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PUTTING THE RABBIT BACK IN THE HAT: *NOEL CANNING*'S IMPACT ON EIGHTEEN MONTHS OF NLRB DECISIONS AND FUTURE PRESIDENTIAL APPOINTMENTS

*Paul Kind**

I. INTRODUCTION

The Supreme Court in *NLRB v. Noel Canning*¹ interpreted the Recess Appointments Clause (alternatively, “Clause”)² for the first time in history.³ In so doing, the Court invalidated hundreds of National Labor Relations Board (NLRB or the “Board”) decisions from 2012 and 2013 and set the standard for future presidential appointments of officials. This Comment focuses on the impact of *Noel Canning* on (1) the invalidated NLRB decisions and (2) future presidential nominations.

The *Noel Canning* opinion centered around whether President Obama had constitutionally applied the Recess Appointments Clause in appointing three of five NLRB members in January 2012. The Court ultimately held that the members had been unconstitutionally appointed because the recess had not been long enough to trigger the Clause.⁴

The controversy at issue stemmed from a somewhat routine dispute between an employer and a union. The dispute resulted in a

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1. 134 S. Ct. 2550 (2014).

2. The Recess Appointments Clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. CONST. art. II, § 2 cl. 3.

3. The Court stated, “We have not previously interpreted the [Recess Appointments] Clause . . .” *Noel Canning*, 134 S. Ct. at 2560.

4. *See id.* at 2557.

decision by the NLRB in favor of the union.⁵ The employer then appealed to the Court of Appeals for the District of Columbia Circuit, arguing that the NLRB decision should be thrown out because three of the five members had been unconstitutionally appointed. The Court of Appeals agreed with the employer and invalidated the NLRB decision.⁶

The Supreme Court unanimously affirmed the Court of Appeals decision holding that the appointments had been unconstitutional. However, the Court was sharply divided between a five-Justice majority, authored by Justice Breyer, and a four-Justice concurrence, vehemently authored by Justice Scalia.⁷ The two opinions disagree on everything except the final judgment. Further, the majority opinion overturned the rationale of the Court of Appeals decision in its entirety and upheld only the end result.

This Comment unpacks the *Noel Canning* opinion's reasoning before delving into the opinion's impact on the invalidated NLRB decisions and future presidential appointments. Part II lays out the facts discussed in the opinion. Part III takes an in-depth look at the Court's reasoning. Finally, Part IV analyzes the impact of *Noel Canning* on the invalidated NLRB decisions and future presidential appointments.

II. NOEL CANNING: THE FACTS

On September 26, 2011, an NLRB administrative law judge (ALJ) ruled in favor of Teamsters Local 760 ("the Union") and against Noel Canning, a bottler and distributor of PepsiCola products and a division of the Noel Corporation.⁸ Specifically, the ALJ held that Noel Canning had violated §§ 8(a)(1) and (5) of the National Labor Relations Act by refusing to execute and enter into a collective

5. See *Noel Canning*, A Div. of the Noel Corp. & Teamsters Local 760, 358 N.L.R.B. No. 4 (Feb. 8, 2012).

6. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013), and *aff'd but criticized*, 134 S. Ct. 2550 (2014).

7. *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring) ("The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.")

8. *Noel Canning*, 358 N.L.R.B. No. 4 at *1.

bargaining agreement that had been verbally agreed to by the parties during negotiations.⁹ Noel Canning appealed the decision, and on February 8, 2012, the NLRB affirmed the ALJ's decision.¹⁰ As a result, the NLRB "ordered the distributor to execute the agreement and to make employees whole for any losses."¹¹

Subsequently, Noel Canning appealed the NLRB's decision to the Court of Appeals for the District of Columbia Circuit.¹² Noel Canning argued that the NLRB's decision should be set aside because three of the five Board members had been invalidly appointed.¹³

On January 4, 2012, the President appointed three NLRB members—Sharon Block, Richard Griffin, and Terence Flynn—by invoking the Recess Appointments Clause, thus bypassing a Senate vote.¹⁴ At that time, the Senate had taken a series of brief recesses from December 17, 2011, until January 23, 2012.¹⁵ According to a Senate resolution, the Senate held pro forma sessions every Tuesday and Friday during this period.¹⁶ Noel Canning argued that the Recess Appointments Clause did not support appointments that were made while the Senate was in a three-day adjournment that occurred between pro forma sessions on January 3 and 6, 2012.¹⁷

The Court of Appeals ruled in favor of Noel Canning but not for the reason that Noel Canning had argued.¹⁸ The Court of Appeals held that the appointments had been unconstitutional because they had been made during an intra-session recess (a recess within a formal session of Congress) rather than an inter-session recess (a recess between formal sessions of Congress).¹⁹ Because the second session of the 112th Congress had begun one day before the

9. *Id.* at *3, *8.

10. *Id.* at *1.

11. *Noel Canning*, 134 S. Ct. at 2557.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Pro forma sessions are often only seconds-long and have been used by the Senate to stifle a President's ability to make recess appointments by breaking a longer recess into several shorter adjournments. 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, 2059, 2067 (2013).

17. *Noel Canning*, 134 S. Ct. at 2557.

18. *Id.*

19. *Id.* at 2557–58.

appointments, the appointments occurred during an intra-session recess and not an inter-session recess.²⁰ Furthermore, the Court of Appeals stated that the appointments were unconstitutional because the Recess Appointments Clause applies only to vacancies that arise during the recess.²¹ In this instance, the vacancies had occurred well before the recess.²² Ultimately, the Court of Appeals deemed the NLRB's decision to be invalid because the NLRB had not had a properly appointed quorum of members.²³

Subsequently, the Supreme Court granted the Solicitor General's petition for certiorari on behalf of the government.²⁴

III. *NOEL CANNING*: THE COURT'S REASONING

The Supreme Court addressed three issues in determining the constitutionality of the President's appointments: (1) whether the phrase "recess of the Senate" refers only to an inter-session recess, or also includes an intra-session recess; (2) whether the phrase "vacancies that may happen" refers only to vacancies that first come into existence during a recess, or also includes vacancies that arise prior to a recess but exist during the recess; and (3) whether pro forma sessions should be ignored in calculating the recess's length.²⁵

A. Does the Recess Appointments Clause Apply to Both Inter- and Intra-Session Recesses?

First, on the issue of whether the Recess Appointments Clause includes both inter- and intra-session recesses, the Court disagreed with the Court of Appeals and held that the Clause does apply to both types of recesses.²⁶ The Court of Appeals' narrow interpretation of the Clause limited recess appointments to the inter-session recess, the annual recess between formal sessions of Congress.²⁷ Contrary to the Court of Appeals,²⁸ the Supreme Court determined that the Clause also applies to intra-session recesses of sufficient length.²⁹

20. *Id.* at 2558.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 2556–57.

26. *Id.* at 2567.

27. *Id.* at 2557–58.

28. *Id.* at 2557, 2561.

29. *Id.* at 2561.

The Court determined this by first looking to the Constitution's text.³⁰ After surveying founding-era dictionaries and remarks by the Founders, the Court found that the word "recess" applies to either type of recess.³¹ Further, the word "the"—which precedes "recess" in the Clause—may refer to either a particular recess (e.g., the inter-session recess) or recesses generally and universally.³² Thus, the Court found that the Constitution's text is ambiguous as to this question.³³

Next, the Court looked to the Clause's purpose: giving "the President authority to make appointments during 'the recess of the Senate' so that the President can ensure the continued functioning of the Federal Government when the Senate is away."³⁴ Because the Senate is away during both an inter-session recess and an intra-session recess, the Court held that the Clause should apply to both.³⁵

Finally, the Court looked to historical precedent,³⁶ noting both that intra-session recesses have been longer and more frequent since 1929³⁷ and that Presidents have consistently interpreted the word "recess" to apply to both inter- and intra-session recesses.³⁸ Accordingly, the Court stated that "three-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision."³⁹ In addition, the Court noted that the Senate has not called into question the broader understanding of "recess," despite Presidents making "countless recess appointments during intra-session recesses."⁴⁰

The Court again turned to historical practice to determine the length of an intra-session recess that would trigger the Recess Appointments Clause.⁴¹ To begin with, all parties concerned agreed that a recess must be at least three days in length for the Recess

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2562.

37. *Id.*

38. *Id.* at 2564.

39. *Id.* (citing *Okanogan v. United States*, 279 U.S. 655, 689 (1929)).

40. *Id.*

41. *Id.* at 2566.

Appointments Clause to apply.⁴² This conclusion stemmed from the Constitution's Adjournments Clause, which provides: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."⁴³ Accordingly, a Senate recess that does not require the House of Representatives' consent is not long enough to make the Recess Appointments Clause applicable.⁴⁴ However, the Court found no record of there ever having been an intra-session recess appointment when the recess was shorter than ten days.⁴⁵ The weight of historical practice pushed the Court to conclude "that a recess of more than three days but less than ten days is presumptively too short to fall within the Clause."⁴⁶

In sum, the Recess Appointments Clause applies to both types of recesses, so long as the recess is at least ten days in length.⁴⁷

B. Is the Recess Appointments Clause Limited to Vacancies That Come Open During the Recess?

Once again, the Supreme Court disagreed with the Court of Appeals, holding that the Recess Appointments Clause applies to recesses that come open before or during the recess.⁴⁸ The Court again looked to the Constitutional text, the Clause's purpose, and historical practice in making this determination.

First, the Court found that the Clause's text is ambiguous.⁴⁹ A narrower reading would be to hold that "vacancies that may happen" must be interpreted as vacancies that originate during the Senate recess.⁵⁰ The Court found such a narrow reading to be implausible, especially considering both Thomas Jefferson and William Wirt, President James Monroe's Attorney General, discussed two possible constructions of the Clause.⁵¹

42. *Id.*

43. U.S. CONST. art. I, § 5, cl. 4.

44. *Noel Canning*, 134 S. Ct. at 2566.

45. *Id.*

46. *Id.* at 2567 ("We add the word 'presumptively' to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.").

47. Exceptions may apply as mentioned in note 46, *supra*.

48. *Noel Canning*, 134 S. Ct. at 2567.

49. *Id.* at 2568.

50. *Id.*

51. *Id.* at 2567–68.

Second, the Court stated that the Clause's purpose—allowing the President to appoint officers when the Senate is not available to confirm them—favored applying the Clause to vacancies that had arisen before the recess.⁵² The Court determined that the Recess Appointments Clause's purpose was to foster the government's ongoing operation, and a narrow reading of the Clause would impinge on that purpose.⁵³ Specifically, a narrow reading would keep the President from appointing an officer in certain circumstances “no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”⁵⁴

Third, in looking at historical practice, the Court found that the broader interpretation of the Clause has been strongly favored.⁵⁵ Every President since James Buchanan (1857–61) has made recess appointments to vacancies that existed prior to the recess, and many of the Presidents prior to Buchanan did likewise.⁵⁶ Although historical data on when vacancies arose is incomplete, “a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies.”⁵⁷ In addition, the Senate has largely not contested the practice, and it has been entirely uncontested for approximately seventy-five years.⁵⁸

In sum, the ambiguity of the Clause's text, the Clause's purpose, and the historical application of the Clause led to the conclusion that “all vacancies” includes vacancies that become open prior to a recess.⁵⁹

C. Do Pro Forma Sessions Count as Senate Sessions?

Having interpreted the Recess Appointments Clause, the remaining question is: How long was the intra-session recess in which President Obama appointed the three NLRB members?⁶⁰ The Solicitor General posited that the recess had been twenty days in

52. *Id.* at 2568–69.

53. *See id.*

54. *Id.* at 2569–70.

55. *Id.* at 2570.

56. *Id.* at 2571.

57. *Id.*

58. *Id.* at 2573.

59. *Id.*

60. *Id.* at 2573.

length—from January 3, when the second session of the 112th Congress technically began, to January 23, when the Senate had reconvened for regular business.⁶¹ The Solicitor General argued that the five pro forma sessions held between January 3 and January 23 should be disregarded because the Senate had been functionally on recess the entire time.⁶² Alternatively, if pro forma sessions count as Senate sessions, then the appointments had been made during a three-day recess between pro forma sessions.⁶³

The Court held that pro forma sessions count as sessions because during them the Senate maintains the capacity to transact business.⁶⁴ Central to the Court's determination was that the Senate has the right to determine when the Senate is in session.⁶⁵ Both the Constitution's structure and the Court's precedents reflected the Senate's ability to set its own rules and control its own schedule.⁶⁶

However, the Court looked to the Recess Appointments Clause's purpose in identifying one caveat: the Senate must have the ability to conduct business.⁶⁷ Otherwise it would be meaningless for the Senate to say it is in session in name only.⁶⁸

By this standard, the Court determined that the pro forma sessions were in fact sessions and not a functional recess.⁶⁹ The Court came to this conclusion for several reasons. First, the Senate had declared that it was in session.⁷⁰ Second, the Senate had in fact maintained the ability to conduct business.⁷¹ For example, just weeks before the Presidential appointments of the NLRB members, the Senate had passed a bill by unanimous consent during a pro forma session.⁷² Accordingly, the Court refused to engage in the Solicitor General's request for a "more realistic appraisal of what the Senate actually did."⁷³ To hold that the pro forma sessions were actual sessions of the Senate and not a form of recess, it was sufficient that

61. *Id.* at 2574.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 2574–75.

67. *Id.* at 2575.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2576.

the Senate had declared itself in session and had maintained the capacity to conduct business.⁷⁴

In sum, the President had appointed the NLRB members during a three-day recess, which is too short of a recess to trigger the Recess Appointments Clause.⁷⁵ The Court, therefore, affirmed the Court of Appeals' judgment but under a completely different rationale.⁷⁶ Whereas the Court of Appeals had held that the Clause applies only to inter-session recesses and only to vacancies that come open during the recess, the Supreme Court held that the Clause applies to both inter- and intra-session recesses and to all vacancies regardless of when they arise.

IV. ANALYSIS

Much could be said about the divergent approaches to constitutional interpretation exhibited by the majority and concurring opinions.⁷⁷ However, this Comment is focused on the *Noel Canning* opinion's impact on the hundreds of NLRB decisions made during the invalidated members' tenure, as well as the opinion's impact on future recess appointments. Accordingly, the concurring opinion is not discussed because it lacks precedential authority.

A. Impact of Noel Canning on the NLRB Decisions Made by the Invalid Board Members

As a result of *Noel Canning*, all of the NLRB decisions that were decided by the improperly appointed members are invalid and must be reheard by the current Board. This covers the eighteen-month period from January 4, 2012, when the President appointed the three members via the Recess Appointments Clause, to July 30, 2013, when the Senate confirmed all five Board members.⁷⁸ Early reports suggested 400 to 600 cases needed rehearing.⁷⁹

74. *Id.*

75. *Id.* at 2574.

76. *Id.* at 2578.

77. *See id.* at 2592 (Scalia, J., concurring).

78. Ramsey Cox, *Senate Confirms All 5 NLRB Members*, THE HILL (July 30, 2013), <http://thehill.com/blogs/floor-action/senate/314503-senate-votes-to-confirm-all-five-nlr-b-members>. To find consensus in the Senate for the confirmation of five NLRB members, the nominations of the invalidly appointed members were withdrawn, and two of the five members confirmed were selected by the Republican Party. *Id.*

79. Benjamin Goad, *Workload Threatens to Paralyze Labor Board*, THE HILL (July 13, 2014), <http://thehill.com/regulation/labor/212031-new-workload-threatens-to-paralyze-obama>

However, NLRB spokesperson Tony Wagner said the Board had identified approximately 100 decisions that will be reviewed.⁸⁰ Because the five-member NLRB regularly delegates its decision-making authority to three-member subsets of the Board, only the decisions that had been decided by the invalidated members must be reheard.⁸¹ Further, many other disputes have subsequently been resolved, and the parties will not press for rehearing.⁸² Dozens of NLRB decisions from this time period have been challenged in federal court, and these will likely be remanded to the Board for reconsideration.⁸³

The method that the NLRB will use to rehear the decisions is unclear. The day *Noel Canning* was published, the NLRB Chairman released a statement that said the NLRB was “analyzing the impact that the Court’s decision has on Board cases,” and that the NLRB “is committed to resolving any cases affected by today’s decision as expeditiously as possible.”⁸⁴ Although some commentators suggest that rehearing the decisions will result in little change,⁸⁵ many

-labor-board (stating that more than 400 cases were initially thought to require rehearing); Richard Meneghello, *A Series of Ticking Time Bombs—A Review of the Supreme Court’s 2013–2014 Term*, JDSUPRA BUS. ADVISOR (Aug. 8, 2014), <http://www.jdsupra.com/legalnews/a-series-of-ticking-time-bombs-a-revie-02866/> (stating that more than 600 cases were invalidated and thought to require rehearing).

80. Goad, *supra* note 79.

81. *Id.*

82. *Id.*

83. Anne Averitt & Matthew C. Lonergan, *Supreme Court Opinion Calls Into Question Hundreds of NLRB Rulings*, JDSUPRA BUS. ADVISOR (Aug. 6, 2014), <http://www.jdsupra.com/legalnews/supreme-court-opinion-calls-into-questio-27774/>; *see, e.g.*, Nestle Dreyer’s Ice Cream Co. v. NLRB, No. 12-1684 (4th Cir. July 29, 2014) (“The court vacates the Board’s order and remands the case to the Board for further consideration in light of the Supreme Court’s decision in *NLRB v. Noel Canning* . . .”), available at <http://www.chamberlitigation.com/nestle-dreyers-ice-cream-company-v-nlr-et-al> (select PDF link for Order Vacating and Remanding to NLRB—Nestle Dreyer’s Ice Cream Company v. NLRB, et al.).

84. Office of Pub. Affairs, *Statement of NLRB Chairman Mark Gaston Pearce on the Supreme Court’s Noel Canning Decision*, NAT’L LAB. REL. BOARD (June 26, 2014), <http://www.nlr.gov/news-outreach/news-story/statement-nlr-chairman-mark-gaston-pearce-supreme-courts-noel-canning>; *see also* Office of Pub. Affairs, *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, NAT’L LAB. REL. BOARD (Aug. 4, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-officials-ratify-agency-actions-taken-during-period-when-supreme-court> (stating that the NLRB “ratified all administrative, personnel, and procurement matters taken by the Board” during the invalidated period).

85. Henry W. Sledz, Jr., *Supreme Court Affirms Noel Canning Decision, Invalidates President Obama’s January 2012 Recess Appointments to the NLRB*, NAT’L L. REV. (July 4, 2014), <http://www.natlawreview.com/article/supreme-court-affirms-noel-canning-decision-invalidates-president-obama-s-january-20> (“Given the Democratic majority on the Board, we

commentators contend that rehearing will be more favorable for employers than workers.⁸⁶

There are at least three reasons for a potential employer-friendly outcome as a result of *Noel Canning*. First, the NLRB decisions during the eighteen-month invalidated time period were generally worker-friendly.⁸⁷ Therefore, it is possible that on rehearing employers may be more pleased with the outcome. For example, the noteworthy NLRB decision, *Banner Health System*,⁸⁸ struck down an employer's policy that workers could not discuss "ongoing investigations of employee misconduct."⁸⁹ The NLRB held that "an employer's interest in maintaining an internal investigation's integrity did not outweigh the potential restrictions the policy imposed on an employee's right to concerted action."⁹⁰ This ruling, were it to stand, impacts all private-sector employers, not just union employers.⁹¹ Employers will be eager to see if *Banner Health System*, and other notable decisions, will have more favorable outcomes for their interests. The Board's changed composition could lead to a different result the second time around.

Second, reviewing approximately 100 decisions will likely hamper the NLRB for several months.⁹² This is thought to be employer-friendly due to the current worker-friendly nature of the Board. Several potentially precedent-setting cases are presently before the Board, including the following: "the Northwestern University football team's unionization bid, the right of employees to use work email to organize a union, the board's proposed rule

anticipate that many of the invalid prior decisions will be reaffirmed by the Board . . ."); Goad, *supra* note 79 ("Given the board's political and ideological makeup, the decisions are not likely to change much a second time around.").

86. See Meneghello, *supra* note 79; Tanja L. Thompson & Brenda N. Canale, *Supreme Court Holds NLRB Recess Appointments Invalid*, HR PROF. MAG., <http://hrprofessionalsmagazine.com/supreme-court-holds-nlrbs-recess-appointments-invalid/> (last visited Oct. 24, 2014).

87. *What Should Workers and Employers Expect Next from the National Labor Relations Board?: Hearing Before the H. Subcomm. On Health, Emp't, Labor, and Pensions*, 113th Cong. 8 (2014) (statement of G. Roger King, Of Counsel, Jones Day), available at http://edworkforce.house.gov/uploadedfiles/king_testimony_revised.pdf (arguing that the invalidated Board was extremely worker-friendly and that the Board "is engaged in an agenda that clearly goes considerably beyond moderate policy oscillation").

88. 358 N.L.R.B. No. 93 (July 30, 2012).

89. *Id.* at *2.

90. Averitt & Lonergan, *supra* note 83.

91. *Id.*

92. Goad, *supra* note 79.

allowing for speedier union elections and a decision that could change the very definition of who counts as an employer for the purpose of labor rules.”⁹³ If, as some have posited, the current Board members have a pro-worker agenda, then they will have a difficult time carrying that out in cases that have yet to be decided because of the burden of rehearing around 100 cases.⁹⁴

Third, an additional change in the Board’s makeup occurred in December 2014. Nancy Schiffer, one of the three Democratic members on the Board, had her term expire on December 16, 2014, and Lauren McFerran was appointed shortly thereafter. Largely regarded as a pro-worker addition to the Board, her presence could lead to many of the invalidated pro-worker decisions ultimately being upheld. However, this remains to be seen. Either way, it is possible that things could move in an employer-friendly direction when the cases are reheard.

In sum, the potential for new decisions regarding notable cases, the backlog created by rehearing approximately 100 cases, and the recent shakeup of the Board make *Noel Canning* a welcome opinion among the employer-friendly crowd.

B. Impact of Noel Canning on Future Recess Appointments

Noel Canning’s impact on future recess appointments cuts two ways. On the one hand, the Court’s broad interpretation of “recess” and “vacancies that may happen” means that recess appointments are constitutional at all times, so long as the recess is of sufficient length. On the other hand, weighing against future recess appointments, the Court’s determination that pro forma sessions count as Senate sessions means that the Senate can use this tactic to block future recess appointments. Given the newly established interpretation of the Recess Appointments Clause, the following analysis provides an overview of how Presidential appointments can and cannot occur moving forward.

The need for and likelihood of recess appointments depends on which party controls the two Houses of Congress. First, if the members of the President’s own political party control the Senate, then recess appointments will likely not be an issue because of recent

93. *Id.*

94. *See* Meneghello, *supra* note 79.

changes to Senate rules.⁹⁵ Until recently, the Senate required a supermajority of sixty Senators to support a Presidential nomination in order to avoid a filibuster by the opposing party.⁹⁶ However, in November 2013, in a 52-to-48 vote, the Democrat-controlled Senate voted to do away with filibusters for all Presidential nominations, with the exception of Supreme Court nominations.⁹⁷ Now, a simple majority is all that is needed to ensure confirmation of a President's nominee.⁹⁸ This rule change upended nearly forty years of requiring a supermajority for nominations.⁹⁹ Consequently, the President will have little to no reason to resort to using recess appointments if his or her party controls the Senate.

Second, if the President's political party controls the House, but not the Senate, that party will have the option of demanding adjournment on a certain date and creating a recess. The Constitution makes it clear that the two Houses of Congress must be in agreement when they adjourn for more than three days.¹⁰⁰ If the Senate were to oppose, then the President has the Constitutional authority to set the adjournment date of both Houses of Congress.¹⁰¹ The Constitution states, "in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."¹⁰² As the Court in *Noel Canning* stated, this allows the President to essentially "force a recess."¹⁰³ Practically, this means that if members of the President's political party control the House but not the Senate, then that party can use the rules outlined in the Constitution to create a recess of sufficient length for the Recess Appointments Clause to apply.

Third, if the President's political party does not control either House of Congress, then the President will be unlikely to appoint

95. See Peter Shane, *Two Cheers for Recess Appointments*, PENN PROGRAM ON REG. REG BLOG (June 26, 2014), <http://www.regblog.org/2014/06/26-shane-two-cheers-recess-appointments.html>.

96. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

97. *Id.*

98. *Id.*

99. *Id.*

100. U.S. CONST. art. I, § 5, cl. 4.

101. *Id.* art. II, § 3.

102. *Id.*

103. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014).

government officials unless they are amenable to the opposing party. In this scenario, the President would have no guaranteed method of having nominations confirmed or of creating recesses of sufficient length for the Recess Appointments Clause to apply.¹⁰⁴ For example, President Clinton, a Democrat, began his presidency with Democrats in control of both Houses of Congress.¹⁰⁵ However, Republicans took control of both Houses at the first mid-term election and remained in control for the remaining six years of Clinton's presidency.¹⁰⁶ If this scenario occurred again, because the Senate would be free to set its own schedule, the Senate would have the option of scheduling business sessions or pro forma sessions to the extent needed to negate the President's ability to appoint officials under the Clause.¹⁰⁷ Accordingly, the President would have to resort to bipartisan cooperation to attain his or her nominees' confirmations.¹⁰⁸

Because the Supreme Court gave great weight to historical practice, the tools available to the President for nominations of officers are largely the same as they were before *Noel Canning*. As a result of *Noel Canning*, however, all parties involved know what the rules are and what the extent of the President's authority is under the Recess Appointments Clause.

104. Shane, *supra* note 95.

105. See *Party Divisions of the House of Representatives: 1798–Present*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [hereinafter *House Party Divisions*] (last visited Oct. 25, 2014); *Party Division in the Senate 1789–Present*, U.S. SENATE, <http://www.senate.gov/history/partydiv.htm> [hereinafter *Senate Party Division*] (last visited Oct. 25, 2014).

106. *House Party Divisions*, *supra* note 105; *Senate Party Division*, *supra* note 105.

107. *Noel Canning*, 134 S. Ct. at 2577.

108. The Vacancies Act, 5 U.S.C. §§ 3345–3349 (2012), provides the rules for the President's ability to designate acting officers for certain periods of time. See *The Vacancies Act*, U.S. DEP'T OF JUSTICE ARCHIVE, <http://www.justice.gov/archive/transition/vacancies-act.htm> (last visited Oct. 25, 2014).