

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL LABOR RELATIONS BOARD, :

4 Petitioners : No. 12-1281

5 v. :

6 NOEL CANNING, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Monday, January 13, 2014

10

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

14 APPEARANCES:

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19 Respondents.

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

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

2 (10:04 a.m.)

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

6 General Verrilli?

7 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

7 JUSTICE SOTOMAYOR: Why not?

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

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

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

25 JUSTICE SOTOMAYOR: What would happen if --

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

3 GENERAL VERRILLI: Well, I think that --

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

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

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

12 GENERAL VERRILLI: Yes, we would.

13 JUSTICE SCALIA: Of course, you would.

14 GENERAL VERRILLI: Yes, we would.

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

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

25 JUSTICE SCALIA: You started off by

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

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

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

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

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

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

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

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

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

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

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

12 JUSTICE SCALIA: Yes or no?

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

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

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

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

22 GENERAL VERRILLI: No --

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

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

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

6 GENERAL VERRILLI: No, I am -- I am
7 answering. I think I already answered it once,
8 Justice Scalia, but I'll answer it again. The answer is
9 I think, given this -- a practice going back to the
10 founding of the Republic, the practice should be -- the
11 practice should govern, but we don't have that here.

12 This provision has been subject to
13 contention as to its meaning since the first days of the
14 Republic.

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

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

1 Now, would we say that your appointment as
2 Solicitor General is happening today and will happen
3 again tomorrow and happened yesterday? Is that the way
4 the English language is used?

5 GENERAL VERRILLI: But the word "happens"
6 may not always be an apt phrase, the phrase "may
7 happen," the constitutional phrase, but it is a natural
8 use. And if I may, Justice Alito, I'll give you a
9 counterexample.

10 If Congress had enacted a statute in the
11 summer of 2008 that said the Federal Reserve is invested
12 with all powers necessary to deal with any financial
13 emergency that may happen in 2009, if that emergency
14 first arose in November of 2008, I don't think anybody
15 would interpret that statute as denying the Federal
16 Reserve the authority that Congress conferred.

17 And that's because "may happen" -- "may
18 happen" won't cover every situation of a persisting
19 state, but it's certainly a natural reading of it that
20 covers some. And as Jefferson said, it's certain -- in
21 this context, it's certainly susceptible of being
22 interpreted to mean --

23 JUSTICE GINSBURG: General Verrilli, we've
24 taken you off your starting point. Your starting point
25 was what is it -- what constitutes a recess. And your

1 position is that it can be an intra-session recess. But
2 if we look back historically, Congress met, and they met
3 continuously. And then they went on horseback back
4 home, and they were away for 6 months, even 9 months.

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

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

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

1 Framers contemplated the possibility of a break longer
2 than 3 days.

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

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

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

20 JUSTICE SOTOMAYOR: Is that 3 days?

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

25 GENERAL VERRILLI: Well, but the problem

1 with the pro forma sessions, I think, Justice Kennedy,
2 is in thinking about the length of the recess. The
3 recess, we would submit -- and this is based on the
4 formal dictionary definition of "recess" at the time of
5 the founding and now, which is "a suspension of
6 business," the recess was from January 3 when the
7 session started until January 23.

8 And the reason I think that --

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

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

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

21 GENERAL VERRILLI: I think that it's a --
22 that's a different case, and I think, concededly, a
23 significantly harder case for the Executive because
24 here --

25 CHIEF JUSTICE ROBERTS: Yeah. Well, it's

1 difficult and harder, but it also suggests that you're
2 just talking about a couple of magic words that the
3 Senate can just change at the drop of a hat, so maybe
4 the point is not that significant.

5 GENERAL VERRILLI: Well, I think it is
6 significant, Mr. Chief Justice. It's a formal action by
7 the Senate by rule saying that no business shall be
8 conducted.

9 And then in addition, there are other formal
10 actions that the Senate took during this period that are
11 confirming indicia. The Senate passed -- the Senate
12 passed a resolution that gave committees the authority
13 to submit reports and report bills. They passed a
14 resolution giving the -- the President Pro Tempore the
15 power to sign enrolled bills. It passed --

16 JUSTICE KAGAN: But General, I think you're --
17 you're not answering the real thrust of the Chief
18 Justice's question, which is that we could just be back
19 here if we -- if we said, well, they didn't phrase this
20 in the right way.

21 Well, they'll phrase it differently, and we
22 would be back here with the same essential problem, that
23 you're asking us to peg this on a formality that the
24 Senate could easily evade, and that suggests that it
25 really is the Senate's job to determine whether they're

1 in recess or whether they're not.

2 GENERAL VERRILLI: I think there has to be a
3 limit to that point, Justice Kagan, because, after all,
4 what we're talking about here is a power that the
5 Constitution gives to the President, the power in
6 Article II, and the President has got to make the
7 determination of when there's a recess.

8 JUSTICE SOTOMAYOR: But why? You're making
9 an assumption, which is that the Senate has to take a
10 recess, but the Senate could choose, if it wanted to,
11 and I think there might be some citizens that would
12 encourage it to, to never recess.

13 GENERAL VERRILLI: Sure. Of course, it
14 could.

15 JUSTICE SOTOMAYOR: And -- and to work every
16 day, which --

17 GENERAL VERRILLI: That's true.

18 JUSTICE SOTOMAYOR: -- lots of people do.

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

21 (Laughter.)

22 JUSTICE SOTOMAYOR: So --

23 GENERAL VERRILLI: That's absolutely true.
24 But -- but it seems to me that that is the choice that
25 the Constitution puts --

1 JUSTICE BREYER: So what do you say about
2 the Twentieth Amendment, which says that that
3 January 3rd was a meeting? Are you saying they violated
4 the Twentieth Amendment? January 3rd. This says the
5 Congress of the United States shall meet on January 3rd
6 every year, unless they appoint a different day.

7 GENERAL VERRILLI: Yes.

8 JUSTICE BREYER: And they haven't. And,
9 therefore, they met in pro forma session. Or do you
10 think it wasn't a meeting? And what do you think about
11 the other part of the Constitution, which says they
12 can't adjourn for more than 3 days without the approval
13 of the House, which they didn't have.

14 So are you saying that the Senate violated
15 those other two amendments of -- the two parts of the
16 Constitution, or are you saying that they have different
17 meanings in the three parts?

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

21 JUSTICE BREYER: Okay. So you're saying
22 they violated, if that -- if they have pro forma
23 sessions on January 3rd, they violate the Twentieth
24 Amendment to the Constitution. You are saying that if
25 they had a pro forma session on January 3rd, that since

1 their meeting -- their recess was still on and lasted
2 more than 3 days, it was a violation of that Adjournment
3 Clause of the Constitution.

4 Now, that's one way to interpret it. Over a
5 long period of time, they have apparently met pro forma
6 on those days. Or we could try to make them mean the
7 same thing, which would mean it was up to the Senate.
8 They consider that a meeting, it's a meeting. What do
9 we do?

10 GENERAL VERRILLI: Or there is another
11 option, Justice Breyer.

12 JUSTICE BREYER: Would you write that
13 opinion, saying the Senate of the United States has
14 violated two -- two provisions of the Constitution?

15 GENERAL VERRILLI: No, no. I don't
16 think you need -- I don't think you need to write that
17 opinion.

18 JUSTICE BREYER: All right. Why not?

19 GENERAL VERRILLI: Because you might,
20 perhaps, give the Senate some deference with respect to
21 requirements that apply only internally to the Congress.
22 But when what you're talking about is the Senate's use
23 of pro forma sessions in a manner that deprives the
24 President of authority that Article II would otherwise
25 give to the President --

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

5 GENERAL VERRILLI: So why --

6 JUSTICE BREYER: What my really basic
7 question is why is this an important case, in your
8 opinion? Now, you've said, oh, because there are
9 thousands of recess appointments, not on the happen
10 clause.

11 You've listed 7600 or so, really, on the
12 recess part, but on the happen clause, you've only been
13 able to find 102. And moreover, we've had an example
14 of -- where this Court, for better or for worse, said
15 that two members of the board is not a quorum, and we
16 got some more members, they dealt with the problem.
17 They ratified all those opinions, they dealt with it.
18 It didn't take them too much time.

19 So -- and we have different political
20 parties taking absolutely opposite sides, it seems to
21 me, or some members thereof, depending on the political
22 party of the President. And we have a clause that had
23 to do with the Constitution and the problem of intra --
24 inter-session recesses when they were 7 months and
25 nobody could meet. Okay. That isn't true anymore.

1 So explain to me. I'm not saying you're
2 wrong. I just want to hear from your mouth why this is
3 an important case.

4 GENERAL VERRILLI: So it's important for
5 multiple reasons, with respect to practicalities and
6 fundamental questions of constitutional structure.

7 Let me start with practicalities and with
8 the happens point, the "may happen" point, that our
9 appendix doesn't purport to be comprehensive or anything
10 like comprehensive. Part of the reason why it can't be
11 comprehensive is that there really aren't records of
12 when the vacancy first arose with respect to huge
13 numbers of recess appointments, and that's because, I
14 submit, it wasn't considered material.

15 But second, I can -- there are -- there are
16 numerous practical examples in our history of when it
17 made a very great deal of difference that the President
18 had the authority to make an appointment to a vacancy
19 that preexisted the recess.

20 We have mentioned the 1948 example; the
21 Secretary of Labor dies on the verge of a very extended
22 intra-session recess by the -- by the Senate. They're
23 going to be out for a month, back for 12 days, and then
24 out all the way from June -- they go out in June,
25 they're out for a month, they are back for 12 days, and

1 then they're out all the way until December 31st.

2 The Secretary of Labor dies just in advance
3 of them going out in June, and this is -- remember, 1948
4 is a period of significant labor unrest. They needed a
5 Secretary of Labor in place.

6 JUSTICE KAGAN: General, would you agree
7 that this clause now is not mostly used to deal with
8 emergencies arising from congressional absence? That
9 most modern Presidents -- and I say this sort of
10 going -- going back to President Reagan, Presidents of
11 both parties, essentially, have used this clause as a
12 way to deal -- not with congressional absence, but with
13 congressional intransigence, with a Congress that simply
14 does not want to approve appointments that the President
15 thinks ought to be approved?

16 You know, absence in this day and age --
17 this is not the horse-and-buggy era anymore. There's no
18 real -- there's no such thing, truly, as congressional
19 absence anymore. And that makes me wonder whether we're
20 dealing here with what's essentially a historic relic,
21 something whose original purpose has disappeared and has
22 assumed a new purpose that nobody ever intended it to
23 have.

24 GENERAL VERRILLI: Well, two answers. I
25 don't think its original purpose has disappeared. I

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1 mean, the NLRB was going to go dark. It was going to
2 lose its quorum.

3 JUSTICE KAGAN: Yes, as a result of
4 congressional refusal, not as a result of congressional
5 absence.

6 GENERAL VERRILLI: And that gets to the
7 second point, which is that it may be true, as a matter
8 of raw power, that the Senate has the ability to sit on
9 nominations for months and years at a time, but that is
10 100 miles from what the Framers would have expected.

11 If you look at what Hamilton said in
12 Federalist 76 about the advice and consent role of the
13 Senate, he said he thought it would be a power that was
14 rarely exercised and would operate, if at all, invisibly
15 or silently. And in the early days of the Republic, it
16 was -- advice and consent was a matter of days, not months and years.

17 JUSTICE ALITO: But you are making a very,
18 very aggressive argument in favor of executive power
19 now, and it has nothing whatsoever to do with whether
20 the Senate is in session or not. You're just saying,
21 when the Senate acts, in your view, irresponsibly and
22 refuses to confirm nominations, then the President must
23 be able to fill those -- fill those positions.

24 That's what you're arguing. I don't see
25 what that has to do with whether the Senate is in

1 session.

2 GENERAL VERRILLI: Well, I do -- I think
3 this -- I think the recess power may now act as a safety
4 valve given that intransigence, and that is actually
5 quite consistent --

6 JUSTICE GINSBURG: But it isn't -- it isn't
7 tied then to the availability of Congress,
8 availability of the Senate. I think you said throughout
9 your brief that the rationale for the recess power is
10 the President must be able to have the government
11 functioning and staffed even though -- although the
12 Senate isn't -- isn't around. But now the -- you seem,
13 in your answers, to be departing from the Senate not
14 available and making quite another justification for
15 this.

16 The Senate -- I think, to be candid, the
17 Senate is always available. They can be called back on
18 very short notice. So what is it that's the
19 constitutional flaw here? It isn't -- it isn't that the
20 Senate isn't available. The Senate is available. It
21 can easily be convened.

22 GENERAL VERRILLI: So let me take a half a
23 step back, if I could, Justice Ginsburg, and answer that
24 question in this way -- you know, perhaps it sounds like
25 this is an aggressive assertion of executive authority,

1 but I'd ask the Court to think back to Federalist 51.

2 And what the Framers were most concerned
3 about was that Congress, in the separation of powers
4 calculus, was going to amass authority and drain
5 authority and energy from the Executive, and therefore,
6 the Executive needed to be fortified against those
7 actions by Congress.

8 And one specific way in which the Framers
9 decided to fortify the Executive was by rejecting the
10 notion that the appointment power should reside with the
11 Senate. The Framers considered that, and they rejected
12 it.

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

16 CHIEF JUSTICE ROBERTS: But the compromise
17 they settled on in moving away from that is that the
18 President will nominate and the Senate, if it so
19 chooses, can confirm a nominee. You spoke of the
20 intransigence of the Senate. Well, they have an
21 absolute right not to confirm nominees that the
22 President submits.

23 And it seems to me, following up on Justice
24 Kagan's point, you're latching on to the Recess
25 Appointment Clause as a way to combat that

1 intransigence, rather than to deal with the happenstance
2 that the Senate is not in session when a vacancy becomes
3 open.

4 GENERAL VERRILLI: Well, but those things --
5 there are often situations in which the Senate is not in
6 session when a vacancy becomes open or needs to be
7 filled, I guess would be the more accurate way to say
8 it. The examples -- I'll give you another example, if I
9 could, from the 1940s. Taft-Hartley gets enacted in
10 1947 in the summer.

11 One requirement of Taft-Hartley is that the
12 general counsel of the NLRB must enforce the ban on
13 secondary boycotts within a fixed period of time, 30 or
14 60 days. Well, it turns out there is no general counsel
15 of the NLRB at that time, so President Truman --

16 CHIEF JUSTICE ROBERTS: Well, the Senate
17 has -- the Congress and the Executive have come together
18 to address those sorts of problems in a vast number of
19 cases by providing that there can be an acting general
20 counsel of the NLRB to deal with that situation.

21 GENERAL VERRILLI: Well, actually,
22 Mr. Chief Justice, with respect to multi-member boards,
23 the Vacancy Act doesn't cover them. That's one reason
24 we have the problem here. But beyond that, the Framers
25 made a judgment that this wasn't going to be left to

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1 congressional largesse. That's why there is a Recess
2 Appointment Clause, and it's not left to the Congress.

3 JUSTICE SCALIA: Well, let's -- let's talk about your
4 1948 emergency of the Secretary of Labor. There was
5 a vacancy in -- in that post. The President has the
6 authority to convene Congress. And whatever was the
7 case in 1948 or -- or in 1789, Congress can be back here
8 in one day.

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

11 GENERAL VERRILLI: That's true,
12 Justice Scalia. But the --

13 JUSTICE SCALIA: So what's the problem? If
14 there is indeed this -- you know, this terrible
15 emergency you're talking about, the President has the
16 power to call them back.

17 GENERAL VERRILLI: Well, I think it seems to
18 me the Framers made a different judgment because they
19 gave the President both the power to call back in
20 extraordinary circumstances and the recess appointment
21 power. And if the Framers had intended the power to
22 call back to be the way to deal with vacancies during
23 absences of the Senate, then --

24 JUSTICE SCALIA: Yes, but my only point is
25 what -- what the recess appointment power consists of

1 cannot be determined on the basis that, well, there are
2 going to be terrible emergencies, so it must enable the
3 President to do this or that. Extraordinary emergencies
4 are handled in the Constitution. You don't have to
5 expand the -- the vacancy appointment power in order to
6 handle those.

7 GENERAL VERRILLI: So what I would say about
8 this, and also to your point, Mr. Chief Justice, is we
9 have, I would submit, a stable equilibrium that has
10 emerged over the course of this country's history
11 between the two branches. After all, what we are
12 advocating for here is the status quo. It is the
13 equilibrium that has emerged since Congress -- since the
14 Senate started taking lengthy intra-session recesses,
15 Presidents started making recess appointments during
16 those recesses.

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

19 JUSTICE KAGAN: General, I think that's a
20 really strong argument, but I have to say I'm not sure
21 it applies consistently throughout each of the three
22 claims that you make. Because if you are going to rely
23 on history and on the development of an equilibrium with
24 respect to what "happens" means, and if you are going to
25 do that again with respect to whether intra-session

1 recesses are included, then it seems to me you also have
2 to look to history and the development of an equilibrium
3 with respect to Congress's definition of its own power
4 to determine whether they are in recess or not.

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

11 GENERAL VERRILLI: Well, winning on
12 questions 1 and 2 would be of great importance to the
13 Executive, but we also should win on question 3, and
14 here's why: There isn't a long history reflecting the
15 equilibrium with respect to the use of pro forma
16 sessions in order to restrict the President's ability to
17 use the recess appointment power.

18 There really is no history before 2007 of
19 this daisy chaining of one pro forma session after
20 another after another in conjunction with an order that
21 no business shall be conducted.

22 JUSTICE ALITO: Well, there's no practice --
23 there is no long practice of doing it. There is also no
24 long practice of rejecting it.

25 But if I could take you back to that, you

1 said that the pro forma sessions may violate the
2 Adjournment Clause in the Twentieth Amendment. Would
3 you also say that they violate the Presentment Clause,
4 because the Senate has passed legislation during these
5 pro forma sessions and the President has signed that
6 legislation.

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

14 Now, what the Senate did with respect to the
15 legislation Your Honor identified was they came out of
16 pro forma session, they passed legislation, and then
17 went back in to -- they went back in under the order of
18 pro forma session. So they take that action --

19 JUSTICE KENNEDY: But it seems -- it seems
20 to me that we're searching here for a proper
21 interpretation of the word "session," which, after all,
22 is in the provision that we are looking at. It talks
23 about "next session." And we have a long tradition of
24 Congress defining what that session is.

25 They have the first -- this is, what, the

1 113th Congress? I think something like that. And they
2 have the first and second session. That's how their
3 records are based.

4 This is a considered judgment by both houses
5 of the Legislative Branch as to what "session" means,
6 and it seems to me that that has very powerful bearing
7 on the question of inter- and intra-session appointments
8 that we are arguing, forget the -- when the vacancy
9 happens to arise.

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

14 GENERAL VERRILLI: I don't think that that's
15 an interpretation that really could be squared with the
16 body of contemporaneous evidence from the time of the
17 framing. And I would start with the text of the
18 Constitution itself and the Adjournment Clause, which is
19 at page 91a of the appendix to our brief.

20 And it -- one thing it says is that,
21 "Neither house during the session of the Congress shall,
22 without consent of the other, adjourn for more than 3
23 days." It seems clear from that language that "the
24 session of the Congress" is referring to the period that
25 commences on the constitutionally prescribed date and

1 continues until the Congress adjourns sine die because,
2 otherwise, these recesses wouldn't be during the session
3 of the Congress.

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

8 JUSTICE ALITO: But where does this 3-day
9 rule --

10 JUSTICE KENNEDY: But you are relying on
11 adjournment. That -- that -- that does not have the
12 word "recess" in --

13 GENERAL VERRILLI: No, that's right. But
14 I'm going back now to think about what "session" means
15 in the Recess Appointment Clause where "the session" is
16 also used. I would submit, Your Honor, that it means
17 the same thing as it means here, which is the full
18 session of the Congress.

19 JUSTICE SOTOMAYOR: If it means the same
20 thing, then what you are tying the two together, which
21 actually might have some validity, but wouldn't that
22 require the definition of a recess to be a period in
23 which both houses have chosen to consent to an
24 adjournment?

25 GENERAL VERRILLI: No, I don't think so

1 because the dictionary definition then and now of recess
2 is a suspension of business. And you could have
3 recesses of that kind, suspensions of business within
4 sessions. That's -- Jefferson's parliamentary manual
5 refers to recess by adjournment --

6 JUSTICE SOTOMAYOR: Can you have an
7 adjournment without a suspension of business? Aren't
8 the two the same?

9 GENERAL VERRILLI: Well, I'm just talking
10 now, Justice Sotomayor, if I may, about the
11 intra-session recess point.

12 JUSTICE SOTOMAYOR: But I'm talking about
13 tying the two together.

14 GENERAL VERRILLI: Right, but with respect
15 to -- putting the pro forma issue aside for a second,
16 with respect to intra-session recesses, the meaning of
17 the "session," it seems to me, is the session, the full
18 session, because you can have -- you can have recesses
19 by adjournment, as Jefferson's parliamentary manual
20 said.

21 And as I think I said earlier, there is
22 quite substantial evidence that the term "the recess" at
23 the time of the framing could refer to a break during a
24 session and not just breaks between sessions. So I just
25 don't think there is contemporaneous evidence from the

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1 framing generation that would lead you to conclude that
2 intra-session recesses are not within the meaning of the
3 word "recess."

4 JUSTICE BREYER: What, where is this --
5 the most surprising thing
6 to me that you have said, and it's important, is not
7 just the view of language at the time of the framing,
8 but what the purpose of this clause was. I mean, this
9 is a very well-briefed case, and I have looked at them.
10 I have read them, actually.

11 (Laughter.)

12 GENERAL VERRILLI: Okay.

13 JUSTICE BREYER: And I'll tell you, I cannot find anything, so
14 far, and I may have missed it -- I'm asking -- I can't
15 find anything that says the purpose of this clause has
16 anything at all to do with political fights between
17 Congress and the President. To the contrary, Hamilton
18 says that the way we're going to appoint people in this
19 country is Congress and the President have to agree.

20 Now, that's a political problem, not a
21 constitutional problem, that agreement. And it was just
22 as much true of President George Bush, who made six
23 appointments that happened previously, as it is with
24 President Obama, who's made four. All right?

25 So -- so where -- and he says this clause is

1 a supplement, a supplement, to the basic clause to take
2 care of the timing problem. So, what have I missed?
3 Where is it in the history of this clause, in its
4 origination, that it has as a purpose to allow the
5 President to try to overcome political disagreement?

6 GENERAL VERRILLI: I don't -- I don't think
7 that that's -- I don't think that that -- I don't think
8 that's its purpose, but it is in the Constitution. The
9 President has the authority to make appointments --

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

20 So look at the language difficulty. Look at
21 the comparatively small practice in that area. Look at
22 the other ways to get around the problem, and then give
23 me another example in the Constitution where you have
24 both language and purpose pointing one place and yet
25 this Court because of practice has come to the opposite

1 conclusion.

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

4 JUSTICE BREYER: "Happen?" Of course,
5 battles happen. That's because battles occur over time.
6 Give me an example with the word "vacancy," where that
7 word "vacancy" is used with the word "is," but not
8 "occurred."

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

11 JUSTICE BREYER: But just give me an English
12 example where it's natural to say --

13 GENERAL VERRILLI: I tried with my statutory
14 example before, but from --

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

17 GENERAL VERRILLI: No, it was an
18 emergency. It was the statutory example about a
19 financial emergency that may happen, which is a state,
20 just like the vacancy.

21 JUSTICE BREYER: A financial emergency,
22 correct. I'm sorry. I'm asking you for an example with
23 the word "vacancy." That's what I am having trouble
24 with.

25 GENERAL VERRILLI: Well, a vacancy is an

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1 enduring state. From the perspective of the --

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

5 GENERAL VERRILLI: Well, I think --

6 JUSTICE BREYER: And -- and I couldn't
7 either.

8 GENERAL VERRILLI: Your Honor, maybe this
9 statutory -- maybe the language in the Constitution
10 looks unambiguous to you now, but it has been the
11 subject of contention, it has been thought to be
12 ambiguous from the time of George Washington to the
13 President -- to the present.

14 And with respect to the question of the
15 practice and there being -- I don't think it's correct
16 to assume that because there are a certain number of
17 identified examples of preexisting vacancies being
18 filled in our appendix, that that's a sum total. I
19 think this is far, far less than the sum total. It represents --

20 JUSTICE SCALIA: It's been assumed
21 to be -- it's been assumed to be ambiguous by
22 self-interested Presidents.

23 (Laughter.)

24 JUSTICE SCALIA: Of course. Death is an
25 enduring state. But if someone dies in 1941, you don't

1 say he died in 1945. He's still dead.

2 (Laughter.)

3 GENERAL VERRILLI: The fact -- the fact
4 that -- the fact it happens --

5 JUSTICE SCALIA: But his death happened in
6 1941.

7 GENERAL VERRILLI: But the fact that "may
8 happen" is a phrase that isn't always apt to describe an
9 enduring state doesn't mean it's never apt to
10 describe an enduring state. It's what Jefferson
11 thought. It's what -- it's -- it has been the
12 understanding, since the framing, that there is
13 ambiguity here and there --

14 CHIEF JUSTICE ROBERTS: Your -- it's your
15 argument -- your friend on the other side says one flaw
16 with your argument is that it makes the words "it may
17 happen" or "happen during" superfluous, that the clause
18 would mean exactly what you say it means if you took
19 those words out.

20 And your response -- the only one I could
21 see on the reply -- your reply brief, page 13, is that
22 those words were put in there to quote, "confine the
23 President to filling vacancies that actually exist at
24 the time of appointment."

25 Now, is that -- do you really think that

1 they put that language in there because they were afraid
2 the President would fill appointments that don't exist?

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

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

16 JUSTICE GINSBURG: You do have -- you do
17 have the one that you relied on in your brief, and this
18 understanding goes back at least to 1823, and the -- the
19 Wirt letter, Attorney General Wirt said, on the
20 wording -- maybe on the wording, the case is not strong.
21 But the purpose, he said, you would be honoring the
22 letter and defying the spirit. That was the -- on the
23 question of the -- when the vacancy --

24 GENERAL VERRILLI: And we don't disagree
25 with that. We think it's just what Wirt said. It's --

1 does no violence to the language and is consistent with
2 the purpose of the -- of the clause. And from the --
3 from the perspective of the purpose of the clause, the
4 office is equally vacant, whether that vacancy arose the
5 day before or the day after the Senate went into recess.

6 The Senate is equally unavailable to act
7 because they're dispersed, whether the vacancy arose the
8 day before or the day after. And the public's need that
9 the office be filled so that the laws can be faithfully
10 executed is the same whether the vacancy arose the day
11 before or the day after.

12 JUSTICE GINSBURG: Before you -- before
13 you --

14 GENERAL VERRILLI: And so you do have that
15 very established practice that is completely in accord
16 with the purpose and the structure.

17 JUSTICE GINSBURG: The -- we sort of drifted
18 away from the new -- the new practice, the pro forma
19 session. And you were asked, suppose there was nothing
20 in the resolution about they would conduct no business.
21 It was an informal understanding that they wouldn't.
22 But there is no express agreement that they're not going
23 to conduct business. Then do you lose on that part of
24 the case?

25 GENERAL VERRILLI: I think that's a way

1 harder case for us. I would agree with that, Justice
2 Ginsburg, and -- but they're two things. One is that
3 formalities do matter; and two, going back to the point
4 you made earlier, Justice Kagan, I think it's not an
5 accident that there's a no-business order in place.

6 It's because that's what gives the Senators
7 the protection to know that they can leave town without
8 somebody else going to the --

9 JUSTICE KAGAN: Suppose it was -- suppose it
10 was the exact same no-business order, but the single
11 senator who was there got up and asked for unanimous
12 consent to name a post office, and every three days, he
13 got up and said unanimous consent to name a post office.
14 The post office is named.

15 So they can do -- you know, trivial business
16 in each of these sessions. Would that make a
17 constitutional difference?

18 GENERAL VERRILLI: Well, I think if they did
19 business each of the three days, then you wouldn't have
20 a situation in which no business was conducted and you
21 wouldn't meet the definition of a recess. But that's a
22 different case than this one.

23 JUSTICE KAGAN: But that, again, suggests
24 that the rule that you're asking us to establish is --

1 is so easy to evade that why bother establishing it at
2 all. The fact that it's so easy to evade suggests that
3 this really is -- the question of how to define a recess
4 really does belong to the Senate.

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

13 JUSTICE KAGAN: I totally take your point on
14 that. But what I'm suggesting is they could just come
15 back, and by naming post offices, have the same effect,
16 that they would write it out of the -- of the
17 Constitution as much as you say this does.

18 GENERAL VERRILLI: Well, this does. This
19 does. And whether something else might or might not, I
20 guess we could try to fight that out if the Senate were
21 ever to do it. But I assume, if this Court were to hold
22 that pro forma sessions of this kind are not real and
23 they don't defeat the President's recess appointment
24 power, that maybe the Senate would think twice
25 before doing something like that.

1 JUSTICE ALITO: Well, what is significant is
2 whether they're available to confirm nominees; isn't
3 that right?

4 GENERAL VERRILLI: Yes.

5 JUSTICE ALITO: So suppose they say, instead
6 of no business will be conducted, no nominations will be
7 considered.

8 GENERAL VERRILLI: That would be a different
9 case because they would be --

10 JUSTICE ALITO: I know it would be a
11 different case, but --

12 GENERAL VERRILLI: -- they would be there --
13 they would be here. You know, they're not -- they're in
14 business for something.

15 JUSTICE ALITO: So what? The point of the
16 question is whether they're available to consider
17 nominations. So if they say, we'll do other business,
18 but no nominations will be considered, why isn't it
19 exactly the same for purposes of the Recess Appointments
20 Clause?

21 GENERAL VERRILLI: It's not because the
22 recess -- or the definition of recess is when no
23 business shall be conducted. And that's exactly what
24 the Senate said. If I may reserve the balance of my
25 time.

1 CHIEF JUSTICE ROBERTS: Thank you, General.
2 Mr. Francisco.

3 ORAL ARGUMENT OF NOEL J. FRANCISCO
4 ON BEHALF OF THE RESPONDENTS

5 MR. FRANCISCO: Mr. Chief Justice, and may
6 it please the Court:

7 The Advice and Consent Clause imposes an
8 important check on executive power. Each of our three
9 arguments preserves that check, and provides a separate
10 and independent basis for affirming the court below.

11 The government's position, in contrast,
12 would eviscerate that check, creating a unilateral
13 appointment power available for every vacancy at
14 virtually any time with advice and consent to be used
15 only when convenient to the President.

16 JUSTICE GINSBURG: But your argument would
17 destroy the recess clause. There would be -- under your
18 argument, it is totally -- totally within the hands of
19 the Senate to abolish any and all recess appointments.

20 MR. FRANCISCO: Yes, Your Honor. And that
21 reflects the fact that the recess appointment power is a
22 contingent one. It arises only when the Senate chooses
23 to trigger it by ending its session and beginning its
24 recess. So the Senate always has the power to prevent
25 recess appointments.

1 The Constitution, however, gives the
2 President corresponding powers. If the President thinks
3 that the Senate is being derelict in its duties, he can
4 convene an emergency session, and he can force the
5 Senate to consider his nominees.

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

14 JUSTICE ALITO: Can I ask you a variant of
15 the question that Justice Scalia asked General Verrilli?
16 Suppose we think that the language in the Constitution
17 is perfectly clear in some respect, but that there is a
18 200-year-old consistent practice, agreement by the
19 President, going back to Washington and by the Senate
20 that the language actually means something else. What
21 would we do in that situation?

22 MR. FRANCISCO: Your Honor, I think that the
23 language has to govern. And I would like to address the
24 issue about the consequences of a ruling in our favor in
25 this case. Of course, if you were to rule on the third

1 question presented, it wouldn't call into question any
2 past recess appointments at all, given the unprecedented
3 nature of the appointments at issue in this case.

4 But, frankly, if you ruled on the first two
5 questions, I don't think it would be particularly
6 disruptive in terms of calling into question the
7 decisions of past appointees.

8 Justice Sotomayor, to take the Article III
9 courts, for example, since 1960, there have only been
10 four potentially improper appointments to the Article
11 III court's recess appointments. Each of them served
12 approximately a year or less. Three were to the court
13 of appeals, one to a Federal district court judge in
14 1981.

15 JUSTICE KAGAN: Mr. Francisco, I'm sorry,
16 but could we go back to Justice Alito's question?
17 Because I really have the same issue with your argument.

18 You know, suppose that on one -- let's say
19 the "happens" argument, that yours is at least the most
20 natural reading of the statute, at least the way we
21 understand the word "happen" today, and maybe a
22 compelled reading, but the history points so much in the
23 other direction; and that that history brings with it a
24 whole set of practices and traditions and ways of
25 dealing with each other that has grown around a certain

1 interpretation of what "happens" means, right?

2 The idea that we would wake up one fine
3 morning and chuck all of that because all of a sudden we
4 happened to read the clause, I mean, that at least needs
5 to be defended.

6 MR. FRANCISCO: Yes, Your Honor, and I
7 believe that the relevant history actually supports us,
8 that is the history at the time of the founding.

9 JUSTICE KAGAN: I know, but now, you're --
10 you're again -- I mean, assume that there is a
11 200-year-old established practice, everybody has agreed
12 to it, but the text, when you really look at it, points
13 the other way.

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

21 These are liberty-protecting provisions that
22 protect the people from the government as a whole. So
23 if the Constitution is quite clear as to what those
24 structural protections are, but the political branches,
25 assuming for the sake of argument, have conspired to

1 deplete them, that is illegitimate, and it should be
2 rejected by this Court.

3 JUSTICE SOTOMAYOR: But that -- but that
4 assumes something, which is --

5 MR. FRANCISCO: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: -- let's go back to the
7 "happenings" words -- that is so unambiguous, that they
8 knew it was unambiguous, but 200-year history, starting
9 with President Washington, who filled two vacancies that
10 occurred before the Senate broke, to every -- almost
11 every President thereafter has done the same.

12 So why should we conclude that today's
13 understanding is the same as the understanding of the
14 Founding Fathers? Why don't we take their unbroken
15 practice as giving us that definition?

16 MR. FRANCISCO: Yes, Your Honor, a couple of
17 different responses. First of all, we dispute the
18 government's historical account of President
19 Washington's and the first four Presidents' position --
20 actions. But even putting that aside here, everyone who
21 actually spoke to and addressed the issue at the time
22 agreed that the text means precisely what it says,
23 including President Madison, who refused to make a
24 recess appointment to Andrew Jackson, the hero of the
25 War of 1812, precisely because the vacancy had arisen

1 during the Senate's session and in its recess.

2 Second, we also don't have an unbroken and
3 never-contested practice. Indeed, the Senate has
4 regularly resisted. In 1863, the Senate passed the Pay
5 Act, which prohibited pay to any appointee to a
6 preexisting vacancy. So you don't have a kind of
7 uniform -- uniformly-held practice.

8 JUSTICE KENNEDY: Let me ask you this:
9 Suppose that we were to conclude that the history is
10 simply too overwhelming to rule in your favor on the
11 "happens" problem. Could we still use history to say
12 that -- or overlook history to rule for you on the
13 inter/intra-session point?

14 MR. FRANCISCO: Yes, Your Honor.

15 JUSTICE KENNEDY: How do we do that?

16 MR. FRANCISCO: From the time of the
17 founding --

18 JUSTICE KENNEDY: Is it because of the
19 80 years or --

20 MR. FRANCISCO: I think it's longer than
21 that. From the time of the founding until, I would say,
22 1948, there was a uniform understanding that the recess
23 and the session as used in the clause were interchanging
24 periods. You were either in recess or you were in
25 session. And so an appointment made during the recess

1 lasted until the end of the next session.

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

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

17 JUSTICE KAGAN: Mr. Francisco, tell me if I
18 am wrong about this, but it seems to me that
19 intra-session recesses really only arose in the 1940s or
20 so, right? There is the period with Andrew Johnson and
21 Andrew Johnson used intra-recess -- intra-session
22 recesses to make a lot of appointments. Other than
23 that, intra-session recesses of more than 3 days that
24 are not Christmas simply do not exist.

25 So that assume that as intra-session

1 recesses came to be, Presidents started making
2 appointments in them.

3 MR. FRANCISCO: Let me address it this way.
4 I'm not sure I agree with the factual understanding,
5 Your Honor. There were intra-session recesses longer
6 than 3 days prior to 1867. I think there were some 10
7 of them prior to 1867, including 7 that were longer than
8 10 days. And bear in mind, yes, they were Christmas
9 recesses, but so were the ones at issue in this case.
10 They were Christmas recess appointments.

11 But I do take your point that intra-session
12 recess appointments did not become very common -- or I
13 should say it this way: Intra-session recess
14 appointments did not become very common until the -- really
15 they started with Truman, but then they broke off for a
16 long time with three Presidents, Johnson, Kennedy, and
17 Ford, making no mid-session recess appointments.

18 Then beginning in the Carter and the Reagan
19 Administrations is when they became very common and
20 particularly a very common way to do an end-run around
21 advice and consent.

22 JUSTICE BREYER: What happened in that
23 period at around 1970 is that's about the first time
24 that you have intra-session -- an intra-session recess
25 that's longer than an inter-session recess.

1 And so now if we look from 1970 on, that's
2 fairly common. And so all that's happening is that the
3 Presidents are appointing recess appointees during
4 periods where they are out for a longer time. Now, how
5 are we supposed to go and say that this thing --
6 thousands of people on the recess part -- is
7 unconstitutional?

8 I mean, it isn't unheard of. What about the
9 Due Process Clause? Does that easily cover the
10 language? Substantive due process.

11 What about the Interstate Commerce Clause
12 and the doctrine of -- you know, the implicit clause
13 there? I mean, it isn't unheard of that over time
14 language in the Constitution takes on a somewhat
15 different meaning.

16 MR. FRANCISCO: Yes, Your Honor.

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

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

24 (Laughter.)

25 MR. FRANCISCO: -- unless you are not going

1 to let me off the hook, Your Honor.

2 JUSTICE SCALIA: The two examples that
3 Justice Breyer gives are examples where we gave it a
4 meaning that was different from what it said.

5 (Laughter.)

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

8 MR. FRANCISCO: That's precisely correct,
9 Your Honor. And it reflects the fact that the Recess
10 Appointments Clause and the Appointments Clause and all
11 of the structural protections, again, are not meant to
12 protect the branches against one another.

13 JUSTICE BREYER: If I do place more
14 weight on this, should we -- I mean, I do believe and
15 agree with you to this point that this is basically a
16 matter of politics for other branches basically. That
17 doesn't help me resolve this. But it does lead over to
18 this possibility. Congress did pass the No Pay Act.
19 And then they passed the Pay Act. And in that Pay Act on this
20 "happen" part, which I think is the strongest -- very
21 strong for your side, but it defines the vacancy in
22 terms of 30 days prior to the recess.

23 And that would take care of most of these. You
24 see, if vacancy could be defined as something that
25 stretches, because Congress says it stretches in terms

1 of pay for 30 days.

2 MR. FRANCISCO: Right.

3 JUSTICE BREYER: What do you think of that?

4 And I would love to know what the SG thinks of it.

5 MR. FRANCISCO: Yes, Your Honor. A couple
6 of different responses. First, of course, the third
7 question calls into question no past recess appointees,
8 the third question.

9 JUSTICE BREYER: The third question, by the
10 way, just put in your mind, if you digress in your
11 answer, put in your mind what would have happened in
12 1830 if someone, when they had a 9-month recess, close
13 to 10 months, someone had the bright idea, well, you
14 live near Washington; go show up at wherever we are
15 holding our sessions and sit there for 5 minutes, and
16 we'll stop President Andrew Jackson from making recess
17 appointments. What would we be saying then?

18 MR. FRANCISCO: Sure. Well, I will put my
19 finger on that question and answer your first question
20 first as to the Pay Act in 1940. The Pay Act of 1940,
21 in our view, clearly repudiates the government's
22 inter-session view for the reason you put your finger
23 on. It ties pay to appointments being made either right
24 before or after the session ends.

25 So most mid-session recess appointees can't

1 get paid under the Pay Act.

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

10 Coming back to your historical example, I
11 think it reflects the fact that the Recess Appointments
12 Clause is not about timing, it's not a temporal issue;
13 it's about procedure. What it does is it creates a
14 contingent power that arises when the Senate decides to
15 trigger it.

16 Back at the time of the founding, the
17 senators wanted to trigger that power. It was important
18 to trigger that power, because when they were gone, the
19 President needed to be able to act unilaterally, unless
20 they wanted to be subject to a recall in emergency
21 sessions every time he needed to confirm nominees. They
22 obviously didn't want that.

23 Today, the situation has changed; not the
24 principle, but the historical context. And today, the
25 Senators can get back to Washington, D.C. very easily.

1 They are there for much less --

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

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

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

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

21 MR. FRANCISCO: Yes, Your Honor, but I --
22 first of all, I'd say I don't think you can really
23 separate it from the second question presented because
24 that's why -- it explains why it wouldn't have been much
25 of a problem. Very few vacancies would arise during a

1 3-day break, and so there wouldn't be that much of an
2 opportunity to make those kinds of appointments.

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

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

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

22 If I could turn back to the consequences --

23 CHIEF JUSTICE ROBERTS: Well, before you do
24 so, I mean, is the Senate's power, in your view, so
25 comprehensive that if they passed an order saying, we're

1 actually never in recess, people can be reached -- you
2 know, we can call people back. So for purposes of the
3 Recess Clause, we are never in recess.

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

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

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

21 On the third question presented, I think --
22 where you're deciding whether or not a session is a real
23 session, then, no, I don't think the Senate could do
24 that. I think that it's for the Court to look at the
25 Senate's journal to see what the facts are, and those

1 facts must be taken by this Court as undisputed.

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

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

12 MR. FRANCISCO: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: -- whether it got the
14 consent of the House or not?

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

22 JUSTICE SOTOMAYOR: Does it have to do that?
23 By what command does it have to do that?

24 MR. FRANCISCO: Sine die?

25 JUSTICE SOTOMAYOR: Yes.

1 MR. FRANCISCO: It does not --

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

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

8 JUSTICE SOTOMAYOR: Does it need the consent
9 of the House to do that?

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

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

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

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

25 Here, ruling on our -- in our favor on the

1 third question would, of course, call in the question no
2 past appointees. But I would like to --

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

10 MR. FRANCISCO: Right.

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

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

21 The difference is not in principle; it's in
22 historical context. At the time of the framing, they
23 wanted to trigger the recess appointments power because
24 when they left during long periods of time, they wanted
25 the President to be able to act unilaterally since it

1 was very difficult for them to get back. And if they
2 didn't trigger the power, the only way the President
3 could act unilaterally would -- the only way the
4 President could confirm nominees would be by convening
5 an emergency session. Highly inconvenient.

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

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

20 And so if you're arguing that it only
21 applies at the end of the session, doesn't that depend
22 on the assumption that they never thought about the
23 possibility that there would be a lengthy break in the
24 middle of the session?

25 MR. FRANCISCO: Your Honor, it is possible

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

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

22 JUSTICE KAGAN: Mr. Francisco, can I ask a
23 question about the second question presented, the
24 "happens" question?

25 MR. FRANCISCO: Yes, Your Honor.

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

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

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

20 MR. FRANCISCO: Sure.

21 JUSTICE KAGAN: -- lapsed.

22 MR. FRANCISCO: Well, Your Honor, I actually
23 think the word "happens" had the same meaning then as it
24 does now, which is why at the time of the framing
25 everyone who actually studied the issue -- Madison,

1 Hamilton, both of the first two attorneys general,
2 Edmund Randolph and Charles Lee -- agreed that it meant
3 what it said, as did even --

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

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

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

22 I don't know what the OED examples that
23 Justice Kagan referred to were, but I bet they -- they
24 used "happen" followed by an infinitive, and I think we
25 still use it that way.

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

4 (Laughter.)

5 JUSTICE BREYER: Actually, I think I
6 remember what they were --

7 JUSTICE KAGAN: -- nobody would say --

8 JUSTICE BREYER: -- and they were 1483 and
9 1490-something, and then there was an asterisk that said
10 "obsolete."

11 (Laughter.)

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

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

20 JUSTICE KENNEDY: Well, the Constitution as
21 it -- as it first was has now been amended and it is no
22 longer a part of the Constitution, with reference to
23 appointment of Senate, uses the word "vacancy" in much
24 the same way as the clause we're discussing here, and I
25 think favors your position, because if a vacancy happens

1 by resignation during the recess of the legislature then
2 the governor can make the appointment. And you
3 certainly wouldn't think that that could happen over 3
4 days --

5 MR. FRANCISCO: Exactly, Your Honor --

6 JUSTICE KENNEDY: -- occur over -- I should
7 say occur over 3 days.

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

15 So, yes, that further supports our position
16 on that.

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

20 But the -- the practice, and in particular,
21 the practicalities, because you say, well, the President
22 can make an acting appointment, make a recess
23 appointment even. I mean -- you know, they have much
24 less authority, somebody appointed in that way, much
25 less than a person who's been confirmed by the Senate.

1 So if the government won't grind to a halt, it still
2 faces a problem.

3 MR. FRANCISCO: And Your Honor --

4 JUSTICE BREYER: What do you want to say
5 about that?

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

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

20 I would, though, like to address the
21 practicality issue. I talked about how there have only
22 been four recess appointments to the Article III courts
23 that are potentially invalid since 1960. I likewise
24 don't think, if you were to rule in our favor on the
25 first two questions, that it would be particularly

1 disruptive to the Executive Branch either.

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

18 I think this constellation of issues
19 probably explains why this is the first time this issue
20 has reached this Court in 225 years. This is not to say
21 that a ruling in our favor on the first two questions
22 wouldn't have any past impact. It would undoubtedly
23 have some. But as this Court's decisions in cases like
24 Chadha and Booker and Blakely make clear, this Court has
25 never shied away from enforcing the strictures of the

1 Constitution simply because it could have some impact on
2 prior cases.

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

8 I am happy to answer any additional
9 questions that Your Honors may have.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Estrada.

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

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

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

22 JUSTICE KAGAN: Mr. Estrada, you said in
23 your brief that that was true within wide limits. What
24 are the wide limits?

25 MR. ESTRADA: This is -- this is all about

1 how the Senate chooses to arrange its affairs, Justice
2 Kagan, under the Rules of Proceedings Act.

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

8 The only possible offer here that the
9 Solicitor General has as to how the Constitution could
10 have been violated by the actions of the Senate in
11 arranging its own affairs is the notion that this has
12 invaded the purported recess appointments power of the
13 President.

14 And the reason, as we say in our brief, why
15 that is completely insubstantial is because, as the
16 Solicitor General recognizes in the closing two pages of
17 its brief, the Senate by the design of the Constitution,
18 the Appointments Clause, the primary method of
19 appointment, has an absolute veto over nominations.

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

1 subsidiary power that only arises if the government --
2 if the Senate, excuse me, chooses to recess.

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

7 MR. ESTRADA: If the Senate says, we're
8 never in recess, and the Senate then is not in recess so
9 that it can exercise the duties of its office as it
10 does here, yes, it would be. If the Senate says, we're
11 checking out and going to Hawaii, we'll never again be
12 in Washington, Kona is very nice this time of year, that
13 would not be permissible, because, A, the Adjournment
14 Clause requires the consent of the House for the Senate
15 to be not only gone for 3 days but to be in a different
16 place.

17 And -- and second -- you know, the Senate
18 cannot leave -- you know, the chamber, and -- other than
19 with the -- with the consent of the House. And maybe if
20 the Senate has effectively given up -- you know, the
21 business of legislating, in that case, maybe the
22 President could say that it is, quote, a "recess."

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

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

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

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

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

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

20 MR. ESTRADA: Right.

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

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

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

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

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

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

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

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

4 MR. ESTRADA: In 1903.

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

7 MR. ESTRADA: Yes, constructive recess.

8 JUSTICE BREYER: Yes, yes.

9 MR. ESTRADA: Well --

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

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

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

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

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

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

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

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

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

1 the time.

2 But this is the cockeyed way of going about
3 the instruments of the Constitution. There is no power
4 in the Constitution to use the Recess Appointments
5 Clause to overcome the opposition of the Senate to the
6 President's nominees. And for all that we hear about
7 today, which has to do with how the heaven will fall,
8 and the parade of horrors, there is no parade, and
9 there is no horrible.

10 The only thing that will happen is that the
11 President, heaven help us, will be forced to comply with
12 the advice and consent that the appointments power --
13 excuse me -- the Appointments Clause actually calls for.
14 That was not viewed as an evil by the Framers. That was
15 what the Framers unanimously agreed was going to be the
16 principal means for appointments for the principal
17 officers of the union.

18 JUSTICE SOTOMAYOR: Mr. Estrada --

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

23 MR. ESTRADA: Justice Ginsburg, that is a
24 very interesting and somewhat difficult question. On
25 the facts of this case, there is a substantial question,

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

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

17 Why didn't he? Because by waiting until the
18 convening of the first session -- of the second session
19 of the 112th Congress, by making an appointment on
20 January 4th instead of the morning of January 3rd, he
21 gives an extra year to his appointees to serve. That
22 shows that this is, indeed, the bottom of the slippery
23 slope on the Recess Appointments Clause.

24 It is a complete abuse of the process. It
25 is being used for no other purpose than to overcome the

1 Senate opposition or the Senate disinclination to agree
2 with the President's nominations.

3 What the Framers contemplated in coming up
4 with a joint power of appointment was you have to act
5 jointly. You have to play nice. And in a country of
6 300 million people, when the President wants a nominee
7 and the Senate does not agree, it is always possible for
8 the President to come up with another nominee who is
9 even more qualified and acceptable to the Senate.

10 The key here is acceptable to the Senate.
11 He has to be able to proffer someone to the Senate that
12 the Senate is willing to engage in a joint power of
13 appointment.

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

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

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

24 JUSTICE SOTOMAYOR: So what do you need --
25 why does the President have to adjourn the House in your

1 example?

2 MR. ESTRADA: No, I think --

3 JUSTICE SOTOMAYOR: If the Senate votes
4 tomorrow to recess --

5 MR. ESTRADA: Yes.

6 JUSTICE SOTOMAYOR: -- can the President
7 appoint, at least in your view, any vacancy that occurs
8 during that recess?

9 MR. ESTRADA: If the Senate has been
10 recessed without date so that the session of the Senate
11 is over, even if the President, under Article II,
12 chooses to leave the House in session --

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

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

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

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

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

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

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

22 And if the House in its own judgment thinks
23 that the Senate is sufficiently available to the House
24 in our bicameral system so that it -- so that it has been
25 full compliance with the Adjournments Clause, it is

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

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

12 CHIEF JUSTICE ROBERTS: Yes.

13 MR. ESTRADA: -- makes very clear -- it's
14 also in our appendix -- that any business may
15 conducted - may be conducted at any time, without notice,
16 by unanimous consent.

17 And so that effectively, what we have here
18 is merely an announcement by the Senate that between
19 December 17th and January 23rd, only unanimous consent
20 business would be agreed to.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 General Verrilli, 6 minutes.

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

24 ON BEHALF OF THE PETITIONER

25 GENERAL VERRILLI: Thank you,

1 Mr. Chief Justice.

2 Let me begin with a couple of points on
3 intra-session recesses. With respect to the question
4 that Justice Alito raised, it would have been perfectly
5 familiar to the Framers that a legislative body could
6 take an intra-session recess. Jefferson's parliamentary
7 manual written while he was Vice President and presiding
8 over the Senate specifically refers to recesses by
9 adjournment that occur within a session and the session
10 resumes when they are over.

11 The adjournment clause itself contemplates
12 the need for approval by the other branch for a period
13 longer than three days during the session.

14 I think it's difficult to imagine that if,
15 as Justice Alito's hypothetical suggested, that the
16 Senate had in the first years under President Washington
17 decided to take a two-month, intra-session break, that
18 President Washington wouldn't have been able to staff
19 the offices of the fledgling republic using the recess
20 appointment power.

21 JUSTICE ALITO: Well, if we agree with you
22 on the first question, then there needs to either
23 be a number or a functional test. And I don't know
24 where the number would come from and I don't know how
25 the functional test would play out, so maybe you could

1 say just a word about that.

2 GENERAL VERRILLI: We think the number
3 should -- should be the number in the Adjournments
4 Clause, 3 days or less. Now, Presidents have exercised
5 restraint and there haven't been recess appointments in
6 periods below 10 days, but we think that would be the
7 line. Now --

8 JUSTICE ALITO: The presence
9 of that in the Adjournments Clause but the absence of
10 any number in the Recess Appointments Clause, how do you
11 explain that?

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

20 Now, with respect to the history on
21 intra-session recess appointments, really if you look at
22 the congressional directory, which is a document that we
23 cite in our brief, and you just look at the column that says
24 intra-session recesses, you will see page after page of
25 blank space until you get to the Civil War era when

1 intra-session recesses become more frequent.

2 And intra-session recess appointments really
3 just precisely parallel the increasing use by the Senate
4 of intra-session recesses.

5 CHIEF JUSTICE ROBERTS: And you argue that
6 the Senate sort of acquiesced in that and everybody's
7 come together, but what would you expect a Senator to do?

8 GENERAL VERRILLI: Well, if they --

9 CHIEF JUSTICE ROBERTS: You know, the
10 President appoints somebody during a recess contrary to
11 the Respondent's view, what's the Senator who objects to
12 that supposed to do?

13 GENERAL VERRILLI: Well, a couple of things
14 about that, Mr. Chief Justice. The Pay Act, of course,
15 was first enacted in this period, in the 1860s, when the
16 first intra-session recess appointments occurred. The Pay Act,
17 even in its original form never said -- and since,
18 never said anything about trying to restrict
19 intra-session appointments.

20 If the Congress felt that these were
21 improper, they could have done what they did in the
22 Tenure of Office Act and passed a statute of making it a
23 crime for somebody to take one of these appointments.
24 But they didn't do anything like that.

25 CHIEF JUSTICE ROBERTS: Well, you would

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1 object to that, wouldn't you?

2 GENERAL VERRILLI: Of course.

3 CHIEF JUSTICE ROBERTS: On the same grounds
4 that you're objecting here.

5 GENERAL VERRILLI: Well, we would. But in
6 terms of --

7 CHIEF JUSTICE ROBERTS: Well, then that's
8 not something that is effective for the Senate to do if --

9 GENERAL VERRILLI: But in terms of --

10 CHIEF JUSTICE ROBERTS: -- you think it's
11 unconstitutional.

12 GENERAL VERRILLI: But in terms of an expression
13 of their disagreement as opposed to acquiescence it
14 would certainly be a question of disagreement, and it
15 didn't happen.

16 CHIEF JUSTICE ROBERTS: Well, that'll show them. The Senate
17 says we don't agree with your recess appointment, and you
18 say, well, that's too bad, the appointee is still in
19 office.

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

22 CHIEF JUSTICE ROBERTS: Well, some of the Senators did --
23 Senator Byrd --

24 GENERAL VERRILLI: -- senators --

25 CHIEF JUSTICE ROBERTS: -- famously objected

1 to the President's assertion of that power.

2 GENERAL VERRILLI: Yeah, but he famously
3 objected to it, Mr. Chief Justice, by saying that the
4 intra-session recess ought to be 30 days or longer, not
5 that intra-session recesses are inappropriate as a
6 matter of constitutional power.

7 So I actually think that is just haggling
8 about the length of the recess, not about the existence
9 of the power.

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

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

14 GENERAL VERRILLI: Well, the Senator who
15 objects can say whatever the Senator wants, but we don't
16 have a historical record of objection. We have a
17 historical record of acquiescence.

18 CHIEF JUSTICE ROBERTS: But suppose the
19 Senator says, look, I object to that, I think it's
20 unconstitutional, but I'm not going to -- what can I do?
21 The only think you do is impeach the President,
22 right, for violating the Constitution. And he says it's
23 not worth it for the -- one of the officers on the NLRB --

24 GENERAL VERRILLI: Well, if the Congress as
25 a body thought that these were inappropriate they could

1 take legislative action to try to limit the President's
2 authority, and they just, they never have.

3 CHIEF JUSTICE ROBERTS: Well, but you say
4 that action would be totally ineffective?

5 GENERAL VERRILLI: Well, we agree on
6 the -- we certainly agree on the criminalizing point,
7 but in terms of the Pay Act, for example, they just
8 never in all their -- in their original consideration of
9 the Pay Act and subsequent, they never tried to
10 address this.

11 Now if I could turn to the --

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

15 GENERAL VERRILLI: And, yes, Your Honor, and
16 of course -- and that's an individual objecting and it's
17 not the Senate objecting.

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

21 CHIEF JUSTICE ROBERTS: Take a few more
22 minutes.

23 (Laughter.)

24 GENERAL VERRILLI: I was thinking the same
25 thing, Your Honor.

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1 There were a couple of committee reports but
2 I believe those were on the "happen" issue, and let me
3 turn to that, if I could. Now Your Honor had pointed
4 out the number of - on happens, the number of appointments. As
5 I said, don't take that chart as comprehensive. As we said
6 in our brief, it's not; we think there are many more,
7 and of course 39 Presidents have made those
8 appointments.

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

17 JUSTICE BREYER: Yeah, but I'm focusing on
18 30 days and the reason I'm doing that is this seems to
19 me, hypothetically at least, a real matter for the
20 political branches to resolve among themselves.

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

25 GENERAL VERRILLI: I guess what I --

1 JUSTICE BREYER: So I want to get your view
2 on that.

3 GENERAL VERRILLI: Yes, of course.

4 And what I would point out by analogy also
5 is that there is another provision in the Pay Act, the
6 very same statute, that says so long as a nomination is
7 pending, even if the vacancy arose more than 30 days,
8 that's the same expression of Congress's views about
9 what's appropriate. What they care about is the chance
10 to exercise their advice against the --

11 JUSTICE SCALIA: Well, that was that Senate.
12 I mean, that's not the Senate that is sitting now. You
13 are attributing the views of one Senate to the Senate
14 over -- over time.

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

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

20 GENERAL VERRILLI: Well, I think it, as I
21 said, I think there is an equilibrium here and the
22 30 days doesn't fully capture it.

23 And let me just talk about that if I could.

24

25 CHIEF JUSTICE ROBERTS: Briefly.

1 GENERAL VERRILLI: Yes, thank you,
2 Mr. Chief Justice, briefly.

3 The vast majority of appointees are
4 submitted for advice and consent. That was true
5 historically; it's true now. The vast majority of
6 recess appointees are subsequently confirmed. So it's
7 just not the case that this is an end-run around the
8 advice and consent role of the Senate.

9 And there are powerful reasons, of course,
10 why Presidents do that. They don't want to have
11 temporary appointments that they have got to then deal
12 with vacancies again, and they don't want to
13 unnecessarily create inter-branch friction.

14 The real problem, I would submit here, is
15 that if you go with Respondents on the pro forma issue
16 or under the -- on the two underlying issues that the D.C.
17 Circuit ruled on, you really are writing the recess
18 appointment power out of the Constitution, and that's
19 antithetical to the liberty-enhancing properties of
20 separation of powers that Madison described in Federalist
21 51, because ambitions should counteract ambitions. They
22 shouldn't disarm one side.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 The case is submitted.

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