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Peter E. Quint

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IMPLICATIONS OF THE PRESIDENT'S APPOINTMENT POWER

PETER E. QUINT*

I. THE APPOINTMENT OF JUDGES

When Robert Bork died recently, the obituaries focused primarily on the Senate's rejection of his nomination to become an Associate Justice of the Supreme Court.[1] Although there may have been several grounds for the negative votes of individual Senators, certainly many of those who voted against Bork were animated by their disagreement with positions that they assumed Bork would take in deciding cases in the Court.[2] Prominent among these positions was Bork's rejection of capacious rights of privacy and equality, which Bork viewed as illegitimate products of judicial construction, as well as Bork's narrow view of the freedom of expression, a position that he had advanced in a well-known law review article.[3] In 1963, Bork also published an article criticizing the public accommodations section of the proposed Civil Rights Act of 1964—on the grounds that it might interfere with the liberty of some discriminators—a view that he later sought to characterize as a thought experiment.[4]

Commentators, then as now, asserted that rejections of Supreme Court nominees on such "ideological" or "political" grounds were rare or unprecedented in the Supreme Court's history, and some claimed or implied that rejection of a judicial candidate by the Senate on such grounds was improper or at least unwise. According to this view, the Senate should generally "consent" to a President's judicial nomination unless there are

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* Jacob A. France Professor of Constitutional Law, University of Maryland Francis King Carey School of Law. I am grateful to Mariana Minaya for valuable research assistance.

1. *See, e.g.*, Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES, Dec. 19, 2012, at A1.

2. *Id.*

3. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971).

4. Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21; Bronner, *supra* note 1.

"neutral" disqualifying factors such as the nominee's lack of judicial ability or past financial or other improprieties.[5]

Yet whatever history may tell us about the frequency or infrequency of opposition to judicial nominees based on "political" or "ideological" reasons,[6] it seems clear—as several eminent commentators have pointed out—that there is no argument of substance against the propriety of senatorial opposition based on such grounds.[7] In the choice of members of the federal judiciary, including Supreme Court Justices, the President and the Senate must act as collaborators. According to the constitutional text, the Senate should give the President "advice"[8]—that is, the Senate (or certain chosen members) should give the President an idea of the persons (or kinds of persons) who would be particularly acceptable to the Senate.[9] The President then makes the appointment subject to the approval—the "consent"—of the Senate.[10] There is certainly nothing in the text that suggests that either the President or the Senate should ultimately play the superior role in this process, as both must approve the choice. Moreover, there is no argument on principle for such a view. The President and the Senate are collaborating in the choice of a member of the third branch. That branch may obviously have an impact on the work of both the President and the Senate in the future, but it is an independent branch not

5. *See, e.g.*, Orrin G. Hatch, *Save the Court from What*?, 99 HARV L. REV. 1347 (1986) (reviewing LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985)) (arguing that the Senate should not employ "political considerations" in the judicial confirmation process); *see also* Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, 100th Cong. 2916 (1987) (statement of Professor Paul M. Bator) (arguing that the Senate should adopt "a heavy presumption in favor of the President's nominee if that person possesses outstanding professional, intellectual and moral qualifications for the office of Supreme Court Justice").

6. For varying views on this history, *compare* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 79–80, 86–92 (1985) (citing examples of Supreme Court nominees rejected by the Senate because of their "political, judicial, and economic philosophies"), *with* David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990) (seeking to cast doubt on several of Tribe's historical examples); *see also* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

7. *See, e.g.*, Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 660 (1970) (arguing that Senators should take into account the "policy orientations" of judicial nominees); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?* 101 HARV. L. REV. 1202, 1207 (1988) (declaring that the Senate may reject a Supreme Court nominee "on the basis of statesmanship, prudence, common sense, and politics").

8. U.S. CONST. art. II, § 2, cl. 2.

9. TRIBE, *supra* note 6, at 80–81.

10. U.S. CONST. art. II, § 2, cl. 2.

within the actual purview of either of the departments that are collaborating in the choice.[11]

President Reagan's nomination of Robert Bork was clearly a provocation.[12] It seems undeniable that Reagan chose this radical jurist for precisely the same reasons of "ideology" and "politics" that (in reverse) galvanized the enraged senatorial opposition. Reagan could well have chosen a more moderate candidate—as indeed he ultimately did in nominating Judge Anthony Kennedy after the failure of Bork's nomination.[13] Given the President's choice of Bork for ideological and political reasons, there is no substantial argument that the Senate is in any way disabled from employing precisely the same sorts of criteria in accepting or rejecting the nomination.[14]

The real problem for the Senate in such cases is an intensely practical one. In making the initial decision, the President has the advantage of a certain amount of secrecy: the President does not have to elaborate at length on the ideological or political reasons that animated the nomination. As Reagan did in announcing Bork's nomination, the President can fall back on anodyne pronouncements praising the nominee's qualifications. Thus Reagan noted his "deep respect for [Bork's] extraordinary abilities," and he asserted that "Judge Bork is recognized as a premier constitutional authority" whose work reflects his "outstanding intellect and unrivaled scholarly credentials."[15] Moreover, "[o]n the bench, he has been well prepared, evenhanded, and openminded."[16] Only in remarking that Judge Bork was "widely regarded as the most prominent and intellectually powerful advocate of judicial restraint" did President Reagan even allude to what were certainly the animating reasons for his choice of Bork.[17]

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11. Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J. L. & PUB. POL'Y 47, 52 (2010); Black, *supra* note 7, at 660.

12. Monaghan, *supra* note 7, at 1209.

13. Before settling on Kennedy, President Reagan nominated Douglas H. Ginsburg, a federal appeals court judge and a former Harvard Law School professor, whose nomination was swiftly withdrawn after it became known that he had smoked marijuana. Bronner, *supra* note 1.

14. Black, *supra* note 7, at 660.

15. Ronald Reagan, Remarks Announcing the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States, 1 PUB. PAPERS 736 (Jul. 1, 1987).

16. *Id.*

17. *Id.* In a bitter statement issued after the failure of Bork's nomination, President Reagan tipped his hand a bit more openly. After criticizing the Senate for descending into politics and distorting the confirmation process, President Reagan declared that his next nominee "will share Judge Bork's belief in judicial restraint . . . . He or she will share my belief that the courts of law must administer fair and firm justice to criminals and must show compassion to the victims of crime. I will seek a nominee who understands the dangers of judicial license and leniency in the courtroom." Ronald Reagan, Statement on the Failure of the Senate to Confirm the Supreme

In contrast with the President's opportunity to preserve a pose of statesmanlike demeanor, the opponents in the Senate must necessarily expose the "ideological" and "political" nature of their opposition in the hearings and debates. Thus, the President may seem neutral and statesmanlike and the Senate may seem to have descended into the morass of politics—whereas, in reality, the considerations on both sides are likely to have been of precisely the same nature.

One might argue that vigorous Senate opposition may injure the judiciary by making it difficult to confirm any judges. But this is not an argument for presidential supremacy in this process. Rather, it is an argument for presidential accommodation to some extent of the wishes of the Senate—as indeed ultimately did occur in the President's appointment of Kennedy.

So I would conclude that it is completely appropriate for members of the Senate to consider their approval or disapproval of what they think will be the judicial opinions of a nominee in deciding whether that nominee should be confirmed. The President has taken this "ideological" aspect into account and so may the Senate.

II. THE APPOINTMENT OF EXECUTIVE BRANCH OFFICERS

As many commentators (and Senators) agree, the situation is at least somewhat different with respect to appointments of executive branch officers.[18] In these cases, the President is appointing members of the executive branch itself. Those officers will assist the President in "tak[ing] care that the laws be faithfully executed"[19] and in carrying out whatever direct powers the President may appropriately exercise under Article II. In most instances, the President has been elected by the people, and the candidate of the opposition party has been defeated. These results give significant democratic legitimacy to the President's decisions on how the Executive's constitutional and statutory discretion should be exercised; moreover, the President often "receives the credit or blame" for the performance of the executive branch.[20] Thus, many Senators are willing to

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Court Nomination of Robert H. Bork, 2 PUB. PAPERS 1230 (Oct. 23, 1987). Thus Reagan pretty clearly implied that he sought Supreme Court Justices who would seek to undo (or at least qualify) important aspects of the Warren Court legacy. President Reagan made similar statements on several occasions during the course of the Bork Controversy. *See, e.g.*, Remarks at a White House Briefing on Proposed Criminal Justice Reform Legislation, 2 PUB. PAPERS 1192, 1194 (Oct. 16, 1987).

18. Black, *supra* note 7, at 659–60.

19. U.S. CONST. art. II § 3.

20. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 948 (2013).

accord some degree of deference to the President's choice of the executive personnel who would best implement the President's views. This certainly does not mean that the Senate is obligated to accept, without scrutiny, any nominee proposed by the President. But it does indicate—I believe—that a certain amount of extra weight should be accorded to the fact that the President has chosen a particular individual to assist in implementing the President's discretion on general goals and specific policy. The result is that Senators might appropriately accord a degree of deference to executive branch appointments by the President—a deference which, as shown above, is by no means obligatory in the case of the President's nominations to the federal judiciary.[21]

This view also suggests that, in the case of presidential appointments of executive officers, the use of procedural devices in the Senate to avoid a senatorial vote of approval or disapproval is particularly inconsistent with constitutional implications of the President's appointment power.[22] If a President's nominee for an executive position is voted down in the Senate, the structural value of having consistency in the executive branch, according to the President's views, meets the counterpoise of certain democratic values in the Senate's vote. But if the nominee is blocked by the minority's use of a filibuster or other device, the Senate's democratic values fall away as a counterpoise to the structural value of having the President choose his or her colleagues in the executive branch. Thus, the use of the filibuster against executive branch nominees seems less legitimate than its use in the case of legislation, in which the structure of the system provides no particular justification for or against any proposed statute.

III. THE *NOEL CANNING* CASE

Up to this point, the discussion on judicial and executive appointments has remained in the realm of what might be called "constitutional morality"—that is, thoughts on how members of the Senate should act, or

21. Some observers advance a more absolutist version of this position, according almost complete deference to the President's choice of executive branch officers. Charles Black, for example, declares: "[T]here is a clear structural reason for a Senator's letting the President have pretty much anybody he wants [in an executive office], and certainly for letting him have people of any political views that appeal to him." Black, *supra* note 7, at 660. In my opinion, however, this view goes too far. Structural considerations justify a degree of deference in this area, but a Senator must remain free to oppose executive branch nominees whose views lead the Senator to believe that the nominee's presence in the executive branch would be damaging to important values.

22. *See, e.g.*, Stephenson, *supra* note 20, at 949 (condemning the use of procedural devices in the Senate to block the appointment of senior executive branch officials).

might appropriately act, in voting on presidential appointments. But, up to this point, the discussion has not implicated the kind of "constitutional law" that can be enforced by courts.

Yet, a recent decision concerning recess appointments to the National Labor Relations Board ("NLRB"), *Noel Canning v. NLRB*,[23] suggests that, in some areas, these principles may also have a bearing on judicial review.

The background story of *Noel Canning* begins with the efforts of Republican Senators to employ procedural devices for the purpose of preventing a Senate confirmation vote on one or more prospective members of the NLRB nominated by President Obama.[24] These obstructive measures may have represented opposition to the policies that these Senators thought the nominees might pursue on the Board, or the measures may have reflected hostility toward the entire purpose and effect of the National Labor Relations Act. At approximately the same time, Republican Senators employed procedural devices (a form of filibuster) to prevent a vote by the Senate on the appointment of Richard Cordray, a former Attorney General of Ohio, as Director of the new Consumer Financial Protection Bureau, established by the Dodd-Frank Act.[25] The motivation here was pretty clearly to achieve the de facto "repeal" of portions of the legislation establishing the Consumer Financial Protection Bureau, by refusing to permit an effective Director to be appointed.[26]

Against the background of these attempts to impede the President's authority over the execution of federal law—and, it may well be to impede the federal law itself—President Obama appointed three members of the

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23. 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

24. *See* Stephenson, *supra* note 20, at 943 (noting that the "Senate minority refused to allow a confirmation vote" on nominees for the NLRB).

25. John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

26. *Id.* This issue was particularly important because significant authority under the Dodd-Frank Act, such as the power to regulate "nonbank" financial companies, may only be exercised if the Bureau has a Director. *See* Alexander M. Wolf, Note, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 FORDHAM L. REV. 2055, 2057, 2060–61 (2013); *see also* Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25 (noting that the Bureau "cannot legally exercise its full statutory authority . . . without a director"). According to Senate Majority Leader Harry Reid, this was "'the first time in Senate history [that] a party blocked a qualified nominee solely because it disagrees with the existence of an agency that was created by law, through a bipartisan vote.'" Cushman, *supra* note 25. In a remarkable retrospective statement, one Republican senator candidly acknowledged the Republicans' motives for these maneuvers: "'Cordray was being filibustered because we don't like the law' that created the consumer agency, said Senator Lindsey Graham, Republican of South Carolina. 'That's not a reason to deny someone their appointment. We were wrong.'" Jonathan Weisman and Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1.

NLRB by what he considered to be a "recess appointment" under Article II, Section 2, Clause 3 of the Constitution.[27] This provision authorizes the President to fill a vacancy "that may happen during the recess of the Senate."[28] Such an appointment lasts only until "the end of [the Senate's] next session," and it does not require the consent of the Senate.[29]

A litigant before the NLRB challenged the participation of these three members of the Board, claiming that they were not properly appointed under the Recess Appointments Clause—with the result that the Board lacked a quorum and its decision in the specific case was a nullity.[30] Indeed, the Supreme Court had recently held that the National Labor Relations Act requires a quorum of three members for the Board and its adjudicating panels to act.[31] Since the NLRB possessed only two members without the three recess appointees, invalidation of the recess appointments could bring the work of the Board to a standstill.

In a unanimous decision in January 2013, a three-judge panel of the Court of Appeals for the District of Columbia held that the recess appointments were invalid.[32] In an opinion by Chief Judge David B. Sentelle, the Court found that these appointments were not actually made during a "recess," and two of the three judges also found that the vacancies filled by these appointments did not "happen" during a "recess" either.

In an elaborate opinion based on a close textual interpretation of the word "recess"—read against the constitutional history of the founding period—Chief Judge Sentelle held that Article II, Section 2, Clause 3 authorized appointments only during the "recess" that occurred between congressional sessions (the "int*er*session" recess), and not during a "recess" that the Senate might take within the period of a session (an "int*ra*session" recess).[33] Accordingly, the court found that the appointments were void because they were not made during the requisite "intersession" recess.[34] Moreover, writing for a majority of two of the three judges, Sentelle found that the text required that positions filled under the Recess Appointments

27. Tribe, *supra* note 26. On the same day, President Obama announced he was making a "recess appointment" of Richard Cordray to be Director of the new Consumer Financial Protection Bureau. *Id.*

28. U.S. CONST. art. II § 2, cl. 3.

29. *Id.*

30. Noel Canning v. NLRB, 705 F.3d 490, 493, 498–99 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

31. New Process Steel v. NLRB, 130 S. Ct. 2635, 2638 (2010).

32. *Noel Canning*, 705 F.3d at 499.

33. *Id.* at 505–06.

34. *Id.* at 506–07.

Clause must first have become vacant during an intersession recess—a requisite that was also not fulfilled in this case.[35]

Because the *Noel Canning* decision could well impose a significant limitation on presidential authority, the Obama Administration sought review of the decision in the Supreme Court of the United States, and the Court granted certiorari in June 2013.[36] Perhaps viewing the judgment of the D.C. Circuit Court as having limited reach (and invoking earlier decisions upholding recess appointments), two of the NLRB members involved in the *Noel Canning* decision, Sharon Block and Richard Griffin, Jr., continued to function as Board members even after *Noel Canning* was decided by the D.C. Circuit.[37] In spring and summer 2013, however, two additional federal courts of appeals found that President Obama's recess appointments to the NLRB were unconstitutional, in opinions that did not differ in basic approach from the opinion of Judge Sentelle in *Noel Canning*.[38]

Finally, in July 2013, a form of temporary political truce was achieved—rather surprisingly—when the contending political parties in the Senate entered into an agreement that allowed a Senate vote on President Obama's NLRB candidates, as well as votes on certain other executive

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35. *Id.* at 512. As a corollary of these propositions, the court also concluded that, under the Recess Appointments Clause, "the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose." *Id*. at 514.

In order to prevent recess appointments by President Obama, Republican senators had sought to conduct *pro forma* sessions during the Senate's vacation, so that it could be argued that there had been no "recess." (Democrats had done the same thing, for the same reason, when George W. Bush was President; Stephenson, *supra* note 20, at 945 n.14). The arguments of the parties in *Noel Canning* were focused on whether these *pro forma* sessions would avoid the application of the Recess Appointments Clause. By the breadth of its decision in this case, however, the D.C. Court of Appeals superseded (or at least avoided) these narrower arguments.

36. *Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3702 (U.S. June 24, 2013) (No. 12-1281). In addition to the questions squarely presented in Judge Sentelle's opinion, the Court also asked for argument on the effect of the Senate's *pro forma* sessions on the President's authority under the Recess Appointment Clause. *Id*.

37. Corey Boles and Kristina Peterson, *Deal Pulls Senate from Brink*, WALL ST. J., July 16, 2013, at A1; Sam Hananel, *Obama's Labor Board Picks Face Opposition*, WASH. POST (May 16, 2013) http://articles.washingtonpost.com/2013-05-16/local/39310203_1_senate-republicans-recess-appointments-senate-health; Peter M. Shane, *The Future of Recess Appointments in Light of Noel Canning v. NLRB*, BLOOMBERG LAW, http://about.bloomberglaw.com/practitioner-contributions/the-future-of-recess-appointments-in-light-of-noel-canning-v-nlrb/ (last visited Sept. 28, 2013).

38. NLRB v. Enter. Leasing Co., 722 F.3d 609 (4th Cir. 2013) (finding invalid President Obama's recess appointments of NLRB Members Sharon Block, Richard Griffin Jr., and Terrence Flynn, because these appointments were intrasession, rather than intersession, appointments); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013) (finding invalid President Obama's recess appointment of NLRB Member Craig Becker, because the appointment was an intrasession, rather than an intersession, appointment).

branch nominees, including Richard Cordray.[39] Cordray was immediately confirmed,[40] but NLRB members Block and Griffin, whose nominations were at issue in *Noel Canning*, were casualties of this agreement. President Obama withdrew their nominations for regular (Senate-confirmed) appointments, and two other members were nominated and confirmed in their place.[41]

How do these developments affect the status of the *Noel Canning* case? Certainly, NLRB members Block and Griffin no longer have any claim to office after the withdrawal of their nominations by President Obama and Senate confirmation of their successors, in July and August 2013. But the precise issue in *Noel Canning*—whether Block, Griffin and Flynn were legitimately in office (and thus whether a quorum was present) in February 2012 when the NLRB order was issued against Noel Canning—does not seem to be affected by these later developments.

Thus, it seems that Judge Sentelle's opinion in *Noel Canning* still stands and will most likely be considered by the Supreme Court in the October 2013 term.[42] Accordingly, it seems worthwhile to return to Sentelle's opinion and reconsider it on its own terms. Indeed I think it is particularly important to do this because I believe that the technique of Sentelle's opinion raises fundamental problems. I think it is very questionable in a case like this to employ Sentelle's technique and base a decision solely on an academic parsing of the word "recess" in light of the founding history, especially since the court's interpretation of the term "recess" may not be so clear and convincing as the panel claims.[43]

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39. Boles & Peterson, s*upra* note 37.

40. *Id.*

41. *Id.*; *The National Labor Relations Board Has Five Senate Confirmed Members*, NAT'L LABOR RELATIONS BOARD (Aug. 12, 2013), http://www.nlrb.gov/news-outreach/news-releases/national-labor-relations-board-has-five-senate-confirmed-members.

42. Of course it is always possible that the Court, in light of intervening events, might dismiss the writ of certiorari as improvidently granted. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 358 (9th ed. 2007) (suggesting that the Court has sometimes dismissed a writ of certiorari if "a change in circumstances since the writ was granted [has] lessened the importance of the case"). As this form of dismissal is entirely within the Court's discretion, it is difficult to assess the likelihood of this rather unusual event.

43. For a contrary interpretation of the term "recess"—to include intrasession recesses—see Evans v. Stephens, 387 F.3d 1220, 1224–26 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). In this case, the U.S. Court of Appeals for the Eleventh Circuit upheld the intrasession recess appointment of Circuit Judge William H. Pryor, Jr. by President George W. Bush. *Id.* at 1227. In addition to issues implicated in *Noel Canning*, the court in *Evans* also confronted—and rejected—the argument that federal judges could not permissibly receive recess appointments (which are necessarily temporary) because of the requirement in Article III that federal judges shall hold office "during good behavior"—that is, in effect, for life. *Id.* at 1223. Earlier cases from the U.S. Courts of Appeals for the Ninth and Second Circuits came to the same conclusion, permitting the

Rather, I think that in a case of this kind, questions of principle should also play an important role. The issue of principle here is that in considering appointments to the executive branch, inferences from the President's role in the constitutional structure as head of the executive branch should be given a significant degree of weight—and senators' use of procedural devices (which do not involve a majority vote on the merits of any officer) in order to frustrate the President's choice should be found to possess a significantly lesser degree of legitimacy.

Such a functional decision based on principle would of course require a substantially different mode of analysis than that employed by Judge Sentelle, and, in this brief contribution, I would like to sketch out two possible alternative approaches to this problem. In any event, where the weight of principle falls on the President's side in this area, and the teachings of text and Eighteenth Century history remain unclear, some alternative methods of interpretation might be considered.

The place to start in this form of re-assessment, I think, is with an understanding that the decision in the *Noel Canning* case, and Judge Sentelle's opinion, represent a pretty drastic departure from the way in which the issues of recess appointments have been viewed and acted upon over the past decades. Indeed, the great weight of custom or practice—at least from the mid-twentieth century onwards—seems to be opposed to Judge Sentelle's interpretation. For example, according to the opinion in *Evans v. Stephens*,[44] twelve Presidents "have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate."[45] Moreover—in contrast with the opinion of the two majority judges in *Noel Canning*—the view that a recess appointment may fill a vacancy that has not first occurred during a recess is a view that "is consistent with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence."[46] Therefore, in light of the significant history of recess appointments that were considered valid in their time but would have been struck down under Judge Sentelle's interpretation, we might devote some further thought to Justice Frankfurter's view in the Steel Seizure Case

recess appointment of federal judges. United States v. Allocco, 305 F.2d 704, 708–09 (2d Cir. 1962); United States v. Woodley, 751 F.2d 1008, 1009–12 (9th Cir. 1985).

44. 387 F.3d 1220 (11th Cir. 2004).

45. *Id.* at 1226.

46. *Id.* Earlier federal circuit court cases adopting this position include *Allocco*, 305 F.2d at 709–15 and *Woodley*, 751 F.2d at 1012–13.

that a "systematic, unbroken, executive practice" may well indicate that this is the way the Constitution was designed to work.[47]

Of course Justice Frankfurter was certainly not a hard line originalist in his conception of judicial review. Although he was famous for being painfully scrupulous about whether certain cases should or should not be decided by a court,[48] Frankfurter hardly felt himself constrained by speculations as to the Framers' supposed original intent in the interpretation of the Constitution's substantive provisions. The Constitution was a practical document and—perhaps having in mind certain similarities to the concept of "practical construction" in the common law doctrine of contracts—Frankfurter argued that the way a document, or an institution created by the document, actually worked in practice was ultimately an important criterion to follow in the document's interpretation. "The Constitution is a framework for government," Frankfurter declared, and therefore "the way the framework has consistently operated fairly establishes that it has operated according to its true nature."[49] Justice Frankfurter continued:

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47. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J. concurring). It should be noted, however, that some judges and commentators argue that the President's practice of making "intrasession" recess appointments is not sufficiently longstanding to qualify it as a "gloss on executive power" in Frankfurter's view, and that few if any intrasession appointments occurred in the earliest periods of American history. *See, e.g.*, NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 240 (3d Cir. 2013) ("[I]t has been only over the last thirty years that presidents began relying so heavily on [intrasession] recess appointments"). In response, others maintain that the practice is of rather longer duration, and they suggest that the Presidents' increasing use of intrasession recess appointments is actually a reaction to changes in the Senate's pattern of intersession and intrasession recesses. *See id.* at 264–65 (Greenaway, J., dissenting) ("Since 1947, Presidents have made nearly 400 intrasession recess appointments without significant rebuke or controversy. . . . The recess practices of the Senate have evolved . . . which has caused recess appointment practices to evolve in response."); *see also* NLRB v. Enter. Leasing Co., 722 F.3d 609, 663–64 (4th Cir. 2013) (Diaz J., dissenting) (noting that prohibition of intrasession recess appointments "[would deem] invalid over 500 appointments by fourteen Presidents dating back to the 1860s"). In contrast, Judge Sentelle in *Noel Canning* noted that the Supreme Court explicitly declined to defer to recent congressional practice in INS v. Chadha, 462 U.S. 919 (1983). Noel Canning v. NLRB, 705 F.3d 490, 502 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013). These contending arguments would be analyzed and evaluated in the fuller consideration of the applicability of Frankfurter's views, recommended in the text.

48. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 266–330 (1962) (Frankfurter, J., dissenting) (presenting classic defense of political question doctrine); Poe v. Ullman, 367 U.S. 497, 498–509 (1961) (opinion of Frankfurter, J.) (declining to decide constitutionality of unenforced statute); *see also Youngstown*, 343 U.S. at 594–96 (Frankfurter, J. concurring) (carefully examining question of justiciability before proceeding to the merits in the Steel Seizure Case).

49. *Youngstown*, 343 U.S. at 610. A remark somewhat earlier in Frankfurter's *Youngstown* opinion very interestingly anticipates this connection between history and "nature": "The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature." *Id.* at 593.

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.[50]

This view clearly resembles the doctrine of a "living Constitution"—although not a living constitution under the management of judges. This was the concept of a "living Constitution" developed by the political branches that were frequently required to find a practical path under circumstances unimagined by the Framers. In this respect, Frankfurter followed the general views vividly expressed by his mentor Oliver Wendell Holmes, in a memorable passage in *Missouri v. Holland*:[51]

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[52]

Following Justice Frankfurter, we might therefore say that a long practice of intrasession recess appointments (as well as an even longer history of executive views on appointments to vacancies that originally occurred during a session of the Senate) authorizes us to turn away from a controversial inquiry into the original position of the Framers on various problems of recess appointments and allows us to interpret Article II, Section 2, Clause 3 in conformity with a history and practice that might show us the "true nature" of the document. Indeed, I would argue that such a technique seems particularly justifiable if the history and practice thus

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50. *Id.* at 610–11. For quotation of much of this passage in the specific context of recess appointments, see *Allocco*, 305 F.2d at 713–14.

51. 252 U.S. 416 (1920).

52. *Id.* at 433.

invoked reinforces the important inferences from the Take Care Clause noted above—the view that the Constitution should be interpreted to give significant weight to the President's authority to appoint those executive officers who, in the President's opinion, are most fit for the purpose of exercising discretion under Article II and taking care that the laws are faithfully executed in the general manner that the President prefers.

Finally, I would like to advance an alternative (but complementary) suggestion which may not have much in the way of a judicial pedigree but deserves, I think, serious consideration in light of the general principles of the separation of powers. Under some circumstances, a particular branch of the government may accumulate what seems to be inordinate or excessive power. This may occur through inevitable developments resulting from industrial or political change, such as the increased power of the President and the Executive arising from necessarily broad delegations of power under the statutes of the administrative state. Or, in contrast, excessive (or disproportionate) power may accrue through specific actions of dubious constitutional legitimacy—such as the use of anti-majoritarian procedural devices by a minority of Senators to block Presidential appointments of executive officers, as discussed above. When such a constitutional imbalance occurs, the Court should consider the possibility of implementing the underlying principles of the separation of powers by handing down decisions that redress the balance—or by upholding the actions of another branch that have the purpose or effect of redressing the balance. Thus, if the constitutional role of one section of the government becomes distorted, the courts may interpret the power of another branch in a manner that provides an antidote.[53]

The Supreme Court declined to adopt such a principle in *INS v. Chadha*[54]—when it struck down the institution of the legislative veto, a device which, under many circumstances, could be viewed as redressing excessive power necessarily accorded to the executive by broad legislative delegations of power. I continue to believe that the Court's decision in *Chadha* was a mistake,[55] and I have viewed with considerable interest Congress's persistence in continuing to insert these (now unenforceable) legislative veto provisions in certain statutes.[56] In any case, I think that the

53. For a recent opinion in this area that focuses on the importance of preserving an appropriate balance between the President and the Senate, see NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 244–70 (3d Cir. 2013) (Greenaway, J., dissenting).

54. 462 U.S. 919 (1983).

55. *See* Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 832–37 (1984).

56. *See* LOUIS FISHER, CONG. RESEARCH SERV., RS 22132, LEGISLATIVE VETOES AFTER CHADHA (2005).

principle of redress sketched above should play at least some role in the interpretation of the relevant constitutional language, when that language seems to leave many questions open. And specifically with respect to *Noel Canning*, that principle of redress should take into account the important inferences from Article II, noted above, which favor a significant degree of advantage for the President in choosing the executive officers who will assist the President in taking care that the laws are faithfully executed.

I must concede that each of these two suggested pathways toward a revised view of *Noel Canning* may involve some problems. Nonetheless, I think that an opinion based on function and principle, along the lines discussed above, would come a lot closer than Sentelle's textual exegesis to the true nature and requirements of the separation of powers.