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Preserving the Appointments Safety Valve

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INTRODUCTION

In 2007, Senate Majority Leader Harry Reid had a bright idea. While nominally in recess over Thanksgiving, Reid enlisted senators to return to the empty Senate chamber every few days to conduct pro forma sessions.¹ These sessions, typically no longer than thirty seconds each,² successfully prevented then-President George W. Bush from making a recess appointment of a controversial new Surgeon General.³ Following this success, Democrats deployed this device throughout the remainder of President Bush's term in office. Bush, who had made forty recess appointments in 2006 alone,⁴ had been on pace to surpass President Ronald Reagan's all-time record of 243.⁵ But because of the Reid maneuver, Bush made none at all in his final twenty-one months in office.⁶ In late 2010, the Senate Republicans returned the favor: They forced the Democrat-controlled Senate to revive the Reid maneuver to block a batch of President Barack Obama's nominees during the break before the midterm elections.⁷

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- 153 CONG. REC. 31,874 (2007) (statement of Sen. Harry Reid) ("Mr. President, the Senate will be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.").
 - See Carl Hulse, *Loneliest Man in Town? He's on the Senate Floor*, N.Y. TIMES, Nov. 21, 2007, at A16.
 - Dr. James Holsinger's nomination to be Surgeon General had stalled in the Senate. Democrats opposed the nomination in part because of anti-gay statements Holsinger had made earlier in his career. See Gardner Harris, *Nominee for Surgeon General Testifies He Would Not Give In to Politics*, N.Y. TIMES, July 13, 2007, at A15 (noting that a 1991 paper that Holsinger wrote for a church committee characterized homosexual sex as "unnatural and unhealthy").
 - HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001-OCTOBER 31, 2008, at 2 (2008).
 - CONG. RESEARCH SERV., TOTAL RECESS APPOINTMENTS, BY PRESIDENT, 1933-2010, available at <http://www.senate.gov/artandhistory/history/resources/pdf/TotalRecessAppointments1933-present.pdf> (last updated July 6, 2010).
 - HOGUE & BEARDEN, *supra* note 4, at 15, 19; see also Paul Kane, *As 111th Senate Is Set To Begin, Four Seats Still Up in Air*, WASH. POST, Jan. 3, 2009, at A3; Victor Williams, Op-Ed., *Senate Pro Forma Follies; Obama's Recess Appointment Authority Is Not Limited by the Sham Sessions*, 33 NAT'L L.J. 51 (2010).
 - See Alexander Bolton, *Senate Blocks Recess Appointments with Deal Between Dems, GOP*, HILL (Sept. 29, 2010), <http://www.thehill.com/homenews/senate/121775>

Again the maneuver successfully impeded the President from making any recess appointments. Republicans have since used the maneuver many times against Obama.⁸

This new development is both symptom and cause in our government's plagued appointments process. Vacancies atop the federal bureaucracy and in the courts created by delays at all stages of the appointments process have begun to cripple our government in unprecedented ways.⁹ The Supreme Court's 2010 decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635, demonstrates the harm posed by this paralysis to effective governance. The Court nullified more than two years' worth of National Labor Relations Board decisions, finding that the board lacked a quorum of members during that period as re-

-senate-blocks-recess-appointments. Obama was on pace to match or surpass Bush's ranking in total recess appointments. By the end of his second year in office, Bush had made twenty-three recess appointments. HOGUE & BEARDEN, *supra* note 4, at 2. As of January 2011, the end of Obama's second year, he had made twenty-eight. See Ed O'Keefe, *Amid Recess, Obama Makes 4 Appointments*, WASH. POST, Aug. 20, 2010, at A20; Sheryl Gay Stolberg, *Six Recess Appointments To Be Made, Obama Says*, N.Y. TIMES, Dec. 30, 2010, at A18.

8. In May 2011, the Senate conducted pro forma sessions during the Memorial Day break to block a potential recess appointment of Professor Elizabeth Warren to lead the Consumer Financial Protection Bureau. Alexander Bolton & Josiah Ryan, *GOP Forces Senate Pro-Forma Session*, FLOOR ACTION BLOG, HILL (May 26, 2011, 7:47 PM), <http://www.thehill.com/blogs/floor-action/senate/163635-gop-pressure-forces-senate-to-work-in-pro-forma-session-blocking-elizabeth-warren-recess-appointment>; Scott Wong, *Senate GOP Blocks Recess Appointments*, POLITICO'S ON CONGRESS (May 26, 2011, 9:26 PM), http://www.politico.com/blogs/glennthrush/0511/Obama_cant_make_recess_appointments_next_week.html. The Senate conducted the sessions again during the late August, early September break. See Jennifer Steinhauer, *Sometimes a Day in Congress Takes Seconds, Gavel to Gavel*, N.Y. TIMES, Aug. 5, 2011, at A12; Pete Kasperowicz, *House Forces Pro-Forma Sessions To Avoid Recess Appointments*, HILL'S FLOOR ACTION BLOG (Aug. 4, 2011, 9:29 AM), <http://www.thehill.com/blogs/floor-action/house/175449-house-forces-pro-forma-sessions-in-august-to-avoid-obama-recess-appointments>; see also 157 CONG. REC. S5,292 (daily ed. Aug. 2, 2011) (statement of Sen. Harry Reid). One of the pro forma sessions had to be held outside of the Capitol after an earthquake forced an evacuation. Carl Hulse, *Senate Convenes Unusual Session After Earthquake*, CAUCUS, N.Y. TIMES (Aug. 23, 2011, 6:10 PM), <http://thecaucus.blogs.nytimes.com/2011/08/23/senate-convenes-unusual-session-after-earthquake> (“[Senator Chris] Coons sat at a plain, short folding table with the Senate seal pinned to a curtain behind him.”).
9. See, e.g., ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, *WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 11-12* (2010), available at <http://www.ssrn.com/abstract=1607263> [hereinafter O'CONNELL, WAITING]; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 937-38 (2009) [hereinafter O'Connell, *Vacant*]; see also *infra* Section III.A.

quired under the statute. These unfilled vacancies were a direct product of the Reid maneuver.¹⁰

In this appointments deadlock, the President's power under the Recess Appointments Clause (RAC)¹¹ has been transformed into a constitutional safety valve—relieving the pressure of mounting vacancies and ensuring that the President has the ability to take care that the laws are faithfully executed. The political backlash provoked by recess appointments has kept them relatively rare, but they had remained a fallback option in every modern President's arsenal.¹² Now, the pro forma sessions threaten to deprive the President of this safety valve.

Though neither President Obama nor President Bush opted to challenge these sessions,¹³ a sudden crisis while they are in force might provoke a future President to “call the Senate's bluff” on these sessions, as some have urged.¹⁴ A resulting interbranch face-off may warrant judicial resolution. What, if any, constitutional principles might guide such a judicial intervention into the appointments thicket?

Courts have adjudicated the constitutionality of recess appointments, but only rarely and with much hesitation and deference.¹⁵ Challengers in these cases argued for a restricted reading of the RAC on originalist grounds. The Clause

10. See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010); see also *infra* Section III.B.

11. U.S. CONST. art. II, § 2, cl. 3.

12. Total recess appointments made by Presidents since 1933:

Franklin Roosevelt (1933-1945) = 89

Harry Truman (1945-1953) = 195

Dwight Eisenhower (1953-1961) = 193

John Kennedy (1961-1963) = 53

Lyndon Johnson (1963-1969) = 36

Richard Nixon (1969-1974) = 41

Gerald Ford (1974-1977) = 12

James Carter (1977-1981) = 68

Ronald Reagan (1981-1989) = 243

George H.W. Bush (1989-1993) = 77

William Clinton (1993-2001) = 139

George W. Bush (2001-2009) = 171

Barack Obama (2009-2011) = 28

Data assembled from various sources. See CONG. RESEARCH SERV., *supra* note 5; HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2010); HOGUE & BEARDEN, *supra* note 4; Stolberg, *supra* note 7; see also *infra* Part III.

13. For instance, neither President made a recess appointment notwithstanding the pro forma maneuver, which might have forced the Senate to bring a challenge. See *infra* Section IV.C.

14. See Steven G. Bradbury & John P. Elwood, Op-Ed., *Call the Senate's Bluff on Recess Appointments*, WASH. POST, Oct. 15, 2010, at A19.

15. See *infra* Section I.C.

was designed around a Senate that would be in session only a few months each year. Challengers argued that today's expanded congressional calendar and updated communications and travel technologies have rendered the power to skip Senate "Advice and Consent" essentially moot. But, courts declined these invitations to intervene in the appointments process. Finding the originalist evidence unconvincing or equivocal, these courts deferred to the political branches to "work out" the appointments conflicts themselves.

This Note criticizes this deferential approach and argues for a bolder judicial intervention to preserve the recess appointments safety valve. For an interpretive method to guide such intervention, courts must look beyond the originalism and deference that define the lower courts' RAC jurisprudence, and instead draw upon the Supreme Court's precedent on presidential control over personnel. To this point, however, this jurisprudence has been methodologically asymmetrical. In ruling on the President's removal power—in cases from *Humphrey's Executor v. United States*¹⁶ to *Free Enterprise Fund v. Public Co. Accounting Oversight Board*¹⁷—the Supreme Court has engaged dynamically with the principle of effective governance embodied in the Vesting and Take Care Clauses of Article II,¹⁸ applied this principle to contemporary governmental context, and generated new rules and holdings to guide future practice.¹⁹ In the removal cases, the Court has often been self-consciously attuned both to original underlying principles of the text as well as to modern governmental context. In contrast, lower courts in the RAC cases have avoided any such creativity or overt attention to contemporary context. Instead, they have approached the issue statically, as a choice between original meaning-based intervention and deference to the political branches.²⁰

This strategy of deference has allowed the courts to avoid engaging more dynamically with the RAC to this point, but an interbranch conflict over pro forma sessions could render deference less appealing.²¹ This Note argues that the creative, dynamic method that has guided the Court's removal power jurisprudence should also guide a future court's determination of the constitutionality of the pro forma sessions.

Under the interpretive method of the removal cases, the pro forma sessions should be struck down as unconstitutional. In the contemporary governmental context, where recess appointments have taken on a crucial safety valve function to protect the President's ability to ensure that the laws are faithfully

16. 295 U.S. 602 (1935).

17. 130 S. Ct. 3138 (2010).

18. See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed.").

19. See *infra* Section I.B.

20. See *infra* Section I.C.

21. See *infra* Section IV.B.

executed, the value of effective governance embodied in the RAC mandates the preservation of some minimal presidential access to this essential appointment method.²² The pro forma sessions constitute an impermissible obstruction of this constitutional safety valve, and should be rejected.

Though the pro forma sessions have already begun to reshape the appointments landscape, they have received scant attention from constitutional scholars. One author lauded them as a rare example of the Senate asserting its power against a domineering executive.²³ But this approach fails to engage the principles embedded in the RAC, and ignores the institutional harms that these sessions have already caused beyond the executive.²⁴ Other commentators suggest that the pro forma sessions are not *real* sessions²⁵ or that the “three-day minimum” rule that underlies them is itself constitutionally faulty.²⁶ These arguments may provide plausible rationalizations for a judicial ruling against the sessions, but they similarly fail to grapple with the underlying values of the RAC in the modern appointments context, or with previous cases on the RAC or removal powers. This Note is the first effort to comprehensively address the constitutional significance of the pro forma sessions.

Even if the pro forma sessions maneuver is judicially eliminated, the modern appointments dysfunction still arguably violates the principle of effective governance embedded in the RAC, Article II, and the constitutional separation of powers. Judicial review of the pro forma sessions might present an opportunity for a court to intervene more robustly into this process. This Note concludes by proposing two possible routes for such an intervention.²⁷

This Note proceeds in five parts. Part I establishes the methodological asymmetry between the removal and appointments cases and argues for resolving this asymmetry in favor of the dynamic removal case interpretive method. Part II begins laying the foundation for the application of this method to the pro forma sessions by articulating the principle of effective governance embodied in the RAC. Part III completes this groundwork by reviewing the modern

22. See *infra* Section IV.C.

23. See Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751, 776-77 (2009).

24. See *infra* Section III.B.

25. See Bradbury & Elwood, *supra* note 14; Victor Williams, *Recess Appoint Peter Diamond: Senate Pro Forma Sessions Do Not Limit Obama's Recess Appointment Authority*, HUFFINGTON POST (Oct. 11, 2010), http://www.huffingtonpost.com/victor-williams/recess-appoint-peter-diam_b_758857.html; Williams, *supra* note 6.

26. See Marty Lederman, *The Constitutional Significance of the Thanksgiving Weekend (or, Constitutional Hardball and Recess Appointments)*, BALKINIZATION (Nov. 21, 2007, 10:21 PM), <http://balkin.blogspot.com/2007/11/constitutional-significance-of.html>.

27. See *infra* Part V.

appointments context and the role of recess appointments as a constitutional safety valve. Part IV applies the removal case method to the pro forma sessions by combining the original principle of effective governance from Part II with the modern context provided in Part III, and argues that these sessions should be rejected. Part V proposes two routes by which a court might use this intervention as a wedge into the appointments landscape more broadly.²⁸

I. ASYMMETRICAL METHODOLOGY IN APPOINTMENTS AND REMOVAL CASES

The jurisprudence on presidential control over personnel is methodologically asymmetrical. In removal power cases, the Supreme Court has translated broad principles embodied in Article II and the separation of powers onto the contemporary administrative context, generating new rules and holdings designed to guide future practice. Viewed in concert, rather than in the usual “formalist” and “functionalist” groupings, some significant commonalities emerge in the interpretive method across all of these cases. This method is decidedly non-originalist, and actually bears some similarities to several contemporary alternatives to originalist interpretation, such as Professor Lawrence Lessig’s concept of “fidelity in translation,”²⁹ and Professor William Eskridge’s “dynamic” theory.³⁰ Above all, this creative judicial engagement with contemporary context contrasts starkly with the originalist and deferential approach taken by lower courts in adjudicating the President’s power to make recess appointments. The two issues are intimately related; both concern congressionally imposed limits on the President’s ability to control the federal bureaucracy as part of his constitutional responsibility to “take care” that the laws be faithfully executed. Yet, rather than adopt the approach of the removal cases, the courts reviewing the RAC have framed the question rigidly, as a choice between originalist intervention or deference to the political branches. These courts ignore changes in the appointments context, abjure any judicial creativity in formulating solutions, and instead allow the branches to work out the boundaries themselves.

28. Judicial and executive appointments raise distinct issues. The President’s Article II duty to “take care” is tied more closely to his ability to appoint executive officers than judges. And Article III imposes distinct rules regarding the tenure and salary of federal judges that implicate the conditions of their appointment. Notwithstanding these important distinctions, however, this Note will treat judicial and executive appointments together in order to articulate broader themes in the RAC jurisprudence. It will not ignore these distinctions and will flag them where they arise throughout.

29. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

30. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); see also *infra* Section I.A.

This Part reconstructs and criticizes this methodological asymmetry in the jurisprudence on executive personnel. It begins by briefly sketching the two methods of interpretation. It follows by describing the two lines of cases following these methods. Finally, it argues for resolving the asymmetry in favor of the translation-style approach adopted in the removal cases.

A. *Originalism vs. Translation; Minimalism vs. Creativity*

If constitutional interpretation aims at fidelity to the text, is there any place for consideration of contemporary context? Originalists think not. Originalists of different stripes are all united by a conception of fidelity that requires attention only to some aspect of a text's original history—whether the focus is on a text's ordinary meaning, on the specific intent of its drafters, or on its overarching purpose.³¹ For instance, when evaluating whether a handgun ban violates the Second Amendment, the textualist mode of originalism does not pay attention to changes in weapons technology, urban living conditions, or patterns of gun violence, but only whether the text of that Amendment, as *originally* understood, protected the *individual* right to bear arms.³²

Originalist interpretation, perhaps especially its textualist modes, jibes with a taste for judicial minimalism and deference to the political branches. Although originalism's *results* are certainly not minimalist,³³ its constrained vision of the interpretive function facilitates a clean division between judicial and legislative functions that appeals to those who mistrust judicial power. Under this view, courts look backward, not forward. Their role requires accuracy, not creativity.³⁴

31. See ESKRIDGE, *supra* note 30, at 13-48 (categorizing purposivist, intentionalist, and textualist methods of statutory interpretation together as “archaeological” and “originalist” methods).

32. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (Scalia, J.).

33. Consider the Court's recent Second Amendment jurisprudential revolution. Relying on a new reading of the original meaning of the Second Amendment, the Court struck down the District of Columbia's statute regulating handguns, *Heller*, 554 U.S. 570, and then curtailed other states' ability to enact gun control restrictions, *McDonald v. Chicago*, 561 U.S. 3025 (2010) (incorporating the Second Amendment through the Due Process Clause of the Fourteenth Amendment against the states). Neither *result* could fairly be described as “minimalist.” Results aside, textualism's mechanical jurisprudence has unmistakable appeal to judicial minimalists, who see it as a constraint on the illegitimate and undemocratic exercise of unbounded judicial power. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3-25 (Amy Gutmann ed., 1997) (criticizing the “common law” method of interpretation as antidemocratic).

34. See SCALIA, *supra* note 33.

Judicial restraint itself has a prestigious theoretical pedigree. Professor Jesse Choper proposed that the judiciary should refrain from deciding any “constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another”—that these questions “should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.”³⁵ He argued that both political branches are well equipped to defend their own constitutional turf without assistance from the courts. Channeling *The Federalist*, Choper asserted that each branch “has tremendous incentives jealously to guard its constitutional boundaries and assigned prerogatives against invasion by the other,” and noted the “impressive arsenal of weapons” in each branch’s possession to enforce its constitutional prerogatives.³⁶ Choper argued that these devices would suffice to constrain the executive from overreaching.³⁷

Professor Choper’s judicial minimalism follows in the tradition of Professor Alexander Bickel, who urged courts to exercise “passive virtues”—employing justiciability doctrines to avoid adjudicating difficult or sensitive political cases.³⁸ Bickel aimed to minimize or mitigate the infamous “counter-majoritarian difficulty”—the problem of an undemocratic Court sitting in judgment over the acts of a democratically elected legislature.³⁹ Similarly, Choper sought to preserve the Court’s “special role” in government. Having observed “the penchant of politicians in all respect and deference to pass difficult and provocative matters to the Court only to respond to an adverse decision . . . with hostility and intimidation,”⁴⁰ Choper suggests that the costs of such judicial interventions into politics outweigh any benefit. Fearing that otherwise “the Court will be damaged,”⁴¹ he sought to minimize the needless “ex-

35. JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263 (1980); cf. *THE FEDERALIST* NO. 51, at 294 (James Madison) (ABA ed., 2009) (“But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”).

36. CHOPER, *supra* note 35, at 275.

37. Choper suggested that intra-executive bureaucratic inertia, outside interest groups, various limits imposed by Congress (including rejecting appointments), and the “check of the electorate” would combine to provide an effective “check.” *Id.* at 276-312.

38. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).

39. *Id.* at 16-23.

40. CHOPER, *supra* note 35, at 334.

41. *Id.* at 323.

penditure of precious judicial capital.”⁴² These minimalist and deferential ideas are the second major theme, along with originalism, in the RAC opinions discussed below.⁴³

Originalism and minimalism have also been challenged. As Professor Lessig put it, just as a belch after dinner in Baghdad conveys different information than one at Buckingham Palace, so too a piece of text may require different interpretations to preserve the *same* meaning in different background contexts.⁴⁴ If textualists are “one-step” originalists, Lessig promotes a “two-step” method: After the original meaning of a clause is derived, it then must be *translated* into current context in order to preserve that original meaning.⁴⁵ Justice Jackson articulated a different version of the translation method in his landmark post-New Deal opinion in *West Virginia State Board of Education v. Barnette*, acknowledging its unavoidable call for judicial creativity with a horticultural metaphor:

[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls, and only the mildest supervision over men’s affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of noninterference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.⁴⁶

Such transplanting plainly lacks originalism’s credibility-conserving judicial minimalism. It openly requires judicial *creativity* in translating original values into contemporary context and thereby threatens to blur the lines between legislative and judicial roles. Jackson acknowledged this creativity as an inescapable implication of the translation method, which “cast[s] us more than we would

42. *Id.* at 275.

43. *See infra* Section I.C.

44. Lessig, *supra* note 29, at 1170-71.

45. *Id.* at 1252-61.

46. 319 U.S. 624, 639-40 (1943) (Jackson, J.). Jackson’s concept of transplanting explicitly incorporates changes not just in social and economic, but also in *governmental* contexts. *Id.* Professor Eskridge’s theory of “dynamic” interpretation also encompasses changes in legal and political contexts. *See* ESKRIDGE, *supra* note 30, at 52-55, 125-28. The “governmental context” factor, which Lessig’s model of translation excludes, is an important feature of the Court’s removal jurisprudence. *See infra* note 53.

choose upon our own judgment.”⁴⁷ But, Jackson insisted, “[w]e cannot, because of modest estimates of our competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.”⁴⁸

Translation, like other theories that call for even more open engagement with contemporary context,⁴⁹ provokes the minimalist’s anxiety about conserving judicial credibility. But, such concerns about conserving judicial credibility may be misguided. Professor Erwin Chemerinsky notes that “the federal courts’ legitimacy is quite robust,”⁵⁰ which makes Choper’s credibility-conserving concerns seem overblown. Further, Professor Andrew Koppelman recently argued that even *Bush v. Gore*—a credibility-straining case if ever there was—“did no harm at all to the Court’s prestige in the eyes of the public.”⁵¹

These two interpretive schemes (originalism and translation) and judicial philosophies (minimalism and creativity) map onto two lines of precedent dealing with the President’s control over personnel. The next two Sections discuss these in turn.

B. Removal Cases: Translation and Creativity

In cases adjudicating the President’s removal power, the Supreme Court has constructed various boundaries based on the President’s constitutional duty to “take care that the laws be faithfully executed.”⁵² Removal power cases are

47. *Barnette*, 319 U.S. at 640.

48. *Id.*

49. Other non-originalist theories of interpretation, such as Professor Eskridge’s theory of “dynamic” statutory interpretation, seem to justify a more open-ended engagement with contemporary context than does translation. Eskridge writes: “Statutes are enacted . . . with certain consequences in mind, but whether those consequences actually occur . . . depends on a series of assumptions about people and institutions, about society and its mores, and about law and policy.” ESKRIDGE, *supra* note 30, at 52. Over time, as these assumptions inevitably unravel, “subsequent interpreters will apply the statute in ways unanticipated by the original drafters.” *Id.* This approach is distinct from translation, which sees itself not as facilitating the abandonment of the original meaning, but as actually improving upon the originalist mission of “fidelity.”

50. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 132 (2d ed. 2002); *see also* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at viii (2d ed. 1988) (“[T]he highest mission of the Supreme Court . . . is not to conserve judicial credibility.”); Benjamin Ewing & Douglas Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 415 n.241 (2011).

51. Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 *YALE L.J. ONLINE* 1, 2 (2011), <http://www.yalelawjournal.org/images/pdfs/981.pdf> (citing Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 *JUDICATURE* 32 (2001)).

52. U.S. CONST. art. II, § 3, cl. 4.

typically bifurcated into those adopting “formalist” and “functionalist” reasoning. Actually, this distinction is a second-order one, and there are significant methodological commonalities across removal cases, especially when contrasted with the RAC cases. The Court finds no precise line drawn by the constitutional text regarding the limits on the President’s removal powers. It also finds that the relevant governmental context has changed dramatically since 1787; the modern administrative state has created institutional capabilities and threats not contemplated by the Framers. No constitutional clause addresses independent agencies, independent prosecutors, or multiple layers of “for cause” removal protection. A Choperian court would, perhaps, note the fact that the Constitution provides mechanisms for the political branches to work out this balance themselves—i.e., a President could veto any bill that unduly restricts his removal power—and decline to enter the political fray. But rather than letting the political branches negotiate the boundaries amongst themselves, the Court has intervened repeatedly to construct and police these boundaries around Congress’ ability to restrict the removal power.

The Court, in other words, has engaged in a dynamic, creative mode of constitutional interpretation. First abstracting from Article II’s Vesting and Take Care Clauses the underlying principle of effective execution of the laws, the Court then translates this principle onto the relevant contemporary context: the modern administrative state, with its independent agencies, quasi-judicial and quasi-legislative functions, and intended independence from presidential control.⁵³ Only after engaging in this two-step enterprise does the second-order consideration come into play; in some cases, the Court invents a new *formalistic* rule to guide future practice, while in others it resolves the case with open-ended balancing. In either case, the Court’s underlying reasoning exceeds one-step originalism.⁵⁴

In *Myers v. United States*,⁵⁵ the Court struck down a statute that conditioned the President’s ability to remove postmasters on the Senate’s consent.⁵⁶ The Court found it a “reasonable implication” from the Take Care Clause that

53. Consideration of changed *governmental* context is a departure from Lessigian translation. Lessig’s theory accommodates changes in *social* and *economic* contexts, not governmental ones. Lessig, *supra* note 29, at 1233-50. Other theories of interpretation do allow for these kinds of changes, including Justice Jackson’s conception of transplanting, *see supra* note 46, and Professor Eskridge’s “dynamic” interpretation, *see* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1497 (1987) (applying the theory of dynamic interpretation to changes in both “Societal/Policy Context” as well as “Public Values”).

54. As these removal cases are familiar, I review them only briefly. For a more detailed review, *see* KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 310-11 (16th ed. 2007).

55. 272 U.S. 52 (1926).

56. *Id.* at 175-76.

the President “should select those who were to act for him under his direction in the execution of the laws.”⁵⁷ It followed that “as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.”⁵⁸

Myers was distinguished by the Court in *Humphrey’s Executor*,⁵⁹ in which the Court upheld a statutory “for cause” restriction on the President’s ability to remove members of the Federal Trade Commission (FTC) by translating the values embedded in the separation of powers and Article II onto modern governmental context. This context had changed significantly since 1926: The Depression, Roosevelt’s election, and the first New Deal had all begun to transform government and create a new form of executive power. The FTC was emblematic of that change. The FTC was designed to be “free from executive control,” and could not “in any proper sense be characterized as an arm or an eye of the executive.”⁶⁰ Rather, the FTC was both quasi-legislative and quasi-judicial.⁶¹ To translate the original principles of Article II and the separation of powers into this altered governmental context, the Court constructed a formalist line between purely executive agencies on the one hand (like the postmasters) and quasi-legislative and quasi-judicial agents on the other.⁶² The translation of original values onto the new governmental context produced a creative new formalistic boundary.

The *Humphrey’s Executor* approach was confirmed in *Wiener v. United States*,⁶³ where the Court restricted the President’s ability to remove a member of the War Claims Commission on the grounds that the commission had an “intrinsic judicial character.”⁶⁴ This method expressly contemplates the modern context in which such independent executive actors are part of the administrative reality. *Wiener*, thus, is another exercise in translating original values into changed governmental context.

57. *Id.* at 117; see also SULLIVAN & GUNTHER, *supra* note 54, at 310-11.

58. *Myers*, 272 U.S. at 117.

59. *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

60. *Id.* at 628.

61. *Id.* at 630 (“The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.”).

62. *Id.*

63. 357 U.S. 349 (1958).

64. *Id.* at 355; see also *id.* at 353 (“[T]his sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.”).

In *Morrison v. Olson*,⁶⁵ the Court upheld the constitutionality of the Independent Counsel Statute's "for cause" removal restriction. Under the *Humphrey's Executor* rule, since prosecution is a "core" executive function, the Independent Counsel was a "purely executive" officer and any restrictions on his removability unconstitutionally undermined the separation of powers. This approach, favored by Justice Scalia in dissent,⁶⁶ would have conserved judicial credibility by relying on a previously articulated formalist rule, and by avoiding overt engagement with changes in governmental context since that rule was invented. The majority famously distanced itself from this formalistic approach.⁶⁷ It reread earlier cases, finding that their underlying thrust was "not to define rigid categories of those officials who may or may not be removed at will by the President," but rather "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutional appointed duty to 'take care that the laws be faithfully executed' under Article II."⁶⁸ The "real question" for the Court was whether the removal power restrictions "impede[d] the President's ability to perform his constitutional duty."⁶⁹

Abjuring firm lines and clear boundaries between branch functions, the Court embraced a balancing, functionalist approach that required evaluating the impact that the statute would have on each branch.⁷⁰ The *Morrison* Court's rejection of the earlier formalist rule, and its embrace of this balancing test, implicitly recognized significant changes in governmental context since the formalistic rule announced by *Humphrey's Executor*—changes that required further translation of the original purpose of Article II's commands. In the 1970s, the Watergate scandal undermined trust in government and raised the need for some independent accountability mechanism to police the executive branch from within. The Court's functionalist test of whether one branch encroached or aggrandized its power at the expense of another branch separates it from the earlier cases, but its underlying attention to both original principle and modern context actually parallels them.⁷¹ By announcing this new standard, the Court acknowledged that the change in the role of executive power since *Humphrey's Executor* necessitated a new interpretation of the limits of the removal power.

65. 487 U.S. 654 (1988).

66. *Id.* at 703-15 (Scalia, J., dissenting).

67. *Id.* at 687-94.

68. *Id.* at 689-90.

69. *Id.* at 691.

70. *See id.* at 687-94.

71. *Id.* at 693 ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

Most recently, in *Free Enterprise Fund*,⁷² the Court relied on contextualist reasoning to arrive at a new formalist “punch line.”⁷³ The Court found that two layers of “just cause” insulation from removal⁷⁴ impeded too much on the President’s removal power. Again, the Constitution does not specify any line in this area. The Court balanced values embedded in Article II in light of contemporary governmental context and found that two layers was one too many. The Court employed a contextualist analysis to assess the problem and constructed a formalist rule to provide guidance for Congress going forward.

Free Enterprise Fund demonstrates the modern Court’s willingness to engage in openly creative analysis in executive personnel cases, and not simply defer to the branches to negotiate the proper boundaries themselves, even where there is no originalist guidance from the constitutional text. It also may expose the danger of this approach: that the Court will distort the carefully calibrated interactions between the political branches with unnecessary and cumbersome rules. As Justice Breyer noted in dissent, “[T]he Court fails to show why *two* layers of ‘for cause’ protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President’s* powers than *one* layer.”⁷⁵ A single layer of “for cause” removal protection at the top level, which the Court has long permitted, would effectively block a President from reaching the lower ranking officials. Thus, Presidential control over the operations of the executive branch seems unaffected by the second layer of removal protection. If Justice Breyer is correct and the *Free Enterprise Fund* rule is an unnecessary intrusion, this case might lend support to the minimalist approach adopted in RAC cases:⁷⁶ Where no rigid originalist boundaries exist, courts should simply defer to the political branches to work it out amongst themselves.

Such errors of judicial overreach may be an unavoidable side effect of the translation approach, which, as Justice Jackson recognized, “cast[s] [judges] more than [they] would choose upon [their] own judgment.”⁷⁷ Still, before choosing one or the other methodology, the costs of translation’s risk of judicial overreach must be weighed against the costs of minimalism’s risk of

72. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

73. Cf. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 26 (1998) (arguing that it is possible to have a “functionalist argument for a formalist punch line”).

74. Under the challenged scheme, members of Public Company Accounting Oversight Board could only be removed by SEC Commissioners for cause, and the Commissioners themselves could only be removed by the President for cause. See *Free Enter. Fund*, 130 S. Ct. 3138.

75. *Id.* at 3171 (Breyer, J., dissenting); see also *id.* (“[T]he majority’s decision to eliminate only *Layer Two* accomplishes virtually nothing.”).

76. See *infra* Section I.C.

77. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

underreach. In the Sections that follow, I will argue that the minimalist approach adopted in the RAC context has enacted very high, though often ignored, *underreaching* costs, which justify resolving the judicial asymmetry in favor of translation.

C. *Recess Appointments Clause Cases: Originalism and Minimalism*

In removal cases, the Court has applied underlying constitutional principles drawn from Article II and the separation of powers to the modern governmental context, and engaged in overt acts of judicial creativity to formulate new boundaries around presidential power. One might suspect that in cases testing the boundaries of the President's power to make recess appointments, courts would follow a similar approach. This power, like the power to remove officers, is undoubtedly an important part of the President's constitutional mandate to ensure that the laws are faithfully executed.⁷⁸ Indeed, the recess appointments power may possess an even *stronger* connection to this fundamental executive responsibility; unlike the removal power, the recess power is actually crystallized in text.⁷⁹ But, courts reviewing the RAC have not embraced the dynamic

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

79. It could be reasonably argued that the very absence of constitutional text in the removal cases is precisely the justification for the creativity that the Supreme Court has consistently exercised in this area of the law. See, e.g., Eskridge, *supra* note 53, at 1481-97 (outlining a framework in which the text and history hold more weight for more specific provisions, and dynamic considerations hold more weight for general or vague provisions). This argument—that the more minimal the text, the greater extent of permissible judicial creativity—brings the task of constitutional interpretation uncomfortably close to that of full-blown common-law-style norm-generation. Cf. SCALIA, *supra* note 33, at 22 (criticizing Eskridge's "dynamic" method of interpretation as, essentially, applying the common law method of judging to statutory interpretation). The descriptive version of this argument takes the removal cases as not *interpreting* the Constitution's "Take Care" and "Vesting" Clauses, but rather engaging in common-law-style rule-generation based on ad hoc policy judgments. Interpretation as translation is distinct from this approach, associated with Ronald Dworkin, among others. See RONALD DWORKIN, *LAW'S EMPIRE* 313-54 (1986) (arguing for a conception of interpretation similar to common law adjudication); Eskridge, *supra* note 53, at 1549-54 (distinguishing Dworkin's theory from his own). The judicial creativity envisioned by translation is more circumscribed; it is meant to be bounded by the principles embodied in the text. The distinction may be difficult to observe or to sustain in practice. See John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY L. REV. 177, 179 (1999) ("[T]he process of translating the Constitution on the basis of changed so-

approach of the removal cases. Rather than engaging with the underlying principles or modern governmental context, these courts have opted for a strategy of credibility-conserving judicial minimalism. This Section reconstructs and interprets these minimalist decisions.

Virtually all modern Presidents have made extensive use of the RAC to appoint executive officers and federal judges without the Senate's "advice and consent."⁸⁰ Several of these attempts have been challenged in federal court.⁸¹ Challengers have relied on originalist hooks to ask courts to restrict the recess power to situations in which the Senate was *unable*, rather than merely *unwilling*, to provide its consent to a nominee.⁸² The Senate is no longer *incapable* of giving its advice and consent for eight or nine months out of the year as it was at the founding. The originally conferred powers of the RAC have been mooted by developments in communications and travel technologies and the expansion of the legislative calendar.

Courts have almost universally rejected this argument. Only one modern court found that the President overstepped his recess power authority—a decision that was promptly overturned en banc.⁸³ Rather than attending to contemporary context or creatively generating new rules, as the Court has done repeatedly in removal cases, courts have approached RAC adjudications statically: a choice between originalism on the one hand and judicial abdication to the po-

cial facts is an inherently more complex and open-ended task than Professor Lessig acknowledges—so complex and open-ended that it is unsuitable for judges.”). But, the distinction is still important to understanding the project of interpretation as translation on its own conceptual terms. *See* Lessig, *supra* note 29, at 1206. Under the translation model, principles crystallized in text create a strong justification for judicial creativity in the name of preserving those principles.

80. *See supra* note 12 (listing the number of recess appointments made by every President since Franklin Roosevelt).
81. *See* *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley (Woodley II)*, 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 705 (2d Cir. 1962); *Mackie v. Clinton*, 827 F. Supp. 56, 57 (D.D.C. 1993); *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979); *In re Farrow*, 3 F. 112 (C.C.N.D. Ga. 1880); *In re Dist. Att’y of United States*, 7 F. Cas. 731 (E.D. Pa. 1868) (No. 3924).
82. More specifically, litigants argued that the Clause’s reference to “the Recess of the Senate” includes only intersession, not intrasession, recesses; that “Vacancies that may happen” includes only vacancies that *arise* during a recess, not those that merely *exist* during one; and that “Vacancies” excludes Article III judges. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1225 (11th Cir. 2004) (considering and rejecting the intrasession argument); *United States v. Allocco*, 305 F.2d 704, 705 (2d Cir. 1962) (considering and rejecting the “arise” argument); *id.* at 708 (considering and rejecting the argument that Article III excludes recess appointments).
83. *See United States v. Woodley (Woodley I)*, 726 F.2d 1328 (9th Cir. 1983), *rev’d en banc*, 751 F.2d 1008 (9th Cir. 1985). An 1868 case also ruled against the President’s recess power. *See In re Dist. Att’y of United States*, 7 F. Cas. 731 (E.D. Pa. 1868).

litical branches on the other. Even as the appointments process deteriorated during the late twentieth century, becoming an increasing burden not just on the President's ability to "take care" that the laws be faithfully executed, but also on the courts, Congress, and the citizens who give these actors power to govern, courts avoided intervening.

In *Evans v. Stephens*, the Eleventh Circuit upheld President George W. Bush's recess appointment of William Pryor to that court, relying on a combined approach of minimalism and "one-step" originalism. The court searched for, and could not find, any originalist limit on the President's power to make recess appointments: "The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause."⁸⁴ Finding no determinative originalist guidance, the Eleventh Circuit adopted a deferential posture. It noted that although "[t]he Judicial Branch is the controlling interpreter of how the Constitution applies[,] . . . the President, in his capacity as chief executive of this country is also sworn to uphold the Constitution."⁸⁵ Noting that the challenged use of the recess power was "consistent with . . . written executive interpretations from as early as 1823, and legislative acquiescence,"⁸⁶ the court declined to intervene.⁸⁷

A credibility-conserving court would avoid such political controversy. Judicial appointments under President Bush were an intensely fraught partisan battleground, and any judicial interference would have expended considerable "judicial capital." Pryor, then the Attorney General of Alabama, was Bush's second nominee to fill the position on the Eleventh Circuit; the first nominee failed to win confirmation, was sent back to the President at the conclusion of the 107th Congress, and was not renominated in the 108th Congress.⁸⁸ When Pryor received his nomination in April 2003, he was part of a batch of aggressive choices for positions on the Circuit Courts of Appeals. Pryor's nomination was successfully voted out of the Judiciary Committee, but the Democratic minority blocked the full vote for the remainder of that session and into the next. In this highly politicized context, it is easy to understand why a court might avoid the dynamic, flexible removal case method, with its overt judicial engagement with contemporary governmental context.

84. *Evans*, 387 F.3d at 1225.

85. *Id.* at 1222.

86. *Id.* at 1226.

87. *Id.* at 1222 ("Just to show that plausible interpretations of the pertinent constitutional clause exist other than that advanced by the President is not enough.").

88. The nominee was William H. Steele. See DENIS STEVEN RUTKUS, KEVIN M. SCOTT & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL31868, U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS BY PRESIDENT GEORGE W. BUSH DURING THE 107TH-109TH CONGRESSES 15 n.59 (2007).

In fact, by turning to judicial minimalism and deference to the political branches, the Eleventh Circuit followed solid judicial precedent. A nineteenth-century case, *In Re Farrow*,⁸⁹ introduced the minimalist methodology that still defines RAC jurisprudence. Henry Farrow's term as U.S. District Attorney for Georgia was set to expire in April 1880.⁹⁰ President Rutherford B. Hayes sought to replace him, but before the President could act, Supreme Court Justice Joseph Bradley reappointed Farrow to a second term, as he was purportedly entitled to do under law.⁹¹ President Hayes followed by nominating John S. Bigby. The Senate failed to vote on Bigby's nomination before recess, and Hayes issued a recess appointment to Bigby over the summer.⁹²

Farrow, whose tenure had been cut short by this recess appointment, challenged the appointment's constitutionality. He advanced textualist arguments similar to those relied on by modern RAC challengers: Because the vacancy had *arisen* while the Senate was still in session, he argued, the recess appointment power was not properly available.⁹³ Moreover, Farrow continued, once Justice Bradley had reappointed him to the position, there was no longer any "vacancy" under the meaning of the RAC.⁹⁴

The district court soundly rejected both arguments, deferring to the executive's own constitutional interpretation. The court relied exclusively on the opinions of the "distinguished jurists who have filled the office of attorney general."⁹⁵ Attorneys General William Wirt,⁹⁶ Roger Taney,⁹⁷ and ten others besides, had each uniformly found that the word "happen" in the RAC meant "happen to exist,"⁹⁸ rather than *arise*, as Farrow argued. The executive's own lawyers had consistently held that the *timing* of the origins of the vacancy was constitutionally irrelevant, and the district court was not eager to question these opinions. After all, they "were rendered upon the call of the executive department, and under the obligation of the oath of office, and are entitled to the highest consideration."⁹⁹ These opinions were authored by "distinguished jurists" in the executive branch, and deserving of deference.

89. *In re Farrow*, 3 F. 112 (C.C.N.D. Ga. 1880).

90. *Id.* at 112.

91. *Id.* at 112-13.

92. *Id.*

93. *Id.* at 113.

94. *Id.* at 116.

95. *Id.* at 115.

96. *Id.* at 114.

97. *Id.*

98. *Id.* at 114-15.

99. *Id.* at 115.

Such deference to the political branches and their independent constitution-interpreting authority continues to define contemporary RAC jurisprudence. Though written nearly a century later and after significant changes in governmental context, the Second Circuit's 1962 opinion in *United States v. Allocco*¹⁰⁰ is striking for how much it echoes the deferential reasoning in *Farrow*. President Dwight Eisenhower failed to nominate anyone to fill a judicial vacancy that opened on July 31, 1955, in the two remaining days before the Senate's recess began. Two weeks later, with the Senate on a recess that was to last until January, Eisenhower made a recess appointment of John Cashin to fill the vacancy.¹⁰¹ *Allocco* was one of the first cases decided in Cashin's courtroom. Appealing from his conviction to the Second Circuit, the defendant argued that Cashin was "not constitutionally empowered to preside over the trial."¹⁰² As in *Farrow*, the appellant argued that because the vacancy had arisen while the Senate was still in session, rather than during the recess, the President had exceeded the bounds of his recess appointments power.

The Second Circuit rejected the appeal. As in *Farrow*, the court found the originalist evidence to be indeterminate, and once again fell back on deference to the political branches. The court leaned heavily on both of the political branches' interpretations of the Clause, pointing to fifty judges currently sitting under recess appointments,¹⁰³ a "long and continuous line of opinions" from Attorneys General,¹⁰⁴ and the fact that "Congress has implicitly recognized the President's power to fill vacancies which arise when the Senate is in by authorizing payment of salaries to most persons so appointed under the recess power."¹⁰⁵ Lacking a determinate mandate from the original meaning of the RAC, the Second Circuit declined to intervene.

From *Farrow* to *Allocco* to *Evans*, courts have embraced a minimalist judicial method when adjudicating the RAC. Only one modern court has departed from this approach.¹⁰⁶ In *United States v. Woodley (Woodley I)*,¹⁰⁷ a Ninth Circuit panel renounced *Farrow*-style deference and ruled that the President lacked authority to make recess appointments of Article III judges. In February 1980, President Carter nominated Walter Heen to a vacancy on the District Court of Hawaii. Ten months later, Carter had lost his reelection campaign, and

100. 305 F.2d 704 (2d Cir. 1962).

101. *Id.* at 705.

102. *Id.*

103. *Id.* at 709.

104. *Id.* at 713 (quoting 1 Op. Att'y Gen. 631, 633 (1823) and citing more than a dozen subsequent Attorney General Opinions).

105. *Id.* at 714.

106. Only one lower court case also did the same. See *In re Dist. Att'y of United States*, 7 F. Cas. 731 (E.D. Pa. 1868) (No. 3924).

107. 726 F.2d 1328 (9th Cir. 1983).

Heen's nomination languished in the Judiciary Committee.¹⁰⁸ When the Senate went on intersession recess, the lame-duck President gave Heen a December 31 recess appointment. After taking office in January 1981, President Reagan quickly withdrew Heen's nomination from the Senate.¹⁰⁹ The recess commission itself could not be retracted, however, leaving Heen in an unusual posture: With no chance of confirmation, he was an Article III judge with a one-year term.

The *Woodley I* panel raised the RAC issue sua sponte.¹¹⁰ Judge William Albert Norris¹¹¹ found that Heen's recess appointment violated Article III. Recess appointed federal judges lacked the protections of life tenure and undiminished pay.¹¹² These judges were asked to decide cases with Senate confirmation hearings hovering in the near future, with their careers hanging in the balance. Acknowledging the history of judicial recess appointments and apparent legislative acquiescence, the *Woodley I* court insisted that no amount of historical evidence outweighs the Constitution.¹¹³ Rejecting deference, the court responded to the *Allocco* and *Farrow* courts' reliance on executive constitutional interpretation with a reassertion of judicial supremacy: "While the members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning."¹¹⁴

Woodley I's departure from deferential precedents is also an implicit application of the dynamic method of the removal cases. The appointments process had changed dramatically over the late twentieth century, even since the opinion in *Allocco*. President Reagan was surely not the first President to use the judicial appointments power as an instrument to realize a political vision, but he streamlined and systematized the process in unprecedented ways. By 1983, when *Woodley I* was decided, Reagan had already begun using appointments to the federal judiciary as an arm of his political agenda. Judicial politics were in

108. *Id.* at 1329-30.

109. *Id.*

110. *Id.*

111. Norris was nominated by President Jimmy Carter on February 27, 1980, confirmed by the Senate on June 18, 1980, and received his commission on June 18, 1980. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (search for "Norris, William").

112. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.").

113. 726 F.2d at 1338 ("Historical acceptance and governmental efficiency are not unimportant. They will not, however, 'save [a practice] if it is contrary to the Constitution.'" (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983))).

114. *Id.* at 1336 (citing *United States v. Nixon*, 418 U.S. 683, 703 (1974); *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1803)).

transition, and the nomination of judges became a focal point of political battles. Later, Senate hostility and obstructionism to this agenda would culminate in the infamous Robert Bork Supreme Court confirmation hearings.¹¹⁵ The *Woodley I* court's rejection of deference to the executive can be interpreted as a kind of covert recognition that judicial appointments were not what they used to be, and so the courts' previous rulings on the issue required reexamination. The safe harbor of Article III principles was a badly needed refuge.

The governmental context had changed since the *Allocco* court claimed that it had no reason to believe that the RAC might be abused.¹¹⁶ The *Woodley I* panel criticized *Allocco*'s statement that "the evils of legislative and executive coercion which petitioner foresees have no support in our nation's history."¹¹⁷ Such naïveté was not only inaccurate in the increasingly politicized appointments context, but, the *Woodley I* panel argued, also out of tune with the Constitution itself, since the Framers were "profoundly influenced by the sorry history of a colonial judiciary which lacked the most basic requisites of judicial independence."¹¹⁸

However, this implicitly context-sensitive method was short-lived. In *United States v. Woodley (Woodley II)*, the Ninth Circuit, sitting en banc, reversed the *Woodley I* panel. The opinion by newly minted Reagan appointee Robert Beezer¹¹⁹ returned to *Allocco*- and *Farrow*-style deference.¹²⁰ Finding no unequivocal originalist support for an intervention, the Ninth Circuit opted for the minimalist approach, emphasizing a long and robust history of executive practice and legislative acquiescence. The opinion begins by asking rhetorically whether "a practice followed by the Executive for nearly 200 years" was constitutional—the answer, of course, was yes.¹²¹ Recess appointments of Article III

115. Notably, Senator Robert Dole suggested that the President should grant Bork a recess appointment. See David Lauter, *Reagan Could Put Bork on Court, Dole Asserts*, L.A. TIMES, July 28, 1987, at 14.

116. *Woodley I*, 726 F.2d at 1339 (criticizing the *Allocco* court's reasoning); see also *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962) (rejecting the appellant's claim that the broad construction of the RAC opened it up to executive abuse, and noting that the court had "not been directed to a single instance of behavior by any President which might be termed an 'abuse' of the recess power").

117. *Woodley I*, 726 F.2d at 1339 (quoting *Allocco*, 305 F.2d at 709).

118. *Id.*

119. Robert R. Beezer was nominated by Reagan on March 2, 1984, confirmed by the Senate on March 27, 1984, and received his commission on March 28, 1984. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (search for "Beezer, Robert").

120. *Woodley II*, 751 F.2d 1008 (9th Cir. 1985) (en banc).

121. *Id.* at 1009.

judges, the panel wrote, are “inextricably woven into the fabric of our nation.”¹²²

With the exception of *Woodley I*, RAC cases have opted for a strategy of one-step originalism and minimalism. Courts have been reluctant to enter the political fray over appointments, even as the system has spiraled into greater dysfunction, threatening core constitutional values.

D. Resolving the Asymmetry in Favor of Translation

It is beyond the scope of this Note to fully address (much less resolve) the methodological dispute between originalism and translation, or to assess the relative merits and risks of creativity and minimalism. Nevertheless, there are good reasons in the context of the RAC to favor resolving the methodological asymmetry in favor of the translation approach.

1. Originalism Fails To Answer the Question

Originalism is not adequate to resolve the key issue at the heart of the pro forma sessions dispute. Historians and scholars are split on the fundamental meaning of the RAC. Professor Michael Rappaport and the dissenting opinion in *Woodley II* sketch an original understanding of the RAC as a narrow power.¹²³ But others, such as Professors Edward Hartnett and Michael Herz, have looked at the same history and found support for a broader understanding.¹²⁴ Such ambiguity is hardly surprising, since, as I argue below,¹²⁵ the Appointments Clauses embody both action-constraining and action-promoting principles of the separation of powers. Translation of these competing values into the contemporary appointments context is unavoidable.

This confusion is further borne out in the debate over the intertextualist move that created the pro forma sessions controversy. I discuss this in more detail below,¹²⁶ but a brief summary here is required. A 1993 U.S. Department of Justice (DOJ) brief suggested that for the purposes of the RAC a “recess” must

122. *Id.* at 1012.

123. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204 (1994); see also *Woodley II*, 751 F.2d at 1017-20 (Norris, J., dissenting).

124. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443 (2005).

125. See *infra* Section II.B.

126. See *infra* Section IV.A.

be at least three days long.¹²⁷ The brief pointed to the Adjournments Clause, which bars either house of Congress from adjourning for more than three days without the consent of the other.¹²⁸ According to the DOJ, this Clause demonstrates that the Framers did not consider one, two, or three day recesses to be constitutionally significant,¹²⁹ and so recess appointments could be issued only where the Senate break lasted longer than three days. The Senate's pro forma sessions rely on this still-reigning executive interpretation—by spacing sessions out every three days, the Senate prevents a recess from ever formally occurring.

Many scholars have questioned the validity of the “three-day minimum” interpretation, arguing that the analogy to the Adjournments Clause and the interpretation it rests upon are “faulty.”¹³⁰ They are joined by the Eleventh Circuit, which, in *Evans v. Stephens*, held that “[t]he Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause.”¹³¹ According to some originalist critics of the modern President’s broad use of the recess power, the “recess” of the Senate referred to the eight or nine month periods during which the Senate was away from Washington and thus *unable* (rather than merely *unwilling*) to provide its advice and consent.¹³² Parachuting the three-day requirement from the Adjournments Clause onto the RAC, critics contend, undermines this version of the original meaning of the RAC.

Further, some commentators challenged the validity of the pro forma sessions *as sessions*. One scholar concludes that “[g]aveling open, and then gaveling closed, a half-minute meeting of an empty chamber is not a legitimate break in

127. HOGUE, *supra* note 12, at 2 n.9 (citing Memorandum of Points & Authorities in Support of Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment at 24-26, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993) (Civ. A. No. 93-0032-LFO)). The brief was part of a legal action challenging a lame-duck recess appointment made by President George H.W. Bush to the U.S. Postal Service Board. Bush made the appointment during a twelve-day intrasession recess in the waning days of his administration. Ultimately, the district court rejected the recess appointment on other grounds, without confronting the boundaries of the Recess Appointments Clause. *See Mackie v. Clinton*, 827 F. Supp. 56, 57 (D.D.C. 1993) (noting, with apparent relief, that “[i]n the circumstances here, it is unnecessary to address the elusive issue of when the Senate is in recess within the meaning of the Recess Appointments Clause”).

128. *See* U.S. CONST. art. I, § 5.

129. VIVIAN S. CHU, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 9 n.64 (2011) (citing Memorandum of Points & Authorities, *supra* note 127, at 24-26).

130. Williams, *supra* note 6; Lederman, *supra* note 26.

131. *Evans v. Stephens*, 387 F.3d 1220, 1225 (11th Cir. 2004).

132. *See* Rappaport, *supra* note 123; Carrier, *supra* note 123.

the recess.”¹³³ Two former high-ranking DOJ officials object that the Senate “does not meet as a body during a pro forma session” since “no business can be conducted, and the Senate is not capable of acting on the president’s nominations.” Therefore, they conclude, “the Senate remains in ‘recess’ for purposes of the recess appointment power, despite the empty formalities of the individual senators who wield the gavel in pro forma sessions.”¹³⁴

But, such interpretations only go so far. The Senate commonly meets for days, even weeks at a time without doing anything that might be considered “conducting business.” No one would argue that the President could make a recess appointment during, for instance, an extended filibuster. More deeply, insofar as the Senate’s “business” is balancing against the executive in the separation of powers, the pro forma sessions would seem to qualify.

Ultimately, attempts to resolve the pro forma issue that avoid grappling with the conflicting values embedded in the RAC are unsatisfying. A more robust engagement with these principles is required.

2. Minimalism’s Concern for Protecting the Judiciary Is Self-Defeating

Even assuming that minimalism’s concern with preserving judicial capital is valid,¹³⁵ pursuing this approach by *refraining* from intervention has proven self-defeating. Courts have facilitated the seizure of the entire governmental system, *including the judiciary*, by appointments paralysis. As I will argue in more detail below,¹³⁶ the deterioration of the appointments process has already exacted severe costs not only on the President’s ability to take care that the laws be faithfully executed, but also on the legislative and judicial branches. Adhering to the minimalist method in order to protect judicial capital only exacerbates the appointments paralysis through judicial *underreach*, and actually diminishes the same resources minimalism seeks to protect.

3. A Court May Be Forced To Pick Sides

The deference employed in earlier RAC cases may no longer be as available, or attractive, in the pro forma sessions conflict that may come. Judicial abnegation has successfully resolved previous conflicts only where the Senate had not itself taken any direct, official action against the executive’s recess power. Simply by deferring, a court could resolve the case in favor of the executive without undercutting the Senate in its official capacity. Now that the Senate has sparked

133. Williams, *supra* note 6.

134. Bradbury & Elwood, *supra* note 14.

135. *But see supra* Section I.A (questioning this concept).

136. *See infra* Part III.

a direct interbranch conflict by instituting pro forma sessions, a court may be forced to choose sides.

4. Textual Asymmetry Mandates More Judicial Creativity in Recess Appointments Clause Cases than in Removal Cases

However little the Constitution says about the contours of recess appointments, it says even less about the President's removal power. But, this textual asymmetry supports a methodological asymmetry in the *opposite* direction of the current one. Less originalist support—whether in text, meaning, or purpose—should lead a capital-conserving court to *less* active judicial intervention. The creativity involved in translation is not the same as the unbounded norm-generation of common law, but is guided by text, original principles, and contemporary context.¹³⁷ The RAC embodies the kind of competing principles that mandate creative judicial balancing and translation. The crystallization of these values in the constitutional text points toward a *more* robust judicial engagement in the appointments context than in the removal one—exactly the opposite of the current regime.

5. Counterargument

It might be argued that this asymmetry is not as well defined as I have suggested. Reference to the practice and interpretation of the executive and legislative branches is common in the RAC cases, which reflects consideration of contemporary context—a touchstone of the translation approach.

Such consultation, however, is not part of judicial interpretation under the translation method, but serves as a justification to *avoid interpretation altogether*. Asking how the executive interprets the RAC is part of contemporary context analysis, but it does not substitute for an independent judicial assessment of whether that interpretation is proper in light of the principles of the Clause or other contextual factors. In RAC cases, the courts' reliance on Attorney General opinions and executive practice does not mitigate the asymmetry between these lines of cases.

Some RAC cases *do* hint at a more deeply contextualist and principled approach. One court rejected the challengers' narrow interpretation and noted that it "would create Executive paralysis and do violence to the orderly functioning of our complex government."¹³⁸ Another suggested that the RAC's purpose was "to assure the President the capacity for filling vacancies at any time to keep the Government running smoothly."¹³⁹ Further, the *Woodley II* court rejected the narrow interpretation offered by the challengers because it "attribute[d] to the Framers an intent to create . . . a potentially dangerous situ-

137. See *supra* note 79.

138. *United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962).

139. *Woodley II*, 751 F.2d 1008, 1013 (9th Cir. 1985).

ation” in which appointments were left unfilled for long periods of time.¹⁴⁰ Finally, a court held that “the main purpose of the Recess Appointments Clause” was “to enable the President to fill vacancies to assure the proper functioning of our government.”¹⁴¹

But, these hints at symmetry with the removal cases have been the exception rather than the rule. Courts cite contemporary context evidence to bolster deferential, credibility-conserving decisions. Even to the extent that the recess appointments cases *do* embrace the dynamic, flexible approach of the removal cases, this Note argues that this feature should be developed *further* in the potential pro forma sessions dispute to come.

II. ORIGINAL PRINCIPLE: EFFECTIVE GOVERNANCE

The remainder of this Note applies the translation method to argue that courts should find the pro forma sessions constitutionally invalid. This Part begins to lay the groundwork for the translation approach by articulating the values embodied in the RAC.

A. *The Value of Effective Governance in the Separation of Powers*

Americans are accustomed to viewing their Constitution primarily as a constraint on government. The separation of powers is a system of “checks and balances,” constraining the actions of the various branches. The Bill of Rights is a series of “thou shalt not” restrictions against the government. Even the Constitution’s power-granting provisions are only permissive: “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,”¹⁴² but if Congress decides not to, the Constitution does not appear to object.

The Constitution also speaks in the imperative. It does not merely grant powers to be exercised if desired, it also maps out a set of duties that *must* be obeyed. Thus, “[t]he President . . . *shall take Care* that the Laws be faithfully executed.”¹⁴³ “Taking care” is the affirmative responsibility of a person who “*shall be elected*” to that office.¹⁴⁴

Although the concept of checks and balances predominates in the popular imagination,¹⁴⁵ the Constitution balances action-promoting and

140. *Id.*

141. *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004).

142. U.S. CONST. art. I, § 8, cl. 1.

143. U.S. CONST. art. II, § 3, cl. 4 (emphasis added).

144. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

145. *Ewing & Kysar*, *supra* note 50, at 359 (“[W]orried about concentration and abuse of political power, the Founders sought to minimize the risk of government overreaching Even as the world has changed dramatically, the fears of the Founders continue to guide our thinking.”).

action-constraining principles. The Framers designed a system to avoid not only the governmental overreaches of monarchy, but also the *underreaches* of the failed Articles of Confederation. That these conflicting principles are embodied in the Constitution should not come as a surprise.

Courts and scholars have acknowledged an action-promoting principle embedded in the Constitution. Justice Jackson perceived that “the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.”¹⁴⁶ More recently, Benjamin Ewing and Professor Douglas Kysar urged a reconsideration of the separation of powers. They write that, beyond checks and balances, “the constitutional division of authority also may be seen as a system of ‘prods and pleas’ in which distinct governmental branches and actors can push each other to entertain collective political action when necessary.”¹⁴⁷ Respect for this action-promoting principle is especially needed now, Ewing and Kysar argue, as threats such as climate change and terrorism pose risks of unlimited harm which can only be addressed if our government moves beyond its exclusively action-*constraining* vision. Our society’s “preference for passivity”¹⁴⁸ and hostility toward active government has become a “dangerously double-edged sword in some significant areas of law and policy, where threats to social welfare arise in substantial part from the nature of limited government itself.”¹⁴⁹

Commentators and politicians on both the left and the right have long sounded the alarm about the consolidation of powers in the federal government, particularly in the executive branch.¹⁵⁰ But, as Ewing and Kysar urge, “[l]iberal anxiety today should focus not just on whether our system of checks and balances can safely constrain collective political action, but also on whether the system can ensure that collective action *does* happen when it is necessary.”¹⁵¹ Perhaps no area of government is in more need of an action-promoting revival than the appointments system.

146. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

147. Ewing & Kysar, *supra* note 50, at 350.

148. *Id.* at 353 (quoting Lisa Heinzerling & Frank Ackerman, *Law and Economics for a Warming World*, 1 HARV. L. & POL’Y REV. 331, 335 (2007)).

149. *Id.*; see also Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 10 (2007).

150. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); Koppelman, *supra* note 51, at 17-20 (addressing the infamous “broccoli” argument against health care reform’s constitutionality).

151. Ewing & Kysar, *supra* note 50, at 357.

B. *The Value of Effective Governance in the Appointments Clauses*

This action-promoting principle is particularly embodied in the RAC. The Constitution provides:

[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

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.¹⁵²

The general appointments power, conditioned upon receipt of the “advice and consent of the Senate,” embodies the action-inhibiting checks and balances principle: The Senate provides a check on the executive’s authority to appoint, thereby restraining any monarchical tendencies through mediation and interbranch dialogue. The RAC follows that check, deliberately carving out an exception to enable the continued operations of government. Read together, the Appointments Clauses embody a balance between action-constraining and action-promoting principles.

Various authorities converge on this interpretation of the RAC. Alexander Hamilton characterized the Clause as “nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.”¹⁵³ Justice Story wrote that the RAC serves “convenience, *promptitude of action*, and general security.”¹⁵⁴ Professor Hartnett demonstrated that this understanding of the RAC was its original meaning.¹⁵⁵

Some commentators advanced a narrower reading of the RAC.¹⁵⁶ The Clause, as originally understood, allowed the President to “fill vacancies that occurred during the long intersession recesses when the Senate, with its members dispersed throughout the country, could not readily reconvene to provide its advice and consent.”¹⁵⁷ On this view, the RAC does provide a “supplementary procedure,” but was “adopted without any intent to supplant the Senate’s constitutional role.”¹⁵⁸ It provided a way around the usual appointment proce-

152. U.S. CONST. art. II, § 2.

153. THE FEDERALIST No. 67, at 389 (Alexander Hamilton) (ABA ed., 2009).

154. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1551 (Fred B. Rothman & Co. ed., 1999) (1833) (emphasis added).

155. Hartnett, *supra* note 124; see also Michael Herz, *supra* note 124.

156. See Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 64 (2006); Rappaport, *supra* note 123; Carrier, *supra* note 123.

157. Carrier, *supra* note 123, at 2224-25.

158. Pyser, *supra* note 156, at 64.

dures only when the Senate was *unable*, not merely *unwilling*, to perform its constitutional “advice and consent” function. For the first hundred years of the Republic, the Clause served an important function: Congress was in session for less than half the year and recessed for as long as nine months at a time.¹⁵⁹ On today’s congressional calendar, the powers granted under the Clause have been rendered essentially moot by the changed governmental context.

The objection raised by these scholars is driven by methodological rather than historical reasoning. They dispute the appropriate level of abstraction to interpret the Clause, without denying that the RAC was intended to promote the executive’s ability to continue the activities of government. The disagreement is about when, as Hamilton put it, the “general method was inadequate,”¹⁶⁰ thus meriting recourse to the supplementary method. The narrower reading does not reject the principle of effective governance; it only rejects its abstraction away from the circumstances of the eighteenth century to those of the twenty-first.

III. MODERN CONTEXT: RECESS APPOINTMENTS AS A CONSTITUTIONAL SAFETY VALVE

This Part continues and completes the groundwork for the use of translation by surveying the modern appointments landscape and the safety valve function served by recess appointments.

A. *Modern Appointments Paralysis*

Even as the size and scope of the federal government has continued to expand, presidential appointments have failed to keep pace, producing alarming rates of vacancies. From 1979 until 2003, executive agency positions were vacant an average of 25% of the time.¹⁶¹ After one year in office, President Obama had filled just 64.4% of Senate-confirmed executive agency positions—the worst showing of any of the past five administrations.¹⁶² The Senate took an average of 60.8 days to confirm Obama’s nominees in the first year, longer than Bush II (57.9), Clinton (48.9), or Bush I (51.5).¹⁶³ As of March 2010, Obama had 217

159. T.J. Halstead, *Recess Appointments: A Legal Overview*, in *RECESS APPOINTMENTS: AN END-AROUND PRACTICE* 1, 3 (Chambers Y. Nells ed., 2006).

160. *THE FEDERALIST* No. 67, at 389 (Alexander Hamilton) (ABA ed., 2009).

161. O’Connell, *Vacant*, *supra* note 9, at 962.

162. O’CONNELL, *WAITING*, *supra* note 9, at 2 (Reagan had 86.4%, Bush I had 80.1%, Clinton had 69.8%, and Bush II had 73.8%).

163. *Id.*

nominees pending in the Senate, who had been pending an average of 101 days, including 34 nominees pending more than 6 months.¹⁶⁴

The problem extends to the federal courts. The Judicial Conference of the United States coined the term “judicial emergencies” to draw congressional and executive attention to vacancies in the courts that faced particularly severe docket problems.¹⁶⁵ The Federal Bar Association reports that “[t]he judicial vacancies problem has reached [a] crisis point with more than one-third of the current 103 vacancies in the U.S. Courts of Appeals and the District Courts having existed for at least 18 months.”¹⁶⁶ President Carter enjoyed a confirmation rate of 92% for his circuit court nominees; Bill Clinton and George W. Bush had historically low rates of 71% and 74%.¹⁶⁷ The average time that lower court judicial nominees are awaiting confirmation has lengthened even as the rate of confirmation has decreased.¹⁶⁸ Between 1945 and 1980, the Senate took usually one, rarely two, and almost never more than three months to move from nomination to confirmation for lower court nominees.¹⁶⁹ Beginning with the 100th Congress (1987-1988), lower court nominees took an average of roughly six months to be confirmed. Since then, the timeline has only extended.¹⁷⁰

These vacancies are a heavy burden on effective governance. Professor Anne Joseph O’Connell suggests that “vacancies promote agency inaction,”¹⁷¹ and “[a]gencies without confirmed officials in key roles will be less likely to address important problems and less equipped to handle crises.”¹⁷²

Recently, the Republican Senate minority utilized appointments obstruction as a quasi-legislative power to obstruct the enforcement of a disfavored law. The Dodd-Frank financial reform bill authorized the creation of the Consumer Financial Protection Bureau. The Bureau was a key bargaining chip in the closely contested negotiation of the bill. Its ultimate form was a compro-

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

165. *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Nov. 30, 2011).

166. *Judicial Vacancies Fact Sheet*, FED. B. ASS’N, <http://www.fedbar.org/Advocacy/Judicial-Vacancies/Fact-Sheet.aspx> (last visited Nov. 30, 2011).

167. BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 38-39 (2006).

168. *Id.*

169. *Id.*

170. *Id.* at 39 (noting that “[d]uring the course of the Bush administration through April 7, 2006, it has taken, on average, 394 days to confirm a circuit court judge and 162 days to confirm a district court judge”).

171. O’Connell, *Vacant*, *supra* note 9, at 920.

172. *Id.*; see also O’CONNELL, WAITING, *supra* note 9, at 11.

mise—neither the fully independent agency some Democrats favored, nor removed entirely from the bill as some Republicans favored.¹⁷³ After the 2010 elections, the Republican minority wielded an effective one-house, legislative, line-item veto over the Agency by indefinitely stalling the confirmation of anyone nominated to lead it. Forty-four Republican senators signed a letter pledging to block not just Professor Elizabeth Warren, who was rumored to be Obama's likely choice to lead the Agency, but also *any other nominee* for the director position until Democrats agreed to major reductions in the Agency's power.¹⁷⁴ Now that the President has nominated former Ohio Attorney General Richard Cordray to lead the agency,¹⁷⁵ Republicans have kept their promise.¹⁷⁶

This method of obstruction does not only deal a political blow to President Obama and other Democrats who favor an activist Consumer Financial Protection Bureau, it also undermines the institutional values of the legislative branch. The Republican minority undermined the legislative bargaining process by demanding further concessions *after enactment*. Legislative compromise becomes more difficult when assurances are valid only until the next election cycle, when either side may renege on commitments and extract additional concessions through appointments obstruction. The Republican minority has wielded its "Advice and Consent" role as a quasi-legislative power, achieving through obstruction what it could not through the constitutionally required procedures of bicameralism and presentment.¹⁷⁷

Institutional developments may explain how the appointments system reached this level of dysfunction. The expansion of the federal bureaucracy has created more Senate-confirmed positions, which creates more potential for conflict and delay. Professor Michael Gerhardt observes that "far more presidential nominations are [now] potentially available for senators to oppose."¹⁷⁸

173. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1964 (2010).

174. Edward Wyatt, *Hearing over a Consumer Bureau Descends into Sharp Accusations*, N.Y. TIMES, May 25, 2011, at B1.

175. Binyamin Appelbaum, *Former Ohio Attorney General To Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1.

176. In December 2011, the Senate Republican majority blocked Cordray's nomination. Republican Senator Orrin Hatch explained that the Republican obstructionism was "not about the nominee, who appears to be a decent person and may very well be qualified." John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 8, 2011, at B1. Instead, as Senate Minority Leader Mitch McConnell stated, Republicans "won't support a nominee for this bureau—regardless of who the president is." *Id.* (internal quotation marks omitted).

177. *Cf. INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (ruling that the one-house legislative veto is unconstitutional).

178. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 61-62 (2003).

But, it also means that the President is responsible for finding, vetting, nominating, coaching, and replacing more nominees. Though the Senate is the usual target for appointments complaints, lag times between vacancies and nominations have also been growing, which suggests that the presidency bears responsibility as well.¹⁷⁹

Changing norms and practices of the Senate have also altered appointments and confirmation practice. Observers point to a decline in Senate “collegiality.”¹⁸⁰ Rising individualism and declining norms of reciprocity in the latter part of the twentieth century have led existing rules to acquire new potency.¹⁸¹ The Seventeenth Amendment, passed in 1913, made senators directly elected by voters rather than appointed by state legislatures, and it has been cited as an important facilitator of these institutional changes.¹⁸²

Various obstructionist maneuvers have proliferated. Most famously, the filibuster has become a default supermajority requirement for every appointment.¹⁸³ Secret and public “holds”¹⁸⁴ have proliferated since Senator Jesse Helms

179. See O’Connell, *Vacant*, *supra* note 9, at 35; see also Jonathan Bernstein, *Empty Bench Syndrome*, N.Y. TIMES, Feb. 8, 2011, at A27 (criticizing the Obama administration for long delays in getting judicial nominees to the Senate, and for failing to use the “bully pulpit” to promote these nominees once they got there, and noting that “unless the president speaks up about a relatively thankless task like getting nominations approved, his party’s senators are likely to focus on issues with greater political benefits”).

180. GERHARDT, *supra* note 178, at 66 (noting that various procedural changes “helped to change the Senate from a collegial body to one dominated by individuals with separate agendas”).

181. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 220 (1997).

182. GERHARDT, *supra* note 178, at 65-66 (“One obvious effect of the Seventeenth Amendment has been to make the Senate’s constitutionally imposed duties, such as the confirmation of presidential nominees, subject to electoral review, comment, and reprisal.”).

183. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 162-69 (2006) (describing the use of the filibuster by senators to stall President George W. Bush’s judicial nominees as key evidence of institutional decline in the Senate); see also SARAH A. BINDER & STEVEN S. SMITH, BROOKINGS INST., *POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE* (1996) (finding that filibusters had gone from an average of one per Congress in the 1950s to thirty-five in the 1991-92 Congress); Ezra Klein, *A Productive Congress Doesn’t Weaken the Case for Filibuster Reform*, WASH. POST’S WONKBLOG (Dec. 23, 2010, 9:00 AM), http://voices.washingtonpost.com/ezra-klein/2010/12/filibuster_draft.html (including a chart that shows the precipitous rise in cloture filings over the last ten Congresses as a proxy for the increasing salience of filibuster).

184. A “hold” is “[a]n informal practice by which a Senator informs his or her floor leader that he or she does not wish a particular bill or other measure to reach the

“held” all of President Clinton’s nominees for a North Carolina seat on the Fourth Circuit for six years. President Clinton ultimately filled the post with a recess appointment of a lawyer from another state.¹⁸⁵ Senator Ron Wyden utilized other maneuvers, including the two-hour rule,¹⁸⁶ to block Senate confirmation of two Bush appointees to the FTC.¹⁸⁷ President Bush subsequently gave recess appointments to both.¹⁸⁸ Most recently, using a combination of holds and a tactic called “tracking,”¹⁸⁹ Senator Richard Shelby delayed the confirmation of seventy Obama nominations in order to obtain leverage to gain special funding for home-state projects.¹⁹⁰ Obama gave recess appointments to several of these nominees.

The appointments process at the beginning of the twenty-first century is far from what was envisioned by the Framers. While there was surely no “golden age” of appointments, institutional developments have produced a modern appointments regime that threatens to paralyze effective government in unprecedented ways. The next Section examines the role played by recess appointments in this regime.

B. Recess Appointments as a Constitutional Safety Valve

Recess appointments are a vital mechanism to preserving the effective enforcement of the laws in the face of escalating appointments paralysis. They have taken on a distinct role in the separation of powers as a constitutional safety valve against growing Senate obstruction. The examples provided above of the appointments maneuvers utilized by Senators Helms, Wyden, and Shelby each ended in recess appointments by Presidents Clinton, Bush, and Obama,

floor for consideration.” *Glossary*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/hold.htm (last visited Oct. 12, 2011). “The Majority Leader need not follow the Senator’s wishes, but is on notice that the opposing Senator may filibuster any motion to proceed to consider the measure.” *Id.*

185. Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1711 (2001). The judge was Roger Gregory. *Id.*

186. The two-hour rule can “force an end to a committee meeting that has lasted longer than two hours when the Senate is in session.” James O’Connell, *A Brief Look at Recess Appointments*, ANTITRUST SOURCE (ABA, Chi.), Sept. 2004, at 1.

187. *Id.*

188. *Id.*

189. “Tracking,” also called the “dual-track system,” allows “the majority leader—with the unanimous consent of the Senate or the approval of the minority leader—to set aside whatever [is] being debated on the Senate floor and move immediately to another item on the agenda.” Barry Friedman & Andrew D. Martin, Op-Ed., *A One-Track Senate*, N.Y. TIMES, Mar. 9, 2010, at A27.

190. *Id.*

respectively. These incidents are typical of the safety-valve function that recess appointments play in the contemporary appointments regime.

As delays in confirmations have grown, Presidents have begun to make recess appointments during progressively shorter recesses. A 2008 Congressional Research Service report noted that “[i]t has become commonplace for Presidents to make recess appointments during recesses of less than 30 days.”¹⁹¹ Reagan made a recess appointment to the NLRB during a ten-day intersession recess.¹⁹² Clinton made one during a nine-day intrasession recess.¹⁹³ Political scientists have demonstrated that Presidents use the recess power in a conditionally strategic manner: when the expected policy benefits outweigh the expected political costs.¹⁹⁴ This finding supports the thesis that recess appointments have a safety-valve function: They permit Presidents to make a calculation that a particular appointment or set of appointments is needed and well worth the consequences of the political backlash that it may inspire.

Perhaps the most compelling demonstrations of the safety-valve function of recess appointments are the institutional harms that occur when the valve is blocked by the pro forma sessions. In *New Process Steel v. NLRB*,¹⁹⁵ the Court invalidated twenty-seven months of National Labor Relations Board opinions because the NLRB had been operating without the three-member quorum mandated under the statute. The quorum failure was a direct result of the pro forma sessions.¹⁹⁶ Senator Reid initiated the pro forma blockade for the first time in late 2007, just as the five-member board shrank to four upon the expiration of one board member’s term.¹⁹⁷ Two of the remaining four members were recess appointees whose terms were set to expire at the end of that year.¹⁹⁸ With no new confirmations expected,¹⁹⁹ and with the recess power effectively

191. HOGUE & BEARDEN, *supra* note 4, at 5.

192. *Id.* (citing Digest of Other White House Announcements, 18 WEEKLY COMP. PRES. DOC. 1662 (Dec. 23, 1982)).

193. *Id.* at 6 (citing Digest of Other White House Announcements, 32 WEEKLY COMP. PRES. DOC. 980 (May 31, 1996)).

194. See Pamela C. Corley, *Advice and Consent: Recess Appointments and Presidential Power*, 36 PRESIDENTIAL STUD. Q. 670, 678 (2006); Scott E. Graves & Robert M. Howard, *Ignoring Advice and Consent? The Uses of Judicial Recess Appointments*, 63 POL. RES. Q. 640 (2010).

195. 130 S. Ct. 2635 (2010).

196. *Id.* at 2638.

197. *Id.*

198. *Members of the NLRB Since 1935*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/members-nlr-1935> (last visited Nov. 8, 2011).

199. As a 2010 *Washington Post* article explained: “The board worked with only two members for more than two years because Democrats blocked President Bush’s nominees on complaints that they were biased in favor of business. Then Republicans blocked President Obama’s nominees, complaining that they were biased in

blocked, outgoing board members attempted to circumvent the statutory quorum requirement by vesting authority in the two-member board.²⁰⁰ As the Board's then-chairman Wilma B. Liebman explained, "We thought we were doing the right thing to keep the agency running."²⁰¹ The remaining two members—one Republican and one Democrat—wielded their authority conservatively, declining to rule on approximately sixty cases that would have set new precedents.²⁰² The NLRB relied on the legal advice of the top legal authority in the executive branch, the Office of Legal Counsel, in making this two-member gambit.²⁰³ Before it got to the Supreme Court, several circuit courts affirmed the move, holding that the two-member board had the authority to continue.²⁰⁴ The Supreme Court held that the two-member board lacked statutory authority to decide any cases during this period, and invalidated all of the roughly six hundred decisions.²⁰⁵

New Process Steel marks a new low point in the appointments gridlock. No branch escapes lasting institutional harm from this paralysis. Most obviously, the executive loses its ability to guide an independent agency's enforcement (or *non-enforcement*) of the laws. Congress's institutional values are also implicated, since this appointments obstruction amounts to a one-house legislative veto over a previously enacted statute. In the NLRB context, by blocking recess appointments, Congress effectively deprived the Board of its statutory authority to "prevent any person from engaging in any unfair labor practice . . . affecting

favor of union interests." Peter Whoriskey & Sonja Ryst, *National Labor Relations Board Decisions Were Illegal, Supreme Court Rules*, WASH. POST (June 18, 2010), http://www.washingtonpost.com/wpdyn/content/article/2010/06/17/AR201006175685_2.html.

200. *New Process Steel*, 130 S. Ct. at 2638.
201. Whoriskey & Ryst, *supra* note 199 (quoting Liebman) (internal quotation marks omitted).
202. *Id.*
203. Quorum Requirements, 27 Op. O.L.C., 2003 WL 24166831, at *1 (Mar. 4, 2003); see also *New Process Steel*, 130 S. Ct. at 2638 ("The Board's minutes explain that it relied on . . . an opinion issued by the Office of Legal Counsel (OLC), for the proposition that the Board may . . . 'issue decisions during periods when three or more of the five seats on the Board are vacant.'"); *id.* at 2650 (Kennedy, J., dissenting) ("In 2003, the Office of Legal Counsel advised that two members can operate as a quorum of a properly designated group, even if the other seats on the Board are vacant.").
204. See, e.g., *Narricot Indus. v. NLRB*, 587 F.3d 654 (4th Cir. 2010); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009).
205. *New Process Steel*, 130 S. Ct. at 2644.

commerce”²⁰⁶ for two years without going to the trouble of repealing the statute.²⁰⁷ This undermines the legislative compromise behind the agency’s implementing statute and sets a destabilizing precedent for future legislative bargains.

The judiciary suffers institutional harms as well. As of the time of the *New Process Steel* ruling, ninety-six of the invalidated NLRB decisions were on appeal in the federal courts: six at the Supreme Court and ninety in various courts of appeals.²⁰⁸ Dozens of these cases have now returned to the Board for new consideration, after which a new round of appeals in the courts will likely begin.²⁰⁹ The scarce judicial resources expended on the now-rescinded cases were wasted, since many cases must now be relitigated.²¹⁰

But, more than any governmental actor, it is the parties involved in these invalidated cases, as well as those third parties who are dependent on their results, who bear the brunt of the costs here.²¹¹ Countless workers, unions, businesses, and investors who depend on the NLRB have had their expectations upended.

At high cost to all three branches of government, and especially to the citizens who depend on the government’s effective operation, appointments paralysis reached a new low in *New Process Steel*. Yet, the Court did not seize the opportunity to address the pro forma sessions that precipitated the quorum failure that was really at the center of the case. If and when the Court has the opportunity to address the pro forma sessions, *New Process Steel* should be used as “Exhibit A” for the safety-valve function that recess appointments have come to play in the paralytic appointments regime.

IV. PRESERVING THE APPOINTMENTS SAFETY VALVE

Under the translation method of interpretation, pro forma sessions should be rejected as an unconstitutional burden on the President’s ability to take care that the laws be faithfully executed. This Part brings together the threads of the

206. 29 U.S.C. § 160(a) (2006).

207. Under *INS v. Chadha*, 462 U.S. 919 (1983), this de facto legislative veto power might itself provide a reason to hold these sessions unconstitutional.

208. See Press Release, NLRB, NLRB Outlines Plans for Considering 2-Member Cases in Wake of Supreme Court Ruling (July 1, 2010), <http://www.lrionline.com/wp-content/uploads/R-2762.pdf>.

209. See Press Release, NLRB, NLRB Issues First Decisions Involving Returned Two Member Cases (Aug. 5, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d458038ea81>.

210. See *id.* Updated information on the status of these cases is available at <https://www.nlr.gov/news-media/backgrounders/background-materials-two-member-board-decisions>.

211. Press Release, NLRB, *supra* note 209.

underlying principle of the RAC with the modern appointments context discussed in the previous two Parts. Before proceeding with this analysis, it will be useful to provide some more detail on the pro forma sessions themselves, and how this hypothetical challenge to these sessions might arrive before a court.

A. *The Facts*

Unlimited by judicial boundaries, the political branches have engaged in a series of maneuvers, repeatedly outflanking one another and culminating in the deployment of the pro forma sessions. This Section reviews those maneuvers.

1. The Executive's Three-Day Minimum Interpretation

In a 1993 DOJ brief in *Mackie v. Clinton*, executive branch lawyers suggested that a recess of the Senate for the purposes of the RAC must be at least three days long.²¹² The case was the first to raise the RAC question after the *Woodley I* panel stripped the executive of its power to make judicial recess appointments.²¹³ The *Mackie* brief pointed to Article I, Section 5 of the Constitution, which bars either house of Congress from adjourning for more than three days without the consent of the other. This demonstrates that the Framers did not consider one, two, or three day recesses to be constitutionally significant.²¹⁴ Thus, the DOJ argued, recess appointments could only be made where the recess lasted longer than three days.

The *Mackie* brief may have been a reaction to the threat of judicial review announced in the *Woodley I* case. By prescribing a limit on the recess power, the executive signaled a commitment to exercise its power within some defined limits in order to assuage judicial anxieties about a potentially boundless recess power. By providing a strong textual limit on its own authority, the executive may have sought to preempt a less favorable judicially constructed rule.²¹⁵ Professor Marty Lederman suggests that this three-day minimum was designed “to distract courts and others from the absurd ramification of [the executive’s] actual legal argument, which is that the President may make recess appointments every weekend, indeed, every night.”²¹⁶

212. HOGUE, *supra* note 12, at 2 n.9 (citing Memorandum of Points & Authorities, *supra* note 127, at 24-26); *see also supra* note 127 (discussing the background of the case).

213. *See Woodley I*, 726 F.2d 1328 (9th Cir. 1983), *rev'd en banc*, 751 F.2d 1008 (1985).

214. CHU, *supra* note 129, at 9 n.64.

215. *See supra* Section I.B.

216. Lederman, *supra* note 26.

The executive has continued to promote this three-day minimum position in subsequent briefs and opinions.²¹⁷ In its brief in *Evans v. Stephens*, the DOJ referred to recesses shorter than three days as “de minimis”—i.e., too small to be constitutionally recognized.²¹⁸ As of early 2010, the three-day minimum was still the reigning executive interpretation. Then-Deputy Solicitor General Neal Katyal, arguing the *New Process Steel* case before the Supreme Court, reiterated the position while describing for the Court the current status of the Obama administration’s nominees to the NLRB:

CHIEF JUSTICE ROBERTS: And the recess appointment power doesn’t work why?

MR. KATYAL: The—the recess appointment power can work in—in a recess. *I think our office has opined the recess has to be longer than 3 days.* And—and so, it is potentially available to avert the future crisis that—that could—that could take place with respect to the board.²¹⁹

Unmentioned in this exchange is the fact that the vacancies at the core of the *New Process Steel* litigation were occasioned by the pro forma sessions, which themselves grew out of the three-day minimum interpretation that Katyal articulated.

2. Senate Pro Forma Sessions

Throughout the George W. Bush administration, Democrats in the Senate made trouble for the President’s nominees. As a consequence, Bush made 171 recess appointments during his first six-and-a-half years in office.²²⁰ Bush’s recess appointments of two appellate judges, Charles W. Pickering to the Fifth Circuit and William Pryor to the Eleventh, and one diplomat, John Bolton as Ambassador to the United Nations, attracted the particular ire of the bypassed Democratic senators and other commentators.

In November 2007, Majority Leader Harry Reid organized individual senators to hold pro forma sessions every few days over the Thanksgiving break to prevent the recess appointment of James Holsinger as the new Surgeon General.²²¹ Democrats were adamantly opposed to his nomination.²²² Reid picked up

217. Brief for the Intervenor United States Supporting the Constitutionality of Judge Pryor’s Appointment as a Judge of this Court at 2, *Stephens v. Evans* (11th Cir. July 30, 2004) (No. 02-16424) (describing the three-day minimum as a “de minimis” exception); *id.* at 8 (citing congressional rules to the same effect); *id.* at 29-30 (citing U.S. CONST. art. I, § 5, cl. 4).

218. *Id.* at 2; *see also supra* Section I.C.

219. Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457) (emphasis added).

220. *See HOGUE & BEARDEN, supra* note 4, at 2.

221. *See sources cited supra* notes 2-3.

222. *See Harris, supra* note 3, at A15.

on the executive's three-day minimum interpretation, crafted more than a decade earlier by the DOJ in the *Mackie* case, and scheduled pro forma sessions to prevent the executive's own constitutional timer from expiring. The pro forma sessions succeeded; Bush never attempted the appointment. Democrats continued the practice over the remainder of the Bush administration, and prevented the President from making any additional recess appointments.

But the Democrats were soon beaten at their own game. In mid-2010, after the Democrats lost their filibuster-proof majority, Obama's nominations were delayed, held, and otherwise scuttled at a high rate.²²³ Approaching the midterm elections, Republicans threatened to "send back" Obama's nominees, which would force Senate committees to restart all confirmation processes, imposing substantial delays. Senate Minority Leader Mitch McConnell exploited this vulnerability, threatening to "send Obama's most controversial nominees back to the President if Democrats did not agree to schedule pro forma sessions."²²⁴ Democrats capitulated and initiated the pro forma sessions against their own party's President. Again, the maneuver was effective: Obama made no recess appointments. And, again, Republicans repeated the maneuver.²²⁵ What Reid had created to undermine a Republican President had been transformed into an extractable concession by the minority party.

B. Procedural Posture

Given their proven effectiveness against Presidents Bush and Obama, and as implemented by both majority and minority parties in the Senate, the pro forma sessions seem likely to become a steady fixture in the appointments regime. Or, to put it more ominously, they "threaten[] to become a permanent roadblock in the already dysfunctional appointments process."²²⁶ Future Presidents may be deprived of their power to make recess appointments, including in moments where they most need them. In ordinary circumstances, Presidents seem likely to follow the examples set by Bush and Obama (so far) and wait out, rather than directly challenge, the pro forma sessions. However, a political crisis—some event demanding strong and swift executive action—could force a President to "call the Senate's bluff." Imagine, for instance, the following scenario:

A large number of early resignations and preexisting vacancies leave the National Highway and Traffic Safety Administration without any high-level political leadership. The President nominates a new Administrator

223. See *supra* text accompanying notes 161-164.

224. Alexander Bolton, *Senate Blocks Recess Appointments with Deal Between Dems, GOP*, HILL (Sept. 29, 2010), <http://www.thehill.com/homenews/senate/121775-senate-blocks-recess-appointments>.

225. See sources cited *supra* note 8.

226. Bradbury & Elwood, *supra* note 14, at A19.

but the Senate regards the nominee as unacceptable, vows to block her confirmation, and arranges for pro forma sessions to block a possible recess appointment. Suddenly Mini Coopers begin to self-destruct at an extraordinary rate, injuring thousands. The crisis focuses national attention on the Agency as demands mount for strong federal action. But, the career bureaucrats running the Agency take only the most conservative, slow-moving steps. Under pressure, the President gives a recess appointment to his nominee, notwithstanding the ongoing pro forma sessions.

Assuming that potential plaintiffs find their way over the standing hurdle to challenge such an appointment in federal court,²²⁷ a court might be pressed to reach the merits and decide the constitutionality of these sessions. I have argued that the Court should apply the flexible, dynamic method adopted in the removal cases, rather than the minimalist approach of the RAC cases.²²⁸ The next Section applies this method to the pro forma sessions.

C. Analysis

By blocking off the constitutional safety valve, pro forma sessions constitute a violation of the action-promoting principle of effective law enforcement embodied in the RAC, and should therefore be struck down as unconstitutional.

As Part II showed, the RAC embodies the action-promoting principle of effective law enforcement. This principle is balanced by the action-constraining “check” provided by the Senate’s “advice and consent” function. Courts have the difficult task of determining the threshold at which the protection of one principle at the expense of another goes too far. In *Morrison v. Olson*, the Court found that though such congressional interference implicated executive control, it was permissible.²²⁹ Conversely, in *Free Enterprise Fund*, the Court found that Congress went too far in constricting the President.²³⁰

Locating the threshold point after which intrusion on a principle constitutes a violation is a contextual exercise. Part III above showed that as the ap-

227. A complete discussion of how or whether private parties might obtain Article III standing to litigate the pro forma sessions issue is beyond the scope of this Note. Different types of appointments present different issues, and some appointments may be effectively nonjusticiable. But, the various RAC cases surveyed in Section I.C do provide several pathways to standing. *See, e.g., United States v. Alocco*, 305 F.2d 704, 705 (2d Cir. 1962) (a convicted criminal defendant challenging the constitutionality of his trial judge’s recess appointment on appeal); *In re Farrow*, 3 F. 112 (C.C.N.D. Ga. 1880) (an ousted officer challenging the constitutionality of his recess-appointed replacement).

228. *See supra* Section I.D.

229. *See* 487 U.S. 654 (1988); *see also supra* text accompanying notes 65-71 (interpreting *Morrison*).

230. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *see also supra* text accompanying notes 72-76 (interpreting *Free Enter. Fund*).

pointments process has marched steadily toward governmental paralysis, recess appointments have taken on a critical safety-valve function, allowing the President to relieve the pressure of vacancies and delays, and paying the cost in terms of political backlash. This safety-valve function certainly does not preserve an *optimal* level of effective execution of the laws, but rather a minimally necessary level of enforcement, marking a constitutional threshold point. Depriving the executive of this last-resort mechanism would effectively erase the RAC—and the action-promoting principle it stands for—from the Constitution. The sessions skew the separation of powers too far in favor of the power-checking principle, and neglect the action-promoting principle embedded in the RAC. Like the two layers of for-cause removal in *Free Enterprise Fund*, a court should strike down the pro forma sessions as too great a burden on the President's ability to take care that the laws be faithfully executed.

A court following this removal method would be faced with the second-order decision faced by courts in the removal cases: whether to follow cases like *Free Enterprise Fund* and *Humphrey's Executor* and adopt a formalistic rule to guide future practice, or instead to follow *Morrison* by simply articulating the competing principles (as in the preceding paragraphs) and going no further than announcing this particular ruling. Both approaches are possible here.

A court could follow the formalist suggestion, advanced by various critics of the pro forma sessions, that the thirty-second sessions cannot be a valid obstacle to recess appointments because the Senate does not conduct any *real* business during those sessions.²³¹ Alternatively, a court could announce that there is *no* constitutionally designated minimum time for a recess, that the intertextualist move at the foundation of the three-day minimum interpretation is not constitutionally justified, and that a President is free to make recess appointments during any such recess if he is willing to bear the political costs.²³² However, it may be more advisable to refrain from announcing any rigid formalistic rule that is too determinative in this quickly changing area. Relying only on balancing principles, though it gives the parties less guidance for their behavior going forward, has the advantage of retaining more interpretive power going forward, in case a single ruling is unable to resolve decisively the prisoner's dilemma of appointments paralysis.

D. *An Imperial Presidency?*

Some commentators have greeted the arrival of the pro forma sessions with approval. Blake Denton lauded the pro forma sessions as an end to legislative acquiescence to the domineering executive's ability to recess appoint Article III judges: "Congress has made its distaste for Article III recess appointments ex-

231. See Williams, *supra* note 6; Bradbury & Elwood, *supra* note 14; Lederman, *supra* note 26.

232. See Williams, *supra* note 6; Bradbury & Elwood, *supra* note 14; Lederman, *supra* note 26.

pressly known. . . . [I]t is clear that recess appointments to Article III judgeships are no longer necessary to serve the public interest."²³³ Setting aside the fact that the pro forma sessions have been implemented to block nominees within the *executive* branch, Denton provides an appealing image of a Senate underdog cleverly turning the executive's own sinister machinations against itself.

The expansion of executive power is a major factor contributing to the deterioration of the appointments process.²³⁴ Moreover, the three-day minimum interpretation may confirm some commonly leveled criticisms against executive constitutionalism: It seems driven by political and power-based motives rather than *proper* constitutional considerations,²³⁵ contributes to the growth of an imperial presidency, and undermines predictability in legal administration.

Yet, a position that supports the pro forma sessions simply because it undermines the growth of executive power fails to take into consideration the impact that the pro forma sessions have on effective governance *beyond the executive*. The sessions also burden the legislature's own institutional values, the judiciary's allocation of its scarce resources, and, most importantly, the people's interest in effective law enforcement. As *New Process Steel* demonstrates, these sessions have already begun to have far-reaching costs on all of these interests.²³⁶ The pro forma sessions pose a threat to our government that far outweighs any victory in the battle against the imperial executive.

V. BEYOND THE SAFETY VALVE?

Even if a court were to reassure the availability of the constitutional safety valve, the contemporary appointments regime would still seem to fall far short of any *optimal* level of law enforcement. The dysfunction extends far beyond the use of pro forma sessions.²³⁷ Perhaps, then, a court could justify a broader intervention into this process. Once the court has discarded the minimalism that constricted previous RAC cases, it could use this case as an entry point to remedy the deeper dysfunction of the appointments regime.

Past reform failures by the Senate provide further justification for such intervention. Attempts at reform invariably come from senators of the same party as the sitting President (who are naturally eager to see appointees get into office quickly) and are invariably rejected by the minority party (who are reluctant to give up their obstructionist powers). This pattern suggests a structural and potentially intractable impediment to reform: While each party has expressed support for reform, parties will not give up their individual advantage when in the minority. Appointments reform, in other words, is a prisoner's dilemma:

233. Denton, *supra* note 23, at 776-77.

234. See sources cited *supra* note 150.

235. See *supra* text accompanying notes 212-215.

236. See *supra* Section III.B.

237. See *supra* Part III.

All parties would be better off with everyone cooperating, but each party faces an individual disadvantage from its cooperation. Given the harm that appointments paralysis does to all three branches and the structural incapacity of the political branches to agree on reform, courts could justify greater intervention into the appointments crisis thicket beyond striking down the pro forma sessions.

What form might such intervention take? Various proposals for reform have been raised from within the Senate chambers.²³⁸ In 1995, with Clinton in office, Democratic Senators Tom Harkin and Joe Lieberman proposed a filibuster phase-out plan for judicial nominations: The first vote for cloture would require 60 votes, followed by more debate, and then a second vote would require 57, then 55, and on down to a simple majority.²³⁹ Republican Senator Bill Frist proposed a similar plan while Bush was in office.²⁴⁰ More recently, in early 2011, Senator Tom Udall led a group of Senate Democrats in proposing reforms.²⁴¹

Outside the Senate, Professor Bruce Ackerman has argued for a reform that “requires a speedy up-or-down majority vote on executive nominations” but not judicial ones.²⁴² The Federal Bar Association proposed a “prompt up-or-down vote by the Senate on judicial nominees cleared by the Senate Judiciary Committee.”²⁴³ Chief Justice Rehnquist criticized the Republican-controlled Senate in 1997 for delaying confirmation of President Clinton’s nominees, noting that “[v]acancies cannot remain at such high levels indefinitely without eroding the quality of justice,” and arguing that, “after the necessary time for inquiry, it should vote him up or vote him down” to give the President another chance at filling the vacancy.²⁴⁴

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238. For a review of these and other proposals, see John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181 (2003).
239. Paul Krugman, Op-Ed., *A Dangerous Dysfunction*, N.Y. TIMES, Dec. 20, 2009, at A31.
240. Timothy Noah, *Why Democrats Should Kill the Filibuster: Did Robert Caro Read His Own Book?*, SLATE (June 5, 2003), <http://www.slate.com/id/2084031/>.
241. Carl Hulse, *Democrats Seek Changes in Senate Rules To End Procedural Roadblocks*, N.Y. TIMES, Dec. 25, 2010, at A21.
242. Bruce Ackerman, Op-Ed., *Filibuster Reform Both Parties Can Agree On: Presidents Should Get a Speedy Up-or-Down Vote on Executive Branch Nominees*, WALL ST. J., Jan. 4, 2011, at A15.
243. *Judicial Vacancies Fact Sheet*, FED. B. ASS’N, <http://www.fedbar.org/Advocacy/Judicial-Vacancies/Fact-Sheet.aspx> (last visited Nov. 30, 2010).
244. William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1, 1998, as reprinted in *Judiciary Report: Congress Is Prodded*, N.Y. TIMES (Jan. 1, 1998), <http://www.nytimes.com/1998/01/01/us/judiciary-report-congress-is-prodded.html?pagewanted=all&src=pm>; see also Linda Greenhouse, *Calling John Roberts*, OPINIONATOR, N.Y. TIMES (Oct. 21, 2010, 9:44 PM), <http://opinionator.blogs.nytimes.com/2010/10/21/calling-john-roberts/>.

The challenge for any court will be making the policy choices as to which reform is optimal. This inquiry raises doubts about the merits of the enterprise and may point back toward Choperian deference. The current dysfunctional process at least has the benefit of allowing the branches some room to maneuver and respond to changes in context. If the court were to construct a new constitutional barrier, it would deprive the branches of this flexibility and of the ability to adopt new optimal strategies over time. This problem is not game-ending, just game-changing. It leaves open two possibilities.

A. A Constitutional Default Rule

A court could fashion its remedy in the form of a constitutional default rule. Default rules “govern unless the parties contract around them.”²⁴⁵ Professors Ian Ayres and Robert Gertner were the first to introduce the concept of “penalty defaults,” which are not designed to give the parties what they “would have wanted,” but “to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.”²⁴⁶ In other words, “penalty defaults are purposefully set at what the parties would not want” in order to encourage the parties to “reveal information to each other or to third parties (especially the courts).”²⁴⁷

Using the concept of a “penalty default,” a court considering the problem of pro forma sessions could fashion a flexible remedy to the unconstitutionally paralytic appointments process. By using a default, the court could force reform while enabling the parties to revise the scheme should it prove unworkable.

A constitutional default rule on appointments could start small, perhaps requiring an up-or-down vote on all executive officer appointments within sixty days of the nomination, such that failure to vote on the nomination within that space constitutes a rejection of the nominee.

The next question is about what Ayres calls “altering rules”²⁴⁸—that is, the procedures by which parties may successfully contract around this substantive default. Perhaps the simplest method in this context would be to require a joint resolution signed by the President. Through this procedure, parties could revise this timeline, expand it to encompass judicial nominees, or add any other reforms.

This approach is plainly problematic. The effects of any judicially imposed reform are unpredictable; this reform will put pressure on the minority to permit an up-or-down vote, but it will also place pressure on the President to re-

245. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87 (1989).

246. *Id.* at 91.

247. *Id.*

248. See Ian Ayres, *Regulating Opt Out: An Economic Theory of Altering Rules*, 121 *YALE L.J.* (forthcoming 2012), available at <http://ssrn.com/abstract=1934412>.

spond to the faster rejection of his nominees, and on all parties to speed up the vetting process, and perhaps cause other secondary effects. Moreover, there are many unanswered questions: Can the President renominate a nominee once rejected? What about enforcement? How does this proposal square with the Court's established reluctance to intervene in the internal rules of the Senate?

In short, calibrating a rule in a way that forces the various parties to come together to renegotiate terms is a difficult, perhaps impossible task, far beyond the scope of this Note. Political scientists could help design an optimal default rule. For now, the best approach seems to be a subtler one.

B. A Subtler Approach?

It is preferable, and far more plausible, for a court to accomplish this intervention in a subtler fashion. Ewing and Kysar articulate a theory of "prods and pleas" built into the concept of separation of powers.²⁴⁹ Government actors approaching the boundaries of their own power "may still acknowledge the seriousness of that need and the desirability of action by more appropriate actors."²⁵⁰ Such acknowledgment is a familiar feature of RAC jurisprudence. As courts repeatedly deferred to the executive's broad interpretation of the recess appointment power, they occasionally signaled their discomfort with the status quo. Consider the Supreme Court's 2004 denial of certiorari in *Evans v. Stephens*, in which the Eleventh Circuit upheld President Bush's recess appointment of William Pryor.²⁵¹ The appointment came at the height of Bush's clash with the Senate over judicial nominees, and provoked a hostile reaction. The Supreme Court denied certiorari, accompanied by this enigmatic statement from Justice Stevens:

[I]t would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession "recesses."²⁵²

This is the jurisprudence of "prods and pleas." Though the Court declined to take the case for "valid prudential reasons," Justice Stevens nevertheless expressed doubt about the circuit court opinion, lest the executive assume seemingly limitless appointments discretion. Note the quotation marks around "recesses," which imply exactly the kind of doubt most likely to make a President nervous about overreaching in his use of the recess appointment power. Justice Stevens' statement "prods" the executive to exercise caution in making recess appointments; stronger judicial review remains a possibility.

249. Ewing & Kysar, *supra* note 50, at 354.

250. *Id.* at 354.

251. *Evans v. Stephens*, 544 U.S. 942 (2005).

252. *Id.*

In an opinion on the pro forma sessions, a court might include language suggesting, for instance: that Senate filibustering of judicial nominees was *likely* unconstitutional; that its stonewalling of any and all nominees for a position provided for in enacted legislation violated *Chadha's* bar against the legislative veto;²⁵³ that the President's failure to successfully fill a vacancy within some reasonable period violated the Take Care Clause; that his failure to *nominate* anyone to fill the vacancy exceeded his veto power; or the court might simply reiterate Chief Justice Rehnquist's suggestion that, after a reasonable time has elapsed, a judicial nominee should be entitled to an up-or-down vote.

Such dicta might "prod" the other branches to consider reforming the appointments regime without risking a full-blown intervention beyond the pro forma sessions. It could raise public consciousness about the appointments paralysis and pressure the Senate to enact reforms. And, it could signal judicial impatience over the appointments logjam, which might coerce the legislature into action.

CONCLUSION

Adjudications of the RAC have hewn to a minimalist approach; courts have avoided the judicial creativity and engagement with contemporary governmental context required by the removal case method. This judicial-capital-conserving approach has generated an appointments reform prisoner's dilemma: Even as the appointments paralysis has imposed substantial costs on the executive's ability to effectively enforce the laws, the legislature's ability to pass them, and the allocation of scarce judicial resources, the various factions of the Senate and the executive have been constrained from cooperating on reform by their individual interests. The pro forma sessions offer a unique opportunity for a court to depart from its minimalist record in RAC adjudications. Because they block the constitutional safety valve of recess appointments, a court should find that these pro forma sessions violate the principle of effective execution of the laws embedded in the RAC. Further, a court could use this opportunity to exert pressure on the Senate to change its obstructionist ways, either through a constitutional default rule, or more subtly through a "prod" or "plea."

The judiciary has long provided a strong, independent third voice in disputes between the executive and legislative branches over presidential personnel control. It is no coincidence that the escalating appointments faceoff between the political branches occurs in an area (recess appointments) where courts have been conspicuously absent. The pro forma sessions may provide an opportunity for a court to heal the injuries caused in part by judicial underreach, and to get our appointments regime back on course.

253. *INS v. Chadha*, 462 U.S. 919 (1983).

