

# **The Original Meaning of the Recess Appointments Clause**

by

Michael B. Rappaport

- I. Introduction
- II. Background
  - A. The Methodology of Originalism
  - B. The Structure of the Appointment Provisions
  - C. The Scheduling of Recesses Throughout American History
- III. The Meaning of Happen
  - A. Text
  - B. Structure and Purpose
    - 1. Inferences from the Constitution's Other Appointment Methods
    - 2. Reasons for the Exist Interpretation: End of the Session Vacancies
    - 3. Congress's Power to Provide for Acting Appointments
    - 4. Overall Effect
  - C. History
    - 1. Attorney General Edmund Randolph's Interpretation
    - 2. Alexander Hamilton's Interpretation
    - 3. St. George Tucker's Interpretation
    - 4. George Washington's Interpretation
    - 5. The Previously Occupied Interpretation
    - 6. Congress's interpretation
    - 7. Interpretation of the Senate Vacancies Clause
    - 8. The Recess Appointment of Diplomatic Officers and the Curious View of John Adams
  - D. When Must the Recess Appointment be Made?
  - E. Decline of the Arise Interpretation

1. Attorney General Wirt's Opinion
  2. Section 5503
- F. Conclusion
- IV. The Meaning of a Recess
  - A. Text
    1. The Meaning of Recess
    2. Recess and Adjournment
  - B. Structure and Purpose
    1. The Length of the Recess
    2. The Length of the Recess Appointment
      - a. One Last Textual Argument
    3. The All Recesses Interpretation
  - C. History and the Decline of the Intersession Interpretation
  - D. Conclusion
- V. Connections Between When Vacancies Must Occur and the Type of Recesses Covered
- VI. Conclusion and the Possibility of Returning to the Original Meaning

# The Original Meaning of the Recess Appointments Clause

by

Michael B. Rappaport<sup>1</sup>

## I. Introduction

The Constitution provides that the President shall nominate, and with the advice and consent of the Senate, appoint federal officers.<sup>2</sup> This provision is extremely important because it governs the appointment of both federal executive offices and federal judges. The Framers designed this provision in an effort to produce desirable appointments. While they thought a single responsible person, the President, should initially select the individual to be nominated for an office, they believed it was dangerous for one person to have complete control over appointments.<sup>3</sup> Thus, the Framers required that an individual nominated by the President secure the consent of the Senate.

While this joint appointment process may often select able persons, it unfortunately can create conflict when the President and the Senate disagree over who should be appointed. The potential for conflict can be especially significant when the President is from one party and the Senate is controlled by another, or as in recent years, when the minority party in the Senate filibusters presidential nominees.<sup>4</sup>

When the Senate resists the President's nominees, Presidents often pursue alternative avenues to make appointments. Perhaps the President's principal alternative is through his recess appointment power, which allows the President to make temporary appointments without the

---

<sup>1</sup> University Professor, University of San Diego School of Law. The author would like to thank Edward Hartnett, John McGinnis, Saikrishna Prakash, Michael Ramsey, and Larry Solum for comments on the paper. An earlier version of this paper was presented at a conference on Judicial Appointments held at the Cardozo Law School in March 2004.

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> See text and accompanying notes XX.

<sup>4</sup> John O. McGinnis & Michael B. Rappaport, *Supermajority Rules And The Judicial Confirmation Process*, CARD. L. REV. (2004) (forthcoming) (discussing Senate practice of filibustering judicial nominees).

Senate's consent when a vacancy happens during the recess of the Senate.<sup>5</sup> While the Recess Appointments Clause was designed to allow the President to fill vacancies on his own when a recess prevented the Senate from confirming a nominee, the present interpretation of the Clause provides the President with broad authority to make appointments that bypass the Senate. Thus, the President can use the Clause not merely when the Senate is incapable of considering a nominee, but when the Senate can do so, but the President wants to appoint a nominee that the Senate will not confirm.

Under the current interpretation of the Clause, the President's power is so broad that he can make a recess appointment to *any* office and thereby bypass the Senate so long as he is willing to wait for one of the seven recesses that typically occur during the year.<sup>6</sup> The recess appointment would extend until the end of the next full session of Congress, allowing for a term that might last as long as nearly two years. While there is a federal statute that attempts to place some limits on the President's power, that statute can sometimes be avoided and in any event appears to clearly violate the unconstitutional conditions doctrine.<sup>7</sup>

One might wonder why the Framers would have required that appointments be subject to the consent of the Senate if they were also giving the President such broad authority to bypass the Senate. In this article, I examine the original meaning of the Recess Appointments Clause and conclude that the Framers did not provide the President with this broad authority. By comparison with the existing interpretation of the Clause, the original meaning confers quite narrow recess appointment authority. While the original meaning of the Clause allows the President to make the most necessary recess appointments – those needed to avoid long unfilled vacancies that could not otherwise have been filled through advice and consent appointments – it places strict limits on the President's ability to use his power to recess appoint individuals in order to avoid having to secure senatorial consent.

In particular, I argue that two aspects of the present interpretation of the Clause are inconsistent with the original meaning. First, I maintain that the original meaning permits recess appointments to be made only for an office that becomes vacant during the recess when the recess appointment is to be made. If an office becomes vacant while the Senate is in session, or if it becomes vacant during an earlier recess and remains vacant during the Senate session, the President is not permitted to make a recess appointment to that office. In essence, if an office is vacant while the Senate is in session, the Constitution expects the President to make an advice and consent appointment at that time. By contrast, under the current interpretation, the President

---

<sup>5</sup> U.S. CONST. art. II, § 2, cl. 3 (“The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session”).

<sup>6</sup> See text and accompanying notes XX.

<sup>7</sup> See text and accompanying notes XX.

can make a recess appointment for any office that happens to be vacant during the recess, irrespective of whether the office was ever vacant while the Senate was in session. Consequently, the current interpretation allows the President to make a recess appointment to an office that had first become vacant several years before the recess. The President could also recess appoint an individual who has been nominated for an advice and consent appointment, but who now seems unlikely to secure senatorial consent.

The second issue on which the current interpretation departs from the original meaning is the definition of a recess. The Congress has traditionally held one legislative session per year, which is followed by a recess that lasts until the next session. This recess between the legislative sessions is called an intersession recess. By contrast, Congress also holds recesses during the legislative session, which are called intrasession recesses. I argue that the original meaning allows recess appointments to be made only during intersession recesses. In the early years under the Constitution, intersession recesses typically lasted between 6 and 9 months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long recesses.<sup>8</sup> The current interpretations of the Clause, however, allow recess appointments during intrasession recess. These intrasession recesses are often extremely short, although there is a disagreement over whether recess appointments should be available during all intrasession recesses or only those that last a minimum time, such as two weeks. In either case, though, the current interpretation would allow recess appointments to be made during recesses that seem far too brief to justify bypassing the Senate.

While adopting the original meaning as to either of these two issues would narrow the President's current recess appointment power, accepting the original meaning as to both issues would dramatically constrain the President's ability to circumvent the role of the Senate. If the original meaning were followed on both issues, the President could only make recess appointments during the single annual intersession recess and only for vacancies that arose during that recess. That would make it extremely difficult for the President to use his recess appointment power as a means of appointing individuals who could not secure the consent of the Senate. Yet, the original meaning would still allow recess appointments in the situations when they are most likely to be needed to fill offices that could not be filled through an advice and consent appointment – vacancies that arise and are filled with recess appointments during the single one-to-three month intersession recess.

To illustrate the effect of the original meaning, consider the recent recess appointment of William Pryor to the 11<sup>th</sup> Circuit Court of Appeals. This recess appointment was not made because a recess prevented the Senate from being able to confirm the President's nominee. The vacancy at issue had first occurred more than three years before, while the recess appointment

---

<sup>8</sup> See *infra* text and accompanying notes.

was made during a mere 10 day recess.<sup>9</sup> Rather, the recess appointment was made because Pryor had been unable to secure the consent of the Senate due to a filibuster by Senate Democrats.<sup>10</sup> The original meaning would have prevented this recess appointment in two ways. Not only was the recess appointment made during an intrasession recess, but the vacancy had not arisen during that recess.

Finally, the approach adopted in this article bears emphasis. There is a tendency among commentators to interpret the Recess Appointments Clause based on their view of presidential power generally. If they believe the Constitution establishes a strong presidency, then they interpret the Clause broadly. If they believe the Constitution creates a weak presidency, then they interpret the Clause narrowly. By contrast, my view of the President's powers does not significantly influence my interpretation of the Clause. While I believe that the Constitution provides the President with broad powers generally,<sup>11</sup> I nonetheless interpret the Recess Appointments Clause narrowly. There is nothing strange about this result. Each clause in the Constitution employs different language, which allows for the conferral of different degrees of power. Moreover, the Framers may have decided that it make senses to allow broad power in one area, but not in another.

The article proceeds as follows. In Section I, I provide some background, discussing both the methodology of originalism and the structure and history of the Recess Appointments Clause. Section II argues that the original meaning of the Clause only permits recess appointments when the vacancy arises during the recess when the appointment is made. Section III contends that the Clause only permits recess appointments during intersession recesses. In Section IV, I address the relationship between these two issues. Finally, the Conclusion briefly discusses whether the Supreme Court might legitimately interpret the Clause to return it to the original meaning.

## II. Background

This section provides some necessary background for the main argument of the article.

---

<sup>9</sup> The vacancy occurred in December, 2000 when Emmett Cox took senior status. Pryor was nominated for a permanent appointment in April, 2003, and then recess appointed in February 2004. *See* Vacancy List Archives, 1/1/04, available at <http://www.uscourts.gov/vacancies/archives.htm>.

<sup>10</sup> Geoff Earle, *Kenedy Eyes Suit on Pryor*, *The Hill* (Feb. 26, 2004), available at <http://www.hillnews.com/news/022604/kennedy.aspx>.

<sup>11</sup> For example, I believe that the Executive Power Vesting Clause provides the President with a significant power over foreign affairs, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 309 (2001), and that the Constitution gives the President power to direct all executive officials, rendering independent agencies to be unconstitutional. Steven G. Calabresi and Saikrishna B. Prakash, *The President's Powers to Execute the Laws*, 104 *YALE L.J.* 557 (1994).

First, I outline the methodology that I will be employing in attempting to discern the original meaning of the Recess Appointments Clause. Then, I explore the basic structure established by the Framers to govern appointments. Finally, I briefly discuss the length and frequency of recesses and sessions over American history, which will have a significant effect on the operation of different interpretations of the Clause.

#### A. The Methodology of Originalism

In this essay, I present an originalist theory of the Recess Appointments Clause. Since there are various versions of originalism, it will be useful to briefly set forth the methodology that I will employ here, although there is obviously no room here to present a full explanation of this methodology.

The task is to determine the original meaning of the language of the Recess Appointments Clause – that is, to understand how knowledgeable individuals would have understood this language in the late 1780s when it was drafted and ratified.<sup>12</sup> Interpreters at the time would have examined various factors, including text, purpose, structure, and history.<sup>13</sup>

The most important factor is the text of the Clause. The modern interpreter should read the language in accord with the meaning it would have had in the late 1780s. Permissible meanings from that time include the ordinary meanings as well as more technical legal meanings words may have had.<sup>14</sup>

If the text of the Clause has only one interpretation, then that will be its proper meaning unless perhaps that meaning would result in absurd consequences.<sup>15</sup> If the language has more than one interpretation, then one would look to purpose, structure, and history to help to clarify the ambiguity.<sup>16</sup> But one must also consider how natural the use of the language is under these

---

<sup>12</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); John F. Manning, *Textualism and Equity of Statute*, 101 COLUM. L. REV. 1 (2001); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U.L. REV. 819 (1999).

<sup>13</sup> Rappaport, *supra* note XX.

<sup>14</sup> SIR WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES ON THE LAWS AND CONSTITUTION OF ENGLAND* (1823). To ascertain these meanings, modern interpreters can look to sources from the time that indicate how words were used, including dictionaries, newspapers, judicial opinions, and other legal materials such as statutes or constitutions.

<sup>15</sup> Compare Blackstone, *supra* note XX with John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

<sup>16</sup> JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1991).

interpretations. If two interpretations of the text appear to be equally natural uses of the language, then history, structure, and purpose will be the only ways to determine the meaning that the authors intended to place on the words.<sup>17</sup> If two interpretations are possible, but one of them uses the language in more a natural or common way, then one would choose the more natural interpretation unless the evidence from structure, purpose, and history is strong enough to outweigh the impact of the greater naturalness of the usage.

Purpose, structure, and history provide evidence for determining which meaning of the language the authors would have intended.<sup>18</sup> The purpose of a Clause involves the objectives or goals that the authors would have sought to accomplish in enacting it.<sup>19</sup> One common and permissible way to discern the purpose is to look to the evident or obvious purpose of a provision. Yet, purpose arguments can be dangerous, because it is easy for interpreters to focus on one purpose to the exclusion of other possible purposes without any strong arguments for doing so. Perhaps the biggest interpretive error concerning the Recess Appointments Clause has been the view that the purpose of the Clause was to fill vacant officers rather than to fill such officers without also allowing the President too easily to circumvent the Senate's confirmation role.<sup>20</sup>

One can also discern the purpose of a provision by examining history and structure. Historical evidence can reveal the values that were widely held by the Framers' generation and that presumably informed their purposes when enacting constitutional provisions. History can also reveal their practices, which when widely accepted would be evidence of their values.

The structure of the document can also help to determine the purposes of the Framers. The decision to enact one constitutional clause may reveal the values of the Framers and thereby help us understand the purposes underlying a second constitutional clause.<sup>21</sup> The Framers' decision to employ the Appointments Clause, I will argue, helps to inform their purposes in enacting the Recess Appointments Clause.<sup>22</sup>

---

<sup>17</sup> Rappaport, *supra* note Xx.

<sup>18</sup> The intent here is semantic intent: the intent to use a particular meaning of a word. Scalia, *supra* note XX; Ronald Dworkin, in Scalia *supra* note XX.

<sup>19</sup> Blackstone, *supra* note XX.

<sup>20</sup> *See* text and accompanying notes XX.

<sup>21</sup> *See* Story, *supra* note XX.

<sup>22</sup> *See* text and accompanying notes XX. Debates over originalism and interpretation generally have focused on the dispute whether it is the intent of the authors or the reasonable meaning that the audience would derive from the language that should be the focus of interpretation. In addition, for those who focus on authorial intent, the question arises as to how to determine the collective intent of a

Finally, one additional source of evidence about the meaning of constitutional language is early constitutional interpretations by government officials or prominent commentators. These interpretations have a different status than more direct evidence of purpose, structure, and history, because they would not be available to the first interpreters of the document. Yet, such interpretations may provide evidence of the original meaning of the provisions, because early interpreters would have had better knowledge of contemporary word meanings, societal values, and interpretive techniques. Of course, early interpreters may also have had political and other incentives to misconstrue the document that should be considered.<sup>23</sup>

## B. The Structure of the Appointment Provisions

This section discusses the structure established by the Framers to govern appointments. The Framers established this structure in the Appointments Clause and the Recess Appointments Clause, two clauses involving a common subject matter that the Framers placed next to one another. The two clauses provide:

[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: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.<sup>24</sup>

The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.<sup>25</sup>

---

multimember body, when the individual intentions may diverge. These disputes may be large avoided, however, if one accepts that the Framers' generation had reference to interpretive rules that they believed would apply to the document. The authors of the document would take these rules into account when writing the document knowing that the readers would follow them when interpreting it. Similarly, readers of the document would apply these rules, knowing that the authors of the document would have drafted it with them in mind. In this way, the focus is on the historical interpretive rules rather than on philosophical disputes about the proper means of interpreting language. Significantly, these rules consider, in different ways, both the intent of the Framers and the reasonable import of the words they used.

<sup>23</sup> Steven G. Calabresi and Saikrishna B. Prakash, *The President's Powers to Execute the Laws*, 104 *YALE L.J.* 557 (1994).

<sup>24</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>25</sup> U.S. CONST. art. II, § 2, cl. 3.

These clauses include three interrelated provisions. First, the clauses establish the ordinary or default method for appointing officers – appointment by the President with the consent of the Senate. Second, the clauses permit departures from the default method for the appointment of inferior officers. Finally, the clauses establish an alternative method for making appointments during the recess of the Senate.

Consider first the ordinary method of appointment by the President with the consent of the Senate. The most striking aspect of this method is that the Framers chose to confer the appointment power on two entities jointly rather than on a single entity. The Framers appeared to have believed that this more cumbersome appointment method was superior to providing the appointment power to the President or Senate alone.<sup>26</sup> In Federalist 76, Alexander Hamilton explained the advantages of having a single person nominate an individual while requiring that the Senate consent to that nomination. Hamilton argued that a single individual will have a strong reputational incentive to make a wise appointment and will have less of a tendency to appoint unqualified persons who are his friends than will a legislative body.<sup>27</sup> Hamilton also

---

<sup>26</sup> Since the Framers had before them a range of different appointment methods, including appointment by the executive alone, BLACKSTONE, *supra* note (describing appointment by the King of England), by the legislature alone, VA. CONST. of 1776, and by the executive with a council, N.Y. CONST. of 1777, art. XXIII, they must be presumed to have made an informed choice. One must conclude that the Framers believed that a system where the President had the primary role in selecting officers, but was subject to a senatorial check was superior to the available alternatives.

<sup>27</sup> In Federalist No. 76, Hamilton explained the reasons why one would want the President alone to have the principal role in selecting officers:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He 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. A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body. There is nothing so apt to agitate the passions of mankind as personal considerations whether they relate to ourselves or to others, who are to be the objects of our choice or preference. Hence, 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 dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The 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. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party, will be more

argued, however, that requiring the Senate to consent to the appointment will guard against the possibility of the President making an unwise or unfit selection.<sup>28</sup>

Although the Framers were evidently impressed by the advantages of having the President and the Senate make appointments jointly, this method also has its disadvantages. One problem is that a joint appointment process is more costly and time-consuming than appointment by a single entity, since joint appointments require two entities to approve the appointment. Moreover, with joint appointments, it is more difficult to secure an agreement on a candidate, since both the President and the Senate must consent and they may disagree on the appropriate selection. As a result, presidential nominees may be turned down and, if the two sides are unwilling to reach a compromise, an office may remain unfilled for some time. Finally, the appointment process selected by the Framers also creates a problem because it requires the participation of the Senate, but the Senate may be in recess.

Apparently, the Framers were sufficiently concerned about these disadvantages to take actions to address them. In particular, the two exceptions to the joint appointment method – for inferior officers and during recesses – can be understood as ways of reducing the costs of appointments by the President and Senate together. Under the provision for inferior officers, Congress can provide that the President alone, heads of departments, or courts of law may appoint inferior officers, without having to secure the consent of the Senate. This provision appears to reflect the view that the costs of having to secure Senate consent can be significant and therefore the Constitution need not require it for offices that are not important enough to warrant such an expensive mechanism.

---

considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent: "Give us the man we wish for this office, and you shall have the one you wish for that." This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.

Id. at 455-456.

<sup>28</sup> Hamilton also explains in Federalist No. 76 the reason for giving the Senate a role in the appointments.

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

Id. at 457.

While the Framers were willing to allow departures from the ordinary appointment method for inferior officers, they placed significant limitations on such departures. First, the Framers permitted a single entity to appoint inferior officers only when the Congress chose to pass a law allowing it.<sup>29</sup> This requirement had the effect of ensuring that the Senate, which has an absolute veto over legislation, would have to consent to eliminating its role for the appointment of inferior officers. The Framers did not leave the decision whether to permit unilateral appointments to the President alone, who might be too quick to eliminate the Senate's role in order to enhance his own power.

Second, even if Congress would be willing to pass a law adopting a unilateral appointment method, the Framers did not allow Congress to do so as to superior officers.<sup>30</sup> The Framers evidently believed that the value of joint appointments outweighed the inconveniences for superior officers, and did not trust Congress to conclude otherwise. Thus, the inferior officer provision underscores that the Appointments Clause operates as a check not only on the President but also on the Congress and the Senate.

This leads me to the second exception to the joint appointments method: The Recess Appointments Clause, which allows the President to fill vacancies that happen during the recess of the Senate. The reasons for this exception seem clear. When the Constitution was written, intersession recesses regularly lasted between six and nine months.<sup>31</sup> Thus, the possibility of an important office becoming vacant during the long recess of the Senate would create three unattractive alternatives. First, the position could be left vacant throughout the recess, but that might prove harmful, especially for important offices such as Secretary of War or of State. Second, the Senate could be called into session,<sup>32</sup> but that would be burdensome with a large nation in an age of slow transport. Finally, the Senate could remain in session continuously, but this was thought improper by the republican tradition that dominated American political thought.<sup>33</sup> To avoid these alternatives, the Framers allowed the President to make recess appointments, but limited the terms to the end of the next session.<sup>34</sup>

---

<sup>29</sup> U.S. CONST. art. II, § 2, cl. 2 (allowing Congress to vest the appointment of inferior officers in the President alone, heads of departments, or courts of law).

<sup>30</sup> *Id.*

<sup>31</sup> *See infra* text and accompanying notes.

<sup>32</sup> U.S. CONST. art. II, § 3.

<sup>33</sup> See The Federalist No. 67 (Hamilton) (asserting that “it would have been improper to oblige [the Senate] to be continually in session”).

<sup>34</sup> As Hamilton's said in Federalist No. 67:

The relation in which that clause stands to the other, which declares the general mode of

While the need for a separate method for recess appointments seems evident enough, what is striking about the recess appointments provision is how much more it departs from the ordinary method than the inferior officer provision. While the inferior officer provision permits departures from joint appointments only with the consent of Congress, the Recess Appointments Clause neither requires that the President receive congressional authorization for recess appointments or permits Congress to prevent him from making recess appointments. Moreover, while the inferior officer provision forbids superior officers from being appointed by the President alone, the Recess Appointments Clause allows recess appointments of both inferior and superior offices. Clearly, the Recess Appointments Clause has the potential to intrude more on Senate's confirmation role than the inferior officers provision, which may account why there has been so much more controversy about the recess appointments provision over the nation's history.

Although the Recess Appointments Clause poses a danger to the Senate's confirmation role, one can explain why the Framers might have drafted this way. First, it was necessary for the Framers to allow superior officers to be recess appointed since unfilled vacancies during recesses for superior officers would create the greatest problems. Second, the Framers may also have believed that Congress should not have been given discretion to deny the President recess appointment authority since it doing so would be undesirable. If the President did not have recess appointment authority and a vacancy were to occur during a long recess, the President might be faced with the problematic choice of being deprived of an important officer or of calling the Senate into session, and even if the Senate were called, the long time necessary for it to convene might be dangerous. Moreover, the Framers may have feared that the Senate would be tempted by this power to deny the President recess appointment authority and then to use the possibility of a vacancy as an excuse for remaining in session for most of the year. The Framers might have sought to deny this choice to the Senate, since the Framers' generation thought it was important for the legislature to return to the people for significant periods.<sup>35</sup>

---

appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate JOINTLY, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen IN THEIR RECESS, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, SINGLY, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

<sup>35</sup> While the Framers evidently had strong reasons for conferring this significant recess appointment power on the President, these same reasons, however, did not justify conferring a broad form of this power that would apply to vacancies that arose during the session or to vacancies during intrasession recesses. In fact, as I show believe, the significance of the recess appointment power is a strong reason for construing the clause to apply in narrow circumstances.

To conclude, although the Appointment and Recess Appointment Clauses might seem at first glance to be simple clauses, they turn out upon examination to establish a sophisticated and interrelated structure to govern the appointment of federal officers. The three basic provisions in these clauses establish three different appointment methods designed to apply in distinct circumstances – with one provision setting forth the appointment method for the ordinary situation, another permitting a different appointment process for inferior officers, and the third provision allowing yet another appointment method during recesses.

### C. The Scheduling of Recesses Throughout American History

The final introductory matter concerns the length and frequency of recesses and sessions over the course of American history. Since the Recess Appointments Clause allows the President to make recess appointments during recesses that will last until the end of the next session, the length and frequency of both recesses and sessions will have important effects on the operation of the Clause under different interpretations.

Since the Constitution was enacted, the Congress has regularly scheduled one legislation session each year.<sup>36</sup> At the end of the session, Congress has generally held a recess until the beginning of the next session. This recess between the two sessions is referred to as an intersession recess. Congress has also scheduled recesses during the session, which are known as intrasession recesses.

During the 18<sup>th</sup> and 19<sup>th</sup> centuries, Congress followed a consistent pattern regarding sessions and recesses. Until the Civil War, Congress regularly scheduled short sessions, long intersession recess, and virtually no intrasession recesses. The normal pattern was for Congress to hold a single session of between 3 and 5 months, followed by an intersession recess of between 7 and 9 months.<sup>37</sup> Intrasession recesses were rare, having been held only three times in this period and then only for short periods lasting between 5 and 7 days.<sup>38</sup> After the Civil War, Congress modified this pattern, but retained its overall character. The main change was that Congress would schedule an intrasession recess of between 10 and 14 days over the Christmas holiday.<sup>39</sup> We can understand the traditional pattern as growing out of several forces, including

---

<sup>36</sup> SESSIONS OF CONGRESS (July 8, 2003), available at <http://www.senate.gov/reference/resources/pdf/congresses2.pdf> (hereinafter “Sessions of Congress”);

<sup>37</sup> SESSIONS OF CONGRESS; Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2210 (1994).

<sup>38</sup> *Id.* at 2211.

<sup>39</sup> In the period between the Civil War and the end of the 19<sup>th</sup> century, the main exceptions to the pattern occurred in the years immediately following the Civil War. In 1865, the Senate also recessed from Dec. 6 through Dec. 11. In 1867, the Senate recessed from Mar. 30 through July 3 and then again from July 20 through Nov. 21. In 1868, the Senate had 3 additional recesses, from July 27 to Sept. 21,

high transportation costs, a republican political theory which required Congress to hold short sessions so that legislators could live as private citizens for much of the year, and relatively limited federal legislative responsibilities.<sup>40</sup>

In the 20<sup>th</sup> century, Congress began to modify the traditional pattern more substantially. Modern Congresses regularly scheduled longer sessions, shorter intersession recesses, and far more frequent intrasession recesses.<sup>41</sup> Congress now generally schedules 6 intrasession recesses per year, with lengths ranging from between 5 days to a month or more.<sup>42</sup> Still, important features of the traditional pattern have been maintained, including the use of a single intersession recess, which lasts between 1 and 3 months and is therefore generally longer than any of the intrasession recesses.

### III. The Meaning of Happen

Having provided this background, I am now in a position to address the two basic questions of this article. This sections address the first question: When must a vacancy arise in order to be eligible for a recess appointment. The section explores the text, structure, purpose, and history, concluding that each of these strongly suggests that a vacancy must arise during the recess to be filled by a recess appointment. This section also discusses the related question of when a recess appointment must be made, and concludes that the President must make the recess appointment during the recess when the vacancy arises. These two positions together mean that the President can only make a recess appointment for an office that was not vacant during a session of the Senate. If the office was vacant while the Senate was in session, the President could have made a permanent appointment at that time and should not have the authority make a recess appointment during the recess.

#### A. Text

When must a vacancy arise in order to be eligible for a recess appointment? To answer this question, one must decide between two different interpretations of the Recess Appointments Clause. The first interpretation would allow recess appointments only for vacancies that arise during the recess. If the vacancy arose during a session, no recess appointment could be made.

The second interpretation confers broader authority on the President. Under this

---

Sept. 21 to Oct. 16, and Oct. 16 to Nov. 10. See SESSIONS OF CONGRESS.

<sup>40</sup> See *infra* text and accompanying notes.

<sup>41</sup> *Id.* at 2240. The significant changes in the Senate calendar really begin in the 1940s. SESSIONS OF CONGRESS, *supra*.

<sup>42</sup> Since 1970, Congress has averaged more than 7 recesses per year: 6 intrasession recesses per session and one intersession recess. See SESSIONS OF CONGRESS, *supra*.

interpretation, the Clause permits the President to make a recess appointment whenever there is a vacancy during a recess, irrespective of when the vacancy first arose. Even if an office had been vacant for a long period while the Senate was in session, a recess appointment could still be made once the Senate went into recess. While the first interpretation was employed by the first Attorney General in 1792,<sup>43</sup> the second interpretation was adopted by Attorney General Wirt in 1823 and has been followed by the government ever since.<sup>44</sup>

Both of these interpretations can be rooted in the text of the Clause, which provides that “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” The main difference between the interpretations flows from their divergent readings of the term “happen.” Under the first interpretation, “happen” is read to mean “to happen to arise,” so that the Clause is understood as permitting the President “to fill up all Vacancies that may happen *to arise* during the Recess of the Senate.” The second interpretation, by contrast, reads the term “happen” to mean “to happen to exist.” Under this view, the Clause is understood as permitting the President “to fill up vacancies that may happen *to exist* during the recess.” When the vacancy arose would not matter.

Although both of these interpretations can be rooted in the language of the Clause, the arise interpretation far better fits the language than the exist interpretation. First, the arise interpretation is the more natural or obvious meaning of the language. When one speaks of “Vacancies that may happen during the Recess,” one would ordinarily be speaking of an *event* (the happening of a vacancy) that occurs during the recess.<sup>45</sup> By contrast, under the exist interpretation, nothing new happens during the recess. Indeed, the author of the principal opinion defending the exist interpretation, Attorney General Wirt, acknowledged that the arise interpretation was the more “natural sense” of the language and was more “accordant with the letter of the constitution.”<sup>46</sup>

---

<sup>43</sup> Letter from Attorney General Randolph to President Thomas Jefferson, *in* 24 THE PAPERS OF THOMAS JEFFERSON, at 165-167 (Julian Boyd ed., 1961) (hereinafter the “Randolph Opinion”).

<sup>44</sup> 1 Op. Att’y Gen. 631 (1823)

<sup>45</sup> The dictionary definitions of “vacancy” and “happen” are consistent with the preference for the arise interpretation, although the true strength of the interpretation comes from the combination of the words in the clause. The term “happen” is defined, in relevant parts, as “to come by chance; to come without one’s previous expectation; to fall out.” The term “vacancy” is defined in relevant parts as a “place or office not occupied”; “the state of being destitute of an incumbent”; and as “the office, post or benefice which is destitute of an incumbent.” See NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Thus, one might say that “a vacancy happens during the recess” when an office becomes empty or falls out during the recess.

<sup>46</sup> 1 Op. Att’y Gen. 631 (1823).

Another problem with the exist interpretation is that it reads the Clause to leave the term happen with no function, thereby violating the traditional canon of construction that says avoid interpretations that contrue words as surplusage.<sup>47</sup> Had the Framers omitted the term happen from the Clause, it would have conveyed the exist meaning. With a minor change of word order, the Clause would have read: “The President shall have Power, during the recess of the Senate, to fill up all Vacancies by granting Commissions which shall expire at the End of their next Session.” In fact, this version of the Clause would have unambiguously conved the exist interpretation. Thus, if one believes that the Framers intended that the Clause have the exist meaning, it is extremely hard to understand why they included the term happen, which was not only unnecessary but also made the clause ambiguous.<sup>48</sup>

The arise interpretation also derives support from the two other constitutional clauses that also use the “vacancies happen” language and that are best read as adopting the arise interpretation. First, under the original Constitution, state legislatures selected Senators. To address the situation when a Senator left office before his term, the Senate Vacancies Clause provided that “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.”<sup>49</sup> The Clause was superseded with the enactment of the Seventheth Amendment, which provided for the direction election of Senators.<sup>50</sup>

The Senate Vacancies Clause uses similar language and has a similar purpose to that of the Recess Appointments Clause. It is therefore significant that there is strong case to be made that the language “Vacancies happen” in the Clause should be read to have the arise meaning. While the same arguments that support the arise interpretation of the Recess Appointments Clause apply here also, there is further evidence as well. The Framers insertion of additional language in the Senate Vacancies Clause – “if Vacancies happen *by Resignation, or otherwise, during the Recess of the Legislature*” – makes it even clearer that the arise interpretation was intended. The words “by Resignation or otherwise” refer to the method by which the vacancies arise, making crystal clear that the Clause is saying “if Vacancies happen *to arise* by Resignation or otherwise during the Recess of the Legislature.” By contrast, it would be extremely awkward to read the Clause as if it said “if Vacancies happen *to exist* by Resignation or otherwise during

---

<sup>47</sup> *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

<sup>48</sup> As David Currie says, “A vacancy that happens during a recess is not the same as an office that happens to be vacant.” DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* 188 (2001).

<sup>49</sup> U.S. CONST. art. I, § 03, cl. 2.

<sup>50</sup> U.S. CONST. amend. XVII.

the Recess of the Legislature.”<sup>51</sup> Vacancies do not exist by resignation, they arise by it.<sup>52</sup>

The third clause that uses the “vacancies happen” language, the House Vacancies Clause, also supports the arise interpretation of the Recess Appointments Clause, although the evidence is admittedly not as strong as with the Senate Vacancies Clause. The House Vacancy Clause provides that “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”<sup>53</sup> This provision is best understood as requiring the governor to issue a writ of election as soon as the vacancy occurs. In this way, the membership of the Houses of Representatives can be brought back to its full complement as soon as possible and the governor cannot, for political reasons, delay an election. The term “shall” here underscores the governor’s mandatory duty.

Under this reading of the Clause, one would interpret the term “happen” to have the arise meaning, since it would require that the writ should issue as soon as the vacancy arises. The exist meaning is less suited to the purpose of requiring an immediate issuance of the writ of election. It would read, “when vacancies happen *to exist* . . . , the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” The use of the exist meaning seems to suggest that the writ can be issued at any time that a vacancy exists. While one might argue that the governor is obligated to issue the writ of election immediately, since a vacancy happens to exist, the exist meaning places less emphasis on the obligation to issue the writ immediately when the vacancy arises.<sup>54</sup> Thus, it is reasonable to interpret the “when vacancies happen”

---

<sup>51</sup> It might be argued that the Framers added the words “by resignation or otherwise” to the Senate Vacancies Clause to change the meaning of the words from the exist to the arise meaning. But this argument is weak. First, the language of the Recess Appointments Clause already strongly points in the direction of the arise interpretation. Second, it is very likely that these additional words were not added to change the meaning of words “Vacancies happen during” but instead to clarify a separate point. Under the arise interpretation, it would seem that a Senator might be able to influence who his temporary replacement would be by choosing to resign during the recess, rather than during the session, to allow the governor to name the replacement. By adding the words “by resignation or otherwise, the Framers made clear that the governor still was allowed to make the recess appointment of the Senator, even though he had resigned (perhaps intentionally) during the recess.

<sup>52</sup> As discussed below, the arise interpretation of the Senate Vacancies Clause is also supported by an early interpretation of the Senate. *See infra* text and accompanying notes. In 1794, the Senate adopted the arise interpretation of the Clause, refusing to sit an appointee of the state executive when the vacancy had arisen during the session but continued into the recess. ANNALS OF CONG. 78 (1849) [1793-1795] (“The Senate in 1794 refused to seat a Senator appointed by his governor during a recess when the vacancy had existed during a session of the state legislature.”)

<sup>53</sup> U.S. CONST. art. I, § 2, cl. 4.

<sup>54</sup> Put differently, if one were writing the Clause to require that the executive authority to issue the writ immediately, one would choose the arise interpretation, since the exist interpretation would create the possibility of the inference that the state executive would not have the issue the writ

language here in accord with its more obvious meaning – the arise interpretation.

To conclude, the language of the Recess Appointments Clause strongly supports the arise interpretation. That interpretation gains strong support from the more obvious reading of the words, canons of construction about not rendering words to be surplusage, and other constitutional clauses that use the same language. In fact, the textual argument is so strong that might question whether the exist interpretation is even consistent with the text. If one concluded that the exist interpretation conflicted with the text, then that interpretation would be barred unless one believed that it led to an absurdity and that absurdities justified departures from the text. By contrast, one might conclude that the exist interpretation is a much weaker reading of the language, but one that is still consistent with the text. In that event, the exist interpretation could still be the correct one, but only if there were compelling reasons based on structure, purpose, and history to support it. It is not necessary to decide whether the exist interpretation actually conflicts with the text, because as I show in the next few sections, structure, purpose, and history all strongly favor the arise interpretation.

## B. Structure and Purpose

### 1. Inferences from the Constitution's Other Appointment Methods

The arise interpretation is also strongly supported by constitutional structure and purpose. By examining the choices that the Framers made in enacting the various appointments provisions, one can determine that they intended the arise meaning of the Recess Appointments Clause.

The arise and exist interpretations provide the President with very different powers. Under the arise interpretation, the President's power to make recess appointments is limited to offices that become vacant during the recess of the Senate. Thus, the President alone will lack the authority to make recess appointments to fill a significant number of vacancies. Moreover, the vacancies that the President can fill are likely to be those that most require a recess appointment, since the vacancy was not one that could have been filled during the session.

By contrast, under the exist interpretation, the President can make a recess appointment for any office that becomes vacant so long as the President waits to fill it until the Senate is in recess. Thus, the President can make a much larger number of recess appointments under the exist interpretation than the arise meaning.<sup>55</sup> Moreover, the additional vacancies that can be filled under the exist interpretation are ones that could have been filled during the session. Therefore, one may conclude that these recess appointments were less needed than recess

---

immediately.

<sup>55</sup> The amount turns on whether the President is willing to wait and how long he has to wait based on the definition of recess.

appointments made under the arise interpretation. In fact, the President can use his recess appointment power under the exist interpretation not merely for low priority appointments, but also to circumvent the Senate's confirmation power. Thus, the President can choose to wait until the recess to recess appoint an individual who he fears the Senate would not confirm or even someone who the Senate has already rejected for the position.

Given the powers that the President would possess under these two interpretations, there is a strong argument that the Framers intended the arise interpretation. This can be seen by considering the two other constitutional provisions that govern appointments. First, the Framers chose presidential nomination with the advice and consent of the Senate as the default method for appointing officers. In adopting this method, they clearly intended that the Senate should ordinarily have a veto over nominations. Given that choice, it is hard to believe that the Framers would have provided the President with the broad recess appointment power of the exist interpretation – power that would allow him to circumvent senatorial confirmation simply by waiting until a recess occurred to make a recess appointment. There is little reason to require senatorial confirmation if one is simply going to allow the President to easily circumvent that requirement. Instead, it would have made much more sense for the Framers to provide the limited power under the arise interpretation.

Second, the Framers' decision to allow Congress to depart from senatorial confirmation only for inferior officers provides even stronger evidence that they intended the arise interpretation. In allowing Congress to permit the President alone to appoint inferior officers, the Framers were indicating that sometimes the costs of the joint appointment process were not worth it. Yet, the Framers placed two significant restrictions on the government's ability to depart from this joint appointment process.<sup>56</sup> First, they allowed departures only for inferior officers, not for superior offices. Second, they insisted that Congress make the decision to depart from the appointment process by choosing to delegate the appointment authority to the President. These rules indicate that the Framers placed a high value on senatorial consent for superior offices and that they did not trust the President unilaterally to decide when to depart senatorial consent even for inferior officers.

Given these restrictions, it seems clear that the Framers would not have conferred the broad recess appointment power of the exist interpretation. If the inferior officer provision entirely prohibits the President from appointing superior officers on his own, even if the Congress wants to delegate the power to him, it is hard to believe that the Framers would have given the President the ability, simply by waiting until a recess exists, to recess appoint any officer, based solely on his own determination that such an appointment was needed.

It might be argued, however, that a broad recess appointment power is not so problematic, since recess appointments only last the brief period until the end of the next session. There are two problems with this argument. First, it is simply not true that the period until the end of the

---

<sup>56</sup> See *supra* text and accompanying notes XX.

next session is a brief one. A recess appointment made during an intersession recess can last for a year and one made during an intrasession recess can last for nearly two years.<sup>57</sup> Second, even if one regards these as brief periods, under the exist interpretation, there is no reason why the President could not recess appoint the person again at the end of the next term. After all, the main requirement is that the vacancy exist during the recess and therefore when the next term ends with a recess, a new recess appointment could be made. This type of action has occurred in the past, most famously during the administration of Andrew Jackson.<sup>58</sup>

By contrast, there is a strong argument that repeated recess appointments are not allowed under the arise interpretation. The Recess Appointments Clause says that the commission continues until “the end of the next session.” For the arise interpretation, the crucial question is whether the vacancy following the commission arises during the session or during the next recess. The language here is not clear, since the end of the session appears to be at the dividing line between the session and the recess. Still, the language appears to point slightly in the direction of the vacancy arising during the session, since “the end of the session” would still appear to be part of that session.

This weak textual argument against repeated recess appointments is powerfully supported by arguments from structure and purpose. Since the purpose of the Recess Appointments Clause is to allow vacancies to be filled that could not be filled during the session, it makes little sense to allow a second consecutive recess appointment for the same position, since the President and the Senate would have had an entire Senate session during the first recess appointment to nominate and confirm a permanent appointee.

It should be noted that although the President has vast power under the exist interpretation, Presidents have not tended to exercise the full extent of that power. While they have certainly made many recess appointments that did not meet the requirements of the arise interpretation and that appear to have been intended to circumvent senatorial confirmation,<sup>59</sup> they have not done so in anywhere near all of the cases where they could have under the exist interpretation. There are two main explanations why President have failed to fully exercise this power.

First, a federal statute prohibits paying a salary to recess appointees who have been

---

<sup>57</sup> Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2240 (1994).

<sup>58</sup> Stuart J. Chanan, *Constitutional Restrictions on the Presidential Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 199 (1984); *see also* 2 Op. Att’y. Gen. 525, 525-26 (1832). Presidents have also recess appointed one individual and then, at the end of the first individual’s term, recess appointed another individual to the same position. Chanan, *supra*, at 212-213 n.140.

<sup>59</sup> Stuart J. Chanan, *Constitutional Restrictions on the Presidential Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 212 (1984).

appointed under certain but not all circumstances that do not satisfy the arise interpretation.<sup>60</sup> Although this statute places some limits on the President's ability to make recess appointments, he still has significant power to make recess appointments but often chooses not to do so.<sup>61</sup> For example, the President can make a recess appointment without restriction simply by nominating an individual when he plans to make a recess appointment.<sup>62</sup>

The second reason why Presidents often do not exercise the full extent of their recess appointment power is that it is often not worth it to them politically. Of course, if the President's nominee is likely to secure confirmation, a recess appointment will not be necessary. But even if the Senate opposes the President's preferred appointee, he may not make a recess appointment unless it is worth it to him to incur the possible anger of the Senate from the appointment.<sup>63</sup> Thus, one would expect overall there to be only a limited number of recess appointments that do not satisfy the arise interpretation.

However, that the President does not always make recess appointments when he has the

---

<sup>60</sup> 5 U.S.C. § 5503. The statute provides that funds from the Treasury shall not be used to pay the salary of recess appointees for offices when the office was vacant during a session of Congress, except in three circumstances: when the vacancy arose within 30 days of the end of the session; when a nomination for the vacant office, other than a person previously recess appointed for the office, was pending at the end of the session; or when a nomination for the vacant office was rejected within 30 days of the end of the session and the recess appointee is not the person who the Senate rejected. For a longer discussion of this statute, *see infra* text and accompanying notes.

Another provision also limits recess appointments. A recurring provision of the Treasury and General Government Appropriations Act provides that "No party of any appropriation . . . shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person." See P.L. 107-67 sec. 609. This provision has been part of the law for at least 50 years. See CRS Report 21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue (Sept. 2002).

<sup>61</sup> Another limitation of this statute is that it appears to be unconstitutional. *See infra* text and accompanying notes.

<sup>62</sup> *See Op. Off. Legal Counsel*, August 3, 1989 (available on Lexis at 1989 OLC LEXIS 111) (holding that a recess appointee can be paid, even if the nomination was not made at the end of the last session, so long as it was made prior to the recess when the recess appointment is made).

<sup>63</sup> While the President can use a recess appointment, the extent to which he uses it will depend on how attractive it is. The attractiveness of recess appointments may diverge between judges and executive officers. The term of a recess appointee may last between 1 and 2 years, depending on circumstances. This period is a relatively high percentage of the average term of superior officers in the executive branch. By contrast, it is a small fraction of the average term of a judge. Thus, other things being equal, recess appointments will usually be far more attractive for executive officials than for judges. The recent focus on judicial recess appointments, however, is explained by another factor. While executive officials are able to be confirmed by the Senate, a significant number of appellate judges cannot be.

power to do so does not mean that this power is unimportant. In the cases when he does make recess appointments, his appointees may significantly diverge from the appointments that the Senate would have confirmed.<sup>64</sup> Moreover, the existence of this broad recess appointment power may allow the President to make more extreme permanent appointments than he would have been able to make under the arise interpretation. If the President were deprived of the broad power under the exist interpretation, then he might be forced to compromise with the Senate in order to secure confirmation of a nominee rather than risk running a department with an important office vacant. But if the President knows that he can always fill the office with a recess appointee should the Senate reject his nominee, the President has less incentive to compromise. Thus, the exist interpretation can have an important effect on appointments, even when the President does not make any recess appointments.<sup>65</sup>

## 2. Reasons for the Exist Interpretation: End of the Session Vacancies

While there are strong reasons based on the structure of the Constitution's appointment provisions for concluding that the Framers intended the arise interpretation, defenders of the exist interpretation have principally relied on a purpose argument. In 1823, Attorney General Wirt first adopted the exist interpretation for the executive branch in an opinion that sought to justify it as necessary to ensure that vacancies that exist at the end of a session can be filled. Wirt believed such late session vacancies might not be filled by the President and the Senate before the recess occurred. Since the vacancies would have arisen during the session, the President could not fill them with a recess appointment after the session ended. Wirt argued that the Framers intended such vacancies to be filled and therefore they intended the exist interpretation.<sup>66</sup>

While late session vacancies might require additional actions by the President and the Senate to fill them, they do not create problems that would justify concluding that the Framers intended the exist interpretation. There were various mechanisms available to the federal government to fill such vacancies that did not require changing the meaning of the Recess Appointments clause.

The main problem from late session vacancies is that these vacancies might arise during

---

<sup>64</sup> In fact, one would expect that the cases where it is important to the President might be disproportionately those he chooses to make the important.

<sup>65</sup> Finally, even if the Senate can impose some constraint on the President's use of the exist version of his recess appointment power, that does not cure the problem. Constitutional limits on government actors are supposed to be followed categorically. The Congress should not have to exert its political capital and institutional leverage in order to protect its own powers. Moreover, in cases where the Senate does abdicate its powers, that will leave the people unprotected. The Recess Appointments Clause is designed not only to limit the President's ability to make unilateral appointments, but also to prevent the Senate from allowing the President to do so.

<sup>66</sup> 1 Op. Att'y Gen. 631 (1823).

the last days of the session and therefore make it difficult for the President and the Senate to nominate and confirm a replacement. While such a vacancy certainly places a burden on the President and the Senate, they would simply have to rearrange their schedules in order to fill the office. The President would need to find a nominee quickly and the Senate would need to vote on that nominee. If necessary, the Senate might have to postpone its recess for a brief period.<sup>67</sup>

In fact, the early Presidents and Congresses were conscious of the need to make appointments before the recess and often confirmed appointees on the last day of the session.<sup>68</sup> The early Presidents and Congresses also developed practices that would allow them to fill late session vacancies. First, if a vacancy arose so late that the President could not contact his prospective nominee to find out whether the person would serve, the President would nominate and the Senate would confirm him, without knowing whether he would serve. If the person declined the office, that would create a vacancy that would arise during the recess, permitting the President to fill the office with a recess appointment.<sup>69</sup> Second, Congress would sometimes recognize that certain inferior offices had not been filled and provide the President with statutory authority to do so.<sup>70</sup> Thus, Congress would use its power to vest the appointment of inferior officers in the President alone, allowing the President to fill these offices during the recess.

Despite these methods for filling late session vacancies, it might still be argued that the Senate could end its session without confirming someone to fill the vacancy. Attorney General Wirt argued, for example, that an invasion or a plague might cause the Senate to recess prematurely or that the Senate might reject a nominee and then mistakenly recess without

---

<sup>67</sup> In assessing the feasibility of these arrangements, it is important that we focus our attention on the world of the Framers. If we are to determine whether the Framers would have regarded late session vacancies as requiring the exist meaning, one must look to the world they knew and expected rather than to the world we inhabit. In our world, the idea that a late session vacancy would lead the President and the Senate to rearrange their schedules, or the Senate to postpone its session, might seem unrealistic or undesirable. But our world is completely different than the Framers world. While the contemporary Senate is unlikely to delay its recess to consider a late session appointment, that is because the prevalence of the exist interpretation makes such a delay unnecessary. Moreover, a quick appointment seems problematic in our world where background checks and other procedures make it difficult for an appointment to be made expeditiously.

<sup>68</sup> For an example of President Washington nominating officers on the last day of a Senate session and the Senate confirming them on the same day, see *SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS* 51-53 (Linda Grant De Pauw ed., 1974).

<sup>69</sup> Letter from President Washington to the Senate (Feb. 9, 1790), *in* 11 *SENATE EXEC. JOURNAL AND RELATED DOCUMENTS*, 58-59 (Linda Grant DePaux, Charlene Bangs Bickford, & LaVonne Marlene Siegel eds., 1974); Letter from President Washington to the Senate (Dec. 17, 1790), *in* 11 *SENATE EXEC. JOURNAL AND RELATED DOCUMENTS*, 99 (Linda Grant DePaux, Charlene Bangs Bickford, & LaVonne Marlene Siegel eds., 1974).

<sup>70</sup> *See infra* text and accompanying notes XX.

confirming anyone else.<sup>71</sup> These contingencies also do not justify changing the meaning of Recess Appointments Clause. To begin with, while these actions as well as others could occur, they do not seem very likely.<sup>72</sup> Moreover, in the unlikely event that these contingencies do occur, the President and the Congress have various methods available for addressing them. First, in the case of inferior officers, Congress could allow the President to make these appointments during the recess. Congress could do this based on its authority to vest the appointment of inferior officers in the President alone. Significantly, Congress could either confer broad authority on the President (such as allowing him to appoint all inferior officers during the recess) or narrow authority (such as allowing him to appoint only inferior officers where the vacancy arose within, for example, 10 days of the end of the session and then only for a limited term).

Second, in the case of superior officers, Congress could authorize acting appointments. Under acting appointments, Congress authorizes the occupant of one office to perform the duties of a second office when that second office is vacant. I discuss the nature and constitutionality of acting appointments in the next section. Finally, if the matter were important enough, the President might reconvene the Senate so that it could consider the nominee. For example, in the case raised by Attorney General Wirt of an invasion requiring the premature termination of the session, one would expect that the Congress would reconvene in a different and safer location,<sup>73</sup>

---

<sup>71</sup> 1 Op. Att’y Gen. 631 (1823).

<sup>72</sup> One situation raised by Attorney General Wirt was the possibility that an office far away from Washington might become vacant before the end of the session, but that notice of that vacancy, given the slow communications in the early years of the republic, would not be received until after the Senate has ended its session. Under the arise interpretation, that would appear to prevent a recess appointment from being made. As the text indicates, this situation could be addressed through unilateral appointments of inferior officers, through acting appointments, and even through convening of the Senate. In fact, Congress could pass statutory provisions limiting unilateral inferior officer appointments and acting appointments to cases when the vacancy arises during the session, but notice is not received until after the recess occurs.

Despite this argument, some might regard the possibility of a vacancy arising during the session, but not being transmitted to the President until the recess, as a strong reason for reaching the exist interpretation. But one need not travel all the way to the exist interpretation to address this situation. One might argue that, if an officer wrote a letter resigning during the session, but the letter was not received during the recess, that the vacancy would not have happened or arisen during the recess. The law often faces a question as to when an action is effective – when an action is taken or when notice is received. The most well-known example is the mail box rule in contract law. 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 3.24 (2004). One might conclude that the constitutional language, as to when the “vacancy happens” is ambiguous and that structure and purpose suggest it should be read as to when the notice is received. Even if one believed that the language pointed strongly in favor of the result that the event was effective when the action was taken, one might still reach the opposite result based on structure and purpose, before one was led to embrace the exist interpretation, with its various problems.

<sup>73</sup> U.S. CONST. art. II, § 3 (The President “may, on extraordinary Occasions, convene both Houses, or either of them”).

not merely to confirm appointments but also to pass legislation necessary for responding to the emergency.<sup>74</sup>

### 3. Congress's Power to Provide for Acting Appointments

One important method for addressing vacancies is the use of acting appointments. An acting appointment occurs when the occupant of one office is allowed to perform the duties of a second office when the second office is vacant. Although acting appointments are referred to as appointments, they are misleadingly named, because as I describe below, they do not involve the exercise of any constitutional appointment authority. Whatever their appropriate name, though, acting appointments are extremely important because they allow the duties of superior offices that are vacant to be performed without requiring Senate confirmation. Thus, acting appointments could be used in a variety of different situations, including to address late session vacancies that were not filled. Unlike the exist interpretation, however, acting appointments do not mangle the Constitution and respect the values underlying the requirement of Senate confirmation of superior officers.

Congress authorizes acting appointments by defining the duties of one officer to include the performance of the duties of another officer when that second office is vacant. For example, Congress could provide that when the office of the Attorney General becomes vacant, the Deputy Attorney General, who has been appointed with the consent of the Senate, should serve as acting Attorney General and perform the duties of that office. Although the Deputy Attorney General would generally be described as having an acting appointment in this situation, no one appoints him to any office. Rather, his duties as Deputy Attorney General automatically require that he assume the powers of the Attorney General.

Another type of acting appointment provides the President with more authority. Under this type, Congress could specify that the Deputy Attorney General, the Associate Attorney General, and the Solicitor General all have as part of their duties the power to serve as Acting Attorney General when the Attorney General position is vacant. When the office of Attorney General becomes vacant, however, the President would have the statutory authority to specify which of these officials should exercise the powers of the Attorney General. Although the

---

<sup>74</sup> The weakness of Attorney General Wirt's argument concerning an invasion is also revealed by comparing the recess appointment issue with other presidential powers. If an invasion were to force the Congress to recess prematurely, the country might also need other legislation, such as new appropriations or authorizations for troops. No one would argue that this circumstance justified rewriting the appropriations clause to allow the President to withdraw funds without an appropriation where it was reasonable to do so. Yet, Wirt's argument is little different as to recess appointments. A similar point applies to Wirt's argument that the Senate might reject a nominee in the last hour of a session and then inadvertently recess before a renomination can occur. If the Congress mistakenly failed to pass an appropriation, no one would argue that the President could ignore the appropriations clause. The correct response, that the Congress must come back into session to pass the appropriation, also applies to the Recess Appointments Clause.

President has more power here, he would still not be exercising appointment authority. He would not be appointing one of the subordinate officers to a new office. Instead, he would be assigning a task that is within the job description of the three subordinate officers to one of them. This situation is analogous to the one where a United States Attorney assigns a case to one of the Assistant United States Attorneys in his office. Each one of the Assistant United States Attorneys has as part his official duties the capacity to take the case, but the United States Attorney assigns to them the specific duties that they will exercise. Similarly, the President assigns to one of the subordinate officers powers that are already part of the duties of his office.

Acting appointments therefore are not really appointments at all. In fact, if they were appointments, they would be unconstitutional, since the President could not appoint a new Attorney General without the consent of the Senate. Instead, Congress's power to establish acting appointments derives from its constitutional authority to define the duties of the offices it creates. The Constitution allows Congress significant discretion in defining those offices.<sup>75</sup> If Congress defines the offices broadly, allowing various offices to perform the duties of other offices when they are vacant, this will limit the need for additional appointments. If Congress defines these offices narrowly, then a vacancy will create a greater need for new appointments.<sup>76</sup>

Acting appointments are not only constitutional, but are also far more in accord with the Constitution's senatorial confirmation structure than are recess appointments under the exist interpretation. First, while recess appointments allow the President to appoint individuals who have not received the consent of the Senate, acting appointments require such consent. The officials who can serve as Acting Attorney General in the above examples are all officials who have been confirmed by the Senate. Moreover, there is a strong argument that all officers who act for a superior officer must themselves be superior officers that received Senate confirmation.<sup>77</sup>

---

<sup>75</sup> Congress's power to define offices derives from at least two places, the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, and from the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2.

<sup>76</sup> Congress first enacted an acting appointment statute in 1792. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* 187 (2001) (hereinafter "Currie, The Jeffersonians").

<sup>77</sup> If officer is a superior officer, then it would seem that any officer who has as part of his duties the power to serve temporarily as that superior officer, must also be a superior officer. If one defines a superior officer as an official who has no superior other than the President, then even the temporary exercise of an office with no superior other than the President would involve being a superior officer. See *Edmund v. United States*, 520 U.S. 651 (1997); but see *Morrison v. Olson*, 487 U.S. 654 (1988) (sharply distinguished by *Edmund*). The main argument against this view is that this officer's temporary duties as a superior officer are likely to be limited – the acting appointment might not occur and if it does occur might extend for a short period – and these limited duties as a superior officer are not enough to constitute a superior officer. But to my mind this is mistaken, since the exercise of duties without a superior, even for a short period, involves being a superior officer.

Second, while recess appointments cannot be prevented or limited by Congress, acting appointments can. If Congress believes that the President is abusing his powers, it can restrain or eliminate his power to make acting appointments. Moreover, Congress can vary the extent of the acting appointment authority it provides to the executive. Consider just three of the several ways that Congress could restrain acting appointments. First, Congress could limit the length of acting appointments, such as confining them to a term of 90 days or to the length of the Senate's recess. Second, Congress could restrict the situations when acting appointments can be made, such as allowing them only when the vacancy arises within 30 days of the end of a session.<sup>78</sup> Finally, Congress could restrain the powers exercised by acting officials, such as limiting them to making decisions that the acting official – or, in a different version, that the President – believes are essential to the public interest.

Thus, acting appointments are an extremely flexible mechanism for addressing the problems of late session vacancies or any vacancies that would take a long time to fill. Yet, these appointments fully respect the Senatorial consent provision, since they both require all of the officials who act as superior offices to have secured senatorial consent and also allow Congress to restrain acting appointments should it believe the President has abused his authority.<sup>79</sup>

---

Strangely, the first acting appointment statute, passed in 1792, appears to have been unconstitutional in certain respects. It provided that the President could appoint any person to perform the duties of the secretaries of State, Treasury, or War, if such secretary died or was unable to perform their duties. Since this provision does not require the acting officer to have been confirmed by the Senate, it appears unconstitutional. Interestingly, the successor statute did require the acting officer to have been confirmed by the Senate. See 5 U.S.C. § 3345-3349. See generally Currie, *The Jeffersonians*, supra, at 187 (discussing the first acting appointment statute and arguing that officers who act for superior officers must be confirmed by the Senate).

<sup>78</sup> The main limit on the conditions that Congress can impose on acting appointments is that they not constitute unconstitutional conditions. For example, if one believes that the President has the constitutional power to remove executive officials, then certainly Congress cannot provide that a vacancy may be filled by an acting appointment, but only if the vacancy is not caused by the President removing the official. This provision would operate to burden the President's constitutionally protected removal power. While unconstitutional conditions are most often discussed in the context of burdening individual rights, they also can apply to the burdening of the constitutional powers of the different branches. See Michael Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. L. REV. 771 (1997)

<sup>79</sup> One might wonder if acting appointments are such an attractive mechanism why the Framers needed the Recess Appointments Clause. There is one obvious and important reason why acting appointments would not have been sufficient. In the early years under the Constitution, there were just a small number of significant officers, and therefore it would have been difficult to find officers who could desirably serve as acting. Within each department, there was usually just one important office. For example, the Secretary of Foreign Affairs merely had an assistant. In this situation, it would not have been desirable to allow the assistant to serve in the role of Secretary of Foreign Affairs. While another cabinet secretary could perform in the role, such as the Secretary of Treasury, that would not be ideal, since that would give tremendous power to that individual and place a significant burden on him.

#### 4. Overall Effect

After reviewing the structure and purpose evidence, I am now in a position to determine how strongly this evidence supports the arise interpretation. To begin with, the arise interpretation does a much better job than the exist interpretation in protecting the Senate's confirmation role. While the arise interpretation restricts recess appointments to those vacancies which have arisen during a recess, the exist interpretation allows the President broad latitude to circumvent the Senate's role. So long as the President is willing to wait until a recess occurs, he can recess appoint any person to any vacancy, even if he knows that the Senate would oppose his appointee and even if the Senate has already rejected that appointee.

Moreover, despite claims to the contrary, late session vacancies do not justify adopting the exist interpretation. First, filling such vacancies does not really create significant problems for the political branches. While late session vacancies may require that the President and Senate make special efforts to fill them, including adjusting their schedules, that does not mean that they impose unreasonable burdens. It is entirely to be expected that government officials will often have to act quickly and change their plans. Moreover, even if some late session vacancies cannot be filled, there are still various mechanisms, such as acting appointments and presidential appointment of inferior officers, that can be employed under the arise interpretation.

Second, even if one concluded that these inconveniences were serious, that does not mean that they would support an overall structure and purpose argument for the exist interpretation. To illustrate this point, divide vacancies into two categories: those that arise late in the session and those exist for at least a significant part of the session. Even if there are serious inconveniences involved in filling vacancies that arise late in the session, the Framers might still have preferred to suffer those inconveniences in order to secure the higher quality appointments for these vacancies that senatorial consent would provide. And even if the Framers would have concluded these inconvenience for late session vacancies outweighed the benefits of higher quality appointments, one would still have to consider the reduction in quality that recess appointments for vacancies that do not arise late in the session produce – a reduction in quality that has no offsetting benefit, since long lasting vacancies are not inconvenient to fill. In the end, the structure and purpose argument for the exist interpretation requires that one assume the Framers adopted the questionable judgment of placing a very high value on avoiding the possibility that a late session vacancy would not be made and a very low value on the reduction in quality that avoiding senatorial consent for a larger number of appointments would produce – a judgment that seems inconsistent with the structure of the appointment provisions.

#### C. History

The arise interpretation is not only supported by text, structure and purpose. This section shows that history, in the form of early interpretations of the Clause, also strongly favors the arise interpretation. A wide range of leading figures from the Framers' generation read the Recess Appointments Clause to have the arise meaning, including Edmund Randolph, Alexander

Hamilton, St. George Tucker, and George Washington. In addition, the early Congresses also appeared to adopt the arise interpretation.

### 1. Attorney General Edmund Randolph's Interpretation

An early and important interpretation of the term “happen” in the Recess Appointments Clause occurred during George Washington's First Administration. In 1792, Thomas Jefferson, who was Secretary of Foreign Affairs, asked the first Attorney General, Edmund Randolph, whether a recess appointment could be made for the position of Chief Coiner of the Mint. Randolph, who had been at the Philadelphia Convention and had been an important participant in the Virginia Ratifying Convention, adopted the arise interpretation and concluded a recess appointment was not available.<sup>80</sup>

The statute establishing the Mint had been passed on April 2, 1792, but no person had been nominated for Chief Coiner before the Senate ended its session on May 8<sup>th</sup>.<sup>81</sup> Randolph asked whether the empty office was a vacancy “which has *happened* during the recess of the Senate?” He concluded that the vacancy had “happened” on the day when the statute had been enacted in April. Thus, the vacancy had happened during the session and could not be filled with a recess appointment.

Randolph's analysis relied not only on the language of the Clause, but also on “the spirit of the Constitution,” by which he meant the same thing that I mean by structure and purpose. Randolph concluded that the spirit of the Constitution requires that the Recess Appointments Clause be “interpreted strictly” because it was “an exception to the general participation of the Senate.” While Randolph recognized that there might be legitimate reasons why the appointment could not be made before the end of the session, that was not sufficient to override the language and the spirit of the Constitution.<sup>82</sup>

In this remarkable opinion, Randolph in a few paragraphs articulated the main pillars of the arise interpretation: that the text supports the arise view, that the Senate's confirmation role is inconsistent with the exist interpretation, and that any inconveniences created by the arise interpretation are outweighed by these textual and structural arguments.

### 2. Alexander Hamilton's Interpretation

Alexander Hamilton also interpreted the Clause to have the arise meaning. In 1799,

---

<sup>80</sup> Letter from Attorney General Randolph to President Thomas Jefferson, *in* 24 THE PAPERS OF THOMAS JEFFERSON, at 165-167 (Julian Boyd ed., 1961) (hereinafter “the Randolph Opinion”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Secretary of War James McHenry,<sup>83</sup> who interpreted the Clause to have the arise meaning, asked Hamilton, then serving as a Major General in the United States Army, for his interpretation of the Clause.<sup>84</sup> In response, Hamilton also argued that the arise interpretation was the correct one, writing “It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.”<sup>85</sup>

### 3. St George Tucker’s Interpretation

St George Tucker, the famous expositor of Blackstone’s Commentaries and commentator on the United States Constitution, also interpreted the Clause in accordance with the arise interpretation. In a section devoted to criticizing the Constitution’s appointment provisions, Tucker noted that nothing prevents the President from continuing to nominate an official who had been turned down by the Senate. In the ordinary case, this would mean that the office would remain vacant, with the President and Senate disagreeing. Tucker continued:

But if it should have happened that the *office became vacant during the recess of the senate*, and the vacancy were filled by a commission which should expire, not at the meeting of the senate, but at the end of their session, then, in case such a disagreement between the president and the senate, if the president should persist in his opinion, and make no other nomination, the person appointed by him during the recess of the senate would continue to hold his commission, *until the end of their session*: so that *the vacancy would happen a second time during the recess of the senate*, and the president consequently, would have the sole right of appointing a second time; and the person whom the senate have rejected, may be instantly replaced by a new commission. And thus it is evidently in the power of the president to continue any person in office, whom he shall once have appointed

---

<sup>83</sup> See 23 The Papers of Alexander Hamilton 69-71 (1976), Letter of James McHenry to Alexander Hamilton.

<sup>84</sup> Hamilton provides additional support for my claim in the introduction that one can sensibly have a broad view of executive power and a narrow view of the Recess Appointments Clause. *See supra* text and accompanying notes. In fact, Hamilton’s view of executive power is a bit broader than mine at points, while his view of Recess Appointments Clause is probably narrower, since he adopts the previously occupied interpretation. *See infra* text and accompanying notes XX.

<sup>85</sup> See 23 The Papers of Alexander Hamilton 94 (1976), Letter of Alexander Hamilton to James McHenry. The special law here refers to a law that would vest the appointment of an inferior officer in the President alone. Under such a law, which McHenry and Hamilton were also discussing, Congress could allow the President alone to make a permanent appointment of an inferior officer, or a temporary appointment extending until the end of the next session, irrespective of when the vacancy arose.

in the recess of the senate, as long as he may think proper.<sup>86</sup>

This discussion makes clear that Tucker has adopted the arise interpretation. First, in identifying the category of cases for which the President can make repeated recess appointments, Tucker refers solely to “office[s] that became vacant during the recess of the senate.” By contrast, in other cases he believes that the office would remain vacant if the President and the Senate could not agree on a nominee. Tucker’s argument here only makes sense under the arise interpretation. Under the exist interpretation, repeated recess appointments would be possible not only for offices “that became vacant during the recess of the Senate” but for offices irrespective of when they became vacant. Second, Tucker’s discussion of the fact that the recess appointment continues “until the end of [the Senate’s] session” also indicates that he does not adopt the exist interpretation. Tucker argues that because the commission extends until the end of the session, the vacancy occurs “during the recess” and therefore allows a new recess appointment. Again, this analysis would not be necessary under the exist interpretation, since the President could then make a new recess appointment during the recess, irrespective of when the commission ended.<sup>87</sup>

#### 4. George Washington’s Interpretation

There is also evidence that President George Washington and the Senate adopted the arise interpretation. As I briefly mentioned,<sup>88</sup> President Washington and the Senate pursued a practice to fill late session vacancies that suggests they adopted the arise interpretation. Under this practice, if there was not sufficient time before the end of a session to ask an individual whether he was willing to serve in an office, the President would nominate the individual without knowing whether he would take the position. The Senate would then confirm the individual before recessing.<sup>89</sup>

Washington treated this nomination and confirmation as a full appointment. If the appointee subsequently declined to serve, Washington classified this refusal as a resignation from the office, which created a new vacancy during the recess. Washington could then make a recess

---

<sup>86</sup> ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 279-280 (Liberty Fund, 1999) (emphasis added).

<sup>87</sup> While Tucker’s argument asserts that repeated recess appointments are possible under the arise interpretation, I have argued above that this is not the best way to read the recess appointment clause. *See supra* text and accompanying notes. Perhaps Tucker is partly misled by his mischaracterization of the length of the commission. While he says that the recess appointee would “hold his commission until the end of the[] session,” Tucker, *supra* note XX, the Constitution actually says it “shall *expire* at the End of the session.” The Constitution’s language is slightly more suggestive that the commission ends during the session than is Tucker’s paraphrase.

<sup>88</sup> *See supra* text and accompanying notes.

<sup>89</sup> *Id.*

appointment at that time while fully respecting the arise interpretation. Under the exist interpretation, by contrast, this practice would not have been needed to make a recess appointment, since the President could recess appoint an individual during the recess even if the vacancy had arisen during the session.<sup>90</sup>

Although this practice suggests that Washington and the Senate accepted the arise interpretation, it does not prove it. It is possible that Washington nominated and the Senate confirmed persons immediately before the recess so that a permanent appointment would be made rather than a temporary recess appointment. While this could have been the President and Senate's motivation, it does not seem probable. Nominating and confirming someone at the end of a session takes effort and it seem unlikely that the President and Senate would do so without knowing that the prospective appointee would be willing to serve in the job unless there were significant benefits for doing so. Merely securing a permanent appointment does not seem to warrant going to the trouble of the confirmation process, when under the exist interpretation the President could make a recess appointment during the recess and then a permanent appointment when the Senate came back into session. It is only if the office would have to remain vacant during a long recess, as it would under the arise interpretation, that the President and the Senate would have a strong reason for rushing the appointment at the end of the session.

## 5. The Previously Occupied Interpretation

Additional evidence for the arise interpretation is provided by the support of some prominent figures from the Framers' generation for what I call the "previously occupied" interpretation of the Recess Appointments Clause. Under this interpretation, the term "vacancy" is understood to mean an office that had previously been filled but is now empty. A new office that has never been occupied would not have had a vacancy and therefore could not be filled by a recess appointment.

One important Founder who held the previously occupied position was Alexander Hamilton, who as Major General wrote in 1799 wrote that "Vacancy is a relative term, and presupposes that the Office has been once filled." Hamilton further argued that "the phrase 'Which may have happened' serves to confirm this construction" because "it implies casualty – and denotes such Offices as having been once filled, have become vacant by accidental

---

<sup>90</sup> One might question whether this practice was constitutional. Although my principal purpose in bring it up – that it suggests George Washington and the Senate adopted the arise interpretation – does not require that it be constitutional, I believe it is constitutional. The Constitution states that appointments require nomination and consent, and it also suggests that offices require commissions. See U.S. CONST. art. II, § 3 (providing that the President shall commission officers). It does not say that the appointee must accept the appointment or the commission. This analysis is strongly supported by *Marbury v. Madison*, which held "that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state." *Marbury v. Madison*, 5 U.S. 137, 162 (1803). See also *Randolph Opinion*, *supra* (holding that this practice is constitutional).

circumstances.”<sup>91</sup>

People who adopt the previously occupied interpretation are very likely also to hold the arise interpretation. The main argument against the arise interpretation – that structure and purpose suggest that an unfilled vacancy is a serious problem that should be strongly avoided – applies equally against the previously occupied interpretation, since previously unoccupied offices may also remain unfilled. While the structure and purpose arguments against the previously occupied and the arise interpretations are equivalent, the textual arguments in favor of the arise interpretation are far stronger. I have argued that the arise interpretation is powerfully supported by the language of the Clause, but the previously unoccupied interpretation is not. Although the term “vacancy” might mean a previously filled office, as the previously occupied interpretation suggests, it might also mean any office that is not presently filled. Because the arguments against the arise and the previously occupied interpretations are equally forceful, but the arguments for the arise interpretation are stronger than those for the previously occupied interpretation, people who accept the previously occupied interpretation should also accept the arise interpretation.<sup>92</sup>

## 6. Congressional Interpretations

Early Congresses also appeared to adopt the arise interpretation. These Congresses passed various statutes that conferred appointment power on the President that would not have been necessary under the exist interpretation, thereby suggesting that Congress followed the arise interpretation. For example, in 1791, the First Congress passed a statute providing that inspectors of surveys are to be appointed by the President with the advice and consent of the Senate, but that if the appointment is not made during the present session of Congress, “the President shall have the power to make appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”<sup>93</sup> Under the exist interpretation, this statute would have been unnecessary since the President could have used his constitutional power to make recess appointments. The only way that the President would have lacked recess appointment authority under the exist interpretation is if the Congress had adopted the previously occupied interpretation. But as I have argued, if the Congress had adopted that interpretation, that would strongly suggest it also adopted the arise interpretation.

---

<sup>91</sup> See 23 The Papers of Alexander Hamilton 94 (1976), Letter of Alexander Hamilton to James McHenry. It appears that Secretary of War James McHenry agreed with him. See *id.*, at 71 and 95 n. 2.

<sup>92</sup> While adherents of the previously occupied interpretation are likely to hold the arise interpretation, adherents of the arise interpretation may or may not hold the previously occupied interpretation. Alexander Hamilton agreed with both the arise and the previously occupied interpretations, *see supra* note XX; Edmund Randolph accepted the arise interpretation, but not the previously occupied view. *See Randolph Opinion, supra.*

<sup>93</sup> See Act of 1791, 1 stat. 199, 200.

Thus, this statute as well as others<sup>94</sup> suggest that early Congresses followed the arise view.

## 7. Interpretation of the Senate Vacancies Clause

Additional support for the arise interpretation also derives from an early Senate's interpretation of a similar provision. As I discussed previously,<sup>95</sup> the original Constitution contained the Senate Vacancies Clause, which provided that "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." The Clause is similar in both language and purpose to the Recess Appointments Clause. It is therefore significant that the Senate, which had the primary responsibility for interpreting the Clause, adopted the arise interpretation of "Vacancies happen." In 1794, the Senate refused to sit an appointee of the executive when the vacancy had arisen during the session but continued into the recess.<sup>96</sup>

## 8. The Recess Appointment of Diplomatic Officers and the Curious View of John Adams

---

<sup>94</sup> For a similar statute, see Chap. 31, March 2, 1799 (An Act giving eventual authority to the President of the United States to augment the Army) (providing authority to the President to make appointments of officers during the recess of the Senate but requiring that these officers be nominated and submitted to the Senate for confirmation at the end of the recess).

Congress also passed different types of statutes that provided slightly different evidence in favor of the arise interpretation. In 1799, Congress authorized the President to make appointments to fill "any vacancies in the army and navy which may have happened during the present session of the Senate." Chap. 47, March 3, 1799 (An Act authorizing the President of the United States to fill certain vacancies in the Army and Navy). Because the previously occupied theory holds that an office that has never been filled has never had a vacancy, this statute does not appear to apply to previously unoccupied offices. Thus, Congress's decision to provide the President with this authority cannot be explained as based on Congress's alleged acceptance of the previously occupied interpretation and therefore appears to be based on Congress adopting the arise interpretation. Still, it is possible that the statute was passed for a different reason. Because the statute provides the President with the authority to make permanent appointments, rather than temporary appointments (that terminate at the end of the next session), Congress may have enacted the statute to confer permanent appointment authority. See also Chap. 76, July 16, 1798 (An Act to augment the Army of the United States and for other purposes) ("And in the recess of Senate, the President of the United State is hereby authorized to appoint all the regimental officers proper to be appointed under this act, and likewise to make appointments to fill any vacancies in the army, which may have happened during the present session of the Senate.")

<sup>95</sup> See *supra* text and accompanying notes XX.

<sup>96</sup> ANNALS OF CONG. 78 (1849) [1793-1795] ("The Senate in 1794 refused to seat a Senator appointed by his governor during a recess when the vacancy had existed during a session of the state legislature.")

While this article has focused on the recess appointment of ordinary federal offices that were created by Congress, the recess appointment of ambassadors and other diplomatic offices requires additional discussion. During the early years under the Constitution, diplomatic offices were not viewed as the exclusive creation of Congress, which had implications for the proper way to make recess appointments to these offices. Although the recess appointment of diplomatic officials may have followed slightly differently rules, these rules were fully consistent with the arise interpretation and do not provide support for the exist view.

In the early years under the Constitution, diplomatic offices were conceived of differently than most other offices. As is true today, ordinary offices were created exclusively by federal statute. By contrast, diplomatic offices were not thought to be the exclusive creation of federal law. Instead, they were viewed as being established under the Constitution or possibly under international law.<sup>97</sup>

This view of offices was based in part on a reading of the Appointments Clause. The Appointments Clause provides for the appointment by the President and the Senate of “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments . . . shall be established by Law.”<sup>98</sup> This language was viewed as reflecting a distinction between these named officers and other offices whose appointments were “established by law.” Under this view, while the latter had to be created by Congress, the named offices had been purposely not described as being “established by law” so that they could be created by sources of law other than federal statutes.<sup>99</sup>

Both the executive branch<sup>100</sup> and Congress appeared to accept this view of diplomatic

---

<sup>97</sup> DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* 44 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 309 (2001); 1813 debate (rooting this power in Constitution or international law); Randolph Opinion, *supra*, at 167.

<sup>98</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>99</sup> DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* 45 (1999); 23 *THE PAPERS OF THOMAS JEFFERSON* at 18-19 (Julian Boyd ed., 1961); Letter from George Washington to Thomas Jefferson (Apr. 27, 1790), in 4 *THE DIARIES OF GEORGE WASHINGTON, 1748-1799*, at 122 (John C. Fitzpatrick ed., 1925). Under this view, not only diplomatic officers, but also the offices of the Supreme Court justices would not be exclusively created by Congress. See Currie, *The Federalist Period*, at 45. In contrast with diplomatic officers, Congress chose to specifically create Supreme Court justices and therefore there was never an opportunity for the President to create such an office on his own. See Currie, *The Federalist Period*, at 45.

<sup>100</sup> Randolph Opinion, at 167; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 309 (2001); 23 *THE PAPERS OF THOMAS JEFFERSON* at 18-19 (Julian Boyd ed., 1961); Letter from George Washington to Thomas Jefferson (Apr. 27, 1790), in 4 *THE DIARIES OF GEORGE WASHINGTON, 1748-1799*, at 122 (John C. Fitzpatrick ed., 1925); 16 *THE*

offices. Significantly, Congress did not pass a federal statute establishing diplomatic offices. Instead, it only passed an appropriation with a lump sum to be spent on diplomatic offices.<sup>101</sup> Under this arrangement, diplomatic offices would be created or invoked when the President determined that an office was required. If the President decided that an ambassador or other diplomatic officer was needed for a particular country, he would nominate an individual for that office and send his name to the Senate for its consent. If the Senate confirmed the nominee, then the office would be filled.<sup>102</sup>

This view of how diplomatic offices are created has important implications for recess appointments. A President might decide during the recess that a new diplomatic office was needed. The President's decision to fill that office would create the office and a vacancy. Since the vacancy would have arisen during the recess, the President could then make a recess appointment under the arise interpretation.<sup>103</sup> This situation differs somewhat from the ordinary situation that governs offices created by statute that have never been filled. When Congress creates an office in a statute, the vacancy will usually arise when the statute takes effect during the session<sup>104</sup> and therefore cannot be filled by a recess appointment.<sup>105</sup>

---

PAPERS OF THOMAS JEFFERSON at 378-382 (Julian Boyd ed., 1961).

<sup>101</sup> 1 Stat. 128, § 1 (July 1, 1790); Currie, *The Federalist Period*, at 45.

<sup>102</sup> The Washington Administration as well as James Madison apparently believed that the Senate's role here was very limited. They concluded that the Senate had no power to decide on whether to confirm an individual based on whether we needed a diplomatic for that country, but only on whether the individual was fit. Also, they believed that the Senate could not decide on the appropriate pay grade for such individuals. Letter from George Washington to Thomas Jefferson (Apr. 27, 1790), *in* 4 *THE DIARIES OF GEORGE WASHINGTON, 1748-1799*, at 122 (John C. Fitzpatrick ed., 1925); 23 *THE PAPERS OF THOMAS JEFFERSON* at 18-19 (Julian Boyd ed., 1961).

<sup>103</sup> 26 *ANNALS OF CONG.* 697-700 (1854) (recording debate of March, 1814) (statement of Senator Bibb advocating this view); *id.* at 712-713 (recording debate of April, 1814) (statement of Senator Horsey advocating this view).

<sup>104</sup> Attorney General Randolph's reply to Thomas Jefferson, *in* 24 *THE PAPERS OF THOMAS JEFFERSON* at 165-167 (Julian Boyd ed., 1961). Under the arise interpretation, the President will not always be disabled from making a recess appointment to a new a statutorily created office. The statute may have been signed by the President during the recess and therefore taken effect at that time. Similarly, the office may have been created, pursuant to the statute, based on a contingency that occurs during the recess.

<sup>105</sup> The analysis in this section is mirrored by the argument made by Edmund Randolph in his 1792 opinion, which distinguishes between recess appointments of statutory officers and diplomatic offices:

An analogy has been suggested to me between a Minister to a foreign court and the appointment now under consideration [of a coiner whose office was created during the session]. With much

While the President would have additional discretion to recess appoint diplomatic offices since he could create an office during the recess, he would only enjoy this discretion if the arise interpretation were followed but the previously occupied interpretation were not. Under the previously occupied interpretation, a vacancy is defined as an office that was previously filled but has become vacant.<sup>106</sup> Consequently, even if the President were to create a diplomatic office during the recess, he could not make a recess appointment to that office under the previously occupied interpretation because there would be no vacancy. The Washington Administration made recess appointments to newly created diplomatic offices and therefore appeared to reject the previously occupied interpretation.<sup>107</sup>

While the arise interpretation (without the previously occupied view) would provide additional discretion to the President for the recess appointment of diplomatic offices, the arise interpretation would still impose significant limits on the President. If a diplomatic office were not created during the recess,<sup>108</sup> then the President could not make a recess appointment.

Thus, although diplomatic offices were viewed as having been established by a different law than ordinary offices, the arise interpretation would still apply to the recess appointment of these offices. The only difference for diplomatic offices was that the President could use his power to create new offices during the recess. However, one prominent person from the Founder's generation – President John Adams – may have sought to use the recess appointment of diplomatic offices to support a broader interpretation of the Recess Appointments Clause.

---

strength it has been contended that a Minister may be appointed who, or whose mission was never mentioned to the Senate. But mark the peculiar condition of a Minister. The President is allowed by law to spend a limited sum on diplomatic appointments, no particular courts are designated. But they are consigned by the Constitution to his pleasure. The truth then is that independently of congress, or either house the President may at any time during the Recess declare the court and the grade. But this power would be nugatory during the recess if he could not also name the Person. How unlike is this example to that of the Coiner, in which the office can be created by congress alone; And in the appointment to which the Senate might have an opportunity, of concurring at the Session when the law passed creating it?

Randolph Opinion at 167.

<sup>106</sup> See *supra* text and accompanying notes XX.

<sup>107</sup> See American State Papers No. 370 (List of Ministers and Consuls Appointed in the Recess of the Senate 1814); The Randolph Opinion at 167.

<sup>108</sup> A diplomatic office would not be created during the recess if the office preexisted the recess. For example, if the previous occupant of the diplomatic office resigned during the session, then the vacancy would not arise during the recess. Alternatively, if the President created the office during a session by nominating an individual, but that nomination was rejected by the Senate, the vacancy would not have arisen during the recess.

I previously discussed a situation in which both Alexander Hamilton and James McHenry supported the arise interpretation.<sup>109</sup> In a letter to President Adams, Secretary of War James McHenry had asserted his view that there was no statutory authority to make appointments during the recess for certain army offices that had been created during the session, but had never been filled. In response, Adams wrote that the statutory question could be bypassed since there was constitutional authority for a recess appointment: “Wherever there is an office that is not full, there is a Vacancy, as I have ever understood the Constitution. To suppose that the President has the power to appoint judges and ambassadors, in the recess of the Senate, and not officers of the army, is to me a distinction without a difference, and a Constitution not founded in law or sense, and very embarrassing to the public service. All such Appointments to be sure must be nominated to the Senate at their next Session and subject to their ultimate decision.”<sup>110</sup>

Although Adams’s reasoning is not entirely clear, he appears to be arguing that because ambassadors and judges were subject to one set of rules for recess appointments, other officers should be subject to the same set of rules. There are several problems with this argument. To begin with, it is not clear what Adams means here. His assertion that “there is a vacancy whenever an office is not filled” might mean one of two things. First, he might be arguing that the previously occupied interpretation (which held that the term vacancy implies that an office was previously occupied and therefore that recess appointments cannot be made to new offices) should not be applied to army officers because it was also not applied to diplomatic offices.<sup>111</sup> If this is his argument, it makes sense, because the recess appointment of diplomatic offices that had never been filled does imply a rejection of the previously occupied interpretation.<sup>112</sup> The problem, though, for Adams argument, is that even if the previously occupied interpretation is not applied here and these army offices are deemed to have vacancies, these vacancies occurred during the session. Thus, the vacancy did not arise during the recess and therefore could not be filled by a recess appointment.

As a result, one might interpret Adams to be asserting the exist interpretation: that any unfilled office creates a vacancy that allows a recess appointment during the recess. The problem with this interpretation, however, is that diplomatic offices do not appear to have been subject to the exist interpretation. While the President could create these offices, he could make recess appointments only if the vacancy arose during the recess.

---

<sup>109</sup> *See supra* text and accompanying notes XX.

<sup>110</sup> Letter from President John Adams to Secretary of War James McHenry (April 16, 1799), in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, 632-633 (Charles Francis Adams ed., 1853).

<sup>111</sup> *See supra* text and accompanying notes XX.

<sup>112</sup> Under the previously occupied interpretation, even if the President created a diplomatic office during the recess, he could still not make a recess appointment, because there would be no vacancy, since the office had not been previously occupied.

One final problem with Adams argument is his mistaken assumption that there is no legitimate basis for distinguishing between diplomatic offices and army offices. It is the Constitution, however, that provides that basis, since it was viewed as allowing the President more control over the creation of diplomatic offices than of army offices.

In the end, diplomatic officers were treated differently than other officers in the early years of the Constitution. But despite these differences, the arise interpretation was applied to these offices and limited the recess appointment power as to these offices.

#### D. When Must the Recess Appointment be Made?

While I have argued that the Recess Appointments Clause should be interpreted to require that a vacancy arise during the recess, there is a second issue concerning the Clause that is often neglected: When must the recess appointment be made? For example, under the arise interpretation, must the President make the recess appointment during the recess when the vacancy arose or can he make the recess appointment at a later time? Most readers of the Clause assume that the recess appointment must be made during the recess when the vacancy arose, but careful examination of the Clause reveals that its language does not specifically say when the appointment must be made. This silence as to when the recess appointment must be made occurs under both the arise interpretation and the exist interpretation.

While the language of the Clause is therefore ambiguous, it is clear that the Clause should be interpreted to require the recess appointment to be made during the recess – the recess when the vacancy happens to arise under the arise interpretation and the recess when it happens to exist under the exist interpretation. Under this view, the Clause would read: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions *during that recess* which shall expire at the End of their next Session.” This reading of the Clause views the italicized words “during that recess” as implied by the remainder of the Clause. By contrast, one might also read the Clause as not imposing *any* limitation on when the appointment should be made. One would then read it to say, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions *at any time* which shall expire at the End of their next Session.”

While both of these interpretations are plausible readings of the language, the “at any time” interpretation is nonsensical as a matter of structure and purpose. This interpretation would allow a recess appointment while the Senate is in session. Allowing such recess appointments does not serve any legitimate purpose, because the Senate could receive the President’s nomination at that point, and it operates as a tremendous intrusion on the Senate’s power to consent to nominees. Thus, there is an extremely powerful case for reading the Clause, as virtually everyone does who looks at it, as implicitly requiring that the appointment be made during the recess.

Curiously, the Clause’s silence as to when the appointment must be made has been used

as an argument in favor of the exist interpretation. In an opinion written in 1868, Attorney General Stanbery maintained that the arise interpretation required only that the vacancy arise during the recess and therefore the Clause permitted the absurdity of allowing a recess appointment during the session.<sup>113</sup> At the same time, Stanberry believed that the exist interpretation would not allow this absurdity. Clearly, though, Stanberry is confused. While he is certainly correct that it is possible to combine the arise interpretation with a view that allows the recess appointment at any time, he fails to appreciate that it is equally possible to combine the exist interpretation with that same view. Under both the arise and exist interpretations, one must supply the missing language, and in both cases structure and purpose overwhelmingly support the view that the recess appointment must be made during the recess when the vacancy happened.

#### E. Decline of the Arise Interpretation

Although the historical evidence suggests that the arise interpretation was largely followed in the early years under the Constitution, the exist interpretation emerged in the first quarter of the 19<sup>th</sup> century and has been followed ever since. This section discusses two significant events in that decline. First, I review Attorney General Wirt's opinion in 1823, which established the exist interpretation.<sup>114</sup> Then, I discuss the federal statute that has sought to restrict but not eliminate the President's use of the exist interpretation.

##### 1. Attorney General Wirt's Opinion

Although Attorney General Edmund Randolph had adopted the arise interpretation in 1792,<sup>115</sup> his opinion was overruled thirty years later by Attorney General Wirt. In a famous opinion, celebrated by adherents of the exist view, Wirt concluded that the exist interpretation was the best reading of the Clause.<sup>116</sup>

---

<sup>113</sup> 12 Op. Att. Gen. 32, 38-39 (1866); Edward Hartnett, *Recess Appointments of Article III Judges*, CARD. L. REV. (2004) (forthcoming) (making this argument).

<sup>114</sup> Although Wirt's opinion dates from the first quarter of the Nineteenth Century, it cannot be viewed as a product of the Framers' generation, having been written 36 years after the Constitution was drafted. While it is entitled to some respect, its progeny cannot be compared to the writings of leading figures of the Framing period, such as Randolph and Washington, discussed above. See *supra* text and accompanying notes.

<sup>115</sup> The Randolph Opinion, *supra*, at 165.

<sup>116</sup> 1 U.S. Op. Atty. Gen. 631 (1823). As Jefferson Powell stated "This is another opinion of great historical importance. The executive branch has consistently adhered to Wirt's conclusion. . . . Attorney General Devens remarked in 1880 that although 'this argument has been subsequently restated and amplified by other Attorneys-General since Mr. Wirt,' Wirt's opinion standing alone was 'eminently satisfactory.'" H. Jefferson Powell, *The Constitution and the Attorneys General* 36 (1999). Subsequent Attorneys General opinion which have cited Wirt's opinion and relied on his reasoning, include: 2 Op.

While I have had occasion to refer to different aspects of Wirt’s opinion, it is useful to review his overall argument in a single place. Wirt’s basic argument is that while the text of the Clause supports the arise interpretation, structure and purpose favor the exist interpretation and outweigh the textual evidence.<sup>117</sup> First, Wirt commendably admits that the more “natural sense” of the language supports the arise interpretation. Yet, he is quick to add that the one can reach the exist interpretation “without violence” to the language.<sup>118</sup>

Attorney General Wirt then explains why he believes what he calls the “reason and spirit” of the Constitution and what I call structure and purpose support the exist interpretation. His main concern is that a vacancy might occur during the session that could not be filled due to no fault of the President. He argues that “the substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed.”<sup>119</sup> As I have discussed, while Wirt lists several situations where he believes that vacancies might not be filled, the political branches would have various mechanisms available for filling these vacancies.<sup>120</sup>

While the Wirt opinion focuses on the problem of ensuring that the President has adequate power to fill vacancies during the recess, it spends little time on the dangers of a broad recess appointment power – in particular, that the President might use the power to circumvent the Senate’s consent requirement rather than to fill offices that would otherwise have remained vacant. In the weakest part of the opinion, Wirt briefly states “that the construction which I prefer is perfectly innocent. It cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies.”<sup>121</sup>

Wirt’s argument is seriously deficient in terms of both general constitutional theory and the recess appointments issue. As a matter of constitutional theory, the claim that we can trust

---

Att’y. Gen. 525 (1832)(Taney), 4 Op. Att’y. Gen. 523 (1846)(Mason), 7 Op. Att’y. Gen. 186 (1855)(Cushing), 10 Op. Att’y. Gen. 356 (1862)(Bates), 11 Op. Att’y. Gen. 179 (1865)(Speed), 12 Op. Att’y. Gen. 32 (1866)(Stanberry), 12 Op. Att’y. Gen. 449 (1868)(Everts), 16 Op. Att’y. Gen. 522 (1880)(Devens), 18 Op. Att’y. Gen. 29 (1884)(Brewster), 19 Op. Att’y. Gen. 261 (1889)(Miller), 30 Op. Att’y. Gen. 314 (1914)(Gregory), 33 Op. Att’y. Gen. 20 (1921)(Daugherty).

<sup>117</sup> Wirt Opinion, *supra* note at 631-32. At one point, Wirt writes: “Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the constitution; the second, most accordant with its reason and spirit.” Wirt Opinion, *supra* note at at 632.

<sup>118</sup> Wirt Opinion, *supra* note at 633.

<sup>119</sup> Wirt Opinion, *supra*, at 633.

<sup>120</sup> *See supra* text and accompanying notes XX.

<sup>121</sup> Wirt Opinion, *supra*, at 634.

the President to exercise a power only when it is needed is flatly inconsistent with the approach of the Constitution. In various ways, the Constitution places checks on the different branches based on the idea that no single branch can be trusted.<sup>122</sup> Similarly, Wirt’s prediction about the recess appointment power – that President’s would never use the exist interpretation to circumvent Senate confirmation – has also turned out to be grossly mistaken. Not only do Presidents do this fairly regularly,<sup>123</sup> but their lawyers now view the Recess Appointments Clause as a “counterbalance to the power of the Senate” and therefore in a way that assumes the legitimacy of circumventing Senate confirmation.<sup>124</sup>

In the end, Wirt’s opinion is problematic both because it does not give sufficient weight to the text and because it ignores that the Recess Appointments Clause was designed both to allow vacancies to be filled and to restrain President’s from circumventing the Senate. Had Wirt attended to the risk that Presidents might abuse a broad recess appointment power, he would not have been able to conclude that the natural meaning of the text should be disregarded.<sup>125</sup>

## 2. Section 5503

The executive branch’s adoption of the exist interpretation eventually led Congress to pass a statute restricting the President’s recess appointment power. This statute, which in a different form is still with us today,<sup>126</sup> uses Congress’s appropriation power to restrain

---

<sup>122</sup> The classic cite is to James Madison. See THE FEDERALIST No. 51.

<sup>123</sup> See Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2212-2216 (1994)

<sup>124</sup> As the Office of Legal Counsel wrote in 1989, “the recess appointment power is an important counterbalance to the power of the Senate. By refusing to confirm appointees, the Senate can cripple the President’s ability to enforce the law. The recess appointment power is an important resource for the President, therefore, and must be preserved.” 13 Op. Off. Legal Counsel 299, 309-310 (1989).

<sup>125</sup> One significant event that I do not discuss separate involved an 1814 Senate debate over President James Madison’s recess appointment of some diplomatic officers. In that debate, Senator Gore of Massachusetts powerfully set forth the arguments for the previously occupied and the arise interpretation, while Senators Bibb and Horsey argued principally against the previously occupied interpretation, but did mention their agreement with the exist view. See 26 ANNALS OF CONG. 652-657, 694-722, 742-758 (1854) (recording debate of March and April, 1814).

<sup>126</sup> The present version of the statute is codified at 5 U.S.C. § 5503. Prior to 1940, this statute embraced the arise interpretation much more than the current version does. It provided that no salary shall be paid to any recess appointee “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 such appointee has been confirmed by the Senate.” 5 U.S.C. § 56 (1934). This provision suggests that the Congress had previously embraced the arise interpretation much more forcefully than the modern Congress and that any Senate acquiescence in the exist view dates largely since 1940. Provisions limiting the pay of recess

the President’s ability to make certain recess appointments under the exist interpretation. The statute provides that no salary shall be paid to recess appointees when the office to which they were appointed was vacant during a session of Congress – that is, when the arise interpretation would not permit a recess appointment. The statute, however, creates three exceptions: It allows funds to be paid when the vacancy arose within 30 days of the end of the session; when a nomination for the vacant office was pending at the end of the session; and when a nomination for the vacant office was rejected within 30 days of the end of the session.<sup>127</sup>

The statute appears designed to restrain the President from using his power under the exist interpretation to circumvent the Senate’s confirmation role. The statute does this by adopting the arise interpretation but allowing recess appointments under the exist view when they are regarded as necessary rather than as a means of circumventing senatorial consent. For example, the statute appears to assume that if a vacancy arose within 30 days of the end of a session, the President and the Senate might not have sufficient time to make a new appointment before the recess begins. Although this statute clearly improves on the exist interpretation alone, it suffers from two basic problems. First, as discussed previously,<sup>128</sup> the executive can often avoid the effect of the statute by satisfying one of the exceptions, such as nominating an individual for the position just prior to the recess in which he is recess appointed. Second, and more importantly, the statute itself suffers from serious constitutional infirmities.

The nature of the statute’s constitutional problems depend on whether one assumes the exist or the arise interpretation. If we assume that the the exist interpretation is the correct view of the Constitution, the statute is unconstitutional because it uses Congress’s appropriation power to infringe on the President recess appointment authority. Congress cannot use its appropriations power to take actions indirectly that it could not take directly.<sup>129</sup> For example, just

---

appointments made under the exist interpretation date back to the Army Appropriation Bill of 1863, 12 Stat. 646 (1863). See CRS Report 21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue (Sept. 2002).

<sup>127</sup> These provisions also impose other limitations. First, the exception for when a nomination for the vacant office was pending at the end of the session only applies if the nominee had not been recess appointed to that office during the previous recess. Second, the exception for when a nomination was rejected within 30 days of the end of the session only applies if the recess appointee was not the person whose nomination was rejected by the Senate. Finally, all three exceptions require that the President submit a nominee for the position to the Senate within 40 days of the next session of the Senate. 5 U.S.C. § 5503.

<sup>128</sup> See *supra* text and accompanying notes.

<sup>129</sup> 16 Op. Att’y Gen. 507, 526 (1960) (“Congress may not use its powers over appropriations to attain indirectly an object which it could not have accomplished directly.”); 43 Op. Att’y Gen. 293 (1981); Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1350-1351 (1988); William P. Barr, *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U.L.Q. 623, 628 (1990) (“Congress cannot use the appropriations power to control a Presidential power that is beyond its direct

as Congress cannot pass a statute preventing the President from vetoing a bill, so it cannot indirectly prevent the President from doing so by forbidding him from using appropriated funds to purchase a pen to veto the bill. Similarly, under the exist interpretation, Congress could not pass a statute forbidding the President from making recess appointments for offices that were vacant during the session except in the three exceptions specified by section 5503; therefore, Congress also cannot prohibit the President from using appropriated funds to pay recess appointees in the same circumstances. The Constitution confers the recess appointment power on the President and does not allow Congress to eliminate that power. Congress can no more use its appropriation to restrain the President's recess appointment authority than any of the President's other constitutional powers.<sup>130</sup>

The statute is also constitutionally problematic under the arise interpretation. One might argue that the statute is not technically unconstitutional under the arise interpretation, because it only restrains the President from taking actions that are already prohibited by the arise view. Congress may certainly use its appropriation power to deny funds to the President for illegal actions. What is more problematic about the statute is that it seems to endorse, or at least acquiesce in, the use of the exist interpretation for the three exceptions. The statute does not simply forbid a subset of unconstitutional actions. Instead, it identifies a class of unconstitutional actions – recess appointments made for a vacancy that existed while the Senate was in session – and then prohibits such appointments, except in three circumstances. It is not unreasonable to view this statute as endorsing or at least acquiescing in the constitutionality of appointments in those three situations. If Congress were to pass a statute providing that no funds may be used to impose a religious test on executive officers, except for Internal Revenue Service officers who enforce the tax exemption for religious institutions, it is hard to believe there would be nothing constitutionally problematic about this measure.

Whether or not one reads the statute as endorsing or acquiescing in unconstitutional action, it is clear that if the Constitution adopts the arise interpretation, the statute does not by

---

control”); Memorandum for Alan J. Kreczko Special Assistant to the President and Legal Adviser to the National Security Council, Op. Off. Legal Counsel (May 8, 1996) (Assistant Attorney General Walter Dellinger) (“Congress may not use its power over appropriation of public funds to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.”)

<sup>130</sup> Given the clear unconstitutionality of the statute under the exist interpretation, one might wonder why the executive branch has not argued it is unconstitutional. After all, the executive has not been shy about fighting what it regards as unconstitutional uses of the appropriation power to infringe on the executive's prerogatives. *See, e.g.* 5 Op. Off. Legal Counsel 1, 5-6 (1981)(holding that Congress could not deprive the President of this power to perform his constitutional responsibilities by purporting to deny him the minimum obligational authority sufficient to carry this power). My strong suspicion is that executive branch realizes that an attack on the statute would expose the weaknesses of the exist interpretation. Therefore, the executive acquiesces in the statute, knowing it is better off with the exist interpretation and the statute than it would be under the arise interpretation alone.

itself cure the unconstitutionality of the exist interpretation. The statute will still allow the President to make many recess appointments that the arise interpretation would forbid.

That unconstitutionality would persist even if one were somehow to read the Senate's approval of the statute as consenting to the President's exercise of the exist interpretation in limited circumstances. The Senate cannot consent to the exercise of recess appointment authority that the Constitution does not confer.<sup>131</sup> The appointment provisions of the Constitution are not simply designed to protect the Senate's rights, but to protect the people from abusive government. While the Constitution allows the Senate to divest its confirmation role in certain circumstances – such as by allowing Congress to vest the appointment of inferior officers in the President alone – it forbids Congress from such delegation as to superior officers.

The only way that section 5503 would be fully constitutional is if one read the Recess Appointments Clause not to incorporate the arise or the exist interpretation, but to provide that “the President shall have power to fill up all vacancies that may happen *to exist* during the recess of the Senate, *when it is reasonable that the President shall do so.*” One would also have to read this provision to allow Congress the principal responsibility for determining when it is reasonable for the President to exercise the recess appointment power. Clearly, the Recess Appointment Clause says nothing of the kind and therefore the arrangement established by the statute is unconstitutional.

#### F. Conclusion

I conclude that the Recess Appointments Clause adopts the arise interpretation. The case for the arise interpretation is extremely strong. The text, structure, purpose, and history each by itself provides powerful evidence for the arise view. When one combines the weight of this evidence, the case for the arise interpretation appears overwhelming. Unfortunately, though, the arise interpretation has not been followed since the 19<sup>th</sup> century and is rarely even defended any longer.

#### IV. The Meaning of Recess

I now turn to the second question addressed in this essay: What is the meaning of the term “recess” in the Recess Appointments Clause? The basic issue here is whether the term “recess” is restricted to intersession recesses or also may include intrasession recesses. Under the intersession interpretation, a recess appointment can only be made in the period between the two full sessions of Congress. Under the intrasession interpretation, by contrast, a recess appointment can be made not only during an intersession recess but also during an intrasession recess. The intrasession interpretation comes in two versions. One version interprets the term “recess” to include all intrasession recesses, irrespective of how long they are – what I call the

---

<sup>131</sup> See *I.N.S. v. Chadha*, 462 U.S. 919, 941-942 (1983)(suggesting that the assent of a branch of the government to a bill cannot cure it of a constitutional defect).

“all recesses interpretation.” Alternatively, one might believe that the term “recess” includes only intrasession recesses that are greater than a specified length, such as two weeks or a month – what I call “the practical interpretation.”

Originally, the Clause was applied mainly to intersession recesses. While Attorney General Knox explicitly endorsed the intersession interpretation in 1901,<sup>132</sup> two decades later Attorney General Daugherty overruled this position and adopted the practical interpretation.<sup>133</sup> Daugherty held that the term recess should be understood to include intrasession recesses when as a practical matter the Senate was not conducting business. To determine whether the Senate was actually conducting business, Daugherty would ask whether there was a duty of attendance, whether the chamber was empty, and whether there was anyone there to receive communications from the executive.<sup>134</sup> Daugherty did not believe that this analysis yielded any specific minimum time period for a recess, but he did conclude that there were clear cases: A break of 30 days would certainly be a recess, whereas a break of 10 days would not.<sup>135</sup> Because of the uncertainty about what constituted a recess, Daugherty decided that the President was “necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine

---

<sup>132</sup> See 23 U.S. Op. Atty. Gen 599 (1901) (hereinafter “Knox Opinion”).

<sup>133</sup> 33 U.S. Op. Atty. Gen 20 (1921) (hereinafter “Daugherty Opinion”). Attorney General Daugherty's opinion has been cited with approval in subsequent opinions of the Attorneys General, and has been relied on by the Comptroller General as well. See e.g., 41 Op. Att'y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948).

<sup>134</sup> Daugherty Opinion, at 25.

<sup>135</sup> The core of Daugherty's analysis is brief enough to reproduce here. He writes:

“If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution either house can adjourn for more than three days without the consent of the other. As I have already indicated the term ‘recess’ must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution. In the very nature of things the line of demarcation can not be accurately drawn. To paraphrase the very language of the Senate Judiciary Committee Report, the essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?”

recess making it impossible for him to receive the advice and consent of the Senate.”<sup>136</sup>

Over time, though, the executive branch has appeared to expand the definition of a recess. Thus, the Office of Legal Counsel has held, on more than one occasion, that a recess of 18 days is constitutionally sufficient.<sup>137</sup> President George H. W. Bush made several recess appointments during a 12 day intrasession recess.<sup>138</sup> President Clinton made a recess appointment of an Ambassador during a ten day intrasession recess,<sup>139</sup> while President George W. Bush recently recess appointed William Pryor to the Eleventh Circuit also during a 10 day intrasession recess.<sup>140</sup>

The executive branch’s legal analysis contemplates even shorter recesses. One opinion suggested that 3 days might be sufficient. A Justice Department legal brief, as well as some commentators, argue that in principle there is no limit on the length of a recess.<sup>141</sup> If this opinion were accepted, that would transform the practical interpretation into the all recesses view.

This part explores these three interpretations, arguing that the evidence from text, structure, purpose, and history strongly favors the intersession interpretation over the other two interpretations. While the intersession view makes sense in terms of text, structure and purpose, the other two interpretations suffer from serious problems. Most significantly, the all recesses view appears absurd as a matter of structure and purpose, because it would allow the President make recess appointments during a one week or even a one day recess. While the practical interpretation would avoid recess appointments during extremely short recesses, this view cannot derive a workable standard from the language of the Constitution.

---

<sup>136</sup> Elaborating on the President’s discretion to make recess appointments, Daugherty wrote that “Every presumption is to be indulged in favor of the validity of whatever action [the President] may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.” *Id.* at 25.

<sup>137</sup> Memorandum Opinion for the Deputy Counsel to the President from the Acting Assistant Attorney General, *Recess Appointments During an Intrasession Recess* (Jan. 14, 1992).

<sup>138</sup> See Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2215 (1994).

<sup>139</sup> See Tom Raum, *Clinton Gives “Recess Appointment” to Gay Philanthropist*, ASSOCIATED PRESS, June 4, 1999.

<sup>140</sup> Geoff Earle, *Kenedy Eyes Suit on Pryor*, The Hill (Feb. 26, 2004), available at <http://www.hillnews.com/news/022604/kennedy.aspx>.

<sup>141</sup> Memorandum of Points and Authorities in Support of Defendants’ Motion for Summary Judgment on Count II, *Mackie v. Clinton*, at 14, 827 F.Supp. 56 (1993) (No. 93-0032-LFO) (“There is no lower time limit that a recess must meet to trigger the recess appointment power”); Edward Hartnett, *Recess Appointment of Article III Judges*, Card. L. Rev. (forthcoming 2004).

## A. Text

In examining these different interpretations, the first question is whether they are consistent with the constitutional text. I look at the text from several perspectives, focusing on the term “recess” and then on the relationship between the Recess Appointments Clause and other constitutional clauses.

### 1. The Meaning of Recess

The primary textual question is whether these different interpretations are consistent with the term “Recess.” Each of the three interpretations presents a different meaning of the term. While both the all recesses interpretation and the intersession interpretation are consistent with plausible meanings of recess, the practical interpretation is not.

The all recesses interpretation reads the term recess to mean all periods, no matter how short, when the Senate is not conducting business. This understanding of the term might be thought to conform to the dictionary definition when the Constitution was written, which defined as one meaning of recess “a remission or suspension of business or procedure.”<sup>142</sup>

The intersession interpretation, by contrast, reads the term recess to mean a period when the Congress is not in session. Under this view, a recess is not just any break in the business of the legislature, but only the break that occurs when the legislature is not in session. This understanding of recess views it to be mutually exclusive with the legislative session. A legislature is either in session, or on a recess, but never doing both at the same time. This understanding of the recess has some connection to the ordinary meaning, but also seems to be a more specialized meaning of the term.

Finally, the practical interpretation might be thought also to rely on the ordinary meaning of a recess. It seems plausible, in ordinary language, to use recess to mean a break in legislative business of a significant degree, excluding very short interruptions as not really amounting to a recess. One important problem with this understanding of recess is that there is no clear way to distinguish between breaks in legislative business that are long enough to count as recesses and those that are not. The extreme vagueness of this interpretation makes it unlikely that the the

---

<sup>142</sup> The 1828 edition of Webster’s Dictionary defines a recess as “Remission or suspension of business or procedure; as, the house of representatives had a *recess* of half an hour.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis in original). A similar definition is contained in Johnson’s Dictionary. See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1978).

One issue that arises under the all recesses interpretation is how short a recess can be and still be covered by the Clause. Does a recess from one day to the next count, a recess from Friday evening to Monday morning, or a half hour recess? Webster’s definition appears to suggest a half hour recess counts. Yet, common sense might suggest that a recess of at least one day would be needed. Fortunately, this essay does not require that I answer these questions.

Framers would have employed this concept of a “not too short” break in the legislative proceedings.<sup>143</sup> This inference seems especially strong, since uncertainty over whether a recess had occurred and therefore a valid recess appointment made could create serious problems concerning whether the purported recess appointee’s act were valid.

Attorney General Daugherty attempted to solve this definitional problem but his proposed solutions cannot be satisfactorily derived from the Constitution. Daugherty’s principal method was to argue that recesses were accompanied by certain features (there being no duty of attendance at the legislature, that the chamber was actually empty, and there was no one present to receive communications from the executive) and then to attempt to determine a time period when these features would occur (somewhere between 10 and 30 days).<sup>144</sup> But this argument is seriously flawed.

First, it is by no means clear that the features Daugherty identifies are significantly connected to the existence of a recess. In the modern world, the Congress does not completely close down even during very long recesses. There are often committees meeting during recesses and therefore many legislators may both have a duty of attendance and actually be in attendance.<sup>145</sup> In addition, the congressional houses may leave agents to receive presidential communications.<sup>146</sup> Thus, the features that Daugherty identifies may be satisfied even though the Congress is officially in recess and the entire house is not scheduled or permitted to act as a whole until the recess ends.

If these features are not closely connected to the concept of a practical recess, then which features are? There is a strong argument that what really matters is whether a legislative house can meet and take action as a whole. If it can, then the house is clearly not at recess. And if it cannot, then the house is not able to confirm nominees and is therefore recessed. Under this view, the features that Daugherty mentions are either secondary or irrelevant. Moreover, even if the Daugherty features were deemed to more important than I suggest, they do not operate to clarify when there is a recess. The consideration of three features – which may conflict with one another – instead of one feature is hardly a way to eliminate the vagueness of the concept of a “not too short” recess.

Second, even if one were to accept the Daugherty features, Daugherty still fails to justify

---

<sup>143</sup> Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989).

<sup>144</sup> Daugherty Opinion, at 25.

<sup>145</sup> This was also true in the 18<sup>th</sup> century. In England, committees could sit during a recess during the session, but not after the session the ended. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE (1812).

<sup>146</sup> See Carrier, *supra* note XX.

or even explain why those features lead one to conclude that the minimum period for a recess is between 10 and 30 days. The problem is that there is no necessary or even strong connection between the length of a recess and whether these features are satisfied. There might, for example, be a short 3 day recess that satisfied the Daugherty features – where there was no duty of attendance, the chamber was empty, and the legislative house had failed to designate an agent to receive presidential communications.<sup>147</sup> In the end, then, Daugherty’s approach does not really solve the practical interpretation’s problem of a vague standard. It does not suggest a specific period of time nor does it provide a persuasive and workable analysis for determining such a time period.

A second possible approach to clarifying the vagueness of the practical interpretation is to adopt an arbitrary time period as the definition of a recess, such as a one month or two month period. Once a specific period was chosen and accepted, this approach would have the advantage of eliminating uncertainty. Unfortunately, it is difficult to derive such an arbitrary period from the Constitution, because there is little reason to select one period rather than another – why, for example, one month rather than two? Moreover, had the Framers intended to define a recess through an arbitrary time period, they could have done so expressly, as they did with other constitutional concepts.<sup>148</sup> Perhaps for these reasons, Daugherty was unwilling to select a single time period and instead came up with a range of more than 10 days but less than 30, which did little to lessen the arbitrariness of the definition, but did create uncertainty.<sup>149</sup>

---

<sup>147</sup> Similarly, there might a one or two month recess that failed to satisfy the Daugherty features – where committee hearings were often held and therefore committee members had a duty of attendance, the chamber was not empty, and the legislative house had designated an agent to receive presidential communications.

<sup>148</sup> See U.S. CONST. art. I, § 7, cl. 2. (specifying that the President has ten days to veto a bill passed by both houses of the Congress; U.S. CONST. art. I, § 5, cl. 4 (specifying that the consent of both houses is needed for adjournments longer than 3 days).

<sup>149</sup> While I have described Daugherty’s approach as looking to three features (whether there was a duty of attendance at the legislature, whether the chamber was actually empty, and whether there was anyone present to receive communications from the executive), Daugherty also throws in a fourth feature: whether the Senate can “participate as a body in making appointments?” Daugherty Opinion, at 25. I have omitted this feature from the analysis in the text, because including it makes Daugherty’s argument even less coherent. The problem is that whether the Senate can participate as a body in making appointments does not appear to be merely a feature of the existence of a recess, but pretty close to the defining condition of being in a recess. *See supra* text and accompanying notes XX. If the Senate can act as a whole, it is hard to see how one could say that the Senate was in recess. And in a world where the Senate can, during a recess, conduct significant business through committees and leave agents to receive communications, it is hard to know what else could define a recess other than a period when the Senate cannot act as a body. Thus, considering whether the Senate can act as a body renders the other factors largely irrelevant. Yet, Daugherty cannot adopt this definition of a recess, because it would transform his approach into the all recesses view. A two-day period during which the Senate cannot participate as a whole is a two day recess under this view. Thus, the more coherent definition of a recess

A final approach is to find a time limit within the Constitution itself. Significantly, the Constitution distinguishes between adjournments that are three days or less and adjournments that are longer, providing that one house cannot adjourn during the session for more than three days without the consent of the other house.<sup>150</sup> Based on this provision, one might argue that the Constitution draws a distinction between de minimis and more substantial adjournments that should be applied not merely to whether one house can adjourn without the other's consent but also to whether recess appointments should be allowed.

While this approach attempts to avoid the arbitrariness of simply selecting a specific number of days as the minimum length of a recess, it does not succeed in finding a constitutionally based limit. Simply because the Constitution draws a line at 3 day adjournments in one context does not mean that it intends that same line to apply in different contexts. In fact, the two contexts are quite different and therefore applying the line established in one context to the other is both arbitrary and mistaken. The apparent purpose of the 3 day adjournment provision is to ensure that one house cannot unilaterally adjourn for a long period and thereby prevent the two houses from performing joint undertakings, such as passing legislation. Thus, the 3 day adjournment provision must balance the value of autonomy for a single house to schedule its activities against the value of restraining one house from unilaterally preventing the Congress from completing its business.

The balance between these two values, however, is quite different than the balance between the two main values concerning recess appointments – the need to avoid unfilled vacancies and the need for senatorial confirmation. This is illustrated most clearly by the fact that a three day recess appears to be extraordinarily short as a measure of when a recess appointment would be needed. If the Framers were going to select a time limit for recesses, it is hard to imagine them picking three days as sufficient to justify circumventing the Senate's confirmation role. By contrast, there is nothing peculiar about saying that one legislative house should receive the consent of the other to take a recess longer than three days.

To conclude, the practical interpretation has serious problems with the constitutional text.

---

under Daugherty's assumptions leads to the all recesses view, not the practical interpretation.

The incoherence of Daugherty's standard can be explained in part. He took his definition of a recess from a Senate report which had been drafted in response to a unique historical episode. S. REP. NO. 4389 *reprinted in* 39 CONG. REC. 3823, 3824 (1905). In 1903, the Senate ended its old session and began its new session on the same day. The intersession recess lasted only so long as it took the presiding officer to strike the gavel down once to end the session and then again to start the new one. President Theodore Roosevelt, however, argued that there was nonetheless an intersession recess in the instant between the two sessions that allowed him to make a recess appointment. While the definition of a recess in the Senate report made perfect sense as a means of criticizing Roosevelt's claim that there was a "constructive recess" in the instant between the two sessions, it does not help to identify those multiple day recess which might be "too short" to count as a recess.

<sup>150</sup> U.S. CONST. art. I, § 5, cl. 4.

If recess is interpreted to mean “not too short of a break,” this meaning is too vague to support a workable interpretation. The various means used to avoid that vagueness, however, cannot really be derived from the Constitution. By contrast, the all recesses and the intersession interpretations are both consistent with the use of the term “recess” in the text.

## 2. Recess and Adjournment

A comparison of the Constitution’s use of the term “recess” with its use of the similar term “adjournment” also provides guidance as to the meaning of the Recess Appointments Clause. When the Constitution was written, the dictionary meaning of “adjournment” was similar to that of “recess,” with both referring to a break in legislative business.<sup>151</sup> Yet a review of these terms throughout the Constitution suggests that the Framers used the terms “recess” and “adjournment” with more precise meanings that differed from one another. The Framers used the term “adjournment” to refer to all breaks in legislative proceedings – in other words, to have the same meaning attributed to recess under the all recesses interpretation. By contrast, they used the term “recess” with a different meaning – the one employed by the intersession interpretation or possibly the practical interpretation.<sup>152</sup>

This inference as to the different meanings of recess and adjournment is based on a pattern of usage in the Constitution. There are five constitutional clauses that employ either “adjournment” or its cousin “adjourn,” while there are two clauses that use “recess.” A review of the five clauses that use adjournment makes clear that the term was used for all intersession and intrasession recesses. By contrast, the two clauses that use recess are on their face at least ambiguous.<sup>153</sup> That the Framers followed this consistent pattern of usage concerning the two

---

<sup>151</sup> The 1828 edition of Webster’s Dictionary defines the term “adjournment” as “the time or interval during which a public body defers business.” See *An American Dictionary of the English Language* (1828). The definition also states that “in Great Britain, as well as in the United States, *adjournment* is now used for an intermission of business, for any indefinite time; as, an *adjournment* of parliament for six weeks.” *Id.* (emphasis in original). Thomas Jefferson also understood the term adjournment to include short breaks. See Thomas Jefferson, *A Manual on Parliamentary Practice* (1812).

<sup>152</sup> The distinction between adjournments and recesses also seems to have existed in the Articles of Confederation. The Articles use adjournment in contexts that suggest it includes both short breaks (“adjourning from day to day”) and long breaks (Congress has power to adjourn but “no period of adjournment[should] be for a longer duration than the space of six months”). ARTICLES OF CONFEDERATION, 1777 art. IX, cl. 7. By contrast, the Articles use the term recess for longer breaks (authorizing a committee of states “to sit in the recess of Congress” and exercise various powers). *Id.* at art. X; art. IX, cl. 6.

<sup>153</sup> While the text claims that the two clauses that use recess are on their face ambiguous, I of course have been arguing that text as well as structure and purpose support the intersession interpretation. But to make the argument here as strong as possible, I am assuming that the Clause itself is ambiguous. In this way, the argument shows that, even without other evidence, there is an inference towards the intersession interpretation from the various adjournment and recess clauses in the

clauses suggests that they intended them to have distinct meanings.

Consider first the five constitutional provisions that use the term adjournment. The first provision is in the Presentment Clause, which authorizes the President to return bills that he vetoes to the Congress so that they will have an opportunity to override his veto. The Clause, however, allows the President to not return the bill – and thereby to prevent its enactment without giving Congress the opportunity to override his veto – if “the Congress by their adjournment prevent its return.”<sup>154</sup> The term adjournment here should be understood to refer to all recesses, since both intersession and intrasession recess can interfere with the President’s constitutional right to take 10 days to return a bill to the Congress. In fact, even a one day recess can interfere with the President’s right to have 10 days to veto a bill if it is taken on the ninth day of the ten day period.

The second provision is the Three-Day Adjournment Clause, which provides that “Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days.”<sup>155</sup> This Clause clearly refers to intrasession recesses, since it refers to recesses occur “during the session of Congress.” Yet, it is possible that the Clause refers to intersession recesses as well. If the proposed adjournment were to end the session and bring about an intersession recess, that would presumably also be covered by the Clause, as an adjournment “during the session . . . for more than three days.” Thus, the Three-Day Adjournment Clause understands adjournments to include both short intrasession recesses as well as intersession recesses.<sup>156</sup>

The next two provisions address issues that flow from the Three-Day Adjournment Clause and therefore employ the same meaning of adjournment as that Clause. The Presidential Adjournment Clause provides that “in case of disagreement between [the two houses], with respect to the time of adjournment, [the President] may adjourn them to such time as he shall think proper.”<sup>157</sup> Because the Three Day Adjournment Clause requires both houses to agree as to

---

Constitution.

<sup>154</sup> The Clause, in the relevant part, states: “If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.” U.S. CONST. art. I, § 7, cl. 2.

<sup>155</sup> The full Clause states: “Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.” U.S. CONST. art. I, § 5, cl. 4.

<sup>156</sup> Another reason why it probably extends to intersession adjournments is otherwise it seems as if one house could on its own end the session.

<sup>157</sup> U.S. CONST. art. II, § 3.

adjournments, the Presidential Adjournment Clause is needed to resolve disagreements between them. The Orders Presentment Clause was added to make sure that Congress did not circumvent the requirement of presentment to the President by calling a bill by a different name. The Clause provided that not only bills, but also “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.”<sup>158</sup> This Clause also refers to the Three Day Adjournment Clause, because it acknowledges the requirement of that Clause that adjournments require the agreement of both houses. Since both the Presidential Adjournment Clause and the Orders Presentment Clause use adjournment in the same way that the Three Day Adjournment Clause does, all three clauses intend adjournment to refer to both intersession and intrasession recesses.

The fifth provision is the “Day-to-day Adjournment Clause. This Clause provides that “a majority of each [house] shall constitute a quorum to do business; but a smaller number may adjourn from day to day.”<sup>159</sup> Because this provision speaks of adjourning from day-to-day, it would normally refer to extremely short intrasession recesses.<sup>160</sup> Yet it is also possible that it would refer to an intersession recess if the new session had been scheduled for the next day.

These five clauses use the term adjournments in situations where the adjournment might cover both intersession and intrasession recesses. Moreover, they refer to recesses that are as short as a single day, or in the case of a day to day adjournment, even shorter. Collectively, these clauses suggest that the Framers used the term adjournment to have largely the same meaning as the all recesses interpretation.

By contrast, the two constitutional clauses that speak of recesses do not, on their face at least, indicate whether they are referring to all recesses or merely a subset of them. One of these clauses is, of course, the Recess Appointments Clause. The other is the State Legislature Recess Clause.<sup>161</sup>

---

<sup>158</sup> U.S. CONST. art. I, § 7, cl. 3.

<sup>159</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>160</sup> Even if one disagreed with my view that this Clause could allow an intersession recess, that would not undermine the argument here. In that event, the term adjournment would sometimes be used to mean all recesses and sometimes be used in a context where it referred to an intrasession recess of an extremely short duration. Yet, that would not mean that it could not include all recesses, but merely that intersession recesses were not covered by that particular clause. Thus, the pattern of usage would still apply.

<sup>161</sup> As discussed previously, the State Legislature Recess Clause provides that “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.” U.S. CONST. art. I, § 3, cl. 2.

Thus, the Constitution exhibits a pattern. It uses the term “adjournment” in situations when it appears to mean the all recesses view, while it uses the term recess when it is not clear whether it is referring to the all recesses view or to a smaller portion of the recesses. Why would the Constitution exhibit this pattern? The most obvious explanation is that the Framers used the two terms to have different meanings. They used the term adjournment to have the same meaning as the all recesses interpretation,<sup>162</sup> whereas they used the term recess to refer to a narrower definition of recess.

Of course, it is possible that the Constitution’s usage was accidental – that the Framers followed this consistent pattern by chance and really used the two terms interchangeably. But the evidence here suggests that the pattern was intentional. The number of clauses involved counts against the view that the pattern was accidental. While it might be argued that the pattern was accidental if one clause used adjournment and another used recess – although even then it is an acceptable inference that the usage was intentional – here there are five uses of adjournment and two of recess. Moreover, the Framers were careful about consistency in this area, making sure to link and coordinate the Three-Day Adjournment Clause with both the Orders Presentment Clause and the Presidential Adjournment Clause.

While the pattern of constitutional usages argues against the all recess interpretation, what are the implications for the choice between the other two interpretations? In the main, one must say that both the intersession interpretation and the practical interpretation are consistent with the pattern, since both of these interpret recess to have a different meaning than the all recesses meaning of adjournment. Yet, the closer the practical interpretation is to the all recesses interpretation, the less support the pattern provides to the practical interpretation. After all, if the practical recess interpretation covered recesses of, say, 5 days, there would be less reason for the Framers to have gone to the trouble of distinguishing between recesses and adjournments. By contrast, it would have made perfect sense for them to have used different terms to convey the enormous distinction between the all recesses meaning and intersession recess meaning.<sup>163</sup>

---

<sup>162</sup> While it would seem that the five clauses that use the terms adjournment or adjourn adopt a single definition of that term, one might wonder whether all of the adjournment clauses really use the term adjournment to cover the short “day to day adjournments” of the Day to Day Adjournment Clause. There is no problem concluding that the Three Day Adjournment Clause (as well as the other two clauses related to it) include day to day adjournments, since that interpretation of the Clause would correctly indicate that such short adjournments can be taken by a single house. The only potential problem is the Presentment Clause, which allows pocket vetoes if “the Congress by their Adjournment prevent” the return of a bill.” Clearly, a day to day adjournment would not allow the President to pocket veto a bill. But the proper way to reach this conclusion is not to say that day to day adjournments are not adjournments, but instead that they are not adjournments that prevent the return of a bill to Congress. Since day to day adjournments do not prevent Congress being in session each day, the President has a full opportunity to return the bill to Congress for the ten days after he receives it.

<sup>163</sup> Another possible textual argument for the intersession interpretation focuses on the fact that the Clause speaks not simply of a recess, but of “the Recess of the Senate.” This formulation seems to

## B. Structure and Purpose

While the language of the Constitution favors the intersession interpretation, constitutional structure and purpose provide even stronger support for that interpretation. There are two ways that structure and purpose support the intersession interpretation. First, the relative brevity of intrasession recesses suggests that the Framers would not have wanted to permit recess appointments during these recesses. Second, the intrasession interpretation would result in intrasession recess appointments that are longer than intersession recess appointments. Because there is no reason why the Framers would have desired this result, this also casts doubt on the intrasession interpretation.

In developing these structure and purpose arguments, I will initially compare the intersession interpretation with the stronger (at least in terms of structure and purpose) of the two intrasession interpretations – the practical interpretation. After showing that structure and purpose argue for the intersession view rather than the practical interpretation, I then briefly consider the all recess interpretation to show how very weak it is.

### 1. The Length of the Recess

One important argument in favor of the intersession interpretation is the relative brevity of intrasession recesses. Even under the practical interpretation, intrasession recesses can be as little as one week, two weeks, or a month, depending on the particular version of the practical interpretation. It is extremely unlikely that the Framers would have granted recess appointment authority to the President for recesses of this short length. While it is understandable that the Framers would have allowed the President to bypass the Senate to prevent a position from being filled during a six or nine month recess, it seems absurd to imagine that the Framers would allowed recess appointments to prevent an office from being vacant for only a week or two. Even one month recesses seem too short. Under the arise interpretation, a one month recess is unlikely to have a vacancy for the entire period. On average, a vacancy should arise at the two-

---

imply that there would be a single recess, presumably for every session, which is what one would envision under the intersession interpretation. By contrast, this is not the way that one would phrase the language if one thought there would be multiple recesses per session, as one might expect under the all recesses interpretation or the practical interpretation. Had the Framers believed that there would be multiple recesses per session, it seems unlikely that they would have used the term “recess” instead of “recesses” and that they would have used the term “the recess” rather than excluding the definite article with terms such as “during a senate recess.”

While this textual inference has some force, it is limited by the fact that one can also read “the Recess of the Senate” to cover multiple recesses. Under this view, the recess of the Senate refers to the condition of the Senate being in a recess, not to the number of recesses. Thus, it would mean when the Senate is in a recess. A similar usage appears in the Constitution where it refers to the Senate choosing “a President pro tempore, in *the Absence* of the Vice President.” U.S. CONST. art. I, § 3, cl. 5. Even though the language reads as “the absence,” it does not imply there is one absence per session or year. Edward Hartnett, *Recess Appointments of Article III Judges*, CARD. L. REV. (2004) (forthcoming)

week or halfway point of the recess. Even if the vacancy occasionally arose at the beginning of the recess, acting appointments could fill the vacancies until the Senate came back into session. Under the exist interpretation, by contrast, there would often be a vacancy throughout the entire month of the recess, because the the vacancy would have existed prior to the recess. But there would be far less reason to allow a recess appointment, because the vacancy could have been filled during the session.

While these arguments based on the shortness of intrasession recesses are powerful, defenders of the intrasession interpretation might argue that the possibility of such short recesses proves nothing. Although intrasession recesses under the practical interpretation can be brief, intersession recesses can even be shorter. Since there is no time limit at all on intersession recesses, they could be as short as a day. Thus, the brevity of intrasession recesses, according to this argument, does not count as evidence against the intrasession interpretation. Moreover, that the Framers placed no limit on the length of intersession recesses might suggest that the length of recesses, despite its intuitive appeal, is not really an important value underlying the Recess Appointments Clause.

These arguments, however, are mistaken. Although it is true that the Framers did not place any time limits on intersession recesses, that does not mean that they did not consider the length of recesses to be important. Instead, the Framers took the length of recesses into account indirectly. As I discussed previously, the early Congresses followed a practice in which intersession recesses would last between 6 and 9 months every year, whereas intrasession recesses either did not occur or lasted at most for seven days.<sup>164</sup> Thus, by limiting the Recess Appointments Clause to intersession recesses, the Framers would have restricted recess appointments to long recesses, without imposing an arbitrary time limit on the length of recesses.

One might question whether the Framers would have really based a constitutional provision on a practice that might have changed over time. If the practice were modified, the constitutional provision might no longer be desirable. Yet, there are strong reasons to believe that the Framers would have reasonably anticipated that this practice would continue for generations to come. First, the Republican political theory that was widely held during the early years of the Republic required that legislatures should remain in session only for a fraction of the

---

<sup>164</sup> See *supra* text and accompanying notes XX. The Framers clearly anticipated that the Congress would meet only for a portion of the year. First, the state legislatures had met only for selected intervals. ROBERT LUCE, *LEGISLATIVE ASSEMBLIES* 154 (1924) (concerning state legislatures, “in colonial times and indeed up to the development of our railroad systems, the slowness of travel made any but periodical gatherings out of the question”). Alexander Hamilton predicted during the Ratification debates the sessions of Congress with remarkable accuracy. *THE FEDERALIST* No. 84 (predicting House sessions of three months per year and Senate sessions of between four and six months). Indeed, discussion during the Philadelphia convention assumed that the legislature would meet either in the Spring or the Winter. MAX FARRAND, *2 THE RECORDS OF THE FEDERAL CONVENTION 1787-1791* 199-200 (1966). In fact, some delegates were worried that the Congress would not meet every year, so the Constitution required that it do so. *Id.* at 198-199; U.S. CONST. art. I, § 4, cl. 2.

year, thereby allowing the legislators to return to their homes and behave like ordinary citizens.<sup>165</sup> Second, the high transportation costs, in a world that did not even initially have railroads, meant that the Congress would meet only once during the year.<sup>166</sup> While the transportation costs might decrease over time, the distances would increase as the country grew. Thus, the combination of republican political theory and high transportation costs meant that Congress would meet for one relatively short session per year followed by one long recess. The need for a short session would mean that intrasession recesses would also be brief, so that the legislators could get their work done and go home.<sup>167</sup>

Moreover, the Framers would have been largely accurate in these predictions. The traditional practice remained completely intact for 75 years. Until the Civil War, the Congress regularly had one session each year followed by a long intersession recess. Congress rarely took an intrasession recess, doing so only in 1800, 1817, and 1828, each time for at most one week.<sup>168</sup> Even after the Civil War, the pattern largely continued, although the number and occasionally the length of the intrasession recesses did increase.<sup>169</sup> And even today, the remnants of the pattern are still discernible in that intrasession recesses are normally considerably shorter than the single intersession recess.<sup>170</sup>

While departures from the traditional practice could certainly have been envisioned by the Framers, the intersession interpretation would still be desirable in these situations. One possible departure would involve something like the arrangement that we have today resulting from lower transportation costs and longer sessions. In this arrangement, the Congress schedules

---

<sup>165</sup> See *supra* text and accompanying notes XX.

<sup>166</sup> See *supra* text and accompanying notes XX.

<sup>167</sup> Another factor that would lead to short sessions is the belief that the Congress would have limited responsibilities, limits that were written into the Constitution and unlikely to change. Farrand, *supra*, at 198. This expectation about limited congressional responsibilities also proved accurate until the 20<sup>th</sup> century.

<sup>168</sup> SESSIONS OF CONGRESS, *supra*.

<sup>169</sup> See *supra* text and accompanying notes XX.

<sup>170</sup> SESSIONS OF CONGRESS, *supra*. According to Michael Carrier, although “Today’s Senate schedule is far different from that which the Framers envisioned,” still intrasession recesses are “generally shorter than intersession recesses. Most intersession recesses last for at least one month, and some last for three months. In contrast, the overwhelming majority of intrasession recesses last less than twenty days. Only four intrasession recesses in history have exceeded sixty days, and none of these occurred in the past forty years.” *Id.* at 2240.

more frequent intrasession recesses for relatively short periods of one to six weeks.<sup>171</sup> That there are more frequent short recesses rather than a single long recess, however, does not argue for additional recess appointments, but for fewer. If a vacancy happens during one of the frequent recess, it will not cause a significant burden. Instead, the President can submit a nominee to the Senate when it returns from the recess. In the meantime, mechanisms such as acting appointments should be adequate for filling vacancies.

Another possibility, that did not develop, would have been for Congress to change its schedule from one session per year to two semiannual sessions. Perhaps it would have involved two three-month sessions, with each followed by an intersession recess of three months. The President would then have had an opportunity to make recess appointments twice a year during the two intersession recesses, but the length of the recess appointment would be considerably shorter, extending to at most 6 months.

Finally, one can imagine an arrangement where Congress attempts to use its power to schedule recesses to deprive the President of recess appointments. To take an extreme example, Congress might schedule a very brief intersession recess, while treating its long recess as an intrasession recess. Congress could do this only if both houses agreed, since taking an intrasession recess of more than three days requires their joint approval. Such an extreme action would be designed to deprive the president of recess appointments, even at the risk of not being able to fill vacancies for a long period. It is therefore likely that it would only occur if a significant portion of Congress – extreme opponents of the President as well as moderate ones in both houses – believed that the President was abusing his power so much that it was worthwhile to constrain him even though it might create problems filling vacancies. It is by no means clear that the Framers would have desired to prevent the Congress from taking this action.<sup>172</sup> If both houses regarded the President as abusing his authority sufficiently to justify such drastic action, one might conclude that Congress's decision should not be lightly rejected.<sup>173</sup>

Even if one did conclude that the Framers would have regarded congressional action of this sort to be improper, they would have left the President with significant tools for forcing the Congress to address these vacancies. Most importantly, the President could require the Senate to

---

<sup>171</sup> Since 1970, the Senate has recessed only 25 times for longer than 30 days. Moreover, it has only recessed longer than 6 weeks once, in 1994. *SESSIONS OF CONGRESS, supra*.

<sup>172</sup> Not only did the Framers provide Congress with the ability to constrain recess appointments in this way, it also allowed Congress to take actions against a distrusted President in a variety of areas, including: reducing appropriations over key areas of executive authority to small amounts, eliminating various offices, and refusing to confirm officials. Since these are clearly constitutional, it is not clear why the Framers would have prohibited similar actions regarding the recess appointment power.

<sup>173</sup> It might be argued that the proper approach for a Congress that believes the President is abusing his authority is to impeach the President. But it is not clear why Congress cannot take a more measured response to its perception of improper presidential behavior.

come back into session in order to determine whether to confirm his nominees.<sup>174</sup> In this way, the President could prevent the Congress from scheduling its recesses to deprive him of the ability to fill vacancies, while at the same time allowing Congress to limit the President from using his recess appointment power to follow a pattern of abusive behavior. Far from seeming problematic, this scheme of checks and balances actually appears to be quite attractive as a means of dealing with significant disagreements between the President and the Congress.

In the end, there are strong arguments for concluding that the Framers did not intend the practical interpretation, because they expected intrasession recesses to be too short to justify recess appointments. Although these expectations would have been based on 18<sup>th</sup> and 19<sup>th</sup> century practices, they continued to prove accurate until the 20<sup>th</sup> century. Other institutional arrangements, including the modern schedule of recesses as well as other alternatives, would also not justify the practical interpretation.

## 2. The Length of the Recess Appointment

The relative lengths of intersession and intrasession recess appointments also suggests that the Framers did not allow intrasession recess appointments. If the Constitution is read to authorize intrasession recess appointments, these appointments could be considerably longer than intersession recess appointments. Because there is no reason why the Framers would have desired this result, this suggests that they did not intend the intrasession interpretation.

Intrasession recess appointments are generally longer than their intersession counterparts. The Recess Appointments Clause provides that recess appointments shall expire at the “end of the next session.” When a recess appointment is made during an intersession recess, the appointment extends through the remainder of that recess and then through the next session of the Congress. By contrast, when a recess appointment is made during an intrasession recess, the appointment extends through the remainder of the existing session, through the intersession recess, and then through the next full session of Congress. The reason for the additional length of the intrasession recess appointment is that an intrasession recess occurs during the existing session of the Congress. Thus, the appointment does not terminate until the end of the “next session.”

While intrasession recess appointments will be longer than intersession recess appointments, there is no plausible reason why the Framers would have desired this result.<sup>175</sup>

---

<sup>174</sup> U.S. CONST. art. II, § 3.

<sup>175</sup>The additional length of recess appointments made during intrasession recesses raises the question why the Framers might have made recess appointments last as long as they do when made during intersession recesses. There are several possible reasons, including that shorter recess appointments might make it not worthwhile for a recess appointee to serve or might make it too difficult for him to learn the job.

One reason to extend the length of a recess appointment is to give the President and the Senate enough time to make a permanent appointment before the recess appointment ends. But the President and the Senate need no more time to make a permanent appointment to an office that was filled during an intrasession recess than to one that was filled during an intersession recess. Another reason to extend the length of a recess appointment is to give the recess appointee time to learn and perform his job. But intrasession recess appointees require no more time to learn their jobs than do intersession recess appointees.

The additional length of intrasession recess appointments becomes even more incongruous when one considers, as discussed in the previous section, that the Framers would have expected intrasession recesses to be much shorter than intersession recesses. The brevity of intrasession recesses suggests that there is less need for such recess appointments. It is hard to understand why the Framers would have made these lower value intrasession recess appointments last longer than the higher value intersession recess appointments – why they would have allowed a one year recess appointment to prevent a vacancy from being unfilled for 9 months, but permitted an 18 month recess appointment to prevent an unfilled vacancy of a week or month. Thus, the relative shortness of intrasession recesses combined with the additional length of intrasession recess appointments provides strong evidence that the Framers did not intend the Constitution to authorize such appointments.

Moreover, if the Framers intended to authorize intrasession recess appointments, they would not have needed to adopt this incongruous system. There were alternative arrangements that could have been used. To mention just one example, the Framers could have provided that, while intersession recess appointments should continue until the end of the next session, intrasession recess appointments should continue until the end of the existing session. This would have allowed intrasession appointments but for shorter periods.<sup>176</sup>

Although the Framers might have drafted this Clause in this manner, it might be argued that the Clause as written need not be interpreted to require such long intrasession recess appointments. Under an alternative view of the Clause, intrasession recess appointments can be made, but they would only extend until the next recess – whether that is an intrasession or intersession recess. This view would result in shorter intrasession recess appointments, because they would often last only until the next intrasession recess. To reach this result, one would have interpret the terms of the Recess Appointments Clause differently than they have been traditionally. A session would be a continuous period when the Congress is not in recess. When

---

<sup>176</sup> One argument against the provision discussed in the text is the possibility that an intrasession recess might be followed by a brief period of business and then the end of session. If a recess appointment were made during the intrasession recess, it would then be difficult for the President and Senate to make a permanent appointment for the office in the brief period following the intrasession recess. To avoid this possibility, the Framers could have allowed the intrasession recess appointment to continue until the end of the next session in cases when there was less than 30 days remaining in the session after the intrasession recess.

the Congress took a recess, that would end the session. Thus, there would be no recesses during a session – that is, no intrasession recesses – because any recess would terminate the session.

This alternative interpretation stands in contrast to the way the Clause has been traditionally interpreted. Under the traditional view, a session is a period during which the Congress schedules business and over which Congress has significant control. Congress can choose to have recesses during the session of whatever length it determines. Moreover, Congress can end the session at its discretion and thereby create an intersession recess.

While the alternative interpretation helps to address the incongruity of longer intrasession recess appointments, it has other problems. One problem turns on whether the alternative interpretation applies to all intrasession recesses or only those of a certain length. The alternative interpretation is plainly wrong if it were to apply to all recesses since it would entail no recesses could occur during the session. But the Constitution clearly indicates that there are some intrasession recesses, since the Three Day Adjournment Clause provides that “Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days.”

Even if one restricts the alternative interpretation to a subset of longer recesses, there are other problems. One is that this interpretation would require the length of both intersession and intrasession recess appointments to be calculated differently than they always have been.<sup>177</sup> This is not a problem for intrasession recess appointments, since changing their length is the purpose of the alternative interpretation. But the alternative interpretation would also change the length of intersession recess appointments. If a recess appointment is made during an intersession recess, it will extend through that recess and during the next session only until Congress takes an intrasession recess, rather than extending until the end of the session. No one, to my knowledge, has ever adopted this view of determining the length of an intersession recess appointment.

Finally, the alternative interpretation has the curious effect of depriving Congress of control over the length and number of its sessions. This not only limits the ability of the legislature to schedule its session as it sees fit, but also creates a situation where it is harder to predict how long recess appointments will last. When the Congress decides to take an intrasession recess, that would end the existing recess appointments. This feature would complicate Congress’s decisions as to when to recess and would also make it harder to plan when permanent appointments for offices filled with recess appointees need to be made.

---

<sup>177</sup> In this section, I continue to use the term intrasession recess when talking about recesses taken under the alternative interpretation. This is a bit misleading, because the alternative interpretation regards all recesses (at least those allowing recess appointments) to be intersession recesses. Yet, it is more confusing to refer to them as intersession recesses and therefore I will continue to use the intersession and intrasession terminology, referring to recesses in the middle of the one long session to be intrasession recesses.

For purposes of this article, it is not necessary to decide whether the traditional or alternative interpretation states the better view of the length of intrasession recess appointments, since neither of these interpretations is the correct view of the Clause. Rather, I argue that the intersession recess view is the best interpretation, as it avoids the incongruity of longer intrasession recess as well as the problems of the alternative interpretation, and also has the other advantages that have been developed in this article. Deciding whether the alternative or the traditional view is the second best view is not necessary for my argument.

### 3. One Last Textual Argument

Having discussed the intricacies of the length of recess appointments, I am now in a position to make one additional textual argument for the intersession recess view. The language of the Clause relating to the length of the recess appointment better fits the intersession view better than the intrasession view. While this language seems well-drafted if the Clause only applies to intersession recesses, the language is much less clear if the Clause applies to intrasession recesses as well. Unless one assumes that the Framers were poor drafters, the language they chose suggests that they intended the term to apply only to intersession recesses.

Under the intersession interpretation, the relationship between “the recess of the senate” and the length of the commission is simple and intuitive – they fit together like hand and glove. The Clause allows appointments “during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.” If there is a recess appointment, it will occur during the intersession recess and extend until the end of the next session. This is a simple arrangement, which is neatly described by the language of the Clause.

Under the intrasession interpretation, however, the language does not work so well. If the Framers had adopted the traditional interpretation, with its peculiar consequence of longer intrasession recess appointments, they could have indicated their intention much more clearly. The Framers could have provided that the commissions shall expire “at the end of their next *full* session.” This language would have clarified that the intrasession recess appointments were intended to extend into a second session. It would also have clarified that intrasession recesses were covered by the Clause. By referring to a full session, the language would suggest that a recess appointment could be made in the middle of a session and therefore during an intrasession recess.

If the Framers had intended to adopt the alternative interpretation, they also could have drafted the Clause differently. They could have provided that the commission shall expire “at the inception of the next recess.” In this way, they would have indicated that the length of recess appointments are tied to the scheduling of recesses rather than on how one defines a session.

### 4. The All Recesses Interpretation

These arguments based on the lengths of recesses and of recess appointments provide

strong evidence from structure and purpose that the intersession recess interpretation is superior to the practical interpretation. Having addressed the practical interpretation, I can now briefly discuss the all recesses view. Whatever its limited merits as a reading of the language, the structure and purpose arguments against the all recesses view are overwhelming. It is absurd to argue that recess appointments would have been intended for one day recesses – or even for three or 10 day recesses. It is even more absurd to imagine that such recess appointments would be considerably longer than those for intersession recesses.

### C. History and the Decline of the Intersession Interpretation

While the Executive Branch followed the intersession interpretation during the 18<sup>th</sup> and through most of 19<sup>th</sup> century, it departed from this interpretation in the 20<sup>th</sup> century, first adopting the practical interpretation and now adopting a position that appears to approach the all recesses view.

The pre-twentieth century history provides some support for the intersession interpretation. There were no intrasession recess appointments for the first 75 years under the Constitution and then only a few such appointments, made in a single intrasession recess during the troubled presidency of Andrew Johnson, until after World War I.<sup>178</sup> This pattern provides some evidence that government officials did not believe they had the authority to make intrasession recess appointments.<sup>179</sup> It is true that during this period intrasession recesses generally lasted no more than 2 weeks, but that would still allow intrasession recess appointments under the all recesses interpretation and under some versions of the practical interpretation. Moreover, the intrasession recesses that did occur in 1867 came under truly exceptional circumstances that suggest they should not be given much weight as a precedent. These appointments were made by President Andrew Johnson when he was battling with the Republican Congress that was soon to impeach him. Their disagreements focused in part on appointments and personnel, thereby suggesting that Johnson's aggressive use of the recess appointments power was triggered by that environment rather than firm constitutional convictions. It is also significant that the executive branch issued no written opinions that attempted to justify these intrasession recess appointments.

The First Attorney General opinion to address the issue specifically held that intrasession

---

<sup>178</sup> See Carrier, *supra* note XX; Hartnett, *supra* note XX.

<sup>179</sup> That government officials accepted the intersession recess interpretation is also supported by Attorney General opinions from the early part of the 19<sup>th</sup> century. While no opinion addressed intrasession recesses explicitly, several of the opinions wrote from the assumption that recesses and sessions were mutually exclusive. See 1 Op. Att'y Gen. 631, 633 (1823) (“[W]hether [a vacancy] arose during the session of the Senate, or during [its] recess, it equally requires to be filled.”); 2 Op. Att'y Gen. 525, 527 (1832) (“[A notice of vacancy] informs [the President]... that [the vacancy] took place while the Senate was in session, and not during the recess.”). This provides some support for the intersession recess interpretation, which interprets the term recess as the period when Congress is not in session.

recess appointments were not constitutional. In a 1901 opinion, Attorney General Knox concluded that the term “recess” in the Clause referred only to intersession recesses.<sup>180</sup> Knox’s opinion capably marshaled several arguments in favor of the intersession recess view, including that the Constitution drew a distinction between recesses and adjournments, that there was no principled way to restrict intrasession recesses to relatively recesses, and that the all recess interpretation would have the undesirable consequence of permitting recess appointments during extremely short recesses.<sup>181</sup>

Despite the strength of Knox’s opinion, a little more than twenty years later Attorney General Daugherty reversed it and adopted the practical interpretation. While I have already discussed the textual problems with this view, his opinion is also seriously flawed as to structure and purpose. Daugherty’s opinion focuses exclusively on the benefits of intrasession recess appointments, without considering the extent to which it allows the President to circumvent the senatorial consent requirement. He does this by explicitly relying on Attorney General Wirt’s distorted analysis of the Clause in his opinion defending the exist view. Thus, the practical interpretation announced in Daugherty’s opinion can fairly be read as the product of the reasoning that produced the exist interpretation.

#### D. Conclusion

In conclusion, the case for the intersession interpretation appears to be quite strong, although perhaps not as powerful as the case for the arise interpretation. The intersession interpretation relies on a straightforward reading of the constitutional text and conforms to constitutional structure and purpose. The two alternative interpretations, by contrast, suffer from serious defects. The biggest problem for the all recesses view is that it would have the undesirable if not absurd consequence of allowing recess appointments for extremely short recesses. The main problem for the practical interpretation is that its attempt to define a longer recess cannot be derived from the constitutional text. Both of these interpretations also suffer from the problems that they slight the distinction between adjournments and recesses and that intrasession recess appointments are longer than intersession recess appointments.

#### V. Connections Between When Vacancies Must Occur and the Type of Recesses Covered

This essay has attempted to address two issues concerning the Recess Appointments Clause – when vacancies must occur and what type of recesses are covered by the Clause – separately. While this strategy simplifies the analysis, there are some significant relationships between the two issues that merit discussion.

First, there is a strong reason to believe that people who hold the broader interpretation of

---

<sup>180</sup> 23 Op. Att’y. Gen. 599 (1901).

<sup>181</sup> *Id.*

the first issue will also adopt the broader interpretation of the second issue. The reason involves inferences from structure and purpose. If one believes that the central purpose of the Recess Appointments Clause is to prevent any unfilled vacancies from occurring, then one would be inclined to adopt the exist interpretation and one of the intrasession interpretations. By contrast, if one believes that the Constitution requires that the goal of preventing unfilled vacancies be balanced against the value of protecting the Senate's confirmation role, then one would be more disposed towards both the arise and intersession interpretations.

Despite this important connection between the two issues, it is nonetheless clear that there is no logical or necessary relationship between the issues. One can adopt any combination of positions on the two issues, including holding an interpretation that confers broader recess appointment power on one issue with the interpretation that confers narrower recess appointment power on the other. For example, one might adopt the arise interpretation, based largely on the language of the Clause, but believe that the practical interpretation or even the all recesses interpretation was the correct one based on text, structure, and purpose. Or one might adopt the exist interpretation, based on the view that late session vacancies might otherwise be difficult to fill, but believe that the language of the Constitution as well as the history required the intersession interpretation.

A second important matter concerns the effects of combining different interpretations on the two issues. While each of the broad interpretations conveys significant power on the President, it is the combination of the two broad interpretations that really provides the President with a stunning degree of authority. It is true that the exist view gives broad authority to the President since it allows him to make a recess appointment for any vacancy so long as he waits for a recess. But when the exist interpretation is combined with the intersession view, the authority is constrained because the President can only make the appointment once a year, when the intersession recess occurs. Similarly, the all recesses interpretation allows the President broad authority to make recess appointments even during the shortest of recesses, but if this interpretation is combined with the arise view, those recess appointments can only be made if the vacancy occurs during those short recesses and the President makes the appointment at that point.

It is when the two broad interpretations are combined that the President's recess appointment power really becomes vast. Under a regime that follows both the exist and all recesses interpretations, the President can make recess appointments for any vacancy so long as he waits for a recess and recesses come many times throughout the year. Thus, the President need not wait very long to make any recess appointment that he desires. By contrast, under a regime that follows both the arise and the intersession interpretations, the President's power is quite limited. He can only make recess appointments during the intersession recess and only then if the vacancy arises during that recess.

## VI. Conclusion and the Possibility of Returning to the Original Meaning

In this article, I have argued that the current interpretation of the Recess Appointments

Clause significantly departs from the original meaning of the Constitution. As originally written, the Constitution adopted the arise and intersession interpretations of the Clause. Unfortunately, over time, these interpretations have been abandoned and the President's recess appointment power has been greatly expanded beyond its original limits.

Although the original meaning is of normative interest to both originalists and those who regard this meaning as relevant to, but not dispositive of, constitutional issues, the more practical question is whether the political branches and the courts should follow the original meaning today, when the broad constructions of the Clause have been regularly followed since the 1820s for one issue and since the 1920s for the other. The answer to this question turns on the correct theory of precedent and practice in constitutional law.

Unfortunately, there is great disagreement about the role of these matters, even among originalists. Theories of precedent range from those that reject precedent entirely, to more intermediate theories that give precedent varying force depending on the circumstances, to theories that place great weight on precedent.<sup>182</sup> The Supreme Court also has varied its treatment of precedent across different cases and over time.<sup>183</sup>

Yet despite this disagreement, the case for returning to the original meaning of the Recess Appointments Clause appears to be quite strong. While those who eschew precedent would obviously endorse returning to the original meaning, surprisingly there is a strong case to be made that many other approaches would also reach this conclusion.

Although the political branches have been interpreting and applying the Recess Appointments Clause for many years, there is little judicial precedent supporting the exist or intrasession interpretations. The Supreme Court has never addressed either issue, while the circuit courts have said little. Two appellate court decisions adopted the exist interpretation,<sup>184</sup> while the appellate courts have never decided whether the Constitution adopts either of the intrasession interpretations.<sup>185</sup> Thus, the Supreme Court as well as the other circuits are free to decide this issue without constraint from prior judicial precedent.

---

<sup>182</sup> See e.g. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L.REV. 1 (2001).

<sup>183</sup> Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647 (1999).

<sup>184</sup> *United States v. Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. *en banc* 1984)(adopting the exist interpretation); *United States v. Allocco*, 305 F.2d 704, 712 (2nd Cir. 1962)(same).

<sup>185</sup> Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2237-2240 (1994).

The main reason to retain the current interpretations of the Clause is the government's longstanding practice adhering to them. The executive branch has been making recess appointments under the broader interpretations for many years now.<sup>186</sup> The Congress has appeared to acquiesce in these appointments. And the federal courts have allowed recess appointees under the broader interpretations to serve as judges, thereby appearing to make an administrative decision that the recess appointments were legal.

Yet, one may seriously question the force of this practice. Commentators and courts generally view government practice to be less weighty than judicial precedent. While originalists may be influenced by practice that derives from the establishment of the Constitution,<sup>187</sup> practice that clearly departs from the original meaning and dates from later periods, as do the exist and intrasession views, has much less weight.

Governmental practice might gain additional force, however, if departing from it would cause significant disruption. But returning to the original meaning would be unlikely to create serious dislocations. Under the original meaning, the President could use his constitutional recess appointment authority and statutory acting appointment authority to fill the vacancies that require immediate attention. Especially in a world with relatively short recesses, the original meaning would require at most some adjustments to a couple of minor statutes relating to acting appointments.

The principal way that a return to the original meaning might cause disruption is if it led to an overturning of the past decisions reached by executive officers and judges who had been improperly recess appointed. Such a general overturning, however, seems unlikely. Traditionally, the de facto officer doctrine operated to prevent challenges to the decisions of improperly appointed officers, but the Supreme Court has in recent years cast some doubt on the application of that doctrine to constitutional challenges.<sup>188</sup> Yet, even if such challenges are allowed if they are raised before the officer makes his decision (or even on appeal from that decision), that would still permit challenges only to a relatively small number of decisions by improperly appointed officers. To create significant disruption, the Court would have to be willing to allow the past decisions of such officers to be collaterally attacked, something the Court has been unwilling to do so far and seems unlikely to do in the future.<sup>189</sup>

---

<sup>186</sup> See *supra* text and accompanying notes XX.

<sup>187</sup> See, e.g. *Marsh v. Chambers*, 436 U.S. 783 (1983) (holding that the longstanding practice dating from the First Congress entitled to great weight in interpreting the Constitution).

<sup>188</sup> *Ryder v. US*, 515 U.S. 177 (1995); *Nguyen v. US*, 539 U.S. 69 (2003); but see Ronald M. Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 328 n. (2003) (listing cases suggesting the continuing vitality of the doctrine).

<sup>189</sup> See *Nguyen v. US*, 539 U.S. 69, 76 (2003) (noting that the Court has been willing to correct “on direct review” violations that embody “a strong policy concerning the proper administration of

In the end, there is a strong case for returning to the original meaning, especially if one believes as I do, that the current interpretations clearly depart from that meaning. The main argument for continuing the current interpretations is that they have been followed for a lengthy period, but the weight of this practice is reduced because it does not date from the Founding and departing from it would not cause disruption. To conclude that the current interpretations should continue to be followed, one would have to place extraordinary weight on the mere existence of this practice – something that few theories of precedent and practice are likely to do. Thus, if the Supreme Court ever decides a case raising these issues, there is a strong argument that it is free to restore both the original meaning of the Constitution and real limits on the recess appointment power.

---

judicial business, even though the defect was not raised in a timely manner”); *Ex parte Ward*, 173 U.S. 452, 456 (1899) (habeas corpus challenge to the recess appointment of a judge denied on the ground that “the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked”); see also *Ryder v. US*, 515 U.S. 177 181, 182 (1995) (distinguishing *Ward* on the ground that the challenge in *Ryder* had been raised in a timely manner before the original decision was reached).