

**WHY NON-ORIGINALISM DOES NOT JUSTIFY
DEPARTING FROM THE ORIGINAL MEANING
OF THE RECESS APPOINTMENTS CLAUSE**

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INTRODUCTION	890
I. THE ORIGINAL MEANING	897
A. The Happen Issue.....	898
B. The Type of Recess Issue.....	900
C. The Modified Intersession View	903
II. LIVING CONSTITUTIONALISM.....	907
A. The Value of Senatorial Confirmation and the Cost of Longer Vacancies.....	908
B. The Length of the Modern Appointment Process.....	910
C. The Valuation of Benefits and Costs by the President and the Senate	911
D. Other Changed Circumstances.....	914
E. Implications for the Meaning of the Recess Appointments Clause.....	915
III. THE ACTUAL PRACTICE	919
A. The Happen Issue: 1789 to 1940	920
B. The Type of Recess Issue: 1789 to 1940.....	930
1. The Johnson Recess Appointments	931
a. The First Set of 1867 Recess Appointments	932
b. The First Set of 1868 Recess Appointments	934
c. The Second Set of Recess Appointments in 1867 and 1868	936
d. The Recess Appointments Under the Modified Intersession View	937

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2. The Knox and Daugherty Opinions and Subsequent Recess Appointment Practice	941
C. The Pay Act Amendment of 1940	944
1. The Happen Issue	946
2. The Type of Recess Issue	948
D. Interpretation of the Pay Act Amendment and the Recess Appointments Clause	956
E. The Recent Change in Practice and Expansion of Executive Power	959
F. Resisting the Broad Recess Appointment Power with Pro Forma Sessions	962
G. Conclusion.....	964
IV. THE SENATE'S CONSENT OR ACQUIESCENCE.....	965
V. RELIANCE.....	968
VI. RECESS APPOINTMENTS AS A MEANS OF AVOIDING THE FILIBUSTER	969
CONCLUSION.....	972

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 this 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."¹ 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.

1. U.S. CONST. art. II, § 2, cl. 3.

In a 2005 article, I argued that the original meaning of the Clause incorporates a narrow understanding as to both issues.² 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 giving the President broad authority to bypass the Senate when his nominee could not secure confirmation.

Last term, the Supreme Court in *NLRB v. Noel Canning* addressed these issues for the first time. In an opinion concurring in the judgment written for four members of the Court, Justice Scalia adopted the narrow interpretation of the Clause on these two issues, largely following the theory developed in my earlier article.³ In my view, Justice Scalia persuasively showed how the Clause's language, reinforced by constitutional structure and purpose, strongly indicates that the narrow interpretation as to both the happen and type of recess issues was the original meaning.

Justice Breyer, however, in a majority opinion written for five Justices, rejected these interpretations. Largely accepting the view of the Clause put forward by the executive branch, Justice Breyer concluded that the Clause conferred much broader power with respect to both issues. Justice Breyer stated that 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.

Justice Breyer also interpreted the Clause to allow recess appointments to be made during all legislative breaks of a certain length, whether or not they occur during a legislative session.

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

3. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment).

4. *Id.* at 2567–73 (majority opinion).

While not defining the requisite length with precision, Justice Breyer concluded that a break of at least ten days would allow a recess appointment.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 six to ten legislative breaks of ten days or more that typically occur each year. Thus, under the majority's interpretation, the President ordinarily has expansive authority to bypass the Senate confirmation requirement throughout the year.

How did Justice Breyer attempt to justify this broad authority? Breyer largely relied on three considerations that he believed supported this interpretation. First, he maintained that the Clause's language as to both the happen and type of recess issues was ambiguous, permitting either the narrow or broad interpretation. He then argued that both the purpose of the Recess Appointments Clause and governmental practice supported the broad interpretation.

There are two ways to view Breyer's arguments. One way is to read him as offering an interpretation consistent with originalism. Under this view of his opinion, the ambiguity in the Clause's language allows the Court to consider purpose and subsequent practice as a means of resolving the uncertainty. But Justice Breyer's arguments are problematic if viewed as originalist interpretation. His conclusion that the language is ambiguous is weak. A review of the constitutional language in context shows that it strongly favors the narrow interpretation as to both issues.⁶

Justice Breyer's purpose argument is also problematic because it employs a non-originalist understanding of purpose.

5. More specifically, Justice Breyer announced that a break of three days or fewer would always be too short to allow a recess appointment and that a break of fewer than ten days was presumptively too short, but that special circumstances might overcome that presumption. *Id.* at 2566–67.

6. The broad interpretation as to the happen issue conflicts with the way in which the Clause is written, as even advocates of that interpretation are forced to admit. See Rappaport, *The Original Meaning*, *supra* note 2, at 1541; *Noel Canning*, 134 S. Ct. at 2567. Similarly, the broad interpretation adopted by Justice Breyer as to the type of recess issue also conflicts with the language of the Clause because an interpretation that finds a recess to occur when there is a legislative break of more than three days and presumptively more than ten days was not one of the meanings of the term in 1787. See *Noel Canning*, 134 S. Ct. at 2597 (Scalia, J., concurring in the judgment) (ordinary meaning of recess allowed recesses of thirty minutes); Rappaport, *The Original Meaning*, *supra* note 2, at 1550 (same).

Rather than looking to purpose as evidence of the content of the provision that the constitutional enactors passed, Breyer largely divorces purpose from the enactors.⁷ Breyer also uses practice differently than originalists generally do. In originalist theory, early practice is most important, but Breyer largely discounts such practice, relying most strongly on twentieth and twenty-first century practice.⁸

The better way to view Breyer's opinion is as a form of non-originalism. The problems I have noted with viewing the opinion as originalist as well as Breyer's own criticisms of originalism strongly support this interpretation.⁹ Under this view, Breyer's purpose arguments are not a way of determining what the constitutional enactors were passing, but instead are largely a way of viewing the Clause as intended to do what judges or

7. Sometimes Breyer ignores the circumstances present at the Framing, looking instead to modern circumstances that would not have been anticipated by the enactors. See *Noel Canning*, 134 S. Ct. at 2565 (looking to modern appointment practices). At other times, Breyer expressly presumes that the enactors would have intended that the Constitution be interpreted in accordance with the later determinations made by government officials. See *id.* at 2566. Further, Breyer relies on a purpose argument even when another conflicting purpose is at least equally as strong, which might be thought to suggest that Breyer believes judges can weigh purposes rather than following the weighing that the enactors appeared to follow. Compare *id.* at 2561–64, 2568–73 (finding that the Recess Appointments Clause has the purpose of filling vacant offices during a senate break), with *id.* at 2609–10, 2613–14 (Scalia, J., concurring in judgment) and Rappaport, *The Original Meaning*, *supra* note 2, at 1506–11 (finding that the Recess Appointments Clause has the purpose of filling vacant offices but without allowing the President to easily circumventing the Senate's confirmation role).

8. The use of practice as a mode of interpretation or construction within originalism is sometimes controversial. It is least controversial when used as evidence of the original meaning, but it is only considered good evidence when it is early practice. Some people also argue that a series of decisions can liquidate the meaning of ambiguous provisions. See THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527–29 (2003). Whether this is allowed is a complicated question that cannot be addressed here. But even if one accepts liquidation, it is least controversial when it involves an early series of decisions that agree with one another. If there is an early series of decisions that are consistent, which are then followed by a later series of decisions that adopt a different view, then it is by no means clear that the later series can liquidate the meaning. Similarly, if the early decisions are conflicting, and then are followed by a later series of consistent decisions, one might doubt that this later series liquidates the meaning. Significantly, Justice Breyer relies most on these latter two types of asserted liquidations. See *Noel Canning*, 134 S. Ct. at 2561–65.

9. STEPHEN A. BREYER, MAKING DEMOCRACY WORK: A JUDGE'S VIEW 76–80 (2011) (criticizing originalism).

other modern government officials believe would be desirable in modern circumstances. In other words, purpose comes very close to being a method of engaging in living constitutionalism.

This non-originalist interpretation of Breyer's opinion also makes sense of his practice arguments. As noted, these arguments rely most substantially on the modern period and give effect to positions that constituted changes from those taken earlier in the nation's history. Under the non-originalist interpretation of his opinion, reliance on these modern practices is a way of giving effect, not to the Constitution's original meaning, but to the non-originalist meaning that resulted from the choices of government officials over time.

In this Article, I address these and other non-originalist arguments for the broad interpretation of the Recess Appointments Clause, arguing that they cannot justify the broad interpretation. While I continue to believe that the broad interpretation is inconsistent with originalism, I here maintain that the broad interpretation also cannot be defended by non-originalism. Thus, the problems with the broad interpretation are not limited to one methodology.

Perhaps the most common non-originalist consideration provided for not following the original meaning—the existence of one or more non-originalist Supreme Court precedents—could not be used to justify the broad interpretation in *Noel Canning*.¹⁰ The Supreme Court had never before written an opinion interpreting the Clause and therefore the Court was addressing the issue with a judicial blank slate. It is often acknowledged that in the absence of Supreme Court precedent, originalist arguments have more weight.¹¹

Another common argument made against following the original meaning of a provision is based on living constitutionalism.¹² This approach can be pursued openly or as a gloss on other concepts, such as purpose. 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

10. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

11. Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 326 (2009).

12. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

provisions to take account of modern values and circumstances. And it is clearly true that the circumstances governing appointments have changed since the late-eighteenth century when antiquated transportation methods often led the Senate to take recesses of between six and nine months.¹³

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 nominations taking four months and appointments taking five to six months on average. This evidence suggests that short recesses of ten or thirty 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 Clause's original meaning is based on historical practice. Defenders of the executive branch's view of the Clause, such as Justice Breyer, 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.¹⁴

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 Congress passed a statute in 1863 that rejected the executive's broad view.¹⁵ Although Congress relaxed the statutory restrictions in 1940, the new statute still did not embrace the executive's broad view, but merely ex-

13. See JOINT COMM. ON PRINTING, UNITED STATES CONGRESS, 2013–14 OFFICIAL CONGRESSIONAL DIRECTORY, 113th Cong. 524–30 [hereinafter OFFICIAL CONGRESSIONAL DIRECTORY], available at <http://www.gpo.gov/fdsys/pkg/CDIR-2014-02-18/pdf/CDIR-2014-02-18-STATISTICALINFORMATION-6.pdf> [http://perma.cc/E6E8-3JDT]; Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2210 (1994).

14. See Cass R. Sunstein, *Originalism v. Burkeanism: 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).

15. See *infra* Part III.A.

panded recess appointment authority in three limited circumstances. Thus, neither the Senate nor Congress as a whole has ever endorsed the broad executive view on this issue.

As to the type of legislative break that is a recess, there is a strong case to be made that the executive branch adopted an intermediate interpretation of a recess in 1921 and that this interpretation was followed until at least 1948.¹⁶ Moreover, the statute that Congress passed in 1940 is also best read as departing from the broad view. Thus, the last time the entire Congress took action concerning the Recess Appointments Clause, it rejected the modern executive's view that Justice Breyer embraces.

While the executive branch has been following its own interpretation of the Recess Appointments 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 to a consistent executive practice during this period. Moreover, as Presidents have exercised their 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 Presidents the opportunity to make recess appointments.

But even if the broad interpretation of the Clause were supported by historical practice, that would not justify departing from the original meaning. Congressional or senatorial 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.

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

16. This intermediate interpretation, which I call the modified intersession recess view, is narrower than Justice Breyer's broad interpretation and is broader than the narrow view. *See id.* (discussing the modified intersession recess view).

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 whom the Senate was unwilling to confirm, but that reduction in power would not involve significant disruption.¹⁷

This Article proceeds in several parts. Part I briefly reviews the original meaning of the Recess Appointments Clause. Part II then explores living constitutionalism and argues that changes in circumstances and values do not support a broad recess appointment power. Part III is the longest, 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 IV maintains that even if the Senate had consented to or acquiesced in the executive's practice, that would not be a good reason for following that practice. Parts V and VI 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.¹⁸

I. THE ORIGINAL MEANING

In my prior article, *The Original Meaning of the Recess Appointments Clause*,¹⁹ 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. Justice Scalia's concurring opinion in *Noel Canning* largely agreed with this interpretation.²⁰

17. See *infra* Part V.

18. The first draft of this Article was written in the summer of 2013, before the briefs were submitted to the Supreme Court in *Noel Canning*. In October 2013 the Solicitor General filed his 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 Brief of Constitutional Law Scholars, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); Brief of Political Scientists and Historians, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The second draft of the article was also cited at various points in Justice Scalia's concurring opinion. See, e.g., *Noel Canning*, 134 S. Ct. at 2597 (Scalia, J., concurring in the judgment). The current third draft was revised during the summer of 2014 to take account of the Supreme Court's decision in *Noel Canning*.

19. Rappaport, *The Original Meaning*, *supra* note 2.

20. *Noel Canning*, 134 S. Ct. at 2592.

In this Part, 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 Appointments 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.”²¹ 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 vacancy must arise during the recess for which the recess appointment is being made.²² This interpretation derives from the Clause’s text, which speaks of filling up “Vacancies that may happen *during* the Recess of the Senate.”²³ By contrast, the “exist view” claims that it does not matter when a vacancy arises so long as it “happens to exist” 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.²⁴

The text of the Clause strongly supports the arise view. As even advocates of the exist view have admitted,²⁵ 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

21. U.S. CONST. art. II, § 2, cl. 3.

22. Robert G. Natelson, *The Origins and Meaning of “Vacancies That May Happen During the Recess” in the Constitution’s Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL’Y 199, 227–36 (2014); Rappaport, *The Original Meaning*, *supra* note 2, at 1502–06.

23. U.S. CONST. art. II, § 2, cl. 3 (emphasis added).

24. Rappaport, *The Original Meaning*, *supra* note 2 at 1502–06.

25. *Noel Canning*, 134 S. Ct. at 2567; 1 Op. Att’y Gen. 631 (1823) [hereinafter *Wirt Opinion*].

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.²⁶ 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.²⁷ 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 or largely to fill vacant offices and therefore argue that it does not matter when the vacancy arose so long as it exists during the recess.²⁸ 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—one that allows vacancies to be filled but does not permit Presidents to freely circumvent the senatorial consent requirement.²⁹

26. Rappaport, *The Original Meaning*, *supra* note 2, at 1507.

27. *Id.* at 1508.

28. Noel Canning, 134 S. Ct. at 2568; Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005).

29. 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 three to six months and the recesses would last from six to nine months. *See infra* note 32 and accompanying text. 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.

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.³⁰ 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 subscribed to the arise view.³¹

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 breaks 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 six to nine months and therefore it would have been necessary for the President to be able to fill offices that became vacant during this period.³² By contrast, intrasession breaks were extremely short (such as three days) and therefore would not have required recess appointments. Thus, it would have made good sense for the constitutional enactors 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

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

31. See Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 69–71 (Harold C. Syrett ed., 1976); Rappaport, *The Original Meaning*, supra note 2, at 1522–23, 1524–25.

32. Rappaport, *The Original Meaning*, supra note 2, at 1491.

meaning.³³ There was an ordinary meaning of recess that referred to any break in a proceeding, including one as short as thirty minutes.³⁴ 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 of 1780, that referred to an intersession recess—a break in the legislative proceedings that occurred at the end of the session.³⁵ This understanding of the word is also supported by some evidence of word usage.³⁶

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.³⁷ 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. Justice Breyer’s interpretation of the Clause views it as necessarily referring to a

33. See Natelson, *supra* note 22, at 213.

34. The 1828 edition of Webster’s Dictionary defines a recess as “Remission or suspension of business or procedure; as, the house of representatives had a recess of half an hour.” NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 51 (1828). A similar definition is contained in Johnson’s Dictionary. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 1602–03 (6th ed. 1785).

35. Rappaport, *The Original Meaning*, *supra* note 2, at 1552; see also Natelson, *supra* note 22, at 213–24 (citing numerous eighteenth-century records for the proposition that the phrase “the Recess” always referred to the gap between sessions).

36. For example, Johnson’s Dictionary included as one definition of a session as the period “for which an assembly sits without intermission or recess.” JOHNSON, *supra* note 34, at 1739. In addition, various early discussions seem to assume that the Senate is either in session or in recess. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2595–97 (2014) (Scalia, J., concurring in judgment); see also Michael Stern, *The Recess Appointments Clause and the War of 1812*, POINT OF ORDER (Feb. 5, 2012, 11:06 PM), <http://www.pointoforder.com/2012/02/05/the-recess-appointments-clause-and-the-war-of-1812/> [<http://perma.cc/E55J-8ZSD>].

37. Rappaport, *The Original Meaning*, *supra* note 2, at 1557.

break of more than three days and presumptively of one of at least ten days.³⁸ But there is no principled basis for this interpretation. Thus, Justice Breyer must simply assert an arbitrary number of days for recess appointments, based on his own understanding of what seems a sufficient time limit.³⁹ 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 their next session.”⁴⁰ 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, let alone twice as long as, intersession ones.⁴¹

38. *Noel Canning*, 134 S. Ct. at 2567. The executive’s interpretations in recent years of an intrasession recess as either a break of at least ten days or of more than three days suffers from the same problem. Hartnett, *supra* note 28; 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) (eleven-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) (ten-day recess).

39. Justice Breyer does attempt to justify this limit based on practice, but his argument here is problematic for a variety of reasons. First, the ten-day limit is only of recent origin. The limit on intrasession recess appointments was first stated by the executive branch in 1996. See *infra* note 167 and accompanying text. Justice Breyer avoids acknowledging this by a careful use of language, *Noel Canning*, 134 S. Ct. at 2566 (“we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days”). Second, the ten-day limit was not applied to intersession recesses, even though Justice Breyer treats the limit as applying to such recesses. See *id.* at 2567.

40. U.S. CONST. art. II, § 2, cl. 3.

41. If anything, intrasession recess appointments should have shorter durations. After all, intrasession breaks are typically shorter than intersession recesses and

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.⁴² 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 treats all recesses as occurring outside of the session. There are, then, no intrasession

therefore there is less reason for there to be a recess appointment during this break. To extend the recess appointment a much longer period, when it was made during these shorter breaks, makes little sense.

Justice Breyer sought to provide a justification for the extended length of intrasession recess appointments, but his justification is woefully inadequate. He argues that the extended length of intrasession recess appointments assures that the President and Senate always have at least a full session to secure an ordinary Senate confirmation. *Noel Canning*, 134 S. Ct. at 2565. But this argument is problematic. First, at the time of the Framing, it would not have been thought necessary to have at least a full session to fill an appointment, as appointments were usually made relatively quickly and often in a few days. The long periods for appointments cited by Justice Breyer have occurred only in the modern period and was unlikely to have been anticipated by the enactors. Second, even if one believed that a longer period was needed when the vacancy occurred during a session, requiring so much of a longer period—possibly nearly two years in length—seems wildly excessive. For example, in the modern period when the session normally lasts eleven months, if a vacancy occurred two months into the session, it would be disproportionate to allow a recess appointment of twenty-one months rather than simply allowing one of nine months. Even for vacancies that occur somewhat later in the session, it is not necessary to have longer recess appointments. While the average length of appointments is long, there is no reason why the executive could not accelerate the process for vacancies that occur later in the session.

42. Rappaport, *The Original Meaning*, *supra* note 2, at 1569 (referring to this as the alternative interpretation).

sion 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.⁴³ Stern attempts to develop the modified intersession view by deriving the meaning of recess from the related idea of session. Stern begins with this quotation from Alexander Hamilton in the Federalist Papers, who offered an explanation of the Recess Appointments Clause:

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.⁴⁴

43. Michael Stern, *Burying the Multi-Session Recess Appointment Theory*, POINT OF ORDER (May 3, 2012), <http://www.pointoforder.com/2012/05/03/burying-the-multi-session-recess-appointment-theory/> [<http://perma.cc/9956-YELB>].

44. THE FEDERALIST NO. 67, at 409–10 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

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.⁴⁵

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 they are assembled in the nation's capital, then they are available to advise and consent. By contrast, "[t]he recess of the Senate is the period when Senators are not assembled at the seat of government . . ."⁴⁶ and therefore are not available to advise and consent. The "next session" would then be the next time that the Senate assembles following a recess.⁴⁷

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

45. Stern, *supra* note 43.

46. *Id.*

47. *Id.* 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 under the modified intersession view during a single annual session.

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 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 long 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.

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 non-originalist 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.

II. LIVING CONSTITUTIONALISM

The most fundamental non-originalist 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.⁴⁸ 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 six and nine months per year. We now live in a world of cheap air travel, and the Congress holds many shorter recesses per year.

In this Part, 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 four or ten days or one month 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 five and six 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 non-originalists 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 includ-

48. See STRAUSS, *supra* note 12.

ing text and perhaps original meaning. How much these non-policy considerations actually constrain non-originalist interpretation is a matter of dispute. But because non-originalists typically discuss these other considerations, very few non-originalist or living constitutionalist approaches actually read as naked discussions of modern values, as this Part does.⁴⁹

Thus, rather than understanding this Part of the Article 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 non-originalism that is concerned with what would be desirable policy in the modern world. And here I argue that modern circumstances 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*

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 extend the vacancy. Making a high-quality choice is, of course, an important goal of appointment methods. But in order to make 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 or to engage in a more thorough assessment 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 vacancy.⁵⁰ 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 Presi-

49. For example, Justice Breyer's opinion, even though he is a non-originalist and seems to favor a kind of living constitutionalism, nonetheless does not read as one using a naked living constitution approach. Instead, he employs an open-ended understanding of purpose and a significant role for practice that promotes what are in the end his views of modern values based on modern circumstances. See *supra* notes 7–9, 38–39 and accompanying text.

50. Another cost is the additional personnel and effort to make the appointment that could have been employed elsewhere.

dent 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 there are checks on presidential appointments.⁵¹ 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 from six to nine 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 generally have been one or two recesses per year longer than thirty days, with another approximately six to twelve recesses each year lasting shorter periods.⁵² It is by no means clear, without

51. 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.

52. See OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 533–42 (indicating that this pattern held from 1973 until 2007). In more recent years, the pattern would probably have continued except that the Senate chose to employ the device of pro forma sessions rather than to take recesses. For example, in 2012 the House took six recesses but the Senate only took two, holding pro forma sessions when the House took its remaining four recesses. See CONG. REC. S2,283 (daily ed. Mar.

further information, that recess appointments should be allowed during recesses shorter than sixty 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.

To more precisely balance these competing considerations, it is necessary to discuss additional information about appointment practices in the modern period. Such information will explain how the President and the Senate trade off the benefits 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 eight months.⁵³ This seems incredibly long. The length of time here no doubt is a function of many different causes, including the fact that a large number of appointments need to be made at the beginning of a presidency and that 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

29, 2012) (pro forma session during the period of House recess); CONG. REC. S2,888 (daily ed. Apr. 26, 2012) (same); CONG. REC. S4,782 (daily ed. June 29, 2012) (same); CONG. REC. S6,873 (daily ed. Nov. 15, 2012) (same).

53. One study indicated the average length of vacancies from presidential inauguration to Senate confirmation for the Clinton and George H. W. Bush administrations was eight 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 eight months for George W. Bush, nearly nine months for Clinton, five and a half months for George H. W. Bush, and nearly six and a half months for Reagan. See Anne Joseph O'Connell, *Vacant Offices: Delays In Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 957 (2009).

indicate that the median length of appointments for positions requiring Senate confirmation is between five and six months.⁵⁴

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.⁵⁵ With the exception of the Cabinet Secretary level, where the two stages were of equal length, the nomination stage was generally two or three times as long as the confirmation stage. For example, Agency Heads had a nomination period of nearly six months, but a confirmation period of only two 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 nomination stage lasts 5.7 months and the confirmation stage 2.3 months. For vacancies throughout the presidency, the nomination stage lasts four months and the confirmation stage one and a half months.⁵⁶

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

54. From 1984 to 1999, during the second Reagan Administration, the George H. W. Bush 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 five and six 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 George H. W. Bush, Clinton, and George W. Bush, 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 as Agency Heads, Deputy Agency Heads, and Assistant Secretaries, were quite long, ranging from five months to fifteen months, depending on the Administration. See O'Connell, *supra* note 53, at 958.

55. See *id.* at 968.

56. This calculation is based on the following assumptions: inaugural appointments take eight months, ordinary appointments take five and a half months, and the nomination stage takes two and a half times as long as the confirmation stage. These assumptions are based on the studies cited above. See *supra* notes 53–55 and accompanying text.

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 four 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 position (as well as Justice Breyer's) concerning the length of the recess necessary to allow a recess appointment. While the executive took the position in *Noel Canning* that recess appointments may be made in recesses that exceed three days, it is hard to reconcile this position with its own practices. If the executive takes four 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 believes that its confirmation role is more valuable than a short recess. The Senate could change its 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.⁵⁷

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 five or eight months, then it seems very hard to argue that a short recess of four or ten days should allow a bypassing of the Senate confirmation requirement. A ten-day delay would be one-fifteenth of the ordinary appointment process of five months and one-twenty-fourth 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.

It might be objected that, even if the average length of an appointment is long, some high level appointments are more pressing and require swifter action. For example, if the offices of Secretary of State or Defense were to become vacant, the country might require that the vacancy be filled more quickly than a month or two. While a more rapid appointment for these offices might be desirable, it does not require an expanded recess appointment power. Instead, in these special circumstances, the Senate would be expected to take quicker action, especially if there were an extended recess of a month or longer. The Senate committee with jurisdiction over the nomination would realistically be expected to return earlier from the recess for a hearing. Moreover, the full Senate could either vote on the nomination immediately upon its return or, if this would delay the nomination excessively, could return earlier than scheduled from the recess. The Senators understand that filling a high-level position might occasionally require some inconvenience.

57. 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.

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 and to the additional executive discretion allowed by the relaxation of the nondelegation doctrine.⁵⁸ 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.

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

58. There are other causes as well, such as the expansion in the President's war powers. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1095 (2003).

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.⁵⁹ 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 is that the recess must be more than three days and Justice Breyer concludes that it presumptively must be ten or more 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

59. Of course, it might be argued that acting officials are not able to perform the job as well as a confirmed appointee. 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.

simply inconsistent with such a short period. Similarly, the small percentage of the ordinary appointment process of a four- or ten-day delay also suggests that this period is too short to justify bypassing the Senate confirmation requirement. Defenders of this short period have only been able to maintain their position by focusing exclusively on the delay that the recess causes without considering the value of the Senate confirmation requirement or how long the modern appointment process takes.⁶⁰

If four or ten 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 thirty-day recess. A thirty-day period would at least represent twenty percent of the ordinary appointment process. While this is the minimum length, there is a strong case for requiring sixty days. The Senate confirmation is important enough to require such a substantial period. Moreover, the average period for Senate confirmation is one-and-a-half 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 sixty-day requirement, I find it hard to understand how one could apply a shorter limit than thirty days.

Second, an important issue is whether the thirty- or sixty-day cutoff should be applied only to intrasession recesses or also to intersession recesses. It is true that a minimum time limit has not been applied to intersession recesses in the past. But once intrasession breaks are accepted as affording the President 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.⁶¹ Still, if one applied a version of the living constitutional approach that

60. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2565–67 (2014) (finding that a ten day recess is presumptively of adequate length to trigger the Recess Appointments Clause without discussing the value of Senate confirmation).

61. Despite his claims to be following the practice, Justice Breyer felt free to discount the practice of not imposing a time limit on intersession recesses in *Noel Canning*. See *id.* at 2567. This further suggests that Justice Breyer is applying a living constitution approach rather than a practice-following approach.

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 thirty days, then there is likely to be only one recess during the year.⁶² This would allow a recess appointment that lasts on average 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 two or three times as long as it ordinarily takes to make a confirmation decision.⁶³ 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 that result.⁶⁴

62. See OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 527–42.

63. 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.

64. Another question is whether the Recess Appointments Clause should follow the arise or the exist interpretation. In my view, the arise interpretation should be followed under modern circumstances, although the relative desirability of the arise view will depend on the rules defining a recess. The main problem under the exist view is that the President has great discretion to circumvent the senatorial confirmation requirement simply by waiting until the next eligible recess to make a recess appointment. Such appointments have no good justification, because the claim that the Senate is acting unreasonably is foreclosed by the notion that Senate confirmation is a needed check on presidential appointments.

If recess appointments are allowed under short recesses of ten days, then the exist view is clearly undesirable. The frequent recesses of this length throughout the year would grant the President many opportunities to avoid the confirmation requirement. Furthermore, allowing recess appointments during these short recesses would offer few if any compensatory benefits, since these short recesses would only delay confirmation decisions very briefly. It is true that the arise view might have an additional cost in modern circumstances. In the modern world of short recesses, it might be

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 sixty days, would apply this requirement to both intersession and intrasession recesses, and would extend 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 sixty days. But even if one rejected these interpretations, it is extremely difficult to justify allowing recess appointments during intrasession recesses of less than thirty days. And if one changed the modern executive’s interpretation, which was largely embraced by Justice Breyer, 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.

thought that when a vacancy arises is not an important factor in determining whether it is desirable for the President to be able to fill it with a recess appointment. Instead, one might argue that the relevant question is how long the recess would require an office to remain vacant if the President lacked the power to make a recess appointment—a question largely unrelated to the when the vacancy arose. But the power that the exist view allows the President to circumvent the confirmation requirement and the brief delay in confirmation decisions that short recesses would cause far outweigh this cost of the arise view. While the question is a bit closer in the case of recesses of at least thirty days, the need to prevent presidential circumvention would again, I believe, outweigh any delay that the recesses would cause.

The harder question is whether the arise view should be followed if recess appointments are permitted only during longer recesses, such as those lasting at least sixty days. The exist view is more attractive under such a rule, because such recesses are much less common and could potentially delay confirmation decisions for a longer period. Nonetheless, there are still strong arguments against the exist view. Even if sixty-day recesses are not very common, when they do occur, they would allow the President to recess appoint to offices any persons who could not secure confirmation. Moreover, these longer recesses might not actually further delay confirmation decisions under the arise view. Since the vacancy would have occurred prior to the recess, the executive branch could adjust its schedule for nominating an officer so that a confirmation vote could be had before the recess. And, of course, the existence of acting appointments would allow the office to remain filled if for some reason the confirmation vote did not occur prior to the recess.

Ultimately, it is a close question whether a recess appointment should be allowed under the exist view when only recesses of at least sixty days are eligible for recess appointments. My view is that the benefits of the arise view outweigh its costs even in this situation, but others might reasonably disagree. But if recess appointments can be made for recesses of less than sixty days, then it seems clear that the arise view should be followed.

III. 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 1921.⁶⁵ Justice Breyer adopts a slightly different view of the tradition. As to the happen issue, he maintains that the executive followed the exist view since 1815 and that the Senate had ceased to object to this view either prior to the Civil War or at least by 1905.⁶⁶ As to the type of recess issue, he contends that the intrasession view was accepted by all branches, with one exception, since 1867.⁶⁷ But all of these claims turn out to be seriously mistaken.

This Part 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 Justice Breyer's or the executive's broad view is that the legislative houses for a period of time did not actively resist the broad assertions of power by the executive, even when those assertions were 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 by 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 in-

65. See Sunstein, *supra* note 14; see also Brief for the Petitioner, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

66. *Noel Canning*, 134 S. Ct. at 2572.

67. *Id.* at 2563–64.

termittent 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*

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.⁶⁸ 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.⁶⁹

This 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,

68. Randolph Opinion, *supra* note 30, at 165–67.

69. Rappaport, *The Original Meaning*, *supra* note 2, at 1519–20. In addition, it appears that Attorney General Lee, who served in the second Washington Administration, also followed the arise view. See Letter from Charles Lee to George Washington (July 7, 1796), available at <http://founders.archives.gov/documents/Washington/99-01-02-00702> [<http://perma.cc/TWR8-WJ8H>].

the resulting vacancy would have arisen during the recess.⁷⁰ 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.⁷¹ 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.⁷² In 1823, however, Attorney General Wirt wrote an opinion adopting the exist interpretation.⁷³ 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 of the Clause was “to keep offices filled.”⁷⁴ But this is a one-sided view of the Clause, which also has the purpose of protecting senatorial confirmation as the main method for appointing offices—a point that Randolph’s opinion articulated, but which Wirt ignored.

70. Rappaport, *The Original Meaning*, *supra* note 2, at 1522–23.

71. *Id.* at 1524–25.

72. Compare *id.* at 1529–36, with Hartnett, *supra* note 28. The executive branch argues that there were recess appointments made under the exist interpretation prior to Attorney General Wirt’s opinion, even during the Washington Administration. See Brief for the Petitioner, *supra* note 65, at 9. Others have questioned how many, if any, of these recess appointments failed to comply with the arise view. See Brief for the Respondent at 13–14, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); see also *id.* at 2570 (claiming that recess appointments under the exist view happened at least since 1815). But even if some of these recess appointments did violate the arise view, there is no evidence that there were public or even private legal justifications offered for these recess appointments. Thus, recess appointments may have occurred by mistake or may have not generally been known about. Consequently, they would normally be entitled to less respect either as evidence of the original meaning or as part of a practice that other branches acquiesced in or consented to. By contrast, in addition to the written opinions issued by Edmund Randolph, *supra* note 30, Alexander Hamilton, *supra* note 31, and Attorney General Lee, *supra* note 69, there is written evidence that James Madison accepted the advice of his Secretary of War that he lacked the power to make recess appointments to offices that were vacant during the session. See *Noel Canning*, 134 S. Ct. at 2611 (Scalia, J., concurring in the judgment).

73. Wirt Opinion, *supra* note 25.

74. See *id.*

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.⁷⁵

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 of the arise interpretation, it seriously neglects the problems of 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.⁷⁶

Interestingly, Attorney General Wirt obliquely recognized that the exist view could create problems. But in either a 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."⁷⁷ Clearly, Wirt's words are not accurate, as modern Presidents have regularly used the recess appointment power to ap-

75. *Id.*

76. Repeated recess appointments have occurred various times throughout history. See Rappaport, *The Original Meaning*, *supra* note 2, at 1508 n.61; *infra* Part III.B.2 (discussing repeated recess appointment of Roy Harper).

77. Rappaport, *The Original Meaning*, *supra* note 2, at 1542.

point individuals who could not secure Senate confirmation.⁷⁸ 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 between 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 accident. The fortuity requirement also has a textual hook. The idea is that the language, “vacancies may happen 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 problematic examples I raise would not be accidental and could not receive recess appointments.⁷⁹

78. 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.

79. That Justice Breyer does not mention the fortuity interpretation is a serious problem for his purpose arguments for the exist view. See *Noel Canning*, 134 S. Ct. at 2568–69. Breyer repeats Attorney General Wirt's purpose arguments for the exist view that an office might not be filled based on unexpected circumstances or accidents. But the fortuity interpretation would allow recess appointments to be

While Wirt adopted the exist view, later Attorney Generals were attracted to the fortuity view.⁸⁰ For example, in 1845 Attorney General Mason advised that the President could not make recess appointments for the newly admitted state of Florida, explaining that “[i]f 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.”⁸¹ The next year Mason wrote another opinion distinguishing his earlier decision, but again making clear the importance of fortuity.⁸²

made for these offices without allowing them to be made in other circumstances and thereby to be used to circumvent the senatorial confirmation requirement.

80. 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].

81. Mason 1845 Opinion, *supra* note 80.

82. Mason 1846 Opinion, *supra* note 80. 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 ended 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 1846 Opinion, *supra* note 80 (“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”); *id.* (“It is no disrespect to the Senate to suppose that their failure to act on this nomination was accidental”); 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.

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 Clause'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.

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. In 1862, Bates wrote that, "[i]f 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, "[b]ut the question is not new."⁸³ 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,⁸⁴ the Senate Judiciary Committee issued a report that adopted the arise interpretation and rejected the exist interpretation as unconstitutional.⁸⁵ 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:

83. *President's Appointing Power*, 10 U.S. Op. Att'y Gen. 356 (1862).

84. *See S. REP. NO. 37-80* (1863).

85. *See id.* at 7.

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.⁸⁶

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.”⁸⁷ This amendment seemed intended to adopt the report of the Senate Judiciary Committee.⁸⁸

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 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

86. *Id.*

87. 12 Stat. 646 (1863).

88. Justice Breyer’s interpretation of this event shows the high hurdles he imposes on counting Senatorial action as disagreeing with the executive. Justice Breyer questions whether the entire Senate agreed with the report, noting a Senator’s statement that some Senators believed that the President had the authority. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2571–72 (2014). But a committee report, issued by the committee with jurisdiction in the area, is a significant congressional action. Moreover, that report was then combined with the passage of a bill that took aim at the exist interpretation by denying payment to persons recess appointed under that interpretation. That some members might have disagreed seems largely beside the point unless one believes that a unanimous Senate action is required. While it is true that the law did not prohibit, but merely denied payment for persons appointed under the exist interpretation, I have offered several explanations for this, including the fact that the President might have vetoed the law. See *infra* notes 91–92 and accompanying text.

when payment is prevented, I think that will probably put an end to the habit of making such appointments.⁸⁹

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 a decision not 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.⁹⁰

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."⁹¹

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.

89. 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.*

90. *Id.*

91. *Id.*

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 on the ground that the President thought it was unconstitutional. If the President believed that 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 was unconstitutional and 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 appropriation statute. But Senate rules or practices might have allowed it to be placed in an appropriation law only if it were a 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 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.⁹² 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

92. See 16 Op. Att'y Gen. 522 (1880).

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 *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.⁹³ 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*.⁹⁴ 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.⁹⁵

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 appointments 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

93. *Case of Dist. Attorney of United States*, 7 F. Cas. 731 (E.D. Pa. 1868).

94. *Schenck v. Peay*, 21 F. Cas. 672, 675 (C.C.E.D. Ark. 1869).

95. *In re Farrow*, 3 F. 112 (C.C.N.D. Ga. 1880).

of the Clause,⁹⁶ 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.⁹⁷ Most importantly, 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 be 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 recess appointment power often claim that the intrasession view has been consistently followed at least since 1921.⁹⁸ 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

96. *The President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32 (1866) (AG Stanbery).

97. 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.

98. See Brief for the Petitioner, *supra* note 65, at 11.

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 1920s.⁹⁹ 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 either that a significant majority of the Johnson recess appointments were made under the intersession view or that all of them were made under 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.

1. *The Johnson Recess Appointments*

In the nearly eighty years from 1789 until the Johnson recess appointments in 1867, there were no intrasession recess appointments.¹⁰⁰ 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 really true. From 1857 until 1867, there were eight different twelve- to fourteen-day intrasession breaks over the Christmas holiday, and no recorded recess appoint-

99. *See id.* at 1a–11a.

100. 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. *Id.* 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* Brief for the Respondent, *supra* note 72, at 25.

ments.¹⁰¹ Since Justice Breyer concluded that intrasession recess appointments can be made for breaks of at least 10 days, this practice counts against his 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.¹⁰² 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 schedule additional meetings during the remainder of the year. These breaks between the meetings have been thought to be intrasession recesses, but as I argue below, it is not at all clear that they were. The alleged intrasession recess appointments can be usefully classified into three groups.

a. The First Set of 1867 Recess Appointments

Let me begin with the first set of 1867 recess appointments. In 1867, Congress convened in the beginning of March, but then adjourned on March 30 until July 3. This intended ninety-two day break was quite unusual, but did not occur. President Johnson called the Senate into session on April 1. This special session continued until April 20, when the Senate took a recess until July 3.¹⁰³ During this seventy-three day break between April 20 and July 3, Johnson made twenty recess appointments.¹⁰⁴

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 in-

101. See OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 526–27. There were also three five- to seven-day intrasession recesses over the holidays before 1857. *Id.*

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

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

104. See Brief for the Petitioner, *supra* note 65, at 1a–3a.

trasession 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.¹⁰⁵ Thus, it was not clear how to analyze the 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 previously 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.¹⁰⁶ 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."¹⁰⁷ The idea seems to be that two sessions 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—these recess appointments would be hard to view as

105. See OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 522–25.

106. Thomas Jefferson, A Manual of Parliamentary Practice: for the Use of the Senate of the United States Sec. LI (1812).

107. *Id.*

having been taken under the intrasession view.¹⁰⁸ Instead, it would be an intersession recess appointment reflecting the special circumstances at the time.

b. The First Set of 1868 Recess Appointments

Consider now the first set of 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 fifty-six days from July 27, 1868 to September 21, 1868.¹⁰⁹ During this recess, Johnson made sixteen additional recess appointments.¹¹⁰

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.¹¹¹ 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.¹¹² 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.¹¹³

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* stated that “[t]he 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 reso-

108. Senators Howard and Nye referred to these meetings as “separate sessions.” See CONG. GLOBE, 40th Cong., 1st Sess. 753–54 (1867) (referring to 1867 meetings as separate sessions) (remarks of Senators Howard and Nye).

109. OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 519.

110. Brief for the Petitioner, *supra* note 65, at 5a–8a.

111. 12 Op. Att’y Gen. 469, 470 (1868).

112. 12 Op. Att’y Gen. 455 (1868); 12 Op. Att’y Gen. 449, 451 (1868).

113. 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 indicate a visible practice. Instead, it suggests an exercise of power that was not openly justified.

lution, adjourned until the third Monday in September next a twelve o'clock."¹¹⁴

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: "[t]he 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."¹¹⁵

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 Attorney General did not even discuss the issue of intrasession recesses, even though this might 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 Attorney General spoke of the office becoming "vacant during the *late session* of the Senate."¹¹⁶

As with the first set of 1867 recess appointments, 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, 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."¹¹⁷ 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 be then otherwise ordered by the two Houses, they further adjourn their

114. See CONG. GLOBE, 40th Cong., 2nd Sess. 4327 (1868) (emphasis added)

115. See CONG. GLOBE, 40th Cong., 1st Sess. 4501 (1868).

116. 12 Op. Att'y Gen. 469, 470 (1868); 12 Op. Att'y Gen. 455 (1868); 12 Op. Att'y Gen. 449, 451 (1868) (emphasis added).

117. CONG. GLOBE, 40th Cong., 2nd Sess. 4501 (1868).

respective Houses until the first Monday in December, 1868."¹¹⁸ Finally, when the Senate met again on September 21, some of the Senators appeared at pains to note that their prior adjournment had not ended the session, without, however, referring to the President pro tempore's statement to the contrary.¹¹⁹

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.

c. The Second Set of Recess Appointments in 1867 and 1868

While there are strong arguments that the above thirty-six recess appointments either conformed to or were reasonably thought to conform to the intersession view, there are two sets of recess appointments made 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 3.¹²⁰ This session lasted until July 20, when Congress recessed until November 21, 1867.¹²¹ Even if one treated the previous recess as an intersession recess, this ninety-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 twelve officials.¹²²

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

118. CONG. GLOBE, 40th Cong., 2nd Sess. 4327 (1868).

119. CONG. GLOBE, 40th Cong., 2nd Sess. 4519 (1868).

120. *Sessions of Congress, 1st-110th Congresses, 1789-2007*, CONGRESSIONAL DIRECTORY 519 (2007).

121. *Id.*

122. Brief for the Petitioner, *supra* note 65, at 4a-5a; *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884).

end the session until November 10 at the earliest.¹²³ During the period between September 21 and November 10, President Johnson made nine additional recess appointments.¹²⁴ 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 attempted to justify or even mention that these recess appointments had been made during what might have been an intrasession break.

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

d. The Recess Appointments Under the Modified Intersession View

Even if one does 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.¹²⁵ 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

123. The uncertainty here about the ending—that it lasted at least until November 10—derives from the fact, discussed below, *see infra* notes 128–30 and accompanying text, that the concurrent resolution adopted on September 21 provided that the two Houses were to adjourn until October 16, 1868, and then until November 10, 1868, and then until the first Monday in December. On the first date, the Houses would adjourn unless otherwise ordered by the two Houses. On November 10, however, the Houses, unless otherwise ordered by the two Houses, would end the session by adjourning until the first Monday in December—the day scheduled for the next session. Thus, an adjournment on November 10 might have ended the session.

124. Brief for the Petitioner, *supra* note 65, at 8a–9a.

125. *See* Michael Stern, *A Recess By Any Other Name*, POINT OF ORDER (Mar. 21, 2012, 8:47 PM), <http://www.pointoforder.com/2012/03/21/a-recess-by-any-other-name/> [<http://perma.cc/G4Q3-E5W7>].

Senate had taken a break longer than fourteen 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 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.¹²⁶

Significantly, the modified intersession view might justify not only the thirty-six Johnson recess appointments made during the two arguably intersession recesses, but also the twenty-one recess appointments during the breaks in 1867 and 1868 that do not appear to be intersession under the intersession view.¹²⁷ First, the 1867 break lasted ninety 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, 1868 at 12 o'clock noon; and that they

126. 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 S. JOURNAL, 40th Cong., 1st Sess., 785 (Jul. 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 S. JOURNAL, 40th Cong., 2nd Sess., 859 (Nov. 21, 1867). Senators Howard and Nye also referred to these meetings as separate sessions. See CONG. GLOBE, 40th Cong., 2nd Sess. 753-54 (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 125.

127. Justice Breyer's review of the Johnson recess appointments is seriously deficient. He seems to be completely unaware of the modified intersession view and the possibility that all of the Johnson recess appointments followed that view. He also seems unaware that a majority of the Johnson recess appointments may have been made under the intersession view. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2562 (2014).

then, unless otherwise ordered, further adjourn their respective [H]ouses to the first Monday of December.”¹²⁸ 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 twenty-five days, which may or may not be long enough to constitute an intersession recess under the modified view. But even if twenty-five days was not long enough, one might conclude that the actual break lasted to November 10, which would be fifty days, and almost certainly would 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.¹²⁹ 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.¹³⁰

128. S. JOURNAL, 40th Cong., 2nd Sess. 787 (Sept. 21, 1868).

129. 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 was conducted, resembles the Obama 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. There are two important differences between these meetings that might lead to different conclusions. First, the Senate did not claim to be in session in these 1868 meetings, but the Senate did so in 2012. Second, 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.

130. While the recesses in which these appointments were made appear to conform to 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 of 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,

Finally, instead of viewing the Johnson recess appointments as having been made under either the intersession or the modified intersession interpretations, one might view them 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 thirty-six recess appointments as having been made under the intersession view, with the remaining twenty-one as having been effected under the intrasession view. On the other hand, one could view all fifty-seven 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 isolated historical episodes that were not repeated for at least a half century. Second, the executive did not identify or justify any of these recess appointments as being intrasession recess appoint-

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.) 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 were 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. Technically, then, this recess appointment would again have lasted a short period. But if the recess appointments were 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 ones in the second class above, which would extend at least until March 3, 1869.

ments. This significantly reduces the importance of these recess appointments for purposes of determining their effects on the practice. Theories that justify interpreting the Constitution based on practice—whether based on acquiescence or consent—generally assume that the practice occurred 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 ten days and most of which were at least fourteen days—periods that would have entitled the President to make recess appointments under Justice Breyer’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.¹³¹ Combined with the absence of intrasession recess appointments during the prior period, the Knox 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.

In 1923, however, Attorney General Daugherty disregarded this practice and overturned the Knox opinion.¹³² For those who believe strongly in practice, Daugherty’s opinion might be subject to criticism. But even assuming that Daugherty’s opinion was correct, the question is what view Daugherty actually

131. 23 Op. Att’y Gen. 599 (1901) [hereinafter Knox Opinion].

132. 33 Op. Att’y Gen. 20 (1921) [hereinafter Daugherty Opinion].

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.¹³³ 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.¹³⁴ 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, fifteen recess appointments were made during legislative breaks that were not intersession recesses under the intersession view.¹³⁵ 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, 1928.¹³⁶ If this appointment had been made under the intrasession view, this recess appointment would not have ended then, but would have ex-

133. Michael Stern, *Attorney General Daugherty and the "Intra-Session" Recess*, POINT OF ORDER (Mar. 30, 2012, 6:33 AM), <http://www.pointoforder.com/2012/03/30/attorney-general-daugherty-and-the-intra-session-recess/> [<http://perma.cc/D9RV-422L>].

134. Daugherty wrote: "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." Daugherty Opinion, *supra* note 132, at 21–22 (emphasis added).

135. See Brief for the Petitioner, *supra* note 65, at Appendix A.

136. Clarence A. Miller, *The Interstate Commerce Commissioners: The First Fifty Years: 1887-1937*, 5 GEO. WASH. L. REV. 580, 664–65 (1937).

tended through the intersession recess as well as through the next annual session until March 3, 1929. The length of the remaining fourteen 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 adopted the modified view, not the intrasession view.¹³⁷

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 discussed in this Part, they cast further light on the meaning of the Daugherty opinion, as interpreted by the executive branch.¹³⁸ The Truman Administration recess appointed Roy Harper three times between 1947 and 1948.¹³⁹ Harper's first two recess appointments in August and December 1947 conformed to the modified intersession view.¹⁴⁰ 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.¹⁴¹

137. Once again, Justice Breyer does not address the strong argument that Daugherty's Opinion and these recess appointments followed the modified intersession view, not the intrasession view.

138. During the Roosevelt Administration, the seven 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 the recess appointees were confirmed. *See* 89 CONG. REC. 8034, 8165 (1943); *see also* 90 CONG. REC. 8190, 8446 (1944).

139. 28 Comp. Gen. 30, 31 (1948).

140. *See* Michael Stern, *Comptroller General Warren and the Origins of the Multi-Session Recess Appointment*, POINT OF ORDER (April 21, 2012, 11:06 PM), <http://www.pointoforder.com/2012/04/21/comptroller-general-warren-and-the-origins-of-the-multi-session-recess-appointment/> [<http://perma.cc/MDY5-KBBE>].

141. 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* Brief for Petitioner, *supra* note 65, at 13a. But while Harper received another recess appointment beginning December 20, 1947, 28 Comp. Gen. 30, 31 (1948), there is no record of Adams receiving another recess appointment.

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 to 1940 or from 1921 until 1940. Instead, there is significant evidence of a practice under the intersession view from 1789 until 1921, including a significant majority of the Johnson recess appointments and an 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 an account of possibly all of the Johnson recess appointments and of nearly twenty-five years of recess appointments under the Daugherty opinion. 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*

Now that we have brought the discussion of the practice about both the happen and type of recess issues up to 1940, we are ready to review 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

Instead, Adams was confirmed on February 26, 1948. *See* 94 CONG. REC. 1768 (1948). 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* Brief for Petitioner, *supra* note 65, at 13a–18a. Thus, it may be that the records of the recess appointments from December 1947 of Adams and other officials are not available.

passed a formal enactment about 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*. Instead, the evidence suggests that Congress adopted either the intersession or the modified intersession view 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. Significantly, Justice Breyer's opinion appears completely unaware of this evidence.¹⁴²

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."¹⁴³ 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.¹⁴⁴

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."¹⁴⁵

This statute is more difficult to understand than it initially seems, but in general, it allows some recess appointees to be paid, even though the vacancy existed during the session, if the

142. *Noel Canning*, 134 S. Ct. 2550, 2572.

143. 5 U.S.C. § 5503 (1940).

144. *Id.*

145. *Id.*

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 should be allowed to make a recess appointment, with the exception that the President cannot 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.

1. *The Happen Issue*

Let us focus initially on the effect of the Amendment on the happen issue. 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, as 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 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 used the appropriations power in this way as unconstitutional. For example, if a statute pro-

vided 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 abridged executive power.¹⁴⁶

146. *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, 35 Op. O.L.C. 1 (2011) (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 to carry out diplomatic relations.); Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1 (2009) (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, 23 Op. O.L.C. 279, 282 (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 (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 (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 (1995) (Placing a condition on the use of appropriated funds to pay for the construction in 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 (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 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.").

The apparent reason why the executive has not challenged the Pay Act Amendment 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 likely would 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 while Congress favors an intermediate position that imposes limitations on the exist view.

Third, the statute that 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 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, the statute would not

restrict the payment of salaries to many recess appointees whom the statute would seem to have restricted.¹⁴⁷

Although the correct interpretation of the statute is not entirely clear, it is clear that the statute should be interpreted to accord with the meaning of the Clause, because the two were obviously intended to function in tandem, and that one should interpret the statute and the Constitution to have divergent meanings only for a strong reason. The executive branch, however, has deviated from this principle without justification, interpreting the statute to have the modified intersession meaning and the Clause to have the intrasession meaning. Consequently, the limits that Congress established for the executive have been evaded, as 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.¹⁴⁸

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 Part III.D, I show that the executive has interpreted the statute and the 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 recess appointees 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

147. See *infra* text accompanying note 153.

148. See *infra* Part III.D.

them to involve intersession recesses. For example, the first exception would allow payment only if a vacancy had arisen within thirty days of the end of the annual session (and therefore within thirty 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.¹⁴⁹

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. It is entirely possible that Congress assumed the intersession view of the Clause 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 could not be 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 fifteen 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

149. For example, the first exception of the statute allows payment only if the vacancy arises within thirty days of the end of the session. If this is understood as requiring that the vacancy arise within thirty 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 thirty-day limit to the period prior to that intersession recess rather than to intrasession breaks.

history of the statute. Thus, it is quite possible that 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 thirty 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 only would 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 only would 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.¹⁵⁰

There is also strong evidence that Congress might have believed that the Clause had the modified intersession meaning. 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

150. Having the terms operate consistently throughout the statute is not a trivial accomplishment. 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.

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 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 thirty 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 only if the vacancy arose within thirty 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.¹⁵¹ 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.

Surprisingly, however, there may be an argument for the intrasession view of the statute if, in hostility for the intrasession view of the Clause, Congress intended the statute to restrict intrasession recess appointments. 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 ex-

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

ception for a vacancy that arises within thirty 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 thirty days prior to an intrasession recess.¹⁵²

There is also some support for concluding that Congress might have believed that the Recess Appointments Clause 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 defended 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 matter, it seems clear that the constitutional and statutory 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 a person appointed during an intersession recess. Similarly, if the statute has the modified intersession meaning, but the Clause has the intrasession meaning, then the statute treats all recesses of a sufficient length as ending the session, but the

152. 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 thirty 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.

recess appointments made in these recesses extend for what the statute treats as numerous sessions.¹⁵³

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 by the evident purpose of the statute to constrain certain recess appointments by the President. The statute therefore should be interpreted based in part on how Congress understood the meaning of the Clause at the time when the statute was enacted.¹⁵⁴

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 intrasession interpretation, the language has the peculiar effect of excluding intrasession recesses from the three exceptions.¹⁵⁵

153. 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). If the recess appointment is made during the first of these legislative breaks, it will last through nine sessions as the term is understood under the modified intersession view.

154. As discussed below, the fact that Congress believed that the Clause had a certain meaning does not mean that the courts or other interpreters were bound by that determination, even if they were bound by Congress's understanding of the statute. How much Congress's understanding of the Recess Appointments Clause should affect how a court interprets the Clause would depend on the interpretive approach adopted by the court. Congress's understanding of the meaning of the Clause when it enacted the statute, however, would be relevant under various interpretive theories, including one that relied on practice as an important ingredient of the proper interpretation of the Constitution.

155. 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 interpret the Clause. At the time of the 1940 Amendment, the intersession view derived support from both the Knox opinion and relatively few non-intersession recesses; the modified view was supported by the Daugherty 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 Clause 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 Clause 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*

I have argued that Congress should be understood to have intended that the statute and the Recess Appointments Clause 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 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 Clause and the statute does not mean that they actually had such reasons. Once these interpreters construed the Clause, 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. Under this interpretation, the President has very broad recess appointment authority. He 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 Recess Appointments Clause had both been given the intrasession view or the modified intersession view, the President's power would have been significantly narrower.¹⁵⁶

156. If both the statute and the Clause 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 Clause had been given the modified intersession meaning, then the length of the recess appointments

This view of the Attorney General and the Comptroller General was adopted in two main episodes. The first involved two opinions issued by Comptroller General Lindsay Warren in August 1948.¹⁵⁷ In these opinions, Warren interpreted the Clause to have the intrasession meaning without seriously considering the evidence against this view. He then interpreted the statute to have the modified intersession view. He reached these conclusions even though they required him to treat what he deemed a recess *during* the session to be one that *ended* the session.¹⁵⁸ 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.¹⁵⁹

would be far shorter. Although the Comptroller General did not adopt the intersession view, the President's authority would also have been narrower if both the Clause and the statute were given the intersession meaning.

157. See 28 Comp. Gen. 30, 31 (1948); 28 Comp. Gen. 121 (1948).

158. Warren admitted that what he regarded was an intrasession recess "was not a 'termination of the session'" in a "strict technical sense," 28 Comp. Gen. 30, 31, 34 (1948), but he overrode this meaning of the term session (which he had followed for the Constitution) based on his view of the purposes of the statute.

159. It might be thought that Comptroller General Warren's opinions represent the position of Congress, since the Comptroller General is often thought to be a legislative official. See *Bowsher v. Synar*, 478 U.S. 714, 731–32 (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 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 (Apr. 29, 2012, 9:02 PM), <http://www.pointoforder.com/2012/04/29/when-harry-met-lindsay/> [http://perma.cc/

Warren's conclusions were then adopted twelve years later by Acting Attorney General Lawrence Walsh at the end of the Eisenhower Administration.¹⁶⁰ Walsh first adopted the intrasession view of the Clause, 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 failed to provide a persuasive argument for the inconsistency between his interpretation of the statute and the Clause.¹⁶¹

To conclude, the executive's interpretation of the Pay Act Amendment turns out to have been extremely weak. Although there were several plausible positions that one could have taken about the statute and the Clause, 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

RP7Q-38KK]. It is, of course, possible that the culture of the comptroller general's office might exhibit an association with the legislative branch so that a comptroller general who often took a position, strongly opposed by a large portion of 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 Congress.

160. 41 Op. Att'y Gen. 463 (1960).

161. Walsh fails to recognize the arguments for interpreting the statute and the Clause to have corresponding meanings. Instead, he asserts that the statute and the Clause serve different purposes, which requires different interpretations. *See id.* at 479. 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).

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.

Although these doctrines have been in place during this entire period, that does not mean that recess appointments practice has 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. Once again, Justice Breyer's opinion ignores or misses these aspects of the practice.¹⁶²

The recess appointments 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 President George W. Bush, however, Presidents reversed this practice and predominantly employed intrasession recess appointments.¹⁶³ This

162. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2564, 2573 (2014).

163. According to a Congressional Research Service study (as supplemented by the Solicitor 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 larger percentage of intrasession recess appointments. See HENRY B. HOGUE, ET AL., 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

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 significantly. This decrease in length is revealed through a variety of measures, including the length of shortest intrasession recess during which a particular President made a recess appointment (Eisenhower thirty-five days and George W. Bush ten days) and the average length of the intrasession recess during which a President made such an appointment (Eisenhower seventy days and George W. Bush twenty days).¹⁶⁴ 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 twenty-eight day break was adequate to allow a recess appointment. That same year, the executive announced that a thirty-two day break was adequate.¹⁶⁵ It was only in 1971 that the executive issued an opinion approving a recess appointment during a fifteen day break.¹⁶⁶ It would take another twenty-five years before the executive in 1996 shortened the period down to ten days. And then, after another seventeen years, the executive announced in its brief for the Supreme Court in *Noel Canning* that the new

intrasession recess appointments, with Jimmy Carter and Richard Nixon making only seventeen and Lyndon Johnson and John Kennedy none. See Brief for the Petitioner, *supra* note 65, Appendix A.

164. 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), 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), Clinton (28), and George W. Bush (20). See Brief for the Petitioner, *supra* note 65, Appendix A.

165. 41 Op. Att'y Gen. 463 (1960).

166. Memorandum for the Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 3, 1971).

period is three days.¹⁶⁷ 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 one per year, whereas during the Presidency of George W. Bush it was eight.¹⁶⁸ 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 of 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

167. Brief for the Petitioner, *supra* note 65, at 10–11.

168. See OFFICIAL CONGRESSIONAL DIRECTORY, *supra* note 13, at 531, 538–40.

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 about 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 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.¹⁶⁹ 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 contended that these sessions were not real sessions and therefore made several recess appointments under that theory.¹⁷⁰

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.

169. Michael D. Ramsey, *The Limits of Custom in Constitutional and International Law*, 50 SAN DIEGO L. REV. 867, 897–98 (2013).

170. Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 1 (2012).

Thus, it is simply not true that 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 seven years, they were a relatively prompt response to the more aggressive assertions of recess appointment power.¹⁷¹ It is only since the mid-1990s that Presidents began regularly making intrasession recess appointments during short recesses of approximately ten days. And it is only in the 2000s that Presidents expanded this practice by beginning to make more intrasession than intersession recess appointments. 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.

These pro forma sessions clearly represent opposition to what the legislative houses regarded as an overly expansive assertion of the recess appointment power. One might analogize the holding of these sessions to a Senate or House resolution condemning the excessive use of the recess appointment power.¹⁷² But these ses-

171. 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 CONG. REC. 22915 (1999) (statement of Sen. Inhofe on recess appointments). 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 22916–17.

172. 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 the 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 under-

sions 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 indicates 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 was needed was a Supreme Court decision clarifying that the Constitution does not confer broad recess appointment authority on the President. That way, the President would be prevented from seizing this power in the future. Instead, Jus-

stood 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.

tice Breyer's opinion unfortunately sanctioned these adverse possessions by the President.¹⁷³

IV. THE SENATE'S CONSENT OR ACQUIESCENCE

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 been neither 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 permit 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 follows, rather than changes, the meaning of the Constitution.¹⁷⁴ 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.¹⁷⁵ 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

173. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) (claiming the majority embraces an adverse possession theory of executive power).

174. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1700 (2009).

175. THE FEDERALIST NO. 51 (James Madison).

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.¹⁷⁶ 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, in a similar manner, can 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 only included in non-enforceable committee reports.

This analysis provides a useful guide for 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 or check such appointments. The President's principal power is over law execution and therefore making personnel decisions about 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

176. 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. & CONTEMP. PROB. 293, 294 (1993); J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 DUKE L.J. 325, 326-27 (1991).

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 the President's party will control the Senate a significant portion of the time. 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.¹⁷⁷

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.¹⁷⁸ 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 a successful effort to have the statute amended in 1940. 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.

177. Eventually, though, the Democrat Senators overcame their reluctance and chose to eliminate the filibuster for the appointment of all officials except Supreme Court Justices. *See infra* Part VI.

178. *See supra* Parts III.A and III.B.2.

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.¹⁷⁹ These implicit deals 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 make appointments without any check is also not a desire that promotes the public interest. This analysis explains why the Supreme Court should not respect the arrangement worked out by the branches, but should instead enforce the Constitution's original meaning.¹⁸⁰

V. RELIANCE

An 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, departing from precedents finding a broad commerce power, based on the view that the Constitution's original meaning adopted much narrower commerce authority, would cause significant disruption.¹⁸¹ Large numbers of programs would suddenly be unconstitutional

179. 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, 944 (1983), the Supreme Court rejected the claim that consent or practice validated the legislative veto. Although the legislative veto had been included in nearly three-hundred provisions in the previous fifty-year period, the Supreme Court held that it was unconstitutional in part, because the Constitution was clear on the matter. 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 Appointments Clause.

180. 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. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 439-41 (2012). The President can take decisive action in defending his recess appointment power, whereas it is more difficult for 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.

181. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 837 (2009).

and people who relied upon them would have a difficult time adjusting. In the case of the Recess Appointments 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, that Presidents would often have to wait until the end of a recess to have their nominees confirmed would not result in much disruption. 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. Such a change would certainly reduce the power of the 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.

VI. 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, either because the filibuster generally is unconstitutional, or because it is unconstitutional for 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.¹⁸² 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. This is not the place to address these arguments in detail, but 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 retains the power to change the filibuster rule.¹⁸³ Although the Senate rules purport to allow filibusters of proposed changes in the Senate rules, and therefore to prevent 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 nominees appears to have been based on the view that a majority of the Senate could change the rules.¹⁸⁴

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

182. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?pagewanted=all> [<http://perma.cc/6NTV-BGAE>].

183. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 507 (1995).

184. 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 – an option that would have allowed a vote on a change in the Senate filibuster rule, notwithstanding the Senate rule that permitted such changes to be filibustered. Jonathan Weisman, *Filibuster Deal Heralds Stirrings of Compromise*, N.Y. TIMES, July 17, 2013, http://www.nytimes.com/2013/07/18/us/politics/filibuster-deal-heralds-stirrings-of-compromise.html?_r=0 [<http://perma.cc/J5PD-PZZQ>].

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. A broad recess appointment power is a constitutional wrong, since it is justified neither by the original meaning nor by a living constitution approach. Normally, we do not believe that two constitutional wrongs make a constitutional right. For example, assume that one believed that the filibuster was unconstitutionally applied to ordinary bills. That certainly would 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.¹⁸⁵

185. 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. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 7 (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 addressing 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 appointment 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 initial departure 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

CONCLUSION

In this Article, I have tried to show that the broad interpretation of the Recess Appointments Clause cannot be justified by non-originalist arguments. Given the strong originalist support for the narrow interpretation, the only arguments for the broad interpretation would be based on non-originalism. But these arguments fail as well. A living constitutionalist approach that interprets the Clause to take account of modern values and circumstances does not support the broad interpretation, but a narrow one. And a focus on practice does not suggest that the broad interpretation has been acquiesced in or consented to by the legislature. The Congress as a whole, far from accepting the broad interpretation, generally has rejected that view whenever it has passed legislation. Congress did fail to strongly object to the broad interpretation for a limited period, but that occurred when the executive asserted its authority in a restrained manner, and once the executive more aggressively asserted authority, congressional objections soon ensued. Thus, while Justice Breyer's opinion for the Court purports to justify a broad recess appointment power based on practice and desirable results masquerading as purpose, neither practice nor results actually justify the broad interpretation. Sadly, his opinion moves us farther away from the original meaning without any significant justification.

two considerations suggest that the compensating adjustment of a broad recess appointment does not produce net benefits.