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John C. Roberts

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I. INTRODUCTION

The remarkable men who created our national Constitution created a system of government consisting of three separate branches—each with discrete and specified powers—designed to ensure that governmental power could not be abused. That system has served us well, though it may seem cumbersome and is not always wholly democratic. But in several crucial areas the Framers created shared or overlapping powers between the two political branches. The precise boundaries of that sharing between the President and Congress was left ambiguous, giving rise to an enduring tension that has ebbed and flowed throughout our history. One such area of shared power concerns waging war, where Congress was given the power to declare war and to appropriate funds for its support, but the President was appointed Commander and Chief of the Armed Forces. In the twentieth century, Congress and the President sparred repeatedly over the ability of the President to deploy military forces throughout the world without a declaration of war.[1] The constitutional standoff has continued, and the resolution in each case has remained firmly in the political arena.

Another such area is the appointment of federal judges and executive officials, which was a highly divisive subject during the constitutional convention.[2] The debate revealed deep differences among the Framers on the role of the President and the balance between the executive and legislative branches. The result is an Appointments Clause that does not give full power over appointments either to the President or to Congress. In a complicated structure, the President nominates judges and Officers of the United States, but the Senate is given the power to advise and consent to such nominations. Different constitutional mechanisms govern the appointment of lesser governmental officials. Senate participation in the two general types of appointments—federal judges and

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[1] On the war powers issue, see generally LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 284–301 (6th ed. 2005) (describing the history surrounding the President's war powers, including the President's ability to declare war, military tribunals, the War Powers Resolution, and related cases); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-6, at 657–70 (3d ed. 2000) (juxtaposing the President's powers as Commander-in-Chief with Congress's power to declare war).

[2] *See generally* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 15–38 (2000) (describing the Founders' varying positions on the Appointments Clause).

administrative officials—arguably has different constitutional justifications. In the case of federal judges, who are appointed for life, it is understandable and appropriate that the two elected branches should share power to appoint members of the third branch, which then operates largely independent of them.

In the case of executive branch functionaries—including members of the cabinet, lower ranking officials, and more recently, members of a bewildering variety of administrative entities—giving a veto power over such appointments to the Senate stands in obvious conflict with the President's constitutional duty to take care that the laws passed by Congress are "faithfully executed."[3] And practically speaking, such a veto may prevent the President from choosing officials to serve with him in carrying out what he sees as his popular mandate to govern the country in line with his articulated policies. To make matters worse, some important questions are left unanswered or ambiguous in the constitutional text. Where is the line between "Officers of the United States," which require Senate approval, and lesser ranking officials, who do not?[4] Must the Senate explicitly vote nominations up or down, or may it do nothing, and if so, what are the consequences?[5] May the Senate by legislation constrain the President's selection by mandating certain qualifications?[6] Who may remove which officials, and on what grounds?[7] Most importantly for this discussion, what can the President do when he wishes to make an appointment but the Senate is not available to exercise its constitutional consent power?

Given the President's strong political and practical motivation to get on with the day-to-day business of government and the Senate's desire to preserve its prerogatives against executive ambitions, it is not surprising that the appointments process has been a source of constant struggle between the branches from the very first Congress.[8] That struggle has been exacerbated not only by the ambiguities in the constitutional text, but also by the enormous changes in the size and complexity of government since 1789. As the President and Congress have battled over nominations through the years, each has developed devices to give itself the advantage, thus escalating the tension and ill feeling between the branches. The struggle has reached a new level in the last fifty years, with the arguments resting not only on political grounds, but also on constitutional ones as well. The constitutional concerns have more recently centered on the Recess Appointments

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[3] U.S. CONST. art. II, § 3.

[4] *See* GERHARDT, *supra* note 2, at 158–61 (discussing the interpretations of "Officer of the United States").

[5] *See* Mathew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 950–58 (2013).

[6] *See* GERHARDT, *supra* note 2, at 273–80.

[7] The key case here is probably *Morrison v. Olson*, 487 U.S. 654 (1988), which dealt with the constitutional status of the independent counsel. *See generally* TRIBE, *supra* note 1, at 680–99 (discussing *Morrison v. Olson* and the independent counsel statute).

[8] The best overall survey is GERHARDT, *supra* note 2.

Clause,[9] which allows the President to bypass Senate advice and consent by making temporary appointments when the Senate is not in session.

This Article argues that the long-term struggle between the President and the Senate over executive appointments has now reached a crisis and that we may be approaching a point where the President's crucial duty to take care that the laws be faithfully executed is significantly impaired. During the Obama administration, an unprecedented number of judgeships and executive branch positions remain unfilled, threatening the smooth functioning of government at an especially demanding time.[10]

Republican opposition is increasingly based on extraneous political issues, not on the merits of each nominee.[11] Pervasive obstruction by the minority in the Senate prevents action on nominations and forces the President to assert broad powers under the Recess Appointments Clause to make temporary appointments. Most importantly, two recent developments threaten to completely undo the tenuous compromises that historically have been observed between the branches. One is the assertion by the Senate that through its brief pro forma sessions during longer periods of absence from Washington, it can completely negate the President's recess appointments power. The second is a recent decision by a panel of the Court of Appeals for the District of Columbia that takes an extremely narrow view of the Recess Appointments Clause, overriding a complex series of interpretations shared by the executive and legislative branches that have allowed the Clause to function in the modern administrative state.[12]

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[9] U.S. CONST. art. II, § 2, cl. 3.

[10] For executive appointments, one-quarter of key policy-making positions remained vacant after President Obama's first eighteen months in office, and almost 20% remained so after two years. WILLIAM A. GALSTON & E.J. DIONNE, JR., A HALF-EMPTY GOVERNMENT CAN'T GOVERN: WHY EVERYONE WANTS TO FIX THE APPOINTMENTS PROCESS, WHY IT NEVER HAPPENS, AND HOW WE CAN GET IT DONE 1–2 (2010). Senate delays were a major cause. At the end of their first years in office, President George W. Bush saw 8% of his nominees awaiting confirmation as compared with President Obama's 20%. *Id.* at 9. In March of 2010, 217 nominations were pending in the Senate. Seventy-seven had cleared committee and were awaiting floor action, including forty-four that had been pending for more than a month. Brian C. Kalt, *Politics and the Federal Appointments Process*, HARV. L. & POL'Y REV. ONLINE (April 5, 2011), http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1467&context=facpubs.

[11] *See also* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 98–100 (2012) (discussing the Republican tactic of blocking judicial nominations even while acknowledging the competence and integrity of the nominees).

[12] Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom.* NLRB v. Noel Canning, 133 S. Ct. 2861 (2013). Two other circuit panels, using somewhat different reasoning than the D.C. Circuit, made similar rulings later in 2013 by divided votes. NLRB v. Enter. Leasing Co., 722 F.3d 609 (4th Cir. 2013); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013).

If the Senate minority continues to obstruct even routine executive nominations, and if the courts essentially eliminate the President's recess appointments power, the country will face a dangerous shift in the constitutional relationship between the branches. These two recent developments make it urgent to address the struggle over appointments and to restore a workable balance of power between the President and the Senate. This Article attempts to outline the nature of the crisis we face in more detail and to propose a course of action for the future. Because the appointment of federal judges presents a somewhat different set of issues, the discussion focuses on appointments to executive branch positions requiring Senate advice and consent. Now numbering well over one thousand, these positions include cabinet and subcabinet officials, as well as administrators working in a variety of both departmental and independent agencies and commissions.[13] The men and women who occupy them direct the thousands of offices around the country that profoundly affect the lives of individual citizens, along with their businesses and civil institutions. To Americans in their daily lives, these men and women *are* "the government."

In what follows, Part II identifies the structure, background, and history of the Recess Appointments Clause, and Part III examines the threat to effective governance posed by recent legal and political developments. Part IV provides an analysis of legal issues raised by the Senate's practices and recent court decisions on recess appointments. Part V outlines recommendations for restoring the balance between the branches on executive appointments.

II. BACKGROUND

A. Structure and Background of the Appointments Clause

To resolve the important issue of which branch of government would control the appointment of judges and executive officials, the Framers opted for shared power between the President and the Senate and created three different methods of appointment.[14] For "Officers of the United States," which were not defined in the text of the Constitution, the President was given the power to nominate and the Senate the power to advise and consent, which is also not further delineated in the text. For inferior officers, Congress may by legislation choose the method of appointment, which might be by the President alone or by cabinet officers or other high-ranking officials, all without individual approval by the Senate. "Advice and Consent" was generally interpreted as "approval" from the beginning and is now generally referred to as "confirmation." The third method of appointment was intended to deal with the situation where the President needed to appoint an Officer of the United States, but the Senate was not available to perform its constitutional role. Because Congress's workload was light and travel to and from

[13] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 917 (2009).

[14] U.S. CONST. art. II, § 2.

the capital was difficult, it was expected that Congress would meet for short working sessions followed by long recesses as members returned home. Under those circumstances, some additional mechanism was clearly necessary. Thus, the President was given the power in the Recess Appointments Clause to appoint officers during Senate recesses, to serve only until the end of the following session of the Senate.[15]

Alexander Hamilton explained in The Federalist #76 that the Senate was expected to be deferential in exercising its confirmation power, presumably because of the President's role as executor of the laws, and would only reject nominations for "special and strong reasons."[16] He and other Framers made it clear that the Recess Appointments Clause was included to ensure that important judicial and executive positions did not remain unfilled during breaks in the Senate's work and that the important day-to-day functioning of government would continue.[17] This attitude reflected the general concern among the leaders of the day that the lack of a strong executive function under the Articles of Confederation had been a major cause of the weakness and ineffectiveness of the national government before the Constitution was adopted.[18] The temporary duration of recess appointments, on the other hand, preserved the essentials of the Senate's approval power.

It is important to note that the Framers used terms such as "recess," "session," and "adjournment" in the Constitution but did not define them in its text. Then, as now, these words are not terms of art but have vague and varied meanings. The Framers had experience with state legislatures in which the terms were used and unfortunate memories of the chaotic and ineffective Confederation Congress,[19] but they left the job of defining these key terms on which the Appointments Clause depends to a Congress that had yet to be elected. They even explicitly granted the exclusive power to create procedural rules to the House and Senate separately.[20] Thus, those who wrote the Recess Appointments Clause had no way of knowing exactly how it would work because the key terms were yet to be defined and their meanings could be changed by the Senate over time. Fearing the kinds of

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[15] *Id.* cl. 3.

[16] THE FEDERALIST NO. 76 (Alexander Hamilton).

[17] THE FEDERALIST NO. 67 (Alexander Hamilton) ("[I]t might be necessary for the public service to fill [vacant positions] without delay . . . ."); Evans v. Stephens, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc) (describing "what we understand to be the main purpose of the Recess Appointments Clause—to enable the President to fill vacancies to assure the proper functioning of our government").

[18] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 131–35 (2005); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 547–53 (1969).

[19] A principal motivation behind the 1787 Constitutional Convention was frustration over the dysfunction and powerlessness of government under the Articles of Confederation. *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1799–1805 (2003).

[20] *See* U.S. CONST. art. I, §§ 5–6.

attendance problems they had encountered under the Articles, they adopted only one specific requirement—that the Congress meet at least once each year, no later than the first Monday in December.[21]

B. Historical Evolution of the Appointments Clause

Though the text of the Appointments Clause might suggest that it is a neutral housekeeping provision, appointments were controversial and highly political from the very first Congress.[22] The power struggle we now discuss was present from the beginning, and both sides sometimes acted from political motives divorced from the qualifications of the nominee. President Washington's effort to appoint John Rutledge to the United States Supreme Court was only the first example.[23] The rise of contentious political parties, which the Framers did not take into account, made matters worse. Though the level of conflict rose and fell over the years, there were periods of intense controversy over appointments, especially after the Civil War. In the twentieth century, we saw profound changes in both the presidency and the Senate, which must be taken into account in giving modern meaning to the Recess Appointments Clause.

The early executive branch was tiny by today's standards.[24] We now have many more cabinet departments, along with myriad executive agencies and offices. Since the New Deal, there has been a dramatic rise in the number of independent administrative agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, and the National Labor Relations Board, which wield important quasi-legislative and quasi-judicial powers pursuant to delegations from Congress. That factor alone has raised the stakes in the appointments process because Congress seeks to control some of the power it has given away by influencing the appointment of members of commissions and agencies. It has attempted to exercise its power not only through its approval of individual nominations, but also by vastly increasing the number of lower ranking officials whose appointments require Senate action. There are fourteen advice-and-consent appointees in the EPA alone.[25] Likewise, the high turnover of cabinet and subcabinet appointees in modern times places additional strain on the appointments process.

It seems indisputable that the power of the presidency has increased greatly since the founding period, adding to concerns in Congress over erosion of its influence. Whatever the causes and contours of this accretion of power, it is a

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[21] U.S. CONST. art. I, § 4, cl. 2. The annual meeting date was changed to January 3 by constitutional amendment in 1933. U.S CONST. amend. XX, § 2.

[22] *See* GERHARDT, *supra* note 2, at 45–77.

[23] *Id.* at 51–52. Professor Gerhardt notes that a minor executive nomination by President Washington was rejected barely three months into the first session of the first Congress, apparently because Senators from the state preferred another candidate. *Id.* at 63–64.

[24] *See* O'Connell, *supra* note 13, at 922–23.

[25] *Id.* at 931.

reality. Commentators have cited the President's power over the policy choices of key agencies and commissions, the concentration of power in the large White House staff, the use of executive orders to essentially bypass the legislative process, the acceptance of executive agreements as an alternative to treaties, and the President's crucial daily access to the media to push his policy agenda.[26] All of these factors, and more, add up to an increasing threat to the power of Congress and play a part in the escalation of obstruction in the Senate since 1980.

The modern Senate is also a different institution than it was when the first Congress met, and these changes have dramatically affected the struggle over executive appointments. In many ways, the Senate plays a different role than that envisaged by the Framers. It is much more activist and more powerful, moving from its primary role of protecting the interests of the states. The early Senate was very small and operated like an intimate private club composed of the leading men of the day. Today's Senate has one hundred members, elected directly and highly varied in experience and outlook. The work schedule of the Senate has also evolved from the one anticipated by the Framers—short sessions followed by long recesses each year. Members of the Senate and the House can now travel to and from their home states with ease. Accordingly, they meet for longer sessions with many short breaks interspersed. From 2001 to 2010, for example, the Senate was actually in session about 45% of the time, with recesses averaging eighteen days, with the longest fifty-six days.[27] Internal Senate rules and practices have also evolved significantly over time. Unknown in the early Senate, the filibuster is now a commonplace parliamentary device that has come close to paralyzing the body.[28] The Senate also allows holds on legislation and nominations by individual members[29] and traditionally requires consultation (if not more) with home state senators on many judgeships and executive nominations.[30] There is much greater control of the advice-and-consent process by Senate committees and with that comes much deeper scrutiny of nominees' policy positions and backgrounds.[31]

In the aggregate, these changes in the Senate have made it much more difficult and time-consuming for the President to obtain approval of executive-branch nominees. By far the most important change in the culture and operation of the Senate in recent years, and the change that most severely affects the struggle over appointments, is the unprecedented increase in political polarization that has

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[26] The literature on presidential power is enormous. A useful summary of current issues involving increased presidential authority is *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057 (2012).

[27] Kalt, *supra* note 10, at 2 n.16.

[28] *See generally* John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189 (2013) (discussing the use of Senate rules by the minority to create gridlock in Washington).

[29] *Id.* at 2196.

[30] *See* GERHARDT, *supra* note 2, at 143–54.

[31] *See* G. Calvin Mackenzie, *The State of the Presidential Appointments Process*, *in* INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 1, 40–44 (G. Calvin Mackenzie ed., 2001).

occurred since the 1970s.[32] Most issues are now defined by sharply contrasting party positions, discipline is rigid, and compromise is very difficult to achieve. Each side sees the other as not just mistaken, but evil or immoral, and the rhetoric is increasingly sharp. Coupled with the many and varied weapons for minority obstruction available to senators, this development has drastically altered the appointments process, creating a situation that those who adopted the Appointments Clause would not recognize.

The great majority of executive-branch nominees have always been approved eventually because most do not present momentous issues from the Senate's point of view.[33] But this fact masks the ominous changes that have taken place in recent years. Since about 1980, we have seen increasing conflict between the President and the Senate on nominations to sensitive agency positions, subcabinet positions, and even on some seemingly unimportant posts.[34] At first these refusals to confirm came in the regular order after a negative vote on the Senate floor, presumably as the Framers envisaged. At the same time, Congress expanded the number of positions requiring Senate confirmation and deepened its scrutiny of nominees' backgrounds and finances. More recently, however, the Senate has exercised its confirmation power without a floor vote, either by lengthy delay, which resulted in a withdrawn nomination, or by minority obstruction of a final vote by either a filibuster or the threat of one.[35] This has led modern presidents, beginning with Ronald Reagan, to increasingly use recess appointments to overcome the Senate's new tactics and to interpret broadly the recess appointments power.[36] Most recently, as we shall see in an examination of President Obama's disputes with the Senate, the minority in that fiercely polarized body has begun to block votes on nominations for reasons completely unrelated to the merits of the nominee.[37] Some of these acts of obstruction have grown out of opposition to the policy directions of

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[32] *See* Roberts, *supra* note 28, at 2190.

[33] One study places the "failure rate" for executive nominations, including negative votes, withdrawals, and expired nominations, from 1885 through 1996 at 4.4%. Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations, 1885–1996*, 43 AMER. J. POL. SCI. 1122, 1126 (1999).

[34] *See* Mackenzie, *supra* note 31, at 19–27 (2001); Burdett Loomis, *The Senate: An "Obstacle Course" for Executive Appointments?*, *in* INNOCENT UNTIL NOMINATED, *supra* note 31, at 160, 163–68.

[35] *See* Mackenzie, *supra* note 31, at 31–36.

[36] The Congressional Research Service has reported that presidents from Ronald Reagan through Barack Obama have made 652 recess appointments, about evenly divided between inter-and intrasession appointments. President Reagan made by far the most—232—and President Obama (as of 2013) by far the fewest—thirty-two. HENRY HOGUE ET AL., CONG. RESEARCH SERV., THE *NOEL CANNING* DECISION AND RECESS APPOINTMENTS MADE FROM 1981–2013, at 4 tbl.1 (2013), *available at* https://www.fas.org/sgp/crs/misc/m020413.pdf.

[37] *See, e.g.*, Sarah A. Binder, *The Senate as A Black Hole? Lessons Learned from the Judicial Appointments Experience*, *in* INNOCENT UNTIL NOMINATED, *supra* note 31, at 173, 176 ("Senators themselves will often admit that their willingness to delay a presidential nominee has little to do with the qualifications of the nominee.").

the agency or department involved or from a desire to use the nomination process to prevent entirely the operation of the agency. Senators also have increasingly blocked nominations to extract unrelated concessions from the President. These motivations would surely have seemed unacceptable and unwise to those who devised the appointments process in the first place. Since in all the recent examples it was clear to observers that a majority of the Senate would vote in favor of the nominee if a floor vote were permitted, these minority tactics have become so blatant as to trigger threats of revising Senate rules either to restrict or eliminate filibusters and individual holds.[38]

In sum, the current state of the appointments process seems far from that envisaged by Hamilton and his contemporaries. Even so, neither the White House nor the Senate has resorted to every possible tool in the struggle over executive nominations, probably out of fear that at some point a constitutional crisis could result. Until recently the rival branches have recognized the high stakes involved, particularly in making or blocking recess appointments, and have stepped back from the brink of confrontation. Good examples include the informal understanding in 1960 that the President would not make recess appointments to the Supreme Court[39] and more recent agreements by presidents to refrain from making recess appointments in exchange for up-or-down votes on pending nominees.[40] But the struggle over executive appointments, which has been slowly evolving in seriousness over time, but also moderated by mutual restraint, has now reached the point of crisis.

III. THE THREAT TO EFFECTIVE GOVERNANCE

Even before the events of 2012 and 2013 that brought to a head the continuing struggle over executive appointments, scholars and political observers became increasingly concerned that a general breakdown in the appointments process had

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[38] A major effort was mounted by reformers, backed by Majority Leader Reid, to restrict filibusters at the start of the 113th Congress in January 2013. Minor modifications were made. Roberts, *supra* note 28, at 2213–14. A more serious effort, focused on restricting filibusters only for executive-branch nominations, was made in July 2013 and resulted in a number of confirmations but no permanent changes in rules or practices. *See* David Hawkings, *Consumer Bureau Gets a Leader, and Dodd-Frank Gets an Enforcer*, ROLL CALL (July 16, 2013, 5:49 PM), http://blogs.rollcall.com/hawkings/consumer-bureau-gets-a-leader-and-dodd-frank-gets-an-enforcer/; The Editorial Bd., *The Senate Clings to the Filibuster*, N.Y. TIMES (July 16, 2013), http://www.nytimes.com/2013/07/17/opinion/the-senate-clings-to-the-filibuster.html.

[39] *See, e.g.*, 106 CONG. REC. 18145 (1960) (passing a resolution that recess appointments to the Supreme Court should not be made except under "unusual circumstances"). Presidents have not made recess appointments to the Supreme Court since and only rarely to lower federal courts.

[40] For a review of some recent political accommodations on recess appointments, see LOUIS FISHER, CONG. RESEARCH SERV., RL31112, RECESS APPOINTMENTS OF FEDERAL JUDGES 9–13 (2001); Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CAL. L. REV. 235, 252–56 (2008).

begun to seriously impair the efficient operation of the executive branch. Political Science researchers pointed out that since about 1980, delays in the confirmation process had resulted in an ever-increasing percentage of unfilled positions both in departmental offices and independent regulatory agencies.[41] Several causes were identified, including expanded ethics screening, greater financial disclosure, and disorganization in the White House personnel offices, but a major cause of vacancies was surely procedural delays in the Senate.[42] Compounding the trend was the significant expansion of the number of positions requiring Senate confirmation, a result of legislative changes aimed at increasing Congress's control over executive policymaking. Minority obstruction made it increasingly difficult for a President to staff his administration even during periods when the presidency and the Senate were in the same hands.

Ronald Reagan's use of recess appointments stands as a useful illustration of the increasingly polarizing confrontation between the President and the Senate. Because of obstruction in the Senate, he resorted to a large number of recess appointments to independent agencies, allowing him to put into place his deregulatory policy regime.[43] Recess appointments, which can last up to two years in the right circumstances, were particularly effective tools because appointees to such agencies usually serve for a relatively short period even when they receive regular appointments approved by the Senate. The trend continued in subsequent administrations, but use of recess appointments aroused much more controversy as the Senate saw its influence over agency policymaking eroding. President George W. Bush eventually stopped making recess appointments because of intense Senate opposition and new parliamentary tactics, including the first use of pro forma sessions.[44]

During the period after 1980, we saw many more examples of action by the Senate to obstruct or disable executive policymaking through refusal to confirm key nominees. Democrats used such tactics against the second President Bush,[45] and Republicans accelerated them during the Obama administration, slowing down banking regulation by refusing to confirm key Treasury Department officials[46] and refusing to vote on Elizabeth Warren's nomination to head the new Consumer Financial Protection Bureau (CFPB).[47] Both parties stubbornly refused to act on nominations to the Federal Election Commission and the National Labor Relations

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[41] By one estimate, 8% of total nominees were pending action in the Senate at the end of George H.W. Bush's first year in office, compared to 20% at the end of Barack Obama's first year. GALSTON & DIONNE, *supra* note 10, at 9.

[42] MANN & ORNSTEIN, *supra* note 11, at 94–98.

[43] *See* HOGUE ET AL., *supra* note 36, at 5–12 (noting President Reagan's seventy-two intrasession recess appointments and 160 intersession recess appointments).

[44] *See* Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570, 580–81 (2011).

[45] *Id.*

[46] *See* MANN & ORNSTEIN, *supra* note 11, at 96–97.

[47] *See id.* at 99–100.

Board (NLRB) because of disagreement about the mission of those agencies. Senators even began to block nominees because of completely irrelevant disagreements with the President or even with their colleagues.[48] Such practices raise serious constitutional questions since refusal to act by the Senate in those instances is based not on the merits of the nominees, as contemplated originally by the Framers, but on an effort to disable the office or agency involved or even to pursue a selfish personal or political goal. As the Supreme Court held in *INS v. Chadha*,[49] Congress may not act in ways that have the effect of legislation without following the procedure laid down in Article I—passage of a bill by both houses followed by presentment to the President.[50] When the Senate refuses to confirm any nominee to head the CFPB because it disagrees with its statutory mandate or blocks any appointment of assistant secretaries charged with implementing banking reform in order to prevent that reform, it is arguably overstepping its constitutional authority; its proper alternative is to amend the relevant statute. These tactics are even more constitutionally suspect because they are frequently not acts of a Senate majority, but are the result of minority obstruction through threatened filibusters, again not a tactic that would have been within the contemplation of those who wrote the Constitution.

The President has alternatives to move forward with his policy initiatives and carry out legislatively mandated programs without achieving Senate confirmation of his nominees. He can use recess appointments, and has been increasingly driven to do so, but such appointments increase the conflict with the Senate and so may be politically undesirable. Moreover, they are temporary solutions. He may also use the Federal Vacancies Reform Act to appoint acting officers from within the executive branch, though the Act does not apply to independent administrative agencies.[51] Scholars have pointed out that, aside from the political risks, these alternatives create officeholders who lack the gravitas or political credibility of confirmed appointees and, thus, impair the operation of the offices involved.[52] Presidents have increasingly resorted to another tactic to get around Senate obstruction by creating shadow officers within the White House, with titles such as Coordinator or Czar, who effectively control an office or agency without being appointed or confirmed.[53] Ironically, this cycle of obstruction followed by presidential avoidance measures actually decreases the Senate's influence over the executive branch. The more that important offices and agencies are run by officials

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[48] *See, e.g.*, MANN & ORNSTEIN, *supra* note 11, at 85 ("In February 2010, Senator Richard Shelby of Alabama put a blanket hold on all White House nominations for executive positions (over seventy were pending at the time) in order to get two earmarks with tens of billions of dollars fast-tracked for his state.").

[49] 462 U.S. 919 (1983).

[50] *Id.* at 953–56.

[51] Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d (2012).

[52] *See, e.g.*, O'Connell, *supra* note 13, at 937–46 (explaining that the costs of such alternative appointments include "agency inaction, confusion among nonpolitical workers, and decreased agency accountability").

[53] *See id.* at 930–31.

with recess or acting appointments not involving the Senate, or even worse run unofficially by White House staff, the less power the Senate has to influence them through the normal course of committee hearings and confirmation interviews. The Senate's current tactics then have the perverse effect of lessening its influence over the bureaucracy and ultimately increasing the power of the presidency.

We come then to the events of 2011 and 2012 that escalated the conflict between President Obama and the Senate over several key appointments, leading to the controversial use of pro forma sessions to block recess appointments and to the D.C Circuit's decision in the *Noel Canning* case.[54]

Despite Barack Obama's decisive victory in the 2008 election and comfortable Democratic majorities in both the House and Senate, the new President experienced unprecedented problems with executive appointments from the beginning of his administration. Republican Senators, manifesting the extreme partisanship and polarization that had been growing in Congress, vowed to block the President's policies at all costs and rejected talk of compromise. In the midst of the gravest economic crisis since the Great Depression, minority senators used holds and threatened filibusters to delay over one hundred subcabinet and agency nominations.[55] Though the administration also deserves some blame for the slowness of its selection and vetting process, minority senators were mostly responsible for keeping positions unfilled or filled with acting officers. The new administration, as a result, faced the largest percentage of its advice-and-consent positions unfilled after one year as compared with previous ones.[56] In a number of cases, minority obstruction was based not on doubts about the qualifications or suitability of the nominee, but on a desire to cripple the office or agency involved. This was especially true for Treasury subcabinet positions. As the President and his Treasury Secretary struggled with measures to stabilize the banking system and stimulate the economy, minority senators who opposed the administration's economic policies used the appointments process to try to cripple the Treasury Department.[57] When nominations finally made it to the floor of the Senate, the approval vote was overwhelming, demonstrating the real motives behind minority delaying tactics. This blatant misuse of the constitutional advice-and-consent power, in which a minority of senators actually wielded the power, came to a head in 2011 when the Senate minority resolved to prevent two entities established by Congress—the CFPB and the NLRB—from carrying out their statutory responsibilities. President Obama's attempt to resolve the conflicts through the use of recess appointments, and thus fulfill his constitutional duty to execute the laws, and the Senate's effort to thwart him, brought about the appointments crisis the country now faces.

The NLRB, a five-member independent regulatory agency charged with carrying out the nation's labor laws, has long been a center of appointments

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[54] Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).
[55] MANN & ORNSTEIN, *supra* note 11, at 96–100.
[56] *See supra* note 10 and accompanying text.
[57] MANN & ORNSTEIN, *supra* note 11, at 96–97.

controversies between the political parties.[58] Each is concerned that the other's nominees will tilt the Board too far in favor of labor or management. Not surprisingly, five of the last seven appointments to the NLRB have been recess appointments, as presidents were unable to achieve Senate confirmation of their choices.[59] But in 2011, an unprecedented situation threatened to destroy the agency entirely. The Board had been reduced to only two members for over two years, and the Supreme Court ruled that two members were not enough to conduct official business, casting doubt on countless decisions already made.[60] President Obama thus faced an emergency. Senate obstruction had succeeded in crippling the Board completely. In order to pursue his administration's labor policies, and to carry out its statutory responsibilities, the President was forced either to resort to the Recess Appointments Clause or to allow this important agency to lie dormant in the face of a number of adjudicative and regulatory imperatives. The President chose to make three nominations to the Board in 2011, but the Senate took no action on them.[61] Nearing the end of the session, the Senate scheduled a recess from December 20, 2011, to January 23, 2012. The Unanimous Consent Agreement which governed the break specified that brief pro forma sessions, at which only a few senators would be present, would be held every three days, including on January 3 when Congress was constitutionally required to meet to open the new session.[62] The Agreement specified that "no business" would be conducted during the pro forma sessions. On January 4, 2012, now in the second session, the President appointed his three earlier nominees to the Board through recess appointments, allowing them to serve for almost two years until the end of the next session. The validity of the appointments was challenged in federal court later in 2012 by a business that had been subject to a decision made by the newly constituted Board. A panel of the D.C. Circuit eventually held the recess appointments unlawful on broad grounds in early 2013, but did not decide the narrow question of the constitutional effect of pro forma sessions to block recess appointments.[63]

The second appointments controversy in 2011 involved the President's efforts to put in place a director of the new Consumer Financial Protection Board (CFPB), created by the Dodd-Frank law designed to prevent a repeat of the banking crisis.[64] Minority Republicans in the Senate had opposed this new agency, seeing it as another layer of bureaucracy burdening the banks. The President's desire to

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[58] Until this year, most of the recent appointments to the Board have been recess appointments. For a useful procedural history, see TODD GARVEY & DAVID H. CARPENTER, CONG. RESEARCH SERV., R43030, THE RECESS APPOINTMENTS POWER AFTER *NOEL CANNING V. NLRB*: CONSTITUTIONAL IMPLICATIONS 8 (2013).

[59] *Id.* at n.51.

[60] New Process Steel v. NLRB, 560 U.S. 674, 686–87 (2010).

[61] GARVEY & CARPENTER, *supra* note 58, at 7–9.

[62] 157 CONG. REC. S8783–84 (daily ed. Dec. 17, 2011).

[63] Noel Canning v. NLRB, 705 F.3d. 490, 514 (D.C. Cir. 2013).

[64] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301–5641 (2012)).

appoint Elizabeth Warren, a Harvard Law professor who had played an important advisory role in creation of the agency, was thwarted by minority opposition. He responded by appointing her to the role of consultant to the Treasury Department, where the new bureau resided, which further angered Republicans.[65] In May 2011, forty-four Republican senators signed a letter opposing the appointment of *any* head of the CFPB, regardless of qualifications, until changes were made in its governing statute, making it clear that they would use the appointments process for purposes unrelated to the merits of the nominee.[66] In July, the President nominated Richard Cordray to head the CFPB.[67] Cordray, a widely respected former Ohio Attorney General, garnered praise from both parties in the Senate, but the minority still vowed to oppose his confirmation. The relevant Senate committee approved Cordray's nomination, however, and in a test vote to bring his nomination up for a floor vote, he received fifty-three votes.[68] Since the Senate's rules required sixty votes to overcome a filibuster, the nomination failed. Once again, the spirit of the Appointments Clause was openly violated. Faced with potentially being unable to fully implement a key element of Dodd-Frank, the President responded by making Cordray a recess appointee in January, at the same time as his NLRB nominations.

Partisan debate and scholarly discussion over executive nominations continued throughout the first half of 2013, and further minority obstruction occurred—nominations of new heads for the Environmental Protection Agency and the Labor Department became stalled, along with the perennial case of the head of the Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and several other nominations. Majority Leader Reid raised the stakes by threatening to invoke the "nuclear option" (sometimes called the "constitutional option") to change Senate rules so as to prohibit filibusters on executive-branch nominations. This tactic has been tried in the past, usually with the aim of more general filibuster reform, and often results in compromise by the minority to avoid a rules change. And so it was in July 2013 when, at the last moment, Republicans agreed to allow votes on Cordray and other pending nominees.[69] As to the NLRB nominees, the President agreed to withdraw the nominations of the two members whose nominations had been declared invalid in *Noel Canning*, but Republicans agreed to immediately process and allow votes on two new nominees, bringing the NLRB to full strength. Even the ATF, which had never had a confirmed head since the office was upgraded to advise-and-consent status seven years before, was included in the package and its nominee was confirmed. This compromise, however, did not end the partisan controversy.

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[65] Ms. Warren was also appointed Assistant to the President. Amelia Frenkel, Note, *Defining Recess Appointments Clause "Vacancies"*, 88 N.Y.U. L. REV. 729, 731 n.10 (2013).

[66] *44 U.S. Sens. to Obama: No Accountability, No Confirmation*, SHELBY.SENATE.GOV (May 5, 2011), http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation.

[67] 157 CONG. REC. S4646 (daily ed. July 18, 2011).

[68] 157 CONG. REC. S8429 (daily ed. Dec. 8, 2011).

[69] *See supra* note 38.

Further obstruction in late 2013 led the majority to exercise the "nuclear option" to curtail filibusters on most nominations.[70] This development, however, will not end the struggle over executive nominations. Parliamentary warfare will continue and may even escalate. Delay tactics using Senate rules and traditions are still available to the minority. More importantly, constitutional issues involving the Recess Appointments Clause remain unresolved, to be addressed by the Supreme Court in the 2013–14 term.

IV. ANALYSIS

A. Interpreting the Recess Appointments Clause

The current dispute over the meaning of the Recess Appointments Clause, and thus the balance of power between the President and the Senate in the struggle over executive appointments, revolves largely around a choice between originalist and functionalist interpretations of the constitutional text**,** and over the role of historical practice in constitutional interpretation. The *Noel Canning* court took a narrow originalist approach, parsing the words of the text and discounting historical practice. Those who favor a broader interpretation emphasize the ambiguities of the text, the overall purpose of the Clause, and a generally uniform view of presidential practice over much of our history. Advocates of the broader approach have included most modern commentators, and until recently, all the federal courts that have addressed the issue.[71] They have argued that the Appointments Clause is inherently political and must be approached with its principal purpose in mind—to ensure the smooth and sustained functioning of the national government in all its vast and varied fields of responsibility. They have also recognized the overriding importance of the President's duty to execute the laws duly passed by Congress. We turn now to those interpretive issues.

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[70] *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; Niels Lesniewski, *Democrats go "Nuclear," Eliminate Filibusters on Most Nominees*, ROLL CALL (Nov. 21, 2013, 1:22 PM), http://blogs.rollcall.com/wgdb/democrats-go-nuclear-elim inate-filibusters-on-most-nominees/. Tellingly, press reports noted that when the Senate finally acted to curtail confirmation filibusters, 189 executive nominations were pending action in the Senate. Philip Rucker et al., *White House, Allies Weigh Nomination Strategy Under New Senate Rules*, WASH. POST (Nov. 22, 2013), http://www.washingtonpost.com/politics/white-house-allies-weigh-nomination-strategy-under-new-senate-rules/2013/11/22/31664534-538e-11e3-9e2c-e1d01116fd98_story.html.

[71] For commentators, see, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Patrick Hein, *supra* note 40. For courts, see *infra* note 79. In *Evans v. Stephens*, the Eleventh Circuit stated that it was "the intent of the Framers to keep important offices filled and government functioning." 387 F.3d 1220, 1225 (2004).

The text of the Recess Appointments Clause is as follows: "The President shall have the 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."[72] For purposes of this Article, there are two phrases that bear crucially on the relative powers of the President and the Senate in the context of recess appointments—"Vacancies that may happen" and "during the Recess of the Senate."

Almost from the beginning, there have been two competing views about the "may happen" language. The most obvious interpretation would seem to require that a resignation, removal, or death of an officeholder requiring Senate confirmation must actually take place while Congress is not in session, but it quickly became apparent that the obvious interpretation creates both practical and political difficulties. It means that a vacancy-causing event that occurs during the last days of a Senate session could not be filled by recess appointment, despite the fact that the recess then following could be as long as nine months under early practice. There was also the occasional problem of determining exactly when a resignation or death had occurred. Those who see the language as ambiguous argue that "happen" can refer to a continuing state as well as a single occurrence. The first Attorney General, Edmund Randolph, took the narrower view,[73] but early presidents and other formal Attorney General opinions advocated the "happen to exist" interpretation of the text. They argued that the actual event causing the vacancy could occur while the Senate was in session, and since it also continued to "exist" during the subsequent recess, the President could make a recess appointment. In the face of an ambiguous text, they relied on the purpose of the Clause—to keep the government functioning smoothly despite the Senate's meeting schedule—observing that the harm done by a vacancy was the same regardless of when it technically occurred. Presidents Adams, Jefferson, and Madison made recess appointments to fill vacancies that originated while the Senate was in session.[74] Scholars have debated the exact time this interpretation attained broad acceptance, but there was little contrary argument after Attorney General Wirt's opinion to that effect in 1823.[75] The Congress itself clearly accepted it as well, as exemplified by the Pay Act in 1863,[76] which assumed that the "happen to exist" interpretation was valid but restricted the pay of such recess appointees. In fact, subsequent amendments to the Pay Act have actually broadened the types of recess appointees who could be paid.[77] Further acceptance

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[72] U.S. CONST., art. II, § 2.

[73] Edmund Randolph, *Opinion on Recess Appointments*, *in* 24 THE PAPERS OF THOMAS JEFFERSON 165–67 (John Catanzariti et al. eds., 1990).

[74] Hartnett, *supra* note 71, at 387–401. Greater doubt exists about the status of President Washington's recess appointments, though Harnett would put him in the same category. *Id.*

[75] Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823).

[76] The original version of the Pay Act was an appropriations rider. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646 (current version at 5 U.S.C. § 5503 (2012)).

[77] The current version of the Pay Act is codified at 5 U.S.C. § 5503 (2012).

of the broader view of the recess appointment power can be found in the impeachment of President Andrew Johnson, which included several charges involving appointments and removals, but no mention of his recess appointments made under the "happen to exist" interpretation.[78]

Though the few court challenges that have occurred resulted in decisions accepting the broader interpretation,[79] the D. C. Circuit in the *Noel Canning* case adopted the strict view that vacancies eligible for recess appointments must occur when the Senate is in recess.[80] The panel majority relied heavily on dictionary definitions of "happen" and the early Randolph opinion and downplayed the importance of subsequent practice.[81] This interpretation, if it prevails on review, would seriously curtail the President's recess appointment power. Particularly if combined with a narrow view of what constitutes a recess, the result is that the President will have fewer opportunities to overcome the kind of obstruction and parliamentary maneuvering that has caused our current appointments crisis. It would demand exquisite timing by the President to ensure that resignations occur during a recess and would eliminate the current practice of a resignation followed by a nomination, with the recess appointment of the same person occurring at the next recess only if the Senate fails to act in a timely fashion.

The second key phrase involved in interpreting the Recess Appointments Clause is "the recess of the Senate." One view, adopted by the *Noel Canning* court, is that the phrase refers only to so-called "intersession" recesses, the ones that end an annual session of the Senate.[82] On this view, the terms "recess" and "session" are mutually exclusive, and there is only one of each during a particular year. The broader view, taken by courts and long practiced by presidents and congresses, is that "the recess" refers to the time the Senate is in recess, not to any particular recess. Thus, in modern times when the Senate takes numerous shorter "intrasession" recesses throughout the calendar year, the President may make recess appointments during each of them.

There are numerous problems with the narrower view that only intersession recesses may trigger the recess appointment power. As a textual matter, it rests almost entirely on the Framers' use of the definite article "the" to restrict recesses to the single intersession recess that they might have been familiar with. But it is

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[78] Hartnett, *supra* note 71, at 409.

[79] Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 944 U.S. 942 (2005); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *In re* Yancey, 28 F. 445 (C.C.W.D. Tenn. 1886); *In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880).

[80] Noel Canning v. NLRB, 705 F.3d 490, 507 (D.C. Cir. 2013). Judge Griffith did not join in this portion of the opinion, given the long-standing acceptance of the "happen to exist" interpretation between the President and Congress, also noting that the court need not decide this question after concluding that intrasession recess appointments were unconstitutional. *Id.* at 515.

[81] *Noel Canning*, 705 F.3d at 507–13.

[82] *Id.* at 499–507.

not difficult at all to imagine that the Framers might have meant the phrase to mean "the period in which the Senate is in recess," allowing for more than one recess in a year's meeting of the Senate. Use of the narrower meaning was not universal in legislative bodies of the period—Article IX of the Articles of Confederation, for example, uses "the recess" in a more general sense.[83] And "session," whose meaning is inextricably linked to "recess" in the narrower view, is not always used in the Constitution to mean only the annual meeting required by the Constitution. In both the Adjournment Clause and the Speech and Debate Clause, it clearly seems to have the more general meaning of any session.[84] More importantly, commentators who take the restrictive view, and the *Noel Canning* court, tend to ignore two important points. First, that the Constitution left to each house of Congress the power to control its procedures, and therefore to give meaning to "recess" and "session" in actual practice.[85] The Framers must have been aware that they were using terms that they did not define and that could change over time. Second, Congress did in fact have more than one session per year quite often in its early years—the very first Congress had three sessions, not two, and some later congresses had as many as five.[86] Many early congresses had more than one intersession recess during a calendar year. Thus, there was no such thing as *the recess* even in the early years. While Congress, up until the Civil War, usually followed the original practice of having one short session and a long recess each year, it increasingly added short "intrasession" recesses as well, especially around the holidays in December.[87] The first intrasession recess appointment was probably made in 1867, though such appointments were not always accurately recorded in those years.[88]

In short, the use of originalist arguments in the case of parliamentary terms like "recess," "session," and "adjournment" in the Constitution simply does not

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[83] ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5 ("The united states in congress assembled shall have the authority to appoint a committee, to sit in the recess of congress, to be denominated 'A Committee of the States' . . . ."). The Confederation Congress was required to meet at least once every six months. *Id.* at para. 7. It, in fact, had a chaotic meeting record because of its onerous quorum requirement. *See id.*

[84] U.S. CONST., 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 . . . ."); U.S. CONST., art. I, § 6, cl. 1 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses . . . .").

[85] *See* U.S. CONST. art. 1, § 5. I have written at length elsewhere about the importance of the Rulemaking Clause as interpreted by the federal courts. *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 522–43 (2001).

[86] *Dates of Sessions of the Congress, Present–1789*, SENATE.GOV, https://www.senate.gov/reference/Sessions/sessionDates.htm (last visited Mar. 5, 2014).

[87] Hartnett, *supra* note 71, at 408.

[88] *Id.* at 408–09 (noting that three of President Johnson's recess appointments were made during intrasession recesses and that the practice was supported by Attorney General opinions).

make sense since they depend on the developing parliamentary practices adopted by the Senate over time. In fact, the meaning of "recess" and "session" are now quite confusing, as the Senate's definitive procedural guide and a recent Congressional Research Service analysis show.[89] There are several different uses for the term "recess." Most importantly, the Senate distinguishes between "daily recesses" and "annual recesses," only the latter being breaks in the annual session of Congress.[90] Senators commonly speak of being "in recess" overnight or on weekends when the Senate is in session, but those are only daily recesses, and no president has asserted the power to make recess appointments in those circumstances. The Senate can either recess or adjourn at the end of a day, and the two terms have different parliamentary implications.[91] The key term "adjournment *sine die*" is usually reserved for the end of an annual session, but is not always used. The very first Congress, which included many of those who were present at the Philadelphia Convention, did not adjourn *sine die* (often appearing as "without day") at the end of its first session on September 29, 1789, but rather to a date certain the next January.[92] The same is true of its second session, which ended on August 12, 1790.[93] The first five congresses, in fact, adjourned *sine die* only at the end of their two-year elected life, which then was the March following a November election.[94] The practice of inconsistent use of *sine die* adjournment to end annual sessions continued throughout our history. Whatever may have been the original expectations of the Framers, given this ambiguity and confusion, it is clearly illogical to hold on to a meaning of "the recess" that has no basis in reality. The Senate went its own way in defining and labeling its various sessions. Certainly the *Noel Canning* court's reliance on *sine die* adjournment as the touchstone for triggering the recess appointment power is artificial in the extreme and exalts form over substance. Though intersession and intrasession recesses are functionally identical, under the recent circuit courts' reasoning, if the Senate never adjourns *sine die*, there can never be recess appointments regardless of the length of the Senate's absence.

Given the purpose of the Recess Appointments Clause, it is clear that distinguishing between intersession and intrasession recesses for purposes of defining the President's ability to make recess appointments makes no sense. If the

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[89] *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1080–90 (Alan S. Frumin ed., 1992); RICHARD S. BETH & JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 17–20 (2013).

[90] BETH & TOLLESTRUP, *supra* note 89, at 1–2.

[91] RIDDICK & FRUMIN, *supra* note 89, at 14, 714.

[92] 1 ANNALS OF CONG. 94 (1789) (Joseph Gales ed., 1834) ("The business of the session being brought to a close, the Vice President . . . adjourned the Senate to the first Monday in January next . . . .").

[93] *Id.* at 1036 (1790) ("And the Vice President adjourned the Senate accordingly, to meet on the first Monday in December next.").

[94] 8 ANNALS OF CONG. 2244 (1798); 6 ANNALS OF CONG. 1580 (1797); 4 ANNALS OF CONG. 854 (1795); 3 ANNALS OF CONG. 665 (1793); 2 ANNALS OF CONG. 1782 (1791).

goal is to ensure that important government offices keep functioning without interruption, then the type of recess that causes the problem is of no relevance. While intersession recesses are usually longer, intrasession recesses in the twentieth century have been as long as four months.[95] Distinguishing between the two types cannot be made based on their duration. Do we really believe that if the Framers had foreseen the Senate's increasing use of other recesses throughout the year, they would have confined the recess appointment power to only one type?

Because intrasession recesses were not common until the twentieth century, except for the traditional holiday break, the President's power to make recess appointments during those periods was not an issue in the early years. Attorney General Knox's opinion in 1901 relied on the definite article "the" in concluding that only intersession recesses triggered the President's power.[96] Attorney General Daugherty's 1921 opinion took the broader view, relying on the overriding purpose of the Clause, and that position has been followed uniformly since—until *Noel Canning*.[97] Presidents, aware that pushing the broader definition too far could lead to an all-out war with the Senate, have generally used restraint and have not made recess appointments during recesses of less than ten days. Again, there is strong evidence of congressional and judicial concurrence. A 1905 Senate Judiciary Committee Report on recess appointments did not distinguish between the two types of recesses, adopting a practical set of tests as to when the President could make recess appointments—basically defining "session" by whether there was a duty of attendance and whether the Senate had the ability to participate as a body in confirming nominations.[98] That test still appears in the definitive Senate handbook on procedure.[99] Likewise, in the Pay Act Congress conceded the validity of intrasession appointments. Adding to the argument for congressional acquiescence, a 1948 opinion of the Comptroller General, an arm of Congress, acknowledged the propriety of intrasession recess appointments and found that the Pay Act permitted payment to those who are appointed "during periods when the Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date."[100] The first federal court to address the question was the Eleventh Circuit in 2004. In *Evans v. Stephens*,[101] the court upheld an intrasession recess appointment.[102] The point seemed settled until the recent decisions of panels of the D.C., Third, and Fourth Circuits.

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[95] Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1500–01 (2005).

[96] 23 Op. Att'y Gen. 599, 600–01 (1901).

[97] 33 Op. Att'y Gen. 20, 20–22 (1921).

[98] 39 CONG. REC. 3823–24 (1905).

[99] RIDDICK & FRUMIN, *supra* note 89, at 947, 1084.

[100] 28 Comp. Gen. 30, 37 (1948).

[101] 387 F.3d 1220 (11th Cir. 2004).

[102] *Id.* at 1224 (citing United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985)).

This Article cannot do justice to the many scholarly commentaries that have delved into the Framers' original understandings and to the complicated parliamentary issues involved.[103] But it ends this discussion with some general conclusions. First, the text of the Recess Appointments Clause is genuinely ambiguous as to the two phrases discussed above. Second, purely originalist arguments, especially as to the meaning of "recess," are of little usefulness since Congress can and did change its meeting habits over time. Third, intersession and intrasession recesses are functionally identical and cannot logically be treated differently for recess appointment purposes. Fourth, the President, Congress, and the courts have long acquiesced in a practical structure for recess appointments that, while it may be different from that anticipated by the Framers, carries out the purpose of the Clause and balances the prerogatives of both branches. The *Noel Canning* opinion, if upheld on review, would drastically upset that balance and significantly curtail the President's recess appointment power. And if the Supreme Court were also to uphold the validity of the Senate's pro forma session in blocking the President's appointment power, an issue not reached by the panel in *Noel Canning*, the recess appointments power could be extinguished altogether. It is to that issue that we now turn.

B. The Pro Forma Session

As noted above, the efforts of a minority of senators to block any appointment of a director of the CFPB and to cripple the NLRB by denying it a quorum of members came to a head in January 2012 when President Obama made recess appointments in both cases. In this situation, however, the Senate took an additional, and controversial, step to prevent the appointments—it employed so-called pro forma sessions in an effort to nullify the President's recess appointment power.

Pro forma sessions occur when a single senator in the chair gavels the Senate into session, usually for only a few seconds, and then immediately adjourns it without conducting any business. Such sessions are often used in cases where the House has not consented to the Senate's recessing for more than three days, since the Constitution explicitly prevents either house of Congress from recessing for more than three days without the consent of the other. The Senate sometimes uses a pro forma session to extend a weekend recess for the same reason, to permit a cloture vote to ripen, or for other internal parliamentary purposes.[104] The critical question raised by the recess appointments of January 2012 is whether the pro forma session may be used to prevent the President from making such appointments.

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[103] *See, e.g.*, Rappaport, *supra* note 95; Hartnett, *supra* note 71.

[104] Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 18 & n.23 (2012) [hereinafter OLC Memo].

In this case, the motives of the minority in the Senate, particularly in the case of the Cordray nomination, were clear. As noted above, they announced that they would block any nominee to head the CFPB. More generally, twenty GOP senators wrote to the Speaker in May 2011 urging the House to refuse to agree to an adjournment of the Senate for more than three days.[105] In June of 2011, almost eighty House members asked the Speaker to take "all appropriate measures . . . to prevent . . . the Senate from recessing for the remainder of the 112th Congress" to help the Senate minority block recess appointments.[106] These actions raise the interesting question of whether the House was attempting to intrude itself into the appointments process in contravention of the constitutional scheme. At the very least, they show dramatically how the struggle over executive appointments has now escalated beyond anything the Framers might have imagined.

The facts of this particular recess illustrate clearly the artificiality of distinguishing between intersession and intrasession recesses for purposes of recess appointments. The Senate adopted a Unanimous Consent Agreement on December 17, 2011, specifying that it would adjourn at the end of the day, and convene for pro forma sessions only "with no business conducted" every three days until January 23, 2012.[107] Those pro forma sessions included one on January 3, the day established by the XX Amendment for the start of the second session of the 112th Congress. If we take seriously the Senate's assertion that pro forma sessions are valid, there was no intersession recess in this case, the first session ending and the second session beginning simultaneously. But the entire period involved, thirty-seven days, closely resembled a typical intersession recess. The Senate did not adjourn *sine die* in this instance, though the effect is exactly the same as if it had.

The President chose to make his recess appointments after January 3, of course, because that would make them intrasession appointments and the appointees could then serve until the end of the first session of the 113th Congress—almost two years. Had he made the appointments in late December, they would also have been intrasession appointments, but his appointees would only have been able to serve until the end of the new session beginning January 3, 2012, a little over one year. The President made his recess appointments on January 4, 2012, when the Senate was not in either a regular or pro forma session, but either in a three-day or a twenty-day intrasession recess. If the President may validly make recess appointments during a three-day intrasession recess, then the pro forma issue is irrelevant since there is no question that the Senate was in a three-day recess on January 4. If the President may make recess appointments only during intrasession recesses of more than three days, then the validity of the

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[105] *Vitter, DeMint Urge House to Block Controversial Recess Appointments*, VITTER.SENATE.GOV (May 25, 2011), http://www.vitter.senate.gov/newsroom/press/vitter-demint-urge-house-to-block-controversial-recess-appointments.

[106] Letter from Freshman Members of the House of Representatives to House Leadership (June 15, 2011), *available at* http://woodall.house.gov/sites/woodall.house.gov/files/Freshmen%20Recess%20Appointment%20Letter.pdf.

[107] *See supra* note 62.

appointments turns on whether a pro forma session can interrupt a longer intrasession recess. The President asserts, backed by an opinion of the Justice Department's Office of Legal Counsel (OLC),[108] that pro forma sessions are not valid sessions for recess appointment purposes and, therefore, cannot interrupt a longer recess. If this is correct, then he has made an intrasession recess appointment during a twenty-day recess—between the start of the second session of the 112th Congress on January 3 and the end of the Senate's recess on January 23. His assertion of recess appointment power in this case would then be quite conservative, falling well within the recess period during which other presidents in the twentieth century have made intrasession appointments. The OLC opinion, in fact, takes no position on whether the President may make recess appointments during a three-day recess.[109]

Pro forma recesses to prevent recess appointments were first used in 2007 by the Democratic majority in the Senate to block recess appointments by President Bush, and the tactic was successful in that it deterred the President from attempting recess appointments.[110] Unanimous Consent Agreements providing for pro forma sessions explicitly stated that they were for the purpose of preventing recess appointments.[111] It may seem surprising, however, that Majority Leader Reid would use the tactic again against a president of his own party beginning in 2010. The fact that he did may reflect to some extent an aversion to recess appointments even by presidents of one's own party. But in this case the Majority Leader was put under intense pressure by the House and by minority threats in the Senate to hold up other business. Thus pro forma sessions were employed throughout 2010 and 2011.[112] Only frustration over the minority blocking of the functioning of the CFPB and the prospect of a completely powerless NLRB led the President to act in January 2012. Even so, one could view the President's actions as conservative since he only acted on this one occasion and focused only on two cases of clear obstruction of his duty to execute the laws.

On the first question, whether the President may make intrasession recess appointments during a three-day recess of the Senate, there is no judicial precedent, and scholarly opinion is divided.[113] The main argument against such appointments is that the Adjournment Clause demonstrates that the Framers did

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[108] OLC Memo, *supra* note 104, at 1.

[109] OLC Memo, *supra* note 104, at 9 n.13.

[110] DAVID H. CARPENTER ET AL., CONG. RESEARCH SERV., R42323, PRESIDENT OBAMA'S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES 16 (2012).

[111] *Id.*

[112] *Id.*; *see also* HENRY HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 11–12 (2013).

[113] *See, e.g.*, CARPENTER ET AL., *supra* note 110, at 20–21 & n.117–25 (noting that courts may "conclude that recess appointments may only be made during intrasession recesses of more than three days"); Jeff VanDam, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 NW. L. REV. 361, 381–84 (2012) ("While three days is shorter than most recesses during which presidents have made appointments, presidential action to make appointments during a recess of that length is not unprecedented.").

not consider recesses of three days or fewer to be constitutionally significant,[114] and even Attorney General opinions over the years have equivocated on this question. While the two clauses are not related and have different constitutional purposes, they provide a convenient way of establishing a lower limit on the President's power, once it has been established that intrasession recesses can provide opportunities for recess appointments. A powerful argument for recognizing a three-day limit as legally significant is that, as we have noted, it is deeply imbedded in Senate rules and traditions and in the very definition of annual recesses. As a policy matter, the danger of long vacancies in offices has receded as a justification for recess appointments over the years, but allowing them during one- or two-day recesses seems to push that argument dangerously far. Modern presidents have as a practical matter conceded this point by generally not making recess appointments during recesses of less than ten days. A court that upheld the validity of intrasession recess appointments but rejected the validity of pro forma sessions might well decide to leave the question of the lower limit to political accommodation between the Senate and the President.

The OLC memo argues forcefully that a pro forma session of only a few seconds, during which there is no quorum of senators present (and often none other than the chair), is not a session for purposes of interrupting a longer recess because the Senate was not capable of considering and acting on nominations.[115] It rests on the terms of the Unanimous Consent agreement, which state that no business will be conducted, and on the fact that no business was in fact conducted after January 3. It lays particular stress on the 1905 Judiciary Committee definition of when the Senate is in session for purposes of the recess Appointments Clause:

> It was evidently intended by the framers of the Constitution that [the word "recess"] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of Congress*, . . . ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments.[116]

This definition appears in the Senate's official parliamentary manual and has been relied on as its own way of defining a session since 1905.[117] It rests on the common sense idea that the body during a pro forma session is not capable of exercising its advice-and-consent power; since it conducts no business, it cannot debate or vote upon nominations. It also by definition cannot meet the requirement

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[114] *See* Hartnett, *supra* note 71, at 419–21.
[115] *See* OLC Memo, *supra* note 104, at 13–18.
[116] 39 CONG. REC., *supra* note 98, at 3823.
[117] *See* RIDDICK & FRUMIN, *supra* note 89, at 1084.

of the Constitution and of Senate rules that a majority of senators must be present to conduct business.[118] Therefore, pursuant to the purpose of the Recess Appointments Clause, the President may act to prevent harmful official vacancies under his take-care duty.

There are a number of other indicators that pro forma sessions are not real sessions for purposes of recess appointments. They include the senators' habit of referring to the whole period as a recess, and the fact that presidential messages are commonly not laid before the Senate during pro forma sessions but are entered into the Congressional Record only after the end of the whole recess period.[119] Likewise the entire period appears in the official record of the Senate as one recess, not as a series of short three-day recesses. It is true that by subsequent unanimous consent the Senate could conduct business during a pro forma session and that it occasionally does so—for example, passing a bill that had been earlier agreed to or taking some minor administrative action. In this instance, however, the Majority Leader announced explicitly that no business was to be conducted, and no business was actually conducted from January 3 to January 23. It is also true that Senate committees can and do meet during recesses to consider nominations.[120] Logically, however, it should not matter that the Senate could potentially meet and consider a nomination during a pro forma session since that potentiality is also present during any recess. No one has argued that the President's recess appointments power may not be exercised during a six month intersession recess because the Senate could change its mind and come back early to act on a nomination. Such an argument would entirely negate both the letter and the purpose of the Clause. In the end, there is one crucial fact—a quorum of the Senate was not sitting on January 4 to debate and vote on the President's nominees and did not assemble for business until January 23.

The crux of the President's argument, therefore, is that while the Senate could constitutionally preclude any recess appointments by actually remaining in session throughout the year—in the sense that a quorum is present and official business is conducted—it may not block the President's power by pretending to be in session when it is not. The argument seems compelling. If pro forma sessions were valid to block recess appointments during what would otherwise be a recess, then the President's power to make recess appointments even during months-long recesses would be negated, surely disrupting the balance established by the Appointments Clause.

V. CONCLUSION: RESTORING THE BALANCE

We can see now that two sets of developments threaten to bring about a constitutional crisis over the President's appointment of executive officers. On the one hand, internal Senate practices increasingly allow inordinate delay and

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[118] *See* U.S. CONST. art I, § 5.
[119] *See* OLC Memo, *supra* note 104, at 4 & n.5.
[120] *See* RIDDICK & FRUMIN, *supra* note 89, at 404.

obstruction, often by a minority of members and over issues unrelated to the nominee. On the other hand, the President's use of temporary recess appointments to counter such tactics is threatened by narrow court interpretations and pro forma sessions of the Senate. Unless change occurs on one or both of these fronts, the President's duty to execute the laws will be seriously impaired. If Senate parliamentary reforms allow more speedy and orderly disposition of nominees on the merits, then a narrowing of the recess appointments power may not be fatal. Likewise, if the President is granted wide recess appointment power, then Senate obstruction is not as alarming a problem (though it still has serious consequences). Ideally, change should take place on both sides of this crucial equation. We turn, then, to specific steps that can be taken to restore the proper balance between the President's prerogative to staff his administration and take care that the laws are faithfully executed and the Senate's rightful advice-and-consent role. All three branches must participate in a solution.

The Supreme Court has a major opportunity to redress the balance in the struggle over executive appointments, since it will review the D.C. Circuit's *Noel Canning* decision, including the pro forma session issue not reached below.[121] The Court could simply reverse on the grounds that the respective powers of the President and the Senate present a political question unsuited to judicial resolution, but that course is both unlikely and unwise. Genuine textual constitutional issues are involved. Likewise, the Court should reject the argument that the Rulemaking Clause prohibits any judicial challenge to the Senate's recess and adjournment practices. Under the Court's precedents, that is clearly true of rules and practices which involve purely internal workings of the Senate, but not those, like the one-house legislative veto, which affect the workings of the executive branch.[122] The use of a pro forma session solely to avoid triggering the recess appointments power seems clearly in the latter category. So, while the Court could not prohibit the use of pro forma sessions by the Senate, it could hold that such sessions do not interrupt a period of recess for purposes of recess appointments.

The Supreme Court's analysis should begin with a recognition that the original practical purpose of the Recess Appointments Clause in 1789 has become irrelevant in the twenty-first century and indeed started to become irrelevant in the first Congress. There is no longer any danger of federal offices going vacant for long periods because of Congress's meeting schedule. But even in the early years, presidents and senators began acting for political and tactical purposes, changing the original function of the Clause. With the rise of polarizing political parties and the great growth of government, the focus by the mid-nineteenth century was more on instances where the Senate was *reluctant* or *unwilling* to confirm nominees, not where it was *unable* to. Hamilton's comment that the purpose of recess

[121] On a practical level, affirming the version of the Recess Appointments Clause espoused by the *Noel Canning* panel could invalidate literally thousands of decisions made by the hundreds of officials serving through recess appointments over many years.

[122] The key case on the Rulemaking Clause is *United States v. Ballin*, 144 U.S. 1 (1892). I have discussed this issue at length in earlier articles. *See, e.g.*, Roberts, *supra* note 85, at 528–41.

appointments was to allow the President to make appointments to his administration where "the general method was inadequate"[123] should now be viewed in a new light—the method is inadequate today not because the Senate is absent for long periods during the year, but because mindless obstructionism has prevented the regular appointments process from working as it was intended. Moreover, the advice-and-consent power was effectively wielded over the past several years by a minority in the Senate, something the Framers surely would not have countenanced.

Both the President and the Senate have acted in ways arguably divergent from the original intent, often in reaction to moves by the other. But the overriding purpose of the Recess Appointments Clause is still the touchstone—efficient functioning of the executive branch and fulfillment of the President's duty of executing the laws passed by Congress. Thus recent Senate efforts to thwart the Treasury's regulation of banks in the financial crisis, its effort to strangle the CFPB by refusing to confirm any director, and its complete crippling of the NLRB, present the same dangers to efficient government as did the Senate's absence from Washington for nine months in 1790.

To those who might argue that the broader reinterpretation of the Recess Appointments Clause is an impermissible revision of the constitutional text, I would point out that the Senate has already accomplished such a revision of its confirmation power by adopting rules and practices that allow a minority of senators to block the majority from confirming nominations. Fair is fair—the President should also be allowed some increased latitude on recess appointments to compensate. Some might assert, nonetheless, that the Supreme Court should not participate in such a clear change in the constitutional order. But despite our reverence for the document, the Court has sanctioned or created a number of fundamental changes since the founding. Perhaps most important, it has approved the transfer to executive offices and independent agencies of the power to create binding legislative rules and to adjudicate cases involving private parties.[124] Without this modification of the traditional three-branch governmental structure, the administrative state as we know it would be impossible. The Court has also allowed a substantial diminution of the Senate's power to approve treaties by allowing the President to enter into executive agreements having the same legal effect[125] and approving presidential power to terminate treaties without Senate approval.[126] Likewise, it has allowed the President to exercise quasi-legislative powers directly through executive orders.[127] The Court has even reinterpreted

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[123] THE FEDERALIST NO. 67 (Alexander Hamilton).

[124] For a succinct summary of this much-discussed point, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 327–31 (3d ed. 2006).

[125] *See* United States v. Belmont, 301 U.S. 324, 330–31 (1937).

[126] To be more precise, the Court held in *Goldwater v. Carter* that the President's power to abrogate a treaty was a nonjusticiable political question left to be worked out by the political branches. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

[127] *See* PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS 88–89 (1988).

constitutional text to virtually eliminate the President's pocket veto power. The list is a long one, but suffice it to say that there is ample precedent for recognizing that the Recess Appointments Clause has changed drastically since 1789 in practical operation, but still retains its crucial importance in the Constitution.

Where can the Court look for guidance in interpreting the Recess Appointments Clause so that it functions effectively in the twenty-first century? The closest analogy is probably the federal court decisions on the Constitution's pocket veto provision. The Supreme Court in *Wright v. United States*[128] and the D.C. Circuit in *Kennedy v. Sampson*[129] confronted the question of when the Senate has prevented the return of a bill under the veto provisions of the Constitution. Those courts found that though the Senate was not in session during the time the President would have to have returned a bill to exercise his veto, it had not prevented the return because it had appointed an officer to receive presidential communications and the Senate's administrative offices were open and functioning. Their holdings would seem at first blush to support the Senate's argument that pro forma sessions can be effective in negating the recess appointment power. But a closer analysis reveals something else. The crucial act in question in these cases was merely the notification by the President of his veto. No Senate action was required, and it had an indefinite time to exercise its power, along with the House, to override the veto. The Court's pragmatic approach, emphasizing the fact that many Senate functions, such as receiving messages, could be performed by designated staff, effectively modernized the constitutional provision. Applying the same reasoning to the pro forma session, the Court would have to recognize that the acts needing to be performed are debate and vote on the nomination, which require the Senate to be in an actual session. Following its functional approach, it would ask whether the Senate could perform the function required and would find that it could not. Thus, as the OLC memo supporting President Obama's recess appointments argues, a pro forma session sufficient to negate the President's pocket veto might well be insufficient to prevent a recess appointment.[130]

A closer analogy for the Court to use is the line of cases involving the President's removal of federal officers. After experimenting with dividing appointees into different categories to determine whether the Senate could restrict the President's removal power, the Court in *Morrison v. Olson*[131] settled on a more amorphous functional test—such restrictions were not constitutional if they impaired the ability of the President to execute the laws or "disrupt[] the balance between the coordinate branches."[132] This line of cases could well support an analysis by the Court that placed prime emphasis on the ability of the President to

[128] 302 U.S. 583 (1938).
[129] 511 F.2d 430 (D.C. Cir. 1974).
[130] *See* OLC Memo, *supra* note 104, at 22–23.
[131] 487 U.S. 654 (1988).
[132] *Id.* at 695.

carry out the laws and the need to preserve the recess appointment power in its modern form.

The Court's seminal decision in *INS v. Chadha*[133] should also figure in its analysis of issues under the Recess Appointments Clause. There the Court resoundingly rejected a one-house legislative veto of an executive action because it had the effect of legislation while not following the constitutional requirements of passage by both houses and presentment to the President.[134] Some may argue that the Court's rejection of the arguments that one-house vetoes in statutes were acquiesced in by both branches, and had existed in great numbers for some time, will lead the Court to reject the importance of historical practice which is arguably at odds with the text of the Recess Appointments Clause. But there are several important differences. First, legislative vetoes, while numerous, were seldom used and could not be seen as a crucial issue in relations between the President and Congress. Second, there was no textual ambiguity in *Chadha* while there is in this case. Third, acquiescence by both branches is much clearer in the recess appointments case. Fourth, the historical practice on the textual issues, bolstered by court decisions, was of a much longer duration—since 1823 on one and at least 1921 on another. Finally, the legislative veto went to the very heart of the enactment process, which is a key element in the carefully balanced democratic policy-making process created by the Constitution. The Appointments Clause is clearly an area of shared power, like the War Power, and some ambiguity and accommodation between the branches is to be expected. The most important lesson of *Chadha* is directly relevant to the issues presented by *Noel Canning* and senatorial efforts to stifle the recess appointments power. The underlying teaching of *Chadha* is that Congress's role is to pass laws and the President's is to carry out the laws—the one-house veto gave one house of the Congress the power to participate in the execution of the laws passed by Congress. Yet that is exactly what the Senate has attempted to do when in the current controversies involving the CFPB, the NLRB, and Treasury policies during the financial crisis. Even worse, the current situation allows a minority in the Senate, because of that body's peculiar rules and traditions, to exercise the advice-and-consent power in an unconstitutional manner.

The Court should recognize that the narrow holdings of the *Noel Canning* panel and the Senate's recent use of pro forma sessions for the sole purpose of blocking recess appointments have created a dangerous imbalance in the continuing struggle over executive appointments. Accordingly, it should adopt the broader approach to the textual issues taken by the circuits in *Evans v. Stephens*, *United States v. Woodley*,[135] and *United States v. Allocco*.[136] Based on the textual ambiguity, historical practice acquiesced in by the branches, and most importantly on the overriding goal of the recess appointments clause, the Supreme Court

[133] 462 U.S. 919 (1983).
[134] *See id.* at 957–59.
[135] 751 F.2d 1008 (9th Cir. 1985).
[136] 305 F.2d 704 (2d Cir. 1962).

should hold that recess appointments can be made during both intersession and intrasession recesses and that the vacancies involved need not have occurred during the recess. It should recognize that there is no functional difference between the two and that the Framers did not anticipate the emergence of two different types of recesses.

A much more difficult question is how to resolve the question of whether there is a lower limit to the length of a recess during which a president may make an appointment. The Court could simply leave that question to the President and Congress as a matter of political accommodation, like the current unofficial limit of ten days. But it would be far better if the Court gave the parties some guidance on this point as well. It could start by recognizing the established distinction in the Senate's own rules and traditions between daily recesses—overnight and over a weekend, for example—and annual recesses, which are breaks in the annual session itself. That would make it clear that the President could not make recess appointments at midnight between daily sessions of the Senate. It could, as many commentators have done, draw on the Adjournment Clause to hold that recesses of less than three days, since they require approval of the other House, are not constitutionally significant, and thus may not be used to make a recess appointment. The logic connecting the two clauses is questionable, but in fact the three days is significant in Senate rules and practices distinguishing between daily and annual recesses. It has the advantage of setting a reasonable lower limit, and one that few presidents have tried to breach.

On the issue of pro forma sessions, I would suggest it set a clear guideline that brings the Quorum Clause of the Constitution and Senate practice into play by holding that the recess appointment power is triggered when the Senate fails to convene a quorum (a majority of its members) or perform any official business for four consecutive calendar days, Sundays not included. Therefore, the Senate could nullify the recess appointment power if it stayed in actual session at all times (a practical impossibility), but it could not do so by pretending to be in session when it is not.

Supreme Court action to clarify definitively the crucial constitutional issues, however, will not be enough to restore balance to the process of executive appointments. The Senate and the President should also consider entering into an agreement, embodied either in rules or in a Sense of the Senate Resolution, and a formal presidential statement, that codifies best practices in the appointments process. The agreement must be balanced, with each side receding from some of the practices that have aggravated the relationship. As this Article was being prepared for publication, the Senate, in a truly historic moment, amended its rules by majority vote to curtail the filibuster.[137] It eliminated the sixty-vote requirement for confirmation of executive officers and judges other than Justices of the Supreme Court. It is too early to assess the long-term effect of this change, which

[137] *See supra* note 70. I discuss the constitutional arguments in favor of the nuclear option in John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189 (2013).

has been threatened often by both parties. Nominations can theoretically move faster, though the minority still has many tools for delaying votes because of the complexity of Senate rules and traditions, and may now have special motivation to use them aggressively.[138] Only time will tell whether traditions like holds and senatorial courtesy will be preserved.[139] Future Senate majorities will be freer to make further changes in the confirmation rules. Moreover, it is important to note that filibuster reform does not help a president who faces a hostile Senate majority of the other party; there recess appointments are a vital tool.

The Senate should still adopt requirements for the efficient handling of executive nominations. I would suggest that committees be required to report nominations within a set time, perhaps three months, and that floor votes be required within a set time thereafter, perhaps one month. The Senate should also agree not to manipulate its convening and adjournment practices, as it tried to do with pro forma sessions, for the sole purpose of blocking recess appointments. These changes and commitments would be contingent on the President's pledge to limit certain of her recess appointment options. These could include a commitment not to make a recess appointment of a person unless he or she had earlier been nominated for the same position and nominated at least four months before a recess appointment is made. The President should also commit to informing the Senate in writing of her intention to make a recess appointment at least thirty days before a recess, though that could turn out to be difficult. She could also pledge not to make a recess appointment in cases where the Senate has rejected the person in question for the same office after a floor vote governed by simple majority rule. Finally, the President might well want to reiterate her commitment not to make recess appointments during recesses of fewer than ten days. It would also be wise for the President to improve the process of vetting nominees after each election and for the Congress to provide additional funds to staff such personnel operations.[140]

If the Supreme Court were to clarify the constitutional issues, and the two branches would adhere to a series of sensible guidelines, the current crisis in the executive appointments process could be eased. The President would still be able to make recess appointments when the Senate refused to act or attempted to use the appointments process for improper or irrelevant ends. The Senate's advice-and-consent function would be strengthened because recess appointment would usually not be necessary. Within the Senate, the proper role of majority rule would be restored in this area, as the Framers undoubtedly intended.

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[138] *See* Jonathan Weisman, *Partisan Fever in Senate Likely to Rise*, N.Y. TIMES (Nov. 21, 2013), http://www.nytimes.com/2013/11/22/us/politics/a-move-years-in-the-making-with-lasting-ramifications.html?_r=0.

[139] *See* Niels Lesniewski, *Uncertain 'Nuclear' Fallout in Senate*, ROLL CALL (Nov. 25, 2013, 2:49 PM), http://blogs.rollcall.com/wgdb/uncertain-nuclear-fallout-in-senate/.

[140] *See* Terry Sullivan, *Reducing the Adversarial Burden on Presidential Appointees: Feasible Strategies for Fixing the Presidential Appointments Process*, PUB. ADMIN. REV. 1124, 1124–35 (2009).

Preserving the President's ability to act decisively in executing the laws and carrying out the policies on which he or she was elected is even more important now when the Congress is in such disarray. A combination of political polarization, intensely partisan tactics, and antiquated rules has made it nearly impossible for the Congress to address legislatively the important issues now facing the country. Though there is admittedly some danger in excessive presidential power, modern chief executives have successfully resorted to administrative action as a substitute for legislation when urgent action is required. Narrowing or destroying the recess appointment power could have the effect of spreading the contagion of inaction from the legislative to the executive branch, to the ultimate detriment of the country.