ing.[630] The Court found that as, as with the issue of vacancies, a broader interpretation of the term "the Recess" was consistent with both the purpose of the clause[631] and historical practice.[632] Historical practice also informed the Court's holding that a recess of more than 3 days[633] but less than 10 days is presumptively too short to fall within the Clause.[634]

The preceding discussion may, however, remain of predominantly academic interest with the advent of "*pro forma*" sessions, where the Senate convenes briefly every few days, not to transact business, but in order to prevent recess appointments. Deferring to the authority of Congress to "determine the Rules of its Proceedings,"[635] the Court in *Noel Canning* considered whether the Senate, in a "*pro forma*" session, had the capacity to act legislatively and thus could give "advice and consent" to an appointment. Because the Journal of the Senate (and the Congressional Record) declared the Senate in session during those periods, and because the Senate could, under its rules, have conducted business under unanimous consent (a quorum being presumed), the Court found that the Senate was indeed in session. The Court declined to consider whether Senators were in fact engaged in Senate business on the floor, whether the Senate could meaningfully act upon Presidential messages, or whether attendance was, for practical purposes, required.[636]

It should be noted that, by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee,

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[630] 573 U.S. ___, No. 12–1281, slip op. at 9–11.

[631] 573 U.S. ___, No. 12–1281, slip op. at 11. "The Clause gives the President authority to make appointments during 'the recess of the Senate' so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure." Id.

[632] The Court note that Presidents have made "thousands" of intrasession recess appointments, and that Presidential legal advisors had been nearly unanimous in determining that the clause allowed these appointments. 573 U.S. ___, No. 12–1281, slip op. at 11.

[633] The Court held that, considering the Adjournments Clause, Art. I, §5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."), a 3-day recess was not a significant interruption of legislative business, and thus was too short a period for the President to make a recess appointment. 573 U.S. ___, No. 12–1281, slip op. at 20.

[634] 573 U.S. ___, No. 12–1281, slip op. at 21. The Court left open the possibility that some very unusual circumstance, such as a national catastrophe that renders the Senate unavailable, could require the exercise of the recess-appointment power during a shorter break.

[635] U.S. Const. Art. I, § 5, cl. 2. The Court noted that it generally takes the Senate's own report of its actions at face value. *See, e.g.,* United States v. Ballin, 144 U.S. 1, 9 (1892). (Court will not question indication in the Journal of the Senate that a quorum was present when a bill was passed).

[636] 573 U.S. ___, No. 12–1281, slip op. at 38.