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THE KILL SWITCH: THE NEW BATTLE OVER PRESIDENTIAL RECESS APPOINTMENTS

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ABSTRACT—Presidential recess appointments have strained relations between Congress and the Executive Branch since the Administration of George Washington. But in 2007, Congress began using a procedure to prevent such appointments from happening at all. By sending one member to stand in front of an empty chamber while the rest of the Senate took vacation, Congress claimed it was in "pro forma" session, not at recess, and that the President could therefore not make recess appointments. While Presidents Bush and Obama acquiesced to this tactic and declined to make appointments during such pro forma sessions, Obama changed course in early 2012. In so doing, this Comment argues, Obama's appointments were on solid constitutional footing. Not only did the pro forma sessions deactivate an enumerated power of the President, but they did so by explicitly involving the House of Representatives in the appointments process, an event the Framers specifically sought to guard against. Indeed, by putting an end to recesses (and thus recess appointments), Congress defied a procedural assumption of the Framers written into the Constitution and practiced by legislatures for millennia. From a policy standpoint, blocking presidential appointments perpetuated a harmful glut of unfilled offices, but was in some cases self-defeating. The President, through the Appointments Act, has the power to fill certain positions with acting heads who carry out his policy goals.

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INTRODUCTION

On the morning of January 23, 2012, just after most senators were returning from a month-long vacation away from Washington, Senator Chuck Grassley, a straight-talking seventy-eight-year-old farmer from Iowa, took the floor of the Senate with a blistering attack. The message: during the Senate's holiday recess, President Barack Obama had orchestrated a power grab unprecedented in the annals of Congress.[1] In making four recess appointments to executive branch positions earlier that month, Obama had become, Grassley said, nothing less than a king.[2] He had shed constitutional limits on his powers, becoming the reviled monarch that the Constitution sought to replace.[3]

These were serious charges, to be sure, but Grassley was not alone. Nearly the entire Republican cohort in the Senate vilified the President's decision to "arrogantly cast[] aside our Constitution," an action straight out

[1] 158 CONG. REC. S24 (daily ed. Jan. 23, 2012).

[2] *Id.* at S25.

[3] *Id.* Grassley went on to promise that the Office of Legal Counsel attorney who had written a memo defending the recess appointments would never again receive Senate confirmation; his hometown paper described the speech as an "explo[sion] [of] outrage." Editorial, *Grassley Personal Attack Went Too Far*, DES MOINES REG., Jan. 31, 2012, at 6A.

of "the monarchies of Western Europe."[4] January 4, 2012, the day of the appointments, was a national disaster—"a day that will live on in infamy."[5] Thirty-nine senators signed an open letter promising to serve as amici curiae to a pending legal claim against the appointments.[6] And at a hearing with one of Obama's recess picks, one senator actually stayed home in protest,[7] while others assured the appointee that nothing he did in office would ever be upheld.[8]

Angry senators have been a time-honored accompaniment to most presidents' recess appointments, from George Washington to Theodore Roosevelt to George W. Bush. Presidents have used the power, set forth explicitly in Article II,[9] to appoint federal officers ranging from army officers[10] to Justices of the Supreme Court[11] while the Senate is on vacation. Yet the anger that surrounded Obama's own recess appointments in 2012 reached a new level for one reason: this time, the Senate claimed it had never actually been at recess.

Instead, during the chamber's latest break, one senator briefly stood guard over the chamber once every three days—one time for forty-one seconds,[12] another for twenty-nine seconds.[13] In parliamentary terms, these legislators were keeping the Senate in "pro forma" session, thus preventing

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[4] Seung Min Kim, *Republicans Join Challenge of Recess Appointments*, POLITICO (Feb. 3, 2012, 1:37 PM), http://www.politico.com/news/stories/0212/72422.html (quoting Sen. John Cornyn).

[5] Felicia Sonmez, *Mike Lee on Obama Recess Appointments: A 'Day of Infamy*,*'* WASH. POST (Feb. 1, 2012, 3:02 PM), http://www.washingtonpost.com/blogs/2chambers/post/mike-lee-on-obama-recess-appointments-a-day-of-infamy/2012/02/01/gIQAxozJiQ_blog.html (quoting Sen. Mike Lee).

[6] Open Letter from Thirty-Nine Members of the U.S. Senate (Feb. 3, 2012), *available at* http://images.politico.com/global/2012/02/senate_gop_amicus_intent_letter_3_feb_12.pdf.

[7] *See* Peter Schroeder, *Republican Lawmakers Begin Pushback Against Obama Recess Appointments*, THE HILL (Jan. 29, 2012, 8:16 PM), http://thehill.com/blogs/on-the-money/1007-other/207277-republican-lawmakers-begin-pushback-against-obama-recess-appointments- (quoting Sen. Roger Wicker: "I will not provide the administration with the appearance of legitimacy in this action, and I will therefore not be in attendance at next Tuesday's hearing.").

[8] Jim Puzzanghera, *GOP: Cordray's Appointment Invalid*, L.A. TIMES, Feb. 1, 2012, at B2 (statement of Sen. Mike Johanns to Consumer Financial Protection Bureau Director Richard Cordray).

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

[10] *See Special Session Is Merged Into Regular*, N.Y. TIMES, Dec. 8, 1903, at 1 [hereinafter *Special Session*] (detailing President Theodore Roosevelt's recess appointment of 168 army officers during momentary recess of Congress).

[11] *See* Henry B. Hogue, The Law: *Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 660–61 (2004) (describing recess appointments of twelve Supreme Court Justices). The practice of recess-appointing Supreme Court Justices was not limited to early America; Chief Justice Earl Warren and Justices William Brennan and Potter Stewart received their initial appointments from President Eisenhower during Senate recesses. *See* Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1677–78 (2011).

[12] 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

[13] *Id.* at S3 (daily ed. Jan. 6, 2012).

the President from making any recess appointments whatsoever.[14] While both George W. Bush and Obama had previously acquiesced to this tactic,[15] the Obama Administration in 2012 determined that the Senate was, in fact, bluffing.[16] Obama's four appointments included the director of the Consumer Financial Protection Bureau (CFPB), a new agency, as well as three members of the National Labor Relations Board (NLRB), which would not otherwise have been able to issue binding decisions.[17]

Though it first appeared as a means of blocking appointments in 2007, the pro forma session—or, as at least one member of Congress called it publicly, the "kill switch"[18]—quickly became relied upon by both parties as a weapon against disfavored potential recess appointees.[19] Yet Obama's appointments in early 2012 changed that, and opponents of the move in legal circles have charged the President with abusing the separation of powers by deciding for himself whether the Senate was at recess.[20] These opponents claim that parties who seek to challenge decisions of the agencies headed by recess appointees will likely find success in court.[21] The reality, however, may not play out so cleanly.

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[14] *Id.* at S24 (daily ed. Jan. 23, 2012) (statement of Sen. Grassley: "[T]he Senate has been holding sessions every 3 days. It did so precisely to prevent the President from making recess appointments.").

[15] *See* Charlie Savage, *Obama Tempts Fight over Recess Appointments*, N.Y. TIMES CAUCUS (Jan. 4, 2012, 4:34 PM), http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments (positing that the 2012 appointments were "an unprecedented legal step that brought into sharper focus a recent bipartisan struggle over presidential power").

[16] *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. (Jan. 6, 2012) [hereinafter Lawfulness of Recess Appointments], *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

[17] Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1 (late edition). For the Supreme Court's decision that the NLRB must have three members to issue decisions, see New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2644 (2010).

[18] *See* Press Release, U.S. Congressman Jeff Landry, Landry Presides Over House, Blocks Recess Appointments (July 1, 2011), *available at* http://landry.house.gov/press-release/landry-presides-over-house-blocks-recess-appointments (describing the "kill switch" as "a provision the Founding Fathers gave the House to utilize when the Senate's advice and consent is being circumvented by a hostile Administration").

[19] *See* Steven G. Bradbury & John P. Elwood, *Recess Is Canceled: President Obama Should Call the Senate's Bluff*, WASH. POST, Oct. 15, 2010, at A19 (noting that pro forma sessions "will inevitably become the standard operating procedure, and the recess appointment power could become a virtual dead letter").

[20] *See, e.g.*, Richard Epstein, *The Constitution Is Clear on Recess Appointments*, RICOCHET (Jan. 4, 2012, 3:52 PM), http://ricochet.com/main-feed/The-Constitution-Is-Clear-On-Recess-Appointments.

[21] *See, e.g.*, John Yoo, *Richard Cordray & the Use and Abuse of Executive Power*, NAT'L REV. ONLINE CORNER (Jan. 5, 2012, 10:59 AM), http://www.nationalreview.com/corner/287264/richard-cordray-use-and-abuse-executive-power-john-yoo. On the opposite end of the spectrum, proponents of the appointments have predicted their defense in court will be a "slam-dunk." *See, e.g.*, Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25. Others have opined that courts could go "either way." *See, e.g.*, Alexander Bolton, *Obama's Recess Appointments Might Not Hold Up in Court*, THE HILL (Jan. 18, 2012, 5:00 AM), http://thehill.com/homenews/administration/204731-recess-appointments-might-not-hold- (quoting Professor Charles Fried).

The recess appointments of 2012 may have occurred while the Senate had not formally declared a recess. But as this Comment will argue, they were nonetheless constitutional—and also prudent. As employed by the President, the recess appointments interrupted an unconstitutional congressional practice that appeared regularly since 2007. During that time, both the Senate and later the House employed the pro forma session in a manner that did not comport with the Framers' intent or with modern policy realities that infuse the appointments process. Not only did the sessions nullify an enumerated power of the Executive, but they also involved the House in the appointments process, which is strictly the province of the President and Senate. Further, pro forma sessions essentially eliminated the recess, violating an assumption of the Framers who wrote recesses into the Constitution.

Part I of this Comment will explore the historical antecedents of the recess of the American Congress and of the recess appointment power, as well as examine the evolution of both from procedural convenience to strategic weapon. In Part II, this Comment will examine arguments for and against the constitutionality of President Obama's 2012 recess appointments, concluding that they were constitutionally valid. Part III will go further to examine whether the pro forma sessions intended to block those appointments were constitutional in their own right, concluding they were not. And in Part IV, this Comment will analyze policy implications of the pro forma session and of the President's recess appointments, observing both the problem of crucial federal offices remaining unfilled and the negligible strategic effect that obstructionist pro forma sessions actually possess.

These arguments seek to clarify a debate that has already sparked a vigorous back-and-forth in the legal community. But clarity on this question is also critical for its legal resolution. That this year's recess appointments will be challenged is not in question; they already have been. In September 2012, forty-two Republican senators made good on their promise to fight the appointments in court, filing an amicus brief in a canning company's suit challenging the constitutionality of Obama's recess appointments to the NLRB.[22] Three months earlier, a Texas bank sued the CFPB itself, challenging the agency's "unconstitutional formation and operation" due in part to Obama's "refusing to secure the Senate's advice and consent" in recess appointing the CFPB's director.[23] And in Washington, a district judge

[22] *See* Brief for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the United States Senate in Support of Petitioner/Cross-Respondent Noel Canning, Noel Canning v. NLRB, Nos. 12-1115, 12-1153 (D.C. Cir. Sept. 26, 2012). Speaker of the House John Boehner filed an amicus brief of his own as well. Amicus Curiae Brief of the Speaker of the United States House of Representatives, John Boehner, in Support of Petitioner, Noel Canning v. NLRB, Nos. 12-1115, 12-1153 (D.C. Cir. Sept. 26, 2012).

[23] Complaint for Declaratory and Injunctive Relief at 3–4, State Natl'l Bank of Big Spring v. Geithner, No. 12-cv-01032, 2012 WL 2365284 (D.D.C. June 21, 2012).

in early 2012 dismissed a similar argument about the NLRB's board members because the NLRB decision in question occurred "well before the recess appointments were announced."[24]

Given the status quo result of the November 2012 election—with President Obama returned to office, and the House and Senate retaining the same majorities—further skirmishes are possible. Each action of the CFPB under Richard Cordray and the NLRB with its new membership is subject to challenge by those affected. And as it was pointed out on the day of Obama's reelection, Cordray's recess appointment expires in 2013, portending another fight over an appointment for his position.[25] A workable defense of the appointments on the merits will assist in deciding inevitable criticisms of the appointments in the coming years.

I. THE RECESS AND THE RECESS APPOINTMENT

A. Historical Antecedents

The idea of legislative recess did not originate with the United States Congress. The Roman Senate typically took a recess starting in late spring, known as the *senatus discessus*. Only on these breaks, which were discussed by Cicero, "could a senator enjoy a connected holiday of any length."[26] While the houses of the English Parliament have always adjourned frequently, the decision to adjourn was sometimes not by choice, as the King often prorogued (or temporarily halted) parliamentary proceedings.[27] Four hundred years ago, the houses of Parliament sought permission from the King to take their traditional recesses, and permission was not always given.[28] But the practice of voluntary holiday breaks in

[24] Nat'l Ass'n of Mfrs. v. NLRB, Civ. Action No. 11-1629 (ABJ), 2012 U.S. Dist. LEXIS 128436, at *4 (D.D.C. Mar. 2, 2012). The decision has been appealed. Steve L. Hernández, *Employer Associations Appeal District Court NLRB Posting Decision*, LEXOLOGY (Mar. 6, 2012), http://www.lexology.com/library/detail.aspx?g=2b1ab9f9-cc5c-44d9-b1a0-1fde7034899a.

[25] *See* Kevin Wack, *What Obama's Victory Means for Banks*, AM. BANKER (Nov. 6, 2012, 11:36 PM), http://www.americanbanker.com/issues/177_215/what-obama-s-victory-means-for-banks-1054189-1.html?zkPrintable=true. As this Comment went to press, the first appellate arguments over the recess appointments were being held. In the Seventh Circuit, Judge Ann Claire Williams appeared skeptical of the Senate's contention that it was not at recess. "Isn't the Senate having its cake and eating it too?" she asked. Andrew Harris, *Obama Recess Appointments Face First Appeals Court Test*, BLOOMBERG (Nov. 30, 2012, 2:39 PM), http://www.bloomberg.com/news/2012-11-30/obama-recess-appointments-face-first-appeals-court-test.html.

[26] JOHN H. D'ARMS, ROMANS ON THE BAY OF NAPLES: A SOCIAL AND CULTURAL STUDY OF THE VILLAS AND THEIR OWNERS FROM 150 B.C. TO A.D. 400, at 48–49 (1970).

[27] 2 JOSEF REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 65–67 (A. Earnest Steinthal trans., 1903).

[28] On April 10, 1628, for example, the House of Commons asked King Charles I, "with his gracious Favour," to grant an Easter recess; later that day, the King's secretary reported that "his Majesty, for many weighty Reasons, desireth there may be no Recess." 1 H.C. JOUR. 881 (Apr. 10, 1628), *available at* http://www.british-history.ac.uk/report.aspx?compid=3704&strquery=recess.

Parliament was well established before the American Revolution. In 1770, for example, the House of Lords voted to adjourn on December 21, and returned to London in time to hold sessions during the last few days of January the following year.[29]

In America, the Continental Congress broke frequently as it moved around the country during the lead-in to the Revolutionary War, staying ahead of potential danger surrounding its activities.[30] The body took few long recesses, perhaps owing to the urgency of its task managing the new country and its war, but after the completion of hostilities, it did manage to take a holiday vacation.[31] After 1789, recesses were more frequent and lasted much longer.[32] The state legislatures took generous breaks as well. In December 1778, its work complete for the year, the Virginia House of Delegates took a recess of over four months; members were instructed to meet with their constituents during the break and gain their approval for a pay raise.[33] In Colonial Era Massachusetts, the House of Representatives held three sessions each year, with breaks of a few months between each.[34]

Just as Congress did not come up with the idea of taking pronounced legislative breaks, it also did not originate the practice of tapping an actor to execute its duties while members are away. In England, the House of Commons was permitted to grant large sums for the King's use during an upcoming recess if the House feared that war would break out at that time.[35] Likewise, as Blackstone noted, if the House of Lords was away at recess and could not perform its duty as a supreme court of appeal, a tribunal of nobles, appointed with every new Parliament, was empowered to serve in its place.[36] Finally, if Parliament was in recess "upwards of twenty days" when a vacancy occurred among its members, the Speaker of the House of

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[29] 33 H.L. JOUR. 35–37 (Dec. 21, 1770).

[30] 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 754–55 (Worthington Chauncey Ford ed., 1907) (entry for Sept. 18, 1777, referring to a letter from a Revolutionary Army colonel that "intimated the necessity of Congress removing immediately from Philadelphia"; the body met again nine days later in Lancaster, Pennsylvania).

[31] 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 710 (Gaillard Hunt ed., 1928) (adjourning on Dec. 24, 1784, for eighteen days); 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1 (John C. Fitzpatrick ed., 1933) (resuming business on Jan. 11, 1785).

[32] *See infra* Part I.B.

[33] *See* 1778 JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 123, 129 (Richmond, Thomas W. White 1827).

[34] *See, e.g.*, JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1721–1722 (1922); JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1764–1765 (1971).

[35] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 209 n.32 (Thomas M. Cooley ed., Chi., Callaghan & Cockcroft 1871) [hereinafter BLACKSTONE (Cooley ed.)].

[36] 3 WILLIAM BLACKSTONE, COMMENTARIES *56–57. The tribunal comprised one prelate, two earls, and two barons. *Id.* at *57.

Commons was directed by statute to make arrangements for a special election.[37]

The theme continued in the Colonies. When members of the Continental Congress traveled during the Revolutionary War, they assigned General George Washington "full power" to execute combat operations.[38] Similarly, the Articles of Confederation made provisions for what was to occur when Congress was at recess and could not perform its duties. The Articles called for a "Committee of the States,"[39] which could, during a recess, execute "such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with."[40] The committee was the brainchild of Thomas Jefferson, who saw the need for a body "during vacations of Congress" that could "superintend the executive business."[41] Yet Jefferson watched the committee crumble; he wrote in his autobiography that its members "quarrelled very soon, split into two parties, abandoned their post, and left the government without any visible head, until the next meeting in Congress."[42] Still, the outcome was not all bad; it helped convince Jefferson that a unitary executive, or a "single Arbiter," was necessary for effective government.[43]

B. The Recess Appointment in History

1. Founding Principles.—Despite their antecedents in British and American history, recess appointments received little mention during the Founding Era. After the regular Appointments Clause[44] was adopted during the Convention of 1787, an action that engendered some debate,[45] a North Carolinian named Richard Dobbs Spaight made a motion to adopt the

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[37] 1 BLACKSTONE (Cooley ed.), *supra* note 35, at 115 n.40. The Speaker could also issue a writ for a new election during a recess of any fellow member who had been declared bankrupt. *Id.* at 116 n.41.

[38] 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 30, at 1027 (1906) (declaration of Dec. 12, 1776).

[39] ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 ("The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress . . . .").

[40] *Id.* art. X.

[41] THOMAS JEFFERSON, *The Autobiography of Thomas Jefferson*, *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 7, 53–54 (Adrienne Koch & William Peden eds., 2004).

[42] *Id. at* 54.

[43] *Id.*

[44] U.S. CONST. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . .").

[45] *See* JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 680–81 (photo. reprint 2003) (E.H. Scott ed., Chi., Scott, Foresman & Co. spec. ed. 1898) (debate of Sept. 7, 1787). George Wilson, for example, wanted to exclude the legislature altogether from the appointments process; Charles Pinckney argued that the Senate should be involved only in appointing ambassadors, in which the President should have no say at all. *Id.*

language of the Recess Appointments Clause as it stands today.[46] The language was accepted unanimously and apparently without debate.[47] The Clause's language closely followed that of the North Carolina constitution,[48] and the reasoning for accepting it was not discussed. One explanation, provided by Justice Story, was that the Framers' decision to allow recess appointments was "so obvious that it can require no elucidation," because without them, "the Senate should be perpetually in session, in order to provide for the appointment of officers."[49] That option "would have been at once burdensome to the Senate and expensive to the public," and so recess appointments were permitted in the pursuit of "convenience, promptitude of action, and general security."[50]

Justice Story's point makes sense, because in the beginning, the recess of the Senate was long—sometimes longer than the actual session itself. Even before the Senate first convened, the Framers were likely aware of the hardship of travel to Washington from most states. Therefore, as Hamilton observed, "it would have been improper to oblige this body to be continually in session for the appointment of officers."[51] While the Senate's first recess, in 1789, was just over three months,[52] subsequent recesses in the next several sessions of Congress ranged from four months[53] to nine.[54]

In fact, prior to the twentieth century, the Senate averaged fewer than six months of active duty each year.[55] The prospect of leaving open vital executive offices, such as that of Secretary of War, was considered potentially dangerous, just as reconvening the Senate whenever an appointment was necessary would be costly.[56] During all other times, the President could "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" only with the "Advice and Consent of the Senate."[57] Thus, even though

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[46] *Id.* at 681–82.

[47] *Id.*

[48] Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1770–72 & n.71 (1984).

[49] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1557, at 380 (photo. reprint 1994) (Melville M. Bigelow ed., Bos., Little, Brown, & Co. 5th ed. 1891).

[50] *Id.*

[51] THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[52] 1 ANNALS OF CONG. 94 (1789) (Joseph Gales ed., 1834).

[53] *Id.* at 1036 (1790) (noting adjournment of Congress from August to December).

[54] 3 ANNALS OF CONG. 668 (1793) (noting adjournment *sine die* on March 4, 1793); 4 ANNALS OF CONG. 9 (1793) (noting commencement of new session of Senate on Dec. 2, 1793).

[55] HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001–OCTOBER 31, 2008, at 5 (2008).

[56] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498–99 (2005).

[57] U.S. CONST. art. II, § 2, cl. 2.

practically nothing was said when the Convention adopted the Recess Appointments Clause, evidence suggests that it was intended to allow the President to act unilaterally on appointments when the Senate was unable to advise and consent.

This intention was tested immediately, as George Washington made the first recess appointments during the three-month break between the first and second sessions of Congress.[58] Certain officers that President Washington had nominated (and that the Senate had confirmed) declined to serve.[59] When the Senate returned, Washington wrote its members a polite letter informing them that, "agreeably to the Constitution," he had appointed four individuals to fill those spots during the recess: three district judges, and also a replacement for John Marshall, who had turned down the job of U.S. Attorney for Virginia.[60] Washington's successors continued the practice. John Adams, for example, made 21 recess appointments between the Fifth and Sixth Congresses.[61] Just over 2 years later, Thomas Jefferson managed to appoint 120 officers during a single Senate recess, including 30 judges in the newly created courts for the District of Columbia and replacements for others who had died, resigned, declined, or been promoted.[62]

Not all of these appointments were without controversy. President Washington was the first to find that failure to involve the Senate in the appointment of a major government officer comes with drawbacks. During a recess in 1795, Washington appointed John Rutledge to be Chief Justice of the Supreme Court.[63] Yet in a rare rebuff to a president of "transcendent status,"[64] the Senate refused to confirm Rutledge during its next session, requiring him to leave office.[65] The reason, it seemed, was political, as Rutledge had made a speech against the Jay Treaty with the British.[66] The conflict was a portent, albeit a small one, of the prolonged battle over recess appointments to come.

2. Modern Warfare.—The modern conception of the recess appointment as an alternative to advice and consent may have originated with Theodore Roosevelt.[67] In December 1903, Roosevelt needed a way to

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[58] *See* JOURNAL OF THE FIRST SESSION OF THE SENATE 38 (Washington, Gales & Seaton 1820) (proceedings of Feb. 9, 1790).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 325–26 (proceedings of Dec. 5, 1799).

[62] *Id.* at 400–04 (proceedings of Jan. 6, 1802).

[63] Curtis, *supra* note 48, at 1775–76.

[64] JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 147 (2004).

[65] Motz, *supra* note 11, at 1671.

[66] *Id.*

[67] The Senate does, however, have a history of rejecting recipients of presidential recess appointments who are then nominated for confirmation through normal means. *See generally* Louis C.

reappoint Dr. William D. Crum, an African-American, as Collector of Customs in Charleston, South Carolina.[68] Roosevelt and his Secretary of War, Elihu Root, did not want to face the wrath of Southern Democrats who opposed Crum's tenure—particularly South Carolina Senator Benjamin R. "Pitchfork Ben" Tillman.[69] So Roosevelt and Root decided upon a recess appointment as the way to keep Crum in office.[70] There was only one problem: the Senate planned to start its new session immediately after the end of the previous one.[71] Ingeniously, Roosevelt announced that his recess appointment of Crum, along with 167 other officers, would occur during the split second between the two Senate sessions—an infinitesimal period that Root and Roosevelt termed a "constructive" recess."[72]

The Senate was not happy.[73] In 1905, the Judiciary Committee issued a report arguing that "[t]here was no 'recess' within the letter or spirit of the Constitution, and therefore there was no right to issue commissions . . . . The theory of 'constructive recess' constitutes a heavy draft upon the imagination."[74] It should be noted that the President's "constructive" recess appointments nonetheless stood, despite the controversy.[75]

Modern presidents have continued to appoint officers of the federal government during congressional recesses for reasons more like

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James, *Senatorial Rejections of Presidential Nominations to the Cabinet: A Study in Constitutional Custom*, 3 ARIZ. L. REV. 232 (1961) (outlining such senatorial rejections).

[68] EDMUND MORRIS, THEODORE REX 198, 301 (2001). Earlier in his term, Roosevelt had chosen Crum to replace a white man as Collector of Customs in Charleston.

[69] Willard B. Gatewood, *Theodore Roosevelt and Southern Republicans: The Case of South Carolina, 1901–1904*, 70 S.C. HIST. MAG. 251, 263 (1969) (reporting that Roosevelt's failure to back Crum "would appear too much like a surrender to the blatant racism of his enemy Tillman"). Roosevelt had roused considerable Southern anger with the appointment of Crum; in particular, Senator Tillman "threatened social violence" if the Senate overrode his committee's negative report on the appointment, musing that "[w]e still have guns and ropes in the South." MORRIS, *supra* note 68, at 210.

[70] MORRIS, *supra* note 68, at 301.

[71] VIVIAN S. CHU, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 8 (2011). Roosevelt had called Congress into special session the month before to acquire approval for his Cuban reciprocity treaty. *See* MORRIS, *supra* note 68, at 272. Showing their disfavor for Roosevelt and displaying their power, House leaders dragged on the session until the very moment before the scheduled start of the regular session, despite having already passed the treaty. *Id.* at 299.

[72] *Special Session*, *supra* note 10 ("The conclusion has been reached that between the time of the falling of President pro tempore Frye's gavel signifying the conclusion of the extraordinary session and the calling to order of the Senate in the regular session of Congress, an appreciable lapse of time occurred.").

[73] *See Fight on Crum Renewed: Senators Attack President's "Constructive Recess" Policy*, N.Y. TIMES, Jan. 26, 1904, at 3 (detailing the Senate debate over Dr. Crum's appointment, including charges that Roosevelt's Secretary of the Treasury, Leslie M. Shaw, was "guilty of malfeasance in office" and thus indictable for installing Crum).

[74] S. REP. NO. 58-4389, at 3 (1905).

[75] Gatewood, *supra* note 69, at 262–64 (noting that the Senate finally confirmed Dr. Crum for the office he had held for over two years in 1905; Roosevelt had to use the recess appointment several times in the absence of confirmation).

Roosevelt's than Jefferson's. In announcing a round of recess appointments in 2010, Barack Obama blamed the Senate's pursuit of "scoring political points" in blocking his nominees, adding, "I simply cannot allow partisan politics to stand in the way of the basic functioning of government."[76] George W. Bush expressed similar sentiments when he appointed John R. Bolton ambassador to the United Nations during a Senate recess in 2005, calling the position "too important to leave vacant any longer, especially during a war and a vital debate about U.N. reform."[77] In other words, presidents today still see the recess appointment power as necessary—but the aggravating factor now is the intransigence of the Senate, not the long trip to and from the Capitol.

Though the rationale for recess appointments has changed drastically between the era of Washington and Jefferson and that of Bush and Obama, the power still stands as an accepted use of presidential power. During a recent oral argument at the Supreme Court, the conversation turned to the Senate's failure to reach a vote on certain presidential nominees.[78] When the Acting Solicitor General, Neal Katyal, complained that the regular advice and consent process had been too contentious, Chief Justice John Roberts seemed incredulous. "And the recess appointment power doesn't work—*why*?" Roberts asked,[79] wondering aloud at the government's failure to implement the obvious solution to evade a stubborn Senate.

Roosevelt's stratagem of using a recess appointment to install a nominee who is particularly unfavorable to the Senate has become more or less standard practice,[80] so much so that scholars once predicted that Congress could not or would not overcome it.[81] In terms of numbers, recess appointments are relatively infrequent, yet frequent enough to draw scrutiny. One recent study found that 12% of presidential appointments to independent agencies occurred during recesses of the Senate; such appointments were far more likely when the President was popular and

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[76] Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.

[77] Elisabeth Bumiller & Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, N.Y. TIMES, Aug. 2, 2005, at A1 (late edition).

[78] Transcript of Oral Argument at 49–50, New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (No. 08-1457). The case considered whether the NLRB could issue binding decisions with fewer than three members. *New Process Steel*, 130 S. Ct. at 2638.

[79] Oral Argument at 51:48, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457), *available at* http://www.oyez.org/cases/2000-2009/2009/2009_08_1457.

[80] *See* Press Release, The White House, Statement by the President on Senate Confirmations (Feb. 11, 2010), *available at* http://www.whitehouse.gov/the-press-office/statement-president-senate-confirmations; *see also infra* notes 100–01 and accompanying text (discussing the recess appointments of George W. Bush).

[81] *See* Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 460 (2005) (arguing that congressional adoption of an innovative legislative means to overcome recess appointments was highly unlikely and noting "these things *never* happen").

lacked partisan support in the Senate.[82] Their use has accordingly varied widely with each administration, though counts are not exact[83]:

TABLE 1: RECESS APPOINTMENTS FROM FDR TO OBAMA

President	**Number of recess appointments**[84]
Franklin D. Roosevelt	89
Harry S. Truman	195
Dwight D. Eisenhower	193
John F. Kennedy	53
Lyndon B. Johnson	36
Richard M. Nixon	41
Gerald R. Ford	12
James E. Carter	68
Ronald W. Reagan	243
George H.W. Bush	77
William J. Clinton	139
George W. Bush	171
Barack H. Obama[85]	28

As is evident from the chart above, President Reagan was the most prolific recess appointer in recorded American history, "shap[ing] executive agencies in ways that would have been difficult, if not impossible" had Reagan followed the typical nominations process.[86] Such actions often drew harsh responses. In the controversy over Reagan's nomination of Judge Robert Bork to the Supreme Court in October 1987, Senate Majority Leader

[82] Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, 36 PRESIDENTIAL STUD. Q. 670, 676–78 (2006) (counting appointments between 1945 and 2000). As Corley posits, the President is a "rational political actor"; recess appointments are easiest to make in a political sense when the President has enough popularity to sell the appointments to the public. *Id.* at 672, 678. In other words, "it appears that presidents use this power sparingly and strategically, when they think they can get away with it." *Id.* at 678.

[83] *See* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2209 n.31 (1994) (noting the difficulties of compiling a complete list of recess appointments, especially before 1965 when they were "recorded in a haphazard fashion" (quoting Memorandum from Rogelio Garcia, Government Division, Congressional Research Service, Library of Congress, to Senate Committee on Banking, Housing and Urban Affairs (Mar. 13, 1985))).

[84] All figures except that of the Obama administration come from *Total Recess Appointments, by President, 1933–2010*, U.S. SENATE (July 6, 2010), http://www.senate.gov/artandhistory/history/resources/pdf/TotalRecessAppointments1933-present.pdf.

[85] Kara Rowland, *Two Nominees Again Face Senate*, WASH. TIMES, Jan. 31, 2011, at A4 ("Mr. Obama has made 28 recess appointments so far.").

[86] Carrier, *supra* note 83, at 2215.

Robert Byrd warned that he would hold pro forma sessions to keep the Congress in session for the rest of the year if Reagan tried to recess appoint a Supreme Court Justice.[87] Instead, Reagan proceeded to nominate Bork through regular means, and the full Senate rejected his nomination.[88] While Senator Byrd never had to make good on his threat, his successors in the Senate—and then the House—would do so with great effect two decades later.

C. Evolution of the Pro Forma Session

1. Early Use.—For much of the lifespan of Congress, the pro forma session, in the words of former Speaker of the House Jim Wright, "never hurt anybody."[89] Its use was routine and procedural. Members of one house of Congress would hold such a session when, for whatever reason, it did not reach a joint agreement to adjourn with their counterparts. The practice is required, or at least inspired, by a clause in Article I (the "Adjournments Clause") that forbids either house of Congress to adjourn for over three days "without the Consent of the other."[90]

For example, if the House passed an adjournment resolution before one of Congress's typical vacation periods but the Senate did not, then the two bodies did not agree on the recess. As a result, the House would be obliged to meet in pro forma session every three days during the vacation to satisfy the Adjournments Clause.[91] Such meetings were not extraordinary; Senator Byrd characterized them as "just coming in, going out—because otherwise we could not recess for 3 days without the approval of the other body."[92] The only other clause of the Constitution addressing the situation of disagreement between the houses on adjournment allows the President to "adjourn them to such Time as he shall think proper."[93] However, no president has ever invoked that authority, though they have often used the procedural power granted by Article II to, "on extraordinary Occasions, convene both Houses, or either of them."[94]

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[87] *See* John Hanrahan, *Washington News*, UNITED PRESS INT'L, Oct. 7, 1987 (available at LexisNexis) (describing Senate's threat to hold pro forma sessions "for the remainder of the year" if Reagan nominated a Supreme Court Justice during congressional recess).

[88] Edward Walsh & Ruth Marcus, *Bork Rejected for High Court*, WASH. POST, Oct. 24, 1987, at A1.

[89] 124 CONG. REC. 7047 (1978) (statement of Rep. Jim Wright).

[90] U.S. CONST. art. I, § 5, cl. 4.

[91] *See, e.g.*, 112 CONG. REC. 7843 (1966) (statement of Sen. Mike Mansfield) (describing concurrent adjournment resolution to be passed alongside the House before Easter recess, without which "it would be necessary for the House to meet every 3 days as prescribed in the Constitution").

[92] 123 CONG. REC. 33,302 (1977).

[93] U.S. CONST. art. II, § 3.

[94] *Id.*; THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 563 (Johnny H. Killian et al. eds., 2004).

For some members of Congress, the promise of holding a pro forma session in place of the next day's regular session was a "carrot,"[95] or an incentive to quickly finish the day's work so that most members could leave town. Just one unlucky member of the house in question would stay behind to conduct the pro forma session. The member's punishment was not severe; the sessions were often less than a minute, and sometimes so brief as to be instantaneous.[96] Sessions on Mondays and Fridays were often pro forma, "without roll-call votes," so that members' "weekend fence-building trips back home could be extended."[97]

On occasion, however, pro forma sessions arose during conflict between the two houses. In 1977, the House considered rejecting the Senate's recess resolution and holding pro forma sessions instead of adjourning in order to protest the Senate's decision to go on break without addressing certain legislation, which left House members "dangling on the vine."[98] In general, however, pro forma sessions occurred not out of spite, but out of necessity, as one house for whatever reason was not able to adjourn at the same time as the other.

2. Transformation Into Political Weapon.—Throughout the 1980s and 1990s, senators continued to hold pro forma sessions for procedural reasons only. They did not use them to block recess appointments during that time, despite threats to do so.[99] However, rumblings about pro forma sessions ratcheted up during the tenure of George W. Bush[100] and escalated in 2004 after he recess appointed two federal circuit court judges.[101] The appointment of one of those judges, William Pryor of the Eleventh Circuit, prompted a motion in a lawsuit before that court to disqualify Judge Pryor from hearing the case. The litigant claimed that the judge's recess

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[95] 111 CONG. REC. 22,640 (1965) (statement of Sen. Wayne Morse) ("I have some good hopes that we might be able to finish that bill this afternoon, and, if we can finish it this afternoon, it is my understanding that any session that we have tomorrow will be only a pro forma session and that the Senate will adjourn until Tuesday. That would be called a 'carrot.'").

[96] *See, e.g.*, 123 CONG. REC. 37,532 (1977) (recording a six-second session of the Senate gaveled in and out by Sen. Lee Metcalf).

[97] ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 388 (2002).

[98] 117 CONG. REC. 16,833 (1971) (statement of Rep. Durward G. Hall).

[99] *See, e.g.*, Marc Lacey, *Gay Activist Named Envoy over Objections*, L.A. TIMES, June 5, 1999, at A1 (describing senators' anger over President Clinton's appointment of a gay man as ambassador to Luxembourg and threats to block subsequent recess appointments with pro forma sessions).

[100] Bush's recess appointment of Eugene Scalia in particular set off Senate alarm bells. Paul Kane, *Senate Set for Recess Politics*, ROLL CALL, Dec. 13, 2001 (available at LexisNexis) (reporting that Senate Majority Leader Tom Daschle had "floated the idea that the Senate would not adjourn for recess at all").

[101] *See* Paul Kane, *Daschle: Recess in Peril; Judicial Appointments Again Scramble Schedule*, ROLL CALL (Feb. 25, 2004, 12:00 AM), http://www.rollcall.com/issues/49_82/-4489-1.html (reporting Daschle's anger over the recess appointments of Charles Pickering to the Fifth Circuit Court of Appeals and William Pryor to the Eleventh Circuit).

appointment was invalid.[102] And before the summer recess of 2007, Senate Democrats came close to activating pro forma sessions in response to President Bush's recess appointment of Sam Fox, financial backer of a group that criticized 2004 Democratic presidential nominee John Kerry, as ambassador to Belgium.[103]

It was not until the Thanksgiving recess of 2007 that senators finally followed through with threats to use the pro forma session to prevent all recess appointments by President Bush.[104] Angry over the breakdown of a deal with Bush, as well as the possibility of a recess appointment of a Surgeon General who had made potentially dubious health claims,[105] Senate Majority Leader Harry Reid scheduled two weeks of pro forma sessions during the recess.[106] Senate Democrats again used the tactic over the holiday recess into 2008,[107] and in February,[108] May,[109] August,[110] October through

[102] *See* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (en banc). The motion failed; in one of the few judicial pronouncements on the subject, the en banc court held that Pryor's appointment was valid based on the history and text of the Recess Appointments Clause. *Id.* at 1222–27.

[103] Erin P. Billings, *Democrats May Block Nominees*, ROLL CALL (Apr. 11, 2007, 12:00 AM), http://www.rollcall.com/issues/52_106/-17925-1.html. The two sides reached a deal instead, in which Bush agreed not to make recess appointments if Senate Majority Leader Harry Reid allowed some of Bush's nominees to reach a vote. Al Kamen, *Don't Make Me Use Article I, Section 5!*, WASH. POST, Oct. 17, 2007, at A15.

[104] The associate historian of the United States Senate, Donald A. Ritchie, said in late 2007 that the Democrats' use of pro forma sessions at that time was the first instance of the body doing so "for the express purpose of blocking appointments." Peter Baker, *During Recess, Democrats Push Back*, WASH. POST, Dec. 24, 2007, at A13.

[105] Sean Lengell, *Senate Democrats Play Recess Hardball*, WASH. TIMES, Nov. 21, 2007, at A1 (reporting accusations that Bush's candidate had made erroneous claims about homosexual sex).

[106] Paul Kane, *Senate Stays in Session to Block Recess Appointments*, WASH. POST, Nov. 17, 2007, at A4 (reporting Reid's anger with Bush's failure to nominate "Democratic selections for . . . bipartisan commissions").

[107] *See* Gail Russell Chaddock, *Watchdog Panel Sidelined as Elections Roll*, CHRISTIAN SCI. MONITOR, Jan. 9, 2008, at 1.

[108] *See* Neil H. Simon, *Virginians at the Capitol*, RICHMOND TIMES-DISPATCH, Feb. 24, 2008, at A7.

[109] *See* Jim Abrams, *Quick Senate Session Blocks Bush Appointees*, CHARLESTON GAZETTE, May 24, 2008, at 8A.

[110] *See* Sean Lengell, *Senate Democrats Seek to Block Bush*, WASH. TIMES, Aug. 6, 2008, at A6.

December of 2008,[111] and in January 2009.[112] During these periods, Bush chose not to make a single recess appointment.[113]

For some time after, the pro forma session again went dormant, perhaps because the Democrats who had initially used it were now of the same party as the President. President Obama made recess appointments without incident on four separate occasions in 2010.[114] But later that year, Senate Democrats brought the pro forma session back. They struck a deal with Republicans to hold pro forma sessions through the November elections if the Republicans agreed not to send Obama's nominations back to the White House.[115]

A few months later, the House got involved. Fearing that President Obama would recess appoint Elizabeth Warren to head the Consumer Financial Protection Bureau,[116] House Republican leaders threatened, at the urging of Senate Republicans,[117] not to send an adjournment resolution to the Senate, forcing Harry Reid to schedule more pro forma sessions.[118]

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[111] *See* Kelsey Lamb & Michael Lepage, *The Week in Review*, CONGRESSNOW, Nov. 21, 2008 (available at LexisNexis) (reporting pro forma sessions through Dec. 8 "to prevent President George W. Bush from making recess appointments"); Kelsey Lamb & Michael Lepage, *Two Weeks in Review*, CONGRESSNOW, Oct. 3, 2008 (available at LexisNexis) (reporting pro forma sessions through November 17).

[112] *See* Greg Hitt et al., *Rescue Bid for Detroit Collapses in Senate*, WALL ST. J., Dec. 12, 2008, at A1 (reporting that Senate would be in pro forma session "until January, when the new Congress will be convened with stronger Democratic majorities").

[113] HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 3 (2012) (indicating Bush made no recess appointments after the seventh year of his presidency).

[114] *See* Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Dec. 29, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/29/president-obama-announces-recess-appointments-key-administration-posts; Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Aug. 19, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/08/19/president-obama-announces-recess-appointments-key-administration-posts; Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (July 7, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions-0; Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.

[115] *See* David M. Herszenhorn, *A Rush to Legislate, and to Maneuver*, N.Y. TIMES, Oct. 1, 2010, at A16.

[116] Warren was, to say the least, disliked by Republican House members as a potential leader of the bureau. *See* Ylan Q. Mui, *GOP Senators Vow to Block CFPB Chief*, WASH. POST, May 6, 2011, at A20.

[117] *See* Jonathan Allen, *Senators Ask John Boehner to Help Block Obama Recess Appointments*, POLITICO (May 25, 2011, 7:15 PM), http://www.politico.com/news/stories/0511/55723.html (detailing senators' request to House Republican leadership for help on blocking recess appointments).

[118] Kathleen Hunter, *Senate Republicans Block Prospect of Warren's Consumer Board Appointment*, BLOOMBERG (May 26, 2011, 11:00 PM), http://www.bloomberg.com/news/2011-05-27/senate-republicans-block-prospect-of-warren-s-consumer-board-appointment.html. The move brought

Following that episode, several members of the House decided they would cut out the middleman and simply hold pro forma sessions themselves, pushing the Senate to do the same.[119] Throughout the summer of 2011, these congressmen gaveled in pro forma House sessions every three days;[120] in response, Obama made no recess appointments.

That is, until January 2012. Despite continuing pro forma sessions that had been the norm during Senate breaks since 2007, President Obama made four recess appointments on January 4.[121] The appointments did not occur on a day when the Senate was in pro forma session; one such session was held the day before, on January 3,[122] and the next happened on January 6.[123] The Administration released as support for its decision a memorandum by the Department of Justice's Office of Legal Counsel, which opined that because the Senate had not been conducting business during its pro forma sessions, it was effectively at recess for over a month.[124]

The outcry was immediate. The Speaker of the House, John Boehner, said the appointments represented "an extraordinary and entirely unprecedented power grab."[125] Mitch McConnell, the Senate Majority Leader, said Obama had "threaten[ed] the confirmation process and fundamentally endanger[ed] the Congress's role in providing a check on the excesses of the executive branch."[126] And one member of the House, Bill Johnson of Ohio, threatened to sue Obama himself over the appointments.[127] Was it possible the President had overstepped his authority?

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on the odd sight of Democratic senators holding pro forma sessions, which had the effect of blocking the nominees of the President of their own party.

[119] Peter Schroeder, *GOP Freshmen: Stop Recess Appointments by Stopping Recess*, THE HILL, June 14, 2011, at 6.

[120] Stephen Dinan, *GOP Prevents Recess Appointments*, WASH. TIMES, Aug. 10, 2011, at A3 (reporting that House members were "holding regular sessions throughout the summer so that the Senate also must remain in session").

[121] Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[122] 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

[123] *Id.* at S3 (daily ed. Jan. 6, 2012).

[124] *See* Lawfulness of Recess Appointments, *supra* note 16, at 3–4.

[125] Brad Plumer, *With Cordray Appointment, Obama Sets New Precedent*, WASH. POST WONKBLOG (Jan. 4, 2012, 11:22 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/with-cordray-appointment-obama-to-set-precedent/2012/01/04/gIQAJvMYaP_blog.html.

[126] David Nakamura & Felicia Sonmez, *Obama Defies Senate, Puts Cordray in Consumer Post*, WASH. POST, Jan. 5, 2012, at A1.

[127] David DeWitt, *GOP Rep Threatens to Sue Obama over Recess Appointment*, ATHENS NEWS, Jan. 17, 2012, at 13. Still unclear is what standing Representative Johnson would have had in such a lawsuit.

II. CONSTITUTIONALITY OF OBAMA'S 2012 RECESS APPOINTMENTS

When the dust settled and the legal academic community began to debate the 2012 recess appointments, arguments centered on a few key issues. The primary contention of those opposing the appointments was that the President had taken it upon himself to decide when the Senate was at recess, removing from the Legislative Branch the ability to make its own rules.[128] "Here, it is for the Congress to decide how to operate and govern itself, not the president," wrote Professor John Yoo. "If the Senate wants to have a session where nothing happens—which, I might argue, is best for the country in many cases—that is its prerogative."[129]

Another argument held that the Senate did in fact do substantive work between the time it recessed on December 17 and when it resumed work on January 23.[130] Senator Harry Reid, standing in a chamber with one other senator, had asked for and received unanimous consent on the payroll tax cut on December 23 during a supposedly pro forma session.[131] Finally, opponents argued that because the House had not ever consented to an adjournment of more than three days, the Senate could not technically recess without violating the Adjournments Clause[132] of Article I.[133]

A. Realities on the Ground

As a general response to the above arguments, it is first important to note one objective fact: the Senate was not in any kind of session, pro forma or otherwise, on the day the President made his recess appointments. No meeting of the Senate took place between January 3 and January 6;[134] the January 4 appointments, therefore, occurred during a three-day recess at the

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[128] *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

[129] John Yoo, *Cordray's Tribe*, NAT'L REV. ONLINE CORNER (Jan. 6, 2012, 5:42 PM), http://www.nationalreview.com/corner/287439/cordrays-tribe-john-yoo.

[130] *See, e.g.*, Michael McConnell, Op-Ed., *Democrats and Executive Overreach*, WALL ST. J., Jan. 10, 2012, at A13 ("[T]hese sessions are not, in fact, a sham—the Senate enacted the payroll tax holiday extension, President Obama's leading legislative priority, on Dec. 23 during one of those pro forma sessions . . . .").

[131] 157 CONG. REC. S8789–90 (daily ed. Dec. 23, 2011). Reid was able to use this unusual maneuver to pass legislation because the Republican congressional leadership had agreed to it the day before. *See* Pete Kasperowicz, *Congress Approves Payroll Tax Bill*, THE HILL (Dec. 23, 2011, 11:06 AM), http://thehill.com/blogs/floor-action/house/201157-house-quickly-approves-payroll-tax-bill.

[132] 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, nor to any other Place than that in which the two Houses shall be sitting.").

[133] Edwin Meese III & Todd Gaziano, Op-Ed., *Obama's Abuse of Power*, WASH. POST, Jan. 6, 2012, at A17 (arguing that the appointments violated "the duty of comity that the executive owes to Congress").

[134] 158 CONG. REC. S1 (daily ed. Jan. 3, 2012) ("Under the previous order, the Senate stands adjourned until 11 a.m. on Friday, January 6, 2012.").

least. They were appointments made when no Senator was around to vote on them, not during a Senate lunch break or under cover of night.

And the recess, in reality, was much longer than three days. When the Senate broke for vacation on December 17, 2011, its members unanimously consented that there would be "no business conducted" until January 23, 2012.[135] Standing alone, such a declaration meets the Senate's only officially promulgated definition of recess. In the fury over Theodore Roosevelt's "constructive recess" of 1903, the Senate sought to define the term so there would be no further confusion.[136] A recess of the Senate occurs, the Senate said, "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."[137] This definition has been formally included in the Senate Parliamentarian's manual of procedure.[138] Those requirements were all met during the pro forma sessions of 2011 and 2012; no senator was required to attend, the chamber was empty save for a matter of seconds, and the body as a whole certainly could not participate in making appointments.

There is, however, the fact that some business *was* conducted between December 17 and January 2.[139] On December 23, as noted above, Senator Reid obtained unanimous consent from an empty chamber on the payroll tax cut[140] during an eighty-five-second session.[141] Reid's action, opponents claim, interrupted the recess, "clearly undermining any claim that the Senate is unavailable to perform its duties during a pro forma session."[142]

Even if one accepts the argument that Reid's motion for unanimous consent constituted Senate business—an arguable claim[143]—Obama's recess appointments still pass muster. Reid's motion occurred on December 23, a full twelve days before Obama appointed Cordray and the NLRB members, two days more than the minimum recess period appointment opponents

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[135] 157 CONG. REC. S8783–84 (daily ed. Dec. 17, 2011).

[136] *See supra* notes 68–75 and accompanying text.

[137] S. REP. NO. 58-4389, at 2 (1905).

[138] FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 1084 (Alan S. Frumin ed., rev. ed. 1992).

[139] *See, e.g.*, McConnell, *supra* note 130; Meese & Gaziano, *supra* note 133.

[140] *Senate Pro Forma Session*, C-SPAN VIDEO LIBRARY (Dec. 23, 2011), http://www.c-spanvideo.org/program/SenateProFormaSess.

[141] 157 CONG. REC. S8789–90 (daily ed. Dec. 23, 2011).

[142] 158 CONG. REC. S317 (daily ed. Feb. 2, 2012) (statement of Sen. Orrin Hatch, reading into the record a letter from thirty-four senators questioning the appointments).

[143] The actual business—the agreement to the payroll tax cut extension—had been worked out during the previous few days, not on the day in question. Further, Reid's motion was not the passage of legislation; it was consent that future legislation would be considered passed upon its appearance, something the Senate was free to undo in the future. *See* Kasperowicz, *supra* note 131 (detailing the deal between Democrats and Republicans).

have said is necessary for a proper recess.[144] Going further, as the Administration has argued, the recess period during the new session of Congress, from January 3 to 23, 2012, constituted a twenty-day recess, regardless of pro forma sessions.[145] Most of all, it has been standard practice since at least 1921 for the President to determine whether a recess is occurring,[146] as the Senate sends no actual word to the White House that it is in recess. Opponents of the appointments have failed to marshal evidence that any Senate business occurred between Reid's December 23 motion and the January 4 appointments, or they have otherwise made the unprecedented claim that twelve days is not a sufficiently lengthy recess to allow a recess appointment. The appointments should stand on their own.

B. Three Days or Less?

But even if the pragmatic arguments above were not true, and the 2012 appointments occurred during what was merely a three-day recess of the Senate,[147] the appointments remain constitutionally legitimate. While three days is shorter than most recesses during which presidents have made appointments,[148] presidential action to make appointments during a recess of that length is not unprecedented. Moreover, the rationale behind the argument that a recess must be three days long to validate a recess appointment fails under close examination.

In addition to Theodore Roosevelt's "constructive recess," lasting only moments,[149] President Harry Truman made an appointment during a similarly limited window early in his presidency.[150] During a three-day break between December 31, 1948, and January 3, 1949, Truman re-appointed Oswald Ryan, a prominent member of the Civil Aeronautics Board,[151] to his post without the consent of Congress. (The appointment stood.)[152]

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[144] *See* Carrie Johnson, *Debate over Appointees Hinges On One Word: Recess*, NPR (Jan. 7, 2012), http://www.npr.org/2012/01/07/144812953/debate-over-appointees-hinges-on-one-word-recess (quoting Heritage Foundation official Todd Gaziano: "There have been over 90 years of interpretation in which both branches of government have agreed that [a break of] at least nine or 10 days [with no Senate business conducted] is necessary . . . ." (alterations in original)).

[145] Lawfulness of Recess Appointments, *supra* note 16, at 1.

[146] Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 25 (1921) ("[T]he President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.").

[147] The January 3 session ended at 12:02 and 13 seconds PM; the January 6 session began at 11:00 and 3 seconds AM.

[148] HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 10 (2012) (pointing to shortest recess length of at least ten days).

[149] *See supra* Part I.B.2.

[150] HOGUE, *supra* note 148, at 10.

[151] William G. Blair, *Oswald Ryan, 94, Once Headed C.A.B.*, N.Y. TIMES, Jan. 1, 1983, at 24.

[152] HOGUE, *supra* note 148, at 10.

While two episodes do not make a trend, they suggest that there is no ironclad constitutional or historical reason a recess must be three days long before a president can consider recess appointments. As the only federal appellate court to touch this question in recent years has found, the Constitution "does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause."[153] It would be difficult to argue from a plain reading of the Constitution's text, combined with historical experience, that Obama's appointments during a three-day recess were either unprecedented or blatantly in violation of the separation of powers.

Opponents of the appointments nonetheless claim constitutional support for the idea that a recess appointment can occur only during a recess of more than three days. For this idea, they point to the Adjournments Clause, requiring either house of Congress to acquire consent from the other if its members want to adjourn for over three days.[154] Therefore, they submit, a recess must be three days to be constitutionally valid and thus appropriate for recess appointments. The sole authority[155] beyond the op-ed page for this notion rests in the tentative wording of a Department of Justice amicus brief from 1993. In *Mackie v. Clinton*, a federal district court heard a claim on an appointment made during a thirteen-day recess of the Senate.[156] Though the decision turned on other matters, the Justice Department filed a twenty-eight page "memorandum of points and authorities" in the case that included four paragraphs discussing recess lengths.[157]

After citing the Adjournments Clause, the brief begins and ends its substantive argument on the topic with two sentences: "It might be argued that this [constitutional language] means that the Framers did not consider one, two and three day recesses to be constitutionally significant. But that situation is not presented here because the recess lasted 13 days."[158] This assertion is accompanied by no support, historical or otherwise. In addition, the brief states, any *other* argument for the baseline length of a recess in reference to the Recess Appointments Clause "would of necessity be

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[153] Evans v. Stephens, 387 F.3d 1220, 1225 (11th Cir. 2004) (en banc).

[154] *See, e.g.*, Meese & Gaziano, *supra* note 133.

[155] MAEVE P. CAREY & HENRY B. HOGUE, CONG. RESEARCH SERV., R41776, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS IN INDEPENDENT AND OTHER AGENCIES DURING THE 110TH CONGRESS 6 n.25 (2011) (noting that the "three-day norm" cited as justification for pro forma sessions "derives from" a brief in the *Mackie* case).

[156] 827 F. Supp. 56, 57 (D.D.C. 1993).

[157] Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 25, *Mackie*, 827 F. Supp. 56 (No. 93-0032-LFO).

[158] *Id.*

completely arbitrary" because "the Constitution provides no basis for limiting the recess to a specific number of days."[159]

The assertion in the memo that three days might have been "constitutionally significant" to the Framers is belied by two historical facts. First, the initial text of the Adjournments Clause during the Constitutional Convention appeared in a draft constitution submitted by Charles Pinckney of South Carolina on May 29, 1787.[160] Yet that document did not specify three days, or any number of days at all: "Neither House, without the consent of the other, shall adjourn for more than —— days, nor to any place but where they are sitting."[161] It strains credulity to claim that a three-day period is somehow a natural fit for the Constitution, as the number was initially left indeterminate.

Second, there is no record of any debate in Madison's journal of the Convention over what number of days to require in the Clause. Its next mention at the Convention was more than two months after Pinckney introduced his plan, when the "three days" language suddenly appeared in a new draft of the Constitution.[162] Madison's journal reveals no debate on the Clause between those two dates, and nothing that would shed light on the Framers' choice of three days for the timing of adjournments. Finally, the three-day requirement has not proven to be ironclad. In 1916, to pick just one example, the Senate adjourned from a Saturday to a Thursday without the House's consent;[163] the lapse "was called to the attention of the House membership but nothing further was ever done about it."[164] That was not the only instance. As Senator Byrd noted in 1977, "precedent" reveals that the Senate has often recessed without pro forma sessions, despite not receiving the House's permission: "The Senate has, in the past, gone out from Wednesday until Monday without the approval of the other body."[165]

There are few logical or constitutional reasons why the Framers would have placed a special importance on the number three. Nor, for that matter, is there any constitutional reason why the Recess Appointments Clause be considered in light of the Adjournments Clause. Three days is longer than a weekend, perhaps, but shorter than a work week, and there is little else but conjecture to guide the question. It was not mentioned in the debates of the Convention, nor in *The Federalist*. Even Justice Story, who seemed able to articulate the logic behind the entire Constitution, gave no explanation for the figure in his *Commentaries*, despite mentioning the Clause.[166]

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159 *Id.* at 26.

160 MADISON, *supra* note 45, at 64–72 (debate of May 29, 1787).

161 *Id.* at 67.

162 *Id.* at 452 (debate of Aug. 6, 1787).

163 53 CONG. REC. 8853 (daily ed. May 29, 1916).

164 RIDDICK & FRUMIN, *supra* note 138, at 15.

165 123 CONG. REC. 33,302 (daily ed. Oct. 12, 1977).

166 2 STORY, *supra* note 49, § 841, at 303–04.

What is more, Article II gives the President a special power to adjourn the houses of Congress "in Case of Disagreement between them, with Respect to the Time of Adjournment."[167] The Clause mentions no minimum time during which the houses must disagree before the President can step in. As noted above, no president has ever used this power.[168] But its inclusion nonetheless suggests that the three-day requirement for "constitutionally significant" recesses is far from ironclad. And it further justifies the notion that the President does have some right to interact with Congress over its adjournment—at the very least when Congress is actually at recess but claims not to be.

III. CONSTITUTIONALITY OF THE PRO FORMA SESSION

A. Deactivation of an Enumerated Power

Through use of the pro forma session in recent years, Congress has blockaded presidential use of a power enumerated in Article II of the Constitution. That article confers upon the President the "Power to fill up *all* Vacancies that may happen during the Recess of the Senate."[169] Yet Congress has used the pro forma session as a vehicle to claim that recesses no longer occur, making the Recess Appointments Clause into surplusage. However, the Senate is not in session when it sends one senator for a "pro forma" meeting of the body. Even if it were, holding these "meetings" once every three days does not render the body continuously in session.[170] It is in recess. By claiming otherwise, the Senate's arguments risk violating the letter of the Constitution and the intent of its Framers. In defying the Senate's interpretation and making his appointments, President Obama stood on solid ground.

It is a simple canon of constitutional interpretation that nothing in the Constitution should be construed to be "entirely without meaning."[171] "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[172] Any construction of a provision of the Constitution that renders it "mere surplusage, [or] form without substance . . . cannot, therefore, be the true construction of the article."[173] And yet, the Recess Appointment Clause was destined to remain mere surplusage without the appointments of January 2012. Since 2007, first George W. Bush and then

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[167] U.S. CONST. art. II, § 3.

[168] CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 94, at 563.

[169] U.S. CONST. art. II, § 2, cl. 3 (emphasis added).

[170] *See supra* Part II.A–B.

[171] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[172] *Id.*

[173] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 394 (1821) (quoting *Marbury*, 5 U.S. (1 Cranch) at 174) (internal quotation marks omitted).

Barack Obama had acquiesced to the Senate's interpretation, refraining from making appointments during recess when pro forma sessions were ongoing.[174]

Article II, unlike the laundry list of congressional powers in Article I, affords the Executive only a few enumerated powers. The section names just six separate prerogatives of the President, a list short enough to be repeated here: to serve as Commander in Chief; to require opinions from the heads of executive departments; to grant reprieves and pardons; to make treaties; to make appointments; and to make recess appointments.[175]

The power of the President to make appointments is enumerated within a single clause of the Constitution, but it is admittedly tempered within that same clause by the involvement of the Senate. The extent of the Senate's involvement in the appointments process is articulated in three words: "Advice and Consent."[176] Though the meaning of that phrase "is not self-evident,"[177] the understanding among the Framers eventually settled upon the notion that "as the President was to nominate, there would be responsibility; and as the Senate was to concur, there would be security"[178]—in other words, the definition of shared governance and separation of powers.

Yet there is no such mention of the Senate in the subsequent clause on recess appointments. The Framers excluded involvement of senators in recess appointments because—and this almost goes without saying—they would not be in town when such appointments were needed. Yet today, when the Senate holds pro forma sessions, it is also not sitting as a deliberative body, despite claiming to be one. Ninety-nine senators have gone home to perform vital constituent services.[179] One senator stands before an empty chamber;[180] orders of procedure explicitly command that no business is to be conducted.[181] The great majority of senators are away,

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[174] *See supra* Part I.C.2.

[175] U.S. CONST. art. II, § 2. Curiously, Section Two also enumerates a power of Congress, in that it "may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* cl. 2. For an exploration of that Clause, see Hanah Metchis Volokh, Note, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).

[176] U.S. CONST. art. II, § 2, cl. 2.

[177] Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 108 (2005).

[178] MADISON, *supra* note 45, at 681 (quoting Gouverneur Morris) (debate of Sept. 7, 1787).

[179] *See infra* notes 226–30 and accompanying text.

[180] *See, e.g.*, Lengell, *supra* note 105 (describing a twenty-two second Senate session with one senator where no business was conducted).

[181] *See, e.g.*, 154 CONG. REC. S1085 (daily ed. Feb. 14, 2008) (including multiple statements of Sen. Harry Reid that "the Senate [will] meet in pro forma session only with no business conducted" on several upcoming days).

but through a construction of the word "recess," they are squelching an enumerated power designed to operate when they are in absentia.

As Chief Justice Roberts observed recently in another context, "The Constitution's express conferral of some powers makes clear that it does not grant others."[182] It is a simple point, but the Constitution does not grant the Senate the power to block recess appointments by pretending not to be at recess. The Bush–Obama-era pro forma sessions allowed Congress to nullify an enumerated Article II power of the President and were therefore contrary to the Constitution.

B. The House's Involvement

The most recent pro forma sessions of the House aimed squarely at recess appointments represented a more blatant affront to the Constitution. The House of Representatives is excluded entirely from the Appointments Clause and has no role to play in presidential appointments. The Framers of the Constitution had sensible reasons for making such an exclusion.[183] Yet, as of 2011, Republican members of the House, who held the majority, were holding pro forma sessions explicitly to block presidential appointments.[184] These actions unconstitutionally usurped the Senate's appointment power and violated the intent of the Framers to leave the House out of appointments.

By themselves, the House's pro forma sessions—when used for procedural reasons only—represent valid practice.[185] But in 2011, House members held pro forma sessions with the explicit and exclusive intent to obstruct presidential nominations. As eighty House members wrote to their leadership in 2011, "[t]he next logical step in our efforts to restore the public's trust in their government is to prevent further recess appointments" and ensure that "the House of Representatives will meet no less than once every three days for the remainder of 2011 and all of 2012."[186] Several

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[182] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012). Writing for the majority, Chief Justice Roberts also pointed out that "[l]egislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Id.* at 2586 (second and third alterations in original) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010)). As noted earlier, the pro forma sessions under discussion represented the first instance where Congress actually attempted to nullify the recess appointment power. *See supra* note 104.

[183] *See infra* notes 188–98 and accompanying text.

[184] *See supra* Part I.B. Recess appointments or no, they were still appointments.

[185] *See supra* notes 89–92 and accompanying text.

[186] Letter from Eighty Members of the House of Representatives to John Boehner, Eric Cantor, and Kevin McCarthy, U.S. House Representatives (June 15, 2011), http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen Recess Appointment Letter.pdf.

House members, with the consent of their majority leaders, acted on that proposal.[187]

This House involvement in appointments would likely have come as something of a surprise to the Framers. When Hamilton addressed a potential "scheme" to include the House of Representatives along with the Senate in the "business of appointments,"[188] he did not dismiss it out of hand, but he came close:

> A body so fluctuating, and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the executive and of the senate, would be defeated by this union; and infinite delays and embarrassments would be occasioned.[189]

While debate over the Constitution produced several different proposals for the appointments process, including sole Senate authority for appointing Supreme Court Justices and ambassadors,[190] the House did not feature in the negotiations. The first proposal for the appointment of judges assigned the task to the "National Legislature,"[191] but James Wilson and others feared that the "impropriety of such appointments by numerous bodies" necessarily included "[i]ntrigue, partiality, and concealment."[192] In response, the Framers struck a compromise representing the shared power that landed the nomination power with the Executive.[193]

Concerns about the size of the House came at a time when it had just sixty-five members to the Senate's twenty-six,[194] half the proportional advantage the House holds today. While Hamilton's fear of "pervasive politicization and instability" through involving the House in appointments[195] has also more or less infected the modern Senate, the original design of unelected senators was implemented to avoid such problems. The Framers wanted "persons of more experience, weight of

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[187] *See* Jordy Yager, *Meet the Eight Freshmen Keeping Congress in Session This Summer*, THE HILL (Aug. 6, 2011, 2:07 PM), http://thehill.com/homenews/house/175767-meet-the-eight-freshman-keeping-congress-in-session (describing pro forma sessions initiated by House members).

[188] THE FEDERALIST NO. 77, *supra* note 51, at 515, 519 (Alexander Hamilton).

[189] *Id.* at 519.

[190] MADISON, *supra* note 45, at 455 (reprinting a draft of the Constitution produced by the Committee of Detail, with Senate appointment powers contained in § 1 of "Article IX").

[191] *Id.* at 108 (debate of June 5, 1787).

[192] *Id.*

[193] Buckley v. Valeo, 424 U.S. 1, 131 (1976) (per curiam) ("It would seem a fair surmise that a compromise had been made.").

[194] White, *supra* note 177, at 129.

[195] David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1059 (2008) (reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006), and JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

character, and talents, than the members of the House."[196] The appointments process remains entrusted to the Executive and the Senate, "the two elective branches of the federal government least susceptible to majoritarian pressures."[197] In the House, the bar to gaining office is lower,[198] terms are shorter, and its members are thus more vulnerable to ouster than those in the Senate and Executive Branch. While there have been inventive proposals[199] for involving the House in advice and consent, such proposals would nonetheless likely require a constitutional amendment,[200] which at this point does not appear to be forthcoming.

But these points do not require exhaustive analysis here. Whether implemented for valid reasons or not, the Appointments Clause excludes the House.[201] Because the recess appointment power "is to be considered as supplementary to the one which precedes,"[202] i.e., the appointment power, there is no question that it, too, excludes the House. In holding pro forma sessions to block recess appointments, House members did not incur punishment or court challenges, but perhaps they should have. They plainly inserted the House of Representatives into the appointments process—lending President Obama's 2012 recess appointments during pro forma sessions even more constitutional credibility.

C. The Recess as Constitutional Assumption

As a final matter, it is worthwhile to note that recesses of Congress are referenced in the United States Constitution but not created by it. Unlike specifically promulgated notions such as the compensation[203] and the required number of annual meetings[204] of Congress, the recess of Congress

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[196] 2 STORY, *supra* note 49, § 1516, at 344.

[197] Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1060 (2007).

[198] For example, senators still hold office for six years, and a senator is responsible to a broader range of interests in that she must gain the vote of her entire state rather than any individual district. And while a successful candidacy for a House seat requires raising a large amount of money from a smaller number of donors, a successful Senate candidacy requires raising a tremendous amount of money from a staggering number of donors. *See, e.g.*, *Ohio: Congressional Races in 2010*, OPENSECRETS.ORG, http://www.opensecrets.org/races/election.php?state=OH&cycle=2010 (last visited Sept. 8, 2012).

[199] *See, e.g.*, Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1105 (1993) (urging inclusion of the House in confirming Supreme Court Justices).

[200] *Id.* at 1106–07 (discussing the need for amendment and suggesting possible language).

[201] It does not, for example, refer to the "recess of the House." *See* U.S. CONST. art II, § 2, cl. 3.

[202] THE FEDERALIST NO. 67, *supra* note 51, at 455 (Alexander Hamilton).

[203] U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.").

[204] *Id.* § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.").

is only mentioned once in passing: in reference to the grant of authority to the President in the Recess Appointments Clause.[205]

As this section will explain, the inclusion of the recess in the Constitution resulted from a simple assumption of the Framers: that recesses were a necessary component of legislative procedure. They included an appointment power based on the presence of recesses because they assumed legislative recesses would always exist, as they had for millennia. Yet through its targeted pro forma sessions, Congress attempted to eliminate the recess. That attempt defied an original procedural assumption of the Framers—that recesses will exist—which arguably underlies the Constitution and should not be contravened. Further, Congress's attempt to eliminate the recess is proven illegitimate by the fact that recesses still occur during pro forma sessions in everything but name.

There are several oblique references to procedural mechanisms and entities in the Constitution that the document does not explicitly call for. One example is the Chief Justice of the Supreme Court, who is required to preside over the impeachment trial of the President.[206] That is the sole mention of the office of Chief Justice in the document; the office is never explicitly created,[207] and provisions for salary and tenure of federal judges in Article III otherwise make no "special reference to the chief."[208] Likewise, other institutions and procedures are mentioned in passing as though their existence was assumed at the Framing, such as the Treasury,[209] state legislatures,[210] orders and resolutions of Congress,[211] and militias.[212] The Framers' assumptions about procedural mechanisms such as recesses are distinct from the Framers' possible substantive assumptions about rights

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[205] *Id.* art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

[206] *Id.* art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside . . . .").

[207] The role was established by statute in the 1789 Judiciary Act. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

[208] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 41 (2011).

[209] *E.g.*, U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.").

[210] *E.g.*, *id.* § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[211] *E.g.*, *id.* § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . .").

[212] *E.g.*, *id.* § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .").

and privileges, which are less certain and arguably not binding.[213] Instead, these assumptions refer to things that in large part *already existed* or were part of the common practice of the time.[214] Such procedures should be governed strictly by the Framers' assumptions; they represent the Framers' critical thoughts about how government should be structured and therefore must be maintained.

Admittedly, the recess appointment power is a conditional grant of authority to the President. The power is active only "during the Recess of the Senate."[215] But the Framers assumed the condition necessary for exercise of that power would exist; many of them had taken recesses themselves as legislators under the Articles of Confederation.[216] They were also no doubt aware of the historical procedural practices of legislatures that served as their models, which took recesses as a matter of course.[217] Just as important, the state legislatures from which many of the Framers arose also regularly took recesses,[218] an experience that helped inspire Jefferson's idea for a Committee of the States to act during congressional intermissions.[219] Both Parliament and the Congress of the Confederation had assigned powers away for the inevitable consequence that recesses would occur.[220] The recess appointment power in Article II was no different, and the Framers no doubt assumed it would always be accessible, just as they assumed recesses would always take place.

One response to this argument is that simply because the Framers assumed the existence of recesses does not mean they must still occur. And it is certainly true that the recess of the Senate is no longer strictly

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[213] *See* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 616 (2009) (discussing the range of possible substantive assumptions of the Framers and criticizing the treatment of such assumptions as binding, as in contract law).

[214] As demonstrated in Part I.A, the recess was assuredly a longstanding legislative practice from the Roman Senate through Parliament, and its similar structural equivalents in the Constitution also have long histories. The tradition of appointing a chief justice is also ancient, having been brought to England by William the Conqueror from Normandy, "where it had long existed." 1 LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 1 (Jersey City, Fred. D. Linn & Co. 1881). The Articles of Confederation created the national treasury, which provided that American war debt "be defrayed out of a common treasury." ARTICLES OF CONFEDERATION of 1781, art. VIII. The militia assuredly existed throughout the colonies prior to the 1787 Constitutional Convention. *See, e.g.*, MUSTER ROLLS OF THE NAVY AND LINE, MILITIA AND RANGERS, 1775–1783, at 399–809 (William Henry Egle ed., Pa., Wm. Stanley Ray 1898).

[215] U.S. CONST. art. II, § 2, cl. 3.

[216] *See supra* notes 30–34 and accompanying text.

[217] *See supra* Part I.A (describing practices of the Roman Senate and the English Parliament to regularly take recesses).

[218] *See supra* Part I.A.

[219] *See* JEFFERSON, *supra* note 41, at 53 ("The remissness of Congress, and their permanent session, began to be a subject of uneasiness; and even some of the legislatures had recommended to them intermissions, and periodical sessions.").

[220] *See supra* notes 35–37, 39–43 and accompanying text.

necessary. Senators are among the most frequent fliers[221] and train passengers[222] in our country; barring incompetency in our common carriers, enough of them can make it to Washington to perform Senate business at any given time. Yet the Framers' recognition that Senate recesses were necessary—that the body could not be "continually in session"[223]—was as valid then as it is today. Even with modern pro forma sessions, during which the Senate is "active," senators still perform the same traditional recess activities that their predecessors did. In other words, they are at recess, but calling it something else.

During the Senate's 2011–2012 winter break, for example, which lasted from December 17[224] to January 23,[225] its members were busy outside Washington. They went on diplomatic missions,[226] toured businesses in their home states,[227] spoke to local Boys and Girls Clubs,[228] and met with their constituents[229]—an exchange one of them deemed "so important to the process of representative government."[230] These senators would likely be the first to admit that such activities are necessary to their effectiveness as representatives. Yet they are the same senators who claimed their chamber was fully active during pro forma sessions. Without recesses, senators could not exit Washington en masse to perform vital constituent services.

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[221] *See, e.g.*, Rhonda Schwartz, *Reid, Lott Top Senate List of Corporate Frequent Fliers*, ABCNEWS (Jan. 8, 2007, 5:23 PM), http://abcnews.go.com/blogs/headlines/2007/01/reid_lott_top_s.

[222] *See, e.g.*, Mark Leibovich, *Riding the Rails with Amtrak Joe*, N.Y. TIMES CAUCUS (Sept. 16, 2008, 5:51 PM), http://thecaucus.blogs.nytimes.com/2008/09/16/riding-the-rails-with-amtrak-joe (detailing the train-based exploits of then-Senator Joe Biden, an Amtrak aficionado).

[223] *See supra* note 51 and accompanying text.

[224] 157 CONG. REC. S8783–84 (daily ed. Dec. 17, 2011) (unanimous consent given to Senator Ron Wyden's request that "when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times").

[225] 158 CONG. REC. S13 (daily ed. Jan. 23, 2012) (statement of Sen. Harry Reid: "I, first of all, welcome everyone back after the long break we had. I hope it was restful and productive for everyone.").

[226] Press Release, Office of Sen. Mitch McConnell, McConnell to Visit Burma (Jan. 12, 2012), *available at* http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases (browse by month and year to January 2012; then select Jan. 12, 2012 press release).

[227] Press Release, Office of Sen. Marco Rubio, Senator Marco Rubio to Visit Orlando Wednesday (Jan. 10, 2012), *available at* http://www.rubio.senate.gov/public/index.cfm/news?p=Press-Releases (browse by month and year to January 2012; then select Jan. 10, 2012 press release).

[228] *Wyoming Image*, FIRSTPOST, http://im.firstpost.com/topic/place/wyoming-in-this-photo-taken-tuesday-aug-7-2012-sen-jo-image-02MFcWue0s4fH-421-1.html (last visited Oct. 29, 2012) (showing Wyoming Senator John Barrasso speaking during an awards ceremony on August 7, 2012, for the Boys and Girls Clubs of Central Wyoming).

[229] *Senator Blunt Participates in Economic Roundtables Across Mid-Mo 1/3/2012 & 1/4/2012*, OFFICE OF SEN. ROY BLUNT, http://blunt.senate.gov/public/index.cfm/senator-blunt-participates-in-economic-roundtables-across-mid-mo (last visited Sept. 8, 2012).

[230] Press Release, Office of Sen. Chuck Grassley, Grassley Begins 2012 Meetings with Iowans in 36 Counties (Jan. 5, 2012), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=38446.

As it stands, senatorial opponents of pro forma session recess appointments have tried to have it both ways. They pretended recesses were not occurring despite traveling home for recess duties, yet still tried to scuttle an enumerated recess power the Framers assumed would always be available. In the process, they defied a constitutional assumption of the Framers, who wrote the practice of recess appointments into the Constitution itself based on history, logic, and good sense.

IV. POLICY ARGUMENTS

The appointments process and the recess appointments process have changed drastically since the time of the Framers. As originally conceived, the interplay of advice and consent with presidential nominations was uncontroversial. From 1789 until 1961, for example, the Senate rejected only eight presidential nominees to cabinet positions,[231] reflecting the "usual custom of the Senate"[232] not to interfere with the President's choices for who would lead departments of the Executive Branch. Yet with the passage of time, the ever-increasing use of "dilatory tactics" in the Senate has produced "a highly politicized process of confirming executive branch nominations."[233] This is not a new story. President Obama's complaint in 2010, for example, about the Senate's "unprecedented obstruction"[234] of his nominees was itself hardly unprecedented.[235]

As the appointments process has evolved, so has the recess appointment power. The recess appointment today is just as exemplary of partisan conflict as the normal appointments process.[236] The original reasons behind such a power—much shorter sessions of Congress and the realities of eighteenth century travel—no longer apply. Yet both appointment provisions have evolved to complement each other as a new form of checks and balances. Through the use of such "dilatory" measures, the Senate has achieved a nearly unfettered ability to frustrate typical nominations, and the recess appointment power has likewise evolved to allow the Executive the ability to combat such obstruction.

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[231] *See* James, *supra* note 67.

[232] *Id.* at 261.

[233] Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1141 (1999).

[234] Letter from President Barack Obama to Senators Harry Reid, Mitch McConnell, Patrick Leahy, & Jeff Sessions 1 (Sept. 30, 2010), *available at* http://www.politico.com/static/PPM153_cc_093010.html.

[235] *See, e.g.*, Brian Naylor, *Bipartisan Group Pursuing Compromise on Filibuster*, NPR (May 20, 2005), http://www.npr.org/templates/story/story.php?storyId=4659790 (quoting Sen. Mitch McConnell on the Democrats' "unprecedented obstruction" of President Bush's nominees).

[236] *See, e.g.*, Jennifer Rubin, *So Much for Bipartisanship—A Slew of Recess Appointments*, WASH. POST RIGHT TURN (Dec. 30, 2010, 8:30 AM), http://voices.washingtonpost.com/right-turn/2010/12/so_much_for_bipartisanship_--.html (quoting a senior advisor to a "key Republican senator" calling Obama's recess appointments "an outrage" amid partisan rancor over nominees).

However, when the Senate denies the President the recess appointment power through its use of pro forma sessions, it upsets this balance. Senate success at derailing nominations, including recess nominations, is not only damaging, it is self-defeating. The reason is clear: Senate obstruction often fails to block the nominees it targets. Were the recess appointment power instead allowed to function,[237] it could resume its important role as both a check and a balance in the appointment of government officers.

A. The Problem of Unfilled Offices

Congressional obstruction of presidential appointments has costs that are practical as well as constitutional. In general, over the past several administrations, vacancies have caused "agency inaction, confusion among nonpolitical workers, and decreased agency accountability."[238] The predicament may be most acute in the judiciary, where vacancies are pushing the system toward a "crisis point" of too many cases and too few judges.[239] In 2011, 101 of the nation's 857 federal judgeships (excluding the Supreme Court) were empty, with the Administrative Office of the Courts calling 46 of those vacancies "judicial emergenc[ies]" where judges cannot keep up with caseloads.[240]

The problem is directly linked to the Senate's obstruction of presidential nominees. In his annual report on the federal judiciary in 2010, Chief Justice Roberts wrote that "[e]ach political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads."[241] The crisis has grown to the point where the Justice Department estimates that by 2020, half of all judgeships will be unfilled if the current pattern continues.[242] Litigants will wait even longer for their day in federal court, and those with exclusively federal claims, such as those in the ever-booming patent

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[237] And as it has been conceded to (at least until recently) by the "unbroken acquiescence of the Senate." President's Appointing Power, 10 Op. Att'y Gen. 356 (1862).

[238] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 937–38 (2009).

[239] Jerry Markon & Shailagh Murray, *Vacancies on Federal Bench Hit Crisis Point*, WASH. POST, Feb. 8, 2011, at A1. Circuit courts have held that presidents can appoint Article III judges through recess appointments, though the Supreme Court has not reached the topic. *See, e.g.*, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (en banc); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[240] Markon & Murray, *supra* note 239.

[241] JOHN ROBERTS, U.S. SUPREME COURT, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (Dec. 31, 2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf.

[242] Eric H. Holder Jr., Op-Ed., *A Crisis in Our Courts*, WASH. POST, Sept. 28, 2010, at A25.

litigation market,[243] will be the most affected because they have no choice but federal court from the outset. The potential impact of this situation is ominous. As Justice Kennedy has noted, "If judicial excellence is cast upon a sea of congressional indifference, the rule of law is imperiled."[244]

The dilemma is far from limited to the judiciary appointments. For example, the Senate's decision in 2007 to block all recess appointments with pro forma sessions produced governmental difficulties and had "far-reaching policy consequences."[245] Among these consequences was the inability of the Federal Elections Commission to make major campaign finance decisions a year before heated midterm elections; another was the discrediting of the National Labor Relations Board,[246] which was operating with two of five members, a situation the Supreme Court later held to be unacceptable.[247] The current Administration's decision to alter this balance and restore the President's ability to make these entities functional was not only constitutional, but a step in the right direction for the effective functioning of American government.

B. The Problem of Acting Heads

Not all offices, however, have remained unfilled during the era of pro forma obstruction. While members of Congress may believe they are preventing the appointment of individuals who will make unwelcome policy choices, refusing a recess appointment often does not freeze an agency or prevent it from acting. On the contrary, many agencies continue to operate under the direction of a person Congress has never confirmed: the acting head, or the person who fills the office before the Senate approves the official head.

Federal law permits the President to appoint an individual "to perform the functions and duties of [a] vacant [federal] office temporarily in an acting capacity."[248] In allowing this power, Congress "wanted to diminish the length of vacancies by temporarily filling such offices with subordinates while the President nominated a permanent replacement to the Senate."[249] Congress provided for such vacancies through the Vacancies Act of 1868

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[243] *See, e.g.*, Nicholas W. Stephens, Note, *From* Forest Group *to the America Invents Act: False Patent Marking Comes Full Circle*, 97 IOWA L. REV. 1003, 1005 (2012) ("The past two decades have seen a steady growth in the volume of high-stakes patent litigation."); James Bessen & Michael J. Meurer, *The Patent Litigation Explosion* (Bos. Univ. Sch. of Law, Law & Econ. Working Paper No. 05-18, 2005), *available at* http://www.researchoninnovation.org/lit.pdf.

[244] Carol J. Williams, *Political Logjam on Federal Judgeships*, L.A. TIMES, Aug. 31, 2010, at A7.

[245] Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570, 571 (2011).

[246] *Id.*

[247] *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010).

[248] 5 U.S.C. § 3345(a)(2) (2006).

[249] Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 274 (2008).

and subsequent amendments; the most recent version allows for acting heads to remain in office for up to 210 days.[250] Therefore, while Congress regularly held pro forma sessions to block recess appointments since 2007, it was doing nothing to prevent the accession of acting heads who proceeded to make policy decisions without any congressional oversight whatsoever.

A particularly acute example is the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). While President Obama's 2010 nominee for ATF director has been waiting over two years[251] for Senate confirmation at this writing, presidents have appointed multiple acting directors to head the $1 billion, 2,500-agent agency,[252] all without any Senate input. In fact, ATF has been without a confirmed director since Senate confirmation was first required[253] for the agency in 2006, with five acting directors since then.[254] These acting heads have not hesitated to make policy[255] and personnel choices[256] since that time, despite the lack of any Senate-confirmed director. Some of these policy choices, such as the notorious Fast and Furious program which inadvertently put guns in the hands of drug cartels, have sparked controversy.[257] Consequently, it might be argued that policymaking at ATF has been removed from the advice and consent regime altogether, despite the law requiring the Senate to confirm the agency's directors.

Other offices serving important roles in government have also been home to acting heads. For example, the Obama Administration's

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[250] § 3346(a)(1).

[251] *See* Frank Main, *ATF Boss Unfazed by Firearm Probe*, CHI. SUN-TIMES (Oct. 26, 2011, 10:32 AM), http://www.suntimes.com/photos/galleries/8428277-417/atf-boss-unfazed-by-firearm-probe.html (noting that Andrew Traver was still awaiting Senate confirmation); Press Release, The White House, President Obama Announces More Key Administration Posts (Nov. 15, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/11/15/president-obama-announces-more-key-administration-posts (announcing nomination of Andrew Traver for ATF head).

[252] *See* Sheryl Gay Stolberg, *Firearms Bureau Finds Itself in a Rough Patch*, N.Y. TIMES, July 5, 2011, at A14 (quoting ATF agent about multiple acting heads: "We'll never get a director confirmed, even if it was the pope.").

[253] 28 U.S.C. § 599A (2006) (requiring ATF director "be appointed by the President, by and with the advice and consent of the Senate").

[254] Kevin Johnson, *New Chief Enters Fray as ATF Faces 2 Federal Probes*, USA TODAY, Sept. 1, 2011, at 5A.

[255] *See* Main, *supra* note 251 (describing ATF acting director discussing his agency's "crackdown" on weapons trafficking to Mexico).

[256] *See* Press Release, Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Acting Director Jones Announces New Staff Assignments (Oct. 5, 2011), *available at* http://www.atf.gov/press/releases/2011/10/100511-atf-atf-acting-director-jones-announces-new-staff-assignments.html (describing the orders of new acting head to make numerous personnel changes at the agency).

[257] *See* Charlie Savage, *Justice Inquiry Faults Its Own in Guns Fiasco*, N.Y. TIMES, Sept. 20, 2012, at A1 (late edition) (describing the Inspector General's "scathing critique" of the guns program); *see also* Richard A. Serrano, *ATF Gun Debacle Costs Leader His Job*, L.A. TIMES, Aug. 31, 2011, at A1 (detailing the downfall of temporary ATF head Kenneth E. Melson).

Comptroller of the Currency, a Treasury Department office whose charge is to "charter, regulate, and supervise all national banks and federal savings associations,"[258] was home to an acting head for nearly two years.[259] This unconfirmed director had an indisputable effect on policy after taking office; Senate Democrats demanded his removal for "obstructing key aspects" of the Administration's financial overhaul plan.[260] Senators' holding out on recess appointments did not change the fact that officers unaccountable to the Senate were running those agencies.

Moreover, in several instances the acting head of an agency was the very same person whose recess appointment Congress was attempting to prevent—rendering the use of the pro forma session to block that appointment all the more fruitless. For example, the Obama Administration in June 2011 nominated Martin J. Gruenberg to serve as chairman for the Board of Directors of the Federal Deposit Insurance Corporation (FDIC).[261] But despite the fact that the Senate had not yet confirmed his appointment as of November 2011, Gruenberg had been serving since his nomination as acting chairman.[262] At the National Labor Relations Board, already a contentious battleground in this area after Obama's January 2012 recess appointments to its board,[263] the President's current nominee for general counsel[264] and the current acting general counsel[265] are one and the same.

These acting heads implement policy just as an officially confirmed officeholder would, especially if the nominee and the acting head are the same person. Were the House and Senate to allow recess appointments of

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[258] *About the OCC*, OFF. COMPTROLLER CURRENCY, http://www.occ.treas.gov/about/what-we-do/mission/index-about.html (last visited Sept. 9, 2012).

[259] *John G. Walsh: Acting Comptroller of the Currency*, OFF. COMPTROLLER CURRENCY, http://www.occ.treas.gov/about/who-we-are/comptroller-of-the-currency/bio-john-walsh.html (last visited Nov. 29, 2012).

[260] Binyamin Appelbaum, *Official from F.D.I.C. Picked to Lead Banking Regulator*, N.Y. TIMES, July 2, 2011, at B3.

[261] Press Release, The White House, Nominations Sent to the Senate, 6/13/2011 (June 13, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/13/nominations-sent-senate-6132011 (including the name of Gruenberg for an FDIC position).

[262] Chris Isidore, *'Too Big to Fail' Foe Picked for Top FDIC Post*, CNNMONEY (Oct. 21, 2011, 12:53 PM), http://money.cnn.com/2011/10/21/news/economy/banks_hoenig/index.htm (reporting that Gruenberg was serving as vice chairman and acting chairman since his nomination).

[263] *See* Steven Greenhouse, *Deadlock Is Ending on Labor Board*, N.Y. TIMES, Apr. 1, 2010, at B1 (reporting tension over recess appointments to the NLRB "after 26 months of near paralysis").

[264] Press Release, Nat'l Labor Relations Bd., President Obama Nominates Lafe Solomon to Be General Counsel, Terence F. Flynn to Be Member of the National Labor Relations Board (Jan. 5, 2011), *available at* https://www.nlrb.gov/news/president-obama-nominates-lafe-solomon-be-general-counsel-terence-f-flynn-be-member-national-la.

[265] *The General Counsel*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/who-we-are/general-counsel (last visited Nov. 29, 2012) (describing Lafe Solomon as acting general counsel since June 21, 2010).

these individuals, as it may have done with Obama's 2012 appointees,[266] the effect would be the same. In such an event, the constitutional problem of such sessions could be avoided, and the recess appointments would expire "at the End of their next Session,"[267] allowing the Senate a new chance to evaluate a new nominee.

CONCLUSION

Although members of the House and Senate purported to honor the Constitution by blocking presidential recess appointments with pro forma sessions for years, this Comment contends that they were instead violating it. Despite congressional backlash against President Obama's decision in early 2012 to break the logjam these sessions created, an analysis of the timing of the appointments indicates that the President was on solid policy and constitutional ground. Further, even if the timing of Obama's appointments was questionable, the pro forma sessions that otherwise restrained him from acting to fill vital offices did not reflect sound constitutional policy. Not only did the sessions effectively erase an enumerated executive power from Article II, they did so in a way that perpetuated an unsafe glut of unfilled government offices. When courts take up the question of whether the 2012 appointments were appropriate, they should take care to recognize that the recess appointment remains a vital part of the hamstrung advice and consent process. It should be left in place as an effective but limited tool of government.

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[266] *See* Pete Kasperowicz, *After a Long Year, Congress Grants Itself an Actual Recess*, THE HILL FLOOR ACTION BLOG (Mar. 30, 2012, 4:50 PM), http://thehill.com/blogs/floor-action/house/219325-after-a-long-year-congress-grants-itself-an-actual-recess (describing a deal between Republicans and Obama to forego recess appointments during the 2012 Easter break). By summer, however, pro forma sessions had started back up again—albeit down the street in a Senate office building. *See* Al Kamen, *Senate 'Pro Formas' to Be Held Down the Street*, WASH. POST, IN THE LOOP (Aug. 7, 2012, 8:00 AM), http://www.washingtonpost.com/blogs/in-the-loop/post/senate-pro-formas-to-be-held-down-the-street/2012/08/06/5429948e-dfe2-11e1-8fc5-a7dcf1fc161d_blog.html. No doubt the saga will continue.

[267] U.S. CONST. art. II, § 2, cl. 3.