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NLRB v. NOEL CANNING EXPOSES JUDICIAL INCAPACITY: JUNIOR VARSITY POLITICIANS’ FOUL THE PRESIDENT’S TEXTUAL APPOINTMENT DISCRETION

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Such is the foundation...of the political-question doctrine: the Court’s sense of lack of capacity compounded in unequal parts of ... the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be.

ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH:
THE SUPREME COURT AT THE BAR OF POLITICS

This Article is offered in tribute to civil rights legends Leon Higginbotham, Spottswood Robinson, and David Rabinovitz whose judicial recess appointments were invalidated by *National Labor Relations Board v. Noel Canning*.¹ It also honors President Lyndon Johnson, who made the bold decision within just six weeks of inheriting the Oval Office, to force racial and religious integration

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1. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014).

of the federal judiciary by signing the recess commissions.² The appointments, made in January 1964 during an eight day intercession recess of the 88th Senate, were President Johnson's initial salvo in a hard-fought battle that resulted in historic advances in both civil rights and economic justice.³ The recess appointments were the earliest manifestation of LBJ's political will and unparalleled political skill that would soon force the Civil Rights Act, the Voting Rights Act, the Economic Opportunity Act, Head Start, Medicare, and Medicaid. President Johnson's January 1964 integration of the three district courts signaled the coming appointment of Thurgood Marshall first as U.S. Solicitor General, and then as the first African-American on the U.S. Supreme Court.⁴

Introduction: Junior Varsity Politicians Insist on Answering a Nonjusticiable Question with Unknown Results

In his May 2014 remarks to the American Law Institute, Justice Stephen Breyer warned of times when Supreme Court Justices are perceived as "wannabe or minor-league politicians." Justice Breyer went on to also discuss the politicization of the judiciary, how it results in judges being viewed as "junior-varsity politicians,"⁵ and its danger to our legal system. His remarks were a refinement of the same speech that he has given many times since he began selling his 2010

2. See Victor Williams, *NLRB v. Noel Canning Tests the Limits of Judicial Memory: Leon Higginbotham, Spottswood Robinson and David Rabinowitz "Rendered Illegitimate,"* 6 HOUS. L. REV.: OFF THE REC. 107 (2015) [hereinafter *Limits of Judicial Memory*].

3. See Michael O'Donnell, *How LBJ Save Saved the Civil Rights Act*, THE ATLANTIC, April 2014, <http://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630>.

4. See generally, See ROBERT CARO, THE PASSAGE OF POWER (2012).

5. *Supreme Court Justices Just 'Junior Varsity' Politicians? Breyer Talks State of legal Profession at ALI Dinner*, BLOOMBERG BNA (May 21, 2014), <http://www.bna.com/supreme-court-justices-b17179890644/>. Speech was a refinement of the same speech that Breyer had given many times since he began selling his 2010 commercial book. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (Alfred A. Knopf ed. 2010). He is presently selling a more recently published one including by appearing on the Steven Colbert's Tonight Show. See STEPHEN BREYER, THE COURT AND THE WORLD (Deckle Edge ed., 2015). See also, Adam Liptak, *Justice Breyer Sees Value in Global View of Law*, N.Y. TIMES, Sept. 12, 2015, http://www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html?_r=0.

commercial book;⁶ he presently selling a more recently published one.⁷ Justice Breyer is right however about the harm of a public misperception that judges play politics. There is far greater danger presented though when the judges actually do play politics. Just one month after his ALI remarks, Justice Breyer's majority opinion in *NLRB v. Noel Canning* was released, where he essentially jumped into the middle of the political branches' escalating appointment battles as he invented an absurd and unworkable "presumptive ten day" recess rule. In playing J.V. politician, Justice Breyer first had to acknowledge that he was not interpreting the Appointments Clauses of Article II, Section 2 at all but was attempting a sophomoric, fake-lateral from the Adjournment Clause of Article 1, Section 4:

The Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess- appointment power. That is not to say that the President may make recess appointments during any recess that is "more than three days."⁸

After the political game had been moved to the playground of the marble temple, Justice Breyer was free and at liberty to make-up a new and complicated set of rules:

We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.⁹

But note that Justice Stephen Breyer now asserts the right to play all positions: President, Senate majority leader, and Director the Federal Emergency Management Agency (FEMA). "Brownie" -- George Bush's FEMA Director at the time of the Katrina hurricane -- could not have fouled it up

6. See generally BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 5.

7. See generally BREYER, The Court and the World, *supra* note 5. See also Liptak, *supra* note 5.

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

9. *Id.* at 2567.

worse.¹⁰ And rather than offer criticism, the progressive academy's uniformly favorable response to the absurd *Noel Canning* rule has been close to the infamous FEMA cheer; "Brownie, you are doing a heck of a job."¹¹

In his dissenting concurrence, Justice Antonin Scalia provided a running commentary on the majority opinion's fumbling attempt to copy-and-paste the legislature three-day adjournment comity rule as a replacement for the unambiguous Article II, Section 2 grant of appointment discretion for temporary appointment to the President:

Fumbling for some textually grounded standard, the majority seizes on the Adjournments Clause, which bars either House from adjourning for more than three days without the other's consent. According to the majority, that clause establishes that a 3-day break is *always* "too short" to trigger the Recess Appointments Clause. It goes without saying that nothing in the constitutional text supports that disposition. . . . And the fact that the Constitution includes a 3-day limit in one clause but omits it from the other weighs strongly against finding such a limit to be implicit in the clause in which it does not appear. In all events, the dramatically different contexts in which the two clauses operate make importing the 3-day limit from the Adjournments Clause into the Recess Appointments Clause "both arbitrary and mistaken."¹²

10. Mathew Diebel, *Hurricane Katrina's "Brownie,"* USA TODAY, Aug. 26, 2015, <http://www.usatoday.com/story/news/2015/08/28/katrinass-heckuva-job-brownie-where--he-now/32485703/>.

11. *Id.* See e.g., Jamal Greene, *The Supreme Court, 2013 Term--Comment: The Supreme Court as a Constitutional Court*, 128 Harv. L. Rev. 124, 128 (2014), <http://harvardlawreview.org/2014/11/the-supreme-court-as-a-constitutional-court/>; Ronald J. Krotoszynski Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L. J. 1513-1569 (2015), <http://scholarship.law.duke.edu/dlj/vol64/iss8/2>; *A Fourth Way? Bringing Politics Back into Recess Appointments (And the Rest of the Separation of Powers, Too)*, 64 DUKE L. J. ONLINE, May (2015), <http://dlj.law.duke.edu/2015/05/bringing-politics-back-into-recess-appointments-and-the-rest-of-the-separation-of-powers-too/>; Bradley, Curtis A. and Siegel, Neil, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession* (January 10, 2015). SUPREME COURT REVIEW, Forthcoming; Duke Law School Public Law & Legal Theory Series No. 20015-6, available at <http://ssrn.com/abstract=2547962>.

12. *Noel Canning*, 134 S.Ct. at 2599 (Scalia, J., concurring) (citations omitted) (quoting Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1556 (2005)).

And Scalia also accurately described the “presumptive” caveat to the “ten-day” rule as a “judicial fabrication of vague, un-administrable limits on the recess-appointment power . . . that overstep the judicial role.”¹³

A. Latent Nonjusticiability

It was telling that Justice Breyer felt the need to add the “presumptive” modifier to his made-up ten-day rule with the “unusual occurrence” four- to nine-day window for national emergencies. Perhaps this was a subconscious manifestation of a latent nonjusticiability instinct, well described by Alexander Bickel as “the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be.”¹⁴ This article’s thesis is that the Supreme Court missed a historic opportunity to stay out of the political game. *Noel Canning* presented the Supreme Court a patent conflict of interest and a nonjusticiable political question that should not have been reviewed by any level of the judiciary. As this author has argued in various popular comments,¹⁵ an academic essay,¹⁶ in *amicus* briefs filed with numerous appellate circuits,¹⁷ and in *amicus* filings with the Supreme

13. *Id.* at 2595.

14. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 184 (1st ed.1962).

15. See e.g., Victor Williams, *A Political Question Imperative*, NAT’L L. J., 30-31 (Feb. 4, 2013); Victor Williams, *Courts (Should Not) Consider Recess Appointment Challenges: Posner Explains Political Questions*, HUFFINGTON POST (Dec. 4, 2012), http://www.huffingtonpost.com/victor-williams/recess-appointments_b_2229426.html.

16. Victor Williams, *NLRB v. Noel Canning Presents a Nonjusticiable Political Question*, 2014 CARDOZO L. REV. 45 (2014) [hereinafter *Cardozo article*], http://www.cardozolawreview.com/content/denovo/WILLIAMS_2014_45.pdf.

17. For over a year, this author unsuccessfully attempted to convince the Obama Justice Department to adopt an alternative non-justiciability argument. DOJ lawyers defending challenges against President Obama's appointments before the Third, Fourth, Seventh, Ninth and D.C. Circuits refused to adopt the political question alternative argument. It was left to this author file *amicus* briefs before each circuit. See Brief for Victor Williams as Amicus Curiae Supp. Pet’r, *NLRB v. New Vista Nursing and Rehab.*, No. 11-3440 (3d Cir. Nov. 27, 2012); Motion to File as Amicus Curiae by Victor Williams, *Nestle Dreyer’s Ice Cream Co. v. NLRB*, No. 12-1684 (4th Cir. Nov. 15, 2012); Brief by Victor Williams as Amicus Curiae in Supp. of Resp’t, *Big Ridge, Inc. v. NLRB*, No. 12-3120

Court in *Noel Canning*, none of the numerous federal court challenges to Barack Obama's 2012 appointments were justiciable.¹⁸ Each challenge lodged asked the same non-justiciable political question that should not have been answered by judges. The judiciary should have simply stayed out of the political branch fight over recess and reserved its juridical capital for hard individual rights adjudications.

The non-justiciability argument was received but its intended purpose was ultimately minimized by Justice Scalia's minority opinion, and badly distorted by the majority opinion. As is detailed below, Justice Scalia's four-justice concurrence advanced a non-justiciability political question determination—albeit only in the conclusion and as an alternative to his robust, and wrongheaded, defense of the D.C. Circuit's uber-textualist interpretation. In a classic “Hail Mary” jurisprudential pass, Scalia explained that there is “no judicially discoverable and manageable standard for resolving’ whether a particular break was long enough to trigger the recess-appointment power, making that a nonjusticiable political question.”¹⁹ Even the majority made a fallback nonjusticiability determination when attempting to justify its rejection of the Solicitor General's request for a “realistic” factual appraisal of the House and Senate's *pro forma* session shenanigans:

(7th Cir. Mar. 28, 2013); Brief by Victor Williams as Amicus Curiae in Supp. of Resp't, DIRECTV Holdings, LLC v. NLRB, No. 12-72526 (9th Cir. Jan. 16, 2013); Brief by Victor Williams as Amicus Curiae in Supp. of Resp't, *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Nov. 2, 2012); Brief by Victor Williams as Amicus Curiae in Supp. of Resp't, *Sands Bethworks Gaming, LLC v. NLRB*, No. 12-1240 (D.C. Cir. Dec. 20, 2012). The Third Circuit ruling gave the most fulsome attention to the political question alternative thesis. See *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203 (3d Cir. 2013). The *New Vista* majority opinion considered and rejected various political question arguments lodged by this author's amicus brief. However, a dissent in *New Vista*, which forcefully rebutted the majority's opinion, also explained why the majority's “test—that an adjournment *sine die* marks an intersession recess—is unworkable and not judicially manageable.” *Id.* at 268.

18. See Victor Williams, *D.C. Circuit Appointment Usurpation Ripe for High Court Reversal as Nonjusticiable*, AMERICAN CONSTITUTION SOCIETY (June 7, 2013), <http://www.acslaw.org/acsblog/dc-circuit%E2%80%99s-appointment-usurpation-ripe-for-high-court-reversal-as-non-justiciable>.

19. *Noel Canning*, 134 S. Ct. at 2600 (Scalia, J., concurring) (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012)).

From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.²⁰

Distorting nonjusticiability theory and perverting its purpose (to keep judges out of politics), Breyer only used the nonjusticiability determination when it was required to protect his unfortunate, results-driven recess rule. In the end, Breyer recklessly took sides in the political fight by conjoining his absolutist three-day Senate recess minimum together with a vague “presumptive” ten-day limit.²¹ Breyer’s recess rule rends the Constitution’s unambiguous textual grant of presidential discretion in making the temporary appointments required to ensure the continued functioning of the national government in the event of Senate nonattendance to its confirmation duty. The jurisprudential impact and practical effects of the ruling’s invalidation of President Barack Obama’s January 2012 NLRB and Consumer Financial Protection Bureau (“CFPB”) appointments, continues to unfold.²² Breyer’s ruling significantly altered the constitutional separation of powers such that either congressional house can now abrogate the textually committed recess appointment authority of the Executive Branch by scheduling shenanigans.²³ With its invention of the vague presumptive ten-day rule, *Noel Canning* encouraged and facilitated future recess appointment litigation. Any recess appointment to a significant office will be challenged in federal court. The vague rule ensures that the junior varsity politicians will now always be at the center of the appointment game.

20. *Id.* at 2576.

21. *Id.* at 2567.

22. For further and diverse analysis of *Noel Canning* consider the symposium and materials at SCOTUSblog.com. The site lists the 25 *Noel Canning* amicus/amici briefs that were filed in opposition to Barack Obama’s appointments and the three amicus briefs (by the Constitutional Accountability Center, Brennan Center for Justice, and this author) filed in support of the President’s appointments. See *National Labor Relations Board v. Noel Canning*, SCOTUSBlog (2015), <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/>. See also Michael B. Rappaport, *Why Non-Originalism Does Not Justify Department From the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL’Y 889 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374563.

23. See Pema Levy, *Did the Supreme Court Just Set up a Constitutional Crisis?*, NEWSWEEK (June 27, 2014), <http://www.newsweek.com/did-supreme-court-just-set-constitutional-crisis-256461>.

Such is a quite lot of damage from just one high court ruling, but there is still more. *Noel Canning* also revoked and invalidated President Lyndon Johnson's 1964 judicial recess appointments of labor-rights champion David Rabinovitz and civil-rights legends Spottswood Robinson, III and Leon Higginbotham, Jr.²⁴ The three judicial commissions, signed by President Johnson during an eight-day recess, were "rendered illegitimate,"²⁵ and thus "invalid" for failing Stephen Breyer's made-up presumptive ten-day recess rule.²⁶

B. *Noel Canning* Consequence: Breyer Furtively Strips Civil Rights Legends of Federal Judgeships

In the fall 2015 essay *NLRB v. Noel Canning Tests the Limits of Judicial Memory*, published by the online companion of the HOUSTON LAW REVIEW, this author revealed that the 2014 Supreme Court ruling had furtively revoked the 1964 judicial recess appointments of David Rabinowitz, Spottswood Robinson, and Leon Higginbotham.²⁷ This revocation of the three judgeships has significant jurisprudential, political, and practical effects. Professor Edward Hartnett's prescient 2004 article describes the untenable results of a court ruling that would invalidate the constitutionality of judicial recess appointments:

To conclude that recess appointments to Article III courts are unconstitutional would mean that [the president] making the appointments violated the Constitution. It would also mean that every one of those judges did so as well -- not in the way they decided a particular case -- but in exercising judicial power in the first place, indeed at the very

24. See Henry B. Hogue, "The Law": *Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 671 (2004) (listing the appointments made by President Lyndon B. Johnson).

25. *Noel Canning*, 134 S. Ct. at 2577. The majority opinion used the term "render[ed] illegitimate" in response to Antonin Scalia's wrong but logically consistent dissenting concurrence. Stephen Breyer stated: "Justice Scalia would render illegitimate thousands of recess appointments reaching all the way back to the founding era." *Id.* However, it was Justice Breyer's majority opinion with its absurd recess rule that "rendered illegitimate" the Rabinovitz, Higginbotham, and Robinson appointments.

26. The 88th Senate's intersession break began on December 30, 1963 through noon on January 7, 1964. See *id.* at 2577, app. A.

27. See *Limits of Judicial Memory*, *supra* note 2, at 108-113.

moment that they took their oath to “faithfully and impartially” discharge their duties “under the Constitution and laws of the United States.”²⁸

Today, *Noel Canning*'s recess rule means that Lyndon Johnson violated the Constitution by using his textual Article II, Section 2, Clause 3 authority to bench the judges, and that Leon Higginbotham, Spottswood Robinson, and David Rabinovitz separately violated the Constitution when they each took a solemn oath to serve their nation as a federal judge.

This Article is written with the belief that the three advocates would have wanted the truth of the revocations told. Denial of the effects of *Noel Canning*'s historic [mal]practice on their appointment would have offended the truth-seeking lawyers. They appear to have been quite different men in many interesting ways; the contrast is worthy of a professional historian's long-form analysis. However, the available record is clear that each man possessed exceptional intelligence, profound internal courage, and each spent their lives speaking truth to power. In any work examining their initial judicial appointments and the 2014 revocations by the nation's highest court, all three lawyers would have wanted attention directed to President Lyndon Johnson who signed their commissions.

C. The Supreme Court Hides History to Play Politics

So why was the *Noel Canning* stripping of the renowned civil rights advocates recess judgeships completely unreported by news sources and unanalyzed by commentators for over a year? In short, such was carefully hidden. Justice Breyer's desire for to play J.V. politician's but his later inability to accept the responsibility for the results of such political gamesmanship, resulted in

28. Edward Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 428-429 (2004).

the carefully masking of this *Noel Canning* consequence.²⁹ He concealed the judicial appointment revocations by burying the three Johnson commissions among other “scattered” recess appointments that failed his ten day recess test. All such are dismissively referenced by Breyer as only “anomalies;” as among inconsequential, “scattered examples” not worthy of further inspection:

We have already discussed President Theodore Roosevelt’s appointments during the instantaneous, “fictitious” recess. President Truman also made a recess appointment to the Civil Aeronautics Board during a 3-day inter-session recess. Hogue, *Recess Appointments: Frequently Asked Questions*, at 5-6. President Taft made a few appointments during a 9-day recess following his inauguration, and President Lyndon Johnson made several appointments during an 8-day recess several weeks after assuming office. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 *Presidential Studies Q.* 656, 671 (2004); 106 *S. Exec. J.* 2 (1964); 40 *S. Exec. J.* 12 (1909). There may be others of which we are unaware. But when considered against 200 years of settled practice, we regard these few scattered examples as anomalies.³⁰

Further analysis shows that the Supreme Court’s majority opinion went to some lengths to mask the names and offices of the historic “anomalies;” all the reader needs to know however is that they violated Breyer’s *ex post* recess rule. Although the second article citation to the academic work of Congressional Research Service employee Henry Hogue offers a strong hint that both the Taft and Johnson appointments were to judgeships, the actual *Presidential Studies Quarterly* article is only available through a royal fee subscription service.³¹ The article is not even available through Westlaw and Lexis. The opinion is carefully written such that the curious citizen, the prying journalist, or even the dutiful scholar, would have to go through a hard paywall to know the who, what, and exact when of the LBJ judicial recess appointments.³² If any did, there was certainly no reporting or commentary referenced the effect of Breyer’s 10-day rule in revoking the judicial recess

29. *Limits of Judicial Memory*, *supra* note 2, at 112-15.

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

31. *Limits of Judicial Memory*, *supra* note 2, at 113-14.

32. *See generally* HOGUE, *supra* note 24.

appointments for over year -- until exposed by this Author.³³ Even after the judicial revocations became public, the Federal Judicial Center's official online biography for each judge still references their recess commissions as if they were valid.³⁴

Stephen Breyer's majority opinion was also very careful not to reference George W. Bush's recess judicial appointment of William Pryor during a ten day recess in 2004. Without mentioning William Pryor's appointment, *Noel Canning's* exact ten day recess rule worked to reconfirm Pryor's 2004 controversial appointment to the Eleventh Circuit, which had subject to an even more controversial court challenge. Just as Senate Minority Leader Mitch McConnell had done in *Noel Canning*, Senator Edward Kennedy had filed an *amicus* brief supporting a federal court challenge to the William Pryor recess appointment. The *en banc* Eleventh Circuit ruled that the political aspect of the challenge to the recess appointment was a nonjusticiable political question.

The Eleventh Circuit precedent was referenced by the parties and heavily referenced by this author and other *Noel Canning amicus*. Breyer's majority opinion did not analyze, reference, or even cite the important Eleventh Circuit precedent regarding the William Pryor appointment. Unlike the Eleventh Circuit, the Supreme Court was determined to answer the obvious political question. Just as Breyer had to hide Higginbotham, Robinson and Rabinovitz, the majority opinion could not

33. See e.g., Lawrence B. Solum, *Williams on Noel Canning*, LEGAL THEORY BLOG, Aug. 11, 2015, <http://lsolum.typepad.com/legaltheory/2015/08/williams-on-noel-canning.html>.

34. Higginbotham, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1039&cid=999&ctype=na&instate=na> (last visited December 9, 2015); Robinson, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2031&cid=999&ctype=na&instate=na> (last visited December 9, 2015); Rabinovitz, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2697&cid=999&ctype=na&instate=na> (last visited December 9, 2015). As the unconfirmed Rabinovitz was never a judge according to the Breyer rule, his listing is a double-error.

acknowledge relevant William Pryor's judicial appointment made during a ten day Senate recess- despite it serving as the best evidence for *Noel Canning's* ten day rule. To have done so would have made the conflict of interest in the judiciary reviewing the political branch fight about the appointment process, which has been used by many Presidents since George Washington to form, reform, transform, and integrate the federal judiciary, too apparent

Rather, the *Noel Canning* majority opinion purposely reads as if no President ever appointed a federal judge during a recess. After emphasizing that that “[t]here is a great deal of history to consider here,” the majority opinion scrubs from history any mention of the relationship between the federal judiciary and many presidents’ recess appointment historic practices, when over 300 judges and Justices have come to the federal bench by recess commission.³⁵ There is no discussion of even one recess-appointed judge.

D. Hiding the Judiciary’s Recess Appointment History

With due respect to Professors Curtis Bradley and Neil Siegel for their interesting “historic gloss” thesis, *Noel Canning* was not about “historic gloss” application but rather the majority’s purposeful, hard scrubbing of the federal judiciary’s own history to remove any acknowledgement of the transformative role of judicial recess appointments.³⁶ It was particularly important for Justice Breyer to have hidden all history regarding the presidential use of judicial recess appointments to force integration- racial, gender and religious- of the federal courts. Presidents have used recess appointments to both force both the generational change and the integration of our federal courts. The first female federal judges, the first Jewish federal judges, and the first African American judges

35. LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 380 (2013).

36. See Curtis A. Bradley and Neil Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015), <http://ssrn.com/abstract=2547962>.

all rose to the bench by bold and daring recess appointment actions by courageous presidents. Senate confirmation obstruction was made more difficult if the judicial nominee was already serving as a judge. Still, these temporary appointments were often the target of extreme private and public anger from the status-quo, white, male judges dominating the federal benches. Once the courts were partially integrated however, the judiciary had no choice but to accept the change; to challenge the power of their new colleagues would have diminished their own authority. The historic recess appointments exponentially transformed race, religion, and gender diversity expectations for subsequent ordinary Article II, Section 2, Clause 2 judicial appointments.³⁷ In 1949 for example, President Harry Truman recess appointed Burnita Shelton Matthews to be the first woman seated on a U.S. District Court bench. The harshest negative reaction came from her new male brethren on the U.S. District Court for the District of Columbia.³⁸ One judge said publically, "Mrs. Matthews would be a good judge," but there is "just one thing wrong: she's a woman."³⁹ In their attempts to haze her off the bench, her male colleagues assigned her only the most challenging and technically-difficult cases. Veteran court reporter Linda Greenhouse retold the history upon Judge Matthews' 1988 passing.⁴⁰ History records that our nation's first female federal judge was not one to be deterred or bullied.⁴¹ Prior to the recess appointment, she had already fought gender bias battles in order to be admitted to the bar and to secure employment with a government agency as a lawyer. Like Sandra Day O'Connor's early experience,⁴² male lawyers wanted Ms. Matthews' obvious talents

37. See Sylvia R. Lazos Vargas, *Only Skin Deep: The Cost of Partisan Politics on Minority Diversity on the Federal Bench*, 83 IND. L.J. 1423 (2008).

38. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. TIMES, Apr. 28, 1988, <http://www.nytimes.com/1988/04/28/obituaries/burnita-s-matthews-dies-at-93-first-woman-on-us-trial-courts.html>.

39. *Id.*

40. *Id.*

41. *Id.*

42. LINDA HIRSHMAN, *SISTERS IN THE LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD* (2015).

but only in the role of a secretary.⁴³ With the recess appointment providing a black robe to wear over her dress, Judge Mathews quickly gained Senate confirmation for a life-tenured bench. Judge Matthews is only one such transformative recess appointment. Ultimately, the first African American federal judges, the first Jewish federal judges, and many of the first female federal judges, rose to bench through recess appointments.

E. LBJ Continues JFK's Use of Judicial Recess Appointments

President John F. Kennedy fought hard against Southern racist-reactionary factions of his own party for transformation of the courts and integration of the federal judiciary. His bold appointment strategy was an energetic use of recess commissioning authority. It was classic Kennedy style- to just sign a judicial commission and put the judge to work. President Kennedy recess commissioned over twenty percent of his judicial selections.⁴⁴ With assistance from Attorney General Robert Kennedy and Deputy Attorney General Byron White, JFK recess appointed seventeen judges on just one day- Oct. 5, 1961. Thurgood Marshall was recess commissioned to the U.S. Court of Appeals for the Second Circuit on that day. The years of judicial service gave the former NAACP Legal Defense Fund advocate much needed cover during his subsequent fight to receive confirmation for his seat on the high court against powerful Senate obstructionists. Marshall's Second Circuit recess appointment was foundational to his becoming the first African American Supreme Court Justice.

During the first weeks of his inherited presidency,⁴⁵ Lyndon B. Johnson sought to continue and expand the Kennedy legacy of court transformation, and he therefore forced integration of the

43. *Id.* See Meg Waite Clayton, *Flirting with Justice*, L.A. TIMES, Sept. 25, 2011, <http://articles.latimes.com/2011/sep/25/opinion/la-oe-clayton-oconnor-20110925>.

44. HAROLD CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 115 (1972).

45. See CARO, *supra* note 4, at 328-36.

judiciary through recess appointments. Even the events of Lyndon Johnson legal succession to the presidency involved a recess appointment. Johnson demanded that recess-appointed Judge Sarah Hughes be located and brought to Love Field to administer the oath before allowing Air Force One to return the dead president, his widow, and the Camelot entourage to Washington, D.C.⁴⁶

In that moment, Johnson was not only making a point that he was now Commander-in-Chief, but fundamentally settling an old recess appointment score. For months prior to the assassination of President Kennedy, Vice President Johnson had unsuccessfully lobbied JFK to appoint Sarah Hughes to the federal judiciary in Texas. Johnson finally gave up and instead promised the prized judgeship to another influential Texas supporter.⁴⁷ When Johnson was subsequently out of the country, House Speaker Sam Rayburn separately made the request for President Kennedy to name Sarah Hughes to the federal bench. JFK immediately acceded to Sam Rayburn's request, and the powerful House Speaker got the credit for the appointment. Having been completely out of the loop, Johnson was humiliated upon his return from the foreign visit to learn of the appointment of Sarah Hughes to a federal judgeship in Texas.⁴⁸

Sarah Hughes was only the third female Article III judge in the nation and remains the only woman in history to have ever administered the presidential oath.⁴⁹ Such is traditionally done by the U.S. Chief Justice and the nation has yet to have had a female in the center seat on the high bench. Hughes is also known as the author of the 1970 three-judge trial court opinion overturning Texas' abortion restriction law in *Roe v. Wade*.⁵⁰ Stephen Breyer's psychic conflict in writing the *Noel Canning*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Mary L. Clark, One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges, 49 VILL. L. REV. 487, 514 (2004).

opinion must have been quite intense as there exists so much judicial history to avoid when drafting an opinion that claims to be creating a rule based on “historic practice.”?

Part I: “What the Hell’s the Presidency For?” (Lyndon Johnson on November 26, 1963, Three Days after John F. Kennedy’s Murder in Dallas)

John F. Kennedy’s 1963 nominations of civil-rights lawyer Leon Higginbotham, Jr. and labor-rights attorney David Rabinowitz to the judiciary had been blocked for many months by Senate Judiciary Chair James Eastland.⁴⁸ The reactionary and racist Eastland was well-known for orchestrating extended delays and outright obstruction of both African American and Jewish judicial nominees.⁵¹ In the mid-1960s, columnist Drew Pearson exposed the “racial-religious barrier inside the Senate Judiciary Committee”⁵² as he wrote:

Every Negro judge to come before Eastland’s judiciary committee has been kept waiting nine months to a year for confirmation. The same has been true of Jewish judges... Judge Thurgood Marshall, counsel for the NAACP and a Negro, was nominated Sept. 26, 1961, to the 2nd Circuit Court of Appeals and kept waiting one year by Eastland... Judge Irwin Ben Cooper, nominated to the U.S. District Court for New York at the same time was kept waiting by Eastland on whole year... Cooper is Jewish.⁵³

51. Drew Pearson, *Long Wait is Suggested for Judge’s Confirmation*, SPOKANE DAILY CHRONICLE, July 7, 1965, <https://news.google.com/newspapers?nid=1338&dat=19650707&id=61ZYAAAIAIBAJ&sjid=ofcDAAAIAIBAJ&pg=3332,1147545&hl=en>. The present GOP/Tea Party appointment obstruction roots lie in ugly Southern Democrat race and religion hatred. Most recently the obstruction was directed at the entire governance effort of the first black President with a primary focus directed against his appointments. See Charles Blow, *The Obama Opposition*, N.Y. TIMES, Nov. 9, 2014, [http://www.nytimes.com/2014/11/10/opinion/charles-blow-the-obama-opposition.html?_r=0](http://www.nytimes.com/2014/11/10/opinion/charles-blow-the-obama-opposition.html?_r=0;); Race Alone Doesn’t Explain Hatred of Obama But It is Part of the Mix, May 13, 2014, <http://www.npr.org/sections/codeswitch/2014/05/13/311908835/race-alone-doesnt-explain-hatred-of-obama-but-its-part-of-the-mix>.

52. *Id.* Even prior to Eastland’s chairmanship, William Hastie’s appointment as the first black tenured judge to the federal appellate court in 1950 was delayed. Also delayed, for a full year in 1956, was the confirmation the first Jewish federal judge on the U.S. Court of Appeals for the Fourth Circuit, Simon E. Sobeloff.

53. *Id.*

John Kennedy's last press conference, held in November 1963 just days before he left for Dallas, Texas, dealt with the Senate and anti-labor obstruction of David Rabinowitz' judicial nomination.⁵⁴ Jack Kennedy was solidly behind Rabinowitz.

On the third day following John Kennedy's November 23, 1963 murder, President Lyndon Johnson called a meeting with advisors that stretched into the wee hours of the night. The group worked to prepare a televised speech for Johnson to deliver the next day to a joint session of Congress. As Johnson would later acknowledge: "I was still illegitimate, a naked man ..., a pretender..., an illegal usurper. And then there was Texas, my home, the home of...the murder."⁵⁵ All advisors at the meeting knew the importance of the speech to comfort the mourning nation, and more so to set the right tone with Congress. Johnson's reputation and authority with congressional leaders had been diminished by the Kennedy Administration's marginalization of his role as Vice-President.⁵⁶ Johnson had gone from the respected and feared Senate Majority Leader, to being the regular butt of pre-beltway jokes – "Where's Lyndon?" was the nicest of the regular Kennedy clan cuts. He was ostracized by the Georgetown social circuit, ridiculed by Attorney General Robert Kennedy, and found it difficult even to get a meeting with President Kennedy.

LBJ's one certain triumph during the 34 months of his Vice Presidency was a speech he gave at Gettysburg Battlefield for the 100th Anniversary of Gettysburg's consecration by President Abraham Lincoln. The eloquence of the Johnson commemoration speech, delivered on May 30,

54. President John F. Kennedy, President Kennedy News Conference No. 64 (Nov. 14, 1963), <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Press-Conferences/News-Conference-64.aspx>.

55. CARO, *supra* note 4, at 345.

56. *Id.* ("[T]he respect and fear with which the Senate had once regarded him evaporating without a trace, and the senatorial snubbing was merely one aspect of a situation on Capitol Hill that Johnson's ascension to the presidency especially difficult."). LBJ's December 1960 attempt to formally retain chairmanship of the Senate Democratic Caucus – even as only a symbolic "*pro forma* position" – had failed. Hubert Humphrey stated that Johnson "had the illusions that he could be in a sense, as Vice President, the Majority Leader."

1963, would foreshadow that midnight meeting and his coming presidency's commitment to racial justice. In relevant part, Lyndon Johnson's Gettysburg Address:

As we maintain the vigil of peace, we must remember that justice is a vigil, too--a vigil we must keep in our own streets and schools and among the lives of all our people--so that those who died here on their native soil shall not have died in vain.

One hundred years ago, the slave was freed.

One hundred years later, the Negro remains in bondage to the color of his skin.

The Negro today asks justice.

We do not answer him--we do not answer those who lie beneath this soil--when we reply to the Negro by asking, "Patience."

Our nation found its soul in honor on these fields of Gettysburg one hundred years ago. We must not lose that soul in dishonor now on the fields of hate.

To ask for patience from the Negro is to ask him to give more of what he has already given enough. But to fail to ask of him--and of all Americans--perseverance within the processes of a free and responsible society would be to fail to ask what the national interest requires of all its citizens.⁵⁷

The Lyndon Johnson Gettysburg speech was heralded as a meaningful and successful event, even by LBJ's harshest critics. The Johnson-haters in the Kennedy inner circle were cowed. Once he became President, Johnson would not continence "patience" and he would interpret and apply civil rights broadly.

As the story of the November 26 1963 late-night meeting was later retold counted by LBJ's long-time attorney and confidant Abe Fortas, many of the assembled advisors warned President Johnson against raising civil rights issues in the joint-session speech. They feared that LBJ would needlessly antagonize James Eastland and the other reactionary southerners who firm controlled the Eighty-Eighth Congress. The future Supreme Court Justice Abe Fortas⁵⁸ recounted an inflection-point at which one of the graybeard advisors asserted that LBJ should not waste his power on the

57. Vice President Lyndon B. Johnson, Memorial Day Remarks at Gettysburg, Pennsylvania to Commemorate the 100th Anniversary of the Gettysburg Address (May 30 1963), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/630530.asp>.

58. The judicial career of Abe Fortas has important lessons for contemporary appointment battles. See David Leonhardt, *The Supreme Court Blunder that Liberals Tend to Make*, N.Y. TIMES, June 2, 2014, http://www.nytimes.com/2014/06/03/upshot/the-supreme-court-blunder-that-liberals-tend-to-make.html?_r=0&abt=0002&abg=1.

“lost cause” of civil rights; “The presidency has only a certain amount of coinage to expend and you oughtn’t to expend it on this.” In classic form, LBJ shouted back: “Well, what the hell’s the presidency for?”⁵⁹

Just six weeks later, during the first available Senate recess, President Johnson commissioned Leon Higginbotham to become the first African American federal trial judge in Philadelphia. On the same day, Johnson also recess appointed Spottswood Robinson, who was renowned for his advocacy in *Brown v. Board*,⁶⁰ to become the first African-American Article III judge in the nation’s capitol. On the following day, January 7, 1964, LBJ again consulted with political and labor leaders regarding Senate reactionaries’ obstruction of Dave Rabinovitz’s judicial nomination. Literally minutes before the Senate returned from its eight day intercession recess, President Johnson commissioned David Rabinovitz to be the first Jewish federal judge in Madison, Wisconsin. The master of political detail, Johnson instructed that Rabinovitz pledge his oath of judicial office before 12:00 noon Wisconsin time --taking full advantage of the one-hour difference in time zones. Timing was critical and patience was not an option. The first week of January 1964 signaled a promising year ahead for American civil rights, and fundamentally, for American human rights.

Part II: *Ex Post* Debenching Higginbotham, Robinson and Rabinovitz and Reconfirming Eleventh Circuit Judge (and U.S. Sentencing Commission Member) William Pryor

No short-form article could ever capture the remarkable personal life stories and long and varied careers of the three civil rights legends that President Lyndon B. Johnson recess appointed to the federal bench. A humble attempt is offered to introduce the three advocates to a new generation of readers. Also George W. Bush’s judicial recess appointment of William Pryor during a ten day

59. CARO, *supra* note 4, at 428.

60. Spottswood Robinson III (1916-), PBS, <http://www.pbs.org/beyondbrown/history/spottswood.html> (last visited Dec. 9, 2015).

recess is discussed. 2004- the intended confirmation of which likely formed and served as the basis for the *Noel Canning* ten day rule- warrants a contrasting introduction to that Eleventh Circuit jurist and most recently appointed member of the Steven Breyer's U.S. Sentencing Commission.⁶¹ An introduction to Eleventh Circuit Judge William Pryor is offered as Breyer's selection of the 10-day rule served to re-confirm the legitimacy of his judgeship. Note is also made of the Judge Pryor's 2013 appointment to the U.S. Sentencing Commission which was a brainchild of, and continues to be of great interest to, Steven Breyer.⁶² The Article asks if the 10-day rule was furtively created to protect Pryor judicial legacy even as it tainted the Higginbotham, Rabinovitz, and Robinson's careers.

A. Leon Higginbotham: A Racial Historian Who Defeated Racist Senator James Eastland's Confirmation Obstruction

It would take a multivolume work to do credit to Aloyisus Leon Higginbotham, Jr.'s career as a lawyer,⁶³ as a trial and appellate judge,⁶⁴ and as a historian with a scholarship focus on "lessons of racial history."⁶⁵ Young Leon Higginbotham was blessed to have a loving, domestic-servant mother and a generous factory-worker father. Although raising him in a home with only two books (a Bible and one other retrieved by his mother from her employer's trash), his parents instilled in

61. Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES, Nov. 21, 1998, <http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html>.

62. Luca F. Schroeder, *Foreign Legal Issues Can Inform U.S. Courts, Breyer Says*, HARVARD CRIMSON, Nov. 8, 2015, <http://www.thecrimson.com/article/2015/11/8/associate-justice-breyer-iop/>.

63. Clifford Scott Green & Stephanie L. Franklin-Suber, *Keeping Thurgood Marshall's Promise—A Venerable Voice for the Law*, 16 HARV. BLACKLETTER L.J. 27, 30-34 (2000);

Charles J. Olgetree, Jr., *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801 (1999); John P. Frank, *Giant: A Higginbotham Memoir*, 142 U. PA. L. REV. 521 (1993), http://scholarship.law.upenn.edu/penn_law_review/vol142/iss2/4/.

64. William J. Brennan, Jr., *Tribute to Judge A. Leon Higginbotham, Jr.*, 9 LAW & INEQ. J. 383, 383 (1991); Guido Calabresi, *What Makes a Judge Great: To A. Leon Higginbotham, Jr.*, 142 PENN. L. REV. 513 (1993).

65. A. LEON HIGGINBOTHAM, JR., RACE AND THE AMERICAN LEGAL PROCESS ix (1978).

him a belief that education was the certain path to the American Promised Land. From segregated public schools in Trenton, New Jersey, Higginbotham went west but did not immediately find Canaan. He attended Purdue University in 1944 only to be housed off campus with the other eleven black students in what he later described as “barracks-style in [the] unheated attic” of a building in West Lafayette, Indiana.⁶⁶ When he personally presented a “modest request” to Purdue University’s president that the black students be “allowed to stay in some [heated] section of state-owned dormitories,” Higginbotham was scorned with legal citation: “‘Higginbotham, the law doesn’t require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately.’”⁶⁷ Higginbotham left, and history has appropriately-tainted the name of Purdue President Edward Charles Elliott:

I knew then I had been touched in a way I had never been touched before, and that one day I would have to return to the most disturbing element in this incident--how a legal system that proclaims “equal justice for all” could simultaneously deny even a semblance of dignity to a 16-year-old boy who had committed no wrong.⁶⁸

He transferred to Antioch College changing his career path from engineering to law.⁶⁹ As the first black male ever to attend the progressive institution; he integrated the college that 1945 term along with Coretta Scott (King). Against the advice of clergy and family, he declined a full three-year scholarship offered by Rutgers Law to instead attend Yale Law School.⁷⁰ Even while silently struggling with finances, Higginbotham proved himself to be a stellar student winning several oral

66. *Id.* at vii. This personal story retelling examples Higginbotham’s effective use of narrative in his historical academic work. See Ronald K. Noble, *Between Complicity and Contempt: Racial Presumptions of the American Legal Process*, 72 N.Y.U. L. REV. 664, 682 (1997), <http://www.nyulawreview.org/issues/volume-72-number-3/between-complicity-and-contempt-racial-presumptions-american-legal-process>.

67. HIGGINBOTHAM, *supra* note 65, at viii.

68. *Id.* at vii-ix. See also A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 815-16 (1987).

69. HIGGINBOTHAM, *supra* note 65, at vii-ix.

70. See A. Leon Higginbotham, Jr., *The Dream with Its Back Against the Wall*, YALE L. REP. (1990).

advocacy awards.⁷¹ Dean Wesley Sturges arranged for Higginbotham to interview at a prestigious law firm in Philadelphia and he even gave Higginbotham money to buy a new suit.⁷² When actually visiting the firm, however, Higginbotham was cruelly rejected. The hiring partner, who was an Eli alum, complained that his last name “Higginbotham,” and the stellar grades and references, had given the false impression that he was white (perhaps even blue blood).⁷³ Unbowed, Higginbotham clerked for a judge after graduation,⁷⁴ went on to become an Assistant District Attorney in the city of Philadelphia,⁷⁵ and eventually co-founded Philadelphia’s first African American law firm.⁷⁶ He was also elected president of the local NAACP chapter while developing a national reputation.⁷⁷ He strongly supported Hubert Humphrey in the 1960 presidential primary contest. Yet, President John Kennedy appointed him in 1962 to the Federal Trade Commission to become the youngest and first African American on any federal regulatory agency.⁷⁸

71. See F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 13 (2013), and F. Michael Higginbotham, *In Memoriam: A. Leon Higginbotham, Jr.: A Man for All Seasons*, 16 Harv. BlackLetter J. 7, 8 n.13 (2000).

72. Frank, *supra* note 62, at 524.

73. A. Leon Higginbotham, Jr., *The Dream with Its Back Against the Wall*, YALE L. REP. (1990), <http://www.law.yale.edu/news/3321.htm>. See also William Glaberson, *A. Leon Higginbotham Jr., Federal Judge, Is Dead at 70*, N.Y. TIMES (Dec. 15, 1998), <http://www.nytimes.com/1998/12/15/us/a-leon-higginbotham-jr-federal-judge-is-dead-at-70.html?pagewanted=all>.

74. Frank, *supra* note 62, at 524.

75. See Glaberson, *supra* note 73.

76. See Albert S. Dandridge III, *Commentary: Norris Schmidt, Philadelphia’s First African-American Firm, Is a Model for All Firms*, THE LEGAL INTELLIGENCER (Jun. 27, 2009), <http://www.thelegalintelligencer.com/id=900005484377?keywords=norris+schmidt+philadelphia&publication=The+Legal+Intelligencer> (explaining that A. Leon Higginbotham joined the first black law firm of Green Schmidt & Harris as a partner, to form Norris Schmidt Green Harris Higginbotham & Brown).

77. Glaberson, *supra* note 73.

78. *A. Leon Higginbotham Jr.*, JUST THE BEGINNING FOUNDATION, <http://www.jtb.org/index.php?src=directory&view=biographies&srctype=detail&refno=11> (last visited Oct. 29, 2015). See also, Neil Lewis, *Black Judge’s Success Story Begins in Cold Attic*, N.Y. TIMES (July 19, 1991), <http://www.nytimes.com/1991/07/19/news/black-judge-s-success-story-begins-in-cold-attic.html>.

Kennedy next nominated Higginbotham in 1963 to the federal trial court in Philadelphia.⁷⁹ The nomination was blocked for months by Senate Judiciary Chair James Eastland.⁸⁰ While the average judicial appointment time from nomination to Senate confirmation was just weeks in the 1950s and early 1960s, both Jewish and black judicial nominees were regularly subjected to many months' delay.⁸¹ In the mid-1960s, columnist Drew Pearson exposed the "racial-religious barrier" in the Senate Judiciary Committee.⁸²

In a direct rebuke to the Eastland-ilk in both Senate and House, President Johnson recess appointed Higginbotham in January 1964 to integrate the U.S. District Court for the Eastern District of Pennsylvania.⁸³ Once he was sitting on the federal bench, not even the Mississippi senator—doing his racist worst—could block the judge's subsequent Senate confirmation. Leon

79. ROGER K. NEWMAN, THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, 264 (Roger K. Newman, 2009).

80. See Drew Pearson, *Long Wait is Suggested for Judge's Confirmation*, SPOKANE DAILY CHRONICLE (July 7, 1965), <https://news.google.com/newspapers?nid=1338&dat=19650707&id=61ZYAAAAIIBAJ&sjid=ofcDAAAAIIBAJ&pg=3332,1147545&hl=en>.

81. *Id.* See also Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?* 32 PEPP. L. REV. 847, 854-55 (2004-2005) (explaining the "extraordinary power" enjoyed by the coalition of Southern senators, which they used to filibuster civil rights legislation). The roots of the present GOP/Tea Party appointment obstruction lie deep in a history of ugly race hatred. This obstruction was directed at the entire governance effort of the first black President with a primary focus against his appointments. See Charles Blow, *The Obama Opposition*, N.Y. TIMES (Nov. 9, 2014), http://www.nytimes.com/2014/11/10/opinion/charles-blow-the-obama-opposition.html?_r=0; See also Alan Greenblatt, *Race Alone Doesn't Explain Hatred of Obama But It is Part of the Mix*, NPR, <http://www.npr.org/sections/codeswitch/2014/05/13/311908835/race-alone-doesnt-explain-hatred-of-obama-but-its-part-of-the-mix>.

82. Pearson, *supra* note 80. Even prior to Eastland's judiciary chairmanship, William Hastie's nomination as the first black tenured judge to the federal appellate court in 1950 was delayed (and required Truman's recess appointment). *Id.* Also delayed for a full year in 1956, was the confirmation of the first Jewish federal judge on the U.S. Court of Appeals for the Fourth Circuit, Simon E. Sobeloff. *Id.* Thurgood Marshall was confirmed for the Second Circuit and Irwin Cooper was confirmed for the federal trial court only after JFK recess appointed them.

83. See JUST THE BEGINNING – A PIPELINE ORGANIZATION, *A. Leon Higginbotham Jr.*, <http://www.jtb.org/index.php?src=directory&view=biographies&srctype=detail&refno=11>.

Higginbotham served many years as a famed trial judge⁸⁴ before President Jimmy Carter elevated him to the U.S. Court of Appeals for the Third Circuit.⁸⁵ As an academic, Higginbotham's personal history kept his scholarship and teaching fresh and relevant, particularly as he promoted gender equality.⁸⁶ His first law clerk was the first female law clerk hired in his federal court jurisdiction—Eleanor Holmes (Norton). As an active Yale Law alum, he worked to persuade Yale College to admit its first female students.⁸⁷ A bibliography of Higginbotham's scholarly writings would list sixty-plus significant works,⁸⁸ and the judge came to hold an equal number of honorary degrees. After full judicial retirement, Higginbotham joined his spouse in teaching at Harvard University and returned to law practice. President Bill Clinton awarded Leon Higginbotham the Presidential Medal of Freedom in 1995- the highest civilian honor that is granted by our nation's government.⁸⁹

84. See, e.g. *Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974).

85. Colleen L. Adams, Rubin M. Sinins, and Linda Y. Yueh, *A Life Well Lived: Remembrances of Judge A. Leon Higginbotham Jr.—His Days, His Jurisprudence, and His Legacy*, 33 LOY. L.A. L. REV. 987 (2000), <http://digitalcommons.lmu.edu/llr/vol33/iss3/5>.

86. In addition to teaching the Missouri-based infamous *Dred Scott* case, for example, Higginbotham added *State of Missouri v. Celia: A Slave* to the curriculum. The case involved a slave woman who was not allowed to use an early stand-your-ground defense when she grew tired of being raped and bearing more children (property) for her master. In the middle of a yet another attack when she was again pregnant, she bludgeoned the slave master to death and cremated him in the fireplace of her slave shack. See Douglas O. Linder, *Celia, A Slave, Trial (1855)*, FAMOUS TRIAL SERIES (UMKC SCHOOL OF LAW) (2011), <http://law2.umkc.edu/faculty/projects/ftrials/celia/celiahome.html>.

87. F. Michael Higginbotham, *Speaking Truth to Power, A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341, 346 (2002), <http://digitalcommons.law.yale.edu/ylpr/vol20/iss2/7/>.

88. Higginbotham's two major works -- *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978) and *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) won major awards and good reviews. See, e.g., Yale Kamisar, *Jim Crow on the Bench*, N.Y. TIMES BOOK REV., Nov. 24, 1996, at 10, <https://www.nytimes.com/books/98/09/06/nnp/higginbotham-freedom.html>

89. Glaberson, *supra* note 73 (explaining just two weeks before his passing, the retired-judge Leon Higginbotham testified before the House Judiciary Committee accurately explaining why there existed no constitutional grounds by which to impeach President Bill Clinton).

A summary retelling should end with the Medal of Freedom award. However, recent brutal interactions between police and African Americans⁹⁰ -- which history records daily and digitally⁹¹ -- require that Judge Higginbotham be asked to narrate his very first day on the job as a recess-appointed federal judge:

In January 1964, on my first day of active duty in the federal courts in Philadelphia ... I drove to work in my new station wagon. I did some reminiscing and I thought first of my mother, who had worked for decades in other people's kitchens, who for decades had scrubbed other people's floors, who had accepted denigration, and who had been denied an adequate education in rural Virginia. With dignity she tolerated all adversities because, as she said, 'Someday, son, I want to see you in a white shirt and a tie, and have an important position.'⁹²

Higginbotham's thoughts then turned to his hardworking father who had held the same low-level factory job for decades. And just prior to arriving at his new job, Higginbotham tells of giving a silent thanks to his Heavenly Father for his loving parents, and for the opportunity to serve his nation as a judge. But then:

I parked in the spot clearly reserved for federal judges, got out of the car, took out my two attaché cases, and proceeded to walk to the street. After I had gone only a few feet, someone yelled to me, "Hey, boy, you can't park your car there." I continued to walk, and he said, "Hey, boy, didn't you hear me? You can't park your car there." Now at that point a sense of reality came. I knew that I had two attaché cases in my hand, and he had a gun in his holster.

So I turned around and calmly said, 'What is the problem, officer?' He said, 'That spot is reserved for federal judges only.' And I responded, 'I know. That is why I parked there.' And then, with his face flushed, he said, 'Oh! You're Judge Higginbotham. Welcome.' And I walked into the courthouse considering it just another typical incident Black people experience as part of their daily duality challenge.⁹³

90. See, e.g. Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks, Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html>.

91. See Haeyoun Park, *et al*, *The Disputed Accounts of the Arrest and Death of Sandra Bland*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html>.

92. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1416 (1994). The article first was delivered by Higginbotham as the 1994 Matthew O. Tobriner Memorial Lecture at the University of California's Hasting College of the Law.

93. *Id.* at 1416-17.

Noel Canning now *ex post* reprimands that court security officer for not standing-his-ground against the tall, black, adult male who parked in the judges' reserved area. Higginbotham was not a "boy," but neither was he then a "judge."

B. David Rabinovitz; Borked Twenty Years Before Robert Bork and Recess Appointed Minutes Before the 88th Senate Came-In from Intersession Recess

With only minutes left before the end of the eight-day intersession recess of the Eighty-Eighth Senate, President Lyndon Johnson recess commissioned David Rabinovitz to a trial court in western Wisconsin on June 7, 1964. While earning his undergraduate degree at Marquette University, David Rabinovitz was drawn to Wisconsin's Progressive Party with its rich Robert La Follette history and liberal tradition. The party's concern for ethics, civil rights, and social justice, fit well with Rabinovitz's strong Jewish faith.⁹⁴ After graduating from the University of Wisconsin Law School, Rabinovitz established a private practice in Sheboygan, Wisconsin. In diverse work, he represented individuals in a variety of concerns and also served as the United Auto Workers Local 833's lawyer. In 1954, *Rabinovitz was the UAW's lead attorney* during what turned into one of the longest strikes in the nation's history. The strike at the local Kohler Industries plant did not end until the NLRB, in 1960, ordered the reinstatement of 1700 workers.⁹⁵ The zealous Rabinovitz earned the respect of organized labor, and the life-long enmity of local and national anti-union forces.⁹⁶ Many of Rabinovitz's *Sheboygan* adversaries did not look highly on his observant faith and

94. Marian McBride, *David Rabinovitz Must Make the Next Move*, MILWAUKEE SENTINEL (Sept. 6, 1963), <https://news.google.com/newspapers?nid=1368&dat=19630906&id=PMsVAAAIAIBAJ&sjid=6BAEAAAIAIBAJ&pg=7394,1533622&hl=en>.

95. *Kohler Strike Ire Exhibited to NLRB*, MILWAUKEE SENTINEL (March 11, 1960), <https://news.google.com/newspapers?nid=1368&dat=19600311&id=jf4jAAAIAIBAJ&sjid=ihAEA AAAIAIBAJ&pg=7278,426971&hl=en>. Contract negotiations and backpay disputes drug on for five additional years.

96. *Id.*

his progressive views on race equality however- particularly his family's famed relationship with Brooklyn baseball giant Jackie Robinson.⁹⁷

A true truth-teller like Higginbotham, Rabinovitz went to Washington, D.C. for several weeks in 1958 to assist with Senator John McClellan rackets committee hearings regarding corporate abuses in the ongoing Kohler strike.⁹⁸ He gave daily assistance to the committee's legal counsel, Robert F. Kennedy, and a friendship soon ensued. Rabinovitz strongly encouraged Senator John Kennedy's active engagement in the 1960 Wisconsin presidential primary- one of only fifteen Democratic Party primaries that was then held- and offered full-throttled support. During their active campaign assistance, Rabinovitz and his family deepened a friendship with both campaign manager Bobby Kennedy and the candidate.⁹⁹ (The night that Jack Kennedy defeated the highly-favored Hubert Humphrey was not lost to history. A documentarian had convinced Jack Kennedy to allow him to film the campaign 24 hours-a-day for five days, arguing: "Because it's a new form of

97. David Rabinovitz had written a fan letter on behalf of his son Robbie to Jackie Robinson, and a correspondence and friendship ensued. Eventually Robinson was scheduled to visit the Rabinovitz family's home. When news got out of the black baseball legend and civil rights advocate planned to visit to the all-white community, David Rabinovitz law office was vandalized. Spray painted across the office window in large letters: "Rabinovitz Plans to Bring N.....s to Sheboygan." Bob Nightengale, *Letters Reveal Part of Robinson, Open World for a Young Fan*, USA TODAY, (Apr. 13, 2007), http://usatoday30.usatoday.com/sports/baseball/2007-04-12-robinson-letters_N.htm.

98. See *NLRB Rules for Kohler Company*, Milwaukee SENTINEL, (Jan. 8, 1959), <https://news.google.com/newspapers?nid=1368&dat=19590107&id=vnBRAAAAIBA&sjid=OB AEAAAIBA&pg=3910,3281302&hl=en>.

99. The son, Robbie Rabinovitz, still remembers running Jack Kennedy's "usual" lunch up from the hotel kitchen -- calm chowder, a peanut butter sandwich, and a glass of beer. The History Theater in St. Paul, Minnesota presented a play in 2014 that wove together the Rabinovitz' family's relationship with both Jackie Robinson and Jack Kennedy. Renee Valois, *Review: Historic Icons, a Boy and Sheboygan Come Together in 'Ronnie Rabinovitz'*, TWIN CITIES PIONEER PRESS (Feb. 2, 2014), http://www.twincities.com/stage/ci_25047355/review-historic-icons-boy-and-sheboygan-come-together.

history, very little narration, no lighting, no interviews, we're just going to do what happens. That's history").¹⁰⁰

When President Kennedy nominated David Rabinovitz to the federal judiciary in 1963, the labor lawyer faced instant, virulent opposition in both the Senate and Wisconsin. The reactionary James Eastland of Mississippi delayed Rabinovitz just as he had Leon Higginbotham.¹⁰¹ And Judiciary subcommittee chair Sam Ervin joined in the obstructionist effort against Rabinovitz. The Senate delay provided ample time for anti-labor forces to fully develop an opposition campaign. A full twenty years before Robert Bork's confirmation tribulation turned his surname into a verb of assault against a judicial nominee,¹⁰² David Rabinovitz became victim of a concerted ordeal of partisan, special interest and media attacks. Payback was past due for Rabinovitz' zealous advocacy during the Kohler strike. The opposition campaign co-opted the Wisconsin and national bar associations in an unprecedented campaign to publically tarnish the Jewish lawyer's reputation. The Wisconsin Bar Association conducted a "special poll" of its members in an effort to brand Rabinovitz as "unqualified." A formal challenge¹⁰³ to the bar association's political involvement was filed directly with the Wisconsin Supreme Court in its supervisory capacity of the 'integrated' bar.¹⁰⁴

100. For a remembrance of, and a side link to, the resulting 1960 documentary ("PRIMARY") that includes reporter Sander Vanocur interviewing both Kennedy and Humphrey while they were together awaiting returns in a local newsroom on primary night, see Bill Glauber, *Scenes from 1960 Wisconsin Primary Chaotic, Poignant*, MILWAUKEE J. SENTINEL (Nov. 21, 2013), <http://www.jsonline.com/news/statepolitics/scenes-from-1960-wisconsin-primary-chaotic-poignant-b99148293z1-232954951.html>.

101. See HIGGINGBOTHAM, *supra* note 68.

102. See Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR (Dec. 19, 2012), <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever>.

103. See generally *Axel v. State Bar*, 124 N.W.2d 671, 677 (Wis. 1963), <http://law.justia.com/cases/wisconsin/supreme-court/1963/21-wis-2d-661-6.html>.

104. The phrase "integrated bar" is used synonymously with terms such as unified, or mandatory, or simply state bar. Such a bar requires payment of membership dues to practice law and

However, the influential anti-union forces won in the state's high court.¹⁰⁵ In the published opinion, a stinging dissent stated:

The court's opinion stresses that the poll is an expression of the opinions of the individual members and not 'a position of the State Bar.' In my view, this is completely unrealistic; perhaps the best proof of this is the vast number of headlines, news stories and even cartoons which almost invariably reported the result as the 'State Bar's rejection' of the nominee.¹⁰⁶

By the fall of 1963, the Rabinovitz confirmation fight was a national issue. At his last press conference on November 14, 1963 -- nine days before Dallas -- President Kennedy was asked about Rabinovitz and the state and national bar associations' opposition. As the JFK Library tapes reveal, the press asked: "In light of the opposition, do you still support this nomination, or are you going to withdraw?"¹⁰⁷ John Kennedy was resolute: "I'm for David Rabinovitz all the way. I've known him very well, in fact for a number of years."¹⁰⁸ President Kennedy reminded reporters that Supreme Court Justice Louis Brandeis had spoken-out against the bar associations' irregular tactics; he concluding: "And, I'm for David Rabinovitz."¹⁰⁹ After President Kennedy's murder, Rabinovitz' enemies redoubled their efforts and remained undistracted from their purpose.¹¹⁰ The *New York Times* editorialized December 3, 1963 that LBJ should just drop the nominee.¹¹¹

it is usually a creature of the state high court of a state statute. See *Overview*, State Bar of Wis. (last visited Dec. 3, 2015), <http://www.wisbar.org/aboutUs/Overview/Pages/overview.aspx>

105. See Wisconsin Supreme Court OK's Poll on Rabinovitz, CHI. TRIB. (Nov. 8, 1963), <http://archives.chicagotribune.com/1963/11/08/page/25/article/wisconsin-supreme-court-oks-poll-on-rabinovitz>.

106. *Axel*, 124 N.W.2d at 677 (J. Gordon, dissenting).

107. *John F. Kennedy Press Conference No. 64*, John F. Kennedy Presidential Library & Museum (Nov. 14, 1963, 11:00 A.M.), <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Press-Conferences/News-Conference-64.aspx>

108. *Id.*

109. *Id.*

110. See generally NEIL D. MCFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY (Univ. of Tex. Press 1987).

111. *Id.*

Oval office tapes record Lyndon Johnson still discussing the macro and micro politics of the matter on January 7, 1964 -- less than two hours before the Senate's return from its intersession recess -- with Senator William Proxmire,¹¹² Governor John Reynolds,¹¹³ party leader Pat Lucy,¹¹⁴ and labor leader Joseph Raul.¹¹⁵ Pat Lucy stated that the opposition to Rabinovitz was clearly both Antisemitic and anti-union. LBJ's final decision to recess appoint Rabinovitz just minutes before the Senate ended its adjournment was a bold act that integrated the far away Madison Wisconsin federal court. President Johnson also cemented a working relationship with organized labor, with Jewish Americans,¹¹⁶ with progressive Democrats, and with hard-working men and women across the nation. Senator Bill Proxmire wrote a letter to LBJ: "Your recess appointment of David Rabinovitz was an act of ...courage....it was taken in extraordinarily difficult circumstances. The opposition to this decision was powerful and determined. This was a brave decision on your part. I will always be grateful for it." LBJ would use this capital to push hard for civil rights and economic justice issues over the next three years.¹¹⁷

112. Telephone Conversation, Ref # 1213, William Proxmire, LBJ LIBRARY DIGITAL COLLECTION, (Jan. 7, 1964), 10:20AM, <http://digital.lbjlibrary.org/record/TEL-01213>.

113. Telephone Conversation, Ref. #1215, John Reynolds, LBJ LIBRARY DIGITAL COLLECTION, 1/7/1964, 10:20AM (Jan 7, 1964) 10:35AM, <http://digital.lbjlibrary.org/record/TEL-01215>.

114. Telephone Conversation, Ref. #1216, Pat Lucey, LBJ LIBRARY DIGITAL COLLECTION, (Jan. 7, 1964), 10:20AM 1/7/1964, 10:45AM, <http://digital.lbjlibrary.org/record/TEL-01216>.

115. Telephone Conversation, Ref. #1216, Joseph Raul, LBJ LIBRARY DIGITAL COLLECTION, (Jan. 7, 1964), 11:15AM, <http://digital.lbjlibrary.org/record/TEL-01219>

116. President Johnson Appoints David Rabinovitz to Federal Judgeship, JEWISH TELEGRAPHIC AGENCY, Jan. 9, 1964, <http://www.jta.org/1964/01/09/archive/president-johnson-appoints-david-rabinovitz-to-federal-judgeship>.

117. A recent analysis well described the help that organized labor gave Lyndon Johnson's progressive agenda during 1964: In addition to supporting Lyndon's Johnson's election campaign in 1964, the AFL-CIO...proved integral to lobbying for Johnson's domestic proposals. George Meany...and Walter Reuther...were regular visitors to the White House, helping Johnson not only with bills directly related to labor but with other parts of his domestic agenda, ranging from the War on Poverty to civil rights. Julian Zelizer, *Why Democrats Need Labor Unions*, CNN, (July 17, 2012), <http://www.cnn.com/2012/07/17/opinion/zelizer-labor-democrats/index.html>.

After his re-nomination for a tenured bench, Judge Rabinovitz's name never reached the Senate floor for a confirmation vote. Mississippi's James Eastland and North Carolina's Sam Ervin purposely blocked tenure for the first Jewish Wisconsin federal judge.¹¹⁸ David Rabinovitz returned to private practice in late 1964, and spent the remainder of his career working for Wisconsin workers. In 2014, *Noel Canning* ruled that the famed labor lawyer was never a federal judge.

C. Spottswood W. Robinson III; Irene Morgan's Advocate a Decade Before Rosa Parks

As he relayed in January 6, 1964 phone conversations with the National Urban League's Whitney Young¹¹⁹ and the NAACP's Roy Wilkins,¹²⁰ Lyndon Johnson took his appointment duties quite seriously and often for layered purpose. With the unilateral nature and immediate effect of the three judicial appointments, LBJ sent a strong signal to all civil rights opponents (including racist recalcitrants on the federal bench and in Congress) that he personally intended to achieve even greater civil rights progress – and soon. Of the three men LBJ recess appointed, Spottswood Robinson perhaps best represented the dogged, determined soldiers marching toward equal justice from 1865 to 1964. After earning the highest scholastic record in the history of Howard Law

118. *Rabinovitz Issue Again Bypassed*, MILWAUKEE SENTENTIAL, (Sept. 12, 1964), <https://news.google.com/newspapers?nid=1368&dat=19640912&id=L5hRAAAAIBAJ&sjid=7BAEAAAIAAJ&pg=7027,2193988&hl=en>.

119. Telephone Conversation, Ref. #1197, by Whitney Young with Linden B. Johnson, LBJ LIBRARY DIGITAL COLLECTION, (Jan. 6, 1964), <http://digital.lbjlibrary.org/record/TEL-01197>; See Yoichi Okamoto, Whitney Young and LBJ Photograph - Lyndon Baines Johnson Library and Museum, https://en.wikipedia.org/wiki/Whitney_Young#/media/File:Whitney_Young_and_Lyndon_Johnson.jpg.

120. Telephone Conversation, Ref. #1200, by Roy Wilkins with Linden B. Johnson, LBJ LIBRARY DIGITAL COLLECTION, (Jan. 6, 1964), <http://digital.lbjlibrary.org/record/TEL-01200>. Johnson promises the Higginbotham and Robinson commissions will be signed “in the next five minutes.”

School and studying under the renowned Charles Hamilton Houston,¹²¹ Spottswood Robinson remained at Howard Law as a faculty member.¹²² However, Professor Robinson also began a law practice defending those Americans that the law held in its lowest esteem (this was before the academy knew to classify such as a “clinical” program)¹²³. In 1944, Robinson defended Irene Morgan, who, more than a decade before Rosa Parks famously did so, refused to move to the back of the bus when instructed to do so as required by a state segregation law.¹²⁴ Ms. Morgan refused to give up her Greyhound bus seat to a white woman, and was therefore arrested.¹²⁵ Spottswood Robinson, with the help of (soon to-be recess-appointed) William Hastie and Thurgood Marshall, defended her from the resulting criminal charges and also challenged the state segregation law.¹²⁶ Ultimately, in *Morgan v. Commonwealth of Virginia*, the U.S. Supreme Court ruled the specific Virginia’s

121. See Spottswood W. Robinson, III, *No Tea for the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 HOW. L.J. 1 (1977); See also Genna Rae McNeil, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2167 (1998).

122. Robinson’s Howard Law grade point record still stands.

123. Eric Pace, *Spottswood W. Robinson 3d, Civil Rights Lawyer, Dies at 82*, N. Y. TIMES (Oct. 13, 1998), <http://www.nytimes.com/1998/10/13/us/spottswood-w-robinson-3d-civil-rights-lawyer-dies-at-82.html>.

124. Raymond O. Arsenault, *You Don’t Have to Ride Jim Crow*, 34 STETSON L. REV. 343 (2005).

125. Irene Morgan’s story is as compelling as that of Rosa Parks. Her Greyhound bus was on route from Gloucester County, Virginia, through the District of Columbia, to Baltimore, Maryland. Refusing to leave the bus, the 27-year-old mother was presented with an arrest warrant by the local sheriff; Irene Morgan tore it up and threw it out the bus window. It took two officers physically assaulting her to remove Ms. Morgan from the bus to the local jail, but not before she took one of the men down with a kick to the groin. See SIMEON BOOKER, SHOCKING THE CONSCIENCE: A REPORTER’S ACCOUNT OF THE CIVIL RIGHTS MOVEMENT 187 (2013), https://books.google.com/books?id=me4aBwAAQBAJ&pg=PA187&dq=spottswood+robinson+ireme+montgomery&hl=en&sa=X&ei=ELcOVajIAcG_ggS7mIHACw&ved=0CC0Q6AEwAg#v=onepage&q=spottswood%20robinson%20ireme%20montgomery&f=false.

126. Robin Washington, *You Don’t Have to Ride Jim Crow*, ENCYCLOPEDIA VIRGINIA (1995)(a documentary featuring Ms. Morgan retelling her story), http://www.encyclopediavirginia.org/media_player?mets_filename=evm00000831mets.xml.

segregation law was void as it was a burden on interstate commerce.¹²⁷ Judge Leon Higginbotham narrated a PBS documentary, in 1995, that tells the story of Irene Morgan, the Court ruling and the subsequent Journey of Reconciliation.¹²⁸

Spottswood Robinson fought similar battles for over a decade as the NAACP's lead attorney in Virginia. He brought litigation representing 117 high school students who protested the deplorable conditions of their segregated Farmville, Virginia public school.¹²⁹ *Davis v. Prince Edward County Board* became one of the cases consolidated into the *Brown v. Board of Education* adjudication.¹³⁰ A fulsome history lesson tells that the school district closed all public schools for five years rather than to desegregate pursuant to the *Brown* rulings.¹³¹ A variety of state and federal challenges were brought regarding the resistance. At the Supreme Court, Justice Hugo Black wrote that there had been "too much deliberation and not enough speed" and that "[t]he time for mere 'deliberate speed' has run out."¹³² More than ten years after *Brown*, local officials reopened the public schools in June

127. *Morgan v. Virginia*, 328 U.S. 373, 385 (1946). The victory temporarily led to celebratory bus trips and a unique folk song incorporating references to the high court ruling. Consider the Quaker and civil rights advocate Bayard Rustin's performance of the folk song, "You Don't Have to Ride Jim Crow". BAYARD RUSTIN, YOU DON'T HAVE TO RIDE JIM CROW (American Program Service 1961), <https://www.youtube.com/watch?v=KzeAfj9QwTk>. However, Jim Crow was to soon ride again as southern state governments circumvented the ruling. See Washington, *supra* note 109.

128. See YOU DON'T HAVE TO RIDE JIM CROW (PBS 1993), <http://www.robinwashington.com/jimcrow/producer.html>.

129. Katy June-Friesen, *Massive Resistance in a Small Town*, 34 HUMANITIES 5 Sept.- Oct. 2013, <http://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town>.

130. *Id.*

131. *Id.*

132. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 229 (1964).

1964 with \$175,000 funding for integrated schools while allocating \$375,000 in funding for a tuition voucher program to support segregated private schools.¹³³

Meanwhile Robinson had been serving as Dean of Howard Law School.¹³⁴ In January 1964, President Johnson (illegally) placed him on the U.S. District Court for the District of Columbia.¹³⁵ As a sitting judge, Professor Robinson was able to timely secure Senate confirmation for genuine tenure.¹³⁶ After two years as a trial court judge, LBJ appointed Robinson to become the first black judge on the U.S. Court of Appeals for the D.C. Circuit.¹³⁷ In September 2014, Professor Henry Louis Gates elegantly described how Judge Robinson was “known especially for that rare combination of fastidiousness, courage and painstaking attention to detail.”¹³⁸ For the Supreme Court, earlier that same year, to have “rendered illegitimate” the first months of Spottswood Robinson’s exceptional judicial career, was a particularly harsh insult.

133. See Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, NAACP, and Brown*, 90 VA. L. REV. 1667, 1690 (2004), <http://www.virginialawreview.org/volumes/content/both-victors-and-victims-prince-edward-county-virginia-naacp-and-brown>.

134. Henry Louis Gates, Jr., *Who were the 1st Black Federal Court Judges*, THE ROOT (Sept. 29, 2014), http://www.theroot.com/articles/history/2014/09/_1st_black_federal_judges_who_were_they.4.html.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* The tribute piece makes no mention of the *Noel Canning* having “rendered illegitimate” either Robinson or Higginbotham three months prior. Gates’ quote from Robinson’s law clerk (Yale Law Professor) Stephen Carter is even more compelling *ex post Noel Canning*.

D. George W. Bush' Recess Appointment of William Pryor in a ten-Day Recess

On the seventh day of a ten day intra-session recess in February 2004, President George W. Bush recess appointed William Pryor to the U.S. Court of Appeals for the Eleventh Circuit.¹³⁹ A multi-talented Alabama lawyer with strongly-held political and religious views, the Tulane law school graduate had become known as the “Johnny Appleseed of the Federalist Society.”¹⁴⁰ Pryor was remarkably successful in establishing new chapters of the now powerful conservative-libertarian law society.¹⁴¹ Elected to be Alabama’s youngest Attorney General at the early age of thirty four, Pryor earned the respect of Alabama civil rights leaders when he supported repeal of a provision in the Alabama Constitution that barred interracial marriage.¹⁴² Most importantly however, he stood alone in this endeavor as he was the only white statewide officeholder to support repeal of the racist state constitution provision.¹⁴³

When nominated to fill an Eleventh Circuit vacancy in 2003 however, Bill Pryor’s Senate confirmation was vigorously opposed and then filibustered. Senate opponents expressed concern about his record as Alabama Attorney General and his strongly-held personal views¹⁴⁴. Pryor was also criticized for an intemperate statement- almost accurate at the time- regarding the “nine octogenarian lawyers who happen to sit on the Supreme Court.”¹⁴⁵ In his Senate confirmation

139. Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb 21, 2004, <http://www.nytimes.com/2004/02/21/us/bypassing-senate-for-second-time-bush-seats-judge.html>.

140. Sheryl Gay Stolburg, *A Different Timpanist*, N.Y. Times (June 10, 2005), <http://www.nytimes.com/2005/06/10/politics/a-different-timpanist.html>.

141. *Id.*

142. *Id.*

143. *Id.*

144. Byron York, *The Nominee Who Won't Back Down*, NAT'L REV. (June 12, 2003), <http://www.nationalreview.com/article/207215/nominee-who-wont-back-down-byron-york>.

145. *Id.*

hearings, Pryor proved too consistent in repeating his strong opinions; he did so with a candor surprising for such Senate proceedings.¹⁴⁶

William Pryor's selection for the Eleventh Circuit was just one of several judicial nominations by which the Bush administration intended to ideologically transform the U.S. Court of Appeals.¹⁴⁷ Pryor's recess appointment was subsequently subjected to a controversial and ultimately unsuccessful court challenge supported by Senator Edward Kennedy. The Eleventh Circuit rejected the challenge, including making a political-question determination that portions of the suit were not justiciable. In 2005, the U.S. Supreme Court declined to grant *certiorari* review. To the degree that a *cert* denial counts, the *Noel Canning* ruling was the second time that the Supreme Court had indirectly protected Pryor's recess appointment. The creation of its "presumptive 10-day" rule was exactly the right recess time needed to confirm Bill Pryor's recess commission made just ten years before. In doing so, the Supreme Court avoided unknown legal consequences that might have resulted from the Court rendering "illegitimate" all his relatively recent judicial actions made in the 18 months from his recess commissioning in February 2004 to his Senate confirmation in June 2005. As discussed, *supra*, President Obama selected the Bush recess-appointee for service on the U.S. Sentencing Commission in 2013, during the very time that *Noel Canning* was being considered by the judiciary. Justice Stephen Breyer helped design and served as an original member of the unusual, bipartisan interagency panel. In 2004, Justice Breyer then controversially participated in the Supreme

146. *Id.*

147. Charlie Savage, *Appeals Court Pushed to Right by Bush Choices*, N.Y. TIMES, OCT. 28, 2008, http://www.nytimes.com/2008/10/29/us/29judges.html?pagewanted=all&_r=0. For contemporaneous criticism of those goals, see Dawn Johnson, *Tipping the Scale*, WASH. MONTHLY, July-Aug, 2002, <http://www.washingtonmonthly.com/features/2001/0207.johnsen.html>.

Court's *United States v. Booker* adjudication which affirmed the U.S. Sentencing Commission's constitutionality.¹⁴⁸ Thus, Pryor's recess appointment was effectively reconfirmed.

It was telling that *Noel Canning's* majority did not even reference this recent "historic practice" example of its ten day rule. Nevertheless, fighting over recess math is not allowed, and *Noel Canning's* ten day rule protected Pryor's judicial legacy. Additionally, Judge William Pryor is doing his part to maximize his legacy: "Put it this way — I exercise every day and eat a healthy diet so that I can keep doing this job for a long, long time," he said. "It's exactly what I want to be doing."¹⁴⁹

E. Ignoring Precedent While Scrubbing History

A lawsuit, in many ways analogous to *Noel Canning*, was filed to challenge the Pryor appointment. The suit argued that the duration of recess was too short,¹⁵⁰ and that Bush was circumventing Senate confirmation of the controversial nomination,¹⁵¹ which had been filibustered. The challenge also argued that judges, who ordinarily hold life-tenure appointments, could not receive a "temporary" commission¹⁵². The lawsuit was made even more controversial- and even more directly analogous to *Noel Canning*- because the challenge drew the amicus support of Senator Edward Kennedy just as Noel Canning drew an amici brief from GOP Senators. The Eleventh Circuit, sitting *en banc*, rejected the legal challenge and specifically determined that part of the

148. Erwin Chemerinsky Says Justice Stephen Breyer Should Recuse Himself, DUKENEWS.COM (Sept. 29, 2004), <https://law.duke.edu/features/2004/chemerinskybreyer/>.

149. George Talbot, *Mobile Native Bill Pryor Says Federal Bench a 'Dream Job'*, AL.COM (Sept. 13, 2012), http://blog.al.com/live/2012/09/mobile_native_bill_pryor_says.html.

150. *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005).

151. *Id.* at 1227.

152. *Id.* at 1226.

litigation was a nonjusticiable political question; that part was most directly analogous to *Noel Canning*:

Plaintiff-appellees.... contend that the President misused this discretionary appointment authority in this particular instance because Judge Pryor's nomination —before the recess appointment—had been especially controversial and his confirmation had been blocked in the Senate. The argument ... is that this specific recess appointment circumvented and showed an improper lack of deference to the Senate's advice-and-consent role and, thus, should not be allowed.¹⁵³

The Eleventh Circuit explained why the case presented a political – not a legal – question:

This kind of argument presents a political question that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity and good policy. These matters are criteria of political wisdom and are highly subjective. They might be the proper cause for political challenges to the President, but not for judicial decision making: we lack the legal standards—once we move away from interpreting the text of the Constitution—to determine how much Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him.¹⁵⁴

The Supreme Court subsequently denied a 2005 *certiorari* petition that sought a review of the Eleventh Circuit's ruling including its discrete nonjusticiable political question determination. There was a separate concurrence from John Paul Stevens.¹⁵⁵

The Supreme Court, of course, is never obliged to consider circuit court precedent -- even of a directly relevant issue.¹⁵⁶ However, when the high court was confronted with what it described as “ambiguous” text to rule in a case of first impression, and on an issue of monumental importance, it

153. *Id.* at 1227.

154. *Id.*

155. Justice Stevens authored a separate concurrence to the 2005 *cert.* denial to emphasize that the *certiorari* denial was not a “decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession ‘recesses.’” *Evans v. Stephens*, 544 U.S. 942 (2005).

156. Two prior challenges to recess appointed judges were rejected by lower courts. *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962) *cert. denied*, 371 U.S. 964 (1963). Like *Evans*, neither opinion found citation in *Noel Canning*.

was somewhat unusual for *Noel Canning* not to have even footnoted the past analysis of lower courts.¹⁵⁷ More unusual still for the high court to have failed to note how the D.C. Circuit's analysis of the Recess Appointments Clause in *Noel Canning* differed markedly from that earlier analysis provided by its sister circuits. And as Judge Pryor's appointment, does remain the best -- and appears to be the most recent -- evidence of the origin of the Breyer "ten day" recess rule, the avoidance raises suspicion and becomes suspect.

Asserting that "both the words of the Constitution and *the history of the nation* support the President's authority,"¹⁵⁸ the Eleventh Circuit opinion certainly appears relevant. Justice Breyer's majority opinion explained that "historical practice" must be given "significant weight,"¹⁵⁹ and it emphasized how historic practice is "an important interpretive factor," and one that should "inform determination of 'what the law is.'"¹⁶⁰ It was unusual for the Supreme Court to have airbrushed away such lower court historical analysis.

Perhaps the *Noel Canning* majority was suffering a type of jurisprudential cognitive dissidence. There must be a compelling reason that would justify why the Justices avoided such relevant precedent and so many excellent examples of recess-appointment historic practice.

Part III. More Inconvenient Truth Telling: *Noel Canning* Exposes a Historic Deficiency in Judicial Transparency and Provides a Lesson in Judicial Incompetence

The majority opinion offers no constitutional justification or rationale basis for its magic "presumptive ten day" recess rule other than its asserted evaluation of much "historic practice." The opinion is careful not to mention the rule was exactly configured so as to legitimize William Pryor's recess commission. Truth be told, Judge William Pryor has a solid record as feeder judge of

157. William Baude explains the significance of the majority opinion's initial determination of "ambiguity" and its subsequent reliance on its purported historic practice analysis. William Baude, *Symposium: What Divides the Court, and What Unites It*, SCOTUSblog (Jun. 27, 2014, 9:33 AM), <http://www.scotusblog.com/2014/06/symposium-what-divides-the-court-and-what-unites-it/>.

158. *Evans*, 387 F.3d at 1222.

159. *Noel Canning*, 134 S. Ct. at 2559.

160. *Id.* at 2560 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

law clerks to Supreme Court Justices and is thus well known to the Justices aside from the Eleventh Circuit court challenge to his recess appointment, which has essentially been forgotten.

While *Noel Canning* was being adjudicated, President Obama selected the controversial Bush recess-appointee to serve on the high-profile U.S. Sentencing Commission.¹⁶¹ As an architect and original member of the inter-branch Sentencing Commission, Stephen Breyer retains a strong interest in its operations.¹⁶² While he was quite willing to secretly throw the Higginbotham, Robinson and Rabinovitz' judicial commissions under the *Noel Canning* bus, Breyer's majority opinion's ten day rule ultimately saved Pryor's judicial legacy.

It has now been over a year since the Supreme Court "rendered illegitimate" Robinson, Rabinovitz, and Higginbotham. As noted above, this Article is written with the strong belief that the three advocates would have wanted the truth of the revocations and of the conflict inherent in the context to be told. The courageous lawyers who had a unique political sense would know that it is past time for truth to be told about the unprecedented, passionate appointment obstruction faced by the nation's first African American president; a court battle of which their three recess commissions were just a few of the casualties.

A. Truth Telling About *Ultra Vires* Judges, Asymmetric Partisan Appointment Obstruction, and our First Black President

161. See Jennifer Koons, *Obama Nominates Three to Sentencing Commission*, MAIN JUSTICE (Apr. 16, 2013, 12:37 PM), <http://www.mainjustice.com/2013/04/16/obama-nominates-three-to-sentencing-commission/>; See also Christine Sistro, *Judge: Holder 'Disrespected' Judicial Branch In Sentencing Change*, NAT'L REV. (Apr. 10, 2014 6:31 PM), <http://www.nationalreview.com/article/375540/judge-holder-disrespected-judicial-branch-sentencing-change-christine-sisto>.

162. See Linda Greenhouse, *Guidelines on Sentences are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), <http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html>.

The three recess appointees were acting without the color of law during their time of initial judicial service. Any person stumbling into a federal courthouse, slipping into a mislaid black robe, and climbing up onto an empty judicial bench would have had just as much legal authority as Mr. Robinson, Mr. Rabinovitz and Mr. Higginbotham did in January 1964. Noel Canning says their authority was none whatsoever- the men were simply “playing judge.” That is what being “rendered illegitimate” means to the law and to history. The ruling’s effect on the three judicial commissions is the same as its effect of nullification on the NLRB appointments. Noel Canning’s nullification of the illegal judges’ work is as real as was the ruling’s effect on the work of the CFPB and NLRB officials.¹⁶³

The discrete *Noel Canning* result was that the NLRB “invalid members” were judged to have issued an “invalid” order to the bottling company. Unstated and unaddressed was *Noel Canning*’s similar result that the three “invalid” federal judges have to be judged by history to have issued many “invalid” decisions, judgments, and orders. All orders issued by the judges, which sitting as recess appointees, were *ultra vires* and thus null and void.

As the reactionary Senate forces of 1964 ultimately denied David Rabinovitz confirmation for a life-tenure bench, this reality is particularly disturbing for his legacy and memory as the ruling strips him of the distinction of ever having been a judge. *Noel Canning* gives the ugly anti-Semitic and anti-union forces, which for years marshaled their energies against Rabinovitz both in Wisconsin and Washington, D.C., a fresh victory over the Jewish labor lawyer. It also adds insult and injury to the contemporary labor movement generally and specifically to unions in Wisconsin to which Rabinovitz served as counsel.

163. See G. Roger King and Brian J. Letch, *The Impact of the Supreme Court's Noel Canning Decision -- Years of Litigation Challenges on the Horizon for the NLRB*, BLOOMBERG (June 27, 2014), <http://www.bna.com/impact-supreme-courts-n17179891624/>.

It is also important to note that Leon Higginbotham was Justice Alito's Chief Judge on the U.S. Court of Appeals for the Third Circuit and had sat as a visiting judge with Justice Breyer on the First Circuit. While Judge Higginbotham had publically described the experience of working with First Circuit Breyer as a highlight of his career, Steven Breyer instead did not even acknowledge Higginbotham but rather, dismisses him as an "anomaly." And Justices Ruth Bader Ginsburg and Antonin Scalia served with Spottswood Robinson on the D.C. Circuit, while Justice Clarence Thomas took Robinson's actual seat on that appellate court when Robinson took senior status. Surely, many other of the Justices had seen Spottswood Robinson's portrait hanging in the Pettyman federal courthouse in the nation's capital. Regardless, not one of the nine Justices felt moved to drop a footnote acknowledging the *Noel Canning* consequence on the judicial legacy of both Higginbotham and Robinson.¹⁶⁴

Perhaps the three civil rights advocates would not view their personal de-benching as so much of an injustice as an opportunity for truth telling. Their commission revocations were just three individual casualties of a much larger conflict against the appointments and the progressive governance attempts of the nation's first African American President. The asymmetric partisan obstruction against Barack Obama's time in the White House has been genuinely historic and unquestionably passionate; "unprecedented" is the too-soft word often used by the Administration. More truth be told: Barack Obama was given unwise counsel in 2009 to announce he was "moving beyond" past partisan appointment conflicts. He should have instead announced that he was ready to go political war for his nominees. The "moving beyond" pledge was not taken as a flag of truce by opponents, but rather as a target to be repeatedly pinned on the backs of each of his nominees.

164. See *Limits of Judicial Memory*, *supra* note 2 at 115-117; See also Plessy v. Ferguson Re-Argument, HARVARD UNIV. W. E. B. DU BOIS RESEARCH INST., C-SPAN (Apr. 20, 1996), <http://www.c-span.org/video/?71350-1/plessy-v-ferguson-reargument> (Higginbotham makes this comment during his introduction of Breyer at 12:30 minutes into the video).

The Supreme Court in *Noel Canning* also suppressed relevant recent history by failing to even footnote that President Barack Obama's recess appointment history has been extremely restrained; President Ronald Reagan made 700-percent more recess appointments than Obama. Including the four that were revoked, Barack Obama has only made 32 recess appointments, whereas George W. Bush signed 171 recess commissions and Ronald Reagan recess appointed 232 officials.¹⁶⁵ Neither did the Supreme Court note the degree to which Barack Obama's ordinary nominations have faced historic, passionate congressional confirmation obstruction.¹⁶⁶

B. Why Does Senate Staffer Steven Breyer Know Senate Business Better than Senate Majority Leader Lyndon Johnson?

Among its many inquiries, the political question doctrine asks who has the better institutional competence to have the final political word – elected political branch officers or unelected judges? Fresh from a year of teaching impoverished Hispanic children in his native Texas hill country, Lyndon Johnson first came to Washington, D.C. to be a congressional staffer for “Mr. Sam” Rayburn. Young Lyndon spent hours lingering in his housing's communal bathroom to hunker down with the folks – soliciting and absorbing all possible institutional knowledge about the

165. Bruce Drake, *Obama Lags His Predecessors in Recess Appointments*, PEW RESEARCH CENTER (Jan.14, 2014), <http://www.pewresearch.org/fact-tank/2014/01/13/obama-lags-his-predecessors-in-recess-appointments/>.

166. Without partisan bias, this author has supported the appointment authority of the past four presidents. For a selection of the author commentaries on appointment gridlock as to the 44th President, which were included in his *Noel Canning* amicus briefs, see Victor Williams, *Averting a Crisis: The Next President's Appointment Strategy*, NAT'L L.J., 14 (Mar. 10, 2008); Victor Williams and Nicola Sanchez, *Confirmation Combat*, NAT'L L.J., 34 (Jan. 4, 2010); Victor Williams, *Ben Bernanke Should Be Reappointed Fed Chair: Discuss*, JURIST (Jan. 27, 2010); Victor Williams, *Senate Pro Forma Follies: Recess Appointment Authority is Not Limited by Sham Sessions*, NAT'L L.J., 51 (Oct. 11, 2010); Victor Williams, *A Quick Fix for Senate's Broken Confirmation Process*, 27 CONN. L. TRIB. 29 (July 4, 2011); Victor Williams, *House GOP Can't Block Recess Appointments*, NAT'L L.J., 39 (Aug. 15, 2011); Victor Williams and Nicola Sanchez, *More Recess Appointments Needed: Senate's Confirmation Process — Dilatory and Dysfunctional — Needs a Fundamental Reboot*, NAT'L L.J., (Jan. 16, 2012); Victor Williams, *Recess Appointment Challenges*, NAT'L L.J., 22-23 (Nov. 26, 2012). For additional blog posts by author criticizing confirmation obstruction of Obama's nominees and arguing for an assertive Executive response, see <http://www.huffingtonpost.com/victor-williams/>.

U.S. Congress. Hungry for such institutional knowledge for his entire career and uniquely devoid of concern about others' personal space, LBJ theoretically stayed in that communal bathroom for decades. Robert Caro tells of Johnson serving in the House as a Franklin Roosevelt advocate during the New Deal legal battles- his loyalty enduring even throughout FDR's court-packing controversy.¹⁶⁷ Johnson then served as a member of the Senate for over a decade, where he served six years as Majority Leader, two years as Minority Leader, and two years as Majority Whip. Then for nearly three years, LBJ had a reserved seat by the Senate's presiding officer as President of the Senate- in frustrated service as John F. Kennedy's Vice President.¹⁶⁸ To the relevant point: LBJ had only been out of the Senate for six weeks when he signed the Higginbotham, Rabinovitz, and Robinson commissions. In early January 1964, Johnson determined that the Senate was in an intercession recess of sufficient length, which had been scheduled for eight days, to invoke his inherited recess appointment authority. How is it possible for Stephen Breyer to thought that he had a better institutional knowledge and competence of the Senate's business and of the Executive's Article II appointment and "take care" duties sufficient to justify his second guessing President Johnson's constitutional and institutional judgment over 50 years later? That is not to say that Steve Breyer should not have an opinion about the matter; such an opinion could have formed the treatment for his next commercial trade book to hawk on late night television.¹⁶⁹

167. In his first congressional campaign in a special election, LBJ distinguished himself from the crowded Democratic field by being a zealous supporter of FDR's court reorganization plan. Senator Hugo Black was Johnson's only congressional competition in proving such FDR loyalty and it earned Black Roosevelt's choice to be his first appointment to replace eight of the "nine old men." *See New Deal vs. Nine Old Men*, AMERICAN ENTERPRISE INSTITUTE (Mar. 16, 1995), <https://www.aei.org/publication/new-deal-vs-nine-old-men/>.

168. Lyndon B. Johnson: Life Before the Presidency, MILLER CENTER.ORG, <http://millercenter.org/president/biography/lbjohnson-life-before-the-presidency>.

169. Ken Tucker, *A 'Colbert' Report: Host Vomiting Defeats The Supreme Court*, YAHOO (Sept. 15, 2015), <https://www.yahoo.com/tv/colbert-stephen-breyer-emily-blunt-vomit-129145311925.html>.

As previously noted, President Johnson used the three appointments to restart his relationship with African American leaders and cement relations with progressives. As signed the commissions on January 6th and January 7th in 1964, Johnson reached out to the African American and progressive community to seek personal and political credit. He made a point that the Higginbotham and Rabinovitz appointments were his choices as opposed to just being JFK holdovers. LBJ also sought to spread the word as to how the appointments were meant to send a signal of future civil rights progress to come, as he would later personally force the passage of the 1964 Civil Rights Act by mid-year. In an analysis written in 2014 for the 50th Anniversary of the historic legislation in *THE ATLANTIC*, attorney-author Michael O'Donnell first recognized the work of civil rights leaders who provided "moral and spiritual focus" before stating:

But the times also called for a leader who could subdue the vast political and administrative forces arrayed against change—for someone with the strategic and tactical instincts to overcome the most-entrenched opponents, and the courage to decide instantly, in a moment of great uncertainty and doubt, to throw his full weight behind progress. The civil-rights movement had the extraordinary figure of Lyndon Johnson.¹⁷⁰

Giving full credit to the "masterful" work of Robert Caro in *PASSAGE TO POWER*, O'Donnell explains the interconnection between the legislation's passage and other efforts to forcefully advance civil rights: "Days after Kennedy's murder, Johnson displayed the type of leadership on civil rights that his predecessor lacked and that the other branches could not possibly match." LBJ acted decisively so that presidency would be remembered for having forced religious and racial integration of the judiciary through recess commissions. O'Donnell also gives important context to the well-timed decision by LBJ to recess appointment Higginbotham, Rabinovitz, and Robinson just 40- plus days after assuming the presidency from the slain John Kennedy -- during the first available Senate recess:

170. See Michael O'Donnell, *How LBJ Saved the Civil Rights Act*, *THE ATLANTIC* (April 2014), <http://www.theatlantic.com/author/michael-odonnell/>.

He grasped the unique possibilities of the moment and saw how to leverage the nation's grief by tying Kennedy's legacy to the fight against inequality. Addressing Congress later that day, Johnson showed that he would replace his predecessor's eloquence with concrete action. He resolutely announced: "We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter, and to write it in the books of law."¹⁷¹

It was Johnson's fulfillment of his Gettysburg commemoration address. In addition to many other "concrete" efforts, Johnson would also integrate the Supreme Court with Thurgood Marshall's 1967 appointment.¹⁷²

President Lyndon Johnson's carefully-considered, purposeful, and barrier-breaking recess appointment decisions are now judged by *Noel Canning* to be mere "anomalies" listed with Harry Truman's choice of a Civil Aeronautics Board member. Former Senate Majority Leader and President Lyndon Baines Johnson's bold and transformative executive action is now *ex post* cancelled and labeled an historic inconsistency, solely because it conflicts with Justice Breyer's made-up recess rule.

In fairness, Stephen Breyer does claim several years of significant work experience as a Senate staffer on the Judiciary Committee working for Teddy Kennedy. Breyer's lasting claim to genuine Senate was his successful advocacy for creation of the U.S. Sentencing Commission on which Judge William Pryor now sits. Any further analysis of Breyer's lack of relevant life experience might appear as *ad hominem*. Best that Professor Stanford Levinson be allowed to frame his *Noel Canning* political question reflection:

One need not attack the intelligence or integrity of current Justices in order to be skeptical that they are just the right persons to "resolve" the kinds of truly political questions raised by the operation of the Recess Appointment Clause in the twenty-first century. This is the first Court in our history, for example, to have not a single member who has ever run for elected public office, let alone actually experienced the

171. *See id.*

172. Johnson's bold and exhaustive lobbying for Marshall's confirmation serves as a model for our 45th President to follow in his strategy for confronting confirmation obstruction.

challenges of filling an elective office, including, if one is a legislator, having to participate in the “sausage-making process” of drafting and voting on actual legislation.¹⁷³

Or, to go back to Stephen Breyer’s analogy, the present high court is a J.V. politician team that no smart coach would ever allow off the bench.

Part III. Judges Insist on Answering Political Questions: Scalia’s Non-justiciability Hail Mary, the No-Capacity Illusionary Limitation, and Breyer’s Catastrophe of a Recess Rule.

All the many wrongs of *Noel Canning* stem from the Supreme Court rejection of the wise counsel of the late Alexander Bickel.¹⁷⁴ In a scholarly aesthetic verging on poetry, Professor Bickel offered a “foundation” for judicial abstention.¹⁷⁵ Consider how the following verse might apply to

Noel Canning:

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (“in a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.¹⁷⁶

173. See Stanford Levinson, *Constitutional Design*, 128 HARV. L. REV. F. 14, 19-20 (2014), <http://harvardlawreview.org/2014/11/constitutional-design/>.

174. Cert Amicus was filed May 28, 2013. Amicus Curiae Brief of Professor Victor Williams in Support of Petitioner, *NLRB v. Noel Canning*, No. 12-1281 (U.S. May 28, 2013), 2013 WL 2365102 http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-1281_pet_amicu_Williams.authcheckdam.pdf.

175. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 183-197 (1st ed. 1962).

176. *Id.* at 184; See generally Anthony Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L. J., no. 7, at 1567, 1569 (1985), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2063&context=fss_papers (discussing Bickel’s belief in prudence as “an indispensable condition for success in the activities of both the politician and judge”); See also Adam J. White, *The Lost Greatness of Alexander Bickel*, COMMENTARY (Mar. 1, 2012), <http://www.commentarymagazine.com/article/the-lost-greatness-of-alexander-bickel/> (“[T]o focus exclusively on the question of how justices *ideally* should interpret the Constitution ultimately misses Bickel’s more important point: the need for Burkean prudence and humility carrying out the judicial task *in practice*.”).

A. **Justiciability and Conflict-of-Interest Issues**

Judge Richard Posner has helpfully explained that the non-justiciability political question doctrine is triggered where the Constitution's framers have made "assignment of exclusive decisionmaking responsibility to the nonjudicial branches of the federal government."¹⁷⁷ A summary application of the Supreme Court's seminal *Baker v. Carr* non-justiciable formula makes obvious that the recess appointment power is "textually committed" to the President, and that no "judicially discoverable and manageable standards" could guide a court's interference in the President's exercise of that exclusive authority.¹⁷⁸ The political-question doctrine is fundamental to the most basic constitutional norms of government by consent and the separation of powers.¹⁷⁹ The Supreme Court has long recognized that the Constitution leaves some questions to be answered only by the elected political branches.¹⁸⁰ In his abstaining statement in *Marbury v. Madison*, Chief Justice John Marshall wrote that "by the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."¹⁸¹

The highest practical value of the political question doctrine is that a court's one-time non-justiciability determination ensures *invaluable finality* by protecting the nation against months and years of political and economic chaos caused by judicial review of matters best resolved by the

177. See *Miami Nation of Indians of Ind., Inc. v. United States DOI*, 255 F.3d 342, 349 (7th Cir. 2001).

178. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

179. See *Noel Canning*, 134 S. Ct. at 2593.

180. See e.g., *Luther v. Borden*, 48 U.S. 1 (1849); *Pac. States Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Coleman v. Miller*, 307 U.S. 433 (1939); *Gilligan v. Morgan*, 413 U.S. 1 (1973).

181. *Marbury*, 5 U.S. at 165. And U.S. House Member John Marshall earlier explained that without such a doctrine, the political departments "would be swallowed up by the judiciary." Hon. John Marshall, Speech in the House of the Representatives of the U.S. (Mar. 7, 1800), reprinted in 4 THE PAPERS OF JOHN MARSHALL 82 (Charles T. Cullen ed., 1984), discussed in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 25 (Nada Mourtaba-Sabbah & Bruce E. Cain, eds. 2007).

political branches. This dangerous harm is exactly what Breyer's vague "presumptive" recess rule with its "unusual occurrence" confusion guarantees. The political question doctrine ultimately benefits the judiciary by allowing it to bank its limited reputational capital to spend on difficult (and often unpopular) individual liberty and political participation controversies. Such is the sum and substance of the Alexander Bickel principle.

B. "Hail Mary Pass" Fallback—Scalia's Concurrence Adopts a Nonjusticiability Political Question Alternative; Majority Opinion Evidences Nonjusticiability Inconsistency

This author's political question thesis was not accepted when it was presented to the Supreme Court in a *Noel Canning certiorari*-stage *amicus* brief suggesting that a threshold question-presented be added to the case's review to address non-justiciability.¹⁸² However, the abstention argument, which was expanded in a subsequent merits *amicus* brief,¹⁸³ ultimately had a twelfth-hour acceptance. In the conclusion of the four-justice dissenting-concurrence, Antonin Scalia was quite direct in arguing political question abstention.¹⁸⁴ After Justice Scalia exhaustively restated the D.C. Circuit's uber-strict textualist interpretation,¹⁸⁵ he raised a nonjusticiability alternative position, beginning, "[t]he majority replaces the Constitution's text with a new set of judge-made rules to

182. *See Noel Canning*, 134 S. Ct. at 2550.

183. Amicus Curiae Br. of Prof. Victor Williams in Supp. of Pet'r at 43-46, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281).

184. *See Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring).

185. *See id.* at 2595-2600.

govern recess appointments.”¹⁸⁶ The concurrence then adopted a political question determination, albeit as a classic jurisprudential “Hail Mary pass”¹⁸⁷:

An interpretation that calls for this kind of judicial adventurism cannot be correct. Indeed, if the Clause really did use “Recess” in its colloquial sense, then there would be no “judicially discoverable and manageable standard for resolving” whether a particular break was long enough to trigger the recess-appointment power, making that a non-justiciable political question.¹⁸⁸

Scalia asks if the majority had forgotten that the textual recess appointment authority was the Executive’s alone to exercise; “by what right does the majority subject the President’s exercise of that power to vague, court-crafted limitations with no textual basis?”¹⁸⁹ As noted above, further down the political question road in the concurring opinion, Scalia quite accurately described the “unusual occurrence” aspect of the “presumptive ten-day” recess rule as a “judicial fabrication of vague, unadministrable limits on the recess-appointment power . . . that overstep the judicial role.”¹⁹⁰

B. The Majority’s Non-justiciability Perversion and its Illusionary, Internally-Inconsistent “Senate Capacity” Limitation.

Justice Breyer’s majority opinion also made a direct concession of non-justiciability, but he did so only when such it served his purpose to reach a specific desired result. The Solicitor General had

186. *Id.* at 2617.

187. For the origin of the term, *See* Sam Farmer, *Hail Mary Passes Remain Most Exciting Plays in Football*, L.A. TIMES (Dec. 25, 2014), <http://www.latimes.com/sports/nfl/la-sp-nfl-hail-mary-farmer-20141226-column.html#page=1> (“It’s the ‘Hail Mary’ pass, a term coined 39 years ago Sunday, when Dallas Cowboys quarterback Roger Staubach heaved a 50-yard, desperation pass for Drew Pearson with 24 seconds left in an NFL divisional playoff game at Minnesota. . . . Staubach, a devout Catholic, later confided that he said a Hail Mary prayer after releasing the ball, hence the play’s nickname that now transcends sports and is used as a metaphor for last-gasp attempts in all sorts of situations.”),.

188. *Noel Canning*, 134 S. Ct. at 2600 (Scalia, J., concurring) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012)).

189. *Id.*

190. *Id.* at 2595.

asked the Court to conduct a “more realistic appraisal” of the Senate’s fake *pro forma* sessions.¹⁹¹ Breyer attempted to justify his refusal to fully explore the congressional *pro forma* sessions shenanigans that were the core reason for the recess appointments, and thus, central to the adjudication’s context. In refusing to go to the heart of the controversy, Breyer acknowledged the difficulty inherent in judges answering such questions about political branch operations:

From a practical perspective, judges cannot easily determine such matters as who is, and who is not, in fact present on the floor during a particular Senate session. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.¹⁹²

Stepping just a few feet into the *pro forma session* “political thicket,” the majority realized that it did not have the ability or competence to clear its way through. Breyer acknowledged that the majority would be overstepping the judicial role to conduct such an intrusive internal review of a political branch’s operation. Just as the political question ruling in *Walter Nixon v. United States* instructed judges not to review the Senate’s impeachment trial shortcut shenanigans¹⁹³, the *Noel Canning* majority opinion acknowledges that judges should not attempt to deconstruct or reconstruct the House majority and Senate minority’s *pro forma* shenanigans. However, Breyer chose to honor the nonjusticiability principle only when and where it offers support of his pragmatic, forced result.

It would logically follow that the majority’s nonjusticiability admission should also apply to Breyer’s illusory limiting principle that the Senate must have the so-called “capacity to act.” The majority stated “our deference to the Senate cannot be absolute. When the Senate is without the

191. To remind, the Senate minority had colluded with the House majority and the House withheld its adjournment consent thus forcing the Senate into *pro forma* sessions against its will. The partisan collusion was purposely orchestrated to frustrate the president’s recess appointment authority. Recognizing the layered collusion would need careful analysis, the Solicitor General ask for a realistic appraisal.

192. *Noel Canning*, 134 S. Ct. at 2576.

193. *Nixon v. United States*, 506 U.S. 224, 235 (1993).

capacity to act, under its own rules, it is not in session even if it so declares.”¹⁹⁴ The majority helpfully lifted an example of such a ‘no- capacity’ scenario from an oral argument statement by Republican Senators’ counsel Miquel Estrada; “if the Senate had left the Capitol and effectively given up ... the business of legislating then it might be in recess, even if it said it was not.”¹⁹⁵ For discussion purposes, this example might be best termed the “*Senate exodus*” scenario.

Of course, the judiciary’s *ex-post* examination of Senate “capacity” -- to review a President signing of recess commissions during such a *Senate exodus* will be an even more difficult, impractical, and imprudent intrusion into the legislative branch’s operation than the rejected reality-based appraisal of *pro forma* sessions. Judicial review of the *Senate exodus* will require a more exacting “factual appraisal” than the one the Solicitor General had requested that the high court make regarding the Senate’s *pro forma* sessions. It deserves note that each fake *pro forma session* was broadcast live and recorded by C-SPAN2; best evidence that was easily available to the Supreme Court. Even Brian Lamb, however, could not so completely capture all the factual details of a *Senate exodus*. Consider this application of the majority opinion’s own nonjusticiability statement to its own ‘no-capacity’ example of a *Senate exodus*:

“From a practical perspective, judges cannot easily determine such matters as who [has], and who [has] not, in fact [left the Capitol and effectively given up the business of legislating]. Judicial efforts to engage in these kinds of inquiries would risk undue judicial interference with the functioning of the Legislative Branch.”¹⁹⁶

Making a realistic “factual appraisal” of the Senate’s maintenance of “capacity” while the upper chamber supposedly continues to act under its rules falls outside the competence of the courts.

194. *Noel Canning*, 134 S. Ct. at 2275 (emphasis in original).

195. *Id.* at 2275 (adopting the example and quoting Senate *amici* counsel Miguel Estrada in oral argument).

196. *Id.* at 2576.

Separately, Tom Goldstein of Scotusblog.com has proposed that that such “capacity” might also be effectively defeated during a *pro forma* session by a simple quorum call demand by an individual Senator attempting to support the executive’s appointment discretion.¹⁹⁷ However, such a *Goldstein quorum call*, even if it invokes the active participation of the Sargent-at-Arms, is the Senate continuing to operate under its rules. Is the Senate not demonstrating “capacity” by any and all actions taken to enforce the quorum requirement? In a rebuttal to Tom Goldstein’s quorum-call thesis, Jon Neiman argued in a Scotusblog symposium piece that *Noel Canning* establishes “when the Senate is willing to take these sorts of measures, the president can’t use recess appointments to work an end-run around his coordinate branch.”¹⁹⁸ Neiman argues:

The next question ... is whether some future president, facing an uncooperative Senate, can come up with a creative way to formally force the chamber to go into a recess. It seems to me that the answer is likely “no.” To be sure, Justice Scalia suggested that the president’s allies might make it more difficult to convene *pro forma* sessions, and Tom [Goldstein] has offered some more specific musings on how they might achieve that result. But if that sort of thing happens, it would simply increase the *practical* costs the Senate would have to bear if it wants to avoid a recess. It would not make it impossible for the Senate to take that step.¹⁹⁹

As Neiman summarizes the opinion: “The message the Court seems to be sending is that as long as the Senate is willing to take the necessary steps to avoid going into recess, it should be fully capable of heading off any real attempt the president might make to abuse the recess-appointments process.”²⁰⁰

197. Tom Goldstein, *Can A President (with a little help from one senator of his party) Circumvent Most of the Court’s Limitation on the Recess Appointments power?*, SCOTUSblog (Jun. 27, 2014, 8:29 AM), <http://www.scotusblog.com/2014/06/can-a-president-with-a-little-help-from-one-senator-of-his-party-circumvent-most-of-the-courts-limitation-on-the-recess-appointments-power>.

198. John Neiman, *Symposium: The Majority Opinion Should Be All the Senate Really Needs*, SCOTUSblog (Jun. 27, 2014, 1:44 PM), <http://www.scotusblog.com/2014/06/symposium-the-majority-opinion-should-be-all-the-senate-really-needs/>.

199. *Id.*

200. *Id.*

And, of course, the judiciary's *ex-post* examination of Senate "capacity"- after a President has signed recess commissions during a *Tom Goldstein envisioned-quorum call* --- will be no less difficult, impractical, and imprudently intrusive that the majority opinion's rejected "practical appraisal" of *pro forma sessions*.²⁰¹ The majority opinion's capacity reference, whether exemplified by a *Senate exodus* scenario or a *Goldstein-quorum call* suggestion, is an illusionary limiting principle. Breyer's majority opinion, if logically read and consistently applied, proves its "no capacity" caveat is not a limitation at all, but rather meaningless dicta. But no more absurd that the presumptuous "presumptive 10-day rule" itself.

C. The "Presumptive" Catastrophe: "Judges cannot easily determine such matters as [the flood water level in the Senate basement] in a given Session."

Justice Scalia was accurate in describing the "presumptive 10-day" rule as "judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role." As to the rule's "unique occurrence" four day to nine day window of presumptive allowance, the majority opinion offered no quantitative metric or judicially discoverable and measurable standards as to how future presidents or future reviewing judges should evaluate just how short was long enough. Nor did the opinion offer any standards or metrics as to the comparative relation of a given emergency or catastrophe's severity to any given Senate recess duration. Nor did Breyer contrast the consequences of the likely difference between the duration of a planned Senate recess under its regular order versus the actual resulting recess in the disorder of a national emergency. The opinion did not even bother to think through or offer scenario examples.

G-d forbid a 100-year freak flood of the Washington, D.C. metropolitan area, an East Coast tsunami, or an ISSL sponsored dirty bomb attack at the Library of Congress resulting in an unplanned 4-day Senate recess – with the recess due solely to senatorial cowardice. Do any of those

201. Goldstein, *supra* note 197.

scenarios justify an “unusual occurrence” recess appointments as made in the four to nine day window? There are limitless ratio scenarios of catastrophe-severity occurrences to Senate recess durations within the *Noel Canning* designated five day window.²⁰² Why is the judiciary any more able or competent to make a realistic appraisal of what the flood water level is in the Senate basement (or Senate gallery) following a serious flood (or genuine tsunami) than it is to watch C-SPAN2’s broadcast of fake *pro forma sessions*? Why is the judiciary more amenable to making a such a realistic appraisal of Senate “capacity” in an “unusual occurrence” than making a realistic appraisal of Senate “capacity” during a series of fake *pro forma sessions*?

The *Noel Canning* recess minimum is absolute; a three day recess is always too short for recess appointments.²⁰³ The nation has only to hope that in a worst-case, national-disaster scenario, the President will not place the national welfare in jeopardy while attempting to follow *Noel Canning’s* vague and dangerous presumptive rule. In the most horrendous of national catastrophes, that could result in the loss of cabinet members, subcabinet officials, Fed Board members, Senate leadership, and top military ranks, the Commander-in-Chief must still wait for that fourth day of a Senate break to fill vacancies with recess commissions. The judiciary now insists on a three-day cooling-off period before the President may honor’s the Executive’s Article II, Section 3 “take care” mandate with necessary importance.²⁰⁴

Stephen Breyer was right in his May 2014 ALI remarks: “There is inherent danger to the public’s trust in our legal system when Justices are perceived as playing “junior-varsity” politics.”²⁰⁵

202. See generally Gregory Korte, *Special Report: America’s Perpetual State of Emergency*, USA TODAY (Oct. 10, 2014), <http://www.usatoday.com/story/news/politics/2014/10/22/president-obama-states-of-emergency/16851775/>.

203. See *Limits of Judicial Memory*, *supra* note 2 at 120-21.

204. U.S. CONST. art II., § 3. (“[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”)

205. Victor Williams, *Junior Varsity Politics*, HUFFINGTON POST, June 6, 2014, http://www.huffingtonpost.com/victor-williams/junior-varsity-politics-scotus_b_5420183.html.

There is much greater danger presented however when they actually do so act -- under some J.V judicial play-book affirmed only by the progressive academy as “pragmatic formalism.”

The layered absurdity of the “presumptive” caveat to the ten day recess rule is beyond this Article’s full examination; it simply suffices to show that a “presumptive” rule fully fails all justiciability analysis. After *Noel Canning*, any recess appointment to a significant office is likely to be challenged by litigation. Justice Scalia quite reasonably questioned whether a recess appointment made in a break ten days or greater would be immune from judicial review:

As for breaks of 10 or more days: We are presumably to infer that such breaks do not trigger any “presumpt[ion]” against recess appointments, but does that mean the President has an utterly free hand? Or can litigants seek invalidation of an appointment made during a 10–day break by pointing to an absence of “unusual” or “urgent” circumstances necessitating an immediate appointment, albeit without the aid of a “presumpt[ion]” in their favor?²⁰⁶

It is a near certainty that a “unusual circumstance” recess appointment made in a break of four to nine days will be challenged by litigation around the nation just as were the January 2012 NLRB and CFPB recess commissions. Justice Scalia accurately described such future litigation as presenting an “absurd spectacle of unelected judges evaluating (after an evidentiary hearing?) whether an alleged “catastrophe” was sufficiently “urgent” to trigger the recess-appointment power.”²⁰⁷

Judicial review of the president’s emergency recess appointments will cause months, and perhaps, years of political and economic chaos. Chief Justice Rehnquist’s nonjusticiable determination in *Walter Nixon v. United States* again directly informs: “Justiciability is also refuted by ... the lack of finality inherent in exposing the country's political life ... to months, or perhaps years, of chaos during judicial review of [emergency recess appointments].”²⁰⁸

206. *Noel Canning*, 134 S. Ct. at 2599.

207. *Id.*

208. *Nixon*, 506 U.S. at 236 (quoting *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991) (citations omitted)).

Conclusion: An Alexander Bickel Litmus Test

A future Supreme Court will have ample opportunity to revisit *Noel Canning* in future years. Our 45th President should forcefully adopt a judicial appointment strategy to assure a reconfiguration of the courts sufficient so that judges are no longer allowed or in the position to have the last word on the judicial appointment process. This Article thus concludes with the suggestion of a litmus test for the next Chief Executive's judicial selection: Does the potential judicial nominee respect Alexander Bickel's nonjusticiability counsel to stay out of political branch struggles?