# THE ORIGINS AND MEANING OF "VACANCIES THAT MAY HAPPEN DURING THE RECESS" IN THE CONSTITUTION'S RECESS APPOINTMENTS CLAUSE

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*There has been longstanding uncertainty about the meaning of "the Recess" and "Vacancies that may happen" in the Constitution's Recess Appointments Clause. This Article finds that both "the Recess" and close variants of "Vacancies that may happen" were standard terms in Founding-Era legislative practice, and appear copiously in legislative records. Those records inform us that "the Recess" means only the intersession recess and that a vacancy "happens" only when it first arises.*



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## I. THE ISSUES AND THE CASE OF *NOEL CANNING*

### *A. The* Noel Canning *Case*

The Constitution's 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."[1] In absence of legislation authorizing the President unilaterally to appoint "inferior" officers, the President normally must obtain the consent of the Senate for his appointments.[2] The Recess Appointments Clause, however, grants the President a limited, unilateral power to fill vacancies without senatorial consent.

The Recess Appointments Clause presents several controversial questions of interpretation. The two issues explored in this Article are: (1) whether "the Recess" encompasses only intersession recesses or intrasession breaks as well; and (2) whether to "happen during the Recess" means the vacancy must arise during a recess or whether a vacancy could "happen

1. U.S. CONST. art. II, § 2, cl. 3.

2. U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

during the Recess" if it arises while the Senate is in session but continues beyond the session and into the recess.[3]

Both of these questions were at issue in the recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Noel Canning v. National Labor Relations Board*.[4] In *Noel Canning*, the court reviewed an order by the National Labor Relations Board (NLRB) finding that Noel Canning (an employer and a division of a larger corporate entity) had violated federal labor law.[5]

Noel Canning contended that the order was illegally issued because three of the five individuals acting as NLRB members were not validly appointed under the Constitution.[6] The individuals had been appointed by the President, without senatorial approval, to fill existing vacancies.[7] Two of the vacancies arose during intrasession recesses and continued into a period in which the Senate, while not actually conducting business, was in pro forma session.[8] The third arose during the pro forma session.[9] Noel Canning argued that the appointments were invalid both because "the Recess" means only the intersession recess[10] and because for a vacancy to "happen" it must arise during the recess.[11]

The D.C. Circuit agreed with Noel Canning on both questions.[12] It held that "the Recess" refers only to the Senate's for-

3. A third issue, whether the President's recess appointment authority includes the authority to appoint federal judges, is outside the scope of this paper. See Hartnett, *infra* note 187, for a discussion of all three issues. Another issue is whether a newly created position qualifies as a vacancy. *See* Amelia Frenkel, Note, *Defining Recess Appointments Clause "Vacancies,"* 88 N.Y.U. L. REV. 729, 733 (2013).

4. 705 F.3d 490, 499 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013).

5. *Id.* at 492.

6. *Id.* at 499.

7. *Id.* at 498.

8. *Id.* at 512–14. *See generally* Alex N. Kron, Note, *The Constitutional Validity of Pro Forma Recess Appointments: A Bright-Line Test Using a Substance-over-Form Approach*, 98 IOWA L. REV. 397, 405–10 (2012) (discussing history of pro forma sessions); Jeff Bergner, *Advise and Dissent: The recess appointment power: a slow-motion train wreck*, WKLY. STANDARD, 30 Apr. 22, 2013, http://www.weeklystandard.com/print/articles/advise-and-dissent_716288.html (discussing the political background of the Noel Canning case and pro forma sessions).

9. *Noel Canning*, 705 F.3d at 512–14.

10. *Id.* at 499.

11. *Id.* at 507.

12. *Id.*

mal intersession recess, not to shorter adjournments.[13] Shortly after the *Noel Canning* decision, the U.S. Court of Appeals for the Third Circuit decided *National Labor Relations Board v. New Vista Nursing and Rehabilitation*,[14] which reached the same conclusion.[15] The *Noel Canning* court also held that for a vacancy to "happen" during "the Recess," the vacancy must arise during the recess; a vacancy does not "happen" during "the Recess" if it begins while the Senate is in session and continues into the recess.[16] The *New Vista* court did not reach this question.[17]

### *B. Previous Writing on the Recess Appointments Clause*

There has long been a split in opinion on the two questions addressed in *Noel Canning*. The federal courts of appeals are divided as to whether "the Recess" may include intrasession breaks and whether a vacancy may "happen" by continuing into the recess.[18] There are long lines of opinions from U.S. attorneys general supporting the position that the "Recess" includes intrasession recesses[19] and the position that vacancies need not arise during the recess to "happen,"[20] although earlier

13. *Id.* at 506–07.

14. 719 F.3d 203 (3d Cir. 2013).

15. *Id.* at 208.

16. *Noel Canning*, 705 F.3d at 507.

17. *New Vista*, 719 F.3d at 244.

18. *Compare* Evans v. Stephens, 387 F.3d 1220, 1224, 1226 (11th Cir. 2004) (en banc) (holding that "the Recess" includes intrasession breaks and that "if vacancies 'happen' to exist during a recess, they may be filled on a temporary basis by the President"), United States v. Woodley, 751 F.2d 1008, 1013 (9th Cir. 1985) (adopting the same view of "happen"), *and* United States v. Allocco, 305 F.2d 704, 710–12 (2d Cir. 1962) (same), *with* NLRB. v. Enter. Leasing Co. Se., 722 F.3d 609, 647 (4th Cir. 2013) (holding that "the Recess" means only intersession breaks), *and New Vista*, 719 F.3d at 207 (same).

19. *See* Exec. Power—Recess Appointments, 33 Op. Att'y Gen. 20, 24–25 (1921) (opining that "the Recess" may include relatively short intrasession breaks); Recess Appointments During an Intrasession Recess, 16 Op. O.L.C. 15, 16 (1992) (stating that the President may make appointments during intrasession recesses); *see also* HALSTEAD, *infra* note 187, at 7–9 (collecting opinions on that issue).

20. United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) ("The Attorneys-General of the United States . . . have held in a long and continuous line of opinions that the recess power extends to vacancies which arise while the Senate is in session."); *see also* Exec. Auth. Op., *infra* note 187, at 632 (stating that "happen" may mean "happen to exist"); HALSTEAD, *infra* note 187, at 4–6.

attorney general opinions took the contrary views.[21] Among commentators, some have supported the opinions dominant among attorneys general,[22] but most have supported the positions enunciated in *Noel Canning*.[23] The leading article on the Recess Appointments Clause, authored by Professor Michael Rappaport, concluded that "the Recess" includes only intersession breaks and that the vacancy must arise during one of those breaks.[24] In its opinion, the *Noel Canning* court relied heavily on Professor Rappaport's article.[25]

All of this writing suffers from at least one weakness: the failure to marshal a significant amount of evidence arising prior to the Constitution's ratification. One reason for this is a paucity of discussion on the Recess Appointments Clause in familiar Founding-Era sources such as *The Federalist*. Instead of relying on Founding-Era sources, therefore,[26] writers have de-

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21. *See* President—Appointment of Officers—Holiday Recess, 23 Op. Att'y. Gen. 599, 601 (1901) (opining that "the Recess" means only intersession breaks); Edmund Randolph, *Opinion on Recess Appointments*, (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 65, 165–67 (John Catanzariti et al. eds., 1990) (opining that "happen" refers to the time a vacancy commences).

22. *E.g.*, Hartnett, *infra* note 187 (concluding that "happen" can include continuing vacancies and that "the Recess" can include most intrasession breaks).

23. *E.g.*, Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2208–09 (1994) (arguing that "the Recess" refers only to intersession breaks); Stuart J. Chanen, Comment, *Constitutional Restrictions on the President's Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 193 (1984) (arguing that the vacancy must arise during a recess); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1553 (1833), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 122 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html (arguing that a vacancy must arise during "the Recess" to "happen" then).

24. Rappaport, *infra* note 187, at 1501–02, 1549.

25. Noel Canning v. NLRB, 705 F.3d 490, 503, 508, 510, 513 (D.C. Cir.), *cert. granted* 133 S. Ct. 2861 (2013); *see also* New Vista Nursing & Rehab. v. NLRB, 719 F.3d 203, 222, 224, 239 (3d Cir. 2013) (citing Rappaport, *infra* note 187).

26. *See, e.g.*, Wilkinson v. Legal Servs. Corp., 865 F. Supp. 891, 897 (D.D.C. 1994) ("It is difficult to ascertain the Framers' true intention in drafting the Recess Appointments Clause. There was little discussion and no debate on this provision at the Constitutional Convention . . . . The only references to this Clause are Alexander Hamilton's comments [in FEDERALIST NO. 67] that it should be used for 'temporary appointments' when 'it might be necessary for the public service to fill [a vacancy] without delay' and that it was intended as a 'supplement' to the Appointments Clause."(second alteration in original)).

duced their answers almost exclusively[27] from textual analysis and from statements and practices arising years—often decades—after the Constitution was debated and ratified.

Illustrative of this practice is the *Noel Canning* opinion, which relied on only two preratification sources: a snippet from *Federalist* 67 and a provision of the 1776 North Carolina Constitution[28]—both of dubious relevance.[29] The attorney general opinions have cited even fewer preratification sources, resting mostly on speculation, purported prudential considerations, and prior attorney general opinions.[30]

The disadvantages of omitting preratification material should be obvious. Statements and practices arising after the ratification

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27. The principal exception is Professor Rappaport, who does discuss preratification sources to a greater extent than most writers. *See, e.g.*, Rappaport, *infra* note 187, at 1550–52 (discussing British parliamentary practice and the 1780 Massachusetts Constitution). Even he, however, relies mostly on textual analysis and postratification sources. The dissent in *Evans* undertakes a survey of Founding-Era dictionaries, 387 F.3d 1220, 1230 & n.4 (en banc) (Barkett, J., dissenting), as Professor Rappaport notes, Rappaport, *infra* note 187, at 1503 n.46.

28. *Noel Canning*, 705 F.3d at 500–01.

29. The North Carolina constitutional provision, N.C. CONST. of 1776, art. XX, is examined, and its relevance questioned, *infra* note 150 and accompanying text. Regarding THE FEDERALIST No. 67, the court wrote:

> When the Federalist Papers spoke of recess appointments, they referred to those commissions as expiring "at the end of the ensuing session." For there to be an "ensuing session," it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session—that is, when it was in "the Recess."

*Noel Canning*, 705 F.3d at 500–01 (citation omitted).

However, this seems to squeeze too much from a passage that does not address either "the Recess" or "happen." The passage was part of Alexander Hamilton's treatment of another topic entirely: Anti-Federalist claims that the Recess Appointments Clause enabled the President to appoint Senators. *See* THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In any event, it is not "likely to the point of near certainty" that because an appointment expired at the end of a session it must be made only between sessions. The Framers certainly could have provided for vacancies to be filled during intrasession recesses with expiration at the end of the following session. As this Article makes clear, however, that would have required different wording.

On the other hand, Hamilton's stated reason for the provision—"it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*," THE FEDERALIST No. 67, at 410—does support the view of consequentialists who might argue that changed conditions justify constructions that disfavor the President's efforts to avoid senatorial confirmation.

30. *See* Exec. Auth. Op., *infra* note 187.

may not have been part of the ratifiers' original understanding.[31] When postratification sources do shed light back into the tunnel of time, that light is usually weak and uncertain.[32] Even statements by people who participated in the constitutional debates, such as Edmund Randolph, Alexander Hamilton, and Christopher Gore,[33] are of limited value if made after the Constitution was already law. Memories fade and incentives change. Thus, the best evidence of the original force of the unamended Constitution comes from sources arising before the thirteenth state, Rhode Island, ratified the document on May 29, 1790.[34]

## II. AVAILABLE PRERATIFICATION MATERIALS

Fortunately, there are plentiful preratification materials probative of original understanding and original meaning. The Framers of the Constitution did not invent the phrases "the Recess" and "Vacancies that may happen." Both the first phrase and close variants of the second were stock terms from legislative and other governmental practice. Contemporaneous governmental records are littered with them. Those records also

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31. Founding-Era legal practice considered the understanding of the "makers" (meaning, in the Constitution's case, the ratifiers) to determine a document's legal force. If that understanding was not coherent or determinable, the original public meaning controlled. *See generally* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007).

32. I am reminded of the niggardly light by which Aeneas attempted to make his way to the Underworld:

> Ibant obscuri sola sub nocte per umbram
> perque domos Ditis uacuas et inania regna:
> quale per incertam lunam sub luce maligna
> est iter in siluis, ubi caelum condidit umbra
> Iuppiter, et rebus nox abstulit atra colorem.

P. VERGILI MARONIS OPERA, AENEID 6:268–72 (Oxford Univ. Press 1969).

33. *See Noel Canning*, 705 F.3d at 508–09 (citing postratification statements by Randolph, Hamilton, and Gore—all leading ratifiers).

34. *See* ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT 40 (2d ed. 2010) (discussing the need to limit reliance on postratification evidence). Professor Michael Ramsey points out that "a central problem with post-ratification evidence is that, post-ratification, people have personal and political reasons to support particular interpretations that have nothing to do with whether the interpretation is a good reading of the text." Michael Ramsey, *Michael Stern on James Monroe and the Recess Appointments Litigation*, ORIGINALISM BLOG (Dec. 7, 2012, 7:00 AM), http://originalismblog.typepad.com/the-originalism-blog/2012/12/michael-stern-on-the-recess-appointments-litigationmichael-ramsey.html.

reveal the meanings of both phrases to a high degree of certainty. Anyone with experience with contemporaneous legislatures would have known what they meant. The leading Founders, of course, certainly fit that category.[35]

The legislature whose proceedings served as the model for legislatures in America was the British Parliament, particularly the House of Commons.[36] Although insofar as I am aware, no major Framer had served in Parliament, several (such as Benjamin Franklin and John Dickinson) had been directly exposed to its proceedings.[37] Books discussing parliamentary practice were freely available in America, among them Blackstone's *Commentaries*, DeLolme's *Constitution of England*, and popular English law books, such as Giles Jacob's *New Law-Dictionary*.[38]

State conventions and legislatures served as more direct sources of experience. Because procedures were based on those of the House of Commons, they tended to be similar from state to state.[39] Those procedures tended to govern also the Continental

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35. *See generally* CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966) (describing the Framers' backgrounds).

36. SQUIRE, *infra* note 187, at 46 ("The rules and procedures initially used by the [colonial] assemblies were taken from English parliamentary practices."); Greene, *infra* note 187, at 466 (pointing out that lower houses of colonial legislatures often justified their actions by claiming that they were "agreeable to the practice of the House of Commons"); Leonard, *infra* note 187, at 239 (noting similarity between rules of the Pennsylvania Assembly and the House of Commons); Pargellis I, *infra* note 187, at 74 (observing that "the historic procedure of the house of commons . . . was copied in nearly every important detail by the house of burgesses"); *see also* Pargellis II, *infra* note 187, at 156 (noting the House of Burgesses' "remarkable adherence to English forms and practices").

37. Franklin had, of course, served in London as colony agent to the British government. J. A. Leo Lemay, *Franklin, Benjamin*, AM. NAT'L BIOGRAPHY ONLINE, http://www.anb.org. Dickinson had studied at the Middle Temple in London, where he attended parliamentary debates. H. Trevor Colbourn & Richard Peters, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754–1756*, 86 PA. MAG. HIST. & BIOGRAPHY 241, 242 (1962).

38. On Founding-Era legal bibliography in America, see Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 803–05 (2006), and sources cited therein. Jacob's A NEW LAW-DICTIONARY, like other law dictionaries of the time, was really an encyclopedia. The entry for "parliament" in the 1782 edition continued for nine extremely packed, double-column pages. GILES JACOB, A NEW LAW-DICTIONARY (10th ed., London 1782) (unpaginated).

39. Greene, *infra* note 187, at 458, 466 (explaining the reasons for similarity in development of colonial legislatures and pointing out that lower houses of colonial legislatures often justified their actions by claiming that they were "agreeable to the practice of the House of Commons").

Congresses (September 5, 1774 to March 1, 1781) and the Confederation Congress (March 2, 1781 to March 2, 1789), nearly all of whose members came from the legislatures of individual colonies and states.[40] Similar procedures governed the many intercolonial and interstate conventions held during the Founding era.[41]

The records of these assemblies largely survive. As elucidated below, those records provide clear answers to the questions: (1) Does "the Recess" include intrasession breaks? and (2) does a vacancy arising during a session but continuing into "the Recess" thereby "happen" during the Recess?

As explained below, the answer to both questions is "no." Despite the defects in its methodology, the *Noel Canning* court was correct.

## III. THE CONCEPT OF THE "SESSION"

Key to grasping the meaning of the phrase "the Recess" is understanding how the founding generation understood the concept of a legislative *session*. This term was derived from the Latin "sedere" (to sit).[42] The word "sitting" (or, more rarely, "setting") served as a synonym.[43]

The sources evince a high level of agreement on the characteristics of a legislative session.[44] Under British practice, a session of Parliament was the "season, or space, from its meeting

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40. Only the delegates from Rhode Island were elected directly for a time. *See* R.I. RECORDS (1863), *infra* note 187, at 179.

The Confederation Congress sometimes is conflated with the "Continental Congress," as is done in the title of its proceedings ("Journals of the Continental Congress"). In this Article, however, when Congress is acting under the Articles of Confederation, it is designated as the Confederation Congress.

41. *See generally* Natelson, *infra* note 187 (summarizing over a dozen eighteenth-century intercolonial and interstate conventions).

42. *Session*, OXFORD ENGLISH DICTIONARY, www.oed.com/view/Entry/176769?rsKey=HUEau0&result=1#eid.

43. *See, e.g.*, 2 CONN. RECORDS (1895), *infra* note 187, at 396 (stating that "such complaints are to be made to the General Assembly when sitting, and in their recess the Governor and his said Council"); 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 588–89 (reproducing omnibus resolution granting power during "the recess" to the executive "until the next setting" of the legislature).

44. For the information provided in the ensuing paragraphs of the text, *see also* 8 ENCYCLOPAEDIA BRITANNICA 5876–77 (2d ed., Edinburgh, Balfour & Co. 1781).

to its prorogation, or dissolution."[45] Parliament met as the result of a call from the Crown.[46] The session became official once Parliament had undertaken some formal act.[47]

A session continued until ended by prorogation or dissolution. *Prorogation* was the name of the procedure whereby the king terminated the session by writ.[48] William Blackstone wrote:

> A PROROGATION is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end, until a prorogation: though, unless some act be passed or some judgment given in parliament, it is in truth no session at all.[49]

After a writ of prorogation, if the parliament was not subsequently dissolved or if its term of office had not ended, then the same lawmakers would convene again on the date specified in the writ of prorogation.[50] Thus, there could be multiple sessions during a particular legislative term of office. In emergencies, the king might call the members together at a time earlier than that specified in the writ.[51] Reconvening after proroga-

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45. 4 CHAMBERS (1786), *infra* note 187 at 5.

46. In emergencies, the call could be issued on as few as fourteen days' notice. HATSELL, *infra* note 187, at 219 (citing 2 Geo. 3, c. 20, § 117 (1762), which provided that if Parliament were "separated by such adjournment or prorogation as will not expire within fourteen days, it shall be lawful for his Majesty to issue a proclamation for their meeting, upon such day as he shall appoint, giving fourteen days notice . . . . ").

47. 1 BLACKSTONE, *infra* note 187, at *180.

48. HATSELL, *infra* note 187, at 207 (referring to prorogation as "adjournment by writ"); *see also* Pargellis I, *infra* note 187, at 73 n.1 (recommending Hatsell's work for an accurate view of Parliamentary proceedings).

49. 1 BLACKSTONE, *infra* note 187, at *179–80l; *see also* HATSELL, *infra* note 187, at 200 ("The session is never understood to be at an end, until a prorogation . . . .").

50. ENCYCLOPAEDIA BRITTANNICA, *infra* note 187, at 5876–77.

51. 1 BLACKSTONE, *infra* note 187, at *180 ("And, if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king is empowered to call them together by proclamation, with fourteen days notice of the time appointed for their reassembling.").

tion represented the beginning of a new session rather than a continuation of the old.[52]

*Dissolution* was the "civil death of the parliament."[53] A dissolution could be effected by (1) the decision of the king, (2) the death of the king, or (3) the expiration of the parliament's term of office. The king could dissolve a parliament after proroguing it.[54] Any parliament meeting after dissolution was (except temporarily, after the king's death) the product of new elections and a fortiori represented a new session.[55]

Although prorogation or dissolution terminated a session, mere adjournment did not. Prorogation killed all pending measures; adjournment did not. As stated by Blackstone:

> An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. . . . It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly. Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills, as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session: whereas, after an adjournment, all things continue in the same state as at the time of the ad-

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52. HATSELL, *infra* note 187, at 214 (noting that when Parliament met on the day to which it was prorogued, the normal state of business was for the cause of the summons to be declared, and the king to open the session).

53. 1 BLACKSTONE, *infra* note 187, at *180–82:

> [Dissolution] may be effected three ways: 1. By the king's will, expressed either in person or by representation . . . . [2.] By the demise of the crown . . . . [3.] By length of time. . . . So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year ; if not sooner dissolved by the royal prerogative.

*See also* 3 CHAMBERS (1781), *infra* note 187, at 195 (entry for "Parliament, dissolution of").

54. HATSELL, *infra* note 187, at 218 (stating that a prorogued Parliament can be dissolved).

55. *See* ENCYCLOPAEDIA BRITTANNICA, *infra* note 187, at 5876–77.

> journment made, and may be proceeded on without any fresh commencement.[56]

In the colonies, the royal or proprietary governor generally enjoyed the regal powers of initiating a session of the lower (popular) house of the assembly[57] and of ending it by prorogation or dissolution.[58] The governor's act of proroguing sometimes was called "granting (or giving) a recess."[59] As in Britain, the end of the assembly's term of office necessarily terminated any ongoing session.[60] When the governor wanted a break in the proceedings without an end of the session, he asked the legislators to adjourn themselves.[61]

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56. 1 BLACKSTONE, *infra* note 187, at *179 (citation omitted); *see also* 3 CHAMBERS (1781), *infra* note 187, at 195 (entry for "Parliament, adjournment of"); HATSELL, *infra* note 187, at 207 (stating that by prorogation, "all matters depending before the House are discontinued," but with "an adjournment without a session"—meaning adjournment without terminating the session—matters continue). Although the House of Commons could refuse a King's request to adjourn, as of 1781 it never had. *Id.* at 209; *see also id.* at 211.

57. Thus, in Virginia, the House of Burgesses was called by the governor. Pargellis I, *infra* note 187, at 76.

58. Pargellis II, *infra* note 187, at 155 ("The powers of the governor as to the calling and duration of assemblies need only a brief word, for no discussion ever arose in Virginia as to the exact limitation of such powers. The burgesses always accepted his right to call them together, to prorogue and dissolve them.").

59. 1 VA. COL. COUNCIL J., *infra* note 187, at 229 (April 30–May 1, 1696) (reporting that in 1696 the governor had sought the advice of the executive council, which was "of Opinion that a Recess be Granted," whereupon the governor prorogued the legislature until a date certain); *cf.* 6 N.C. COLONIAL RECORDS, *infra* note 187, at 1311–12, which reproduces the following from a message from royal governor Arthur Dobbs:

> The Votes and Resolutions of the Assembly have never been Produced or shewn to me, as they ought to have been; I can neither pass the Bills nor Prorogue the Assembly until I have perused them. I therefore Expect that you will send the original Votes and Resolutions in Manuscript for my Perusal, in order to my Passing the Bills and giving a Recess to the General Assembly.

60. *See* Leonard, *infra* note 187, at 220.

61. *See, e.g.*, 3 VA. COL. COUNCIL J., *infra* note 187, at 1336 (Dec. 21, 1764):

> The Governor was then pleased to signify to the Council and House of Burgesses that upon considering the season of the year and the long time they had sat he judged a recess would be agreeable and that unwilling to impede the Business of the Session by a prorogation he thought it expedient to direct both Houses to adjourn themselves to the first of *May* next [1765]. After which the Burgesses withdrew.

*See also* MD. 1773 PROCEEDINGS, *infra* note 187, at 27–28 (setting forth an example of prorogation ending a session in Maryland); Pargellis II, *infra* note 187, at 155 (stating that the Burgesses "always obeyed [the governor's] order to adjourn, though, except for a single case in 1693, the adjournment proper was an act of the house").

To be sure, American practice did not always follow parliamentary rules. In the Virginia House of Burgesses, for example, a session could not begin until members had taken oaths required of colonial legislators by parliamentary statute.[62] In Pennsylvania, the assembly won the power to determine the length of its own session by ending it with an adjournment *sine die*.[63] In general, however, parliamentary practice prevailed in the colonies.[64]

The British Parliament controlled by statute the length of its term of office, so the royal power to prorogue and dissolve was a valuable check on its power.[65] In America, however, the state constitutions adopted after independence all imposed short, fixed terms on lawmakers. This rendered the executive's prorogation and dissolution authority less necessary. Accordingly, the new state constitutions granted only limited, if any, prorogation or dissolution powers. Illustrative is the Massachusetts Constitution:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court, to adjourn or prorogue the same to any time the two Houses shall desire; and to dissolve the same on the day next preceding the last Wednesday in May; and, in the recess of the said court, to prorogue the same from time to time, not exceeding ninety days in any one recess . . . .[66]

Mostly unfettered by executive powers to prorogue or dissolve, American legislative sessions ended when the legisla-

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62. Pargellis I, *infra* note 187, at 75.

63. Leonard, *infra* note 187, at 217–20. When Pennsylvania became a state, a session could end with an adjournment to the scheduled time of the next session. *See, e.g.*, 1784–85 PA. MINUTES, *infra* note 187, at 313 (adjourning from April 8, 1785 to the next session on August 23); 1789 PA. MINUTES, *infra* note 187, at 202 (adjourning from March 28, 1789 to the next session on the third Tuesday in August).

64. *See* SQUIRE, *infra* note 187, at 46.

65. 1 BLACKSTONE, *infra* note 187, at *180 ("If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power.").

66. MASS. CONST. of 1780, ch. II, § 1, art. V. On the other hand, the U.S. Constitution grants the President an even fainter shadow: ["h]e may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper . . . ." U.S. CONST. art II, sec. 3.

ture's term of office expired or when it adjourned itself.[67] As in Britain, there might have been more than one session during a particular term of office,[68] and, as in prior practice, adjournment from day to day or adjournment for relatively short periods did not end the session. There were, however, some variations from British custom. The state constitutions of Pennsylvania and Vermont introduced a check on hasty action by their unicameral legislatures by providing for deferral of bills to a later session.[69] Also, in America an adjournment ending a session did not have to specify that it was *sine die*[70] (as the *New Vista* court inaccurately assumed),[71] and the adjournment could provide for reassembly at the time set for the opening of

67. N.Y. J. ASSEM., *infra* note 187, at 118 (reporting that the legislature adjourned without day, ending the session); *see also* 26 J. CONT'L CONG., *infra* note 187, at 221 (Apr. 14, 1784) (reporting a resolution of the Rhode Island legislature instructing Rhode Island's congressional delegates to "use their influence to obtain a recess of Congress" and to convince Congress to "adjourn and convene at Rhode Island in the course of the next year"); 10 R.I. RECORDS, *infra* note 187, at 16 (setting forth the resolution).

68. Failure to understand that there could be several discrete sessions within a year afflicted not just the *New Vista* decision, but also the *Noel Canning* petition for certiorari. Petition for a Writ of Certiorari at 14, Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) (No. 12-1281) [hereinafter Cert. Petition]. That petition cited 3 VT. JOURNALS, *infra* note 187, for the proposition that multiple legislative gatherings within a given year without adjournments *sine die* were necessarily the same session. The Vermont Journals clearly provide otherwise, though. *See, e.g.*, 3 VT. JOURNALS, *infra* note 187, at title page (listing multiple sessions each year); *id.* at 4 (referring to the sitting beginning in March as "this present Session"); *id.* at 48 (providing at the October session that "the next Session of this Assembly be held on the second thursday [sic] of February next"); *id.* at 52 (referring to an earlier March session); *id.* at 116 (referring at a March session to a committee to choose a printer "appointed last Session"—that is, during the sitting the previous October, *id*. at 94); *id.* at 232–33 (providing for deferral of April session business until "next session"). Sessions held after the first of a legislative term were called "adjourned sessions." *See, e.g., id*. at 18, 49 (listing multiple sessions each year).

69. PA. CONST. of 1776, § 15; VT. CONST. of 1777, ch. II, § 14; *see also* 3 VT. JOURNALS, *infra* note 187, at 17 (1778) (providing for postponement of a bill "until the next session").

70. *E.g.*, 19 J. CONT'L CONG., *infra* note 187, at 223 (stating merely that the Continental Congress was "adjourned," when it ended its final session because it was being replaced the following day by the Confederation Congress).

71. NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 225 n.16 (3d Cir. 2013); *see also* Cert. Petition, *supra* note 68, at 14 (inaccurately assuming that the June session was a continuation of the March session because the adjournment of the March session was to a later day rather than *sine die*).

a new session.[72] Sometimes a session ended without recording a formal vote of adjournment at all.[73]

## IV. THE MEANING OF "THE RECESS"

In common use, the term "recess" (without "the") meant only "A retreat, a withdrawment; a place of retirement, a secret abode; remission, a suspension of any procedure . . . ."[74] In legislative practice, "recess" (without "the") could refer to any time when the legislature is not physically sitting,[75] including intrasession breaks[76] and apparently even a noon recess.[77] It seems, however, that in government practice the phrase "the Recess" *always* referred to the gap between sessions.

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72. *See, e.g.*, 16 N.C. STATE RECORDS, *infra* note 187, at 177 (1782) ("The business of the Session being ended . . . . The House Adjourned till the first Monday in November next [1782], then to meet at Hillsborough."); 17 *id*. at 977–78 (similar recital); 1784–85 PA. MINUTES, *infra* note 187, at 313 (adjourning from April 8, 1785 to the next session beginning August 23, 1785); 1789 PA. MINUTES, *infra* note 187, at 202 (1789) (adjourning from March 28, 1789 to the next session on the third Tuesday in August); 3 VT. JOURNALS, *infra* note 187, at 18, 48, 235 (providing for the end of sessions by adjournment until a specified date).

73. *E.g.*, 12 N.C. STATE RECORDS, *infra* note 187, at 113 (ending session of the state senate without recording vote of formal adjournment); *id*. at 815 (same).

74. ASH, *infra* note 187 (unpaginated) (defining "recess"); *see also* ALLEN, *infra* note 187 (unpaginated) (defining "recess" as "retirement. Departure"); BAILEY, *infra* note 187 (unpaginated) ("a retreating or withdrawing; a place of retreat or retirement"); DONALDSON, *infra* note 187 (unpaginated) ("retirement; retreat; withdrawing; secession. Departure. Place of retirement; place of secrecy; private abode. Secrecy of abode. Secret part"); DYCHE & PARDON, *infra* note 187 (unpaginated) ("a retreating, going back, or withdrawing; also a place of retirement, case, or hiding," followed by a definition specific to astronomy); 2 JOHNSON, *infra* note 187 (unpaginated) (reciting definitions similar to those in ASH); KENRICK, *infra* note 187 (unpaginated) ("Retirement; retreat; withdrawing; secession.—Departure.—Place of retirement; place of secrecy; private abode . . . Remission or suspension of any procedure.—Removal to distance . . . ."); PERRY, *infra* note 187, at 428 ("secret place, departure, retirement"); SHERIDAN, *infra* note 187 (unpaginated) (setting forth definitions similar to those in ASH).

75. *See, e.g.*, 1780 Mass. Acts, *infra* note 187, at 137.

76. *See, e.g.*, 1 GA. RECORDS, *infra* note 187, at 322 (stating that "[t]his, the first legislature under the [state] constitution, was in session almost continuously, with an occasional recess, 'till the middle of September"); *see also* 1785 Mass. Acts, *infra* note 187, at 818–19 (referring to "a short recess"); 3 VA. COL. COUNCIL J., *infra* note 187, at 1336 (Dec. 21, 1764) (reproducing the governor's 1764 message that he suggested "a recess" by adjournment rather than prorogation since he was "unwilling to impede the Business of the Session").

77. Leonard, *infra* note 187, at 222.

Numerous references in eighteenth-century records support this conclusion. I shall present these references in two classes.

The first class of references consists of those that refer to "the recess" specifically as the period between legislative sessions—that is, where there really is no other way to read the record. The second class consists of uses of "the recess" in ways that imply longer (intersession) periods rather than short breaks. Among these are legislative grants to the executive or to particular committees for exercise during "the recess" under circumstances where doing so would make no sense unless the recess referred to was a long, intersession break.

### *A. References to the Period Between Sessions as "the Recess"*

The Founding-Era record contains various references to "the Recess" as necessarily meaning the period between sessions, in sharp contradistinction to the time the legislature was in session.[78] Thus, William Blackstone wrote that "*During the session* of parliament the trial of an indicted peer is not properly in the court of the lord high steward . . . . But in the court of the lord high steward, *which is held in the recess of parliament*, he is the sole judge in matters of law."[79] Blackstone also wrote of a grievance committee "established, lest there should be a defect of justice for want of a supreme court of appeal, *during the intermission or recess of parliament*; for the statute farther directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the *next* parliament, who shall finally determine the same."[80] The recess, in other words, was the time between "parliaments"—or, more precisely, parliamentary sessions. It did not denote times within a particular session. Thus, another English writer observed that, "*The last*

78. In addition to the use of the term "the Recess" to refer to the intersession intermission, the governor sometimes referred to it as "your [legislators'] recess." *See, e.g.*, MD. 1773 PROCEEDINGS, *infra* note 187, at 2 (quoting an address of the governor). But the technical term was "the recess."

79. 4 BLACKSTONE, *infra* note 187, at *260 (emphasis added).

80. 3 BLACKSTONE, *infra* note 187, at *57 (first emphasis added).

*recess* of Parliament was a period filled with unprecedented troubles: *and the Session opened* in the midst of tumults."[81]

In 1765, American lawmakers were asked to send delegates to what was later called the Stamp Act Congress.[82] Lawmakers in some colonies were frustrated, however, because their governors had prorogued their assemblies. On September 6, 1765, Alexander Wyllys of Connecticut told a correspondent, "The General Assembly of this Province Stands Prorogued to the Twenty second day of October," "it being in the recess of the General Assembly . . . ."[83] Thus, the prorogation, necessarily the end of the session,[84] triggered "the recess." In Delaware, an informal caucus of lawmakers appointed their state's delegates because they did not have "it in [their] Power to Convene as a House" although they were "sensible of the impropriety of Assuming the Functions of Assembly Men, during the Recess of [the] House."[85] In other words, during the recess they were out of session.

Early American governors rendering reports to their legislatures at the opening of a formal session also referred to the period since the last session as "the Recess."[86] So also did the 1784 New Hampshire Constitution, which provided that:

> The President with advice of council, shall have full power and authority in the recess of the general court [legislature], to prorogue the same from time to time, not exceeding ninety days in any one recess of said court; and during the ses-

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81. John Wesley, Free Thoughts on the Present State of Public Affairs In a Letter to a Friend 26 (London 1770) (emphasis added) (quoting "a late writer").

82. Natelson, *infra* note 187, at 635–37.

83. Letter from Alexander Wyllys (Sept. 6, 1765), *in* WESLAGER, *infra* note 187, at 215–16.

84. *Supra* notes 49, 51, 55, 59, 66 and accompanying text.

85. WESLAGER, *infra* note 187, at 191–93.

86. *Infra* note 128 and accompanying text; *see also* 28 J. CONT'L CONG., *infra* note 187, at 104 (reproducing a proposed revision of the duties of the congressional secretary in 1785, including the phrase, "He shall attend Congress during their session, and in their recess the Committee of the States."); 34 J. CONT'L CONG., *infra* note 187, at 21, 106, 222 (reproducing 1788 correspondence referring to the period after the end of one session and before the Continental Congress could obtain a quorum to begin its next session as "the recess" or "the present recess") 21 N.H. PAPERS, *infra* note 187, at 49 (1787) (referring to the state president's message and correspondence received "in the recess"). *But see* Letter from Henry Knox (June 9, 1787), *in* 32 J. CONT'L CONG., *infra* note 187, at 302–03 (referring to a period during which Congress was unable to assemble a quorum as "the present recess of Congress"—surely a euphemism, under the circumstances).

> sion of said court, to adjourn or prorogue it to any time the two houses may desire, and to call it together sooner than the time to which it may be adjourned, or prorogued . . . .[87]

The legislative journals contain a massive number of references by which "the recess" is distinguished from the legislature's "sessions." For example, the New York legislative records from 1774 report the phrase "the Recess" being employed exclusively to refer to periods when the legislature was not in session.[88] Similarly, the 1778 journal of the Virginia House of Delegates tells us that the house,

> *Ordered*, That the delegates for the several counties consult with their constituents, during *the recess* of Assembly, on the justice and expediency of passing [a designated] bill . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates *at their next session."*[89]

A resolution of the Massachusetts legislature adopted September 9, 1779 referred to "the Recess" of the state constitutional convention as the time after the convention's "late session."[90] On March 24, 1788, the same legislature authorized a payment to a committee "appointed in the last Session . . . to sit in the recess."[91] A Massachusetts enactment providing for a vacancy appointment during "the Recess" explicitly referred to that period as occurring after the session.[92] A Rhode Island leg-

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87. N.H. CONST., pt. II, § 50 (amended 1792).

88. *See, e.g.*, N.Y. J. GEN. ASSEM., *infra* note 187, at 83 (1774) ("That the said bill be postponed till the next session; and that the clerk of this house do, in the recess thereof, . . . furnish the parties interested . . . with [certain documents] . . . .").

89. VA. J. DELEGATES, *infra* note 187, at 123 (1778) (emphasis added).

90. 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 125 (reproducing the resolutions for adjourning the sessions of the Superior Court, which referred to "said Convention at their late Session . . . [and a] Committee is enjoined to sit upon that Business on Monday next, and to compleat [sic] their Work during the Recess of the said Convention").

91. 1787 Mass. Acts, *infra* note 187, at 855 ("*Resolved*, that there be allowed and paid out of the publick Treasury of this Commonwealth, to the Committee of Finance, appointed in the last Session of the General Court [the legislature], to sit in the recess, the sums to their several names . . . .").

92. 1783 Mass. Acts, *infra* note 187, at 523 ("[I]n case a vacancy shall happen . . . in the recess of the General Court, or at so late a period in any session of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof."); *see also id.* at 128; 1786 Mass. Acts, *infra* note 187, at 126 (creating a procedure "in case a vacancy shall happen . . . in the recess of the General Court").

islative resolution also referred to the time following the session as "the recess."[93]

The legislative journals of New Hampshire are replete with legislative resolutions authorizing work to be done "during the recess" with directions that the result of the work should be produced "before this house at the next session."[94] Similarly, the period immediately before a new session was referred to as "the last recess."[95] The New Hampshire records also refer to a 1789 petition being "put over to the next Session of the General Court [legislature] and if the parties should not settle in the recess that [the petitioner] have leave to bring in a Bill at said next Session."[96] From references like these, it is clear that "the recess" represented the period between sessions and was clearly distinguished from them.[97]

### *B. Usages Implying that "the Recess" Meant Only the Intersession Recess*

Part IV.A provided instances in which the term "the recess" was clearly used as an alternative to, and synonymously with, the term "between sessions." This part examines other usages that, while less definitive, strongly imply that "the recess" was generally understood to mean the break between legislative sessions.

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93. 10 R.I. RECORDS, *infra* note 187, at 122 ("It is voted and resolved, that the secretary, *within ten days after the rising of every session of this Assembly*, make out and transmit, to the persons concerned therein, copies of all votes appointing committees to act *in the recess* of the General Assembly, or directing anything to be done by any officer of this state or others; to the end that the same may be carried into effect, agreeably to the true intention and meaning thereof." (emphasis added)).

94. *E.g.*, N.H. RECORDS, *infra* note 187, at 469 (providing for committee in 1777 to draw up fee schedule for officers during the recess, with production for the next session); 20 N.H. PAPERS (1891), *infra* note 187, at 141 (1784) (referring to 1784 committee report recommending inquiry "in the recess" with a report "at the next session"); *id*. at 181 (same), *id*. at 200 (providing for revision of fees "in the recess" with a report at "the next session"); *see also id.* at 220, 506, 662, 664; 21 N.H. PAPERS (1892), *infra* note 187, at 187, 222, 504, 562, 569–70, 604, 619, 721, 730.

95. *E.g.*, N.H. RECORDS, *infra* note 187, at 768 (mentioning "the last recess" as the period immediately before the session, which had just obtained a quorum the day before).

96. 21 N.H. PAPERS (1892), *infra* note 187, at 503–04.

97. *See id.* at 716 (reproducing report stating "Your Committee have also *in the recess* of the Court [legislature] and *during the Session* carefully examined the vouchers") (emphasis added).

### *1. Legislative Grants of Special Powers During "the Recess"*

Legislatures generally were the most potent branches of colonial and state government during the Founding era. They exercised not merely legislative powers, but also those that we would consider executive.[98] Colonial assemblies, for example, often were involved in executive appointments and the formulation of executive policy.[99]

Yet legislatures were part-time and often had to delegate authority to other actors for the duration of their recesses. The Founding-Era legislative records are full of these delegations. Most of them make sense only if one assumes that "the recess" will not be a short-term adjournment, but an intermission lasting a considerable amount of time—presumably until the next session.

Sometimes the delegatee was a legislative committee. I already have referred to Parliament's creation of a grievance committee to act "during the . . . recess of parliament," with possible further proceedings in a later session.[100] On September 22, 1777, the New York legislature voted "to constitute a Council of State to assist the Governor, for the Time being, to administer the Government during the Recess of the Legislature."[101] In November 1778, the New York assembly appointed a committee to examine the public accounts "during the Recess of the Legislature."[102]

Most often, however, the delegatee was the governor or president of the state, with or without his executive council. The Recess Appointments Clause is itself a specimen of this practice, as is the Constitution's grant to state executives of the power to appoint

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98. *Cf.* Greene, *infra* note 187, at 468 (stating that colonial assemblies assumed many powers formerly thought of as executive).

99. *Id.* at 468–69.

100. 3 BLACKSTONE, *infra* note 187, at *57.

101. 1777 N.Y. J. ASSEM., *infra* note 187, at 17; *see also* 1780 N.Y. J. ASSEM., *infra* note 187, at 46, 50, 56.

102. 1778 N.Y. J. ASSEM., *infra* note 187, at 37; *see also id.* at 98 (1779) (passage of similar bill). *Cf.* 1781 Mass. Acts, *infra* note 187, at 697 (appointing a committee to examine accounts during the recess and make a report at the "next setting").

temporary U.S. Senators "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State."[103]

Illustrative is the Pennsylvania legislature's resolution of December 5, 1778:

> That his excellency the president and the supreme executive council be authorized, during the recess of the house, to employ proper persons to make sale of the state brig *Convention*, and such of the gallies, armed boats, with their apparel, guns, tackle, &c. as the said council shall think proper; and if it shall appear to the said president and supreme executive council, in the recess of the house, that it will promote the good of the state, to provide a ship of war, or the protection of trade, they shall be, and are hereby empowered, to agree with suitable persons to purchase or build and fit out the same . . . .[104]

Two years later, the Pennsylvania legislature "empowered the Executive to proclaim and establish martial law in case of necessity during the recess of the Assembly, for limited periods."[105]

Similarly, the Delaware legislature empowered the state president "from time to time during the recess of the General Assembly, to draw his orders on the State Treasurer . . . for such sum or sums of money as may be necessary to enable him to procure and furnish" officers "with the supplies and clothing for the ensuing year . . . ."[106] The Rhode Island colonial assembly authorized the governor to pursue measures to resolve the Gaspee affair "during the recess of the General Assembly."[107] Resolutions from other states authorized the executive

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103. U.S. CONST. art. I, § 3, cl. 2 ("[I]f Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."). The Guarantee Clause is superficially similar: "The United States . . . shall protect each [state] against Invasion; and on Application of the Legislature, *or of the Executive (when the Legislature cannot be convened)* against domestic Violence." U.S. CONST. art. IV, § 4 (emphasis added). The Guarantee Clause, however, is tied to the physical inability of the legislature to meet, rather than to the formal recess.

104. PA. J., *infra* note 187, at 253.

105. Letter from William H. Houston to Governor William Livingston (June 4, 1780), *in* SELECTIONS FROM THE CORRESPONDENCE OF THE EXECUTIVE OF NEW JERSEY, FROM 1776 TO 1786, at 221, 223 (Newark 1848).

106. DELAWARE COUNCIL MINUTES, *infra* note 187, at 537.

107. 7 R.I. RECORDS, *infra* note 187, at 51.

during the legislative recess to: (1) grant permissions,[108] (2) impose an embargo,[109] (3) discontinue an embargo,[110] (4) hear complaints,[111] (5) call out the militia,[112] (6) issue other military orders,[113] (7) withdraw funds from the treasury,[114] and (8) fill vacancies.[115] The South Carolina legislature granted such broad recess authority to its governor, John Rutledge (later a leading Constitutional Convention delegate), that its action provoked claims that the governor had become "dictator John."[116]

This practice was so common that in some states it became customary for a legislature nearing the end of its session to pass an omnibus bill delegating a list of powers to the executive to be exercised in "the recess" or "until the next Setting [session]."[117]

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108. 1 GA. RECORDS, *infra* note 187, at 223 ("[N]o recruiting officers from South Carolina shall enlist any men within this State, without express permission first obtained from the Convention, or, in its recess, from the President and Council.").

109. 1 CONN. RECORDS (1894), *infra* note 187, at 10.

110. 2 CONN. RECORDS (1895), *infra* note 187, at 17 ("[T]he Governor by and with the advice of his Council and the Council of Safety may discontinue the said embargo in whole or in part if they shall judge the public good requires it at any time during the recess of the General Assembly."); *see also* 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 196–97 (empowering the executive council to lift an embargo during the recess).

111. 2 CONN. RECORDS (1895), *infra* note 187, at 396 (stating that "such complaints are to be made to the General Assembly when sitting, and in their recess the Governor and his said Council"); 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 311–12 (quoting resolution appointing a recess committee to consider a dispute among several towns).

112. 1781 Mass. Acts, *infra* note 187, at 667 (reproducing authorization for governor to call out militia).

113. 12 N.C. STATE RECORDS, *infra* note 187, at 99–100 (granting governor military powers during "the recess").

114. 1780 Mass. Acts, *infra* note 187, at 368 (authorizing a grant of ten thousand pounds "during the recess of the General Court" [legislature] to be drawn out of the treasury by the governor for "contingent services").

115. *Infra* Part V.A.

116. 17 J. CONT'L CONG., *infra* note 187 at 636 (paraphrasing South Carolina's "ordinance for the better security and defence of this State during the recess of the General Assembly"); 21 J. CONT'L CONG., *infra* note 187 at 1105 (containing similar paraphrase). For an account of the "dictator" charge, see Robert W. Barnwell, Jr., *Rutledge, "The Dictator,"* 7 J. S. HIST. 215 (1941).

117. *See, e.g.*, 19 MASS. COLONIAL RESOLVES, *infra* note 187, at 720–21 ("Resolves Vesting the Council with Certain Powers"). Another, similar resolution reads in part:

> Whereas it may be of Public Utility that in the recess of the General Court [legislature] Certain powers should be vested in the Council other than those with which they are ordinarily Cloathed therefore;
>
> *Resolved* that the Hon'ble Council during the next Recess of the General Court be and hereby are fully authorized and impowered to nominate and appoint as Occasion may require such Commissioned Officers in any

The Continental Congress repeatedly encouraged states to make decisions through executive action "in the recess" of the state legislature by adopting resolutions calling on state legislatures or, "in their recess" the executive, to undertake certain actions.[118] The Continental Congress itself delegated authority

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of the Land Forces in the Service and Pay of this State and also in the militia as to them shall appear Necessary and also to put said forces under the Command of such Officers as they shall judge proper, & the Commission or Authority of such Officers shall continue till the further order of the Gen Court And it is also

*Resolved*, That the said Council be and hereby are also impowered and Authorized to treat with any Indians that may arrive in this State and make such provision for them as they may judge proper.

And it is also

*Resolved* That the said Council shall have full power and Authority to examine allow & pass upon the pay rolls of the Sea Coast men and their Commissaries accounts, any Act or Resolve to the Contrary notwithstanding and grant Warrants upon the Treasury for the payment of the same. Also

*Resolved* that the Hon'ble Council shall be and hereby are Impowered to call the General Court together at any time sooner than the time to which said Court shall stand adjourned, if they judge it necessary for the publick safety

The aforegoing powers to Continue in the Council until the next Setting of the General Court and no longer.

*Id.* at 812; *see also* 1780 Mass. Acts, *infra* note 187, at 372 (authorizing special powers during the recess of the General Court); 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 229–30 (same).

118. *See, e.g.*, 7 J. CONT'L CONG., *infra* note 187, 124–25:

That, for this purpose, it be recommended to the legislatures, or, in their recess, to the executive powers of the States of New York, New Jersey, Pensylvania [sic], Delaware, Maryland, and Virginia, to appoint commissioners to meet at York town, in Pensylvania, on the 3d Monday in March next, to consider of, and form a system of regulation adapted to those States, to be laid before the respective legislatures of each State, for their approbation:

That, for the like purpose, it be recommended to the legislatures, or executive powers in the recess of the legislatures of the States of North Carolina, South Carolina, and Georgia, to appoint commissioners to meet at Charlestown, in South Carolina, on the first Monday in May next . . . .

*See also id.* at 172:

*Resolved*, That it be recommended to the legislatures, or, in their recess, to the executive power of each of the United States, to cause assessments of blankets to be made . . . and that all blankets to be obtained in this manner, be valued at a just and reasonable price, and paid for by the states respectively, to be repaid by the United States: and that the legislature, or, in their recess, the executive power, do cause money to be put into the hands of a proper officer in every county, district, or

to named officials or committees during "the Recess." Hence, that body,

> *Resolved,* That the pay master general of the army at Cambridge, be empowered to draw his bills upon the president of the Congress, or, in their recess, upon the committee of Congress for that purpose appointed, for any sums of money which may be deposited in his hands, not exceeding, in any one month, the monthly expences of the army . . . .[119]

The Articles of Confederation formalized recess delegation by establishing a thirteen-member Committee of the States "to sit in the recess of Congress."[120]

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township, in order that such blankets may be paid for, without delay or trouble, to the housekeepers on whom the assessments shall be made.

*See also id.* at 264 ("*Resolved*, That a committee of three be appointed to confer . . . be appointed to confer concerning the mode of authority which they shall conceive most eligible to be exercised, during the recess of the [state] house of assembly and the council, in order that the same, if approved of by Congress, may be immediately adopted.").

119. 4 J. CONT'L CONG., *infra* note 187, at 60.

120. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5. In its petition for certiorari in *Noel Canning,* petitioner NLRB asserted that the committee of the States, designed to convene in "the recess," met during an intrasession recess in 1784. Cert. Petition, *supra* note 68 at 14 & n.3. This is inaccurate. The intermission actually lasted from June 3, 1784 to the first Monday in November (that is, November 1, 1784), the date designated by the Articles of Confederation for the beginning of the next term of office. Thus, it was necessarily an intersession recess. 27 J. CONT'L CONG., *infra* note 187, at 556; *id*. at 641; *see also* ARTICLES OF CONFEDERATION of 1781, art. V, para. 1.

The basis for the petitioner's assertion was that the adjournment resolution contemplated reconvening at Trenton on October 30 rather than on November 1. Cert. Petition, *supra* note 68, at 14 (citing 26 J. CONST'L CONG. (1928), *infra* note 187, at 295–96. This is relevant only if one assumes that an October 30 gathering would have been part of the previous session rather than a new session. There is, however, little basis for that assumption.

If the date was not a mistake and Congress planned a one-day end-of-term meeting (October 31 was a Sunday), the long gap between adjournment and re-assembly suggests that Congress intended a new session. This would have been consistent with the Articles, which specified an annual term for Congress and a beginning date for the first session, but did not constrain congressional power to add sessions within a term. ARTICLES OF CONFEDERATION. Of 1781, art. V, para. 1 ("[D]elegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year.").

The October 30 date may have been simply an error: It was not the custom to begin sittings on a Saturday, and neither the journal nor the available correspondence reveals any reason for selecting October 30 rather than November 1—and no one showed up until November 1. Perhaps selection of the 30th resulted from a miscalculation designed to effectuate Congress's plans to divide time equally between Annapolis and Trenton.

One special sort of recess delegation was the legislative grant of recess war powers to committees of safety (also called councils of safety and councils of war). In 1775, the Continental Congress recommended that "each Colony . . . appoint a committee of safety, to superintend and direct all matters necessary for the security and defence of their respective colonies, in the recess of their assemblies and conventions."[121] Congress also recommended that "all officers above the Rank of a captain, be appointed by their respective provincial assemblies or conventions, or in their recess, by the committees of safety appointed by [said] assemblies or conventions."[122] Throughout the Revolution, the Continental Congress continued to refer to committees of safety as the proper agents to act during the recess of a state legislature or convention.[123]

Most, if not all, states responded by appointing committees of safety to act during "the recess" of their legislatures.[124] In states such as Connecticut, the delegation of authority during "the recess" was made to the governor acting with the commit-

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121. 2 J. CONT'L CONG., *infra* note 187, at 189.

122. *Id.* at 188.

123. *See, e.g.*, 4 J. CONT'L CONG., *infra* note 187, at 34 ("*Resolved*, That it be recommended to the Convention, or in their recess, to the committee of safety, of New York, to carry into execution the above resolution."); 5 *id.* at 488 ("That it be recommended to the convention, or, in their recess, to the committee or council of safety of Maryland, immediately to appoint proper officers for, and direct the inlistment of, the four companies to be raised in that colony.").

124. *See, e.g.*, 1 CONN. RECORDS (1894), *infra* note 187, at 588 ("*Therefore voted and resolved,* That his Honor the Governor, his Honor the Deputy Governor, [and certain named persons] be and they are hereby appointed a Council of War; that they or any five of them are fully empowered to do, act and transact, all and every thing and matter for the well being and security of this State, and the United States in general; that they make and ordain all such rules, orders and regulations for the well governing, ordering, disciplining, cloathing [sic] and supplying the army now raised . . . ; [a]nd that all such rules, orders and regulations by them made in the recess of the General Assembly shall be of as full force and authority to all intents and purposes as though made and passed by this General Assembly."); *see also* DELAWARE COUNCIL MINUTES, *infra* note 187, at 22 (reproducing a message from the council addressing a house of delegates resolution for "the appointment of a Council of Safety for this State, to act during the recess of the Legislature"); *id.* at 24 (listing election results "for persons to compose a Council of Safety during the next recess of the General Assembly"); 19 MASS. COLONIAL RESOLVES, *infra* note 187, at 586 (reproducing delegation of broad powers to a committee of safety "during the Recess of the General Court"); N.H. RECORDS, *infra* note 187, at 21 (voting to create a committee of safety "[t]o transact the Business of this Colony in the recess of the General Assembly"); 7 R.I. COLONY RECORDS, *infra* note 187, at 322 (appointing a committee of safety).

tee of safety rather than to the committee alone.[125] In other states, the legislature granted recess authority to the committee alone, sometimes including the governor as one of its members. The authority thus granted was often vast. The Rhode Island committee of safety initially received power "during the recess of the General Assembly, to fill up all vacancies that shall happen amongst the officers that shall be appointed by the General Assembly for the said army."[126] Later, however, the committee—now renamed the "council of war"—was entrusted with authority during "the recess of the General Assembly" to:

> [M]ake, ordain, constitute and appoint all such orders, decrees, regulations and commands of an executive nature, whether civil or military, as require an immediate attention, and which do not interfere with, or counteract any known and established laws of this state, in as full, ample and effectual manner, as this General Assembly could or ought, were they actually sitting.[127]

Obviously, few, if any, of these delegations contemplated short-term, intrasession adjournments. They assumed extended periods of time during which the legislature would not be available—that is, intersession recesses.

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125. *E.g.*, 1 CONN. RECORDS (1894), *infra* note 187, at 93 (referring to receipt of certification of election of military officers and commissioning "to the General Assembly or in the recess of said Assembly to the Governor and Council of Safety"); *id.* at 118 ("*It is therefore resolved*, That in the recess of the General Assembly his Honor the Governor with the Council of Safety may and they are authorized to make other or further regulations or provisions as from the state and circumstances of the case shall appear to them expedient and necessary for the safety and defence of any of the coasts or places aforesaid."); *id.* at 374 ("*Resolved*, That the raising the regiment ordered by this Assembly to be raised for the defence of this or the neighbouring States be postponed for the present, and that his Excellency the Governor with the advice of the Council of Safety have power to give all necessary orders for raising the same if it shall be necessary in the recess of the General Assembly."); *see also* 2 CONN. RECORDS (1895), *infra* note 187, at 464 ("*It is therefore resolved by this Assembly*, That in the recess of the Assembly his Excellency the Governor by and with the advice of the Council of Safety are hereby authorized and impowered to hear the application of any person or persons of the aforesaid character, and to grant permission to such person or persons as they may judge proper, to go to Long Island and to bring their families and effects under such regulations and restrictions as they may judge proper . . . .").

126. 7 R.I. COLONY RECORDS, *infra* note 187, at 322.

127. 9 R.I. RECORDS, *infra* note 187, at 73; *see also id.* at 471–72 (reproducing powers of the council).

### *2. Other Resolutions Implying That "the Recess" Referred Only to Intersession Breaks*

Several kinds of documents other than recess delegations seem based on the assumption that "the Recess" refers only to gaps between sessions. For example, colonial and state governors and state presidents typically addressed messages to their legislatures at or near the opening of each new session. Perhaps the most representative are those addressed by Governor George Clinton to the New York State General Assembly. Such messages invariably referred to the period since the previous session as "the recess."[128] Less formal messages—from the governor or the speaker of the house—disclose the same usage.[129]

Additional specimens appear in resolutions the legislatures passed for the operation of government during "the recess," other than the delegations discussed earlier.[130] These resolutions also assume that "the recess" will last a substantial amount of time, or otherwise imply that the period will last from the end of one session or "sitting" to the next.[131] Insofar as

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128. *See, e.g.*, 1784 N.Y. J. ASSEM., *infra* note 187, at 6–7 (reproducing message from an opening of session that referred to the period since the last session as "the recess"); 1788 N.Y. J. ASSEM., *infra* note 187, at 7 (same); JOURNAL OF THE HOUSE OF ASSEMBLY OF THE STATE OF NEW YORK B (New York 1790) (same). *Cf.* 1785 Mass. Acts, *infra* note 187, at 824 ("During the recess of the General Court, there have happened two vacancies in the revenue department; one by death, and the other by resignation.") (The source erroneously tags the session as a 1785 session, *id.* at 821–22, although the documents clearly pertain to the February, 1786 session and are dated as such.); 16 N. C. RECORDS, *infra* note 187, at 30 (reproducing message from the governor laying before the state House of Commons letters received "in the recess of the General Assembly").

129. *E.g.*, DELAWARE COUNCIL MINUTES, *infra* note 187, at 1157 (referring to an early-session message from the state president with the words, "During your late recess, the following public letters have been received by me"); 1779 N.Y. J. ASSEM., *infra* note 187, at 5 ("I now also submit to your Consideration . . . sundry Resolutions from Congress transmitted to me in the Recess of the Legislature."); 7 R.I. COLONY RECORDS, *infra* note 187, at 333 (reproducing governor's letter referring to letters received "during the recess"). *Cf.* 1780 N.Y. J. ASSEM., *infra* note 187, at 88 ("Since your Recess I have received several Resolutions from the Honorable the Congress.").

130. *Supra* Part IV.B.1.

131. *E.g.*, 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 122 ("[The executive council] until the next Sitting of the General Court . . . [is] hereby fully authorized and impowered to nominate and appoint, as occasion may require, such Commission Officers in any of the Land Forces, armed Vessels or Vessels of War in the Service and Pay of this State, and also in the Militia, whose Places by Death or otherwise, are or may *in the Recess* of the Court become vacant."(emphasis added)); *see also id.* at 363, 588–89 (containing similar usage).

I have found, resolutions of that kind never seem to be referring to mere intrasession breaks.

Illustrations abound:

- Legislatures very often authorized special pay for committees and other persons with duties "during the recess," which would hardly have been necessary if the recess were not fairly long.[132]
- In April 1784, the congressional delegates from Rhode Island moved that the Confederation Congress convene in Trenton after "the recess of Congress." The motion reveals that the delegates conceived of "the recess" as lasting from June 3 to October 30—that is, an intersession break.[133] Congress approved the motion.[134]
- A letter read in the Confederation Congress to the French ambassador in 1784 referred to a letter from France that "will probably arrive in the Recess of Congress"[135]—an eventuality that would have been likely only if "the recess of Congress" was a lengthy one.
- The Confederation Congress debated whether its president "should continue in Office during the recess of Congress." The resulting resolution provided "that on the adjournment of the present Congress, the duties of their President cease; and that when the United States assemble pursuant to such adjournment, or in consequence of a call from the Committee of the states, his Excellency Thomas Mifflin, do

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132. *E.g.*, *id.* at 485 (authorizing pay for a committee sitting "during the present recess"); N.H. RECORDS, *infra* note 187, at 962 (authorizing pay for the committee of safety in the 1872 recess of the legislature); 20 N.H. PAPERS at 111 (authorizing payment for council members during the 1784 recess); 1784–85 PA. MINUTES, *infra* note 187, at 201, 306 (providing special pay for clerk and assistant clerk for work done during the previous recess); *id.* at 306 (authorizing pay for work to be done by those officers "during the [next] recess of the House").

133. 26 J. CONT'L CONG., *infra* note 187, at 287–88 ("The Delegates for the State of Rhode Island and Providence Plantations pursuant to their instructions . . . beg leave to renew their motion . . . Resolved: That the President be, and he hereby is authorised and directed, to adjourn Congress on the third day of June next, to meet on the thirtieth of October next at Trenton, for the despatch [sic] of public business; and that a committee of the states shall be appointed to sit in the recess of Congress.").

134. *Id*. at 295–96.

135. 27 J. CONT'L CONG., *infra* note 187, at 393.

resume the chair."[136] Such a resolution would have made no sense if "the recess" could refer to short adjournments.

## V. VACANCIES AND THE MEANING OF "HAPPEN"

### *A. The Use of "Vacancies . . . Happen" Language in the Founding Era*

The long-standing controversy involving the phrase "vacancies that may happen" centers on the meaning of the word "happen." Specifically, must the vacancy arise during "the recess" to "happen" then, or does "happen" capture vacancies arising during a session and extending into the recess? In other words, may "happen" mean not merely "arise" but also "happen to exist"?

A survey of Founding-Era dictionaries reveals "happen" more likely was used to mean "arise."[137] William Perry's Royal Standard English Dictionary, American edition, defined "happen" as "to come to pass; to light on"[138]—phrases that certainly imply a discrete event rather than a continuing condition. Similarly, Francis Allen's dictionary described "happen" as to "fall out; to

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136. *Id*. at 505.

137. Insofar as I am aware, no one had undertaken a full survey of Founding-Era dictionaries when I commenced my research for this Article. Professor Rappaport consulted dictionaries composed by Samuel Johnson and Noah Webster. Rappaport, *infra* note 187, at 1503 n.46, 1550 n.191. He also observed that Judge Barkett's dissent in *Evans v. Stephens* undertook a partial survey. *Id.* at 1503 n.46; *see also* Evans v. Stephens, 387 F.3d 1220, 1230 & n.4 (11th Cir. 2004) (en banc) (Barkett, J., dissenting).

The Johnson dictionary, while always valuable, can be idiosyncratic, and therefore should be confirmed by other sources. One should never, as the Court of Appeals for the Third Circuit did in *NLRB v. New Vista*, limit one's examination of Founding-Era dictionaries solely to Johnson's definitions. 719 F.3d 203, 221 (3d Cir. 2013). Samuel Johnson was a famously crusty figure who sometimes inserted archaisms and personal opinions into his definitions. For example, as a committed Tory, Johnson defined "Tory" as "[o]ne who adheres to the ancient constitution of the state . . . [as] opposed to a whig." But he defined "Whig" merely as "[t]he name of a faction." On a lighter note, his entry for "lexicographer" (which he was) stated "A writer of dictionaries; a harmless drudge." 1 JOHNSON, *infra* note 187 (unpaginated).

The Webster dictionary was published in 1828, nearly four decades after the Founding, and therefore too late to serve as an appropriate confirmation.

For my survey, I examined the definitions of "happen" in eleven Founding-Era dictionaries. When a dictionary was issued in multiple editions, I selected the edition nearest to, but not after, the end of the ratification era on May 29, 1790.

138. PERRY, *infra* note 187, at 272.

come to pass; to light upon or meet with by chance."[139] John Ash's compendium stated, "[t]o fall out, to come to pass, to light on by accident."[140] Nathan Bailey[141] and John Kersey[142] offered only "to fall out." Frederick Barlow's entry recited, "to fall out. To come to pass without being designed. To light upon or meet with by chance, or meer [sic] accident."[143] Comparable definitions—all implying a discrete event rather than a continuing situation—were reported by Alexander Donaldson,[144] Samuel Johnson,[145] William Kenrick,[146] and Thomas Sheridan.[147] The only arguably dissenting work was that by Thomas Dyche and William Pardon, which gave as a secondary definition (after "to come to pass") the phrase "to be."[148]

What, then, of other documentary Founding-Era sources? In its very abbreviated examination of those sources, the *Noel Canning* court wrote that the "North Carolina Constitution[ contained] the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause's model."[149]

In truth, however, the North Carolina language was not much like the Recess Appointments Clause: It neither referred to "the Recess" nor used any variant of the phrase "Vacancies . . . happen."[150] Several other state constitutions contained

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139. ALLEN, *infra* note 187 (unpaginated).

140. ASH, *infra* note 187 (unpaginated).

141. BAILEY, *infra* note 187. (unpaginated).

142. KERSEY, *infra* note 187 (unpaginated).

143. 2 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London 1773) (unpaginated).

144. DONALDSON, *infra* note 187 (unpaginated) ("to fall out; to chance; to come to pass. To light; to fall by chance.").

145. 1 JOHNSON, *infra* note 187 (unpaginated) ("1. To fall out; to chance; to come to pass. 2. To light; to fall by chance.").

146. KENRICK, *infra* note 187 (unpaginated) ("To fall out; to chance; to come to pass—To light; to fall by chance.").

147. SHERIDAN, *infra* note 187 (unpaginated) ("[T]o fall out by chance; to light on by accident.").

148. DYCHE & PARDON, *infra* note 187 (unpaginated).

149. Noel Canning v. NLRB, 705 F.3d 490, 501 (D.C. Cir. 2013). The court based this statement on the conclusions of a student law review note. *Id.* (citing Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretations*, 84 COLUM. L. REV. 1758, 1770–72 (1984)).

150. N.C. CONST. of 1776, art. XX ("That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assem-

provisions for filling vacancies whose language was at least as similar to the Recess Appointments Clause: Georgia (1777), Maryland (1776), Massachusetts, New Hampshire (1784), Pennsylvania (1776), and South Carolina (1776 and 1778).

Like the North Carolina language, the provisions in the constitutions of Georgia[151] and South Carolina[152] mentioned neither "the Recess" nor "Vacancies . . . happen" in relation to the Recess. The Maryland instrument mentioned "the Recess," but did not use the term "happen."[153] The Massachusetts and 1784 New Hampshire instruments employed variants on the phrase "vacancies . . . happen," but did not refer specifically to "the Recess."[154] The Pennsylvania section authorizing the executive to fill vacancies in offices used neither the word "recess" nor "happen,"[155] but the section authorizing filling vacancies in the executive council did feature a variant of "vacan-

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bly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.").

151. GA. CONST of 1777, art. XXI ("The governor, with the advice of the executive council shall fill up all intermediate vacancies that shall happen in offices till the next general election; and all commissions, civil and military, shall be issued by the governor, under his hand and the great seal of the State.").

152. S.C. CONST. of 1776, art. XXIV ("That in case of vacancy in any of the offices above directed to be filled by the general assembly and legislative council, the president and commander-in-chief, with the advice and consent of the privy council, may appoint others in their stead, until there shall be an election by the general assembly and legislative council to fill their vacancies respectively."); S.C. CONST. of 1778, art. XXXI (same, with minor wording changes).

153. MD. CONST. of 1776, art. XIII (stating that if there is a vacancy in one of the two treasurers' offices, "in the recess of the General Assembly, the governor, with the advice of the Council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the next General Assembly"); *id.* art. XLI (providing the same as to the register of wills); *cf. id.* art. XLVII (providing for appointments of judges to fill certain vacancies, although legislative recess is not a triggering factor).

154. MASS. CONST., ch. 1, § 2, art. IV (amended 1860) ("[A]nd in like manner all vacancies in the Senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be after such vacancies shall happen."); N.H. CONST., pt. II, "Senate," (amended 1889) ("And in like manner all vacancies in the Senate, arising by death, removal out of the state, or otherwise, shall be supplied as soon as may be after such vacancies happen.").

155. PA. CONST. of 1776, § 20 ("The president . . . shall supply every vacancy in any office, occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution.").

cies . . . happen."[156] The significance of the Massachusetts, New Hampshire, and Pennsylvania provisions is discussed below.[157]

Fortunately, Founding-Era legislative records are replete with other provisions for filling vacancies, including grants of vacancy-filling authority during "the Recess." They certainly were common enough to be familiar to anyone with any exposure to the legislative process. Specimens are extant from the Continental Congress[158] and from most of the States.[159] Some-

156. *Id.* § 19 (providing a procedures for filling "[a]ll . . . vacancies in the council that may happen by death, resignation, or otherwise").

157. *Infra* notes 171, 180, 181 and accompanying text.

158. *See, e.g.*, 4 J. CONT'L CONG., *infra* note 187, at 220 ("That, in case of vacancy occasioned by the death or removal of a colonel or inferior officer, the provincial convention of North Carolina, or, in their recess, the provincial council, appoint another person to fill up such vacancy, until a commission shall issue from this Congress.").

159. The following represents only a sampling:

*Connecticut*: 2 CONN. RECORDS (1985), *infra* note 187, at 525 (granting power to the governor "by and with the advice of the Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by death or refusal of any commissary or commissarys [sic] appointed under this act"); 3 CONN RECORDS (1922), *infra* note 187, at 386 ("That his Excellency the Governor be and he is hereby authorized and requested to fill up all vacancies which may happen by the refusal or resignation of any one of the committee appointed by this Assembly in their present sessions"); 5 CONN RECORDS (1943), *infra* note 187, at 327 (providing for collectors of duties to be "appointed by the General Assembly or in their Recess by the Governor and Council of this State").

*Delaware*: DELAWARE COUNCIL MINUTES, *infra* note 187, at 1084 ("[I]n case of the death, inability, or refusal to act, of the said Eleazar McComb, as State Commissioner as aforesaid, it is the opinion of the General Assembly that his Excellency the President, in their recess, appoint some other suitable person to act as State Commissioner in the business aforesaid.").

*Georgia*: 1 GA. RECORDS, *infra* note 187, at 345 ("[I]n case any of the Commissioners appointed . . . shall die, or resign their appointment, refuse or neglect to Act in the recess of the Legislature then the Governor and Council for the time being, are hereby Authorized and empowered to appoint some proper and discreet person or persons to act in the room or stead of any such person or persons, who shall or may die, or resign, refuse or neglect to Act as aforesaid.").

*Massachusetts*: 20 MASS. COLONIAL RESOLVES, *infra* note 187, at 646–47 ("*Resolved* that the Honorable Council until the next sitting of the General Court, be and they hereby are fully authorized and impowered to nominate and appoint, as occasion may require, such commissioned officers . . . whose places by death or otherwise are or may in the recess of the General Court become vacant."); *id.* at 224, 540, 717 (reproducing similar resolutions); 21 MASS RESOLVES (1922), *infra* note 187, at 229–30, 363–64).

*New Jersey*: NEW JERSEY LAWS, *infra* note 187, at 102 (reproducing 1790 statute empowering the governor to appoint U.S. Senators "during the recess of the legislature").

*North Carolina*: 12 N.C. STATE RECORDS, *infra* note 187, at 99–100 ("Resolved therefore that the Governor be authorized and impowered, from time to time, during the recess

times they addressed only vacancies.[160] On other occasions they appeared in end-of-session omnibus resolutions granting wide authority for "the recess."[161] The Constitution's expression "Vacancies . . . happen" was but one variant of a group of stock phrases employed in these provisions. Although some do not tell us much about the meaning of "happen,"[162] many others do.

These documents confirm that "happen" always signified a discrete event. When the drafters wished to designate a continuing vacancy rather than the creation of one, they did not use the unadorned word "happen." They resorted to phrases such

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of the General Assembly, to give such orders as he may think necessary . . . . It is further Resolved that the Governor be impowered to appoint at his discretion, officers to fill up such vacancies as may happen in the Continental Army aforesaid."); 24 N.C. STATE RECORDS, *infra* note 187, at 443 ("That in case of the resignation or death of the comptroler [sic], the supreme executive are hereby authorised and impowered to nominate a person to exercise the powers, and perform the duties of comptroler, during the recess of the General Assembly."); *see also id.* at 553, 654 (authorizing recess appointments of port collectors and state treasurer).

*Pennsylvania*: PA. J., *infra* note 187, at 131 (authorizing president and council to make appointments "during the recess of [the Pennsylvania House of Representatives]").

*Virginia*: 1778 VA. J. SENATE, *infra* note 187, at 8 (referring to a previous "appointment of the Governor and Council, made during the recess of the General Assembly").

160. *See supra* note 159 and sources cited therein.

161. *E.g.*, 21 MASS. COLONIAL RESOLVES, *infra* note 187, at 122–23 (granting wide authority to the executive council "until the next Sitting of the General Court," including power to "nominate and appoint, as occasion may require . . . Officers in any of the Land Forces, armed Vessels or Vessels of War in the Service and Pay of this State, and also in the Militia, whose Places by Death or otherwise, are or may in the Recess of the Court become vacant").

162. *See, e.g.*, 4 CONN. RECORDS (1942), *infra* note 187, at 248 (reproducing a May 25, 1782, order of the Governor making a contingent appointment of a military officer "where a Vacancy shall happen"); 24 N.C. STATE RECORDS, *infra* note 187, at 354 (reproducing a 1780 law):

> Whereas, . . . no provision is made for the filling up of vacancies, occasioned by the death, removal, or refusal to act, of the persons appointed. . . . [T]he General Assembly by a joint resolve of both houses, may occasionally appoint another person or persons to fill up the vacancies aforesaid; and if any vacancy should happen during the recess of the General Assembly, the Governor, with advice of the council of the State, may make a temporary appointment, to be in force until the General Assembly shall meet and take such appointment under consideration . . . .

*See also* 12 N.C. STATE RECORDS, *infra* note 187, at 100 ("It is further Resolved that the Governor be impowered to appoint at his discretion, officers to fill up such vacancies as may happen in the Continental Army aforesaid."); N.H. LAWS, *infra* note 187, at 170 ("That if a vacancy shall happen in either of said cases, they shall be filled up in manner aforesaid.").

as "during the Vacancy,"[163] "are at present vacant,"[164] "if there be a vacancy,"[165] and "if at any Time, by Death or otherwise, the Offices . . . shall be vacant."[166]

### *B. How Founding-Era Documents Illustrate the Meaning of "Happen"*

The Constitution itself offers an example of what it meant for a vacancy to "happen." Article I, Section 3 uses the phrase "if Vacancies happen by Resignation, or otherwise."[167] Under the *ejusdem generis* rule of construction, the events contained in "otherwise" are presumed to be of the same kind as the example given ("Resignation")[168]—that is, discrete events.

This is only one of many Founding-Era legal materials illustrating what it meant for a vacancy to "happen." All the illustrations I have been able to discover so far are discrete events. I have found none that represents continuance of a preexisting vacancy.

Just as the Constitution cites the example of resignation, a Pennsylvania legislative resolution cites the example of death:

> *Resolved,* That where vacancies *by death or otherwise* may happen in any offices which ought to be filled by this house, during their recess, the president and council be hereby empowered to appoint suitable persons to fill the said offices till the same shall be appointed by the house.[169]

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163. CONN. ACTS, *infra* note 187, at 4.

164. 15 N.C. STATE RECORDS, *infra* note 187, at 79.

165. *Id.* at 493.

166. *See* CONN. ACTS, *infra* note 187, at 27.

167. U.S. CONST. art. I, § 3, cl. 2 (describing the former procedure for filling vacancies in the Senate).

168. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (explaining that the canon provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (citations and internal quotation marks omitted).

169. PA. J., *infra* note 187, at 131 (Mar. 20, 1777) (emphasis added); *see also* JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *available at* http://www.constitution.org/jadams/thoughts.htm (using analogous language to argue that one of the defects of a unicameral parliament is that it may "vote itself perpetual," such as in Holland, whose assembly eventually voted that "all vacancies happening by death or otherwise, should be filled by themselves, without any application to constituents at all").

Similar language appears in a 1777 Rhode Island resolution entrusting the electorate with the choice of that state's delegates to the Continental Congress.[170]

Other legislative measures offer multiple illustrations of how a vacancy might "happen." The Pennsylvania constitution offers two: "All vacancies in the council *that may happen by death, resignation, or otherwise*, shall be filled at the next general election . . . ."[171] A 1780 Connecticut resolution also offers two:

> *And be it further enacted,* That his Excellency [the governor] be and he is hereby desired and impowered, by and with the advice of the Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by *death or refusal* of any commissary or commissarys [sic] appointed under this act . . . .[172]

Another Connecticut resolution lists four: "*Provided always,* That in case of *death, resignation, refusal or revocation*, the General Assembly may supply such vacancy as may so happen."[173] A 1784 message from the Governor of Massachusetts offered two: "During the recess of the General Court, there *have hap-*

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170. 8 R.I. RECORDS, *infra* note 187, at 177 (providing for popular election, but adding that "in case any vacancy shall happen, by death, or otherwise, the General Assembly shall fill up such vacancy for the remainder of the year").

The year following its ratification of the Constitution, the Rhode Island legislature adopted an act authorizing incorporation of a bank. This included a provision for filling vacancies in the board of directors that "shall happen, by death or otherwise." 10 R.I. RECORDS, *infra* note 187, at 460. Even earlier—in November, 1790, only six months after the last ratification—the New Jersey legislature adopted a statute providing for filling recess vacancies for U.S. Senators. It read in part:

> And in case a vacancy or vacancies shall *happen by death or otherwise . . . and during the sitting of the legislature*, then and in such case the vacancy or vacancies so happening may and shall be filled . . . by the council and assembly of this state. And if a vacancy or vacancies, by the death of either or both of the said senators, or otherwise howsoever, *shall happen during the recess of the legislature*, then the governor of the state . . . may make a temporary appointment or appointments until the next meeting of the legislature . . . .

NEW JERSEY LAWS, *infra* note 187, at 102 (emphasis added). Note the implication that "happening" refers to discrete acts.

171. PA. CONST. of 1776, ch. II § 19 (emphasis added).

172. 2 CONN. RECORDS (1895), *infra* note 187, at 525 (emphasis added).

173. *Id.* at 264 (emphasis added).

*pened* two vacancies in the revenue department; one by death, and the other by resignation."[174]

Several 1785 South Carolina statues set forth instances of "happen" that were likewise limited to discrete events. A measure addressing the county courts provided that "if any vacancies shall happen by the *death, resignation or removal out of the county* of any of the said justices," then the remaining justices may "fill up such vacancies."[175] Another measure provided for the appointment of loan-office commissioners "if any vacancy shall happen by the *death, resignation, or removal out of this State*" occurring "in the recess of the General Assembly." In such case, the Governor with the advice of the Privy Council could "fill up such vacancy until the next meeting and sitting" of the legislature.[176] Still another enactment addressed vacancies among road commissioners that "shall happen . . . by *refusal to act, death, removal out of the parish or district*, or otherwise."[177]

Numerous other examples exist.[178] Many more could have been added to this sample. Had I been willing to extend the

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174. 1785 Mass. Acts, *infra* note 187, at 824 (emphasis added).

175. S.C. PUBLIC LAWS, *infra* note 187, at 366 (emphasis added).

176. *Id.* at 398 (emphasis added).

177. *Id.* at 444 (emphasis added).

178. *Connecticut*: CONN. ACTS., *infra* note 187, at 39 ("Provided always, That in Case of Death, Resignation, Refusal or Revocation, the General Assembly may supply such Vacancy as may so happen.").

*Delaware*: DELAWARE LAWS, *infra* note 187, at 851 (reproducing a 1786 law that has no "catchall" provision, but refers to a "vacancy or vacancies that may happen by reason of such death or refusal to act").

*Maryland*: 1 THE LAWS OF MARYLAND ch. XIII (William Kilty ed., Annapolis, Frederick Green 1799) (reproducing a 1744 statute with five examples of how the vacancy "shall happen"); *id.* at ch. XXIV (reproducing a 1788 statute providing for the filling of "vacancies happening from death, refusal, disqualification or resignation"); 2 *id.* chapter VIII, § IX (reproducing a 1789 statute listing removal, refusal, or disabilities as examples of how "such vacancy shall happen").

*New Hampshire*: N.H. LAWS, *infra* note 187, at 171 (reproducing a law adopted February 7, 1789, referring to "all vacancies . . . that shall happen by death, resignation, or otherwise"); 21 N.H. PAPERS, *infra* note 187, at 878 (reproducing a 1788 law providing for "if a Vacancy shall happen" due to an electoral defect).

*North Carolina*: 19 N.C. STATE RECORDS, *infra* note 187, at 543 ("Recommended, That this State annually appoint their delegates to serve in Congress for one year . . . , and *when vacancies shall happen by the removal or resignation* of any of the said Delegates within the year, this State shall appoint others in their stead.") (emphasis added).

*Pennsylvania*: PA. GEN. ASSEMBLY, *infra* note 187, at 413 (as paginated in supplement entitled "Laws Enacted in the Second Sitting of the Twelfth General Assembly of the

time period for a year or two past May 29, 1790, I could have cited more examples.[179]

### *C. References That Necessarily Exclude All But Discrete Events from the Meaning of "Happen"*

Other Founding-Era uses of the "vacancies . . . happen" formula do more than *suggest* that a happening had to be a discrete event. They are so worded that, as a practical matter, they *bar any other interpretation*.

Consider the wording of two state constitutions. After providing for election of state senators, the 1784 New Hampshire instrument added that "all vacancies in the senate, arising by death, removal out of the State, or otherwise, *shall be supplied as soon as may be after such vacancies happen.*"[180] In other words, the vacancy continued *after* it "happened," but was not "happening" for this length of time. The language of the Massachusetts Constitution was similar: "[A]ll vacancies in the Senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen."[181]

A resolution the Rhode Island General Assembly adopted in 1782 addressed a vacancy created when a battalion captain resigned. The resolution filled the vacancy with Lt. Benjamin L. Peckham, and prescribed that Peckham "take rank from the 22d day of June last, it being the time that the said vacancy happened."[182] In view of the assembly, it was not the ongoing existence of the vacancy that was a "happening," but the occurrence of the resignation.

A resolution the Connecticut legislature adopted in 1779 also clarifies that a vacancy happens with a discrete event, not by continuing existence. The resolution read as follows:

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Commonwealth of Pennsylvania") ("*Provided always,* That whenever any vacancy shall happen by *death, refusal to serve, or other removal* of one or more of the said trustees, an election shall be held as soon as conveniently can be done.") (emphasis added).

179. *See supra* notes 31, 32 and accompanying text (explaining why it is usually better practice to avoid relying even on early postratification materials as evidence of original understanding or original meaning).

180. N.H. CONST. of 1784, pt. II, "Senate" (emphasis added).

181. MASS. CONST. pt. II, ch. 1, § 2, art. IV.

182. 9 R.I. RECORDS, *infra* note 187, at 585.

> Whereas the office of lieutenant colonel in Colo. Sherburn's regiment *became vacant Sept. the 20th, A.D. 1779, by the promotion* of Lieut. Colo. Meigs to a full colonel in the line, and said office in Colo. S. B. Webb's regiment likewise became vacant by the resignation of Lieut. Colo. Wm. Livingston in Feb. last, neither of which vacancies have been filled . . . and Maj'r Ebenezer Huntington of Colo. S. B. Webb's regiment claiming a right to have been promoted to the first vacancy in Colo. Sherburn's regiment *when it happened*, and now applies to be appointed a lieutenant colonel in the continental army and to take rank from the time the first *vacancy aforesaid happened*, as being the time when his right of preferment accrued . . . .[183]

Another Connecticut resolution responded to a need for enough militiamen to meet a congressional requisition. It authorized the Governor to "fill up such Vacancies as *have or may happen* in the Line of Officers appointed in said Service."[184] In other words, a vacancy happened not through its continued existence, but exclusively through events that "have or may happen."

Finally, a 1786 Massachusetts statute did what the Constitution did not do: It provided for a recess appointment when the vacancy arose too close to the end of the session for the legislature to approve the appointment. The statute read as follows:

> *Be it enacted*, That in case a vacancy shall happen by the death or otherways [sic] of any Naval Officer or Collector of Impost, in the recess of the General Court, or at so late a period in any session thereof as that the vacancy shall not be supplied by the Court, the Comptroller General is hereby authorized immediately to fill up such Vacancy.[185]

Perhaps it would have been wise for the Framers to adopt the scheme embodied in this Massachusetts law, which was enacted just a few months before the Constitutional Convention met. But for better or worse, the Framers did not do so, and we should not pretend that they did.[186]

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183. 2 CONN. RECORDS (1895), *infra* note 187, at 371–72 (emphasis added).

184. 5 CONN. RECORDS (1943), *infra* note 187, at 445 (emphasis added).

185. 1786 Mass. Acts, *infra* note 187, at 126.

186. In the same category, a Massachusetts law provided as follows:

> *And be it enacted*, That in case a vacancy shall happen by reason of the death, resignation, removal out of the State, or non-acceptance of any person appointed, or that shall be appointed, Collector of Excise, or otherways

## VI. CONCLUSION

Founding Era legislative and other governmental records tell us that the Constitution's phrase "the Recess" refers only to the formal recesses of the Senate between sessions. "The Recess" does not include other intermissions, pro forma or not. The records also inform us that for a vacancy to "happen" in "the Recess of the Senate," the vacancy must have arisen during that period. In other words, the predecessor's death, resignation, removal, retirement, or expiration of term must have occurred during the intersession recess. If it occurs while the Senate is in session (pro forma or not), then the President may appoint only with the consent of the Senate.[187]

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> [sic], in any of the counties of this Commonwealth, in the recess of the General Court, *or at so late a period in any session of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof*, the Governor, with the advice of the Council, shall be, and hereby is authorized and impowered [sic], to appoint a Collector of Excise for the county where such vacancy shall happen.

1783 Mass. Acts, *infra* note 187, at 523 (emphasis added). Like the statute discussed in the text, this law provides separately for the continuing situation in which the vacancy happens so late in a session that it was not filled. *See also* 1782 *id.*, at 128 (adapting similar wording).

187. *Bibliographical Note*: This footnote collects secondary sources cited more than once. Legislative and other governmental publications are listed first, followed by other books and articles, including dictionaries. Dictionaries of the time generally were unpaginated.

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