

Online Essays

THE DEFINITE ARTICLE: THE D.C. CIRCUIT'S REDEFINITION OF RECESS APPOINTMENTS[†]

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ABSTRACT—The Supreme Court is in the midst of considering the D.C. Circuit's decision in *NLRB v. Noel Canning*, in which the Court of Appeals decided that a few of President Obama's 2012 recess appointments were unconstitutional. As the Justices review *Noel Canning*, they have before them a majority opinion with a peculiar, and somewhat alarming, stance on constitutional interpretation. By deciding that the appointments did not accord with the Constitution in part because the word *the* appears in the operative clause of Article II, the D.C. Circuit placed a sort of textualist originalism ahead of common sense. If the Supreme Court agrees with the outcome of the D.C. Circuit case—and this Essay (mostly) takes no position on whether it should—grammarians and legal minds alike would rest easier if the Court does so on grounds other than those related to *the* that the D.C. Circuit found so persuasive.

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Counting the Preamble and the signing statement at the bottom of page four, the word *the* appears approximately 420 times in the United States Constitution.¹ The terms that *the* modifies are predictably varied—both singular² and plural,³ both uppercase⁴ and lowercase⁵—although they rarely represent anything but grand concepts.⁶ Previously, scholars have engaged in deep-rooted study of words in the Constitution that are just as short and seemingly routine as *the*,⁷ not to mention analysis of even shorter, everyday words by important constitutional actors.⁸ But until recently, the constitutional *the* had not really gotten its due, its starring role, before the January 2013 decision of the United States Court of Appeals for the District of Columbia in *Noel Canning v. NLRB*.⁹ It was a long time coming for the most common word in the English language.¹⁰ It's just too bad it was entirely unnecessary.

To claim the D.C. Circuit has caused a minor kerfuffle with its opinion would be to bask in understatement. Here's how the whole thing started: In January 2012, President Obama made four appointments to executive offices during what he termed a recess of the Senate,¹¹ pursuant to his power under Article II to unilaterally make such recess appointments.¹² The Court of Appeals determined that the appointments were invalid.¹³ But the main problem wasn't, as many had predicted, that the appointments

¹ We counted, several times.

² See, e.g., U.S. CONST. art. II, § 1, cl. 4 (“the Time of chusing the Electors”).

³ See, e.g., *id. passim* (“the several States”).

⁴ See, e.g., *id.* art. III, § 3, cl. 2 (“the Punishment of Treason”).

⁵ See, e.g., *id.* art. II, § 1, cl. 8 (“the best of my Ability”).

⁶ See, e.g., *id.* pmb. (“the People”).

⁷ See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 762 (1999) (finding significance in attachment of the word *all* only to some of the categories of cases listed in Article III and arguing that “[i]t is hardly to be presumed that the variation in the language could have been accidental” (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816))).

⁸ Such as, for example, the President. See Timothy Noah, *Bill Clinton and the Meaning of “Is,”* SLATE (Sept. 13, 1998, 9:14 PM), http://www.slate.com/articles/news_and_politics/chatterbox/1998/09/bill_clinton_and_the_meaning_of_is.html (detailing President Clinton’s parsing of one of our shortest verbs).

⁹ 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

¹⁰ See *The OEC: Facts About the Language*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/words/the-oec-facts-about-the-language> (last visited Nov. 28, 2013) (putting *the* at the top of the list of more than two billion words).

¹¹ See Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts> (providing details of recess appointments for three members of the National Labor Relations Board as well as the director of the Consumer Financial Protection Bureau).

¹² U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

¹³ *Noel Canning*, 705 F.3d at 506–07.

occurred while the Senate had claimed not to be at recess.¹⁴ Instead, the crux of the D.C. Circuit’s opinion was that the appointments were bad because they were made during *the wrong recesses*—i.e., those the Framers did not contemplate when writing the Recess Appointments Clause.

This is where *the* comes in, and bear with me as I describe this chain of logic. Though the court also made historical arguments favoring its ultimate resolution of the case, its decision appeared to hinge on the fact that, when the Framers wrote the Recess Appointments Clause in Article II, they decided to include the word *the* in front of the words “Recess of the Senate.”¹⁵ Citing a 1755 British dictionary to define *the* as “a particular thing,”¹⁶ the court proclaimed that the Framers’ reference to “*the* Recess of the Senate” leads to “the inescapable conclusion” that the Framers actually meant “something different than a generic break in proceedings.”¹⁷ And because the same clause refers to “Session[s]” of the Senate, the court reasoned that *the Recess* obviously refers to breaks between those sessions. Ergo, any presidential appointments *not* made during these specific intersession breaks is illegitimate by the decree of the Framers. This ruled out Obama’s 2012 appointments, which were ostensibly made during an *intrasession* break not falling between two official Senate sessions. In other words, the court decided it had “discovered, so to speak, *the* meaning of ‘the.’”¹⁸

The D.C. Circuit’s analysis is based on a reading of the constitutional text that has been rejected by other courts of appeals both before and after *Noel Canning*,¹⁹ and discounted even by some supporters of the ultimate result.²⁰ This Essay argues, more or less, that the court’s reading is

¹⁴ See Charlie Savage, *Obama Tempts Fight over Recess Appointments*, N.Y. TIMES CAUCUS (Jan. 4, 2012, 4:34 PM), <http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments> (describing the brouhaha involving the Senate’s “pro forma” sessions, in which one senator would briefly gavel in and gavel out a session in front of an empty Senate chamber, and Obama’s decision to use recess appointment power during said sessions).

¹⁵ See *Noel Canning*, 705 F.3d at 500 (“It is this difference between the word choice ‘recess’ and ‘the Recess’ that first draws our attention. . . . This is not an insignificant distinction. In the end it makes all the difference.”).

¹⁶ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2041 (London, W. Strahan 1755).

¹⁷ *Noel Canning*, 705 F.3d at 500.

¹⁸ Garrett Epps, *What Did the Word ‘the’ Mean in 1755? And Why Does the Court Care?*, ATLANTIC (Feb. 1, 2013, 4:08 PM), <http://www.theatlantic.com/national/archive/2013/02/what-did-the-word-the-mean-in-1755-and-why-does-the-court-care/272773>.

¹⁹ See *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 228 (3d Cir. 2013) (concluding “that use of ‘the’” in the Recess Appointments Clause “is uninformative” about when the Constitution allows recess appointments); *Evans v. Stephens*, 387 F.3d 1220, 1224–25 (11th Cir. 2004) (en banc) (same).

²⁰ See, e.g., Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1561 n.225 (2005) (“While this textual inference has force, it is limited by the fact that one can also read ‘the Recess of the Senate’ to cover multiple recesses. Under this view, the recess of the Senate refers to the condition of the Senate being in a recess, not to the number of recesses. Thus, it would mean whenever the Senate is in a recess.”); see also Mike Rappaport, *Greve on*

absurd—or, at least, that it leads to absurd results. The D.C. Circuit relied upon a single, incredibly common term, which alone betrays nothing, in order to decide a constitutional case of the highest order. Of course, picking on the D.C. Circuit’s exegesis on *the* could be characterized as simply “criticizing the weakest case of one’s opponent,” which “is hardly the way to convince informed people, even if it works well on the uninformed.”²¹ Ordinarily, that could be true. But here, it just so happens that the “weakest case” of the court’s opinion is also the crux of its case: “In the end,” Chief Judge David Sentelle wrote for the panel, the fact that the word *the* is in the Recess Appointments Clause “makes all the difference.”²²

Leave aside the fact that the decision could invalidate recess appointments at least all the way back to the administration of Grover Cleveland,²³ not to mention all modern presidents.²⁴ And forget the notion that the result of the case disrupted a major agency²⁵ and could call into question many other agencies’ actions stretching back decades.²⁶ Instead,

the Recess Appointments Decision, ORIGINALISM BLOG (Jan. 30, 2013, 7:48 AM), <http://originalismblog.typepad.com/the-originalism-blog/2013/01/greve-on-the-recess-appointments-decisionmike-rappaport.html> (allowing that “[t]he recess of the Senate in my view is somewhat ambiguous—it could simply refer to the state of the Senate being in recess”).

²¹ Mike Rappaport, *Eric Posner on the Recess Appointments Clause*, ORIGINALISM BLOG (Mar. 21, 2013, 8:04 AM), <http://originalismblog.typepad.com/the-originalism-blog/2013/03/eric-posner-on-the-recess-appointments-clausemike-rappaport.html>.

²² *Noel Canning*, 705 F.3d at 500.

²³ See *Budget of Recess Appointments*, WASH. POST, Sept. 8, 1894, at 4 (noting several recess appointments “to bear date September 7”); *Recess Appointments*, WASH. POST, Dec. 5, 1895, at 1 (noting President Cleveland had “sent to the Senate a number of recess appointments” that had “been made since Congress adjourned” (emphasis added)). For a list of dates of sessions of Congress, see *Dates of Sessions of the Congress, Present–1789*, U.S. SENATE, <http://www.senate.gov/reference/Sessions/sessionDates.htm> (last visited Nov. 28, 2013).

²⁴ See Memorandum from Henry B. Hogue et al., Cong. Research Serv., to Members of Congress 3 (2013), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf> (“If the court had issued its decision in *Noel Canning* prior to January 20, 1981, it is possible that the President would have been precluded from making many of the specific recess appointments listed in this memorandum.”).

²⁵ See Carlyn Kolker, *NLRB Pursuing Settlements, Despite Noel Canning Decision*, REUTERS, May 16, 2013, available at WESTLAW, 5/16/13 REUTERS LEGAL 09:59:54 (“Forty-six cases involving the board are currently being held in abeyance in the District of Columbia Circuit because of the Canning decision, Paulsen said, and 38 cases have raised the issue of the Canning decision in other federal circuits . . .”). Admittedly, however, the NLRB itself has described this impact as “not paralyzing.” *Id.*

²⁶ The NLRB has issued more than 600 decisions since the actual recess appointments in January 2012—all of which could be swept away if the Supreme Court affirms the D.C. Circuit in the coming term after its recent grant of certiorari in the case. See Lyle Denniston, *Recess Appointments Case Set*, SCOTUSBLOG (June 4, 2013, 3:51 PM), <http://www.scotusblog.com/?p=164452>; Valerie Eifert, *No Timeout in Recess Appointment Battle over NLRB’s Authority*, FORBES (Mar. 13, 2013, 3:19 PM), <http://www.forbes.com/sites/theemploymentbeat/2013/03/13/no-timeout-in-recess-appointment-battle-over-nlrbs-authority>. But the court’s reasoning certainly stretches beyond January 2012 and could be used as grounds to invalidate any decision made by any recess appointee since the Founding. Most NLRB members for the last three decades have been recess appointees, as were Alan Greenspan and countless other officials. See Garrett Epps, *Let’s Stop Treating the Constitution Like The Da Vinci*

consider this: the decision on its own represents a prime example of a sort of textual originalism run amok—a brand of legal reasoning in which the reasoner searches for a meaning that cannot be discerned with certainty, and yet presents its chosen meaning as “the only one faithful to the Constitution’s text, structure, and history.”²⁷ There are other problems with *Noel Canning*, to be sure,²⁸ but *the* was the key to it all—and *the* is where its reasoning fails. This coming term, when the Supreme Court decides the fate of *Noel Canning*, it could very well leave the D.C. Circuit’s analysis unmolested. And grammarians everywhere would weep.

* * *

Noel Canning has already inspired fascinating scholarship²⁹ and also debates about grammar sure to delight any middle school English teacher.³⁰ But while the colloquy over the court’s focus on *the* has even spilled over from the law nerd blogs into popular media,³¹ the decision nonetheless calls out for a bit more parsing, if only to fully comprehend its use of the constitutional text—along with parts of the text that the court *didn’t* use. After all, the court claimed to be able to determine “the natural meaning of

Code, ATLANTIC (Apr. 12, 2013, 11:53 AM), <http://www.theatlantic.com/national/archive/2013/04/lets-stop-treating-the-constitution-like-the-da-vinci-code/274946>. In its petition for certiorari in *Noel Canning*, the Solicitor General’s Office observed that American presidents have already made more than 500 intrasession appointments and flatly warned that “similar reasoning [to the D.C. Circuit’s] could threaten past and future decisions of other federal agencies.” Petition for a Writ of Certiorari at 11–12, 17, *NLRB v. Noel Canning*, No. 12-1281 (U.S. Apr. 25, 2013), 2013 WL 1771081.

²⁷ *Noel Canning*, 705 F.3d at 505.

²⁸ See, for example, the second half of the textual–historical analysis, focusing on the word *happen* in the Recess Appointments Clause, *id.* at 507–14.

²⁹ See, e.g., Peter Strauss, Reaction, *The Pre-Session Recess*, 126 HARV. L. REV. F. 130 (2013), http://www.harvardlawreview.org/issues/126/february13/forum_992.php; Cass R. Sunstein, Reaction, *Originalism v. Burkeanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 126 (2013), http://www.harvardlawreview.org/issues/126/february13/forum_991.php; Adrian Vermeule, Reaction, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013), http://www.harvardlawreview.org/issues/126/february13/forum_990.php.

³⁰ See, e.g., Lawrence Solum, *Rappaport on Posner on Recess Appointments*, LEGAL THEORY BLOG (Mar. 21, 2013, 1:38 PM), <http://lsolum.typepad.com/legaltheory/2013/03/rappaport-on-posner-on-recess-appointments.html> (arguing that “[a] rolling stone gathers no moss” and “[t]he rolling stone gathers no moss” help show whether a speaker is talking about a particular rolling stone (emphasis added)).

³¹ See, e.g., Kevin Drum, *DC Circuit Rules Obama Misused the Word “The,”* MOTHER JONES (Jan. 25, 2013, 9:15 AM), <http://www.motherjones.com/kevin-drum/2013/01/dc-circuit-court-rules-obama-misused-the>; Dominic Perella, *Is the President’s Recess Appointment Power Effectively Dead?*, MSNBC (Apr. 30, 2013, 2:01 PM), <http://tv.msnbc.com/2013/04/30/presidential-recess-appointments-could-be-coming-to-an-end>; Eric Posner, *Indefinite Articles*, SLATE (Mar. 19, 2013, 3:41 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/03/the_folly_of_originalism_judges_should_stop_parsing_every_word_the_founders.single.html; Mark Silva, *The Meaning of “The”*: Makes “All the Difference,” BLOOMBERG (Jan. 25, 2013, 11:37 AM), <http://go.bloomberg.com/political-capital/2013-01-25/the-meaning-of-the-makes-all-the-difference>.

the text as it would have been understood at the time of the ratification of the Constitution.³² That sort of thing is all well and good, unless one has to guess to do so.

To start, the Supreme Court's precedents are of little help here, though the Court has touched on the importance of *the* in the past. As early as *Gibbons v. Ogden*, the Court observed that Congress's power to regulate commerce cannot be exclusive, as the Constitution states only that "Congress shall have power" to do so, and not "*the* power."³³ But the Court in *Gibbons* attached significance to *the* in this instance because it had actually been *deleted* from earlier drafts of the Constitution; it concluded the omission of *the* "was not accidental, but studiously made."³⁴ We have no evidence of such deletions here, nor do we deal with a constitutional area like federalism, where the Framers' feelings were copiously documented in contemporaneous accounts.³⁵ Many years later, in *Freytag v. Commissioner*,³⁶ Justice Scalia in concurrence examined the presence of *the* in the *main* Appointments Clause, which permits Congress to vest the power to appoint inferior officers in "the Courts of Law."³⁷ There, Justice Scalia wrote, "The definite article 'the' obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution."³⁸ These courts envisioned by the Constitution were easy to find because the Framers conveniently promulgated them in Article III. Sadly, we have no such explicit help with recesses. They, like adjournments, are among several vital devices of government that the Constitution mentions but does not define or create.³⁹ Other cases are of little help; none analyze the presence of the definite article in the Constitution itself.

Without the assistance of helpful precedent, the D.C. Circuit in *Noel Canning* turned instead to what it called "cold, unadorned logic" to determine that the Constitution's reference to *the Recess* pointed to a *specific* recess, not some "generic break in proceedings."⁴⁰ It distinguished *the Recess* from various references in the Constitution to *adjournment*, which the court defined (without citation or reference) as "breaks in the

³² *Noel Canning*, 705 F.3d at 500.

³³ 22 U.S. (9 Wheat.) 1, 85–86 (1824) (emphasis omitted).

³⁴ *Id.* at 85.

³⁵ *See id.* at 85–86.

³⁶ 501 U.S. 868 (1991).

³⁷ U.S. CONST. art. II, § 2, cl. 2.

³⁸ *Freytag*, 501 U.S. at 902 (Scalia, J., concurring in part and concurring in the judgment).

³⁹ The office of Chief Justice is another, and so is the concept of "militias," the nondefinition of which has been the subject of considerable judicial parsing in the past. *See* *District of Columbia v. Heller*, 554 U.S. 570, 595–96 (2008).

⁴⁰ *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

proceedings” of Congress.⁴¹ It then helpfully consulted Samuel Johnson’s 1750s dictionary, which defines *the* as a definite article, a “particular thing.”⁴² Thus, *the Recess* means a recess that occurs between sessions of Congress, because of the word *the* in front of it, but *adjournments* are other breaks occurring at other times.

The court should have kept reading. Later in Article II, the Constitution refers to the President’s power to disperse both houses of Congress if they cannot agree upon “*the* Time of Adjournment.”⁴³ Under the D.C. Circuit’s strict definition of *the*, should we take the Constitution to mean there can only be *one* “Time of Adjournment”? And if so, does that mean an *adjournment* is the same thing as *the Recess*? Or that the Senate is actually allowed to break only once per year? Answers are not forthcoming.

Perhaps, then, there is something in the Constitution’s *choice* of article itself that more credibly reveals intention. Recall first that the Court of Appeals used a 1755 definition of *the* (“article noting a particular thing”) to posit that, “[u]nlike ‘a’ or ‘an,’ that definite article suggests specificity.”⁴⁴ But the same dictionary’s definition of *a* is not that different from its definition of *the*. Samuel Johnson wrote that *a* is an article “denoting the number *one* . . . that is, *no more than one*.”⁴⁵ In other words, *a* also means singular, or something particular. Based on 1755 definitions alone, which is all the D.C. Circuit used here, there is no difference at all.

There are many more *a* uses in the Constitution that bring this supposed distinction into sharper relief. If *the* is an indisputable signal from the Framers, then it follows that indefinite articles must be statements of inexactitude. The Constitution refers to “*a* President” multiple times in the document; the Senate is to select “*a* President pro tempore,”⁴⁶ and the executive power is “vested in a President of the United States.”⁴⁷ Perhaps there can be *multiple* presidents pro tempore, or multiple presidents of the United States? Of course not. But investing such insignificant words with such momentous import is the sort of judicial construction that leads to these questions.

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⁴¹ *Id.* Never mind the possibility that a *recess* and an *adjournment* are both technically “breaks in the proceedings of . . . Congress.” *Id.*; see *Evans v. Stephens*, 387 F.3d 1220, 1225 (11th Cir. 2004) (en banc) (observing that the Supreme Court has defined *recess* and *adjournment* in similar ways).

⁴² *Noel Canning*, 705 F.3d at 500 (emphasis omitted) (quoting JOHNSON, *supra* note 16).

⁴³ U.S. CONST. art. II, § 3 (emphasis added).

⁴⁴ *Noel Canning*, 705 F.3d at 500 (emphasis omitted) (quoting JOHNSON, *supra* note 16).

⁴⁵ 1 JOHNSON, *supra* note 16, at 52.

⁴⁶ U.S. CONST. art. I, § 3, cl. 5.

⁴⁷ *Id.* art. II, § 1, cl. 1.

Another curious feature of *Noel Canning* is that while the D.C. Circuit provides a 1755 definition of *the*, it focuses little on definitions of the words that *the* modifies: “recess” and “time of adjournment.” Turning back to Samuel Johnson’s dictionary to define these words confuses the issue further. To *recess* is merely to “retire[,]” to “retreat,” to “withdraw[]”; a “recess” is a “departure.”⁴⁸ And to *adjourn* is not much different: outside of the judicial context, it means “[t]o put off; to defer; to let stay to another time.”⁴⁹ In modern and historical practice, a recess could be either one of these things, even an intrasession recess. There, senators do “retreat” and “withdraw,” if only until “their next Session”;⁵⁰ the same temporary absence could just as easily be construed as “defer[ring]” national business until senators return to Washington.

Further, one of the court’s main pieces of evidence actually blunts its argument. In the midst of its textual analysis, the court points to the 1776 North Carolina state constitution, which “likely served as the [Recess Appointment] Clause’s model,” as support for its interpretation.⁵¹ That constitution “describes a singular recess,” the D.C. Circuit said, in that it gives the governor the power to fill vacancies that occur “during their recess”—*their* referring to the General Assembly.⁵² For those who had been paying attention to this point, with the impression that *the* was the be-all, end-all determinative word, this inclusion came as a surprise. *Their* is not an article at all, but a possessive pronoun.⁵³

How then could it possibly fit the court’s grammatical rubric? No explanation was given, and there is evidence that *other* state governments viewed the word *recess* for the purpose of recess appointments to mean *intrasession* breaks.⁵⁴ It may be that selective historical citation is the hallmark of this type of textualism—originalism. When there are conflicting historical examples, simply cite the one that helps and stop the discussion.

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To its credit, though, the court in *Noel Canning* did signal that it was aware of an alternate reading of these definitions. After all, the Eleventh

⁴⁸ JOHNSON, *supra* note 16, at 236.

⁴⁹ 1 JOHNSON, *supra* note 16, at 81.

⁵⁰ U.S. CONST. art. II, § 2, cl. 3.

⁵¹ *Noel Canning v. NLRB*, 705 F.3d 490, 501 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

⁵² *Id.* (quoting N.C. CONST. OF 1776, art. XX, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978)).

⁵³ Turning again to Johnson: “their” means “[o]f them; the pronoun possessive from *they*.” JOHNSON, *supra* note 16, at 421.

⁵⁴ See *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 225–26 (3d Cir. 2013) (discussing practices of Vermont, Pennsylvania, and New Jersey prior to ratification).

Circuit had already posited a plausible one, nine years earlier.⁵⁵ But the D.C. Circuit's rejection of that reading was just as questionable. The exact same arguments against intrasession recesses had been made in a case challenging the recess appointment of Judge William Pryor to the Eleventh Circuit.⁵⁶ And that court, too, whipped out the dictionaries when the parties challenging the judge's appointment argued that *the* was determinative in the Recess Appointments Clause—yet that court's decision went the opposite way:

We do not agree that the Framers' use of the term "the" unambiguously points to the single recess that comes at the end of a Session. Instead, we accept that "the Recess," originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate's acts of recessing, that is, taking a break.⁵⁷

As backup, the Eleventh Circuit cited two definitions of *the* that permit the word to be used generically, one of which provided eighteenth-century examples of usage.⁵⁸ And that was the end of the matter.

In *Evans v. Stephens*,⁵⁹ common sense in the context of our everyday grammar made the *the* issue a nonissue. The court recognized that we often use *the* when we mean to use a plural, or at least to reference vague, inexact, or generic concepts, and that we did so at the time of the Framing, too. It's also easy to find examples in various modern sources: "Five major factors have shaped *the* American city."⁶⁰ "*The* Apple user is an adrenaline junky"⁶¹ "[*T*he platypus is most interesting from a physiological point of view"⁶² "And I'm hungry like *the* wolf."⁶³ And so on. One can't imagine it was much different around 1789. In fact, one can see it for

⁵⁵ And let us also note here that the D.C. Circuit's analysis was not exactly new. It was advanced over a century earlier by Attorney General Philander C. Knox, who issued an opinion paper with the exact same argument in 1901. *See* President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 600–02 (1901) ("It will be observed that the phrase is '*the* recess.' . . . [*T*he recess means the period after the final adjournment of Congress for the session, and before the next session begins."). Note Knox's conflation of *recess* and *adjournment*, right there in that last sentence.

⁵⁶ *See* *Evans v. Stephens*, 387 F.3d 1220, 1221 (11th Cir. 2004) (en banc).

⁵⁷ *Id.* at 1224–25.

⁵⁸ *See id.* at 1225 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1965 (2d ed. 1987) (*the* is "used to mark a noun as being used generically: *the* dog is a quadruped"); 17 OXFORD ENGLISH DICTIONARY 879 (2d ed. 1989) (*the* "refer[s] to a term used generically or universally")).

⁵⁹ 387 F.3d 1220.

⁶⁰ Kenneth T. Jackson, *A Nation of Cities: The Federal Government and the Shape of the American Metropolis*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 14 (2009) (emphasis added).

⁶¹ Bianca Bosker, *How Apple's Losing Its Monopoly on Magic*, HUFFINGTON POST (Mar. 6, 2013, 12:13 PM), http://www.huffingtonpost.com/2013/03/06/apple-future-monopoly-on-magic_n_2814015.html (quoting MIT lecturer Howard Anderson) (emphasis added).

⁶² T.R. Grant & T.J. Dawson, *Temperature Regulation in the Platypus, Ornithorhynchus Anatinus: Maintenance of Body Temperature in Air and Water*, 51 PHYSIOLOGICAL ZOOLOGY 1, 5 (1978) (emphasis added).

⁶³ DURAN DURAN, *Hungry Like the Wolf, on RIO* (EMI 1982) (emphasis added).

oneself: “the numerous innovations displayed on *the* American theatre,”⁶⁴ “the cruel disposition of *the* British Court,”⁶⁵ and so on again.

Yet the D.C. Circuit in *Noel Canning* chided the Eleventh Circuit for daring to define *the* differently. It argued that the Eleventh Circuit in *Evans* “underestimates the significance of the definite article ‘the’ preceding ‘Recess’ by relying on twentieth-century dictionaries.”⁶⁶ Only “[c]ontemporaneous dictionaries” will do, the court said, swatting away definitions of *the* that didn’t fit its decision by claiming *the definition of the itself has changed*.⁶⁷ The court then quoted the same dictionary (not multiple “[c]ontemporaneous dictionaries”) to prove its point that *the* means “singular.”⁶⁸

As of this past summer, however, the weight of the circuits fell against this analysis. In May, the Third Circuit decided that *the* sheds no light at all on the proper application of the Recess Appointments Clause. While the court invalidated Obama’s recess appointments in *NLRB v. New Vista Nursing and Rehabilitation*, it did so on grounds other than *the*—and went out of its way to retire the idea that *the* provides any insight into what the Framers intended here.⁶⁹ The Third Circuit’s analysis was brief; it admitted that a possible construction of *the* is that the word “refers to a specific thing, possibly suggesting that recess refers to the one recess that follows every session, an intersession break.”⁷⁰ But the court proceeded to agree with *Evans*, in that *the Recess* could “simply refer to times in which the Senate is in a recess.”⁷¹ The bottom line was unmistakable: “There is nothing that shows what ‘the’ means in the Recess Appointments Clause, especially because the Constitution uses ‘the’ in several manners. . . . Accordingly, we are convinced that use of ‘the’ is uninformative.”⁷²

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⁶⁴ THE FEDERALIST NO. 14, at 88 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

⁶⁵ THOMAS PAINE, *Common Sense*, in 1 THE WRITINGS OF THOMAS PAINE 67, 111 (Moncure Daniel Conway ed., New York, G.P. Putnam’s Sons 1894) (emphasis added).

⁶⁶ *Noel Canning v. NLRB*, 705 F.3d 490, 505 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

⁶⁷ *Id.*

⁶⁸ *Id.* (citing JOHNSON, *supra* note 16, at 2041).

⁶⁹ *See* 719 F.3d 203, 227–28 (3d Cir. 2013). The court decided against the NLRB and invalidated the recess appointments. *See id.* at 208.

⁷⁰ *Id.* at 227.

⁷¹ *Id.*

⁷² *Id.* at 227–28. It should also be noted that the Third Circuit chided those who would turn to mid-eighteenth-century dictionaries to decide major constitutional questions, noting that “[d]ictionaries from the time of ratification provide definitions that can be read to support any” possible definition of *recess*. *Id.* at 221.

The greater point about all of this is, should we really decide such momentous issues based on what one dictionary said in the 1750s versus another—about the single-most common word in the English language? Instead of reserving an originalist–textualist analysis for cases in which there is actual evidence of the Framers’ thoughts and motivations, cases like *Noel Canning* reach past history into darkness, counting words and defining humdrum terms to arrive at some simulacrum of intent. This is supposition as law.

Perhaps somewhat less importantly, should the Supreme Court affirm the D.C. Circuit’s course of reasoning, recess appointments as presidents have known them for decades will vanish. But can we live without them?

We have before. George W. Bush made his last recess appointments on April 4, 2007, and there was not another one until Barack Obama took office and made fifteen appointments to various offices during an intrasession recess in March 2010.⁷³ The country continued to function without the appointments. Yet it may not have to live without these appointments entirely. Those of us in the recess appointments community—small as it is—are loath to admit a fairly feasible work-around based on *Noel Canning*. But there is one that will no doubt catch the attention of future administrations, should *Noel Canning* remain good law. Short of dying, or being ousted by scandal, most presidential appointees choose when to leave office; after *Noel Canning*, they may simply choose to do so during the next intersession recess.⁷⁴ Pity the first unsuspecting Congress that adjourns *sine die*, ending its official session and going home for an intersession break,⁷⁵ only to learn about a flood of resignations and subsequent recess appointments—all of them *intersession* and thus just fine under *Noel Canning*.

Should that happen, one hastens to imagine that the Senate would quickly grow wise to this tactic. Though it is required to start and end distinct sessions,⁷⁶ the Senate might alter its schedule to permit no recess of any appreciable time between these sessions. The President might then be prompted to return to the brilliant and ridiculous “constructive-recess” tactic of Theodore Roosevelt, who appointed scores of officers during what

⁷³ See Jeff VanDam, Comment, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 NW. U. L. REV. 361, 377 (2012) (detailing 2010 appointments).

⁷⁴ See, e.g., Kathryn A. Wolfe & Burgess Everett, *Ray LaHood to Resign from Obama Administration*, POLITICO (Jan. 29, 2013, 10:06 AM), <http://www.politico.com/story/2013/01/lahood-resignation-transportation-86859.html> (outgoing Secretary of Transportation retiring, but not choosing to “depart until his successor is confirmed, which gives the president some breathing room in selecting a new leader”).

⁷⁵ See *Adjournment Sine Die*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/adjournment_sine_die.htm (last visited Nov. 28, 2013).

⁷⁶ “The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.” U.S. CONST. art. I, § 4, cl. 2.

he declared to be the infinitesimal moment—a “recess”—between two contiguous sessions of Congress in 1903.⁷⁷

Yet this is the sort of political *absurdum ad infinitum* that the D.C. Circuit has invited in deciding *Noel Canning* on such grounds. It may only too soon come to pass.

⁷⁷ See VanDam, *supra* note 73, at 370–71.