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## Plausible Absurdities and Practical Formalities: The Recess Appointments Clause in Theory and Practice

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## NOTE

### PLAUSIBLE ABSURDITIES AND PRACTICAL FORMALITIES: THE RECESS APPOINTMENTS CLAUSE IN THEORY AND PRACTICE

David Frisof\*

*The recent controversy surrounding President Obama's recess appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau while the Senate was holding pro forma sessions illustrates the need to reach a new understanding of the Recess Appointments Clause of the Constitution. For the Recess Appointments Clause to be functional, it must fulfill two essential constitutional purposes: it must act as a fulcrum in the separation of powers, and it must ensure the continued exercise of the executive power. Achieving this functionality depends not only on the formal constructions of the Clause but also on the ways in which powers conferred under the Clause are exercised—in other words, on the constitutional expectations that the president and the Senate bring to recess appointments practice. The practical constitutional expectations that have governed recess appointments practice have largely prevented the active use of the Clause's many textually plausible absurdities that would utterly disrupt the Clause's functionality. In light of the role that constitutional expectations play in the functionality, and therefore constitutionality, of the Clause, the recent pro forma appointments controversy should not be resolved by the courts. Instead, both the pro forma sessions held by the Senate and the pro forma session recess appointments made by the president present a nonjusticiable political question. By declining to decide the constitutionality of these actions, courts will provide the executive and legislative branch the opportunity to ensure agreement as to both the construction of the Recess Appointments Clause and the attendant constitutional expectations that assure its functionality.*

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*[T]hat a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish.*

—Learned Hand<sup>1</sup>

## INTRODUCTION

On a blustery day in northeast Ohio in January 2012, President Obama announced the recess appointment of Richard Cordray, the former attorney general of Ohio, to the directorship of the Consumer Financial Protection Bureau.<sup>2</sup> On the same day, the president also announced that he was exercising his recess appointments power to appoint Sharon Block, Richard Griffin, and Terence F. Flynn to the National Labor Relations Board.<sup>3</sup> In making these appointments, the president employed his authority under the Constitution's Recess Appointments Clause, which enables him to make temporary appointments to senior executive branch positions and to Article III courts

1. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SUPREME JUDICIAL COURT OF MASSACHUSETTS: 1692–1942*, at 59, 66 (Mass. Bar Ass'n 1942), quoted in Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *COLUM. L. REV.* 237, 324 (2002).

2. *President Obama Speaks on Appointing Richard Cordray*, WHITE HOUSE (Jan. 4, 2012, 1:26 PM), <http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript>; see also David Nakamura & Felicia Sonmez, *Obama Defies Senate, Puts Cordray in Consumer Post*, WASH. POST, Jan. 5, 2012, at A1, available at [http://articles.washingtonpost.com/2012-01-04/politics/35441368\\_1\\_richard-cordray-president-obama-consumer-financial-protection-bureau](http://articles.washingtonpost.com/2012-01-04/politics/35441368_1_richard-cordray-president-obama-consumer-financial-protection-bureau).

3. Nakamura & Sonmez, *supra* note 2; *President Obama Announces Recess Appointments to Key Administration Posts*, WHITE HOUSE (Jan. 4, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

when the Senate is not in session and available to offer its advice and consent on the president's nominations.

Obama's decision to grant recess appointments to nominees that had been blocked by the Republican minority in the Senate was by no means unusual. While the Recess Appointments Clause was perhaps originally intended to ensure the continued functioning of the executive branch during the Senate's lengthy recesses,<sup>4</sup> presidents of both parties have exercised their constitutional powers under the Recess Appointments Clause for decades to appoint individuals blocked by opposing parties in Congress.<sup>5</sup> In fact, the president's appointments followed recent presidential practice and historical convention to the letter, except for one small detail: the Senate, according to its own proceedings, was not in recess.

On the date of Obama's appointments, the Senate was in the midst of holding pro forma sessions—sessions held purely to deny the president the ability to make recess appointments. Pro forma sessions had their genesis in 2007, when Democratic Senate Majority Leader Reid successfully used them to deny President Bush the ability to make any recess appointments during his last fourteen months in office.<sup>6</sup> Every three days, a senator would gavel the Senate to order only to adjourn the Senate a minute or two later, thereby carving a longer recess into a succession of shorter recesses and denying Bush a recess of the length sufficient to make a recess appointment.<sup>7</sup>

While the pro forma sessions of 2007 and 2008 had been the work of a Democratic Senate, a Republican House necessitated those sessions that stymied Obama's recess appointments power in August 2011 and attempted to do so again in December 2011 and January 2012.<sup>8</sup> Taking advantage of Article I, Section 5's requirement that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days,"<sup>9</sup> the Republican House, by refusing to consent to a recess with the Democratic Senate, forced the Senate to continue its pro forma sessions.<sup>10</sup>

As a practical matter, the pro forma sessions and the president's recess appointments notwithstanding, these sessions were merely the latest escalation of an increasingly dysfunctional presidential appointments process. In recent years, appointments to both Article III courts and executive agencies have ground to a halt, considerably impeding government functions.<sup>11</sup> As a

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4. See *infra* Sections I.A and II.A.

5. See, e.g., *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (detailing President George W. Bush's recess appointment of a federal appellate judge whose nomination had previously been vigorously opposed by Senate Democrats).

6. HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 11 (2013), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A>.

7. See *infra* Section III.A.

8. See *infra* Section III.A.

9. U.S. CONST. art. I, § 5, cl. 4.

10. See *infra* Section III.A.

11. See *infra* Section II.B.

constitutional matter, however, the Obama Administration's assertion that the president has the power to make recess appointments during pro forma sessions has resulted in a flurry of challenges.<sup>12</sup> Several courts of appeals have held these and other recent appointments unconstitutional.<sup>13</sup> By the time of this Note's publication, one such case, decided by the D.C. Circuit Court of Appeals, *Noel Canning v. NLRB*, will have been briefed and argued before the Supreme Court. In the decision below, the D.C. Circuit not only held that the president's appointments were unconstitutional but did so by holding that the president could make recess appointments only during intersession recesses and only when the vacancies had begun during that recess,<sup>14</sup> thereby upending long established, and previously uncontroversial, recess appointments practice.

Unlike other clauses in the Constitution, the Recess Appointments Clause has only occasionally been the subject of litigation. Until recently, both its place in the constitutional structure, as a minor fulcrum of the separation of powers between Congress and the president, and its relative unimportance, at least as compared with the likes of the Commerce Clause or the Equal Protection Clause, have only rarely made it the subject of judicial analysis.<sup>15</sup> Prior to the current controversy, interpretation of the Recess Appointments Clause has primarily occurred in opinions by attorneys general.<sup>16</sup> In the years leading up to the current controversy and in anticipation of the Supreme Court's forthcoming ruling on the scope of the Recess Appointments Clause, however, legal scholars have also weighed in on the Clause's meaning.<sup>17</sup>

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12. See, e.g., *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281); *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032(ESH), 2013 WL 3945027 (D.D.C. Aug. 1, 2013).

13. *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 660 (4th Cir. 2013); *New Vista*, 719 F.3d at 238–39; *Noel Canning*, 705 F.3d at 506–07.

14. *Noel Canning*, 705 F.3d at 506–07, 512.

15. See Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 443–44 (2005).

16. See, e.g., Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20 (1921) [hereinafter Daugherty Opinion]; President's Power to Fill Vacancies in Recess of the Senate, 12 Op. Att'y Gen. 32 (1866) [hereinafter Stanbery Opinion]; Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823) [hereinafter Wirt Opinion]; Edmund Randolph, Opinion on Recess Appointments (July, 7 1792) [hereinafter Randolph Opinion], in 24 THE PAPERS OF THOMAS JEFFERSON 165 (John Catanzariti ed., 1990).

17. See, e.g., Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751 (2009); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235 (2008); Herz, *supra* note 15; Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 Nw. U. L. REV. COLLOQUY 82 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/2/LRColl2007n2Tillman.pdf>; Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV.

Generally, interpreters of the Recess Appointments Clause have confronted three fundamental issues of constitutional construction. The Clause reads simply, “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.”<sup>18</sup> First, it is unclear when a vacancy must “happen” to satisfy the Clause. Must the vacancy first “happen to arise” during the recess or need the vacancy only “happen to exist” during the recess? In other words, if a position becomes vacant while the Senate is in session but remains unfilled until the next recess, is the president then able to make a recess appointment to fill the vacancy? Second, what types of recesses are comprehended by the Clause? Are recess appointments permitted only during intersession recesses (recesses between distinct sessions of Congress), or are they also permitted during intrasession recesses (breaks during a session of Congress)? Third, can the president use the Recess Appointments Clause to make judicial appointments to Article III courts?<sup>19</sup>

Within this framework, the history of the president’s power under the Recess Appointments Clause has generally been one of expansion. The earliest interpretations of the Clause were quite narrow, limiting recess appointments to positions that happened to become vacant during an intersession recess.<sup>20</sup> Later interpretations expanded the power, enabling presidents to make recess appointments regardless of when the vacancy first occurred<sup>21</sup> and without regard to the type of recess at issue.<sup>22</sup>

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2204 (1994); Amelia Frenkel, Note, *Defining Recess Appointments Clause “Vacancies”*, 88 N.Y.U. L. REV. 729 (2013); Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL’Y REV. 255 (2011).

18. U.S. CONST. art. II, § 2, cl. 3.

19. Other tangential or secondary issues concerning the Recess Appointments Clause have also been the subject of controversy and analysis. For instance, attorneys general and other commentators have addressed the scope of Congress’s authority to limit or deny pay to recess appointees, Recess Appointments, 41 Op. Att’y Gen. 463, 471–75 (1960) [hereinafter Walsh Opinion], and the length of tenure of an intrasession recess appointee (assuming the president is authorized to make them). *Id.* at 469–70.

20. Rappaport, *supra* note 17, at 1518–23 (discussing an opinion by the first attorney general, Edmund Randolph, and President Washington’s recess appointments practice during the First Congress).

21. Wirt Opinion, *supra* note 16.

22. Daugherty Opinion, *supra* note 16. Since 1921, opinions on the Recess Appointments Clause have focused on more technical issues, while leaving the essential construction endorsed by Daugherty untouched. Since the Daugherty Opinion, constructions of the Clause have focused on more narrow issues. A 1960 opinion by Acting Attorney General Walsh, endorsing the conclusions reached by Wirt and Daugherty, addressed the issue of *when* an intrasession recess appointment expired, arguing that the language of the Clause—“shall expire at the End of their next Session”—meant that a recess appointment expired not at the end of the current session but instead at the end of the next session fully distinguished from the current session by an intersession recess. Walsh Opinion, *supra* note 19, at 469–70 (quoting U.S. CONST. art. II, § 2, cl. 3) (internal quotation marks omitted). A 1993 brief by the Department of Justice, gesturing toward the Adjournments Clause, which prohibits either house of Congress from adjourning “without the Consent of the other . . . for more than three days,”

As with virtually all constitutional interpretation, interpreters of the Recess Appointments Clause support their preferred constructions with a constellation of arguments relying on the text of the Clause,<sup>23</sup> the purpose of the Clause within constitutional structure and separation of powers doctrine,<sup>24</sup> long-standing historical practice,<sup>25</sup> and changing political circumstances.<sup>26</sup> Despite wide divergence in methodologies and conclusions, most commentators agree on the Recess Appointments Clause's overarching, dual constitutional purposes: (1) maintaining a suitable balance of power between the president and the Senate, while (2) simultaneously enabling the president to ensure that the executive branch retains a continuous ability to execute the law when the Senate is unavailable to act on nominations the president puts forth.<sup>27</sup> Obviously, when asserting that nearly all constructions of the Recess Appointments Clause recognize these general purposes, the devil is in the details. Identifying a "suitable balance of power" and defining with precision the phrase "when the Senate is unavailable" are loaded exercises that serve to radically differentiate one construction of the Clause from another.<sup>28</sup> Despite these differences, general coalescence around these two purposes reveals an understanding that the Recess Appointments Clause, whatever its construction, was meant to be *functional*—to maintain a balance between the president and the Senate and to ensure that the executive branch always retains the power to execute the law.

But interpreters of the Clause do not rely merely on the inherent functionality of their constructions for justification. Many interpreters, regardless of the particular methodology employed or the evidence cited in support of their construction, bolster their reading of the Clause by relying on *dysfunctional* counterconstructions. To follow such constructions, the argument goes, would result in absurd abuses of power by the Senate or the president that would either eliminate the proper balance of power between the branches or suffocate the president's ability to see that the laws are executed. The great variety of constructions that employ this sort of dysfunctional counterconstruction argumentation demonstrates that, while perhaps an innumerable number of constructions are textually or formalistically plausible (and therefore defensible), one construction of the Clause is emphatically not available—a construction that renders the Clause *dysfunctional*. While each reading of the Clause stakes its legitimacy, at least in part, on the potential for absurdity and dysfunction presented by relevant

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concluded that a recess merely needed to be longer than three days to be constitutionally significant and therefore capable of supporting a valid recess appointment. U.S. CONST. art. I, § 5, cl. 4; Platt, *supra* note 17, at 277–78.

23. See, e.g., Noel Canning v. NLRB, 705 F.3d 490, 500 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281).

24. See, e.g., Wirt Opinion, *supra* note 16; Randolph Opinion, *supra* note 16.

25. See, e.g., Hein, *supra* note 17, at 243–49.

26. See, e.g., Platt, *supra* note 17, at 295–96.

27. See *infra* Section I.A.

28. See *infra* Section I.A.

counterconstructions, each construction is nonetheless at risk of absurd interpretation and dysfunctional practice.

Consequently, this Note argues that, insofar as a functional Recess Appointments Clause is the aim, functionality cannot be sought in the staid confines of the powers conferred and abuses curtailed under any particular textual construction. Rather, the underlying basis for functionality in the Clause should be sought in the extratextual constitutional expectations that both president and Senate bring to their respective roles in the appointments and recess appointments process. Both narrow and broad constructions are capable of sustaining a functional Recess Appointments Clause, so long as the political branches have similar expectations for recess appointments practice and the respective roles each branch is to play.

As Professor Primus has defined them, “[c]onstitutional expectations are intuitions about how the system is supposed to work” that, while often related to the text, are not bound by it.<sup>29</sup> They are the informal rules of the game, shaped by “a combination of experience, socialization, and principle,”<sup>30</sup> that often do more to shape the actions of constitutional players than the text itself.<sup>31</sup> This is particularly true with regard to recess appointments. The Clause, despite (or perhaps, because of) its seeming simplicity, depends heavily on shared constitutional expectations both for its execution and to ensure that it fulfills its functional constitutional role.

So what does this mean for the most recent controversy, in which the absurdity of a Senate taking a recess in all but name met the absurdity of a president making recess appointments when the Senate was not technically in recess? Unfortunately, this Note does not argue for the easy solution of judicial adjudication, based either on unearthed historical evidence or on rigid adherence to one theory of constitutional construction or another. Instead, the aim of this Note is three-fold. First, it demonstrates that the most basic purpose of the Recess Appointments Clause—to facilitate a functional process that preserves both the separation of powers and the executive’s ability to execute the law without interruption—can only be understood and served by going beyond the formal bounds of any particular construction of the Clause and by focusing on the expectations that each branch brings to the recess appointments process. Second, and in light of the first conclusion, this Note differentiates the broader structural questions related to the Recess Appointments Clause (as delineated by the various definitions of “recess” and “happen”) from the absurd abuses of pro forma sessions and pro forma session recess appointments. Third, this Note argues that the Supreme Court should decline to address the constitutionality of the pro forma sessions and the pro forma session appointments as a nonjusticiable political question, leaving the construction of both the Clause and its attendant constitutional expectations to the president and the Senate.

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29. Richard Primus, Essay, *Constitutional Expectations*, 109 MICH. L. REV. 91, 93–94 (2010).

30. *Id.* at 93.

31. *Id.* at 95.

Part I explores the role of functionality—maintaining a balance of power and ensuring the continued exercise of the executive power—in several important constructions of the Clause throughout history. It also identifies the “dysfunctional” counterconstructions used to legitimize the preferred, “functional” constructions. Last, it addresses the textually plausible absurdities in recess appointments practice that emphasize the need for extratextual considerations to assure that the Clause is functional.

Part II demonstrates that, in historical practice, formal constructions of the Recess Appointments Clause are connected to and dependent on sets of constitutional expectations for their functionality. By exploring recess appointments as practiced by President Washington and the First Congress and comparing them to modern recess appointments practice prior to the pro forma sessions, the crucial role of constitutional expectations in ensuring functionality is made clear.

Part III addresses the recent circuit court decision, *Noel Canning v. NLRB*, and suggests potential avenues for restoring functionality to the Recess Appointments Clause. Regardless of its merits as a matter of constitutional construction, *Noel Canning* fails because it results in a fundamental mismatch between the construction and the constitutional expectations of the Clause. Other possibilities, holding either the pro forma sessions or the pro forma recess appointments to be unconstitutional, would run contrary to the existing Political Question Doctrine and fail to ensure functionality in recess appointments. The best solution, instead, is to hold that the constitutionality of the pro forma sessions and the pro forma session appointments is a nonjusticiable political question, thereby encouraging the Senate and the president to agree on a construction of the Recess Appointments Clause and attendant constitutional expectations that assure its functionality.

#### I. FUNCTION AND DYSFUNCTION IN CONSTITUTIONAL CONSTRUCTION

Interpreters of the Recess Appointments Clause have long justified their preferred constructions as being functionally superior to others, insofar as their constructions fulfill the Clause’s two fundamental purposes: (1) maintaining a suitable balance of power between the president and the Senate, while (2) simultaneously ensuring that the president retains the continuous ability to execute the law, even when the Senate is unavailable to act on nominations. Moreover, interpreters rely not only on the functionality of their preferred constructions but also on the demonstrated *dysfunctionality* of disfavored counterconstructions. If followed, these dysfunctional counterconstructions would result in absurd presidential or senatorial abuses of power that would completely defeat one or the other of the Clause’s fundamental purposes. Interpreters of the Clause have employed this mode of argument nearly universally, regardless of whether they advocate for a narrow or broad interpretation of the president’s recess appointments power.

In addition to the canonical constructions, many commentators have identified absurd, but textually plausible, interpretations of the president’s

or the Senate's powers under the Clause. These textually plausible absurdities, which may be grafted onto either broad or narrow constructions of the Clause, would serve to completely undermine its purposes and turn any "functional" construction into a "dysfunctional" one.

The great variety of constructions that rely on dysfunctional counter-construction argumentation and the lurking presence of additional textually plausible absurdities demonstrate that formal constructions of the Clause cannot, of their own accord, provide for a happily functional recess appointments process. Instead, as explored in Part II, functionality is derived from the existence of relatively uniform constitutional expectations shared by both the president and the Senate.

Section I.A explores the role of functionality and dysfunctional counter-constructions in the treatment of two fundamental issues relating to the Recess Appointments Clause: whether a vacancy must begin during a recess to be filled with a recess appointment and whether a president can make recess appointments during intrasession recesses in addition to intersession recesses. Section I.B examines several textually plausible absurdities that lurk within constructions of the Recess Appointments Clause and their potential to render any broader construction of the Clause dysfunctional.

#### A. *Function and Dysfunction*

While the current controversy has produced a veritable blizzard of interpretations by courts, parties, and scholars purporting to determine the breadth of the president's recess appointments power, this Section looks to older constructions of the Clause. Two reasons motivate this analysis. First, the aim is to demonstrate that abuse and absurdity have always been part of the calculus in interpreting the Clause, and second, however elaborate recent interpretations have become in their exposition of text, original meaning, structure, and history,<sup>32</sup> arguments about function and dysfunction, abuse and absurdity have remained largely unchanged.

One of the earliest issues regarding the Recess Appointments Clause concerned the meaning of the word "happen" in the phrase, "[t]he President shall have power to fill up all Vacancies that may *happen* during the Recess of the Senate."<sup>33</sup> The crux of the issue is whether "happen" means "to arise" or "to begin" (the "arise interpretation"), thereby limiting the president to filling vacancies that first become so during a recess, or whether "happen"

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32. Cf. *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 669 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("I do not suggest that history should be ignored as a tool of constitutional interpretation. But one need only read the fine briefs in these cases to recognize that, given time, savvy lawyers can excavate historical references to support virtually any proposition."). A glance at the length of these arguments in recent court cases gives one a sense of the degree to which disagreeing interpretations of the Clause have mined the text, original meaning, structural relationships, and history of the Clause to prove their points. See, e.g., *id.* at 631–62 (majority opinion and Duncan, J., concurring) (spending thirty pages determining the meaning of "recess").

33. U.S. CONST. art. II, § 2, cl. 3 (emphasis added).

means “to exist” (the “exist interpretation”), enabling the president to make recess appointments during a recess regardless of when the vacancy first arose. Although Attorney General Randolph embraced the narrower arise interpretation in 1792<sup>34</sup> and President Washington did so as well around the same time,<sup>35</sup> the broader exist interpretation has been followed at least since Attorney General Wirt’s opinion in 1823.<sup>36</sup> Interested parties on both sides of the issue have emphasized the functionality of their preferred interpretation, and more importantly, the dysfunctionality of the opposing interpretation.

Adherents of the narrower arise interpretation, while acknowledging the Clause’s dual purposes, have typically prioritized the Clause’s role in maintaining a balance of power between the president and the Senate over its role in promoting the continued exercise of executive power. In his 1792 opinion,<sup>37</sup> although Randolph acknowledged that the Recess Appointments Clause was framed by its two fundamental purposes,<sup>38</sup> he feared that a contrary interpretation would force the Senate to vote on the confirmation of a recess appointee already in possession of the office.<sup>39</sup> Placing the Senate in such a situation meant that it would be unable to make a “[j]udgment absolutely free” in choosing to confirm or reject the appointee’s nomination.<sup>40</sup> For Randolph, the Senate’s ability to make confirmation decisions without

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34. Randolph Opinion, *supra* note 16, at 165–67.

35. Rappaport, *supra* note 17, at 1522.

36. Wirt Opinion, *supra* note 16. Some debate exists as to when precisely the exist interpretation became the default. Compare Hartnett, *supra* note 17, at 388–401 (arguing that the exist interpretation “dates back to at least 1813, . . . and may date back to President Jefferson in 1801 or to President Adams in 1799”), with Rappaport, *supra* note 17, at 1529–35 (calling into question evidence of the exist interpretation being widely adopted prior to 1823).

37. In July 1792, Randolph penned a brief opinion endorsing the arise interpretation in response to a query from Secretary of State Jefferson regarding whether Washington might make a recess appointment to an office that had been created in the last Senate session but had not yet been filled. Randolph Opinion, *supra* note 16, at 165–66. On April 2 of that year, Congress had passed an act establishing the mint and the office of chief coiner, and, while the Senate had remained in session until May 8, the president had not put forth a nominee for the position. *Id.* at 166. Acknowledging that no meaningful difference existed between a vacancy created by the death or resignation of a prior officeholder and a vacancy in a newly legislated office, Randolph argued that even though the office of chief coiner was in fact vacant, the president could not now make an appointment to that office. *Id.* at 166–67. Randolph straightforwardly equated “happened” with “commenced,” and because the vacancy had happened while the Senate was in session, no recess appointment could therefore be made to the office of chief coiner. *Id.* at 166. Randolph stated the issue at hand and his conclusion bluntly: “[I]s it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.” *Id.*

38. *Id.* “The Spirit of the Constitution favors the participation of the Senate in all appointments,” Randolph wrote, “[b]ut as it may be necessary oftentimes to fill up vacancies, when it may be inconvenient to summon the senate a temporary commission may be granted by the President.” *Id.*

39. *Id.*

40. *Id.*

influence was an essential component of the constitutionally divided appointments power that should only be discarded in cases of absolute necessity.<sup>41</sup> On Randolph's account, to enable the president to eliminate this senatorial prerogative by making recess appointments without regard to when the vacancy began would simply place too much strain on the carefully crafted separation of powers inherent in the Recess Appointments Clause.<sup>42</sup>

More recently, Judge Barkett hewed to the arise interpretation in dissenting from an Eleventh Circuit, en banc decision upholding a recess appointment.<sup>43</sup> Like Randolph, Judge Barkett emphasized the Clause's dual purposes within the constitutional structure<sup>44</sup> while forcefully pointing out the dysfunction inherent in the opposing counterconstruction (that is, the exist interpretation). Under the exist interpretation, she argued, the president could simply wait until a recess to appoint a nominee that the Senate had refused during the last session.<sup>45</sup> The president held "the power to repeatedly circumvent the Senate's advice-and-consent role *even when the Senate is not disabled from exercising that role but is, instead, perfectly capable of exercising it.*"<sup>46</sup> To Judge Barkett, the dysfunctional counterconstruction adopted by the court "frustrate[d] . . . the careful separation of powers intended by the framers" and necessitated adherence to the narrower arise interpretation.<sup>47</sup>

Proponents of the exist interpretation, which has attained near-universal acceptance since the early nineteenth century,<sup>48</sup> have also framed their constructions of the Clause in terms of its functionality and against the dysfunctionality of the counterconstruction (here, the arise interpretation). Adherents of the exist interpretation have acknowledged the dual purposes

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41. Necessity occurred when an appointee died, resigned, or refused to accept an appointment during a recess, causing the vacancy to arise during the recess. *Id.*

42. *Id.*

43. *Evans v. Stephens*, 387 F.3d 1220, 1226–28 (11th Cir. 2004) (en banc) (holding that Judge Pryor's recess appointment to the circuit was constitutional, even though Pryor's appointment was made during an intrasession recess and filled a vacancy that had arisen during a prior recess).

44. *Id.* at 1231–34 (Barkett, J., dissenting) ("Considering that the Recess Appointments Clause was intended to enable the President to fill vacancies only when the Senate was disabled from acting, and in light of the role that Article II gives the Senate in approving nominations to federal offices, there must be some more meaningful limit on the President's power to make a recess appointment than the two the majority proposes (i.e., that the Senate be in recess and that there be a vacancy to fill).").

45. *Id.* at 1233.

46. *Id.*

47. *Id.* at 1234.

48. See, e.g., *id.* at 1221–28 (majority opinion); *United States v. Alocco*, 305 F.2d 704 (2d Cir. 1962); *Stanbery Opinion*, *supra* note 16; *Wirt Opinion*, *supra* note 16.

of the Clause<sup>49</sup> while recognizing an imperative in the continuous exercise of executive power.<sup>50</sup> Unlike the legislative and judicial powers, which could “come into play at intervals,” it is “the very essence of executive power that it should always be capable of exercise.”<sup>51</sup> The president must “take care that the laws be faithfully executed,”<sup>52</sup> a responsibility which he fulfills by acting through the agency of others, by exercising both his powers of appointment and removal.<sup>53</sup>

For proponents of the exist interpretation, the dysfunction inherent in the counterconstruction is potentially ruinous. According to Wirt, if the arise interpretation were followed, then, if a vacancy were to arise on the last day of the Senate’s session and the president was not informed of the vacancy until later, the president would be unable to fill the vacancy, paralyzing the government.<sup>54</sup> This potential for paralysis and for the Recess Appointments Clause to fail in one of its primary functions—“to keep these offices filled”<sup>55</sup>—made the arise interpretation untenable for Wirt. Even more broadly, Attorney General Stanbery saw the arise interpretation as fatally dysfunctional because, regardless of cause, it opened the possibility that the executive branch would simply be unable to execute the laws when the Senate was not in session.<sup>56</sup> Wirt and Stanbery also rejected the claim that because the exist interpretation created the potential for presidential abuse of power, it was therefore defective. They pointed out that such an argument both assumed a degree of moral turpitude on the part of the president<sup>57</sup> and

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49. Wirt Opinion, *supra* note 16, at 632. For Wirt, the balance between separation of powers and ensuring a functioning executive power was simple: permanent appointments required the consent of the Senate while the president could make temporary appointments whenever the Senate was unavailable to act on nominations. *Id.*

50. Stanbery Opinion, *supra* note 16, at 35–36; Wirt Opinion, *supra* note 16, at 632 (“The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the constitution will be sacrificed to a dubious construction of its letter.”).

51. Stanbery Opinion, *supra* note 16, at 35.

52. *Id.* (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted).

53. *Id.* at 36–37, 40.

54. Wirt Opinion, *supra* note 16, at 632. Any number of unanticipated calamities—including “sudden and destructive pestilence . . . invasion . . . and a thousand other causes which cannot be foreseen”—could prevent the Senate from holding an expected session and offering their advice and consent on presidential nominations, thereby paralyzing the government. *Id.* at 633.

55. *Id.* at 632.

56. Stanbery Opinion, *supra* note 16, at 39 (“If during the recess the power [of appointment] is not in the President, it is nowhere, and there is a time when for a season the President is required to see that the laws are executed, and yet denied the very means provided for their execution.”).

57. Wirt Opinion, *supra* note 16, at 634 (“It cannot possibly produce mischief without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies . . .”).

applied just as easily to the expansive nature of senatorial powers in the appointments process.<sup>58</sup>

Functionality and dysfunctionality are also important to constructions that address whether the Recess Appointments Clause permits recess appointments during intrasession recesses in addition to intersession recesses. In 1901, Attorney General Knox argued that, although the president could make intersession recess appointments, he lacked the authority to make intrasession recess appointments.<sup>59</sup> Knox saw inescapable dysfunction in the pro-intrasession recess counterconstruction. First, if intrasession recess appointments were permitted, Knox saw no minimal limit on the amount of time Congress would need to be adjourned before the president could make a recess appointment. This would enable the president to make recess appointments during very short intrasession recesses, “as from Thursday or Friday until the following Monday,”<sup>60</sup> the obvious consequence of which would be to utterly destroy the Senate’s advice-and-consent role in appointments and thereby defeat one of the Recess Appointments Clause’s primary purposes: to maintain a suitable balance of power between the Senate and the president.<sup>61</sup>

In 1921, Attorney General Daugherty provided the counter to Knox’s opinion and argued that the Recess Appointments Clause did provide for intrasession recess appointments.<sup>62</sup> Although Daugherty’s argument relied

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58. Stanbery Opinion, *supra* note 16, at 39 (“[F]or we may imagine that the Senate might refuse to consent to every appointment made by the President, or to any appropriation to pay the salaries of officers, and thus leave the Executive without power to execute the laws.”).

59. President-Appointment of Officers-Holiday Recess, 23 Op. Att’y Gen. 599, 601 (1901) [hereinafter Knox Opinion]. Knox’s opinion that the Constitution did not permit intrasession recess appointments relied on both a functional argument and other bases. According to Knox, “adjournment” meant a break shorter than “recess.” *Id.* According to ordinary language, the Constitution, and legislative practice, “an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or . . . for such brief periods over holidays as are well recognized and established and as are agreed upon” by both houses of Congress. *Id.* These temporary adjournments, which occurred “during the session of Congress,” as per the Adjournments Clause, by definition did not end the session of Congress and therefore could not be recesses in the constitutional sense. *Id.* (emphasis added) (quoting U.S. CONST. art. I, § 5, cl. 4). By comparison, the president could make a recess appointment during “the recess [which] means the period after the final adjournment of Congress for the session, and before the next session begins.” *Id.* For two more recent commentaries arguing against the constitutionality of intrasession recesses, see Rappaport, *supra* note 17, at 1547–73, and Carrier, *supra* note 17.

60. Knox Opinion, *supra* note 59, at 603.

61. Knox saw further potential for absurdity in permitting intrasession recess appointments. Because recess appointments last until the end of Congress’s *next* session, an intrasession recess appointment would extend through the current session and to the end of the one following. *Id.* at 603–04. Implying this result to be unacceptable, Knox contended that the only way to frustrate it would be to assume that the return of the Senate after an intrasession adjournment would constitute the beginning of a new session. *Id.* at 604. This position was “wholly untenable” in light of the Adjournments Clause, which provides for adjournments “during the session.” *Id.*

62. Daugherty Opinion, *supra* note 16.

on a few precedents, it proceeded essentially on the basis of the dual purposes of the Clause.<sup>63</sup> For Daugherty, a functional Recess Appointments Clause required giving the word “recess” a practical construction rather than a technical one.<sup>64</sup> Like Wirt and Stanbery before him, Daugherty viewed intrasession recess appointments as almost obviously constitutional, given the “disastrous consequences a contrary construction may lead to.”<sup>65</sup>

Last, Daugherty addressed the potential for dysfunctional absurdity within his own construction. As raised by Knox twenty years previously, if intrasession recess appointments were permitted, what was the constitutionally mandated minimum length of time for a recess before the president could make a recess appointment? To Daugherty, this question lacked a precisely calculable answer. Alluding to the three days requirement of the Adjournments Clause,<sup>66</sup> he reiterated that the term “‘recess’ must be given a practical construction.”<sup>67</sup> While Daugherty admitted that allowing intrasession recess appointments gave the president wide discretion in “determin[ing] when there is a real and genuine recess,” thereby preventing the Senate from providing its advice and consent, he nonetheless saw this power as necessary to the functionality of the Recess Appointments Clause.<sup>68</sup>

These historical constructions and counterconstructions direct us toward two conclusions. First, these interpretations demonstrate that, whatever their interpretive methods, commentators on the Recess Appointments Clause universally agreed that functionality—balancing the separation of powers and ensuring that the executive branch maintains a

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63. *Id.* at 21–23. Daugherty first noted “that the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained.” *Id.* at 21. Daugherty then quoted with approval the purposes cited by Attorneys General Wirt and Stanbery. *Id.* at 22 (“The substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed.” (quoting Wirt Opinion, *supra* note 16, at 632) (internal quotation marks omitted)); *id.* at 23 (“The President must take care at all times that the laws be faithfully executed.” (quoting Stanbery Opinion, *supra* note 16, at 35) (internal quotation marks omitted)).

64. *Id.* at 21–22 (“Regardless of whether the Senate has adjourned or recessed, the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.”).

65. *Id.* at 23. Specifically, Daugherty saw the failure of denying intrasession recess appointments to be “the painful and inevitable result” of “prevent[ing] the exercise of governmental functions,” a “catastrophe” that the Framers never could have intended. *Id.*

66. *See infra* Section III.A.

67. Daugherty Opinion, *supra* note 16, at 25. While “the line of demarcation can not be accurately drawn,” he did not believe that “an adjournment for 5 or even 10 days can be said to constitute” a recess sufficient to activate the recess appointments power. *Id.* In this analysis, Daugherty relied on a 1905 Senate Judiciary Committee Report on recess appointments, which was a response to President Roosevelt’s recess appointment shenanigans in 1903, in which the president made well over one hundred recess appointments during an intersession recess that “occurred” when the presiding officer of the Senate simply announced that one session had adjourned and the next had immediately begun. *See id.* at 24–25; Hartnett, *supra* note 17, at 416.

68. Daugherty Opinion, *supra* note 16, at 25.

continuous ability to exercise its power—is the essential and constitutional purpose of the Clause. Second, by demonstrating the potential absurdities presented by alternate constructions, these interpretations urge us to seek functionality beyond the mere confines of constitutional construction.

### B. *Plausible Absurdities*

In addition to the competing dysfunctional counterconstructions urged by the commentators above, more than a few additional plausible absurdities lurk within the Constitution. These absurdities, reflecting unconventional (but plausible) readings of the constitutional text, aggregate power to either the president or the Senate and thereby distort or defeat the twin purposes of the Recess Appointments Clause. Their existence, and their at least plausible constitutionality, reinforce the notion that the functionality of the Recess Appointments Clause is not guaranteed by any specific construction but rather must be sought elsewhere.

St. George Tucker, one of the preeminent judges and legal scholars of the early republic,<sup>69</sup> was perhaps the earliest commentator to recognize plausible absurdity in the Recess Appointments Clause. Writing in 1803 and adopting the narrower arise interpretation endorsed by Randolph,<sup>70</sup> Tucker envisioned a constitutionally permissible method by which the president might bypass the Senate in appointing officers.<sup>71</sup> If an office became vacant during a recess and the president filled the vacancy with a recess appointment, because the recess appointment lasted until the end of the next senatorial session, the president could then make a second recess appointment to that office whether the Senate approved or not.<sup>72</sup> “[I]t is evidently in the power of the president to continue any person in office, whom he shall once have appointed in the recess of the senate, as long as he may think proper.”<sup>73</sup> Tucker clearly imagined that future presidents might take advantage of this constitutional “loophole” to effectively nullify the Senate’s advice-and-consent role for a significant portion of senior government offices. This potentiality concentrated such power in the president, he argued, that “[e]ven the control of elections [lost] its force” to effectively constrain the corruption and nepotism that would inevitably flow from it.<sup>74</sup>

Attorney General Stanbery, in his 1866 opinion, perceived the risk of mass recess appointments as well. While he acknowledged that there was an

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69. Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS*, at viii–x (Liberty Fund 1999) [hereinafter TUCKER, *SELECTED WRITINGS*].

70. See *supra* Section I.A.

71. ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* (1803), reprinted in TUCKER, *SELECTED WRITINGS*, *supra* note 69, at 91, 279–80. I am grateful to Professor Rappaport for identifying this source in his article. See Rappaport, *supra* note 17, at 1520–21.

72. TUCKER, *supra* note 71, at 279–80.

73. *Id.* at 280.

74. *Id.*

obvious potential for abuse of power under the exist interpretation, in which the president could make recess appointments regardless of when the vacancy began,<sup>75</sup> he saw little in the narrower arise interpretation that would prevent a president from acting similarly. Stanbery took Tucker's fears to their logical conclusion. A president acting under the arise interpretation could, during the recess, "remove every officer . . . whose tenure of office is not during good behavior, and thus create vacancies in *the recess* all to be filled by his own appointments."<sup>76</sup> In so doing, the president could "defeat entirely any participation on the part of the Senate."<sup>77</sup>

But absurdities that might upset the functionality of the appointments process are not merely the province of the president. Although Stanbery recognized that, broadly speaking, a Senate that "refuse[d] to consent to every appointment made by the President . . . [would] leave the Executive without power to execute the laws,"<sup>78</sup> other commentators have since identified particular constitutional quirks that could conceivably frustrate the functionality of the Recess Appointments Clause. Professor Herz suggests, for instance, that Congress could hold twelve full "sessions" each year, separated by intersession recesses of a few days, instead of its customary one full session per year.<sup>79</sup> Because recess appointments terminate at the end of the next session,<sup>80</sup> the Senate would dramatically decrease the length of any recess appointments made, "in effect eliminat[ing] the recess appointment power," regardless of whether the Clause was construed broadly or narrowly.<sup>81</sup>

Seth Barrett Tillman proposes an even more radical use of the Senate's ability to manage its own proceedings. Tillman argues that the Senate could actively use a "removal power" over recess appointees.<sup>82</sup> In the event of a recess appointment that the Senate found objectionable, "the Senate could convene, immediately terminate its session, and then reconvene instantly."<sup>83</sup>

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75. Stanbery Opinion, *supra* note 16, at 39.

76. *Id.* at 40.

77. *Id.*

78. *Id.* at 39.

79. Herz, *supra* note 15, at 459. Such an adjustment in schedule would be constitutional according to the Constitution's provisions that "[e]ach House may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2; Herz, *supra* note 15, at 459.

80. U.S. CONST. art. II, § 2, cl. 3.

81. Herz, *supra* note 15, at 460.

82. Tillman locates this power in the Orders, Resolutions, and Votes Clause of the Constitution, which provides that "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 . . ." U.S. CONST. art. I, § 7, cl. 3; Tillman, *supra* note 17, at 86. Under this Clause, "either the Senate acting alone or the two houses acting collectively can terminate a presidential recess appointment." *Id.*

83. Tillman, *supra* note 17, at 83.

These actions would effectively terminate all prior intersession recess appointments and another quick termination and reconvention would terminate all prior intrasession recess appointments.<sup>84</sup> While this innovation would be sure to diminish the president's power as compared with that of the Senate, Tillman sees its essential effect as causing the Senate to be "responsible to the electorate," as the Senate would no longer be able to deny responsibility for appointments by blaming the president for unpopular or controversial recess appointments.<sup>85</sup>

These innovations, at once both plausible and absurd, point us toward a deeper understanding of what the Recess Appointments Clause looks like. Indeed, insofar as we are willing to concede that whatever else a constitutional construction of the Recess Appointments Clause might be, it *must* be functional, it appears that such constitutionality cannot be achieved through construction of the text alone. Instead, functionality, and therefore constitutionality, seems to depend on *how* and *how often* the president and the Senate exercise powers conferred to them under any particular construction of the Clause. For instance, if the president were to make the occasional recess appointment, even under the narrowest construction of his power, his actions would unquestionably be constitutional. If, on Tucker's advice, however, the president were to make *all* his appointments during a recess (perhaps by requesting appointees to resign during the recess), his actions would emphatically defeat the functional purposes of the Clause, and, insofar as functionality is constitutionality, would appear to be unconstitutional. Notice that the character of the power exercised is unchanged; what affects functionality is the practice of the construed power, not the power itself.<sup>86</sup>

Given the many abuses of power that lurk within the Recess Appointments Clause, how can we differentiate between functional and dysfunctional, constitutional and unconstitutional? The answer lies in understanding and embracing the crucial role that extratextual constitutional expectations play in shaping the choices of constitutional actors, especially with regard to the appointments and recess appointments process.

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84. *Id.* at 83–84, 83 n.8. Because intrasession recess appointments last until the end of the next *full* session, the additional termination and reconvention would be required to terminate an intrasession recess appointment. *Id.* at 83 n.8.

85. *Id.* at 87 (emphasis omitted).

86. We could just as easily imagine actions taken by the Senate that could fit into this broadened understanding of functionality and constitutionality. For instance, if the Senate were to take no action on one nomination put forth by the president, that inaction would certainly be constitutional. It is only when the Senate refuses to act on *any* nomination put forth by the president and refuses to go into recess, thereby denying the president any ability to make appointments, that its inaction becomes unconstitutional. See Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1759–72 (1998) (arguing that the Senate's failure to vote on nominees put forth by the president is a failure to fulfill its nondiscretionary duty of providing advice and consent, conceivably actionable under the Due Process or Presentments Clauses).

## II. RECESS APPOINTMENTS AND CONSTITUTIONAL EXPECTATIONS

Constitutional expectations, as Professor Primus tells us, “are intuitions about how the system is supposed to work. They arise from a combination of experience, socialization, and principle.”<sup>87</sup> While constitutional expectations may reflect the constitutional text, they often eclipse the text in shaping our actions and can even drive construction of the text.<sup>88</sup> Moreover, constitutional expectations are neither universal nor static,<sup>89</sup> and when groups hold different expectations, conflict over both the expectations themselves and over textual meaning can arise.<sup>90</sup> When constitutional expectations are widely shared, however, they can form the basis for shared and universal practice that is considered constitutional, even if the practice lacks obvious textual support or is in fact explicitly contradicted by the text.<sup>91</sup>

Constitutional expectations explain why the president and the Senate have typically refrained from such absurdities and employed the powers conferred on them in a responsible and functional manner.<sup>92</sup> To understand how constitutional expectations can interact with the recess appointments process, it is instructive to scrutinize practices and expectations that appear foreign to us. The construction and expectations embraced by President Washington and the First Congress provide just such an opportunity: they

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87. Primus, *supra* note 29, at 93.

88. *Id.* at 93–94; *see also id.* at 97–98 (discussing the well-established and uncontroversial practice of having a member of the House of Representatives, elected in a special election during an odd year, run for reelection during the regular election cycle in the following even year, even though the Constitution specifically provides that “the House of Representatives ‘shall be composed of Members chosen every second Year by the People of the several States’” (emphasis added by Primus) (quoting U.S. CONST. art. I, § 2, cl. 1)).

89. Professor Primus suggests that changes in constitutional expectations result from a variety of social, cultural, and political events. *Id.* at 99 (“For example, the Great Depression prompted many Americans to reevaluate the allocation of power between the federal and state governments. Similarly, the confrontation with Nazi Germany and the Soviet Union prompted major changes in constitutional law’s regard for racial equality, free speech, and open democratic politics.” (footnote omitted)).

90. *Id.* at 93, 98.

91. *Id.* at 98. Consider Professor Primus’s opening example, that of the oath taken by President Obama during his inauguration in 2009. *Id.* at 92–93. The oath in Article II, Section 1 begins, “I do solemnly swear . . .” yet President Obama’s oath of office began, “I, Barack Hussein Obama, do solemnly swear . . .” *Id.* at 93 (quoting U.S. CONST. art. II, § 1, cl. 8, and *Barack Obama Re-Takes Oath of Office*, YouTube (Jan. 22, 2009), [http://www.youtube.com/watch?v=bq\\_PzWzC7rA](http://www.youtube.com/watch?v=bq_PzWzC7rA)). In so doing, President Obama followed the practice of presidents since Franklin Roosevelt (excepting Lyndon Johnson’s oath taken aboard Air Force One). *Id.* at 94. As Professor Primus explains, this practice—inserting one’s name into the presidential oath—has become what we expect to hear on inauguration day. *Id.* at 95. These “expectations define the operative constitutional norm, even though the text reads differently.” *Id.*

92. The prevailing construction of the Recess Appointments Clause has changed multiple times in the past two hundred years, and without doubt, so have the correspondent constitutional expectations. *See* discussion *supra* Part I. A full historical survey of these constitutional expectations, however, is beyond the scope of this Note. Instead, this Note identifies how constitutional expectations can shape the recess appointments practice and how this might provide guidance in resolving the current controversy.

construed the Clause very narrowly, limiting recess appointments to vacancies that began during the recess—a limitation that has been decisively rejected since the 1820s. Comparing Washington’s exercise of power under the Recess Appointments Clause to the recess appointments process prior to the pro forma sessions helps us understand these constitutional expectations and what options are available if we wish to return to a functional Recess Appointments Clause.

Section II.A demonstrates the interconnection of Washington’s construction of the Recess Appointments Clause with his constitutional expectations and argues that the former’s functionality depends on the nature of the latter. Section II.B provides a general sketch of recess appointments practice and expectations prior to the pro forma sessions and explains how the pro forma sessions and the pro forma session appointments destabilized settled, if strained, expectations.

#### A. *Practical Formalities: Virtue as Constitutional Expectation*

President Washington’s early recess appointments practice indicates that he subscribed to a relatively narrow construction of the Clause—limiting recess appointments to vacancies that happened to arise during the recess.<sup>93</sup> In the days leading up to the end of a Senate session, Washington would submit dozens of civilian and military nominations to the Senate to ensure that positions were filled prior to the recess.<sup>94</sup> Then, if a confirmed appointee declined the appointment during the recess, the president would be able to make a recess appointment because the vacancy would have *arisen* during the recess.<sup>95</sup> While Professor Rappaport sensibly reads this record to demonstrate Washington’s adherence to the narrower arise interpretation,<sup>96</sup> the picture remains incomplete until we place Washington’s construction of the Clause in the context of his constitutional expectations.

A cursory examination of the typical appointments process of Washington and the First Congress reveals that it is substantially different from the

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93. See Rappaport, *supra* note 17, at 1522–23. I am once again grateful to Professor Rappaport for identifying the source, 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS (Linda Grant De Pauw ed., 1974) [hereinafter SENATE EXECUTIVE JOURNAL], that provides the basis for this analysis. Rappaport, *supra* note 17, at 1512 n.71.

94. See SENATE EXECUTIVE JOURNAL, *supra* note 93, at 43–53.

95. See Letter from President George Washington to the Senate (Feb. 9, 1790) in SENATE EXECUTIVE JOURNAL, *supra* note 93, at 58–59. In this letter, Washington informed the Senate that William Paca, Cyrus Griffin, William Nelson Jr., and William Drayton were recess appointed to positions to fill vacancies caused by the resignations of Thomas Johnson, Edmund Pendleton, John Marshall, and Thomas Pinckney, respectively. *Id.* The four resigning appointees had been nominated and confirmed at the end of the previous session. Letter from President George Washington to the Senate (Sept. 24, 1789) in SENATE EXECUTIVE JOURNAL, *supra* note 93, at 44; SENATE EXECUTIVE JOURNAL, *supra* note 93, at 44, 47–48.

96. See Rappaport, *supra* note 17, at 1522–23.

appointments process that we have grown accustomed to in the late twentieth and early twenty-first centuries. Throughout the First Congress, the Senate acted on the president's nominations within two to three days, regardless of how close the president made the nomination to the end of a session.<sup>97</sup> Even the rare rejection of a nominee was handled promptly.<sup>98</sup> Of course, nothing explicit in the Appointments Clause requires such prompt action by the Senate in exercising its advice-and-consent responsibilities.<sup>99</sup> The prompt mutuality exhibited by the president and the First Congress in their appointments duties undoubtedly had many causes, likely including the smaller size of the Senate and the lesser extent of the federal government. Appointments in those early days were simply easier.

But perhaps more importantly, it is likely that the Founding Fathers simply assumed that this was the way that the appointments process should operate. In the Federalist Papers, Hamilton appeared to assume that the Senate could only act to confirm or reject a nominee,<sup>100</sup> a notion seconded by other Founding Fathers.<sup>101</sup> This relatively specific expectation of constitutional practice might have had its basis in a broader constitutional expectation: that powers conferred under the Constitution would be exercised virtuously. Washington understood that the written Constitution, while necessary, was insufficient on its own to secure the blessings of republican government and liberty for the people.<sup>102</sup> Instead, Washington believed that the success of the Constitution depended firmly on the virtue of those political actors entrusted with the powers and responsibilities enumerated in the Constitution.<sup>103</sup> The new government under the Constitution "was to be, in the first instance, in a considerable degree a government of accommodation

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97. See, e.g., SENATE EXECUTIVE JOURNAL, *supra* note 93, at 8–9 (recording the nomination and confirmation of William Short to the office of ambassador to France); *id.* at 13–24 (recording the nomination and confirmation of dozens of port officials); *id.* at 49–50 (recording the nomination and confirmation of several cabinet-level officials).

98. Benjamin Fishbourn was nominated to be the naval officer of the Port of Savannah on August 3, 1789 and was rejected by the Senate on August 5, 1789. Letter from President George Washington to the Senate (Aug. 3, 1789) in SENATE EXECUTIVE JOURNAL, *supra* note 93, at 16 & n.22; SENATE EXECUTIVE JOURNAL, *supra* note 93, at 23–24. On August 7, responding to the rejection of Fishbourn, Washington wrote a letter to the Senate informing them of the reasons for Fishbourn's nomination and requesting that, in the future, the Senate directly communicate its objections regarding specific nominees to the president so that the president could share with the Senate the information on which he based his nominations. Letter from President George Washington to the Senate (Aug. 7, 1789) in SENATE EXECUTIVE JOURNAL, *supra* note 93, at 24–25.

99. U.S. CONST. art. II, § 2, cl. 2.

100. Matthew C. Stephenson, Essay, *Can the President Appoint Principal Executive Officers Without Senate Confirmation Vote?*, 122 YALE L.J. 940, 965–66, 966 n.82 (2013) (citing Nos. 66, 76, and 77 of the Federalist Papers in which Hamilton appears to assume as much).

101. *Id.* at 966.

102. Richard Loss, *The Political Thought of President George Washington*, 19 PRESIDENTIAL STUD. Q. 471, 477 (1989).

103. *Id.* at 478. Washington's belief in the absolute necessity of virtuousness in the political class was reflected in his steadfast devotion to the establishment of a national university in the United States. *Id.* at 479.

as well as a government of laws. Much was to be done by *prudence*, much by *conciliation*, much by *firmness*.<sup>104</sup> In other words, Washington believed virtue to be a vital constitutional expectation attendant on the exercise of constitutionally granted power.

This virtue is reflected in the actions of the president and the Senate. The president endeavored to include the Senate in every appointment possible, and the Senate acted promptly on the president's nominees. Rather than push their constitutionally conferred powers to the utmost, they acted with explicit and overt respect for the other branch's constitutional role and responsibilities.

In the final analysis, however, it is irrelevant whether a heightened sense of virtue or something else shaped their actions. The crucial point, indisputable here, is that the president and the Senate, in implementing their preferred construction of the Recess Appointments Clause, did so in a way neither required nor constrained by their construction of the text. For Washington and the First Congress, the obvious functionality of their Recess Appointments Clause depended in part on their construction of the Clause itself and in part on a set of shared expectations. In short, it depended on the practical formalities with which they expected the appointments game to be played.

#### B. *Recess Appointments in the Modern Era and Pro Forma Destabilization*

With only a few exceptions since Attorney General Daugherty's 1921 opinion, the president, the Congress, and the courts have all agreed that the president may make both intersession and intrasession recess appointments regardless of when the vacancies first arose. But this difference in constitutional construction is not the only gulf that separates recent recess appointments and appointments practice in general from those of President Washington. Unlike in Washington's era, modern presidents make recess appointments largely in the face of political opposition, and they do so with some frequency.<sup>105</sup> Moreover, recess appointments are made in the context of an appointments process of astonishing sluggishness: some vacancies remain open for years<sup>106</sup> and appointees may wait for months before being

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104. *Id.* at 478 (quoting Letter from George Washington to Catherine Macauley Graham (Jan. 9, 1790), in 30 THE WRITINGS OF GEORGE WASHINGTON 495, 496 (John C. Fitzpatrick ed., 1939)).

105. President Reagan made 240 recess appointments in two terms, President George H.W. Bush made 77 recess appointments in one term, and President Clinton made 139 in two terms. Hein, *supra* note 17, at 236. President George W. Bush made 171 recess appointments in his terms, although pro forma sessions prevented him from making recess appointments during the last fourteen months of his presidency. President Obama, as of June 4, 2013, had made 32 recess appointments. HOGUE, *supra* note 6, at 1, 11.

106. See, e.g., *Judicial Emergencies as of 02/01/2013*, U.S. COURTS (Feb. 1, 2013), <http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201302/psoutput/jdarevac.html> (identifying thirty judicial vacancies, as of February 1, 2013, that qualify as "judicial emergencies" because of the high level of filings in that court or because the vacancy has been in existence for more than eighteen months). A cursory examination of the archives available

confirmed.<sup>107</sup> As is well documented, increased political polarization has played no small part in creating these circumstances.<sup>108</sup>

But it is not political polarization alone that has slowed down the appointments process such. Scholars have suggested at least two other potential contributing factors. First, the dramatically expanded size and scope of the administrative state and the federal judiciary may simultaneously decrease the urgency of filling vacancies<sup>109</sup> and make filling vacancies more politically contentious.<sup>110</sup> Second, Congress has provided for an alternative temporary appointments process by means of a statute enabling vacancies to be filled with “acting appointees” who serve for a limited time period.<sup>111</sup> While this statute might arguably reduce the need for quick appointments to the executive branch, some have suggested that it is largely ineffective in limiting the costs caused by extended vacancies.<sup>112</sup>

Prior to the pro forma sessions, these factors sustained a semifunctional Recess Appointments Clause grounded in expectations of political puffery and, ultimately, compromise or acquiescence. In other words, the Senate<sup>113</sup>

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here suggests that, in recent years, a substantial number of judicial vacancies have been open at any one time. See, e.g., *Current Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 2012), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201212/psoutput/jdarvac1\\_current\\_circuit.html](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201212/psoutput/jdarvac1_current_circuit.html) (83 vacancies); *Current Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 2010), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201012/jdarvac1\\_current\\_circuit.html](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/201012/jdarvac1_current_circuit.html) (110 vacancies); *Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 2008), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/200812/current\\_vacancy\\_list.pdf](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/200812/current_vacancy_list.pdf) (42 vacancies); *Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 2004), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/200412/current\\_vacancy\\_list.pdf](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/200412/current_vacancy_list.pdf) (29 vacancies); *Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 4, 2000), <http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/12042000/judgevacancy.htm> (67 vacancies); *Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 1996), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/1981\\_1985/Dec\\_Vacancies\\_1996.pdf](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/1981_1985/Dec_Vacancies_1996.pdf) (75 vacancies); *Vacancies in the Federal Judiciary*, U.S. COURTS (Dec. 1, 1992), [http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/1981\\_1985/Dec\\_Vacancies\\_1992.pdf](http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/archives/1981_1985/Dec_Vacancies_1992.pdf) (104 vacancies).

107. See Mark Eisen, Note, *Who’s Running This Place? A Comparative Look at the Political Appointment System in the United States and Britain, and What the United States Can Learn*, 30 B.U. INT’L L.J. 295, 320 (2012).

108. See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1126, 1141 (1999).

109. See Denton, *supra* note 17, at 763–65 (arguing that having more than eight hundred federal district and circuit judges means that the death or resignation of one judge will no longer shut down an entire court).

110. See *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2138–44 (2012).

111. Vacancies Act, 5 U.S.C. §§ 3345–3349d (2012); see also HENRY B. HOGUE, CONG. RESEARCH SERV., RS21412, TEMPORARILY FILLING PRESIDENTIALLY APPOINTED, SENATE-CONFIRMED POSITIONS 2 (2008), available at <http://www.fas.org/sgp/crs/misc/RS21412.pdf>. Under this Act, acting appointees can typically serve for 210 days. 5 U.S.C. § 3346.

112. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 934, 938–46 (2009).

113. In discussing recent recess appointments practice in this Section, generic references to the Senate are meant to capture the part of the Senate that opposed the president at

and the president engaged in a continuing contest of political will: the Senate would bluster about the inadequacy or inappropriateness of the president's nominees or simply place a hold on nominees in exchange for the funding or initiation of pet projects, and the president would complain about the Senate's (or a senator's) refusal to provide his nominees with an up or down vote.<sup>114</sup> Depending on how the political winds were blowing, the Senate would weigh how long to continue its dissembling and the president would weigh whether compromise or recess appointments were the proper response.<sup>115</sup>

So long as the conflict between the Senate and the president remained political, both sides had tools with which they could readjust the balance between the Clause's two competing purposes. The Senate, if it felt that its role in the appointments process was being denigrated, could threaten specific slowdowns of nominees or hold up other presidential priorities. The president, if he felt that the Senate was impeding the continued exercise of the executive power, could make the requisite recess appointments over the Senate's objection. While this kind of intense politicization might not produce a perfectly functional recess appointments clause, nor could it devolve into utter dysfunction in which one or the other of the Clause's dual purposes would be ignored entirely. These constitutional expectations, like those of Washington, are neither defined by nor bounded by the construction of the Clause presently in vogue.<sup>116</sup> It was in this context, of both a broad construction of the Recess Appointments Clause and highly politicized constitutional expectations, that the pro forma sessions were implemented.

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any particular time, whether the opposing party in the majority or the opposing party in the filibuster-proof minority.

114. In 1985, for example, Democratic Senate Minority Leader Byrd warned President Reagan against making any recess appointments during an upcoming recess. Hein, *supra* note 17, at 253. When Reagan ignored Byrd's warning and made recess appointments, Byrd and the Senate Democrats held up seventy executive and judicial nominations. *Id.* at 253–54. In response, President Reagan agreed to provide the Senate majority and minority leadership with advance notice of potential recess appointees. *Id.* at 254.

115. In 2006, for example, in response to Senate outrage regarding the recess appointment of John Bolton to the office of ambassador to the United Nations, President Bush, while complaining of "Senate obstructionism," opted not to reappoint Bolton during the second recess for fear that it would worsen relations between the legislative and executive branches. Hein, *supra* note 17, at 255–56.

116. It is not hard to imagine more cordial constitutional expectations in the context of the presently favored broad construction of the Clause. The Senate could work in good faith to give its advice and consent as quickly as possible. Given the sheer number of appointments to be made, these efforts still might not ensure that all vacancies would be filled during the session and the president might then feel the need to make recess appointments. Respecting the Senate's good faith, however, the president might willingly subject recess appointments to immediate Senate approval upon its return and might offer up another nominee in the event that the Senate rejected the full nomination of a recess appointee.

### III. PRO FORMA SESSIONS AND THE FUTURE OF THE RECESS APPOINTMENTS CLAUSE

The pro forma sessions and the president's correspondent recess appointments pose a potentially lethal challenge to maintaining some semblance of functionality in recess appointments practice. Both the pro forma sessions and the president's appointments during these sessions constitute the very plausible absurdities that previous interpreters of the Clause worried about.<sup>117</sup> Both carry plausible textual justifications, but both also seem facially absurd: the Constitution neither intended for Congress to declare itself to be in session when *no one* was in the capital, nor intended for the president to make recess appointments when the Senate *says that it is not* in recess.

Neither of these plausible absurdities deserves a judicial imprimatur of constitutionality. Absurdities of this sort do not reflect the Constitution itself, but rather reflect the discretionary and highly malleable constitutional expectations related to the Clause. These absurdities present quintessential political questions that should be left to the judiciary's coordinate branches of government. Leaving the question of constitutionality to the legislative and executive branches also ensures that the Recess Appointments Clause will remain semifunctional.

Section III.A presents as background the facts and legal arguments in support of both the pro forma sessions and the president's pro forma session recess appointments. Section III.B exposes the failures of the D.C. Circuit in *Noel Canning* in framing the question, especially in light of the connection between constitutional expectations and functionality. Section III.C argues that although holding either the pro forma sessions or the pro forma session recess appointments unconstitutional might be appealing as a temporary solution, it encourages the Senate and the president to explore other absurdities that could conceivably destroy functionality. Section III.D argues that the best solution, instead, is to hold that the constitutionality of the pro forma sessions and the pro forma session appointments is a nonjusticiable political question. This solution has two vital advantages. First, it maps onto existing political question jurisprudence and avoids entangling the judiciary in future discretionary decisions by its coordinate branches. Second, by leaving the constitutionality of the Recess Appointments Clause largely up to the Senate and the president, it urges them to settle their differences and embrace a set of constitutional expectations that enables recess appointments practice to be functional.

#### A. *The Pro Forma Sessions and Pro Forma Session Recess Appointments*

At the time of their implementation, the constitutional basis for the pro forma sessions relied on reading the Recess Appointments Clause and the Adjournments Clause together. Under this analysis, the Adjournments

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117. See *supra* Part I.

Clause's limitation that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days,"<sup>118</sup> sets a minimal length of time for which recesses could have constitutional significance and could therefore provide an opportunity for the president to make a recess appointment.<sup>119</sup> In 2007, Senate Democrats adopted this reasoning and held pro forma sessions over the Thanksgiving "recess" to prevent President Bush from making any recess appointments.<sup>120</sup> Proving successful, the Senate continued pro forma sessions through the end of Bush's presidency, preventing him from making any more recess appointments.<sup>121</sup>

In 2011, the pro forma sessions took on an added twist. This time, Republican senators urged Republican Speaker of the House Boehner to refuse to consent to adjournment of more than three days for the rest of President Obama's term.<sup>122</sup> Because the Senate would be unable to adjourn for more than three days, and because a recess needed to be more than three days to support a recess appointment, the House's refusal to adjourn would thereby defeat Obama's recess appointments power.<sup>123</sup>

Unlike Bush, however, Obama called Congress's bluff. In making his recess appointments during the pro forma session, Obama relied on two arguments. First, that the president had authority to make recess appointments during an intrasession recess of twenty days, and second, that a practical construction of the Recess Appointments Clause "focus[es] on the Senate's ability to provide advice and consent to nominations," rather than on whether the Senate is technically in recess.<sup>124</sup>

#### B. *Framing the Issue: Willful Ignorance Is Undeserved Bliss*

The D.C. Circuit, declining to address the unique nature of the pro forma sessions and the president's subsequent appointments as briefed by

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118. U.S. CONST. art. I, § 5, cl. 4.

119. HOGUE, *supra* note 6, at 2–3. The Department of Justice prominently and explicitly made this textual argument in 1993 in a brief submitted in the case *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993). HOGUE, *supra* note 6, at 3–4.

120. HOGUE, *supra* note 6, at 11. While 2007 was the first implementation of pro forma sessions to block recess appointments, it was not the first time the Senate considered such an idea. *Id.* at 11 & n.44. During the 1980s and 1990s, both Democratic and Republican Senators threatened their use. *Id.*

121. *Id.* at 11.

122. *Id.* at 12.

123. *Id.*

124. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 2012 WL 168645, 4 (Op. O.L.C. Jan. 6, 2012) [hereinafter OLC 2012 Memo].

both Noel Canning<sup>125</sup> and the National Labor Relations Board (“NLRB”),<sup>126</sup> instead held that, because the proper construction of the Recess Appointments Clause limits the president’s power to making *only intersession recess appointments* to vacancies that *first arose during that recess*, the appointments in question were unconstitutional.<sup>127</sup> The court’s originalist construction overturned more than 90 years of settled practice regarding intrasession recess appointments and almost 200 years of making recess appointments so long as the vacancy exists during the recess.<sup>128</sup> The merits of the D.C. Circuit’s reasoning on the meanings of “happen” and “recess” are beyond the focus of this Note, and the parties before the Supreme Court will doubtless argue this issue in much greater depth than is possible here. Instead, the aim of this Section is to demonstrate not that the D.C. Circuit reached the wrong answer but that it asked the wrong question.

Indeed, the Supreme Court has already expressed its openness to deciding the case on different grounds, asking the parties to brief the additional question of “[w]hether the President’s recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.”<sup>129</sup> But even this question risks confusing the true issue. It is not a

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125. The petitioner, Noel Canning, in contesting the legitimacy of a decision of the NLRB, argued that the three members of the NLRB appointed during the pro forma session were appointed unconstitutionally. Final Joint Brief for Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace at 2–5, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153), 2012 WL 5982360, at \*2–3, *cert. granted*, 133 S. Ct. 2861 (2013) (June 24, 2013) (No. 12-1281). Noel Canning argued that the pro forma sessions are real sessions of the Senate and that the adjournments of less than three days separating such sessions lack the constitutional significance necessary to support a recess appointment. *Id.* Unsurprisingly, Noel Canning relied on a dysfunctional counterconstruction to drive home its argument. Allowing the president the discretion to determine when the Senate is “unavailable” to receive nominations and is therefore in “recess,” argued Noel Canning, “would enable the President to both unilaterally declare recesses and make unilateral recess appointments, eviscerating the Senate’s constitutional role in the appointments process.” *Id.* at 4–5, 2012 WL 5982360, at \*4–5 (internal quotation marks omitted).

126. In response, the NLRB argued that the practical effect of the Senate’s actions during the pro forma sessions was to be in recess. Brief for the National Labor Relations Board at 11–12, *Noel Canning*, 705 F.3d 490 (Nos. 12-1115, 12-1153), 2012 WL 5982362, at \*11–12. The Senate, according to the NLRB, had passed, “by unanimous consent, an order that it would not engage in any business” during the January pro forma sessions. *Id.* Moreover, the Senate treated the January break as a recess and structured its affairs accordingly. *Id.* Last, like Noel Canning, the NLRB argued against the dysfunctional counterconstruction that ruling in Noel Canning’s favor would entail. If the Senate could transform longer recesses into shorter three-day recesses, despite officially declaring that no business is to be conducted during the pro forma sessions, it “would frustrate the constitutional design that ensures a mechanism for filling offices at all times . . . [and] would have substantially impaired the functioning of an Executive Branch agency and undermined the President’s responsibility to ‘take Care that the Laws be faithfully executed.’” *Id.* at 12–13, 2012 WL 5982362, at \*12–13 (quoting U.S. CONST. art. II, § 3).

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

128. See *supra* Section I.A.

129. *NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013), *granting cert. to Noel Canning*, 705 F.3d 490.

question of *when* the president may make recess appointments but of *whether* the Senate may manipulate its calendar so as to deny the president a Senate available to receive presidential nominations, while simultaneously denying him his recess appointments power. It is also a question of whether the president, in response, can make recess appointments when the Senate does not hold itself to be “in recess.” Like the absurdities of a president who makes only recess appointments or a Senate that never votes on the nominations before it, these are ploys to which the text, the writings of the Founders, and all subsequent constitutional history offer no clear answers.

Without a doubt, the D.C. Circuit takes comfort in the fact that its originalism enables it to resolve the case while avoiding these dicey issues. But this comfort is undeserved. By declining to address the facts on the ground as they are, the court, with one swift blow, has severed long-held and firmly entrenched constitutional expectations from their attendant constitutional construction. Insofar as functionality remains the guiding light in the understanding and practice of the Recess Appointments Clause, it is clear that no mere construction of the Clause can achieve it. If the D.C. Circuit’s decision were to stand, we would be left with an eighteenth-century construction and twenty-first-century expectations. The court’s decision hands the game to the Senate and, given present-day politicized expectations, ensures that dysfunctionality will be the inevitable result.

### C. *The Perils of Judicial Resolution on the Merits*

Once the question has been framed in this manner, the difference between determining the constitutional meanings of “happen” and “recess” and adjudicating the constitutionality of the pro forma sessions and the pro forma session recess appointments becomes clear. Defining “happen” and “recess” merely provides the broad structure of the recess appointments power and, regardless of whether they are construed broadly or narrowly, provides conceivable bases for functional recess appointments processes.<sup>130</sup> In contrast, the pro forma sessions and the subsequent appointments *are themselves* plausible absurdities.<sup>131</sup> The Senate’s and the president’s actions are efforts to stretch and redefine constitutional expectations regarding recess appointments practice.

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130. See *supra* Section I.A.

131. Judges have recognized the absurdities inherent in both sides of the pro forma controversy. See *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 651 (4th Cir. 2013) (“[T]he intrasession definition offers vague and the unavailable-for-business definition offers no durational guideposts. Under these definitions of the term ‘the Recess,’ the President simply is left to determine whether the Senate is in recess, with little or no guidance and/or judicial oversight.”); *id.* at 671–72 (Diaz, J., concurring in part and dissenting in part) (“As the majority would have it, the Senate is free to read out of the Constitution the President’s recess appointment power by refusing to take intersession recesses, opting instead to take an extended intrasession break . . . . To make matters worse . . . it actually gives the House of Representatives a de facto veto on presidential recess appointments.”).

Of course, there is nothing inherent about constitutional expectations that prevent them from changing or from being adjudicated by the Court. Constitutional expectations can change through a variety of means, and such changes can be enshrined by the Supreme Court.<sup>132</sup> As Professor Primus notes, recent Second Amendment victories before the Supreme Court “do[ ] not reflect the discovery of a heretofore neglected but inherently correct reading of the text”; they instead reflect “a victory for a political movement that, over the course of decades, persuaded many people to adopt a certain view of that text.”<sup>133</sup> The Court has also been closer to the vanguard in efforts to change constitutional expectations.<sup>134</sup>

But simply because the Court could enshrine different constitutional expectations with regard to the Recess Appointments Clause does not mean that it should. If the Supreme Court, as a practical matter, were to hold that the Senate can be in recess without being “in recess,” then what majority or filibuster-proof minority in the Senate would ever allow the president to again make recess appointments when it could so effectively prevent him from doing so? If the Court were to hold that the president can make “recess appointments” when the Senate says that it is not in recess, it would embolden the executive branch, perhaps encouraging a future president to make the absurdist “lunch recess appointments”<sup>135</sup>—those that haunt the dreams of ardent Senate partisans—a reality.

The Court ought not to enforce one absurdity simply because it finds it to be slightly more textually plausible than the next. Either decision, like the D.C. Circuit’s decision in *Noel Canning*, would give the winning branch of government a powerful, judicially approved weapon in asserting itself in the appointments process. While these holdings might seem to offer certainty in defining the bounds of the Clause—a valued feature in separation of powers doctrine<sup>136</sup>—it is doubtful that such a decision would settle recess appointments practice for long. More likely, it would start an arms race, with both the Senate and the president looking for whatever textually plausible absurdity would give one a slight and fleeting advantage over the other.<sup>137</sup>

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132. Primus, *supra* note 29, at 99–100.

133. *Id.* at 100.

134. *E.g., id.* at 102–05 (discussing the Court’s role in shifting constitutional expectations with respect to racial equality and the federal government through its decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

135. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 230 (3d Cir. 2013).

136. *Noel Canning v. NLRB*, 705 F.3d 490, 504 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013) (June 24, 2013) (No. 12-1281) (“As the Supreme Court has observed when interpreting ‘major features’ of the Constitution’s separation of powers, we must ‘establish[ ] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.’” (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995))).

137. A tentative détente appeared possible in July 2013, when Senate Republicans and Democrats were able to compromise on several politically controversial nominees and agencies—including Richard Cordray, nominated to head the Consumer Financial Protection Bureau and alternative nominees to the NLRB—and were able to confirm them. See Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*,

D. *Political Question Doctrine: The Benefits of Deciding Without Deciding*

Framing the issue in this manner—whether the Senate may manipulate its calendar to deny the president his recess appointments power while simultaneously engaging in a practical recess, and whether the president, in response, can make recess appointments despite the fact that the Senate has not held itself to be “in recess”—also demonstrates its nonjusticiability as a political question.

In *Baker v. Carr*, the foundation for the modern-day political question doctrine, the Court identified six factors that might betray the presence of a political question: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” (2) “a lack of judicially discoverable or manageable standards for resolving it,” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion,” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” (5) “an unusual need for unquestioning adherence to a political decision already made,” and (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>138</sup>

Other interpreters have also employed these factors in arguing for or against the application of the political question doctrine to aspects of the Recess Appointments Clause. In 2004, the Eleventh Circuit, sitting en banc, held that the discretionary authority of the president to recess appoint an individual whose confirmation had previously been blocked in the Senate presented a nonjusticiable political question.<sup>139</sup> The court also held that the president could make both intrasession recess appointments and recess appointments to vacancies that existed prior to the recess, but it noted that “we lack the legal standards—once we move away from interpreting the text of the Constitution—to determine how much Presidential deference is due to

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N.Y. TIMES, July 17, 2013, at A1, available at <http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html>. This no longer seems a likely possibility. In November 2013, after renewed Republican stonewalling of specific executive and judicial nominees, Senate Democrats opted to reform the Senate rules, eliminating the filibuster for executive and judicial nominees and requiring only a simple majority to end debate on executive and judicial nominees. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1, available at <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>. While this reform lessens the possibility of controversial recess appointments when the presidency and the Senate are controlled by the same party, it has heightened the already-considerable animosity between the two parties. In the likely event that the presidency and the Senate are not controlled by the same party in the near future, a Supreme Court decision vindicating either of the pro forma absurdities would only encourage more constitutional shenanigans. As has already been established, no shortage of plausible absurdities exists from which the president and the Senate can draw. See *supra* Section I.B.

138. 369 U.S. 186, 217 (1962).

139. *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004) (en banc).

the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him.”<sup>140</sup>

Most recently, Professor Williams, in an amicus curiae brief to the Supreme Court, argues that the Court should hold that the president’s pro forma session recess appointments present a political question.<sup>141</sup> Williams’s argument strikes broadly. First, he argues that the Framers’ decision to endow the president with “predominant authority over appointments while restricting the Senate to an advisory consent vote,” especially in contrast to Congress’s role in appointments during the confederation, demonstrates a “textually demonstrable commitment” of the power to the president.<sup>142</sup> Second, he maintains that this exclusive authority, embodied in the terms “the Recess” and “Vacancies that may happen,” contains no identifiable textual limit, similar to the lack of a limit in the word “try” in the Impeachment Power Clause, as determined in *Nixon v. United States*.<sup>143</sup> Third, Williams reasons that, properly framed in light of the Senate minority’s extended campaign of obstruction of presidential nominations, there are no judicially manageable standards for resolving the recess appointments controversy.<sup>144</sup> Last, Williams argues that, in light of the substantial political and economic disruptions already caused by challenges to the recess appointments, the need for finality is extreme.<sup>145</sup>

Williams’s arguments have already been largely rejected by the Third Circuit, which, in a case decided in May 2013, ruled that the recess appointment of Craig Becker to the NLRB during a two-week intrasession recess in March 2010 was unconstitutional because the word “recess” comprised only

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140. *Id.* Patrick Hein analyzes this decision in his comment as demonstrative of the judiciary’s long-standing acquiescence to the broad interpretation of the Recess Appointments Clause asserted by the executive branch. Hein, *supra* note 17, at 265–68. Hein’s aim is both to justify a broad recess appointment power and to demonstrate the means by which both the legislative and judicial branches have acceded to the executive’s interpretation. *Id.* at 240–41. Moreover, Hein is concerned with generic application of the Political Question Doctrine to the Recess Appointments Clause, in contrast to the aim of this Note, which is to apply the Political Question Doctrine only to the plausible absurdities of the pro forma sessions, rather than to the Clause’s entire scope. *Id.* at 265–68.

141. Amicus Curiae Brief of Professor Victor Williams in Support of Petitioner, NLRB v. Noel Canning, No. 12-1281 (U.S. May 28, 2013) [hereinafter Williams Amicus Brief], 2013 WL 2365102.

142. *Id.* at 9–16, 2013 WL 2365102, at \*9–16.

143. *Id.* at 16–17, 2013 WL 2365102, at \*16–17 (internal quotation marks omitted). In *Nixon v. United States*, 506 U.S. 224 (1993), the Court held that the shape and meaning of the impeachment power was a political question delegated to the Senate and that the Senate’s procedures were not subject to judicial review. *Id.* at 238. The Court’s opinion emphasized that the Constitution gave the Senate “sole Power to try all Impeachments.” *Id.* at 229 (emphasis added) (quoting U.S. CONST. art. I, § 3, cl. 6). These words indicated a “grant of authority to the Senate” that was both exclusive and without implied limitation. *Id.* at 229–30. The Court also recognized that both the “lack of finality and the difficulty of fashioning relief counsel[ed] against justiciability.” *Id.* at 236.

144. See Williams Amicus Brief, *supra* note 141, at 21–24, 2013 WL 2365102, at \*21–24.

145. *Id.* at 27–29, 2013 WL 2365102, at \*27–29.

intersession recesses.<sup>146</sup> In reaching this conclusion, the court held that the definition of “recess” was not a political question, specifically rejecting nearly identical arguments put forth in an earlier amicus curiae brief by Williams.<sup>147</sup> It rejected the notion that the president’s unilateral authority to make recess appointments included an authority to determine when he could make recess appointments, stating that it does not “textually commit[ ] to the president the task of defining ‘recess.’”<sup>148</sup> As the court emphasized, the Clause “does not provide unqualified power to either the Senate or the president that would suggest it makes a textual commitment to either.”<sup>149</sup> The requirement that the Senate be in recess, according to the court, limited the president’s recess appointment power, while the Senate’s absence during senatorial recesses limited its power of advice and consent.<sup>150</sup> The Third Circuit also rejected Williams’s argument that no judicially manageable standards existed for determining the meaning of “recess,” noting that both an intersession definition and a definition based on the three-days requirement of the Adjournments Clause presented manageable standards.<sup>151</sup>

In light of these recent analyses, two observations are worth noting. First, in addition to the critiques leveled by the Third Circuit, Williams’s argument that the lack of a textual limit on the president’s exclusive recess appointments authority renders such authority unreviewable proves too much. It would result in the same plausible absurdity as a decision on the merits in favor of the president, enabling a president to make a recess appointment without regard to the stated availability or sessions of Congress. The case hinges only on whether the pro forma sessions and the pro forma session recess appointments ought to be considered political questions, not on the justiciability of the entire breadth of the Recess Appointments Clause. Similarly, because it focused on determining whether the definition of “recess” is a political question, the Third Circuit’s analysis does not bear directly on the question here. Indeed, this Note does not dispute that the definitions of “recess” and “happen” within the Clause are justiciable issues. As emphasized in Section III.C, defining the broad contours of the Recess Appointments Clause, as demarcated by the words “recess” and “happen,” is a question separate from determining the justiciability of absurd abuses of recess appointments power by either the Senate or the president.<sup>152</sup>

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146. NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 208 (3d Cir. 2013).

147. *Id.* at 215–17.

148. *Id.* at 216.

149. *Id.*

150. *Id.*

151. *Id.* at 217.

152. The Third Circuit identifies a similar distinction, noting that determining “*when* the president can use his recess-appointments power” is an issue separate from determining “*how* the president can use that power.” *Id.* at 217 (emphases added).

To understand why the pro forma actions of both the Senate and the president ought to be considered nonjusticiable political questions, it is important to return to the underlying purposes of the political question doctrine. Despite *Baker*'s six factors, the purposes of the doctrine can be distilled to two<sup>153</sup>: The classical political question doctrine comprises the notion that in some cases, “[t]he Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion.”<sup>154</sup> The prudential political question doctrine is a “judge-made overlay” employed by courts to “avoid deciding controversial cases” and to “protect their legitimacy and to avoid conflict with the political branches.”<sup>155</sup>

These purposes illuminate the applicability of the political question doctrine to the pro forma sessions and pro forma appointments. No matter how the broader recess appointments power is structured (that is, how “recess” and “happen” are construed), the Constitution provides both the president and the Senate total discretion to engage in abuses that render the Recess Appointments Clause dysfunctional and therefore defeat the very purpose of the Clause within the constitutional structure. The Adjournments Clause,<sup>156</sup> the Proceedings Clause,<sup>157</sup> and Article I, Section 4, Clause 2,<sup>158</sup> unequivocally provide the Senate with the ability to determine its own session, rules, and

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153. In a recent concurrence, Justice Sotomayor placed the six *Baker* factors into three purpose-oriented categories. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431–32 (2012) (Sotomayor, J., concurring in part and concurring in the judgment). The first factor—“textually demonstrable constitutional commitment”—reflected the idea that the Court “lacks authority to resolve [the] issue.” *Id.* at 1431 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted). The second and third factors—a lack of judicially manageable standards and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”—“reflect circumstances in which a dispute calls for decisionmaking beyond courts’ competence.” *Id.* at 1431–32 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted). The fourth, fifth, and sixth factors—“expressing lack of the respect due coordinate branches of government,” a need for finality, and the potential for embarrassment of “multifarious pronouncements”—“address circumstances in which prudence may counsel against a court’s resolution of an issue presented.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted).

154. *Barkow*, *supra* note 1, at 247–48. This doctrine is encapsulated by the first *Baker* factor (and potentially the second). *Id.* at 265. In the eighteenth and nineteenth centuries, this doctrine was considered to be at one end of a spectrum of considerable judicial deference to the political branches, while declaring only statutes at “irreconcilable variance” with the Constitution to be unconstitutional was at the other. *Id.* at 250–52 (quoting *THE FEDERALIST* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Political questions of this sort “involve areas in which the Constitution vests the political branches with discretion.” *Id.* at 249.

155. *Id.* at 253. The prudential political question doctrine is encapsulated by the last four *Baker* factors and potentially the second. *Id.* at 265.

156. 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.”).

157. *Id.* art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

158. *Id.* art. I, § 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

calendar. The Recess Appointments Clause and the Take Care Clause<sup>159</sup> provide the president with the authority to make recess appointments to offices created and mandated by law and to see that the laws are executed. While these Clauses lack the unique language of the Impeachments Clause that was held to be so pivotal in *Nixon*,<sup>160</sup> textual commitment need not rely on such specific language.<sup>161</sup> These Clauses provide both branches of government with wide-ranging authority, authority that could be quite plausibly read to include any number of the absurdities cataloged in Section I.B.<sup>162</sup> They also reach to the very foundational workings of the political branches. The legislature must be able to independently set its own calendar and agenda, and the president, in light of a constitutional structure that envisions an executive branch manned by appointees charged with executing the law, must be able to make such appointees.<sup>163</sup> By ruling on the constitutionality of the pro forma sessions and recess appointments, the Court exposes itself to future litigation on these highly discretionary functions. As Justice Scalia has commented, “official representations” of “matters of internal process” must “be accepted at face value” by the Court.<sup>164</sup>

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different Day.”), *amended by* amend. XX, § 2 (changing the constitutionally required first day of the session to be January 3).

159. *Id.* art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

160. *See supra* note 143.

161. In two concurrences to *Nixon*, both Justices Stevens and Souter dismissed the notion that the specific wording of the Clause was essential to the holding. *Nixon v. United States*, 506 U.S. 224, 238 (1993) (Stevens, J., concurring) (“For me, the debate about the strength of the inferences to be drawn from the use of the words ‘sole’ and ‘try’ is far less significant than the central fact that the Framers decided to assign the impeachment power to the Legislative Branch.”); *id.* at 252 (Souter, J., concurring in the judgment) (“[T]he functional nature of the political question doctrine requires analysis of ‘the precise facts and posture of the particular case,’ and precludes ‘resolution by any semantic cataloguing.’” (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))); *see also* Barkow, *supra* note 1, at 253 (“Given that the Constitution does not contain an express textual commitment of judicial review in the Supreme Court, it is not surprising that provisions of the Constitution do not explicitly strip the Court of power and vest interpretive authority with Congress or the Executive.”).

162. It is worth noting that the plausible absurdities of the pro forma controversy and the other plausible absurdities available to the Senate and the president do not take the form of actions typically reviewable by the courts. The Supreme Court has repeatedly emphasized that when a constitutional question involves a question of statutory interpretation, such a question is unlikely to be a nonjusticiable political question. *See, e.g., Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). The pro forma sessions controversy is emphatically *not* a question of statutory interpretation.

163. Stanbery Opinion, *supra* note 16, at 36 (“But the President, although the source of executive power, cannot exercise it all himself. . . . He must act by the agency of others.”).

164. *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in the judgment).

Moreover, to solve one problem here is to beget another. If the Court condemns the Senate's duplicity,<sup>165</sup> it condones the president's overreach;<sup>166</sup> if the Court condemns the president's overreach, it condones the Senate's duplicity. As the Court emphasized in *Nixon*, "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."<sup>167</sup> That no judicial resolution of the controversy will satisfactorily curtail the abuses of both branches indicates that the final resolution of these issues must be textually committed to the political branches.<sup>168</sup> The Recess Appointments Clause is not textually committed to either the president or the Senate exclusively so much as it is committed to the both of them under the idea that the elected branches of government will in fact govern.

Both because we consider the ultimate authority over these Clauses to be delegated to the political branches and because it is well-nigh impossible to imagine discoverable and manageable judicial standards by which such absurdities might be contained, the constitutionality of the pro forma sessions and the pro forma recess appointments must be considered to present a nonjusticiable political question.<sup>169</sup>

Of course, such a resolution is far from immediately satisfactory. While it risks further dysfunction, it also places on the shoulders of the legislative and executive branches the burden of finding functionality for themselves; in the end, right where it has always been.<sup>170</sup> It may be that pro forma sessions

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165. *Cf.* *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 676 (4th Cir. 2013) (Diaz, J., concurring in part and dissenting in part) ("The majority's view also ignores the modern recess practices of the Senate, wherein intrasession recesses have become the norm . . . [I]t . . . grants the Senate—through the use of a *procedural artifice unworthy of the world's greatest deliberative body*—unfettered power to prevent the President from making recess appointments to fill up important offices." (emphasis added)).

166. *Cf. id.* at 634 (majority opinion) ("[T]he Recess Appointments Clause was designed to prevent the President from unilaterally exercising appointment power, thereby preserving the separation of the powers between the Legislative and Executive Branches.").

167. *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

168. In a way, the lack of judicially manageable standards here results in a curious inversion of the fifth *Baker* factor's requirement for an "unusual need for unquestioning adherence to a political decision already made." *Baker v. Carr*, 369 U.S. 186, 217 (1962). It is not the finality of an earlier decision by a coordinate branch that is required but rather the *absence of finality* as imposed by the courts that is required.

169. The applicability of the Political Question Doctrine here also serves to invalidate what would perhaps be the most karmically satisfying solution—to hold that both the Senate's pro forma sessions *and* the president's pro forma session appointments are unconstitutional. The appeal of being able to issue a stern admonishment to both the president and the Senate is mighty indeed. While this solution preserves both the presently accepted construction of the Clause as well as the current constitutional expectations, it likely cannot overcome the political question analysis discussed in this Section.

170. *Cf. Barkow, supra* note 1, at 327 ("Placing some interpretive power with the political branches also insures that those branches will, as a general matter, be more attentive to constitutional concerns. [When the Court opts not to leave particular constitutional questions with the political branches,] the political branches lose their sense of responsibility to analyze independently the constitutionality of a particular course of action.").

and pro forma session recess appointments become a new fixture in the constitutional firmament. That, when the Senate feels strongly about the shortcomings of a particular candidate or wishes to make its voice known in a policy debate, it will hold pro forma sessions to ostensibly “prevent” the president from making any appointments. In response, when the president feels that the Senate is doing so unreasonably, he will make pro forma session appointments. Our constitutional expectations will be of each branch accusing the other of unconstitutionality. But this is only one possibility. Maybe we will return to the semifunctionality of the 1990s and 2000s. Or maybe we will do something new.

Ultimately, the lesson here is that, in looking for a functional Recess Appointments Clause, we must look not only to the formally construed powers of the president or Congress but also to how these powers are to be used.<sup>171</sup> Every formal construction by one branch or the other is susceptible to plausible absurdities that can disrupt functionality. Instead, we must look to the expectations and manners of the president and the Senate, to each branch’s understanding of its constitutional role and the valid and substantive constitutional role of the other branch. The Constitution (as a written document) and the great corpus of constitutional law would have us believe that functionality stems from simply getting the formal interpretation of the law right.<sup>172</sup> It would lead us to believe that we can be, and are, a nation of laws and laws alone. What the many textually defensible constructions of the Recess Appointments Clause tell us, and what the many opportunities for textually plausible absurdity tell us, is that however much we are a nation of laws, we are also a nation of people, and that whatever constructions we might place on the Constitution, they will always be, in some measure, inadequate.<sup>173</sup> Constitutional behavior can never be fully codified or judicially interpreted. No, the Constitution must rely, for its final defense, on the expectations, manners, and sentiments of the constitutional actors to whom it is entrusted.

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171. Niceties aside, the thesis hinted at herein is the utter irrelevancy of any formal construction of the Recess Appointments Clause to its functionality. To the extent that we argue for any particular interpretation, narrow or broad, we are arguing over the bones of a beast without regard to its flesh and skin. The dysfunction in any particular construction is born not of the Constitution or the construction but of us. It is *our* dysfunction. We make the Constitution dysfunctional; it is not the other way around.

172. Cf. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 9 (1999) (“In many ways, it is the striking presence of a written constitutional text that has blinded us to the complexity of our constitutional discourse.”).

173. This is not a new proposition. Consider Professor Tiedeman’s somewhat antiquated assertion: “It is not so much what is found in the written constitution, as the conservative, law-abiding, and yet liberty-loving character of the Anglo-Saxon, which guarantees a permanent free government to . . . the United States of America.” CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 20 (New York, Knickerbocker Press 1890).

## CONCLUSION

The functionality of the Recess Appointments Clause depends on the degree to which it balances two competing purposes: maintaining the separation of powers and ensuring that the executive power can continue to be exercised. To achieve this functionality, formal construction of the Clause is insufficient. Instead, we must consider the constitutional expectations of the political actors involved. In this light, the constitutionality of the pro forma sessions of the Senate and the pro forma session appointments by the president should not be resolved judicially. Instead, the Supreme Court should declare that the pro forma controversy presents a nonjusticiable political question. This would enable the president and the Senate to establish constitutional expectations that would ensure that the Recess Appointments Clause remains functional and therefore fulfills its constitutional purpose.