Fordham Law Review

Volume 81 | Issue 4 Article 12

2013

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TAKING BACK WHAT'S THEIRS: THE RECESS APPOINTMENTS CLAUSE, PRO FORMA SESSIONS, AND A POLITICAL TUG-OF-WAR

*Alexander M. Wolf**

This Note surveys the current landscape of the Recess Appointments Clause. With the recent recess appointments of Richard Cordray to direct the Consumer Financial Protection Bureau (CFPB) and three other individuals to join the National Labor Relations Board (NLRB), came an influx of old—and new—controversy over the President's recess appointment authority. This Note explores interpretational issues that have surrounded the Clause since its inception, as well as novel issues that have arisen with the Congress's use of pro forma sessions in an attempt to block recess appointments and derail the executive's agenda. The conflict over control of the appointments process is at its peak, as exemplified by the current litigation seeking to invalidate President Obama's most recent recess appointments. This Note examines the varied interpretations of the Clause, the current litigation and potential dispositions, the increasing congressional trend of using the appointments process as an obstructionist device, and the possible state of both the CFPB and the Recess Appointments Clause after litigation. Ultimately, this piece proposes a modified functionalist standard by which the validity of recess appointments should be judged. That is, if the Senate is in a truly functional recess for a period of longer than three days, then the President should be able to make a valid recess appointment. Additionally, this three-day rule can be broken in the event of an emergency that renders the Senate unable to advise and consent to a nominee at a time when a recess appointment is necessary for the uninterrupted functioning of the government.

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INTRODUCTION

President Obama must have been happy. After taking the keys to the White House, he was handed a country on the brink—a scathed country trying to survive what many consider to be the worst financial crisis since

the Great Depression.[1] But on July 21, 2010, President Obama matched the magnitude of the crisis with an equally epic financial services industry reform[2]—the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] (Dodd-Frank)—the most sweeping reform of its kind since the Great Depression.[4] By affecting almost every aspect of the financial services industry through increased regulation, the President, and many in Congress, hope to prevent a similar crisis and restore public faith in the financial system.[5]

As part of this vast and polarizing institutional reform,[6] Dodd-Frank established a new watchdog, the Consumer Financial Protection Bureau (CFPB).[7] The CFPB, a centerpiece of the Dodd-Frank Act,[8] is an administrative agency focused directly on consumers and aimed at protecting them from "unfair, deceptive and abusive financial practices."[9] According to the organic statute, however, a CFPB Director must be appointed before the CFPB can exercise the full authority granted to it under Dodd-Frank.[10] Thus, opponents of the controversial Bureau, who asserted—and continue to assert—that the Bureau has unfettered authority with limited oversight,[11] planned to starve the CFPB of its full authority by preventing the appointment of a director.[12]

The responsibility to install a director fell jointly to the President and the Senate, as mandated by Dodd-Frank and the Appointments Clause of the

1. *See, e.g.*, Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1; Chris Isidore, *The Great Recession*, CNN MONEY (Mar. 25, 2009, 5:19 PM), http://money.cnn.com/2009/03/25/news/economy/depression_comparisons/.

2. Remarks on Signing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 DAILY COMP. PRES. DOCS. 3 (July 21, 2010).

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

4. *See* Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J., July 16, 2010, at A1.

5. *See* William Sweet, *Dodd-Frank Act Becomes Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jul. 21, 2010, 11:49 AM), http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/.

6. *See, e.g.*, Binyamin Applebaum & Brady Dennis, *Dodd Bill Would Redo Entire Regulatory System*, WASH. POST, Nov. 11, 2009, at A18.

7. *See, e.g.*, Jean Eaglesham, *Warning Shot on Financial Protection*, WALL ST. J., Feb. 9, 2011, at C1.

8. *See id.*

9. *Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Feb. 15, 2013).

10. *Bureau of Consumer Financial Protection (C.F.P.B.)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/c/consumer_financial_protection_bureau/index.html (last updated Jan. 10, 2013) [hereinafter Times Topics].

11. *See, e.g.*, Press Release, Sen. Richard Shelby, 44 U.S. Sens. to Obama: No Accountability, No Confirmation (May 5, 2011), *available at* http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17 [hereinafter Shelby Press Release].

12. *See id.*; Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25.

U.S. Constitution.[13] Strong opposition from the financial services industry and congressional Republicans ensured that the appointment of the Democratic President's nominee would be a near-impossible feat.[14] On May 5, 2011, nearly all Republican senators sent President Obama a letter, assuring him, in no uncertain terms, that they would not "confirm any nominee . . . to be the Director of the new [CFPB] absent structural changes [to the Bureau]."[15] Eventually, after countless congressional hearings, Senate filibusters, and an all-out assault by an army of conservative lobbyists,[16] the CFPB received its long-awaited leader, President Obama's nominee, former Ohio Attorney General Richard Cordray.[17] In fact, many Republicans view Cordray as the type of person who would "normally cruise to Senate confirmation."[18] The opposition to Cordray's appointment demonstrates the distinction between objecting to a nominee based on that individual's qualifications and character, and objecting to a nominee in an effort to derail the executive's effective execution of the law and his or her administrative agenda.[19]

Like the CFPB itself, President Obama's method of appointing Cordray proved highly controversial.[20] Faced with an uncooperative Senate, President Obama circumvented the Senate confirmation process, which requires the chamber's "Advice and Consent,"[21] by announcing on January 4, 2012, that he would use his recess appointment authority to install Cordray as CFPB Director and three individuals as members of the NLRB.[22] Today, the battle for control over the appointments process is arguably the most contested power struggle between the legislative and

13. The President is granted authority to appoint individuals to certain government positions by and with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2; s*ee infra* Part I.B.1.

14. *See* Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. TIMES (Sept. 7, 2011), http://articles.latimes.com/print/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907.

15. Shelby Press Release, *supra* note 11.

16. *See, e.g.*, Puzzanghera, *supra* note 14.

17. Remarks at Shaker Heights High School in Shaker Heights, Ohio, 2012 DAILY COMP. PRES. DOCS. 2 (Jan. 4, 2012); *See* Press Release, White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/President-obama-announces-recess-appointments-key-administration-posts [hereinafter Recess Appointments Press Release]. Along with Cordray, Obama nominated three members to the National Labor Relations Board (NLRB) whose nominations face similar scrutiny. *See* discussion *infra* Part III.A.1.b.

18. Joseph Williams, *GOP to Richard Cordray: Nothing Personal*, POLITICO (July 20, 2011, 11:42 PM), http://www.politico.com/news/stories/0711/59524.html.

19. *See* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 942–44 (2013).

20. Ronald D. Orol, *Obama Recess Appoints Cordray to CFPB*, WALL ST. J. MARKET WATCH (Jan. 4, 2012), http://articles.marketwatch.com/2012-01-04/economy/30688232_1_obama-recess-recess-appointments-obama-appointments.

21. U.S. CONST. art II, § 2, cl. 2.

22. *See* Recess Appointments Press Release, *supra* note 17.

executive branches.[23] The struggle between the two branches reached a new height in 2007, when Democratic members of Congress, fearful of certain recess appointments, attempted to stifle President Bush's authority to make such appointments by periodically holding brief pro forma sessions, rather than going into a full-fledged recess.[24] The effectiveness and merits of this practice are discussed below.

This Note is organized in four parts and will address various questions raised by the Cordray appointment, including the novel issue of whether pro forma sessions of the Senate can disrupt a recess sufficiently to preclude the President from making recess appointments and Congress's trend away from using the appointments process to evaluate the nominees themselves and instead use the power as an obstructionist device. Part I introduces the constitutional provisions most pertinent to this discussion, the history of pro forma sessions, and commonly debated interpretational issues regarding the Recess Appointments Clause (RAC). Next, to frame the discussion of the current conflict, Part II provides contemporary background on RAC usage and pro forma sessions, relying heavily on the Department of Justice's (DOJ) Office of Legal Counsel's (OLC) January 2012 opinion[25] (2012 OLC Opinion) on the validity of the January 4, 2012 appointments. Then, Part III explores the conflict over the validity of these appointments, gleaning arguments from current litigation—including the D.C. Circuit's 2013 decision regarding the NLRB appointments—and a detailed report from the Congressional Research Service (CRS).[26] Lastly, Part IV supports a functionalist RAC interpretation, suggesting a standard that allows the President to make recess appointments when the Senate is unable to advise and consent to a nominee for a period longer than three days, with an emergency exception.

I. THE CFPB AND THE EVOLUTION OF THE RECESS APPOINTMENTS CLAUSE

This part begins with a brief background on the CFPB and why the Bureau is particularly susceptible to harm as a result of appointment gridlock. Next, this part surveys relevant constitutional clauses and their relation to the history and current use of pro forma sessions. It also explores why almost all RAC controversies have their genesis in formalist and functionalist interpretations of the Clause.

23. *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2146–47 (2012) [hereinafter *Presidential Authority*].

24. *Id.* at 2152.

25. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012) [hereinafter 2012 OLC Opinion], *available at* http://www.justice.gov/olc/memoranda-opinions.html.

26. *See infra* note 34.

A. The Birth of the Consumer Financial Protection Bureau

Before exploring the intersection between the RAC and the CFPB, it is important to understand why presidential appointments and the RAC are implicated in the creation of the Bureau. The CFPB is an executive agency[27] whose director "shall be appointed by the President, by and with the advice and consent of the Senate."[28] As such, there is little doubt that whomever holds the position of CFPB Director is a principal officer of the United States within the meaning of the Constitution[29] and, thus, properly subject to the Appointments Clause[30] and its supplement,[31] the RAC.[32]

The CFPB consolidates a wide range of regulatory responsibility, which, prior to the passage of Dodd-Frank, was scattered across government entities including the Federal Reserve, the Federal Trade Commission, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development.[33] The Bureau was also granted new authority to regulate nonbank financial companies,[34] an industry largely unregulated prior to the passage of Dodd-Frank.[35] Unlike other regulators, the CFPB is focused solely on consumer protection,[36] aimed at shielding consumers from "unfair, deceptive, and abusive financial practices."[37] Today, most consumer financial protection at the federal level is the CFPB's responsibility.[38]

Yet, this broad jurisdiction did not come automatically with the enactment of Dodd-Frank.[39] The CFPB's newfound authority[40] came with statutory strings attached—these new powers could not be exercised until the agency had a director.[41] This constraint is of no small import, as CFPB's new authority over entities like nonbank mortgage brokers became the "agency's most immediate focus."[42] President Obama remarked that,

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27. 12 U.S.C. § 5491(a) (Supp. V 2011). "Executive agency" is defined as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105 (2006).

28. 12 U.S.C. § 5491(b)(2).

29. *See* discussion *infra* Part I.B.1.

30. *See* U.S. CONST. art. II, § 2, cl. 2; *infra* discussion Part I.B.1.

31. *See infra* notes 58–66 and accompanying text.

32. *See* discussion *infra* Part I.B.2.

33. *See, e.g.*, Times Topics, *supra* note 10; *Creating the Consumer Bureau*, *supra* note 9.

34. *See, e.g.*, DAVID H. CARPENTER ET AL., CONG. RESEARCH SERV., R 42323, PRESIDENT OBAMA'S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES 28 (2012).

35. *See, e.g.*, Edward Wyatt, *New Consumer Chief Promises Strong Agenda*, N.Y. TIMES, Jan. 6, 2012, at B3.

36. *See Creating the Consumer Bureau*, *supra* note 9.

37. *Id.*

38. *Id.*

39. *See, e.g.*, Times Topics, *supra* note 10 (noting that pursuant to Dodd-Frank, "the agency could not write new rules or supervise financial companies other than banks without a director").

40. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 28.

41. *See* Wyatt, *supra* note 35.

42. *See id.*

without the ability to fill the director vacancy, the Bureau "is left without the tools it needs to prevent dishonest [nonbank financial products companies] from taking advantage of consumers."[43] President Obama continued, "[t]hat's inexcusable. It's wrong. And I refuse to take 'no' for an answer."[44]

In exercising its full authority, the CFPB can write rules, issue orders, and subpoena entities within its jurisdiction for both testimony and documents, which can form the basis for enforcement actions.[45] Importantly, the CFPB has authority to write and enforce standards for various consumer financial products that have not yet been subject to extensive regulation, such as mortgages and credit cards.[46] It is this authority, coupled with the CFPB's direct funding from the Federal Reserve—circumventing the congressional appropriations process[47]—that provides the basis for critics' claims that the CFPB has inappropriate sweeping authority, with no accountability.[48]

B. Laying the Constitutional Foundation

There are several clauses and concepts in the Constitution that are fundamental to this Note's discussion of the current landscape of the RAC. They are briefly addressed below.

1. The Appointments Clause

The Appointments Clause of the Constitution prescribes that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ."[49] The two-branch process was enacted as a "check upon a spirit of favoritism in the president, and would tend greatly to preventing the appointment of unfit characters."[50] An individual appointed by this process is known as a "principal officer,"[51] and generally "exercise[es] significant authority pursuant to the laws of the United States."[52] This executive nomination, senatorial advice and consent, and subsequent appointment process is followed for both executive branch and judicial branch

43. Orol, *supra* note 20.
44. *Id*.
45. *See* Times Topics, *supra* note 10.
46. *See id.*; *see also* CARPENTER ET AL., *supra* note 34, at 28.
47. *See Presidential Authority*, *supra* note 23, at 2152.
48. *See, e.g.*, Shelby Press Release, *supra* note 11.
49. U.S. CONST. art. II, § 2, cl. 2.
50. THE FEDERALIST NO. 76, at 405 (Alexander Hamilton) (J.R. Pole ed., 2005). Hamilton also noted the harm that misguided nominations might do to a President's "political existence." *Id.*
51. Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam).
52. *Id.* at 126.

appointees.[53] Historically, the Senate has granted a greater degree of deference to the President's nomination of executive branch officials, compared to the President's judicial nominations.[54]

The Appointments Clause separates federal officers into two categories: principal officers who must be nominated by the President, then confirmed upon the advice and consent of the Senate, and "inferior officers" whose appointments can be expedited without the two-branch process.[55] Generally,[56] a major distinguishing factor between principal and inferior officers is "the extent to which the officers are 'directed and supervised' by persons 'appointed by Presidential nomination with the advice and consent of the Senate.'"[57]

2. The Recess Appointments Clause

Article II, Section 2, Clause 3 of the U.S. Constitution, or the RAC, was enacted as a supplement to the Appointments Clause.[58] The RAC states, "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."[59] Recesses can generally be classified into two categories: intersession recesses—or, recesses that occur between two sessions of Congress[60]—and intrasession recesses—or recesses that occur within one particular session of Congress.[61] It is widely recognized that the RAC was enacted in order to ensure the continuity of the government by allowing the President to fill vital vacancies at times when the Senate would be unable to advise and consent to a nominee.[62] The Framers—recognizing that the Senate could not be obliged to stay in session 365 days a year,[63] and at a time in which it was more difficult for

53. JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 242 (4th ed. 2012).

54. *Id.*

55. *See id.* at 242–44.

56. *See* Morrison v. Olson, 487 U.S. 654, 671 (1988) ("The line between 'inferior' and 'principal' officers is . . . far from clear."). *See generally* ATTANASIO & GOLDSTEIN, *supra* note 53.

57. Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 684 F.3d 1332, 1337 (D.C. Cir. 2012) (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).

58. *See* THE FEDERALIST NO. 67, *supra* note 50, at 361 (Alexander Hamilton); *see also* T.J. HALSTEAD, CONG. RESEARCH SERV., RL 33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 1 (2005).

59. U.S. CONST. art II, § 2, cl. 3.

60. These recesses are also known as *sine die* adjournments. They are the final adjournment of a one—or two—year congressional session. *Glossary: Adjournment Sine Die*, U.S. SENATE http://www.senate.gov/reference/glossary_term/adjournment_sine_die.htm. That is, a *sine die* recess is an intersession recess, as opposed to all other recesses, which are intrasession recesses. *See, e.g.*, HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., R 42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 4 (2012).

61. *See, e.g.*, HOGUE & BEARDEN, *supra* note 60, at 4.

62. *See, e.g.*, *id*. at 1.

63. *See, e.g.*, LOUIS FISHER, CONG. RESEARCH SERV., RL 31112, RECESS APPOINTMENTS OF FEDERAL JUDGES 1 (2001).

senators from across the country to convene in a timely fashion[64]—saw the RAC as a logical and necessary corollary to the Appointments Clause in order to keep the government operating effectively.[65] The RAC was adopted into the Constitution without a single dissenting vote, and without debate regarding its intent and scope.[66]

An individual who takes office as the result of a recess appointment has no less authority or standing than an individual confirmed by the Senate.[67] The Eleventh Circuit recently held that "[t]he Constitution, on its face, neither distinguishes nor limits the powers that a recess appointee may exercise while in office. . . . [T]he appointee is afforded the full extent of authority commensurate with that office."[68] However, a recess appointee's term is temporary, as it expires at the end of the next session of Congress.[69] Notably, there is no requirement that the recess appointee have been previously nominated to the position[70] nor is there any explicit limitation regarding which offices may be filled via recess appointments.[71]

Some view certain uses of the RAC as an improper commandeering of the Congress's authority;[72] accordingly, the Senate has attempted to discourage its use through prohibitive legislation.[73] Based on concern over the increasing frequency with which recess appointments were being made, the Senate, in 1863, attempted to "put an end to the habit of making such appointments"[74] by passing legislation prohibiting payment of salaries to certain recess appointees until they were confirmed by the Senate.[75] This prohibition was amended in 1940 to provide some exceptions to the strict policy set forth nearly eighty years prior,[76] and payment to recess

64. *See Presidential Authority*, *supra* note 23, at 2154.

65. *See id.*; *see also* HALSTEAD, *supra* note 58, at 2; THE FEDERALIST NO. 67, *supra* note 50, at 361 (Alexander Hamilton) (noting that the RAC operates as a supplement to the Appointments Clause when the general appointments method is unavailable. Alexander Hamilton goes on to observe that obliging the Senate to remain continuously in session would be "improper.").

66. *See* VIVIAN S. CHU, CONG. RESEARCH SERV., RL 33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 1 (2012); FISHER, *supra* note 63, at 1.

67. Evans v. Stephens, 387 F.3d 1220, 1223–24 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005).

68. *Id.*

69. *See* U.S. CONST. art. II, § 2, cl. 3; *infra* notes 83–84 and accompanying text.

70. *See* HOGUE & BEARDEN, *supra* note 60, at 6–7.

71. Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1764 (1984).

72. Manu Raju & Scott Wong, *Obama Recess Appointments: GOP Stuck on Response*, POLITICO (Jan. 25, 2012, 11:55 P.M.), http://www.politico.com/news/stories/0112/71984.html.

73. *See* HALSTEAD, *supra* note 58, at 13–14; FISHER, *supra* note 63, at 5.

74. FISHER, *supra* note 63, at 5 (quoting CONG. GLOBE 37th Cong., 3d Sess. 565 (1863) (statement of Sen. Fessenden)).

75. Act of Feb. 9, 1863, ch. 25, 12 Stat. 642, 646; *see* HALSTEAD, *supra* note 58, at 13–14; FISHER, *supra* note 63, at 5–6.

76. *See* FISHER, *supra* note 63, at 6.

appointees is now permissible under certain circumstances.[77] The OLC, in discussing the propriety of the Cordray appointment, held that Congress's willingness to provide payment to recess appointees under certain circumstances is an express acquiescence that intrasession recess appointments, like the Cordray appointment, are constitutional.[78]

The DOJ recently made this argument regarding the recess appointment of an Article III judge.[79] Although some submit that the limitations on payment to recess appointees are indicative of Congress's reluctance to allow recess appointments for vacancies during congressional sessions,[80] the fact remains that the Senate has acquiesced and agreed to compensate such appointees, arguably approving of recess appointments for certain vacancies occurring in-session.[81]

As for the termination of a recess appointee's term, the RAC states that it shall be at the "End of [the Senate's] next Session."[82] It is "clearly established" that this phrase means "the end of the session following the final adjournment of the current session of Congress."[83] Thus, an appointment made during the first session of a particular Congress will not expire until the end of the second session of that Congress.[84] Accordingly, Richard Cordray's recess appointment expires at the end of 2013 and, on January 14, 2013, President Obama announced his renomination of Cordray for CFPB Director.[85] A deeper exploration of the interpretive and practical controversies surrounding the RAC is discussed below.[86]

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77. Recess appointees receive payment (1) if the vacancy arises within thirty days of the end of the Senate's session; (2) if a nomination is pending before the Senate at the conclusion of a session, and that individual had not been appointed during a preceding recess; and (3) if a nomination is rejected by the Senate within thirty days of the conclusion of a session, and a different individual receives a recess appointment. 5 U.S.C. § 5503 (2006); *see also* FISHER, *supra* note 63, at 6.

78. 2012 OLC Opinion, *supra* note 25, at 7 (citing Recess Appointments, 41 Op. Att'y Gen. 463, 466 (1960)). See *infra* Part I.D.2 for more on intrasession recesses.

79. "[T]he constitutionality of intra-session recess appointments has been reinforced by various affirmative indications of Congressional acquiescence, including Congress's decision to pay such appointees in various circumstances." Reply Brief for the Intervenor United States Supporting the Constitutionality of Judge Pryor's Appointment As a Judge of This Court at 16–17, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424), 2004 WL 3589822 [hereinafter *Evans* Intervening Brief]. *But see* Canning v. NLRB, --- F.3d --- Nos. 12-1115, 12-1153, 2013 WL 276024, at *23–24 (D.C. Cir. 2013) (holding that recess appointments cannot be made during intrasession recesses); *see also infra* Part III.A.1.

80. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1543–46 (2005).

81. *See id.* at 1546.

82. U.S. CONST. art II, § 2, cl. 3.

83. Intrasession Recess Appointments, 13 Op. O.L.C. 271, 273 (1989) (citing Recess Appointments, 41 Op. Att'y Gen. 463, 469–70 (1960)).

84. *Id.*

85. Remarks on the Nomination of Mary Jo White To Be Chair of the Security and Exchange Commission and the Renomination of Consumer Financial Protection Bureau Director Richard A. Cordray, 2013 DAILY COMP. PRES. DOCS. 2 (Jan. 24, 2013).

86. *See infra* Part I.D.1–3.

There are many conceivable uses of the RAC that can be relatively uncontroversial, even when used to appoint high-ranking officials.[87] Throughout the early history of the United States, short sessions and long recesses of six to nine months characterized the congressional calendar.[88] This perhaps rationalized the need for the RAC during this period of time,[89] when slow communication and travel restricted Congress's ability to convene.[90] Congressional sessions often lasted less than half the year,[91] and the earliest sessions averaged approximately seven months long.[92] As time went on and technology and infrastructure advanced, the congressional calendar shifted to more frequent, and relatively short, intrasession recesses as well as shorter intersession recesses.[93] Today, intrasession recesses can last from a few days to more than a month.[94] As the congressional calendar has undergone dramatic changes over time, some argue, so too have the uses and concerns over the RAC.[95]

3. The Adjournment Clause

The Adjournment Clause helps define the contours of a recess or adjournment. The Constitution instructs that "neither [chamber], during the Session of Congress, shall, without Consent of the other, adjourn for more than three days . . . ."[96] Thus, in order for one chamber to adjourn for more than three days, both chambers must pass a concurrent resolution to that effect.[97] The resolution will generally include the date on which the particular chamber will adjourn, and the date on which that chamber will reconvene.[98] Today, these resolutions usually include a provision that allows the chamber to reconvene sooner than the agreed upon date.[99] Importantly, the Senate was not adjourned pursuant to the Adjournment

87. *See* JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 46–47 (2011).

88. HALSTEAD, *supra* note 58, at 2 (citing HENRY B. HOGUE, CONG. RESEARCH SERV., RS 21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2005)).

89. *Id.*; *see also* Michael A. Carrier, Note, *When Is the Senate In Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2210, 2214–15 (1994).

90. *See Presidential Authority*, *supra* note 23, at 2154.

91. *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RS 21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2012).

92. Carrier, *supra* note 89, at 2226 (citing U.S. GOV'T PRINTING OFFICE, 1993–94 OFFICIAL DIRECTORY, 103D CONG. 580 (1993)).

93. *See* HALSTEAD, *supra* note 58, at 2 (citing Rappaport, *supra* note 80, at 1500–01).

94. Rappaport, *supra* note 80, at 1501.

95. *See* Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y REV. 255, 271 (2012) ("The originally conferred powers of the RAC have been mooted by developments in communications and travel technologies and the expansion of the legislative calendar."); *see also* HOGUE & BEARDEN, *supra* note 60, at 8–9; Rappaport, *supra* note 80, at 1501 (noting the shift in congressional scheduling).

96. U.S. CONST. art. I, § 5, cl. 4.

97. *Glossary: Adjourn for More Than Three Days*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/adjourn_more_than_3_days.htm (last visited Feb. 15, 2013).

98. *See* HOGUE & BEARDEN, *supra* note 60, at 9.

99. *See id.* at 9 n.31.

Clause at the time of the Cordray and NLRB appointments.[100] By refusing to pass a concurrent resolution, the House of Representatives can prevent the Senate from recessing for a period longer than three days, and vice versa, raising questions of whether recess appointments can be made when the Senate is not in an Adjournment Clause recess.[101]

If one chamber of Congress desires to adjourn, and the other chamber does not consent, the chamber seeking adjournment can functionally adjourn, and hold brief pro forma sessions[102] every three days in order to meet the Adjournment Clause's "three day" requirement.[103] With a Republican majority in control of the House at the time of the Cordray proceedings, and the specter of recess appointments haunting the halls of the Capitol, it is unlikely that the Democrat-controlled Senate would have been able to acquire the House's consent to recess, which might have opened the door for an influx of recess appointments.[104]

4. The Take Care Clause

In laying out the executive's responsibilities, Article II, Section 3—the Take Care Clause—requires the President to "take Care that the Laws be faithfully executed."[105] The Clause is pertinent here as Dodd-Frank—a bill approved by a majority of both chambers of Congress and subsequently signed into law by the President[106]—mandated the creation of the CFPB.[107] However, it is a Senate faction—from the same chamber that previously gave Dodd-Frank final Congressional approval[108]—that took it upon itself to stifle the agency created by a law that it, as a body, enacted.[109] In litigation related to the January 4, 2012 recess appointments, the DOJ invokes the Take Care Clause, contending that the aforementioned use of pro forma sessions to preclude key recess appointments "prevent[s] the execution of a duly passed Act of Congress and the performance of the

100. *See infra* Part II.B; *see also infra* note 129 and accompanying text.
101. *See infra* notes 126–30 and accompanying text.
102. *See infra* Part I.C.
103. *See infra* note 115 and accompanying text.
104. *See* Letter from Representative Jeff Landry et al., to Representative John Boehner, Speaker of the House, et al., (June 15, 2011) [hereinafter Landry Letter] (on file with author).
105. U.S. CONST. art. II, § 3.
106. *See supra* note 2. This process fulfills the constitutional requirement known as bicameralism and presentment. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 22–25 (2010).
107. *See* Eaglesham, *supra* note 7; *see also supra* note 7 and accompanying text.
108. 156 CONG. REC. S5932–33 (daily ed. July 15, 2010).
109. *Cf.* INS v. Chadha, 462 U.S. 919, 956–58 (1983) (holding that unilateral acts taken by one chamber of Congress that are legislative in character are unconstitutional unless such acts are subject to bicameralism and presentment). The unconstitutional acts detailed in *Chadha* are known as legislative vetoes. *Id*. at 959–60 (Powell, J., concurring). For further discussion, see *infra* notes 451–56 and accompanying text.

functions of an office 'established by Law.'"[110] Thus, such a practice is arguably in contravention of the Clause and raises balance of powers concerns.[111] Put simply, the Senate's role in directing executive agencies is limited to enacting legislation, allotting appropriations,[112] and certain oversight functions, while the Take Care Clause leaves the President with the responsibility of executing the enacted legislation.[113]

C. Pro Forma Sessions

Generally, a pro forma session begins with a single Senator gaveling-in the session and concludes with the same Senator ending the session only several seconds or minutes later.[114] Historically, pro forma sessions of Congress have been held to satisfy certain constitutional requirements, including the Adjournment Clause requirement necessitating a concurrent resolution before either chamber of Congress can adjourn for more than three days.[115] Thus, in situations in which one chamber is keeping the other open, the chamber wishing to adjourn for an extended period can satisfy the Adjournment Clause by holding pro forma sessions every three days.[116]

Recently, in addition to enabling a chamber to adjourn for extended periods without the consent of the other, pro forma sessions have been wielded as a sword to deprive the President of the ability to make recess appointments.[117] Although the Senate almost always[118] agrees beforehand that there will be no business conducted during these pro forma sessions,[119] some posit that by allowing a lone senator to conduct a brief session every few days, and thus never recessing pursuant to the Adjournment Clause, the Senate can significantly shrink the window in which a President can make valid recess appointments.[120] Although it was not the first time that this use of pro forma sessions was considered,[121] Senate Majority Leader Harry Reid was the first to utilize this strategy out of concern for potential recess appointments by President George W. Bush in 2007.[122] The practice has continued throughout the Obama presidency[123] and has raised separation of

110. Brief for the NLRB at 63, Canning v. NLRB, --- F.3d ---, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. 2013) [hereinafter NLRB Brief] (quoting U.S. CONST. art. II, § 2, cl. 2).

111. *Id.*

112. *See Presidential Authority*, *supra* note 23, at 2144 n.67.

113. *See, e.g.*, *id.* at 2153–54.

114. *Id.* note 23, at 2152.

115. U.S. CONST. art. I, § 5, cl. 4; *see also* 2012 OLC Opinion, *supra* note 25, at 18.

116. *See e.g.*, Platt, *supra* note 95, at 278.

117. *Presidential Authority*, *supra* note 23, at 2152.

118. *See* 2012 OLC Opinion, *supra* note 25, at 2 n.3.

119. *See Presidential Authority*, *supra* note 23, at 2152; *see also* 2012 OLC Opinion, *supra* note 25, at 2.

120. *See Presidential Authority*, *supra* note 23, at 2152.

121. *See* HOGUE, *supra* note 91, at 8 n.28; Dave Boyer, *Clinton Warned Against Recess Appointments: GOP Senators May Not Adjourn*, WASH. TIMES, Nov. 5, 1999, at A1.

122. *See, e.g.*, 2012 OLC Opinion, *supra* note 25, at 2, 19.

123. *Id.* at 2.

powers questions regarding the practice's effect on the President's explicit RAC authority.[124] Whether these seconds-long pro forma sessions—in which the Senate agrees to conduct no business—interrupt a recess sufficiently to preclude legitimate action under the RAC is the subject of great debate[125] and a critical aspect of this Note.

Senators using pro forma sessions to block recess appointments have expressly endorsed the use of this procedural mechanism for this innovative purpose.[126] Prior to recessing for Thanksgiving in 2007, Majority Leader Reid stated, in no uncertain terms, that "the Senate will be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."[127] Similarly, in May 2011, out of concern for potential recess appointments including that of Elizabeth Warren to direct the CFPB, twenty senators sent a letter to Speaker of the House John Boehner requesting that he not pass a concurrent resolution that would allow the Senate to adjourn for more than three days, and instead force the Senate to convene in pro forma session.[128] A similar request, this time supported by eighty members of the House, was made to House leadership the following month.[129] Thus, pro forma sessions can be initiated either by the majority party in the Senate, as they were by Democrats in 2007, or forced by the House of Representatives, as they have been by Republicans during the Obama presidency.[130]

The initial implementation of this strategy in 2007[131] arguably proved effective. President Bush made no recess appointments for the remainder of his term after November 2007.[132] Senator Reid reasoned, "pro forma sessions break a long recess into shorter adjournments . . . too short to be considered a 'recess' within the meaning of the [RAC], thus preventing the President from exercising his constitutional power to make recess appointments."[133]

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124. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 23.

125. *See generally* 2012 OLC Opinion, *supra* note 25; Charles J. Cooper et al., *Are the Recent Recess Appointments Constitutional?*, *in* 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 76 (2012); *Presidential Authority*, *supra* note 23, at 2152.

126. *See* 2012 OLC Opinion, *supra* note 25, at 2.

127. 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

128. Press Release, Senator David Vitter, Vitter, DeMint Urge House To Block Controversial Recess Appointments (May 25, 2011), *available at* http://www.vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=290b81a7-802a-23ad-4359-6d2436e2eb77.

129. A large coalition of freshman members requested that House leadership "take all appropriate measures . . . to prevent any and all recess appointments by preventing the Senate from officially recessing" pursuant to the Adjournment Clause. Landry Letter, *supra* note 104. The letter continued to assure leadership that the eighty undersigned "stand ready to assist you in ensuring there are always sufficient members to cover the necessary *pro forma* sessions." *Id.*; *see also* HOGUE, *supra* note 91, at 9.

130. 2012 OLC Opinion, *supra* note 25, at 2.

131. HOGUE, *supra* note 91, at 8.

132. *Id.*

133. 2012 OLC Opinion, *supra* note 25, at 2 (citing 154 CONG. REC. S7558 (daily ed. July 28, 2008)).

D. Differing Interpretations of the RAC

Much of the controversy over the constitutionality of recess appointments hinges on the interpretation of the RAC, driven by the two main schools of constitutional interpretation: formalism and functionalism.[134] Formalists tend to favor sharp, generally unyielding, distinctions between the three branches and their respective responsibilities.[135] Formalist interpretations pay heed to a historical understanding of the framers' intentions at the time of the drafting and maintain that this historical meaning ought to prevail today.[136] Sometimes, such an interpretation can come at the expense of a relatively cumbersome federal government not completely adapted to deal swiftly with contemporary issues.[137] For a formalist, efficiency was never the goal of federalist government; Justice Brandeis observed, "[T]he separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power."[138]

By contrast, functionalists have a more dynamic view of the Constitution, reading its provisions as a framework or generality.[139] To this end, functionalists use a largely purposivist approach to constitutional interpretation, favoring the adaptability and workability of modern government over strict definitions of power.[140] Such a view has permeated jurisprudence. For instance, in *Buckley v. Valeo*[141] the Supreme Court held that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[142] Further, in *Youngstown Sheet & Tube Co. v. Sawyer*,[143] Justice Jackson described a practical approach to constitutional adherence: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."[144]

Over time, although the interpretation of the RAC by the executive branch has changed, it has nevertheless remained relatively consistent and

134. *See* MANNING & STEPHENSON, *supra* note 106, at 376.
135. *Id.* at 377.
136. *Id.*
137. *Id.*
138. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (Justice Brandeis continued, "The purpose was, not to avoid friction, but, by means of the inevitable friction . . . to save the people from autocracy."); *see also* MANNING & STEPHENSON, *supra* note 106, at 377.
139. MANNING & STEPHENSON, *supra* note 106, at 377–78 (citing Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1813 (1996)).
140. *Id.*
141. 424 U.S. 1 (1976).
142. *Id.* at 121.
143. 343 U.S. 579 (1952).
144. *Id.* at 635 (Jackson, J., concurring); *see also* MANNING & STEPHENSON, *supra* note 106, at 378 (using Justice Jackson's *Youngstown* concurrence as an example of the functionalist approach to constitutional interpretation).

well settled for nearly two centuries.[145] While the courts or Congress have not addressed the RAC's ambiguities extensively,[146] RAC interpretation has received significant formal attention from the executive branch through numerous Attorneys General and OLC Opinions.[147] At the outset, it is important to note that the judiciary has stated, "[Attorney General Opinions are] rendered upon the call of the executive department, and under the obligation of the oath of office, and are entitled to the highest consideration."[148] Below, two common areas of debate—revolving around the terms "Vacancies that may happen" and "Recess of the Senate," as used in the RAC[149]—are discussed. As will be illustrated, a functionalist interpretation of both is the modern and well-established trend, culminating in an apposite 2004 Eleventh Circuit decision,[150] *Evans v. Stephens*.[151]

1. What Are "Vacancies that may happen during the Recess"?

The language, "The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate," has been interpreted in, largely, two different ways.[152] Some consider the word, "happen," to be synonymous with "arise" or "occur," while others read "happen" as synonymous with "exist" or "to be going on.[153] If "happen" is synonymous with "exist," and the President can fill up all vacancies that *exist* during the recess, then it would likely imply that the vacancy at issue does not have to actually occur during the recess in question.[154] If "happen" is interpreted to mean "occur" or "arise," and the President can fill up vacancies that *arise* during the recess, then the vacancy likely must occur during the same recess in which it is filled using authority under the RAC.[155] The latter, formalist, interpretation—"occur" or "arise"—is favored today by those seeking to limit presidential authority under the RAC.[156] Alexander Hamilton, in *Federalist 67*, seems to suggest the "arise" interpretation,[157] while a long line of Attorneys General have agreed

145. *See infra* Part I.D.1–2.

146. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at summary.

147. *See, e.g.*, *id.* at 4; CHU, *supra* note 66, at 3.

148. *In re* Farrow, 3 F. 112, 115 (C.C.N.D. Ga. 1880); *see also* United States v. Allocco, 305 F.2d 704, 714 (2d Cir. 1962) ("The opinions of the Attorneys-General have been accepted as conclusive authority . . . .").

149. CHU, *supra* note 66, at 3.

150. *See infra* notes 279–81 and accompanying text.

151. 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). Notably, the D.C. Circuit, in a January 25, 2013 opinion disagreed with the *Evans* interpretation of the RAC. *See* discussion *infra* notes 410–27.

152. *See* HALSTEAD, *supra* note 58, at 3–6; WEXLER, *supra* note 87, at 48–52.

153. *See* WEXLER, *supra* note 87, at 48–49.

154. *See* HOGUE, *supra* note 91, at 4.

155. *See id.* at 4; Rappaport, *supra* note 80, at 1502–06.

156. Rappaport, *supra* note 80, at 1490–91.

157. THE FEDERALIST NO. 67, *supra* note 50, at 361 (Alexander Hamilton) ("[I]t would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess* . . . ."); *see also* FISHER, *supra* note 63, at 2.

that the functionalist interpretation—"exist"—satisfies the reason, scope, and purpose of the Constitution.[158]

Support for the proposition that the President has authority to make a recess appointment regardless of when the vacancy occurs—or the "exist" interpretation—first began in 1823,[159] when Attorney General William Wirt found it "perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled."[160] Wirt's position has remained the prevalent RAC interpretation to this day,[161] supported by a long line of subsequent Attorney General Opinions[162] and first approved by the federal judiciary in an 1880 district court decision.[163] Subsequent judicial opinions have confirmed this position,[164] with the Second Circuit holding that not allowing the President to make a recess appointment for a vacancy that occurred while the Senate was in session would "create Executive paralysis and do violence to the orderly functioning of our complex government."[165]

Despite these holdings and significant historical support from the DOJ,[166] this issue continues to be a point of contention.[167] For example, this

158. *See* FISHER, *supra* note 63, at 2.

159. *See, e.g.*, Appointments During Recess of the Senate, 16 Op. Att'y Gen. 522, 524–25 (1880).

160. Executive Authority To Fill Vacancies, 1 Op. Att'y Gen. 631, 633 (1823); *see also* Rappaport, *supra* note 80, at 1512 (adding that Attorney General Wirt saw an unexpected event like a plague, which could prohibit the meeting of Congress, as support for a broad RAC interpretation).

161. *See* Rappaport, *supra* note 80, at 1502. Of course, this is the prevalent RAC interpretation notwithstanding the D.C. Circuit's recent decision in *Canning v. NLRB*, --- F.3d ---, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), discussed below.

162. *See, e.g.*, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 161 (1996); Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 22–23 (1921) [hereinafter Daugherty Opinion] (Attorney General Daugherty agreed that when the vacancy occurs is not significant for RAC purposes and cited to over eighty years of support in prior Attorney General Opinions); *see also* HALSTEAD, *supra* note 58, at 4–6.

163. *See In re* Farrow, 3 F. 112, 116 (C.C.N.D. Ga. 1880) (holding that the President has "constitutional power to make [recess] appointment[s] . . . notwithstanding the fact that the vacancy filled by [the] appointment first happened when the senate was in session"); *see also* HALSTEAD, *supra* note 58, at 6.

164. *See, e.g.*, United States v. Woodley, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc) (holding that the President may utilize his power under the RAC to fill vacancies that occur while Congress is in session or in recess and that this holding is consistent with judicial precedent and Attorney General Opinions). Thus, the *Woodley* court "decline[d] to adopt [petitioner's] 'happen to occur' argument and recognize[d] the President's power to fill all vacancies that exist during a recess of the senate." *Id.* at 1013; *see also* United States v. Allocco, 305 F.2d 704, 712–15 (2d Cir. 1962) (holding the same).

165. *Allocco*, 305 F.2d at 712. The *Allocco* court, acknowledging that the RAC could be interpreted by some to mean that the RAC applies only to vacancies that occur during Senate recesses, justified its position, among other things, because "the logic of words should yield to the logic of realities." *Id.* at 710 (quoting Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting)).

166. *See, e.g.*, Recess Appointments, 41 Op. Att'y Gen. 463, 465–66 (1960); Daugherty Opinion, *supra* note 162, at 22–23; President—Recess Appointment—Postmaster, 30 Op.

argument was raised recently in *Evans v. Stephens*,[168] during litigation over President George W. Bush's recess appointment of Judge William H. Pryor to an Article III judgeship.[169] Those challenging the appointment argued, inter alia, that because the judicial vacancy did not occur during the recess, appointment authority under the RAC could not be constitutionally utilized.[170] The court, however, maintained the judicial and executive branch's functionalist precedent by holding that the challengers' interpretation of the RAC, "contradicts what we understand to be the purpose of the [RAC]: to keep important offices filled and the government functioning."[171]

2. When is "The Recess of the Senate"? Intrasession Appointments Versus Intersession Appointments

The *Evans* attempt to invalidate Judge Pryor's appointment raised another issue common in RAC debates—what is the definition of "the Recess" as used in the RAC?[172] Some, including the *Evans* plaintiffs, argue that the RAC allows recess appointments only during intersession recesses and not intrasession recesses.[173] This is a formalist interpretation of the RAC favored by those seeking to reign in the President's recess

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Att'y Gen. 314, 315 (1914); Vacancy in Office, 19 Op. Att'y Gen. 261, 263 (1889); Vacancies in Office, 18 Op. Att'y Gen. 29, 29 (1884); Appointments During Recess of the Senate, 16 Op. Att'y Gen. 522, 524 (1880) (finding that the President's power to fill vacancies regardless of when the vacancy originated is well settled); Case of the Collectorship of Customs for Alaska, 12 Op. Att'y Gen. 455, 457 (1868); President's Power To Fill Vacancies in the Recess of the Senate, 12 Op. Att'y Gen. 32, 38 (1866) ("[W]herever there is a vacancy, there is a power to fill it."); President's Appointing Power, 10 Op. Att'y Gen. 356, 356 (1862) (emphasizing that this issue is "settled . . . as far . . . as a constitutional question can be settled, by the continued practice of your predecessors, and . . . by the unbroken acquiescence of the Senate"); Power of President To Appoint to Office During Recess of Senate 4 Op. Att'y Gen. 523 (1846); Power of the President To Fill Vacancies, 2 Op. Att'y Gen. 525 (1832) (advising that the President can make a recess appointment regardless of whether the vacancy occurred during a recess or not).

167. *See, e.g.*, Evans v. Stephens, 387 F.3d 1220, 1226–27 (11th Cir. 2004); CHU, *supra* note 66, at 3; WEXLER, *supra* note 87, at 46–47 (2011).

168. 387 F.3d 1220 (11th Cir. 2004).

169. *See id.* at 1226–27; WEXLER, *supra* note 87, at 46–47.

170. WEXLER, *supra* note 87, at 46–47.

171. *Evans*, 387 F.3d at 1227. The court also observed that Congress must "implicitly agree" with this interpretation, as 5 U.S.C. § 5503 (1996) permits salaries for appointees filling vacancies that existed while the Senate was in session. *See supra* notes 76–79 and accompanying text. Again, this interpretation was recently rejected by the D.C. Circuit in the 2013 decision discussed below. *See infra* notes 410–27 and accompanying text.

172. *See, e.g.*, Rappaport, *supra* note 80, at 1573 (engaging in the debate over the meaning of "the recess" as used in the RAC); WEXLER, *supra* note 87, at 48–54.

173. FISHER, *supra* note 63, at 3–4; *see, e.g.*, Response Brief of the Plaintiffs-Appellees and Amicus Curiae, U.S. Sen. Edward M. Kennedy, Pro Se, in Support of Plaintiffs-Appellees' Motion To Disqualify Member of the Court on the Ground That His Recess Appointment Is Invalid at 4–6, *Evans*, 387 F.3d 1220 (No. 02-16424) [hereinafter Kennedy Brief] (arguing that Attorney General Philander Knox's view, *infra* notes 179–86 and accompanying text, of the different meanings of "recess" and "adjournment" "adopted the *proper* construction of the phrase 'the Recess'").

appointment authority.[174] Using this interpretation, the *Evans* plaintiffs argued that because the appointment occurred during an intrasession recess, the appointment was invalid.[175] The court, in favor of reading "the Recess" as meaning any recess, rejected this argument.[176] Ensuring that this issue would not die with the *Evans* decision, Justice Stevens, in denying certiorari, opined that "it would be a mistake to assume that our disposition . . . constitutes a decision on the merits of whether the President has the constitutional authority to fill [future vacancies] with appointments made absent consent of the Senate during short intrasession 'recesses.'"[177]

The *Evans* court's decision follows a long history of legal opinions, established after some early disagreement. In the first official opinion on the matter in 1901,[178] Attorney General Philander C. Knox made a distinction between a "recess" and an "adjournment,"[179] later relied upon by those challenging the recess appointment in *Evans*.[180] Attorney General Knox advised that "recess," as used in the Constitution, referred only to intersession recesses,[181] whereas, "adjournment" simply refers to a temporary, day-to-day, suspension of business,[182] or intrasession recess.

According to Knox, it is only during this final break, marking the end of an existing session—an intersession recess—that the President may use his recess appointment authority.[183] Knox's supporters point to the nature of the early congressional calendar[184] and the relative difficulty of convening during an intersession recess, compared to an intrasession recess, at the time of the framing.[185] This arguably buttresses the view that the Framers only intended to allow recess appointments during intersession recess, when they could not readily reconvene.[186]

However, this position was contradicted and reversed in a 1921 Attorney General Opinion by Harry M. Daugherty.[187] Daugherty's notion that the terms "recess" and "adjournment" could be used interchangeably, and could

174. *See* Rappaport, *supra* note 80, at 1491.
175. *Evans*, 387 F.3d at 1224–26.
176. *Id.* at 1226 ("[W]e are unpersuaded by the argument that the recess appointment power may only be used in an intersession recess, but not an intrasession recess.").
177. Evans v. Stephens, 544 U.S. 942 (2005).
178. CHU, *supra* note 66, at 7.
179. President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 601 (1901); *see* FISHER, *supra* note 63, at 3.
180. *See* Kennedy Brief, *supra* note 173, at 4–6.
181. *See* President—Appointment of Officers—Holiday Recess, *supra* note 179, at 601.
182. *Id.*
183. *Id.*
184. *See supra* notes 88–91 and accompanying text.
185. *See Presidential Authority*, *supra* note 23, at 2154; *see also* Carrier, *supra* note 89, at 2218–19.
186. *See, e.g.*, Carrier, *supra* note 89, at 2224–25.
187. *See* Daugherty Opinion, *supra* note 162, at 21–22; *see also* FISHER, *supra* note 63, at 3–4; 2012 OLC Opinion, *supra* note 25, at 5 n.6. The DOJ recently held that the Knox Opinion "is inconsistent with constitutional text, actual Presidential practice, and judicial precedent, and was convincingly overruled in 1921 [by the Daugherty Opinion]." *Evans* Intervening Brief, *supra* note 79, at 16.

refer to either inter- or intrasession breaks, has remained the DOJ's position.[188] Since Daugherty's opinion, the DOJ has consistently held that recess appointments during both intersession and intrasession recesses are constitutional.[189]

In advising President Warren Harding that he could utilize his RAC authority during a twenty-eight-day intrasession recess, Attorney General Daugherty asserted that the President is vested with a great degree of discretion to determine when the Senate is in a "real and genuine" recess, rather than requiring the executive to obey strict definitional constructs of terms used in the RAC.[190] He further noted that the purpose of the Constitution was to prevent the President from making appointments without the advice and consent of the Senate at a time in which the Senate is in session and therefore able to perform its advice and consent function.[191] Thus, Daugherty found that "the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained. To give the word 'recess' a technical and not a practical construction, is to disregard substance for form."[192] It was in this sense that Daugherty opted for a functionalist interpretation of the RAC—the interpretation that the executive branch relies on to present day.[193]

In support of his functionalist approach, Daugherty relied on a Senate Judiciary Committee Report[194] from early in the twentieth century to settle on the essential inquiry to determine whether the President can act pursuant to the RAC.[195] In making this determination, Daugherty found the most helpful inquiries to be: "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?"[196]

Daugherty observed that, to deprive the President of his authority to unilaterally appoint officers simply because Congress has adjourned for a number of days would lead to "painful and inevitable" government

188. *See, e.g.*, 2012 OLC Opinion, *supra* note 25, at 8; *Evans* Intervening Brief, *supra* note 79, at 5–15.

189. *See, e.g.*, *The Obama Administration's Abuse of Power: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 8–9 (2012) (prepared written statement of Lee A. Casey, Partner, Baker & Hostetler LLP); Intrasession Recess Appointments, *supra* note 83, at 272–73.

190. *See* Daugherty Opinion, *supra* note 162, at 25.

191. *Id.* at 21–22.

192. *Id.*

193. *See, e.g.*, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 161 (1996) ("[T]he President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play."); *infra* Part II.C.

194. S. REP. NO. 58-4389, at 2 (1905); 39 CONG. REC. 3823–24 (1905) (the report determined that a recess should be defined as the time when the Senate "is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*").

195. Daugherty Opinion, *supra* note 162, at 25.

196. *Id.*

paralysis, which could not have been the Framers' intent.[197] Notably, Daugherty did not grant the President unfettered recess appointment authority—he advised that an adjournment of as little as two days would not meet the "practical" definition of a recess sufficient to trigger RAC authority[198]—a stance echoed in subsequent Opinions.[199] The Constitution's silence, and the Supreme Court's denial of certiorari,[200] on the issue of how long a recess must be before recess appointments can be made perpetuates this debate today.[201]

Daugherty's position was, in large part, reiterated by the *Evans* court in holding that whether the recess appointment was made during an intersession or intrasession recess had no bearing on the constitutionality of the appointment.[202] The court observed that neither the text of the RAC, nor the historical usage of the term "recess," points specifically to an intersession or intrasession recess.[203] The court held that "the main purpose of the [RAC]—to enable the President to fill vacancies to assure the proper functioning of our government—supports reading both intrasession recesses and intersession recesses as within the [RAC]."[204] In addition to the textual interpretation, the *Evans* court also relied on the well-established historical practice of making recess appointments during intrasession recesses.[205]

Because of the RAC's rationale—to ensure the continuity of the government[206]—one might assume that recess appointments must be made early in the recess, when the period of time between the appointment and the next available day in which the Senate is scheduled to conduct business is at its greatest.[207] Yet, there is apparently no authority to support this principle,[208] and recess appointments have been made as late as 11:30 a.m. on the same day the Senate was scheduled to reconvene at noon.[209] While the OLC has stated its preference that, "ideally [a recess appointment] would be made as early as possible in the recess," the Office has conceded that, "[s]uch appointments could be made at any time during the recess."[210]

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197. *Id.* at 23.

198. *Id.* at 24–25. Nor did Attorney General Daugherty think that a recess of five to ten days could be considered lengthy enough to constitute a recess within the intended meaning of the Constitution. *Id.*

199. *See, e.g.*, Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation, 3 Op. O.L.C. 314, 315 (1979) (submitting that a five-to-ten day recess is not sufficient to trigger the President's RAC authority).

200. *See supra* note 177 and accompanying text.

201. *See, e.g.*, HOGUE & BEARDEN, *supra* note 60, at 8.

202. Evans v. Stephens, 387 F.3d 1220, 1224–27 (11th Cir. 2004).

203. *Id.* at 1224–26.

204. *Id.* at 1226. This interpretation was recently rejected by the D.C. Circuit in a 2013 decision discussed later. *See infra* notes 410–27 and accompanying text.

205. *Evans*, 387 F.3d at 1225–26.

206. *See, e.g.*, HOGUE, *supra* note 91, at 1.

207. *See* Intrasession Recess Appointments, *supra* note 83, at 273.

208. *See, e.g.*, *id.*; *Evans* Intervening Brief, *supra* note 79, at 24–25.

209. Intrasession Recess Appointments, *supra* note 83, at 273 (citing Memorandum from Ralph W. Tarr, Deputy Asst. Att'y Gen., Office of Legal Counsel (Oct. 19, 1983)).

210. *Id.* at 271.

3. Executive Discretion and Manipulation of a Recess

The RAC's various interpretations have been illustrated through creative manipulation and application by the executive.[211] Perhaps no application is more creative than President Theodore Roosevelt's use of the RAC on December 7, 1903,[212] when he determined that "there is an infinitesimal fraction of a second," when a session is first gaveled in, "which is the recess between the two sessions . . . . [The recess] is so small that no name for it can be found."[213] To the dismay of the Senate, Roosevelt used this "preposterous"[214] period of time on that December morning to appoint 160 officials,[215] including at least some who likely would not have survived the Senate confirmation process.[216]

Tension arises when the President's utilization of his recess appointments power appears more political than functional.[217] There seems to be little doubt that the President can make a recess appointment in order to ensure the uninterrupted function of the federal government when the Senate is unable to perform its advice and consent function,[218] but the President raises eyebrows when RAC authority is used to appoint an individual specifically because the nominee would not survive the Senate's advice and consent process.[219] As discussed above, recess appointment authority as an ostensible political maneuver is not a new phenomenon.[220] Presidents George Washington and James Madison were both sharply criticized based on their exercise of recess appointment power.[221] That is, the RAC can be—and historically has been—used to allow the President to appoint controversial individuals to high government posts by preventing the Senate from performing its constitutional advice and consent duty.[222] The use of the RAC in this manner is a marked departure from the original purpose for the inclusion of the Clause in the Constitution.[223]

Because of political disagreements, critical government positions can go unfilled for extended periods of time, as was the case with the CFPB.[224] For example, it is clear that the Director's office at the CFPB was going to

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211. *See, e.g.*, WEXLER, *supra* note 87, 49–50.

212. *See, e.g.*, *id.*; Carrier, *supra* note 89, at 2211–12; Bill McAllister, *Recess Appointments: A Disputed Matter of Timing*, WASH. POST, July 19, 1993, at A13.

213. McAllister, *supra* note 212.

214. WEXLER, *supra* note 87, at 49–50.

215. *Id.*

216. McAllister, *supra* note 212.

217. *See* CHU, *supra* note 66, at 2; HALSTEAD, *supra* note 58, at 2.

218. *See* HALSTEAD, *supra* note 58, at 2.

219. *Id.*

220. *See* CHU, *supra* note 66, at 2.

221. *See, e.g.*, HALSTEAD, *supra* note 58, at 2–3.

222. *See, e.g.*, Carrier, *supra* note 89, 2214–15 (explaining how President Ronald Reagan waited until the Senate recessed to appoint controversial nominees that would not have survived Senate advice and consent).

223. *See supra* notes 58–66 and accompanying text.

224. *See, e.g.*, Puzzanghera, *supra* note 14.

be indefinitely vacant unless a Director was recess appointed;[225] the Senate explicitly refused to offer advice and consent regarding this vacancy.[226] However, as the President is capable of using his RAC authority to further a political agenda, so too is the Senate capable of manipulating the appointments process for pure political gain.[227] The executive branch has asserted that RAC authority can be an "important counterbalance" on occasions when the Senate, "[b]y refusing to confirm appointees . . . can cripple the President's ability to enforce the law."[228] Today, growing use of combative tactics by both branches in the battle to control the appointment process has highlighted the contentiousness between the legislative and executive branches.[229]

Perhaps it is no coincidence, then, that the executive branch relies on Presidential discretion to determine when the Senate has truly recessed.[230] As mentioned above, in a significant affirmation of executive power, Attorney General Daugherty held that the President is "vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess . . . . Every presumption is to be indulged in favor of the validity of whatever action he may take."[231] The position that it is left to the President's discretion to determine when the Senate has functionally recessed for RAC purposes[232] is a stance that has been echoed consistently in subsequent opinions.[233] The DOJ, however, has conceded that "[g]iving advice on how the President may properly exercise that discretion has proven a difficult task,"[234] and the judiciary has been hesitant to engage this issue.[235]

II. THE RECENT EMERGENCE OF RECESS APPOINTMENTS AND PRESIDENT OBAMA'S MOST RECENT RECESS APPOINTMENTS

Part II continues to set the stage for the current interbranch showdown over appointment power involving issues in Part I, as well as contemporary trends in recess appointments and pro forma sessions. In examining the

225. *See id.*; Shelby Press Release, *supra* note 11.

226. *See, e.g.*, Puzzanghera, *supra* note 14.

227. *See, e.g.*, Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 257 (1989).

228. *Id.*

229. *Presidential Authority*, *supra* note 23, at 2138.

230. *See infra* notes 232–33 and accompanying text.

231. Daugherty Opinion, *supra* note 162, at 24; *see also* Intrasession Recess Appointments, *supra* note 83, at 272.

232. *See, e.g.*, Intrasession Recess Appointments, *supra* note 83, at 272 (quoting Daugherty Opinion, *supra* note 162, at 25).

233. *See, e.g.*, 2012 OLC Opinion, *supra* note 25.

234. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 161 (1996).

235. *See infra* text accompanying note 358. *But see* Canning v. NLRB, Nos. 12-1115, 12-1153, 2013 WL 276024, *13 (D.C. Cir. Jan. 25, 2013) ("[P]ermit[ting] the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement . . . .").

specific and novel issues surrounding the January 4, 2012 recess appointments, Part II.A surveys the contemporary trends in the appointments process, Part II.B details the events surrounding the Cordray appointment, and Part II.C features the OLC's official stance on the matter, released only two days after the Cordray and NLRB appointments.

A. Contemporary Trends in the RAC Tug-of-War

The number of recess appointments since the Reagan administration has marked a significant increase in the practice, relative to historical frequency,[236] with President Ronald Reagan utilizing his recess appointment authority 240 times and President George H.W. Bush seventy-seven.[237] Through January 23, 2012, President Obama has made thirty-two recess appointments, six during intersession recesses and the remainder during intrasession recesses; eighteen of these appointments were eventually confirmed by the Senate.[238] For comparison, at the same point in their presidencies, Presidents George W. Bush and Bill Clinton had made sixty-two and twenty recess appointments, respectively.[239]

As the rate of recess appointments has changed in recent history, so too has the Senate's attitude toward providing advice and consent.[240] A study found that from 1885 to 1996, only 4.4 percent of all executive nominations to domestic offices failed.[241] Of these failures, just four nominations failed as a result of actual rejection by the Senate.[242] The study determined that nominee failure is most often the result of the Senate's failure to act on the nomination.[243] Since 1970, the length of time between Presidential nomination and eventual consent has increased,[244] due in large part to increased political polarization.[245] In recent years, this trend has grown,[246] and with political polarization at an all-time high, will likely continue to increase.[247] The Cordray nomination process illustrates this trend.[248]

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236. *See, e.g.*, McAllister, *supra* note 212.

237. *See, e.g.*, HENRY B. HOGUE, CONG. RESEARCH SERV., RS 21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 2 (2002). Seventy-three of the Reagan recess appointments and thirty-seven of the Bush recess appointments were made during intrasession breaks. *See* McAllister, *supra* note 212.

238. *See* HOGUE & BEARDEN, *supra* note 60, at 3–5.

239. *Id.* at summary. At the end of their terms, Presidents George W. Bush and Bill Clinton made a total of 171 and 139 recess appointments, respectively. HOGUE, *supra* note 91, at 1.

240. *See Presidential Authority*, *supra* note 23, at 2144–46.

241. *Id.* at 2145 (citing Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1123 (1999) (failures were characterized as nominations that were either rejected by the Senate, withdrawn by the President, or expired without action)).

242. *Id.*

243. *Id.*

244. *See id.* at 2145–46.

245. *Id.* at 2146.

246. *Id.*

247. *Id.*

248. *See, e.g.*, *infra* Part II.B.

Notably, each of President Obama's thirty-two recess appointments through January 23, 2012, was preceded by the official nomination of the same individual for the same position.[249] The average time between each nomination and eventual corresponding recess appointment was 216 days.[250] Professor Matthew C. Stephenson has proposed that, in order to resolve the growing problem of failure-by-inaction, nominees should be considered confirmed if the Senate fails to formally vote against the nominee within a reasonable period of time.[251] Specifically, Professor Stephenson suggests that the Senate's failure to proactively vote against a nominee—an option always available to the chamber—should be viewed as the Senate's tacit approval of confirmation.[252] Recall the recent trend of stalling nominations, not for the nominee's lack of qualifications but on purely political grounds.[253] The Cordray confirmation standoff, exemplifying this modern trend, is precisely the type of situation Professor Stephenson's solution might resolve.[254]

B. The Cordray Recess

On December 17, 2011, the Senate, by unanimous consent, agreed to adjourn until January 23, 2012, when the Senate would reconvene for the second session of the 112th Congress.[255] The Senate further agreed that, during this adjournment, it would "convene for pro forma sessions only, with *no business conducted*" every three or four days until January 23, 2012.[256] Pursuant to the Constitution's Twentieth Amendment,[257] the Senate convened on Wednesday, January 3, 2012, in pro forma session, to commence the second session of the 112th Congress.[258]

Senator Mark Warner gaveled in the January 3rd session at 12:01:32 p.m.[259] and, after 41 seconds,[260] adjourned the Senate until the next pro forma session, scheduled three days later. On January 4, 2012, despite strong partisan opposition,[261] and a lack of adjournment pursuant to the

249. *See* HOGUE & BEARDEN, *supra* note 60, at 7.
250. *Id.*
251. Stephenson, *supra* note 19, at 946.
252. *Id.*
253. *See supra* notes 14–19 and accompanying text.
254. Stephenson, *supra* note 19, at 946.
255. 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011) (statement of Sen. Wyden); *see also* HOGUE & BEARDEN, *supra* note 60, at 11–12.
256. 157 CONG. REC. S8783 (statement of Sen. Wyden) (emphasis added).
257. U.S. CONST. amend. XX, § 2 (requiring Congress to meet on January 3 of each year, unless otherwise provided by law).
258. 158 CONG. REC. S1 (daily ed. Jan. 3, 2012); *see also* 2012 OLC Opinion, *supra* note 25.
259. 158 CONG. REC. S1.
260. *Id.*
261. *See, e.g.*, Ben Feller, *AP Sources: Obama Bucks GOP, OKs Consumer Watchdog*, BLOOMBERG BUSINESSWEEK (Jan. 4, 2012, 9:46 AM), http://www.businessweek.com/ap/financialnews/D9S26CO02.htm; Scott Wong & Josh Boak, *Republicans Stands Solidly Against Richard Cordray*, POLITICO (Dec. 7, 2011, 1:11 PM), http://www.politico.com/news/stories/1211/69984.html.

Adjournment Clause, President Obama announced his intent to recess appoint four individuals to vacant positions, including Richard Cordray for CFPB Director.[262] As discussed above, the CFPB had existed since its creation without a director until Cordray's appointment.[263] The absence of formal stewardship at the CFPB was not for lack of trying—President Obama nominated Cordray six months prior to Cordray's eventual recess appointment.[264] And, despite support from a majority of senators,[265] the Senate Republicans effectively blocked confirmation.[266]

At the time, Obama and his Administration justified the decision to utilize the power granted under the RAC, dismissing the significance of pro forma sessions as a "gimmick,"[267] and stressing that the country "can't wait" for Senate advice and consent.[268] The Obama Administration's position that pro forma sessions do not sufficiently interrupt a recess for RAC purposes is memorialized in the OLC's response to the Administration's inquiry on the matter.[269]

C. January 2012 OLC Opinion

In answering whether the recess appointments were permissible during the twenty-day intrasession recess, punctuated with periodic pro forma sessions, from January 3, 2011, to January 23, 2011, the OLC responded by dividing the question into two issues.[270] First, could the President make a recess appointment during the intrasession recess of twenty days? Based in large part on prior Attorney General Opinions from both parties, judicial authority—particularly, *Evans*—and historical practice discussed above, the answer was affirmatively, yes.[271] The second, "novel," issue addressed by the OLC was whether periodic pro forma sessions throughout a recess

262. Recess Appointments Press Release, *supra* note 17.

263. *See, e.g.*, Feller, *supra* note 261.

264. *See* 157 CONG. REC. S4646 (daily ed. July 18, 2011) (executive nominations received by Senate); Press Release, White House, President Obama Announces Richard Cordray As the Director of the Consumer Financial Protection Bureau (Jul. 17, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/17/President-obama-announces-richard-cordray-director-consumer-financial-pr.

265. *See, e.g.*, Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

266. *See, e.g.*, David Nakamura & Felicia Sonmez, *Obama Names Richard Cordray Consumer Watchdog Chief Over GOP Objections*, WASH. POST (Jan. 4, 2012, 1:50 PM), http://www.washingtonpost.com/blogs/44/post/obama-to-use-executive-power-to-name-consumer-watchdog-chief-over-gop-objections/2012/01/04/gIQAVtFXaP_blog.html.

267. *Id.*; Dan Pfeiffer, *America's Consumer Watchdog*, WHITE HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog ("Republican Senators insisted on using a gimmick called 'pro forma' sessions . . . [b]ut gimmicks do not override the President's constitutional authority to make appointments to keep the government running.").

268. Nakamura & Sonmez, *supra* note 266.

269. 2012 OLC Opinion, *supra* note 25, at 1.

270. *See id.* at 4.

271. *Id.*

preclude the President from utilizing his authority under the RAC.[272] The OLC answered that the pro forma sessions at issue did not preclude RAC action.[273]

Regarding the first question, in recognizing that "[t]he President may make appointments under the [RAC] during an intrasession recess of the Senate that is of substantial length,"[274] the OLC advised, consistent with executive branch precedent,[275] that a twenty-day recess is of sufficient length to trigger RAC action.[276] The OLC gives weight to historical practice—including Congressional acquiescence,[277] buttressed by a similar view taken by the courts[278]—as a guide to illustrate the permissibility of intrasession appointments during recesses of similar, or shorter, duration.[279] *Evans* is "the only federal court of appeals decision squarely on point"[280] and upheld a recess appointment made during an eleven-day recess.[281] Notably, the OLC observes that the previous five Presidents have all made intrasession recess appointments during recesses of fourteen days or fewer.[282]

As for the second question, the OLC based its answer largely on executive and judicial branch sources, including the functionalist Daugherty Opinion,[283] an extensive subsequent history of Attorney General Opinions, and available judicial precedent.[284] In finding that pro forma sessions do not interrupt a recess of the Senate in a way that would foreclose the President's ability to make recess appointments under the RAC,[285] the OLC looked largely to Daugherty's practical RAC interpretation—focusing on the Senate's ability to perform its advice and consent function.[286] In this

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272. *Id.*

273. *Id.*; *see also id.* at 9 ("[P]ro forma sessions of this sort do[] not have the legal effect of interrupting the recess of the Senate for purposes of the [RAC] and . . . the President may properly conclude that the Senate is unavailable for the overall duration of the recess.") (citation omitted).

274. Intrasession Recess Appointments, *supra* note 83, at 271.

275. *See* 2012 OLC Opinion, *supra* note 25, at 5–6.

276. *Id.* at 5 ("We have little doubt that a twenty-day recess may give rise to presidential authority to make recess appointments.").

277. *See supra* notes 78–79 and accompanying text.

278. *See supra* note 205 and accompanying text. The opinion states that "[w]hile there is little judicial precedent addressing the President's authority to make intrasession recess appointments, what decisions there are uniformly conclude the President does have such authority." 2012 OLC Opinion, *supra* note 25, at 8.

279. 2012 OLC Opinion, *supra* note 25, at 6.

280. *Id.* at 8.

281. Evans v. Stephens, 387 F.3d 1220, 1224–26 (11th Cir. 2004).

282. 2012 OLC Opinion, *supra* note 25, at 7.

283. *See supra* note 192 and accompanying text. The opinion states that "in our judgment, [pro forma] sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to 'receive communications from the President or participate as a body in making appointments.'" 2012 OLC Opinion, *supra* note 25, at 1 (quoting Intrasession Recess Appointments, *supra* note 83, at 272).

284. *See* 2012 OLC Opinion, *supra* note 25, at 11–12.

285. *Id.* at 1.

286. *See id.* at 4.

sense, the Opinion is very much aligned with relevant judiciary and executive branch precedent.[287] The OLC correctly[288] predicted, however, that litigation over this recess appointment is a risk, considering the novelty of the overall question.[289]

Citing various commentaries and Attorney General Opinions since the founding,[290] the OLC notes that the RAC has been interpreted in accordance with its purpose[291] "that there be an uninterrupted power to fill federal offices."[292] Relying on the Daugherty opinion and the 1905 Senate report, the OLC reiterates that the RAC is implicated when the Senate is practically unable to advise and consent.[293] That is, whether it is practically possible for the Senate to convene and dispense its advice and consent is the dispositive issue for the OLC in determining whether the Senate is in recess in "the constitutional sense."[294]

Finally, the OLC lays forth three considerations on which it rests its conclusion that pro forma sessions do not interrupt a Senate recess for RAC purposes.[295] First, the OLC recites the executive and legislative branches' belief that "recess" be defined in practical terms.[296] In drawing out this point, the OLC distinguishes between, on the one hand, the Senate legitimately starving the President of recess appointment authority by staying continuously in session,[297] remaining able to advise and consent, and on the other hand, convening only in pro forma session during which no business is to be—or can be—conducted.[298] For the OLC, it is the latter scenario in which the President can rightfully use his discretion to determine that the Senate is in genuine recess.

Second, the OLC asserts that equating pro forma sessions to legitimate Senate meetings contravenes the RAC's purpose.[299] An established mechanism to fill critical vacancies when the Senate is unable to perform its constitutional function is neutralized if the Senate can effectively disable the mechanism, even when the Senate itself cannot conduct any business.[300]

The OLC also draws similarities between the recess at issue and long intersession recesses during which appointments have been made since

287. *See, e.g.*, *id.* at 11 n.16. OLC noted, "We draw on the analysis developed by this Office when it first considered the issue." *Id.* at 4 (citing Memorandum from John P. Elwood, OLC, Re: Lawfulness of Making Recess Appointments During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions," (Jan. 9, 2009)).

288. *See* discussion *infra* Part III.A.1.

289. 2012 OLC Opinion, *supra* note 25, at 4.

290. *See id.* at 10–11.

291. *See id.*

292. *Id.* at 11.

293. *See id.* at 10–12.

294. *Id.* at 12.

295. *See id.* at 13–18.

296. *Id.* at 13–15.

297. *See* THE FEDERALIST NO. 67, *supra* note 49, at 361 (Alexander Hamilton); *supra* text accompanying note 65.

298. 2012 OLC Opinion, *supra* note 25, at 17–18.

299. *See id.* at 15.

300. *See id.*

President Washington's Administration.[301] As noted above, starting on December 17, 2011, the recess at issue spanned the final seventeen days of the first session of the 112th Congress and the first twenty days of the second session, totaling thirty-seven days and "closely resembl[ing] a lengthy intersession recess."[302] Therefore, the RAC should apply to this recess in the same way it does to recesses similar in character.[303]

The third consideration raises separation of powers concerns.[304] The OLC submits that, in light of the express constitutional authority of the President to make recess appointments, any effort to undermine this power would improperly tip the balance of power among the branches of government.[305] The OLC cites Supreme Court jurisprudence in holding that congressional acts cannot impermissibly "'undermine[ ]' the powers of the Executive Branch . . . or 'disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'"[306] Practices designed exclusively to limit the President's RAC power seemingly run contrary to a government designed to "restrict[] each branch to its sphere."[307] Certainly, though, some critics argue the converse—that recess appointments are a usurpation of Congress's power by the executive, as they deprive the Senate of its constitutional appointment role.[308]

The OLC also addressed a variety of counterarguments—some of which are discussed below—that might weigh against the conclusion that the President could properly make recess appointments between January 3, 2012, and January 23, 2012. One such argument is that pro forma sessions are meaningful because, in other contexts, they have been found to satisfy certain constitutional requirements.[309] Namely, the requirements that neither chamber adjourn for more than three days without the consent of the other[310] and that Congress convene on January 3rd of each year.[311] The OLC distinguishes the aforementioned uses of pro forma sessions as mere "housekeeping," that "affect the Legislative Branch *alone*,"[312] and that the use of such sessions should not affect the President's broad grant of discretion to determine when the Senate is unavailable to perform its advice and consent function for RAC purposes.[313]

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301. *Id.*
302. *Id.*
303. *See id.*
304. *Id.* at 16.
305. *Id.*
306. *Id.* (quoting Morrison v. Olson, 487 U.S. 654, 695 (1988)).
307. *Presidential Authority*, *supra* note 23, at 2143.
308. *See, e.g.*, Cooper & Steinhauer, *supra* note 265; Raju & Wong, *supra* note 72.
309. 2012 OLC Opinion, *supra* note 25, at 18.
310. U.S. CONST. art. I, § 5, cl. 4; *see supra* Part I.C.
311. U.S. CONST. amend. XX, § 2; *see also supra* notes 257–59 and accompanying text.
312. 2012 OLC Opinion, *supra* note 25, at 19.
313. *Id.* at 19–20 ("[W]hether the House has consented to the Senate's adjournment of more than three days does not determine the Senate's practical availability during a period of

Another counterargument addressed by the OLC is, because the Senate has the constitutional authority to "determine the Rules of its Proceedings,"[314] the President must abide by the Senate's determination of whether the body has recessed for purposes of the RAC.[315] The OLC relies on federal case law to observe that, when Congress makes a rule that affects individuals outside of the legislative branch, that rule may be subject to judicial review.[316] As any type of rule created for the purpose of preventing recess appointments would affect the executive branch and the potential appointee,[317] it could be subject to review. Relatedly, the constitutionality of the indirect legislative methods enacted by Congress to protect its advice and consent power[318] has not been adjudicated,[319] and questions remain as to whether such legislation could pass constitutional muster.[320] However, the OLC believes a rule declaring the Senate in session when it is unable to advise and consent is likely untenable,[321] just as it would be impermissible for the President to use his discretion to declare the Senate unable to advise and consent when, practically speaking, the Senate is able to perform such a function.[322]

Importantly, the OLC acknowledges that in 2011 alone, the Senate passed legislation—thus, arguably conducting business—on two different occasions while it was in pro forma session.[323] The legislation was agreed to by unanimous consent, and it is through this same practice that one could argue the Senate might advise and consent to a nominee during a pro forma session.[324] The OLC maintains, however, that the President can still reasonably rely on the Senate's declaration that "no business" will be conducted during the pro forma sessions and, if he does properly conclude that the Senate cannot provide advice and consent, then he can lawfully make recess appointments.[325]

Finally, the OLC addresses whether the DOJ had previously taken the position that regular pro forma sessions might preclude RAC action.[326] In

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pro forma sessions and thus does not determine the existence of a 'Recess' under the [RAC].").

314. U.S. CONST. art. I, § 5, cl. 2 (the Rules of Proceedings Clause).

315. 2012 OLC Opinion, *supra* note 25, at 20.

316. *Id.* (citing United States v. Smith, 286 U.S. 6, 33 (1932); United States v. Ballin 144 U.S. 1, 5 (1892); Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983)).

317. *Id*.

318. *See, e.g.*, *supra* notes 73–78 and accompanying text.

319. *See* CHU, *supra* note 66, at 19.

320. *See, e.g.*, 2012 OLC Opinion, *supra* note 25, at 17 n.20; Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 251–52 (2008).

321. 2012 OLC Opinion, *supra* note 25, at 20.

322. *Id.*

323. *Id.* at 21.

324. *Id.*

325. *See id.* Further, even if the Senate does not explicitly state that "no business" shall be conducted, the President can still conclude that it is impossible to obtain advice and consent from the body and make recess appointments. *Id.*

326. *Id.* at 23.

the proceedings surrounding *New Process Steel, L.P. v. NLRB*,[327] the DOJ, in a letter to the Supreme Court, considered whether a three-day recess could trigger the RAC.[328] The OLC notes that DOJ did not directly answer the three-day recess question, but rather focused on the "uncertain status of recess appointments during intrasession recesses of three or fewer days to argue that the possibility of recess appointments did not render *New Process Steel* moot."[329] Thus, the DOJ did not actually answer the question regarding pro forma sessions presently at issue.[330]

III. THE BATTLE FOR CONTROL OVER APPOINTMENTS

At the precipice of the RAC debates outlined in Parts I and II stands the issue of whether pro forma sessions sufficiently interrupt a recess for purposes of the RAC. The dueling RAC interpretations discussed above have direct consequences on the validity of the Cordray appointment.[331] The novelty of the issue, combined with "a lack of judicial precedent that may otherwise elucidate the [RAC],"[332] makes it "difficult to predict how a reviewing court would define the contours of the President's recess appointment authority."[333] The divisive positions in academia and all three branches of government[334] surround the question of whether the Cordray—and NLRB—appointments were made during a three-day recess between the January 3 and January 6, 2012 pro forma sessions[335] or a twenty-day intrasession recess beginning the second session of the 112th Congress, from January 3 to January 23.[336] This part will explore some of the hypothetical and actual issues pertinent in current and prospective litigation challenging the validity of the January 4, 2012 appointments. This information will help highlight the current conflict over the scope of RAC powers and the significance of pro forma sessions. This discussion will be based on briefs from relevant suits, nonpartisan reports from CRS, and prior case law and executive branch opinions.

In sum, Senate Republicans, and others who oppose the CFPB, claim that President Obama exceeded his constitutional authority because the Senate's recess at the time of Cordray's appointment was not of sufficient duration—due to regular pro forma sessions—to warrant the use of the President's

327. 130 S. Ct. 2635 (2010).

328. 2012 OLC Opinion, *supra* note 25, at 23 (citing letter from Elena Kagan, Solicitor Gen., to William K. Suter, Clerk, Supreme Court of the United States, at 3 (Apr. 26, 2010)).

329. *Id.*

330. *See id.*

331. *See, e.g.*, *id.* at 1.

332. CARPENTER ET AL., *supra* note 34, at summary.

333. *Id.*

334. For example, note the variations in RAC interpretation and application provided in Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); *id.* at 1228 (Barkett, J., dissenting); 2012 OLC Opinion, *supra* note 25, at 8 n.12; Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 424 (2005); Rappaport, *supra* note 80, at 1487; Landry Letter, *supra* note 104.

335. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 15.

336. *See, e.g.*, *id.*

recess appointment power.[337] On the other hand, supporters argue that the President's constitutional authority to make such an appointment is nearly beyond dispute,[338] as pro forma sessions do not interrupt a recess.[339] One broad perspective is that the Cordray appointment simply implemented the will of the majority, as fifty-three senators voted to advance the Cordray nomination.[340]

A. Novel Points of Contention

While the most recent dispute over whether pro forma sessions sufficiently interrupt a recess is cut across partisan lines,[341] support for the OLC's January 2012 position has come from both parties. In addition to the OLC's 2012 opinion, two former DOJ officials under President George W. Bush characterized this use of pro forma sessions as a "bluff" that "undermin[es] what the Founders viewed as an essential tool for the effective functioning of our government."[342] A number of legal experts have already taken the position that, upon judicial review, a court is likely to affirm the OLC's position that pro forma sessions do not meaningfully interrupt a recess.[343]

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337. *See, e.g.*, Letter from Senator Chuck Grassley et al. to Eric Holder, Att'y Gen., Jan. 6, 2012, [hereinafter Grassley Letter], *available at* http://www.grassley.senate.gov/judiciary/upload/Recess-Appointments-01-06-12-SJC-members-letter-on-OJC-input-on-recess-appointments-signed-letter.pdf; *see also* Cooper et al., *supra* note 125, at 76; Michael McConnell, Op-Ed., *Democrats and Executive Overreach*, WALL ST. J., Jan. 10, 2012, at A13; V. Gerard Comizio & Amanda M. Jabour, Am. Bar Ass'n, *Cordray's Recess Appointment: Future Legal Challenges*, BANKING L. COMM. J., 3–5, Mar. 2012, http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/201203/comizio-jabour.pdf.

338. *See* 2012 OLC Opinion, *supra* note 25, at 1; Cooper et al., *supra* note 125, at 76; Tribe, *supra* note 12.

339. *See* 2012 OLC Opinion, *supra* note 25.

340. *See, e.g.*, John Nichols, *Teddy Roosevelt Would Recess Appoint Cordray As Wall St. Watchdog*, NATION (Dec. 8, 2011), http://www.thenation.com/blog/165062/obama-should-pull-teddy-roosevelt-and-appoint-cordray#.

341. *See, e.g.*, Shelby Press Release, *supra* note 11; Brief for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the U.S. Senate in Support of Petitioner/Cross-Respondent Noel Canning, Canning v. NLRB, --- F.3d ---, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. 2013) [hereinafter McConnell Brief] (generally demonstrating the current partisan divide in RAC interpretation).

342. Stephen G. Bradbury & John P. Elwood, Op-Ed., *Recess Is Canceled*, WASH. POST, Oct. 15, 2010, at A19.

343. *See* Alex M. Parker, *Obama on Firm Legal Ground with Recess Appointment, Experts Say*, U.S. NEWS & WORLD REP. (Jan. 12, 2012), http://www.usnews.com/news/articles/2012/01/12/obama-on-firm-legal-ground-with-recess-appointment-experts-say (citing multiple legal scholars who believe that a court would not overturn Cordray's recess appointment). *But see Canning*, 2013 WL 27602, at *23–24 (invalidating the January 4, 2012 NLRB appointments); Ken Klukowski, *Federal Appeals Court Likely To Invalidate Obama's Recess Appointments*, BREITBART (Dec. 5, 2012), http://www.breitbart.com/Big-Government/2012/12/05/Federal-Appeals-Court-Likely-to-Invalidate-Obama-s-Recess-Appointments.

Like their successors, the Bush officials leaned on the 1905 Senate Report[344] and the Daugherty Opinion discussed above to support their conclusion,[345] which ultimately rests on the unconstitutionality of using pro forma sessions to starve the President of his constitutionally bestowed appointment power.[346] Indeed, there are alternative methods of hampering the President's appointment power including restrictions on the appointee's salary, limiting agency funding, and thwarting the President's legislative agenda.[347] Finally, former Bush officials, and others,[348] acknowledge that if debate surrounding the significance of pro forma sessions continues, the ultimate resolution may be left to the courts.[349]

1. Pro Forma Sessions and the RAC in Litigation

The 2012 OLC Opinion alluded to the fact that, the shorter the intrasession recess, the higher the risk might be of having a recess appointment overturned through litigation.[350] A great degree of uncertainty surrounds the outcome of such litigation, however, due to the limited judicial authority available on the issue.[351] Although, at this point, analysis of litigation surrounding the Cordray appointment is mostly prospective, the nonpartisan and authoritative CRS[352] compiled a report detailing what such litigation might look like.[353] Additionally, at least one lawsuit attempting to invalidate the Cordray nomination has already been filed,[354] and on January 25, 2013, in *Canning v. NLRB*,[355] the D.C. Circuit invalidated the three NLRB appointments made by President Obama at the same time he appointed Cordray.[356] These sources and related documents are helpful in illustrating the novel points of contention surrounding the Cordray appointment, and provide the basis for much of the following in this subsection.

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344. *See supra* note 194 and accompanying text.
345. Bradbury & Elwood, *supra* note 342.
346. *Id.*
347. *Id.*
348. *See Presidential Authority*, *supra* note 23, at 2155–56; Raju & Wong, *supra* note 72, at 2.
349. Bradbury & Elwood, *supra* note 342.
350. *See* 2012 OLC Opinion, *supra* note 25, at 8.
351. *Id.*; *see* CHU, *supra* note 66, at 22–23.
352. *See Values*, LIBR. CONGRESS (last updated Nov. 15, 2012), http://www.loc.gov/crsinfo/about/history.html.
353. For a complete analysis of prospective litigation, see CARPENTER ET AL., *supra* note 34.
354. Complaint for Declaratory and Injunctive Relief, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032 (D.D.C. filed June 21, 2012), 2012 WL 2365284 [hereinafter Big Spring Complaint].
355. Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).
356. *Id.* at *23–24; *see supra* text accompanying note 17.

a. The CFPB Challenge

Nonbank financial companies that are subject to CFPB rules or enforcement action are likely to be among the entities that challenge the validity of the Cordray appointment in the future.[357] Recess appointments of the Cordray character—during the three-day period between pro forma sessions—raise questions surrounding justiciability, namely whether a plaintiff has sufficient standing to bring suit, and whether the issue itself invokes the political question doctrine.[358] Regarding the critical question of standing,[359] the potential plaintiffs perhaps most likely to meet the requirements for litigation are the aforementioned nonbank financial entities that have felt some specific putative harm as a result of a discrete action by the CFPB.[360] Such plaintiffs would likely challenge a ruling or enforcement action taken by the CFPB—after Cordray's appointment—on the grounds that the Director lacked authority to take such action as a result of his invalid appointment,[361] akin to the strategy of the *Evans* and *Canning* plaintiffs.[362]

In fact, at least one complaint challenging the Cordray appointment has been filed on behalf of several plaintiffs, including a Texas-based bank, in *Big Spring v. Geithner*.[363] In order to combat a purported chilling effect on financial institutions as a result of the CFPB's "unlimited power" to determine what constitutes "unfair, deceptive, or abusive" acts on an ad hoc

357. *See* Orol, *supra* note 20, at 2; Raju & Wong, *supra* note 72.

358. CARPENTER ET AL., *supra* note 34, at 6–14. A complete discussion of the justiciability of this issue is outside the scope of this Note. However, it is worth noting the possibility that much of the debate outlined in this part may fall under the political question doctrine and, thus, outside the scope of judicial review. *See id.* at 11–13. Notably, with regard to the President's use of discretion in making recess appointments, the *Evans* court found that "[t]hese matters are criteria of political wisdom and are highly subjective. . . . [W]e lack the legal standards . . . to determine how much Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him." Evans v. Stephens, 387 F.3d 1220, 1227 (11th Cir. 2004). Additionally, a circuit judge presiding over *Canning* noted during oral arguments that the court has not involved itself in separation of powers and appointments disputes in the past, and questioned whether Congress should "drag [the court] in" to rule on the validity of the recess appointments. Tom Schoenberg, *Republican Lawmakers Argue Obama Appointments Unlawful*, BLOOMBERG BUSINESSWEEK (Dec. 5, 2012), http://www.businessweek.com/news/2012-12-05/republican-lawmakers-argue-obama-appointments-unlawful; *see also* CARPENTER ET AL., *supra* note 34, at 12–14; CHU *supra* note 66, at 22. For a more in-depth exploration of this issue, see generally CARPENTER ET AL., *supra* note 34.

359. *See* CARPENTER ET AL., *supra* note 34, at 7; Hein, *supra* note 320, at 249–51.

360. CARPENTER ET AL., *supra* note 34, at 7–8. The Plaintiffs in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), provide an example of proper standing for a private plaintiff in bringing a claim against an executive agency, as the Court was willing to hear the case on the merits.

361. *See* CARPENTER ET AL., *supra* note 34, at 7–8.

362. The *Evans* plaintiffs hoped to obtain a favorable ruling on a civil rights action, in part, by challenging the authority of Judge Pryor, a circuit court judge, based on the fact that he was recess appointed to the bench. *See Evans*, 387 F.3d at 1221–22; *infra* note 371 and accompanying text.

363. Big Spring Complaint, *supra* note 354.

basis,[364] the plaintiffs allege, inter alia, that Cordray's nomination is unconstitutional.[365] They therefore request that the court "enjoin[] Cordray from carrying out any of the powers delegated to the office of CFPB Director by [Dodd-Frank]."[366]

Specifically, the plaintiffs argue that the Senate was not in a recess sufficient to trigger RAC action because: The body (1) can declare its own rules and procedures and did not declare itself in recess during the time in question, (2) was not recessed pursuant to the Adjournment Clause at the time of the Cordray nomination, and (3) did, in fact, pass legislation during the recess in question, and therefore the recess appointment was an unconstitutional act.[367] As discussed above in Part II.C, the OLC anticipated and responded to each of these points. Still in the pleading stages, the government, in late 2012, moved to dismiss, claiming that all plaintiffs lack the "core requirements" of standing.[368] Thus, how the court will handle the justiciability and interpretative issues remains to be seen.

b. The D.C. Circuit's 2013 RAC Doctrine

In implementing a similar strategy to attack the companion January 4, 2012 recess appointments,[369] a Pepsi bottling company appealed to the D.C. Circuit to invalidate a ruling by the NLRB.[370] In *Canning*, the plaintiff corporation, subject to an adverse ruling by the Board, challenged the five-member Board's ability to act, claiming that the NLRB lacked the three-member quorum necessary to render rulings.[371] The three members in question were appointed at the same time as Cordray,[372] and the plaintiffs allege that the appointments did not occur during a recess sufficient to trigger the RAC.[373] This argument is based on the plaintiff's theory that pro forma sessions do, in fact, interrupt recesses for RAC purposes and, therefore, the Senate never properly recessed during the time in question, making any RAC action improper.[374]

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364. *Id.* ¶¶ 35–42.
365. *Id.* ¶¶ 80–86.
366. *Id.* at prayer for relief.
367. *Id.* ¶¶ 80–83.
368. Memorandum in Support of Defendants' Motion to Dismiss the Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) at 16, Big Spring v. Geithner, No. 1:12CV01032 (D.D.C. Nov. 20, 2012); *see also* Big Spring v. Geithner, No. 1:12CV01032 (D.D.C. 2012) (docket).
369. President Obama announced the recess appointments of a total of four individuals, including Richard Cordray, on January 4, 2012. *See supra* note 17.
370. *See* Opinion, *Packing the NLRB*, WALL ST. J., Dec. 5, 2012, at A18 [hereinafter *Packing the NLRB*].
371. *Id.*
372. *See supra* text accompanying note 17.
373. Final Joint Brief for Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the U.S. and the Coalition for a Democratic Workplace at 1, Canning v. NLRB, --- F.3d ---, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. 2013) [hereinafter Brief for Canning].
374. *See id.* at 5.

In an amicus brief on behalf of the plaintiffs, forty-two Republican members of the Senate supported this argument, based largely on the Senate's ability to make the rules of its proceedings and declare itself in—or out of—recess.[375] Like the *Big Spring* plaintiffs, the senators argue that the President cannot usurp that authority by unilaterally deciding that the Senate has recessed and appointing officials pursuant to the RAC.[376] These senators state that because the Senate had not adjourned pursuant to the Adjournment Clause, it "hardly could be deemed in 'Recess' when it was constitutionally bound to be in session."[377] Therefore, in an apparent rebuke[378] to the belief that the President has discretion to determine what constitutes a recess for RAC purposes,[379] Senate Republicans assert that it is in the Senate's hands to determine the chamber "expressly and unambiguously" in—or out of—session, pursuant to the Rules of Proceedings Clause.[380] Again, like *Big Spring*, the senators posit that even if the President could make a determination as to whether the Senate has recessed for RAC purposes, pro forma sessions are decidedly not de facto recesses, especially considering the Senate's willingness to pass legislation during such sessions.[381] In sum, the senators submit that, in making the January 4, 2012 recess appointments, the President "conflate[d] the chamber's *unavailability* to act with its *unwillingness* to do so."[382]

On the other hand, the government's brief mirrors many of the functionalist arguments[383] from the 2012 OLC opinion[384] and a long line of executive precedent[385] to argue that the recess appointments occurred during a twenty-day break and were constitutional.[386] The government's stance is rooted in the "well-understood meaning long employed by both the Legislative and Executive Branches," that a recess of the Senate refers "to a break from the Senate's usual business."[387] Therefore, the government contends, inter alia, that the Senate's unanimous announcement that it would conduct no business during the twenty-day period in question is, in effect, an announcement by the Senate that it would go into recess despite regular pro forma sessions.[388] Based on the fact that no business

375. McConnell Brief, *supra* note 341, at 2–4.
376. *See id.* at 10.
377. *Id.* at 15.
378. *See, e.g.*, Schoenberg, *supra* note 358 (Republicans argue that the court must "defer to the Senate," not the President in determining when the Senate has recessed) (interal quotation marks omitted).
379. *See supra* note 193 and accompanying text.
380. McConnell Brief, *supra* note 341, at 15; *see supra* notes 314–16 and accompanying text.
381. *See* McConnell Brief, *supra* note 341, at 11; *see also supra* notes 323–25 and accompanying text.
382. McConnell Brief, *supra* note 341, at 11.
383. NLRB Brief, *supra* note 110, at 29.
384. *See, e.g.*, *id.* at 46.
385. *See id.* at 29.
386. *Id.* at 11–12.
387. *Id.*
388. *Id.* at 11–12, 23–24.

was actually conducted during the twenty-day period in question,[389] and applying the Daugherty functionalist standard,[390] the government concludes, "[T]here is no question that . . . the Senate was in recess from January 3 to January 23, 2012, notwithstanding the periodic *pro forma* sessions."[391] With specific regard to the "rules of proceedings" argument anticipated by the OLC,[392] the DOJ observed that "[the Senate] passed no rule or resolution setting forth the conclusion that the Senate was not in recess for purposes of the [RAC]."[393] The DOJ also made reference to a "shared understanding" for more than a century between the executive and legislative branches that a recess is defined by whether the Senate is—or is not—conducting work.[394] Further, the rules of proceedings power is granted to the extent that it solely affects the legislative branch—thus rules that act to limit the power of the executive branch are not permissible.[395]

The DOJ also responds to claims that the Senate was expressly not in recess by pointing out that the Senate referred to the break in question as a "recess" in various resolutions.[396] The DOJ thus concluded that, between January 3 and January 23, 2012, based on an established definition of recess, "there was a 'Recess of the Senate' here: the Senate had provided by binding order that it would conduct no business during its January break; it in fact conducted no business during that break; and it referred to its January break as a 'recess.'"[397]

Also, as predicted by the OLC,[398] Senate Republicans contend that the President's reliance on the Senate's announcement that they will conduct no business is unfounded,[399] because the Senate did conduct business in a similar situation in 2011.[400] In response, the DOJ observes that, even when the Senate recesses pursuant to the Adjournment Clause, it is still possible for the Senate to cut short its recess by reconvening on a date earlier than originally agreed upon[401] in the requisite resolution passed prior to recessing.[402] Thus, the Senate is seemingly capable of "chang[ing] its mind and conduct[ing] business"[403] whether or not the Senate has recessed pursuant to the Adjournment Clause, or is in pro forma session in which no business is to be conducted.[404]

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389. *See id.* at 11–12. The DOJ notes that "[t]he Senate considered no bills, held no votes, and passed no legislation. No speeches were made, no debates held." *Id.* at 23.
390. *See, e.g.*, *id.* at 38–39.
391. *Id.* at 39.
392. *See supra* notes 314–22 and accompanying text.
393. NLRB Brief, *supra* note 110, at 56.
394. *See* Schoenberg, *supra* note 358.
395. *See* NLRB Brief, *supra* note 110, at 57–58.
396. *Id.* at 56–57.
397. *Id.* at 48.
398. *See supra* notes 323–25 and accompanying text.
399. McConnell Brief, *supra* note 341, at 26–27.
400. *Id.* at 25–26.
401. NLRB Brief, *supra* note 110, at 41–42.
402. *See supra* notes 98–99 and accompanying text.
403. McConnell Brief, *supra* note 341, at 27.
404. *See* NLRB Brief, *supra* note 110, at 41–42.

The DOJ further observes that the orders providing for adjournment punctuated with pro forma sessions are, functionally, "indistinguishable" from concurrent recess resolutions passed pursuant to the Adjournment Clause.[405] In fact, the Government asserts that it may actually be easier to cut short a recess approved by concurrent resolution pursuant to the Adjournment Clause than it would have been to agree to conduct business during the January 3 to January 23, 2012 break.[406] This is because, since the Senate agreed to "conduct no business" by unanimous consent, only a superseding unanimous consent agreement could have brought the Senate back to Washington to conduct business during this time.[407] By contrast, reconvening after an Adjournment Clause recess often only requires an agreement between the few senators who hold leadership positions.[408] Thus, in the former, unanimous consent, pro forma situation, any single Senator can derail plans to conduct business prior to the agreed upon date, whereas in the latter, Adjournment Clause recess, the Senate can conduct business sooner than planned at the behest of only a few senators.[409]

On January 25, 2013, the three-judge D.C. Circuit panel that presided over *Canning* unanimously flipped the current RAC landscape on its head by invalidating President Obama's NLRB recess appointments.[410] Despite the arguments detailed above, the court based its decision on its interpretation of "the Recess" and "happen" as used in the RAC,[411] arriving at a conclusion that puts the D.C. Circuit squarely at odds with its sister circuits' decisions since the nineteenth century,[412] including the Eleventh Circuit in *Evans*,[413] the Second Circuit in *United States v. Allocco*,[414] the Ninth Circuit in *United States v. Woodley*,[415] and well over a century of consistent executive branch precedent.[416] In ruling that recess appointments can be made only during intersession recesses for vacancies that arise during that particular recess, the court's decision, if upheld, would

405. *Id.* at 38.

406. *Id.* at 42.

407. *Id.* at 40 ("[A] unanimous consent agreement is a binding order of the Senate that can be overridden only through a new unanimous consent agreement.").

408. *Id.* at 42.

409. *See id.*

410. Canning v. NLRB, Nos. 12-1115, 12-1153, 2013 WL 276024, at *23–24 (D.C. Cir. Jan. 25, 2013) (holding that three NLRB members were not validly appointed and vacating the underlying NLRB order against the petitioners).

411. *Id.* at *16 ("In short, we hold that 'the Recess' is limited to intersession recesses); *id.* at *21 ("[T]he original public meaning of "happen" was "arise," [thus] we hold that the President may only make recess appointments to fill vacancies that arise during the recess . . .").

412. *See supra* note 163 and accompanying text.

413. *See* Melanie Trottman et al., *Court Throws Out Recess Picks*, WALL ST. J. (Jan. 26, 2013), at A1; *supra* notes 168–71, 202–05 and accompanying text.

414. *See supra* note 165 and accompanying text.

415. *See supra* notes 164–65 and accompanying text.

416. *See* Trottman et al., *supra* note 159–60, 413 and accompanying text.

all but eliminate the President's recess appointment power.[417] Restricting valid recess appointments to such a limited window would call into question nearly 300[418] prior appointments by President Obama and other presidents, and the validity of the seemingly settled actions taken by these appointees.[419]

Notwithstanding the extensive discussions in the litigants' briefings,[420] the *Canning* court conspicuously did not address the novel issue of whether pro forma sessions can sufficiently break up a recess to prevent recess appointments. As mentioned above, the court instead made its decision on a largely formalist and originalist interpretation of "the Recess" and "happen," "as [the phrases] would have been understood at the time of the ratification,"[421] relying on contemporaneous documents and actions.[422] In fact, one former DOJ official from the George W. Bush Administration noted that the panel "would have benefitted from extensive briefing" on these interpretational issues.[423] That is, the panel left unaddressed the novel

417. Charlie Savage & Steve Greenhouse, *Court Rejects Obama Move To Fill Posts*, N.Y. TIMES, Jan. 26, 2013, at A1. Notably, one judge found that the court should not disturb the "suspect" practice of filling vacancies that do not arise during the recess in which the recess appointment is made, based on the executive branch's "longstanding interpretation of the Constitution" and extensive practice of making such appointments. *Canning*, 2013 WL 276024, at *24 (Griffith, J., concurring).

418. Jay Carney, White House Press Sec., Press Briefing by Press Secretary Jay Carney (Jan. 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013 (stating that the D.C. Circuit's decision calls into question approximately 280 recess appointments made over the past 150 years).

419. Savage & Greenhouse, *supra* note 417. In an extreme illustration of this point, speaking with respect to recess-appointed Article III judges like in the *Evans* case, a former DOJ official under President George W. Bush said there may even be "people sitting in prisons . . . who will be very excited when they learn of this ruling." *Id.* (quoting John Elwood, former Deputy Assistant Attorney General under George W. Bush). Conservative and liberal commentators alike have criticized the *Canning* opinion, characterizing it as everything from "a tad doctrinaire," to "an extravagant act of judicial hubris." Garrett Epps, *What Did the Word "The" Mean in 1755? And Why Does the Court Care?*, ATLANTIC (Feb. 1, 2013, 4:08 PM), http://www.theatlantic.com/national/archive/2013/02/what-did-the-word-the-mean-in-1755-and-why-does-the-court-care/272773/. However, at least one supporter of the opinion greeted it as a check on "executive power tyranny." *Id.* Yet, in perhaps the most colorful criticism of the ruling, Professor Peter Shane, the Jacob E. Davis and Jacob E. Davis II Chair in Law at the Ohio State University's Moritz College of Law, commented, "[t]he [*Canning*] opinion . . . is a little like a Rob Schneider movie—the more you think about it, the worse it seems." Peter M. Shane, *Two More Reasons Why the D.C. Circuit Was "Wrong" and "Wrong" on Recess Appointments*, SHANE REACTIONS (Jan. 30, 2013, 2:57 PM), http://shanereactions.wordpress.com/2013/01/30/two-more-reasons-why-the-d-c-circuit-was-wrong-and-wrong-on-recess-appointments/.

420. *See supra* notes 369–409 and accompanying text.

421. *Canning*, 2013 WL 276024, at *8 ("The interpretation of the [RAC] in the years immediately following the Constitution's ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a 'critical tool of constitutional interpretation . . . .'" (quoting District of Columbia v. Heller, 544 U.S. 570, 605 (2008))).

422. *Id.* at *10.

423. John Elwood, *DC Circuit Strikes Down President Obama's Recess Appointments*, VOLOKH CONSPIRACY (Jan. 25, 2013, 11:24 AM), http://www.volokh.com/2013/01/25/dc-circuit-strikes-down-president-obamas-recess-appointments/. Specifically, the court relied

issue of whether periodic pro forma sessions over a period of extended adjournment can strip the President of his recess appointment authority.[424] In any event, as explained above, the court's decision to interpret the RAC "as it would have been understood at the time of the ratification,"[425] leaves open questions.[426] Namely, whether the use of pro forma sessions can strip the President of his RAC authority—the primary conflict explored in this Note. The Obama Administration maintains that this "unprecedented" decision that "contradicts 150 years of practice by Democratic and Republican administrations . . . has no bearing on Richard Cordray."[427]

2. Intrasession Versus Intersession, Rehashed

Though some view the issue as largely settled,[428] it is worth briefly revisiting the controversy over whether the RAC applies to both intrasession and intersession recesses, as the parties to current litigation[429]

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heavily on the "dearth of intrasession appointments" during the years following the ratification. *Canning*, 2013 WL 276024, at *15. However, as this Note discusses above and Elwood makes clear, intrasession recesses did not become common practice until decades after the ratification of the Constitution. *See* Elwood, *supra*; *supra* notes 91–95 and accompanying text.

424. As its decision rested on issues that the litigants had not briefed to a serious extent, the government might decide to request a rehearing en banc. Elwood, *supra* note 423. Such a petition may be filed contemporaneously with its almost inevitable petition for certiorari. *See id*.; *see also* Trottman et al., *supra* note 413. The Obama Administration "disagree[s] strongly with the decision." Carney, *supra* note 418.

425. *Canning*, 2013 WL 276024, at *8.

426. It seems unlikely that the Framers would have understood that a procedural mechanism, implemented for the sole purpose of preventing recess appointments, would allow the Senate to remain both in session according to the Adjournment Clause and simultaneously unable to advise and consent. In declining to discuss the novel pro forma issue, the D.C. Circuit did not address this point.

427. Carney, *supra* note 418; *see also* Trottman et al., *supra* note 413. While *Canning* has no direct impact on Cordray or the CFPB, the decision might add leverage to Senate Republicans' demands for changes to the CFPB. *See* Trottman et al., *supra* note 413. In fact, the two cases appear distinguishable, and a court deciding on Cordray's validity may want to reconcile the D.C. Circuit's new RAC doctrine with the inherent structural differences between the NLRB and CFPB. That is, the NLRB is a five-member panel that has existed since the Great Depression, *see Our History*, NLRB, http://www.nlrb.gov/who-we-are/our-history (last visited Feb. 15, 2013), while the CFPB is a new agency, led by a single director, created in response to the 2008 financial crisis. *See* discussion *supra* Part I.A. Again, notably, Richard Cordray holds the distinction of serving as the CFPB's first-ever Director.

Further, the D.C. Circuit supports its originalist argument by noting the Framers' implementation of the advice and consent process as a check against unfit appointees. *Canning*, 2013 WL 276024, at *11. A court hearing a similar case may wish to comment on the modern trend exemplified in the Cordray proceedings of objecting to a nominee—not on the grounds of the nominee's qualifications and character—but as a shortcut around the legislative process. *See supra* note 19 and accompanying text; *infra* notes 455–56 and accompanying text. Lastly, as mentioned above, the main issue in this latest recess appointments controversy—and this Note—was not addressed by the court, leaving the validity of using pro forma sessions as a recess appointment bludgeon as perplexing as ever.

428. *See generally* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); CARPENTER ET AL., *supra* note 34, at 4 n.23; 2012 OLC Opinion, *supra* note 25, at 8 n.12; *Evans* Intervening Brief, *supra* note 79.

429. Brief for Canning, *supra* note 373, at *71–73.

and the D.C. Circuit have revived the issue.[430] Those opposed to intrasession recess appointments sometimes point to the disparate term length between an intrasession and intersession recess appointee.[431] The RAC stipulates that the term of recess appointees expires at the "End of their next session," which means the *sine die* adjournment of the next session.[432] Thus, term lengths will vary depending on when an individual is appointed.[433] For example, if the appointment is made during the intersession break, then the appointment will last for approximately one year—until the end of the session that begins immediately after the intersession recess.

By contrast, if the appointment is during an intrasession recess, then the appointee will serve for the remainder of the current session, in addition to the entire subsequent session[434]—that is, the "End of their next Session."[435] The curious result that an intrasession appointee's term could be twice as long as an intersession appointee's term, weighs—for some—in favor of allowing recess appointments only during intersession recesses.[436] Perhaps this explains why President Obama waited until the second day of the new session to make the intrasession Cordray appointment;[437] this effectively doubled the duration of Cordray's term compared to what his term would have been had he been appointed during an intersession recess.[438]

3. The Future of the RAC in Court

Despite the belief of some legal experts that the Cordray appointment is on firm legal ground[439] and that "the courts would probably have a burden to explain why they don't agree with [the January 2012 OLC opinion],"[440] the possibility that the appointments would be challenged in court was expected.[441] CRS observes that a reviewing court could approach the question of the significance of pro forma sessions in at least three ways.[442]

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430. *See, e.g.*, *id.*; James O'Connell, *A Brief Look at Recess Appointments*, ANTITRUST SOURCE, Sept. 2004, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Sep04OConnell.authcheckdam.pdf.

431. *See, e.g.*, McConnell Brief, *supra* note 341, at 27; Brief for Canning, *supra* note 373, at *71–72; Carrier, *supra* note 89, at 2240–41.

432. HOGUE, *supra* note 91, at 5.

433. Carrier, *supra* note 89, at 2240–41.

434. *See* Intrasession Recess Appointments, *supra* note 83, at 273; HOGUE, *supra* note 91, at 5.

435. U.S. CONST. art II, § 2, cl. 3.

436. *See, e.g.*, Brief for Canning, *supra* 373, at 71–72; Carrier, *supra* note 89, at 2241 ("Allowing recess appointments during intrasession recesses thus leads to unusual results that may tilt the balance of power in the appointment process.").

437. McConnell Brief, *supra* note 341, at 27.

438. Recall that, notwithstanding the pro forma sessions, the recess during which Cordray was appointed spanned both intersession and intrasession periods, starting on December 17, 2011, through January, 23, 2011. *See* 2012 OLC Opinion, *supra* note 25, at *1.

439. *See* Parker, *supra* note 343.

440. *Id.* (quoting Michael Gerhardt, Professor of Law, UNC-Chapel Hill).

441. *See, e.g.*, Comizio & Jabour, *supra* note 337, at 6–7.

442. CARPENTER ET AL., *supra* note 34, at 17–18.

First, a court could simply find that pro forma sessions always constitute meaningful sessions for RAC purposes; second, a court could find that a pro forma session is a standard session only if actual business is conducted; and third, a court may find that a pro forma session is a standard session if the Senate has the mere ability to conduct business during such sessions.[443]

Using the first approach, the dispositive question in the Cordray dispute will be whether a three-day recess is of sufficient duration to trigger the President's authority under the RAC.[444] It is unclear how a court would rule on this, given the general hesitancy to declare a bright line rule for recess duration[445] and "limited judicial authority."[446] The OLC, in January, noted the difficulty in "predict[ing] with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones."[447]

Viewing all pro forma sessions as standard sessions might raise constitutional concerns related to the separation of powers doctrine.[448] Using this approach, the Senate can remain continually in pro forma session and completely strip the President of his constitutional RAC authority.[449] Although the President has broad discretion to determine when the Senate is in recess for purposes of the RAC,[450] it is possible for the Senate to deprive the President of RAC power by staying in a continuous session, ready to conduct business.[451] However, attempting to do so using pro forma sessions might effectively amount something similar to a legislative veto,[452] in which one chamber alone prevents the execution of duly enacted law.[453] Such maneuvers could unconstitutionally circumvent bicameralism and presentment.[454] In this case, the Senate minority refused to act—not because of the nominee's qualifications—but because it disagreed with an enacted law that could not come to life without a director.[455] Thus, it has been argued that "the Republican minority . . . [is] achieving through

443. *Id.*
444. *Id.*; *see, e.g.*, CHU, *supra* note 66, at 21–22.
445. 2012 OLC Opinion, *supra* note 25, at 9 n.13.
446. *Id.* at 8.
447. *Id.* (footnote omitted).
448. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 23; *see also* CHU, *supra* note 66, at 21–22.
449. CARPENTER ET AL., *supra* note 34, at 23.
450. *See supra* notes 192–93 and accompanying text.
451. 2012 OLC Opinion, *supra* note 25, at 1.
452. *See* Platt, *supra* note 95, at 286.
453. *See, e.g.*, *supra* notes 106–09 and accompanying text.
454. INS v. Chadha, 462 U.S. 919, 956–58 (1983) (holding that legislative acts must conform to bicameralism and presentment to "maintain the separation of powers, [and ensure that] the carefully defined limits on the power of each Branch . . . not be eroded"); *see supra* note 106 and accompanying text.
455. *See supra* notes 40–41 and accompanying text.

obstruction what it could not through the constitutionally required procedures of bicameralism and presentment."[456]

As the second approach examines the individual pro forma sessions at issue to determine whether the Senate actually conducted business, the court may have to define "business," and determine whether the Senate's activity met the court's standard.[457] Because it appears that no business was conducted during any of the pro forma sessions beginning on January 3, 2012, through January 23, 2012,[458] it seems unlikely that these pro forma sessions would be considered regular sessions under this approach.[459] Thus, by this standard, a court may conclude that the Cordray appointment occurred during a twenty-day intrasession recess, "consistent with established historical precedent."[460]

Under the third approach, a pro forma session would be considered a standard session if the Senate has the mere ability to conduct business. Despite agreements to conduct no business during pro forma sessions, the Senate did, in fact, conduct business on two such occasions in 2011.[461] On both occasions the Senate approved legislation by unanimous consent—the same agreement mechanism that has been used to approve some appointments in the past.[462] Thus, a court may conclude that these sessions ought to be recognized as standard sessions and that the Cordray appointment simply occurred during a recess of three days.[463]

4. No Bright Line Cut-Off Exists for Recess Duration Before a Recess Appointment Is Permissible

If pro forma sessions are found to sufficiently interrupt a recess for RAC purposes, then the inquiry must turn to whether the time in between pro forma sessions is of sufficient duration to make a recess appointment.[464] The Constitution's silence on the issue of how long a recess must be before

456. Platt, *supra* note 95, at 286; *see also* Puzzanghera, *supra* note 14 (reporting that Democrats and the White House have accused Republicans of "misusing the nominations process to fight a legislative battle they lost").

457. *See* CARPENTER ET AL., *supra* note 34, at 23; *see, e.g.*, CHU, *supra* note 66, at 21–22.

458. NLRB Brief, *supra* note 110, at 23–24; *see supra* text accompanying note 389.

459. CARPENTER ET AL., *supra* note 34, at 17–18. Recall that the OLC was asked to analyze the permissibility of recess appointments between January 3, 2012, and January 23, 2012. As discussed above, a certain amount of business was, in fact, conducted between December 17, 2011, and January 3, 2012. *See infra* note 461 and accompanying text. If the OLC was asked whether recess appointments were permissible during the period between December 17, 2011, and January 23, 2012, perhaps the Opinion would be different.

460. CARPENTER ET AL., *supra* note 34, at 18; 2012 OLC Opinion, *supra* note 25, at 4.

461. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 18; McConnell Brief, *supra* note 341, at 25–26.

462. CARPENTER ET AL., *supra* note 34, at 18.

463. *Id.* at 18.

464. This is in line with the 2012 OLC Opinion's two-part approach to the same issue, which asked whether the recess was of sufficient length to act under the RAC and whether pro forma sessions sufficiently interrupt a recess for RAC purposes. *See supra* notes 270–73 and accompanying text.

the RAC is triggered helps lead to the unsettled status of this issue.[465] However, recent positions taken by the DOJ, including its position in *Evans*, suggests that there may be a cutoff of more than three days.[466] In an attempt to answer this question, the DOJ linked the Adjournment Clause and the RAC,[467] stating that, as both chambers are restricted from unilaterally recessing for more than three days, then "[i]t might be argued that the Framers did not consider one, two and three day recesses to be constitutionally significant."[468] The government reiterated this position to the Supreme Court as recently as 2008, when Solicitor General Neal Katyal stated that in order to trigger RAC action, "our office has opined that the recess has to be longer than three days."[469] Most recently, some, including the DOJ—and even the *Evans* Court[470]—shied away from making such cutoffs,[471] and the question remains, how long must a recess be before recess appointments are allowed? Although it has been argued that the DOJ's functionalist interpretation might lead to appointments during a Senate recess of any duration,[472] this argument has been squarely rejected by the DOJ[473] and affirmed by the judiciary.[474]

In the past, and in recent practice, the DOJ has hesitated to assert recess appointment authority during short breaks of only several days.[475] However, in response to an argument by Senator Ted Kennedy that allowing intrasession recess appointments would result in "lunchtime" appointments,[476] the DOJ referred to the possibility of the three-day de

465. CARPENTER ET AL., *supra* note 34, at 19; HOGUE, *supra* note 91, at 7.

466. *See, e.g.*, HOGUE, *supra* note 91, at 7; *Evans* Intervening Brief, *supra* note 79, at 20–21; Grassley Letter, *supra* note 337, at 1.

467. *See* CARPENTER ET AL., *supra* note 34, at 20 (quoting Memorandum of Points and Authorities in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment at 24–26, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (No. 93-0032-LFO) [hereinafter Mackie Brief]); CHU, *supra* note 66, at 9, 21.

468. CARPENTER ET AL., *supra* note 34, at 20 (quoting Memorandum of Points and Authorities in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment at 24–26, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (No. 93-0032-LFO)).

469. *Packing the NLRB*, *supra* note 370.

470. Evans v. Stephens, 387 F.3d 1220, 1225 (11th Cir. 2004) ("[T]he Constitution . . . does not establish a minimum time" for a recess before the President can act under the RAC).

471. *See, e.g.*, Victor Williams, *House GOP Can't Block Recess Appointments*, NAT'L L.J. (Aug. 15, 201l), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202510852757&House_GOP_cant_block_recess_appointments&slreturn=1&hbxlogin=1; *see also* Platt, *supra* note 95, at 278. Neither the 2012 OLC Opinion nor the DOJ's brief for the NLRB in *Canning* draws a bright line demarcating the minimum recess duration for purposes of the RAC. *See* 2012 OLC Opinion, *supra* note 25, at 9 n.13.

472. *See infra* notes 476–78 and accompanying text; *Packing the NLRB*, *supra* note 370.

473. *See Evans* Intervening Brief, *supra* note 79, at 21–23; NLRB Brief, *supra* note 110, at 13.

474. *See, e.g.*, Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).

475. *See, e.g.*, HOGUE, *supra* note 91, at 3; 2012 OLC Opinion, *supra* note 25, at 9 n.13; *see also* Daugherty Opinion, *supra* note 162 ("Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution. . . . [T]he line of demarcation can not be accurately drawn.").

476. Kennedy Brief, *supra* note 173, at 28–29.

minimus rule,[477] based on a link between the Adjournment Clause and the RAC, as mentioned above.[478] Most recently, the DOJ has defended its interpretation of the RAC against allegations of unlimited recess appointment power—and violating the separation of powers—by maintaining that the constraints of the Daugherty functionalist approach and the threat of judicial review do, indeed, protect against "weekend" recess appointments.[479] Further, the DOJ argues, this authority does not encroach on any branch's powers as, inter alia, the recess appointees are temporary, and the Senate retains the ability to remain continuously in session to conduct business.[480] In the thirty-year period beginning with the Reagan presidency in 1981, through December 2011, the shortest intersession recess appointment was made during an eleven-day recess, and the shortest intrasession recess appointment was made during a ten-day recess.[481]

B. Questions Outside of RAC Interpretation Still Remain

Outside of pending litigation, questions surrounding the future of the CFPB, its director, and even the President remain to be answered. The CRS and other sources help to shed light on ambiguities in the CFPB organic statute, the fate of the CFPB with an invalid director, and the affect of the public's perception of the January 4, 2012 recess appointments.

1. Interpretation of the CFPB Organic Statute

Even if the Cordray appointment occurred in a recess for RAC purposes, there appears to be an issue of whether the authority possessed by a recess appointed CFPB Director differs at all from a Senate-approved director.[482] The question derives from the statutory text in section 1011 of Dodd-Frank,[483] which states that the CFPB Director is to be appointed "by and with the advice and consent of the Senate."[484] Thus, questions are raised as to whether someone who avoids this statutory requirement can be vested with the full authority concomitant with the position.[485]

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477. "[I]t would make eminent sense, in construing any *de minimis* exception from otherwise applicable constitutional rules for 'recess,' to apply the three-day rule explicitly set forth in the Adjournment Clause." *Evans* Intervening Brief, *supra* note 79, at 21; *see also Packing the NLRB*, *supra* note 370.

478. *Evans* Intervening Brief, *supra* note 79, at 23. In support of the three-day rule, the DOJ noted the "commonsense notion that overnight, weekend, and perhaps even long-weekend breaks do not affect the continuity of government." *Id.* at 21.

479. *See* NLRB Brief, *supra* note 110, at 65 (arguing that under the functionalist standard an "evening, a weekend, or a lunch break . . . does not constitute a 'Recess of the Senate' under the [RAC]").

480. *Id.* at 64.

481. HOGUE, *supra* note 91, at 3 (citations omitted).

482. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 27; Comizio & Jabour, *supra* note 337, at 5–6.

483. Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(b)(2) (Supp. V 2011).

484. *See supra* note 28 and accompanying text.

485. *See, e.g.*, Comizio & Jabour, *supra* note 337, at 5–6.

However, this type of statutory requirement is not unique to the organization of the CFPB; statutes pertaining to the State Department, Treasury, and Article III judges, and—most significantly—the Constitution, have similar provisions, yet recess appointments still occur.[486] A court reviewing the issue may wish to align itself with history—as opposed to delving into a Constitutional conflict[487]—by adopting a reasonable interpretation of the statute that does not raise constitutional concerns.[488] Thus, while this issue might not work against Cordray, it may be a feature of potential litigation.[489]

Additionally, section 1066 of Dodd-Frank[490] poses another opportunity for statutory confusion.[491] In providing for interim leadership of the CFPB until a director can take office, the section instructs the Treasury Secretary to "perform the functions of the Bureau . . . until the Director of the Bureau is confirmed by the Senate."[492] The specific functions referred to in this section consist largely of the consolidated regulatory functions, or "transferred authorities," that existed in other agencies prior to the existence of the CFPB.[493] Thus, one interpretation of section 1066 is that a director who is not confirmed by the Senate does not have transferred authority,[494] and Cordray can exercise only the CFPB's newly established power. Identical language in other statues has not caused complications or prevented the President from making unchallenged recess appointments in the past.[495]

However, the deliberate language of section 1066 can raise issues of congressional intent and concomitant separation of powers issues—including whether the appointment power of the President was meant to be constrained.[496] As CRS observes, if the statute is indeed interpreted to mean that recess-appointed directors are not vested with the same authority as Senate-confirmed directors, then such an interpretation "may act to limit the effectiveness of presidential recess appointments by preventing the President from meaningfully filling an existing vacancy in the manner envisioned by the [RAC]."[497] The OLC shares the view that "granting less power to a recess appointee" would "derogate from *the President's* constitutional authority to fill up vacancies during recesses."[498] Thus, a

486. *See id.* at 5–6 n.26.
487. CARPENTER ET AL., *supra* note 34, at 36.
488. This canon of statutory construction is known as the avoidance doctrine. *See* MANNING & STEPHENSON, *supra* note 106, at 268–71.
489. Comizio & Jabour, *supra* note 337, at 5–6.
490. Pub. L. No. 111-203, § 1066, 124 Stat. 1376, 2055 (codified at 12 U.S.C. § 5586(a) (Supp. V 2011).
491. *See, e.g.*, CARPENTER ET AL., *supra* note 34, at 27–29.
492. § 1066, 124 Stat. at 2055.
493. CARPENTER ET AL., *supra* note 34, at 27–28.
494. *Id.*
495. *Id.* at 28.
496. *Id.* at 28, 31–37.
497. CARPENTER ET AL., *supra* note 34, at 33.
498. 2012 OLC Opinion, *supra* note 25, at 16 (citation omitted).

formalist court will be more likely to see a constitutional problem in limiting a recess-appointed director's authority than a functionalist court.[499] For a formalist, any restriction of the Director's power is in contravention of the President's enunciated powers under the Constitution.[500] This restraint would also run contrary to the well-established principle that a recess appointee is vested with all powers associated with a particular office.[501]

On the other hand, a functionalist approach might recognize that reasonable congressional intrusion upon the President's appointment powers are permissible,[502] so long as such intrusions do not have the effect of "undermin[ing] the Presidents [sic] ability to exercise a core function."[503] A functionalist court may view a restriction of the Director's authority as a restriction on the appointee himself, not a restriction on the President's authority to make recess appointments,[504] thus alleviating some of the concern over separation of powers.[505]

2. What If Cordray's Appointment Is Invalid?

What will happen to the disposition of actions taken by the CFPB under Cordray if his appointment is invalidated for any of the foregoing reasons? The De Facto Officer doctrine provides that actions of officers performed while clothed with the authority of law are valid, even if the officer's appointment is subsequently found to be legally deficient.[506] As CRS observes, the doctrine likely does not apply to challenges of recess appointment legitimacy because it generally applies to technical issues with appointments, rather than constitutional issues.[507]

Recently, the Supreme Court displayed reluctance to apply the doctrine to allegedly improper appointments challenged on constitutional grounds.[508] In *Ryder v. United States*,[509] the Court held that parties bringing such challenges are entitled to a decision on the merits and "whatever relief may be appropriate."[510] Thus, given the constitutional issues discussed above, a court reviewing the legitimacy of Cordray's appointment might be inclined to entertain the challenge and invalidate

499. CARPENTER ET AL., *supra* note 34, at 34.
500. *Id.*
501. *See* Evans v. Stephens, 387 F.3d 1220, 1223–24 (11th Cir. 2004); *supra* note 68 and accompanying text.
502. *Id.* at 35–36.
503. *Id.* at 36 (internal quotation marks omitted).
504. *Id.*
505. *Id.*
506. Ryder v. United States, 515 U.S. 177, 180 (1995).
507. CARPENTER ET AL., *supra* note 34, at 37–38.
508. *See* Rappaport, *supra* note 80, at 1577.
509. 515 U.S. 177 (1995).
510. *See id.* at 182–83; CARPENTER ET AL., *supra* note 34, at 38.

certain CFPB rules or enforcement actions,[511] as the D.C. Circuit did with respect to the NLRB in *Canning*.[512]

However, this type of consideration by the judiciary could open the floodgates for a high number of constitutional challenges to every recess appointment—something that the courts have avoided and will be likely to avoid in the future.[513] In an example of the *Ryder* holding in an earlier case, the Court, in *Buckley v. Valeo*,[514] invalidated appointments challenged on constitutional grounds and awarded the plaintiffs declaratory and injunctive relief.[515] However, the *Buckley* court refrained from invalidating the past actions of the body to which the appointments were made—the Federal Election Commission.[516] A challenge against the validity of Cordray's appointment will likely fall under the *Ryder*[517] rule, but how a court might react to a challenge against Cordray, and the consequences of hearing the case on the merits, is far from certain.[518]

3. The Political Check on Recess Appointment Authority

As an alternative to lengthy litigation riddled with uncertainty regarding justiciability,[519] pro forma sessions, and indirect legislation aimed at hampering the President's RAC authority,[520] the political process may provide an effective check against RAC abuse.[521] For example, after President Dwight Eisenhower made recess appointments to the Supreme Court, Senator Philip Hart introduced and passed a resolution expressing the Senate's disapproval of such appointments.[522] Since then, no Supreme Court Justices have been recess appointed, and the number of judicial appointments has generally decreased.[523]

Additionally, the electoral system can be an effective check[524] on the President's already broad discretion to determine when the exercise of the

511. CARPENTER ET AL., *supra* note 34, at 37–38.
512. *See supra* note 410 and accompanying text.
513. *See* Rappaport, *supra* note 80, at 1577.
514. 424 U.S. 1 (1976) (per curiam) (holding, inter alia, that the Federal Elections Commission was invalidly constituted as its members were not appointed pursuant to the Appointments Clause).
515. *Id.* at 140–41, 143–44; *see also* CARPENTER ET AL., *supra* note 34, at 38.
516. *Buckley*, 424 U.S. at 142; *see also* CARPENTER ET AL., *supra* note 34, at 38.
517. 515 U.S. 177 (1995); *see* CARPENTER ET AL., *supra* note 34, at 38.
518. *See* CARPENTER ET AL., *supra* note 34, at 38.
519. *See supra* notes 358–59 and accompanying text.
520. *See supra* notes 73–75, 318–20 and accompanying text.
521. *See* Hein, *supra* note 320, at 252–56.
522. *See* CHU, *supra* note 66, at 20.
523. *See id.*; Hein, *supra* note 320, at 253.
524. *See generally* Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("[T]here is the political check that the people will replace those in the political branches . . . who are guilty of abuse."). The concept of the electorate as a check on executive discretion was echoed, with specific reference to the RAC, in a recent congressional hearing. *The Obama Administration's Abuse of Power*, *supra* note 189 (prepared written statement of Michael J. Gerhardt, Professor of Law, UNC-Chapel Hill).

RAC is appropriate.[525] If the public believes that an elected official has abused his authority in any way, "ultimately . . . the people will replace those in the political branches . . . who are guilty of abuse."[526] Further, Congress holds the impeachment power as another check on the executive's behavior.[527]

IV. A MODIFIED FUNCTIONALIST STANDARD AND ADDITIONAL CONSIDERATIONS

This part argues that a functionalist RAC interpretation, akin to the DOJ's current perspective,[528] qualified by a three-day de minimus limit divined from the Adjournment Clause, should decide the permissibility of recess appointments. While not purely functionalist and also short of a bright line rule, the proposed standard might be characterized as a modified functionalist standard. This part goes on to justify this standard by addressing potential criticisms. Under this standard, pro forma sessions of the kind used between January 3 and January 23, 2012, are insignificant and would not interrupt a recess for RAC purposes.

A. The Proposed Standard

The proposed standard permits recess appointments when the Senate cannot definitely convene to conduct business for three or more days. This comes with one exception: in unforeseen emergency situations in which the Senate may be incapacitated and truly unable to advise and consent, the President, in staying true to the original purpose of the Clause,[529] should be able to disregard the three-day limit and make recess appointments to ensure the undisturbed functioning of the government. Utilizing the Daugherty functionalist approach, this standard relies on the President to assess whether the Senate can reasonably conduct business,[530] with a three-day rule to prevent RAC abuse during very short breaks.[531]

Importantly, the proposed standard will likely lead to the conclusion that pro forma sessions used to prevent recess appointments are meaningless for RAC purposes. For example, between January 3 and January 23, 2012, there was no indication that the Senate could "definitely convene" within three days to conduct business.[532] Admittedly, it may be difficult to determine when the Senate can "definitely" not convene.[533] But, the OLC's reliance argument[534]—echoed in the DOJ's *Canning* brief[535]—based on the

525. *See* Raju & Wong, *supra* note 72; *supra* notes 190–93 and accompanying text.
526. *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).
527. *See id.*
528. *See generally* 2012 OLC Opinion, *supra* note 25.
529. *See supra* note 62 and accompanying text.
530. *See, e.g.*, *supra* note 190 and accompanying text.
531. *See, e.g.*, *supra* notes 477–78 and accompanying text.
532. *See, e.g.*, *supra* notes 396–97 and accompanying text.
533. *See supra* notes 398–404 and accompanying text.
534. *See supra* note 325 and accompanying text.
535. *See supra* note 404 and accompanying text.

Senate's assurances that it will not conduct business, will suffice to meet this standard. For the Cordray recess, a unanimous resolution would have been required to reconvene the Senate,[536] and no such resolution was agreed upon.[537] If anything, the Senate declared its inability to convene during that time.[538]

It is difficult to accept the argument that seconds-long pro forma sessions—in which the Senate unanimously agrees to conduct no business—preclude the President from using his RAC authority.[539] As it appears the RAC was originally conceived precisely because the Senate could not be expected to stay perpetually in session,[540] and given the unconstitutionality of the analogous legislative veto,[541] it is hard to imagine that the Framers would have had such a procedural maneuver—which grants a faction such great power—in mind when they determined that the RAC was a necessary provision.[542]

The proposed standard's three-day limit is divined from the purported interplay between the RAC and Adjournment Clause,[543] in order to create a lower limit for generally impermissible recess appointments. Importantly, this aspect of the standard prevents appointments from being made during Adjournment Clause recesses or prolonged adjournments with pro forma sessions, when the Senate is due to reconvene and conduct business in three days or less.[544] This encourages the President to make appointments early in the recess and prevents RAC action when the Senate might be recessed but can readily act within minutes.[545] On the other hand, the heavy functionalist aspect of the proposed standard continues to rely on Daugherty's assessment of the character of the Senate's break as the primary factor in determining when recess appointments are permissible,[546] similar to the position of today's DOJ.[547]

The emergency exception to this standard's three-day rule vests the President with authority to make appointments in unforeseen situations in which the Senate may not have recessed pursuant to the Adjournment Clause,[548] or otherwise agreed to conduct no business.[549] In this sense, the standard supports recess appointments any time the Senate is reasonably incapable of performing its advice and consent function.[550] In line with

536. *See supra* note 407 and accompanying text.
537. *See supra* notes 397–99 and accompanying text.
538. *See, e.g.*, *supra* note 397 and accompanying text.
539. *See supra* notes 451–54 and accompanying text.
540. *See supra* notes 65, 157 and accompanying text.
541. *See supra* notes 452–54 and accompanying text.
542. *See, e.g.*, *supra* text accompanying note 454.
543. *See supra* notes 467–68 and accompanying text.
544. *See supra* notes 207–09 and accompanying text.
545. *See supra* note 209 and accompanying text.
546. *See supra* note 196 and accompanying text.
547. *See supra* notes 389–91 and accompanying text.
548. *See supra* note 96 and accompanying text.
549. *See* discussion *supra* Part I.C.
550. *See* discussion *supra* Part II.C.

DOJ's present interpretation of RAC authority,[551] it should be left to the President's discretion to determine when an extraordinary situation calls for suspending the three-day rule. The President should evaluate the situation by weighing the functionalist Daugherty factors[552] and make necessary appointments if it appears the Senate cannot convene in regular, or even "extraordinary" session.[553]

B. Justifying the Standard

Unlike the eighteenth and nineteenth centuries,[554] it is difficult, today, to imagine the Senate being unavailable to perform its advice and consent function for months, or even weeks, at a time.[555] As a prohibitive—and archaic—Senate calendar was arguably an impetus for drafting the RAC,[556] it might now be argued that the RAC has either lost its relevance or must be adapted to make sense in the modern day.[557] For example, perhaps "the Recess" is better read as "a time when the Senate is unable to advise and consent for a prolonged period of time." Further, a purely functionalist interpretation of the RAC draws arguments that the door will be open for abuse of the privilege.[558] This modified functionalist standard in no way expands the current role of presidential discretion in recess appointments[559] and might even restrict the degree of discretion that is available today.

1. Executive Discretion Is Not Expanded Under the Modified Functionalist Standard

The three-day minimum stays true to—and arguably furthers—the hesitation by Attorney General Daugherty to allow appointments during recesses of only a few days.[560] Given that the suggested standard maintains executive discretion as a prominent feature, formalists may point out that it leaves open the possibility for executive abuse.[561] Whether a standard exists for how long a recess must be before recess appointments can be made is debated,[562] however, and the standard proposed here allows appointments during recesses of less than three days only in unforeseen

551. *See supra* notes 312–13 and accompanying text.
552. *See, e.g.*, *supra* notes 194–96 and accompanying text.
553. *See, e.g.*, *supra* text accompanying note 194.
554. *See, e.g.*, THE FEDERALIST NO. 67, *supra* note 50, at 361 (Alexander Hamilton) (justifying the RAC at the time of the framing as a device to fill vacancies "necessary for the public service . . . without delay"); *supra* notes 88–92 and accompanying text.
555. *See, e.g.*, Platt, *supra* note 95, at 271.
556. *See supra* notes 88–92 and accompanying text.
557. *See* Platt, *supra* note 95, at 271 ("The originally conferred powers of the RAC have been mooted by developments in communications and travel technologies and the expansion of the legislative calendar.").
558. *See, e.g.*, *supra* note 476 and accompanying text.
559. Notwithstanding the D.C. Circuit's controversial decision in *Canning*. *See supra* notes 410–27.
560. *See supra* note 198 and accompanying text.
561. *See, e.g.*, *supra* note 476 and accompanying text.
562. *See supra* notes 198–201 and accompanying text.

circumstances that require the circumvention of senatorial advice and consent. These events can be characterized as emergencies, excluding things like political gridlock in the Senate.[563] Further, a perception of unbridled executive discretion to make recess appointments at any time should be mitigated by systemic checks already in place including the electoral system,[564] the temporary terms of recess appointees,[565] the Senate's undisputed ability to remain continuously in session to conduct business,[566] the Senate's ability to pass a resolution expressing the body's disapproval in the President's actions,[567] or even impeachment.[568] Importantly, the DOJ has asserted that day-to-day and weekend breaks do not threaten the continuity of government.[569] Even the most functionalist interpretations of the RAC have stopped short of endorsing recess appointments during a recess of three days or less,[570] although such appointments have occurred.[571]

Additionally, the Daugherty functionalist interpretation properly cabins overnight or lunchtime RAC abuse.[572] For a functionalist, today's technology and infrastructure may make it difficult to find any time—whether intrasession or intersession—in which the Senate could not advise and consent.[573] Thus, regardless of the length or timing of the recess, or the nature of the vacancy itself, a functionalist might conclude that the necessity for the RAC as envisioned by the Founders has changed over time.[574]

2. No Intersession Versus Intrasession Distinction

Significantly, the proposed standard disregards any difference between intrasession and intersession recesses. Today, the distinction between intrasession and intersession recesses has lost relevance.[575] If the argument is that recess appointments should be limited to intersession recesses because the Senate is less able to convene and conduct business, compared

563. The necessity for the RAC in such a situation had been articulated nearly a century ago. *See, e.g.*, *supra* note 160 and accompanying text.

564. *See supra* note 524 and accompanying text; *see, e.g.*, THE FEDERALIST NO. 76, *supra* note 50, at 405 (Alexander Hamilton); Raju & Wong, *supra* note 72; *supra* text accompanying note 50.

565. *See supra* notes 69, 480 and accompanying text.

566. *See supra* note 480 and accompanying text.

567. *See* CHU, *supra* note 66, at 20.

568. *See supra* note 527 and accompanying text.

569. *See supra* text accompanying note 478.

570. *See, e.g.*, *supra* notes 198–99 and accompanying text.

571. *See supra* notes 212–16 and accompanying text; *see also* HOGUE, *supra* note 91, at 10. Presidents Harry Truman and Theodore Roosevelt both made appointments during recesses of less than three days. HOGUE, *supra* note 91, at 10.

572. *See supra* notes 476–79 and accompanying text.

573. *See, e.g.*, *supra* notes 93–95 and accompanying text.

574. *See supra* notes 88–95 and accompanying text.

575. *See supra* note 176 and accompanying text. *But see* Canning v. NLRB, Nos. 12-1115, 12-1153, 2013 WL 276024, at *16 (D.C. Cir. Jan. 25, 2013) (holding that the President is permitted to make recess appointments during intersession recesses only).

to intrasession recesses,[576] then it might follow that there should be some standard ensuring that recess appointments happen as early as possible in the recess.[577] While no such rule exists,[578] the proposed standard helps to alleviate any potential concerns, as mentioned above.[579]

It is difficult to see a significant functional difference between making an appointment with, for example, five hours remaining in an intersession recess versus five hours remaining in an intrasession recess. Certainly, the limits of the RAC have been tested in even more extreme circumstances, when appointments were made only thirty minutes before the Senate was scheduled to reconvene.[580] The executive[581] and judicial[582] branches seem to view the Senate, today, as similarly capable—or incapable—of performing its advice and consent function whether it is in intersession or intrasession recess. Further, in the recent past, the shortest periods of recess during which appointments were made do not significantly differ between intersession and intrasession recesses,[583] and slow travel and communication are less of a concern today.[584] In a practical sense, the fact that intrasession recesses are sometimes longer in duration than intersession recesses[585] supports Daugherty's proposition that the character of the break should be the dispositive factor in determining whether recess appointments are valid.[586] Thus, asserting any sort of distinction between intersession and intrasession recesses seems to stretch the limits of logic and has no place in today's modified functionalist standard.[587]

3. The "Emergency" Exception

In light of extensive established precedent, the terms "recess" and "adjournment" should be used interchangeably.[588] And, according to the proposed standard—like the DOJ's current position—the Senate does not need to be in "recess," pursuant to the Adjournment Clause for recess appointments to be constitutional.[589] There could be reasons, other than recess, why the Senate might be unable to perform its advice and consent

576. *See supra* notes 185–86 and accompanying text.
577. *See, e.g.*, *supra* note 207 and accompanying text.
578. *See supra* note 208 and accompanying text.
579. *See supra* notes 543–45 and accompanying text.
580. *See supra* note 209 and accompanying text.
581. *See supra* notes 188–89 and accompanying text.
582. *See supra* note 202 and accompanying text. *But see* Canning v. NLRB, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), at *16 (holding that the President is permitted to make recess appointments during intersession recesses only).
583. *See supra* note 481 and accompanying text.
584. *See, e.g.*, *supra* note 90 and accompanying text.
585. *Compare* HOGUE, *supra*, note 91, at 10 (observing that recess appointments have been made during intersession recesses as short as eleven days), *with* Rappaport, *supra* note 80, at 1501 (noting that intrasession recesses can last longer than a month).
586. *See generally* discussion *supra* Part I.D.2.
587. *See generally* discussion *supra* Part I.D.2.
588. *See* discussion *supra* Part I.D.2.
589. *See, e.g.*, discussion *supra* Parts II.C, III.A.1.

function—a terrorist attack, an airline strike or some type of infrastructure breakdown—and such a reason should trigger the President's authority under the RAC.[590] This is facilitated by the emergency exception in the modified functionalist standard. Importantly, the President's discretion, even when given the presumption of validity,[591] is not expanded with the emergency exception. Presently, nothing explicitly prevents the President from making a recess appointment during a recess of fewer than three days.[592] And, as discussed above, such appointments have indeed occurred.[593] While the declaration of an emergency situation would rely on Presidential discretion, this great power is still subject to the systemic checks discussed above[594] to ensure that it is used in only the most extraordinary circumstances.

CONCLUSION

In January 2012, the recess appointment of Richard Cordray and three others reignited an old conflict over the scope of the President's recess appointment power under the Constitution.[595] Some aspects of recess appointments—whether they can occur during an intrasession recess and whether the vacancy has to occur during the same recess in which the appointment is made—are largely settled in the eyes of the executive branch and, to a limited extent, the judiciary,[596] but still remain catalysts for debate.[597] However, the most controversial, and novel, issue arising out of the January appointments is whether strategic use of pro forma sessions by Congress sufficiently interrupts a recess in a way that precludes the President from making recess appointments.[598] Amid colorful arguments on both sides of the issue, the DOJ and the White House rely on a functionalist interpretation of the RAC to conclude that pro forma sessions do not—and, in maintaining the separation of powers, cannot—interrupt recesses in such a way, and therefore, the January 2012 recess appointments are legitimate.[599] However, due to the novelty of the issue, the validity of the appointments is uncertain and presently being challenged in litigation.[600]

The RAC serves an important function in ensuring the continuity of the government.[601] This fundamental purpose is one of the few things agreed

590. *See supra* text accompanying note 160.
591. *See supra* note 231 and accompanying text.
592. *See supra* notes 470–71 and accompanying text.
593. *See, e.g.*, *supra* note 209 and accompanying text.
594. *See* discussion *supra* Parts III.B.3, IV.B.1.
595. *See supra* notes 20–23 and accompanying text.
596. *See supra* notes 161–63, 176, 188, 410–27 and accompanying text.
597. *See* discussion *supra* Part III.A.1(a)–(b), notes 166–69 and accompanying text.
598. *See supra* notes 272–73 and accompanying text.
599. *See* discussion *supra* Parts II.C, III.A.1.
600. *See* discussion *supra* Part III.A.1.
601. *See* discussion *supra* Part I.B.2.

upon by most since the founding.[602] As time has passed, administrations have changed, Congress has changed, and most importantly, the infrastructure, needs, and priorities of the country have changed.[603] While functionalists and formalists hold vastly divergent views of RAC interpretation and appropriate application,[604] the specific needs of the country that precipitated the RAC at the founding, arguably, do not exist today.[605] Yet, the general need for an undisrupted government remains the same, and the RAC continues to be a critical mechanism designed to satisfy that need.[606] Employing a modified functionalist standard to determine when recess appointments are permissible does justice to both the Framer's original intent and this country's ever-evolving structural and political identity.[607] Ultimately, however, it could be the judicial branch that settles the score in the recess appointment power battle between the executive and legislative branches.[608]

602. *See supra* note 62 and accompanying text.
603. *See, e.g.*, *supra* notes 88–95 and accompanying text.
604. *See* discussion *supra* Part I.D.
605. *See supra* notes 88–95 and accompanying text.
606. *See supra* note 171 and accompanying text.
607. *See* discussion *supra* Part IV.
608. *See supra* notes 348–49 and accompanying text.