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NLRB V. NOEL CANNING TESTS THE LIMITS OF JUDICIAL MEMORY: LEON HIGGINBOTHAM, SPOTTSWOOD ROBINSON, AND DAVID RABINOVITZ "RENDERED ILLEGITIMATE"

Victor Williams[*]

> "The struggle of man against power is the struggle of memory against forgetting."
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> MILAN KUNDERA, THE BOOK OF LAUGHTER AND FORGETTING

> "For nothing requires a greater effort of thought than arguments to justify the rule of non-thought."
>
> MILAN KUNDERA, IMMORTALITY

The Supreme Court's *NLRB v. Noel Canning* ruling, which was ostensibly based on "historical practice," has passed its first anniversary.[1] The high court's conjuring of a 3-day Senate recess minimum conjoined with a "presumptive 10-day" Senate recess rule continues to be analyzed.[2] The practical effects of the revocations of

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1. NLRB v. Noel Canning, 134 S. Ct. 2550, 2600–17 (2014).

2. Consider starting a review of the wealth of *Noel Canning* analysis with the May 2015 symposium at the *Duke Law Journal*. *See* Paul C. Light, *Back to the Future on Presidential Appointments*, 64 DUKE L.J. 1499, 1499–1512 (2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3810&context=dlj.

Barack Obama's 2012 National Labor Relations Board (NLRB) recess appointments continue to impact.[3] However, *Noel Canning*'s additional revocations of Lyndon Johnson's 1964 judicial recess appointments of labor-rights champion David Rabinovitz and civil-rights legends Leon Higginbotham, Jr. and Spottswood Robinson III have gone unnoticed. The three judicial commissions, signed by President Johnson during an eight-day intersession recess of the 88th Senate, were "rendered illegitimate"[4] for failing Steven Breyer's made-up "presumptive 10-day" recess rule.[5] The NLRB's "invalid members"[6] were held to have issued an "invalid order"[7] to the Noel Canning Company; so too did these three "invalid" judges issue many "invalid" decisions, orders, and judgments while pretending to be federal judges.

This is of some significant consequence. In a 2004 analysis of court challenges to recess appointed federal judges, Professor Edward Hartnett explained: "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."[8] *Noel Canning* forever tarnished the judicial legacies of the famed Leon Higginbotham and Spottswood Robinson and cancelled the judicial career of David Rabinovitz, best known in the organized-labor community.

I. LYNDON JOHNSON'S PREEMPTIVE CIVIL RIGHTS CONFRONTATION

Six weeks after taking the oath of office from (JFK recess-appointed) federal judge Sarah Hughes, as Air Force One sat on the

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3. G. Roger King & Brian J. Leitch, *The Impact of the Supreme Court's* Noel Canning *Decision—Years of Litigation Challenges on the Horizon for the NLRB*, BLOOMBERG LAW (June 27, 2014), http://www.bna.com/impact-supreme-courts-n17179891624/.

4. *Noel Canning*, 134 S. Ct. at 2577. The majority opinion adopted the term "render illegitimate." *Id.* In response to Antonin Scalia's concurrence, which restated the D.C. Circuit's uber-strict textualist opinion, Steven Breyer stated: "Justice Scalia would render illegitimate thousands of recess appointments." *Id.* In disparate impact, it was Justice Breyer's majority opinion that "rendered illegitimate" the Rabinovitz, Higginbotham, and Robinson appointments. This Essay uses "rendered illegitimate" interchangeably with "revoked" and "stripped" so as to give consistency to the legal effect of retroactive application of Breyer's complicated recess rule in revoking President Obama's January 2012 NLRB and CFPB appointments and President Johnson's January 1964 judicial appointments.

5. The Senate break ran from December 30, 1963 to January 7, 1964. For a listing of all congressional sessions, *see Noel Canning*, 134 S. Ct. at 2577 (app. A).

6. *Id.* at 2558.

7. *Id.*

8. Edward Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 428–29 (2004).

Dallas Love field tarmac, President Johnson sent a strong signal to all civil-rights opponents (including racist recalcitrants in Congress and on the federal bench) that he was dedicating his presidency to civil rights. President Johnson recess appointed the renowned black attorney Leon Higginbotham to be the first African American federal trial judge in Philadelphia.[9] On the same day, Johnson recess appointed Spottswood Robinson, famed for his advocacy in *Brown v. Board*[10] and many other NAACP legal victories in his native Virginia,[11] to become the first black Article III judge in the nation's capital. [12] As President Johnson relayed in January 6, 1964 taped phone conversations with the National Urban League's Whitney Young,[13] and the NAACP's Roy Wilkens,[14] the new President took his appointment duties quite seriously and often for layered purpose. The White House tapes reveal President Johnson giving the civil rights leaders "the treatment"[15] so that they would use the appointments for maximum political gain in the coming battles for the Civil Rights legislation.

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9. *See* A. Leon Higginbotham, Jr., *The Dream with Its Back Against the Wall*, YALE L. SCH. (Dec. 18, 2001), http://www.law.yale.edu/news/3321.htm (reprinting an article originally published in the Spring 1990 issue of the *Yale Law Report*). Higginbotham, who was already serving on the Federal Trade Commission as the first black on any federal regulatory agency, had been nominated for the bench by John Kennedy in 1963. Senate Judiciary Chair James Eastland of Mississippi had a pattern of obstructing both Jewish and black judicial nominees. *See* Drew Pearson, *Long Wait is Suggested for Judge's Confirmation*, SPOKANE DAILY CHRON. (July 7, 1965), at 4, https://news.google.com/newspapers?nid=1338&dat=19650707&id=61ZYAAAAIBAJ&sjid=ofcDAAAAIBAJ&pg=3332,1147545&hl=en.

10. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

11. In 1944, for example, 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. Morgan v. Com., 184 Va. 24, 26 (1945). A documentary features Ms. Morgan retelling her story. *See You Don't Have to Ride Jim Crow!*, ENCYCLOPEDIA VA., http://www.encyclopediavirginia.org/media_player?mets_filename=evm00000831mets.xml (last visited Sept. 8, 2015) (providing an excerpt of Robin Washington's 1995 documentary "You Don't Have to Ride Jim Crow!").

12. Henry Louis Gates, Jr., *Who Were the 1st Black Federal Court Judges*, ROOT (Sept. 29, 2014, 3:00 AM), http://www.theroot.com/articles/history/2014/09/_1st_black_federal_judges_who_were_they.4.html. The tribute piece makes no mention of *Noel Canning* having "rendered illegitimate" either Robinson or Higginbotham three months prior. Gates's quote from Robinson's law clerk (Yale Law Professor) Stephen Carter is even more compelling *ex post Noel Canning*.

13. *Telephone Conversation, Ref. #1197, Whitney Young, 1/6/1994, 3:55P*, LBJ LIBRARY DIGITAL COLLECTION, http://digital.lbjlibrary.org/record/TEL-01197 (last visited Sept. 8, 2015).

14. *Telephone Conversation, Ref. #1200, Roy Wilkens, 1/6/1964, 5:12P*, LBJ LIBRARY DIGITAL COLLECTION, http://digital.lbjlibrary.org/record/TEL-01200 (last visited Sept. 8, 2015). Johnson promises Wilkins that the Higginbotham and Robinson commissions will be signed "in the next five minutes." *Id.*

15. *See* Yoichi Okamoto, *Young Receives "The Treatment" from President Johnson (1966)*, WIKIPEDIA (June 28, 1966), https://en.wikipedia.org/wiki/Whitney_Young#/media/File:Whitney_Young_and_Lyndon_Johnson.jpg.

The following day, just minutes before the Senate's intersession recess ended, President Johnson also recess commissioned the embattled labor-attorney David Rabinovitz to be the first Jewish federal judge in Madison, Wisconsin. Anti-union forces had waged a national campaign against Rabinovitz's 1963 nomination by John Kennedy because he had been the United Auto Workers' zealous lawyer during one of the longest strikes in history.[16] Recorded telephone conversations reveal President Johnson still laying the foundation to get the most political benefit (and minimize the certain fallout) from for the bold appointment act—he executed the appointment just one hour before the 88th Senate's scheduled return from its intersession recess.[17] With the flick of a pen minutes before the Senate's return, the new President cemented a working relationship with organized labor, with Jewish Americans, and with progressive Democrats.[18] Senator Bill Proxmire soon wrote a letter to President Johnson: "'Your recess appointment of David Rabinovitz was an act of courage 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.'"[19] President Johnson would use this capital to push hard for civil rights and economic justice legislation with labor's help. As President Johnson said when signing the Civil Rights Act just six months later, 1964 was a "turning point" in our nation's history.[20] Soon would come the Voting Rights Act, Medicare, and Medicaid. It began with these three historic appointments.

16. *Kohler Strike Ire Exhibited to NLRB*, MILWAUKEE SENTINEL, Mar. 11, 1960, at 5 Star 1, https://news.google.com/newspapers?nid=1368&dat=19600311&id=jf4jAAAAIBAJ&sjid=ihAEAAAAIBAJ&pg=7278,426971&hl=en. Rabinovitz assisted Bobby Kennedy in Senator John McClellan Rackets Committee hearings regarding corporate abuses in the ongoing Kohler strike. He was an early advocate and tireless worker for John Kennedy in the 1960 Wisconsin primary.

17. *Telephone Conversation, Ref # 1213, William Proxmire, 1/7/1964, 10:20A*, LBJ LIBRARY DIGITAL COLLECTION, http://digital.lbjlibrary.org/record/TEL-01213 (last visited Sept. 8, 2015); *Telephone Conversation, Ref. #1215, John Reyonlds, 1/7/1964, 10:34A*, LBJ LIBRARY DIGITAL COLLECTION, http://digital.lbjlibrary.org/record/TEL-01215; *Telephone Conversation, Ref. #1216, Pat Lucey, 1/7/1964, 10:45A*, LBJ LIBRARY DIGITAL COLLECTION, http://digital.lbjlibrary.org/record/TEL-01216.

18. *See, e.g.*, *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.

19. NEIL D. MCFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY 30 (1987) (quoting Senator Williams Proxmire's letter to President Johnson).

20. Michael O'Donnell, *How LBJ Saved the Civil Rights Act*, ATLANTIC (April 2014), http://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/

II. TRUTH TELLING ADVOCATES; EXCEPTIONAL JURISTS

It is not possible to give proper credit to the lives and work of these three courageous lawyers in any form shorter than full biography annotated by references to their judicial opinions; some of which, as noted, are now invalid. As the second in a series of *Noel Canning* commentary, this Essay is written with the belief that the three courageous advocates, who spent their careers speaking truth to power,[21] would want the full truth be told.[22] The three lawyers would not have been surprised by the political and litigation efforts of ideologues attempting to obstruct the nation's first black presidency.

After years of confirmation obstruction of his NLRB nominees, President Barack Obama's 2012 recess appointments were necessary in order to keep a NLRB quorum intact and to thus prevent nullification of the labor agency's legal authority.[23] The union-advocate David Rabinovitz would certainly have known that the *Noel Canning* controversy had a history reaching back to ideological court battles waged since before the 1935 Wagner Act created the NLRB. Depression Era corporate ideologues won repeated victories before reactionary lower federal courts across the county in the early 1930s. Fortunately, for the nation and the judiciary, the Supreme Court moved out of the horse and buggy era, albeit only after a wholesale appointment threat from Franklin Roosevelt, with its *NLRB v. Jones & Laughlin Steel* ruling.[24]

Leon Higginbotham and Spottswood Robinson's lives were based on a common moral mission to expose the big lie of white supremacy, the legal lie of "separate but equal," and a myriad invidious Jim Crow fibs, feints, shams, gimmicks, and games. Their common moral and legal quest was bravely undertaken in schools, businesses, and courthouses flying the Confederate battle

21. *See e.g.*, F. Michael Higginbotham, *Speaking Truth to Power, A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341, 346 (2002).

22. It is also beyond the scope of this Essay to examine the de facto officer doctrine or other such fictions which might be used to mitigate harm resulting from the judges' civil and criminal ultra vires decisions and judgments. While the never-confirmed Rabinovitz had his entire judicial service rendered illegal, Robinson and Higginbotham were only "playing judge" for a few months. Neither can time be turned back to reconsider how Higginbotham and Robinson's subsequent successful Senate confirmations were due to the fact they were sitting judges.

23. James Fallows, *The Nullification Chronicles: At Last Obama Strikes Back*, ATLANTIC (Jan. 4, 2012), http://www.theatlantic.com/politics/archive/2012/01/the-nullification-chronicles-at-last-obama-strikes-back/250878/; John Logan, *Democrats Must Overcome GOP's 'Complete Obstructionism' on NLRB*, HILL (May 23, 2013, 12:30 PM), http://thehill.com/blogs/congress-blog/judicial/301495-democrats-must-overcome-gops-complete-obstructionism-on-nlrb-

24. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

flag.[25] Both men knew Jim Crow personally. The two civil rights leaders would have instantly recognized the 2010–2015 congressional pro forma session shams,[26] games, and gimmicks[27] to be what they were and are—"Mr. Crow Goes to Washington."[28]

III. JURISPRUDENCE AS A DISCOVERY GAME; HISTORY AS ANOMALY

So why has the Supreme Court's posthumous stripping of the recess judgeships gone unanalyzed for over a year? The "presumptive" explanation is that the majority opinion carefully masked this *Noel Canning* consequence. Reading like a practitioner's crafty response to a discovery interrogatory, Stephen Breyer's chary parsing is truthful, but that's all. A simple, veiled reference is buried under a "few scattered examples" of appointments by Theodore Roosevelt, Harry Truman, and William Taft. The opinion dismissed as "anomalies" the "several appointments" that Lyndon Johnson made "during an 8-day recess several weeks after taking office." At most, Justice Breyer gave "constructive notice" of the judgeship revocations:

> 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,

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25. The ugly Jim Crow pennant fight continues to this day. *See* Barbara Liston, *Confederate Flag Supporters Rise Up to Defend Embattled Symbol*, REUTERS (July 12, 2015), http://www.reuters.com/article/2015/07/12/us-usa-confederate-ride-idUSKCN0PM11Q20150712; Markos Molitsas, *Party of Lincoln No More*, HILL (July 14, 2015), http://thehill.com/opinion/markos-moulitsas/247942-markos-moulitsas-party-of-lincoln-no-more..

26.

> The president's constitutional appointment authority cannot be trumped, or even limited, by Senate scheduling shenanigans. In fact and law, the 111th Senate is now dispersed to the four corners for six campaign weeks. Gaveling open, and then gaveling closed, a half-minute meeting of an empty chamber is not a legitimate break in the recess. A Senate quorum could not be gathered. . . . Constitutional law demands substance over form. The faux sessions only further expose the broken institution and its failed, dysfunctional confirmation processes.

Victor Williams, *Senate Pro Forma Follies: Recess Appointment Authority is Not Limited by Sham Sessions*, 33 NAT'L L.J., Oct. 11, 2010, at 51; *see also* Victor Williams, *House GOP Can't Block Recess Appointments*, 33 NAT'L L.J., Aug. 15, 2011 at 39.

27. *See* Laurence H. Tribe, Opinion, *Games and Gimmicks in the Senate*, N.Y. TIMES (Jan. 5, 2012), http://www.nytimes.com/2012/01/06/opinion/games-and-gimmicks-in-the-senate.html.

28. With apologies to Jimmy Stewart. *See* Jamelle Bouie, *Yes, Race Influences Opposition to Obama*, NATION (Sept. 14, 2014), http://www.thenation.com/article/yes-race-influences-opposition-obama/; Manu Raju, *Mitch McConnell Doubles Down Against President Obama*, POLITICO (Nov. 4, 2010, 5:56 PM), http://www.politico.com/news/stories/1110/44688.html.

> 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.[29]

While the majority opinion was careful not to provide names, exact dates, or offices, the Johnson appointments were, however, noted and an approximate date was implied.[30] Plus, the title of the second journal article cited conveys a strong hint that the Taft and Johnson appointments were for offices judicial in nature. Unfortunately for the average reader, the *Presidential Studies Quarterly* (PSQ) article is held in a proprietary database.[31] Repeated Google searches reveal the article has been frequently cited in a variety of public sources, but confirms that an actual and thorough read of the work itself requires payment.[32] Stephen Breyer perhaps determined that $38 was a *de minimis* fee if some nosy citizen or prying journalist felt they just had to know the who, what, why, and the exact "anomalies"—which is fair enough. If Justice Breyer has the raw power to replace Article II, Section 2's unambiguous grant of presidential appointment discretion with his own "presumptive 10-day" recess rule, he can affirm the marketplace fee charged for citizen curiosity. Thus, Breyer's covert disappearing of the three judicial appointments remained unknown for over a year.[33]

IV. VLADO CLEMENTIS' FUR HAT

Noel Canning brings back memories of the old Soviet technique of airbrushing history and photographs to remove

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

30. *Noel Canning* readers should know exactly when Johnson assumed office after the tragic assignation of President Abraham Lincoln. No not March 4, 1865—that was when Andrew Johnson assumed office after Abraham Lincoln's murder. The opinion was at least helpful in that it referenced "Lyndon" and not Andrew.

31. The *PSQ* article is not available through Westlaw or Lexis, and the opinion's Senate Executive Journal citations were unhelpful resources in which to search without more details.

32. *See* Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 656–73 (2004) (available for purchase for $38 at http://onlinelibrary.wiley.com/doi/10.1111/j.1741-5705.2004.00217.x/full).

33. *See* Victor Williams, NLRB v. Noel Canning *Tests the Limits of Judicial Memory: Leon Higginbotham, Spotswood Robinson, and David Rabinovitz "Rendered Illegitimate"*, SOC. SCI. RES. NETWORK (Sept. 11, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642248;Lawrence Solum, *Williams on* Noel Canning, LEGAL THEORY BLOG (Aug. 13, 2015), http://lsolum.typepad.com/legaltheory/2015/08/williams-on-noel-canning.html.

officials who have failed to meet some new, vague test of legitimacy.[34] Then and there, journalists dared not demand history's negatives. Here and now, commentators and reporters do not care enough to ask. The opening page of Milan Kundera's *The Book of Laughter and Forgetting* retells an infamous incident of airbrushing exposed. It involved a photograph capturing Czechoslovakian Communist leader Klement Gottwald in an address from a Prague balcony. The cold-war selfie (original-and-retouched) is a classic.[35]

> In February 1948, the Communist leader Klement Gottwald stepped out on the balcony of a Baroque palace in Prague to harangue hundreds of thousands of citizens massed in Old Town Square. . . . Gottwald was flanked by his comrades, with Clementis standing close to him. It was snowing and cold, and Gottwald was bareheaded. Bursting with solicitude, Clementis took off his fur hat and set it on Gottwald's head.[36]

Communist propagandists distributed hundreds of thousands of copies of the photograph. After a few years, Clementis was deemed illegitimate and hanged: "The propaganda section immediately made him vanish from history and, of course, from all photographs. Ever since, Gottwald has been alone on the balcony. Where Clementis stood, there is only the bare palace wall. Nothing remains of Clementis but the fur hat on Gottwald's head."[37] Kundera gives important insight into how official redaction and lazy forgetting are intertwined with group memory loss. We have long forgotten a time when unelected judges did not have the last word in both law and policy. Are they now to rewrite our history?

Such airbrushing is sometimes best done over time. It has been over a year since the three appointments were revoked and yet the third branch's Federal Judicial Center's official biographies for the men continue to inaccurately detail their recess appointments.[38] And considering the listing by the U.S. District

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34. Giving the devil his due, North Korea's Kim Jong Un has greatly advanced the now digital dark art of airbrushing history to include scrubbing videos and information databases. Ju-min Park & Jack Kim, *North Korea Says Kim Powerful Uncle Dismissed for Criminal Acts*, REUTERS (Dec. 9, 2013, 2:59 AM), http://www.reuters.com/article/2013/12/09/us-korea-north-idUSBRE9B70CL20131209

35. Leandra, *Happy Vladamir Clementis Day,* ADVENTURES IN SLOVAKIA (Sept. 21, 2014), http://theslovakiachronicles.blogspot.com/2014/09/happy-vladimir-clementis-day.html

36. *Id.* (quoting Milan Kundera's *Book of Laughter and Forgetting*).

37. *Id.* The photographer Karel Hájek was also airbrushed away.

38. Each recess appointment was still detailed for each judge in the FJC's brief biography format (last visited by author on July 27, 2015). Higginbotham's FJC biography is available at http://www.fjc.gov/servlet/nGetInfo?jid=1039&cid=999&ctype=na&instate=na; Robinson's biography is available at http://www.fjc.gov/servlet/

Court for the Western District of Wisconsin, as of *Noel Canning's* release date on June 26, 2014, Mr. Rabinovitz was never a federal judge.[39]

V. HISTORIC DISRESPECT

It was a cold-hearted irony that the Justices rendered the three judges "illegitimate" during the very year that the nation commemorated both the 60th Anniversary of the *Brown v. Board I* ruling,[40] and the 50th Anniversary of the Civil Rights Act of 1964.[41] Spottswood Robinson served as a judge of the U.S. Court of Appeals for the District of Columbia Circuit for twenty-three years, and continued on to become its first black Chief Judge for five.[42] Immediately prior to being elevated to the high court, John Roberts, Antonin Scalia, Ruth Bader Ginsburg, and Clarence Thomas all served on that very same D.C. Circuit Court. Clarence Thomas was appointed to fill Robinson's seat when the elder judge took senior status, while Ruth Bader Ginsburg and Antonin Scalia actually sat on panels and authored opinions with Spottswood Robinson.[43]

Leon Higginbotham served as a judge on the U.S. Court of Appeals for the Third Circuit for sixteen years and also sat as its first black Chief Judge for a year prior to his retirement. Samuel Alito, also of New Jersey, joined him on the bench in 1990. Chief Judge Higginbotham was Alito's Third Circuit supervisor (to the extent that an Article III jurist has such). The Justices' forgetting might be understood as a senior moment but for this author's *Noel Canning* amicus brief explicitly reminding the Justices of the Higginbotham and Robinson recess commissions. Sadly, it appears to have been done with malice aforethought.

And what of Noel Canning's majority opinion author Stephen Breyer's relationship with Higginbotham? They judged together—

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nGetInfo?jid=2031&cid=999&ctype=na&instate=na; and Rabinovitz' biography is available at http://www.fjc.gov/servlet/nGetInfo?jid=2697&cid=999&ctype=na&instate=na.

39. *See History of the Federal Court in the Western District of Wisconsin*, USCOURTS (last accessed Sept. 6, 2015), http://www.wiwd.uscourts.gov/courtdistrict-history.

40. Brown v. Bd. of Educ. I, 347 U.S. 483 (1954); *see* Michael Muskal, *Analysis: U.S. Marks 60th Anniversary of* Brown *Ruling that Desegregated Schools*, L.A. TIMES (May 16, 2014), http://www.latimes.com/nation/nationnow/la-na-60th-anniversary-brown-board-education-20140516-story.html; Valarie Strauss, *How, After 60 Years,* Brown v. Board of Education *Succeeded — and Didn't*, WASH. POST (Apr. 24, 2014), http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/04/24/how-after-60-years-brown-v-board-of-education-succeeded-and-didnt.

41. For the best example of the legal profession's efforts to honor the statute's anniversary, see *Civil Rights 50th Anniversary Commemorative Issue,* TEX. LAW. (May 9, 2014), http://www.texaslawyer.com/id=1202654191845.

42. *See generally* Susan Low Bloch & Ruth Bader Ginsburg, *Symposium: The Bicentennial Celebration of the Courts of the District of Columbia Circuit*, 90 GEO. L.J. 549 (2002).

43. *Id.*

sat on the same appellate panels—when Higginbotham was a visiting judge, and Breyer was on the First Circuit. Adding injury to insult, C-SPAN recorded Higginbotham's glowing introduction of Justice Breyer at a 1996 Harvard University "re-argument" of the infamous *Plessey v. Ferguson* case.[44] At the event, sponsored by Harvard's W. E. B. Du Bois Research Institute, Leon Higginbotham applauded Stephen Breyer as "the model of what great scholars, great lawyers, and great jurists should be."[45] Higginbotham went on to grant even more praise by stating that one of the "fondest memories" of his life was the opportunity to sit on First Circuit panels with Breyer.[46] The profound respect and fond feelings were, obviously, not mutually held. Otherwise why not a presumptive 8-day rule "in light of historical practice?"[47] An 8-day rule would have served every supposed purpose as Breyer's invented 10-day recess rule.

It was particularly bad form for Justice Clarence Thomas, who had long nursed a publically strained relationship with Leon Higginbotham, not to have spoken up. In 1992, Higginbotham penned an "Open Letter to Clarence Thomas from a Federal Judicial Colleague"[48] in which he detailed their similar Yale Law (old Eli)[49] backgrounds, presented a poignant retelling of the civil rights movement in its legal context,[50] and counseled the freshly-minted George H.W. Bush appointee:

> Over the next four decades you will cast many historic votes on issues that will profoundly affect the quality of life for our citizens for generations to come. You can become an exemplar of fairness and the rational interpretation of the Constitution, or you can become an archetype of inequality and the retrogressive evaluation of human rights. The choice as to whether you will build a decisional record of true greatness or of mere mediocrity is yours.[51]

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44. 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's introduction of Breyer begins at 12:30 minutes into the video).

45. *Id.*

46. *Id.*

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

48. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PENN. L. REV. 1005 (1992), http://scholarship.law.upenn.edu/penn_law_review/vol140/iss3/4.

49. *Id.* at 1009.

50. *Id.* at 1010–19.

51. *Id*. at 1008. For an annotated, online presentation of the open letter, see William M Carter, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague* (Temple Univ. Legal Studies Research Paper No. 2011-34, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932758.

Thomas took offense at Higginbotham's persistent criticism.[52] Higginbotham came to express profound disappointment with the developing record.[53] Justice Thomas responded in a speech declaring a "right to think for myself, to refuse to have my ideas assigned to me, as though I was an intellectual slave."[54] The public conflict between Thomas and Higginbotham continued until the elder's passing in December 1998, with Clarence Thomas missing the opportunity to make peace with his brother judge. Not to unfairly isolate Thomas; all nine Justices missed the opportunity for transparency. A one-sentence *Noel Canning* concurrence stating that the judicial recess commissions were regretfully revoked would have been easy-enough work.[55]

The revelation that the Court revoked the civil rights advocates' judgeships—without even acknowledging the deed—serves to draw attention to a broader concern about the 2014 *Noel Canning* ruling. After emphasizing that that "[t]here is a great deal of history to consider here," the majority opinion goes out of its way to avoid considering the relationship between the federal judiciary and past presidents' use of recess appointment to alter the judiciary. No mention of even one recess-appointed judge is made, and the "Article III courts" journal citation now stands out like comrade Vlado Clementis's fur hat sitting on Klement Gottwald's head as a reminder of the truth.[56]

VI. FORGETTING TO REMEMBER: REFORMING AND TRANSFORMING COURTS WITH RECESS APPOINTMENTS

The furtive revocations serve to draw attention to a broader concern about the 2014 *Noel Canning* ruling. After emphasizing that "[t]here is a great deal of history to consider here," the majority opinion goes out of its way to avoid considering past presidents' use

52. *See* Kevin Merida & Michael Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas*, N.Y. TIMES (June 17, 2007), http://www.nytimes.com/2007/06/17/books/chapters/0617-1st-meri.html?pagewanted=all (evidencing the general acrimonious relationship between the two judges).

53. *See Judging the Judge*, PBS NEWSHOUR (June 29, 1998), http://www.pbs.org/newshour/bb/law-july-dec98-thomas_7-29. When Clarence Thomas was invited to speak to the National Bar Association in 1998, Leon Higginbotham stated publically that the black bar group's invitation to Clarence Thomas made "no more sense" than if the organization had asked George Wallace to redeliver his "segregation today, segregation tomorrow, segregation forever" speech.

54. *Id.*

55. If such labor proved too difficult for the high court, perhaps law firms should reconsider the $280,000 hiring bonus paid to its departing law clerks. Marisa M. Kashino, *Hiring Supreme Court Clerks, The $500,000 Gamble*, WASHINGTONIAN (Aug. 1, 2013), http://www.washingtonian.com/blogs/capitalcomment/scotus-watch/hiring-supreme-court-clerks-the-500000-gamble.php.

56. *See* text accompanying notes 35–36.

of recess appointment to form, reform, and transform the judiciary. Thirty federal judges, including five Supreme Court Justices, were recess appointed by the first five Presidents.[57] It was something of an airbrush achievement for *Noel Canning* to have disappeared such a quantity of compelling evidence that recess appointments have been used by presidents to transform courts. Consider the immediate jurisprudential effects of notable recess appointments Earl Warren, William Brennan, William Hastie, David Bazelon, Skelly Wright, Irving Ben Cooper, Thurgood Marshall, and Griffin Bell.[58] Presidents have often forced bench integration with the recess appointment method: the first female federal judges, the first black federal judges, and the first Jewish federal judges all rose to the bench by recess commissions.[59] It proved more difficult for even the most extreme civil rights opponents to obstruct nominees who were already wearing black robes. After attempting for five years to integrate the Fourth Circuit, Bill Clinton recess appointed Roger Gregory in late December 2000:

> [I]n the grand tradition of Presidents of both parties, dating all the way back to George Washington, who have used their constitutional authority to bring much needed balance and excellence to our Nation's courts[,] . . . I am compelled by the facts and history to do what I can to remedy an injustice that for too long has plagued the Fourth Circuit.[60]

In airbrushing both "facts and history," did the *Noel Canning* majority think that they could evade the conflict-of-interest patent in their insistence on reviewing of the appointment process by which Presidents exercise such an "important constitutional check on the judiciary"?[61] In *Walter Nixon v. United States*, the Supreme

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57. Thomas A. Curtis, *Recess Appointments to Article III Courts*, 84 COLUM. L. REV. 1758, 1775 (1984). Thomas Jefferson alone recess appointed ten Article III federal judges and thirty more federal Justices of the Peace. This later group included twenty-five recycled John Adams midnight judges whose original commissions went undelivered; President Jefferson wisely excluded the famously litigious William Marbury. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 400 (1996).

58. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Sept. 13, 2015) (recording each judge's appointment history).

59. *See, e.g.*, 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; Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Federal Judges*, 97 VA. L. REV. 1665, 1680–81 (2011).

60. *Presidential Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange with Reporters*, 36 WEEKLY COMP. OF PRES. DOC. 3180 (Dec. 27, 2000), http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-01/html/WCPD-2001-01-01-Pg3180.htm.

61. Walter Nixon v. United States, 506 U.S. 224, 235 (1991) (quoting THE FEDERALIST NO. 81 at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

Court determined that the judiciary should not review the Senate's impeachment trial process because impeachment removal serves as an "important constitutional check" on the judiciary.[62] The function of the "constitutional check" in both constitutional processes, impeachment removal and recess appointment, concerns the personnel composition and quality of the federal judiciary.[63] Chief Justice William Rehnquist authored the majority opinion in *Walter Nixon* to declare nonjusticiability and to state the obvious—the final reviewing authority does not belong "in the hands of the same body that the process is meant to regulate."[64] Some ethical rules refuse to be forgotten; as this natural justice tenet pre-dating the Justinian Codex: "*Ne quis in sua causa judicet vel sibi jus dicat*" ("[N]o one ought to be a judge in his own cause.")[65]

VII. THE ACADEMY'S *NOEL CANNING* EXEGESIS: "ARGUMENTS TO JUSTIFY THE RULE OF NON-THOUGHT."

As (recess-appointed)[66] Justice Oliver Wendell Holmes, Jr. long-ago penned, "a page of history is worth a volume of logic."[67] Even the most "pragmatic" jurist,[68] however, should not choose what "page" to use and what volumes of history to lose. Steven Breyer concludes with the assertion that he is right because Antonin Scalia is wrong. Breyer then significantly overstates his "historic practice" analysis:

> Justice Scalia would render illegitimate thousands of recess appointments. . . . Instead, as in all cases, we interpret the Constitution in light of its text, purposes, and "our whole experience" as a Nation. And we look to the actual practice of Government to inform our interpretation.[69]

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* ANNOTATED JUSTINIAN CODE 3.5.1 (Timothy Kearley ed., Fred H. Blume trans., 2d ed. 2008) (c. 534), http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-1/book-3.html. In the early seventeenth century, the natural truth was restated by Lord Coke. *See* Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (C.P. 1610), http://oll.libertyfund.org/titles/911/106343 ("[N]o one ought to be a judge in his own cause."); *see also* THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 1999) (1787) ("No man is allowed to be a judge in his own cause. . . ."); In re Murchison, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

66. SCOTT E. GRAVES & ROBERT M. HOWARD, JUSTICE TAKES A RECESS: JUDICIAL RECESS APPOINTMENTS FROM GEORGE WASHINGTON TO GEORGE W. BUSH 35 (2009).

67. N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

68. *See generally* Cass Sunstein, *Justice Breyer's Democratic Pragmatist*, 115 YALE L.J. 1719 (2006), http://www.yalelawjournal.org/review/justice-breyers-democratic-pragmatism.

69. NLRB v. Noel Canning, 134 S. Ct. 2550, 2578 (2014) (citation omitted).

Was Lyndon Johnson's January 1964 forced integration of the judiciary not a prime example of "the actual practice of Government"? Were repeated presidential recess appointments that transformed, integrated, and regulated the federal judiciary not integral to "our whole experience as a Nation"? Were the judicial appointments of Spottswood Robinson, Leon Higginbotham, and David Rabinovitz to be forgotten as historic anomalies?

The best evidence of Breyer's historic malpractice is his ridiculous rule: an absolutist 3-day recess minimum mixed with "presumptive 4–10-day" recess waiver to only be enjoyed by the President during an "unusual circumstance" such as a "national catastrophe."[70] Refusing to even examine the fake pro forma sessions as such, Breyer gave each congressional house a non-constitutional license to strip the president of a textually-committed appointment authority by pro forma gimmick. The only certitudes in the vague rule is the three day cooling off period before the President may "take Care" to fill empty positions even in a catastrophe, and the guarantee that all future recess appointments will be subject to legal challenge and judicial review.

It is as "unexpected as it is inevitable"[71] that such logic passes muster with most progressive academics.[72] The past year's flow of favorable commentary for the *Noel Canning* ruling was as paradoxical as was the judiciary's insistence on answering the political question. Some academics have developed high theory out of Steven Breyer's judicial overreach; consider Ronald J. Krotoszynski's "pragmatic functionalism" apologia,[73] and also Curtis Bradley and Neil Siegel's "historic gloss" reflection.[74] Jamal Greene's celebratory take away from *Noel Canning* was that our

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70. *Id.* at 2567.

71. MILAN KUNDERA, THE FESTIVAL OF INSIGNIFICANCE 76 (2015).

72. In contrast, the commentary foundational to, and supportive of, Justice Scalia's concurrence which restated the uber-strict textualist D.C. Circuit ruling is at least fulsome, if consistently wrong. *See, e.g.*, Michael B. Rappaort, *Why Non-Origninalism 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. Scalia wrote that that the President is only able to make recess appointments during inter-session recesses and only to fill vacancies that arose during that sane recess.

73. *See* Ronald J. Krotoszynski Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513–69 (2015), http://scholarship.law.duke.edu/dlj/vol64/iss8/2; *see also* Josh Chafetz, *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.

74. Curtis A. Bradley & Neil Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, SUP. CT. REV. (forthcoming), http://ssrn.com/abstract=2547962.

Supreme Court should be transformed into a genuine "constitutional court," such as those "common in Europe and Latin America, that are specifically empowered to adjudicate public law disputes."[75] In the end, the *Harvard Law Review*'s lead commentary on *Noel Canning*'s structural overreach and unworkable rule begs: "Please Sir, I want some more."[76] Again, Milan Kundera, the master craftsman of paradox, provides insight regarding the "excess of intelligence" in the academy's *Noel Canning* exegesis: "For nothing requires a greater effort of thought than arguments to justify the rule of non-thought."[77]

VII. CONCLUSION: 2016 PRESIDENTIAL AND SENATORIAL ELECTIONS

NLRB v. Noel Canning was a classic example of conflicted judges insisting on answering a political question—just to have the last word in democracy's discourse. However, the 1937 original NLRB adjudication[78] reminds both that opinions change and that judicial personnel are subject to turnover. Consider how Chief Justice William Rehnquist artfully described President Franklin Roosevelt's unsuccessful plans for a more wholesale transformation of the judiciary:

> President Roosevelt lost the Court-packing battle, but he won the war[,] . . . not by any novel legislation, but by serving in office for more than twelve years, and appointing eight of the nine Justices of the Court. In this way the Constitution provides for ultimate responsibility of the Court to the political branches of government.[79]

The limiting principle inherent in recess appointments is that they are temporary; but then so are all appointments of this world. Judicial tenure is only for life. Our 45th President will likely have many Supreme Court seats and lower court benches to fill.[80] By stripping the next chief executive of an alternative appointment authority, *Noel Canning* has elevated judicial appointments to be the most important issue of the 2016 presidential and senatorial

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75. Jamal Greene, *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. *But see* Stanford Levinson, *Constitutional Design*, 128 HARV. L. REV. F. 14, 19–20 (2014), http://harvardlawreview.org/2014/11/constitutional-design.

76. CHARLES DICKENS, OLIVER TWIST 27 (Simon & Schuster 2007) (1839).

77. MILAN KUNDERA, IMMORTALITY 122 (1999).

78. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

79. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595 (2004).

80. *See* Chris Cillizza, *The Massive Stakes in the 2016 Election, in 1 Graphic*, WASH. POST (July 14, 2015), http://www.washingtonpost.com/blogs/the-fix/wp/2015/07/14/a-reminder-of-the-stakes-in-the-2016-election-in-1-graphic/?tid=sm_fb.

elections.[81] The next president needs to be able to claim a mandate to fight for confirmation of her judicial nominations against Senate reactionaries who will surely channel the hot ghost of Mississippi's James Eastland. For all God's children, on and off the bench, the final, last word "be yonder the river Jordan."[82]

81. Recall that the 2013 Senate confirmation filibuster "reform" did not cover high court confirmations. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1, http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html.

82. Blooming Recklessly, *"River of Jordan" Margot Bingham*, YOUTUBE (Nov. 16, 2013), https://www.youtube.com/watch?v=War34JzJMhU ("I'm going down to the river Jordan one of these days. . . .").