THE ORIGINAL MEANING OF THE RECESS APPOINTMENTS CLAUSE

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This Article explores the original meaning of the Recess Appointments Clause. Under the current interpretation, the Clause gives the President extremely broad authority to make recess appointments. The Article argues, however, that the original meaning of the Clause actually confers quite limited power on the President and would not permit most of the recess appointments that are currently made.

The language of the Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The Article makes two basic claims about the original meaning of the Clause. First, it argues that the Clause permits recess appointments only when an office becomes vacant during a recess and when the recess appointment is made during that recess. If an office was vacant while Congress was in session—either because the vacancy arose during a session or a vacancy that arose during a recess continued into a session—the President cannot fill that office with a recess appointment. The prevailing interpretation of the Clause, however, permits the President to make a recess appointment so long as the recess appointment is made during a recess, whether or not the vacancy existed when Congress was in session. Thus, the President can generally make a recess appointment for any office so long as he waits until there is a recess to do so.

The Article's second claim involves the original meaning of the term "recess." The Article maintains that the Constitution permits recess appointments only during an intersession recess—the recess between two sessions of a Congress—and does not allow such appointments during an intrasession recess—the typically shorter recess taken during a session. Under this view, the President generally would be able to make recess appointments only once each year during the intersession recess. The prevailing interpretation, however, allows the President to make recess appointments many times a year, including during intrasession recesses of ten days and perhaps of even shorter duration. Obviously, the prevailing interpretation provides the President with greater recess appointment authority than does the original meaning.

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INTRODUCTION

The Constitution provides that the President shall nominate, and with the advice and consent of the Senate, appoint federal officers.[1] The Framers designed this provision in an effort to produce desirable appointments of both federal executive officers and federal judges. Although they thought a single responsible person—the President—should initially select the individual to be nominated for an office, they believed that it was dangerous for one person to have complete control over appointments.[2] Thus, the Framers required that the individual nominated by the President also 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.[3]

When the Senate resists the President's nominees, the President often pursues 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 Senate's consent when a vacancy occurs during a recess of the Senate.[4] 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 bypass the Senate when making recess appointments. Under this interpretation, the President can make a recess appointment when the Senate is capable of considering a nominee, but the President wants to appoint someone that the Senate will not confirm.

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1. U.S. CONST. art. II, § 2, cl. 2.
2. *See infra* text and accompanying notes 25–27.
3. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 546–47 (2005) (discussing the Senate practice of filibustering judicial nominees).
4. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

The current interpretation of the Clause grants the President such broad power 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.[5] The recess appointment would extend until the end of Congress's next full session, 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 sometimes can be avoided and in any event appears to violate the unconstitutional conditions doctrine.[6]

If the Framers wished to give the President such broad authority to bypass the Senate, one might wonder why they bothered to subject his ordinary appointments to the Senate's consent. 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 current interpretation of the Clause, the original meaning confers quite narrow authority. While the original meaning of the Clause allows the President to make the most necessary recess appointments—those needed to prevent long vacancies that could not be 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 securing senatorial consent.

In particular, I argue that two aspects of the Clause's present interpretation are inconsistent with its original meaning. First, I maintain that the original meaning permits recess appointments 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 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 even 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 seems unlikely to secure senatorial consent.

5. *See infra* note 42.
6. *See infra* text and accompanying notes 173–179.

The second way in which the Clause's current interpretation departs from its original meaning concerns the definition of a recess. Congress has usually held one legislative session per year, which is followed by a recess that lasts until the next session. This recess between 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 Clause's original meaning allows recess appointments to be made only during intersession recesses. In the early years under the Constitution, intersession recesses typically lasted between six and nine months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long periods.[7] The current interpretation of the Clause, however, allows recess appointments during intrasession recesses, which often are extremely short. Although there currently is a disagreement over whether recess appointments should be available during all intrasession recesses or only those that last a minimum time, such as ten days, in either case the current interpretation would allow recess appointments during recesses that seem far too brief to justify bypassing the Senate's constitutionally mandated role.

Adopting the Clause's original meaning concerning either when a vacancy must occur or the definition of a recess would narrow the President's current recess appointment power; however, 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. This 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 situation when they are most likely to be needed—to fill offices that could not be filled through an advice and consent appointment because they arise 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 Court of Appeals for the Eleventh Circuit. This recess appointment was not made because a recess prevented the Senate from confirming the President's nominee, but because Pryor had been unable to secure the consent of the Senate due to a filibuster

7. *See infra* text and accompanying note 37.

by Senate Democrats.[8] The vacancy at issue had first occurred more than three years before, while the recess appointment was made during a mere ten-day intersession recess.[9] 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.

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. Those who believe the Constitution establishes a strong presidency interpret the Clause broadly. Those who believe the Constitution creates a weak presidency interpret the Clause narrowly. By contrast, my general 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 many broad powers,[10] 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 made sense to allow broad power in one area but not in another.

In Part I of this Article, I provide some background, discussing both the methodology of originalism and the structure and history of the Recess Appointments Clause. Part 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. Part III contends that the Clause only permits recess appointments during intersession recesses. In Part IV, I address the relationship between these two issues. Finally, I conclude by discussing whether the Supreme Court legitimately might interpret the Clause so as to return it to its original meaning.

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8. Geoff Earle, *Kennedy Eyes Suit on Pryor*, THE HILL, Feb. 26, 2004, *available at* http://www.hillnews.com/news/022604/kennedy.aspx.

9. 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* ADUSC Office of Legislative Affairs, Vacancies in the Federal Judiciary (Mar. 1, 2004), *available at* http://www.uscourts.gov/vacancies/archives/04-0101/list.pdf.

10. For example, I believe that the Executive Power Vesting Clause provides the President with a significant power over foreign affairs, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 305, 309 (2001), and that the Constitution gives the President exclusive power to direct all executive officials, rendering independent agencies unconstitutional. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Powers to Execute the Laws*, 104 YALE L.J. 541, 636 (1994).

I. BACKGROUND

This part provides some necessary background for the main argument of the Article. First, I outline the methodology that I will employ in attempting to discern the original meaning of the Recess Appointments Clause. I then 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, a matter which significantly impacts the operation of different interpretations of the Clause.

A. The Methodology of Originalism

In this Article, I present an originalist theory of the Recess Appointments Clause. Since there are several versions of originalism, it will be useful to set forth briefly the methodology that I will employ here. The Article seeks 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.[11] Interpreters at that time would have examined various factors, including text, purpose, structure, and history.[12]

The most important factor for discerning original meaning 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 ordinary word meanings as well as more technical legal meanings words may have had.[13]

If the text of the Clause is consistent with only one interpretation, then that will be its proper meaning unless that meaning would result in absurd consequences.[14] If the language is consistent with more than one interpretation, then one must look to purpose, structure, and history to help

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11. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); John F. Manning, *Textualism and the Equity of the 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).

12. Rappaport, *supra* note 11, at 823–24.

13. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *59–*60 (1822). 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.

14. *Compare* 1 BLACKSTONE, *supra* note 13, at *61, *with* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

clarify the ambiguity.[15] But one also must consider how natural the use of the language is under these interpretations. If two interpretations of the text are equally natural uses of the language, then purpose, structure, and history will determine the meaning that the authors intended to place on the words.[16] If two interpretations are possible, but one uses the language in a more natural or common way, then the more natural interpretation governs unless purpose, structure, and history provides evidence strong enough to outweigh the impact of the greater naturalness of the usage.

As noted above, purpose, structure, and history provide evidence for determining the intended meaning of the text.[17] The purpose of a clause involves the objectives or goals that the authors would have sought to accomplish in enacting it.[18] One common and permissible way to discern 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 others without any strong arguments for doing so. For example, perhaps the biggest interpretive error concerning the Recess Appointments Clause has been the view that its sole purpose is to fill vacant offices, rather than to fill such offices while preventing the President from too easily circumventing the Senate's confirmation role.[19]

One can also discern the purpose of a provision by examining its 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 also can reveal practices of the Framers' generation, which when widely accepted, offer evidence of the values underlying a provision.

Constitutional structure also can help to determine the purposes of the Framers. The decision to enact one constitutional clause may reveal certain values and thereby help us understand the purposes underlying a second clause.[20] For example, the Framers' decision to employ the Appointments Clause, I will argue, helps to illuminate their purposes in enacting the Recess Appointments Clause.[21]

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15. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 405, 419 (Fred Rothman Publ'ns ed., 1883).

16. Rappaport, *supra* note 11, at 824.

17. The intent here is semantic intent: the intent to use a particular meaning of a word. SCALIA, *supra* note 11, at 16–18; Ronald Dworkin, *Comment*, *in* SCALIA, *supra* note 11, at 115, 117–18.

18. 1 BLACKSTONE, *supra* note 13, at *61.

19. *See infra* text and accompanying notes 59–68.

20. *See* 1 STORY, *supra* note 15, §§ 449–56.

21. *See infra* text and accompanying notes 23–34. Debates over originalism and interpretation generally have focused on the dispute over whether the intent of the authors or the reasonable

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 have been 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 considerable 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.[22]

B. The Structure of the Appointment Provisions

This subpart 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.[23]

> 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.[24]

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meaning that the audience would derive from the language 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 multimember body when the individual intentions may have diverged. These disputes may be largely avoided, however, if one believes that the Framers' generation assumed that certain interpretive rules would be applied to the Constitution. 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 the rules 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.

22. Calabresi & Prakash, *supra* note 10, at 557.

23. U.S. CONST. art. II, § 2, cl. 2.

24. *Id.* at 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, they permit a departure 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 appear to have believed that this more cumbersome appointment method was superior to providing the appointment power to the President or the Senate alone.[25] In *The Federalist* No. 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 would have a strong reputational incentive to make a wise appointment and less of a tendency to appoint unqualified persons who are his friends than would a legislative body.[26] Hamilton also argued, however, that requiring

25. Since the Framers had before them a range of different appointment methods, including appointment by the executive alone, see 1 BLACKSTONE, *supra* note 13, at *271–*73 (describing appointment by the King of England), by the legislature alone, see N.C. CONST. of 1776, art. XIII, XIV, and by the executive with a council, see N.Y. CONST. of 1777, art. XXIII, they must be presumed to have made an informed choice. One thus must conclude 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.

26. In *The 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

the Senate to consent to the appointment would guard against the possibility of the President making an unwise or unfit selection.[27]

Although the Framers evidently were 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, as 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, which 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 recess appointments—can be understood as ways to reduce the costs of requiring that appointments be made by the President and the 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 senatorial 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.

> more 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 negociations.

THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

27. Hamilton also explains in *The 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 preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

Id. at 513; *see also* 4 FOUNDERS CONSTITUTION 102–03 (Philip & Ralph Lerner Kurland eds., 1987) (recording Archibald Maclaine's discussion of the purpose of the Recess Appointment Clause at the North Carolina Ratifying Convention).

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 Congress chose to pass a law allowing it.[28] 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, as the President might be too quick to exclude the Senate from the process 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 for superior officers.[29] The Framers evidently believed that the value of joint appointments outweighed the inconveniences for superior officers, and they 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 Congress.

This leads me to the second exception to the joint appointment 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.[30] In the absence of a recess appointments provision, the possibility of an important office becoming vacant during the long recess of the Senate would have created three unattractive alternatives. First, the position could be left vacant throughout the recess, but this might prove harmful, especially for important offices such as Secretary of War or Secretary of State. Second, the Senate could be called into session,[31] but this would be burdensome in a large nation during an age of slow transport. Finally, the Senate could remain in session continuously, but this was thought improper by the prevailing republican political theory.[32] To avoid these alternatives, the Framers allowed the President to make recess appointments but limited the terms to the end of the next session.[33]

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28. 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).

29. *Id.*

30. *See infra* text and accompanying note 37.

31. U.S. CONST. art. II, § 3.

32. *See* THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (asserting that "it would have been improper to oblige [the Senate] to be continually in session").

33. As Hamilton said in *The Federalist* No. 67:

> The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to

While the need for a separate method for recess appointments seems evident enough, what is striking about the Recess Appointments Clause is how much more it departs from the ordinary method than does the inferior officer provision. Although the inferior officer provision permits departures from joint appointments only with the consent of Congress, the Recess Appointments Clause does not require that the President receive congressional authorization for 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 officers. Clearly, the Recess Appointments Clause has more potential to intrude on the Senate's confirmation role than the inferior officers provision, which may account for the greater controversy surrounding the recess appointments provision over the nation's history.

Although the Recess Appointments Clause poses a danger to the Senate's confirmation role, there are reasons why the Framers might have drafted it this way. First, it was necessary for the Framers to allow superior officers to be recess appointed because unfilled vacancies in their offices would create the greatest problems. Second, the Framers may also have believed that the President's recess appointment authority should not depend on Congress deciding to pass a law conferring such authority, because Congress's failure to pass such a law would generally lead to undesirable results. 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 foregoing an important officer or calling the Senate into session. Moreover, even if the Senate were called, the time it would take to convene might leave the government without an important officer for an extended period. Furthermore, the Framers may have feared that the Senate would be tempted 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

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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 confided 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 authorise the President *singly* to make temporary

Framers' generation thought it was important for the legislature to return to the people for significant periods.[34]

To conclude, although the Appointment and Recess Appointment Clauses might seem at first glance to be simple clauses, upon examination, they turn out 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: one provision sets forth the ordinary appointment method, another permits a different appointment process for inferior officers, and the third allows 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 that 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, Congress regularly has scheduled one legislation session each year.[35] The session is followed by a recess that extends until the beginning of the next session.[36] This recess between the two sessions is referred to as an intersession recess. Congress also has scheduled recesses during the session, which are known as intrasession recesses.

During the eighteenth and nineteenth centuries, Congress followed a consistent pattern regarding sessions and recesses. Until the Civil War, Congress regularly scheduled short sessions, a long intersession recess, and virtually no

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appointments "during the recess of the Senate, by granting commissions which should expire at the end of their next session."

Id. (emphasis added).

34. 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 below, the significance of the recess appointment power conferred by the Framers is a strong reason for construing the Clause to apply only in narrow circumstances.

35. *See* JOINT COMM. ON PRINTING, UNITED STATES CONGRESS, 2003–04 OFFICIAL CONGRESSIONAL DIRECTORY, 108TH CONG. 512–27, *available at* http://www.senate.gov/reference/resources/pdf/congresses2.pdf [hereinafter OFFICIAL CONGRESSIONAL DIRECTORY].

36. On occasion, Congress has enacted legislation scheduling a second session during the year. *See* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 423–24 (2005). An additional session can also occur if the President calls Congress into session. *See* U.S. CONST. art II, § 3.

intrasession recesses. The normal pattern was for Congress to hold a single session of between three and six months, followed by an intersession recess of between six and nine months.[37] Intrasession recesses were rare, having been held only three times during this period, and then only for short periods lasting between five and seven days.[38] 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 ten and fourteen days over the Christmas holiday.[39] We can understand the traditional pattern as growing out of several forces, including 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.[40]

In the twentieth century, Congress began to modify the traditional pattern more substantially. Modern Congresses regularly scheduled longer sessions, a shorter intersession recess, and far more frequent intrasession recesses.[41] Congress now generally schedules six intrasession recesses per year, with lengths ranging from a few days to a month or more.[42] Still, important features of the traditional pattern have been maintained, including the use of a single intersession recess, which lasts between one and three months and therefore is generally longer than any of the intrasession recesses.

II. THE MEANING OF THE TERM "HAPPEN"

Having provided this background, I am now in a position to address the two basic questions of this Article. This part addresses the first question: When

37. *See* OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35; Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2210 (1994).

38. *See* OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35; Carrier, *supra* note 37, at 2211. It should be noted that these records only report intrasession recesses of three or more complete days, excluding Sundays. OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 526 n.2.

39. In the period between the Civil War and the end of the nineteenth century, the main exceptions to the pattern occurred in the years immediately following the Civil War. In 1865, the Senate recessed from December 6 through December 11. In 1867, the Senate recessed from March 30 through July 3 and then again from July 20 through November 21. In 1868, the Senate had three additional recesses, from July 27 to September 21, September 21 to October 16, and October 16 to November 10. *See* OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 515.

40. *See infra* text and accompanying notes 226–232; *supra* note 32.

41. *See* Carrier, *supra* note 37, at 2239–40. Significant departures from the traditional Senate calendar really began in the 1940s. *See* OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 518–19.

42. Since 1970, Congress has averaged more than seven recesses per year: six intrasession recesses per session and one intersession recess. *See* OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 519–27.

must a vacancy arise in order to be eligible for a recess appointment? The part explores the text, structure, purpose, and history of the Recess Appointments Clause, 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. Together, these two positions mean that the President can only make a recess appointment for an office that was never 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 to 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 possible 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 interpretation, the Clause permits the President to make a recess appointment whenever a vacancy exists during a recess, irrespective of when the vacancy arose. Even if an office was 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,[43] the second interpretation was adopted by Attorney General Wirt in 1823 and has generally been followed by the government ever since.[44]

One can attempt to root both of these interpretations 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."[45] The main difference between the interpretations flows from their divergent readings of the term "happen." Under the first interpretation, "happen" is

43. Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, at 165–67 (John Catanzariti et al. ed., 1990) [hereinafter Randolph Opinion].

44. 1 Op. Att'y Gen. 631 (1823) [hereinafter Wirt Opinion].

45. U.S. CONST. art. II, § 3.

read to mean "arise," so that the Clause is understood as permitting the President "to fill up all Vacancies that may *arise* during the Recess of the Senate." The second interpretation, by contrast, reads the term "happen" to mean "exist" or "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 is irrelevant.

It is clear that the arise interpretation far better fits the language of the Clause than the exist view. First, the dictionary meaning of "happen" at the time of the Framing strongly supports the arise view. These dictionaries defined "happen" as "to come by chance; to come without one's previous expectation," which is consistent with the arise view.[46] They did not define it as to "happen to exist." Second, the arise interpretation is the more natural or obvious meaning of the overall language of the Clause. 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.[47] By contrast, under the exist interpretation, nothing new occurs during the recess.[48] Indeed, the author of the principal opinion defending the

46. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also* Evans v. Stephens, 387 F.3d 1220, 1230 & n.4 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (reviewing numerous dictionaries from the time, all of which define "happen" in a similar manner); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (stating a similar definition). A recent defense of the exist view argues that one meaning of the term "happen" is "to befall" and that one definition of the term "befall" is "to happen to be." *Evans*, 387 F.3d at 1226; *see also* 2 OXFORD ENGLISH DICTIONARY 62 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "befall"). Yet, this argument shows little—the question is not what "befall" means, but what "happen" means, and the dictionary definitions from the time do not say that "happen" means "happen to be." The definitions of "befall" and "happen" will be consistent with one another if one understands "befall" to have a broader meaning than "happen." Under this view, the term "befall" sometimes meant "happen" and sometimes meant "happen to exist" but "happen" never meant "happen to exist."

47. Edward Hartnett also attempts to explain how "vacancies that may happen during the Recess" could refer to vacancies that arise during the session and continue into the recess. Hartnett, *supra* note 36, at 381–84. Hartnett argues that "happen" can refer either to an event that occurs at a particular point in time or to something that occurs over an extended period of time. Thus, Hartnett claims that vacancies can happen over a lengthy period. Imagine that an office became vacant on January 15, 2000, when the prior occupant died, and was not filled again until January 15, 2002. Hartnett seems to believe that while we might say "the vacancy happened on Jan. 15, 2000," we might also say "the vacancy happened from Jan. 15, 2000 until Jan. 15, 2002." *See also id.* at 383 n. 23 (claiming that one might say that the marriage between John and Mary happened between 1879 and 1920). But this is mistaken. The ordinary and clearly preferred usage is to speak of an event as happening, which in the case of a vacancy is when the office becomes vacant. To say that the vacancy "happened" over a two year period is an awkward and at best secondary usage.

48. It is true that one can imagine uses of the term "happen" that refer to vacancies that arise during the session, but continue to exist during the recess. For example, one might say "It just so happens that there was a vacancy during the recess" and be referring to a vacancy that first

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."[49]

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 one should avoid interpretations that construe words as surplusage.[50] 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 unambiguously would have conveyed the exist interpretation. Thus, if one believes that the Framers intended the Clause to have the exist meaning, it is extremely hard to understand why they included "happen," a term that not only was unnecessary but also made the Clause ambiguous.[51]

In addition, the arise interpretation derives support from the two other constitutional clauses that use the "vacancies happen" language, because these clauses also are best read as adopting the arise view. First, under the original Constitution, state legislatures selected senators. To address the situation when a senator left office while the state legislature was in recess, 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."[52] The Clause was superseded with the enactment of the Seventeenth Amendment, which provided for the direct election of senators.[53]

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 such a strong case for reading the language "Vacancies happen" in the Senate Vacancies Clause to have the arise meaning. While the same

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arose during the session. But that hardly establishes that the exist view is consistent with the actual language of the Clause. The issue is not whether "happen" could ever refer to a vacancy that arose during the session, but instead whether the language "all vacancies that may happen during the recess" would have been used to refer to vacancies that arose during the session.

49. Wirt Opinion, *supra* note 44, at 631.

50. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

51. 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, at 188 (2001).

52. U.S. CONST. art. I, § 3, cl. 2.

53. *Id.* at amend. XVII.

textual 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"[54]—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 the Recess of the Legislature."[55] Vacancies do not happen to exist by resignation, they arise by it.[56]

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 Vacancies 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."[57] 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 delay an election for political reasons. The term "shall" here underscores the governor's mandatory duty.

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54. *Id.* at art. I, § 3, cl. 2 (emphasis added).

55. 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 "Vacancies happen during" but instead to address the following point: Under the arise interpretation, a senator might be able to influence the choice of his temporary replacement by resigning during the recess, rather than during the session, thus allowing the governor to name the replacement. By adding the words "by Resignation or otherwise," the Framers made clear that a governor still could make the recess appointment even of a senator who resigned (perhaps intentionally) during the recess.

56. As discussed below, the arise interpretation of the Senate Vacancies Clause also is supported by the Senate's early interpretation of this clause. *See infra* text and accompanying notes 104–106. In 1794, the Senate adopted the arise interpretation of the Clause, refusing to sit an appointee of the state executive when the vacancy arose during the session but continued into the recess. 4 ANNALS OF CONG. 78 (1849) (describing how 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).

57. U.S. CONST. art. I, § 2, cl. 4.

Under this reading of the House Vacancies Clause, one interprets the term "happen" to have the arise meaning because such a meaning requires that the writ be issued 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." This interpretation suggests that the writ can be issued at any time a vacancy exists. While one might argue that the exist meaning obligates the governor to issue the writ of election immediately, because a vacancy happens to exist, the exist meaning places less emphasis on the obligation to issue the writ immediately when the vacancy arises.[58] Thus, it is reasonable to interpret the "when vacancies happen" language here in accord with its more obvious meaning—the arise interpretation.

To conclude, the language of the Recess Appointments Clause powerfully argues for the arise interpretation. That interpretation gains strong support from the dictionary meaning of the words, the more natural reading of the language, canons of construction regarding surplusage, and similar constitutional clauses. In fact, the textual argument is so compelling that one might conclude that the exist interpretation is inconsistent with the text. If one concludes that the exist interpretation conflicts with the textual language, then that interpretation should be barred unless one believes that it leads to an absurdity that justifies a departure from the text. By contrast, one might conclude that the exist interpretation is a much weaker reading of the language, but one still consistent with the text. In that event, the exist interpretation could still be correct if there were compelling reasons based on structure, purpose, and history to support it. It is not, however, necessary to decide whether the exist interpretation actually conflicts with the text. 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 Provisions

The arise interpretation also is strongly supported by constitutional structure and purpose. In enacting the various appointments provisions, the

58. Put differently, if one were writing the Clause to require that the executive authority issue the writ immediately, one would choose the arise interpretation, because the exist interpretation would create the possibility of the inference that the state executive would not have to issue the writ immediately.

Framers made certain choices. By examining these choices, 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 lacks 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 for which a recess appointment is most needed because these vacancies could not 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 he 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 interpretation. Moreover, the additional vacancies that can be filled under the exist view are ones that could have been filled during the session. Therefore, one may conclude that these recess appointments are less needed than 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 who the Senate has already rejected for the position.

Given the different powers that the President would possess under these two interpretations, there is a strong argument that the Framers only could have intended the arise view. 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—a 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. Therefore, it makes much more sense that the Framers provided the limited power of the arise view.

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.[59] First, they allowed departures only for inferior officers, not for superior officers. Second, they insisted that Congress affirmatively decide to depart from the appointment process by choosing to delegate the appointment authority to the President. These restrictions indicate that the Framers placed a high value on senatorial consent for superior officers and that they did not trust the President unilaterally to decide when to forego the need for 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, 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 simply is not true that the period until the end of the next session is a brief one. A recess appointment made during an intersession recess can last for nearly a year, and one made during an intrasession recess can last for nearly two years.[60] 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. Notably, the exist interpretation requires only that the vacancy exist during the recess; 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.[61]

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59. *See supra* text and accompanying notes 28–29.

60. *See* Carrier, *supra* note 37, at 2240.

61. *See* Stuart J. Chanen, Comment, *Constitutional Restrictions on the President's Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 199 (1984); *see also* 2 Op. Att'y Gen. 525, 525–27 (1832); *see, e.g.*, Federal Judicial Center, Biography of Oscar R. Hundley, *available at* http://www.fjc.gov/public/home.nsf/hisj (showing one federal district judge recess appointed three times from 1907 through 1909). 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. Chanen, *supra*, at 212–13 n.140.

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 because the end of the session appears to be at the dividing line between the session and the recess. Still, the language seems 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. As 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, because 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 also 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 Presidents certainly have made many recess appointments that would not meet the requirements of the arise interpretation and that seem intended to circumvent senatorial confirmation,[62] actual recess appointments do not come anywhere close to the number possible under the exist view.

There are two main explanations as to why Presidents have failed to exercise the full power available under the exist interpretation. First, a federal statute prohibits paying a salary to recess appointees who have been appointed under certain, but not all, circumstances that do not satisfy the arise interpretation.[63] Although this statute places some limits on the President's

62. *See* Chanen, *supra* note 61, at 211–12.

63. 5 U.S.C. § 5503 (2000). The statute provides that funds from the Treasury shall not be used to pay the salary of recess appointees for offices that were vacant during a session of Congress, except in three circumstances: (1) when the vacancy arose within thirty days of the end of the session; (2) 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 (3) when a nomination for the vacant office was rejected within thirty days of the end of the session, and the recess appointee is not the person who the Senate rejected. *Id.* § 5503(a). For a longer discussion of this statute, see *infra* text and accompanying notes 173–179.

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* Treasury Department Appropriations Act of 2002, Pub. L. No. 107-67, § 609, 115 Stat. 514, 547 (2001). This provision has been part of the law for at least fifty years. *See* Congressional Research Service Memorandum from Henry B. Hogue, Analyst in American National Government, Government and Finance Division, to Senate 5 (Sept. 10, 2002).

ability to make recess appointments that do not comply with the arise view, he still has significant power to do so.[64] For example, the President can largely avoid the salary restriction by nominating an individual for a permanent appointment at the end of the session prior to the recess when he plans to make the recess appointment.[65]

The second reason why Presidents often do not exercise the full extent of their recess appointment power is that it often is not worth it 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 he believes it worthwhile to incur the possible anger of the Senate from the appointment.[66] Thus, one would expect only a limited number of recess appointments that do not satisfy the requirements of the arise view.

However, that the President does not always make recess appointments when he has the power to do so does not mean that this power is unimportant. In the cases when the President does make recess appointments, his appointees may diverge significantly from the appointments that the Senate would have confirmed.[67] Moreover, the existence of this broad recess appointment power may allow the President to make more extreme permanent appointments than he could 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 the President has less incentive to compromise if, should the Senate reject his nominee, he can always fill the

64. Another limitation of this statute is that it appears to be unconstitutional if the exist view is correct. *See infra* text and accompanying notes 175–178.

65. *See supra* note 63 (stating that the salary restriction does not apply when a nomination was pending at the end of the session). Moreover, the Office of Legal Counsel has interpreted this exception quite broadly. *See* 13 Op. Off. Legal Counsel 271, 276 (1989) (holding that a recess appointee can be paid, even if the nomination is not made at the end of the last session, so long as it is made prior to the recess when the recess appointment is made).

66. The attractiveness of making a recess appointment may depend on whether the appointment is for an executive or judicial officer. The term of a recess appointee may last between one and two years, depending on the 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 can be confirmed by the Senate, a significant number of appellate judges cannot.

67. In fact, one might predict that the President would disproportionately choose to make recess appointments when his appointees would diverge significantly from those that the Senate would confirm.

office with a recess appointee. Thus, the exist interpretation can have an important effect on appointments, even when the President does not make any recess appointments.[68]

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

While there are strong structural reasons 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 formally adopted the exist interpretation for the executive branch in an opinion that sought to justify it as necessary to ensure that vacancies existing 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. Because the vacancies would have arisen during the session, under the arise interpretation 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 must have intended the exist view.[69]

While filling late session vacancies might require additional actions by the President and the Senate, such vacancies 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 do not require changing the meaning of the Recess Appointments Clause.

The main problem with late session vacancies is that these vacancies might arise during the last days of the session, therefore making 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 simply would 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

68. 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. 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, the people will be left 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.

69. Wirt Opinion, *supra* note 44.

postpone its recess for a brief period.[70] In fact, early Presidents and Congresses were conscious of the need to make appointments before the recess, and often confirmed appointees on the last day of a session.[71]

Early Presidents and Congresses also developed other practices that allowed 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 during the recess, which would permit the President to fill the office with a recess appointment.[72] Second, Congress sometimes would recognize that certain inferior offices were vacant and would provide the President with statutory authority to fill them.[73] Thus, Congress used 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 still might be argued that the Senate could end its session without confirming someone to fill a 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 confirming anyone else.[74] These contingencies also do not justify changing the meaning of the Recess Appointments Clause. To begin with, while these contingencies, as well as others, could occur, they do not seem

70. 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 lived in rather than to the world we inhabit today. 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. The contemporary Senate is unlikely to delay its recess to consider a late session appointment simply 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.

71. For an example of President George Washington nominating officers on the last day of a Senate session, and the Senate confirming them on the same day, see 2 SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS 51, 51–53 (Linda Grant De Pauw et al. eds., 1974).

72. *See* Letter from President Washington to the Senate (Feb. 9, 1790), *in* 2 SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS, *supra* note 71, at 58, 58–59; Letter from President Washington to the Senate (Dec. 17, 1790), *in* 2 SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS, *supra* note 71, at 99.

73. *See infra* text and accompanying notes 102–103.

74. Wirt Opinion, *supra* note 44, at 633.

very likely.[75] Moreover, in the unlikely event that they do occur, the President and 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 either could 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 inferior officers only when the vacancy arose within ten days of the end of the session and only for a limited term).

Second, in the case of superior officers, Congress could authorize acting appointments. Under acting appointments, Congress permits 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 Congress would reconvene in a different and safer location,[76] not merely to

75. 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 had ended its session. Under the arise interpretation, that would appear to prevent a recess appointment from being made. However, as the text of the Article indicates, this situation could be addressed through unilateral appointments of inferior officers, through acting appointments, and even through convening 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 readers nevertheless 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 exit 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 resignation letter during the session, but the letter was not received until the recess, the vacancy would not have happened or arisen during the session. The law often faces a question as to when an action is effective—when the action is taken or when notice is received. The most well-known example of this is the mailbox rule in contract law. *See, e.g.*, 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 3.24 (Joseph M. Perillo ed., 1993). Thus, one might conclude that the constitutional language as to when a "vacancy happens" is ambiguous, and that structure and purpose suggest it should be read to mean when the notice is received. Even if one believed that the language pointed strongly in favor of making the event effective when the action was taken, one still might reach the opposite result, based on structure and purpose, before embracing the exist interpretation with its various problems.

76. U.S. CONST. art. II, § 3 (stating that the President "may, on extraordinary Occasions, convene both Houses, or either of them").

confirm appointments, but also to pass legislation necessary for responding to the emergency.[77]

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 a superior office that is vacant to be performed without requiring Senate confirmation of a new superior officer. Thus, acting appointments can be used in a variety of different situations, including to address late session vacancies that are not filled. Unlike the exist interpretation, however, acting appointments do not mangle the Constitution, but instead respect the values underlying the requirement of Senate confirmation of superior officers.

Congress authorizes acting appointments by defining the duties of one office to include the performance of the duties of another office 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 generally would 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 second type, Congress could specify that the Deputy

77. 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 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 could occur. If Congress mistakenly failed to pass an appropriation, no one would argue that the President could ignore the Appropriations Clause. The correct response, that Congress must come back into session to pass the appropriation, also applies to the Recess Appointments Clause.

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 President has more power here, he still would not be exercising appointment authority or appointing one of the subordinate officers to a new office. Instead, he would be assigning a task that is within the job description of all three subordinate officers to one of them in particular. This situation is analogous to a United States Attorney assigning a case to one of the Assistant United States Attorneys in his office. It is within the official duties of each Assistant United States Attorney to try the case, but it is the United States Attorney who decides which one of them will actually perform the duty. Similarly, the President assigns to one of the subordinate officers powers that already are part of the duties of the subordinate 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.[78] 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.[79]

Acting appointments are not only constitutional, but also are 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.

78. 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 the Appointments Clause, *id.* at art. II, § 2, cl. 2.

79. Congress first enacted an acting appointment statute in 1792. CURRIE, *supra* note 51, at 187.

Moreover, there is a strong argument that any officer who acts for a superior officer must himself be a superior officer who received Senate confirmation.[80]

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 in which Congress could restrain acting appointments. First, Congress could limit the length of acting appointments, such as confining them to a term of ninety 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 thirty days of the end of a session.[81] Finally, Congress could restrain the powers exercised by acting officials, such as limiting their powers to making decisions that the acting official—or, alternatively, that the President—believes are essential to the public interest.

Thus, acting appointments offer 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

80. If an officer has as part of his duties the power to serve temporarily as a superior officer, then it would seem that 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 such an office would involve being a superior officer. *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997). *But see* Morrison v. Olson, 487 U.S. 654 (1988) (sharply distinguished by *Edmond*). 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 it might extend for a short period—and these limited duties 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.

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. Because this provision did not require the acting officer to have been confirmed by the Senate, it appears unconstitutional. Interestingly, the successor statute did require that the acting officer receive Senate confirmation. *See* 5 U.S.C. §§ 3345–3349 (2000). *See generally* CURRIE, *supra* note 51, at 187 (discussing the first acting appointment statute and arguing that officers who act for superior officers must be confirmed by the Senate).

81. The main limit on the conditions that Congress can impose on acting appointments is that they not be 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 only if the vacancy was not caused by the President's removal of that 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 different branches' constitutional powers. *See* Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771, 780–81 (1997).

consent provision, because they both require all of the officials who act as superior officers to have secured senatorial consent and also allow Congress to restrain acting appointments should it believe the President has abused his authority.[82]

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 view in protecting the Senate's confirmation role. While the arise interpretation restricts recess appointments to those vacancies that 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 create significant problems for the political branches. While late session vacancies may require that the President and the Senate make special efforts to fill them, including adjusting their schedules, this does not impose unreasonable burdens. It is entirely expected that government officials often must 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 narrower scope of the arise interpretation.

Second, even if one concluded that these inconveniences were serious, they do not necessarily 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 that exist for at least a significant part of the session. Even if filling vacancies that arise late in the

82. One might wonder why, if acting appointments are such an attractive mechanism, 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 serve desirably as acting officers. 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, that would not be ideal since that would give tremendous power to one individual and place a significant burden on him.

session is seriously inconvenient, the Framers might still have preferred to suffer these inconveniences in order to secure the higher quality appointments that senatorial consent would provide. And even if the Framers would have concluded these inconveniences for late session vacancies outweighed the benefits of higher quality appointments, one still would have to consider the reduction in quality produced by recess appointments for vacancies that do not arise late in the session—a reduction in quality that has no offsetting benefit, because long lasting vacancies are not inconvenient to fill. In the end, the structure and purpose argument for the exist interpretation requires one to assume that the Framers placed a very high value on avoiding the possibility that a late session vacancy would not be filled and a very low value on the reduction in quality that bypassing 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 supported by more than text, structure and purpose. This subpart 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, early Congresses also appeared to adopt the arise interpretation.

1. Attorney General Edmund Randolph's Interpretation

An early and important interpretation of 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.[83]

The statute establishing the Mint had peen passed on April 2, 1792, but no person had been nominated for Chief Coiner before the Senate ended its

83. *See* Randolph Opinion, *supra* note 43.

session on May 8.[84] Randolph asked whether the empty office was a vacancy "which has *happened* during the recess of the Senate?"[85] 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 [s]pirit of the Constitution,"[86] 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 is "an exception to the general participation of the Senate."[87] While Randolph recognized that there might be legitimate reasons why the permanent appointment could not be made before the end of the session, those reasons were not sufficient to override the language and the spirit of the Constitution.[88]

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

2. Alexander Hamilton's Interpretation

Alexander Hamilton also interpreted the Clause to have the arise meaning. In 1799, Secretary of War James McHenry,[89] who read 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.[90] In response,[91] Hamilton also argued that the arise interpretation was the correct

84. *Id.* at 166.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 69, 69–71 (Harold C. Syrett ed., 1976).
90. Hamilton provides additional support for my claim in the Introduction to this Article that one sensibly can have a broad view of executive power and a narrow view of the Recess Appointments Clause. *See supra* text and accompanying notes 9–10. In fact, Hamilton's view of executive power is a bit broader than mine at points, while his view of the Recess Appointments Clause is probably narrower, as he adopts the previously occupied interpretation. *See infra* text and accompanying notes 99–101.
91. Hartnett attempts to dismiss this evidence by claiming that Hamilton solely is addressing the question of whether the Recess Appointments Clause applies to offices that have not been previously occupied rather than to the question of whether the Clause requires the vacancy

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."[92]

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

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to have arisen during the recess. Hartnett, *supra* note 36, at 384 n.27; *see infra* text and accompanying notes 99–100 (discussing Hamilton's defense of the previously occupied view, which holds that a vacancy can only occur for an office that was previously occupied). Hartnett's argument, however, is inconsistent with what Hamilton actually says. First, Hamilton adopts an interpretation of "happen" that strongly suggests the arise view rather than the exist view: Hamilton interprets "happen" to mean an event that occurs by accidental circumstances, which is clearly not the "happen to exist" meaning of the exist view, but is quite similar to the meaning employed by the arise view. *See* Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 89, at 94. Second, Hamilton's statement, "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," appears to be a straightforward assertion of the arise view. *Id.* Moreover, given Hamilton's definition of "vacancy" and "happen," it is obvious that he is referring here to a vacancy in a previously occupied office and therefore unambiguously is addressing the arise versus exist question. *See infra* text and accompanying notes 99–100 (discussing Hamilton's definition of "vacancy"). Finally, even if Hamilton were solely arguing for the previously occupied view, there is a strong argument that this suggests he also would hold the arise view. *See infra* notes 100–101.

92. *See* Letter from Alexander Hamilton to James McHenry, *supra* note 90, at 94, 94. 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.

Although Hamilton also was discussing a statute that provided "in [the] recess of [the] Senate, the President of the United States is hereby authorized . . . to make appointments to fill any vacancies in the army, which may have happened during the present session of the Senate," it is clear from the context that his analysis reflects his view of the meaning of both that statute and the Constitution. *See id.* at 95 n.1. First, Hamilton's argument focuses on the words "vacancy" and "happen," which are used in the statute and the Constitution in very similar ways. *Id.* Second, if Hamilton did not also believe that the Constitution had the arise interpretation, then his conclusion that "[i]t 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," would not be true. *See also supra* note 91 (discussing this quote). Finally, Hamilton is responding to a letter written by James McHenry which clearly sets forth both the constitutional and statutory questions, and therefore it is reasonable to interpret Hamilton as also speaking to both issues.

that the office would remain vacant, with the President and the 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 in the recess of the senate, as long as he may think proper.[93]

This discussion makes clear that Tucker 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, under which the President could make a new recess appointment during the recess, irrespective of when the commission ended.[94]

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93. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 279–80 (Liberty Fund 1999) (1803) (emphasis added).

94. 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 60–62. 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 93, at 279, the Constitution actually says it "shall *expire* at the[ ] End of the next Session." U.S. CONST. art. II, § 2, cl. 3 (emphasis added). The Constitution's language suggests slightly more than Tucker's paraphrase that the commission ends during the session.

4. George Washington's Interpretation

There is also evidence that President George Washington and the Senate adopted the arise interpretation. As I briefly mentioned,[95] President Washington and the Senate followed a practice of filling late session vacancies that suggests they adopted the arise interpretation. Under this practice, if there was insufficient 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.[96]

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.[97] Washington could then make a recess appointment at that time while fully respecting the arise interpretation. Under the exist view, by contrast, this practice would not have been needed to make a recess appointment, because the President could recess appoint an individual during the recess even if the vacancy had arisen during the session.[98]

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95. *See supra* text and accompanying notes 71–72.

96. *See supra* text and accompanying note 72.

97. The Eleventh Circuit claims that, in the early years under the Constitution, four recess appointments were made to fill vacancies that arose during a session. *See* Evans v. Stephens, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc) (mentioning the recess appointment of Cyrus Griffin and three recess appointments of judges by Thomas Jefferson in 1801). But the recess appointments cited by the Eleventh Circuit are in fact examples of the practice of appointing an individual without his consent and then, if he turns down the appointment during the recess, making a recess appointment at that time. *See* 2 SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS *supra* note 71, at 47, 59 (describing the recess appointment of Cyrus Griffin to replace Edmund Pendleton, who had declined his appointment); 1 S. EXEC. J. 385 (Feb. 24, 1801) (recording the appointment of Judge Thomas Bee); 1 S. EXEC. J. 389 (Mar. 2, 1801) (noting the appointment of Thomas Johnson); 1 S. EXEC. J. 383 (Feb. 23, 1801) (recording the appointment of John Sitgreaves); 1 S. EXEC. J. 401 (Jan. 6, 1802) (noting the recess appointments made when these three individuals declined the appointments).

98. One might question whether this practice was constitutional. Although my principal purpose in bringing it up—that it suggests George Washington and the Senate adopted the arise interpretation—does not require that it be constitutional, I believe that it is. 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 an appointment requires the appointee to 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 (1 Cranch) U.S. 137, 162 (1803); *see id.* at 161–62 ("When a person appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in

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's and the Senate's motivation, it does not seem probable. Nominating and confirming someone at the end of a session takes effort. It appears unlikely that the President and the Senate would undertake this task without knowing that the prospective appointee would be willing to serve unless they anticipated significant benefits from 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 make 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 previously had been filled but is now empty. A new office that never has been occupied could not have 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 that "*Vacancy* is a relative term, and presupposes that the Office has been once filled."[99] Hamilton further argued that "[t]he phrase 'Which may have happened' serves to confirm this construction" because "[i]t implies casualty—and denotes such Offices as having been once filled, have become vacant by accidental circumstances."[100]

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office, and had created the original vacancy."); *see also* Randolph Opinion, *supra* note 43 (holding that this practice is constitutional).

99. *See* Letter from Alexander Hamilton to James McHenry, *supra* note 91, at 94.

100. *See id.* (citation omitted). It appears that Secretary of War James McHenry agreed with Hamilton. *See id.* at 95 n.2; Letter from James McHenry to Alexander Hamilton, *supra* note 89, at 71.

People who adopt the previously occupied interpretation are very likely to hold the arise interpretation. The main argument put forward against the arise interpretation—that structure and purpose suggest 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 supported powerfully by the language of the Clause, but the previously occupied 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 presently is not 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.[101]

6. Congressional Interpretations

Early Congresses also appeared to adopt the arise interpretation. These Congresses passed various statutes conferring appointment power on the President that would have been unnecessary under the exist interpretation, thereby suggesting that Congress followed the arise view. 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 may, and he is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session."[102] 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

101. 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 Letter from Alexander Hamilton to James McHenry, *supra* note 91; Edmund Randolph accepted the arise interpretation, but not the previously occupied view. *See* Randolph Opinion, *supra* note 43.

102. Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200.

under the exist interpretation is if Congress had adopted the previously occupied interpretation. But as I have argued, if Congress had adopted the previously occupied interpretation, that would strongly suggest it also adopted the arise interpretation. Thus, this statute and others[103] suggest that early Congresses followed the arise view.

7. Interpretation of the Senate Vacancies Clause

Additional support for the arise interpretation derives from an early Senate interpretation of a provision similar to the Recess Appointments Clause. As I discussed previously,[104] 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."[105] This 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 this clause, adopted the arise interpretation of "vacancies happen." In 1794, the Senate refused to sit an appointee of the governor when the vacancy arose during the session but continued into the recess.[106]

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103. For a similar statute, see Act of Mar. 2, 1799, ch. 31, § 2, 1 Stat. 725, 725 (repealed 1802) (providing authority to the President to make appointments of army 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 other types of statutes that provided slightly different evidence in favor of the arise view. 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." Act of Mar. 3, 1799, ch. 47, 1 Stat. 749. Because the previously occupied theory holds that an office that has never been filled does not have a vacancy, adherents of the previously occupied view would not interpret this statute to authorize the President to fill previously unoccupied offices. Thus, Congress's decision to provide the President with this authority cannot be explained based on Congress's alleged acceptance of the previously occupied interpretation, and therefore it appears to be based on 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* Act of July 16, 1798, ch. 79, § 8, 1 Stat. 604, 605 ("And in 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.").

104. *See supra* text and accompanying notes 52–56.

105. U.S. CONST. art. I, § 3, cl. 2.

106. 4 ANNALS OF CONG., *supra* note 56, at 77–78 (describing how 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).

8. The Recess Appointment of Diplomatic Officers

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 different 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 were 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.[107]

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."[108] This language was seen as reflecting a distinction between these named offices and other offices whose appointments were "established by Law." Thus, while the latter offices had to be created by Congress, the named offices purposely were not described as being "established by Law" so they could be created by sources of law other than federal statutes.[109]

107. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 44 (1999); Prakash & Ramsey, *supra* note 10, at 309; Randolph Opinion, *supra* note 43, at 167.

108. U.S. CONST. art. II, § 2, cl. 2.

109. *See* CURRIE, *supra* note 107, at 45; George Washington to the Senate (Jan. 4, 1792), *in* 23 THE PAPERS OF THOMAS JEFFERSON 18, 18–19 (Charles T. Cullen et al. eds., 1990); Diary Entry of George Washington (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 created exclusively by Congress. *See* CURRIE, *supra* note 107, at 45. In contrast with diplomatic officers, Congress chose specifically to create Supreme Court justices. Therefore, there was never an opportunity for the President to create these judicial offices on his own. *See id.*

Both the executive branch[110] and Congress appeared to accept this view of diplomatic 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.[111] 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.[112]

This view of how diplomatic offices are created has important implications for recess appointments. For example, a President might decide during the recess that a new diplomatic office is needed. The President's decision to fill that office simultaneously 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.[113] This situation differs somewhat from the ordinary situation governing offices created by statute that never have been filled. When Congress creates an office by statute, the vacancy usually will arise when the statute takes effect during the session[114] and therefore cannot be filled by a recess appointment.[115]

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110. Randolph Opinion, *supra* note 43, at 167; Prakash & Ramsey, *supra* note 10, at 309; Diary Entry of George Washington, *supra* note 109, at 122; George Washington to the Senate, *supra* note 109, at 18–19; Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 378, 378–82 (Julian Boyd et al. eds., 1961).

111. Act of July 1, 1790, ch. 22, § 1, 1 Stat. 128; CURRIE, *supra* note 107, at 45.

112. The Washington Administration, as well as James Madison, apparently believed that the Senate's role here was very limited. They concluded that the Senate lacked the power to reject a nominee based on its view that the nation did not need a diplomat for a particular country. Rather, the Senate's role was limited to determining whether the nominee was fit. The Washington Administration and Madison also believed that the Senate could not decide on the appropriate pay grade for such nominees. Diary Entry of George Washington, *supra* note 109, at 122; George Washington to the Senate, *supra* note 109, at 18–19.

113. *See* 26 ANNALS OF CONG. 696–705 (1854) (recording debate of Mar. 1814) (statement of Senator Bibb advocating this view); *id.* at 711–13 (recording debate of Apr. 1814) (statement of Senator Horsey advocating this view).

114. Randolph Opinion, *supra* note 43. Under the arise interpretation, the President will not always be disabled from making a recess appointment to a new 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.

115. 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

While the President would have additional discretion to recess appoint diplomatic offices because he could create an office during the recess, he would only enjoy this discretion if the arise interpretation was followed and the previously occupied interpretation was not. Under the previously occupied interpretation, a vacancy is defined as an office that was previously filled but has become vacant.[116] 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 appeared to reject this previously occupied interpretation, as it made recess appointments to newly created diplomatic offices.[117]

While the arise interpretation (without the previously occupied view) would provide additional discretion to the President for the recess appointment of diplomatic offices, it still would impose significant limits on the President. If a diplomatic office were not created during the recess,[118] 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.

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session]. With much 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 was passed creating it?

Id. at 167 (footnote omitted).

116. *See supra* text and accompanying note 40.

117. *See* Randolph Opinion, *supra* note 43, at 167; 2 AMERICAN STATE PAPERS NO. 370, at 242 (Apr. 9, 1814) (providing a List of Ministers and Consuls Appointed in the Recess of the Senate).

118. 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 also would not have arisen during the recess.

9. Subsequent Interpretations: The Administrations of John Adams, Thomas Jefferson, and James Madison

The historical evidence presented here suggests that early interpreters of the Clause adopted the arise view, including the Washington Administration, Edmund Randolph, Alexander Hamilton, early Congresses, and St. George Tucker.

It is not clear when the exist interpretation first started to be followed. The first written opinion attempting to justify that interpretation was penned in 1823 by Attorney General Wirt, more than thirty years after the Constitution was adopted.[119] Significantly, Wirt did not mention any prior recess appointments that employed the exist interpretation.[120] In a recent article, Edward Hartnett spends fourteen pages attempting to show that recess appointments that followed the exist view occurred during the Madison Administration and possibly as early as the Adams or Jefferson Administrations.[121] This subpart, as well as the next, reviews these claims. I argue that Hartnett provides very limited evidence showing that the exist interpretation was employed. Although he discusses many recess appointments, he presents only three situations in which there is any significant evidence that the exist view might have been followed, and in only one of these cases, from 1813, is there a strong case to be made. Moreover, this evidence sheds far less light on the original meaning of the Constitution than does the evidence supporting the arise view.

a. Hartnett's Evidence

One can divide the evidence accumulated by Hartnett into three categories: counterproductive, inconclusive, and worthy of discussion. In the first category, the circumstances surrounding the recess appointments strongly suggest that these appointments followed the arise view, not the exist view. In the second category, one cannot clearly determine whether or not the recess appointments conformed to the arise view, because it is hard to know when the vacancies occurred. Finally, the third category includes three different decisions where there is at least some evidence that the exist view was employed.

The first category of evidence encompasses recess appointments that clearly conform to the arise interpretation. The most important of these recess appointments grew out of an event that is the source of most of

119. Wirt Opinion, *supra* note 44.
120. *Id.*
121. Hartnett, *supra* note 36, at 388–401.

Hartnett's examples: the lame duck Congress following Thomas Jefferson's election in 1801. During that Congress, John Adams and the Federalists sought to create and fill offices with Federalists before Jefferson's inauguration.[122] Although some of the officers were not subject to removal by the President, such as Article III judges and justices of the peace, others were.

Jefferson was outraged by the appointment of both types of officers.[123] Although he did not believe that he could abrogate the completed appointments of the nonremovable officers, he did think that he could replace the removable officers and chose to do so. Jefferson, however, was concerned that these removals would be seen as partisan actions that violated the norm against removing qualified officers simply due to the election of a new President.[124] To avoid being seen as violating this norm, Jefferson decided as a matter of form to treat the removable officers as if they had not been appointed. He would not notify these officials when he replaced them and he would not consider them as candidates to serve in his administration.[125] Similarly, when Jefferson replaced these officials with recess appointments, his

122. *See* DONALD O. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF *MARBURY V. MADISON* 44–60 (1970).

123. *See* Letter from Thomas Jefferson to Pierrepont Edwards (Mar. 29, 1801), *in* 9 THE WORKS OF THOMAS JEFFERSON 245, 245–246 n.1 (Paul Leicester Ford ed., 1905) [hereinafter WORKS OF JEFFERSON]; Letter from Thomas Jefferson to Doctor Benjamin Rush (Mar. 24, 1801), *in* WORKS OF JEFFERSON, *supra*, at 229, 230 (referring to President Adams's lame duck appointments as "indecent conduct").

124. Letter from Thomas Jefferson to Doctor Benjamin Rush, *supra* note 123, at 230 ("But the great stumbling block will be removals, which tho' made on those just principles only on which my predecessor ought to have removed the same persons, will nevertheless be ascribed to removal on party principles."); Letter from Thomas Jefferson to William B. Giles (Mar. 23, 1801), *in* WORKS OF JEFFERSON, *supra* note 123, at 222, 222–23 (worrying that the principle that should govern the removal of a prior President's appointees is contested).

125. In his letter to William Giles, Jefferson wrote "[t]hat some [appointees] ought to be removed from office, & that all ought not, all mankind will agree. But where to draw the line, perhaps no two will agree." Letter from Thomas Jefferson to William B. Giles, *supra* note 124, at 222. Discussing the principles that might govern prior appointees, Jefferson wrote that "all appointments to *civil* offices *during pleasure*, made after the event of the election was certainly known to Mr. [Adams], are considered as nullities. I do not view the persons appointed as even candidates for the office, but make others without noticing or notifying them." *Id.* Similarly, in his letter to Benjamin Rush, Jefferson asserted: "But the great stumbling block will be removals, which tho' made on those just principles only on which my predecessor ought to have removed the same persons, will nevertheless be ascribed to removal on party principles." Letter from Thomas Jefferson to Doctor Benjamin Rush, *supra* note 123, at 230. Jefferson continued:

> I will expunge the effects of Mr. [Adams's] indecent conduct, in crowing nominations after he knew they were not for himself, till 9 o'clock of the night, at 12 o'clock of which he was to go out of office. So far as they are during pleasure, I shall not consider the persons named, even as candidates for the office, nor pay the respect of notifying them that I consider what was done as a nullity.

Id. at 230–31.

message informing the Senate listed the prior occupants as if they had been merely nominated, but not appointed. For example, when replacing Elizur Goodrich, Jefferson wrote "vice Elizur Goodrich, *nominated* February 18th," rather than "vice Elizur Goodrich, *removed.*"[126]

Hartnett views these recess appointments as following the exist interpretation. He argues that Jefferson treated the lame duck appointments as failed appointments. Consequently, the offices would have been vacant during the Senate session and ineligible for a recess appointment under the arise view.[127] Hartnett, however, is mistaken. While Jefferson used political rhetoric to suggest these officials had not really been appointed, his actions show that he treated the appointments as legally valid. First, Jefferson limited his political rhetoric treating the lame duck appointments as nullities to officers that were removable.[128] But if the lame duck appointments were somehow invalid, then the appointment of the Article III judges, for instance, would also have been invalid, allowing Jefferson to appoint Republicans to these judgeships instead of the Federalists appointed by Adams. Yet Jefferson did nothing of the kind, recognizing that these midnight judicial appointments were legal, if politically improper.[129] This conclusion is confirmed by the fact that Jefferson described one of these removable officers as having been appointed and even considered continuing him in office.[130] Because Jefferson

126. According to Hartnett, nineteen other individuals fall into this category of lame duck appointees who were removable and who Jefferson described as merely having been nominated. Hartnett, *supra* note 36, at 399.

127. *Id.* at 399–400.

128. *See* Letter from Thomas Jefferson to Doctor Benjamin Rush, *supra* note 123, at 231. ("So far as they are *during pleasure*, I shall not consider the persons named, even as candidates for the office, nor pay the respect of notifying them that I consider what was done as a nullity.") (emphasis added); Letter from Thomas Jefferson to William B. Giles, *supra* note 124, at 222 (stating that "all appointments to *civil* offices *during pleasure*, made after the event of the election was certainly known to Mr. [Adams], are considered as nullities").

129. Although Jefferson did not attempt to remove the Article III judges who had been appointed in the lame duck session, he was willing to abrogate their appointments when he had another legal excuse for doing so. For example, when Senator Greene's commission turned out to have been mislabeled, Jefferson chose not to correct the commission. But Jefferson required a legal excuse, and was unwilling to act based simply on the fact that lame duck appointments had been made. *See* Letter from Thomas Jefferson to Theodore Foster (May 9, 1801), *in* WORKS OF JEFFERSON, *supra* note 123, at 251, 251–53. Similarly, Jefferson was unwilling to treat the justices of the peace who had received their commission as invalidly appointed. But when they did not receive their commissions, as was the case with William Marbury of *Marbury v. Madison* fame, Jefferson was willing to abrogate their appointments.

130. Jefferson wrote of "the case of Mr. Goodrich, whose being *a recent appointment*, made a few days only before Mr. Adams went out of office, is liable to the general nullification I affix to them. Yet there might be reason for *continuing him*." Letter of Thomas Jefferson to Gideon Granger (Mar. 29, 1801), *in* WORKS OF JEFFERSON, *supra* note 123, at 244, 245 (emphasis added). While Hartnett discusses Goodrich's situation at length, he fails to recognize that Jefferson acknowledged that the appointment had been made. *See* Hartnett, *supra* note 36, at 399.

recognized that these appointments were legally valid, he must be understood to have removed these officials during the recess.[131] Therefore, his recess appointments conformed to the arise interpretation.[132]

The second category of evidence involves recess appointments for which there is no clear information indicating when the vacancy arose. While it is possible that these recess appointments followed the exist interpretation, there is no specific reason to believe that they did. For example, Hartnett raises Thomas Jefferson's recess appointment of David Barnes to a district judgeship.[133] Barnes was filling a vacancy that arose from the resignation of District Judge Benjamin Bourne, who had been elevated to a circuit judgeship by President Adams during the 1801 lame duck session. Unfortunately, there is no strong evidence indicating whether Bourne resigned his district judgeship during the recess, as he might have if he were waiting for the delivery of his new commission before resigning, or during the Senate session.[134] Given the lack of evidence, one

131. Hartnett considers the possibility that Jefferson removed these officials during the recess, but dismisses it on the ground that it would be inconsistent with Jefferson's own understanding of his action, which was to treat Adams's appointments as nullities. Hartnett, *supra* note 36, at 400. Hartnett, however, simply ignores the explanation discussed here: that Jefferson treated the appointments as politically illegitimate, but nonetheless as legal, which is the only explanation consistent with his actions concerning both removable and nonremovable officers. Hartnett also fails to explain the legal theory that could possibly justify Jefferson in concluding that an individual, who had been nominated and confirmed, and had received his commission, did not occupy an office.

132. Another recess appointment discussed by Hartnett for which the evidence strongly suggests that the arise interpretation was followed is Thomas Jefferson's recess appointment of Dominick Hall in 1801. District Judge Thomas Bee had been nominated by John Adams and confirmed by the Senate for a new circuit judge position in February of 1801, but he turned down the position in a letter dated March 19, 1801, during the recess. *See* Letter from Thomas Bee to James Madison (Mar. 19, 1801), *in* 1 PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES 28 (Robert Brugger et al. eds., 1986). Although Hartnett discusses this appointment, he neither questions the date of the declination nor suggests that the recess appointment followed the exist view. *See* Hartnett, *supra* note 36, at 392.

133. Hartnett, *supra* note 36, at 392–93.

134. Although this case is properly classified as inconclusive, the evidence actually points more strongly towards the conclusion that Bourne resigned his judgeship during the recess. President Adams sought to fill Bourne's district judgeship with Senator Ray Greene, who was confirmed by the Senate during the lame duck session. *See* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 498 (1961). But Greene's commission had been mislabeled and Jefferson refused to correct the commission, instead recess appointing David Barnes to the district judgeship. *See* Letter from Thomas Jefferson to Theodore Foster, *supra* note 129, at 251–53. Levi Lincoln, the Acting Secretary of State, explained the circumstances to Jefferson as follows:

> The decision was, to appoint [Greene] to the office of a district judge. The commission to him is, as judge of the circuit court—he has sent it back and wishes to have it rectified. It is probable that Bourne was the judge of the district court. when [sic] the appointment was made—of course, there was no vacancy—His letter of acceptance is dated the 23rd of March.

Letter from Levi Lincoln to Thomas Jefferson (Apr. 8, 1801), *available at* http://memory.loc.gov/ammem/collections/jefferson_papers/. The person referred to in "His letter" is probably Bourne,

cannot treat this case (or the others in this category) as supporting the exist view. As the saying goes, absence of evidence is not evidence of absence.[135]

The last category involves the strongest cases—recess appointments for which the evidence might lead one to conclude that the exist view had been followed. The first of these recess appointments, again, involves John Adams's 1801 lame duck appointments, but in this case the appointments were to justices of the peace who could not be removed by the President. The lame duck Congress had enacted a law providing for "such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient."[136] Adams nominated fifty-six individuals, the Senate confirmed them on the last day of the session, but not all of them received their commissions.[137] Upon taking office, Jefferson refused to deliver the commissions that remained, on the ground that the appointments were not complete without the delivery. Instead, Jefferson gave recess appointments to a new slate of individuals which contained some but not all of the people who Adams had sought to appoint.[138]

To know whether Jefferson intended these recess appointments to comply with the arise interpretation, one must determine when Jefferson believed that the vacancies in these offices occurred. Although offices are

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because the previous phrase referred to him and to the lack of a vacancy in the office he held. In that event, the vacancy occurred during the recess and the recess appointment followed the arise interpretation. Hartnett suggests that "His letter" refers to Greene, but that seems unlikely given the placement of the phrase in the sentence after the reference to Bourne. Harnett also argues that Bourne might already have vacated the judgeship when Greene was appointed. But this argument is based on his erroneous transcription of Lincoln's letter. Hartnett, *supra* note 36, at 395 (transcribing "It is probable that Bourne was the judge of the district court. when the appointment was made," without the period after "district court" and thereby changing the likely meaning of the sentence).

135. Hartnett discusses two other recess appointments that fall into the category of those for which one cannot determine when the vacancy arose. One involved Jefferson's recess appointment of William Stephens to the district judgeship formally held by Joseph Clay. Hartnett, *supra* note 36, at 396–97 (describing it as "likely" that the recess appointment followed the arise interpretation). The other involved John Adams's recess appointment of Isaac Parker as United States Marshal for the position previously held by John Hobby. In that case, the recess appointment was made on March 5, 1799, two days after the Fifth Congress expired. 1 S. EXEC. J. 327 (Dec. 10, 1799). Although Hartnett believes that it is likely that Hobby vacated the position during the session, that judgment is largely unsupported. As Hartnett himself recognizes, Adams may have fired Hobby at the same that Adams made the recess appointment of Parker on March 5. This understanding is supported by the fact that Hobby appears to have committed serious improprieties as Marshal. Hartnett, *supra* note 36, at 388 n.52.

136. Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

137. *See generally* John Copeland Nagle, *The Lame Ducks of* Marbury, 20 CONST. COMMENT. 317, 321–27 (2003).

138. *See* 1 S. EXEC. J. 400–04 (Jan. 6, 1802) (listing commissions); David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 400–02 (1996).

ordinarily created when the statute establishing them is enacted, this statute provided that the President could determine at his discretion how many offices to create and when to create them. Consequently, it is unclear when an office under this statute was created. If an office were created when the statute passed, when the President nominated someone, when the Senate confirmed them, or at any other time prior to the end of the session, a recess appointment to this office would conflict with the arise view. By contrast, if the office were created when the appointment was completed, then Adams would not have created an office in this case. Under Jefferson's view, an appointment was not completed until delivery of the commission, and in this case the commission was never delivered. Consequently, the office would only have been created when Jefferson made the recess appointment during the recess and therefore his action would have complied with the arise interpretation.

Jefferson even may have analyzed this situation in another way. He may have believed that Adams had temporarily created offices when he made the nominations, but that these offices had lapsed when the appointments failed. His recess appointment then would have created new offices. Because these offices would have been created during the recess, the recess appointment would have complied with the arise interpretation. In sum, Jefferson may or may not have conformed these recess appointments to the arise interpretation, depending on when Jefferson believed the offices were created.[139]

The second incident in this category involves an attempted recess appointment by President James Madison in 1813. United States District Judge Dominic Hall resigned from his office on February 22, 1813 during the Senate session that would end on March 3.[140] On April 13, President Madison sought to fill the vacancy with a recess appointment to Theodore Galliard, but Galliard declined the appointment.[141] Based on the available evidence, this recess appointment does seem to have followed the exist view, although even here the evidence is not conclusive.[142] Nevertheless, this example is of

139. Of course, there is no way to know what Jefferson thought in this case or even whether he considered the constitutional issue. As discussed below, that is a problem with the type of evidence principally relied upon by Hartnett.

140. Federal Judicial Center, Biography of Dominic Augustin Hall, *at* http://www.fjc.gov.

141. Letter from Theodore Galliard (Apr. 27, 1813), *in* National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, Record Group 59, Entry 767.

142. It is not entirely clear when Hall resigned, because the information comes from secondary sources. *See* Hartnett, *supra* note 36, at 400. Although Hartnett suggests it was either on the day Hall received a commission for his new job as Supreme Court Justice of Louisiana on

limited force. It occurred nearly twenty-five years after the ratification of the Constitution and there is no indication whether the Madison Administration carefully considered the constitutional question or repeated this action.

b. The Statement of John Adams

Finally, it is worth noting a statement by John Adams that might be thought to support the exist interpretation, but which upon examination does not do so. In a letter to President Adams, Secretary of War James McHenry had asserted his view, discussed above,[143] that there was no statutory authority to make appointments during the recess for certain army offices created during the session but not filled. In response, Adams wrote that the statutory question could be bypassed, as 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 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.[144]

Although Hartnett interprets Adams here to endorse the exist interpretation, there is a strong argument that Adams was not speaking to the arise versus exist issue at all, but instead was arguing against the previously occupied interpretation.[145] First, Adams's actual words concern the previously occupied question, not the arise versus exist question.[146] He was arguing

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February 22, 1813, or on the first day that the Court was established on March 1, 1813, both occurring prior to the end of the Senate session on March 3, that is not absolutely clear. *Id.* Hall might have received the commission and still maintained his District Judgeship for a brief period, perhaps to give the President an opportunity to fill the vacancy with a recess appointment.

143. *See supra* text and accompanying notes 89–92.

144. Letter from President John Adams to Secretary of War James McHenry (Apr. 16, 1799), *in* 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 632, 632–33 (Charles Francis Adams ed., 1853). To my knowledge, the first discussion of this statement in the legal literature was contained in an earlier draft of this Article posted on SSRN.

145. There is also a question as to whether Adams actually adhered to whatever view he happened to be stating here. The recess appointment at issue was never made, because Attorney General Lee found there to be statutory authority for an appointment. Letter from Alexander Hamilton to James McHenry, *supra* note 91, at 95 n.2. Moreover, there is no evidence of how Adams would have responded to the arguments made by McHenry, and through him, Hamilton.

146. As discussed above, the previously occupied interpretation held that the term "vacancy" implied that an office had been previously occupied by an officeholder. *See supra* text

about the meaning of "vacancy"—claiming that there is a vacancy whenever an office is not full. This claim only implicates the previously occupied question. There is nothing in the arise view that denies this claim, and Adams says nothing about the question relevant to the arise versus exist issue—when the vacancy must happen. McHenry's principal argument to Adams, moreover, was focused on the previously occupied issue and therefore it would make sense that Adams was responding to that argument.[147] Adams's justification for his position—that recess appointments could be made for ambassadors and judges in this situation—also supports this interpretation. Adams appears to assume that it was accepted that ambassadors and judges could be recess appointed in this situation. But it would not make sense for Adams to make this assumption if he were arguing for the exist interpretation, because the Washington Administration, which had been in power for eight of the previous ten years at that time, had followed the arise view. It would, however, make perfect sense for Adams to be assuming that others rejected the previously occupied interpretation, because the Washington Administration had done so.[148] In the end, the weight of the evidence suggests that Adams was opposing the previously occupied view rather than arguing for the exist view.[149]

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and accompanying notes 99–101. Edmund Randolph rejected the previously occupied interpretation, while embracing the arise view. *See* Randolph Opinion, *supra* note 43, at 166–67.

147. McHenry wrote to Adams that he "entertained a doubt" whether a statute that allowed for the filling of certain vacancies "could be construed to intend appointments to offices which had never been filled." Letter from James McHenry to Alexander Hamilton, *supra* note 89, at 71 n.1.

148. *See* Randolph Opinion, *supra* note 43, at 166–67. One consideration that would support the conclusion that Adams was arguing both against the previously occupied interpretation and for the exist interpretation is if one determined that the office McHenry sought to fill had existed during the previous session. Then, both acceptance of the exist interpretation and rejection of the previously occupied view would be required to make the recess appointment. Although McHenry appeared to believe that the office had been created during the session, Adams reasonably may have thought otherwise. McHenry wrote that the legislation authorizing the office had been passed in the previous session. *See* Letter from James McHenry to Alexander Hamilton, *supra* note 89, at 69–71. The principal legislation authorizing Army officers during the previous session, however, permitted the President to choose in the future to raise an army. *See* Act of Mar. 2, 1799, ch. 31, 1 Stat. 725 (repealed 1802) (passing legislation two days before the end of the session that authorized the President under certain circumstances to decide to raise additional military forces). Thus, President Adams reasonably might have believed that he had created the office during the recess, even though the legislation had passed during the session and therefore, the recess appointment would be permitted under the arise interpretation.

149. If Adams were not only arguing against the previously occupied interpretation but also for the exist interpretation, one might question how much weight his view should be given, as his argument would then appear to rest on some erroneous assertions. His argument would seem to suggest it was recognized that ambassadors could be recess appointed under the exist interpretation, which was not the position of the Washington Administration. He would also seem to suggest that there was no ground for distinguishing between ambassadors and judges, on the one hand, and all other officers, on the other. Yet, it is the Constitution that was thought to

10. The Import of Early Interpretive Practice Under the Recess Appointments Clause

This review of early practice under the Recess Appointments Clause strongly supports the arise interpretation. While there is powerful evidence for the arise view from the Washington Administration, Congress, and early commentators, the support for the exist view largely is limited to one inconclusive decision from the Jefferson Administration and one attempted recess appointment during the Madison Administration. Although the historical case for the arise view derives in part from the fact that there is more evidence for it, and the evidence is more proximate to the enactment of the Constitution, there is another reason why the evidence for the arise view is compelling: The nature of this evidence is especially likely to shed light on the original meaning of the Constitution.[150]

Early interpretations evidence the original meaning of the Constitution because it is thought that early interpreters were likely to understand the meaning of the constitutional language and the context in which it was enacted.[151] The weight to be accorded early interpretations, however, turns on whether the interpreter impartially based his decision on a genuine and considered view of the constitutional provision. One reason why an early interpretation might be given reduced weight is if it was motivated by the interpreter's self-interest. The evidence supplied by Hartnett of Presidents and executive branch officials who may have interpreted the Recess Appointments Clause broadly raises the suspicion that these interpretations were influenced by a desire to enhance executive power. Interpretations in these circumstances are entitled to less respect.[152]

Another reason why an early decision might not reflect the original meaning is that it was taken without significant attention to the constitutional question. If a decision was made without seriously considering or even being aware of the constitutional issue, there is little reason to rely on

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distinguish ambassadors and justices from other offices that had been created pursuant to statute. *See supra* text and accompanying notes 107–112.

150. Consequently, even if one were to uncover many additional examples of recess appointments that followed the exist interpretation during the post-Washington administrations, one still might argue that the evidence supporting the arise interpretation was stronger.

151. *See supra* text and accompanying note 22.

152. Thomas Jefferson's actions with respect to John Adams's lame duck appointments might also be accorded less than full respect. Because the lame duck appointments outraged Jefferson, it is quite possible that he stretched his authority to abrogate as many lame duck appointments as he could. Thus, even if Jefferson's recess appointments of the justices of the peace conflicted with the arise interpretation, one might question the weight his decision merits.

it. Virtually all of the evidence supplied by Hartnett involves possible exercises of the exist view without any explanation by the decisionmakers and therefore is vulnerable to this criticism. There is no way to know whether the officials carefully reviewed the constitutional issue or were even cognizant of it.[153]

By contrast, the Washington Administration's practice, especially as justified by the Randolph opinion, is entitled to enormous respect. First, the Randolph opinion engages in a penetrating analysis of the constitutional question, addressing not only the main issue but also important ancillary questions such as the recess appointment of ambassadors and the practice of appointing individuals without their consent.[154] Randolph clearly placed great importance on the Constitution that he had done so much to draft and ratify.[155] Second, Randolph's opinion reaches a conclusion that reduces the power of the executive. Thus, the opinion cannot be explained as an attempt to secure additional authority, but is best understood as motivated by the genuine constitutional convictions of an attorney general well positioned to discern the original meaning of the Constitution.

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 remaining issue concerning the Clause that often is 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, such as during the session? 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 say specifically 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.

Although the language of the Clause does not resolve the issue, clearly the Clause should be interpreted to require the recess appointment to be

153. A serious constitutional discussion of the matter would have taken into account Randolph's opinion and the practice of the Washington Administration, and would have sought to justify departing from these precedents. Even Attorney General Wirt's opinion, which certainly engages the textual and structural issues, fails to respond to Randolph's view.

154. Randolph Opinion, *supra* note 43.

155. Notable Names Database, Edmund Randolph, *available at* http://www.nndb.com/people/099/000049949/.

made during the recess—the recess when the vacancy arises 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 possible 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.[156]

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 Henry Stanbery maintained that the arise interpretation required only that the vacancy arise during the recess and therefore that the Clause absurdly permitted allowing a recess appointment during the session.[157] At the same time, Stanbery believed that the exist interpretation would not allow this absurdity. Clearly, though, Stanbery was confused. While he certainly is correct that one can combine the arise interpretation with a view that allows the recess appointment at any time, he

156. It is not certain how one should classify the interpretive reasoning that leads to this result. One possibility is that this interpretation conflicts with the text and therefore should be reached only to avoid an absurdity. *See supra* text and accompanying note 14. Another possibility is that the language of the Clause is largely silent on when the commission may be granted. Under this view, the interpretation does not require finding an absurdity, but only that the structure and purpose strongly support it. This latter view is bolstered by the fact that virtually everyone initially reads the Clause to require a recess appointment during the recess. Interpretations that conflict with the text are not usually the obvious reading. Since I believe that reading the Clause to allow recess appointments during a session would be absurd, however, it is not necessary for me to decide whether or not my interpretation conflicts with the text.

157. 12 Op. Att'y Gen. 32, 38–39 (1866).

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.[158]

E. Decline of the Arise Interpretation

While the historical evidence suggests that the arise interpretation was often followed in the early years under the Constitution, the exist interpretation was formally adopted by Attorney General Wirt in 1823 and has been largely followed ever since. This section reviews Attorney General Wirt's opinion[159] and then discusses the federal statute that has sought to restrict, but not eliminate, the President's use of the exist interpretation.

158. While Hartnett originally argued in favor of Attorney General Stanbery's position, see Edward A. Hartnett, Recess Appointments of Article III Judges 9–10 (draft of Mar. 18, 2004, on file with author), prompting me to add this section, he then changed his mind. Now he agrees that the Clause does not allow, under either the arise or exist interpretation, recess appointments to be made during the session, but relies on a different argument. Harnett maintains that "during the recess of the Senate" does not merely modify "may happen," but also "shall have the power." *See* Hartnett, *supra* note 36, at 381 n.20. Although his bottom line is now consistent with mine, I still disagree with his reasoning. The problem with Hartnett's interpretation is that it does not follow the way that people ordinarily write and speak. As the reader will no doubt attest, in the phrase, "the President shall have power to fill up all vacancies that may happen during the recess," the words "during the recess" seem to modify only "vacancies that happen." This conclusion is also supported by a canon of statutory construction, the last antecedent rule, which provides that a limiting phrase generally is read as modifying only the noun or phrase that that it immediately follows. *See* Barnhart v. Thomas, 540 U.S. 20, 26–29 (2003); 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33, at 369–74 (6th rev. ed. 2000). It is true that sometimes, in ordinary language and statutes, qualifying phrases are read as referring to more than one antecedent when the context suggests this result. But that occurs when the structure of the sentence groups the possible antecedents together and thereby informs the reader that a qualifying phrase might apply to all of the antecedents. For example, if a sentence includes a list, a qualifying phrase at the end of the list might apply to all of the items on the list. *Cf.* FTC v. Mandel Bros., Inc., 359 U.S. 385, 389–90 (1959) (discussing the possibility of not following the last antecedent rule for a list of items, but deciding not to do so). In the Recess Appointments Clause, however, the phrase "shall have power" is not grouped with the phrase "may happen," but is simply earlier in the sentence. Moreover, the Clause actually seems to group "during the recess" with "may happen" since the phrase "may happen during the recess" is so closely integrated. This grouping further cuts against any notion that "during the recess" would modify an earlier phrase. Thus, while Hartnett's interpretation conflicts with the ordinary rules of reference, my interpretation honestly confronts the issue of whether this limitation was implied by the Framers and what evidence is necessary to sustain this conclusion.

159. 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 thirty-six years after the Constitution was drafted. While it is entitled to some respect, it cannot be compared to the views of leading figures of the Framing period, such as Randolph and Washington, discussed above. *See supra* text and accompanying notes 83–89, 95–98.

1. Attorney General Wirt's Opinion

Although Attorney General Edmund Randolph had adopted the arise interpretation in 1792,[160] his opinion was overruled silently 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.[161]

While I already have had occasion to refer to different aspects of Wirt's opinion, it is useful to review his argument in a single place. Wirt's basic argument is that while the text of the Clause supports the arise interpretation,[162] structure and purpose favor the exist interpretation and outweigh the textual evidence.[163] First, Wirt commendably admits that the more "natural sense" of the language supports the arise interpretation.[164] Yet, he is quick to add that one can reach the exist interpretation "without violence" to the language.[165] Then, Wirt 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. Wirt's 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 "[t]he substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."[166] As I have discussed, although Wirt lists several situations in which he believes that vacancies might not be filled, the political branches would have various mechanisms available for filling these vacancies.[167]

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160. Randolph Opinion, *supra* note 43, at 165.

161. Wirt Opinion, *supra* note 44. 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 opinions which have cited Wirt's opinion and relied on his reasoning, include: 2 Op. 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) (Stanbery), 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. 61 (1889) (Miller), 30 Op. Att'y Gen. 314 (1914) (Gregory), and 33 Op. Att'y Gen. 20 (1921) (Daugherty) [hereinafter Daugherty Opinion].

162. Wirt Opinion, *supra* note 44, at 632–33.

163. *Id.* 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." *Id.* at 632.

164. *Id.* at 631.

165. *Id.* at 632.

166. *Id.*

167. *See supra* text and accompanying notes 68–78.

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 consent requirement rather than to fill offices that would otherwise remain vacant. In the weakest part of the opinion, Wirt briefly states that "[t]he 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."[168]

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 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.[169] Similarly, Wirt's prediction about the recess appointment power—that Presidents would never use the exist interpretation to circumvent Senate confirmation—also has turned out to be grossly mistaken. Not only do Presidents do this fairly regularly,[170] but their lawyers now view the Recess Appointments Clause as a "counterbalance to the power of the Senate." In other words, the executive branch now assumes the legitimacy of circumventing Senate confirmation.[171]

In the end, Wirt's opinion is problematic 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 Presidents from circumventing the Senate. Had Wirt attended to the risk that Presidents might abuse a broad recess appointment power, he could not have concluded that the natural meaning of the text should be disregarded.[172]

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168. Wirt Opinion, *supra* note 44, at 634.

169. The classic cite is to James Madison. *See* THE FEDERALIST NO. 51 (James Madison).

170. *See* Carrier, *supra* note 37, at 2212–16.

171. 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 248, 257 (1989).

172. One significant event that I do not discuss 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, although mentioning their agreement with the exist view. *See* 26 ANNALS OF CONG. 651–57, 694–722, 742–58 (1854) (recording debates of March and April 1814).

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. The modern version of this statute[173] uses Congress's appropriations power to restrain 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: (1) when the vacancy arose within thirty days of the end of the session; (2) when a nomination for the vacant office was pending at the end of the session; and (3) when a nomination for the vacant office was rejected within thirty days of the end of the session.[174]

This statute appears to be 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

173. The present version of the statute is codified at 5 U.S.C. § 5503 (2000). The original version, passed in 1863 and only relaxed in 1940, attempted to constrain the exist 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 is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate." Act of Feb. 9, 1863, 12 Stat. 646 (1863); 5 U.S.C. § 56 (1934). In fact, it appears that this statute was enacted based on the Senate's view that the Constitution adopted the arise interpretation. The Senate Judiciary Committee issued a report on January 28, 1863, twelve days before the Act was enacted, that strongly defended the arise interpretation. The report, written by Senator Jacob Howard, who would later play a significant role in drafting the Civil War Amendments, made all of the principal arguments for the arise interpretation: that the language clearly adopts the arise view; that the exist view employs a peculiar sense of the term "happen"; that the purpose of the appointment clauses is not merely to fill vacancies but also to ensure that the Senate will have an opportunity to consent to appointments; that the exist interpretation permits the President to make unchecked appointments that can be repeated and therefore are not temporary; that the Framers believed that any inconveniences of the arise interpretation were outweighed by the benefits of preserving an important role for the Senate; and that any real inconveniences from the arise interpretation could be better addressed through an acting appointment statute than through the exist view. *See* S. REP. NO. 37-80, (3d Sess. 1863). The 1863 statute and Senate Report suggest that earlier Congresses had embraced the arise interpretation much more forcefully than the modern Congress and that any Senate acquiescence in the exist view dates largely since 1940.

174. These exceptions are also subject to other limitations. First, the exception for a vacant office that is 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 a nomination rejected within thirty 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 forty days of the next session. 5 U.S.C. § 5503.

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 thirty 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,[175] the executive often can 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 exist interpretation is the correct view of the Constitution, the statute is unconstitutional because it uses Congress's appropriations power to infringe on the President's recess appointment authority. Congress cannot use its appropriations power to take actions indirectly that it could not take directly.[176] For example, just 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 cannot pass a statute forbidding the President from making recess appointments for offices that were vacant during the session except in the three circumstances 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.[177] Congress can no more

175. *See supra* text and accompanying notes 63–67.

176. 43 Op. Att'y Gen. 293 (1981); 41 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."); William 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 control."); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350–51 (1988); 20 Op. Off. Legal Counsel 182 (May 8, 1996) (preliminary print) ("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." (quotations and citations omitted)), *available at* http://www.usdoj.gov/olc/hr3308.htm.

177. Given the clear unconstitutionality of the statute under the exist interpretation, one might wonder why the executive branch has not argued that section 5503 is unconstitutional. After all, the executive has not been shy about fighting what it regards as unconstitutional uses of the appropriations power to infringe on the executive's prerogatives. *See, e.g.*, 5 Op. Off. Legal Counsel 1, 5–6 (1981) ("Congress could not deprive the President of this power [to perform his

use its appropriations power to restrain the President's recess appointment authority than any of the President's other constitutional powers.[178]

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 already are prohibited by the arise view. Congress may certainly use its appropriations 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

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constitutional responsibilities] by purporting to deny him the minimum obligational authority sufficient to carry this power."). My strong suspicion is that the 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.

178. Hartnett questions my claim that section 5503 unconstitutionally employs Congress's appropriations power to infringe on the President's recess appointment authority. *See* Hartnett, *supra* note 36, at 405. While Hartnett maintains that this area of the law is not clear, he fails to explain why my argument is mistaken. If Congress can prohibit the use of funds to exercise one presidential power, then it can do so for any presidential power, including the power to veto bills, pardon individuals, or negotiate treaties. While Congress can use its appropriations power to determine governmental priorities and to save governmental funds, section 5503 pursues neither of these goals. Instead, it simply attempts to restrain the President from using his recess appointment authority in certain circumstances. Although the precise reach of the appropriations power may be uncertain, that the Constitution forbids such naked attempts to infringe presidential power is not.

Hartnett also claims that I fail to explain why Congress can schedule short recesses that limit the President's opportunity to make recess appointments, but cannot use its appropriations power to restrain his recess appointment power. *See id.* at 405 n.127. But the analogy between these two powers is not apt. To begin with, Congress's power to schedule recesses differs from its power over appropriations. The President's recess appointment power is explicitly limited by Congress's power to schedule recesses—he only has power to fill vacancies that happen "*during the recess of the Senate*." Thus, when Congress schedules shorter recesses, the President's recess appointment power automatically contracts. By contrast, the appropriations power does not contract, but instead overrides or abridges the recess appointment power. This textual analysis is confirmed by the purpose of the Recess Appointments Clause, which is not to provide the President with an opportunity to make unilateral appointments, but instead to allow appointments to be made during the recess. If Congress did not schedule any recesses, the President would have no constitutional grounds to complain.

Finally, even if one believed that Congress could abridge the President's recess appointment power by scheduling short recesses or no recesses at all, that would not help to establish that Congress could use its appropriations power to abridge the recess appointment power. It would merely suggest that there are additional limits on Congress's power to schedule recesses. One problem with finding such limits, however, is that Congress may schedule short recesses for any number of reasons and therefore it would be difficult to determine whether any particular scheduling were permissible. By contrast, section 5503 makes clear that it is designed to restrain certain exercises of the recess appointment power.

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 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.[179] 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 also would 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,

179. *See* INS 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).

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 nineteenth century and is rarely even defended any longer.

III. THE MEANING OF THE TERM "RECESS"

I now turn to the second question addressed in this Article: 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 whether it also may include intrasession recesses. Under the intersession interpretation, a recess appointment can be made only in the period between two sessions of Congress. Under the intrasession interpretation, by contrast, a recess appointment can be made either during an intersession recess or 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 "all-recesses" interpretation. Under this view, an intrasession recess of a single day would constitute a recess (although perhaps weekend breaks, when the legislature does not ordinarily meet, would not). Alternatively, one might believe that the term "recess" includes only intrasession recesses that are greater than a specified length, such as ten days or a month—what I call the "practical" interpretation.

Originally, the Clause was applied mainly to intersession recesses. While Attorney General Philander Knox explicitly endorsed the intersession interpretation in 1901,[180] two decades later Attorney General Harry Daugherty overruled this position and adopted the practical interpretation.[181] 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 conducting business, Daugherty would ask whether there was a duty of attendance, whether the chamber was empty, and whether anyone was there to receive communications from the executive.[182] Daugherty did not believe that this analysis yielded any specific minimum time period for a recess, but he did conclude that clear cases

180. *See* 23 Op. Att'y Gen. 599 (1901) [hereinafter Knox Opinion].

181. Daugherty Opinion, *supra* note 161. 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).

182. Daugherty Opinion, *supra* note 161, at 25.

existed: A break of thirty days would certainly be a recess, whereas a break of ten days would not.[183] 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 recess making it impossible for him to receive the advice and consent of the Senate."[184]

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 eighteen days is constitutionally sufficient.[185] President George H.W. Bush made several recess appointments during a twelve-day intrasession recess.[186] President William Clinton recess appointed an Ambassador during a ten-day intrasession recess,[187] while more recently President George W. Bush also recess appointed William Pryor to the Eleventh Circuit during a ten-day intrasession recess.[188]

The executive branch's legal analysis contemplates even shorter recesses. One opinion suggested that just three days might be sufficient. A Justice Department legal brief argued that in principle there is no minimum

183. 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 neither 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?

Id. at 24–25 (citation omitted).

184. Elaborating on the President's discretion to make recess appointments, Daugherty wrote that "[e]very 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.

185. Memorandum Opinion for the Deputy Counsel to the President, from the Acting Assistant Attorney General, Recess Appointments During an Intrasession Recess (Jan. 14, 1992).

186. *See* Carrier, *supra* note 37, at 2215.

187. *See* Tom Raum, *Clinton Gives "Recess Appointment" to Gay Philanthropist*, ASSOCIATED PRESS, June 4, 1999.

188. Earle, *supra* note 8.

length for a recess.[189] If this opinion were accepted, the practical interpretation would be transformed into the all-recesses view.

This subpart explores these three interpretations—intersession, practical, and all-recesses—and argues that the evidence from text, structure, purpose, and history strongly favors the intersession interpretation over the other two. 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 to 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.

Before proceeding, though, a brief point about terminology. This Article follows the modern terminology of referring to breaks during the session as intrasession recesses and breaks between sessions as intersession recesses. This terminology, however, is problematic because it prejudges the issue by calling a break during the session a recess. It thus unfairly forces adherents of the intersession view to argue that something called an "intrasession recess" is somehow not a recess. It would be better if the two types of breaks were referred to as intrasession adjournments and intersession adjourments, because all commentators appear to accept that both intrasession and intersession breaks are adjournments.[190] Unfortunately, the disadvantages of using new terminology outweigh the advantages of using fair terminology and therefore I shall continue to use the conventional language. But no inference should be drawn from the modern usage of the term "intrasession recess" that the Framers understood the words in the same way.

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.

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189. Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment on Count II at 14, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (No. 93-0032-LFO) ("There is no lower time limit that a recess must meet to trigger the recess appointment power.").

190. Interestingly, Attorney General Daugherty used more neutral terminology when he wrote the first opinion justifying an intrasession recess appointment, referring to the intrasession recess at issue as "an adjournment." *See* Daugherty Opinion, *supra* note 161, at 20–21, 24–25.

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."[191] One problem for this view is that the dictionary meaning of "recess" included short breaks of thirty minutes, while the all-recesses view restricts recesses to a minimum of one day. Still, one might argue that the all-recesses meaning is close enough to the dictionary definition to be plausibly viewed as reflecting the ordinary meaning.

The intersession interpretation, by contrast, reads the term "recess" to mean a period when Congress is not in session. Under this view, a recess is not just any break in the business of the legislature, but only a break that occurs when the legislature is out of session. This position views a recess as mutually exclusive with the legislative session. A legislature is either in session or on a recess, but never both at the same time.

The intersession understanding of "recess" has some connection to the ordinary meaning—one acceptable definition of "recess" is a period when the legislature is not in session—but also it is a more specialized meaning of the term. This specialized meaning can be understood as an American development growing out of the prior English law on the subject.

In England, there were three types of breaks in legislative proceedings. First, an adjournment was a break in the business of a house that occurred during the legislative session. An adjournment was called by a house and could be of extremely short duration.[192] Second, a prorogation was an order by the King that

191. 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." WEBSTER, *supra* note 46, at 51. A similar definition is contained in Johnson's Dictionary. *See* JOHNSON, *supra* note 46, at 1602–03.

192. *See, e.g.*, 1 BLACKSTONE, *supra* note 13, at *186; LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 206–07 (Little, Brown & Co. 2d. 1856); THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, *reprinted in* LEWIS DESCHLER, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES EIGHTY-THIRD CONGRESS, H.R. DOC. NO. 564, at 279–81 (1953).

would end the session for both houses. The resulting break in the business of the Parliament would eventually be followed by a new session.[193] Finally, a dissolution would end the Parliament and require elections for a new Parliament. A dissolution could occur through a proclamation by the King, through the death of the King, or after the Parliament had lasted for seven years.[194]

Because the United States was a republic, the Framers modified these practices to eliminate the monarch's role. Adjournments did not involve the King and so they were retained. Thus, under the Constitution, each house has the authority to adjourn for up to three days during the session, and to take longer breaks with the consent of the other house.[195] For dissolutions, the King's role was omitted, leaving only dissolutions that occurred after a term of years. Thus, every two years, the entire House of Representatives and one third of the Senate would be newly elected.[196]

Finally, the Framers eliminated prorogations by the monarch. Instead of allowing the King to end congressional sessions, the Framers gave that right to the two houses.[197] The Framers, however, did not use the term "prorogue" to describe this power, perhaps because it was associated with a monarchial prerogative that was thought to be inappropriate for a republic.[198] Rather, when the Framers needed to refer to breaks between sessions, they used the term "recess," which previously had been employed with this meaning in American law.

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193. *See, e.g.*, 1 BLACKSTONE, *supra* note 13, at *187; CUSHING, *supra* note 192, at 207–09; DESCHLER, *supra* note 192, at 279–80.

194. *See, e.g.*, 1 BLACKSTONE, *supra* note 13, at *188; CUSHING, *supra* note 192, at 210–11; DESCHLER, *supra* note 192, at 280–82.

195. U.S. CONST. art. I, § 5, cl. 4 ("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."). While the Framers largely retained for Congress the traditional power of adjournment, they used the term "adjournment" with a broader meaning than it had under English law. *See infra* note 198 (discussing use of "adjournment" to include all recesses). This meaning was one of the ordinary meanings. *See* 1 OXFORD ENGLISH DICTIONARY, *supra* note 46, at 157 (defining "adjournment" with usages from the seventeenth century as "the act of adjourning" or as "the state of being adjourned").

196. U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 2.

197. *Id.* § 5, cl. 4 (allowing the two houses to adjourn during the session).

198. Instead of referring to prorogations, the Framers used the term "adjourn" to cover decisions to end the session and to take breaks during a session. *See id.* Thus, the Framers used the term "adjournment" with a broader meaning that it had traditionally under English law. *See infra* Part III.A.3 (arguing that "adjournment" in the Constitution refers to all cessations of business, whether during the session or after it); *see also* 1 OXFORD ENGLISH DICTIONARY, *supra* note 46, at 157 (defining adjournment and stating that traditionally in England prorogation referred to the close of a session, but now in the United States and in England, adjournments had come to include breaks during and between sessions). Having abandoned the term "prorogation" and using a broader meaning of "adjournment," the Framers needed a term to refer to breaks between the sessions—for which, I argue, they used "recess."

The term "recess" had been used to refer to a break between the sessions in the Massachusetts Constitution of 1780, which was a source of many features of the United States Constitution, and would shortly be used again with that meaning in the New Hampshire Constitution of 1792.[199] The Massachusetts Constitution provided:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [that is, the Massachusetts legislature], to adjourn or prorogue the same to any time the two Houses shall desire . . . *and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess*; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same.[200]

This provision uses the term "recess" to refer exclusively to breaks between sessions. That is, the italicized language says that during a break between two sessions, the governor may prorogue the legislature and thereby extend that break for a period not exceeding ninety days. This interpretation is supported, first, by the structure of the phrases in this provision. The initial phrase speaks of actions that the governor might take "during the session," while the second phrase talks of actions that the governor might take when the legislature is not in session—that is, "in the recess." This interpretation of "recess" also is supported by the fact that the governor is given the power, during the recess, only to prorogue and not to adjourn. If a recess can only occur when the legislature is not in session, then it makes perfect sense to give the governor only the power to prorogue. Providing him with the power to adjourn would be inappropriate because that power can only be exercised during the session.[201]

By contrast, if a recess could occur either during the session or after it, it would have made sense for the drafters to have given the governor both the power to adjourn and to prorogue. Then, if the recess occurred during the session, the governor could choose to extend the break without ending the session. In support of this view, other parts of the Massachusetts Constitution

199. MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. V; N.H. CONST. of 1792, pt. 2, § L.

200. MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. V (emphasis added).

201. The governor's power to prorogue during a recess allowed him, in a recess that was scheduled to end on one date, to extend its length to a later date. This suggests that the power to prorogue was not limited to the authority to end a session, but also included the power, once a session had ended, to extend the length of the recess. It seems likely that this authority to extend a recess was in England part of the King's power to prorogue, because it would have allowed the King to change his mind as to the length of a recess, but I have not been able to find specific authority to that effect. *See also* 1 BLACKSTONE, *supra* note 13, at *150–*53 (discussing the power of the King to call a Parliament).

that contemplate gubernatorial actions during the session consistently give him the power either to adjourn or to prorogue.[202] In sum, then, the intersession interpretation derives in part from ordinary language, but is largely clarified by American constitutional usage at the time of the Framing.

Finally, there is the practical interpretation, which defines "recess" as a period when the Senate as a practical matter is not conducting business. This interpretation might also be thought to rely on the ordinary meaning of "recess." It seems plausible, in ordinary language, to use "recess" to mean a break in legislative business of a substantial degree, excluding very short interruptions as not really amounting to a recess. One significant problem with this understanding of "recess" is that there is no clear way to distinguish between legislative breaks that are long enough to count as recesses and those that are not. The extreme vagueness of this interpretation makes it unlikely that the Framers would have employed this concept of a "not-too-short" break in the legislative proceedings.[203] This inference seems especially strong because uncertainty over whether a recess had occurred—and therefore whether a valid recess appointment could be made—could create serious problems concerning whether the purported recess appointee's acts were valid.

Attorney General Daugherty attempted to solve this definitional problem, but his proposed solutions cannot be derived satisfactorily from the Constitution. Daugherty's principal method was to argue that recesses were accompanied by certain features (that there was no duty of attendance at the legislature, that the chamber was actually empty, and that there was no one present to receive communications from the executive) and then to attempt to determine the minimum time period that would allow these features to occur (somewhere between ten and thirty days).[204] But this argument is seriously flawed.

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202. *See* MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. V ("The Governor, with advice of Council, shall have full power and authority, during the session of the General Court, to adjourn or prorogue the same to any time the two Houses shall desire"); *id.* (declaring that the Governor has the power "to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same"). The Massachusetts Constitution also provides that:

> In cases of disagreement between the two Houses, with regard to the necessity, expediency or time of adjournment, or prorogation, the Governor, with advice of the Council, shall have a right to adjourn or prorogue the General Court, not exceeding ninety days, as he shall determine the public good shall require.

Id. at art. VI.

203. *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 306–09 (1989).

204. Daugherty Opinion, *supra* note 161, at 25.

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, Congress does not close down completely even during very long recesses. There are often committee meetings during recesses, and therefore many legislators may have a duty of attendance and actually be in attendance.[205] In addition, the congressional houses may leave agents to receive presidential communications.[206] Thus, the features that Daugherty identifies may be satisfied even though 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 the house can, then it clearly has not taken a recess. If the house cannot take action as a whole, then it is not able to confirm nominees and therefore has taken a recess. Under this view, the features that Daugherty mentions are either secondary or irrelevant. Moreover, even if the Daugherty features were deemed to be 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 or even explain why those features lead one to conclude that the minimum period for a recess is between ten and thirty 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 be, for example, a short three-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.[207] In the end, then, Daugherty's approach does not really solve the problem of the practical interpretation's vague standard. It neither suggests a specific time period nor provides a persuasive and workable analysis for determining such a time period.

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205. This was also true in the eighteenth century. In England, committees could sit during a recess during the session but not after the session ended. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE (U.S. Gov't Printing Office 1993) (1801).

206. *See* Carrier, *supra* note 37, at 2241.

207. Similarly, there might be 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.

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 time 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.[208] Perhaps for these reasons, Daugherty was unwilling to select a single time period and instead came up with a range of more than ten days but fewer than thirty. This did little to lessen the arbitrariness of the definition, but it did create uncertainty.[209]

A final approach is to find a time limit within the Constitution itself. Significantly, the Constitution distinguishes between adjournments that are

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208. *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 Congress); *id.* § 5, cl. 4 (specifying that the consent of both houses is needed for adjournments of longer than three days).

209. While I have described Daugherty's approach as looking to three features (whether there was a duty of attendance, 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, *supra* note 161, at 25. I have omitted this feature from the analysis in the Article's 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 206–207. If the Senate can act as a whole, it is difficult 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 difficult 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 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 recess from a Senate report that had been drafted in response to a unique historical episode. S. REP. NO. 58-4389 (1905). In 1903, the Senate ended its old session and began its new session on the same day. The presiding officer struck the gavel down once to end the old session and then immediately did so again to start the new session. Thus, the "intersession recess" lasted only for the brief instant between the two gavel strikes. President Theodore Roosevelt, however, argued that there was nonetheless an intersession recess at the moment between the two sessions that allowed him to make a recess appointment. While the definition of a recess in the Senate report may have made sense as a means of criticizing Roosevelt's claim that there was a "constructive recess" at the moment between the two sessions, it does not help to identify those multiple-day recesses that might be "too short" to count as a recess.

three days or fewer 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.[210] Based on this provision, one might argue that the Constitution draws a distinction between de minimis adjournments 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 defining a recess in terms of a specific number of days, it does not succeed in finding a constitutionally based limit. Merely because the Constitution draws a line at three-day adjournments in one context does not mean that it intends that same line to apply in other 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 three-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 three-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 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 difficult 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. 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, both the all-recesses and the intersession interpretations are consistent with the use of the term "recess" in the text.

210. U.S. CONST. art. I, § 5, cl. 4.

2. Recess and Adjournment

Comparing 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. An examination of the two terms strongly suggests that the Constitution employs the term "adjournment" to refer to all breaks in legislative proceedings, while it uses the term "recess" with a different meaning—the one employed by the intersession interpretation or possibly the practical interpretation.[211]

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.[212] That the Framers followed this consistent pattern of usage concerning the two clauses suggests that they intended them to have distinct meanings.

Consider first the Constitution's use of the term "adjournment." When the Constitution was written, there were at least two meanings of "adjournment." First, there was the dictionary meaning, which referred to any type of break in legislative business.[213] Second, there was the meaning under English law, which defined "adjournment" as a break in the legislative business that occurred during a session of the legislature.[214] A review of the five constitutional provisions that use "adjournment" makes clear, however, that the Framers used the dictionary meaning of the term. The first provision is in the Presentment Clause, which authorizes the President to return bills that he vetoes to Congress so that Congress will have an opportunity to override his

211. 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 ("adjourn[ing] from day to day") and long breaks (stating that 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, art. IX, cl. 7 (1777). 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. IX, cl. 6, art. X.

212. While the text claims that the two clauses using "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 Constitution.

213. *See supra* note 195.

214 *See supra* text and accompanying note 192.

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."[215] The term "adjournment" here should be understood to refer to all recesses, because both intersession and intrasession recess can interfere with the President's constitutional right to take ten days to return a bill to Congress. In fact, even a one-day recess can interfere with the President's right to have ten days to veto a bill if it is taken on the last 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."[216] This Clause clearly refers to intrasession recesses, because it refers to recesses that 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 presumably also would 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.[217]

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."[218] Because the Three-Day Adjournment Clause requires both houses to agree as to 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 provides that not only bills, but also "Every Order, Resolution, or

215. The Clause, in 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.

216. 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." *Id.* § 5, cl. 4.

217. Another reason why the Three-Day Adjournment Clause probably extends to intersession adjournments is that otherwise it might seem to allow one house to end a session on its own.

218. U.S. CONST. art. II, § 3.

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."[219] This Clause also refers to the Three-Day Adjournment Clause, because it acknowledges the Three-Day Adjournment Clause's requirement that adjournments receive the approval of both houses. Since both the Presidential Adjournment Clause and the Orders Presentment Clause use "adjournment" in the same way as the Three-Day Adjournment Clause, all three clauses use "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."[220] Because this provision speaks of adjourning from day to day, it normally would refer to extremely short intrasession recesses.[221] Yet, it is also possible that the Clause would refer to an intersession recess if the new session had been scheduled for the next day.

These five clauses use the term "adjournment" 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 "recess" does under the all-recesses interpretation.

By contrast, the two constitutional clauses that speak of recesses do not, on their face at least, indicate whether they refer 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.[222]

Thus, the Constitution exhibits a pattern. It uses the term "adjournment" in situations when it appears to intend the all-recesses meaning, while it uses the term "recess" when it is unclear whether it refers to the all-recesses meaning or to a narrower definition of "recess." Why would the Constitution exhibit this pattern? The most obvious explanation is that the Framers used

219. *Id.* at art. I, § 7, cl. 3.

220. *Id.* § 5, cl. 1.

221. Even if one disagrees 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 in which it referred to an intrasession recess of 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.

222. 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.

the two terms to have different meanings. They used the term "adjournment" to have the all-recess meaning,[223] whereas they used the term "recess" to have a narrower meaning.

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.[224]

While the pattern of constitutional usages argues against the all-recesses interpretation, what are the implications for the other two interpretations?

223. While it would seem that the five clauses that use "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, because 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. *Id.* at art. I, § 7, cl. 2. 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 to say they are not adjournments that prevent the return of a bill to Congress. Since day-to-day adjournments do not prevent Congress from 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.

224. Hartnett argues that there is an alternative explanation for this pattern: The Constitution uses "adjournment" to refer to decisions to take a break, whereas it uses "recess" to describe the period when Congress is not meeting. Harnett, *supra* note 36, at 422. But this explanation does not adequately account for the Constitution's usage. First, it is not clear that the Constitution always employs "adjournment" to mean the decision to adjourn. For example, the Presentment Clause's use of "adjournment" could refer to the decision to adjourn or to the period when Congress is not meeting. *See* U.S. CONST. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days . . . , the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return"). More importantly, even if the Constitution does follow the pattern that Hartnett suggests, that still does not explain why the Framers chose the words they did. The Framers could have used the term "adjourned" in the Recess Appointments Clause, writing "the President shall have Power to fill up all Vacancies that may happen when the Senate has adjourned." Indeed, if the Framers had rejected the intersession view, as Hartnett argues, they strongly could have conveyed that decision by using this language. Moreover, the Framers could have used variants of "recess" in the clauses that now use "adjournment." For example, they could have written "Neither House shall, without the consent of the other, *recess* for more than three days." *Cf. id.* § 5, cl. 4 (Three Day Adjournment Clause). In the end, then, Hartnett's explanation for the Framers' usage decisions is mere accident, whereas the intersession view sees them as the result of consistency across interrelated clauses.

In the main, one must say that both the intersession interpretation and the practical interpretation are consistent with the pattern, as 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, five 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.[225]

B. Structure and Purpose

While the language of the Constitution favors the intersession interpretation, constitutional structure and purpose in two ways provide even stronger support for that 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 results in intrasession recess appointments that are longer than intersession recess appointments. Because there is no reason why the Framers would have desired this outcome, this also casts doubt on the intrasession interpretation.

In developing these structure and purpose arguments, I initially will 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

225. 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." *Id.* at art. II, § 2, cl. 3. This formulation seems to 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 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 whenever 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." *Id.* at art. I, § 3, cl. 5 (emphasis added). Even though the language reads as "the Absence," it does not imply there is one absence per session or year. Hartnett, *supra* note 36, at 412–13.

intersession view rather than the practical interpretation, I then briefly consider the all-recesses 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 last as short as one or two weeks. 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 vacant during a six- or nine-month recess, it seems absurd to imagine that the Framers would have allowed recess appointments to prevent an office from being vacant for only a week or two.[226] 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-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 often would be a vacancy throughout the entire month of the recess, because the

226. My claim that allowing recess appointments during breaks of a week or two would be absurd is criticized by Hartnett on the ground that at the time of Framing, a court session might sometimes last for such brief periods. *See* Hartnett, *supra* note 36, at 416 n.172. Like most structure and purpose arguments that support a broad interpretation of the Recess Appointments Clause, Hartnett's argument here focuses only on the benefits of recess appointments, without considering the costs. The question, though, is not whether one can imagine circumstances when it might be convenient for a recess appointment to be made during a short recess. Of course we can. Rather, the question is whether the Framers would have wanted the President to have the power to make recess appointments during all brief recesses, even though filling vacancies during these short recesses would generally not be critical. The answer to that question remains a clear no. This is especially true given that the making of both recess appointments and advice and consent appointments would often take considerably longer than a week or two in the late eighteenth century. To make such appointments, the President would have had to receive a communication of a vacancy, find someone appropriate to fill the office, offer the job to that person, receive his acceptance, and then either make the recess appointment, or in the case of an advice and consent appointment, submit the name to the Senate, which would have to confirm the nominee. In an age of slow communications, that process could take quite a long period. Although the government adopted some practices to shorten this process, such as making the recess appointment before finding out whether the person was willing to accept the position, the process could still be quite lengthy. *See id.* at 400–01 (describing a recess appointment which was made fifty days after the prior occupant of the office resigned and which the recess appointee then declined). It is hard to believe that the Framers would have wanted to take the extraordinary step of bypassing the Senate for a recess of a week or two, when a considerably longer period often would be needed to make either a recess appointment or an advice and consent appointment.

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.[227]

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 be even shorter. Since there is no time limit on intersession recesses, they could be as short as one 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, early Congresses followed a practice in which intersession recesses would last between six and nine months every year, whereas intrasession recesses either did not occur or lasted at most for seven days.[228] Thus, by limiting the Recess Appointments Clause to intersession

227. Hartnett argues that the danger of allowing recess appointments during short recesses of three days is limited by the Senate's powers under the system of checks and balances. *Id.* at 425. Even if one assumes that the Senate can defend itself from presidential misdeeds, which is by no means clear, this argument misconstrues the nature of the Constitution's checks and balances. The checks and balances were intended to restrain a branch from exercising unauthorized powers, not to make the exercise of such unauthorized powers acceptable. For example, that Congress has the impeachment power does not mean that it is legitimate for the President to ignore statutory directives when Congress is willing to look the other way. Rather, the purpose of the impeachment is to allow Congress to remove the President when he abuses his authority by ignoring such directives. Similarly, the Constitution gives the Senate power to respond if the President exercises extraconstitutional recess appointment authority. The Senate's powers are not an excuse for the President to assert such extraconstitutional powers.

228. *See supra* text and accompanying notes 35–40. The Framers clearly anticipated that 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, "[i]n 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"). During the Ratification debates, Alexander Hamilton predicted the length of 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 in either the spring or the winter. 2 THE RECORDS OF THE FEDERAL CONVENTION 199–200 (Max Farrand ed., 1966). In fact, some

recesses, the Framers would have restricted recess appointments to long recesses, without imposing an arbitrary time limit on the length of recesses.

Another possible objection questions whether the Framers really would have based a constitutional provision on a practice that might change 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 anticipated that this practice would continue for generations to come. First, the republican political theory held during the early years of the Republic required that legislatures remain in session only for a fraction of the year, thereby allowing the legislators to return to their homes and behave like ordinary citizens.[229] Second, the high transportation costs, in a world that initially did not even have railroads, meant that Congress would meet only once during the year.[230] 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.[231] The need for a short session would mean that intrasession recesses also would be brief, so that the legislators could get their work done and go home.[232]

Moreover, the Framers would have been largely accurate in making these predictions. The traditional practice remained completely intact for seventy-five years. Until the Civil War, Congress regularly had one session

delegates were worried that the Congress would not meet every year, so the Constitution required that it do so. *Id.* at 198–99; *see also* U.S. CONST. art. I, § 4, cl. 2.

229. *See supra* text and accompanying note 32.

230. *See supra* note 228.

231. That recesses and sessions are mutually exclusive is challenged by Hartnett on the ground that the Constitution provides one method for ending a session and another for creating one. Hartnett maintains that while the two houses can end a session by their joint action alone, they can schedule a new session only by passage of a law. Hartnett, *supra* note 36, at 422–24. Even assuming Hartnett's claim that new sessions can only be established through a law is correct—the Constitution does not say anything explicitly on the matter—there is nothing odd about this arrangement. The Framers expected that Congress would not be in session for at least half of the year, and they authorized the President to call it into session if special circumstances arose. *See supra* note 228; *see also* U.S. CONST. art. II, § 3. That Congress could not call itself back into session, without passing a law that might be vetoed, would not have been deemed to create any special problems. The Constitution specifically required that Congress meet each year, and that ensured Congress would have the opportunity to act. *Id.* at art. I, § 4, cl. 2. Moreover, if Congress was especially distrustful of the President and wanted to retain the right to meet without passing a law, it could take a long intrasession recess, a practice it followed during the presidency of Andrew Johnson. *See* Hartnett, *supra* note 36, at 424.

232. Another factor that would lead to short sessions was the belief that Congress would have limited responsibilities that were written into the Constitution and unlikely to change. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 228, at 198. This expectation of limited congressional responsibilities also proved accurate until the twentieth century.

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.[233] Even after the Civil War, the pattern largely continued, although the number, and occasionally the length, of the intrasession recesses did increase.[234] And even today, the remnants of the pattern are still discernible in that intrasession recesses normally are considerably shorter than the single intersession recess.[235]

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, Congress schedules more frequent intrasession recesses for relatively short periods of one to six weeks.[236] That there are more frequent short recesses rather than a single long recess, however, does not suggest that there should be additional recess appointments, but fewer. If a vacancy happens during one of the frequent recesses, 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 to fill 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 this would have resulted in 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 appointments would be considerably shorter, lasting six months at most.

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

233. OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 512–13.

234. *See supra* text and accompanying notes 39–42.

235. OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35. According to Michael Carrier, although "[t]oday's Senate schedule is far different from that which the Framers envisioned," intrasession recesses are still generally shorter than intersession recesses. Carrier, *supra* note 37, at 2239. "Most intersession recesses last for at least one month, and some last for three months. In contrast, the overwhelming majority of intrasession recesses last fewer 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 (citations omitted).

236. Since 1970, the Senate has taken only twenty-five intrasession recesses that lasted longer than thirty days. Moreover, it has taken only one intrasession recess, in 1994, that lasted longer than six weeks. OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 35, at 519–26.

do this only if both houses agreed, because 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 and moderate opponents of the President 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.[237] Moreover, it is by no means clear that the Framers would have desired to prevent Congress from taking this action.[238] 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 rejected lightly.[239]

Even if one concludes 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 come back into session in order to determine whether to confirm his nominees.[240] In this way, the President could prevent Congress from scheduling its recesses to deprive

237. Hartnett disagrees with my claim that such an extreme action would occur only if the President lost the respect of both houses of Congress. He argues that Congress bears no cost from only holding intrasession recesses that deprive the President of the recess appointment power. Hartnett, *supra* note 36, at 426 n.226. But Hartnett's argument does not accurately portray Congress's desires or incentives. First, Congress traditionally has recognized that there is a need for the President to fill even superior offices without the advice and consent of the Senate, as it has enacted acting appointment statutes beginning in 1792. *See supra* note 79. Presumably, Congress's desire to see that the laws are enforced, combined with its desire to avoid public criticism for causing damaging vacancies, leads it to pass such statutes. Second, if Congress did choose to abuse its power and deprive the President of the ability to fill vacancies, the President could respond by calling the Senate into session. *See* U.S. CONST. art. II, § 3. This would be undesirable for the Senate in two ways. The Senate might find it burdensome to be forced to meet when it had planned to adjourn and the President could focus public attention on the Senate's improper behavior, possibly reducing the electoral support for some senators. Thus, Hartnett's claim that Congress would not bear any cost is untrue, as he seems implicitly to recognize when he argues that the Recess Appointments Clause can be beneficial to the Senate because otherwise the President would call it into session to consider nominations when the Senate would prefer to be adjourned. *See* Hartnett, *supra* note 36, at 426–27 n.229.

238. 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, eliminating various offices, and refusing to confirm officials. Because these are clearly constitutional, it is not clear why the Framers would have prohibited similar actions regarding the recess appointment power.

239. If Congress believes that the President is abusing his authority, it might be argued that the proper approach is impeachment. But it is not clear why Congress cannot take a more measured response to its perception of improper presidential behavior.

240. U.S. CONST. art. II, § 3.

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.[241]

In the end, there is strong reason to conclude 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 eighteenth century practices, they continued to prove accurate until the twentieth 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 suggest that the Framers did not mean to 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 Congress. By contrast, when a recess appointment is made during an intrasession recess,

241. According to Hartnett, the distinction between intersession and intrasession recesses is not clear when the President calls Congress into session. For example, if the President convenes Congress during an existing session (but during an intrasession recess), Hartnett questions whether a new session is created or the existing session is continued. If a new session were created, then the period between that session and the new session would be an intersession recess. If not, it would be an intrasession recess. *See* Hartnett, *supra* note 36, at 408 n.136 & 414–15. The distinction, however, between intersession and intrasession recesses is crystal clear and depends on whether Congress is in session when the President makes his call. If Congress is not in session when convened by the President, then a new session is created because the old session has ended already. In contrast, if Congress is in session when convened by the President, then the existing session is continued, because the President does not have the power to end a session in order to create a new one. Hartnett could have been misled into believing this question is not clear if he conceived of the President's power as the authority to call "Congress into session." Although that is how the power is often described, the Constitution does not use that language. Rather, it provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them . . . ." U.S. CONST. art. II, § 3. Thus, the Constitution does not authorize the President to create a new session, but simply to convene Congress. And, as Hartnett acknowledges, Congress followed this view in the case he cited and treated such presidential calls to convene during a session as continuations of the existing session. Hartnett, *supra* note 36, at 419.

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 Congress. Thus, the appointment does not terminate until the end of the "next Session."

While intrasession recess appointments often will be longer than intersession recess appointments, there is no plausible reason why the Framers would have intended this outcome. 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 the duties required by his new position. 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 less need for such recess appointments. It therefore is difficult 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 nine month vacancy, but permitted an eighteen-month recess appointment to prevent an unfilled vacancy of a week or two. 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. Alternative arrangements 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 only until the end of the existing session. This would have allowed intrasession appointments, though for shorter periods.[242]

Although the Framers might have drafted the Clause in this manner, it might be argued that the Clause, even 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 would extend only until the next recess—whether that is an intrasession or intersession recess. This view would result in shorter intrasession recess appointments, because they often would last only until the next intrasession recess. To reach this result, one would have to interpret the terms of the Recess Appointments Clause differently than they traditionally have been interpreted. A session would be a continuous period when Congress is not in recess. When 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 Clause's traditional interpretation. Under the traditional view, a session is a period during which Congress schedules business and over which the Congress has significant control. Congress can choose to have recesses during a session of whatever length it determines. Moreover, Congress can end a 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 creates other problems. One such problem turns on whether the alternative interpretation applies to all intrasession recesses or only to those of a certain length. The alternative interpretation is plainly wrong if it were to apply to all recesses because then no recesses could occur during the session. But the Constitution clearly allows for some intrasession recesses, because 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."[243]

Even if one restricts the alternative interpretation to a subset of longer recesses, other problems still exist. For example, this interpretation would require that the length of both intersession and intrasession recess appointments be

242. 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 the session. If a recess appointment were made during the intrasession recess, it then would be difficult for the President and the Senate to make a permanent appointment for the office in the short time 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, after the intrasession recess, there were fewer than thirty days remaining in the session.

243. U.S. CONST. art. I, § 5, cl. 4.

calculated differently than they always have been.[244] This is not a problem for intrasession recess appointments, as changing their length is the purpose of the alternative interpretation. But the alternative interpretation would also change the length of intersession recess appointments. Under this interpretation, a recess appointment made during an intersession recess will extend through that recess and into the next session, but only until Congress takes an intrasession recess. 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 more difficult to predict how long recess appointments will last. Whenever Congress decides to take an intrasession recess, all existing recess appointments would end. This feature would complicate Congress's decisions about when to recess and also would make it more difficult to plan when permanent appointments should be made for offices temporarily filled with recess appointees.

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, because 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 recesses as well as the problems of the alternative interpretation, and it also has the other advantages developed in this Article. Therefore, deciding whether the alternative or the traditional view is the second-best view is unnecessary.

3. One Last Textual Argument

Having discussed the intricacies of recess appointment length, 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 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 intrasessesion recesses as

244. In this subpart, I continue to use the term "intrasession recess" when talking about some of the 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 all recesses as intersession recesses; therefore, I will continue to use the intersession and intrasession terminology, referring to recesses that occur during what otherwise would be the single annual session, as intrasession recesses.

well. Unless one assumes that the Framers were poor drafters, the language they chose suggests that they intended the Clause 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 that is neatly described by the language of the Clause.

Under the intrasession interpretation, however, the language does not work so well, because it does not indicate whether the traditional or alternative interpretation was intended. If the Framers 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 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 is tied to the scheduling of recesses rather than the definition of a session.

4. The All-Recesses Interpretation

These arguments based on recess length and recess appointment length 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 limited merits the all-recesses view possesses as a reading of the constitutional language, the structure and purpose arguments against it are overwhelming. It is absurd to argue that recess appointments would have been intended for one-day recesses—or even for three- or ten-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 eighteenth and most of nineteenth century, it departed from this interpretation in the twentieth 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 limited support for the intersession interpretation.[245] There were no intrasession recess appointments for the first seventy-five years under the Constitution. Then, until after World War I, only a limited number of these appointments were made during the troubled presidency of Andrew Johnson.[246] This pattern provides some evidence that most government officials did not believe they had the authority to make intrasession recess appointments.[247] It is true that during this period, intrasession recesses generally lasted no more than two 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 recess appointments of President Andrew Johnson were made under truly exceptional circumstances that suggest they have limited weight as a precedent. These appointments occurred when Johnson was battling with the Republican Congress that impeached him. The disagreements between the President and Congress focused in part on appointments and personnel, thereby suggesting that Johnson's aggressive use of the recess appointment power may have been triggered by that environment rather than firm constitutional conviction. It also is significant that the Johnson Administration issued no written opinions that argued for the constitutionality of intrasession recess appointments.

The first Attorney General opinion to address the issue specifically held that intrasession recess appointments were not constitutional. In a 1901

245. The support for the intersession interpretation is very limited, because most of this period occurred too late to reflect much light on the original meaning of the Constitution.

246. *See* Carrier, *supra* note 37, at 2211; Hartnett, *supra* note 36, at 408–09.

247. That government officials accepted the intersession recess interpretation is also supported by Attorney General opinions from the early part of the nineteenth century. While no opinion addressed intrasession recesses explicitly, several opinions were written from the assumption that recesses and sessions were mutually exclusive. *See* 2 Op. Att'y Gen. 525, 527 (1832) ("[A notice of vacancy] inform[s the President] . . . that [the vacancy] took place while the Senate was in session, and not during the recess."); Wirt Opinion, *supra* note 44, at 633 ("[W]hether [a vacancy] arose during the session of the Senate, or during [its] recess, it equally requires to be filled."). This provides some support for the intersession recess interpretation, which interprets the term "recess" as the period when Congress is not in session.

opinion, Attorney General Knox concluded that the term "recess" in the Clause referred only to intersession recesses.[248] 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 interpret the Clause to cover only long intrasession recesses, and that the all-recesses interpretation would have the undesirable consequence of permitting recess appointments during extremely short recesses.[249]

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, Daugherty's 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 Wirt's opinion defending the exist view. Thus, the practical interpretation announced in Daugherty's opinion fairly can 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 employs an historically grounded 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 allow recess appointments for extremely short recesses. The biggest problem for the practical interpretation is that it cannot derive its definition of "recess" from the constitutional text. Both of these interpretations also are problematic because they slight the distinction between adjournments and recesses, and they result in intrasession recess appointments that generally will be longer than intersession recess appointments.

248. Knox Opinion, *supra* note 180, at 604.
249. *Id.*

IV. CONNECTIONS BETWEEN WHEN VACANCIES MUST OCCUR AND THE TYPE OF RECESSES COVERED

This Article has attempted to address two issues concerning the Recess Appointments Clause—when vacancies must occur and what type of recesses the Clause covers—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 on the first issue also will adopt the broader interpretation on 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 unfilled vacancies, then one would be inclined to adopt the exist interpretation and one of the intrasession interpretations. By contrast, if one believes that the Constitution balances the goal of preventing unfilled vacancies with that 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 nonetheless is clear that there is no logical or necessary relationship between them. One can adopt any combination of positions on the two issues, including holding an interpretation that confers broader recess appointment power on one issue along with an 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 still believe that the practical interpretation, or even the all-recesses interpretation, was correct based on text, structure, and purpose. Or one might adopt the exist interpretation, based on the view that late session vacancies would otherwise be difficult to fill, but believe that the language and history of the Constitution 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 a stunning degree of authority. It is true that the exist view gives broad authority to the President because 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 during an intersession recess, which generally occurs only once a year. 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 be made only 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. Under this regime, the President can only make recess appointments during an intersession recess and only then if the vacancy arises during that recess.

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 its original meaning. 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 expanded greatly beyond its original limits.

The original meaning is of normative interest to both originalists and to those who regard this meaning as relevant to, but not dispositive of, constitutional issues. The more practical question, however, is whether the political branches and the courts should follow the original meaning today, when broad constructions of the Clause have been followed regularly since the 1820s (concerning when the vacancy must arise) and 1920s (regarding the type of recesses covered by the Clause). 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.[250] The Supreme Court also has varied its treatment of precedent across different cases and over time.[251]

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 obviously would endorse returning to the original meaning, surprisingly, a strong case can be made that many other approaches would also reach this same 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,[252] while the federal circuit courts have said little: Three appellate courts have adopted the exist interpretation[253] and one appellate court has embraced a version of the intrasession interpretation.[254] Thus, the Supreme Court and most circuit courts are free to decide this issue without constraint from prior judicial precedent.

The main reason to retain the current interpretations of the Clause is the government's longstanding practice of adhering to them. The executive branch has been making recess appointments under the broader interpretations for many years now. 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 some originalists may be influenced by practice that dates from the establishment of the Constitution,[255] practice that emerged in later periods, like that which follows the exist and intrasession views, is given much less weight.

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250. *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).

251. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

252. *Cf.* Evans v. Stephens, 125 S. Ct. 1640 (2005) (denial of certiorari petition).

253. Evans v. Stephens, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (en banc) (adopting the exist interpretation); United States v. Woodley, 751 F.2d 1008, 1012–1013 (9th Cir. 1985) (en banc) (same); United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962) (same).

254. *Evans*, 387 F.3d at 1224–26.

255. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (holding that a longstanding practice dating from the first Congress is entitled to great weight in interpreting the Constitution).

Governmental practice might gain additional force, however, if departing from it would cause significant disruption. But returning to the original meaning of the Recess Appointments Clause 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. In a world with relatively short recesses, the original meaning would require, at most, some adjustments to 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 were 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.[256] Yet even if such challenges are allowed if they are raised in a timely manner (that is, before the officer makes his decision) or even on appeal from the officer's decision, that would still permit challenges only to a relatively small number of decisions. 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.[257]

In the end, there is a strong case for returning to the original meaning of the Recess Appointments Clause, 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

256. *See* Nguyen v. United States, 539 U.S. 69 (2003); Ryder v. United States, 515 U.S. 177 (1995). *But see* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 328 n.162 (2003) (listing cases suggesting the continuing vitality of the doctrine).

257. *See Nguyen*, 539 U.S. at 78 (noting that the Court has been willing to correct "on direct review" violations that embody "'a strong policy concerning the proper administration of judicial business,' even though the defect was not raised in a timely manner"); *Ex parte* Ward, 173 U.S. 452, 456 (1899) (denying a habeas corpus challenge to the recess appointment of a judge 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") (citation omitted); *see also Ryder*, 515 U.S. at 181–82 (distinguishing *Ward* on the ground that the challenge in *Ryder* had been raised in a timely manner before the original decision was reached).

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.