On the Power of the President to Appoint his Magistrates

By Jeff Clark and Anthony Licata

INTRODUCTION

Given that it has taken American Presidents months on end to receive the Senate's confirmation of their appointments, President-elect Donald Trump has recently proposed the use of recess appointments, if necessary, to briskly stand up his incoming Administration early next year.[1] But in a Nation ruled by "a government of laws, and not of men,"[2] the question logically arises: is it ***lawful*** for the President to assemble his Executive Branch in a timely manner via recess appointments? As will be shown, the answer is ***yes***. The Constitution provides for the American President to discharge his electoral mandate with his own people in his own Executive Branch—the Administration's "Officers of the United States."[3]

EXECUTIVE SUMMARY

The letter and design, effect and purpose, as well as reason and spirit of the Constitution supply us with little room for doubt about answering this question in the affirmative. The *raison d'être*, the *telos* of the Appointments and the Recess Appointments Clauses, when construed in harmony with one another and against the backdrop of the classical Common Law of England and the Law of Nations which inform that *telos*, is to ensure the efficient appointment and as-near-as-possible perpetual commission of subordinate officers under the direct charge of the President, acting as the sole supreme chief executive magistrate of the United States. These appointment powers ensure that he is equipped with maximal capacity to discharge—with the "vigor," "decisiveness," "energy," and "dispatch" (to use our modern spelling) envisioned by the Framers—the indispensable prerogative of the executive power to "take Care that the Laws be faithfully executed" on behalf of and for the "general Welfare" of the entire nation.

Historical, traditional, and precedential interpretations, executions, and practices by and among all three constitutional branches of government overwhelmingly affirm this vision of the two Appointments Clauses in the Constitution. This was the will of the Framers and the Ratifiers. And so this vision serves as the lodestar of construction for discerning the proper scope of the President's power over the appointment of his principal Officers as against the role of the Senate.

We find that the advice and consent for appointment of nominees to principal Offices is not a constitutional "prerogative" of the Senate. At best, it is no more than and no less than a check or qualification on the inherent, pre-constitutional executive power to appoint all officers

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[1] Donald J. Trump (@realDonaldTrump), X (Nov. 10, 2024, 2:21 PM), https://x.com/realdonaldtrump/status/1855692242981155259?s=46&t=ZOcQqLA_CNE4I0D5pEW0kg.

[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.).

[3] U.S. Const. art. II, § 2, cl. 2.

and magistrates who act under the color of law and in the administration of government, and who derive the entirety of their authority from and are duly subordinate to the Chief Magistrate—the head of our Nation.

Even factoring in the post-nomination advice-and-consent check of the Senate on the traditionally absolute executive power to appoint subordinate executive officers, the appointment power remains substantially vested in the President under the Appointments Clause regime erected by Article II. The President retains absolute authority over the nomination of (i.e., unfettered discretion to select) every Officer to be considered by the Senate for confirmation. Whereas the Senate's window of advice-and-consent authority is confined to mere binary approbation (i.e., aye or nay) of the President's personally selected nominees for appointment to principal Offices, and nothing more. The Senate improperly intrudes upon presidential appointment prerogative when it seeks to impose any additional constraints upon or intrudes any further into his discretionary decision-making regarding whom to nominate to serve to fill principal Offices.

Senate committee referrals and the summoning of presidential nominees for lengthy hearings and invasive inquisitions were completely foreign to those who framed, ratified, and were the first to interpret and act under the Appointments Clauses. Under the original historic mode of confirmation, once the President submits to the Senate his nomination for appointment to a particular Office, the President of the Senate would assign a day for consideration thereof, and the President's nominees should be taken up on the designated day in executive session, on the floor only, and with the appointment assented or dissented to by senators via live voice vote right then and there. That historic model is the touchstone by which to measure the health of the confirmation process.

Whenever possible, the Senate should strive to discharge its advice-and-consent duty on the President's nominations for appointment to principal Offices within just one or two days. Indeed, as a historical matter, the President had a procedural right to be present while the Senate takes up the "purely executive" business of advice and consent on presidential appointments, wherein the Senate's agency is to act purely as a "Council only to the President." The President also arguably has a right to preside over such proceedings himself and order the Senate to convene at "any other place" outside of the Senate chamber to conduct such proceedings.

Under the Recess Appointments Clause, which is a constitutional co-equal with the Appointments Clause, the President's constitutional power to recess appoint Officers to vacant Offices without the advice and consent of the Senate is triggered either by an inter-session recess of the Senate ***or by*** an intra-session recess of the Senate. However, a Senate Recess of more than 3 days but less than 10 days is ***presumptively*** too short to trigger the President's recess-appointment power. The Senate is considered to be in session when it says it is in session, so long as it retains the mere capacity to transact Senate business under its own rules, which is why the "*pro forma*" (effectively faux) sessions the Senate currently purports to conduct do not count as recess periods.

If the Senate is in recess for at least 10 days, however, the President may grant recess commissions to fill up all vacancies in Offices that may happen to arise during the recess and that may happen to exist during the recess but only arose while the Senate was in session. Recess

commissions granted by the President to fill vacant Offices retain constitutional validity until either the Senate passes upon the recess appointee for permanent appointment to the Office or otherwise until the end of the next session of the Senate. Absent Senate confirmation, an inter-session recess appointment typically permits the recess appointee to serve for about one year, while an intra-session recess appointment typically permits the recess appointee to serve for one and a half, or even almost two full years depending on the point in time during a session when the President makes a recess appointment.

A President who grants a recess commission traditionally also seeks permanent appointment of the recess appointee to the Office by simultaneously submitting his nomination to the Senate for full consideration under the advice-and-consent check. ***Thus, recess appointments do not bypass the Senate***, but rather serve to ensure that the President and the Senate always have at least a full session to take up the advice and consent business on the President's recess appointee. But even if the Senate refuses to confirm one of the President's recess appointees for permanent appointment by the time his recess commission expires, the President may still designate his recess appointee, in succession to the recess commission, for continued performance of the functions and duties of his Office "temporarily in an acting capacity" under the Federal Vacancies Reform Act of 1998.

Conventionally, on account of having been appointed to the Office by one of the methods specified by the Constitution itself, a recess appointee receives pay on the same plane as any Senate-confirmed officer. This was attempted to be subverted by the Pay Act Amendment of 1940, which purports to prohibit the use of funds to pay any recess appointee to a vacancy that existed while the Senate was in session. However, that statute unconstitutionally encroaches upon presidential appointment power in two respects we detail below, as well as infringes upon federal judges' guarantee to receive compensation for recess-appointed service. As the supreme constitutional Executor of the laws with the independent obligation to interpret and determine the validity of the enactments, it is within the province of the President's authority to disregard and override the appropriations restrictions codified under the Pay Act Amendment of 1940 and thereby freely withdraw and dispense funds for the compensation of his recess-appointed Officers. This comports with the standard course taken against congressional appropriation restrictions that unconstitutionally infringe upon the executive power.

Finally, the Presidential Adjournment Clause vests in the President the power to adjourn both Houses of Congress to such time as he thinks proper when they are in disagreement on whether and when to adjourn. According to all nine justices of the 2014 Supreme Court in a seminal constitutional case, *NLRB v. Noel Canning*, this Clause of the Constitution empowers the President, when supported by enough allies in Congress, to force a recess of the Senate for the 10-plus days required to authorize his constitutional authority to make recess appointments without the advice and consent of the Senate. Although no President has ever utilized this power, the Framers nonetheless intended to provide a meaningful, yet limited residual grant of the pre-constitutional executive power to summon, prorogue, or dissolve Parliament. According to their understanding, the President's power to adjourn Congress is indispensable to the proper operations of government, and serves as the only peaceable mechanism for terminating a controversy that distracts the government from serving the public.

ANALYSIS

I.

Article II of the Constitution provides that all of "[t]he executive Power" of the United States "shall be vested in a [single] President,"[4] who alone is charged with the indispensable duties and prerogatives to "receive Ambassadors and other public Ministers," "take Care that the Laws be faithfully executed," and "Commission all the Officers of the United States."[5] Article II further vests in the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties" and "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other [principal] Officers of the United States, . . . which shall be established by Law."[6] Congress "may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone,"[7] while the President alone "shall have Power to fill up all Vacancies [in Offices] that may happen during the Recess of the Senate."[8] The President is also granted exclusive authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" and "grant Reprieves and Pardons for Offenses against the United States."[9] On top of all this, the President is bestowed with the highest military Office of the Federal Republic: the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."[10]

It is a foundational constitutional axiom that—subject ***only*** to such "participation of the Senate in the appointment of Officers and the making of Treaties" as well as the "right of the Legislature 'to declare war and grant letters of marque and reprisal'"—the "Executive Power of the Union is ***completely lodged*** in the President."[11] As concisely articulated by Hamilton: "The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the ***exceptions and qu[a]lifications*** which are expressed in the instrument."[12] This construction requires no more than a plain reading of the constitutional text. Article II omits of any semantic limitation attached to the general investment of "executive Power" in the President, whereas Article I expressly limits the investment of "legislative

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[4] U.S. Const. art. II, § 1, cl. 1.

[5] *Id.* art. II, § 3.

[6] *Id.* art. II, § 2, cl. 2.

[7] *Id.*

[8] *Id.* art. II, § 2, cl. 3.

[9] U.S. Const. art. II, § 2, cl. 1.

[10] *Id.*

[11] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793) (emphasis added); *see also* Thomas Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Relations* (Apr. 24, 1790) ("The Constitution has divided the powers of government into three branches . . . [and] has declared that 'the Executive powers shall be vested in the President,' submitting only special articles of it to a negative by the Senate.").

[12] *Id.* (italics in original); *see also Myers v. United States*, 272 U.S. 52, 118 (1926) ("The words of [Article II,] section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used.")

Powers" in Congress to only those "herein granted," i.e., positively enumerated elsewhere in the same Article.[13]

By thus conferring upon a single head of state this otherwise plenary endowment of "executive Power,"[14] a well-developed term of art in the common law and in the law of nations familiar to 18th century contemporaries, the Framers modeled the American Presidency (and the various powers, duties, and prerogatives that accompany it) off of the British Crown—borrowing and importing into Article II the rich, centuries-long traditions of regal and imperial statecraft from their not-so-distant ancestors in England and Continental Europe.[15] Indeed, following his

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[13] *Compare* U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States"), *with id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States") (emphasis added).

Hamilton explained that "the difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms" for vesting power in the President, and that "[t]he different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference." Hamilton, *Pacificus No. 1*. Accordingly, Article II ought "to be considered as intended . . ., to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power." *Id.*; *see also Myers*, 272 U.S. at 118 ("The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, . . . [t]his is the same construction of article 2 as that of Alexander Hamilton"); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 34–35 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) ("By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the 'executive Power' of the Federal Government.").

[14] *See Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (explaining that the Vesting Clause "does not mean ***some of*** the executive power, but ***all of*** the executive power" (italics in original)). It has since been generally accepted within the contemporary Supreme Court and broader legal community that Justice Scalia's lone dissent in *Morrison* was correct. *See, e.g.*, *Trump v. United States*, 144 S. Ct. 2312, 2334 (2024) (citing *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting)).

[15] *Compare* Hamilton, *Pacificus No. 1* (explaining that "the *Executive Power* of the Union is completely ***lodged*** in the President" (emphasis added)), *and id.* ("[T]he general ***Executive Power*** of the Union is ***vested*** in the President" (emphasis added)), *with* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *50 (1765) (explaining that "as with us [in Great Britain] the ***executive power*** of the laws is ***lodged*** in a single person" (emphasis added)), *id.* at *190 ("The supreme ***executive power*** of these kingdoms is ***vested*** by our laws in a single person, the king" (emphasis added)); *and* Emer de Vattel, THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, bk. I, ch. XIII, § 162 (1758) ("The ***executive power*** naturally belongs to the sovereign,—to every conductor of a people: he is supposed to be ***invested*** with it, in its fullest extent, when the fundamental laws do not restrict it.") (emphasis added).

Blackstone's *Commentaries*, particularly the seminal volume concerning public law, as well as Vattel's *Law of Nations*, were treated as authoritative by the Founding Generation. *See* M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 112 (1998); William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L. J. 1559, 1567 n. 57 (2018); *see also* Hon. Paul B. Matey, *"Indispensably Obligatory": Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967, 972–73 (2023) ("[A]ll the formative documents of the Framing Era were drafted by legal thinkers steeped in Blackstone's theories." (citing James Madison, Address to the Virginia Convention (June 18, 1788) (directing the Virginia Convention's attention to "a book which is in every man's hand—Blackstone's Commentaries"))); Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967) ("In pamphlet after pamphlet the American writers cited . . . Vattel on the laws of nature and of nations, and on the principles of civil government."). So too shall we treat them as authoritative sources of general law that inform and give content to the Constitution and laws of the United States. *Cf.* Tamar Herzog, EUROPEAN LAW AND THE MYTHS OF A SEPARATE ENGLISH LEGAL SYSTEM 22–23 (2018) ("[B]oth English and continental

restatement of the powers enumerated under Article II, Hamilton went as far as to acknowledge in *The Federalist Papers* during the Ratification Debate that "[i]n most of these particulars, the power of the President will resemble equally that of the king of Great Britain."[16]

Like their English forebears, the architects of Article II emphasized that a "***vigorous***" and "***energetic*** Executive" is fundamental to "the steady administration of the laws" and "good government" generally, while cautioning, on the other hand, that a "feeble Executive implies a feeble execution of the government."[17] They accordingly understood that the "unity" of near-absolute executive power in the President, as the "only person who alone composes a branch of government,"[18] would be most "conducive to energy" in the administration of federal law and of the federal government as a whole.[19] To that end, the Framers' decision to vest the Executive Power unitarily was simultaneously their decision to vest in the President the ***"[d]ecision, activity, secrecy, and despatch***" which "characterise [*sic*] the proceedings of ***one man***, in a much more eminent degree, than the proceedings of any greater number."[20] And hence with respect to the Executive Branch, they ultimately sought to generate "***energetic, vigorous, decisive, and speedy*** execution of the laws by placing in the hands of a ***single***, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many."[21]

Accordingly, while the Appointments Clause grants to the Senate an advice-and-consent qualification on the appointment of executive officers and, in conjunction with the House, the authority to statutorily create such offices in the first instance,[22] the "entire 'executive Power'" to

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law formed part of the very same legal tradition. Their specific technologies or solutions might have varied to some degree . . ., but they shared a common genealogy that bound them together more strongly than that which drew them apart. . . . English common law and continental civil law formed part of a single European tradition from which they both drew as well as contributed.").

[16] The Federalist No. 69, at 464 (J. Cooke ed. 1961) (Alexander Hamilton).

[17] The Federalist No. 70, at 471–72 (Alexander Hamilton) (emphasis added).

[18] *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020).

[19] The Federalist No. 70, at 472 ("As far, however, as [the experience of other nations] teaches any thing, it teaches us not to be enamoured of plurality in the Executive."); *cf.* 1 Blackstone, COMMENTARIES *50 (observing that because "the executive power of the laws is lodged in a single person," the kings of England "have all the advantages of ***strength*** and ***despatch***, that are to be found in the most absolute monarchy" (emphasis added)); *id.* at *250 ("Were [the executive part of government] placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create *weakness* in a government; and to unite those several wills, and reduce them to one, is a work of ***more time and delay than the exigencies of state will afford***." (emphasis added)).

[20] The Federalist No. 70, at 472, 476 (concluding that "the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution") (emphasis added); *see also* 18 WRITINGS OF GEORGE WASHINGTON 356–357 (J. Fitzpatrick ed. 1939) (pleading with the Continental Congress to create a single executive who can "act with ***dispatch*** and ***energy***" (emphasis added)); *cf.* 1 Blackstone, COMMENTARIES *250 ("[T]he executive part of government . . . is wisely placed in a single hand by the British constitution, for the sake of **unanimity, strength, and despatch**." (emphasis added)).

[21] *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (emphasis added).

[22] *See* U.S. Const. art. II, § 2, cl. 2 (Appointments Clause) (providing that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone").

appoint, remove, supervise, command and control each and every one of these executive officers and offices "belongs to the President alone" under Article II.[23] Writing as Publius, Hamilton declared that subordinate executive officers "ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence."[24] James Madison agreed, proclaiming on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[25] Echoing Hamilton and Madison, President Washington explained in his correspondence with a foreign diplomat that by virtue of the "impossibility that one man should be able to perform all the great business of the State," lesser executive officers are instituted and appointed to "assist the supreme Magistrate in discharging the duties of his trust."[26] And as Chief Justice Taft would later amplify while writing for the Supreme Court, the "ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power," which necessarily includes the power of "appointment and removal of executive officers" and of "supervis[ing] and guid[ing] their construction of statutes under which they act."[27]

Here especially, the Framers were drawing from the wellspring of "executive power" in the English and Continental European traditions as expounded by Blackstone and Vattel; each noted the inherent prerogative of the chief magistrate or head of state of a nation to commission assistants and deputies with the cloak of magistracy to aid in his administration of the law, which has been a definitive axiom of the executive power in the Western legal tradition dating all the way back to Imperial Rome.[28] From the Framers' perspective, crystallizing this centuries-long tradition in our Constitution would ensure that the President, as sole supreme Chief Magistrate of the United States, is fully equipped with the means necessary (*i.e.*, deputy magistrates) to "vigorously" and "decisively" exercise, with "energy" and "dispatch,"[29] the various duties and

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[23] *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (quoting U.S. Const. art. II, § 1, cl. 1); *Myers*, 272 U.S. at 135, 164.

[24] The Federalist No. 72, at 487 (Alexander Hamilton).

[25] 1 Annals of Cong. 463 (1789) (James Madison).

[26] 30 Writings of George Washington 334.

[27] *Myers*, 272 U.S. at 135, 164; *cf* Vattel, The Law of Nations, bk. I, ch. XIII, § 162 ("[T]he conductor of the state . . . should be the ***guardian*** of the law; he should ***watch over*** those who are invested with authority, and ***confine*** each individual within the bounds of duty." (emphasis added)).

[28] *See, e.g.*, 1 Blackstone, Commentaries *250 ("The King of England is therefore not only the chief, but properly the sole, magistrate of the nation, all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor" (citing 1 Giovanni Vincenzo Gravina, Origines Juris Civilis 103 (1713))); Vattel, The Law of Nations, bk. I, ch. XIII, §§ 161, 163 ("The degree of power intrusted by the nation to the head of the state, is then the rule of his duties and his functions in the administration of justice. . . . [B]ut in all cases, he should be the guardian of the law; he should watch over those who are invested with authority, and confine each individual within the bounds of duty. . . . As [he] cannot personally discharge all the functions of government, he should, with a just discernment, reserve to himself such as he can successfully perform, and are of most importance,—intrusting the others to officers and magistrates who shall execute them under his authority." (citing Institutes of Justinian, pr. (535 A.D.)).

[29] The Federalist No. 70, at 471–72.

prerogatives flowing from his near-plenary grant of executive power—especially the faithful and steady administration of all "Laws of the United States"[30] to promote the common good, or "general Welfare,"[31] of the United States.[32]

In furtherance of this constitutional *telos*, the Framers additionally saw to it that, notwithstanding the senatorial advice-and-consent qualification on appointments,[33] the President "shall have Power to fill up all Vacancies [in Offices] that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[34] As President Monroe's Attorney General, William Wirt, propounded in his cornerstone opinion interpreting the Recess Appointments Clause: "The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."[35] Pursuant to the same end, the Framers not only contemplated, but went as far as to constitutionally prescribe an intimate role for the Executive Branch to play in the Senate's exercise of its advice-and-consent check on the President's appointment power.[36]

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[30] U.S. Const. art. II, ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

[31] U.S. Const. pmbl.; *cf.* The Federalist No. 57, at 384 (James Madison) ("[T]he aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the ***common good*** of the society." (emphasis added)); James Otis, *The Rights of the British Colonies Asserted and Proved* (1763) ("But let the *origin* of government be placed where it may, the end of it is manifestly the good of ***the whole***. *Salus populi supreme lex esto*, [i.e., 'Let the highest law be the people's well being,'] is of the law of nature, and part of that grand charter given the human race." (italics in original)); 1 Blackstone, COMMENTARIES *125 (observing that "natural liberty [could be] so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public" (citing INSTITUTES OF JUSTINIAN, 1.3.1)); St. Thomas Aquinas, SUMMA THEOLOGIAE, I-II, q. 96 a. 1 (1485) ("Now the end of law is the common good; . . . [and] the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times.").

[32] *See* James Wilson, LECTURES ON LAW, pt. I, ch. X (1790–91) ("[T]hough [wise and good laws] are essential, they are so only as means. If we stop here, all that we have done is nugatory and abortive. The end is still unattained; and that can be attained only when the laws are vigorously and steadily executed."); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 538–39 (M. Farrand ed. 1911) (James Wilson) ("Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute."); Remarks Of James Wilson *in The Pennsylvania Convention to Ratify the Constitution of the United States* (Dec. 1, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 450 (John P. Kaminski, *et al.*, eds.) ("I would not have the legislature sit to make laws which cannot be executed. It is not meant here that the laws shall be a dead letter: it is meant that they shall be carefully and duly considered before they are enacted, and that then they shall be honestly and faithfully executed."); *cf.* 1 Blackstone, COMMENTARIES *270 ("[T]he manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points . . . are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as [he] shall judge necessary."); Cicero, THE REPUBLIC AND THE LAWS, at 150–51 (Niall Rudd trans. 1998) (51–46 B.C.) ("[T]he magistrate's function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact, it is true to say that a magistrate is a speaking law, and law a silent magistrate.").

[33] *See* U.S. Const. art. II, § 2, cl. 2 (Appointments Clause).

[34] U.S. Const. art. II, § 2, cl. 3 (Recess Appointments Clause).

[35] *Executive Authority to Fill Vacancies*, 1 Op. A.G. 631, 632 (1823).

[36] *Compare* Appointments Clause, *with* U.S. Const. art. I, § 3, cl. 4 (President of the Senate Clause), *and id.* art. II, § 3 (Presidential Adjournment Clause).

Under Article I, they explicitly clothed the "Vice President of the United States" with the Office of "President of the Senate" plus one vote to cast whenever the Senate is "equally divided" on a matter.[37] This deems the highest officer below the President, *virtute officii*, the formal presiding officer of all Senate advice-and-consent proceedings with regard to principal Officers appointed by the President himself.[38] Under Article II, moreover, the Framers explicitly bestowed upon the President the monumental authority to bring the entire Legislative Branch to a grinding halt and implicitly pull toward himself the will of the Senate with regard to appointment of principal Officers: "he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."[39] This empowers the President, under designated circumstances, to exert such direct control over the legislative schedule as to determine when the Senate is in Session or in Recess—which carries the legally dispositive consequence of when the Appointments Clause or the Recess Appointments Clause is in effect for principal Officers appointed by the President himself.[40] In short, the Constitution "gives the President . . . a way to ***force a recess***."[41] Justice Story remarked that the President's power in this respect is "indispensable to the proper operations, and even the safety of the government" since it is "the only peaceable way of terminating a controversy, which can lead to nothing but distraction in the public councils."[42]

The foregoing bird's-eye view, on its own, serves to illustrate that the efficient appointment and perpetual commission of subordinate executive officers is thus intrinsic to the investment of near-absolute executive power in a unitary President—and by extension—the President's capacity to carry out his indispensable prerogative to "take Care that the Laws be faithfully executed" on behalf of and for the general welfare of the entire Nation.[43] On the subject of executive power, the Framers, more than anything, understood that the President's "selection of administrative officers is essential to the execution of the laws by him" since, as the sole

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[37] *Id.* art. I, § 3, cl. 4.

[38] *See* 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION §§ 732–33, 735–37 (1833).

[39] U.S. Const. art. II, § 3; *see* The Federalist No. 69 (explaining that the President is vested with the power to "adjourn the national legislature in the single case of disagreement about the time of adjournment"); *cf.* Frederic Maitland, CONSTITUTIONAL HISTORY OF ENGLAND 422 (1909) (explaining that the King of England's prerogatives included the powers to, *inter alia*, summon and adjourn Parliament).

[40] *See NLRB v. Noel Canning*, 573 U.S. 513, 550–51 (2014) (recognizing the President's Convene and Adjourn Clause powers as "exceptions" to the Senate's general "control over its schedule" for purposes of determining when the recess-appointment power applies).

[41] *Id.* at 555 (citing U.S. Const. art. II, § 3).

[42] 3 Story, *Commentaries* §§ 1556–57; *cf.* 1 Henry Hallam, CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 173, 188, 193–94, 198–99, 212, 215, 246–52 (William S. Hein Co. 1989) (1827) (recounting historical instances of the Stuart dynasty refusing to call Parliament into session or dissolving Parliament in order to avoid dealing with a pesky, rogue, and/or factional legislature and summoning Parliament into session or continuing Parliament indefinitely in order to work with a compliant legislature); 2 *id.* at 323–24, 428–30, 440–41, 446 (same); 3 *id.* at 57–60, 73–75 (same).

[43] U.S. Const. art. II, § 3 (Take Care Clause); *see Printz v. United States*, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints[.]" (citation omitted)).

supreme Chief Magistrate of the United States, he must necessarily "supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which [Article II] of the Constitution evidently contemplated in vesting general executive power in the President alone."[44]

In the Sections that follow, we provide a closer examination of each of the aforementioned powers at the President's disposal for securing the efficient appointment and perpetual commission of subordinate executive officers, such that he can fully equip himself with the essential means for "vigorously" and "decisively" exercising, with "energy" and "dispatch," the various duties and prerogatives of his executive power.

II.

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[45] The Recess Appointments Clause, on the other hand, provides that the President, full stop, "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."[46]

In this section, we offer a reading of both the Appointments Clause and the Recess Appointments Clause that places the two in harmony with one another[47] and with the broader classical constitutional backdrop outlined in Section I, *supra*.[48] By further relying on historical, traditional, and precedential interpretations, acts, and practices—by and among all three constitutional branches of government—our construction seeks to discern the proper scope of the President's power over the appointment of principal Officers as it relates to that of the Senate under the Appointments Clauses.[49]

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[44] *Myers*, 272 U.S. at 117, 135.

[45] U.S. Const. art. II, § 2, cl. 2 (Appointments Clause).

[46] U.S. Const. art. II, § 2, cl. 3 (Recess Appointments Clause).

[47] *Cf. Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532–33 (2022) (instructing that a "natural reading" of multiple Clauses appearing in the same section of the Constitution would "suggest the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others'").

[48] *Cf.* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *59 (1765) ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the ***words, the context, the subject matter, the effects and consequence, or the spirit and reason*** of the law." (emphasis added)).

[49] *Cf. id.*; 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908) ("[It] was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (Marshall, C.J.) ("A doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which . . . the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (providing that an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and

A.

At the outset, it is important to establish that the Courts and the Executive Branch have firmly rejected any notion that "a recess appointment is somehow a constitutionally inferior procedure, not entirely valid or in some way suspect" based on the argument that "the normal appointment process envisioned by the Constitution is nomination by the President with confirmation by the Senate."[50] Such an argument rests on a faulty "assumption that the Constitution precludes us from making,"[51] because the "Supreme Court has unequivocally stated that '[t]he Constitution . . . must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.'"[52] The Appointments Clause taken in juxtaposition with the Recess Appointment Clause is no exception. A recess appointee, just like a Senate-confirmed appointee, "is appointed by one of the methods specified in the Constitution itself . . . he holds the office; and he receives its pay."[53] Furthermore, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity."[54]

It is also essential to establish that the Appointments Clauses, viewed in light of their broader position within the ordering of executive power in the American constitutional tradition and in the pre-constitutional classical law tradition, together ought to be construed according to their "spirit, reason, and purpose,"[55] or reduced to one word, their *telos*.[56] Attorney General

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weighty evidence of its true meaning."); *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) ("A practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." (cleaned up)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore[,] the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government . . . give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

[50] *Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996); *see also Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 215 (2002) (citing *Swan*, 100 F.3d at 987).

[51] *Swan*, 100 F.3d at 987.

[52] *United States v. Woodley*, 751 F.2d 1008, 1009–10 (9th Cir. 1985) (quoting *Prout v. Starr*, 188 U.S. 537, 543 (1903)).

[53] *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 215 (citing *Swan*, 100 F.3d at 987).

[54] *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979).

[55] *Executive Authority to Fill Vacancies*, 1 Op. A.G. 631, 631–34 (1823) (Wirt, A.G.); *cf.* 1 Blackstone, COMMENTARIES *61 ("[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.").

[56] *Cf.* Aristotle, NICOMACHEAN ETHICS bk. X, ch. 7, 1177a11–1177b26 (c. 340 B.C.); St. Thomas Aquinas, SUMMA THEOLOGIAE, I-II, q. 90 a. 1–2, q. 95 a. 1 (1485); *see generally* Hon. Paul B. Matey, *"Indispensably Obligatory": Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967, 968 (2023) (explaining "the natural purpose of the law," its attachment to "traditional moral reasoning," and its grounding in the "'whole teleological conception of the aims of government'" (quoting Adrian Vermeule, COMMON GOOD CONSTITUTIONALISM 63 (2022))); Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 957 (2021) (explaining the necessity of "reconcil[ing] the *ratio legis* [i.e., the reason or purpose

William Wirt suggested as much in his 1823 advisory opinion addressed to President James Monroe on *Executive Authority to Fill Vacancies*.[57] And in its landmark 2014 decision in *NLRB v. Noel Canning*,[58] the Supreme Court adopted wholesale Attorney General Wirt's 1823 opinion, and specifically the "'spirit, reason, and purpose'" method of interpreting the Appointments Clauses, into the Court's own jurisprudence on the Recess Appointments Clause.[59]

But what is the *telos* of the Appointments Clauses? That is, what shall serve as the lodestar for how we are to understand, interpret, and apply the Appointments and/or the Recess Appointments Clauses? In Section I, *supra*, we have identified the core purpose of these clauses as ensuring the efficient appointment and perpetual commission of subordinate officers under the direct charge of the sole chief executive magistrate of the nation, so that he possesses the maximal capacity to discharge—with vigor, decisiveness, energy, and dispatch—the indispensable prerogative of executive power to "take Care that the Laws be faithfully executed" on behalf of and for the general welfare of the entire Nation.[60]

Attorney General Wirt's formulation, and in turn the Supreme Court's, are in agreement. Wirt opined that "[t]he substantial purpose of the constitution was to keep these [principal] offices filled; and powers adequate to this purpose were intended to be conveyed."[61] He recognized that the central object of the Appointments Clauses is assuring the Executive is equipped with subordinates to aid in the administration of the laws for the public good: "The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled."[62] Thus, a construction compatible with the spirit, reason, and purpose of the Appointments Clauses construes them toward the ultimate ends of "insur[ing] to the public the accomplishment of the object to which the constitution so sedulously looks—that the offices connected with their peace and safety be regularly filled."[63] This requires interpreters to further supply a presumption of regularity in the President's discretionary exertion of his appointment power pursuant to either of two applicable Clauses.[64] When examining whether any such

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behind a law] . . . with the telos of the American political order and its Constitution—the 'supreme Law of the Land'" and reading the text of our civil laws "through that harmonized prism").

[57] *See* 1 Op. A.G. at 631–34.

[58] 573 U.S. 513 (2014).

[59] *Noel Canning*, 573 U.S. at 539–545 (citing 1 Op. A.G. at 631–34).

[60] U.S. Const. art. II, § 3; *see, e.g.*, *Myers*, 272 U.S. at 117 ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").

[61] 1 Op. A.G. at 632.

[62] *Id.*

[63] *Id.* at 634.

[64] *See, e.g.*, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32–33 (1827) (Story, J.) ("When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, ***a fortiori, this presumption ought to be favourably applied to the chief magistrate of the Union***. It is not necessary to aver, that the act which he may rightfully do, was so done.") (emphasis added); *Ross v. Reed*, 14 U.S. 482, 486–87 (1816) ("It is a general principle to presume that public officers act correctly until the contrary be shown.").

exertion comports with the Clauses, the interpreter must avoid "imputing to the President a degree of turpitude entirely inconsistent with the character his office implies" and account for "the high responsibility and short tenure annexed to th[e] office [of the President]."[65]

On a separate note, there are some who seriously entertain the theory that the Recess Appointments Clause in particular contains no real *telos*, but is merely attributable to the Framers' lack of knowledge of a world other than one of horses and buggies and corresponding lack of foresight of the jets and high-speed trains of modernity.[66] But if that were truly the *raison d'être* for the Recess Appointments Clause, the Framers would ***not*** have also vested in the President the power to decide when Congress should return to session and come out of recess.[67] The Framers deprived the President of a direct analogue to the classical regal executive power to dissolve Parliament, so the President may not dissolve Congress; Congress has an independent life of its own.[68] But in the Presidential Adjournment Clause, the Framers vested in the President, essentially, a qualified analogue to the classical regal executive power of proroguing Parliament; the President can adjourn Congress to a time he deems proper, so long as the upper and lower houses of the bicameral national legislature are in disagreement.[69] Thus, if the Recess-Appointments-Clause-as-technological-anachronism theory had any weight to it, it would instead have been written so as to permit recesses only of enough duration to ensure that all members of Congress could feasibly return to the capital city and take up the business of advice and consent on the President's appointments. So too, the Presidential Adjournments Clause would instead have been written so as to subject the President's adjournment of Congress in cases of disagreement between both Houses to an expressly definitive time fuse,[70] rather than

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[65] 1 Op. A.G. at 634.

[66] *See Trump's Recess-Appointment Scheme,* WALL ST. J. (Nov. 14, 2024) ("Because the Founders had to travel to and from the national capital by horse, they also granted the President the power 'to fill up all Vacancies that may happen during the Recess of the Senate.'").

[67] *See* U.S. Const. art. II, § 3 (providing that the President "may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper").

[68] *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 223 (3d Cir. 2013) ("Congress is automatically dissolved—and any ongoing session ended—every two years by termination of the terms of one-third of Senators and all members of the House." (citing U.S. Const. art. I, § 2, cl. 1; *id.* art. I, § 3, cls. 1–2)).

[69] *See* The Federalist No. 69 (explaining that while "[i]n most of these particulars, the power of the President will resemble equally that of the king of Great Britain," the President retains only a residual, qualified form of the executive power of the British Monarch to "prorogue or even dissolve the Parliament," wherein the President "can only adjourn the national legislature in the single case of disagreement about the time of adjournment"); *cf.* Frederic Maitland, CONSTITUTIONAL HISTORY OF ENGLAND 422 (1909) (explaining that the King of England's prerogatives included the powers to summon, prorogue, and dissolve Parliament).

[70] If the Framers wanted to provide a more exacting limitation on the amount of time the President may adjourn Congress "in Case of Disagreement between [both Houses]," U.S. Const. art. II, § 3, they could have and certainly would have attached a bright-line ceiling thereunto, as many of the contemporaneous state constitutions well-familiar to the Framers did (or at least had the capacity to do) in their parallel ***gubernatorial adjournment*** provisions. *See, e.g.*, Ma. Const. ch. II, § 1, art. VI (1780) ("In cases of disagreement between the two houses, with regard to the necessity, expediency, or time of adjournment or prorogation, the governor, with advice of the council, shall have a right to adjourn or prorogue the general court, ***not exceeding ninety days, as he shall determine the public good shall require***.") (emphasis added); Pa. Const. art. II, § 12 (1790) ("[The governor] may, on extraordinary occasions, convene the general assembly; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to ***such time as he shall think proper, not exceeding four***

leaving the time period of the adjournment to the President's own sole discretion.[71]

B.

Another equally important threshold matter to establish is that the requirement of the Appointment Clause "that the Senate should advise and consent to the presidential appointments, [is] to be strictly construed."[72] Advice and consent for appointment of the President's nominees to principal Offices is ***not*** a constitutional "prerogative" of the Senate—contrary to modern misconceptions that we live under a system of legislative supremacy.[73] At best, it is no more than and no less than a ***check or qualification*** on the inherent, pre-existing executive power of appointment—a mere string attached to this otherwise ancient tradition of our Western legal order[74] that the executive power of every officer and magistrate to act under the color of law and in the administration of government derives entirely via commission from, and is thus duly subordinate to, the chief magistrate or head of state of the nation.[75]

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months." (emphasis added); Del. Const. art. III, § 12 (1792) ("[The governor] may, on extraordinary occasions, convene the general assembly; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to ***such time as he shall think proper, not exceeding three months***." (emphasis added)); Ky. Const. art. II, § 13 (1792) ("[The governor] may, on extraordinary occasions, convene the general assembly, and in case of disagreement between the two houses, with respect to the time of adjournment, adjourn them to ***such time as he shall think proper, not exceeding four months***." (emphasis added)); *see also, e.g.*, Ga. Const. art. II, § 9 (1789) (omitting any bright-line ceiling on the adjournment period determined by the chief executive, akin to the Federal Constitution: "In case of a disagreement between the senate and house of representatives, with respect to the time to which the general assembly shall adjourn, [the governor] may adjourn them to ***such time as he may think proper***.").

[71] *See* U.S. Const. art. II, § 3 (providing that the President "may adjourn them to ***such Time as he shall think proper***" (emphasis added)). The President's discretion in this respect is constrained only indirectly by the potential applicability of provisions found elsewhere in the Constitution, such as the one requiring Congress to assemble annually. *See* U.S. Const. amend. XX, § 2 (providing that "Congress shall assemble ***at least once in every year***, and such meeting shall begin ***at noon on the 3d day of January***, unless they shall by law appoint a different day" (emphasis added)).

[72] *Myers*, 272 U.S. at 118; *see* U.S. Const. art. II, § 2, cl. 2 (providing that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone").

[73] *Cf. Zivotofsky*, 576 U.S. at 55 (Thomas, J., concurring in the judgment in part and dissenting in part) (denouncing constitutional interpretations "creating a supreme legislative body more reminiscent of the Parliament in England than the Congress in America");

[74] *Cf.* Tamar Herzog, EUROPEAN LAW AND THE MYTHS OF A SEPARATE ENGLISH LEGAL SYSTEM 22–23 (2018) ("[B]oth English and continental law formed part of the very same legal tradition. Their specific technologies or solutions might have varied to some degree . . ., but they shared a common genealogy that bound them together more strongly than that which drew them apart. . . . English common law and continental civil law formed part of a single European tradition from which they both drew as well as contributed.").

[75] *Compare* The Federalist No. 72, at 487 ("The administration of government . . . is limited to executive details, and falls peculiarly within the province of the executive department. . . . The persons, therefore, to whose immediate management these different matters [of government administration] are committed, ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence."), 1 ANNALS OF CONG. 463 ("I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."), *and* 30 WRITINGS OF GEORGE WASHINGTON 334 ("The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the

The following serves to illustrate that, even accounting for the post-ratification advice-and-consent check of the Senate on the traditionally absolute executive power to appoint subordinate executive officers, the appointment power remains substantially vested in the President under a proper understanding of the Appointments Clause regime. Under this regime, the President retains the upper-hand over the Senate in the process of appointing principal Officers for several reasons. The President retains absolute authority over the nomination of (*i.e.*, unfettered discretion to select) every Officer to be considered by the Senate for confirmation. Whereas, the Senate's window of advice-and-consent authority is confined to mere approbation (i.e., aye or nay) of the President's personally selected nominees for appointment to principal Officers positions, and nothing more.

It is important to apprehend that the Appointments Clause does not refer to a Senatorial "veto," but to a mere advice-and-consent role and was understood as such until a breakdown in the process in the modern era. The shameful confirmation spectacles of Judge Bork (who did not get confirmed to the Supreme Court) as well as Justices Thomas and Kavanaugh (who both did) are the most stark examples of the breakdown. Before the newer era, the Senate's secondary role was widely acknowledged. The role of a Senator providing advice and consent is not to imagine that each such Senator is sitting to pronounce on whether he would have nominated a given official to a given Executive Branch or Judicial Branch appointment. That is a role reserved for the President alone and a Senator who wishes to wield that species of power must run for and be elected as President of the United States.

The Senate improperly intrudes upon the President's appointment prerogative when it seeks to impose any additional constraints upon or intrude any further into the President's discretionary decision-making over his nominations for appointment to principal Offices—including but not limited to any inquiries or probes into Executive Branch concerns regarding the appointment of the President's nominee, as well as any other impediments on the President's free selection of his preferred subordinate executive officers that go outside the scope of merely discerning whether a nominee is fit or unfit to serve in higher Office. Senate committee referrals and summoning presidential nominees for lengthy hearings and invasive inquisitions were completely foreign to those who framed, ratified, and were the first to interpret and act under the Appointments Clause.

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great Departments, & appointing officers therein, to assist the Supreme Magistrate in discharging the duties of his trust."), *with* 1 Blackstone, COMMENTARIES *250 ("The King of England is therefore not only the chief, but properly the sole, magistrate of the nation, all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor" (citing 1 Gravina, ORIGINES 103)), *and* Vattel, THE LAW OF NATIONS, bk. I, ch. XIII, §§ 161–63 (1758) ("The degree of power intrusted by the nation to the head of the state, is then the rule of his duties and his functions in the administration of justice. . . . [B]ut in all cases, he should be the guardian of the law; he should watch over those who are invested with authority, and confine each individual within the bounds of duty. . . . As [he] cannot personally discharge all the functions of government, he should, with a just discernment, reserve to himself such as he can successfully perform, and are of most importance,—intrusting the others to officers and magistrates who shall execute them under his authority." (citing *Institutes*, pr.)).

See also Hamilton, *Pacificus No. 1* (observing that "the cooperation of the Senate in the appointment of Officers and the making of treaties . . . are qualifications of the general executive powers of appointing officers and making treaties").

"The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy."[76] Yet the requirement of Senate advice and consent for appointment of principal Officers was enumerated under Article II, which vests all of the "executive Power" and establishes the Executive Branch of the Federal Republic in a single "President of the United States" as its supreme officer—as opposed to the Article I, which vests all "legislative Powers" and establishes the Legislative Branch of the Federal Republic through a bicameral "Congress of the United States" made up of the Senate and House of Representatives.[77] Based solely on a cursory examination of this structural allocation of powers under each Branch's respective Article, it is the least bit difficult to apprehend that the Senate's ***actual***, preeminent sovereign "prerogative" under our Constitution is that of ***legislating*** (*i.e.*, ***making laws*** and ***appropriating funds***) a prerogative in which Congress as a whole has moved away from prioritizing.[78] This prerogative does ***not*** entail expending the bulk of its time, energy, and resources on conducting invasive committee investigations engaging in the procedural stonewalling of the President's preferred subordinate Officers of his own Executive Branch.[79]

Relying on this structural allocation, both the Supreme Court and the Executive Branch have consistently followed the rule of thumb that, since the Article II Appointments Clause "blend[s] action by the legislative branch, or by part of it, in the work of the executive," the Senate's advice and consent function is "to be read as a narrow exception to that broad grant of executive power" provided under Article II, *i.e.*, as a "limitation[] to be strictly construed, and not be extended by implication" or "enlarged beyond the words used."[80] To hold otherwise, Chief

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[76] Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Relations*.

[77] *Compare* U.S. Const. art. II, § 1, cl. 1 (Executive), *with* U.S. Const. art. I, § 1 (Legislative).

[78] *See Gundy v. United States*, 588 U.S. 128, 155–157 (2019) (Gorsuch, J., dissenting) (explaining that if Congress be allowed to continue to "pass off its legislative power," the "***vesting clauses***, and indeed the entire ***structure*** of the Constitution," would "make ***no sense***"; and that "keeping the legislative power confined to the legislative branch [cannot] be trusted to self-policing by Congress," but rather enforced by the other Branches (cleaned up) (emphasis added)); *id.* at 168–169 (observing that courts have often "***policed legislative efforts to control executive branch officials***," while Congress has been allowed to continue unchecked its "***abdication***" of legislative authority in a way that "is ***not*** part of the constitutional ***design***" (cleaned up) (emphasis added)); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) ("It is the peculiar ***province*** of the legislature to ***prescribe*** general rules for the government of society; the ***application*** of those rules to individuals in society would seem to be the duty of ***other departments***." (emphasis added)); The Federalist No. 78, at 522–23 (Alexander Hamilton) (explaining that "[w]hoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other," the Executive "***dispenses the honors***" and "***holds the sword*** of the community," while the Legislature "***commands the purse***" and "***prescribes the rules*** by which the duties and rights of every citizen are to be regulated" (emphasis added)).

[79] The average amount of time consumed by the Senate in confirming a presidential nominee for a presidentially appointed/Senate-confirmed ("PAS") office (excluding federal judges, U.S. marshals, and U.S. attorneys) was approximately 137 days (or 4 1/2 months) during the Obama Administration, 154 days (or 5 months) during the first Trump Administration, and 137 days (or 4 1/2 months) during the Biden Administration as of January 2023. *See* Paul Hitlin, et al., *Outcome of Midterms Unlikely to Improve the Senate Confirmation Process for Executive Branch Nominees*, Partnership for Public Service: Center for Presidential Transition (Jan. 17, 2023), https://ourpublicservice.org/blog/outcome-of-midterms-unlikely-to-improve-the-senate-confirmation-process/.

[80] Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *RE: Authority of the President to Suspend Certain Provisions of the ABM Treaty* at 13 (Nov. 15, 2001); *Myers*, 272 U.S. at 118, 164 (citing 1 Annals of Cong. 462–64); *see also* Jefferson, *Opinion on the*

Justice Taft proclaimed, "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed."[81] In the same opinion, he was careful to articulate the Senate's advice and consent function as merely the Senate's "check upon the President's power of appointment," "power of checking appointments," or "power to check appointments"[82]

In then Secretary of State Thomas Jefferson's 1790 opinion expounding upon the same rule of construction, he stressed the importance of reading the Appointments Clause in light of the Commissions Clause[83] and paying heed to "strict import of each [operative] term."[84] He added that the "Constitution itself indeed has taken care to circumscribe this [advice-and-consent exception] within very strict limits: for it gives [1] the ***nomination*** of the [Officer] to the President, [2] the *appointment* to him and the Senate jointly, [3] the ***commissioning*** to the President."[85] Jefferson proceeded to define the three operative terms: "[1] To ***nominate*** must be to propose: [2] ***appointment*** seems that act of the will which constitutes or makes the Agent: and [3] the ***Commission*** is the public evidence of it."[86] He thereafter emphasized that "***appointment*** does not comprehend the neighboring acts of ***nomination, or commission***," which the Constitution gives "exclusively to the President,"[87] and, significantly, that with respect to its jointly held ***appointment*** role, the Senate is "***not*** supposed by the Constitution to be acquainted with the concerns of the Executive department" because "[i]t was ***not*** intended that these should be communicated to them."[88] Rather, Jefferson clarified, the Senate's jointly held ***appointment*** role is "***only*** to see that no ***unfit*** person be employed."[89]

At the same time, President Washington noted in his diary that Jefferson, Madison, and John Jay uniformly agreed that under the Appointments Clause, the Senate's "powers extend[ed] no farther than to an ***approbation or disapprobation*** of the person nominated by the President[,] all the rest being Executive and vested in the President by the Constitution."[90]

Several decades later, Justice Joseph Story and President James Monroe concurred with Washington, Jefferson, Madison, and Jay that any further congressional intrusion into or

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Powers of the Senate Respecting Diplomatic Relations (explaining that the appointment of officers "belongs then to the head of [the Executive] department, ***except*** as to such portions of it as are specially submitted to the Senate" and that "[e]xceptions are to be construed strictly") (emphasis added); Hamilton, *Pacificus No. 1* (observing that "the cooperation of the Senate in the appointment of Officers and the making of treaties . . . are ***qualifications*** of the general executive powers of appointing officers and making treaties") (emphasis added).

[81] *Myers*, 272 U.S. at 164.

[82] *Id.* at 119–120, 164.

[83] *See* U.S. Const. art. II, § 3 (providing that the President "shall Commission all the Officers of the United States").

[84] Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Relations*.

[85] *Id.* (italics in original).

[86] *Id.* (italics in original).

[87] *Id.* (italics in original).

[88] *Id.* (emphasis added).

[89] *Id.* (emphasis added).

[90] 6 DIARIES OF GEORGE WASHINGTON 68 (Apr. 27, 1790) (emphasis added).

interference or involvement with the President's exercise of the innately executive appointment power—i.e., beyond the mere up or down vote on the President's nominee—runs afoul of the Appointments Clause. Justice Story affirmed that the President "has the ***sole power*** to select for office" and "can never be compelled to yield to [the senate's] appointment" of an Officer,[91] while "the senate cannot, by their refusal to confirm the nominations of the president, prevent him from the proper discharge of his duty."[92] Along the same lines, President Monroe opined that "as a general principle, Congress has ***no*** right under the Constitution to impose ***any*** restraint by law on the power granted to the President so as to ***prevent*** his making a ***free selection*** of proper persons for these offices from the whole body of his fellow citizens."[93]

2.

Records of the Constitutional Convention serve to affirm the above construction. The delegates declined to vest in the Senate the nomination power of Officers on account of the legislative body being "too numerous, and too little personally responsible, to ensure a good choice."[94] To resolve these concerns, the Framers instead vested the absolute power of nomination of Officers in the President. Key delegates such as Nathaniel Gorham and Edmund Randolph viewed the "responsibility of the Executive as a security for fit appointments," while cautioning that "Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[95] In alignment with Jefferson's 1790 opinion, the Anti-Federalist delegates who opposed the Appointments Clause did so on the understanding that "[n]otwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the [Executive] alone."[96]

Hamilton, writing as Publius in the Ratification Debates, echoed the understanding of Convention delegates. He observed that "one man of discernment is better fitted to analise [sic] and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment."[97] "[A] single man, directed by a single understanding," Hamilton added, "will have fewer personal attachments to gratify than a body of men, who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection . . . [and] cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body."[98] Conversely, "in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and

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[91] 3 Story, COMMENTARIES § 1525 (emphasis added).

[92] *Id.* § 1528.

[93] James Monroe, Message to the Senate of the United States (Apr. 13, 1822) (cleaned up and emphasis added).

[94] 2 James Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274–75 (Gaillard Hunt & James Brown Scott eds., 1920) (Nathaniel Gorham).

[95] *Id.* at 301 (Edmund Randolph).

[96] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (Max Farrand ed., 1966) (George Mason).

[97] The Federalist No. 76, at 510 (Alexander Hamilton).

[98] *Id.*

dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly."[99]

Speaking for the Federalists and Framers generally, Hamilton cautioned, above all, that excessive involvement of a legislative body in the appointment of offices must be avoided, for "[t]he choice which may at any time happen to be made under such circumstances will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties," and "[i]n either case, the intrinsic merit of the candidate will be too often out of sight" and "it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negociations [*sic*]."[100] Thus under the Appointments Clause, "[i]n the act of nomination, [the President's] ***judgment alone*** would be exercised; and as it would be his ***sole duty*** to point out the man who, with the ***approbation*** of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be ***no difference*** between nominating and appointing."[101] According to Hamilton, "every man who might be appointed would be, in fact, [the President's] choice," and despite the Senate's ability to vote down the President's nominee, the principal Officer "ultimately appointed must be the object of [the President's] preference" in all cases.[102] Similar to Jefferson, the Publius writers expected the Senate to be generally deferential to the President's appointments, withholding their approbation only for "special and strong reasons."[103]

3.

The practices of the Washington Administration and First Congress are also illustrative of the primacy of the President vis-à-vis the Senate in the distribution of constitutional appointment powers. On August 6, 1789, "the Senate appointed a committee to confer with the President on the manner in which communications between them concerning treaties and nominations should be handled."[104]

In his correspondence to that committee several days later, President Washington pointed out that whenever the Senate exercises its advice-and-consent power in the appointment of principal Officers, "[t]he Senate . . . is evidently a ***Council only to the President***, however [necessary] its concurrence may be to his Acts."[105] Notably, he proceeded to outline for the Senate the constitutionally significant delineation between the nature of its business on presidential appointments versus that of its business on treaties: "In the appointment to offices, the agency of the Senate is ***purely executive***, and they [the Senators] may be ***summoned to the***

[99] *Id.*

[100] *Id.*

[101] *Id.* (emphasis added).

[102] *Id.*

[103] The Federalist No. 76, at 512.

[104] Cong. Res. Serv., 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 32 (Comm. Print 2001).

[105] George Washington, *Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communication Between the President and the Senate on Treaties and Nominations* (Aug. 10, 1789), *in* 30 WRITINGS OF GEORGE WASHINGTON 377–79 (emphasis added).

President. In treaties, the agency is perhaps as much of a legislative nature and the business may possibly be referred to their deliberations in their legislative chamber."[106] In light of this understanding, President Washington insisted that the Senate "accommodate their rules" for appointments to principal Offices so as to "provid[e] for the reception of either oral [or] written propositions, and for giving their consent and advice in either the ***presence*** **or** ***absence*** of the President, leaving him free to use the mode and place that may be found most eligible and accordant with other business which may be before him at the time."[107]

Not long thereafter, the Senate manifested its agreement and conformity to the First President's characterization of the Senate's agency in the appointment process as a "purely executive" "Council only to the President," as well as to his corresponding calls for heavy presidential involvement in and control over its advice-and-consent proceedings. It adopted a resolution establishing the following procedures for exercising its advice and consent check on presidential nominees for constitutional appointment to principal Offices on August 21, 1789:

> *Resolved*, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration; that when the President of the United States shall meet the Senate in the Senate Chamber, the President of the Senate [*i.e.,* the Vice President] shall have a chair on the floor, be considered as at the head of the Senate, and his chair shall be assigned to the President of the United States; that when the Senate shall be convened by the President of the United States to any other place, the President of the Senate and Senators shall attend at the place appointed. The Secretary of the Senate shall also attend to take the minutes of the Senate.
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> That all questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent by answering *viva voce*, ay or no.[108]

The foregoing original process contemplates no committee referrals, no committee hearings, no summoning of the President's nominees, and certainly no invasive inquisitions of the President's nominees, either. Once the President submitted to the Senate his nomination for appointment to Office and the President of the Senate assigned a day for consideration thereof, the President's nominees were taken up on the designated day in executive session, on the floor only, and with the appointment assented or dissented to by senators via voice vote right then and there. Oftentimes, the Senate discharged its advice-and-consent duty on the President's nominations for appointment to principal Offices within just one or two days of the President's submission to the Senate thereof. For example, Alexander Hamilton's nomination for presidential appointment to the Office of Secretary of the Treasury "was approved by the Senate on the same day it was submitted by Washington."[109] Moreover, the President not only had a

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[106] *Id.* (emphasis added).

[107] *Id.* (italics in original).

[108] 1 ANNALS OF CONG. 65 (Aug. 21, 1789).

[109] *Alexander Hamilton's Nomination by George Washington for the Office of Secretary of the Treasury of the United States* (Sep. 11, 1789) (citing 1 S. Exec. J. 25 (1789)). So too was this the case for Nicholas Eveleigh and Samuel

right to be present while the Senate, *qua* "Council only to the President," took up its "purely executive" business of advice and consent on presidential appointments, nay, the President had the right to preside over such proceedings and order the Senate to convene at "any other place" outside of the Senate chamber to conduct such proceedings.

The foregoing should be assigned great weight in construing the constitutional power of the President over the appointment of principal Officers as it relates to that of the Senate. It represents the earliest of institutional interpretations and executions of the Appointments Clause in practice with assent between multiple branches of government—namely, the First President of the United States and the First Senate of the First Congress of the United States. President Washington presided over the Constitutional Convention as its president, while "[o]f the sixty-six men who served in the Senate during Washington's administrations, thirty-one had been members of the Constitutional Congress or of the Congress of the Confederation, twelve had helped draft the Constitution in the convention at Philadelphia, and ten had been members of state conventions which had ratified the Federal instrument."[110]

Accordingly, it would be the farthest thing from unreasonable or novel for the President to demand of the Senate, in imitation of George Washington, that it discharge its historically substantially confined and "purely executive" agency in the appointment of Officers in conformity with the original Constitution, such as by taking up and acting upon ***all*** of President's nominees for appointment to principal Offices in either a same-day or designated single-day executive session, on the Senate floor only, and via live voice vote. Nor would it be anywhere within the universe of unreasonable or novel for the President, exactly like George Washington, to take such affirmative measures as are necessary and proper for constraining and reordering the Senate back to its constitutionally faithful agency in the appointment of Officers as merely a "Council only to the President."

Indeed, in light of everything discussed above, one would be far from unjustified in the assertion that perhaps the President has a ***right*** under our Constitution to be in the privy and "presence" of ***all*** Senate business and proceedings concerning advice and consent to his appointment of subordinate Officers, and perhaps even the power to "convene" and to "summon" the Senate to discharge all such business in his "presence" at "any other place" to effectuate this right. Undeniable on the historic record, these prerogatives were ones the "Father of Our Nation" ***himself*** viewed as not only compatible with, but arguably ***enjoined*** by, our Constitution—the framing of which he himself had presided over and the execution of which he had himself entered into the inaugural duty of public trust.

C.

Having now established that recess appointments and advice-and-consent appointments to principal Offices are equal in the eyes of the Constitution, that the Appointments Clauses must be construed toward their *telos* of ensuring efficient appointment and nearly perpetual commission of subordinate officers under the President's charge to aid in his administration of

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Meredith's nominations for presidential appointment to the Offices of Comptroller and Treasurer, respectively. *See id.*

[110] Ralston Hayden, THE SENATE AND TREATIES, 1789–1817, at 3 (1920).

executive powers, and that the advice-and-consent power of the Senate over appointments to principal Offices must be construed as an auxiliary right to that of the President, we next turn our attention to discerning the contours of the President's power to appoint principal Officers under the Recess Appointments Clause.

The Recess Appointments Clause provides that "[t]he 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."[111] Whereas under the Appointments Clause, the "power of appointment is confided to the President and Senate ***jointly***," the Recess Appointments Clause "authorise[s] the President, ***singly***, to make temporary appointments" to vacant Offices, which may be "necessary for the public service to fill without delay."[112] The fundamentals of the Clause can be divided into four parts: (1) the scope of what constitutes a Senate "Recess" triggering the President's authority to unilaterally appoint Officers; (2) the scope of what kinds of "Vacancies" the President has authority to fill with recess appointments; (3) the duration of "Commissions" granted to recess appointees by the President; and (4) the compensation of recess appointees granted "Commissions" by the President.

1.

The Recess Appointments Clause authorizes unilateral presidential appointments to fill up vacancies during any "Recess of the Senate," which encompasses "both intra-session and inter-session recesses."[113] Put differently, the President's constitutional power to "Recess" appoint Officers to vacant Offices without the advice and consent of the Senate is triggered ***either*** by an inter-session recess of the Senate (*i.e.*, a break between formal sessions of the Senate) ***or*** by an intra-session recess of the Senate (*i.e.*, a break in the midst of a formal session of the Senate). The Senate or the House "announces an inter-session recess by approving a resolution stating that it will 'adjourn *sine die*,' *i.e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin)," whereas the Senate or House "announces any such 'intra-session recess' by adopting a resolution stating that it will 'adjourn' to a fixed date, a few days or weeks or even months later."[114] Although the applicability of "Recess of the Senate" to intra-session recesses is less clear as a textual matter, this construction has been solidified, indeed liquidated, by longstanding practice, as "Presidents have made thousands of intra-session recess appointments" since 1929.[115] For example, during intra-session recesses, President Franklin D. Roosevelt recess appointed Dwight D. Eisenhower as a permanent Major General, President Harry Truman recess appointed Dean Acheson as Under Secretary of State, and President George H.W. Bush recess appointed Alan Greenspan as Chairman of the Federal Reserve Board.[116]

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[111] U.S. Const. art. II, § 2, cl. 3.

[112] The Federalist No. 67, at 455 (Alexander Hamilton) (italics in original).

[113] *NLRB v. Noel Canning*, 573 U.S. 513, 538 (2014).

[114] *Id.* at 526.

[115] *Id.* at 529.

[116] *Id.*

However, not every nominal "Recess of the Senate" (whether intersession or intrasession) is necessarily sufficient to allow the President to wield recess-appointments power. The Congressional Adjournments Clause provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three [3] days."[117] Deriving out of this bicameral consent-to-adjourn requirement is the juridical rule of thumb that if the Senate's recess is "so short that it does not require the consent of the House, it is too short *[per se]* to trigger the Recess Appointments Clause."[118] Synthesized from historical practices is another juridical rule of thumb that if the Senate's recess "last[s] less than 10 days [it] is ***presumptively*** too short" to trigger the Recess Appointments Clause.[119] Ergo, a Senate Recess "of more than 3 days but less than 10 days is ***presumptively*** too short to fall within the Clause" as well.[120] Under this inquiry, the length of a Senate's Recess is "'calculated by counting the calendar days running from the day after the recess begins and including the day the recess ends.'"[121] And the presumption against applicability of the recess-appointment power during a "Recess of the Senate" of less than 10 days may be overcome by "some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response . . . demand[ing] the exercise of the recess-appointment power during a shorter break."[122]

As a matter of law, the Senate "is in session when it says it is, provided that, under its own rules, it retains the ***capacity*** to transact Senate business."[123] Accordingly, the faux "*pro forma*" sessions that the Senate purports to conduct still "count as sessions" and "not periods of recess" under current jurisprudence.[124] This rule of law is predicated on the Constitution vesting in the Senate the power to "determine the Rules of its Proceedings"[125] and requiring the Senate to "keep a Journal of its proceedings."[126] Thus, courts "generally take at face value the Senate's own report of its actions"[127] and "if reference may be had to" the Senate's Journal, "it must be assumed to speak the truth."[128]

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[117] U.S. Const. art. I, § 5, cl. 4.

[118] *Noel Canning*, 573 U.S. at 538.

[119] *Id.* (emphasis added).

[120] *Id.* (emphasis added).

[121] *Id.* at 537 (citation omitted).

[122] *Id.* at 538.

[123] *Id.* at 550 (emphasis added).

[124] *Noel Canning*, 573 U.S. at 550–551 ("[W]e have held that 'all matters of method are open to the determination' of the Senate, as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'" (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892))).

[125] U.S. Const. art. I, § 5, cl. 2.

[126] *Id.* art. I, § 5, cl. 3

[127] *Noel Canning*, 573 U.S. at 551.

[128] *Ballin*, 144 U.S. at 4, 9.

2.

Under the Recess Appointments Clause, the phrase "all Vacancies that may happen" applies to both those "that initially occur ***during a recess***"[129] and those "that come into existence while the Senate is ***in session***."[130] The Supreme Court followed Attorney General Wirt's 1823 advisory opinion to President Monroe in adopting this construction, where he noted that the phrase "all Vacancies that may happen" "may mean 'happen to take place:' that is, '***to originate***,'" or "may mean, also, without violence to the sense, 'happen to exist.'"[131] Wirt concluded that the broader interpretation, i.e., "all Vacancies that may ['happen to exist]'" during the "Recess of the Senate" is the construction "most accordant with [the Constitution's] reason and spirit"[132] that we discussed in Section II.A. above, "[I]f the President's power is to be limited to such vacancies only as happen to occur during the recess of the Senate," Wirt reasoned, "the vacancy in the case put must continue, however ruinous the consequences may be to the public."[133]

In the aftermath of Attorney General Wirt's opinion, the Executive Branch "adhered to [his] broader interpretation for two centuries."[134] Nearly every Attorney General subsequent to Wirt adopted the same construction as him.[135] For example, Attorney General Edward Bates advised President Abraham Lincoln in 1862 that the President's "power to fill pre-recess vacancies was 'settled . . . as far . . . as a constitutional question can be settled,'" while Acting Attorney General Lawrence Walsh provided President Dwight D. Eisenhower with the same advice "'without any doubt'" nearly a century later.[136] In the Senate debate preceding the 1905 Senate Report on President Theodore Roosevelt's 'constructive' recess appointments," Senator Benjamin Tillman "agreed that 'the Senate has acquiesced' in the President's 'power to fill' pre-recess vacancies."[137] Thereafter, the 1905 Senate Report concluded, along the same lines as the reasoning employed by Attorney General Wirt, that the Recess Appointments Clause's "sole purpose was to render it ***certain*** that ***at all times*** there should be, whether the Senate was ***in session*** **or** ***not***, an ***officer for every office***."[138] Even prior to Wirt's cornerstone opinion, President James Madison—who was "as familiar as anyone with the workings of the Constitutional Convention—appointed Theodore Gaillard to replace a district judge who had left office before a recess began" and "made recess appointments to 'territorial' United States attorney and marshal positions . . . which had been created when the Senate was in session more than two years

[129] *Noel Canning*, 573 U.S. at 538 (emphasis added).

[130] *Id.* at 549 (emphasis added).

[131] 1 Op. A.G. at 631–632.

[132] *Id.*

[133] 1 Op. A.G. at 632.

[134] *Noel Canning*, 573 U.S. at 542.

[135] *See id.* at 544 (citations omitted).

[136] *Id.* at 544–545 (citations omitted).

[137] *Id.* at 547 (quoting 38 Cong. Rec. 1606 (1904)).

[138] S. Rep. No. 4389, 58th Cong., 3d Sess. (1905) (emphasis added).

before."[139] With this record before it, the *Noel Canning* Court declined the invitation to "upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long" under the Recess Appointments Clause.[140]

Accordingly, if the Senate, pursuant to its own current rules, adjourns for ***at least*** a 10-day intra-session recess after the hypothetical 129th Congress convenes for its first session on January 3, in the hypothetical year 2045, and the new President is inaugurated into office on January 20, 2045, the President may recess appoint his preferred subordinate Officers to fill up all vacancies that "happen to exist" during that 10-day recess period. This would include all principal Offices that have been vacated by Officers appointed during the previous administration who either resign or are removed by the President himself before or during the 10-day recess period.

3.

With respect to the duration of "Commissions" granted to recess appointees by the President, the President "***alone cannot*** make a ***permanent appointment*** to [principal] offices," so in order to "render the appointment ***permanent***, it must receive the consent of the Senate."[141] However, where the President is authorized under the Recess Appointments Clause to unilaterally grant a recess commission to fill up a vacant Office, the President "shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it [for ***permanent appointment***]; or, in the language of the constitution, till the end of the next session."[142] Absent Senate confirmation of the recess appointee, "a recess appointment made between Congress' annual sessions would permit the appointee to serve for about a year, i.e., until the 'end' of the 'next' Senate 'session.'"[143] However, "an intra-session appointment made at the beginning or in the middle of a formal session could ***permit the appointee to serve for 1 1/2; or almost 2 years*** (until the end of the following formal session)," barring confirmation of the recess appointee for permanent appointment at an earlier date.[144]

Although intra-session recess appointments enable the President to grant lengthier recess commissions to his preferred subordinate Officers, such is by no means an "'illogical'" result as a matter of constitutional law.[145] The Presidents who grant recess commissions traditionally ***also*** seek permanent appointment for each of their recess appointees by simultaneously submitting their nominations to the Senate for full consideration under the Senate's advice and consent check.[146] Thus, far from bypassing the Senate, the President's use of the Recess Appointments Clause actually serves to "ensure[] that the President and Senate ***always have at least a full***

[139] *Noel Canning*, 573 U.S. at 543–44 (citations omitted).

[140] *Id.* at 549.

[141] 1 Op. A.G. at 632 (italics in original).

[142] *Id.*

[143] *Noel Canning*, 573 U.S. at 534 (citation omitted).

[144] *Id.* (emphasis added).

[145] *Id.*

[146] *See id.*

session to go through the nomination and confirmation process" for each of the President's recess appointees.[147] Meanwhile, in the interim, while the Senate takes up consideration of the President's recess appointees for permanent appointment, the President's intra-session recess appointments "last[ing] somewhat longer than a year will ensure the President the ***continued assistance of subordinates*** that the [Recess Appointments] Clause ***permits him to obtain***."[148] Drawing upon Justice Story, the *Noel Canning* Court concluded that an appointment by the President "should last until the Senate has '***an opportunity to act on the subject***,' and the [Recess Appointments] Clause ***embodies a determination that a full session is needed*** to select and vet a replacement."[149]

Accordingly, under the same hypothetical scenario outlined in Section II.C.2. above, the President's intra-session recess appointees would be able to serve as perfectly constitutional principal Officers pursuant to their recess commissions for a maximum of nearly two full years, or about halfway through the President's term of office, until the Senate's second session ends (late December 2046).[150] In the interim, the President may simultaneously submit to the Senate nominations for each of his recess appointees for advice-and-consent consideration. If the Senate confirms one of the President's recess appointees for permanent appointment to his principal Office, that appointee's recess commission will expire and the appointee will constitutionally assume the principal Office under the Appointments Clause. If the Senate rejects one of the President's recess appointees for permanent appointment to his principal Office, that appointee's recess commission will remain constitutionally valid until the end of the Senate's second session (late December 2046), or about halfway through the President's term of office. None of the aforesaid would be a novel enterprise. For context, President George W. Bush made 171 recess appointments, 141 of which were intra-session recess appointments and 165 of which were also submitted to the Senate for advice and consent to permanent appointment.[151] President Barack Obama made 32 recess appointments, 26 of which were intra-session recess appointments and all

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[147] *Id.* (emphasis added).

[148] *Id.* (emphasis added).

[149] *Noel Canning*, 573 U.S. at 534–35 (quoting 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1551 (1833)) (emphasis added).

[150] *Cf.* Henry B. Hogue, Cong. Res. Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 5 (2015) ("Where [the President] has made the appointment during an intrasession recess, however, the duration of the appointment has included the rest of the session in progress plus the full length of the session that followed. At any point in a year, as a result, by making a recess appointment during an intrasession recess, a President could fill a position not just for the rest of that year, but until near the end of the following year. In practice, this has meant that a recess appointment could last for almost two years.").

[151] *See* Henry B. Hogue & Maureen O. Bearden, Cong. Res. Serv., RL33310, *Recess Appointments Made by President George W. Bush* (2009); *see also, e.g.*, Henry B. Hogue, Cong. Res. Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 5, n.27 (2015) ("[D]uring the first recess of the second session [of the 108th Congress], President Bush appointed William H. Pryor to a judgeship on another federal court of appeals. . . . Pryor's recess appointment would have expired after approximately 22 months, at the end of the first session of the 109th Congress. . . . [But] Pryor was subsequently confirmed by the Senate and appointed to the position permanently.").

32 of which were also submitted to the Senate for advice and consent to permanent appointment.[152]

Let us now return to our present scenario beginning January 20, 2045. It is also important to note that even if the Senate's hostility toward one of the President's recess appointees boils over into their refusal to confirm that recess appointee for permanent appointment to his principal Office, the Senate ***still*** will not have seen the last of him. And that is because even after the appointee's recess commission would expire at the end of 2046, or about halfway through the President's term of office, the President may designate him to continue performing the functions and duties of that same principal Office "temporarily in an acting capacity" under the Federal Vacancies Reform Act of 1998 ("FVRA").[153] Pursuant to FVRA, the President "may direct an officer or employee of [an] Executive agency to perform the functions and duties of a vacant presidentially appointed/Senate-confirmed ("PAS") office within the same agency "temporarily in an acting capacity," subject to specified time limits—provided that, "during the year preceding the occurrence of the vacancy, the officer or employee served for at least 90 days in a position in that agency for which the rate of pay equaled or exceeded the rate for GS-15 of the General Schedule."[154] Having agreed to making the FVRA a law, the Senate cannot claim that it did not agree to uses of the FVRA according to its textual terms.

President George W. Bush recess appointed Eugene Scalia to be Solicitor of Labor on January 11, 2002.[155] In late November 2002, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) was asked "whether Eugene Scalia, now serving as the Solicitor for the Department of Labor under a recess appointment, could be designated the Acting Solicitor after his recess appointment expires" if he were appointed to a non-career senior executive service (SES) position beforehand.[156] OLC held that "Mr. Scalia could be designated, while serving in his non-career [SES] position, as the Acting Solicitor after his recess appointment expires."[157] Applying FVRA, the opinion found that "[b]y virtue of his non-career Senior Executive Service position with the Department of Labor, Mr. Scalia would be 'an officer or employee' of that agency, and, during the year before the expiration of his recess appointment created a vacancy, he would have served for at least 90 days in a position—the office of Solicitor, to which he was recess appointed—for which the pay exceeded the GS-15 rate."[158] Thus, OLC concluded, under the plain terms of the FVRA, Eugene Scalia was "eligible to be designated to act" as Solicitor of Labor, *i.e.*, "in the position he will have vacated when his recess appointment expired," upon the actual expiration of his recess appointment.[159] In the aftermath of OLC's opinion, Scalia stepped down from the Office of Solicitor of Labor and was appointed to

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[152] *See* Henry B. Hogue & Maureen O. Bearden, Cong. Res. Serv., R42329, *Recess Appointments Made by President Barack Obama* (2017).

[153] 5 U.S.C. §§ 3345–3349e.

[154] *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 213 (2002) (quoting 5 U.S.C. § 3345(a)(3)).

[155] *See* Press Release, Appointment Announcement, George W. Bush White House (Jan. 11, 2002).

[156] *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 211.

[157] *Id.*

[158] *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 213.

[159] *Id.* at 213–14.

a non-career SES position within the Department of Labor several days prior to when his recess appointment was set to expire at the close of the 107th Congress. With the Office of Solicitor of Labor technically vacant, President Bush then designated Scalia as Acting Solicitor of Labor on November 22, 2002 under the FVRA.[160]

The President could very well do the same for any one of his recess appointees that the Senate refuses to cooperate on and confirm to permanent appointment. The President's recess appointees to X Office and Y Office could simply be redesignated as the "Acting" X Officer and the "Acting" Y Officer upon the expiration of their recess commissions. From there onward, the "Acting" Officers could continue to perform all the "functions and duties" of X and Y Offices "temporarily in an acting capacity, subject to the time limitations of [5 U.S.C. § 3346]."[161] At the very least, the President's recess appointed/turned "Acting" X and Y Officers would be able to continue serving in such Offices for another 210 days.[162] Moreover, notwithstanding the usual 210-day limit, if the President submitted a nomination for the vacant X and Y Offices (including a nomination of the former recess appointees), Acting X Officer and Acting Y Officer's service could continue as long as nominations for such Offices are pending before the Senate.[163] According to one source, the average amount of time consumed by the Senate in confirming a presidential nominee for a PAS office (excluding federal judges, U.S. marshals, and U.S. attorneys) was approximately 137 days (or 4 1/2 months) during the Obama Administration, 154 days (or 5 months) during the first Trump Administration, and 137 days (or 4 1/2 months) during the Biden Administration as of January 2023.[164] The same source posits that "the overall trend is clear: the confirmation process has become longer," and forecasts that "the long-term trend of slower confirmations is likely to continue."[165]

From this we can safely deduce, for purposes of our hypothetical Acting X and Y Officers, a conservative estimate that the Senate will most likely spend at least about 150 days reviewing most nominations for permanent appointment to Office X and Office Y (though, of course, the Senate is always free to accelerate their process and return it to the far quicker historical timelines that governed for the initial periods of the Republic). Accordingly, if the Senate declines to cooperate on and confirm the President's recess appointees to permanent appointments in Offices X and Y, the President's designation of them as acting officers under FVRA in succession to the expiration of their recess appointments could extend their service in Offices X and Y through approximately the third year (late 2047 to early 2048) of the President's four-year term of office (ending January 2049).

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[160] *See* Dana Milbank, *Recess Appointees Relinquish Title Only; Reich, Scalia Put in Similar Jobs*, WaPo (November 23, 2002).

[161] 5 U.S.C. § 3345(a)(3).

[162] *See* 5 U.S.C. § 3346.

[163] *Id.* § 3346(a)(2).

[164] *See* Paul Hitlin, et al., *Outcome of Midterms Unlikely to Improve the Senate Confirmation Process for Executive Branch Nominees*, Partnership for Public Service: Center for Presidential Transition (Jan. 17, 2023), https://ourpublicservice.org/blog/outcome-of-midterms-unlikely-to-improve-the-senate-confirmation-process/.

[165] *Id.*

At no point in between 2002 and now has Congress ever amended the FVRA to render the FVRA's augmentation of a recess appointment effectively continued by redesignating the recess-appointed officer to the same office in an acting capacity. Indeed, six Justices of the Supreme Court (Roberts, C.J., along with Kennedy, Thomas, Breyer, Alito, and Kagan) fully endorsed a strict and broad textual reading of the FVRA in *NLRB v. SW General, Inc.*, 580 U.S. 288 (2017) (declining to allow non-first assistant to the General Counsel of the NLRB to go on serving as the Acting General Counsel by President Obama, even though that official was one of the three types of officials the FVRA generally allowed to serve as an acting officer, because his service was prohibited by a separate textual provision of the FVRA).[166]

4.

As it pertains to compensation of those serving pursuant to "Commissions" granted by the President, the conventional understanding is that on account of having been "appointed by one of the [two] methods specified by the Constitution itself," a recess appointee actually "holds the office" and ergo "receives its pay" on the same plane as any Senate-confirmed officer.[167] This is because, as discussed in Section II.A above, it is well-settled that it is "not appropriate to assume that [the Recess Appointments] Clause has a species of subordinate standing in the constitutional scheme, or that it is not as operative when Congress is not in session as the [Appointments Clause] is when Congress is available."[168]

However, there is an added statutory wrinkle thrown into the equation. In 1863, Congress adopted a statute providing that no salary shall be paid to any recess appointee if the "vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate."[169] A glance at the historical record uncovers that the statute "was enacted based on the Senate's view [at the time] that the Constitution adopted the arise interpretation,"[170] *i.e.*, that the President may only grant recess commissions for all vacancies that may happen to ***occur*** during the Recess of the Senate, rather than all vacancies that may happen to ***exist*** during the Recess of the Senate,

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[166] A few commentators have argued that the separate concurring opinion of Justice Scalia in *Noel Canning* (joined by Chief Justice John Roberts as well as Justices Thomas and Alito) means that Roberts, Thomas, and Alito would, in 2025 and beyond, "find themselves in an awkward position" if President Trump makes broad use of his recess appointment powers. *See* Madiba K. Dennie, *Trump's Recess Appointments Scheme Is a Show of Power Over the Supreme Court, Too: A decade ago, three conservative justices expressed their belief that what Trump wants to do with his Cabinet is unconstitutional*, Balls and Strikes (Nov. 15, 2024). The argument is offered to try to suggest that an opportunity to reconsider and discard *Noel Canning* will arise if President Trump's recess appointments are challenged in the Supreme Court. This ignores the fact that Roberts (who authored *SW General*) and Alito seem to have readily conceded that *Noel Canning* is valid precedent in how it characterized the long and unbroken history of presidential intra-session recess appointments. *See SW General*, 580 U.S. at 308. Roberts and Alito merely said in *SW* General that the FVRA did not have such a long history.

[167] *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. at 215; *see also Swan*, 100 F.3d at 987 (rejecting the assertion that recess appointment is in any way a constitutionally "inferior" procedure for appointment relative to that of presidential nomination and senate advice and consent).

[168] *Staebler*, 464 F. Supp. at 597.

[169] Act of Feb. 9, 1863, 12 Stat. 646 (1863).

[170] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 U.C.L.A. L. Rev. 1487, 1543 n. 173 (2005) (citing S. Rep. No. 37-80, (3d Sess. 1863)).

which has been the correct interpretation dating back to the Wirt opinion in 1823[171] and the controlling precedential interpretation since *Noel Canning*.[172] Another way to look at the 1863 statute, however, is that it reflects Congress's understanding that intra-cession recess appointments are ***constitutionally valid*** that it sought only to disincentivize them, rather than simply attempting to declare such appointments unlawful and invalid.

The current iteration of the statute, the Pay Act Amendment of 1940,[173] relaxes the 1863 iteration so as to allow payment for some recess appointees under limited circumstances, but not by a constitutionally consequential margin in light on the Supreme Court's decision in *Noel Canning*.[174]

Subsection (a) of the current iteration repeats the 1863 prohibition: "Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate."[175] It then diverges from the original prohibition by proceeding to carve out three exemptions which allow Treasury funds to be paid:

> (1) when the vacancy arose within thirty days before the end of the session of the Senate;
>
> (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
>
> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.[176]

Subsection (b) further requires that "[a] nomination to fill a vacancy referred to by [one of the three exemptions] shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate."[177] Despite the narrowing exemptions, the sweep of the text still forcefully rejects or at least runs in deep tension with both the happen-to-***exist***

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[171] *See* 1 Op. A.G. at 631–632;

[172] *See Noel Canning*, 573 U.S. at 549.

[173] 5 U.S.C. § 5503.

[174] 573 U.S. 513.

[175] 5 U.S.C. § 5503(a).

[176] *Id.* § 5503(a)(1)–(3).

[177] *Id.* § 5503(b).

interpretation of applicable "Vacancies,"[178] as well as the ***intra-session*** recess interpretation of an applicable "Recess of the Senate."[179]

An act of Congress "repugnant to the constitution, is void."[180] An example of such an act is Congress' "use [of] its powers over appropriations to attain indirectly an object which it could not have accomplished directly."[181] This includes "us[ing] the appropriations power to control a Presidential power that is beyond its direct control"[182] or "depriv[ing] the President of [an Article II] power by purporting to deny him the minimum obligational authority sufficient to carry this power."[183]

By enacting the Pay Act Amendment of 1940 pursuant to its appropriations power, Congress generally prohibits "[p]ayment for services . . . from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed ***while the Senate was in session*** and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate."[184] Under the Article II Recess Appointments Clause, however, the President has the power to grant commissions during Recess of the Senate to fill up any "vacancies that come into existence ***while the Senate is in session***."[185] Ergo, because Congress cannot by statute "directly" prohibit the President from actually granting constitutional recess commissions to Offices that became vacant "while the Senate was in session," so too Congress cannot by statute "indirectly" prohibit the President from dispensing appropriated Treasury funds to pay his recess appointees with constitutionally granted commissions to Offices that became vacant "while the Senate was in session," which is an authority necessary for effectuating the President's exclusive Article II recess-appointment power. Accordingly, the pay restrictions in Subsection (a) are unconstitutional.

Moreover, Subsection (b)'s command that the President "shall" submit to the Senate a "nomination to fill [an exempted] vacancy" in the Office of his recess appointee "not later than 40 days after the beginning of the next session of the Senate"[186] runs in direct contravention to the President's "exclusive power to select the principal (noninferior) officers" under the Article II Appointments Clause and to decide the timing of when to submit an appointment under the Appointments Clause, which was designed to "prevent" exactly this sort of "congressional encroachment upon the Executive and Judicial Branches."[187] Consequently, the Pay Act

[178] *See Noel Canning*, 573 U.S. at 549.

[179] *See id.* at 538.

[180] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

[181] *Mut. Sec. Program-Cutoff of Funds from Off. of Inspector Gen. and Comptroller*, 41 Op. A.G. 507, 526 (1960).

[182] *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996) (cleaned up).

[183] 5 Op. O.L.C. 1, 5–6 (1981).

[184] 5 U.S.C. § 5503(a) (emphasis added).

[185] *Noel Canning*, 573 U.S. at 549 (emphasis added).

[186] 5 U.S.C. § 5503(b).

[187] *Edmond v. United States*, 520 U.S. 651, 659 (1997).

Amendment of 1940's Subsection (b) is also an unconstitutional encroachment upon presidential appointment power via congressional appropriations power for a separate but related reason even beyond the attempt in Subsection (a) to strip certain recess-appointed officials of pay.

The same logic applies even more forcefully when testing the Pay Act Amendment of 1940 against the Compensations Clause of Article III,[188] which "guarantees federal judges 'a Compensation, which shall not be diminished during their Continuance in Office.'"[189] The Recess Appointments Clause "extends to judicial officers" and "a recess appointee to the federal bench can exercise the judicial power of the United States."[190] The Pay Act Amendment of 1940 does not provide for any exclusion of Article III judges from its general assertion of authority over the payment of salaries of recess appointees.[191] On its face, then, the Pay Act Amendment of 1940 is also an unconstitutional infringement on federal judges' Article III guarantee to receive a compensation for recess-appointed service on the bench. This violation of the constitutional guarantees of compensation for Article III judges therefore reflects yet a third way in which the Pay Act Amendment of 1940 is unconstitutional. One is tempted to observe (while, in reality, only one ground for unconstitutionality is sufficient to make the statute a nullity), surely where there are three strikes, the Pay Act Amendment of 1940 is out!

As the supreme "constitutional Executor of the laws" of the land[192] entrusted with the independent obligation to interpret and determine the validity of the enactments he executes,[193] it would be well within the province of the President's authority to summarily disregard and override the appropriations restrictions codified under the Pay Act Amendment of 1940 by freely withdrawing and dispensing Treasury funds for the compensation of Officers commissioned

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

[189] *U.S. v. Hatter*, 532 U.S. 557 (2001) (quoting U.S. Const. art. III, § 1); *see U.S. v. Will*, 449 U.S. 200, 218 (1980) ("[C]ontrol over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government."); *cf.* 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701) (guaranteeing that "Judges Commissions be made *Quamdiu se bene gesserint* [i.e., during good behavior], and their Salaries ascertained and established").

[190] *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985); *see, e.g.*, Henry B. Hogue, Cong. Res. Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 5, n.27 (2015) ("During the recess between the first and second sessions [of the 108th Congress], President George W. Bush appointed Charles W. Pickering to a federal court of appeals judgeship. Several weeks later, during the first recess of the second session, President Bush appointed William H. Pryor to a judgeship on another federal court of appeals.").

[191] *Woodley*, 751 F.2d at 1011 (citing 5 U.S.C. § 5503).

[192] Hamilton, *Pacificus No. 1*.

[193] *See id.* ("He who is to execute the laws must first judge for himself of their meaning."); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2725–26 (2003) (explaining that "execution of the law" necessarily requires "expound[ing] and interpret[ing] the law in the course of performing such duties" and that "the President possesses an independent power of constitutional review of the actions of the other branches in any matter that falls within the sphere of his governing powers"); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 203 (1994) (providing that "when a statute appears to conflict with the Constitution . . . the President can and should exercise his independent judgment to determine whether the statute is constitutional").

pursuant to his Article II recess-appointment power.[194] And indeed, such action would also comport with the standard course taken against congressional appropriation restrictions that unconstitutionally infringe upon the Executive Power under OLC precedents.[195] And, to the extent deemed necessary by the incoming President and his Attorney General, a new OLC opinion can be drafted and issued to memorialize these conclusions.

III.

If, in light of everything we heretofore have set out to establish with due care, a majority of the Senate assents to neither carry out its limited advice-and-consent check on presidential appointments in compliance with the Constitution nor adjourn for the requisite time period authorizing presidential recess appointments under the Constitution, additional lawful measures are at the President's disposal. Properly administered, these measures would *also* empower the President to efficiently appoint the Officers necessary for him to—with vigor, decisiveness, energy, and dispatch—take care that the laws be faithfully executed in promotion of the general welfare of the nation. We ***briefly*** place just ***one*** of those measures on the table here.

Under our Constitution, "[n]either House [of Congress], during the Session of Congress, shall, without the ***Consent*** of the other, ***adjourn for more than three [3] days***, nor ***to any other Place*** than that in which the two Houses shall be sitting."[196] In light of this requirement, as well as the constitutional exemption of bicameral agreements on questions of Adjournment from presidential presentment,[197] the Framers very deliberately bestowed upon the President the monumental authority to "adjourn" the entire Legislative Branch when the two Houses of Congress are "in disagreement about the time of adjournment,"[198] and further prevent them from reconvening in session until the President himself deems their return proper:

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[194] *See Freytag v. Comm'r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) ("Thus, it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. . . . [including] the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional."); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 202–203 (concluding that "the President has the authority to . . . refus[e] to execute a constitutionally defective provision"); *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C 55, 55–56 (1980) ("[T]he President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts."); Memorandum for the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sep. 27, 1977) (concluding that the President may lawfully disregard a statute that he interprets to be unconstitutional).

[195] *See, e.g.*, *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C. 1, 12 (2009).

[196] U.S. Const. art. I, § 5, cl. 4 (Congressional Adjournments Clause).

[197] U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President.").

[198] The Federalist No. 69 (explaining that the President is vested with the power to "adjourn the national legislature in the single case of disagreement about the time of adjournment").

> [***The President***] may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of ***Disagreement*** between them, with Respect to the Time of Adjournment, he ***may adjourn them*** to such Time ***as <u>he</u> shall think proper***."[199]

Although no President has yet to exercise his presidential adjournment power, the Framers clearly understood it to be a meaningful, albeit qualified, residual grant of the classical executive power to summon, prorogue, and dissolve Parliament.[200] The Framers deprived the President of a direct analogue to the regal executive power to dissolve Parliament, so the President may not dissolve Congress; Congress has an independent life of its own.[201] But in the Presidential Adjournment Clause, the Framers vested in the President, essentially, a qualified analogue to the regal executive power of proroguing Parliament; the President may adjourn Congress to a time he deems proper, so long as the upper and lower houses of the bicameral national legislature are in disagreement.[202] Despite being well-aware of the means, the Framers did not subject the President's adjournment of Congress in cases of bicameral disagreement on the question of Adjournment to an expressly definitive time fuse.[203] Rather, they left the determination as to the time period of the adjournment of both Houses up to the President's own sole discretion, *i.e.*, "to such Time as ***he shall think proper***."[204] Justice Story remarked that the President's power in this respect is "indispensable to the proper operations, and even the safety of the government," since it is "the only peaceable way of terminating a controversy, which can lead to nothing but distraction in the public councils."[205]

A.

The Supreme Court in *Noel Canning* recognized that the Presidential Adjournment Clause empowers the President, under designated circumstances, to exert such direct control over the legislative schedule as to determine when the Senate is in Session or in Recess—which carries the constitutionally dispositive consequence of when the Appointments Clause or the Recess Appointments Clause is in effect for the President's appointment of Officers.[206] The majority opinion pronounced that "[t]he Constitution gives the President (if he has enough allies in Congress) a way to ***force a recess***."[207] Justice Scalia, writing for the remaining members of the

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[199] U.S. Const. art. II, § 3 (emphasis added) (Presidential Adjournment Clause).

[200] *See supra* n.69.

[201] *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 223 (3d Cir. 2013) ("Congress is automatically dissolved—and any ongoing session ended—every two years by termination of the terms of one-third of Senators and all members of the House." (citing U.S. Const. art. I, § 2, cl. 1; *id.* art. I, § 3, cls. 1–2)).

[202] *See supra* n.69.

[203] *See supra* n.70.

[204] *See supra* n.71.

[205] *See supra* n.42.

[206] *See NLRB v. Noel Canning*, 573 U.S. 513, 550–51 (2014) (recognizing the President's Convene and Adjourn Clause powers as "exceptions" to the Senate's general "control over its schedule" for purposes of determining when the recess-appointment power applies).

[207] *Noel Canning*, 573 U.S. at 555 (citing U.S. Const. art. II, § 3 ("[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper")) (emphasis added).

Noel Canning Court, agreed with the majority and proclaimed that "Members of the President's party in Congress may be able to ***prevent the Senate*** from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President ***may be able to adjourn both*** 'to such Time as he shall think proper.'"[208]

Ergo, it is clear that "all nine justices of the Supreme Court [in *Noel Canning*] agreed that the president could use the Adjournment Clause to force an ***adjournment long enough to make recess appointments***, as long as there is a ***disagreement*** between the Senate and the House on when to adjourn."[209] The political conditions that would in theory produce such a disagreement derive, of course, from the Congressional Adjournments Clause, which provides in relevant part that neither House of Congress "shall, without the ***Consent*** of the other, adjourn for more than three [3] days."[210]

Our inquiry, then, reduces to a bifold question: ***what*** constitutes a "***Disagreement***" between the House and Senate on Adjournment and ***who*** decides whether one exists?

B.

By virtue of there being no President who has ever utilized the Presidential Adjournment Clause in practice, there does not exist any on-point judicial precedent to illuminate our inquiry. Yet this is not to be understood as the ***sole*** reason for the want of such a decision by a federal court.

Accounting for and harping on the acute awareness of institutional competence, embrace of self-restraint, and appropriate deferential respect owed by Article III judges to the Constitution's distribution of powers, then-D.C. Circuit Judge Scalia submitted that courts would "intrude upon the prerogatives of the Legislative Branch" beyond the scope of their "judicial Power"[211] to decide Cases or Controversies[212] if they were to "resolve an internal dispute regarding the provision that '[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.'"[213] This is intimately related to Justice Scalia's later pronouncement in *Noel Canning*, where he recognized that "Members of the President's party in Congress may be able to prevent the Senate from holding *pro forma* sessions with the necessary frequency, and if the House and Senate disagree, the President may be able to adjourn both 'to such Time as he shall think proper.'"[214] Read together, these judicial proclamations demonstrate Scalia's deferential recognition of the Constitution's vesting of the final decisionmaking authority over questions of Adjournment ***exclusively*** in the President ***alone***.

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[208] *Noel Canning*, 573 U.S. at 614 (Scalia, J., concurring in the judgment) (quoting U.S. Const. art. II, § 3).

[209] Hans A. von Spakovsky, et al., *Can the President Adjourn Congress and Make Appointments Without Senate Confirmation?*, Heritage Foundation (Apr. 17, 2020) (emphasis added).

[210] U.S. Const. art. I, § 5, cl. 4 (Congressional Adjournments Clause) (emphasis added).

[211] U.S. Const. art. III, § 1.

[212] U.S. Const. art. III, § 2, cl. 1.

[213] *Moore v. U.S. House of Representatives*, 733 F.2d 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring) (quoting U.S. Const. art. I, § 5, cl. 4).

[214] *Noel Canning*, 573 U.S. at 614 (Scalia, J., concurring in the judgment) (quoting U.S. Const. art. II, § 3).

In other words, the President's discretionary determination to execute the Presidential Adjournment Clause pursuant to his own reasonably perceived existence of a bicameral "Disagreement" on the question of Adjournment is a ***final*** determination; it is not subject to further appeal to the scrutiny or revision of officers of the Judicial Branch, whose jurisdiction and province these determinations are deliberately taken out of by the Constitution and textually committed to the Chief Magistrate of the Executive Branch instead.

This understanding also finds support in and is buttressed by the political question doctrine, which compels federal courts to abstain from resolving nonjusticiable political questions in excess of their Article III "judicial Power"[215] to decide Cases or Controversies.[216] A political question compelling courts to dismiss for nonjusticiability is found to exist when any one of the following formulations is "inextricable" from the case before them:

> [1] a ***textually demonstrable constitutional commitment of the issue to a coordinate political department***; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the ***impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government***; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the ***potentiality of embarrassment from multifarious pronouncements by various departments on one question***.[217]

We can unhesitatingly conclude, based on the persuasive weight of 19th century constitutional practice and judicial decisionmaking on ***gubernatorial*** adjournments rendered under state constitutional analogues, that the nonjusticiable formulations emphasized, *supra*, are inextricably linked to the President's finding of a bicameral "Disagreement" on a question of Adjournment and subsequent determination to execute the Presidential Adjournment Clause in resolution thereof.

In his heralded Treatise, *Constitutional Limitations*, Judge Thomas M. Cooley explained that "every department of the government . . . may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction" and that "[s]ometimes the case will be such that the decision when made *must*, from the nature of things , be ***conclusive*** **and** ***subject to no appeal or review***, however erroneous it may be in the opinion of other departments or other officers."[218] In terms mirroring that of the federal political question doctrine, Judge Cooley instructed that such a case is one "where, by the constitution, a particular question is *plainly* ***addressed*** to the ***discretion*** **or** ***judgment*** of some ***one department*** **or** ***officer***, so that the ***interference*** **of** ***any other department*** or officer, with a view to the ***substitution of its own*** discretion or judgment in the place of that to which the constitution has confided the

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[215] U.S. Const. art. III, § 1.

[216] U.S. Const. art. III, § 2, cl. 1.

[217] *Baker v. Carr*, 369 U.S. 186, 217 (1962) (emphasis added).

[218] Thomas M. Cooley, A Treatise Upon the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union *41 (1868) (emphasis added) [hereafter *Cooley* at __].

decision, would be ***impertinent*** **and** ***intrusive***.[219] Of monumental significance is that Judge Cooley proceeded to identify the Clause preceding and intimately related to the Presidential Adjournment Clause as the prototypical example of such a case:

> We will suppose, again, that the constitution empowers the executive to convene the legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the constitutional sense; it is obvious that the question is ***addressed exclusively to the executive judgment***, and ***neither the legislature nor the judicial department can intervene*** to compel action if he decide against it, or to enjoin action if, in his opinion, the proper occasion has arisen.[220]

Relying on state court jurisprudence, Judge Cooley similarly identified constitutional clauses analogous to the Presidential Adjournment Clause as another such example, instructing that "if the executive in any case undertake to ***exercise this power to prorogue and adjourn***, on the ***assumption that a disagreement exists*** between the two houses which warrants his interference, and his action is acquiesced in by those bodies, . . . the legislature must be held in law to have adjourned, and ***no inquiry*** can be entered upon as to the ***rightfulness of the governor's assumption*** that such a disagreement existed."[221]

In the 1893 case of *In re Legislative Adjournment*,[222] the Supreme Court of Rhode Island presented with the question of whether, in accord with the state's constitution, there was an actual "disagreement between the two houses of the general assembly, respecting the time or place of adjournment" that lawfully authorized the governor's adjournment of the general assembly.[223] There, the state supreme court held that "this is a case in which the executive department of the state government has the power and duty to finally pass upon a question of constitutional construction."[224] With respect to the question of whether the prerequisite "Disagreement" existed so as to constitutionally empower the governor to adjourn the state assembly, the court opined:

> Whenever, therefore, there shall be a ***disagreement between the two houses*** as to the time or place of adjournment, ***certified to the governor by either***,—and, as before stated, he is the ***sole judge*** as to the fact of the ***existence of such disagreement*** upon such certification to him,—we think ***he has the constitutional***

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[219] *Id.*

[220] *Id.*; *see* U.S. Const. art. II, § 3 (providing that the President "***may, on extraordinary Occasions, convene both Houses, or either of them***, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper" (emphasis added)).

[221] *Cooley* at *132 (citing *People ex rel. Harless v. Hatch*, 33 Ill. 9 (Ill. 1863)) (emphasis added).

[222] 27 A. 324 (R.I. 1893).

[223] *Id.* at 326, n. 4 (cleaned up).

[224] *Id.* ("The power of the executive which we are considering is a political power, 'in the exercise of which,' in the language of Chief Justice Marshall . . . 'he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience; and, whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (Marshall, C.J.))).

> ***power to adjourn*** them under [the gubernatorial adjournment clause] of the constitution.[225]

The state supreme court went even further, proclaiming that a certificate of disagreement from either House, albeit dispositive, is not necessary for the chief executive to have determined that a "Disagreement" between both Houses on the question of Adjournment existed. Rather, it is fully within the constitutional prerogative of the chief executive to judge that a "Disagreement" exists ***without*** any formal certification from either House, and ***merely*** by interpreting the nonaction of one House to consent to the other's adjournment as a "Disagreement" authorizing resolution by the chief executive in the form of his adjournment power:

> [E]ven if the record of one house should not disclose that it had acted, ***nonaction is sometimes equivalent to adverse action***, and ***may be so treated by the executive*** in determining whether a disagreement exists, which calls for the ***exercise of his constitutional prerogative***.[226]

Relying on Justice Story's U.S. Supreme Court opinion in *Martin v. Mott*, the Rhode Island Supreme Court therefore concluded that it does not have any authority "to inquire into the facts upon which the governor based his said action; for . . . '[w]henever a statute gives a ***discretionary power*** to any person, to be exercised by him upon his ***own opinion of certain facts***, it is a sound rule of construction that the statute constitutes him the ***sole and exclusive judge*** of the existence of those facts.'"[227]

C.

Applying the above, if upon judgment of the facts known to him, the President arrives at the opinion that a bicameral "Disagreement" on a question of Adjournment has manifested, in one form or another, the President is vested with the exclusive, absolute discretion under the Presidential Adjournment Clause to adjourn Congress for the requisite 10-day-or-more recess that authorizes his unilateral recess appointment of subordinate executive officers to vacancies without the Senate's advice and consent. Let us assume *arguendo* that the House of Representatives were to pass a concurrent resolution adjourning Congress for the requisite 10-day recess authorizing the President to recess appointment his subordinate executive officers. If the Senate fails to adopt the concurrent resolution to adjourn for the requisite recess either via majority down vote *or* via "nonaction" that may properly be interpreted as "equivalent to adverse action," the President would be well within his sound discretion to judge that "Disagreement" has indeed arisen. The same would be true if, upon the Senate's majority down vote or nonaction on the concurrent resolution adjourning Congress passed by the House, the Speaker of the House submitted some certification of the disagreement between both Houses to the President.

This is why hair-splitting arguments—deployed to try to deny to a President the power to adjudge that a disagreement exists between the House and the Senate as to adjournment—must fail, whether those arguments are based on (a) the claim that the disagreement must specifically

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[225] *Id.* at 328 (emphasis added).

[226] *Id.*

[227] *Id.* (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (Story, J.)) (emphasis added).

relate to the ***time*** of adjournment, rather than to whether to enter a recess; or (b) attempted abstention by one of the two houses of Congress as to issuing a pronouncement about its view of taking a recess (for instance, were the Senate to insist it wanted to "stay in session," and that such a position is not the functional equivalent of disagreeing that an adjournment (recess) should be taken).[228]

Under any circumstances falling within the realm of the aforementioned scenarios, the President wields the exclusive and supreme power under the Constitution to adjourn Congress for the requisite ten-day period to authorize his unilateral appointment of subordinate executive officers, ***without*** the advice and consent of the Senate, pursuant to the Recess Appointments Clause. Most importantly, because the Constitution textually commits the "sole and exclusive judge"[229] of the existence of a bicameral "Disagreement" on a question of Adjournment to the President, the President's discretionary determination to execute his Presidential Adjournment Clause power in resolution of that Disagreement would be ***final***. "[N]either the legislature nor the judicial department can intervene" *post hoc*,[230] and "no inquiry can be entered upon as to the rightfulness of the [President's] assumption that such a disagreement existed."[231]

Accordingly, if the President executed his discretionary power to adjourn both Houses of Congress according to his sound and reasonable judgment on the existence of a "Disagreement between them," it may yield the efficient appointment of subordinate executive officers necessary for the President to "vigorously" and "decisively" carry out, with the requisite "energy" and "dispatch," his indispensable law execution prerogative in advancement of the public good. In other words, the Presidential Adjournment Clause may be administered toward

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[228] *See, e.g.,* Ed Whalen, *The House Has No Authority to 'Disagree' with Senate's Decision to Remain in Session*, National Review (Nov. 17, 2024) ("[T]he Senate has complete authority to decide to stay in session. It does not need the House's consent, and there would be no occasion to ask the House to agree. So for purposes of Article II, section 3, there can ***never be*** a 'Case of Disagreement' between the House and the Senate over the Senate's staying in session.") (emphasis added).

With all due respect, this argument is the height of arid formalism. To use a prosaic example to illustrate the shortcomings of Whalen's logic, suppose a younger child is placed in the care of her older brother along with a motherly instruction: "You two must keep playing the game you are playing now unless both of you agree to do something different; but if you two do disagree about whether to keep playing, you must come back to me and I will decide." The oldest of the two siblings eventually says he wants to stop playing (because he's losing), even though his younger sister want to keep going. The sister protests when the oldest pronounces both of them will stop playing the game. Then, both children go to their mother for a tie-breaking decision. The oldest sibling, with a look of great satisfaction (he is a budding lawyer, after all), argues that the mother cannot decide whether the game should continue because the siblings did not disagree about "keep[ing] playing the game," rather he, the older sibling, wanted to "***stop*** playing the game," which is entirely different. What result from the mother? Of course, the mother is going to say that she is fully empowered to decide, consistent with the ground rule set for the children, whether they stop or keep playing the game (which are just two sides of the same coin). For Mr. Whalen to argue that the Senate can try tactics similar to those of the older sibling and thereby prevent a dispute between the two houses of Congress from ever arising, based on the view that whenever the Senate says it wants to continue a session there is "***never***" a disagreement between the two houses falling within the precise terms of the Presidential Adjournment Clause, makes no practical sense. The President can clearly look at the on-the-ground procedural realities and judge for himself whether the two houses of Congress disagree about calling a recess.

[229] *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827) (Story, J.).

[230] *See Cooley* at *41.

[231] *Id.* at *132 (citing *People ex rel. Harless v. Hatch*, 33 Ill. 9 (Ill. 1863)) (emphasis added).

the very same *telos* that guides the unitary executive power and its complementary powers of appointment vested under Article II.

CONCLUSION

While expressed informally, nothing that President-Elect Trump has said about presidential recess appointment powers has been incorrect. Indeed, the full range powers vested in the Chief Magistrate under the Recess Appointments Clause and the base Appointments Clause, as supplemented under the FVRA, are sweepingly broad and dynamic—more than adequate to fill the subordinate Offices necessary for a fully functioning Executive Branch. And if the Senate persists in protracting the confirmation process, the Chief Magistrate is vested with the exclusive and final authority to adjourn both Houses of Congress into recess for a sufficient amount of time necessary to unilaterally fill his Executive Branch.