing Finance Board	1/9/1992
Howard H. Dana Jr., Board Member, Legal Services Corporation	1/10/1992
J. Blakeley Hall, Board Member, Legal Services Corporation	1/10/1992
William L. Kirk Jr., Board Member, Legal Services Corporation	1/10/1992
Jo Betts Love, Board Member, Legal Services Corporation	1/10/1992
Guy V. Molinari, Board Member, Legal Services Corporation	1/10/1992
Penny L. Pullen, Board Member, Legal Services Corporation	1/10/1992
Thomas D. Rath, Board Member, Legal Services Corporation	1/10/1992
Basile J. Uddo, Board Member, Legal Services Corporation	1/10/1992
George W. Wittgraf, Board Member, Legal Services Corporation	1/10/1992
Jeanine E. Wolbeck, Board Member, Legal Services Corporation	1/10/1992
Edward J. Damich, Commissioner, Copyright Royalty Tribunal	9/3/1992
Bruce D. Goodman, Commissioner, Copyright Royalty Tribunal	9/3/1992

James H. Grossman, Chair, Foreign Claims Settlement Commission	9/3/1992
David J. Ryder, Director of the Mint	9/3/1992
Steven Muller, Member, National Security Education Board	1/6/1993
S. William Pattis, Member, National Security Education Board	1/6/1993
John P. Roche, Member, National Security Education Board	1/6/1993
Richard F. Stolz, Member, National Security Education Board	1/6/1993
Thomas L. Ashley, Governor, Board of Governors, U.S. Postal System	1/8/1993
Marion G. Chambers, Member, Board of Trustees, Institute of American Indian and Alaska Native Culture and Arts Development	1/8/1993
James A. Courter, Member, Defense Base Closure and Realignment Commission (BRAC)	1/8/1993
Peter B. Bowman, Member, BRAC	1/8/1993
Beverly B. Byron, Member, BRAC	1/8/1993

Rebecca G. Cox, Member, BRAC	1/8/1993
Hansford T. Johnson, Member, BRAC	1/8/1993
Arthur Levitt Jr., Member, BRAC	1/8/1993
Harry C. McPherson Jr., Member, BRAC	1/8/1993
Robert D. Stuart Jr., Member, BRAC	1/8/1993

Intra-session Appointments by William J. Clinton[102]

William C. Brooks, Member, Social Security Advisory Board	1/19/1996
Eileen B. Claussen, Assistant Secretary – Oceans and International Environmental and Scientific Affairs, Dep't of State	1/19/1996
Robert F. Drinan, Member, Civil Liberties Public Education Fund	1/19/1996
Peter B. Edelman, Assistant Secretary – Planning and Evaluation, Dep't of Health and Human Services	1/19/1996
Sarah M. Fox, Member, NLRB	1/19/1996

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[102] The source for all listed appointments by President Clinton is *Hogue 1981-2013*, at 16-18.

Leo M. Goto, Member, Civil Liberties Public Education Fund	1/19/1996
Susan Hayase, Member, Civil Liberties Public Education Fund	1/19/1996
Charles A. Hunnicutt, Assistant Secretary – Aviation and International Affairs, Dep't of Transportation	1/19/1996
Elsa H. Kudo, Member, Civil Liberties Public Education Fund	1/19/1996
Yeiichi Kuwayama, Member, Civil Liberties Public Education Fund	1/19/1996
Harlan Mathews, Member, Social Security Advisory Board	1/19/1996
Dale Minami, Member, Civil Liberties Public Education Fund	1/19/1996
Peggy A. Nagae, Member, Civil Liberties Public Education Fund	1/19/1996
Don T. Nakanishi, Member, Civil Liberties Public Education Fund	1/19/1996
Gerald M. Shea, Member, Social Security Advisory Board	1/19/1996
Gerald N. Tirozzi, Assistant Secretary – Elementary and Secondary Education, Dep't of Education	1/19/1996
Robert C. Brown, Member, Metropolitan Washington Airport Authority	4/12/1996

Daniel Guttman, Member, Occupational Safety and Health Review Commission	4/12/1996
Elizabeth K. Julian, Assistant Secretary – Fair Housing, Dep't of Housing and Urban Development	4/12/1996
Lowell L. Junkins, Member, Federal Agricultural Mortgage Corporation	4/12/1996
Martin A. Kamarck, President (designated Chair), Export-Import Bank	4/12/1996
Michael Kantor, Secretary of Commerce	4/12/1996
Yolanda T. Wheat, Member, National Credit Union Administration	4/12/1996
Johnny H. Hayes, Member, Tennessee Valley Authority	5/31/1996
Wyche Fowler Jr., Ambassador to Saudi Arabia	8/10/1996
Heidi H. Schulman, Member, Corporation for Public Broadcasting	8/20/1996
John E. Higgins, Member, NLRB	8/30/1996
Kevin L. Thurm, Deputy Secretary of Health and Human Services	8/30/1996

Mary L. Jordan, Member, Federal Mine Safety and Health Review Commission	8/31/1996
James B. King, Director, Office of Personnel Management	4/6/1997
Tadd Johnson, Chairperson, National Indian Gaming Commission	8/29/1997
David G. Carpenter, Assistant Secretary – Director of Diplomatic Security and Office of Foreign Missions, Dep't of State	8/12/1998
William L. Swing, Ambassador to Congo	8/12/1998
James C. Hormel, Ambassador to Luxembourg	6/4/1999
Mark R. Tucker, U.S. Marshal, E.D.N.C.	9/2/1999
Sue Bailey, Administrator, National Highway Traffic Safety Administration	8/3/2000
Arthur C. Campbell, Assistant Secretary – Economic Development, Dep't of Commerce	8/3/2000

James A. Daley, Ambassador to Barbados, Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines	8/3/2000
Robin C. Duke, Ambassador to Norway	8/3/2000
Sally Katzen, Deputy Director, Office of Management and Budget	8/3/2000
Bill Lann Lee, Assistant Attorney General, Civil Rights Division, Dep't of Justice	8/3/2000
Franz S. Leichter, Member, Federal Housing Finance Board	8/3/2000
W. Michael McCabe, Deputy Administrator, Environmental Protection Agency	8/3/2000
Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice	8/3/2000
David W. Ogden, Assistant Attorney General, Civil Division, Dep't of Justice	8/3/2000
Francisco J. Sanchez, Assistant Secretary - Aviation and International Affairs, Dep't of Transportation	8/3/2000

Carl Spielvogel, Ambassador to the Slovak Republic	8/3/2000
Ella Wong-Rusinko, Alternate Federal Co-Chair, Appalachian Regional Commission	8/3/2000
George T. Frampton Jr., Member (designated Chair), Council on Environmental Quality	8/4/2000
John D. Holum, Under Secretary – Arms Control and International Security Affairs, Dep't of State	8/4/2000
Robert S. LaRussa, Under Secretary – International Trade, Dep't of Commerce	8/4/2000
James C. Riley, Commissioner, Federal Mine Safety and Health Review Commission	8/31/2000
Sarah L. Wilson, Judge, U.S. Court of Federal Claims	1/19/2001

Intra-session Appointments by George W. Bush[103]

Peter J. Hurtgen, Member (designated Chair), NLRB	8/31/2001
Emil H. Frankel, Assistant Secretary – Transportation Policy, Dep't of Transportation	3/29/2002

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[103] The source for all listed appointments by President George W. Bush is *Hogue 1981-2013*, at 21-26.

Gerald Reynolds, Assistant Secretary – Civil Rights, Dep't of Education	3/29/2002
Dennis L. Schornack, Commissioner, International Joint Commission, United States and Canada	3/29/2002
Jeffrey Shane, Associate Deputy Secretary of Transportation	3/29/2002
Michael E. Toner, Member, Federal Election Commission	3/29/2002
Albert Casey, Governor, U.S. Postal Service	8/6/2002
Thomas C. Dorr, Board Member, Commodity Credit Corporation	8/6/2002
Thomas C. Dorr, Under Secretary – Rural Development, Dep't of Agriculture	8/6/2002
Cheryl F. Halpern, Board Member, Corporation for Public Broadcasting	8/6/2002
Tony Hammond, Commissioner, Postal Rate Commission	8/6/2002
Susanne T. Marshall, Chair, Merit Systems Protection Board	8/6/2002
W. Scott Railton, Member (designated Chair), Occupational Safety and Health Review Commission	8/6/2002

Lillian R. BeVier, Board Member, Legal Services Corporation	4/22/2003
Naomi C. Earp, Member (designated Vice Chair), Equal Employment Opportunity Commission	4/22/2003
Peter Eide, General Counsel, Federal Labor Relations Authority	4/22/2003
April H. Foley, Board Member, Export-Import Bank	4/22/2003
Thomas A. Fuentes, Board Member, Legal Services Corporation	4/22/2003
R. Bruce Matthews, Member, Defense Nuclear Facilities Safety Board	4/22/2003
Neil McPhie, Member (designated Vice Chair), Merit Systems Protection Board	4/22/2003
James C. Miller III, Governor, U.S. Postal Service	4/22/2003
William A. Schambra, Board Member, Corporation for National and Community Service	4/22/2003
Stanley C. Suboleski, Member, Federal Mine Safety and Health Review Commission	4/22/2003

Donna N. Williams, Board Member, Corporation for National and Community Service	4/22/2003
A. Paul Anderson, Member, Federal Maritime Commission	8/22/2003
Ephraim Batambuze, Board Member, African Development Foundation	8/22/2003
David W. Fleming, Member (public), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Jose A. Fourquet, Board Member (government representative), Inter-American Foundation	8/22/2003
Adolfo A. Franco, Board Member (government representative), Inter-American Foundation	8/22/2003
Jay P. Greene, Member (academic), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Walter H. Kansteiner, Board Member, African Development Foundation	8/22/2003
Charlotte A. Lane, Member, U.S. International Trade Commission	8/22/2003

Patrick L. McCrory, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	8/22/2003
Roger F. Noriega, Board Member (government representative), Inter-American Foundation	8/22/2003
Daniel Pearson, Member, U.S. International Trade Commission	8/22/2003
John R. Petrocik, Member (academic), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Daniel Pipes, Board Member, U.S. Institute of Peace	8/22/2003
Juanita A. Vasquez-Gardner, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	8/22/2003
John P. Woodley Jr., Assistant Secretary – Civil Works, Dep't of the Army	8/22/2003
William H. Pryor, Judge, U.S. Court of Appeals for the Eleventh Circuit	2/20/2004
Linda M. Combs, Assistant Secretary – Budget and Programs, Dep't of Transportation	4/16/2004
Linda M. Conlin, Board Member, Export-Import Bank	4/16/2004

Eugene Hickock, Deputy Secretary of Education	4/16/2004
Edward R. McPherson, Under Secretary of Education	4/18/2004
Romolo A. Bernardi, Deputy Secretary of Housing and Urban Development	5/28/2004
Edward Brehm, Board Member (designated Chair), African Development Foundation	5/28/2004
Charles Johnson, CFO, Environmental Protection Agency	5/28/2004
Ann R. Klee, Assistant Administrator (General Counsel), Environmental Protection Agency	5/28/2004
Adam M. Lindemann, Member, Advisory Board for Cuba Broadcasting	5/28/2004
Cathy M. MacFarlane, Assistant Secretary – Public Affairs, Dep't of Housing and Urban Development	5/28/2004
Dennis C. Shea, Assistant Secretary – Policy Development and Research, Dep't of Housing and Urban Development	5/28/2004
Kiron K. Skinner, Member, National Security Education Board	5/28/2004
Deborah A. Spagnoli, Commissioner, U.S. Parole Commission	5/28/2004

Kirk Van Tine, Deputy Secretary of Transportation	5/28/2004
Juanita A. Vasquez-Gardner, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	5/28/2004
Sue Ellen Wooldridge, Solicitor, Dep't of the Interior	5/28/2004
Michael D. Gallagher, Assistant Secretary – Communications and Information, Dep't of Commerce	7/2/2004
Floyd Hall, Member, Reform Board (Amtrak)	7/2/2004
Theodore W. Kassinger, Deputy Secretary of Commerce	7/2/2004
Jack E. McGregor, Member – Advisory Board, Saint Lawrence Seaway Development Corporation	7/2/2004
Carin M. Barth, CFO, Dep't of Housing and Urban Development	8/2/2004
Jonathan W. Dudas, Under Secretary – Intellectual Property and Director of the U.S. Patent and Trademark Office, Dep't of Commerce	8/2/2004
Albert A. Frink Jr., Assistant Secretary – Manufacturing and Services, Dep't of Commerce	8/2/2004
Susan J. Grant, CFO, Dep't of Energy	8/2/2004

Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission	8/2/2004
Nadine Hogan, Board Member (private representative) (designated Vice Chair), Inter-American Foundation	8/2/2004
Stephen L. Johnson, Deputy Administrator, Environmental Protection Agency	8/2/2004
Paul Jones, Member, Internal Revenue Service Oversight Board	8/2/2004
James R. Kunder, Assistant Administrator – Bureau for Asia and the Near East, U.S. Agency for International Development	8/2/2004
John D. Rood, Ambassador to the Commonwealth of Bahamas	8/2/2004
Enrique J. Sosa, Member, Reform Board (Amtrak)	8/2/2004
Charles G. Untermeyer, Ambassador to the State of Qatar	8/2/2004
Jack Vaughn, Board Member (private representative), Inter-American Foundation	8/2/2004
Gary L. Visscher, Member, Chemical Safety and Hazard Investigation Board	8/2/2004

Richard K. Wagner, Member, Advisory Board, National Institute for Literacy	8/2/2004
Scott K. Walker, Member – Advisory Board, Saint Lawrence Seaway Development Corporation	8/2/2004
Roger W. Wallace, Board Member (private representative) (designated Chair), Inter-American Foundation	8/2/2004
Aldona Wos, Ambasador to the Republic of Estonia	8/2/2004
Deborah P. Majoras, Commissioner (designated Chair), Federal Trade Commission	8/16/2004
Jon D. Leibowitz, Commissioner, Federal Trade Commission	9/1/2004
Carolyn L. Gallagher, Governor, U.S. Postal Service	11/3/2004
Louis J. Giuliano, Governor, U.S. Postal Service	11/3/2004
Adolfo A. Franco, Board Member (government representative), Inter-American Foundation	1/19/2005
Gregory B. Jaczko, Member, Nuclear Regulatory Commission	1/19/2005
Peter B. Lyons, Member, Nuclear Regulatory Commission	1/19/2005

Roger F. Noriega, Board Member (government representative), Inter-American Foundation	1/19/2005
James H. Bilbray, Member, Defense Base Closure and Realignment Commission (BRAC)	4/1/2005
Philip Coyle, Member, BRAC	4/1/2005
Harold W. Gehman Jr., Member, BRAC	4/1/2005
James V. Hansen, Member, BRAC	4/1/2005
James T. Hill, Member, BRAC	4/1/2005
Lloyd W. Newton, Member, BRAC	4/1/2005
Anthony J. Principi, Member (designated Chair), BRAC	4/1/2005
Samuel K. Skinner, Member, BRAC	4/1/2005
Sue Ellen Turner, Member, BRAC	4/1/2005
Michael W. Wynne, Under Secretary – Acquisition, Technology and Logistics, Dep't of Defense	4/1/2005

John R. Bolton, Representative of the United States to the United Nations, Dep't of State; Representative of the United States in the U.N. Security Council, Dep't of State; Representative of the United States to Sessions of the U.N. General Assembly, Dep't of State	8/1/2005
Peter C. W. Flory, Assistant Secretary – International Security Policy, Dep't of Defense	8/2/2005
Eric S. Edelman, Under Secretary – Policy, Dep't of Defense	8/9/2005
Alice S. Fisher, Assistant Attorney General, Criminal Division, Dep't of Justice	8/31/2005
Peter Schaumber, Member, NLRB	8/31/2005
Gordon England, Deputy Secretary of Defense	1/4/2006
Stephen Goldsmith, Board Member, Corporation for National and Community Service	1/4/2006
Floyd Hall, Member, Reform Board (Amtrak)	1/4/2006
Tracy A. Henke, Executive Director, Office of State and Local Government Coordination and Preparedness, Dep't of Homeland Security	1/4/2006

Nadine Hogan, Board Member (private representative) (designated Vice Chair), Inter-American Foundation	1/4/2006
Peter N. Kirsanow, Member, NLRB	1/4/2006
Robert D. Lenhard, Member, Federal Election Commission	1/4/2006
Ronald E. Meisburg, General Counsel, NLRB	1/4/2006
Julie L. Myers, Assistant Secretary – Bureau of Immigration and Customs Enforcement, Dep't of Homeland Security	1/4/2006
Benjamin A. Powell, General Counsel, Office of the Director of National Intelligence	1/4/2006
Arthur F. Rosenfeld, Director, Federal Mediation and Conciliation Service	1/4/2006
Ellen R. Sauerbrey, Assistant Secretary – Population, Refugees, and Migration, Dep't of State	1/4/2006
Dorrance Smith, Assistant Secretary – Public Affairs, Dep't of Defense	1/4/2006
Enrique J. Sosa, Member, Reform Board (Amtrak)	1/4/2006

Hans von Spakovsky, Member, Federal Election Commission	1/4/2006
Roger W. Wallace, Member (private representative) (designated Chair), Inter-American Foundation	1/4/2006
Steven T. Walther, Member, Federal Election Commission	1/4/2006
John Gardner, Governor, U.S. Postal Service	1/5/2006
Steven K. Mullins, U.S. Attorney, D.S.D.	1/9/2006
C. Boyden Gray, Ambassador to the European Union	1/17/2006
Dennis P. Walsh, Member, NLRB	1/17/2006
John L. Palmer, Member, Board of Trustees of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund; Board of Trustees of the Supplementary Medical Insurance Trust Fund; Board of Trustees of the Federal Hospital Insurance Trust Fund	4/19/2006
Thomas R. Saving, Member of the same three Boards of Trustees	4/19/2006
Bertha K. Madras, Deputy Director, Demand Reduction, Office of National Drug Control Policy	4/19/2006

James F.X. O'Gara, Deputy Director, Supply Reduction, Office of National Drug Control Policy	4/19/2006
Paul DeCamp, Administrator, Wage and Hour Division, Dep't of Labor	8/31/2006
Michael F. Duffy, Member, Federal Mine Safety and Health Review Commission	8/31/2006
Daniel Meron, General Counsel, Dep't of Health and Human Services	8/31/2006
Richard E. Stickler, Assistant Secretary – Mine Safety and Health, Dep't of Labor	10/19/2006
Jeffrey R. Brown, Member, Social Security Advisory Board	10/19/2006
Andrew G. Biggs, Deputy Commissioner, Social Security Administration	4/4/2007
Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget	4/4/2007
Sam Fox, Ambassador to Belgium	4/4/2007
Carol W. Pope, Member, Federal Labor Relations Authority	4/4/2007

Intra-session Appointments by Barack Obama[104]

Jeffrey A. Goldstein, Under Secretary – Domestic Finance, Dep't of the Treasury	3/27/2010
Michael F. Mundaca, Assistant Secretary – Tax Policy, Dep't of the Treasury	3/27/2010
Eric L. Hirschhorn, Under Secretary – Export Administration, Dep't of Commerce	3/27/2010
Michael W. Punke, Deputy U.S. Trade Representative – Geneva, Office of the U.S. Trade Representative	3/27/2010
Francisco J. Sanchez, Under Secretary – International Trade, Dep't of Commerce	3/27/2010
Islam A. Siddiqui, Chief Agricultural Negotiator, Office of the U.S. Trade Representative	3/27/2010
Alan D. Bersin, Commissioner of U.S. Customs and Border Protection, Dep't of Homeland Security	3/27/2010
Jill L. Thompson, Member, Farm Credit Administration	3/27/2010

[104] The source for all listed appointments by President Obama is *Hogue 1981-2013*, at 27-28.

Rafael Borras, Under Secretary – Management, Dep't of Homeland Security	3/27/2010
Craig Becker, Member, NLRB	3/27/2010
Mark G. Pearce, Member, NLRB	3/27/2010
Jacqueline A. Berrien, Member (designated Chair), Equal Employment Opportunity Commission (EEOC)	3/27/2010
Chai R. Feldblum, Member, EEOC	3/27/2010
Victoria A. Lipnic, Member, EEOC	3/27/2010
P. David Lopez, General Counsel, EEOC	3/27/2010
Donald M. Berwick, Administrator of the Centers for Medicare and Medicaid Services, Dep't of Health and Human Services	7/7/2010
Philip E. Coyle III, Associate Director for National Security and International Affairs, Office of Science and Technology Policy	7/7/2010
Joshua Gotbaum, Director, Pension Benefit Guaranty Corporation	7/7/2010
Mari C. Aponte, Chief of Mission, El Salvador, Dep't of State	8/19/2010

Elisabeth A. Hagen, Under Secretary – Food Safety, Dep't of Agriculture	8/19/2010
Winslow L. Sargeant, Chief Counsel for Advocacy, Small Business Administration	8/19/2010
Richard Sorian, Assistant Secretary – Public Affairs, Dep't of Health and Human Services	8/19/2010
Richard Cordray, Director, Consumer Financial Protection Bureau	1/4/2012
Sharon Block, Member, NLRB	1/4/2012
Terence F. Flynn, Member, NLRB	1/4/2012
Richard Griffin Jr., Member, NLRB	1/4/2012

APPENDIX B

ILLUSTRATIVE RECESS APPOINTMENTS MADE TO FILL VACANCIES THAT PRE-EXISTED THE RECESSES DURING WHICH THEY WERE MADE[1]

Appointee & Office	*App't Date*	*Vice*
Appointments by George Washington		
Robert C. Scot, Engraver of the Mint[2]	11/23/1793	new position, created 4/2/1792
William Clarke, District Attorney, D. Ky.[3]	10/13/1796	vacant since 12/1792, last declined by 10/1794
Appointments by Thomas Jefferson		
Walter Jones, Jr., District Attorney, D. Potomac[4]	3/31/1801	new position, created 2/13/1801

[1] This list presents only an illustrative sample of known recess appointments to vacancies that pre-existed the recesses during which those appointments were made. It is not intended to be comprehensive.

[2] Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246; 27 *The Papers of Thomas Jefferson* 191-192 (John Catanzariti ed., 1997); S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793).

[3] U.S. Dep't of State, *Calendar of the Miscellaneous Letters Received By The Department of State* 456 (1897); S. Exec. Journal, 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 70-73 (1978).

George Dent, U.S. Marshal, D. Potomac[5]	4/4/1801	new position, created 2/13/1801
William McMillan, District Attorney, D. Ohio[6]	6/26/1801	new position, created 2/13/1801
James Tindlaye, U.S. Marshal, D. Ohio[7]	6/26/1801	new position, created 2/13/1801

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[4] Act of Feb. 13, 1801, ch. 4, §§ 21, 37, 2 Stat. 96-97, 99-100; Appointment Record of Walter Jones, Jr., *Card Record of Appointments Made from 1776 to 1960* (Entry 798), Records Relating to Appointments and Commissions, Records Relating To Various Functions 1764-1979, General Records of the Department of State, Record Group 59 (RG 59), National Archives College Park (NACP).

[5] Act of Feb. 13, 1801, ch. 4, §§ 21, 36, 2 Stat. 96-97, 99; Letter from Levi Lincoln to Thomas Jefferson (Apr. 9, 1801), in 33 *Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting Dent's acceptance of the Marshal position); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Washington, D.C.* 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent's April 4, 1801, recess appointment).

[6] Act of Feb. 13, 1801, ch. 4, §§ 4, 37, 2 Stat. 89-90, 99; S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802); List of U.S. Attorneys, Entry for William McMillan, Vol. 2, p. 109, *Lists of Miscellaneous Federal Officers, 1789-1912* (Entry 800), RG 59, NACP.

[7] Act of Feb. 13, 1801, ch. 4, §§ 4, 36, 2 Stat. 89-90, 99; S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Ohio* 2 (noting Tindlaye's June 26, 1801, recess appointment).

Appointments by James Madison

Theodore Gaillard, District Judge, D. La.[8]	4/18/1813	Dominic Hall, resigned 2/22/1813
Roger Skinner, District Attorney, N.D.N.Y.[9]	3/21/1815	new position, created 3/3/1815
John W. Livingston, U.S. Marshal, N.D.N.Y[10]	6/19/1815	new position, created 3/3/1815
Solomon Sibley, U.S. Attorney, Michigan Territory[11]	8/21/1815	new position, created 2/27/1813
Thomas Rowland, U.S. Marshal, Michigan Territory[12]	8/21/1815	new position, created 2/27/1813

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[8] Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 400-401 (2005).

[9] Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, S. Journal, 13th Cong., 3d Sess. 689-690 (1815) (reflecting statute's effectiveness before Senate's adjournment); S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointment); Appointment Record of Roger Skinner, Entry 798, RG 59, NACP.

[10] Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, S. Journal, 13th Cong., 3d Sess. 689-690 (1815); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: New York* 9.

[11] Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointment); List of U.S. Attorneys, Entry for Solomon Sibley, Vol. 2, p. 113, Entry 800, RG59, NACP.

Appointment by James Monroe

Richard W. Habersham, District Attorney, D. Ga.[13]	3/29/1819	William Davies, received commission as district judge 1/14/1819

Appointment by John Quincy Adams

Amos Binney, Navy Agent, Port of Boston[14]	3/22/1825	himself, term expired on 2/15/1825

Appointment by Martin Van Buren

Denny McCobb, Collector of Customs and Inspector of the Revenue, Waldoboro, Me.[15]	between 3/10/1837 & 9/4/1837	himself, term expired on 3/3/1837

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[12] *Ibid.*; U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Michigan* 2.

[13] S. Exec. Journal, 16th Cong., 1st Sess. 185-186 (1819); Federal Judicial Center, *Biographical Directory of Federal Judges*, available from www.fjc.gov/public/home.nsf/hisj (*FJC Biographical Directory*), Entry for William Davies; Appointment Record of Richard W. Habersham, Entry 798, RG59, NACP.

[14] 2 Op. Att'y Gen. 525, 530 (1832).

[15] S. Exec. Journal, 24th Cong., 2d Sess. 615 (1837) (noting expiration date of prior commission); S. Exec. Journal, 25th Cong., 1st Sess. 28 (1837) (noting new recess commission).

Appointment by John Tyler

Dabney Smith Carr, Minister resident at Constantinople[16]	10/6/1843	David Porter, died 3/3/1843

Appointment by James K. Polk

James H. Cocke, U.S. Marshal, D. Tex.[17]	3/6/1847	John M. Allen, died 2/1847

Appointment by Zachary Taylor

Thomas Moses Foote, Charge D'Affaires, New Grenada[18]	5/24/1849	Benjamin A. Bidlack, died 2/6/1849

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[16] 5 *American Biography: A New Cyclopedia* 29 (1919) (noting Porter's death on March 3, 1843, in Pera, Turkey); Cong. Globe, 27th Cong., 3d Sess. 394 (1843) (noting Senate's adjournment between 10 p.m. on March 3 and 2:30 a.m. on March 4, in Washington); S. Exec. Journal, 28th Cong., 1st Sess. 195 (1843); 7 *The Works of James Buchanan* 62 n.2 (John Bassett Moore ed., 1909) (noting Carr's appointment date).

[17] *Died*, Tex. Presbyterian (Victoria, Tex.), Mar. 13, 1847, at 3 (Allen's death), http://texashistory.unt.edu/ark:/67531/metapth80390/m1/3; S. Exec. Journal, 30th Cong., 1st Sess. 249-250 (1847); Commission of James H. Cocke, Mar. 6, 1847, Vol. 1, p. 89, *Temporary Marshals' Commissions (Apr. 20, 1829-Nov. 30, 1887)* (Entry 787), RG 59, NACP.

[18] Office of the Historian, U.S. Dep't of State, *Benjamin A. Bidlack (1804-1849)*, http://history.state.gov/departmenthistory/people/bidlack-benjamin-a; Office of the Historian, U.S. Dep't of State, *Thomas Moses Foote (1808-1858)*, http:// history.state.gov/departmenthistory/people/foote-thomas-moses.

Appointment by Millard Fillmore

Alfred Wheeler, U.S. Attorney, S.D. Cal.[19]	8/22/1851	James McHall Jones, received commission as district judge 12/26/1850

Appointments by James Buchanan

Richard Elward, Deputy Postmaster, Natchez, Miss.[20]	3/25/1857	himself, recess appointment expired 3/3/1857
Daniel C. Brown, Deputy Postmaster, Janesville, Wis.[21]	4/2/1857	Elisha H. Strong, term expired 3/6/1857

Appointments by Abraham Lincoln

William E. Phelps, Consul, St. Petersburg, Russia[22]	10/14/1862	John D. Arnold, resigned 6/16/1862

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[19] List of U.S. Attorneys, Entry for Alfred Wheeler, Vol. 2, p. 141, Entry 800, RG59, NACP; S. Exec. Journal, 32d Cong., 1st Sess. 342 (1851); *Official Confirmations*, N.Y. Daily Trib., Dec. 30, 1850, at 7; *FJC Biographical Directory,* Entry for James McHall Jones.

[20] S. Exec. Journal, 35th Cong., 1st Sess. 386 (1858); Appointment Record of Richard Elward, Entry 798, RG59, NACP.

[21] S. Exec. Journal, 35th Cong., 1st Sess. 436 (1858); Appointment Record of Daniel C. Brown, Entry 798, RG59, NACP.

[22] List of Consuls to St. Petersburg, Entries for John D. Arnold and William E. Phelps, Vol. 1, p. 97, *List of Consuls and Commercial*

David Davis, Associate Justice, U.S. Supreme Court[23]	10/17/1862	John Archibald Campbell, resigned 4/30/1861
John C. Underwood, District Judge, E.D. Va.[24]	3/27/1863	James D. Halyburton, resigned 4/24/1861
Edward Henry Durell District Judge, E.D. La.[25]	5/20/1863	Theodore H. McCaleb, resigned 1/28/1861

Appointments by Andrew Johnson

George W. Brooks, District Judge, Albemarle, Cape Fear, and Pamptico Districts of N.C.[26]	8/19/1865	Asa Biggs, resigned 4/23/1861

Agents, 1797-1909 (Entry 803), RG 59, NACP; S. Exec. Journal, 37th Cong., 3d Sess. 26 (1862).

[23] *FJC Biographical Directory,* Entries for David Davis and John Archibald Campbell.

[24] *FJC Biographical Directory,* Entries for John Curtiss Underwood and James Dandridge Halyburton.

[25] *FJC Biographical Directory,* Entries for Edward Henry Durell and Theodore Howard McCaleb.

[26] *FJC Biographical Directory,* Entries for George Washington Brooks and Asa Biggs.

Hiram Ketchum, Jr., Collector of Customs, D. Alaska[27]	8/20/1868	new position, created 7/27/1868

Appointments by Ulysses S. Grant

Benjamin Bristow, Solicitor General of the United States[28]	10/11/1870	new position, created 7/1/1870
John McKinney, District Judge, S.D. Fla.[29]	11/8/1870	Thomas J. Boynton, resigned 1/1/1870
Wilhelm Finkler, Consul, Ghent, Belgium[30]	10/1/1874	William Brisbane, resigned 10/18/1873

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[27] Act of July 27, 1868, ch. 273, § 2, 15 Stat. 240; S. Journal, 40th Cong., 2d Sess. 782 (1868) (reflecting statute's effectiveness before Senate's adjournment); Commission of Hiram Ketchum, Jr., Aug. 20, 1868, Vol. 35, p. 15, *Commissions Issued To Major Treasury Officers ("Presidential Appointments"), 1791-1909* (Entry 234), Records Relating to Appointments and Commissions, Records of the Division of Appointments, 1791-1945, General Records of the Department of the Treasury, Record Group 56 (RG 56), NACP.

[28] Act of June 22, 1870, ch. 150, §§ 2, 19, 16 Stat. 162, 165; 79 U.S. (12 Wall.) iii (1872).

[29] *FJC Biographical Directory,* Entries for John McKinney and Thomas Jefferson Boynton.

[30] List of Consuls to Ghent, Entries for William Brisbane and Wilhelm Finkler, Vol. 1, p. 192, Entry 803, RG 59, NACP; S. Exec. Journal, 43d Cong., 2d Sess. 396 (1874); *Consular Suspensions and Patent Promotions*, Nashville Union & American, Oct. 3, 1874, at 1.

Appointments by Rutherford B. Hayes

John F. Hartranft, Collector of Customs, Port of Philadelphia[31]	6/17/1880	A.P. Tutton, term expired 5/31/1880
John S. Bigby, U.S. Attorney, D. Ga.[32]	7/6/1880	Henry P. Farrow, term expired 4/19/1880

Appointment by James A. Garfield

George M. Duskin, U.S. Attorney, S.D. Ala.[33]	6/2/1881	himself, term expired 3/16/1881

Appointment by Chester A. Arthur

Max Polachek, Consul, Ghent, Belgium[34]	10/23/1883	Thomas Wilson, reassigned 4/30/1882

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[31] 16 Op. Att'y Gen. 522, 523 (1880).

[32] *In re Farrow*, 3 F. 112, 112-113 (C.C.N.D. Ga. 1880); Entry for John S. Bigby, *List of U.S. District Attorneys, 1798-1887* (Entry 809), RG 59, NACP.

[33] S. Exec. Journal, 47th Cong., 1st Sess. 213 (1881); Commission of George M. Duskin, June 2, 1881, Vol. 2, p. 27, *Temporary Attorneys' Commissions, 1829-1887* (Entry 789), RG 59, NACP.

[34] List of Consuls to Ghent, Entries for Thomas Wilson and Max Polachek, Vol. 2, p. 34, Entry 803, RG 59, NACP.

Appointments by Grover Cleveland

James C. Matthews, Recorder of Deeds, D.C.[35]	8/9/1886	Frederick Douglass, resigned 3/1/1886
Frederick Fitz Gerald, Consul, Cognac, France[36]	11/5/1894	John P. Beecher, resigned 6/1894

Appointments by Benjamin Harrison

James H. Beatty, District Judge, D. Idaho[37]	3/7/1891	new position, created 7/3/1890
Thomas E. Olsgard, Register of the Land Office, Minot, N.D.[38]	3/9/1891	new position, created 9/26/1890

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[35] 4 *The Life and Writings of Frederick Douglass* 119 (Philip Sheldon Foner ed., 1955); *The Senate Gives Reasons*, N.Y. Times, Feb. 8, 1887, at 1; 17 Cong. Rec. 2221 (1886).

[36] List of Consuls to Cognac, Entries for John P. Beecher and Frederick Fitz Gerald, Vol. 2, p. 103, Entry 803, RG 59, NACP; U.S. Dep't of State, *Register of the Department of State* 57 (Oct. 15, 1912).

[37] Act of July 3, 1890, ch. 656, § 16, 26 Stat. 217; S. Exec. Journal, 52d Cong., 1st Sess. 6 (1891); *FJC Biographical Directory,* Entry for James Helmick Beatty.

[38] Act of Sept. 26, 1890, ch. 946, § 3, 26 Stat. 485; S. Exec. Journal, 52d Cong., 1st Sess. 12 (1891).

Appointments by William McKinley

Daniel Mayer, Consul, Buenos Aires, Argentina[39]	11/3/1897	Edward L. Baker, died 7/8/1897
Frederick H. Wines, Assistant Director of the Census[40]	3/6/1899	new position, created 3/3/1899
George Gray, Judge, U.S. Court of Appeals for the Third Circuit[41]	3/29/1899	new position, created 2/23/1899
John C. Ingersoll, Consul, Cartagena, Colombia[42]	6/11/1900	Rafael Madrigal, resigned 2/23/1900

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[39] S. Exec. Journal, 55th Cong., 2d Sess. 264 (1897); List of Consuls to Buenos Aires, Entries for Edward L. Baker and Daniel Mayer, Vol. 2, p. 34, Entry 803, RG 59, NACP.

[40] Act of Mar. 3, 1899, ch. 419, § 2, 30 Stat. 1014; S. Exec. Journal, 56th Cong., 1st Sess. 3 (1899); 32 Cong. Rec. 2874 (1899) (reflecting statute's effectiveness before Senate's adjournment).

[41] Act of Feb. 23, 1899, ch. 186, 30 Stat. 846; S. Exec. Journal, 56th Cong., 1st Sess. 206 (1899); *FJC Biographical Directory,* Entry for George Gray.

[42] S. Exec. Journal, 56th Cong., 2d Sess. 563 (1900); List of Consuls to Carthagena [*sic*], Entries for John C. Ingersoll and Rafael Madrigal, Vol. 2, p. 84, Entry 803, RG 59, NACP.

Appointments by Theodore Roosevelt

William Dulany Hunter, Consul, Nice, France[43]	3/30/1907	Harold S. Van Buren, died 2/12/1907
Oscar R. Hundley, District Judge, N.D. Ala.[44]	4/7/1907	new position, created 2/25/1907

Appointments by William Howard Taft

John M. Cheney, District Judge, S.D. Fla.[45]	8/26/1912	James W. Locke, resigned 7/4/1912
Clinton W. Howard, District Judge, W.D. Wash.[46]	8/26/1912	Cornelius H. Hanford, resigned 8/5/1912

Appointments by Woodrow Wilson

William S. Benson Chief of Naval Operations[47]	5/11/1915	new position, created 3/3/1915

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[43] S. Exec. Journal, 60th Cong., 1st Sess. 9 (1907); List of Consuls to Nice, Entries for Harold S. Van Buren and William Dulany Hunter, Vol. 2, p. 110, Entry 803, RG 59, NACP.

[44] Act of Feb. 25, 1907, ch. 1198, 34 Stat. 931; *FJC Biographical Directory,* Entry for Oscar Richard Hundley.

[45] *FJC Biographical Directory,* Entries for John Moses Cheney and James William Locke; 48 Cong. Rec. 9763 (1912).

[46] *FJC Biographical Directory,* Entries for Clinton Woodbury Howard and Cornelius Holgate Hanford.

Samuel Alschuler, Judge, U.S. Court of Appeals for the Seventh Circuit[48]	8/16/1915	Peter S. Grosscup, resigned 10/23/1911

Appointments by Warren G. Harding

Claude Zeth Luse, District Judge, W.D. Wis.[49]	4/1/1921	Arthur Loomis Sanborn, died 10/18/1920
William Eli Baker, District Judge, N.D. W. Va.[50]	4/4/1921	Alston Gordon Dayton, died 7/30/1920

Appointments by Calvin Coolidge

Johnson Jay Hayes, District Judge, M.D.N.C.[51]	4/6/1927	new position, created 3/2/1927

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[47] Act of Mar. 3, 1915, ch. 83, 38 Stat. 929; 52 Cong. Rec. 5509 (reflecting adjournment at midnight on March 4); 22 Comp. Treas. 530, 531 (1916).

[48] *FJC Biographical Directory,* Entries for Samuel Alschuler and Peter Stenger Grosscup.

[49] *FJC Biographical Directory,* Entries for Claude Zeth Luse and Arthur Loomis Sanborn.

[50] *FJC Biographical Directory,* Entries for William Eli Baker and Alston Gordon Dayton.

[51] Act of Mar. 2, 1927, ch. 276, 44 Stat. 1340; *FJC Biographical Directory,* Entry for Johnson Jay Hayes.

Simon Louis Adler, District Judge, W.D.N.Y.[52]	5/19/1927	new position, created 3/3/1927

Appointments by Herbert Hoover

C.B. Denman, Member, Fed. Farm Bd.[53]	7/15/1929	new position, created 6/15/1929
Alexander Legge, Member, Fed. Farm Bd.[54]	7/15/1929	new position, created 6/15/1929
William F. Schilling, Member, Fed. Farm Bd.[55]	7/15/1929	new position, created 6/15/1929
James C. Stone, Member, Fed. Farm Bd.[56]	7/15/1929	new position, created 6/15/1929
Charles C. Teague, Member, Fed. Farm Bd.[57]	7/15/1929	new position, created 6/15/1929
Carl Williams, Member, Fed. Farm Bd.[58]	7/15/1929	new position, created 6/15/1929
Charles S. Wilson, Member, Fed. Farm Bd.[59]	7/15/1929	new position, created 6/15/1929

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[52] Act of Mar. 3, 1927, ch. 332, 44 Stat. 1370; *FJC Biographical Directory,* Entry for Simon Louis Adler.

[53] Act of June 15, 1929, Ch. 24, § 2, 46 Stat. 11; 9 Comp. Gen. 190, 191 (1929); 71 Cong. Rec. 3403 (1929).

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

Samuel Roy McKelvie, Member, Fed. Farm Bd.[60]	7/30/1929	new position, created 6/15/1929
Ben H. Fuller, Commandant of the Marine Corps[61]	8/8/1930	Wendell C. Neville, died 7/8/1930

Appointments by Franklin D. Roosevelt

Philip Leo Sullivan, District Judge, N.D. Ill.[62]	11/8/1933	George E.Q. Johnson, recess appointment expired 3/3/1933
Charles Edison, Secretary of the Navy[63]	12/30/1939	Claude A. Swanson, died 7/7/1939

Appointments by Harry Truman

Edward Allen Tamm, District Judge, D.D.C.[64]	6/22/1948	James McPherson Proctor, appointed as circuit judge 3/5/1948

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[59] *Ibid.*

[60] *Ibid.*; *M'Kelvie Is Named To Farm Board*, N.Y. Times, July 31, 1929, at 3.

[61] *Gen. Neville Dead; Leader of Marines*, N.Y. Times, July 9, 1930, at 17; *MacArthur Named Chief of Army Staff*, N.Y. Times, Aug. 6, 1930, at 1.

[62] *FJC Biographical Directory,* Entries for Philip Leo Sullivan and George E.Q. Johnson.

[63] *Edison Appointed Naval Secretary By The President*, N.Y. Times, Dec. 31, 1939, at 1.

Albert J. Loveland, Under Secretary of Agriculture[65]	6/26/1948	Norris E. Dodd, resigned 6/7/1948
Maurice Tobin, Secretary of Labor[66]	8/13/1948	Lewis B. Schwellenbach, died 6/10/1948

Appointments by Dwight D. Eisenhower

Elmer J. Schnackenberg, Judge, U.S. Court of Appeals for the Seventh Circuit[67]	11/17/1953	Otto Kerner Sr., died 12/13/1952
John M. Cashin, District Judge, S.D.N.Y.[68]	8/17/1955	Samuel H. Kaufman, assumed senior status 7/31/1955

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[64] *FJC Biographical Directory,* Entries for Edward Allen Tamm and James McPherson Proctor; 28 Comp. Gen. 30, 30 (1948).

[65] *In Washington Yesterday*, N.Y. Times, June 8, 1948, at 18; *Two Agriculture Posts Filled*, N.Y. Times, June 27, 1948, at 29.

[66] *Lewis Schwellenbach Dies at 53*, N.Y. Times, June 11, 1948, at 1; *Tobin Takes Oath As Secretary of Labor*, N.Y. Times, Aug. 14, 1948; 94 Cong. Rec. 10,187 (1948).

[67] *FJC Biographical Directory,* Entries for Elmer Jacob Schnackenberg and Otto Kerner Sr.

[68] *FJC Biographical Directory,* Entries for John M. Cashin and Samuel Hamilton Kaufman; *United States* v. *Allocco*, 305 F.2d 704, 705 (2d Cir. 1962).

Herold C. Hunt, Under Secretary of Health, Education, and Welfare[69]	9/2/1955	Nelson A. Rockefeller, resigned 12/11/1954
Mansfield D. Sprague, General Counsel, Dep't of Defense[70]	10/4/1955	Wilbur M. Brucker, became Secretary of the Army 7/21/1955
J. Lee Rankin, Solicitor General of the United States[71]	8/14/1956	Simon E. Sobeloff, became circuit judge 7/19/1956
Appointments by John F. Kennedy		
Thurgood Marshall, Judge, U.S. Court of Appeals for the Second Circuit[72]	10/5/1961	new position, created 5/19/1961

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[69] Office of Public Information, Office of the Secretary, U.S. Dep't of Health, Education, and Welfare, *"A Common Thread of Service": An Historical Guide to HEW* 43 (1970), http://babel.hathitrust.org/cgi/pt?id=mdp.39015078355107;seq=51#view=1up;seq=51.

[70] *New Secretary of the Army Takes Oath at the Pentagon*, N.Y. Times, July 22, 1955, at 7; Russell Baker, *President Shows Steady Progress; Mood Is Cheerful*, N.Y. Times, Oct. 5, 1955, at 1.

[71] *Sobeloff Is Sworn In*, N.Y. Times, July 20, 1956, at 28; *Rankin Appointed Solicitor General*, N.Y. Times, Aug. 15, 1956, at 22.

[72] Pub. L. No. 87-36, § 1(a), 75 Stat. 80; *FJC Biographical Directory,* Entry for Thurgood Marshall.

Gaspard d'Andelot Belin, General Counsel, Dep't of the Treasury[73]	11/13/1962	Robert H. Knight, resigned 10/6/1962

Appointments by Lyndon B. Johnson

William Gorham, Assistant Secretary, Dep't of Health, Education, and Welfare[74]	11/19/1965	new position, created 10/2/1965
William H. Darden, Judge, U.S. Court of Military Appeals[75]	11/5/1968	Paul J. Kilday, died 10/12/1968

Appointments by Richard M. Nixon

Hubert Pair, Judge, D.C. Ct. App.[76]	10/24/1970	new position, created 7/29/1970

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[73] *Treasury Counsel Resigns*, N.Y. Times, Oct. 6, 1962, at 21; *Boston Attorney Is Named Treasury General Counsel*, N.Y. Times, Nov. 15, 1962, at 60.

[74] Pub. L. No. 89-234, § 1(b), 79 Stat. 903; John D. Pomfret, *Problem: How to Administer the Great Society*, N.Y. Times, Nov. 21, 1965, at E5.

[75] *Judge Paul Joseph Kilday Dies; Sat in Military Court of Appeals*, N.Y. Times, Oct. 13, 1968, at 84; *Springfield Man Named to Bench*, Wash. Post, Nov. 6, 1968, at A21.

[76] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §§ 195(a)(1) and 199(b)(8), 84 Stat. 595, 598; Statement Announcing the Recess Appointment of Three Judges to the District of Columbia Court of Appeals, Pub. Papers 939 (Oct. 24, 1970).

Walter Yeagley, Judge, D.C. Ct. App.[77]	10/24/1970	new position, created 7/29/1970
Gerard Reilly, Judge, D.C. Ct. App.[78]	10/24/1970	new position, created 7/29/1970
Richard E. Wiley, Commissioner, Federal Communications Commission[79]	1/4/1972	Robert Wells, resigned 11/1/1971
Irving Kristol, Member of the Board of Directors, Corporation for Public Broadcasting[80]	12/15/1972	Saul Haas, died 10/15/1972

Appointment by Gerald Ford

Malcolm Toon, Ambassador to the Union of Soviet Socialist Republics[81]	11/24/1976	Walter John Stoessel, reassigned 9/13/1976

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[77] *Ibid.*

[78] *Ibid.*

[79] Federal Communications Commission, 7 Weekly Comp. Pres. Doc. 1580 (Nov. 30, 1971); Digest of Other White House Announcements, 8 Weekly Comp. Pres. Doc. 36 (Jan. 4, 1972).

[80] Corporation for Public Broadcasting, 8 Weekly Comp. Pres. Doc. 1763-1764 (Dec. 15, 1972).

[81] Office of the Historian, U.S. Dep't of State, *Walter John Stoessel (1920-1986)*, http://history.state.gov/departmenthistory/people/stoessel-walter-john; Office of the Historian, U.S. Dep't of State, *Malcolm Toon (1916-2009)*, http://history.state.gov/departmenthistory/people/toon-malcolm.

Appointments by Jimmy Carter

Neil Goldschmidt, Secretary of Transportation[82]	8/10/1979	Brock Adams, resigned 7/20/1979
Walter Heen, District Judge, D. Haw.[83]	1/1/1981	Dick Yin Wong, died 12/26/1978

Appointments by Ronald Reagan

Robert P. Hunter, Member, NLRB[84]	8/13/1981	John C. Truesdale, resigned 1/26/1981
John R. Van de Water, Member, NLRB[85]	8/13/1981	John A. Penello, resigned 1/14/1981

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[82] *Adams Angrily Quits Transportation Job*, N.Y. Times, July 21, 1979, at 1; *New Transportation Chief To Take Helm Wednesday*, Wash. Post, Aug. 11, 1979, at A4.

[83] *FJC Biographical Directory,* Entries for Walter Meheula Heen and Dick Yin Wong; *United States* v. *Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc).

[84] *Aide Spurned By Reagan Named To N.L.R.B. Post*, N.Y. Times, Jan. 29, 1981, at A9; Nomination of Robert P. Hunter To Be a Member of the National Labor Relations Board, Pub. Papers 539-540 (June 18, 1981); Digest of Other White House Announcements, 17 Weekly Comp. Pres. Doc. 883 (Aug. 13, 1981).

[85] *Labor Panel Job Creates a Rift in Reagan Camp*, N.Y. Times, Jan. 16, 1981, at B5; Nomination of John R. Van de Water To Be a Member of the National Labor Relations Board, Pub. Papers 539 (June 18, 1981); Digest of Other White House Announcements, 17 Weekly Comp. Pres. Doc. 883 (Aug. 13, 1981).

John E. Higgins, Jr., Member, NLRB[86]	8/29/1988	Donald L. Dotson, term expired 12/16/1987
Dennis M. Devaney, Member, NLRB[87]	11/22/1988	Marshall B. Babson, resigned 7/31/1988

Appointments by George H.W. Bush

Clifford R. Oviatt, Jr, Member, NLRB[88]	12/14/1989	Wilford W. Johansen, resigned 6/15/1989
David J. Ryder, Director, U.S. Mint, Dep't of the Treasury[89]	9/3/1992	Donna Pope, term expired 8/1991

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[86] *Chief of U.S. Panel on Labor Relations to Quit Next Week*, N.Y. Times, Dec. 9, 1987, at A27; Digest of Other White House Announcements, 24 Weekly Comp. Pres. Doc. 1100 (Aug. 29, 1988).

[87] *Babson to Quit, Creating Third NLRB Vacancy*, Wash. Post, Mar. 3, 1988, at A23; *32 Are Appointed to Agencies During Congressional Recess*, N.Y. Times, Nov. 23, 1988, at D20; NLRB, *Members of the NLRB Since 1935*, www.nlrb.gov/members-nlrb-1935.

[88] NLRB News Release, *NLRB Member Wilford W. Johansen To Resign On or Before June 16, 1989* (Mar. 30, 1989), http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ca48a6; Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made from 1981-2013,* at 15 (Feb. 4, 2013) (*Hogue 1981-2013*).

[89] U.S. Mint, *Directors of the U.S. Mint: 1792–Present*, www.usmint.gov/about_the_mint/?action=past_directors; *Hogue 1981- 2013*, at 13.

Lawrence Eagleburger, Secretary of State[90]	12/8/1992	James Baker, resigned 8/23/1992

Appointments by William J. Clinton

John C. Truesdale, Member, NLRB[91]	12/4/1998	William B. Gould IV, term expired 8/27/1998
John D. Hawke, Jr., Comptroller of the Currency[92]	12/7/1998	Eugene A. Ludwig, term expired 4/4/1998
Roger L. Gregory, Judge, U.S. Court of Appeals for the Fourth Circuit[93]	12/27/2000	new position, created 12/1/1990

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[90] *State Dept. Fills Posts After Baker Departure*, N.Y. Times, Aug. 25, 1992, at A10; *Hogue 1981-2013*, at 15.

[91] NLRB News Release, *In End Of Term Report, NLRB Chairman William B. Gould IV Assesses Initiatives, Accomplishments & Case Decisions* (Aug. 26, 1998), http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ca4acf; *Hogue 1981-2013*, at 19.

[92] Office of the Comptroller of the Currency, *Past Comptrollers of the Currency*, www.occ.gov/about/who-we-are/leadership/past-comptrollers/index-past-comptrollers.html; *Hogue 1981-2013*, at 19.

[93] Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 202(a)(2) and 206, 104 Stat. 5099, 5104; Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange With Reporters, 3 Pub. Papers 2783 (Dec. 27, 2000).

Appointments by George W. Bush

Ronald E. Meisburg, Member, NLRB[94]	12/23/2003	R. Alexander Acosta, resigned 8/21/2003
William H. Pryor Jr., Judge, U.S. Court of Appeals for the Eleventh Circuit[95]	2/20/2004	Emmett Ripley Cox, assumed senior status 12/18/2000
John Bolton, Representative of the United States to the United Nations[96]	8/1/2005	John C. Danforth, resigned 1/2005
Gordon R. England, Deputy Secretary of Defense[97]	1/4/2006	Paul Wolfowitz, resigned 4/29/2005

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[94] Division of Information, NLRB, *Ronald Meisberg Receives Recess Appointment From President Bush To Be NLRB Member* (Dec. 29, 2003), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d5d75.

[95] *FJC Biographical Directory,* Entries for William Holcombe Pryor Jr. and Emmett Ripley Cox.

[96] Judith Miller, *Annan Planning Deep Changes in U.N. Structure, Aide Says*, N.Y. Times, Jan. 17, 2005, at A4; *Hogue 1981-2013*, at 24.

[97] *Pentagon Honors a Departing Wolfowitz*, N.Y. Times, Apr. 30, 2005, at A9; Digest of Other White House Announcements, 42 Weekly Comp. Pres. Doc. 20 (Jan. 4, 2006).

Peter N. Kirsanow, Member, NLRB[98]	1/4/2006	Ronald E. Meisburg, recess appointment expired 12/8/2004
Dennis P. Walsh, Member, NLRB[99]	1/17/2006	himself, term expired 12/16/2004

Appointments by Barack Obama

Joshua Gotbaum, Director, Pension Benefit Guaranty Corporation[100]	7/7/2010	Charles E.F. Millard, resigned 1/20/2009
James M. Cole, Deputy Attorney General, Dep't of Justice[101]	12/29/2010	David W. Ogden, resigned 2/5/2010

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[98] Division of Information, NLRB, *President Bush Recess Appoints Ronald Meisburg as NLRB General Counsel, Peter Kirsanow Board Member, and Arthur Rosenfeld FMCS Director* (Jan. 5, 2006), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d7041; Nominations Submitted to the Senate, 42 Weekly Comp. Pres. Doc. 228 (Feb. 10, 2006).

[99] Division of Information, NLRB, *Dennis Walsh Receives Recess Appointment From President Bush To Be NLRB Member* (Jan. 18, 2006), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d7043.

[100] Pension Benefit Guaranty Corporation, *Past PBGC Directors and Executive Directors*, www.pbgc.gov/about/who-we-are/pg/past-pbgc-directors-and-executive-directors.html; 155 Cong. Rec. 27,625 (2009); *Hogue 1981-2013*, at 28.

[101] Office of Public Affairs, Dep't of Justice, *Deputy Attorney General David Ogden to Leave Department of Justice*, Dec. 3, 2009, www.justice.gov/opa/pr/2009/December/09-ag-1300.html; *Hogue 1981-2013*, at 29.

Terence F. Flynn, Member, NLRB[102]	1/04/2012	Peter Schaumber, term expired 8/27/2010
Richard Griffin Jr., Member, NLRB[103]	1/04/2012	Wilma B. Liebman, term expired 8/27/2011

[102] Pet. App. 16a.

[103] *Ibid.*

APPENDIX C

1. The United States Constitution provides in pertinent part:

Art. I:

* * * * *

§ 3:

Cl. 2:

> and if Vacancies [in the Senate] happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

* * * * *

Cl. 5:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

* * * * *

§ 4, Cl. 2:

> The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

* * * * *

§ 5, Cl. 4:

> Neither House, during the Session of the Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

* * * * *

§ 7, Cl. 2:

> If 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.

* * * * *

Art. II:

§ 2, Cl. 2:

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

alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

§ 3:

[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Amend. XX, § 2:

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

2. 29 U.S.C. 153 provides, in pertinent part:

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors,

and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, consti-

tute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

3. 29 U.S.C. 160 provides, in pertinent part:

Prevention of unfair labor practices

* * * * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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