Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause

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I. Introduction

The Constitution requires officers to be appointed through a process of presidential nomination and senatorial consent, but the Recess Appointments Clause allows the President alone to make temporary appointments during Senate recesses. In this way, the President can fill offices even if the Senate is not available to confirm a nominee.

A key issue is how broad the President's recess appointment authority is. The scope of that authority turns on two basic questions of interpretation of the Clause's language providing the President with the power "to fill up all vacancies that happen during the recess of the Senate."[2] The first question – the happen issue – concerns when a vacancy must "happen" for the President to be able to make a recess appointment to fill it. The second question – the type of recess issue – involves what type of legislative breaks constitute a "recess of the Senate" that allows a recess appointment.

In a 2005 article, I argued that the original meaning of the Clause incorporates a narrow understanding as to both issues.[3] According to the original meaning, the President can only make a recess appointment to fill a vacancy that arises during the recess of the Senate. If the vacancy arises during the Senate session, it cannot be filled with a recess appointment. A recess of the Senate, moreover, is a special type of legislative break that ends a Senate session. A legislative break during the session is an adjournment, not a constitutional recess. This understanding of the Recess Appointments Clause historically would have allowed the President to fill vacancies when a recess actually prevented the Senate from confirming a nominee, without

[2] U.S. CONSTITUTION ART. II, SECT. 3.

[3] Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005) (hereinafter, *The Original Meaning*).

giving the President broad authority to bypass the Senate when his nominee could not secure confirmation.

The executive branch, however, interprets the Clause more broadly. In its view, the President can fill a vacancy irrespective of when it arises so long as the vacancy happens to exist during a recess.[4] This means that the President can make a recess appointment for any office so long as he simply waits until a recess occurs. The executive branch also interprets a recess broadly to include all legislative breaks that last more than 3 days.[5] When combined with the broad view as to when a vacancy happens, this interpretation allows the President to make a recess appointment for any vacant office during the 8 to 12 legislative breaks of more than 3 days that typically occur each year. Under the executive branch's interpretation, the President has expansive authority to bypass the Senate confirmation requirement throughout the year.

If the executive's interpretation is inconsistent with the original meaning, then how do its defenders seek to justify it? The main method has been to argue, that whatever one's view about originalism, various nonoriginalist considerations indicate that the executive's broad interpretation should be followed. In this Article, I examine the principal nonoriginalists arguments that might be made and contend that none of them provides a persuasive case for departing from the original meaning.

Interestingly, perhaps the most common nonoriginalist consideration provided for not following the original meaning – the existence of one or more nonoriginalist Supreme Court precedents – does not apply to recess appointments.[6] The Supreme Court has never written an opinion interpreting the Clause and therefore the Court can address the issue with a blank slate. It is often acknowledged that in the absence of Supreme Court precedent, originalist arguments have more weight.

Another common argument made against following the original meaning of a provision is based on living constitutionalism.[7] Under this approach, the original Constitution is seen as an old, potentially outdated document and judges are viewed as having the power to update its provisions to take into account modern values and circumstances. And it is clearly true that the circumstances governing appointments have changed since the late 18th century, when antiquated transportation methods often led the Senate to take recesses of between 6 to 9 months.

But these changes in circumstances argue for narrower, not broader recess appointment authority. In a world with airplanes, Senate recesses are shorter and therefore there is less need to allow the President to make unilateral appointments. Moreover, modern appointment practices indicate that appointments take a long time, with on average nominations taking 4 months and appointments taking 5 to 6 months. This evidence suggests that short recesses of 10

[4] *See infra* text and accompanying notes.
[5] NLRB v. Noel Canning ,Brief for the Petitioner (September 2013), at 18.
[6] John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. L. REV. 803 (2009).
[7] DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

or 30 days, which delay appointments by only a fraction of the ordinary appointment process, do not justify bypassing the senatorial confirmation requirement.

The most common and probably the strongest argument for departing from the original meaning is based on historical practice. Defenders of the executive branch's view of the Clause argue that the political branches have followed a practice allowing broad recess appointment power and that this practice has either been agreed to or acquiesced in by both branches. Some of these defenders argue that the practice has followed the broad view of the power since 1823 for the happen issue and since 1921 for the type of recess issue.[8]

This article reviews the recess appointment practice and shows that this account of the practice is mistaken. As to when the vacancy must arise, I show that the Congress passed a statute in 1863 that rejected the executive's broad view.[9] While Congress relaxed the statutory restrictions in 1940, the new statute still did not embrace the executive's broad view, but merely expanded recess appointment authority in three limited circumstances. Thus, neither the Congress nor the Senate as a whole has ever endorsed the broad executive view on this issue.

As to the type of legislative break that is a recess, I argue that there is a strong case to be made that the executive branch adopted a narrower interpretation of a recess in 1921 and that this interpretation was followed until at least 1948. Moreover, the 1940 statute is also best read as not endorsing the executive's broad view. Thus, the last time the entire Congress took action concerning the Recess Appointments Clause, it rejected the modern executive's view.

While the executive branch has been following its interpretation of the Recess Appointment Clause since at least the early 1960s, the executive's recess appointment practice has been changing during this period and becoming more aggressive. Therefore, Congress cannot be seen to have been acquiescing in a consistent executive practice during this period. Moreover, as the President has exercised his asserted authority more aggressively in recent years, the legislative houses have started to resist this authority with the use of pro forma sessions that are intended to deny the President the opportunity to make recess appointments.

But even if the executive's interpretation of the Clause were supported by historical practice, I argue that would not justify departing from the original meaning. The Congress or Senate's consent or acquiescence is insufficient to justify departing from the Constitution. If the Senate consented to an expansion of the President's recess appointment powers, that might show that the expansion benefited the President and Senate. But the purpose of the Constitution is to protect the people, not to further the interests of the political branches. The purpose of senatorial confirmation is to ensure that the President cannot employ extreme or unqualified persons as officers. Therefore, the fact that the Senate may be willing to abandon its confirmation powers does not mean that it should be allowed to do so.

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[8] See Cass Sunstein, *Originalism v. Burekanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 126 (2013); but see id. (acknowledging the counter-argument that the history is not so clear).

[9] *See infra* text and accompanying notes.

Another argument made for allowing practice to override the original meaning of the Constitution is that departing from the practice might create significant disruption or upset substantial reliance interests. While changes in practice can sometimes lead to disruption, that would not be the case for a departure from a broad recess appointment power. It is true that the original meaning would often prevent the President from making recess appointments of individuals who the Senate was unwilling to confirm, but that reduction in power would not involve significant disruption.

The article proceeds in several parts. Part II briefly reviews the original meaning of the Recess Appointments Clause. Part III then explores living constitutionalism and argues that changes in circumstances do not support a broad recess appointment power. Part IV is the longest part of the article, reviewing the history of recess appointments. It concludes that Congress has not supported the executive's interpretation and that the practice has been changing. Part V then maintains that even if the Senate had consented or acquiesced in the executive's practice, that would not be a good reason for following that practice. Parts VI and VII contend that following the broad interpretation of the Recess Appointments Clause is not justified by protecting reliance interests or as a means of addressing problems with the filibuster.[10]

II. The Original Meaning

In my prior article, The Original Meaning of the Recess Appointments Clause,[11] I put forward an originalist interpretation of the Clause based on evidence of what it would have meant at the time of the Constitution's enactment. The three most recent Court's of Appeals to address the issue have largely followed this interpretation as to the matters they addressed.[12] In this section, I do not review all of the arguments or evidence that led to those conclusions. Instead, I briefly examine the most important considerations as a means of discussing the arguments offered for departing from the original meaning.

A. The Happen Issue

The Recess Appointment Clause 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." There are two basic issues raised by the Clause: the "happen" issue and the "type of recess" issue. The happen issue involves when the vacancy must happen for it to be eligible for a recess appointment. Under the "arise interpretation," the

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[10] The first draft of this article was written in the Summer of 2013, before the briefs were submitted to the Supreme Court in the Noel Canning case. In October, 2013 the Solicitor General filed its brief, which included a large number of intrasession recess appointments that had not previously been uncovered. This article was then revised to take account of these newly uncovered recess appointments. Since the first draft of this article was shared with two of the amici, it is cited in their briefs. See NLRB v. Noel Canning, Brief of Constitutional Law Scholars (November 2013); NLRB v. Noel Canning, Brief of Political Scientists and Historians (November 2013).

[11] Rappaport, *The Original Meaning*.

[12] Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013); NLRB v. New Vista Nursing and Rehabilitation, No. 11-3440; (3rd Cir. May 16, 2013); NLRB v. Enterprise Leasing Co., No. 12-1514 (4th Cir. July 17, 2013).

vacancy must arise during the recess for which the recess appointment is being made.[13] This interpretation derives from the Clause's text, which speaks of filling up "vacancies that may happen *during* the Recess of the Senate."[14] By contrast, the "exist view" claims that it does not matter when a vacancy arises so long as it "happens to exists" during the recess. Thus, a vacancy might arise during a session, but the President could still make a recess appointment during the recess, so long as the vacancy existed at that time.[15]

The text of the Clause strongly supports the arise view. As even advocates of the exist view have admitted,[16] the Clause's language is more naturally read as requiring that the vacancy arise during the recess. The arise meaning is the more obvious reading of the language and the exist view renders the words "that may happen" largely redundant.

Considerations of structure and purpose also strongly support the arise view. The recess appointment power is an exception to the ordinary method of appointing officers, which requires nomination by the President and confirmation by the Senate. The evident purpose of the exception is to allow temporary appointments by the President alone when a recess prevents the Senate from making a confirmation decision.[17] The Recess Appointments Clause cannot be read so broadly that this exception swallows the rule, but the exist interpretation does exactly that. Under the exist view, the President can always make a recess appointment to fill a vacancy so long as he waits until a recess of the Senate. And once that recess appointment has ended, the President can then make a new recess appointment of the same individual or another person.[18] Thus, the exist view allows the President broad authority to circumvent the confirmation requirement.

By contrast, the arise view limits the recess appointment power to vacancies that arise during the recess in which they are to be appointed. Vacancies that exist during the session cannot be filled with recess appointments. The arise view also makes sense of the evident purpose of the Clause. If a vacancy arises during the recess, then it allows the President to make the recess appointment. If a vacancy extends into the session, though, a recess appointment is not generally necessary, because the Senate is available to vote on a nominee.

Proponents of the exist view claim that the purpose of the Clause is simply to fill vacant offices and therefore argue that it does not matter when the vacancy arose so long as it exists during the recess.[19] But this argument is mistaken. The purpose of the Clause, as confirmed by the constitutional structure, is to provide a limited exception to the confirmation requirement –

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[13] Rappaport, *The Original Meaning*, at 1502-1506 .
[14] U.S. Const. art. II, sec. 2, cl. 3 (emphasis added).
[15] Rappaport, *The Original Meaning*, at 1502-1506.
[16] 1 Op. Att'y Gen. 631 (1823) [hereinafter Wirt Opinion].
[17] Rappaport, *The Original Meaning*.
[18] Rappaport, *The Original Meaning*.
[19] Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377 (2005).

one that allows vacancies to be filled but does not permit Presidents to freely circumvent the senatorial consent requirement.[20]

Finally, this interpretation derives support from early interpretations of the Clause. The arise view was adopted by the first Attorney General, Edmund Randolph, who was an important drafter and ratifier of the Constitution. Randolph's 1792 opinion expressly adopted the arise view.[21] The arise view was also expressly adopted by Alexander Hamilton. The practices of President George Washington as well as the early Congresses also suggest that they followed the arise view.[22]

B. The Type of Recess Issue

The second basic issue is the type of recess issue. This issue concerns the type of recess or legislative break for which a recess appointment can be made. There are at least two different types of legislative breaks – intersession recesses, which occur between the two (typically) annual sessions of the Congress – and intrasession breaks, which occur during the session of Congress. The "intersession view" limits recess appointments to intersession recesses, whereas the "intrasession view" allows them during either intersession recesses or intrasession breaks that exceed a minimum length.

The intersession view is supported by strong evidence. To begin with, it makes sense that the original meaning would have allowed only intersession recess appointments. When the Constitution was enacted, intersession recesses generally lasted for 6 to 9 months and therefore it would have been necessary for the President to be able to fill offices that became vacant during this period.[23] By contrast, intrasession breaks were extremely short (such as 3 days) and therefore would not have required recess appointments. Thus, it would have made good sense for them to limit recess appointments to intersession recesses.

The intersession view also makes sense textually. When the Constitution was enacted, the term recess had more than one meaning. There was an ordinary meaning of recess that referred to any break in a proceeding, including one as short as 30 minutes.[24] Clearly, this understanding was inconsistent with the meaning of the term in the Recess Appointments Clause. There was, however, another meaning, one that was employed in the Massachusetts Constitution

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[20] The arise view is also supported by the conditions governing recesses at the time of the Constitution's enactment. At that time, Congress would have short sessions and long recesses: generally the sessions would last from 3 to 6 months and the recesses would last from 6 to 9 months. As a result, it would make perfect sense to limit recess appointments to the arise view. When a vacancy arose during the long recess, it would be necessary for the President to fill it until the Senate came back. It would not be necessary during a session, when the Senate was available.

[21] 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].

[22] *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); Rappaport, *The Original Meaning.*, at 1522-1523, 1524-1525.

[23] Rappaport, *The Original Meaning.*

[24] Cite

of 1780, that referred to an intersession recess – a break in the legislative proceedings that occurred at the end of the session.[25] This understanding of the word is also supported by some evidence of word usage.[26]

A comparison of constitutional clauses also supports this understanding. Although modern usage refers to "intrasession recesses," this term is actually a constitutional misnomer. When the Constitution speaks of a recess, it means an intersession recess. When the Constitution refers to legislative breaks generally – either during the session or between sessions – it calls them adjournments. This understanding of the terms recess and adjournment is supported by the Constitution's use of these terms in seven different clauses.[27] When understood in this way, these terms make perfect sense of all seven clauses.

The intrasession interpretation of the Clause also suffers from other serious problems. The term recess cannot have the ordinary meaning, since that would allow excessively short breaks. But if it does not have the intersession meaning, then it is not clear what meaning it could have. The modern executive's interpretation of the Clause views it as referring to a break during the session of more than 3 days.[28] But there is no principled basis for this interpretation. Thus, the executive must simply assert an arbitrary number of days for recess appointments. It is very unlikely that the best understanding of the term recess is this vague one when there were other clearer meanings.

Another problem with the intrasession interpretation is that an intrasession recess appointment lasts longer – perhaps twice as long – as an intersession recess appointment. The Constitution directs that all recess appointments last until "the end of the next session." When there is an intersession recess appointment, it begins during the recess between the sessions and then continues for one full session. But when there is an intrasession recess appointment, it begins during the existing session, then continues during the intersession recess, and then extends through the entire next session. Thus, an intrasession recess appointment extends through two sessions whereas an intersession appointment extends through only one. If the intrasession recess appointment was made at the beginning of the first session, it can extend nearly twice as long as an intersession recess appointment. Yet, there is no policy reason why the Framers would have desired to make intrasession recess appointments longer than, not to mention twice as long as, intersession ones.[29]

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[25] Rappaport, *The Original Meaning*.

[26] For example, Johnson's Dictionary included as one definition of a session as the period "for which an assembly sits without intermission or recess." CITE In addition, various early discussions seem to assume that the Senate is either in session or in recess. CITE

[27] Rappaport, *The Original Meaning*.

[28] Hartnett, supra note XX; Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Re: Recess Appointments In The Current Recess Of The Senate (Feb. 20, 2004) (11 day recess); Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Recess Appointments (May 29, 1996) (10 day recess).

[29] If anything, intrasession recess appointments should have short durations. After all, intrasession breaks are typically shorter than intersession recesses and therefore there is less reason for there to be a recess appointment

C. The Modified Intersession View

In my prior article, I noted another possible way of resolving the type of recess issue. This view – which I here call the modified intersession view – combines elements of the intersession and intrasession views.[30] While I believe that the intersession view, rather than the modified intersession view, states the Constitution's original meaning, it will be useful to discuss the modified intersession view for two reasons. First, this view may have been followed by the political branches at different points over the years. Second, this view highlights various problems with the intrasession view. Even if one somehow believed that the intersession view was defective because it did not allow recess appointments unless the Senate expressed its intent to end its session, one should favor the modified intersession view, not the intrasession view.

The modified intersession view is something of a mixture of the intersession and intrasession views. As with the intrasession view, this position interprets the term recess to include all breaks in the legislative session of a sufficient length. But, as with the intersession view, this interpretation view treats all recesses as occurring outside of the session. There are, then, no intrasession recesses. Instead, when the Senate takes a recess of sufficient length, it automatically ends the session and when the recess terminates, a new session begins.

Under the modified intersession view, there can be many recesses during the year. But every time there is a recess, the session ends and therefore there can also be many sessions during a year. The most significant difference between the intrasession view and the modified intersession view is that the modified intersession view has much shorter recess appointments. For example, if there were only four recesses in a year, then a recess appointment would last only a fraction of the year. While these might seem like short recess appointments, that is not necessarily a problem. Under both of the intersession views, ending the recess appointment after the next session is entirely appropriate because that length of time would provide the President and the Senate an opportunity to fill the vacancy through a normal appointment. Even under recess appointments that last a fraction of the year, the President and the Senate would still have a reasonable opportunity to fill the vacancy.

When I wrote my article, no scholar had developed the modified intersession view. But recently, Michael Stern, an expert in legislative law, has argued for this view based on both originalism and practice.[31] Stern attempts to develop the modified intersession view by deriving the meaning of recess from the related idea of session. Stern begins with this quote from Alexander Hamilton in the Federalist, who offered this explanation of the Recess Appointments Clause:

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during this break. To extend the recess appointment a much longer period, when it was made during these shorter breaks, makes no sense.

[30] Rappaport, *The Original Meaning*, at 1569 (referring to this as the alternative interpretation).

[31] Michael Stern, *Burying the Multi-Session Recess Appointment Theory*, Point of Order Blog (May 3, 2012), http://www.pointoforder.com/2012/05/03/burying-the-multi-session-recess-appointment-theory/.

> 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 continuously in session for the appointment of officers*, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, singly, to make temporary appointments.[32]

Stern then claims that Hamilton's use of "session" here meant something specific. He writes:

> What did Hamilton mean by the Senate's "session" or the Senate being "in session"? He was not referring to the time when Senators are actually on the floor conducting legislative business. It would not be necessary for Senators to remain continuously on the floor in order to act on nominations, nor would it be feasible for them to do so. Nor could he be referring simply to a parliamentary status unrelated to the Senate's ability to act on nominations.[33]

Stern argues that a session – understood as a continuous meeting of the legislature – involves "the period of time when Senators are assembled at the seat of government, and therefore are not in their home states." If there are assembled in the nation's capital, then they are available to advise and consent. By contrast, the recess of the Senate "is the period when Senators are not assembled at the seat of government and therefore are not available to advice and consent. The "next session" would then be the next time that the Senate assembles following a recess.[34]

Under this interpretation, then, a recess does not depend on whether the Senate seeks to end the session, as it does under the intersession interpretation. Instead, it turns on whether the legislative break is one where the Senators will be available at the seat of government. One might give effect to this understanding in different ways. The view that Stern seems to employ is not to ask whether a majority of Senators are actually in the capital, which would be difficult and uncertain, but instead to inquire whether the length of the legislative break is long enough for a majority of the Senators to travel home. This understanding has the advantage of allowing one to know whether the Senate is in recess simply by determining how long the recess will last.

The modified intersession view has some attractive features. It allows recess appointments to be made during breaks when the Senate cannot act, even if the Senate has not purported to end the session. This would serve the purpose of ensuring that recesses do not prevent a vacancy from being filled. This interpretation would also avoid two weaknesses of the intrasession view. First, it does not result in recess appointments that extend through two sessions. Instead, these recess appointments only last through the next period when the Senate comes back into session so that a normal appointment can be made. Second, it does not require

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[32] THE FEDERALIST NO. 67 emphasis added)

[33] Stern, supra note XX.

[34] These two understandings of session – one in the intersession and intrasession views, and the other in the modified intersession view – can create confusion. To make clear the distinction, I will sometimes refer to the session in the intersession and intrasession view (that typically occurs once in a year) as the annual session. Thus, there could be several sessions in the modified intersession session during a single annual session.

an arbitrary time period to establish whether a legislative break is long enough to be a recess. Instead, it makes that determination based on the historically and conceptually relevant question of whether the break would actually prevent the Senate from being available to advise and consent.

While the modified intersession view provides a principled answer to how a legislative break must be to constitute a recess, one might still wonder how many days that is. If a recess occurs and a session ends when there is a break long enough to allow the majority of the Senators to leave the seat of government and travel home, then one way of interpreting this would be to ask how long of a break, at a particular time in history, would allow Senators to travel home. This would depend in part on the modes of travel at the time. In 1789, it seems likely that a two week break would not be long enough for most Senators to travel home and return. Thus, a two week break would be an adjournment and would not end the session. Today, by contrast, two weeks would be more than enough to allow the majority of Senators to leave and therefore it would end the session.[35]

In conclusion, I believe that the original meaning of the Recess Appointments Clause clearly departs from the modern executive's interpretation. In my view, both the arise and the intersession views are strongly supported by text, structure, purpose, and history. Moreover, if one did reject the intersession view, the modified intersession view would be superior to the intrasession view.

Yet, the original meaning is often not regarded as being determinative. Thus, one must also look at nonoriginalist reasons for departing from the original meaning. But when one examines these reasons – reasons based on living constitutionalism, the practice of the political branches, and reliance – they turn out not to provide strong support for departing from the original meaning.

III. Living Constitutionalism

[35] It is an interesting question how one would apply this test in today's world. One way would simply ask how long a break would be needed for most Senators to travel home. In today's world, where many Senators may sometimes travel home for the weekend, this becomes difficult to determine. One possibility is that any break of more than the traditional 3 day weekend break would constitute a recess and termination of the session. While this would mean that 4 day recesses would allow recess appointments, those recess appointments might be extremely short, lasting only the brief time until another short recess occurs. With such short recess appointments, it seems unlikely that many people will accept a recess appointment (especially since they might not be able to receive pay for a repeated recess appointment).

Another possibility is that, in a world where the Senators could easily meet again in a day or two, if necessary, there are no longer any recesses of the kind contemplated by the Constitution. Even if the Senate intended to take a 14 day recess, they could come back quickly if needed. The modern Senate would then have a comparable ability to act on a nomination as the historical Senate would if it took a 14 day recess and a majority of the Senators remained in Washington, D.C. Just as there would be no recess in the latter situation, so there would be no recess in the former either. The result of this analysis is that there would be no longer be any recesses, except perhaps for recesses at the end of the annual session.

The most fundamental nonoriginalist argument involves living constitutionalism. While the original meaning of the Recess Appointments Clause may adopt the arise and intersession views, the original meaning is the not sole or even primary criterion for the living constitutionalist. Instead, the living constitutionalist believes that constitutional provisions should often be updated to take into account modern circumstances and values.[36] After all, the Recess Appointments Clause was written for a world where republican values and transportation conditions meant that the Senate generally held a single recess of between 6 and 9 months per year. We now live in a world of cheap air travel, and the Congress holds many shorter recesses per year.

In this section, I assume that living constitutionalism is the correct interpretive approach. I argue, however, that this methodology does not actually support the modern executive's broad interpretation of the Recess Appointments Clause. Although modern circumstances differ from those existing at the time of the Framing, they still do not support broad recess appointment authority. In particular, I argue that the relatively short recesses of 4 days or 10 days or one month – and perhaps even of two months – should not provide the President with the opportunity to make a recess appointment. The main argument for this conclusion relies on the appointment practices of the executive branch itself. Appointments of officers requiring senatorial consent take between 5 and 6 months on average, with the bulk of this time being taken by the executive branch in determining who to nominate. If the executive branch believes it is appropriate to leave vacancies open for these long periods in order to make high quality appointments, then it is hard to argue that the senatorial confirmation requirement, one of the essential features in the Constitution for promoting high quality appointments, should be bypassed to avoid the delay of short recesses.

Finally, it should be noted that very few nonoriginalists expressly adopt either a living constitution approach or a view that considers modern values and circumstances as the primary consideration. Instead, they employ a methodology that also considers precedent, practice, and other considerations including text and perhaps original meaning. How much these nonpolicy considerations actually constrain nonoriginalist interpretation is a matter of dispute. But because nonoriginalists typically discuss these other considerations, very few nonoriginalist or living constitutionalist approaches actually read as naked discussion of modern values, as this section does.

Thus, rather than understanding this section of the paper as an effort to reproduce a living constitutionalist argument as living constitutionalists would make it, the reader should consider it as mainly focused on that portion of living constitutionalism and nonoriginalism that is concerned with what would be desirable policy in the modern world. And here I argue that modern circumstance and values argue for a very narrow understanding of the recess appointments power.

A. The Value of Senatorial Confirmation and the Cost of Longer Vacancies

[36] See Struass, supra note XX.

In evaluating appointment methods, there is a basic tradeoff between the benefits of making a high quality choice and the costs of taking additional time that will lengthen the vacancy. Making a high quality choice is, of course, an important goal of appointment methods. But in order to make a such a choice, it is often necessary to take additional time to find the right appointee. This time may be used to search for better candidates and to engage in a more thorough assessments of the candidates one has collected. The additional time to make an appointment, however, can be costly. The principal cost here will be the additional delay without an appointment – that is, a longer period with a vacancy.[37] In designing a desirable appointment process, one must compare these benefits and costs.

If the drafters of the Constitution had assigned the appointment decision entirely to the President, then appointments would take less time. But it was feared that allowing the President to make the decision on his own would lead to poor choices, permitting the President to nominate cronies and other persons who lacked the nation's confidence. Thus, the costs of the additional time and effort necessary for the Senate to consent to the nomination was thought to be outweighed by the benefits of better appointments.

The first question for a living constitutionalist is whether senatorial confirmation still makes sense today. Is there anything about modern circumstances and values that suggests that this requirement should be weakened? Here, there is a strong argument that these values are still with us. As with the traditional American republic, checks and balances are the genius of modern democracy. The executive branch exercises tremendous power and thus it makes sense to ensure that are checks on presidential appointments.[38] Although the confirmation requirement does take additional time and incurs senatorial resources, these costs are worth it.

If senatorial confirmation still makes sense, then the next step in evaluating the constitutional scheme is to consider whether the concerns that led to the Recess Appointments Clause continue to apply in the modern world. Clearly, there can be times when departing from confirmation makes sense. At the time of the framing, when recesses typically lasted 6-9 months, it would have made sense to allow temporary or recess appointments without senatorial confirmation. Otherwise, an important position might have remained unfilled for a large proportion of the year.

In the modern world, it is not as obvious whether and when recess appointments are desirable. In recent times, there is generally one recess per year longer than 30 days, with another approximately 10 recesses each year lasting shorter periods.[39] It is by no means clear, without further information, that recess appointments should be allowed during recesses shorter than 30 days. While a month is not a trivial length of time, it is not obvious that this period of delay is more important than the value of requiring senate confirmation. It is less obvious that even shorter recesses justify recess appointments.

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[37] Another cost is the additional personnel and effort to make the appointment that could have employed elsewhere.
[38] While institutions other than the Senate might perform this function, it does not seem within the power or discretion of the courts to rewrite the Constitution so thoroughly to adopt such a change.
[39] Cite

To more precisely balance these competing considerations, additional information about appointment practices in the modern period is necessary. Such information will explain how the President and the Senate trades off the benefit of improved appointments against the costs of longer vacancies. It will also provide additional context for balancing these benefits and costs.

B. The Length of the Modern Appointment Process

In recent years, scholars have learned a great deal about the appointment process. For our purposes, the most startling statistic comes from the length of vacancies at the beginning of a new presidency. Significantly, the average time from the inauguration of the President to the appointment of an office that requires Senate confirmation is a staggering 8 months.[40] This seems incredibly long. The length of time here no doubt is a function of many different causes, including that a large number of appointments need to be made at the beginning of a presidency and the administration making the appointments is a new one.

While longest for inaugural vacancies, the vacancy period over the course of a presidency is also quite long. Available statistics indicate that the median length of appointments for positions requiring Senate confirmation is between 5 and 6 months.[41]

Another important issue is how long the two basic stages of the appointment process – nomination and confirmation – take. A recent study indicates that the nomination stage takes considerably longer than the confirmation stage.[42] With the exception of the Cabinet Secretary level, where the two stages were of equal length, the nomination stage was generally 2 or 3 times as long as the confirmation stages. For example, Agency Heads had a nomination period of nearly 6 months, whereas a confirmation period of 2 months.

Based on some rough calculations, we can offer an estimate of the length of the nomination and confirmation stages of the appointment process. The results suggest that, for inaugural vacancies, the length of the nomination stage is 5.7 months and of the confirmation

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[40] One study indicated the average number of months for the Clinton and Bush I administrations was an average of 8 months. G. CALVIN MACKENZIE & ROBERT SHOGAN, OBSTACLE COURSE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE PRESIDENTIAL APPOINTMENT PROCESS 72 (1996). Another study indicated it was 8 months for George W. Bush, nearly 9 months for Clinton, 5 ½ months for George H. W. Bush, and nearly 6 ½ months for Reagan. See Anne Joseph O'Connell, *Vacant Offices: Delays In Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 957 (2009).

[41] From 1984 to 1999, during the second Reagan Administration, the Bush I Administration, and the Clinton Administration, the median length of a vacancy (measured from the time that an appointee was notified by the Administration they were being considered) was between 5 and 6 months. See PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., THE MERIT AND REPUTATION OF AN ADMINISTRATION: PRESIDENTIAL APPOINTEES ON THE APPOINTMENTS PROCESS 8 (2000). A later study, beginning with the Reagan Administration and covering Bush 41, Clinton, and Bush 43, had comparable lengths. This study provided information of vacancy periods for officials broken into categories, but not one overall number for all officials. Significantly, the vacancy period for Cabinet Secretaries was considerably shorter than for officials at lower levels. Nonetheless, the vacancy periods for relatively high officials, such Agency Heads, Deputy Agency Heads, and Assistant Secretaries, were quite long, ranging from 5 months to 15 months, depending on the Administration. See O'Connell, supra, at 958.

[42] See O'Connell, supra, at 968.

stage is 2.3 months. For vacancies throughout the presidency, the nomination stage would be 4 months and the confirmation stage 1.5 months.[43]

C. The Valuation of Benefits and Costs by the President and the Senate

We are now in a better position to evaluate the tradeoff between making high quality appointments and filling vacancies quickly. Three considerations provide a strong argument for concluding that recess appointments should not be made during short recesses: the tradeoffs made by the executive branch, those made by the Senate, and an analysis of the additional delay that recesses cause during the appointment process.

First, the decisions of the executive branch strongly suggest that recess appointments should not be allowed during short recesses. The executive branch itself faces a tradeoff between making high quality appointments and filling vacancies quickly. We know from the statistics of appointment practices that the executive believes that a significant period of time is justified in making the appointment decision. As noted above, the nomination stage is 5.7 months for inaugural vacancies and 4 months for vacancies throughout the presidency.

These are important figures. They indicate that the executive does not believe that filling vacancies quickly is a dominant consideration that strongly overrides considerations of making quality appointments. The executive is willing to allow vacancies to continue for relatively long periods in an effort to make the correct nomination.

The revealed preferences of the executive cast serious doubt as to its positions concerning the length of recesses necessary to allow a recess appointment. While the executive has taken the position that recess appointments may be made in recesses that exceed 3 days, it is hard to reconcile this with its own practices. If the executive takes 4 months to make nominations, then it clearly believes that delays considerably longer than a week or two are needed before a recess appointment is justified.

Of course, the executive might believe that long periods of delay are justified for its own decisionmaking process, but not for the Senate to be able to take action. But that approach would be hard to justify. The Constitution treats the senatorial confirmation requirement as an essential element of the appointment process and modern circumstances continue to suggest that an external check on the executive is important. Any executive argument treating the senatorial check as lacking in value should be rejected as self serving.

Similar considerations apply when we consider the Senate's decisions. The Senate's decisions as to how long to take in the confirmation process – 2.3 months for inaugural vacancies and 1.5 months for vacancies during the presidency overall – suggest that the Senate also believe that its confirmation role is more valuable than a short recess. The Senate could change its

[43] This calculation is based on the following assumptions: inaugural appointments take 8 months, ordinary appointments take 5.5 months, and the nomination stage takes 2.5 times as long as the confirmation stage. These assumptions are based on the studies cited above. See supra text and accompanying notes XX.

process to make it operate more quickly, even if it had to reduce the quality of its check on executive appointments, but it does not do so.[44]

Finally, even apart from what it reveals about the judgments of the executive and the Senate, the length of the appointment process also argues against allowing recess appointments during short recesses. If the typical appointment process would take 5 or 8 months, then it seems very hard to argue that a short recess of 4 or 10 days should allow a bypassing of the Senate confirmation requirement. A 10 day delay would be $1/15^{th}$ of the ordinary appointment process of 5 months and $1/24^{th}$ of the inaugural appointment process. One would have to have a very low opinion of the value of the Senate confirmation requirement to allow it to be bypassed due to such a short delay.

D. Other Changed Circumstances

In addition to these considerations rooted in contemporary appointments practice, further arguments based on modern circumstances suggest that the benefits of higher quality appointments are greater, and the costs of longer vacancies lower, than they were in the early years under the Constitution.

To begin with, the benefits of higher quality appointments through a senatorial check have only increased since the early years of the republic. The executive branch has more power today than it did at the time of the Constitution. The additional power of the executive branch is due primarily both to the broader interpretation of the federal government's enumerated powers as well as to the additional executive discretion allowed by the relaxation of the nondelegation doctrine.[45] Because of the executive branch's additional power, placing a check on the executive branch that helps to ensure that its officials are high quality should produce greater benefits.

The benefits of a strong senatorial check that promotes high quality appointments can be divided into three categories. First, the President, as the head of the executive branch, has more power than he originally did. Therefore, a check on his power to appoint officials helps to ensure that his overall power does not become excessive. Second, the executive officials that require senatorial confirmation now exercise greater power. This makes it even more important than it once was for the appointments to these offices to be high quality.

Third, many of these executive officials serve as the heads of independent agencies and therefore are not subject to supervision by anyone, including the President. These officers, then, have more power than they would have had at the time of the Constitution, when there were no independent agencies. Such unsupervised authority increases the benefits to be derived from high quality appointments.

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[44] One might argue that the Senate is unlikely to care about the speed of executive appointments, but that seems like a strong overstatement. While there may be cases where the Senate opposes a nominee or wants to delay his or her appointment, there are many cases where the Senate has no particular opposition to a nominee. Yet, the Senate will nonetheless proceed in an orderly manner in an attempt to make sure that the nominee actually warrants confirmation.

[45] There are other causes as well, such as the expansion in the President's war powers.

In addition to the greater benefits from high quality appointments, there are also reduced costs from longer vacancies. When an office becomes vacant, the executive branch has the power to assign someone to serve in the capacity of an acting officer. These acting officials are likely to be more qualified than those that existed at the time of the Constitution's enactment, when the acting official might have been simply a clerk. Today, there are large agencies, filled with many significant officers who can serve as acting officials.[46] These officers, who may have been confirmed by the Senate, provide a supply of persons who can serve as acting officials.

Moreover, vacancies are normally less of a problem for multi-member commissions, which may have five or seven members. Depending on the specific quorum rules, these commissions can continue to operate if one or more of the commissioner positions are vacant. Thus, the costs of vacancies are much reduced as to these commissions.

To conclude, then, the benefits of higher quality appointments have increased and the costs of delays in appointments have decreased since the early years under the Constitution. This change in circumstances reinforces the conclusion that short recesses should not permit recess appointments by the President.

E. Implications for the Meaning of the Recess Appointments Clause

Given the modern appointment practices and other changed circumstances, what are the implications of a living constitutionalist approach for recess appointments doctrine? There are three issues that these modern circumstances might affect.

The first issue is the minimum length of an intrasession recess during which the President may make a recess appointment. While the modern executive's interpretation has been more than 3 days, the contemporary appointment process strongly suggests that this is far too short a period. The tradeoffs between making quality appointments and delaying vacancies made by the executive and by the Senate are simply inconsistent with such a short period. Similarly, the small percentage of the ordinary appointment process of a 4 or 10 day delay also suggests that this period is too short to justify bypassing the Senate confirmation requirement. Defenders of this short period, both in the executive and in the academy, have only been able to do so by focusing exclusively on the delay that the recess causes without considering the value of the Senate confirmation or how long the modern appointment process takes.

If 4 or 10 days is too short, then what should be the appropriate cut off? While drawing a line is obviously difficult and somewhat arbitrary, I believe that the absolute minimum period should be a 30 day recess. A 30 day period would at least represent 20 percent of the ordinary appointment process. While this is the minimum length, there is strong case for requiring 60 days. The Senate confirmation is important enough to require such a substantial period.

[46] Of course, it might be argued that acting officials are not able to perform the job as well as a confirmed appointment. Whether and to what extent this is true will depend on the particular circumstances. But even in cases where the acting official is less qualified for the job or enjoys less confidence in the government than a regular official would, that official will still be able to operate in the job, which reduces the costs of the vacancy.

Moreover, the average period for Senate confirmation is 1.5 months and it would be inappropriate to allow a recess appointment to be made to avoid a shorter delay than the period it ordinarily takes to secure senatorial confirmation. But even if one disagrees with the 60 day requirement, I find it hard to understand how one could apply a shorter limit than 30 days.

Second, an important issue is whether the 30 or 60 day cutoff should be applied only to intrasession recesses or also to intersession recesses. It is true that the executive's interpretation only applies the 3 day limit to intrasession recesses. But once intrasession breaks are accepted as affording the President with the opportunity to make a recess appointment, there is little reason as a matter of policy to draw a distinction between the minimum length of intersession and intrasession recesses. The best argument for not applying the cutoff to intersession recesses is that it would somehow be inconsistent with the meaning of the term recess or with long practice regarding the matter. Still, if one applied a version of the living constitutional approach that emphasized modern policy over other considerations, there would be a pretty powerful case for extending the limit to intersession recesses as well.

Finally, an important issue is how long the recess appointment should last. Should "the end of the next session" be interpreted as extending merely to the next recess, as it does under the modified intersession view, or should it extend to the end of the next annual session, as it does under the intrasession view? There is a strong policy argument for following the modified intersession view. If a recess is defined as a minimum of 30 days, then there is likely to be only one recess during the year. This would allow a recess appointment of approximately half the year. Such a recess appointment would certainly allow the Senate to have more than enough time to make a confirmation decision. If the recess appointment was made after the nomination was made, which is the usual case, that would allow the Senate 2 or 3 times as long as it ordinarily takes to make a confirmation decision.[47] An additional consideration in favor of this position is that the intrasession view allows intrasession recess appointments to be much longer than an intersession ones, even though there is no good policy reason for result.[48]

In the end, if I were updating the Recess Appointments Clause to take modern values and circumstances into account, I would interpret recess to require a break of 60 days, would apply this requirement to both intersession and intrasession recesses, and would extend recess

[47] The strongest argument against this short recess appointment is that the nominee might not be willing to serve for such a short time. The nominee might be willing to serve for a year or more, but a third or half of the year would not justify leaving their former position. This is possible, but it is hard to know whether this would be true.

[48] It might be argued that modern circumstances support departing from the arise view in favor of the exist view. According to this argument, the long duration of the modern appointment process renders the arise limitation undesirable. If an appointment takes six months to make, then it may not be relevant whether or not the vacancy arose during a recess. While not without force, there is also a strong argument against this view. The fact that the exist view allows the President to make a recess appointment for any vacancy simply by waiting until there is a recess means that it allows the President to purposively circumvent the senatorial confirmation process. This is a significant cost. Although the arise limitation may no longer operate to ensure that recess appointments are made for vacancies that require them, it still operates to prevent a president from circumventing the senatorial confirmation process. In the end, whether one believes that the arise requirement should apply in modern circumstances depends on how one evaluates the costs of allowing presidents to circumvent the recess appointment power as compared to the benefits of allowing presidents to make recess appointments during longer recess.

appointments only until the next recess (as the modified intersession view holds). Under this view, there would normally be no recess appointments for the President to make, because there are rarely recesses exceeding 60 days. But even if one rejected these interpretations, it is extremely difficult to justify allowing recess appointments during intrasession recesses of less than 30 days. And if one changed the modern executive's interpretation in only that way, that would still be a significant cut back on the President's recess appointment power, since it would generally allow recess appointments to be made only during one or two recesses per year.

IV. The Actual Practice

Perhaps the most common argument made for a broad recess appointment power is that long standing practice supports it. It is sometimes said that the practice of the political branches consistently supports the exist view from 1823 onward and the intrasession view either from 1867 or 1921.[49] But this claim turns out to be seriously mistaken.

This section reviews the recess appointment practice from the time of the Constitution's enactment until the present. Several important themes emerge from this review. First, neither the Congress nor the Senate by itself has ever clearly adopted the modern executive's interpretation of the recess appointment power. In fact, both of the laws passed by the Congress on the subject of recess appointments adopt interpretations of the Clause that are narrower than the modern executive's view. Second, the strongest claim that can be made about the legislature supporting the executive's broad view is that the legislative houses for a period of time had not actively resisted the broad assertions of power by the executive, even when those assertions had been inconsistent with the best understanding of Congress's statutes. Yet, even those failures to resist have now ended in response to the most aggressive assertions of power in the Bush and Obama presidencies. Third, the recess appointment practice has not been consistent over time, but has changed, including in the last two generations. Fourth, the executive has been aggressive in expanding its power, regularly asserting the broadest power it can sustain.

Overall, the practice reveals a persistent effort on the executive's part to assert a broad recess appointment power and intermittent resistance by the legislative houses. Rather than exhibiting congressional agreement with a broad recess appointment power or even consistent acquiescence in it, the practice suggests a strong desire by the executive for broad recess appointment power with a weaker desire on the part of Congress to constrain such authority.

In presenting the practice it will be useful to divide the discussion into several parts: first, a discussion of the happen issue from the enactment of the Constitution until just prior to the passage of the Pay Act Amendment in 1940; second, a review of the type of recess issue during the same period; third, a discussion of the Pay Act Amendment and of how it came to be misinterpreted; and finally a review of the practice in the last half century.

A. The Happen Issue: 1789 to 1940

[49] See Sunstein, supra note XX; Solicitor General's Brief, supra note XX.

The practice concerning when a vacancy happens largely begins in 1792 with the opinion of the first Attorney General, Edmund Randolph, who was an important delegate at the Philadelphia Convention as well as at the Virginia Ratifying Convention. Despite the executive branch's interests in a broad recess appointment power, Randolph interpreted the Clause to require that a vacancy arise during the recess, relying both on the Clause's language and the constitutional structure.[50] Randolph recognized that the Clause was an exception to the confirmation requirement and had to be interpreted in a limited way. In 1799, Alexander Hamilton, who was then serving as Major General of the United States Army, wrote an opinion agreeing with the arise view.[51]

The arise interpretation was also followed by President Washington and the early Congresses. As a session drew to a close, Washington would nominate an individual and have the Senate confirm him without first securing the individual's consent to serve in the office. Then, if the individual declined to serve, the resulting vacancy would have arisen during the recess.[52] Likewise, Congress passed statutes that gave the President the power alone to appoint inferior officers during the recess of the Senate, even though appointing those officers normally required the advice and consent of the Senate.[53] In both cases, these practices would have been unnecessary if the Recess Appointments Clause allowed the President to make recess appointments for vacancies that arose during the session.

It is not clear when the executive made its first recess appointment under the exist interpretation, nor more importantly when the executive first started to engage in such a practice.[54] In 1823, however, Attorney General Wirt wrote an opinion adopting the exist interpretation.[55] The Wirt opinion acknowledged that the text of the Clause favored the arise interpretation, but argued that matters of structure and purpose supported the exist interpretation and outweighed the textual evidence. Wirt believed the purpose the Clause was "to keep offices filled."[56] But this is a one sided view of the Clause, which also has as its purpose to protect senatorial confirmation as the main method for appointing offices – a point that Randolph's opinion articulated, but which Wirt ignored.

The main force of Wirt's opinion comes from the examples of problems that he believes could occur if the arise interpretation were followed. He notes the possibility of a plague or other catastrophe occurring that forces the legislature to end its session prematurely, of the Senate recessing without realizing that it has not acted on a nomination, or of an office becoming vacant at some distance from the capital so that the Senate recesses without knowing of the vacancy.[57]

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[50] 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].
[51] Rappaport, *The Original Meaning* at 1519-1520.
[52] Id. at 1522-1523.
[53] Id. at 1524-1525.
[54] Cf. Rappaport, *The Original Meaning* at 1529-1536 with Hartnett, supra note XX.
[55] 1 Op. Att'y Gen. 631 (1823) [hereinafter Wirt Opinion].
[56] See Wirt Opinion, supra note XX.
[57] Id.

These arguments have some force on their own, but they hardly establish the correctness of the exist view. First, most of these circumstances seem very unlikely to occur, and if they did happen, could be addressed through other mechanisms, such as convening the legislature again in a different place or providing for acting appointments. Second, while the opinion focuses on the problems from the arise interpretation, it seriously neglects the problems from the exist view. For example, the exist view allows the President to wait the entire session without nominating anyone and then to recess appoint an individual during the recess. It permits the President to nominate an individual for an office, watch the Senate reject that person, and then recess appoint that person during the recess. It allows the President to repeatedly recess appoint an individual to an office, even though the Senate is unwilling to confirm him. These problems are far more likely to occur than the rare events that Wirt mentioned.[58]

Interestingly, Attorney General Wirt obliquely recognized that the exist view could create problems. But in an either naïve or cynical part of the opinion, he wrote that the exist interpretation "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, as well as with the high responsibility and short tenure annexed to that office."[59] Clearly, Wirt's words here are not accurate, as modern Presidents have regularly used the recess appointment power to appoint individual who could not secure Senate confirmation.[60] Or to put the point differently, the foundation stone for the modern executive branch's recess appointment jurisprudence itself condemns the actions of modern Presidents.

Had Wirt been more willing to take seriously that Presidents are not saints, but power seeking politicians, he would have recognized that these type of recess appointments should not be permitted. And had Wirt been forced to choose between the arise or the exist view, and to make the choice based on the avoidance of these problematic circumstances, he should have chosen the arise interpretation – a choice that would have been further supported by the constitutional text.

But Wirt did not necessarily have to choose been these extremes. There was an interpretation of the Clause that could have both allowed recess appointments during the circumstances raised by Wirt while also prohibiting recess appointments in the circumstances I have noted. Under this interpretation, the "vacancies may happen" language of the Clause does not require that a vacancy arise during the recess, but does require that a vacancy that arose during the session extend into the recess only by accident or fortuity. For example, if the vacancy occurred during the session, but the President did not learn of it until after the recess began, the extension of the vacancy into the recess occurred by an accident or fortuity. Thus, the vacancy "happened to exist" during the recess of the Senate by an accident. The fortuity requirement also has a textual hook. The idea is that the language, "vacancies may happen

[58] Repeated recess appointments have occur various times throughout history. See Rappaport, *The Original Meaning*, at n. 61; infra text and accompanying notes XX (discussing repeated recess appointment of Roy Harper).
[59] Id.
[60] For example, President Obama's recess appointments held unconstitutional by the D.C. Circuit in Noel Canning were made because the Senate was unwilling to confirm his nominees.

during the recess," suggests that a vacancy that arises during the session can only "happen during the recess" if it occurs unintentionally. Under this view, the genuinely accidental vacancies that arise during the session that Wirt discusses would involve fortuities and could receive recess appointments, but the examples I raise would not be accidental and could not.

While Wirt adopted the exist view, later Attorney Generals were attracted to the fortuity view.[61] For example, in 1845 Attorney General Mason held that the President could not make recess appointments for the newly admitted state of Florida, explaining that "If vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate."[62] The next year Mason wrote another opinion distinguishing his earlier decision, but again making clear the importance of fortuity.[63]

The version of the fortuity view adopted by the Attorney Generals, however, was perhaps unsurprisingly more congenial to executive power than the version most straightforwardly derived from the Clauses's language. The Attorney Generals invoked a presumption that when the Senate did not act on a nomination, it had done so unintentionally. This presumption allowed the President under the fortuity view to make recess appointments when the President had nominated someone but the Senate had failed to act on the nomination. But this version of the fortuity view was still quite distinct from the exist view in that the latter would allow, but the former would prohibit, recess appointments to be made for vacancies that arose during the session when the President had not nominated an individual during the session.

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[61] See 3 U.S. Op. Att'y Gen. 673 (1841) ("I say it has 'happened;' for, if any stress is laid on the peculiar use of [the] word [happen], as implying something fortuitous and unexpected, the presumption must be that the omission to confirm the nomination was a mere oversight"); 4 U.S. Op. Att'y Gen. 361 (1845) [hereinafter Mason 1845 Opinion]; 4 U.S. Op. Att'y Gen. 523 (1846) [hereinafter Mason 1846 Opinion].

[62] Mason 1845 Opinion.

[63] Mason 1846 Opinion. Because subsequent Attorney Generals Stanberry and Evarts wrongly claimed that Mason's 1846 opinion overruled his earlier one, 12 Op. Atty Gen. 32 (Aug. 30, 1866) (AG Stanbery), it is worth briefly discussing this issue. The 1846 Mason opinion allowed a recess appointment to be made based principally on the ground that a prior recess appointment that had extended "until the end of the next session" had end during the recess. While this reason would have been adequate to sustain the recess appointment, Mason felt compelled to add that the President had nominated an individual during the session and therefore the President had not sought to evade the confirmation requirement. See Mason ("when the office is lawfully filled until the session is closed, and happens to be vacant at that time, by reason of the inaction of the Senate on the nomination of the President, it may be filled by an executive appointment"); see also id. ("It is doing no violence to the language of the constitution to maintain, that this vacancy, happening from the inaction of the Senate on the nomination made, is within the meaning of the section quoted, and may be filled by an Executive appointment. . .). Mason also clearly indicated that the question raised by Wirt's opinion was not presented by the facts of the present case. See id. ("Whatever may be the estimate of that construction, by which the vacancies [in the Wirt opinion were addressed]"). Nor is there anything express or implied in the opinion to suggest that Mason was overruling his prior opinion.

It is true that Mason made clear that he was rejecting the arise view. But that does not mean that he was adopting the exist view, since the fortuity view was broader than the arise view in the relevant respects that Mason discusses. While Attorney General Evarts claimed that Mason approved of the earlier opinions adopting the exist interpretation, this is simply not true. Mason follows earlier opinions in certain respects, but, as the language referred to above indicates, does not adopt the reasoning or result of the Wirt opinion.

Even more fundamental doubts were expressed concerning the exist view (as well as the fortuity view) a few years later by Attorney General Edward Bates, who served under Abraham Lincoln. Bates wrote in 1862 that, "If the question were new, and now, for the first time, to be considered, I might have serious doubts of your constitutional power to fill up the vacancy, by temporary appointment, in the recess of the Senate" when the vacancy had existed during the session. "But the question is not new."[64] Bates may have believed that the Senate had acquiesced in these interpretations, but that was soon to change, in response to the actions of the Administration in which he served.

In 1863, the Senate took action that rejected both the opinions of the executive branch and the exist interpretation. In response to President Lincoln's recess appointment of a large number of individuals,[65] the Senate Judiciary Committee issued a report that adopted the arise interpretation and rejected the exist interpretation as unconstitutional.[66] To my mind, the Judiciary Report was a model of reasoning, hitting all the high points of the arise view.

Even more significantly in terms of the practice, the Committee Report recognized that the Attorney Generals had not followed the arise interpretation and that consistent practice could sometimes determine the meaning of a constitutional provision. But the Report concluded that the constitutional language was clear and therefore practice could not change its meaning.

> We are also aware of the great weight which such a continued practical construction is entitled to in considering the meaning and intent of a *doubtful* clause in a public act. But we have not been able to convince ourselves that such is the character of the provision. We think the language too plain to admit of a doubt or to need interpretation; and where such is the case, the language must not be wrestled from its natural sense to avoid a supposed inconvenience.[67]

On the same day that the Committee issued its report, the Senate considered an amendment to an appropriations bill that prohibited payment "to any person appointed during the recess of the Senate to fill a vacancy in an existing office, which vacancy existed while the Senate was in session, and is by law required to be appointed by and with the advice of the Senate."[68] This amendment seemed intended to adopt the report of the Senate Judiciary Committee.

This understanding of the amendment is supported by the legislative debate. Senator Fessenden referenced the situation where a person was nominated by the President, but the Senate either rejected him or did not act upon the nomination. He then stated:

> It ought to be understood distinctly, that when an officer does not come distinctly within the rules of law, and is appointed in that way in defiance of the wishes of the Senate, he

[64] Cite
[65] See S. REP. NO. 37-80 (3d Sess. 1863) (Appendix).
[66] See S. Rep, supra.
[67] Id. at 7.
[68] 12 Stat. 646 (1863).

shall not be paid. It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments.[69]

Senator Fessenden also clearly indicated his disagreement with the view of the Attorney Generals that the failure of the Senate to act on a nomination could somehow be deemed an accidental act or not a decision to reject the nominee. Fessenden says

> Certainly there were appointments before us at the last session which we did not act upon, which were before us for some time, and in the recess those same officers were appointed to those same offices, and hold them still. The reason why we did not act upon them, the Senator will recollect, was, not because we did not consider them, but because we did not wish to confirm them; yet they were reappointed, and are holding those offices. I think that is improper; I think it involves a violation of the privileges of the Senate, which we should maintain.[70]

Fessenden's remarks briefly touched on an important question. If the Senate thought these recess appointments were unconstitutional, then why were they simply refusing to pay the appointees rather than prohibiting such appointments entirely? As noted above, Fessenden had stated, "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment."[71]

It is not clear why Senator Fessenden believed that the Congress did not have the power to prevent the appointment. One possibility is that he did not believe that Congress had authority to enforce constitutional limits on the President, but that view seems problematic. Presumably, the Congress could have passed a law stating that any person recess appointed to a vacancy that existed during the session should not have any authority to act and the appointment shall be null and void. Congress would have authority to pass this statute based on its power to enact laws necessary and proper for carrying into execution all powers vested by this Constitution in any officer. Ensuring that the President did not illegally recess appoint officials and that illegally appointed officials did not serve would appear to be within Congress's authority.

A second possible explanation is that Fessenden believed the President would refuse to enforce such a law as unconstitutional. If the President believed he had the authority not to enforce unconstitutional laws, then the President might conclude that a law prohibiting recess appointments to fill vacancies that existed during the session had no effect. Yet another possibility is that Fessenden feared the President would veto the statute if it were passed on its own as an independent substantive provision, but would be reluctant to veto it if it were bundled with an appropriate statute. But Senate rules or practices might have allowed it to be placed in

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[69] CONG. GLOBE, 37TH CONG., 3D SESS. 565 (1863). In response, one Senator, Senator Harris, believed that the issue should not be addressed in an amendment to an appropriation bill given the various Attorney General opinions on the subject. But he stated that "if the Senate chooses to reverse the action of the Government for the last forty years I have nothing to say upon the subject." Id.

[70] Id.

[71] Id.

an appropriation law only if it were spending measure addressing payment, not a substantive provision

Whatever the reason why the Congress did not enact a full prohibition, the passage of the salary limitation certainly indicates that the Senate, and probably Congress generally, did not agree with the exist interpretation, was not acquiescing in it, and likely rejected it entirely. The statutory text clearly evinces hostility to appointments made under the exist view, since it is burdens only such appointments. The legislative history confirms this hostility to the exist interpretation. Both the Senate Judiciary Committee Report, which expressly adopted the arise interpretation, and the legislative debate rejected the exist view.

The best argument for concluding that the Congress did not reject the exist interpretation is that Congress could have passed a substantive prohibition, but instead chose merely to enact a pay prohibition. The Attorney General made this argument in 1880, but it is weak.[72] There is no indication in the statute or the legislative history that the Congress failed to pass a full prohibition because it supported recess appointments under the exist view. To determine whether Congress agreed with or acquiesced in the executive's view, the question is not whether the Congress actually prohibited such recess appointments, but instead what view of the underlying constitutional issue they expressed. Both the text and the legislative history express strong opposition to appointments made under the exist view. Moreover, if Congress chose only to prohibit payment to persons recess appointed under the exist view, either because it feared that a full prohibition on such recess appointments would be vetoed or would be not enforced by the President on constitutional grounds, that would hardly suggest that Congress was agreeing with or acquiescing in the exist view.

Further evidence against the existence of a practice following the exist view is that the federal courts were split on the arise-fortuity-exist issue. There were three federal court decisions, two of which rejected the exist view. In 1868, in re District Attorney of the United States, a District Court, in a long, scholarly opinion, adopted the arise view and rejected the notion that the Attorney General opinions had decided the matter or that the legislature had consented to the exist view.[73] One year later, in Schenck v. Peay, a circuit court also rejected the exist interpretation, relying in part on what it described as the "learned and exhaustive opinion" of the court in In re District Attorney.[74] It is not entirely clear from this case whether the District Court was adopting the fortuity or the arise interpretation, with some of the language suggesting one interpretation and other language suggesting the other. But it is clear that the Court was rejecting the exist view, as it held that the recess appointment, which would have been allowed under that view, was unconstitutional. In 1880, another circuit court, in In re Farrow, adopted the exist interpretation, relying largely on the attorney general opinions and the supposed acquiescence of the Senate.[75]

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[72] See 16 U.S. Op. Atty. Gen. 522 (1880).
[73] Case of Dist. Attorney of United States, 7 F. Cas. 731 (E.D. Pa. 1868).
[74] Schenck v. Peay, 21 F. Cas. 672 (C.C.E.D. Ark. 1869).
[75] *In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880).

The pay prohibition remained in full force until 1940. Thus, the Congress's rejection of the exist view in favor of the arise view continued throughout this period. While we do not know how many recess appointment were made under the exist view while the prohibition was in force, it is a reasonable inference that they were relatively uncommon. After the Civil War, the Attorney Generals expressly abandoned the fortuity view of the Clause,[76] but the actions of one branch by itself, given the continuing existence of the pay prohibition, could not establish an accepted practice of appointments under the exist view.

Overall, then, a review of the actions of the branches during this period counts strongly against the claim that there was a continuing practice of following the exist view from 1823 until the present. In fact, during a portion of this period, a rejection of the exist view came close to being adopted by all three branches at the same time.[77] Most importantly, beginning in 1863, Congress passed a statute that was based on a rejection of the exist and fortuity views and attempted to limit, if not eliminate, appointments that did not conform to the arise view. Thus, the claim that the political branches supported an exist view practice during this period must be rejected. Nor can a Congress, that passed a strong rejection of the exist view, be considered to have acquiesced in that view because it did not pass a statute that even more strongly rejected the view.

In 1940, however, the situation changed when Congress amended the pay prohibition. But because the 1940 Pay Act Amendment also raises questions as to the type of recess issue, it will useful first to discuss the early practice concerning that issue. Then, we will be in a position to turn to the Amendment and its interpretation.

B. The Type of Recess Issue: 1789 to 1940

There are three possible positions on the type of recess that can allow a recess appointment: the intersession view, the modified intersession view, and the intrasession view. Defenders of a broad recession appointment power often claim that the intrasession view has been consistently followed at least since 1921.[78] As with the claims about the happen issue, these claims are vastly overstated. First, there were only three sets of recess appointments, that might have been intrasession recess appointments, made during the period from 1867 to 1940 – a substantial cluster made by Andrew Johnson in 1867 and 1868, and then another group made in the 1920 and 1930s. Even if all of these were intrasession recess appointments, they would not constitute a practice, but instead largely isolated intrasession recess appointments.

Second, these recess appointments were not clearly made under the intrasession view. There is a strong case that at least the great majority of the Johnson recess appointments were

[76] The President's Power to Fill Vacancies in Recess of the Senate, 12 Op. Atty Gen. 32 (Aug. 30, 1866) (AG Stanbery).

[77] Congress rejected the exist view in 1863. The Attorney General appeared to have rejected the exist view with the fortuity view in the 1840s. The courts rejected the exist view in the late 1860s. The executive's apparent acceptance of the exist view in 1862, while appearing to suggest that it was wrong as an original matter, prevented the exist view from being rejected by all three branches at the same time.

[78] See Solicitor General's Brief, supra at 11.

made under either the intersession view or the modified intersession view. Similarly, there is a strong argument that the recess appointments made in the 1920s and 1930s, that are often viewed as being made under the intrasession view, were actually made under the modified intersession view. Overall, the period from 1789 to 1940, and even that from 1867 to 1940, is not best understood as exhibiting a practice of intrasession recess appointments.

2. The Johnson Recess Appointments

In the nearly 80 years from 1789 until the Johnson recess appointments in 1867, there were no intrasession recess appointments.[79] The practice during this period is important in and of itself. While this practice is often dismissed on the ground that there were no long intrasession recesses during this period that would have allowed Presidents to make intrasession recess appointments, that is not entirely true. From 1857 until 1867, there were 8 different 12-14 day intrasession breaks over the Christmas holiday, and no recorded recess appointments.[80] Since the executive branch now argues that intrasession recess appointments can be made for breaks of more than 3 days, this practice counts against its version of the intrasession view.

In 1867 and 1868, President Andrew Johnson made a cluster of recess appointments that have often been thought to be intrasession recess appointments. These alleged intrasession recess appointments occurred in extraordinarily unique circumstances. For almost 80 years, the Congress had consistently followed a pattern of holding two annual sessions, with a single long intersession recess each year.[81] In 1867 and 1868, the pattern briefly changed. In each year, Congress convened a session and met for a period of time. But instead of simply taking a recess until the next session began in December, Congress instead chose to take a break for a period and then to meet again in the middle of the year. These breaks have been thought to be intrasession recesses, but as I argue below, it is not at all clear that they were.

Let me begin with the 1867 recess appointments. In 1867, Congress convened in the beginning of March, but then adjourned on March 30 until July 3. This intended 92 day break was quite unusual, but did not occur. President Johnson called the Senate into session on April

[79] The Solicitor General's brief claims that President Lincoln "appears" to have made recess appointments of several Brigadier Generals during the holiday recesses of 1862 and 1863. NLRB v. Noel Canning, Brief for the Petitioner (September 2013), at 22 n. 15. But this is mistaken. These appointments were, if legal at all, acting appointments, not recess appointments. See John H. Eicher & David H. Eicher, Civil War High Commands 31 (2001) (the "appointments were often carried unofficially or considered an "acting" appointment pending the legal outcome of the confirmation or reversion."). This is confirmed by the fact that the appointment letters stated that the person would receive a commission if the Senate consented to the appointment, while recess appointments are made by issuing commissions. See U.S. Const. art. II, sec. 2, cl. 3 ("by granting commissions which shall expire at the end of their next session"). See also NLRB v. Noel Canning, Brief for the Respondent (November 18, 2013), at 25.

[80] See JOINT COMM. ON PRINTING, UNITED STATES CONGRESS, 2003-04 OFFICIAL CONGRESSIONAL DIRECTORY, 108TH CONG. 522-524 available at http://www.senate.gov/reference/resources/pdf/congresses2.pdf [hereinafter OFFICIAL CONGRESSIONAL DIRECTORY]. There were also 3 5-7 day intrasession recesses over the holidays before 1857. Id.

[81] The main exceptions were the holiday recess referred to above as well as special sessions called by the President.

1. This special session continued until April 20, when the Senate took a recess until July 3.[82] During this 73 day break between April 20 and July 3, Johnson made 20 recess appointments.[83]

Some commentators have argued this legislative break was an intrasession recess on the ground that the Congress had not ended the session. There is, however, an alternative way of viewing the matter. While the Senate may have taken an intrasession recess on March 30, it held a separate special session in April, and it ended that session on April 20 with an adjournment sine die. The resulting break might have been an intersession recess.

It appears that this was the first time in the history of the nation where a special session had occurred during the period when an ordinary session had been planned.[84] Thus, it was not clear how to analyze this situation. On the one hand, it might be thought that the first session of the 40th Congress (that had been adjourned on March 30 for the intrasession break) continued through the entire time of the special session; then, when the special session ended the first session continued. Under this view, there was no genuine intersession recess from April 20 to July 3 and therefore no recess appointment could be made under the intersession view.

On the other hand, it might be thought that the end of the special session on April 20 constituted a genuine intersession recess that allowed recess appointments to be made under the intersession view. Under this view, the special session would have ended the ordinary session that had begun at the start of March. This position was taken by Thomas Jefferson in his influential Senate Manual and therefore is likely to have had a significant effect on both the Senate and the President.[85] Jefferson wrote: "What then constitutes a session . . . The constitution authorizes the President 'on extraordinary occasions, to convene both Houses or either of them.' I. 3. If convened by the President's proclamation, this must begin a new session, and of course determine the preceding one to have been a session."[86] The idea seems to be that two session cannot occur at the same time.

Although I have been inclined toward the former view, the point is that it is not clear what people at the time believed. If a significant percentage of political actors in the political branches believed that the intersession recess allowed the President to make a recess appointment – a not unlikely circumstance given Jefferson's authority and the absence of objections from the Senate – this recess appointment would be hard to view as having been taken under the intrasession view.[87] Instead, it would be an intersession recess appointment reflecting the special circumstances at the time.

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[82] This session lasted from July 3 to July 20, when the Congress recessed until November 21, 1867.

[83] Solicitor General's Brief, at HENRY B. HOGUE, CONG. RESEARCH SERV., INTRASESSION RECESS APPOINTMENTS (2004).

[84] See OFFICIAL CONGRESSIONAL DIRECTORY, at 522-525.

[85] THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES Sec. LI (1812).

[86] Id.

[87] Senators Howard and Nye referred to these meetings as separate sessions." See Cong. Globe 753-54 (40th Cong. July 19, 1867) (referring to 1867 meetings as separate sessions) (remarks of Senators Howard and Nye).

Consider now the 1868 recess appointments. The second session of the 40th Congress began on December 2, 1867. After the Senate acquitted Johnson in his impeachment trial, Congress adjourned for 56 days from July 27, 1868 to September 21, 1868.[88] During this recess, Johnson made 16 additional recess appointments.[89]

During this recess, Attorney General Evarts was asked whether the President could make a recess appointment for a collector of customs concerning a vacancy that had arisen during the session. Evarts followed the prior Attorney General decisions that had adopted the exist view. But, significantly, Evarts said nothing about the fact that this appointment was made during what some people have regarded as an intrasession recess. He also said nothing about it in two other opinions he issued shortly thereafter. Nor do we have any record of objections made by a Congress that had impeached Johnson and therefore would have been quite willing to criticize him for the exercise of a new power.[90]

There is a strong reason to believe that these recess appointments were understood to be intersession recess appointments. When the Senate took its recess on July 27, the Congressional Globe indicated that "The president pro tempore announced that the hour of twelve o'clock, fixed by the resolution of the two Houses *for closing the present session of Congress by a recess*, had arrived, and declared the Senate, in pursuance of the said resolution, adjourned until the third Monday in September next a twelve o'clock."[91]

This statement was significant. When the Senate adjourned for an intrasession recess, it would typically use different language. For example, on March 30, 1867, when the Senate intended to take a long intrasession break, it stated: "The hour fixed by concurrent resolution of the two Houses for that purpose having arrived, the Senate stands adjourned until the first Wednesday of July, at noon." There was no language about "closing the present session" or even use of the term "recess."[92]

This language on July 27 might reasonably have led the Attorney General and others to conclude that the Senate was ending its session. This would explain much about the Attorney General's three decisions written during this recess. The AG did not even discuss the issue of intrasession recesses, even though this would have been an unprecedented action that required justification. Moreover, the opinions appear to have understood the Senate's recess as having ended the session. In each of the three opinions, the AG spoke of the office becoming "vacant during the *late session* of the Senate."[93]

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[88] OFFICIAL CONGRESSIONAL DIRECTORY, at 519.
[89] Solicitor General's Brief, Appendix A, at 5a-8a.
[90] Of course, it is possible that he simply chose to ignore the issue so as to bring no attention to it. But if that is true, that also does not suggest a practice. Instead, it suggests an exercise of power that was not openly justified and that apparently was not followed up upon.
[91] See CONG. GLOBE, 40TH CONG., 2ND SESS. 4518 (1868) (emphasis added)
[92] See Cong. Globe, 40th Cong., 1st Sess. 458 (1867).
[93] 12 U.S. Op. Att'y Gen. 469, 470 (1868); 12 U.S. Op. Att'y Gen. 455 (1868); 12 U.S. Op. Att'y Gen. 449, 451 (1868) (emphasis added).

As with the 1867 recess appointment, it is by no means clear that this action actually rendered the recess an intersession recess. It is true that the announcement by the President pro tempore seemed to clearly signify an intent to end the session and that would, at least if joined by the House, to have actually ended the session. But things are more complicated. First, despite the President pro tempore's announcement, the House did not make a similar statement, announcing only that "by the concurrent resolution of both Houses of Congress the House of Representatives now takes a recess until Monday, September 21."[94] Second, the President pro tempore's action may not have been authorized by the concurrent resolution, which stated that the House and Senate "adjourn their respective houses until the third Monday of September, and on that day, unless it then be otherwise ordered by the two Houses, they further adjourn their respective Houses until the first Monday in December, 1868."[95] Finally, when the Senate met again on September 21, some of the Senators appeared at pains to note that their adjournment had not ended the session, without however referring to the President pro tempore's statement to the contrary.[96]

But whether or not the Senate's action actually ended the session, the point is that it might have been easy for the President and the Attorney General, as well as members of the Senate, to have believed that it had done so. Thus, these recess appointments might be best understood either as intersession recess appointments or as having been made under the assumption that they were intersession recess appointments. In either case, it is hard to argue that they are part of a practice of intrasession recess appointments.

While there are strong arguments that the above 36 recess appointments either conformed to or were reasonably thought to conform to the intersession view, there are two sets of recess appointments during this period that probably did not follow the intersession view. First, in 1867, after taking the recess following the special session called by the President, Congress convened on July 3.[97] This session lasted until July 20, when Congress recessed until November 21, 1867. Even if one treated the previous recess as an intersession recess, this 90 day recess would most likely have been an intrasession recess, since there was no indication that the Senate had ended the session. During this recess, President Johnson recess appointed 12 officials.[98]

Second, in 1868, after the recess that the Senate pro tempore announced as ending the session, the Senate met again on September 21. After a one day meeting, it adopted a concurrent resolution taking a break, but that resolution did not purport to end the session until November 10 at the earliest.[99] During the period between September 21 and November 10, President Johnson made 9 additional recess appointments. Since the September 21 resolution did not end the session before November 10, these recess appointments cannot be justified as intersession recess appointments. Significantly, neither the Johnson Administration nor the Attorney General

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[94] See CONG. GLOBE, 40TH CONG., 2ND SESS. 4501 (1868).
[95] See CONG. GLOBE, 40TH CONG., 2ND SESS. 4327 (1868).
[96] Cite
[97] OFFICIAL CONGRESSIONAL DIRECTORY, at 519.
[98] Gould v. United States, 19 Ct. Cl. 593 (1884).
[99] The details of this concurrent resolution are discussed below. See infra XX.

attempted to justify or even mention that these recess appointments had been made during what might have been an intrasession break.

While these 21 recess appointment cannot be justified under the intersession view, that does not mean that the Johnson Administration did not understand the other 36 recess appointments as intersession recess appointments. Since the Administration did not explain its actions, we simply do not know their basis. But it is entirely possible that it employed the intersession view for the other 36 appointments while relying on another view for these recess appointments. It is a quite common practice in the law to rely on a less controversial position when one can do so, while employing a more controversial one only in cases when there is no alternative.

Even if one did not view the Johnson recess appointments as having been made under the intersession view, they might instead be understood as having been made under the modified intersession view.[100] Under that view, Senate breaks would constitute intersession recesses so long as they were of a sufficient length. These recesses would have been the first time that the Senate had taken a break longer than 14 days that did not occur at the end of the session. Thus, they might have been thought to have ended the session under the modified intersession view. Some of the evidence discussed above that supports the intersession view could also be used to support the modified intersession view, such as the Attorney General Evarts's opinions and the statement by the President pro tempore of the Senate on July 27, 1868. But the modified intersession view would also apply in the absence of this evidence simply on the ground that the breaks were long ones.[101]

Significantly, the modified intersession view might justify not only the 36 Johnson recess appointments made during the two arguably intersession recesses, but also the 21 recess appointments during the breaks in 1867 and 1868 that do not appear to be intersession under the intersession view. First, the 1867 break lasted 90 days, which would certainly constitute an intersession recess under the modified view.

Second, the 1868 break might also have been long enough to constitute an intersession recess under the modified intersession view. Analyzing this break is a bit more complicated than the 1867 break. The concurrent resolution adopted on September 21, 1868 provided that the two Houses should adjourn until October 16, 1868 and "that they then, unless otherwise ordered by the two Houses, further adjourn their respective Houses until the 10th day of November, at

[100] Michael Stern, *A Recess By Any Other Name,* POINT OF ORDER BLOG (21 March 2012, 8:47 pm), http://www.pointoforder.com/2012/03/21/a-recess-by-any-other-name/.

[101] It might also be argued that the Senate Executive Journal reflected this view of the matter. In 1867, the Senate executive journal referred to the session beginning July 3, 1867 as the "First adjourned session of the Fortieth Congress." See SENATE EXECUTIVE JOURNAL, 40TH CONG., 1ST SESS. 785 (July 3, 1867). In addition, the Senate executive journal referred to the next meeting of the Senate on November 21, 1867 as the "Second adjourned session of the Fortieth Congress." See SENATE EXECUTIVE JOURNAL, 40TH CONG., 2ND SESS. 859 (Nov. 21, 1867). Senators Howard and Nye also referred to these meetings as separate sessions." See Cong. Globe 753-54 (40th Cong. July 19, 1867) (referring to 1867 meetings as separate sessions) (remarks of Senators Howard and Nye). It is true that there are alternative ways to read these entries, but they might be taken as a recognition that these long recesses constituted new sessions. See Stern, supra note XX.

twelve o'clock noon; and that they then, unless otherwise ordered, further adjourn their respective Houses to the first Monday of December." On October 16 and November 10, the Senate as a whole did not appear to meet. Instead, four and five Senators, respectively, appeared and, concluding that there was no motion to do otherwise, adjourned the Senate. If we assume the break lasted from September 21 until October 16, that would be 25 days, which might or might not be long enough to constitute an intersession recess under the modified view. But even if 25 days was not long enough, one might conclude that the actual break lasted to November 10, which would be 50 days and would almost certainly be long enough to constitute an intersession recess under the modified view.

The reason one might treat this recess as lasting until November 10 is that the Senate did not seem to actually hold a session on October 16. Since the Senate as a whole did not meet, there would be no real session.[102] To put the point more explicitly in terms of the modified intersession view, if the session is defined as a period when there are enough Senators at the capital so they can take action on nominations, then the fact that less than a half dozen Senators showed up would not establish a session.[103]

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[102] This argument for concluding that the October 16 and November 10 meetings were not sessions, because only four or five Senators showed up and no business conducted resembles the Obama's Administration's argument that the 2012 pro forma sessions were not real ones. But the two arguments are distinct in various ways and one might conclude that the recess appointments made by President Obama were not valid even if one also concluded that these meetings did not constitute sessions under the modified intersession view. Two important differences between these meetings that might lead to different conclusions is that the Senate did not claim to be in session in these 1868 meetings, but the Senate did so in 2012; and the Senate listed the number of Senators in attendance in 1868, but it did not do so in 2012. There are, moreover, other differences between the two situations, such as the fact that the 2012 pro forma sessions were intended to represent formal sessions either to comply with the 20th Amendment or to prevent recess appointments, whereas the 1868 meetings did not have any such objective.

[103] While these recesses appear to satisfy the requirements of the modified intersession view, there is also a question about the length of the recess appointments. Under the modified intersession view, the recess appointment can only last through the end of the next session – that is, the next period during which the Senate meets until there is a legislative break that is long enough to count as a recess. There is unfortunately not clear information about the length about these recess appointments, but it is still worthwhile asking how long these recess appointments would have had to last under the modified intersession view. If one interprets the modified intersession view in the pragmatic way referenced below, then two of the four classes of recess appointments would have lasted a significant period of time, but two of them would have lasted only a relatively brief time, raising questions as to whether the recess appointments really lasted such a short period.

There are four different classes of recess appointments to consider. First, there is the recess from July 20, 1867 to November 21, 1867. The next session would then have extended until December 1, 1867, when the Senate adjourned sine die to begin the new session on the next day. Because the modified view is based on a factual understanding of the recess, rather than a formal one that depends on how the Senate defines its session, one might conclude that from a factual or pragmatic perspective there was no new session on December 2. In that event, the next session would have continued a considerable period through July 27, 1868. A similar result obtains for the second class of recess appointments. These recess appointments were made during the recess of September 21, 1868 to December 7, 1868. (This assumes, as discussed earlier, that this recess can be interpreted as a single recess. See supra note XX.) These recess appointments would then have ended at the earliest on March 3, 1869, which would again be a considerable period.

The third class of recess appointments are those made during the recess from April 20, 1867 to July 2, 1867. Those appointments would have extended until the end of the session on July 21. This would be a very short recess appointment. Thus, it is quite possible that these recess appointments might have been treated as lasting past this date. The fourth class of recess appointments are those made during the recess from July 27, 1868 to September 21.1868 The Senate met for only one day on September 21, but that probably still constituted a session.

Finally, one might view the Johnson recess appointments as having been made under the intrasession interpretation. One can imagine two versions of this view. On the one hand, one might view the first 36 recess appointments as having been made under the intersession view, with the remaining 21 as having been effected under the intrasession view. On the other hand, one could view all 57 as having been made under the intrasession view. Under either version, the intrasession view gains some support in the overall practice from these recess appointments. But two factors significantly reduce the degree of support that the intrasession view derives from them. First, as discussed below, these recess appointments made during a two year period are an isolated historical episode that were not repeated for at least a half century. Second, the executive did not identify or justify any of these recess appointment as being intrasesession recess appointments. This significantly reduces the importance of these recess appointments for purposes of determining their effects on the practice. As discussed below, theories that justify interpreting the Constitution based on practice – whether based on acquiescence or consent – generally assume that the practice was engaged in the full light of day and was understood by other parties. If the executive did not indicate either the character or justification of these recess appointments, then this greatly reduces their contribution to the effect of the practice.

2. The Knox and Daugherty Opinions and Subsequent Recess Appointment Practice

Even if one reads them as intrasession recess appointments, the Johnson recess appointments would have been largely an isolated event limited to a very unusual two year period. Subsequently, there were no intrasession recess appointments for at least a half century. Thus, one might argue with some force that the practice during this period was not to have intrasession recess appointments. While this period did not have very long intrasession breaks, it did usually have Christmas recesses, virtually all of which lasted more than 10 days and most of which were at least 14 days – periods that would have entitled the President to make recess appointments under the modern executive's intrasession view.

In 1901, Attorney General Knox expressly adopted the intersession view, concluding that the President could not make recess appointments during intrasession breaks.[104] Combined with the absence of intrasession recess appointments during the prior period, this Attorney General opinion suggests a strong practice against intrasession recess appointments beginning either in 1868 or, with the exception of the Johnson recess appointments that Knox had repudiated, in 1789.

Technically, then, this recess appointment would again have lasted a short period. But if the recess appointments was not treated as ending on September 21, one possible explanation is that the session was so short (perhaps unexpectedly) that the Johnson Administration decided to treat it as a de minimis session, notwithstanding the probable legalities. If that were the case, then the recess appointments might have been treated like the one in the second class above, which would extend at least until March 3, 1869.

[104] 23 U.S. Op. Att'y Gen. 599 (1901) [hereinafter Knox Opinion].

In 1923, however, Attorney General Daugherty disregarded this practice and overturned the Knox opinion.[105] For those who believe strongly in practice, Daugherty's opinion might be subject to criticism. But even assuming that Daugherty's opinion was legitimate, the question is what view Daugherty actually adopted. While it has often been assumed that Daugherty adopted the intrasession view, there is a strong case to be made that he actually endorsed the modified intersession view.

Daugherty's opinion never says that the recess during which a recess appointment can be made occurs during the session and therefore is an intrasession recess. Instead, Daugherty's opinion focuses on whether the Senate is in session.[106] If it is in session, then no recess appointment can be made. If it is not in session, then a recess appointment can be made. Daugherty concludes that if the Senate takes a break during an annual session – that is, if it does not formally end the session, as with a sine die adjournment – that break can still be a recess if it is long enough. The reason that break can be a recess is that the Senate is not in session.[107] This understanding of a recess – as the period when the Senate is not in session – represents the modified intersession view.

Additional support of considerable force for understanding Daugherty's opinion as adopting the modified intersession view is the length of the recess appointments made under it. In the period from Daugherty's Opinion until 1940, 15 recess appointments were made during a legislative break that was not an intersession recess under the intersession view.[108] None of these recess appointments lasted the length that the intrasession view would allow. Most importantly, the recess appointment of John Esch on January 3, 1928 extended only until the end of the existing session of Congress on May 29, 1928.[109] If this appointment had been made under the intrasession view, this recess appointment would not have ended then, but would have extended through the intersession recess as well as through the next annual session until March 3, 1929. The length of the remaining 14 recess appointments is also consistent with the modified view. These recess appointments ended during the next meeting of the Senate, when the Senate confirmed the recess appointees for ordinary appointments. Thus, the overall practice of recess appointments at this time suggests that the executive branch understood the Daugherty opinion to have adopt the modified view, not the intrasession view.

The length of recess appointments made by the Truman Administration also reinforces this conclusion. Although these recess appointments take place after the 1940 time period of this

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[105] 33 U.S. Op. Att'y Gen. 20 (1921) [hereinafter Daugherty Opinion].

[106] Michael Stern, Attorney General Daugherty and the "Intra-Session" Recess, Point of Order Blog (March 30, 2012), http://www.pointoforder.com/2012/03/30/attorney-general-daugherty-and-the-intra-session-recess/.

[107] Daugherty writes: "It seems to me that the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained. Regardless of whether the Senate has adjourned or recessed, *the real question, as I view it, is whether in a practical sense the Senate is in session so that its advice and consent can be obtained.* To give the word ' recess' a technical and not a practical construction, is to disregard substance for form." *See* Daugherty Opinion, supra note (emphasis added).

[108] See Solicitor General's Brief, Appendix A.

[109] Clarence A. Miller, *The Interstate Commerce Commissioners: The First Fifty Years: 1887-1937*, 5 GEO. WASH. L. REV. 580, 665 (1937).

section, they cast further light on the meaning of the Daugherty opinion, as interpreted by the executive branch.[110] The Truman Administration recess appointed Roy Harper three times in 1947-1948.[111] Harper's first two recess appointments in August and December, 1947 conformed to the modified intersession view.[112] While his third recess appointment in June, 1948, followed the intrasession view, that was only because Comptroller General Warren adopted the intrasession view in an opinion, discussed below, that may have initiated the governmental practice of following that view.[113]

In sum, in this key period prior to the 1940 Pay Act Amendment, the actions of the President and the Senate do not provide support for a practice based on the intrasession view. There is certainly no clear evidence of a practice under the intrasession view either from 1867 or from 1921 until 1940. Instead, there is significant evidence of a practice under the intersession view from 1789 until 1921, include a significant majority of the Johnson recess appointments and Attorney General opinion expressly adopting the view. There is also substantial evidence for the modified intersession view, including a very reasonable interpretation of Daugherty's opinion and the length of various subsequent recess appointments. Finally, there is some evidence for the intrasession view, based especially upon the minority of recess appointments that cannot be justified under the intersession view and on an interpretation of the Daugherty opinion as adopting the intrasession view. Yet, the force of this evidence is reduced because the Johnson recess appointments were not openly justified as intrasession recesses and the length of the recess appointments made under the Daugherty opinion reflected the modified intersession view rather than the intrasession view.

C. The Pay Act Amendment of 1940

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[110] During the Roosevelt Administration, the 7 recess appointments that were not made during an intersession recess under the intersession view also conformed to the modified intersession view, because the recess appointments ended during the next meeting of the Senate when they were confirmed. Cite.

[111] 28 Comp. Gen. 30, 31 (1948).

[112] Michael Stern, *Comptroller General Warren and the Origins of the Multi-Session Recess Appointment,* POINT OF ORDER BLOG (21 April 2012, 11:06pm), http://www.pointoforder.com/2012/04/21/comptroller-general-warren-and-the-origins-of-the-multi-session-recess-appointment/.

[113] While the Truman Administration's recess appointments of Roy Harper clearly conform to the modified intersession view rather than the intrasession view, it is not clear that all of the recess appointments from this time followed the same understanding. There are certain recess appointments from the same period that may have extended longer. For example, J Altson Adams was recess appointed to the Federal Home Loan Bank Board on August 11, 1947, the same week that Roy Harper received one of his recess appointments. See Solicitor General's Brief, at Appendix A at 13a-19a. But while Harper received another recess appointment on December 20, 1947, 28 Comp. Gen. 30, 31 (1948), there is no record of Adams receiving another recess appointment. Instead, Adams was confirmed on February 26, 1948. See Cong. Rec. 1768, 80th Congress, 2nd Sess. If Adams served in the recess appointment until his confirmation (a possible but not certain possibility), then his recess appointment would not have conformed to the modified intersession view. Of course, this all assumes that our lack of records of Adams not receiving a recess appointment in December 1947, like the one that Harper received, is accurate. But it is quite possible that our records are incomplete. The Solicitor General's Brief lists Harper as receiving recess appointments in August 1947 and June 1948, but not in December 1947, even though we know independently that he received a December 1947 appointment from the Comptroller General opinion discussing his case. See Solicitor General's Brief, at Appendix A at 13a, 18a. Thus, it may be that the recess appointments from December, 1947 of Adams and other officials are not available.

Now that we have brought the discussion of the practice as to both the happen and type of recess issues up to 1940, we are ready to review the Congress's action in amending the Pay Act. This is an extremely important issue for understanding both the practice and the statutory law that is now in place. The 1940 Pay Act Amendment was the last time that Congress as a whole passed a formal enactment as to recess appointment issues. This Amendment reveals that Congress did depart from the arise view, but did not embrace the full exist view. The Amendment also suggests that Congress did not adopt the intrasession view of the Constitution and intended a constitutional and statutory legal regime that is considerably narrower than the one that the executive branch has pursued. Thus, once again, Congress's actions do not support the executive branch's intrasession view or its interpretation of the Amendment.

Before discussing how the Pay Act Amendment should be interpreted, let me briefly describe it. The Amendment relaxed the original 1863 Pay Act to allow payment of some recess appointees. Section (a) of the Act repeats the previous prohibition on payment for services "to an individual appointed during a recess of the Senate to fill a vacancy . . . if the vacancy existed while the Senate was in session."[114] The Act, however, provides that this subsection does not apply in three circumstances:

> (1) if the vacancy arose within 30 days before the end of the session of the Senate; (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.[115]

Finally, section (b) adds that these three exceptions shall only apply "if a nomination to fill a vacancy referred to by paragraphs (1), (2), or (3) . . . shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate."

This statute is more difficult to understand than it initially seems. But in general we can understand it as allowing some recess appointees to be paid, even though the vacancy existed during the session, if the circumstances do not involve what Congress regarded as unreasonable behavior on the executive's part. Under paragraphs (1) and (3), if either the vacancy arose or the President's nominee was rejected within 30 days of the end of the session, it is thought that the President and the Senate could not act quickly enough to nominate and confirm a new nominee. Similarly, under paragraph (2), if the Senate had not acted on a nomination when the session ended, it is assumed that the President had not acted unreasonably and therefore the President should be allowed to make a recess appointee. But paragraph (2) limits the exception so that the President cannot use it to recess appoint the same individual two times in a row. Finally, section (b) holds that all of these recess appointees should be submitted to the Senate, which not only gives the Senate an opportunity to act on these appointees, but will sometimes prevent them from being paid if they are recess appointed again in the next session.

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[114] 5 U.S.C. 5503.
[115] Id.

1. The Happen Issue

Let us focus initially on the effect of the Amendment on the happen issue. Clearly, the statute is the first action by the Congress and the Senate that departs from the arise view. While that departure is significant, it is also important to recognize that the Amendment departs in a relatively moderate way, allowing pay for a recess appointee to a vacancy that existed during the session only under three limited circumstances. The statute provides far less of a basis for the modern executive's interpretation of a broad recess appointment power than is normally suggested.

First, the Amendment was not enacted to implement the exist view. Instead, it was passed to allow an expansion beyond the arise interpretation but only to a portion of the exist view – a kind of compromise between the arise and the exist interpretations. If the statute had been enacted to adopt the exist view, it would not have refused to pay recess appointees outside of the three listed exceptions.

Second, the statute involves far less of an agreement between the Congress and the President than is normally thought. Although the executive branch has adopted the exist view, the statute limits the President's recess appointment authority through Congress's appropriations power. Normally, the executive would reject a statute that exercised the appropriations power in this way as unconstitutional. For example, if a statute provided that no money should be paid to officials working on pardons for executive branch officials, there is little doubt that the executive branch would argue that this statute unconstitutionally infringed executive power.[116]

[116] See *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, Op. O.L.C. 1, 1 (2011) (Preliminary Print) (Congress prohibiting the use of appropriated funds for the Office of Science and Technology Policy to develop and implement a bilateral policy to participate or coordinate in any way with China or any Chinese-owned company is unconstitutional because such expenditures fall within the President's exclusive authority when they are necessary to carry out diplomatic relations); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, Op. O.L.C. 1, 1 (2009) (Preliminary Print) (Congress prohibiting the use of appropriated funds to pay the expenses for any United States delegation to a specialized U.N. body that is chaired by a country that the Secretary of State has determined supports international terrorism, unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy.); *Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, Op. O.L.C. 1, 3 (2001) (Preliminary Print) (Congress prohibiting "the use of appropriated funds for the participation of U.S. Armed Forces in a U.N. peacekeeping mission under foreign command, unless the President's military advisors have recommended such involvement and the President has submitted such recommendation to Congress" is unconstitutional because "as Commander in Chief, the President must be able to determine, not only *whether* United States Armed Forces are to be deployed abroad, but also *under what conditions* they are to be deployed."); *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 182 (1996) (Funding restriction prohibiting the President from placing United States Forces under U.N. operational or tactical control in U.N. peacekeeping operations would "unconstitutionally constrain the President's exercise of his authority as Commander-in-Chief" and unconstitutionally undermine the President's authority to carry out diplomatic relations); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 189 (1996) (Placing a condition on the use of appropriated funds to pay for the United States' diplomatic representation to Vietnam unconstitutionally interferes with the Presidential power to maintain diplomatic relations.); *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 OP. O.L.C. 123, 123 (1995) (Placing a condition on the use of appropriated funds to pay for the construction in

The apparent reason why the executive has not challenged the statute is that the statute, as the executive has interpreted it, does not limit the President's power very much and an attempt to declare the statute unconstitutional would be likely to provoke strong reactions from Congress. But the point is that there does not seem to be any real agreement on the underlying basis of the statute. The executive silently favors the full exist interpretation whereas the Congress favors an intermediate position that imposes limitations on the exist view.

Third, the statute that the Congress passed is much narrower than the statute that the executive has enforced. As I discuss below, the exceptions from the arise interpretation that the Amendment allows have been significantly broadened by the executive through its interpretation of both the Recess Appointments Clause and the statute. Thus, Congress's actions in passing the statute in 1940 did not contemplate the expanded use to which the executive has made of it.

2. The Type of Recess Issue

Let me now turn to the more complicated issue – the meaning of the Pay Act Amendment as it relates to the type of recess issue. There are three possible interpretations of the statute. Just as the Recess Appointments Clause could have three different meanings – the intersession meaning, the modified intersession meaning, and the intrasession meaning – so can the statute.

When interpreting the statute, one must consider two issues. First, what is the meaning of the statute itself? Did Congress enact a statute that employed the intersession meaning of the terms recess and session, the modified intersession meaning, or the intrasession meaning? Second, what is the relationship between the meaning of the statute and the meaning of the Recess Appointments Clause? The meaning of the Clause is important here, because the statute is obviously intended to function in tandem with the Clause. Therefore, the statute and the Clause should be interpreted together to have a coherent meaning. Otherwise, the statute may not operate as the check that Congress intended it to be. For example, if the statute adopted the intersession meaning of the terms, but the Constitution was interpreted to allow recess appointments under the intrasession view, then the statute would not restrict payments of salaries of many recess appointees who the statute would seem to have restricted.

While the correct interpretation of the statute is not entirely clear, it is clear that it should be interpreted with reference to the meaning of the Clause and that one should only depart from a corresponding interpretation of the two for a strong reason. The executive branch, however, has

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Jerusalem of the United States Embassy to Israel unconstitutionally infringes on the President's authority in the field of foreign affairs.); *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 258 (1989) (Placing a condition that would oblige the President to notify Congress of any covert actions to be funded out of the Reserve for Contingencies, would unconstitutionally interfere with the President's constitutional responsibilities to safeguard the lives and interests of Americans abroad.); *Mutual Security Program- Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507, 530 (1960) (Requiring funds for the Office of the Inspector General and Comptroller to be restricted for the failure to supply documents, is unconstitutional because it infringes on the "constitutional duty and right of the President and those officials acting pursuant to his instructions, to withhold information of the executive branch from Congress whenever the President determines that it is not in the public interest.")

interpreted the statute and the Clause to have different meanings – without justifying this divergence – and as a result has conferred extremely broad authority on itself. Consequently, the limits that Congress established for the executive have been evaded. More specifically, the executive has interpreted the statute to have the modified intersession meaning, but has the interpreted the Clause to have the intrasession meaning. As a result, the executive is able to pay recess appointees for recess appointments that would not have been allowed if the Clause and the statute had corresponding meanings.

In this section, I argue that the three different interpretations of the statute are at least plausible so long as the statute and the Constitution have corresponding meanings. I also show that these meanings have implications for Congress's understanding of the Recess Appointments Clause. Significantly, *all three meanings of the statute indicate that Congress did not favor the intrasession view of the Clause*. In the next section, I show that the executive has interpreted the statute and Constitution to have different meanings, without providing a strong justification, and that this interpretation has allowed it broad recess appointment power.

Let us start with the interpretation of the statute. The language of the statute uses two key terms: "recess" and "session" (and the related phrase "end of the session"). Depending on the interpretation given to these terms, the statute could have any of three meanings. One understanding of the statute would interpret these terms in accord with the intersession view. Under this view, the term recess means only intersession recesses, and the term session refers to annual sessions. The Act would then prohibit payment to persons recess appointed during an intersession recess if the vacancy existed during the session. It would allow payment if one of the three exceptions (relating to actions "at the end of session") were satisfied, but it would interpret all three of them to involve intersession recesses. For example, the first exception would allow payment only if a vacancy had arisen within 30 days of the end of the annual session (and therefore within 30 days of the beginning of the intersession recess).

This interpretation would make sense of both the statute itself and the statute in relation to the Recess Appointments Clause (assuming that the Clause also had the intersession meaning). While the statute would only restrict payments for recess appointments made during an intersession recess, if the Recess Appointments Clause had the intersession meaning, there could only be recess appointments in those circumstances. The three exceptions in the statute also work sensibly under this interpretation. They allow a recess appointee for a vacancy that had existed during the session to be paid based only in circumstances relating to an intersession recess, which is the only kind of recess recognized by the intersession view.[117]

Further, there is reasonably strong historical evidence for this interpretation. In determining the meaning of these statutory terms that Congress adopted, one must also consider the meaning that the Congress at the time likely believed the Recess Appointments Clause had.

[117] For example, the first exception of the statute allows payment only if the vacancy arises within 30 days of the end of the session. If this is understood as requiring that the vacancy arise within 30 days of the end of the annual session, this makes sense of the statute. Since recess appointments can only occur (under the Constitution) during the intersession recess following the end of the annual session, one would want to restrict the 30 day limit to the period prior to that intersession recess rather than to intrasession breaks.

It is entirely possible that Congress assumed the intersession view of the Constitution when they enacted the statute. As I have already noted, there was a strong practice of only intersession recess appointments from 1789 to 1921, capped by the Knox opinion that rejected intrasession recess appointments. It is true that a distinct minority of the Johnson recess appointments were not subject to being understood under the intersession view, but those were not openly justified as departing from the tradition of intersession recess appointments and in any event appear to have been an isolated historical episode. It is also true that 15 recess appointments during the 1920s and 1930s followed the Daugherty opinion, but it is not clear how visible or significant this opinion or these appointments were. Certainly, there is no mention of them in the ordinary legislative history of the statute. Thus, it is quite possible that the Congress simply overlooked these recess appointments and assumed that only intersession recess appointments could be made.

A second reading of the statute would interpret its terms in accord with the modified intersession view. Under this view, the term "recess" would mean either a recess following the annual session or a recess of sufficient length to allow a recess appointment; and the term "session" would mean the period between two such recesses. The statute would then prohibit payment to persons recess appointed during any such recess if the vacancy had existed during the session. The statute would allow payment if one of the three exceptions were satisfied, and would interpret the term "end of the session" in those exceptions to refer to the period immediately prior to the next eligible recess. For example, the first exception would allow payment only if a vacancy had arisen within 30 days of the beginning of the next eligible recess.

This understanding would also make sense of both the statute alone and the relationship between the statute and the Recess Appointments Clause (assuming that the Clause had the modified intersession meaning). The statute would only restrict recess appointments made during a recess covered by the modified intersession meaning, but if the Recess Appointments Clause had the modified intersession meaning, there would only be recess appointments in those circumstances. Moreover, the three exceptions would work sensibly under this interpretation, as they would define recess and session in the same manner as the remainder of the statute.[118]

There also strong evidence that Congress might have believed that the Clause had this meaning. In the period from 1789 to 1940, the modified intersession view may be able to account for every recess appointment, except possibly for the length of some of the Johnson recess appointments. Most importantly, the modified view could account for all of the recess appointments made under the Daugherty opinion prior to the enactment of the statute, which neither the intersession or intrasession views could do.

A third interpretation of the statute would interpret its terms in accordance with the intrasession view, with the term "recess" meaning either an intrasession recess of sufficient length or an intersession recess, and the term "session" meaning an annual session. The statute

[118] While having the terms operate consistently throughout the statute might seem like a trivial accomplishment, that is not true. As discussed below, the intrasession view of the statute defines recesses to include both intersession and intrasession recesses, but then allows the three exceptions only in relation to intersession recesses.

would then restrict payment to persons appointed during a recess of this type (if the vacancy existed during the session). The statute would also allow payment if one of the three exceptions (relating to actions "at the end of session") were satisfied, but it would interpret all three of the exceptions to involve the end of the annual session. For example, the first exception would allow payment only if a vacancy had arisen within 30 days of the end of the annual session.

Unlike the first two interpretations, this one seems a bit odd. Under the intrasession view, the statute would treat both intersession and intrasession recesses as recesses, but it would apply the first exception from the pay restriction, for example, only if the vacancy arose within 30 days before the end of the annual session. Thus, it would allow exceptions from the pay prohibition only for recess appointments made under circumstances relating to an *intersession* recess.[119] If the statute adopts an intrasession understanding of recess, it seems incongruous that it would not allow exceptions for recess appointments in relation to intrasession recesses.

But surprisingly there may be an argument for the intrasession view of the statute based on congressional hostility for the intrasession view of the Constitution. The statute may make sense if it was intended to restrict intrasession recesses. The statute first imposes a broad restriction of payment to any person recess appointed during either an intersession or intrasession recess (if the vacancy existed during the session). But then it applies the three exceptions that allow payments so that they are focused on circumstances relating to the end of the annual session. As a result, the exceptions will allow payment much more readily to recess appointments made during intersession recesses. For example, the exception for a vacancy that arose within 30 days of the end of the session will allow payment for a recess appointment made during the ensuing intersession recess. But that exception cannot be used to pay a recess appointee if the vacancy arose within 30 days prior to an intrasession recess.[120]

There is also some support for concluding that Congress might have believed that the the Constitution had this meaning in 1940. The Johnson recess appointments can be understood as having been made under this approach and some of them are most easily understood in this way, except for the fact that they were not justified under this approach. One might also read the recess appointments made pursuant to the Daugherty opinion as following the intrasession view, except for the length of those appointments.

We can see, then, that each of these three interpretations makes some sense. What does not make sense, however, is to imagine that Congress enacted one of these interpretations but then embraced a different interpretation of the Recess Appointments Clause. As an initial

[119] For example, the statute would allow payment, under the first exception, to recess appointees who are appointed to a vacancy that arose within 30 days of the intersession recess but not to those recess appointed to a vacancy that arose within 30 days of an intrasession recess.

[120] While the provision would limit the three exceptions to circumstances relating to the end of an annual session, it would not necessarily prevent payment to all intrasession recess appointees. For example, if a vacancy arose "within 30 days before the end of the [annual] session," then it is possible that a recess appointment made during a subsequent intrasession recess might be entitled to payment. This conclusion, however, is not certain, since one might argue that the statute's use of the phrase "the end of the session" referred to the same session in which the vacancy existed during the session.

matter, it seems clear that the provisions were meant to operate together and therefore to have corresponding meanings.

This point can be shown even more clearly by examining the results if the meaning of the statute and the Clause differ. For example, if the statute has the intersession meaning, but the Clause has either the intrasession or modified intersession meaning, then the statute would not restrict payment for any intrasession recess appointment. Under the intersession meaning, the initial part of the statute, which denies pay "to an individual appointed during a recess of the Senate," would only apply to person appointed during an intersession recess. Similarly, if the statute has the modified intersession meaning, but the Constitution has the intrasession meaning, then the statute treats all recesses of a sufficient length as ending the session, but the recess appointments made in these recesses extend for what the statute treats as numerous sessions.[121]

Thus, there is a strong argument that the statute and the Constitution should have corresponding meanings. Put differently, the statute and the Clause should be read in pari materia. This position is strongly justified based on the evident purpose of the statute to constrain certain recess appointments by the President. The statute should therefore be interpreted based in part on how Congress understood the meaning of the Clause at the time when the statute was enacted.[122]

If one interprets the statute to have the same meaning as the Recess Appointments Clause, which single meaning should the statute and Clause receive? Based on the interpretations of the Clause prior to the 1940 Act, it is not entirely clear which of the three meanings is the strongest. Still, given my review of the evidence from this period, I believe that the intersession or the modified intersession meanings are a bit stronger than the intrasession view. In particular, the statutory language supports the intersession and the modified intersession meanings more than the intrasession meaning, since under the interasession interpretation, the language has the peculiar effect of excluding intrasession recesses from the three exceptions.[123]

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[121] For example, imagine that there are annually four legislative breaks long enough to constitute recesses under the modified intersession view (as well as a recess following the annual session). Then if the recess appointment is made during the first of these legislative breaks, it will last through 9 sessions, as the term is understood under the modified intersession view.

[122] As discussed below, the fact that the Congress believed that the Clause had a certain meaning does not mean that the courts or other interpreters were bound by that determination of the meaning of the Constitution (even if they were bound by Congress's understanding of the statute). The answer would depend on the interpretive approach adopted by the court. But Congress's understanding of the meaning of the Clause when it enacted the statute would be relevant under various interpretive theories, including one that relied on practice as an important ingredient of the proper interpretation of the Constitution.

[123] While the statutory language appears to disfavor the intrasession view, each of the views appears to have some significant support that it was being used to interpreted the Clause. At the time of the 1940 Amendment, the intersession view derived support from both the Knox opinion and relatively few nonintersession recesses; the modified view was supported by the Daughtery opinion and the practice under it; and the intrasession view derived support from the Johnson recess appointments and the possibility that the Daugherty opinion could be interpreted to adopt that view.

This discussion of the Pay Act Amendment has two significant implications for our understanding of the practice. First, the interpretation of the Amendment tells us something about Congress's view of the Recess Appointments Clause in 1940. Congress most likely adopted either the intersession or the modified intersession view of the Clause. But, significantly, even if the Congress did adopt the intrasession view of the Clause, that would still not support the modern executive's interpretation. The main reason to conclude that Congress adopted the intrasession view of the statute, despite its peculiarities, would be a congressional hostility towards intrasession recess appointments and the desire to cut back on such appointments. Thus, if Congress did read the statute and the Clause as having the intrasession view, it would have done so because it rejected the intrasession view as too broad and sought to curtail it.

This is an important point. It indicates that the last time that the entire Congress spoke to the issue, it did not endorse the intrasession recess view. Rather, it either embraced an alternative interpretation or employed the intrasession view in order to constrain the President's power under it. Thus, one cannot argue that the Congress in 1940 supported any alleged prior executive practice of following the intrasession recess view.

Second, this discussion also tells us something about the legal regime that Congress intended to govern recess appointments. My analysis above suggests that Congress probably intended a regime under which both the Constitution and the statute had the intersession or the modified intersession meaning. In both cases, the President would have a far more constrained recess appointment power than under the modern executive's interpretation. But even if Congress intended a regime in which both the statute and the Constitution had the intrasession view, that would be more constrained than the executive's present interpretation. For example, under what is probably the most used exception – allowing payment if a nomination was pending at the end of the session – the exception could only be employed if the nomination had been pending at the end of an annual recess. This exception thus might require a long period of vacancy before a recess appointment could be made.

D. Interpretation of the Pay Act Amendment and the Recess Appointments Clause

My analysis has argued that Congress should be understood to have intended that the statute and the Constitution be interpreted in pari materia and therefore to have corresponding meanings. But the fact that Congress believed a constitutional clause had one meaning does not, of course, mean that the President or the courts are obliged to follow that meaning. The meaning that the President or the courts should give to the Constitution depends on the interpretive approach that they are following. For example, an originalist might interpret the Clause based on its original meaning and then might construe the statute to have a different meaning based on Congress's expressed intent.

Of course, that the executive or the courts could conceivably have persuasive reasons for adopting divergent interpretations of the Constitution and the statute does not mean that they actually had such reasons. Once these interpreters construed the Constitution, there was a strong argument – based on the in pari materia point and the at least plausible evidence in favor of all

three meanings of the statute – that they should have interpreted the statute to have the corresponding meaning. To have reached divergent interpretations of the Clause and the statute, the interpreters should have had powerful reasons for doing so.

Unfortunately, the interpretation of the Pay Act Amendment by the Attorney General and the Comptroller General was based on extremely weak reasoning. These interpreters read the statute and Clause divergently, interpreting the statute to have the modified intersession meaning and the Clause to have the intrasession meaning. Yet, the interpreters did not provide any good reason for reaching these divergent constructions. While not persuasively defended, this interpretation provides very broad recess appointment authority. Under this interpretation, the President can make paid recess appointments during intrasession recesses, but these recess appointments can extend through what the statute treats as numerous sessions. If the statute and Constitution had both been given the intrasession view or the modified intersession view, the President's power would have been significantly narrower.[124]

This view of the statute and Clause was adopted in two main episodes. The first involved two opinions issued by Comptroller General Lindsay Warren in August 1948.[125] In these opinions, Warren interpreted the Constitution to have the intrasession meaning, without seriously considering the evidence against this interpretation. He then interpreted the statute to have the modified intersession view. He reached this conclusion, even though it required him to treat what he deemed a recess *during* the session to be one that *ended* the session.[126] Warren sought to justify this interpretation – which violated his understanding of the text – on the ground that the intent of the statute was to make it easier to pay recess appointees. But this argument was weak. It assumed that one could override the meaning of the text based on what he regarded as the purposes of the act, and it took a one sided view of the purpose of the act, without considering the other purposes that Congress might have had. Thus, Warren interpreted the Constitution and the statute to have divergent meanings, without providing a persuasive reason for doing so.[127]

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[124] If both the statute and the Constitution had been given the intrasession meaning, then fewer recess appointments would satisfy one of the three exceptions and therefore fewer would be paid. If both the statute and the Constitution had been given the modified intersession meaning, then the length of the recess appointments would be far shorter.

[125] 28 Comp. Gen. 30 (1948); 28 Comp. Gen. 121 (1948).

[126] Warren admitted that what he regarded was an intrasession recess "was not a 'termination of the session' . . . in a strict technical sense." But he overrode this meaning of the term session (which he had followed as to the Constitution) based on his view of the purposes of the statute. 28 Comp. Gen, at 34.

[127] It might be thought that Comptroller General Warren's opinions represent the position of the Congress, since the Comptroller General is often thought to be a legislative official. See Bowsher v. Synar, 478 U.S. 714 (1986) (indicating that the Comptroller General is a legislative official, since he can be removed through a joint resolution that requires both bicameralism and presentment). It is not clear, that as an original matter, removal by the equivalent of a law is enough to make an officer, who is appointed through a process of nomination by the President, a legislative official. Instead, one might conclude that the officer is neither executive nor legislative. But even if one assumes that the Comptroller General is fully a legislative official, that does not mean his position represents that of Congress. After all, a single member of the House would clearly be a member of the legislative branch but his views would not necessarily reflect that of the Congress. Significantly, there is no procedure whereby the Congress instructs the Comptroller General as to what positions to take. In the case of Comptroller General Warren's opinions, there is no record that he even consulted any members of the legislature. By contrast, Warren did indicate his desire to please the President. *See* Michael Stern, *When Harry Met Lindsay,* POINT OF ORDER

Warren's conclusion were then adopted twelve years later by Acting Attorney General Lawrence Walsh at the end of the Eisenhower Administration.[128] Walsh first adopted the intrasession view of the Constitution, concluding that a recess appointment could be made during an intrasession break and that this appointment would extend through the existing session until the end of the next annual session. But Walsh then went on to conclude that the Pay Act Amendment should be read to have the modified intersession meaning. As with Warren's opinions, Walsh relied on what he regarded as the obvious purpose of allowing recess appointees to receive payment when they have been appointed. Walsh never confronted the obvious counter that, if Congress had that purpose, it would not have written the statutory text in the way that it did. Nor does Walsh acknowledge Congress's purpose was not simply to pay recess appointees but to provide a limited set of exceptions for such payment. Finally, Walsh fails to provide a persuasive argument for the inconsistency between his interpretation of the statute and the Constitution.[129]

To conclude, the executive's interpretation of the Pay Act Amendment turns out to have been extremely weak. While there were several plausible positions that one could have taken as to statute and the Constitution, the Attorney General (and the Comptroller General) chose none of them and did so without offering any good reason. Instead, the executive selected a position that allows the President to exercise broad recess appointment authority under both the statute and the Constitution. Thus, the practice that eventually emerged after the Walsh opinion did not reflect Congress's enacted view, but instead a misinterpretation of Congress's action that enabled an even greater recess appointment power.

E. The Recent Change in Practice and Expansion of Executive Power

From at least 1960, the executive branch has adopted the intrasession view of the Recess Appointments Clause. This interpretation has allowed the President to make recess appointments during all intrasession breaks of the requisite length and to have those recess appointments last through two annual sessions. Along with its adoption of the exist view of the Clause and its construal of the Pay Act Amendment to have the modified intersession meaning, this interpretation has given the President extremely broad recess appointment power.

BLOG (29 April 2012, 9:02 pm), http://www.pointoforder.com/2012/04/29/when-harry-met-lindsay/. It is, of course, possible that the culture of the Comptroller General's office might exhibit an association with legislative branch so that a Comptroller General who often took a position, strongly opposed by a large portion of the Congress, would face criticism. But the possibility of that criticism does not mean that every position adopted by the Comptroller General should somehow be understood to be the position of the Congress.

[128] 41 U.S. Op. Att'y Gen. 463 (1960).

[129] Walsh fails to recognize the arguments for interpreting the statute and Constitution to have corresponding meanings. Instead, he claims that the statute and the Constitution serve different purposes, which requires different interpretations. Walsh Opinion at 10. But Walsh fails to explain why the purposes of the two provisions differ, especially since he regards both provisions as animated by the overriding intent to fill positions (rather than as being designed to create limited exceptions to a general rule).

Although these doctrines have been in place during this entire period, that does not mean that recess appointments practice have been consistent. Instead, the practice has changed over time to manifest even greater power by the President to make recess appointments with less public policy justification. This change in practice is important. It indicates that the current practice of recess appointments has not been in existence for a significant period. Instead, it has grown markedly in the last generation.

The practice has changed in several different ways. First, the relative number of intrasession versus intersession recess appointments has grown. Presidents during the earlier years of this period made more intersession than intrasession recess appointments. Beginning with George W. Bush, however, Presidents reversed this practice and predominantly employed intrasession recess appointments.[130] This change has been important because it allows longer recess appointments even though there is less justification for bypassing the Senate during the typically shorter intrasession recesses.

Second, the length of the intrasession recesses during which these appointments have been made has decreased. This decrease in length, which is quite significant, is revealed through a variety of measures, including the length of shortest intrasession recess during which a particular President made a recess appointment (Eisenhower 35 days and George W. Bush 10 days) and the average length of the intrasession recess during which a President made such an appointment (Eisenhower 70 days and George W. Bush 20 days).[131] Under both measures, the length of the intrasession recesses has consistently decreased over this period. As a result, there is far less justification for making intrasession recess appointments for such recesses than for the longer intrasession recesses of past years.

Third, the minimum length of time that the executive branch has found in an opinion to be necessary for an intrasession recess to be made has also decreased significantly during this period. In 1960, the executive was working with the Daugherty opinion, which provided that a 28 day break was adequate to allow a recess appointment. That same year, the executive announced that a 32 day break was adequate.[132] It was only in 1971 that the executive issued an

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[130] According to a Congressional Research Service study (as supplemented by the Solitor General's Brief), Presidents Ronald Reagan, George H. W. Bush, and Bill Clinton each made more intersession recess appointments than intrasession ones, whereas Presidents George W. Bush and Barack Obama each have made a much large percentage of intrasession recess appointments. HENRY B. HOGUE, MAEVE P. CAREY, MICHAEL W. GREENE & MAUREEN BEARDEN, CONG. RESEARCH SERV., THE NOEL CANNING DECISION AND RECESS APPOINTMENTS MADE FROM 1981-2013 (2013). While I do not have statistics for earlier Presidents, the predominance of intersession over intrasession recesses for Presidents prior to Ronald Reagan seems likely. Earlier presidents made relatively few intrasession recess appointments, with Jimmy Carter and Richard Nixon making only 17 and Lyndon Johnson and John Kennedy none. HENRY B. HOGUE, CONG. RESEARCH SERV., INTRASESSION RECESS APPOINTMENTS (2004); Solicitor General's Brief, at Appendix A.

[131] The length of the shortest intrasession recess during which a particular President made a recess appointment: Eisenhower (35), Nixon (32), Carter (32), Reagan (13), George H. W. Bush (17), William Clinton (9), and George W. Bush (10). The average length of the intrasession recess during which a President made a recess appointment: Eisenhower (70), Nixon (32), Carter (40), Reagan (35), George H. W. Bush (29), William Clinton (28), and George W. Bush (20). See HENRY B. HOGUE, CONG. RESEARCH SERV., INTRASESSION RECESS APPOINTMENTS (2004).

[132] 41 U.S. Op. Atty. Gen. 463 (July 14, 1960).

opinion approving a recess appointment during a 15 day break.[133] It would take another 25 years before the executive in 1996 shortened the period down to 10 days. And now, after another 17 years, the executive has announced that the new period is 3 days.[134] While the executive likes to portray its opinions as consistent, the present day position of the executive represents a radical expansion of the President's powers.

Fourth, the number of intrasession recesses has greatly increased. During the Eisenhower years, the average number of intrasession breaks was slightly more than 1 per year, whereas during the Presidency of George W. Bush it was 8.[135] As a result, there are far more opportunities per year to make recess appointments. Thus, recent Presidents do not have to wait very long to make a recess appointment that avoids senatorial confirmation, whereas earlier Presidents had to wait much longer.

This shift in practice is not only relevant to the intrasession view, but also to the arise versus exist question. The justification given for the exist view – that it is necessary to prevent an extended period of vacancy – is far weaker for these short intrasession recesses, which do not do much to extend a vacancy. But such recesses do give the President more opportunity to bypass senatorial consent. Thus, the increase in the number of short intrasession breaks make it less justifiable to have recess appointments made under the exist view.

In sum, the practice of recess appointments as it relates to both the type of recess issue and happen issue has changed since the middle of the last century. There have been more intrasession recess appointments which allow longer recess appointments, during shorter intrasession recesses, under legal opinions that allow recess appointments during shorter recesses, in an environment that allows more opportunities for the President to bypass the Senate. Thus, even if one believed that the practice was an acceptable balance of powers in 1950 or even 1970, that would not mean that one would approve the practice in 2000 or 2014. Put differently, if one believes that the practice is relevant because it was either consented to or acquiesced in by the Congress, then the recent practice has not been in existence long enough to indicate a significant degree of consent or acquiescence.

Some readers might object that most of these changes in the practice do not relate to the legal rules employed by the executive. It is the exist and the intrasession views that count, not the way in which the President has exercised his power under those doctrines. This objection, however, is mistaken. There is a strong argument that this practice should be understood not only in terms of the doctrine but also as to how it is exercised. This argument can be put in both functional and formalist terms. Functionally, if the argument based on recess appointment practice is supposed to turn on Congress's acquiescence (or acceptance), then how the recess appointment authority is exercised will affect whether Congress acquiesces in it. If the President exercised the broad recess appointment authority it claimed in a careful and limited way, the Congress might be willing to accept that practice. But that does not mean that the Congress

[133] Memorandum For The Counsel To The President, From Leon Ulman, Deputy Assistant Attorney General, Office Of Legal Counsel (December 3, 1971).
[134] Solicitor General's Brief, at X.
[135] See OFFICIAL CONGRESSIONAL DIRECTORY.

would be willing to acquiesce in aggressive and unrestrained presidential assertions of recess appointment authority. In formalist terms, Congress can only acquiesce in a practice that has already occurred.[136] If the more restrained practice has occurred, then this is the only version of the practice in which Congress could have acquiesced. A different version of the practice simply did not exist until more recently and that version has been resisted.

F. Resisting the Broad Recess Appointment Power with Pro Forma Sessions

A final aspect of the practice has been the use of pro forma sessions to resist the broad recess appointments power. Such sessions were first adopted in 2007 by the Democratic Senate to prevent President Bush from making recess appointments. In 2011, these sessions were employed to prevent President Obama from making recess appointments, but in January 2012 President Obama claimed that these sessions were not real sessions and therefore made several recess appointments under that theory.[137]

These pro forma sessions are also part of the recess appointments practice. If one is going to consider practice when interpreting the Clause, then one must include all of the practice, including the pro forma sessions. These sessions were employed in reaction to the broad use of recess appointment powers and therefore constitute a protest against such powers. Thus, it is simply not true the Congress has acquiesced in recent years to the broad use of recess appointment authority.

While these pro forma sessions have only been employed to limit recess appointments for the last 7 years, they were a relatively prompt response to the more aggressive assertions of recess appointment power.[138] It is only since the mid 1990s that Presidents began regularly to make intrasession recess appointments during short recesses of approximately 10 days.[139] And it is only in the 2000s that Presidents expanded this practice by beginning to make more intrasession than intersession recess appointments.[140] Thus, the pro forma sessions only began approximately a decade after the more aggressive form of the practice started to emerge and only approximately half a decade after it reach its current level. Therefore, even if one regards the failure of the Senate to actively resist the President's actions as important, the Senate cannot be understood to have acquiesced in the current and most aggressive forms of recess appointments practice.

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[136] Michael D. Ramsey, The Limits of Custom in Constitutional and International Law (forthcoming San. Diego L. Rev Forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249133.

[137] Lawfulness Of Recess Appointments During A Recess Of The Senate Notwithstanding Periodic Pro Forma Sessions, Memorandum, 36 Op. Off. Legal Counsel (Jan. 6, 2012).

[138] Actually, one can find earlier opposition to the recess appointment power by the Senate though pro forma sessions and other means. In 1985, Senator Robert Byrd "extracted from" President Reagan a commitment that limited the exercise of the recess appointment power," based on a threat of employing pro forma sessions. See M. Inhofe, "Recess Appointments," remarks in the Senate, Congressional Record, vol. 145, part 163 (November 17, 1999), p. 29915). In 1999, Senator Inhofe led a group of Senators to extract the same commitment from President Clinton based on a threat of placing holds on all judicial nominations. Id at 22916-22917.

[139] See HENRY B. HOGUE, CONG. RESEARCH SERV., INTRASESSION RECESS APPOINTMENTS (2004).

[140] HENRY B. HOGUE, MAEVE P. CAREY, MICHAEL W. GREENE & MAUREEN BEARDEN, CONG. RESEARCH SERV., THE NOEL CANNING DECISION AND RECESS APPOINTMENTS MADE FROM 1981-2013 (2013).

These pro forma session clearly represent opposition to what the legislative houses regarded as excessive recess appointment powers. One might analogize the holding of these sessions to a Senate or House resolution condemning the expansive use of the recess appointment power.[141] But these sessions are actually stronger than a resolution, because they take actions to prevent the recess appointments from occurring. They engage in a form of self help designed to prevent the President from exercising a broad recess appointment power.

G. Conclusion

This review of the recess appointment practice has shown that the legislative houses have not agreed to the modern executive branch's broad interpretation of the recess appointment power. Nor have the legislative houses acquiesced over a long period in such an interpretation. Rather, Congress has resisted a broad interpretation of the power whenever it has passed legislation. It is true that the houses did not actively resist the executive branch's actions for a significant period beginning in the middle of the last century, but during this period the President exercised the recess appointment power in a relatively restrained manner. When the President's exercise of the power became more aggressive, the houses once again actively resisted.

This history suggests that neither consent nor acquiescence captures the recess appointment practice. Rather, the practice suggests – and the theoretical discussion in the next section supports – that the President cares more about exercising a broad recess appointment power than the Congress cares about resisting it. But that does not provide a reason for respecting the broad assertions of recess appointment authority. To the contrary, there is a strong argument that, in these circumstances, what is needed is a Supreme Court decision clarifying that the Constitution does not confer broad recess appointment authority on the President. In that way, the President will be prevented from seizing this power in the future.

V. The Senate's Consent or Acquiescence

[141] It has been argued that unlike the pro forma session adopted to prevent President Bush from making recess appointments, the pro forma sessions adopted during the Obama Administration were largely instigated by the Republican House rather than the Democratic Senate. Assuming for the moment that the failure of Democratic Senate to propose a pro forma session suggests that it did not object to an aggressive recess appointment power, that does not mean that there was no constitutionally relevant opposition to the recess appointment power. Even though the House is not directly involved in deciding whether to confirm nominees, the House does play a role in the appointment and creation of offices, including creating the offices and allowing inferior offices to be appointed without the consent of the Senate. Thus, its preference should count as part of any analysis as to whether the practice has been acquiesced in or consented to by the relevant branches.

It is not clear, however, that the instigation of the House to hold a pro forma session to prevent a recess appointment means that the Senate should be understood as not objecting to the practice. It appears that a majority of the House sought to prevent a recess, and a majority of the Senate sought to allow a recess, because the House was controlled by Republicans and the Senate was controlled by Democrats. When the Senate was controlled by the Democrats in 2007, it used the pro forma session to stop President Bush from making recess appointments. Thus, the better explanation for the Senate's desire not to use pro forma sessions is that a Democrat was in the White House, not that it believed aggressive assertions of recess appointment power were suddenly proper.

One argument for following the executive's recess appointment approach is that it has been supported by practice that has been consented to or at least acquiesced in for a long period. I have tried to show that there has neither been consent to the executive's approach nor long acquiescence in it. The congressional legislation has contemplated a much narrower recess appointment authority, the executive branch practice has not been consistent but expanding over time, and the legislature has come to resist the executive practice.

But even if one assumes that the broad recess appointment authority had been consented to by the Congress, that would not be a strong reason to follow that broad authority. It is true that enforcing the explicit agreements or implicit bargains between the President and the Congress might further the preferences of the political branches. The point of the Constitution, however, is not to realize the political branches' preferences, but to protect the people. Constitutional provisions are enacted through a different procedure than ordinary political action in an effort to ensure that the government must follow rather than change the meaning of the Constitution. Thus, there is little reason to allow ordinary political actions to undermine or change the constitutional rules.

It is true that the separation of powers is in part based on the notion that ambition is supposed to counteract ambition and therefore that the government branches will act to protect their own powers.[142] But this feature of the separation of powers is not the only way that the different branches are protected in their separate powers. Rather, where there is a constitutional rule that governs a separation of powers dispute, that rule should be followed. And where the issue is properly raised in a lawsuit, the courts should enforce that rule. The ambition counteracting ambition feature is merely an additional mechanism for enforcing the separation of powers, not a means for exempting separation of powers questions from judicial review.

These concerns about the political branches making deals that depart from the Constitution in problematic ways can be further developed. Scholars have explored how the branches have an incentive to make explicit or implicit arrangements that depart from constitutional provisions when doing so would benefit them.[143] When, for example, the executive prefers a constitutional power more than the Congress does, the executive can assert that power, even though the Constitution may assign the power to Congress. The Congress may be willing to allow the executive to exercise that power if the executive desires it more than the Congress does. The Congress may have an incentive to allow the executive to exercise it, because the executive may strongly defend its exercise of the power and may retaliate if the Congress interferes. It may simply not be worth it for the Congress to contest the matter, especially if the Congress can in a similar manner secure powers that it does not possess under the Constitution. These type of considerations may help to explain why the President has strongly asserted the right to engage in military engagements without a congressional declaration of war, but the Congress has succeeded in having earmarks enforced, even though they are included only in nonenforceable committee reports.

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[142] THE FEDERALIST No. 51.

[143] John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONT. PROB. 293 (1993); J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 Duke L.J. 325 (1991).

This analysis provides a useful guide as to why the practice of recess appointments has strayed so far from the original meaning. The President likely cares much more about being able to make appointments, including recess appointments, than the Senate or the Congress does in being able to stop such appointments. The President's principal power is over law execution and therefore making personnel decisions as to executive officers is extremely important to him. The Senate, by contrast, probably cares less about being able to check such appointments for a variety of reasons. First, while the senatorial check allows the Senate to exercise power, it also requires Senators to be accountable for their confirmation decisions. By contrast, the recess appointment power allows the Senate to take no action and thereby avoid accountability, with the President recess appointing the individual. Second, the Senate is divided by political parties and therefore a significant portion of the time the Senate will be controlled by the President's party. In these circumstances, the Senate may actually want the President's appointees to go through, but may not mind if they do not have to vote on the record in favor of them.

Third, a narrow recess appointment power may actually place burdens on the Senate that the Senators may dislike. In some circumstances, a narrow recess appointment power might require that the Senate take action on a nominee before leaving for a recess. The Senators might dislike having to delay their recesses in this way. Finally, in recent years, Senators may have been willing to accept the recess appointment power because it avoided the need to engage in reform of the filibuster. Senators regard changes in the filibuster as an extremely sensitive subject, since it affects their privileges, and therefore this might have been an important matter.

This analysis appears to be consistent with the overall pattern of the recess appointment power. For both the happen and the type of recess issues, the executive initially adopted narrow interpretations of the recess appointment power, as with Randolph's articulation of the arise view, and Knox's employment of the intersession view.[144] Yet, the importance to the President of a broad power led the executive to reverse itself and to adopt a broader view. Similarly, when Congress took action to limit the President's power in 1863, the President made an effort to have the statute amended. And the President then interpreted that amended statute to have a lenient effect. By contrast, while Congress occasionally becomes motivated to action, it does not sustain its effort. It was willing to relax the 1863 Pay Act and it did nothing after the executive reduced the restrictions of the 1940 Amendment.

If this analysis does describe the relationship between the branches, it provides a strong argument for not following the arrangements that the branches work out.[145] These implicit deals

[144] See supra text and accompanying notes XX.

[145] It is by no means clear that existing law would treat the consent of the Congress as validating a broad recess appointment power. In the important case of INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court rejected the claim that consent or practice validated the legislative veto. Although the legislative veto had been included in nearly 300 provisions in the previous 50 year period, the Supreme Court held that it was unconstitutional in part because the Constitution was clear on the matter. See 462 U.S. at 944. It is true that long practice is sometimes thought to be relevant to the constitutionality of legislative or executive action. But such practice is generally just one factor and does not override the meaning of a clear constitutional provision, like the Recess Appointment Clause.

will reflect a variety of concerns that are important to the branches, but do not necessarily reflect the public interest. In particular, the desire of the Senate not to be held accountable for appointment decisions or to incur the trouble of delaying its recesses are not matters of the public interest, but instead the private interests of the Senators. Similarly, the desire of the President to be able to make appointments without any check is also not a desire that promotes the public interest. This analysis explains why the Supreme Courts should not respect the arrangement worked out by the branches, but should instead enforce the Constitution's original meaning.[146]

VI. Reliance

One additional reason why one might advocate adhering to a practice is that departing from it would cause significant disruption or upset important reliance interests. For example, if one were to depart from precedents finding a broad commerce power based on the view that the Constitution's original meaning adopted much narrower commerce authority, that would cause significant disruption.[147] Large numbers of programs would suddenly be unconstitutional and people who relied upon them would have a difficult time adjusting. In the case of the Recess Appointment Clause, however, returning to the Clause's original meaning would not cause significant disruption or upset important reliance interests.

If the Supreme Court returned to the original meaning of the Clause – adopting both the arise and intersession views – that would considerably reduce the recess appointments that the President could make. The President could then only make recess appointments during the intersession recess for vacancies that arose during that recess. But this narrowing of the recess appointment power would not cause significant disruption or upset substantial reliance interests. First, this holding would not result in much disruption due to the fact that Presidents would often have to wait until the end of a recess to have their nominees confirmed. As discussed in Part III, the appointment process takes many months and the short recesses that occur throughout the year would not significantly delay the appointments. Moreover, even if the recesses did cause significant delay, these vacancies could be filled by acting officers, and in the case of multimember commissions, would often not prevent the commission from acting without its full complement of members.

It is true that adoption of the original meaning of the Clause might prevent the President from recess appointing officials who the Senate is unwilling to confirm. In that event, the President would be forced either to nominate someone else who was more acceptable to the Senate or to leave the position vacant. That change would certainly reduce the power of the

[146] There is also a strong argument that acquiescence should not be readily applied against the Congress, because it is harder for legislative bodies to act than for the President. Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss And The Separation Of Powers*, 126 HARV. L. REV. 412 (2012). The President can take decisive action in defending his recess appointment power, whereas it is more difficult for the Senate and the Congress to do so. Bills must overcome impediments such as the committee system, Senate action proceeds through difficult procedures, such as the filibuster, and congressional enactments must be presented to the President. By contrast, the President can take action on his own say so.

[147] John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism And Precedent*, 103 NW. L. REV. 803 (2009).

President. But a change is not the same thing as substantial disruption or as upsetting reliance interests. This is especially the case, since the requirement of Presidential compromise with the Senate in the appointment process is a feature built into the Constitution.

VII. Recess Appointments as a Means of Avoiding the Filibuster

Another argument made for a broad recess appointment power is that it is a necessary response to the unconstitutional filibuster power. Under this view, a Senate minority that denies nominees a vote on their confirmation is acting unconstitutionally, because the filibuster generally is unconstitutional or because it is unconstitutional as to nominations. A broad recess appointment power allows the President to circumvent the filibustering of nominees and therefore is constitutionally proper or at least desirable as a policy matter.

This argument might have seemed more persuasive before the Senate's recent elimination of the filibuster for the confirmation of all officials except Supreme Court justices. But even when the filibuster was applied to all confirmation votes, this argument was mistaken for several reasons. First, there is a strong case that the filibuster is not unconstitutional either generally or as applied to nominations. While this is not the place to address these arguments in detail, the best evidence based on the original meaning (not to mention the long practice in favor of the filibuster) is that the filibuster is constitutional so long as a majority of the Senate retain the power to change the filibuster rule.[148] Although the Senate rules purport to allow filibusters of proposed changes in the Senate rules and therefore to prevent a a Senate majority from changing the filibuster rule, the Senate appears to recognize that this rule is unconstitutional as applied to the filibuster. The recent change in the filibuster rule to eliminate its application to all confirmation votes except for Supreme Court appears to have been based on the view that a majority of the Senate could change the rules.[149]

Second, even if the filibustering of nominees were unconstitutional, a broad recess appointment power would not be the proper way to address the problem. A broad recess appointment power would allow the President to make recess appointments not only when his nominee is being filibustered, but in other situations as well. Most importantly, a nominee might not receive a confirmation vote when the Senate is controlled by the opposing party of the President. Thus, a broad recess appointment power is significantly overinclusive as a means of addressing any problems with the filibustering of nominees.

Third, even if the broad recess appointment power were somehow restricted to filibusters, the power would still not be an appropriate means of remedying problems with the filibuster.

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[148] John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

[149] Cite. An earlier compromise that allowed several of President Obama's nominees to receive a vote on confirmation was also based on the threat of using the constitutional or nuclear option that would have allowed a vote on a change in the Senate filibuster rule, notwithstanding the Senate rule allowed such changes to be filibustered. Jonathan Weisman, Filibuster Deal Heralds Stirrings of Compromise, N.Y. TIMES, July 17, 2013, /filibuster-deal-heralds-stirrings-of-compromise.html?pagewanted=all&_r=0.

A broad recess appointment power is a constitutional wrong, since it is justified neither by the original meaning nor by a living constitution approach. We do not normally believe that two constitutional wrongs make a constitutional right. For example, assume that one believed that the filibuster was unconstitutionally applied to ordinarily bills. That would certainly not justify treating a bill that did not get a vote in the Senate as a law, even if the House passed the bill, the President was willing to sign it, and a majority of the Senate supported it. Instead, the proper way to address an unconstitutional practice is to stop engaging in that practice.[150]

[150] Some commentators do believe that it can be desirable to follow one departure from the correct understanding of the Constitution with a second departure – what is sometimes called a compensating adjustment. Vermeule, Adrian. Foreword: System Effects and the Constitution, 123 Harv. L. Rev. 4 (2009). While this is not the place to address the question in general, there is good reason to believe that a compensating adjustment of an expanded recess appointment power would not be a desirable way of address the alleged unconstitutionality of the filibuster. To conclude that a compensating adjustment was desirable, one would want to determine that the second departure (a broad recess appointment power) would lead to a result closer to the correct understanding of the Constitution than only the first departure (the filibuster rule). But that is unlikely here for two reasons.

First, the benefits of the compensating adjustment come from the recess appointments of persons made under the broad power who would otherwise have been confirmed by the Senate if there were no filibuster rule. But these benefits must outweigh the costs of the compensating adjustment. There will be recess appointees under the broad power who would have been rejected by the Senate if there were no filibuster rule. There will also be recess appointees under the broad power in situations when the party in opposition to the President controls a majority of the Senate. It is by no means clear that these costs will be outweighed by the benefits. Second, even if these benefits do outweigh the costs, one must also consider the possibility that the failure to make the compensating adjustment will lead to an elimination of the intial depature from the Constitution. If the narrow recess appointment power is followed, then great pressure will be placed on the Senate to reform the filibuster power. The Senate's decision to eliminate the filibuster for all appointments except Supreme Court justices appears to have been made in part because there was a real chance that the Supreme Court would hold the broad recess appointment power unconstitutional. If finding a narrow recess appointment power leads to elimination of the filibuster as to appointments, then one would have the significant benefit of obtaining the correct constitutional rule as to both issues, with no departures from the Constitution. Together, these two considerations suggest that the compensating adjustment of a broad recess appointment does not produce net benefits.