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NLRB v. NOEL CANNING PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

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INTRODUCTION: JUDICIAL RESTRAINT

Federal judges should not monitor recess.[1] The President's recess appointment power is a textbook example of "the assignment of exclusive decision making responsibility to the nonjudicial branches of the federal government."[2] Answers to political questions, such as those raised by the Republic's constitutional processes of Senate impeachment trials and presidential recess appointments, should come only from elected political leaders.[3] The Recess Appointment Clause's textual mandate and structural logic recognize that only the President possesses the institutional competence to know when such discretionary appointment action is required to meet his Article II, Section 3 obligation: "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."[4] Alexander Hamilton explained in Federalist 67 that Article II, Section 2, Clause 3 is "intended to authorize the President *singly* to make temporary appointments."[5]

This Article argues that the *Noel Canning* challenge to the President's use of his recess appointment authority presents a nonjusticiable political question. The work draws from arguments developed for this author's Supreme Court *amicus* briefs in *Noel Canning*, other *amicus* briefs lodged during the past year for related actions in the Third,[6] Fourth,[7] Seventh,[8] Ninth,[9] and D.C. Circuits,[10] and a variety of this author's commentary on federal appointments.[11]

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[1] For leading commentary on recess appointments, see Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 379 (2005); Michael Herz, *Abandoning Recess Appointments?: A Comment On Hartnett (and Others*), 26 CARDOZO L. REV. 443 (2005).

[2] Miami Nation of Indians of Indiana, Inc. v. United States DOI, 255 F.3d 342, 349 (7th Cir. 2001).

[3] *See generally* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (Quid Pro Books 2013) (1980).

[4] U.S. CONST. art II., § 3.

[5] THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

[6] NLRB v. New Vista Nursing, Nos. 11-3340, 12-1027 & 12-1936.

[7] Nestle Dreyer v. NLRB, Nos. 12-1684 & 12-1783.

[8] *See* Brief for Victor Williams as Amicus Curiae Supporting Respondent, Big Ridge v. NLRB (2013) (No. 12–3120) 2013 WL 1451436.

[9] *See* Brief for Victor Williams as Amicus Curiae Supporting Respondent, DIRECTV Holdings v. NLRB, (No. 12–72526) 2013 WL_298322.

[10] *See* Brief for Victor Williams as Amicus Curiae Supporting Petitioner and Urging Reversal, Noel Canning v. NLRB, 705 F.3d 490 (2013) (No. 12–1281); Brief for Victor Williams as Amicus Curiae Supporting Respondent, Sands Bethworks v. NLRB (2012) (No. 12–1684).

[11] *See* Victor Williams, *A Political Question Imperative: The D.C. Circuit's Ruling Against NLRB Recess Appointments Proves DOJ Should Rely on the Political-Question Defense that Was Upheld by the Supreme Court in* 'Goldwater v. Carter', 35 NAT.'L L.J. no. 22, Feb. 4, 2013, at 30;

It begins, in Part I, by discussing the unprecedented partisan appointment obstruction that led to President Barack Obama's modest exercise of his temporary appointment authority, in January 2012, to prevent nullification of the National Labor Relations Board (NLRB). The confirmation obstruction was central to a larger partisan and factional conflict described by Thomas Mann and Norman Ornstein as "asymmetric polarization."[12] The same obstructionists would later collude to shut down the government in October 2013.[13] This Part references how the partisans and ideologues then attempted to invalidate President Obama's recess appointment response in federal court challenges throughout the nation.

Part I then summarily reviews the Supreme Court's January 2014 oral arguments which focused on the D.C. Circuit's "horse-and-buggy" definitions. It analogizes the contemporary political and legal battle against a functioning NLRB to the original battle fought by President Franklyn Roosevelt to defend the 1935 Wagner Act against such "horse-and-buggy" jurisprudence. This Part offers a broader first principles perspective showing that the recess appointment method was the "capstone" of the Framers' grant of predominant appointment authority to the President. Part I concludes by suggesting that the Court should recognize that *Noel Canning* presents a nonjusticiable political question.

Victor Williams, *A Quick Fix for Senate's Broken Confirmation Process*, 37 CONN. L. TRIB. No. 27, July 4, 2011, at 29; Victor Williams, *Averting a Crisis: The Next President's Appointment Strategy*, 30 NAT.'L L.J. no. 26, Mar. 10, 2008, at 23; Victor Williams and Nicola Sanchez, *Confirmation Combat: The Re-Emerging Conflict Over High-Level Vacancies Is One Battle That President Obama Must Resource, Fight and Win*, 32 NAT.'L L.J. no. 17, Jan. 4, 2010, at 32; Victor Williams, *House GOP Can't Block Recess Appointments: Obama Should Feel Free to Make Appointments at Any Time When the Senate Is Not Sitting as a Deliberative Body*, 33 NAT.'L L.J. no. 50, Aug. 15, 2011, at 39; Victor Williams and Nicola Sanchez, *More Recess Appointments Needed: Senate's Confirmation Process—Dilatory and Dysfunctional—Needs a Fundamental Reboot*, 34 NAT.'L L.J. no. 20, Jan. 16, 2012, at 34; Victor Williams, *Recess Appointment Challenges: Obama's NLRB Recess Appointments Should Not Be Subject to Judicial Review Because of the Doctrine of Political Question Nonjusticiability*., 35 NAT.'L L.J. no. 13, Nov. 26, 2012, at 22; Victor Williams, *Senate Pro Forma Follies: Obama's Recess Appointment Authority Is Not Limited by the Sham Sessions*, 33 NAT.'L L.J. no. 6, Oct. 11, 2010, at 51; Victor Williams, *Ben Bernanke Should Be Reappointed Fed. Chair: Discuss*, JURIST, Jan. 27, 2010, http://jurist.law.pitt.edu/forumy/2010/01/ben-bernanke-should-be-reappointed-fed.php. For an additional fifteen blog posts by this author, criticizing confirmation obstruction of Obama's nominees and arguing for an assertive Executive response, see Archive of Columns by Victor Williams, HUFFINGTON POST, http://www.huffingtonpost.com/victor-williams (last visited Nov. 2, 2013).

[12] THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012).

[13] *See* Jonathan Weisman & Ashley Parker, *A Committed Group of Conservatives Outflanks the House Leadership*, N.Y. TIMES, Oct. 2, 2013, at A14.

In Part II, the Article references political-question precedent from John Marshall's *Marbury v. Madison* 1803 ruling[14] through Sonia Sotomayor's *Zivotofsky v. Clinton* 2011 concurrence.[15] The Article frames the numerated criteria of *Baker v. Carr*[16] and heralds the abstention efficiency of *Goldwater v. Carter*.[17] This Part fully applies the practical nonjusticiable analogy of *Nixon v. United States*[18] in which the nation's highest court refused to define "try" for the Senate; neither should the Court define "the recess" for the President.

Part II of the Article also suggests that *Noel Canning* presents an ethical conflict for the judiciary. Just as *Nixon* said that judges should not be the final arbiters of the Senate's impeachment trial method used to "regulate" the judiciary, neither should they have final authority to review the President's appointment method often used to "regulate" *status quo* bench composition and transform the courts' racial and gender demographics.[19]

If the Court is not moved to a nonjusticiability determination, after applying its own political-question and ethical abstention precedent, Part III asserts that the Court should consider a less "domesticated" perspective; "something greatly more flexible, something of prudence, not construction and not principle" in the form of Alexander Bickel's strong abstention doctrine.[20]

In conclusion, the Article argues that the Court should determine the Respondent's challenge to be nonjusticiable and thus be faithful to the Framers' design of a functional government. It argues that abstention will best insure finality so that on January 20, 2017 the next President will have both temporary and permanent appointment authority to staff her government.

I. OBSTRUCTIONISTS DRAFT THE JUDICIARY TO FIGHT OBAMA'S APPOINTMENTS AND GOVERNANCE

Destructive cycles of confirmation obstruction and subsequent partisan payback worsen with each of the past four presidencies.[21] Chief

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14 Marbury v. Madison, 5 U.S. 137, 165–66 (1803).

15 Zivotofsky v. Clinton, 132 S. Ct. 1421, 1431 (2012).

16 Baker v. Carr, 369 U.S. 186 (1962).

17 Goldwater v. Carter, 444 U.S. 996 (1979).

18 Nixon v. United States, 506 U.S. 224 (1993).

19 Many of the first female, Jewish, and African-American federal judges came to the bench by recess commission. Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Article III Judges*, 97 VA. L. REV. 1665, 1680–81 (2011).

20 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 125–26 (1962).

21 *See* Tevi Troy, *Fixing the Confirmation Process*, NAT'L AFFAIRS (Spring 2011), *available at* http://www.nationalaffairs.com/publications/detail/fixing-the-confirmation-process.

Justice John Roberts captured the downward spiral: "Each political party has found it easy to turn on a dime from decrying to defending the blocking of . . . nominations, depending on their changing political fortunes."[22] The Executive's contemporary reliance on temporary appointments has tracked the Senate's increasing dysfunction in failing to provide timely advisory consent votes for permanent appointments. When the Senate was negligently nonattendant to its confirmation duties, the Executive has used the alternative appointment method provided by the 1787 Framers.

A. Defeat Obama by Obstructing His Appointments

In a stated attempt to "move beyond the confirmation wars," Barack Obama began his presidency hoping for timely Senate consent for his historically diverse and exceptionally well-qualified nominees.[23] Instead, his nominees faced unprecedented partisan appointment obstruction.[24] Throughout Obama's first two years, a substantial percentage of top executive and agency positions remained empty or filled with holdovers. Offices critical to economic and security interests have been left years without leadership.[25] Venerable regulatory boards risked loss of quorum and authority,[26] newly established agencies were hobbled,[27] and the independent judiciary struggled with empty benches and severe caseload emergencies.[28] In considering the historic

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[22] *See* SUPREME COURT OF THE UNITED STATES, HON. JOHN G. ROBERTS, C.J., YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf.

[23] *See* Peter Baker, *Obama's Team Is Lacking Most of Its Top Players*, N.Y. TIMES, Aug. 24, 2009, at A1; *see also* Charlie Savage, *Obama Backers Fear Opportunities to Reshape Judiciary Are Slipping Away*, N.Y. TIMES, Nov. 15, 2009, at A20.

[24] *See* Editorial, *Filibustering Nominees Must End*, N.Y. TIMES, Jan. 29, 2012, at SR10.

[25] *See* John Berry, *Republicans Block Key Economic Appointments*, FISCAL TIMES (June 7, 2011), http://www.thefiscaltimes.com/Blogs/Capital-Exchange/2011/06/07/Republicans-Block-Key-Economic-Appointments.aspx#page1. *See also* James Fallows, *A Republican Doubles-Down on Nullification*, THE ATLANTIC, Dec. 11, 2011, http://www.theatlantic.com/politics/archive/2011/12/a-republican-doubles-down-on-nullification/249820/; Fareed Zakaria, *The Debt Deal's Failure*, TIME, Aug. 15, 2011, www.time.com/time/magazine/article/0,9171,2086858,00.html; Steve Benen, *A Radical Embrace of Nullification*, WASH. MONTHLY POLITICAL ANIMAL BLOG (Dec. 12, 2011, 8:40 AM), http://www.washingtonmonthly.com/political-animal/2011_12/a_radical_embrace_of_nullifica034050.php; Jonathan Cohn, *The New Nullification: GOP v. Obama Nominees*, THE NEW REP. (July 19, 2011), http://www.tnr.com/blog/jonathan-cohn/92167/cordray-warren-cfpb-obama-republicans-nomination.

[26] Chris Isidore, *NLRB Could Be Shut Down in New Year*, CNN MONEY (Dec. 23, 2011, 11:06 AM), http://money.cnn.com/2011/12/23/news/economy/nlrb/index.htm.

[27] Ylan Q. Mui, *Political Battle Threatens Centerpiece of Financial Reform*, WASH. POST, June 14, 2011, http://articles.washingtonpost.com/2011-06-14/business/35266014_1_raj-date-cfpb-consumer-financial-protection-bureau.

[28] *See* Marge Baker, Op-Ed., *There Is a Judicial Confirmation Crisis, and the GOP Is*

obstruction during his presidency, President Obama stated it best: "During the financial crisis, half my Treasury slots weren't filled—couldn't get them filled. And this [was] a time when we were worried that the entire financial system was melting down."[29]

Following the 2010 midterm elections, partisan obstruction significantly intensified with the stated goal of defeating Obama's agenda and his reelection. Perversely, the systemic damage of vacancies in federal courts, independent agencies, and executive departments serves to encourage rather than deter partisan obstructionists.[30] Scheduling schemes were orchestrated by House and Senate Republican factions to keep both chambers in pro forma sessions every three days in attempts to prevent recess appointments. House self-identified "Tea Party" freshmen pressured House leadership to "prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[31]

In the previous presidency, Democrat obstructionists had scheduled Senate sessions every three days to successfully bluff George W. Bush out of exercising his temporary appointment authority.[32] Obstructionists promoted the myth that a three-day recess minimum was needed to trigger recess appointment authority.[33] The

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Causing It, U.S. NEWS & WORLD REP., Jan. 27, 2012, http://www.usnews.com/opinion/articles/2012/01/27/there-is-a-judicial-confirmation-crisis-and-the-gop-is-causing-it; Zachary A. Goldfarb & Neil Irwin, *Lack of Senate Confirmation Creating a Personnel Gap, Geithner says*, WASH. POST (June 6, 2011), http://www.washingtonpost.com/business/economy/vacancies-in-top-economic-policy-jobs-can-be-harmful-geithner-says/2011/06/06/AGpqcZKH_story.html.

[29] *Obama's Interview with Progressive Bloggers*, HUFFINGTON POST (Oct. 27, 2010, 10:08 PM), http://www.huffingtonpost.com/2010/10/27/obamas-interview-with-progressive-bloggers_n_775112.html (last updated May 25, 2011, 7:10 PM).

[30] *See generally Developments in the Law—Presidential Authority: V. Executive Appointments*, 125 HARV. L. REV. 2135 (2012); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 917 (2009); Daniel Wagner, *Understaffed Geithner Can't Keep Up, Critics Say*, ASSOCIATED PRESS (Mar. 5, 2009, 5:40 PM) http://www.utsandiego.com/news/2009/mar/04/understaffed-treasury-030409/?ap.

[31] H.R. REP. NO. 113-30 (2013) (quoting Representative Jeff Landry, letter to the Speaker of the House John Boehner, et al., June 15, 2011). *See also* Williams, *House GOP Can't Block Recess Appointments: Obama Should Feel Free to Make Appointments at Any Time When the Senate Is Not Sitting as a Deliberative Body*, *supra* note 11; Ylan Q. Mui, *McConnell To Block 'Any Nominee' for Top CFPB Job*, WASH. POST, June 10, 2011, at A12.

[32] *See* Williams, *Averting a Crisis: The Next President's Appointment Strategy*, *supra* note 11; Williams, *Senate Pro Forma Follies: Recess Appointment Authority is Not Limited by Sham Sessions*, *supra* note 11; Steven G. Bradbury & John P. Elwood, *Call the Senate's Bluff on Recess Appointments*, WASH. POST, Oct. 10, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html.

[33] It is also important to note the faulty premise of the congressional obstructionists' scheduling gimmick. There is no three-day recess minimum needed to trigger the president's term appointment authority. Advocates of the three-day recess minimum myth mistakenly reference the totally unrelated Adjournment Consent Clause. The Article I, Section 5 adjournment provision only requires each house of Congress to obtain the other's consent before adjourning for more than three days. U.S. CONST. art I, § 5, cl. 4. The misapplication of the clause (and thus

specific objective of the Tea Party's House-Senate 2011 scheduling collusion was to block the President from responding to the prolonged confirmation tribulation of NLRB and CFPB nominees.[34]

On January 4, 2012, the President called the obstructionists' bluff and recess commissioned three Board members, thus restoring NLRB's legal authority. On the same day, President Obama recess appointed the long-blocked Richard Cordray to head the Consumer Financial Protection Bureau (CFPB). Including those four commissions, Barack Obama has thus far made only 32 recess appointments—fewer than any modern President. Ronald Reagan made 240 recess commissions, George H.W. Bush (one term) 74, William Clinton 139, and George W. Bush 171.[35]

B. Moving Obstruction to Federal Court

The President's modest exercise of his textual authority brought forth a firestorm of negative reaction. Almost immediately after the President's January 2012 appointments, the political conflict was moved to federal court fora. Obstructionists, ideologues, and special-interest groups who actively supported appointment obstruction began promoting court battles in various jurisdictions, attempting to void the recess commissions and thus again, nullify NLRB and CFPB authority.[36] Congressional obstructionists mounted a frontal attack in the *Noel Canning* battle as amici at the D.C. Circuit and the Supreme Court.[37]

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the three-day recess minimum myth) is built on conjecture that any break of three days or less is *de minimis* for adjournment consent and also for analysis of recess appointments. The same Article I provision also restricts either house from moving "to any other Place than that in which the two Houses shall be sitting." *Id.* The Article I, Section 5 provision is meant only as an *internal comity restriction* of the legislative Branch as to time and place of conducting its business.

34 *See* Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25, ("The Constitution that has guided our Republic for centuries is not blind to the threat of Congress's extending its internal squabbles into a general paralysis of the entire body politic, rendering vital regulatory agencies headless and therefore impotent. Preserving the authority the president needs to carry out his basic duties, rather than deferring to partisan games and gimmicks, is our Constitution's clear command.").

35 HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2013); CONG. RESEARCH SERV., TOTAL RECESS APPOINTMENTS, BY PRESIDENT, 1933-2010, *available at* http://www.senate.gov/artandhistory/history/resources/pdf/TotalRecessAppointments1933-present.pdf (last updated July 6, 2010).

36 *See* Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34 (D.D.C. 2012); Seung Min Kim, *Republicans Join Challenge of Recess Appointments*, POLITICO (Feb. 3, 2012, 1:37 PM), http://www.politico.com/news/stories/0212/72422.html.

37 *See* Ashley Southall, *Senate Republicans Challenge Obama's Recess Appointments*, N.Y. TIMES, Sept. 26, 2012, http://thecaucus.blogs.nytimes.com/2012/09/26/senate-republicans-challenge-obamas-recess-appointments/; Tom Schoenberg, *Republican Lawmakers Argue Obama*

During the week that Barack Obama began his second term of office, the U.S. Court of Appeals for the D.C. Circuit issued a ruling, in *Noel Canning v. National Labor Relations Board*, that attempted to eviscerate the president's recess-appointment authority.[38] The appellate panel went far beyond the arguments offered by complaining company Noel Canning or amici Minority Leader Mitch McConnell (R-Ky.) and 41 other Republican senators.[39] The D.C. Circuit panel majority held that the President's recess appointment authority can be validly used only during an "intersession" break and only to fill vacancies that have first "arisen" during that break between sessions.[40] The panel's overreaching answer to the political question effectively grants congressional partisans a procedural scheduling device capable of eliminating the Executive's constitutional appointment authority.[41] Both a Third Circuit and Fourth Circuit panel subsequently joined the D.C. Circuit in ruling that only intersession recess appointments are valid.[42]

The rulings effectively ratified and expanded the obstructionist goals of partisan factions of the Senate and House—namely, to block President Obama's appointments and thus defeat his attempt to govern.[43] The *Noel Canning*, *New Vista* and *Enterprise* opinions deserved the harsh and varied criticism thus far received.[44]

Appointments Unlawful, BLOOMBERG.COM (Dec. 5, 2012, 3:27 PM) http://www.bloomberg.com/news/2012-12-05/republican-lawmakers-argue-obama-appointments-unlawful.html; Brief for Senate Republican Leader Mitch McConnell et al. as Amici Curiae Supporting Certiorari, NLRB v. Noel Canning, (No. 12-1281) 2013 WL 2352593, at *23.

[38] *Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2012); *see* Jeffrey Toobin, *A Judicial Atrocity*, NEW YORKER (Jan. 29, 2013), http://www.newyorker.com/online/blogs/comment/2013/01/the-awful-recess-appointment-ruling-in-canning-v-national-labor-relations-board.html.

[39] *See* Alexander M. Wolf, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug of War*, 81 FORDHAM L. REV. 2055, 2089–95 (2013).

[40] *See* James M. Hobbs, *The Future of Recess Appointments After the Decision of the D.C. Circuit in Noel Canning v. NLRB*, 162 U. PA. L. REV. ONLINE 1, 11-21 (2013).

[41] *See* Charlie Savage & Steven Greenhouse, *Court Rejects Obama Move to Fill Posts*, N.Y. TIMES, Jan. 26, 2013, at A1.

[42] NLRB v. New Vista Nursing & Rehabilitation, 719 F.3d 203, 221 (3rd Cir. 2013); NLRB v. Enterprise Leasing Co. Southeast, 722 F.3d 609, 647 (4th Cir. 2013).

[43] *See* Manu Raju, *Mitch McConnell Doubles Down Against President Obama*, POLITICO, (Nov. 4, 2010, 5:56 PM), http://www.politico.com/news/stories/1110/44688.html.

[44] *See, e.g.*, Peter Strauss, *The Pre-Session Recess*, 126 HARV. L. REV. F. 130 (2013); Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013); Editorial, *The Fight Over Recess Appointments*, N.Y. TIMES, May 26, 2013, http://www.nytimes.com/2013/05/27/opinion/the-fight-over-recess-appointments.html; Douglas Kmiec, *Making Mischief with Recess Appointment Authority—The DC Circuit Adds New Ways to "Just Say No,"* HUFFINGTON POST, (Jan. 29, 2013, 6:53 AM), http://www.huffingtonpost.com/douglas-kmiec/appointing-negativity-wha_b_2560814.html; John Logan, *Democrats Must Overcome GOP's 'Complete Obstructionism' on NLRB*, THE HILL, (May 23, 2013, 12:30 PM), http://thehill.com/blogs/congress-blog/judicial/301495-democrats-must-overcome-gops-complete-obstructionism-on-nlrb-; Jeffrey Toobin, *A Judicial Atrocity*, THE NEW YORKER, Jan. 29, 2013, http://www.newyorker.com/online/blogs/comment/2013/01/the-awful-recess-appointment-ruling-in-canning-v-national-labor-relations-board.html.

After the Supreme Court granted *certiorari* to review *Noel Canning*, Obama opponents redoubled their efforts to obstruct his governance and nullify the labor agency by filing over two dozen separate *amicus* and *amici* briefs against the appointments. Including this author's amicus brief, three briefs were filed in support of the President's temporary commissions.[45]

C. Rejecting "Horse-and-Buggy" Jurisprudence; Accepting Recess Appointments as the Capstone of Appointment Design

Oral arguments for *Noel Canning* had a strangely narrow historic scope. As the Justices examined the D.C. Circuit's myopic opinion, arguments focused on dueling Eighteenth Century dictionary definitions for "happen," conflicting scenarios of founding-era intra and inter session recesses, and the inconsistent appointment practices of first-presidents.[46] It would have been prudent had the Justices taken a broader view with a perspective of the Court's own history. *NLRB v. Noel Canning* is a vestige of a political war waged since before passage of the 1935 Wagner Act, which first created the labor agency. Ideologues and partisans who lost the legislative battles that resulted in New Deal programs successfully moved their obstruction to federal court.[47] Past as prologue, the Depression Era obstructionists won repeated victories before reactionary benches across the nation.[48]

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[45] Just as final briefs were filed in late November 2013, however, the ongoing conflict had a significant and related development. The Senate Majority acted to lower the cloture vote requirement from 60 to 51 votes needed to end confirmation filibusters for all departmental, agency, and judicial nominees (except for Supreme Court nominees). By attempting to invalidate Obama's temporary appointments at the Supreme Court—even while continuing to block Senate confirmations for permanent appointments—partisans and ideologues overplayed their obstructionist hand. Although clearly an unintended consequence, the obstructionists' *Noel Canning* adjudication provided impetus for the Senate's return to the Framers' design of simple-majority confirmation votes. *See* Victor Williams, *Constitutional—Not Nuclear—End to Confirmation Filibusters*, HUFFINGTON POST, (Nov. 22, 2013 3:53 PM), http://www.huffingtonpost.com/victor-williams/a-constitutional-not-a-nuclear_b_4320583.html.

[46] Transcript of Oral Argument, National Labor Relations Board v. Noel Canning (No. 12-1281), *available at* http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/. *See also* Michael Doyle, *Top Court Looks at President's Power to Appoint*, PITTSBURG POST-GAZETTE, Jan. 14, 2014, http://www.post-gazette.com/news/nation/2014/01/14/Top-court-looks-at-president-s-power-to-appoint/stories/201401140094.

[47] Prominent among organizations that mobilized to fight against New Deal reforms was the American Liberty League composed of top corporate attorneys. The Liberty League sponsored the Lawyers Vigilance Committee which quickly built a national network of lawyers offering free legal services to promote litigation that challenged New Deal legislation. *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT, 163–165 (2010.)

[48] *Id*. at 167–69. In the summer of 1935, for example, approximately five new lawsuits were filed each day to challenge only the Agricultural Adjustment Act. During this time, more than 100 U.S. District Court judges held various congressional acts unconstitutional with more than

Economic and agricultural reforms key to confronting the ravages of the Depression were invalidated.[49] Additional litigation threatened Second New Deal legislative programs including Social Security, financial regulation, and the Wagner Act.[50]

President Franklyn D. Roosevelt fought vigorously to defend the needed relief and reform measures. At a famous press conference on May 31, 1935, FDR warned: "we have been relegated to the horse-and-buggy definition of interstate commerce."[51] After a solid 1936 re-election victory, FDR captured the conflict in his State of the Union address: "We do not ask the Courts to call non-existent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good."[52]

Soon thereafter, FDR announced a "reorganization" plan for the judiciary. The Supreme Court got the message and advanced into the 20th Century. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[53] the Court abandoned its "horse-and-buggy" jurisprudence to find contemporary definitions for, and modern understanding of, needed economic reforms including empowerment of the NLRB. In 2003, Chief Justice William H. Rehnquist artfully described the constitutional development as ultimately turning on the President's appointment authority:

> President Roosevelt lost the Court-packing battle, but he won the war . . . not by any novel legislation, but by serving in office for more than twelve years, and appointing eight of the nine Justices of the Court. In this way the Constitution provides for ultimate responsibility of the Court to the political branches of government.[54]

At the D.C. Circuit, the *Noel Canning* dispute borne a strange new hybrid of the rejected "horse-and-buggy" jurisprudence. Indeed at Supreme Court arguments, one Justice wondered if the recess

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1600 injunctions issued to block enforcement of New Deal laws and programs. *Id*. at 169. Robert Jackson, then a federal lawyer, reported how "hell broke loose in the lower courts." *Id*. at 168.

49 *Id*. at 2–3, 127–46.

50 *Id*. at 243–245. A confidential Justice Department memo of late 1936 warned of a "general attitude of law defiance" by many in the business community: "A law is now *the* law only after every last detail has been fought every last court." *Id.* at 245. For alternative perspectives on jurisprudential developments of the period, *see* Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994) and BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

51 JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL 264 (2012).

52 *Id*. at 311.

53 301 U.S. 1 (1937).

54 William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595 (2004).

appointment authority was only a "historic relic" of the "horse and buggy" age.[55] The Solicitor General effectively responded that it was contemporary Senate confirmation obstruction, often lasting "months or years," that was "100 miles from what the Framers would have expected."[56] He urged the Court not to disturb the modern "equilibrium" between political branches. Judging the President's temporary appointment power to be a "historic relic" negates the Framers' vision for a dynamic, functioning government. In our present age of agency nullification by partisan appointment obstruction, such misjudgment risks conjuring the spirit of the Four Horsemen.

Indeed, genuine first principles focus on the central historic mission of the Constitutional Convention: Delegates went to Philadelphia to make the national government work.[57] The first constitution, the Articles of Confederation, which vested Congress with all appointment authority and responsibility, had failed badly. The Confederation Congress had failed to administer the new Republic and execute its laws. The national legislature had failed to execute the law by specially constituted congressional committees or congressionally appointed administrators.[58] The success, perhaps even the survival, of the new Republic was threatened by congressional malfeasance in appointments and administration. In February 1787, George Washington emphasized the critical need for immediate, substantial change so that the government could function, "[o]therwise, like a house on fire, whilst the most regular mode of extinguishing it is contended for, the building is reduced to ashes."[59]

The Philadelphia Framers remedied the Articles' chief defect by formally separating executive authority from Congress. In both form and function, Article II, Section 2 was drafted to provide effective and practical governance through a strong Executive with a predominant appointment prerogative. As the modern Supreme Court has

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55 Lawrence E. Dubé, *Supreme Court Hears Noel Canning Case In Test of President's Recess Appointments*, Bloomberg BNA (Jan. 14, 2014), http://www.bna.com/supreme-court-hears-n17179881342/.

56 *Id*.

57 *See* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC: 1763-89, 129–44 (3d ed. 1992).

58 Also framing the Founders' debate regarding appointments were the unhappy experiences of the independent states which had constitutions that mandated state legislatures appoint officials and judges. Michael Gerhardt describes how many delegates from those states with "little or no gubernatorial involvement in the appointments process regarded their states' practices in this area as failures." MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 18 (2000). The state legislature appointment processes "had fallen easy prey to demagogues, provincialism, and factions." *Id*. Thus the 1787 Convention delegates "quickly accepted the desirability of a significant presidential role in making federal appointments." *Id*.

59 RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 26 (1988) (quoting a letter from George Washington to Henry Knox (February 3, 1787)).

acknowledged, the practical design was for presidential authority over all principal permanent appointments, with the Senate restricted to an advisory-consent vote.[60] The Senate constitutionally "advises" the president only by *ex post* voting "consent" to—or rejection of—the president's appointment choice.[61] The president has first-mover advantage to select nominees and final discretion to sign the commission or not.[62]

The grant of unilateral Executive power to sign recess commissions provided the "capstone" to the Convention's decision for presidential appointment predominance. Just as a capstone is quickly laid as the final protective stone on a structure that may have taken months to build, so the unilateral authority was unanimously approved without debate.[63] On the same day that the Section 2, Clause 2 accord was reached after the summer's debate, the temporary appointment authority was laid as the final protective capstone. Regardless of the Senate's attendance to its duties, the President's appointment authority would remain vested and operable at all times for all purposes. Rather than an "exception" or a "historic relic," the temporary appointment authority remains a capstone to insure the Framers' design of a functioning government: The President simply signs the temporary commission and puts the official to work.

Although not a party in the adjudication and not representing the Senate as an institution, the Senate Minority's participation was accommodated by the extension of *Noel Canning's* argument time to a full 90 minutes. With Miguel Estrada's *amici* support, Noel Canning's counsel was most effective in focusing arguments on the Senate's institutional prerogative to determine its own schedule. In the end, however, whether the Court's internal deliberations move beyond the D.C. Circuit's "horse-and-buggy" definitions should not matter. Nor should the Justices' personal opinions matter regarding whether the Senate or the President controls when the President makes temporary appointments. Nor should the Justices thoughts about how short is too-short for a Senate break control. For the appointments dispute began as—and remains—a partisan fight between factions within the political

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[60] *See* Buckley v. Valeo, 424 U.S. 1, 129 (1976) (per curiam); Freytag v. Commissioner, 501 U.S. 868, 904 (1991) (Scalia, J., concurring).

[61] *See* John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 634–35 (1993).

[62] Although a Senate 'no' vote stops the permanent appointment process, the President is under no obligation to sign the commission just because the Senate has given its affirmative advisory consent. This fact provides insight and rebuttal to the mistaken view that federal appointment authority is a power "equally shared" between the President and the Senate. *See* Dan Koffsky, *Appointment of a Senate-Confirmed Nominee*, Mem. Op. for Counsel to the President (Oct. 12, 1999), *available at* http://www.justice.gov/olc/marbury_ltr.htm.

[63] 2 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1789, 539 (Max Farrand ed., 1966).

branches. Justice Steven Breyer repeatedly acknowledged the political dispute context of the case, making reference to the case as a political question by stating: "[T]his seems to me, hypothetically at least, a real matter for the political branches to resolve among themselves."[64] As this author argues as *amicus*, it must be stated directly: The challenge to the January 4, 2012 appointments presents a political—not a legal—question.[65]

II. POLITICAL QUESTION NONJUSTICIABILITY: *MARBURY* TO *ZIVOTOFSKY*

The political-question doctrine is fundamental to the separation of powers and to basic principles of government by consent.[66] John Marshall provided early nonjusticiability guidance[67] in *Marbury v. Madison*: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[68] Most recently in *Zivotofsky v. Clinton*, Sonia Sotomayor reiterated the importance of the political question doctrine's "due regard for the separation of powers and the judicial role."[69] Sotomayor reiterated the

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64 Transcript of Oral Argument, *supra* note 46, at 86. *But see* Lyle Denniston, *Argument Preview: The Nomination Wars*, SCOTUSBLOG (Jan. 13, 2014, 1:35 PM), http://www.scotusblog.com/ 2014/01/argument-recap-an-uneasy-day-for-presidential-power/

65 For two early commentaries suggesting nonjusticiability, see DAVID H. CARPENTER, ET AL, CONG. RESEARCH SERVICE, R42323, PRESIDENT OBAMA'S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES 11 (2012) and Jeffrey Rosen, *The War Over Recess Appointments Is Not for the Supreme Court to Settle*, NEW REPUBLIC (Jan. 28, 2013), http://www.newrepublic.com/article/112261/recess-appointments-ruling-court-guilty-judicial-activism. For a more recent commentary, see Peter M. Shane, *In NLRB Recess Appointments Case, Roberts Court Can Now Show It Knows How to Exercise Judicial Restraint*, BLOOMBERG BNA, July 29, 2013 *available at* http://shanereactions.files.wordpress.com/2013/07/peter-shane-argument-for-judicial-restraint-in-recess-appointments-cases.pdf. Veteran Supreme Court reporter Lyle Denniston, referencing this author's amicus brief, most recently posited that the political-question alternative was "a way out" for the Court. Lyle Denniston, *Argument Preview: The Nomination Wars*, SCOTUSBLOG (Jan. 11, 2014, 12:03 AM), http://www.scotusblog.com/2014/01/argument-preview-the-nomination-wars/.

66 Throughout our Republic's history, this Court has recognized that some constitutional questions are committed by the Constitution to the discretion of the elected political Branches. *See, e.g.*, Luther v. Borden, 48 U.S. 1 (1849); Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Coleman v. Miller, 307 U.S. 433 (1939); Gilligan v. Morgan, 413 U.S. 1 (1973).

67 Three years before his *Marbury* opinion, Congressman John Marshall provided earlier guidance when explaining to his House colleagues that some constitutional questions should only be answered by the elected political Branches. Without such a jurisdictional limit, the political departments "would be swallowed up by the judiciary." Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 25 n.11 (Nada Mourtada-Sabbah and Bruce E. Cain, eds., 2007) (quoting John Marshall, Speech (Mar. 7, 1800)).

68 Marbury v. Madison, 5 U.S. 137, 165 (1803).

69 Zivotofsky v. Clinton, 132 S. Ct. 1421, 1434 (2012) (Sotomayor, J., concurring).

important rule of judicial restraint as developed in such cases as *Baker v. Carr*,[70] *Nixon v. United States*,[71] and *Goldwater v. Carter*[72]: Political question nonjusticiability "speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable—that is, whether the dispute is appropriate for resolution by courts."[73]

A. Baker's *Numerated Criteria*

In agreeing with the Court's holding that interpretation of a statute merely regulating a passport's contents did not present a political question, Justice Sotomayor focused on *Baker v. Carr* to emphasize the "demanding" inquiry required in a nonjusticiability analysis. The least senior Justice counseled restraint and prudence in future: "The doctrine is 'essentially a function of the separation of powers' . . . which recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers."[74] The "separation of power function" identified by *Baker* is the common element central in many political question constructions.[75]

Baker v. Carr identifies six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as most relevant for inquiry into recess appointment challenges, "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[76] *Baker* also precludes judicial review of an issue where there is a "lack of judicially discoverable and manageable standards for resolving it," or when it is impossible for the court to undertake "independent resolution without expressing lack of the respect due coordinate branches of government."[77] *Baker* serves as doctrinal guidance for the "demanding inquiry" because it numerates both classical and prudential strains of abstention.[78]

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[70] 369 U.S. 186 (1962).
[71] 506 U.S. 224 (1993).
[72] 444 U.S. 996 (1979).
[73] *Zivotofsky*, 132 S. Ct. at 1431 (Sotomayor, J., concurring).
[74] *Id*. at 1431 (Sotomayor, J. concurring) (quoting *Baker*, 369 U.S. at 217).
[75] *Baker*, 369 U.S. at 210.
[76] *Id*. at 217.
[77] *Id*.
[78] It should be noted that a circuit split has now developed regarding the justiciability of challenges to the recess appointment authority. When rejecting a challenge to President George W. Bush's recess appointment of William Pryor, the Eleventh Circuit ruled *en banc* that the "controversial" aspect of the "blocked" confirmation "presents a political question." Evans v. Stephens, 387 F.3d 1220, 1227 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005). The court held that Senator Edward Kennedy's amicus arguments that the Pryor appointment "circumvented and showed an improper lack of deference to the Senate's advice-and-consent role" were nonjusticiable. *Id*. The Eleventh Circuit refused to create a standard to measure "how much

B. Walter Nixon v. United States*: Applying* Baker's *Textual Commitment, Manageable Standards and Due Respect Criteria*

The Supreme Court instructed in *Walter Nixon v. United States* that the determination of "whether and to what extent the issue is textually committed" may be strengthened by a lack of judicially manageable standards.[79] The Court refused to review debenched Judge Walter Nixon's structural challenge to the Senate's shortcut exercise of its "sole" duty to "try" all impeachments. An "evidence committee" of 12 senators heard live testimony and received evidence while 88 senators avoided jury duty in favor of later having access to a cold record. All 100 Senators then voted—thumbs up or down. Hardly the Framers' vision of the upper legislative chamber fully transformed into the nation's High Court of Impeachment. Nevertheless, the Court determined that the textual commitment of authority to the Senate was absolute.

The Court refused to play semantic games: The *Nixon* majority ruled that "the word 'try' in the Impeachment Trial Clause did not provide an identifiable textual limit on the removal authority which is committed to the Senate."[80] Similarly, the terms "the Recess" and "Vacancies that may happen" in the Recess Appointment Clause of Article II, Section 2, do not provide an identifiable textual limit on the exclusive authority which is committed to the President. The commitment of temporary appointment authority "singly" to the President is of the same quality as the commitment of impeachment trial authority "solely" to the upper chamber.

Obvious by the Recess Appointment Clause's structural logic and functional purpose, the unavailable Senate was to have no role or involvement with the President's Section 2, Clause 3 temporary commissions. And, the House was to play no role whatsoever in either of the two appointment methods. In *Federalist* writings, Alexander Hamilton favorably described – with "particular commendation"—the Article II, Section 2 creation of a strong appointment authority in the

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Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him." *Id*. The Third Circuit created a conflict with the Eleventh Circuit's nonjusticiability determination in *Evans* when deciding another challenge to President Obama's NLRB recess appointments. *See* NLRB v. New Vista Nursing & Rehabilitation, 719 F.3d 203 (3rd Cir. 2013). The *New Vista* majority opinion considered and rejected various political question arguments lodged by this author's amicus brief. *Id*. at 215–19. A detailed dissent in *New Vista*, which forcefully rebutted the whole of the majority's merits opinion, also explained why "the Majority's test—that an adjournment sine die marks an intersession recess—is unworkable and not judicially manageable." *Id*. at 268. The Fourth Circuit added to the circuit split by rejecting a political question determination and adopting the flawed semantics of the D.C. and Third Circuit panels. NLRB v. Enterprise Leasing Co. Southeast, 722 F.3d 609, 660 (4th Cir. 2013).

79 Nixon v. United States, 506 U.S. 224, 228 (1993).

80 *Id*. at 239.

Executive "to promote a judicious choice of men for filling the offices of the Union."[81] Hamilton explained that any legislative assembly's "systematic spirit of cabal and intrigue" is incompatible with appointment power. With this, Hamilton contrasted appointment by a "single well directed" person who would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body."[82] Hamilton particularly emphasized in *Federalist 67* that Article II, Section 2, Clause 3 appointment authority is "intended to authorize the President *singly* to make temporary appointments."[83]

Just as *Nixon* recognized that the Senate has a "sole," non-reviewable impeachment removal power, so the President "singly" has a non-reviewable temporary commissioning power. *Nixon* further explained that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[84] Or as Justice Sotomayor described, "[t]he political question doctrine speaks to an amalgam of circumstances."[85]

If the Supreme Court ventures beyond Article II, Section 2 textual commitment of unilateral term appointment authority to the President, it will enter the densest of modern political thickets. The Court will not find manageable standards to resolve congressional interference with the Executive's appointment obligation, nor to supervise the internal conflict among congressional factions, nor to measure how much deference is due the Senate when the President signs recess commissions, if any. The Court should not conjure or adopt a recess standard that would attempt to distinguish different types of Senate unavailability and attach constitutional weight to those various types of Senate breaks.

Judicial review will necessarily focus on the 2011 congressional scheduling collusion expressly meant to force the Senate to hold fake sessions every three days. As noted, a self-identified Tea Party faction of the House demanded from leadership and orchestrated the stratagem with the express motive to "prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[86] Alexander Hamilton specifically cautioned against

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81 THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

82 *Id*. at 510–11.

83 THE FEDERALIST No. 67, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

84 *Nixon*, 506 U.S. at 228–29.

85 Zivotofsky v. Clinton, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring).

86 H.R. REP. NO. 113-30 (2013).

allowing the House to play any role in the appointment process. In *Federalist No. 77*, Hamilton felt obliged to take notice of a "scheme" advocated by "just a few" to give the House of Representatives influence in the federal appointment process.[87] Hamilton predicted that House appointment involvement would manifest "infinite delays and embarrassments." Indeed, it has.

A merits review in *Noel Canning* will thus necessitate the Court's fulsome investigation of the House Majority-Senate Minority scheduling manipulations intended to bluff and bully the President out of exercising his textual duty to fully staff the government. It is unlikely that this Court could undertake "independent resolution" of the obstruction and the President's recess commission response "without expressing lack of the respect due coordinate branches of government."[88] Outside adjudication, disrespect for the partisan confirmation dysfunction is past due.[89]

As in *Nixon*, it is also readily determinable that "there is no separate provision of the Constitution that could be defeated" by allowing the President "final authority" to utilize his temporary appointment authority.[90] It is important to underline that no individual rights claims are, or could be, presented by the Respondent's challenge.[91]

C. Walter Nixon v. United States: *Judges are Conflicted-Out of Reviewing Impeachment Trials and Transformative Appointments*

Whether by reviewing impeachments or appointments, judges should not interfere with either critical judicial life stage. Demonstrating genuine concern for judicial restraint, *Nixon* cautioned: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the

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87 THE FEDERALIST NO. 77, at 519 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

88 Baker v Carr, 369 U.S. 186, 217 (1962).

89 *See* Oskar Garcia, *Kennedy: Judges' Senate Confirmation Too Political*, ASSOCIATED PRESS, (Aug. 15, 2012 6:56 PM), http://bigstory.ap.org/article/kennedy-judges-senate-confirmation-too-political. Justice Anthony Kennedy challenged bar members at the August 2012 Ninth Circuit Conference to help end the increasing "partisan intensity" of the confirmation and appointment process: "This is bad for the legal system . . . [i]t makes the judiciary look politicized when it is not, and it has to stop." *Id*.

90 *Nixon*, 506 U.S. at 237.

91 It remains an open question whether Judge Nixon's lawyer should have emphasized his individual rights claims arising from his impeachment removal by a Senate that was not fully transformed into the nation's High Court of Impeachment (due process or attainder). *See generally* Victor Williams, *Unconstitutional Bills of Attainder or Valid Impeachment Convictions?: The Walter Nixon and Alcee Hastings Impeachment Cases*, 22 SW. U. L. REV. 1077, 1098–99 (1993).

'important constitutional check' placed on the Judiciary by the Framers."[92] Chief Justice William Rehnquist's majority opinion refused to place removal review "in the hands of the same body that the impeachment process is meant to regulate."[93] Similarly, the judiciary should be prudently conflicted-out of reviewing the process by which judges are strategically and most efficiently appointed.

More than 300 justices and judges have risen to the federal bench by a President's signature on a recess commission, including such notable jurists as Earl Warren, Potter Stewart, William Brennan, Skelly Wright, Augustus Hand and Griffin Bell.[94] The Republic's first five Presidents recess appointed over thirty federal judges, including five Supreme Court justices. Immediately after the first session of the first Congress, which passed the Judiciary Act, George Washington used recess commissions to fill three (pre-existing) federal judgeships. Thomas Jefferson recess appointed ten federal judges and thirty critically- important Justices of the Peace—including twenty-five jurists whom John Adams had earlier nominated and the Federalist Senate had confirmed as "midnight" judges.[95]

Applying *Nixon*, it is clear that the efficient appointment of new judges serves as an equally "important constitutional check" on the *status quo* of a given court and the judiciary as a whole. Vacancies on an appellate bench obviously increase the *en banc* voting power and panel influence of the incumbent judges. And the perceived authority and raw power of incumbent judges is significantly increased when bench vacancies are prolonged and numerous, such as those the D.C. Circuit has endured for over a decade. Judges should not be final arbiters of the President's most efficient appointment method to "regulate" bench vacancies, especially in an era of judicial confirmation obstruction.[96]

The *Noel Canning* panel was well aware that presidents have assertively used the authority to bench judges for progressive and transformative results.[97] "[P]residents have long used the recess

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92 *Nixon*, 506 U.S. at 235 (citations omitted).

93 *Id*.

94 Henry B. Hogue, "*The Law": Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUDIES QUARTERLY 656, 661 (2004).

95 Jefferson famously excluded William Marbury from this robust exercise of recess commission signings, thus setting the stage for the familiar adjudication. The double-disappointed Marbury got neither delivery of his ordinary commission from Adams, nor a recess commission from Jefferson. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment Justice of the Peace*, 45 CATH. U. L. REV. 349, 401–02 (1996).

96 *See generally* Matt Viser, *As Obama, Senate Collide, Courts Caught Short*, BOSTON GLOBE, Mar. 10, 2013, http://www.bostonglobe.com/news/nation/2013/03/10/obama-senate-collide-gridlock-hits-federal-courts/zQVtUmOSol9sHre7OuX3MP/story.html.

97 This author's amicus brief lodged in the D.C. Circuit adjudication noted an article in which he had advocated for George W. Bush to recess appoint Miguel Estrada to become the first Hispanic judge on the D.C. Circuit in 2003 after Senate Democrats blocked his confirmation for

appointment power to ease the way for putting well-qualified and distinguished judges from underrepresented groups on the federal bench," writes Fourth Circuit Judge Diana Motz.[98] History is full of recess appointed "judicial firsts." William McKinley recess commissioned Jacob Trieber to a federal trial bench in Arkansas as the nation's first Jewish federal judge. Woodrow Wilson recess appointed Samuel Alschuler as one of the first Jewish federal appellate jurists. Harry Truman used a recess commission to make William Hastie the first African-American on any circuit of the U.S. Court of Appeals. Four of the first five African-American federal appellate judges first came to the bench by recess commission.[99]

Seeking bench transformation during a period of reactionary Senate obstruction by regional factions of his own party, John F. Kennedy recess-commissioned over twenty percent of his judges.[100] Each temporary Kennedy judge was subsequently confirmed with life-tenure.[101] Deputy Attorney General Byron White worked with Attorney General Robert Kennedy to help JFK commission seventeen judges on just one day—October 5, 1961.[102] Thurgood Marshall was named to the Second Circuit on that day, providing the NAACP lawyer with much-needed protection for future harsh Senate confirmation ordeals.[103] The first two women to rise to a federal district court were recess appointed, including Sarah Hughes, whom John Kennedy recess commissioned to the U.S. District Court in Dallas.[104] As the first woman to administer the Presidential oath of office, Judge Hughes swore in Lyndon B. Johnson inside Air Force One on Dallas Love Field.[105]

President Johnson recess commissioned African-American judicial legends Spottswood Robinson, III and A. Leon Higginbotham to the federal trial bench. William Jefferson Clinton placed the first African-American on the Fourth Circuit after being blocked for years from making a permanent appointment. On the eve of the 21st Century,

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two years. *See* Victor Williams, *Estrada: Do a Recess Appointment*, 26 NAT.'L L.J., Mar. 10, 2003, at 12. In ultimate example of partisan payback, the *Noel Canning* oral arguments featured Miguel Estrada arguing the Senate obstructionists' amici brief.

98 Motz, *supra* note 19, at 1680.

99 *Id*.

100 *See* HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 114–15 (1972).

101 STUART BUCK, ET AL., FEDERALIST SOC'Y, JUDICIAL RECESS APPOINTMENTS: A SURVEY OF THE ARGUMENTS (2007), *available at* http://www.fed-soc.org/publications/detail/judicial-recess-appointments-a-survey-of-the-arguments.

102 *Id. See generally*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 157–60 (1997).

103 Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237, 237–239 (1993).

104 Motz, *supra* note 19, at 1682.

105 Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 514 (2004). Hughes is also known as the author of the three-judge trial court opinion overturning Texas abortion restriction law in 1970.

President Clinton recess commissioned Roger Gregory "in the grand tradition of Presidents of both parties, dating all the way back to George Washington, who have used their constitutional authority to bring much needed balance and excellence to our Nation's courts."[106]

Just months later, George W. Bush honored Clinton's recess choice by nominating Gregory to a tenured bench. Democratic and Republican senators joined in quick confirmation. The Gregory appointment set the stage for another example of partisan obstruction hypocrisy. Many of the same partisans who strongly supported Gregory's temporary and permanent appointment in 2000 were harshly critical of President Bush's recess commissioning of Charles Pickering and William Pryor to the appellate bench in 2004.[107] The *Noel Canning* panel's ruling served as an effective preemptive strike against Barack Obama's utilization of either of the Constitution's two appointment methods to fully staff, transform, or diversity their D.C. Circuit bench.[108] It eliminated the temporary recess method that had been historically used for diversity, and substantially weakened the President's ability to confront minority obstruction in confirmation battles regarding permanent appointments. In doing so, the three judges kept more than their fair share of the *en banc* power and insured the *status quo* jurisprudence and demographics of the D.C. Circuit for at least a little longer.[109]

D. Goldwater v. Carter*: Efficient Political Question Analysis*

The Supreme Court's ruling in *Goldwater v. Carter* examples the most efficient political question determination.[110] Barry Goldwater led a group of nine Senators and sixteen House members in suing President James Earl Carter for his controversial abrogation of a treaty with the Republic of China (Taiwan). A district judge escalated the conflict by ruling that the President needed approval of two-thirds of the Senate, or a congressional majority, to abrogate the Mutual Defense Treaty.[111]

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106 President William J. Clinton, *Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange with Reporters*, 36 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS no. 52, Jan. 1, 2001, *available at* http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-01/html/WCPD-2001-01-01-Pg3180.htm.

107 *See, e.g.*, Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees*, N.Y. TIMES, Mar. 3, 2004, http://www.nytimes.com/2004/03/27/us/democrats-issue-threat-to-block-court-nominees.html?pagewanted=all&src=pm.

108 Although that result may have only been an unintended consequence of the ruling, the underlying conflict of interest had been raised by this author's amicus brief.

109 *See generally* Garrett Epps, *How Vacancies on the D.C. Circuit Court Are Swaying Policy in America*, THE ATLANTIC (May 10, 2013, 7:09 AM), www.theatlantic.com/national/archive/2013/05/how-vacancies-on-the-dc-circuit-court-are-swaying-policy-in-america/275730.

110 444 U.S. 996 (1979).

111 Goldwater v. Carter, 481 F. Supp. 949 (1979).

Amid increasing political turmoil, the *en banc* D.C. Circuit reversed on the merits.[112]

Goldwater's congressional delegation immediately sought *certiorari* review at the Supreme Court and the Solicitor General's response raised political question nonjusticiability—albeit in the alternative. Without allowing merits briefing or scheduling oral argument, the Supreme Court ordered: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated, and the case is remanded to the District Court with directions to dismiss the complaint."[113] From the filing of Goldwater's certiorari petition to the final judgment, the high court process took all of ten days.

In a lead concurrence to the judgment, then-Associate Justice William Rehnquist explained: "[T]he basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable."[114] Rehnquist explained: "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty."[115] More so here, "while the Constitution is express as to the manner in which the Senate shall participate" in the confirmation of a permanent appointment, its next clause negates "that body's participation" in the President's signing of a temporary commission.[116]

In promoting the summary procedure, Rehnquist drew analogy to the Court's summary disposal of moot actions:

> It is even more imperative that this Court invoke this procedure to ensure that resolution of a "political question," which should not have been decided by a lower court, does not "spawn any legal consequences." An Art. III court's resolution of a question that is "political" in character can create far more disruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.[117]

Goldwater sets an example for the Court's ultimate withdrawal from the

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112 Goldwater v. Carter, 617 F.2d 697 (1979).

113 Goldwater, 444 U.S. at 996.

114 *Id*. at 1002 (Rehnquist, J., concurring in the judgment).

115 *Id*. at 1003 (Rehnquist, J., concurring in the judgment).

116 *See* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 265–69 n.175 (2008) (referencing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV.1221, 1273 (1995)).

117 *Goldwater*, 444 U.S. at 1005–06 (Rehnquist, J., concurring in the judgment).

ongoing political conflict regardless of how the political question is presented.

III. ALEXANDER BICKEL'S PRUDENTIAL PLEA

If the Court is not persuaded by its own political question jurisprudence, perhaps less "domesticated" abstention advocacy is needed; "something greatly more flexible, something of prudence, not construction and not principle."[118] The purest prudential strain of political question nonjusticiability, however, still incubates in Alexander Bickel's *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. In unmatched scholarly aesthetic, Bickel offered "foundation[s]" instead of criteria of the doctrine:[119]

> Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally, "in a mature democracy," the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[120]

Worsening partisan obstruction and ideological appointment rancor—resulting in critically important federal offices and benches remaining vacant for years at a time—certainly satisfy Bickel's (a) "strangeness of the issue" and intractable resolution description. Stranger still was that the reaction of partisans and ideologues to the President's response to their appointment obstruction was to lodge scores of lawsuits in various jurisdictions across the nation. Having lost the political appointment fight, the obstructionists sued. The popular media captured well the (b) "the sheer momentousness" of the recess appointment response that was needed to resurrect the independent labor agency's authority. Commentators were quick to expose the "unbalance[d] judicial judgment" of the D.C. Circuit's *Noel Canning*,

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118 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125-126 (1962).

119 *Id*. at 183–97.

120 *Id*. at 184. *See generally* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). *See also* Mark Tushnet, *Law and Prudence in the Law of Justiciability*: *The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C.L.R. 1203 (2002); Adam J. White, *The Lost Greatness of Alexander Bickel*, COMMENTARY, Mar. 1, 2012, http://www.commentarymagazine.com/article/the-lost-greatness-of-alexander-bickel ("But to focus exclusively on the question of how justices ideally should interpret the Constitution ultimately misses Bickel's more important point: the need for Burkean prudence and humility carrying out the judicial task in practice.").

Third Circuit's *New Vista* and Fourth Circuit's *Enterprise* rulings.[121]

More analysis will be needed to understand the broader effects of each panel's majority ruling which, if not (c) "ignored" by all, effectively canceled hundreds of past intra-session recess appointments of both officials and judges, and renders *ultra vires* unknown thousands of their actions and judgments. Perhaps the judges below believed the rulings' full effect would be, or should be, "ignored." The Solicitor General framed this analysis by naming names. In Appendices A and B of the Petitioner's merits brief in *Noel Canning*, the Supreme Court was provided the names, offices, and appointment dates of hundreds of officials and judges whose commissions were effectively revoked by courts below.[122] The full legal and political effects of invalidating decades of recess appointments cannot be "ignored" by the high court, and the "convenience" of the *de facto* officer doctrine will not remove the resulting taint to the constitutional legitimacy of these officials.[123] Indeed, the *de facto* officer doctrine so applied would be little more than a forced "ignorance" designed to cover the judicial usurpation of political branch appointment authority.

The final part (d) of Bickel's prudential foundation fully captures the complex absurdity of "electorally irresponsible" edicts from appointed judges whose extreme opinions only worsen the destructive effects of appointment obstruction by elected officials. Especially as the judiciary has "no earth to draw strength from," it should steadfastly resist being pulled into the political mud-fight of modern appointments.[124]

CONCLUSION: FINALITY IN APPOINTMENTS FOR THE NEXT PRESIDENT

There is a related—but separate—abstention consideration for the Court: The need for finality and the economic and political cost of uncertainty in federal appointments. As Steven Williams reasoned in

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121 *See* Douglas Kmiec, *Making Mischief with Recess Appointment Authority—The DC Circuit Adds New Ways to "Just Say No,"* HUFFINGTON POST (Jan. 29, 2013), http://www.huffingtonpost.com/douglas-kmiec/appointing-negativity-wha_b_2560814.html; Editorial, *The Fight Over Recess Appointments*, N.Y. TIMES, May 27, 2013, at A16; John Logan, *Democrats Must Overcome GOP's Complete Obstructionism on NLRB*, THE HILL (May 23, 2013, 12:30 PM), http://thehill.com/blogs/congress-blog/judicial/301495-democrats-must-overcome-gops-complete-obstructionism-on-nlrb; Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013); Peter Strauss, *The Pre-Session Recess*, 126 HARV. L. REV. F. 130 (2013).

122 Brief for Petitioner at Appendices A and B, NLRB v. Canning, 133 S. Ct. 2861 (2013) (No. 12–1281), 2013 WL 5172004. If military appointments are added to the list, the numbers of officers reach into the thousands.

123 *See generally* Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909 (1963).

124 *See generally* BICKEL, *supra* note 118.

1991, when *Nixon v. United States* was before the D.C. Circuit: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . the intrusion of the courts would expose the political [and economic] life of the country to months, or perhaps years, of chaos."[125] The nation's extreme need for finality in appointment practice weighs heavily in favor of a broad political-question determination by the high court. On January 20, 2017, the Republic's 45th President will need both temporary and permanent appointment authority to staff her new government and bench new judges to provide "an important constitutional check" on all levels of the national judiciary.

[125] Nixon v. United States, 938 F.2d 239, 245–46 (D.C. Cir. 1991) (citations omitted).