Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* NOEL CANNING ET AL.

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

No. 12–1281. Argued January 13, 2014—Decided June 26, 2014

Respondent Noel Canning, a Pepsi-Cola distributor, asked the D. C. Circuit to set aside an order of the National Labor Relations Board, claiming that the Board lacked a quorum because three of the five Board members had been invalidly appointed. The nominations of the three members in question were pending in the Senate when it passed a December 17, 2011, resolution providing for a series of "*pro forma* session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923. Invoking the Recess Appointments Clause—which gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate," Art. II, §2, cl. 3—the President appointed the three members in question between the January 3 and January 6 *pro forma* sessions. Noel Canning argued primarily that the appointments were invalid because the 3-day adjournment between those two sessions was not long enough to trigger the Recess Appointments Clause. The D. C. Circuit agreed that the appointments fell outside the scope of the Clause, but on different grounds. It held that the phrase "the recess," as used in the Clause, does not include intra-session recesses, and that the phrase "vacancies that may happen during the recess" applies only to vacancies that first come into existence during a recess.

Held:

1. The Recess Appointments Clause empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length. Pp. 5–33.

(a) Two background considerations are relevant to the questions here. First, the Recess Appointments Clause is a subsidiary method

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for appointing officers of the United States. The Founders intended the norm to be the method of appointment in Article II, §2, cl. 2, which requires Senate approval of Presidential nominations, at least for principal officers. The Recess Appointments Clause reflects the tension between the President's continuous need for "the assistance of subordinates," *Myers* v. *United States*, 272 U. S. 52, 117, and the Senate's early practice of meeting for a single brief session each year. The Clause should be interpreted as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, in interpreting the Clause, the Court puts significant weight upon historical practice. The longstanding "practice of the government," *McCulloch* v. *Maryland*, 4 Wheat. 316, 401, can inform this Court's determination of "what the law is" in a separation-of-powers case, *Marbury* v. *Madison*, 1 Cranch 137, 176. See also, *e.g., Mistretta* v. *United States*, 488 U. S. 361, 401; *The Pocket Veto Case*, 279 U. S. 655, 689–690. There is a great deal of history to consider here, for Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that such appointments can be both necessary and appropriate in certain circumstances. The Court, in interpreting the Clause for the first time, must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached. Pp. 5–9.

(b) The phrase "the recess of the Senate" applies to both inter-session recess (*i.e.,* breaks between formal sessions of the Senate) and intra-session recesses (*i.e.,* breaks in the midst of a formal session) of substantial length. The constitutional text is ambiguous. Founding-era dictionaries and usages show that the phrase "the recess" can encompass intra-session breaks. And this broader interpretation is demanded by the purpose of the Clause, which is to allow the President to make appointments so as to ensure the continued functioning of the Government while the Senate is away. The Senate is equally away and unavailable to participate in the appointments process during both an inter-session and an intra-session recess. History offers further support for this interpretation. From the founding until the Great Depression, every time the Senate took a substantial, non-holiday intra-session recess, the President made recess appointments. President Andrew Johnson made the first documented intra-session recess appointments in 1867 and 1868, and Presidents made similar appointments in 1921 and 1929. Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks and taken longer and more frequent intra-session

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breaks; Presidents accordingly have made more intra-session recess appointments. Meanwhile, the Senate has never taken any formal action to deny the validity of intra-session recess appointments. In 1905, the Senate Judiciary Committee defined "the recess" as "the period of time when the Senate" is absent and cannot "participate as a body in making appointments," S. Rep. No. 4389, 58th Cong., 3d Sess., p. 2, and that functional definition encompasses both intra-session and inter-session recesses. A 1940 law regulating the payment of recess appointees has also been interpreted functionally by the Comptroller General (an officer of the Legislative Branch). In sum, Presidents have made intra-session recess appointments for a century and a half, and the Senate has never taken formal action to oppose them. That practice is long enough to entitle it to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*, *supra*, at 689.

The Clause does not say how long a recess must be in order to fall within the Clause, but even the Solicitor General concedes that a 3-day recess would be too short. The Adjournments Clause, Art. I, §5, cl. 4, reflects the fact that a 3-day break is not a significant interruption of legislative business. A Senate recess that is so short that it does not require the consent of the House under that Clause is not long enough to trigger the President's recess-appointment power. Moreover, the Court has not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. There are a few examples of inter-session recess appointments made during recesses of less than 10 days, but these are anomalies. In light of historical practice, a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. The word "presumptively" leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break. Pp. 9–21.

(c) The phrase "vacancies that may happen during the recess of the Senate," Art. II, §2, cl. 3, applies both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess. Again, the text is ambiguous. As Thomas Jefferson observed, the Clause is "certainly susceptible of [two] constructions." Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 Papers of Thomas Jefferson 433. It "may mean 'vacancies that may happen to be' or 'may happen to fall'" during a recess. *Ibid.* And, as Attorney General Wirt wrote in 1821, the broader reading is more consonant with the "reason and spirit" of the Clause. 1 Op. Atty. Gen. 632. The purpose of the Clause is to permit the President, who is always acting to execute the law, to obtain the assistance of subordinate officers while the Senate, which acts only in

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intervals, is unavailable to confirm them. If a vacancy arises too late in the session for the President and Senate to have an opportunity to select a replacement, the narrower reading could paralyze important functions of the Federal Government, particularly at the time of the founding. The broader interpretation ensures that offices needing to be filled can be filled. It does raise a danger that the President may attempt to use the recess-appointment power to circumvent the Senate's advice and consent role. But the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent a President from making any recess appointment to fill a vacancy that arose before a recess, no matter who the official, how dire the need, how uncontroversial the appointment, and how late in the session the office fell vacant.

Historical practice also strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President Madison. Nearly every Attorney General to consider the question has approved the practice, and every President since James Buchanan has made recess appointments to pre-existing vacancies. It is a fair inference from the historical data that a large proportion of recess appointments over our Nation's history have filled pre-recess vacancies. The Senate Judiciary Committee in 1863 did issue a report disagreeing with the broader interpretation, and Congress passed a law known as the Pay Act prohibiting payment of recess appointments to pre-recess vacancies soon after. However, the Senate subsequently abandoned its hostility. In 1940, the Senate amended the Pay Act to permit payment of recess appointees in circumstances that would be unconstitutional under the narrower interpretation. In short, Presidents have made recess appointments to preexisting vacancies for two centuries, and the Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. The Court is reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long. Pp. 21–33.

2. For purposes of the Recess Appointments Clause, the Senate is in session when it says that it is, provided that, under its own rules, it retains the capacity to transact Senate business.

This standard is consistent with the Constitution's broad delegation of authority to the Senate to determine how and when to conduct its business, as recognized by this Court's precedents. See Art. I, §5, cl. 2; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 672; *United States* v. *Ballin*, 144 U. S. 1, 5, 9. Although the Senate's own determination of when it is and is not in session should be given great weight, the Court's deference cannot be absolute. When the Senate is without

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the capacity to act, under its own rules, it is not in session even if it so declares.

Under the standard set forth here, the Senate was in session during the *pro forma* sessions at issue. It said it was in session, and Senate rules make clear that the Senate retained the power to conduct business. The Senate could have conducted business simply by passing a unanimous consent agreement. In fact, it did so; it passed a bill by unanimous consent during its *pro forma* session on December 23, 2011. See 2011 S. J. 924; Pub. L. 112–78. The Court will not, as the Solicitor General urges, engage in an in-depth factual appraisal of what the Senate actually did during its *pro forma* sessions in order to determine whether it was in recess or in session for purposes of the Recess Appointments Clause.

Because the Senate was in session during its *pro forma* sessions, the President made the recess appointments at issue during a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause, so the President lacked the authority to make those appointments. Pp. 33–41.

705 F. 3d 490, affirmed.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

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