
THE SENATE AND THE RECESS APPOINTMENTS

David J. Arkush*

INTRODUCTION

The Senate and the President have sparred over recess appointments for nearly a decade, and the Supreme Court is poised to weigh in. *National Labor Relations Board v. Noel Canning*¹ asks the Court to choose between polar positions: either the Senate can block all presidential appointments by refusing to confirm nominees and refusing to go on recess, or the Senate’s advice and consent authority may be reduced to nullity because the President can appoint officers during virtually any Senate break. As a result, the case may dramatically reallocate power between the President and the Senate.

This Essay responds to two widely held but mistaken views about the controversy that have harmed judicial review and scholarly debate. The first is that *Noel Canning* presents a classic conflict between the President and the Senate. This view misses that the Senate majority has the power to decide when the Senate is in recess, and in December 2011 it likely intended to hold a recess that would enable presidential appointments. The Senate initiated *pro forma* sessions not because the majority wanted to — or because the minority filibustered an attempt to adjourn — but because the Speaker of the House of Representatives claimed to prevent the Senate from taking a recess. His actions were likely unconstitutional.

The second mistaken view is that courts should resolve *Noel Canning* by defining the term “recess,” as the lower courts have done.² At least one commentator has rejected this perspective, arguing that the President holds exclusive authority to decide when the Senate is in recess.³ Both views are mistaken. Because the Senate majority is empowered to decide when the Senate is in recess, the question for courts

* Visiting Assistant Professor, University of Richmond School of Law. Thanks to Brian Wolfman and Gerard Magliocca for comments on a draft of this Essay.

¹ 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

² See *id.* at 499–507; *NLRB v. Enter. Leasing Co.*, 722 F.3d 609, 633–52 (4th Cir. 2013); *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203, 207–08 (3d Cir. 2013). This Essay concerns two of the three questions on which the Court granted certiorari: the constitutionality of recess appointments during *pro forma* Senate sessions and during an “intrasession” recess.

³ See Victor Williams, Opinion, *Recess Appointment Challenges*, NAT’L L.J., Nov. 26, 2012, at 22.

is not how they (or the President) should define “recess,” but what the Senate majority intended regarding the break it took.⁴

Ordinarily, the courts grant presidential actions a presumption of validity and require challengers to prove claims to the contrary. In this controversy, the courts have failed to do either one, likely because they were influenced by the interbranch-conflict narrative. The better approach is to adopt a rebuttable presumption that the Senate majority intended to enable appointments and defer to that perspective unless the challengers demonstrate otherwise.

Finally, this Essay gives rise to a cautionary note: there are dangers in adjudicating a major case concerning the President’s and Senate’s respective powers without hearing from the Senate majority. The Court should consider requesting its views.

I. A LOST HISTORY

The common view of the President’s recess appointments is the one promoted by the challengers, which are private parties supported by a minority of senators and the Speaker of the House of Representatives: *Noel Canning* presents a classic conflict between the President and the Senate. The Senate attempted to block recess appointments by holding *pro forma* sessions in December 2011 and January 2012, and the President disregarded the Senate’s wishes when he appointed four officials on January 4, 2012.

Here is the problem with that view: It is uncontroversial that the Senate majority has generally supported the President’s nominees, and the most plausible inference is that the majority also supported his recess appointments. The belief that the Senate is in conflict with the President appears to stem from the belief that the Senate minority filibustered the majority’s attempt to take a recess, thereby placing the Senate, as a body, in conflict with the President’s actions. But Senate

⁴ One commentator has suggested in a blog post that the courts should defer to the Senate. His argument differs from this Essay’s because it accepts at face value the view that the Senate attempted to block the recess appointments. See Gerard Magliocca, *Symposium: Listen to the Senate’s Recess Bell*, SCOTUSBLOG (July 16, 2013, 2:06 PM), <http://www.scotusblog.com/2013/07/symposium-listen-to-the-senates-recess-bell>. This Essay’s position on the scope of the Court’s review bears some similarity to Justice Souter’s in *Nixon v. United States*, 506 U.S. 224 (1993). The *Nixon* majority held that a challenge to the Senate’s evidentiary procedures in an impeachment trial presented a nonjusticiable political question. See *id.* at 226. Justice Souter agreed, but he wrote separately to note that the Court’s analysis might be different if the Senate were to venture too far outside the boundaries of the concept of a trial, for example by using a coin toss. See *id.* at 253–54 (Souter, J., concurring in the judgment). This Essay’s position is that the recess at issue in *Noel Canning* is well within the acceptable boundaries of the term “recess,” and that within those boundaries the courts should defer to the Senate. The Essay does not suggest that the Court should never have a role in recess-appointments disputes. Nor does it take a view on whether the Essay’s position would be properly characterized as falling within the political question doctrine.

rules do not permit filibusters of motions to adjourn and, in fact, it was the Speaker of the House of Representatives who claimed authority to block the Senate from taking a recess.⁵

Rather than engage in political theater with the House, the Senate majority settled for holding “*pro forma* sessions” in which, once every three days, a single senator declared the Senate open and adjourned within a span of seconds. *Pro forma* sessions had two particularly useful qualities at the time: the House could not block them, so senators could leave town, and it was reasonable to believe that courts would uphold recess appointments made during the period.⁶ If the Senate majority intended to block recess appointments, then the Majority Leader likely would have made statements to that effect, as he did when successfully deterring recess appointments in 2007 and 2008.⁷ In fact, no member of the Senate majority has even intimated disapproval of the appointments.

This history is relevant for two reasons. It suggests that the Supreme Court can consider the constitutionality of House interference with appointments, and it offers a previously unrecognized view of Senate wishes, to which the Court should defer. Before elaborating on these points, it is necessary to examine the Senate majority’s authority to recess.

II. SENATE MAJORITY POWER OVER RECESSES

It should be uncontroversial that the Senate controls the definition of a recess, at least within the boundaries of the word’s broad, ordinary meaning. Indeed, the *Noel Canning* challengers and their sup-

⁵ See, e.g., Press Release, Representative Jeff Landry, Landry Presides over House, Blocks Recess Appointments (July 1, 2011), available at <http://votesmart.org/public-statement/622905/#.UiDtPdJFSuI> (“This morning — under the instruction of Speaker Boehner, Leader Cantor, and Whip McCarthy — I presided over a pro forma session . . . blocking President Obama from issuing recess appointments.”); see also TODD GARVEY & DAVID H. CARPENTER, CONG. RESEARCH SERV., R43030, THE RECESS APPOINTMENT POWER AFTER *NOEL CANNING* V. *NLRB*: CONSTITUTIONAL IMPLICATIONS 9 (2013).

⁶ The constitutionality of recess appointments during *pro forma* sessions was an open question, but the Constitution was ambiguous on the point, which suggested that some degree of judicial deference would tilt the balance in favor of upholding the appointments, as it had in prior cases. The D.C. Circuit was not expected to go beyond the question regarding *pro forma* sessions and conclude, as it did, that all intrasession recess appointments are invalid or that the President cannot fill vacancies that exist before a recess. The challengers scarcely mentioned these theories, noting their existence only to support a narrower argument against what they characterized as the more assertive use of appointment power during a break of just three days. See Joint Brief for Petitioner Noel Canning and Movant-Intervenors Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace at 68–69, *Noel Canning*, 133 S. Ct. 2861 (Sept. 19, 2013) (Nos. 12-1115, 12-1153) [hereinafter Joint Brief for Petitioner and Movant-Intervenors].

⁷ See, e.g., *Senate Stays in Session to Block Bush Recess Appointments*, CNN (Nov. 19, 2007, 2:20 PM), <http://www.cnn.com/2007/POLITICS/11/19/senate.reid>.

porting House and Senate amici have argued that the courts must defer to the Senate's (or Congress's) view of its own proceedings,⁸ and Judge Griffith at oral argument noted that there is "no question" that the Senate can define "recess" for purposes of the Recess Appointments Clause.⁹ But to accept this principle, alone, requires rejecting the D.C. Circuit's reasoning. That court held that the Recess Appointments Clause defines a particular type of "recess" — and, implicitly, "session" — thereby narrowing the Senate's ordinary authority to define the terms as it sees fit.¹⁰

The Constitution establishes that "Each House may determine the Rules of its Proceedings."¹¹ Read naturally, this rule applies to Senate comings and goings in the absence of a clear, specific provision to the contrary. The Recess Appointments Clause is not such a provision. The Framers carefully considered how Congress should convene and adjourn, viewing the questions as important to congressional independence.¹² They settled on a few simple rules: Congress must meet at least once each year. Each house must consent before the other may adjourn for more than three days. And if the two houses disagree regarding when to adjourn, the President can adjourn them both.¹³ That is all. In contrast, the Framers did not discuss the meaning of the terms "Recess" or "Session," as used in the Recess Appointments Clause,¹⁴ or for that matter "Adjournment," which appears in the next section of the Constitution.¹⁵ There appears to be no evidence that they intended these terms to have anything but their ordinary, commonsense meanings. Moreover, a broad, ordinary, and practical meaning of "recess" fits the pragmatic purposes of the Recess Appointments Clause: to relieve the Senate of the burden of remaining in session con-

⁸ See, e.g., Joint Brief for Petitioner and Movant-Intervenors, *supra* note 6, at 56–58; Brief for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the United States Senate in Support of Petitioner/Cross-Respondent Noel Canning at 12, 13, *Noel Canning*, 133 S. Ct. 2861 (Sept. 26, 2013) (Nos. 12-1115, 12-1153) [hereinafter Brief for Amici Curiae Senate Republican Leader Mitch McConnell et al.]; Amicus Curiae Brief of the Speaker of the United States House of Representatives, John Boehner, in Support of Petitioner at 6, *Noel Canning*, 133 S. Ct. 2861 (Sept. 26, 2013) (Nos. 12-1115, 12-1153).

⁹ Transcript of Oral Argument at 19, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153); see also *id.* at 19–25. Judge Griffith simply believed that the Senate had not defined the term. The Fourth Circuit also suggested that the courts should not "prevent the Senate from establishing its own rules concerning the conduct of its proceedings." *NLRB v. Enter. Leasing Co.*, 722 F.3d 609, 651 (4th Cir. 2013). But it assumed that the Senate's intent in holding *pro forma* sessions was to block an appointment. See *id.*

¹⁰ *Noel Canning*, 705 F.3d at 499–507 (holding that "recess" refers only to intersession recesses).

¹¹ U.S. CONST. art. I, § 5, cl. 2.

¹² See, e.g., Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 386–88 (2004).

¹³ See *id.* at 386–87.

¹⁴ U.S. CONST. art. II § 2, cl. 3.

¹⁵ *Id.* § 3.

tinually to provide advice and consent, and to enable the President to fill important offices temporarily in the Senate's absence.¹⁶

One suspects that some courts' and commentators' recent willingness to read the Clause narrowly stems in part from a sense that it has become irrelevant in an era of rapid communication and travel. If the President needs to make an appointment and the Senate is out of town, the argument goes, he can call it back quickly. But both of the Clause's purposes remain relevant. It is not difficult to imagine circumstances in which modern communications and travel are not so readily available — for example, in the event of an attack or during a war on American soil — precisely when the President needs to fill important executive branch positions. Also, we know that the Framers wanted elected representatives to spend time in their local communities.¹⁷ Even if senators can return to Washington quickly, the Framers might have preferred them to spend longer uninterrupted periods at home, and perhaps future Senates will return to that practice. We would be mistaken to project the limits of our contextually situated imaginations onto a Constitution that was written, in Chief Justice Marshall's words, "to endure for ages to come."¹⁸

Prior to the D.C. Circuit's decision in *Noel Canning*, the principal support for restricting the definition of recess was an article by Michael Rappaport arguing that the "original" meaning of "recess" encompassed only intersession breaks.¹⁹ Rappaport's effort is most illuminating in what it fails to demonstrate: he apparently did not uncover any evidence that the Framers intended "recess" to have a special meaning. He also concedes that, as a textual matter, the ordinary meaning of "recess" is plausible.²⁰ This arguably should end the analysis, but Rappaport goes further, attempting to discern what the Framers would have thought about the meaning of recess, had they thought about it. On its face, this mode of analysis is unlikely to justify departing from the ordinary meaning of constitutional text, and his does not.

The law regarding authority over Senate recesses does not end with the Constitution. Senate rules, in turn, place power to initiate recesses in the hands of a simple majority. Senate Rule XXII(1), not cited by any of the reviewing courts, provides that a motion to adjourn "shall

¹⁶ See THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

¹⁷ See, e.g., Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1561 (2005).

¹⁸ *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

¹⁹ See Rappaport, *supra* note 17.

²⁰ *Id.* at 1550.

be decided without debate.”²¹ In other words, it cannot be filibustered. A motion to adjourn also takes precedence over all other motions and is nearly always in order,²² and a quorum need not be present.²³ The upshot of these rules is that a simple majority of senators can initiate a recess, intersession or intrasession, at any time.²⁴

III. HOUSE INTERFERENCE WITH APPOINTMENTS

All this is to say that the Court should take as its baseline that the Senate majority can legally take the recesses it desires. The Court might then consider whether the House can block recess appointments by interfering with that power. It was the Speaker of the House of Representatives who threatened to prevent the Senate from adjourning from May through December 2011, an action which resulted in the Senate holding the *pro forma* sessions in question in *Noel Canning*.²⁵ He likely lacked the constitutional authority to do so.

The Speaker’s legal basis for his authority to stop the Senate from adjourning was the Adjournments Clause of the Constitution, which states that “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days”²⁶ There are two reasons to doubt that this language authorizes the House to block recess appointments. First, a general provision regarding adjournments, which is justified by purposes unrelated to appointments,²⁷ should not allow one chamber of Congress to defeat the clear assignment of appointment power to the other chamber and the President. The Constitution assigns virtually all authority

²¹ SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 112-1, R. XXII(1), at 20 (2012) [hereinafter STANDING RULES OF THE SENATE] (“When a question is pending, no motion shall be received but — To adjourn. To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain. To take a recess. . . . [A]nd the motions relating to adjournment, to take a recess . . . shall be decided without debate.”). See also FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. DOC. NO. 101-28, at 1 (Alan S. Frumin, ed., rev. ed. 1992).

²² See RIDDICK & FRUMIN, *supra* note 21, at 4.

²³ STANDING RULES OF THE SENATE, *supra* note 21, R. VI(4), at 5 (“[U]ntil a quorum shall be present, no debate nor motion, except to adjourn . . . , shall be in order.”).

²⁴ The Senate adjourns “to a day certain” when it takes an intrasession recess. An adjournment *sine die* (“without date”) ends the current Senate session and gives rise to an intersession recess. Rule XXII prescribes the same treatment for motions “[t]o adjourn” and “[t]o adjourn to a day certain.” *Id.* R. XXII(1), at 20.

²⁵ NLRB v. Noel Canning, 705 F.3d 490 (D.C. Cir. 2013).

²⁶ U.S. CONST. art. I, § 5, cl. 4.

²⁷ The Adjournments Clause has obvious general purposes, such as ensuring that one house of Congress cannot adjourn while the other believes that important business remains unfinished. See, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 379 (2005); see also Vermeule, *supra* note 12, at 390–91.

over appointments to the President and the Senate,²⁸ leaving the House a narrow role: it may join with the Senate to give the President even more independent power, authorizing him to appoint inferior officers without Senate consent.²⁹ In other words, when the Framers wanted the House to have a role in appointments, they gave it one. Indeed, the history confirms that the Framers viewed the House as unsuited to wield appointment authority.³⁰ In light of specific, unambiguous text and purpose limiting the House's role in presidential appointments, it makes little sense to reason that the House's general ability to stop the Senate from adjourning for more than three days gives it back-door power to block a narrow but important category of Presidential appointments.

Second, the Constitution states that if the House and Senate disagree on the "Time of Adjournment," the President can adjourn them both.³¹ This executive power renders the current House's claimed power to block recess appointments a nullity. So long as the Senate majority and the President agree on a nomination — which will be true any time the House might want to block a Senate recess to prevent an appointment — the House cannot stop the appointment. This analysis suggests an independent reason to doubt that the House has any ability to block recess appointments in the first place: it is unlikely that the Framers gave the House a vacuous power.

IV. DEFERENCE TO THE SENATE

Once the Court concludes that it should defer to the Senate majority's wishes regarding the disputed recess appointments, it must discern those wishes. On the surface, the evidence appears mixed. On the one

²⁸ U.S. CONST. art. II, § 2.

²⁹ *Id.* cl. 2.

³⁰ The Framers initially took the position that the whole Congress would participate in judicial appointments, but soon they rejected that plan because they viewed the House as unfit. More difficult was the question whether to allocate appointment power to the Senate, the President, or both, which they finally resolved just ten days before the end of the Convention. See Nicole Schwartzberg, *What Is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J.L. & POL. 231, 242–44 (2013). Alexander Hamilton explained his opposition to House involvement in a well-known passage in the Federalist No. 77: "A body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all when it is recollected that in half a century it may consist of three or four hundred persons." See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 16, at 461. James Madison expressed similar views at the Constitutional Convention. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 120 (Max Farrand ed., rev. ed. 1937) (recording Madison's support for senatorial rather than congressional appointment authority); *id.* at 232–33 (recording that Madison opposed a motion to give the full Congress authority to make judicial appointments and that after his remarks the motion was withdrawn and the delegates unanimously agreed to exclusive Senate power).

³¹ U.S. CONST. art. II, § 3.

hand, the Senate majority took the same action it did when indisputably attempting to block recess appointments in 2007 and 2008: it held *pro forma* sessions. On the other hand, there is reason to believe that it held *pro forma* sessions only because the House would not consent to a recess longer than three days. In addition, the Senate said that it planned to conduct “no business” during the recess,³² and all senators left town, suggesting that they intended to be unavailable to provide constitutional advice and consent. In light of this ambiguity — as well as the general difficulties in discerning Senate intent — the Court should ensure that it adopts the proper rebuttable presumption and places the burden of persuasion where it belongs, for the choice of these default rules may heavily influence the outcome.

In the present situation, the proper rebuttable presumption is that the Senate majority sought to permit appointments. There are two reasons. First is the ordinary default rule that plaintiffs in civil cases bear the burden of proof.³³ Second is the presumption that presidential acts are constitutional,³⁴ particularly when the President “is acting under the color of express authority of the United States Constitution.”³⁵ In other words, if Senate majority intent to permit recess appointments would validate the President’s action, and that reading of Senate intent is plausible, it should be presumed unless the challengers disprove it.

That reading of Senate intent is more than plausible. It is uncontroversial that the Senate majority has generally supported the President’s nominees. The majority also never objected to the appointments at issue in *Noel Canning*, before or after the President made them. The Senate did not pass a resolution condemning the appointments, which could have been accomplished if just a few Democrats joined with the unanimous Republican opposition. To the contrary, not a single senator in the majority party has voiced dissatisfaction. The majority has also declined to participate in litigation challenging the appointments. The Senate has a formal process by which it can authorize the Office of Senate Legal Counsel to intervene or appear as

³² NLRB v. Noel Canning, 705 F.3d 490, 499 (D.C. Cir. 2013) (quoting 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011)).

³³ See, e.g., Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005).

³⁴ INS v. Chadha, 462 U.S. 919, 951 (1983).

³⁵ Evans v. Stephens, 387 F.3d 1220, 1222 (11th Cir. 2004). See also United States v. Alocco, 305 F.2d 704, 713–14 (2d Cir. 1962). The Third Circuit believed that the presumption of validity does not apply “in separation of powers cases,” NLRB v. New Vista Nursing, 719 F.3d 203, 264 (3d Cir. 2013) (Greenaway, J., dissenting), but that statement is overbroad. The presumption does not apply when two government branches *dispute* their constitutional powers. After all, whose view should the court presume valid? See, e.g., Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting). The point applies here only if one assumes that the Senate and the President disagree, a position for which, in the present case, there is no persuasive evidence.

amicus in litigation on behalf of the Senate,³⁶ and the Senate amici in *Noel Canning* have no such authorization. Forty-two senators filed an amicus brief opposing the appointments on their own initiative, with the aid of private counsel,³⁷ underscoring their minority, unofficial status.

The D.C. Circuit failed to presume the validity of the appointments and appears not to have considered who had the burden of persuasion. To the contrary, Judge Griffith at oral argument seemed to assume that the Senate majority opposed the appointments merely because it did not file a brief supporting them.³⁸ But to require affirmative action by the Senate majority would turn the Recess Appointments Clause on its head. The purpose of the Clause is to enable the President to appoint certain officers *without* the Senate's participation.

Moreover, although Judge Griffith was aware that the Senate must pass a resolution to authorize official Senate intervention,³⁹ he appears to have forgotten that resolutions can be debated and therefore filibustered.⁴⁰ In other words, the Senate majority has powers under Senate Rules that it lacks the ability to defend in court, at least officially through the Office of Senate Legal Counsel. In these instances, the majority's failure to appear in court says nothing about its wishes. To be sure, the Majority Leader could retain his own counsel, but it is not difficult to imagine why he might dislike the idea of hiring private lawyers to debate Senate procedure in the courts.⁴¹ Still, he might provide his views if invited, and the Court should consider soliciting them.

Finally, the Supreme Court might be justified in reaching a more emphatic conclusion: it could hold that Senate acquiescence in recess appointments simply validates them, without requiring any inquiry in-

³⁶ See 2 U.S.C. §§ 288b(c), 288e (2012).

³⁷ See Brief for Amici Curiae Senate Republican Leader Mitch McConnell et al., *supra* note 8.

³⁸ Transcript of Oral Argument, *supra* note 9, at 21 (Griffith, J.) (“Why isn’t the Senate here? . . . I mean, the implication is there are not enough votes to get a Senate resolution to do so, so what does that tell us about the Senate’s view of this issue?”).

³⁹ See 2 U.S.C. §§ 288b(c), 288e.

⁴⁰ Resolutions are not among the matters that Senate Rule XXII exempts from debate. See STANDING RULES OF THE SENATE, *supra* note 21, R. XXII, at 20. See also RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 10 (2013); RIDDICK & FRUMIN, *supra* note 21, at 1204.

⁴¹ One might argue that it made little sense for the Majority Leader to sit by while courts invalidated the recess appointments. But he might have been more interested in what he could accomplish in the Senate, where he held the upper hand. In fact, the Senate majority secured confirmations of nominees to the disputed agencies in July 2013, at which point some members of the minority suggested that they were wrong to have blocked them in the first place. See, e.g., Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1. Furthermore, one of the disputed appointees, Richard Cordray, appears to have mooted all litigation over his appointment by ratifying his preconfirmation actions. See Notice of Ratification, 78 Fed. Reg. 53,734 (Aug. 27, 2013).

to Senate intent. Matthew Stephenson has argued that passive acquiescence by the Senate might fulfill its “advice and consent” role even for ordinary, full-term appointments.⁴² Stephenson’s argument is textually plausible, although it is in tension with two centuries’ worth of practice. In the more modest context of temporary recess appointments, it is difficult to see the constitutional harm in a rule that Senate silence quiets third-party claims of unconstitutionality. The rule appears to risk neither aggrandizement nor abdication, the twin concerns of separation of powers doctrine.⁴³ The President cannot encroach on the Senate’s powers unless the majority decides to remain silent, effectively granting its consent. And passive Senate consent to a temporary recess appointment can hardly be deemed an abdication when the Recess Appointments Clause requires no Senate action in the first place.

⁴² See Matthew C. Stephenson, Essay, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013).

⁴³ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).