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## Section 5: First Amendment & Separation of Powers

Institute of Bill of Rights Law at The College of William & Mary School of Law

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## V. First Amendment & Separation of Powers

*In This Section:*

<b>New Case:</b> 12-536 <i>McCutcheon v. Federal Election Commission</i>	p. 284
Synopsis and Questions Presented	p. 284
“JUSTICES TAKE CASE ON OVERALL LIMIT TO POLITICAL DONATIONS” Adam Liptak	p. 292
“IS MCCUTCHEON V. FEC THE NEXT CITIZENS UNITED” Alex Gauthier	p. 294
“COURT UPHOLDS AGGREGATE FEDERAL CONTRIBUTION LIMIT” Matthew Connolly	p. 297
“SUPREME COURT COULD CREATE SYSTEM OF LEGALIZED BRIBERY IN WASHINGTON DEPENDING ON ITS DECISION IN MCCUTCHEON CASE” Fred Wertheimer	p. 298
<b>New Case:</b> 12-1038 <i>United States v. Apel</i>	p. 301
Synopsis and Questions Presented	p. 301
“SUPREME COURT AGREES TO HEAR MILITARY PROTESTER CASE” Larence Hurley	p. 303
<b>New Case:</b> 12-1281 <i>National Labor Relations Board v. Noel Canning</i>	p. 304
Synopsis and Questions Presented	p. 304
“SUPREME COURT TO WEIGH IN ON OBAMA’S RECESS APPOINTMENTS” Robert Barnes	p. 322
“U.S. LIMIT APPOINTMENT POWER REVIEW” Lyle Denniston	p. 324
“COURT RULING UPSETS CONVENTIONAL WISDOM ON RECESS APPOINTMENTS” Carrie Johnson	p. 326
“EMPLOYERS EMBRACE NOEL CANNING ON NLRB RECESS APPOINTMENTS” Frederick L. Warren	p. 329

“A JUDICIAL ATROCITY” Jeffrey Toobin	p. 333
<b>New Topic:</b> Passport Law after <i>Zivotofsky</i> ( <i>looking ahead</i> )	p. 336
“PASSPORT LAW ON JERUSALEM UNCONSTITUTIONAL, FEDERAL APPEALS COURT SAYS” <i>Fox News</i>	p. 336
“WILL ‘ISRAEL’ PASSPORT CASE RETURN TO THE SUPREME COURT?” <i>Washington Jewish News</i>	p. 338
“JERUSALEM PASSPORT CASE – SEPARATION OF POWERS AND STANDING” Eugene Kontorovich	p. 340

*McCutcheon v. Fed. Election Comm'n*

12-536

**Ruling Below:** *McCutcheon v. Fed. Election Comm'n*, 893 F.Supp. 2d 133 (D.D.C. 2012), *cert. granted*, 133 S.Ct. 1242.

Prospective campaign contributor, political party's national committee, and nonparty political committee brought action challenging constitutionality of Federal Elections Campaign Act's (FECA) aggregate limit on candidate contributions and other contributions to party committees. Federal Election Commission filed motion to dismiss. A three-judge panel of the District Court held that FECA's aggregate limit on candidate contributions and other contributions to party committees were a permissible means under First Amendment of preventing corruption or the appearance of corruption, and were not unconstitutionally overbroad.

**Question Presented:** (1) Whether the biennial limit on contributions to non-candidate committees is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national party committees; (2) whether the biennial limits on contributions to non-candidate committees are unconstitutional facially for lacking a constitutionally cognizable interest; (3) whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially; and (4) whether the biennial limit on contributions to candidate committees is unconstitutional for lacking a constitutionally cognizable interest.

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**Shaun MCCUTCHEON, et al., Plaintiffs,**  
**v.**  
**FEDERAL ELECTION COMMISSION, Defendant.**

United States District Court, District of Columbia

Decided on September 28, 2012

[Excerpt; some footnotes and citations omitted.]

## **BROWN, Circuit Judge**

Congress enacted the Federal Elections Campaign Act of 1971 (FECA) to “promote fair practices in the conduct of election campaigns for Federal political offices.” Since 1972, the law has changed significantly. The current iteration of FECA imposes contribution limits stratified to track both the identity of the contributor and the identity of the receiver. Individuals, however, cannot necessarily contribute as much as they might wish within these limits; they, and only they, must comply with a second regulatory tier: a set of aggregate contribution limits. Plaintiffs Shaun McCutcheon and the Republican National Committee (“RNC”) now challenge these aggregate limits as unconstitutional. We reject their challenge.

### **I. Background**

#### **A. Legal Background**

In 1974, Congress amended FECA to prohibit persons from contributing more than \$1,000 to any political candidate, individuals from contributing more than an aggregate of \$25,000 in any calendar year, and political committees from contributing more than \$5,000 to any political candidate. The Supreme Court ultimately upheld these contribution limits in the face of a First Amendment challenge, though it struck down FECA’s expenditure limits [in *Buckley v. Valeo*]. A few months after the *Buckley* Court handed down its decision, Congress amended FECA to distinguish (1) between contributions by persons and contributions by multicandidate political committees, and (2) among contributions to

candidates and their authorized committees, contributions to national political party committees, and contributions to all other political committees. Congress left the \$25,000 aggregate limit on individuals’ contributions untouched, however, until the Bipartisan Campaign Reform Act of 2002 (BCRA), which replaced the \$25,000 aggregate limit with the bifurcated limiting scheme that Plaintiffs now challenge. There are thus two sets of contribution limits: base limits calibrated to the identity of the contributor regulating how much the contributor may give to specified categories of recipients, and a set of aggregate limits regulating the total amount an individual may contribute in any two-year election cycle. Some (but not all) of these limits are periodically indexed for inflation.

The default base limits apply to contributions by “persons,” that is, individuals, partnerships, committees, associations, corporations, unions, and other organizations. FECA currently prohibits persons from contributing more than \$2,500 per election to any given candidate or that candidate’s agent or authorized committee; more than \$30,800 in any calendar year to each of a national political party’s national committee, House campaign committee, and Senate campaign committee; more than \$10,000 in any calendar year to a state party political committee; and more than \$5,000 in any calendar year to any other political committee.

These base contribution limits do not limit how much a contributor can contribute as long as the contributions remain within the

limits for each recipient. Under the base contribution limits, for example, an individual might contribute \$3.5 million to one party and its affiliated committees in a single election cycle. The aggregate limits prevent this. During each two-year period starting in an odd-numbered year, no individual may contribute more than an aggregate of \$46,200 to candidates and their authorized committees or more than \$70,800 to anyone else. Of that \$70,800, no more than \$46,200 may be contributions to political committees that are not national political party committees. These aggregate limits, which amount to a total biennial limit of \$117,000 thus prevent individuals from contributing the statutory maximum to more than eighteen candidates.

FECA includes a number of provisions designed to prevent evasion of the various limits. First, anyone who contributes more than permitted may be subject to civil or criminal penalties. Second, indirect contributions, such as earmarked contributions to an intermediary, are deemed contributions to that candidate. Third, FECA prohibits contributions made in the name of someone else. Finally, contributions made or received by more than one “affiliated” committee are deemed to have been made or received by the same committee.

### ***B. Factual and Procedural Background***

McCutcheon is an Alabama resident eligible to vote in a U.S. presidential election. Thus far, during the 2011–2012 election cycle, he has contributed a total of \$33,088 to sixteen different candidates in amounts ranging

from \$1,776 to \$2,500 per election; \$1,776 to each of the RNC, the National Republican Senatorial Committee (“NRSC”), and the National Republican Congressional Committee (“NRCC”); \$2,000 to a nonparty political committee (the Senate Conservatives Fund); and \$20,000 to the federal account of a state party committee (the Alabama Republican Party). McCutcheon, however, wants to contribute more. He wants to contribute \$1,776 to twelve other candidates and enough money to the RNC, NRSC, and NRCC to bring his total contributions up to \$25,000 each. Doing either of these, however, would violate the aggregate limits: the additional candidate contributions would amount to aggregate candidate contributions of \$54,400, and the additional party committee contributions would amount to aggregate contributions of \$75,000 to national party committees. McCutcheon assures us he intends to repeat these donation patterns during future election cycles.

The RNC, meanwhile, wishes to receive contributions from individuals like McCutcheon that would be permissible under the base limits but violate the aggregate limit on contributions to party committees. Because of the aggregate limit, the RNC has both refused and returned contributions. The RNC believes that others would contribute to the RNC but for the limit. According to the verified complaint, the RNC does not control either the NRSC or the NRCC.

Plaintiffs challenge both the \$46,200 aggregate limit on candidate contributions

and the \$70,800 aggregate limit on other contributions under the First Amendment. They challenge the \$46,200 aggregate limit for being “unsupported by any cognizable government interest ... at any level of review” and for being unconstitutionally low. They challenge the \$70,800 aggregate limit facially, as applied to contributions up to \$30,800 per calendar year to national party committees, and for being too low, both facially and as applied to contributions to national party committees. Plaintiffs also ask this Court for a preliminary injunction to enjoin Federal Election Commission (“FEC”) enforcement of the aggregate limits. We consolidated the preliminary injunction hearing with the hearing on the merits and now resolve both issues.

## II. Discussion

### A. *Level of Scrutiny*

Both contribution limits and expenditure limits implicate “the most fundamental” First Amendment interests, but each does so in a different way. The Supreme Court has accordingly applied different levels of scrutiny to each: expenditure limits are subject to strict scrutiny, while contribution limits will be valid as long as they satisfy “the lesser demand of being closely drawn to match a sufficiently important interest.” The Court has never repudiated this distinction.

Plaintiffs argue that the aggregate limits must be subject to strict scrutiny because laws burdening political speech are subject to strict scrutiny and the aggregate limits “similarly ‘burden’ First Amendment rights.” This syllogism is rooted in *Buckley*

itself. The *Buckley* Court did not unequivocally hold that political expenditures are speech. Rather, it drew on the fact that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money” to hold that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” Thus, the Court suggested, contribution limits might sometimes implicate rights of expression in more than a “marginal” way, like a spiking seismograph at the onset of an earthquake. More recently, *Citizens United* proclaimed that “[l]aws that burden political speech are ‘subject to strict scrutiny,’ ” and this Court relied on that principle to preliminarily enjoin the FEC from enforcing limits on contributions to a political committee interested in making independent expenditures. Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern, we decline Plaintiffs’ invitation to anticipate the Supreme Court’s agenda. Every contribution limit may “logically reduce[ ] the total amount that the recipient of the contributions otherwise could spend,” but for now, “this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny.”

Plaintiffs try to escape the consequences of lesser scrutiny by arguing that the aggregate limits are actually expenditure limits, not

contribution limits. Because § 441a(a)(1) already establishes base contribution limits, they say, “added biennial contribution limits are more appropriately deemed *expenditure* limits, subject to strict scrutiny.” They are wrong. The difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways; the limits primarily implicate associational rights rather than rights of expression because they impose only a “marginal” restriction on the contributor’s “ability to engage in free communication,” they impose only a marginal restriction on a contributor’s expressive ability because the expressive value of a contribution derives from the “undifferentiated, symbolic act of communicating,” and the expressive value of contributions is limited because “the transformation of contributions into political debate involves speech by someone other than the contributor.” The aggregate limits do not regulate money injected directly into the nation’s political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy. To break the chain of legal consequences tied to that fact would require a judicial act we are not empowered to perform.

### **B. *The Merits***

The government may justify the aggregate limits as a means of preventing corruption or

the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anticorruption interest. The Supreme Court has recognized no other governmental interest “sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech.” “Corruption,” though, is a narrow term of art: “Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” Influence over or access to elected officials does not amount to corruption.

*Citizens United* left unclear the constitutionally permissible scope of the government’s anticorruption interest. It both restricted the concept of *quid-pro-quo* corruption to bribery, and suggested that there is a wheeling-and-dealing space between pure bribery and mere influence and access where elected officials are “corrupt” for acting contrary to their representative obligations. Yet if anything is clear, it is that contributing a large amount of money does not ipso facto implicate the government’s anticorruption interest. The government’s assertion that large contributions “could easily exert a corrupting influence on the democratic system” and would present “the appearance of corruption that is ‘inherent in a regime of large individual financial contributions’ ” simply sweeps too broadly. McCutcheon alleges that he has “deeply held principles regarding government and public policy,”



believing that “the United States is slowly but surely losing its character as an exceptional nation that stands for liberty and limited government under the Constitution.” He wants to contribute to a number of candidates “who are interested in advancing the cause of liberty.” Supporting general principles of governance does not bespeak corruption; such is democracy. “It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”

Plaintiffs do not, however, challenge the base contribution limits, so we may assume they are valid expressions of the government’s anticorruption interest. And that being so, we cannot ignore the ability of aggregate limits to prevent evasion of the base limits. Circumvention, after all, can be “very hard to trace.” Eliminating the aggregate limits means an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee comprising a party’s presidential candidate, the party’s national party committee, and most of the party’s state party committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee receives more than its permitted share, but because party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee’s coffers. That committee, in turn, might use the money for coordinated expenditures, which have no “significant

functional difference” from the party’s direct candidate contributions. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.

Gratitude, of course, is not itself a constitutionally-cognizable form of corruption, and it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor’s interests. But it is not hard to imagine a situation where the parties implicitly agree to such a system, and there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction. The Supreme Court has rejected the argument that Congress cannot restrict coordinated spending as an anticircumvention measure because there are “better crafted safeguards” in place like the earmarking rules. We follow the Court’s lead and conceive of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis.

Given our conclusion that the aggregate limits are justified, we reject Plaintiffs’ arguments that the limits are unconstitutionally low and unconstitutionally overbroad. It is not the judicial role to parse legislative judgment about what limits to impose. Only if there are “danger signs” that the limits are not closely drawn will we examine the record to review the statute’s tailoring. We see no danger signs here. Plaintiffs’ argument

depends on using “simple arithmetic” to translate the Vermont contribution limits invalidated in *Randall* to imaginary biennial limits on contributions to party committees and candidates. They argue that the limit on contributions to state party committees invalidated by *Randall* is equivalent to a biennial contribution limit of \$198,389 to national party committees, which they explain is about \$14,000 *more* than the total amount an individual could biennially contribute to the three committees—an amount an individual still cannot contribute because of the aggregate limits. They likewise argue that if an individual wanted to contribute equally to “one candidate of his choice in all 468 federal races” in 2006, he would be limited to contributing \$85.29 per candidate for the entire election cycle, an amount “far below the \$200 limit held too low in *Randall*.” Even granting that Plaintiffs’ methodology and results are correct, “the dictates of the First Amendment are not mere functions of the Consumer Price Index.” The effect of the aggregate limits on a challenger’s ability to wage an effective campaign is limited because the aggregate limits do not apply to nonindividuals. And in any event, individuals remain able to volunteer, join political associations, and engage in independent expenditures.

Plaintiffs’ overbreadth challenge consists of the conclusory assertions that the aggregate limits substantially inhibit protected speech and association “not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications,” and that “there is no ‘scope of ... plainly

legitimate applications’ ” since neither political party proliferation nor movement of “massive” amounts of money through party committees or PACs to candidates is now possible. The *Buckley* Court rejected challenges that the contribution limits are overbroad because most contributors are not seeking a quo for their quid and the base contribution limit is “unrealistically low.” Aside from these two claims, which we join the *Buckley* Court in rejecting, Plaintiffs do not explain how the aggregate limits potentially regulate both protected *and* unprotected conduct. Plaintiffs’ overbreadth argument is essentially a severability claim, but because we conclude that nothing needs to be severed, this argument fails.

Plaintiffs raise the troubling possibility that *Citizens United* undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us.

### III. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order denying Plaintiffs’ Motion for a Preliminary Injunction and granting the FEC’s motion to dismiss.

### ORDER AND FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion, it is this 28th day of September, 2012, hereby ordered that the Defendant Federal Election Commission’s motion to dismiss is granted; it is further ordered that the Plaintiff’s motion for a

preliminary injunction is dismissed as moot;  
and it is further ordered that final judgment  
be entered for the defendant.

**SO ORDERED**

## “Justices Take Case on Overall Limit to Political Donations”

*New York Times*

Adam Liptak

February 19, 2013

The Supreme Court on Tuesday agreed to hear a challenge to federal campaign contribution limits, setting the stage for what may turn out to be the most important federal campaign finance case since the court’s 2010 decision in *Citizens United*, which struck down limits on independent campaign spending by corporations and unions.

The latest case is an attack on the other main pillar of federal campaign finance regulation: limits on contributions made directly to political candidates and some political committees.

“In *Citizens United*, the court resisted tinkering with the rules for contribution limits,” said Richard L. Hasen, an expert on election law at the University of California, Irvine. “This could be the start of chipping away at contribution limits.”

The central question is in one way modest and in another ambitious. It challenges only aggregate limits — overall caps on contributions to several candidates or committees — and does not directly attack the more familiar basic limits on contributions to individual candidates or committees. Should the court agree that those overall limits are unconstitutional, however, its decision could represent a fundamental reassessment of a basic distinction established in *Buckley v. Valeo* in

1976, which said contributions may be regulated more strictly than expenditures because of their potential for corruption.

The case was brought by Shaun McCutcheon, an Alabama man, and the Republican National Committee. Mr. McCutcheon said he was prepared to abide by contribution limits to individual candidates and groups, which are currently \$2,500 per election to federal candidates, \$30,800 per year to national party committees, \$10,000 per year to state party committees and \$5,000 per year to other political committees. But he said he objected to separate overall two-year limits, currently \$46,200 for contributions to candidates and \$70,800 for contributions to groups, arguing that they were unjustified and too low.

He said he had made contributions to 16 federal candidates in recent elections and had wanted to give money to 12 more. He said he had also wanted to give \$25,000 to each of three political committees established by the Republican Party. Each set of contributions would have put him over the overall limits.

In September, a special three-judge federal court in Washington upheld the overall limits, saying they were justified by the need to prevent the circumvention of the basic limits.

“Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern,” Judge Janice Rogers Brown wrote for the court, “we decline plaintiffs’ invitation to anticipate the Supreme Court’s agenda.”

In June, in a brief, unsigned 5-to-4 decision, the Supreme Court affirmed the *Citizens United* ruling, summarily reversing a decision of the Montana Supreme Court that had upheld a state law limiting independent political spending by corporations.

“The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law,” the opinion said. “There can be no serious doubt that it does.” Montana’s arguments, the

opinion continued, “either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”

In 2006, in *Randall v. Sorell*, the Supreme Court struck down Vermont’s contribution limits, the lowest in the nation, as unconstitutional. Individuals and political parties were not allowed to contribute more than \$400 to a candidate for statewide office over a two-year election cycle, including primaries. In a brief concurrence, Justice Samuel A. Alito Jr. said there was no reason to address the continuing validity of *Buckley v. Valeo* in that case, suggesting that a later case might present the question directly.

The latest case, *McCutcheon v. Federal Election Commission*, No. 12-536, may be that case...

## “Is *McCutcheon v. FEC* the Next *Citizens United*?”

*Independent Voter Network*

Alex Gauthier

February 21, 2013

The Supreme Court announced its decision Tuesday to hear *McCutcheon v. Federal Election Commission*. It will likely become another landmark case defining campaign finance and — by extension — the future of national elections.

At stake are contribution limits to state and national party committees as well as PACs, which are biennially capped at \$123,200 in aggregate. An individual can donate to many different party committees or candidates, but cannot exceed an overall donation limit which resets every two years.

*McCutcheon*'s argument falls along similar lines as the *Citizens United* case. He contends his First Amendment rights are being infringed upon by not being able to donate to as many party committees as he would like.

As it follows, eliminating the biennial aggregation restrictions could allow a single individual to donate over \$1 million to political causes in one election cycle — or two years — according to Democracy 21's Fred Wertheimer.

Put simply, national and state/local party committees can receive a maximum of \$32,400 and \$10,000, respectively, each year from an individual donor. Yet, one person cannot exceed the \$123,200 limit.

A ruling in favor of *McCutcheon* would likely remove the biennial aggregation cap. In effect, this would raise the maximum annual donation limit to around \$500,000 per year, which would nearly quadruple the current limit.

There remains a clear distinction, however, between the *Citizens United* case and *McCutcheon v. FEC*. An important rationale for the majority opinion, authored by Justice Kennedy, was:

*“The governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures.”*

This might be a key detail in *McCutcheon*'s case. If significantly increasing party contribution limits is shown to have a corrupting influence or promote the appearance of corruption, the Supreme Court would rule against him.

It remains to be seen how party contributions will be recognized by the high court, since non-coordination between Super PACs and candidates was a critical concept behind Super PACs being able to infinitely raise funds.

Party committees have traditionally been under more scrutiny when it comes to fund

raising and were not regarded as independent and thereby labeled as ‘coordinated communications.’ This subjects them to stricter regulations.

## **Background**

The McCutcheon of *McCutcheon v. Federal Elections Commission* is Shaun McCutcheon of Alabama. He is a conservative activist and chairman of Conservative Action Fund, “a Super PAC that promotes conservative Republicans,” according to the Alabama GOP.

Mr. McCutcheon spent \$33,088 on conservative candidates and committees — most of which (\$20,000) went to the Alabama Republican Party — during the 2012 elections. Yet, he wants to be able to spend more on future elections.

He is currently prohibited from breaching the aggregate limit on biennial committee contributions, which is capped at \$74,600.

## **Looking Ahead**

Although the Republican National Committee is also represented in the case, both Democratic and Republican Party committees are forced to turn down donations every year due to these limits. This means a decision in favor of the plaintiffs could dramatically benefit both parties, not only the GOP.

The law that will be challenged is the Bipartisan Campaign Reform Act of 2002. The BCRA, also known as the “McCain-Feingold Act,” established the current

biennial limits for donations McCutcheon argues are unconstitutional.

Instrumental to how the Supreme Court will decide the McCutcheon case is *Buckley v. Valeo* (1976), which is the cornerstone for campaign finance law and the primary source used to rationalize the infamous Citizens United decision.

Justices Roberts, Scalia, Kennedy, Thomas, and Alito ruled in favor of Citizens United in the 5-4 decision. The dissenters were Stevens, Ginsburg, Breyer, and Sotomayor.

Stevens was replaced by Kagan in 2010, but McCutcheon’s free speech argument could very well resonate with the previous majority, making a ruling in favor of the plaintiffs more likely.

Unsurprisingly, election spending watchdogs like the Campaign Legal Center are critical of a possible expansion of money in politics. Senior counsel for the Campaign Legal Center, Tara Malloy, said in a statement:

*“It has become readily apparent that there are a number of justices who are willing to usurp Congress’s role as legislator when it comes to matter[s] of campaign finance. An aggregate contribution limit was passed in the wake of the Watergate money scandals and was upheld in the 1976 Supreme Court decision Buckley v. Valeo.”*

Even though it is primarily Republicans who are backing the plaintiffs, the Democratic Party and all political action committees would benefit from more relaxed

contribution limits. Raising the limit on the amount one individual can donate each election cycle allows fewer donors to contribute more money.

The decision could not only send skyrocketing campaign costs even higher, but strengthen party affiliated coffers as well, potentially squeezing out third parties that don't have recognized party committees.



## “Court Upholds Aggregate Federal Contribution Limits”

*Inside Political Law*

Matthew Connolly

September 28, 2012

Earlier today, a three-judge panel in the U.S. District Court for the District of Columbia rejected a constitutional challenge to the Federal Election Campaign Act’s (“FECA”) biennial aggregate contribution limits in *McCutcheon v. FEC*, No. 12-cv-1034 (D.D.C. Sept. 28, 2012). Under FECA, an individual may contribute no more than \$117,000 in the aggregate on federal elections in a two-year election cycle. There are various complex sub-limits within that overall biennial limit. Plaintiffs Sean McCutcheon, an Alabama resident, and the Republican National Committee challenged these aggregate limits under the First Amendment as being unsupported by a legitimate government interest and for being unconstitutionally low.

As a preliminary matter, the panel declined to apply the more stringent “strict scrutiny” standard of review that the Supreme Court has recently applied to political expenditure limits, including in *Citizens United*. Instead, the panel applied a more lenient standard, finding that contribution limits are valid if they are “closely drawn to match a sufficiently important interest.”

The panel denied plaintiffs’ First Amendment challenges, finding that the

aggregate contribution limits were sufficiently tied to the government’s interest in preventing corruption. Specifically, the court ruled that aggregate limits were necessary to prevent circumvention of FECA’s base limits—the maximum amount an individual may give to a specific entity, such as a candidate, political committee, or national party committee (the plaintiffs did not challenge the base limits in this case).

Having found that the aggregate limits were justified, the panel rejected plaintiffs’ claims that the aggregate limits are unconstitutionally low or overbroad. The panel refused to question the specific limits imposed by FECA, finding that courts should defer to Congress unless there are “danger signs,” which the court determined are not present with respect to the aggregate limits.

The FEC’s victory before the district court is a setback to those who have thought the biennial limits to be unconstitutional, especially in the wake of the *Citizens United* decision. But the court’s decision likely will be appealed, and the issue ultimately will be resolved by the Supreme Court.

## “Supreme Court Could Create System of Legalized Bribery in Washington Depending on Its Decision in McCutcheon Case”

*Huffington Post*  
Fred Wertheimer  
February 21, 2013

There are enormous stakes for the country in the campaign finance case the Supreme Court agreed to review this week.

If the Supreme Court strikes down the existing limits on the aggregate amount an individual can give to all federal candidates and all party committees in a two-year election cycle, the Justices will create a system of legalized bribery in Washington.

Such a decision by the Court would be a gold mine for big donors interested in buying government decisions and would wreak havoc on the interests of ordinary Americans.

*McCutcheon v. Federal Election Commission*, the case to be considered by the Supreme Court, involves a challenge by Shaun McCutcheon and the Republican National Committee to the constitutionality of the federal aggregate contribution limits, upheld by the Supreme Court in 1976 in *Buckley v. Valeo*.

A decision by the Court to reverse that decision would not only strike down the aggregate contribution limits enacted in 1974, but would also eviscerate an essential anti-corruption provision enacted in 2002 and upheld by the Supreme Court in 2003 in *McConnell v. FEC*. That provision prohibits a federal officeholder or candidate from soliciting contributions that do not

comply with the federal contribution limits, including the aggregate limits.

If the aggregate limits are struck down, officeholders would be able to directly solicit the huge contributions from individual donors that the solicitation ban is intended to prohibit.

The Supreme Court in the landmark *Buckley* case found that a system that allowed huge campaign contributions was an inherently corrupt system. The Court recognized that contribution limits were necessary to deal with:

[T]he reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

The Supreme Court in the *McConnell* case recognized the inherent dangers of corruption if federal officeholders are allowed to solicit huge contributions from donors. In upholding the constitutionality of the federal ban on soliciting soft money, the Court stated:

Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately

control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

Even Justice Kennedy, who voted to strike down the other restrictions on soft money, agreed that the ban on the solicitation of large soft money contributions by federal officeholders was constitutional. Kennedy wrote:

The making of a solicited gift is a quid both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of quids. This regulation fits under Buckley's anti-corruption rationale.

The practical consequences of removing the aggregate limits are illustrated by the fundraising that took place in the 2012 presidential elections.

During the last election, because of the aggregate contribution limits, an individual could give a maximum total of \$70,800 to party committees and a maximum total of \$46,200 to federal candidates in the two-year election cycle.

In order to solicit the largest allowable check from a donor to support his campaign, President Obama established a joint fundraising account, the Obama Victory Fund.

The President solicited individual contributions for the Fund of up to \$75,800 per donor to support his campaign, the

maximum a donor could give to his campaign and party, which was then divided up among the president's campaign, the DNC and several state parties. (Republican nominee Mitt Romney established a similar joint fundraising account.)

Take away the aggregate limit on individual giving to parties and a presidential candidate in the 2016 election could solicit individual checks from donors of up to \$1,194,000 per donor to be spent by his party on his campaign.

Similarly, take away the aggregate total limit on individual contributions to candidates and a House Speaker or Senate Majority Leader could solicit individual checks from donors of up to \$2,433,600 per donor to be distributed among their congressional candidates up to \$5,200 per candidate.

Or, any powerful federal officeholder could solicit individual checks from donors of up to \$3,627,600 per donor for the officeholder's party committees and congressional candidates.

It is axiomatic in American politics that when it comes to raising campaign money, anything that can legally be done will be done.

Thus, President Obama solicited checks for \$75,800 for his presidential campaign and party in 2012, the maximum a donor could give.

Checks in excess of \$1 million, \$2 million and \$3 million per donor, the maximums that a donor could give, will be solicited by

federal officeholders in future elections if the aggregate limits on individual contributions are struck down by the Supreme Court.

It is simply not possible to have a president or any other federal officeholder soliciting individual contributions in excess of \$1 million, \$2 million or \$3 million per donor without creating opportunities for the corruption of federal officeholders and government decisions.

The *Buckley* and *McConnell* Supreme Court decisions and Justice Kennedy in his concurring opinion in *McConnell* all recognized this reality.

Despite the profound problems created by the Supreme Court's misguided decision in the *Citizens United* case, furthermore, this

provides no justification for the creation of a system of legalized bribery that opens the door wide to the corruption of federal officeholders and government decisions.

It is time for this Supreme Court to stop acting like a super legislature.

It is time for this Supreme Court to stop issuing radical decisions that overturn decades of national policy designed to prevent government corruption. A little respect by this Supreme Court for the constitutional right of citizens and Congress to protect the government from corruption is in order.

Citizens deserve no less.

*U.S. v. Apel*

12-1038

**Ruling Below:** *U.S. v. Apel*, 676 F.3d 1202 (9th Cir. 2012), *cert granted*, 133 S.Ct. 2767 (2013).

Appellant John Apel, who was subject to a pre-existing order barring him from Vandenberg Air Force Base, was convicted of three counts of trespassing on the base in violation of 18 U.S.C. § 1382. After his convictions became final in district court, the Ninth Circuit decided *United States v. Parker*. *Parker* held that because a stretch of highway running through Vandenberg AFB is subject to an easement “granted to the State of California, which later relinquished it to the County of Santa Barbara,” the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under 18 U.S.C. § 1382 could not stand, regardless of an order barring a defendant from the base. The Ninth Circuit therefore reversed Apel’s convictions as a result of the *Parker* decision.

**Question Presented:** Whether 18 U.S.C. § 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

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**UNITED STATES of America, Plaintiff–Appellee,**

**v.**

**John Dennis APEL, Defendant–Appellant.**

**United States of America, Plaintiff–Appellee,**

**v.**

**John Dennis Apel, Defendant–Appellant.**

**United States of America, Plaintiff–Appellee,**

**v.**

**John Dennis Apel, Defendant–Appellant.**

United States Court of Appeals, Ninth Circuit

Decided on April 25, 2012

[Excerpt; some footnotes and citations omitted.]

**PER CURIAM**

Appellant John Apel, who was subject to a pre-existing order barring him from Vandenberg Air Force Base, was convicted of three counts of trespassing on the base in violation of 18 U.S.C. § 1382. After his

convictions became final in district court, we decided *United States v. Parker*. *Parker* held that because a stretch of highway running through Vandenberg AFB is subject to an easement “granted to the State of California, which later relinquished it to the

County of Santa Barbara,” the federal government lacks the exclusive right of possession of the area on which the trespass allegedly occurred; therefore, a conviction under 18 U.S.C. § 1382 cannot stand, regardless of an order barring a defendant from the base.

Although we question the correctness of *Parker*, it is binding, dispositive of this appeal, and requires that Apel's convictions be REVERSED.

## “Supreme Court Agrees to Hear Military Protester Case”

*Reuters*

Lawrence Hurley

June 3, 2013

The Supreme Court on Monday agreed to consider whether a protester who was barred from a military base in California violated a federal law when he took part in demonstrations on a public roadway that crosses government-owned land.

The government asked the justices to overturn a lower court ruling in favor of the protester, John Apel. He successfully argued in a federal appeals court that the law, which prevents people from re-entering bases after they are barred, applies only to land over which the military has exclusive authority.

Apel, who protested against nuclear weapons, was barred from Vandenberg Air Force Base but continued to attend demonstrations outside the base entrance. The public roadway on which the protests took place is located on land owned by the

government. Apel was convicted of three counts of trespassing on the base.

The appeals court in San Francisco reversed the convictions, ruling that the government did not have an exclusive right of possession of the area where the alleged trespass took place.

In asking the justices to hear the case, U.S. Solicitor General Donald Verrilli wrote in court papers that the government "will be unable to fully enforce a significant federal criminal statute on many military bases" if the ruling was left to stand.

Oral arguments and a ruling are due in the court's next term, which begins in October and ends in June 2014.

The case is *U.S. v. Apel*, U.S. Supreme Court, No. 12-1038.

*National Labor Relations Board v. Noel Canning*  
**12-1281**

**Ruling Below:** *Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, (D.C. Cir. 2013), *cert. granted*, 2013 WL 1774240 (U.S. 2013).

Noel Canning petitions for review of a National Labor Relations Board decision finding that Noel Canning violated sections of the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement reached with Teamsters Local 760. NLRB cross-petitions for enforcement of its order. On the merits of the NLRB decision, petitioner argues that the Board did not properly follow applicable contract law in determining that an agreement had been reached and that therefore, the finding of unfair labor practice is erroneous.

**Questions Presented:** (1) Whether the President’s recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) whether the President’s recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and (3) whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

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**NOEL CANNING, a Division of the Noel Corporation, Petitioner**  
**v.**  
**NATIONAL LABOR RELATIONS BOARD, Respondent**

United States Court of Appeals, District of Columbia Circuit

Decided on January 25, 2013

[Excerpt; some footnotes and citations omitted.]

**SENTELLE, Chief Judge**

Noel Canning petitions for review of a National Labor Relations Board (“NLRB” or “the Board”) decision finding that Noel Canning violated section 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”) by refusing to reduce to writing and execute a collective bargaining agreement reached with Teamsters Local 760 (“the Union”). NLRB cross-petitions

for enforcement of its order. On the merits of the NLRB decision, petitioner argues that the Board did not properly follow applicable contract law in determining that an agreement had been reached and that therefore, the finding of unfair labor practice is erroneous. We determine that the Board issuing the findings and order could not lawfully act, as it did not have a quorum, for reasons set forth more fully below.

**I. INTRODUCTION**



At its inception, this appears to be a routine review of a decision of the National Labor Relations Board over which we have jurisdiction under 29 U.S.C. § 160(e) and (f), providing that petitions for review of Board orders may be filed in this court. The Board issued its order on February 8, 2012. On February 24, 2012, the company filed a petition for review in this court, and the Board filed its cross-application for enforcement on March 20, 2012. While the posture of the petition is routine, as it developed, our review is not. In its brief before us, Noel Canning ...questions the authority of the Board to issue the order on two constitutional grounds. First, petitioner asserts that the Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative recess appointments which were made when the Senate was not in recess. Second, it asserts that the vacancies these three members purportedly filled did not “happen during the Recess of the Senate,” as required for recess appointments by the Constitution. Because the Board must have a quorum in order to lawfully take action, if petitioner is correct in either of these assertions, then the order under review is void *ab initio*.

Before we can even consider the constitutional issues, however, we must first rule on statutory objections to the Board's order raised by Noel Canning. ... We must decide whether Noel Canning is entitled to relief on the basis of its nonconstitutional arguments before addressing the constitutional question. Noel Canning raises

two statutory arguments. First, it contends that the ALJ's conclusion that the parties in fact reached an agreement at their final negotiation session is not supported by substantial evidence. Second, it argues that even if such an agreement were reached, it is unenforceable under Washington law. We address each argument in turn.

#### ***A. The Sufficiency of the Evidence***

Refusal to execute a written collective bargaining agreement incorporating terms agreed upon during negotiations is an unfair labor practice under section 8(a)(1) and (5) of the NLRA. Whether the parties reached an agreement during negotiations is a question of fact. We therefore must affirm the Board's conclusion that an agreement was in fact reached if that conclusion is supported by substantial evidence.

Noel Canning and the Union had in the past enjoyed a long collective bargaining relationship, but the parties were unable to reach a new agreement before their most recent one expired in April 2010. Negotiations began in June 2010. By the time the parties met for their final negotiation session in December 2010, all issues save wages and pensions had been resolved. According to notes taken by Union negotiators at the parties' final negotiating session, the parties agreed to present two alternative contract proposals to the Union membership: one preferred by Noel Canning management and the other by the Union. Each proposal included wage and pension increases but allocated the increases differently. The notes reveal that the Union proposal put no limit on the membership's

right to decide how much of the \$0.40 per hour pay increase to allocate to its pension fund. According to the notes and Union witnesses, the parties agreed that both proposals would be submitted to the Union membership for a ratification vote and that the parties would be bound by the outcome of that vote. Union negotiators testified that after the parties read aloud the terms of the two proposals, Noel Canning's president stood and said "let's do it."...

The next day, Noel Canning management emailed the Union the wage and pension terms of the two proposals. According to the email, however, the Union proposal capped at \$0.10 the amount of the \$0.40 pay increase that the membership could devote to its pension fund. The email thus conflicted with the Union negotiators' notes, which left the allocation question entirely to the membership. When the chief Union negotiator, Bob Koerner, called Noel Canning's president to discuss the discrepancy, the president responded that since the agreement was not in writing, it was not binding. The vote took place anyway, and the membership ratified the Union's preferred proposal, which allocated the entire pay increase to the pension fund. Noel Canning posted a letter informing the Union that the company considered the ratification vote to be a counteroffer, which the company rejected, and declared the parties to be at an impasse. Noel Canning subsequently refused to execute a written agreement embodying the terms ratified by the Union.

The Union filed an unfair labor practice charge premised on Noel Canning's refusal

to execute the written agreement. After a two-day hearing, the ALJ determined that the parties had in fact achieved *consensus ad idem* as to the terms of the Union's preferred proposal and that Noel Canning's refusal to execute the written agreement constituted an unfair labor practice under section 8(a)(1) and (5) of the NLRA. The ALJ ordered Noel Canning to sign the collective bargaining agreement. Noel Canning timely filed exceptions to the ALJ's decision, and the Board affirmed.

Unsurprisingly, the parties' testimony at the ALJ hearing conflicted over whether the parties in fact agreed to the terms of the Union proposal. The ALJ's decision thus rested almost entirely on his determination of the witnesses' credibility. Assessing the conflicting testimony, the ALJ determined that because the Union witnesses' testimony was corroborated by contemporaneous notes taken during the December 2010 negotiation session, the Union's witnesses were credible. In contrast, he determined that Noel Canning's witnesses were not credible ...

We are loath to overturn the credibility determinations of an ALJ unless they are "hopelessly incredible, self-contradictory, or patently insupportable." Here, the ALJ chose the corroborated testimony of Union negotiators over the unsupported testimony of Noel Canning employees. And given undisputed testimony that at least one Noel Canning representative took notes of the meeting, the ALJ weighed Noel Canning's failure to corroborate its testimony against it.

Noel Canning nevertheless claims that Koerner's testimony is plagued by inconsistencies. But the inconsistencies and contradictions it identifies are either irrelevant or merely the result of the competing testimony of the two parties' witnesses. There is nothing in the Union testimony—corroborated by contemporaneous notes—that hints at hopeless incredibility or self-contradiction.

Noel Canning thus relies on what it alleges to be an inconsistency between Koerner's testimony and his affidavit. The affidavit, which is not in the record, apparently contained the following sentence, referring to the parties' tentative agreement as “TA”:  
“I was voting the contract on Wednesday and that I would vote what we TA'd during the December 8th meeting—noting different than TA'd.” When asked at the ALJ hearing if he saw any errors in his affidavit, Koerner claimed he saw none but struggled to explain what the language meant. Noel Canning contends that the affidavit is an explicit admission that Koerner presented an offer to the Union that was materially different from the one agreed upon by the parties and therefore contradicts his testimony. The ALJ rejected Noel Canning's interpretation, concluding that the sentence suffered from a typographical error—“noting” should have been “nothing”—and that the error accounted for the witness's inability to explain the affidavit's meaning.

We conceive of no reason to disagree. As written, the language of the affidavit is confusing and becomes intelligible only if the typographical error pointed out by the ALJ is corrected. Moreover, the ALJ

specifically determined that the witness was confused by the affidavit, not that he was trying to conceal deception, as Noel Canning contends.

### ***B. The Enforceability of the Contract***

We also agree with the Board that we lack jurisdiction to consider Noel Canning's choice of law argument. Section 10(e) of the NLRA forbids us from exercising jurisdiction to hear any “objection that has not been urged before the Board.” The ALJ specifically rejected Noel Canning's argument that he should apply Washington state law to decide whether the contract could be enforced. In its exceptions to the Board, however, Noel Canning did not mention Washington law. Although Noel Canning contended that the ALJ incorrectly determined that the parties had in fact reached *consensus ad idem* during negotiations, it nowhere argued that the ALJ made an incorrect choice of law to govern the contracts issue.

“While we have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board, we have required, at a minimum, that the ground for the exception be evident by the context in which the exception is raised.” Nothing in Noel Canning's exceptions even hints that it objected to the application of federal law. On the contrary, it conceded to the Board that “[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations.” We therefore lack jurisdiction

to consider Noel Canning's state-law argument because its objections were not "adequate to put the Board on notice that the issue might be pursued on appeal." Having determined that Noel Canning does not prevail on its statutory challenges, consideration of the constitutional question is unavoidable, and we proceed to its resolution.

Because we agree that petitioner is correct in both of its constitutional arguments, we grant the petition of Noel Canning for review and deny the Board's petition for enforcement.

## II. JURISDICTION

...We note at the outset that there is a serious argument to be made against our having jurisdiction over the constitutional issues. Section 10(e) of the NLRA, governing judicial review of the Board's judgments and petitions for enforcement, provides: "No objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The record reflects no attempt by petitioner to raise the threshold issues related to the recess appointments before the Board. Our first question, then, is whether this failure to urge the objection before the Board comes within the exception for "extraordinary circumstances." We hold that it does....

## III. THE UNDERLYING PROCEEDINGS

Petitioner is a bottler and distributor of Pepsi-Cola products and is an employer within the terms of the NLRA. As discussed, an NLRB administrative law judge concluded that Noel Canning had violated the NLRA. After Noel Canning filed exceptions to the ALJ's findings, a three-member panel of the Board, composed of Members Hayes, Flynn, and Block, affirmed those findings in a decision dated February 8, 2012.

On that date, the Board purportedly had five members. Two members, Chairman Mark G. Pearce and Brian Hayes, had been confirmed by the Senate on June 22, 2010. It is undisputed that they remained validly appointed Board members on February 8, 2012.

The other three members were all appointed by the President on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution.

The first of these three members, Sharon Block, filled a seat that became vacant on January 3, 2012, when Board member Craig Becker's recess appointment expired.

The second of the three members, Terence F. Flynn, filled a seat that became vacant on August 27, 2010, when Peter Schaumber's term expired. The third, Richard F. Griffin, filled a seat that became vacant on August 27, 2011, when Wilma B. Liebman's term expired.

At the time of the President's purported recess appointments of the three Board members, the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in *pro forma* sessions every three business days from December 20, 2011, through January 22, 2012. The agreement stated that “no business [would be] conducted” during those sessions. During the December 23 *pro forma* session, the Senate overrode its prior agreement by unanimous consent and passed a temporary extension to the payroll tax. During the January 3 *pro forma* session, the Senate acted to convene the second session of the 112th Congress and to fulfill its constitutional duty to meet on January 3.

Noel Canning asserts that the Board did not have a quorum for the conduct of business on the operative date, February 8, 2012. Citing *New Process Steel, L.P. v. NLRB*, which holds that the Board cannot act without a quorum of three members, Noel Canning asserts that the Board lacked a quorum on that date. Noel Canning argues that the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3. Because we agree that the appointments were constitutionally invalid and the Board therefore lacked a quorum, we grant the petition for review and vacate the Board's order.

#### **IV. ANALYSIS**

It is undisputed that the Board must have a quorum of three in order to take action. It is further undisputed that a quorum of three

did not exist on the date of the order under review unless the three disputed members (or at least one of them) were validly appointed. It is further agreed that the members of the Board are “Officers of the United States” within the meaning of the Appointments Clause of the Constitution, which provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” Finally, it is undisputed that the purported appointments of the three members were not made “by and with the Advice and Consent of the Senate.”

This does not, however, end the dispute. The Board contends that despite the failure of the President to comply with Article II, Section 2, Clause 2, he nonetheless validly made the appointments under a provision sometimes referred to as the “Recess Appointments Clause,” which provides 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.” Noel Canning contends that the putative recess appointments are invalid and the Recess Appointments Clause is inapplicable because the Senate was not in the recess at the time of the putative appointments and the vacancies did not happen during the recess of the Senate. We consider those issues in turn.

### *A. The Meaning of “the Recess”*

Noel Canning contends that the term “the Recess” in the Recess Appointments Clause refers to the intersession recess of the Senate, that is to say, the period between sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President. The Board's position is much less clear. It argues that the alternative appointment procedure created by that Clause is available during intrasession “recesses, or breaks in the Senate's business when it is otherwise in a continuing session. The Board never states how short a break is too short, under its theory, to serve as a “recess” for purposes of the Recess Appointments Clause. This merely reflects the Board's larger problem: it fails to differentiate between “recesses” and the actual constitutional language, “the Recess.”

It is this difference between the word choice “recess” and “the Recess” that first draws our attention. When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. Then, as now, the word “the” was and is a definite article. Unlike “a” or “an,” that definite article suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said “the Recess,” what they really meant was “a recess.” This is not an insignificant distinction. In the end it makes all the difference.

Six times the Constitution uses some form of the verb “adjourn” or the noun “adjournment” to refer to breaks in the proceedings of one or both Houses of Congress. Twice, it uses the term “the Recess”: once in the Recess Appointments Clause and once in the Senate Vacancies Clause. Not only did the Framers use a different word, but none of the “adjournment” usages is preceded by the definite article. All this points to the inescapable conclusion that the Framers intended something specific by the term “the Recess,” and that it was something different than a generic break in proceedings.

The structure of the Clause is to the same effect. The Clause sets a time limit on recess appointments by providing that those commissions shall expire “at the End of their [the Senate's] next Session.” Again, the Framers have created a dichotomy. The appointment may be made in “the Recess,” but it ends at the end of the next “Session.” The natural interpretation of the Clause is that the Constitution is noting a difference between “the Recess” and the “Session.” Either the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in “the Recess.”

It is universally accepted that “Session” here refers to the usually two or sometimes three sessions per Congress. Therefore, “the Recess” should be taken to mean only times when the Senate is not in one of those sessions. Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate's engrossing clerk “two dollars per day during the session, with the like compensation to

such clerk while he shall be necessarily employed in the recess.”

Not only logic and language, but also constitutional history supports the interpretation advanced by Noel Canning, not that of the Board....

[T]he Supreme Court has used analogous state constitutional provisions to inform its interpretation of the Constitution. For example, in *Collins v. Youngblood*, the Court considered several early state constitutions in discerning “the original understanding of the *Ex Post Facto* Clause” because “they appear to have been a basis for the Framers’ understanding of the provision.” The North Carolina Constitution, which contains the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause’s model, supports the intersession interpretation. It provides:

That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.

This provision, like the Recess Appointments Clause, describes a singular recess and does not use the word “adjournment.” And an 1819 North Carolina Supreme Court case dealing with this provision implies that the provision was

seen as differentiating between “the session of the General Assembly” and “the recess of the General Assembly.”

The Board argues that “the Company’s view would ... upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments.” However, the Board’s view of “the established constitutional balance” is neither so well established nor so clear as the Board seems to think. In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent.

The interpretation of the Clause in the years immediately following the Constitution’s ratification is the most instructive historical analysis in discerning the original meaning. ... With respect to the Recess Appointments Clause, historical practice strongly supports the intersession interpretation. The available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified. The first intrasession recess appointment probably did not come until 1867, when President Andrew Johnson apparently appointed one district court judge during an intrasession adjournment. ...

Whatever the precise number of putative intrasession recess appointments before 1947, it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare. The Supreme Court in *Printz v. United States*, exploring the reach of federal power

over the states, deemed it significant that the early Congress had not attempted to exercise the questioned power. Paralleling the Supreme Court's reasoning in *Printz*, we conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic “suggests an assumed *absence* of [the] power” to make such appointments. ...

While the Board seeks support for its interpretation in the practices of more recent administrations, we do not find those practices persuasive. We note that in *INS v. Chadha*, when the Supreme Court was considering the constitutionality of a one-house veto, it considered a similar argument concerning the increasing frequency of such legislative veto provisions. In rejecting that argument, the *Chadha* Court stated that “our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency...” Like the Supreme Court in *Chadha*, we conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers....

The Constitution's overall appointments structure provides additional confirmation of the intersession interpretation. The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent. Hamilton wrote in *Federalist No. 67* that advice and consent “declares the general mode of appointing officers of the United States,” while the Recess Appointments Clause serves as “nothing more than a supplement to the

other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.” The “general mode” of participation of the Senate through advice and consent served an important function: “It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”

Nonetheless, the Framers recognized that they needed some temporary method for appointment when the Senate was in the recess. At the time of the Constitution, intersession recesses were regularly six to nine months, and senators did not have the luxury of catching the next flight to Washington. To avoid government paralysis in those long periods when senators were unable to provide advice and consent, the Framers established the “auxiliary” method of recess appointments. But they put strict limits on this method, requiring that the relevant vacancies happen during “the Recess.” It would have made little sense to extend this “auxiliary” method to any intrasession break, for the “auxiliary” ability to make recess appointments could easily swallow the “general” route of advice and consent. The President could simply wait until the Senate took an intrasession break to make appointments, and thus “advice and consent” would hardly restrain his appointment choices at all.

To adopt the Board's proffered intrasession interpretation of “the Recess” would wholly defeat the purpose of the Framers in the



careful separation of powers structure reflected in the Appointments Clause. ... In short, the Constitution's appointments structure—the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent—makes clear that the Framers used “the Recess” to refer only to the recess between sessions.

Confirming this understanding of the Recess Appointments Clause is the lack of a viable alternative interpretation of “the Recess.” The first alternative interpretation is that “the Recess” refers to all Senate breaks. But no party presses that interpretation, and for good reason. ...

The second possible interpretation is that “the Recess” is a practical term that refers to some substantial passage of time, such as a ten- or twenty-day break. Attorney General Daugherty seemed to abandon the intersession interpretation in 1921 and adopted this functional interpretation, arguing that “[t]o give the word ‘recess’ a technical and not a practical construction, is to disregard substance for form.” Daugherty refused to put an exact time on the length of the break necessary for a “Recess,” stating that “[i]n the very nature of things the line of demarcation can not be accurately drawn.”

We must reject Attorney General Daugherty's vague alternative in favor of the clarity of the intersession interpretation. As the Supreme Court has observed, when interpreting “major features” of the Constitution's separation of powers, we must “establish[ ] high walls and clear distinctions because low walls and vague distinctions

will not be judicially defensible in the heat of interbranch conflict.” Thus, the inherent vagueness of Daugherty's interpretation counsels against it....

A third alternative interpretation of “the Recess” is that it means any adjournment of more than three days pursuant to the Adjournments Clause. This interpretation lacks any constitutional basis....

The fourth and final possible interpretation of “the Recess,” advocated by the Office of Legal Counsel, is a variation of the functional interpretation in which the President has discretion to determine that the Senate is in recess. This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as “self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other.” ...

The Board's arguments supporting the intrasession interpretation are not convincing. The Board relies on an Eleventh Circuit opinion holding that “the Recess” includes intrasession recesses. The *Evans* court explained that contemporaneous dictionaries defined “recess” broadly as “remission and suspension of any procedure.” The court also dismissed the importance of the definite article “the,” discounted the Constitution's distinction between “adjournment” and “Recess” by interpreting “adjournment” as a parliamentary *action*, and emphasized the

prevalence of intrasession recess appointments in recent years.

While we respect our sister circuit, we find the *Evans* opinion unconvincing. Initially, we note that the Eleventh Circuit's analysis was premised on an incomplete statement of the Recess Appointments Clause's purpose: "to enable the President to fill vacancies to assure the proper functioning of our government." This statement omits a crucial element of the Clause, which enables the President to fill vacancies *only when the Senate is unable to provide advice and consent*.... As written, the Eleventh Circuit's statement disregards the full structure of the Constitution's appointments provision, which makes clear that the recess appointments method is secondary to the primary method of advice and consent. The very existence of the advice and consent requirement highlights the incompleteness of the Eleventh Circuit's broad statement of constitutional purpose.

Nor are we convinced by the Eleventh Circuit's more specific arguments. First, the natural meaning of "the Recess" is more limited than the broad dictionary definition of "recess." In context, "the Recess" refers to a specific state of the legislature, so sources other than general dictionaries are more helpful in elucidating the term's original public meaning. Indeed, it is telling that even the Board concedes that "Recess" does not mean *all* breaks.

Second, the Eleventh Circuit fails to explain the use of the singular "Recess," and it underestimates the significance of the definite article "the" preceding "Recess" by

relying on twentieth-century dictionaries to argue that "the" can come before a generic term. Contemporaneous dictionaries treated "the" as "noting a *particular* thing."

Third, as the Eleventh Circuit acknowledged, the Supreme Court has suggested that the Constitution does not in fact only use "adjournment" to denote parliamentary action. ...

Finally, we would make explicit what we have implied earlier. The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments. Recent Presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law....

In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its

decision in this case on February 8, 2012, its decision must be vacated.

### ***B. Meaning of “Happen”***

Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order, as we suggested above, we also agree that the petitioner is correct in its understanding of the meaning of the word “happen” in the Recess Appointments Clause. The Clause permits only the filling up of “Vacancies that may happen during the Recess of the Senate.” Our decision on this issue depends on the meaning of the constitutional language “that may happen during the Recess.” The company contends that “happen” means “arise” or “begin” or “come into being.” The Board, on the other hand, contends that the President may fill up any vacancies that “happen to exist” during “the Recess.” It is our firm conviction that the appointments did not occur during “the Recess.” We proceed now to determine whether the appointments are also invalid as the vacancies did not “happen” during “the Recess.”

In determining the meaning of “happen” in the Recess Appointments Clause, we begin our analysis as we did in the first issue by looking to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. Upon a simple reading of the language itself, we conclude that the word “happen” could not logically have encompassed any vacancies that happened to exist during “the Recess.” If the language were to be construed as the Board advocates, the operative phrase “that

may happen” would be wholly unnecessary. Under the Board's interpretation, the vacancy need merely exist during “the Recess” to trigger the President's recess appointment power. The Board's interpretation would apply with equal force, however, irrespective of the phrase “that may happen.” Its interpretation therefore deprives that phrase of any force. By effectively reading the phrase out of the Clause, the Board's interpretation once again runs afoul of the principle that every phrase of the Constitution must be given effect.

For our logical analysis of the language with respect to the meaning of “happen” to be controlling, we must establish that it is consistent with the understanding of the word contemporaneous with the ratification. Dictionaries at the time of the Constitution defined “happen” as “[t]o fall out; to chance; to come to pass.” A vacancy happens, or “come[s] to pass,” only when it first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess....

In addition to the logic of the language, there is ample other support for this conclusion. First, we repair again to examination of the structure of the Constitution. If we accept the Board's construction, we eviscerate the primary mode of appointments set forth in Article II, Section 2, Clause 2. It would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose....

We further note that the “arise” interpretation is consistent with other usages of “happen” in the Constitution. Article I, Section 3, Clause 2, the Senate Vacancies Clause, provides for the filling of vacancies in Senate seats. ...

It is well established that “inconsistency [within the Constitution] is to be implied only where the context clearly requires it.” Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen “during the Recess” is consistent with the apparent meaning of the Senate Vacancies Clause. The interpretation proffered by the Board is not.

As with the first issue, we also find that evidence of the earliest understanding of the Clause is inconsistent with the Board's position. It appears that the first President, who took office shortly after the ratification, understood the recess appointments power to extend only to vacancies that arose during senatorial recess....

In 1792, Edmund Randolph, the first Attorney General, addressed the issue of an office that had become vacant during the session when the Secretary of State sought his view. Addressing the vacancy, concluding that it did not “happen” during the recess, and thereby rejecting the “exist” interpretation, Randolph wrote:

But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd.

of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.

Alexander Hamilton, similarly, wrote that “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.” In March 1814, Senator Christopher Gore argued that the Clause's scope is limited to “vacanc[ies] that may happen during the recess of the Senate”:

If the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well-established maxim: “Expressio unius est exclusio alterius.”

Additional support for the “arise” interpretation comes from early interpreters who understood that the Clause only applied to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created. Justice Joseph Story explained that “[t]he word ‘happen’ had relation to some casualty,” a statement consistent with the arise interpretation.

We recognize that some circuits have adopted the “exist” interpretation. Those courts, however, did not focus their analyses on the original public meaning of the word “happen.” In arguing that happen could mean “exist,” the *Evans* majority used a modern dictionary to define “happen” as

“befall,” and then used the same modern dictionary to define “befall” as “happen to be.” As the *Evans* dissent argued, “[t]his is at best a strained effort to avoid the available dictionary evidence.” A modern cross-reference is not a contemporary definition. The Board has offered no dictionaries from the time of the ratification that define “happen” consistently with the proffered definition of “happen to exist.”...

The *Evans*, *Woodley*, and *Allocco* courts all relied on supposed congressional acquiescence in the practice of making recess appointments to offices that were vacant prior to the recess because 5 U.S.C. § 5503 permits payment to such appointees in some circumstances.

Section 5503 was passed in 1966. Its similar predecessor statute was passed in 1940. The enactment of statutes in 1940 and 1966 sheds no light on the original understanding of the Constitution. This is particularly true as prior statutes refused payments of salaries to all recess appointees whose vacancies arose during the session. We doubt that our sister circuits are correct in construing this legislation as acquiescent. The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist “the overgrown prerogatives of the other branches of government.” The 1863 Act constitutes precisely that: resistance to executive aggrandizement. In any event, if the Constitution does not empower the President to make the appointments, “[n]either Congress nor the

Executive can agree to waive ... structural protection[s]” in the Appointments Clause.

... The Senate's desires do not determine the Constitution's meaning. The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another... In short, nothing in 5 U.S.C. § 5503 changes our view that the original meaning of “happen” is “arise.”

Our sister circuits and the Board contend that the “arise” interpretation fosters inefficiencies and leaves open the possibility of just what is occurring here—that is, a Board that cannot act for want for a quorum. The Board also suggests more dire consequences, arguing that failure to accept the “exist” interpretation will leave the President unable to fulfill his chief constitutional obligation to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, and even suggests that the interpretation we adopt today could pose national security risks. But if Congress wished to alleviate such problems, it could certainly create Board members whose service extended until the qualification of a successor, or provide for action by less than the current quorum, or deal with any inefficiencies in some other fashion. And our suggestion that Congress can address this issue is no mere hypothesis. The two branches have repeatedly, and thoroughly, addressed the problems of vacancies in the executive branch. Congress has provided for the temporary filling of a vacancy in a

particular executive office by an “acting” officer authorized to perform all of the duties and exercise all of the powers of that office, including key national security positions. Moreover, Congress statutorily addressed the filling of vacancies in the executive branch not otherwise provided for.

Congress has also addressed the problem of vacancies on various multimember agencies, providing that members may continue to serve for some period past the expiration of their commissions until successors are nominated and confirmed. ...

Admittedly, Congress has chosen not to provide for acting NLRB members. But that choice cannot support the Board's interpretation of the Clause. We cannot accept an interpretation of the Constitution completely divorced from its original meaning in order to resolve exigencies created by—and equally remediable by—the executive and legislative branches. ...

In any event, if some administrative inefficiency results from our construction of the original meaning of the Constitution, that does not empower us to change what the Constitution commands. As the Supreme Court observed in *INS v. Chadha*, “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” It bears emphasis that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of “happen” was “arise,” we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

Applying this rule to the case before us, we further hold that the relevant vacancies did not arise during the intersession recess of the Senate. The three Board seats that the President attempted to fill on January 4, 2012, had become vacant on August 27, 2010, August 27, 2011, and January 3, 2012, respectively. On August 27, 2010, the Senate was in the midst of an intrasession recess, so the vacancy that arose on that date did not arise during “the Recess” for purposes of the Recess Appointments Clause. Similarly, the Senate was in an intrasession recess on August 27, 2011, so the vacancy that arose on that date also did not qualify for a recess appointment.

The seat formerly occupied by Member Becker became vacant at the “End” of the Senate's session on January 3, 2012—it did not “happen during the Recess of the Senate.” First, this vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.

It has long been the practice of the Senate, dating back to the First Congress, to conclude its sessions and enter “the Recess” with an adjournment *sine die*. The Senate has followed this practice even for relatively brief intersession recesses.

Indeed, various acts of Congress refer to the adjournment *sine die* as the conclusion of the session. ...

Because, in this case, the Senate declined to adjourn *sine die* on December 30, 2011, it did not enter an intersession recess, and the First Session of the 112th Congress expired simultaneously with the beginning of the Second Session.

Although the December 17, 2011, scheduling order specifically provided that the Second Session of the 112th Congress would convene on January 3, 2012, it did not specify when the First Session would conclude. And, at the last *pro forma* session before the January 3, 2012, session, the Senate adjourned to a date certain: January 3, 2012. Because the Senate did not adjourn *sine die*, it did not enter “the Recess” between the First and Second Sessions of the 112th Congress. Becker’s appointment therefore expired at the end of the First Session on January 3, 2012, and the vacancy in that seat could not have “happen[ed]” during “the Recess” of the Senate.

Second, in any event, the Clause states that a recess appointment expires “at the End of [the Senate’s] next Session,” not “at the beginning of the Senate’s next Recess.” Likewise, the structure of Article II, Section

2 supports this reading, for “it makes little sense to allow a second consecutive recess appointment for the same position, because the President and the Senate would have had an entire Senate session during the first recess appointment to nominate and confirm a permanent appointee.” The January 3, 2012, vacancy thus did not arise during the recess, depriving the President of power to make an appointment under the Recess Appointments Clause. Because none of the three appointments were valid, the Board lacked a quorum and its decision must be vacated.

Even if the “End” of the session were “during the Recess,” meaning that the January 3, 2012, vacancy arose during some imaginary recess, we hold that the appointment to that seat is invalid because the President must make the recess appointment during the same intersession recess when the vacancy for that office arose. The Clause provides that a recess appointee’s commission expires at “the End of [the Senate’s] next Session,” which the Framers understood as “the end of the *ensuing* session.”

Consistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it, the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose. There is no reason the Framers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening

period and available to consider nominations....

As with the first issue, we hold that the petitioner's understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void.

## V. THE MOTION FOR INTERVENTION

The Chamber of Commerce and the Coalition for a Democratic Workplace seek to intervene. It is the law of this circuit that litigants seeking to intervene in cases involving direct review of administrative actions must establish Article III standing. Our judicial power is limited to “Cases” or “Controversies,” meaning that litigants must show “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.”

The movants claim to have “associational standing.” In that context, the Supreme Court has explained that “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”

We need not decide the question of the movants' standing. Our precedent is clear: “[I]f one party has standing in an action, a court need not reach the issue of the

standing of other parties when it makes no difference to the merits of the case.”

Noel Canning has standing. The case, like other petitions for review of administrative adjudications, proceeded between the party to the administrative adjudication and the agency. We reached our decision. The motion is now moot, and we order it dismissed. The Chamber could have had its say by filing as an amicus, but for reasons satisfactory to itself, chose to attempt a strained claim of intervenor status.

## CONCLUSION

For the reasons set forth above, we grant the petition of Noel Canning and vacate the Board's order. We deny the cross-petition of the Board for enforcement of its invalid order.

*So ordered.*

**GRIFFITH, Circuit Judge, concurring in the opinion except as to Part IV.B and concurring in the judgment:**

The majority acknowledges that our holding on intrasession recess appointments is sufficient to vacate the Board's order, and I would stop our constitutional analysis there. If we need not take up a constitutional issue, we should not. I agree that the Executive's view that the President can fill vacancies that “happen to exist” during “the Recess” is suspect, but that position dates back to at least the 1820s, making it more venerable than the much more recent practice of intrasession recess appointments. We should not dismiss another branch's longstanding



interpretation of the Constitution when the case before us does not demand it.

## **“Supreme Court to Weigh in on Obama’s Recess Appointments”**

*Washington Post*

Robert Barnes

June 24, 2013

The Supreme Court announced Monday that it will decide next term whether President Obama exceeded his constitutional authority by making appointments while the Senate was on break last year.

The case at hand involves Obama’s appointment of three members of the National Labor Relations Board (NLRB), but the broader issue concerns the power that presidents throughout history have used to fill their administrations in the face of Senate opposition and inaction.

The justices will review a broad ruling by a panel of the U.S. Court of Appeals for the District of Columbia Circuit that upset decades of understanding about the president’s recess appointment power. The court ruled that presidents may make recess appointments only between sessions of the Senate — they generally come at the end of each year — and not when senators take an intra-session break.

Recent presidents have made appointments during both kinds of recesses.

Solicitor General Donald B. Verrilli Jr. said in a petition to the Supreme Court that the appeals court’s reading of the clause would “drastically curtail the scope of the president’s authority.”

In addition, the Supreme Court will consider a narrower question presented by the specifics of Obama’s January 2012 appointments: whether the president can make appointments when the Senate is holding pro forma sessions designed to thwart such action.

White House press secretary Jay Carney said that he was “confident” that the court will uphold Obama’s appointments and that “the issue here is about the president having the authority that all of his predecessors have had to make these recess appointments.”

Thomas J. Donohue, president of the U.S. Chamber of Commerce, welcomed the court’s decision to hear the case. “We warned last year that by appointing these members to the NLRB in such a controversial fashion, a cloud of uncertainty covered the agency and its work,” he said.

Obama has used the recess appointments power fairly modestly compared with recent predecessors. But he went where no other president had gone in his appointment of the three NLRB members and his appointment of Richard Cordray to head the fledgling Consumer Financial Protection Bureau.

Senators had gone home, but the Senate was holding pro forma sessions by convening with one senator every three days.

The White House justified appointing the NLRB members by reasoning that the Senate actually was in recess because it was not available to fulfill its advice-and-consent role by conducting business.

A challenge brought by a Pepsi bottler in the state of Washington and backed by the U.S. Chamber went to the D.C. Circuit. But in January, the unanimous panel skipped past the question of pro forma sessions for a far broader ruling.

D.C. Circuit Judge David B. Sentelle wrote that the administration's interpretation of when recess appointments may be made would give the president "free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction."

## “U.S.: Limit Appointment Power Review”

*SCOTUS Blog*  
Lyle Denniston  
June 7, 2013

The Obama administration has urged the Supreme Court to limit its review of the President’s constitutional power to temporarily fill vacancies in government offices, saying that the Justices should not take on an added question not yet ruled on by any lower court. Even so, it conceded that it is up to the Court to choose the scope of its review.

The new argument on how far the Court should go came late Thursday as administration lawyers filed their reply brief in *National Labor Relations Board v. Noel Canning* (docket 12-1281). The Justices are scheduled to consider at their June 20 Conference whether they will hear the case at all, and what issues they would address if the case is set for review next Term.

When the administration first took the case to the Supreme Court in April, it asked the Justices to rule on the two issues on which appointments to the NLRB had failed in the D.C. Circuit: whether the President may make temporary appointments to vacant posts only at the end of the Senate’s annual sessions or also during other breaks in sessions, and whether the President could fill a post that became open at any time during an annual session or only those that became vacant in the end-of-session periods.

Noel Canning, a soft drink bottling company in Yakima, Washington, notified the Court

last month that it did not oppose Supreme Court review of those issues, but it asked the Court to tack on a third question: may the President ever make a recess appointment when the Senate is returning to meet every three days, even if it does little or no business in such a sitting?

That question is essential, the company’s attorneys argued, because it is the one question that would settle whether the specific appointments made by President Obama to the NLRB were constitutional; those were made when the Senate was holding “pro forma” sessions — with maybe only a single senator in the chamber and little or nothing was getting done. Such recurring formal gatherings should never amount to a recess that creates an opportunity for the President to make an appointment, Noel Canning contended.

While this case was being reviewed by the D.C. Circuit, both sides had taken positions on whether such sessions eliminated the existence of any recess, but, in the end, the Circuit Court did not rule on that. U.S. Solicitor General Donald B. Verrilli, Jr., in the NLRB’s new reply brief, pointed out that fact.

“That question,” the brief said, “was not resolved by the court of appeals, and it has not yet been resolved by any court.” It might possibly come up in other cases now pending in lower courts, Verrilli conceded,

but has not yet been discussed in a final ruling at that level.

It has long been the Court's practice, the brief noted, that it does not allow itself to be the first to pass upon a constitutional matter. If the Court did seek in this case to define whether pro forma sessions defeat the existence of a recess, the brief went on, that would only prolong the threat to presidential appointment powers that already existed under the Circuit Court ruling. That would not eliminate the dispute among courts of appeals on the issues that the government seeks to have reviewed, the document added.

The Solicitor General, however, went on to suggest that this additional issue might

actually arise if a lower court were to rule on it in one of the other pending cases, before the Supreme Court could get to the Noel Canning case next Term.

If the Court were inclined "to use this case to decide what effect pro-forma sessions of the Senate have on the existence of a recess," Verrilli wrote, it should add that question at the time it granted review of the government's petition. That would put everyone on notice that they should address that issue, too, in the written briefing. If it does so, lawyers should be given added space in their merits briefs to discuss that and the issues the Solicitor General has raised, the brief commented.

## “Court Ruling Upsets Conventional Wisdom on Recess Appointments”

*NPR*

Carrie Johnson  
January 25, 2013

In a bombshell decision on the limits of executive power, a federal appeals court panel in Washington, D.C., has invalidated President Obama's recess appointments to the National Labor Relations Board.

Legal experts say the court's reasoning upends decades of conventional wisdom and deals a big victory to Senate Republicans in an era of congressional gridlock.

The case was brought by a Pepsi-Cola bottling company in a fight with a union. The company, Noel Canning, sued to challenge a decision by the Labor Relations Board, arguing that three board members were appointed in violation of the U.S. Constitution.

Without those three members — who arrived in January 2012 after Obama bypassed the Senate — the board would have no quorum and would essentially be out of business.

"We have a system of rules in this country that confine executive power, and the courts stand ready to enforce those lines when they're crossed," said Noel Francisco, a lawyer at the Jones Day firm who argued the case for the company and the U.S. Chamber of Commerce.

The judges on the appeals court panel — all named by Republican presidents — answered two big questions.

"The first," Francisco said, "is when is the recess appointment power triggered in the first place? And there what the court said was that it only is triggered during intersession recesses."

By that, he means recesses between sessions of Congress — not those short breaks so common these days.

The court added that the Senate, not the president, got to decide what it meant by a recess.

"Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers," wrote Judge David Sentelle for the court majority. "An interpretation of 'the Recess' that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law."

Senate Republicans raced to embrace the decision, which came only a day after lawmakers reached a compromise on the use of the filibuster. Senate Minority Leader Mitch McConnell of Kentucky intervened in

the lawsuit along with more than 40 other senators.

Sen. Mike Lee of Utah, who refused to vote for any other Obama nominees after the recess appointments last year, called it a "vindication of the principled stand I have taken."

The court's next holding went even further, lawyer Francisco said, to cover "what types of vacancies are eligible for recess appointments in the first place."

Two judges on the panel, Sentelle and Karen LeCraft Henderson, said under their reading of the Constitution, the vacancy had to actually arise during the recess, or else no dice.

The third judge, Thomas Griffith, said the court didn't need to go that far. He pointed out that until Friday's ruling, the understanding about the kinds of vacancies open to recess appointments dated all the way back to the 1820s.

"We should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it," Griffith said.

John Elwood, a Washington lawyer who has studied the recess appointment power for years, called this "a very, very broad ruling that, if it stands, will significantly diminish the president's recess appointment power."

Elwood, now at the Vinson & Elkins law firm, said the decision unsettles decades of conventional wisdom about the practice, which has been used by both Republican

and Democratic presidents at least 280 times to get around Senate gridlock and appoint agency heads and other executive branch officials.

The ruling also puts a legal cloud over more than 100 actions the Labor Relations Board has taken since last year. But legal experts say each company involved would have to file its own lawsuit to throw out those actions, which could take some time.

The uncertainty extends to the Consumer Financial Protection Bureau, whose leader, Richard Cordray, was appointed on the same day as the NLRB members.

Sam Kazman, a lawyer who represents a plaintiff in a lawsuit challenging the constitutionality of the Dodd-Frank financial overhaul and the creation of the financial protection bureau, said, "We're confident that Mr. Cordray's appointment will meet the same fate as those NLRB members. They will be remembered as the Not-So-Fab Four of the Appointments Clause."

White House spokesman Jay Carney said the president "strongly but respectfully disagrees with the ruling."

"It basically calls into question 150 years of precedent," Carney told reporters Friday afternoon.

The Justice Department had no immediate word on an appeal. But Lynn Rhinehart, the general counsel at the AFL-CIO, had this to say: "This is one decision that we think is so far out there that we really expect to see it reversed."

The decision conflicts with a holding by the U.S. Court of Appeals for the 11th Circuit in Atlanta, and lawyers for both sides expect

the case to wind up in the U.S. Supreme Court.



## “Employers Embrace Noel Canning on NLRB Recess Appointments”

*Daily Report*  
Frederick L. Warren  
April 16, 2013

In *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's three January 2012 recess appointments to the National Labor Relations Board were invalid, resulting in an absence of a quorum for the NLRB to conduct business. The case, arising in a period of heightened political and legal battles concerning the NLRB, elevated a labor dispute to a constitutional issue headed for the U.S. Supreme Court with potentially far-reaching repercussions.

Putting the more than 600 decisions issued by the board since the January 2012 recess appointments subject to question, *Noel Canning* has already had substantial effects. Employers are filing petitions for review of board decisions in the D.C. Circuit, which has held board cases before it in abeyance pending further order of the court. Employers have also raised the *Noel Canning* defense as challenges to decisions of the board in other circuit courts.

Employers have argued that *Noel Canning's* rationale applies to Craig Becker's recess appointment, which expired in January 2012. If his appointment were invalid, that means board decisions were made without a quorum back to August 2011, when the term of Wilma Liebman expired, and also are in question.

To put *Noel Canning* in context, it helps to understand the controversy concerning the

NLRB, the regulatory agency administering the National Labor Relations Act. It has five board members, serving terms of five years, who are nominated by the president subject to confirmation by the Senate. The board protects employees' rights to organize and acts to prevent and remedy unfair labor practices. Additionally, the board acts as a quasi-judicial body in deciding cases on the basis of records in administrative proceedings.

Board decisions are not self-enforcing. The NLRA allows the board to petition a federal court of appeals for enforcement. A party aggrieved by a final board order may petition for review in applicable circuit courts, including the D.C. Circuit.

Largely for political reasons, the Senate has not voted on some nominations made by both Democratic and Republican presidents. Consequently, the board regularly has operated with fewer than five members. Presidents have made recess appointments when the Senate has failed to act on nominations.

In 2010's *New Process Steel v. NLRB*, the Supreme Court ruled that the NLRB must have a quorum of at least three members to conduct business. The board had operated from January 2008 to March 2010 with only two members due to the Senate's failure to confirm nominees. During that time, approximately 550 cases were decided by

the board, but ultimately only about 100 two-member decisions were returned to the board for new decisions to be issued.

There is a widespread perception in the business community that Obama's board has been particularly pro-labor in its actions and decisions. One of his recess appointments was Becker, whose appointment expired on Jan. 3, 2012, which would have resulted in the board being reduced to two members again. But on Jan. 4, 2012, Obama made three recess appointments to the board: Sharon Block to fill Becker's seat, Terence Flynn to fill a seat that became vacant in August 2010 and Richard Griffin to fill a seat that became vacant in August 2011. At the same time, Obama made a recess appointment of Richard Cordray as the first director of the Consumer Financial Protection Bureau.

In a political maneuver to prevent Obama from making recess appointments after Congress started a holiday break in December 2011, the Senate held pro forma sessions every three business days through Jan. 23, 2012. During the Senate's Jan. 3 pro forma session, the Senate acted to convene the second session of the 112th Congress.

The facts in *Noel Canning* are straightforward. Teamsters Local 760, which represents workers at the Yakima, Wash., plant owned by Noel Canning Corp., a bottler and distributor of Pepsi products, filed an unfair labor practice charge with the NLRB. The board issued a decision on Feb. 8, 2012, finding that the company had unlawfully refused to execute a written collective-bargaining agreement

incorporating the terms agreed upon during negotiations. The company filed a petition for review in the D.C. Circuit. The court found that substantial evidence supported the board's conclusion that an agreement was reached and the company unlawfully refused to execute it.

However, *Noel Canning's* constitutional challenge set the stage for the NLRB's upheaval. The company raised an argument that the board lacked authority to issue a decision for want of a quorum, as three members were not validly appointed because the recess appointments were made when the Senate was not in recess. The company also argued that the vacancies these three members filled did not become vacant, or "happen during the Recess of the Senate," as required by the recess-appointments clause of the Constitution.

As a threshold matter, the court questioned whether it had jurisdiction because the company had made no attempt to raise the issues related to the recess appointments before the board. The section of the NLRA governing judicial review of board decisions says: "No objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court held that the company's failure to raise the objection before the board fell within the exception because a constitutional challenge to the board's composition was an extraordinary circumstance.

The recess-appointments clause provides 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." The company argued that the term "the Recess" refers only to the intersession recess of the Senate, which is the period between sessions of the Senate. The board countered that the recess appointment procedure is available during intrasession recesses or breaks in the Senate's business when it is otherwise in session.

The court agreed with the company that the term "the Recess" refers only to the intersession recess of the Senate and not to adjournments during a session. The court also said that the history and interpretation of the clause at the time of the adoption of the Constitution and the years immediately following the Constitution's ratification supported its conclusion.

Second, the court held that the meaning of the word "happen" in the clause requires that the vacancy actually arises or occurs during the recess between sessions. The court rejected the board's arguments that "happen" means happens to exist during the recess, regardless of when the vacancy began.

In reaching its decision, the D.C. Circuit considered and rejected an earlier decision of the Eleventh Circuit reaching opposite conclusions. In *Evans v. Stephens*, the Eleventh Circuit ruled on constitutional challenges to the recess appointment of William Pryor to that court by President Bush in February 2004 while the Senate took a break in its session.

In *Evans*, the Eleventh Circuit started its analysis by saying that when a president is acting under color of express authority of the Constitution, the court starts with a presumption that his acts are constitutional. The presumption is rebuttable. However, the challengers must overcome it and persuade the court to the contrary. Simply showing that there are plausible interpretations of the Constitution different from the president's is not enough.

Looking at the language of the Constitution, the nation's history, and the purpose of the recess-appointments clause—to keep important offices filled and government functioning when the Senate is not in session—the court ruled that "recess" in the clause can refer to intrasession as well as intersession recesses of the Senate. Similarly, the court concluded that "happen" is open to more than one interpretation. It could mean happen to be or exists. The court found that to be the more acceptable interpretation. Two other circuit courts similarly have interpreted "happen" to mean "exists" rather than "arises": *U.S. v. Woodley* (9th Cir. 1985) and *U.S. v. Allocco* (2d Cir. 1962).

Board Chairman Mark Pearce announced after the *Noel Canning* ruling that the board disagreed with it and would continue business as usual. In February, Obama renominated Sharon Block and Richard Griffin to the board. The board comprises Block, Griffin and Pearce, whose term expires in August. Last week, Obama renominated Pearce to another term and nominated Harry Johnson III and Philip Miscimarra to round out the board.

The NLRB decided not to seek en banc rehearing by the D.C. Circuit in *Noel Canning* and has announced that it intends to file a petition for certiorari with the Supreme Court. The petition for certiorari is due April 25. If the Supreme Court accepts the case, it may not agree with the D.C. Circuit's conclusion that the extraordinary-circumstances exception applies, which would allow the court to reach the constitutional issues not raised with the board. It is also unclear whether the court would adopt the Eleventh Circuit's presumption of constitutionality regarding the president's actions.

A challenge to Richard Cordray's recess appointment to the Consumer Financial

Protection Bureau, *State National Bank of Big Spring v. Jacob J. Lew*, is pending in the U.S. District Court for the District of Columbia, where *Noel Canning* is binding.

A Supreme Court decision could affect the balance of power between the president and the Senate regarding presidential appointments and, at least from a historical perspective, the composition of the court itself. Almost a dozen justices were initially placed on the court through recess appointments, including Oliver Wendell Holmes Jr., Earl Warren, William Brennan and Potter Stewart. The last president to make such recess appointments was Dwight Eisenhower.

## “A Judicial Atrocity”

*The New Yorker*  
Jeffrey Toobin  
January 29, 2013

Right-wing judicial activism has been ascendant in recent years. Five years ago, in the case of *District of Columbia v. Heller*, the Supreme Court, rewrote decades of Second Amendment jurisprudence to thwart local legislators who passed gun control laws. Three years ago, in *Citizens United*, a majority of the Justices overturned decades of precedent to deregulate modern campaign financing. But even these decisions, and others like them, pale beside last week’s extravagant act of judicial hubris by the United States Court of Appeals for the D.C. Circuit. There, in *Canning v. National Labor Relations Board*, three federal judges revealed themselves as Republican National Committeemen in robes.

The facts of the case were straightforward. The N.L.R.B. is supposed to have five members, and it cannot act without a quorum of three. After Republicans in the Senate obstructed the nominations of President Obama’s three nominees to the board (a fact not mentioned, revealingly enough, in the opinion), the President made so-called recess appointments to fill the vacancies.

Recess appointments, which are specifically authorized in the Constitution, have been facts of political life for decades. When faced with senators’ refusals to act on nominations Presidents simply made appointments while the Senate was not in session. There was some political

controversy about whether they should exercise this power, but no legal challenge to their right to do so.

As the *Times* reported (but the D.C. Circuit, once again, did not see fit to mention), President Bill Clinton made a hundred and thirty-nine recess appointments, while George W. Bush made a hundred and seventy-one, including those of John R. Bolton as Ambassador to the United Nations and two appeals-court judges, William H. Pryor, Jr., and Charles W. Pickering, Sr., Obama has made only thirty-two such appointments, including that of Richard Cordray as director of the Consumer Financial Protection Bureau.

The D.C. Circuit nevertheless found that Obama’s appointment of the three N.L.R.B. members was invalid. According to the court’s tortured reasoning, the Senate was not really “in recess” when the three were named. Indeed, the opinion essentially said that the Senate need almost never be in recess; a handful of senators could create “pro-forma” sessions that would trump any President’s ability to make appointments. Even beyond that, the opinion more or less removed the President’s ability to use recess appointments in all but a small handful of cases, suggesting that the vacancies would have to occur, not just remain unfilled, during recesses. The appointments of not only the N.L.R.B. commissioners but also of

Cordray, and all of the actions of his new organization, are now in clear jeopardy.

So, who cares? Why does this dispute about an obscure constitutional provision matter? And who benefits from the court's decision?

The decision matters because it is a huge gift to the contemporary Republican Party—especially to Republican senators. Senate Republicans have engaged in an unprecedented level of obstruction of President Obama's nominations—to executive-branch positions, to independent agencies, and especially to federal judgeships. Recess appointments have given Obama a small degree of leverage to fight back. Characteristically, he hasn't used this power much, especially compared with his predecessors; Obama has tried to negotiate his way out of the problem, with little to show for it. But the D.C. Circuit decision, if it stands, essentially gives veto power to Senate Republicans. If they simply refuse to act on Obama's appointments, he is now powerless to respond. The opinion also said that any action taken by improper recess appointees would be invalid. So the opinion could paralyze a major chunk of the federal government. Filibusters by senators who don't approve of the United Nations could prevent us from having any ambassador at all; indeed, these senators could theoretically leave a President without any Cabinet members at all.

Who wrote this judicial atrocity? No surprise—it was David Sentelle, who has a long and disgraceful reputation as a partisan hack on the bench. A protégé of Jesse Helms, his fellow North Carolinian, Sentelle

is most famous for engineering, in 1994, the dismissal of Robert Fiske as the Whitewater Independent Counsel and replacing him with Kenneth Starr. (How'd that work out?) As a judge, Sentelle has been a thoroughgoing reactionary for thirty years. He was joined in his opinion by two fellow Republican appointees to the D.C. Circuit.

Where, one might ask, were President Obama's appointees to the D.C. Circuit, often described as the second most important court in the country? After four-plus years as President, Obama has succeeded in placing exactly zero judges on this court. The reasons for this absence reflect the strange record of this President on judicial appointments. To some extent, Obama has simply been asleep at this particular switch, nominating judges late or not at all. Obama did nothing while D.C. Circuit vacancies lingered, before finally nominating Caitlin Halligan, a widely respected New York prosecutor. Halligan, in turn, was shamefully filibustered by the Republicans in the Senate, like so many other Obama appointees. Obama has resubmitted Halligan, along with another excellent nominee, Sri Srinivasan, to the Senate—where they languish. Thanks to Sentelle's decision to take senior status, there are now four vacancies on the D.C. Circuit. Obama's lassitude plus the Republicans' obstruction equals decisions like this one on recess appointments.

The Obama Administration will surely challenge the Sentelle ruling—either before the full court of appeals or in the Supreme Court. Like the health-care decision, this one is so terrible that it might stir even some

Republican judges to overturn it. Some day, of course, there will be a Republican President, and this decision will give Senate Democrats the chance to cripple him or her, too. John G. Roberts, Jr., and Samuel A. Alito, Jr., both started in government during the Reagan Administration; they have a real appreciation for executive power, and they may resist giving the Senate unlimited power to make mischief. Or they, like Sentelle, may simply want to cripple a

Democratic President now and worry about Republican Presidents when the time comes.

In any event, the D.C. Circuit's decision is a useful reminder of where power resides in Washington. Presidents come and go, but the judges are there forever. And they know it.

## **“Passport Law on Jerusalem Unconstitutional, Federal Appeals Court Says”**

*Fox News*  
July 23, 2013

A federal appeals court Tuesday declared unconstitutional a law allowing Americans born in Jerusalem to list Israel as their birthplace on their U.S. passports, the latest ruling in a case that stretches back a decade.

The three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit said that the 2002 law impermissibly infringes on the president's exercise of the power to recognize foreign governments.

The case was brought by parents of an American boy named Menachem Zivotofsky, who was born in a Jerusalem hospital soon after the law was passed. The parents wanted to list Israel as his birthplace, but the U.S. has refused to recognize any nation's sovereignty over Jerusalem since Israel's creation in 1948 -- so the boy's U.S. passport only says "Jerusalem" as his birthplace.

The Bush administration said Congress may not tell the president what to do regarding this aspect of foreign relations, and the Obama administration has taken the same position. Longstanding U.S. foreign policy that says the status of Jerusalem should be resolved in negotiations between Israel and the Palestinians.

Tuesday's opinion, written by Judge Karen LeCraft Henderson, an appointee of President George H.W. Bush, took a long

look at the history of the president's power to recognize other countries.

"Beginning with the administration of our first president, George Washington, the executive has believed that it has the exclusive power to recognize foreign nations," she wrote.

Henderson included several examples of presidents asserting authority over Congress in this area, including the Senate consideration of a 1919 resolution recommending withdrawing recognition of the Mexican government. President Woodrow Wilson wrote a letter to Congress that if the resolution were to pass, it would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs" because "the initiative in directing the relations of our government with foreign governments is assigned by the Constitution to the executive, and to the executive, only." The chairman of the Senate Foreign Relations Committee quickly declared the resolution "dead."

In addition, Henderson wrote, the Supreme Court has more than once said that the recognition power lies exclusively with the president.

She said the passport law "runs headlong into a carefully calibrated and longstanding



executive branch policy of neutrality toward Jerusalem."

The law was part of a large foreign affairs bill that President George W. Bush signed into law. But even as he did so, Bush issued a signing statement in which he said that "U.S. policy regarding Jerusalem has not changed."

Henderson said that the purpose of the passport law was to alter U.S. foreign policy toward Jerusalem, noting its title is "United States Policy with Respect to Jerusalem as the Capital of Israel."

Henderson was joined by Judge Judith W. Rogers, an appointee of President Bill Clinton. The third judge, David S. Tatel, also a Clinton appointee, filed a concurring opinion in which he said he fully concurred in the court's opinion, but wanted to "elucidate my thinking about the important and novel separation-of-powers question this case presents."

The attorney for the Zivotofskys, Nathan Lewin, said in a statement that he'll try to get the case heard in the U.S. Supreme Court.

"We hope that before Menachem Zivotofsky's bar mitzvah he will be able to bear a passport that recognizes his birthplace as `Israel,'" Lewin wrote. Jewish boys have their bar mitzvah at the age of 13.

The lawsuit was filed back in 2003, and a judge said it was a political question for Congress and the president to work out without the intervention of the courts. A three-judge appeals court panel -- made up of different judges than the panel which decided the case Tuesday -- agreed that it had no authority to consider the claim.

But the Supreme Court last year overturned the ruling and sent the case back down to the appeals court to decide whether the law was constitutional.

## “Will ‘Israel’ Passport Case Return to the Supreme Court?”

*Washington Jewish Week*

July 25, 2013

An attorney for Washington-area residents Ari and Naomi Zivotofsky says he plans to file a petition to the Supreme Court within 90 days, after a federal appeals court this week upheld the State Department’s refusal to list “Israel” as the country of birth for their Jerusalem-born son, Menachem, 11.

Congress in 2002 passed a law mandating the listing of “Israel” should Americans born in Jerusalem request it. But the State Department has not complied, arguing the law impinges on the executive branch’s foreign policy prerogative.

The Supreme Court last year had remanded the case of *Zivotofsky v. the Secretary of State* to the court of appeals to decide whether the president must follow the congressional directive.

On July 23, the Court of Appeals for the District of Columbia ruled that to list Israel “runs headlong into a carefully calibrated and longstanding executive branch policy of neutrality toward Jerusalem.”

Now, Zivotofsky attorney Nathan Lewin wants to return the case to the Supreme Court. “I think they would agree to hear the case again and decide it,” he told WJW.

The next step after he files the petition is the government’s response. “The case probably won’t be heard until January or February 2014,” he said.

Jewish groups, some of whom had filed friend of the court briefs on behalf of the Zivotofskys, were largely critical of the ruling.

Conference of Presidents of Major American Jewish Organizations Chairman Robert Sugarman and Executive Vice Chairman Malcolm Hoenlein called the decision “disappointing” and expressed the “hope [that] the administration will reconsider the issue... . We hope that the Supreme Court will reverse this policy that discriminates singularly against Israel, and will afford those born in Jerusalem the same right accorded to those born elsewhere.”

U.S. Rep. Eliot Engel (D-N.Y.) said the ruling “not only flies in the face of basic geography, but thumbs its nose at the fact that the U.S. Constitution clearly places authority over passports and regulations regarding U.S. citizens born abroad in the hands of Congress.”

And the ADL expressed “deep disappointment” in the decision. It had earlier “argued that the purpose of passports is for identification, and that the issuance of them does not establish or implement foreign policy.”

“Even Taiwan-born U.S. citizens are permitted to identify Taiwan as their birthplace, despite protests by China, the

recognized sovereign over that territory,” said Abraham H. Foxman, ADL’s national director.

Nathan Diament, executive director of public policy for the Orthodox Union, said the fact that Jerusalem is Israel’s political capital “has been recognized again and again by the United States Congress and duly enacted laws, even as such recognition has been practically unrecognized by the

Executive Branch... . The practice of the State Department to refuse compliance with the law is wrong and we will support the appeal of this ruling to the U.S. Supreme Court.”

Marc Stern, the American Jewish Committee’s general counsel, said, “An American passport, not the current and future status of Jerusalem, is the core issue in the *Zivotofsky* case.”

## “The Jerusalem Passport Case – Separation of Powers and Standing”

*The Volokh Conspiracy*

Eugene Kontorovich

July 23, 2013

The D.C. Circuit has held the Jerusalem passport law unconstitutional for impermissibly intruding into the Executive’s foreign relations powers. The law requiring the State Department to record “Israel” as the country of birth for those born in Jerusalem. The D.C. Circuit, through extensive and lucid analysis, concluded that recognition was an exclusively executive function, on which the Act impinges. The lawsuit, brought by Menachem Zivotofsky, an American born in Jerusalem, has gone on for a decade, but this will probably be the end.

The D.C. Circuit’s separation of powers analysis was quite strong, though I think the case lacks standing, as Judge Gladys Kessler on the district court first ruled nine years ago.

The plaintiff, claimed the issue was just about passports, and did not involve recognizing foreign countries. The argument was hard to take seriously: refusing to recognize Israeli sovereignty over Western Jerusalem, on passports or elsewhere, is a crucial limitation on the U.S.’s recognition of the State of Israel.

More interesting was the plaintiff’s argument that Congress itself acted through an enumerated power – Immigration and Naturalization. The Court rather convincingly showed that passports were not

central to this power, which in any case was concurrent with the Executive’s foreign policy powers. Thus in rock-paper-scissors terms, an exclusive executive power (recognition) beats a concurrent legislative one.

One might think that the Immigration power naturally overlaps with recognition: immigration requires a prior determination of foreignness. The Executive has never taken a position one way or another the sovereignty over Jerusalem. Heck, it might be part of New York, in which case no immigration or naturalization would be needed. Indeed, because of the particular circumstances here – Congress is not contesting a determination of Jerusalem’s status, but rather a non-determination – one might think Congress cannot exercise its powers without such a determination. More broadly, immigration laws may allow different numbers of people to come from different countries, thus it would be essential to determine what country Jerusalem is in.

Two years ago, the Supreme Court, in *M.B.Z. v. Clinton*, rejected the D.C. Circuit’s dismissal of the case on political question grounds. I would have instead dismissed for lack of standing, as the district court originally did (before being reversed by the Court of Appeals; the district court then dismissed as a political question, which the Supreme Court ultimately reversed). The

plaintiff has no injury. His passport is property of the State Department, he has no proprietary interest in its contents.

Rather, the passport is merely a vehicle to challenge a broader government policy. The D.C. Circuit, in reversing the standing dismissal, concluded that the law created a new, individual right to have “Israel” written in one’s passport. Such a legal right would satisfy standing, but there is little evidence that Congress created such a right. The statute instructs the State Department to “upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel”. This seems simply to specify the procedure by which “Israel” would be placed on the passport, rather than create a individual right. It is certainly less obviously

a cause of action than procedural rights created under various administrative laws, where the Court has upheld standing (as in *FEC v. Akins*). Those at least specifically authorize lawsuits and speak of “aggrieved parties.” The provision in question looks more like an order to the administration, rather than the establishment of an individual right.

Indeed, I suppose the reason for the “upon the request” language was not to require those born in Jerusalem who might not want it described as “Israel” to be forced to bear such a description in their passports; that would also generate additional hostility and opposition to the rule. If anything, this is an individual right to NOT have “Israel” printed in one’s passport.