

CONSTITUTIONAL ADVERSE POSSESSION: RECESS APPOINTMENTS AND THE ROLE OF HISTORICAL PRACTICE IN CONSTITUTIONAL INTERPRETATION

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INTRODUCTION

Recess appointments have long been controversial in the United States.¹ In a system based on the advice and consent of the legislature,

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1. While relatively few articles exist, there have been excellent analyses of this issue that reach different conclusions on the meaning of the Recess Appointments Clause. See, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *CARDOZO L. REV.* 377, 441–42 (2005); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. REV.* 1487, 1575–78 (2005); Michael A. Carrier, Note, *When Is the Senate in Recess for*

the unilateral appointment of a high-ranking official runs against the constitutional grain of the system. This controversy has been magnified in modern times as presidents have used the power to openly circumvent hostile or intransigent congresses.² Four appointments made by President Obama in January 2012, however, pushed this conflict between the legislative and executive branches to a new and troubling level. Indeed, for critics, these intrasession appointments obliterated any meaningful limits on when or how the President may claim a right to a recess appointment outside of the confirmation power of the Senate.³ Obama had previously submitted the nomination of Richard Cordray to serve as the first Director of the Consumer Financial Protection Bureau (CFPB).⁴ The nomination was blocked by forty-five senators in a filibuster over a disagreement with the President on the accountability and funding of the bureau.⁵ Obama also appointed three individuals to the National Labor Relations Board (NLRB).⁶ While Obama waited for months to nominate one of these individuals, he gave them appointments on the claim that he could not wait a matter of days before Congress reconvened.⁷

Throughout history, the interpretation of this Recess Appointments Clause⁸ has evolved to the increasing benefit of the executive branch—allowing the Clause to be used to circumvent congressional opposition.⁹ Indeed, the debate today is generally confined to the question of what technically constitutes a “recess” for the purposes of the Clause, treating

Purposes of the Recess Appointments Clause?, 92 MICH. L. REV. 2204, 2246–47 (1994); see also HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS (2013).

2. See Rapport, *supra* note 1, at 1489–90; Carrier, *supra* note 1, at 2204–06.

3. Charlie Savage, *Justice Dept. Defends Obama Recess Appointments*, N.Y. TIMES, Jan. 13, 2012, at A12.

4. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 05, 2012, at A1.

5. Ylan Q. Mui, *Senate Blocks Richard Cordray Confirmation to Head Consumer Watchdog Agency*, WASH. POST (Dec. 8, 2011), http://www.washingtonpost.com/blogs/2chambers/post/senate-republicans-block-cordray-as-obama-consumer-watchdog-nominee/2011/12/08/g1QA6j9BfO_blog.html.

6. Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. I will refer to these appointments as “the Cordray appointment” for the sake of brevity and because the Cordray appointment was the subject of such express opposition before the claimed recess period. See Mui, *supra* note 5.

7. Press Release, The White House, *supra* note 6; see Cooper & Steinhauer, *supra* note 4.

8. U.S. CONST. art. II, § 2, cl. 3.

9. See Carrier, *supra* note 1, at 2209–16; see generally Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013).

as settled the question of whether the Clause can be used to fill a position that the Senate has chosen to leave vacant.¹⁰ In my view, the Clause is now routinely used not only for an unintended purpose, but a purpose that is inimical to core values in our constitutional system. While certainly placing me in a minority, I have long favored the original interpretation of the Clause: that it applies only to vacancies occurring during a congressional recess. This more rigid meaning would have avoided many of the modern controversies that have continued to grow as new interpretations move farther from the plain meaning—and logic—of the Clause.

It has long been accepted that presidents can make recess appointments to vacancies that existed before the recess began.¹¹ However, it has not been accepted that presidents can properly make those appointments during brief breaks of less than three days, a time period derived by reference to the Adjournments Clause.¹² The controversy over the proper use of this power came to a head in the appointment of Cordray and three officials to fill labor board vacancies.¹³ While this is not the first controversy involving recess appointments,¹⁴ the latest appointments are standouts among rather ignoble company in their open defiance and circumvention of congressional opposition. In my view, the appointments can only be justified by discarding both the plain meaning and the long history behind this Clause. Worse still, the appointments directly contradict the intent and purpose of the shared

10. T.J. HALSTEAD, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 3–11 (2005).

11. *Id.* at 7.

12. *See* HOGUE, *supra* note 1, at 3–5.

13. *See Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing before the H. Comm. on the Judiciary*, 112th Cong. 37 (2012) (statement of Jonathan Turley, Professor) [hereinafter *Executive Overreach*]; Cooper & Steinhauer, *supra* note 4; *see also* Jonathan Turley, *Recess Appointments: President as Ruler; Circumventing Congress Is Unwise. Sidestepping the Constitution Is Dangerous.*, USA TODAY, Feb. 15, 2012, at 7A.

14. At the outset, I believe it is worth noting that I believe Mr. Cordray is a well-qualified nominee and he has been treated poorly in the political system. However, the merits of the Cordray appointment or national politics are immaterial. While this article generally supports the congressional confirmation powers, I have also been a critic of congressional practices and rules used to block nominees such as blue slipping regardless of the merits of their nominations. *See* Jonathan Turley, *Seeing Red on Blue Slips*, L.A. TIMES, (May 16, 2001), <http://articles.latimes.com/2001/may/16/local/me-64023>. Blue slipping is a practice that has a negative impact on the entire confirmation process and invites abuse by Senators. *Id.* It is also used by presidents to reinforce claims that recess appointments are justified as countermeasures for such undemocratic procedures. *See* Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 97–98 (2001).

powers under the first two Articles. In the end, the President's contortion of the meaning of the Recess Appointments Clause does not improve our system but introduces the very scourge that the Framers sought to avoid: the concentration of power in one person over federal offices.

The evolution of the meaning of the Recess Appointments Clause showed increasingly dysfunctional practices as the political system moved away from the early understanding of the Clause.¹⁵ In this case, the original meaning of the Clause offered a principled and workable response to long congressional intersession recesses. As each new interpretation stepped further away from that original meaning, recess appointments became more and more controversial.¹⁶ Eventually, presidents were claiming "constructive recesses" of only seconds and using breaks of virtually any length to justify the circumvention of Congress.¹⁷

Modern interpretations of the Clause have reflected dominant functionalist, rather than formalist, interpretations of constitutional text. A "formalist" view of the separation of powers requires the enforcement of separation values with greater involvement of federal courts to police the lines of demarcation between the branches, particularly the legislative and executive branches.¹⁸ Formalist analysis begins with the presumption that "[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories . . . or find explicit constitutional authorization for such deviation."¹⁹ Formalist theories and cases presuppose constitutionally defined and judicially enforced lines that guarantee the value of separation of power as a foundation for the tripartite system of

15. As discussed below, the Supreme Court has made a mess of the area of separation of powers with differing views emerging among the justices. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1565–66 (1991); Erwin Chemerinsky, *A Paradox without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1111 (1987); R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531, 639–41 (1993).

16. See Carrier, *supra* note 1, at 2209–16.

17. See HOGUE, *supra* note 1, at 5–6.

18. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–61 (1990).

19. *Id.* at 858 ("The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.").

government.²⁰ Two of the greatest benefits of formalism are predictability and stability in relations between the branches.²¹

While many past cases have adopted formalist approaches, formalist theory has long been out of vogue in the legal academy in favor of functionalist approaches. Formalism is often dismissed as “inflexible and unrealistic”²² or placing a “straightjacket [on] the government’s ability to respond to new needs in creative ways.”²³ Where formalism offers predictability, functionalism offers adaptability.²⁴ The term “functionalist” is often used as if it has a self-evident meaning as the rejection of formalism.²⁵ Functionalism seeks greater flexibility in the system by focusing on the “basic purposes” of the Constitution as opposed to rigid lines of separation.²⁶ Functionalism is seen as allowing for “workable” changes²⁷ in the role of the branches to reflect the new administrative state while allowing the courts to intervene where changes would fundamentally alter the functioning of the tripartite system—a generally high standard for intervention.²⁸ It is a model of interpretation that invites the use of historical practice as self-affirming support for meaning. However, the controversy over the Clause shows how this theory in practice can offer little beyond a rhetorical patina for departing from the text. Indeed, courts rationalize their refusal to intervene in these disputes by citing the fact that the branches have other means of protecting their constitutional turf and responding to recess appointment

20. *Id.* at 857–58.

21. See William N. Eskridge, Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998).

22. See Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 439 (1987).

23. Brown, *supra* note 15, at 1526.

24. Eskridge, *supra* note 21, at 21.

25. Sargentich, *supra* note 22, at 433.

26. See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

27. See Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990).

28. As Professor John Manning recently noted:

[T]he Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like. In light of that complex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.

John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011).

controversies.²⁹ That approach has led to demonstrably dysfunctional practices under loose claims of functionalism by the courts.³⁰ With the recess appointment controversy now heading to the Supreme Court and a split in the circuits on the issue, the insular question of what constitutes a legitimate recess appointment will likely be resolved.³¹ The legitimacy of the historical practice approach to interpretation, however, demands equal attention for a myriad of interpretative questions.

This Article looks at the history of the Clause and how it has evolved from its plain meaning into an ambiguous, ill-defined standard. This has occurred in the virtual absence of judicial interpretation as courts have steadfastly avoided intervening in recess appointment controversies.³² This pattern of judicial avoidance is discussed below. The evolution in the meaning of the Clause, however, is evident in the different interpretations given to the Clause by past Attorneys General. This includes the recent opinion issued by the Obama Administration to justify the Cordray nomination. These interpretations move progressively away from the original (and coherent) meaning of the Clause, propelled by political expedience during periods of sharp partisan divisions.

The Article explores how past interpretations rely on historical practices and claims of congressional acquiescence as the basis for the broader interpretation of the Clause. Part I looks at the language and the original meaning of the Clause, particularly in light of the different (and longer) forms of recess that existed at the time. Part II explores how the relative clarity of the language and original meaning were gradually lost in a series of interpretations by past presidents—interpretations that reflected periods of sharp political divisions. These interpretations largely came from Attorneys General due to the general judicial avoidance by courts in addressing controversies over recess appointments. The latest such interpretation can be found in the recent detailed defense of the four recess appointments by the Obama Administration. Part III specifically looks at the concept of an *intrasession* recess appointment as opposed to an *intersession* recess

29. Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 111–12 (2006).

30. See *infra* note 31 and accompanying text.

31. *Canning v. NLRB*, 705 F.3d 490, 506 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281). The D.C. Circuit held that the term “recess” applies only to intersession recesses, or recesses which occur between two sessions of Congress. *Canning*, 705 F.3d at 506–07. The Third and Fourth Circuits reached the same result for different reasons. See *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218–19, 221, 236 (3d Cir. 2013); *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 646–51 (4th Cir. 2013). Those circuits conflict on the question with the Eleventh Circuit. *Evans v. Stephens*, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (en banc).

32. See Pyser, *supra* note 29, at 111.

appointment. Using the Cordray appointment as an illustrative context, the Article shows how the current interpretation of the Clause takes the concept of a recess beyond any logical and credible point. Part IV looks more closely at one of the key elements of the broad interpretations used by past administrations: historical practice or congressional acquiescence.

The broad interpretation of the Clause is justified by the fact that presidents have used transparently short recesses, both intrasession and intersession, to make appointments.³³ In light of this practice and the failure of Congress to deter such appointments, the meaning of the Clause is presumed to be much broader. The use of historical practice in the interpretation of the Clause ignores the purpose of the Clause specifically and the separation of powers generally in avoiding the concentration of power. It creates a type of constitutional adverse possession where the simple success of a president in usurping congressional territory is treated as proof of the validity of the underlying interpretation. Like the property doctrine, courts allow the acquisition of title to constitutional territory after “the claimant [demonstrates] exclusive possession that is open, notorious, continuous, and adverse” for a sufficiently long period.³⁴ Of course, in this form of adverse possession, the original holder of the territory, Congress, has long contested the possession of the power in many of these cases. However, the fact that presidents have continued the use of the power has been taken as proof that the Clause has a broad meaning in favor of the Executive Branch.³⁵ This has allowed presidents to adversely possess an area left to Congress to maintain balance within the system. While this fundamental disagreement now appears headed to the courts,³⁶ it is clear that this disagreement is likely to continue and even grow more acute in the coming years. While this Article clearly favors a more restrictive interpretive approach, the Cordray controversy should serve to highlight the insufficiency of historical practice rationales and the need to tether

33. Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235, 260 (2008); Carrier, *supra* note 1, at 2212–13 n.48.

34. *Evanich v. Bridge*, 119 Ohio St. 3d 260, 2008-Ohio-3820, 893 N.E.2d 481, 483.

35. Hein, *supra* note 33, at 241–42.

36. Various groups have taken steps to challenge the law in court, and members of Congress have indicated that they are ready to join such lawsuits. Seung Min Kim, *Republicans Join Challenge of Recess Appointments*, POLITICO (February 3, 2012), <http://www.politico.com/news/stories/0212/72422.html>. At least one appears to have strong claims for standing. See Jim Puzanghera, *Suit Targets Consumer Watchdog*, L.A. TIMES, June 23, 2012, at B1.

interpretations closer to both the text and purpose of constitutional provisions like the Recess Appointments Clause.

I. THE LANGUAGE AND ORIGINAL MEANING OF THE RECESS
APPOINTMENTS CLAUSE

The controversy over the Recess Appointments Clause presents a classic problem of constitutional interpretation with textual, intentional, and purposive elements. What is fascinating is that the Clause itself seems to align all of the traditional approaches of interpretation in favor of a more restrictive meaning of the appointment power. The text of the Clause, while not expressly stating a limit on the time necessary for a legitimate recess, does strongly indicate a true recess as opposed to an intrasession break in Senate business. Moreover, the overwhelming weight of evidence from the structure, intent, and purpose of the constitutional provisions strongly militates in favor of the more limited meaning of the Clause. As discussed later in the Article, a more significant difference is found when one views the question from a formalist versus a functionalist perspective.³⁷

However, one should first start with the text of the Constitution and what the Framers said about its purpose. Article II, Section 2, Clause 3 of the U.S. Constitution states: “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.”³⁸ The meaning of the words “that may happen during the Recess of the Senate” is the heart of the controversy.³⁹ On their face, the words imply that the vacancies themselves should arise during the recess period, as opposed to previously vacant positions that the Senate chose not to fill with a confirmation vote. The words “may happen during the Recess” are clear and plain in their meaning. Most people would conclude that something

37. See *infra* notes 389–95 and accompanying text.

38. U.S. CONST. art. II, § 2, cl. 3.

39. For prior discussions of the recess appointment controversy, see Hartnett, *supra* note 1, at 381–83; Hein, *supra* note 33, 238–39; Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 443 (2005); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 516–17 (2003–04); Pyser, *supra* note 29, at 68–69; Rappaport, *supra* note 1, at 1501–02; Carrier, *supra* note 1, at 2212–13 n.48; Stuart J. Chanan, Comment, *Constitutional Restrictions on the President’s Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 196–97 (1984); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1759 (1984); see also HOGUE, *supra* note 1, at 2–3.

“happens” during a period by occurring within the specified period.⁴⁰ Merriam-Webster defines “happens” as “to come into being or occur as an event, process, or result.”⁴¹ The event referenced in the Clause is the recess and the thing that comes into being within that event is the vacancy.

The text preceding this clause is also relevant and reinforces this plain meaning. The Recess Appointments Clause follows the Appointments Clause, which describes the confirmation process and provides for shared powers in the appointment of high-ranking officials. Article II, Section 2, Clause 2 of the U.S. Constitution states:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁴²

In the Appointments Clause, the Framers state twice that such appointments could only be made with “the Advice and Consent of the Senate.” It is a critical check and balance provision that the two branches must agree on who should sit on federal courts and in federal offices. As Governor Morris explained, “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”⁴³ Thus, the Recess Appointments Clause is written as an exception to this general rule in the event that vacancies “happen during the Recess of the Senate.” Notably, there is no suggestion that the Clause is intended to allow an alternative to the confirmation process to be used on an opportunistic basis or in retaliation for a nomination that was not

40. This includes individuals like Joseph Story, who stated that the purpose of the Recess Appointments Clause was to give the President authorization “to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject.” Story’s Commentaries, § 1551, *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 122 (Philip B. Kurland & Ralph Lerner eds., 1987).

41. Happens Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/happens> (last visited September 12, 2013).

42. U.S. CONST. art. II, § 2, cl. 2.

43. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539 (Max Farrand ed., rev. ed. 1966).

confirmed.⁴⁴ To the contrary, the values of shared power stated repeatedly in the preceding clause indicate that those are the defining values for the interpretation of the Recess Appointments Clause. A president must convince Congress on the merits of a confirmation and Congress may withhold its consent for good reason, bad reason, or no reason at all. That is the nature of a shared power of nomination and confirmation. As the Court stated in *Edmond v. United States*,⁴⁵ the confirmation power “serves both to curb Executive abuses of the appointment power” and “to promote a judicious choice of [persons] for filling the offices of the union.”⁴⁶

Even if one dispenses with the plain meaning of the Clause, the language, at a minimum, closely tethers the meaning to the inability to fill a position during a recess. What it does not indicate or support is the idea that the recess bears the same meaning as it does in elementary school: a time to play outside of the usual rules.⁴⁷ The language states that the Clause is there for appointments that cannot be addressed by Congress due to its absence.

Unfortunately, the language was adopted in the Constitutional Convention without any recorded debate⁴⁸—denying us a contemporary record on the intent of the Framers at that time.⁴⁹ What is known is that North Carolina delegate Richard Dobbs Spaight introduced the Clause soon after the adoption of the Appointments Clause.⁵⁰ The North Carolina Constitution had such a provision and Spaight saw the need for a parallel provision in the federal constitution to allow for the Recess Appointments Clause.⁵¹ The importation of the Clause from the North Carolina Constitution adds an interesting dimension to the record since

44. *Dick v. United States*, 208 U.S. 340, 353 (1908) (stating that “[constitutional] principles are of equal dignity, and . . . must [not] be so enforced as to nullify or substantially impair the other”).

45. 520 U.S. 651 (1997).

46. *Id.* at 659 (alteration in original) (citation omitted) (quoting THE FEDERALIST NO. 76, at 386–87 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987)).

47. Turley, *supra* note 13.

48. The records from the Constitutional Convention were spotty. There may have been some discussion, but it was not recorded. Indeed, there must have been some discussion when Spaight explained the reason for his proposal. Given the concerns raised in state ratification conventions over presidential abuse, such matters may have been discussed. However, there is no record of any controversy on the point. As in other areas of relative silence, it would be a mistake to read much into the absence of a record on either side of this debate.

49. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 43, at 533, 540.

50. *Id.* at 540.

51. *Id.*; N.C. CONST. OF 1776, § 20, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978).

North Carolina was viewed by Madison and others as having the most robust version of legislative powers vis-à-vis executive powers.⁵² Indeed, the chief executive of the state was selected by the legislature.⁵³ In recess appointments, the governor had to act with advice of the Council of State.⁵⁴ While one cannot assume a similar intent from the other framers in adopting the Clause, the understanding of Spaight (who was one of the most influential figures in North Carolina politics)⁵⁵ as to the limitations of executive power would have been significant to the extent he was trying to replicate the North Carolina provision for recess appointments.

The North Carolina provision had language that is quite similar, though it was slightly more descriptive of the cause of the vacancy:

That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, 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.⁵⁶

The federal version is more streamlined. The Framers often removed superfluous language, and there seems little reason to specify death in office when the provision also includes the power to fill an “office [that] by other means become vacant.” The thrust of the North Carolina language, however, was carried over into the federal clause. The action of “filling up” a vacancy is limited to a period defined by the legislative sessions and the clear intent is to address a vacancy occurring during the period when the legislature is not in session.

Notably, even past Attorneys General who have broadened its meaning have admitted that the most natural reading of the Recess Appointments Clause would favor the view that it was intended to address vacancies that occur during a recess.⁵⁷ This is not to say that such an eventuality was viewed as unlikely or uncommon. To the contrary, it was anticipated that the Clause would be used with some regularity

52. See Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2054 (1999).

53. *Id.*

54. N.C. CONST. OF 1776, § 20, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978).

55. LOUISE IRBY TRENHOLME, THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA 73 (1932).

56. N.C. CONST. OF 1776, § 20, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978).

57. See *Executive Overreach*, *supra* note 13, at 37.

because, during this period, Congress was commonly in recess for much of the year.⁵⁸ Members had to travel far distances on horseback or carriage, often along dirt roads, to meet.⁵⁹ It was not uncommon, therefore, for a recess to last six or even nine months.⁶⁰ The first ten recesses in the early Congresses averaged seven months.⁶¹ During those years, critical federal positions such as the Chief Justice of the Supreme Court would have to remain vacant absent the power to temporarily fill the positions until Congress returned. Even with shorter periods, including some periods of just a few weeks of recess, vacancies had a far greater impact in the early Republic than they do today. There were fewer federal offices, including only a six-member Supreme Court.⁶² Accordingly, a vacant office would often mean an office that did not function. The United States did not have a Vacancies Act⁶³ at that time to guarantee that work continued in the absence of a confirmed official.

The historical context of the Clause is lost in much of the modern debates over its meaning. Indeed, it is often suggested the Clause would become largely meaningless were it limited to vacancies that occur during a recess or even if limited to more substantial recesses.⁶⁴ Since the vast majority of modern vacancies “happen” before a recess, it would be rare to have a valid recess appointment. However, this complaint misses the point: the diminished importance of the Clause is caused by changes to Congress’ schedule, not to the original constitutional function of the

58. Turley, *supra* note 13.

59. *Executive Overreach*, *supra* note 13, at 37, 83.

60. Turley, *supra* note 13.

61. U.S. GOV’T PRINTING OFFICE, 1993–94 OFFICIAL CONGRESSIONAL DIRECTORY, 103D CONG. 580 (1993).

62. Notably, however, recess appointments to the Supreme Court were not generally used to exercise the power of that office: “[o]f the twelve recess-appointments to the Court prior to the Eisenhower appointees, only two had heard cases prior to their confirmation.” Mayton, *supra* note 39, at 520 (citing acting Chief Justice John Rutledge and acting Associate Justice Benjamin Curtis).

63. The Vacancies Act was enacted in 1868. 5 U.S.C. §§ 3345–3349d (1998). It allowed for the filling of positions subject to presidential appointment with Senate confirmation (PAS appointments). *Id.* It allowed for “Acting” officers to fulfill the duties of the absent PAS official. *Id.* It was amended by the Federal Vacancies Reform Act of 1998 (Vacancies Reform Act) in 1998. Pub. L. No. 105-277, Div. C, tit. 1, § 151, 112 Stat. 2681–611, codified at 5 U.S.C. §§ 3345–3349d (1998).

64. See Hartnett, *supra* note 1, at 426 (“[A]ny attempt to distinguish between intersession and intrasession recesses and limit recess appointments to the former invites ultimately futile manipulation—or worse, escalation of battles between the President and the Senate. If recess appointments can be made only during intersession recesses, and not during intrasession recesses, Congress might attempt to eliminate intersession recesses—and the recess appointment power.”). Much of the concern is focused on congressional manipulation of the schedule to circumvent the recess appointment power (as opposed to the partly artificial distinctions drawn by presidents to circumvent the confirmation power). *See id.*

Clause. At the time it was drafted and for much of our history, such recess vacancies were indeed quite common with Congress out of session for many months at a time.⁶⁵ Presidents Jackson, Taylor, and Lincoln alone made hundreds of recess appointments during their terms out of necessity with Congress out of town.⁶⁶ While “provisional appointments” were seen as strengthening a nominee’s chances for confirmation,⁶⁷ the early recess appointments were justified by the long intersession periods of Congress.⁶⁸

This more limited interpretation is supported by early defenses and descriptions of the Clause. When various leaders at the time objected to the dangers of a President making unilateral appointments, even on a temporary basis, Alexander Hamilton and other advocates emphasized that the Clause was a limited precaution to handle vacancies.⁶⁹ In *The Federalist Papers*, Alexander Hamilton referred to the recess appointment power as “nothing more than a supplement” to the process of appointment.⁷⁰ There was never a suggestion that the confirmation process was “inadequate” due to congressional opposition or delay of a preexisting vacancy.⁷¹ Rather, the inadequacy referenced the inability of a vacancy to be filled.⁷² Hamilton went on to stress that the Clause was designed in recognition that Congress could not be expected to remain in session continually:

The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other; for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the president and senate *jointly*, and can therefore only be exercised during the session of the senate: but, as it would have been improper to oblige this body

65. *Executive Overreach*, *supra* note 13, at 37.

66. VIVIAN S. CHU, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 2 (2005).

67. Then-Senator John Quincy Adams, Jr., wrote to his father, President John Adams, advocating that such “provisional appointments” be made so that “when the Senate meet, the candidates proposed to their consideration are already in possession of the office to which they are to be appointed.” JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 255 (1968).

68. Turley, *supra* note 13.

69. *THE FEDERALIST* NO. 76, at 346 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987).

70. *Id.*

71. *Id.*

72. *Id.*

to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause [the Recess Appointments Clause] is evidently intended to authorise the president, *singly*, to make temporary appointments⁷³

Hamilton again referenced the limited recess appointments power as occurring only when the joint power over federal offices shared with the Senate cannot be practically realized. This meaning was reaffirmed in 1799 when Hamilton was asked by the Secretary of War about the meaning of the Clause.⁷⁴ Hamilton, then serving as Major General of the Army, strongly contested any claim that a recess appointment could be used to fill a preexisting vacancy: “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.”⁷⁵

During the North Carolina ratification debate, Archibald Maclaine also rose to address concerns over the use of the Clause to circumvent Congress.⁷⁶ In his statement, he referred to the fears of a president using the Clause to make unilateral appointments.⁷⁷ He assured his colleagues that the president would be given this limited authority simply because he would be the only official who does not go into recess but rather remains active throughout his term:

It has been objected . . . that the power of appointing officers was something like a monarchical power. Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences.⁷⁸

73. *Id.*

74. 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976).

75. *Id.*

76. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 135–36 (Jonathan Elliot ed., 2d ed. 1863).

77. *Id.* at 135.

78. *Id.*

The North Carolina debates are particularly interesting since, as noted above, the origin of the Clause can be traced to the similar provision in that state constitution.⁷⁹ Maclaine's description captures the same functional necessity in the federal Clause. Maclaine emphasized that the Senate would simply not be available "to advise [the President] in the appointment of officers" because it would sit only "from time to time."⁸⁰ Clearly, a vacancy that preexisted a recess would have allowed for such advice from the Senate, including advice that a nominee is opposed by Senators or unlikely to receive sufficient votes. Likewise, the use of a brief interruption of less than three days would not reflect the obvious purpose of the Clause to avoid the "public inconveniences" of a position going months without an official. The "monarchical power" described by critics also captures the countervailing fear that this is a power that could be used to circumvent the legislative branch. However, the response by supporters of the Clause to the monarchical concern amplified the plain meaning of the language. They insisted the Clause itself contained its own limitation in restricting appointments to vacancies occurring during a recess.⁸¹ Thus, the Clause was adopted with the understanding that it would not be put to the very use that Obama and other presidents have chosen: to circumvent opposition in Congress.⁸²

79. N.C. CONST. OF 1776, § 20, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 406 (William F. Swindler ed., 1978).

80. Other references to the clause were quite limited and often only restated the terminology of the Clause. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 534 (Jonathan Elliot ed., 1901) (statement of Thomas M'Kean) ("Nor need the Senate be under any necessity of sitting constantly, as has been alleged; for there is an express provision made to enable the President to fill up all vacancies that may happen during their recess . . .").

81. Rappaport, *supra* note 1, at 1518–19.

82. Even critics of the appointments provisions (of giving a President too much power) recognized the limitations posed by the language requiring a vacancy to occur during a recess. Ironically, even with this limitation, they viewed the provision as too broad and would thus find the current interpretation all the more disturbing. One such example is St. George Tucker, a leading commentator on the United States Constitution. Tucker warned that a president could effectively daisy-chain recess appointments while having satisfied the plain meaning on the occurrence within a recess:

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

The original purpose and limitations of the Clause fit squarely within the underlying philosophy of the Madisonian system. Madison and his colleagues sought to create a system of checks and balances between the branches. The nomination/confirmation power is the classic balancing of powers. The creation of an exception of necessity in recess appointments was a measured and obvious move. In this sense, the Obama Administration's recent interpretation is the ultimate example of an exception swallowing the rule. It would be antithetical to the Madisonian system for the framers to create this careful balancing of powers and then establish an option where a president could unilaterally exercise the power, even for the appointment of "acting" officials.⁸³

As presidents sought to broaden their use of recess appointments, the meaning of "vacancies" expanded to refer to any vacancy that arose at any time for any reason.⁸⁴ This effectively read out of the Clause any limiting meaning associated with vacancy despite the emphasis on the term for that function by people like Hamilton. The result was not only to negate the meaning of this core term in the Clause but also to place the modern emphasis on the term "recess." However, the more obvious limiting term may be "session." After all, the Framers created this power to make appointments when Congress was not in session.⁸⁵ A "recess" referred to the period between sessions. The Framers clearly intended for the Appointments Clause to govern during sessions. Yet, there is rarely much attention given to the original understanding of the term "session" in later interpretations. Rather, the focus is on the development of new

commission. And thus it is evidently in the power of the president to continue any person in office, whom he shall once have appointed in the recess of the senate, as long as he may think proper.

ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 279–80 (1999); *see also* Rappaport, *supra* note 1, at 1521.

83. While conflicting with the general philosophy of the Madisonian system and the specific purpose of the Recess Appointments Clause, the Cordray controversy is consistent with a line of policy changes in the Obama Administration that have served to increase the relative power of the presidency. Jonathan Turley, *Ten Reasons We're No Longer the Land of the Free*, WASH. POST, Jan. 15, 2012, at B01. Indeed, this aggregation of executive power has come close to realizing Nixon's model of an Imperial Presidency. Steven Chapman, *Mirror Images?*, CHI. TRIB., Jan. 5, 2012, at C21.

84. Rappaport, *supra* note 1, at 1502. Madison himself was involved in an expansion of the meaning of another aspect of the Clause in 1813 when he appointed officers during the recess of the Senate to negotiate the Treaty of Ghent. The Senate later protested that this was not a "vacancy of any existing office" since it arose as part of the Treaty negotiations. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1559, at 366 (Boston, Little, Brown & Co., 1873). However, Madison could cite to the purpose of the Clause of avoiding the problem of having long vacancies at a time when Congress would be out of session for months, particularly when an important treaty had to be negotiated.

85. Rappaport, *supra* note 1, at 1489–91.

types of sessions like “pro forma” sessions.⁸⁶ Yet, the Framers had a clear concept of what a session was and not only left the matter of adjournment to both houses to jointly decide, but left each house to “determine the Rules of its Proceedings.”⁸⁷ Later, one of the most concrete provisions was added, specifying the start of a congressional session in the Twentieth Amendment and requiring that “Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January.”⁸⁸ While the Obama Administration would argue in the Cordray controversy that the determination of what is a “functional” session must rest with the President, these provisions suggest the opposite: the deference should run to Congress in defining its sessions and recesses. Yet, as discussed below, the Clause evolved from a clear-meaning interpretation to a more fluid interpretation as presidents struggled with reluctant or hostile congresses.

II. THE SEARCH FOR AMBIGUITY: THE EVOLUTION OF THE MEANING OF THE RECESS CLAUSE FROM CLARITY TO CONFUSION

The evolution of the Clause’s language reflects more changes in political exigencies than the meaning of language. Presidents increasingly chafed at the use of appointments as a check on their authority and a bargaining chip with Congress.⁸⁹ The results were transparently opportunistic reinterpretations of the language.⁹⁰ These interpretations came from the Justice Department, which has often seemed in an argument with itself with every new expansive reading following a rejection of the prior, more limited meaning given by the Department.⁹¹ That has produced impressive stratigraphic layers of Justice Department interpretations that not only track the changing legal meaning, but also the changing political times in interbranch relations.⁹²

86. HOGUE, *supra* note 1, at 5 (defining a pro forma session as a “short meeting[] of the Senate or the House held for the purpose of avoiding a recess of more than three days and therefore the necessity of obtaining the consent of the other House”).

87. U.S. CONST. art. I, § 5, cl. 2.

88. U.S. CONST. amend. XX, § 2.

89. See Rappaport, *supra* note 1, at 1489–90.

90. Ironically, due to a clear judicial avoidance of intervening in these conflicts and the difficulty of standing in such cases, there have been more published opinions by Attorneys General and federal courts. See *Evans v. Stephens*, 387 F.3d 1220, 1221–27 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1009–14 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 709–15 (2d Cir. 1962); *In re Yancey*, 28 F. 445 (W.D. Tenn. 1886); *In re Farrow*, 3 F. 112 (N.D. Ga. 1880); *Schenk v. Peay*, 21 F. Cas. 672, 674–75 (E.D. Ark. 1869); *Case of Dist. Attorney of U.S.*, 7 F. Cas. 731, 731–34 (E.D. Pa. 1868).

91. See *supra* note 90 and accompanying text.

92. See *supra* note 90 and accompanying text.

Where clarity of the division of powers is often sought in the separation of powers,⁹³ these interpretations have striven to find ambiguity to create more options for presidents in dealing with congressional opposition.

Virtually every Attorney General in history has addressed the question of the scope of the recess appointment power since the founding.⁹⁴ Most such opinions have reaffirmed earlier meanings or made small adjustments to the practiced use of the recess appointments.⁹⁵ However, there has not been an uninterrupted expansion of meaning. Against their own institutional interest, some Attorneys General have balked at the convenient broadening of the interpretation and supported the original plain meaning.⁹⁶ A few of the more significant interpretations are worth considering.

A. *Randolph Interpretation*⁹⁷

The earliest interpretation by the Executive Branch reflected the same narrow view that emerges from the period of drafting and ratification. Thus, in 1792, Thomas Jefferson (then Secretary of Foreign Affairs) raised the meaning of the Clause with Edmund Randolph, the first Attorney General. Randolph is a particularly interesting source for interpreting the Clause since he was one of the most influential members of the Constitutional Convention (and was a member of the important Committee on Detail).⁹⁸ Randolph came down squarely on the side of the plain meaning of the Clause—that it applies only to vacancies arising

93. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

94. See, e.g., Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), reprinted in 24 THE PAPERS OF THOMAS JEFFERSON 165–67 (John Catanzariti et al. eds., 1990); 1 Op. Att’y Gen. 631 (1823); 2 Op. Att’y Gen. 525 (1832); 3 Op. Att’y Gen. 673 (1841); 7 Op. Att’y Gen. 186 (1855); 10 Op. Att’y Gen. 356 (1862); 12 Op. Att’y Gen. 32 (1866); 12 Op. Att’y Gen. 455 (1868); 14 Op. Att’y Gen. 562 (1875); 15 Op. Att’y Gen. 207 (1877); 16 Op. Att’y Gen. 522 (1880); 16 Op. Att’y Gen. 538 (1880); 17 Op. Att’y Gen. 530 (1883); 18 Op. Att’y Gen. 28 (1884); 18 Op. Att’y Gen. 29 (1884); 19 Op. Att’y Gen. 261 (1889); 26 Op. Att’y Gen. 234 (1907); 30 Op. Att’y Gen. 314 (1914); 33 Op. Att’y Gen. 20 (1921); 41 Op. Att’y Gen. 463 (1960).

95. See *supra* note 94 and accompanying text.

96. See, e.g., Randolph, *supra* note 94.

97. Portions of this section are largely taken from *Executive Overreach*, *supra* note 13.

98. The former governor of Virginia, Randolph was himself a prior Chief Executive with appointment powers. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 58 (Fred B. Rothman & Co. 1993) (1928). He served as personal counsel to George Washington and would later serve as Secretary of State, as the office is now known. See 2 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787, at 641 (2005). Randolph presented the “Virginia Plan” that laid the foundation for the structural compromise for the new federal system. *Id.*

during a recess.⁹⁹ On July 7, 1792, Randolph issued his opinion only a few years after the ratification of the Constitution.¹⁰⁰ Unlike modern interpretations (including the recent opinion of the Office of Legal Counsel on the Cordray appointment), Randolph's interpretation ran not only against his own immediate interest, but also against that of the Jefferson Administration. Jefferson wanted to know if a recess appointment could be used to install the new Chief Coiner of the Mint.¹⁰¹ Since this was a new position, Jefferson asked if the position could be viewed as a vacancy arising during a recess.¹⁰² After all, no nomination had been made before the recess. Randolph, however, demurred and said that the vacancy did not fit the extremely narrow meaning and purpose of the Clause.¹⁰³ He posited that the vacancy "happened" not during the recess, but when the position was created.¹⁰⁴ To use the Recess Appointment Clause in such a circumstance, he insisted, would violate the "spirit of the Constitution"¹⁰⁵ Moreover, Randolph warned that the Recess Appointments Clause had to be "interpreted strictly" because it represented "an exception to the general participation of the Senate."¹⁰⁶ Both Hamilton and Randolph's interpretations appear to be the most faithful to the language and history of the Clause.

For much of our history, hundreds of officials were given recess appointments by presidents—from George Washington to Abraham Lincoln—out of true necessity.¹⁰⁷ This included appointments to the judiciary, despite the conflict with the provision of lifetime tenure to

99. Randolph, who was one of three delegates who refused to sign the Constitution, notably included the recess appointment power as one of his chief objections (at least as it concerned judicial appointments) communicated to the Virginia House of Delegates on October 10, 1787. Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 123, 127 (Max Farrand ed., 1911). However, he eventually supported the Constitution and defended it in the Virginia ratification convention. 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 299–300 (1882). At the time of the state convention, he was Governor of Virginia. *Id.* at 299.

100. Randolph, *supra* note 94, at 165–67.

101. *Id.* at 166.

102. *Id.* at 165–66.

103. *Id.* at 166.

104. *Id.*

105. *Id.*

106. *Id.*

107. See Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1383–86 (2006). The account of the disastrous appointment of John Rutledge shows the urgency felt by presidents like Washington. *Id.* With a relatively small court it was viewed as essential that a Chief Justice be in place for the start of the session. *Id.* At one point, Washington was seeking to appoint Patrick Henry in part because he thought he would be in town and available. *Id.* at 1386–87.

guarantee the independence of judicial review.¹⁰⁸ Ironically, some of these appointments proved the wisdom of requiring confirmation. For example, U.S. Supreme Court Chief Justice John Jay resigned in 1795, during a long congressional recess, to assume the post of Governor of New York—a post that he ran for while still sitting on the bench.¹⁰⁹ With Congress out of session, George Washington appointed John Rutledge of South Carolina to serve as Chief Justice of the Supreme Court on June 30, 1795.¹¹⁰ Rutledge was himself a member of the Constitutional Convention and chaired the important Committee of Detail.¹¹¹ A successful lawyer, Rutledge was a central leader of the Revolution in South Carolina.¹¹² However, he was later described by South Carolinian members as prone to “mad frolics” and “frequently so much deranged, as to be in a great measure deprived of his senses.”¹¹³ Rutledge also “tried repeatedly to drown himself in various rivers before finally resigning within a year of his appointment.”¹¹⁴ Had Rutledge been subject to the confirmation process, his “mad frolics” may have been addressed.¹¹⁵ Both Rutledge’s injudicious public comments on the Jay Treaty (alienating Federalist members)¹¹⁶ and his obvious mental derangement may have led the Senate to reject his confirmation.¹¹⁷ Yet, the appointment fit the standard set by Edmund Randolph (who ironically served with Rutledge as a member of the Committee of Detail

108. *Id.*

109. Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 125.

110. It was Rutledge himself who sought out this appointment from Washington. Mayton, *supra* note 39, at 534.

111. See John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 774–75 (1990).

112. See Jonathan Turley, *The Top Nine Justices of All Times*, AM. HIST. MAG., Sep. 2009, at 1.

113. Jonathan Turley, *When Justices Won't Go*, L.A. TIMES, (August 13, 2005), <http://articles.latimes.com/2005/aug/13/opinion/oe-turley13>.

114. *Id.*

115. Ironically, Rutledge was previously confirmed as an Associate Justice on the Supreme Court in 1789, but he chose the “more prestigious” position of Chief Justice of the South Carolina Court of Common Pleas and Sessions. See Wexler, *supra* note 107, at 1384–85. His recess appointment as Chief Justice came in 1795. Rotunda, *supra* note 109, at 125.

116. Mayton, *supra* note 39, at 535. Attorney General Bradford recognized the problem in a letter to Alexander Hamilton: “That crazy speech of Mr. Rutledge, joined to certain information that he is daily sinking into debility of mind and body, will probably prevent him receiving the appointment . . .” 19 THE PAPERS OF ALEXANDER HAMILTON 87 (Harold S. Syrett ed., 1973). Rutledge resigned his recess appointment after participating in only two decisions. Mayton, *supra* note 39, at 535.

117. See *supra* notes 112–14 and accompanying text.

and a Framers of the Constitution).¹¹⁸ The most prominent factors influencing these appointments were the long congressional recesses and the greater relative importance of filling offices in the smaller federal government.

B. *The Wirt Interpretation*¹¹⁹

It was not until roughly four decades after the adoption of the Constitution that a more liberal interpretation of the Clause was put forward by Attorney General William Wirt.¹²⁰ Wirt's interpretation not only failed to mention the view of the first Attorney General, but dismissed the statements of contemporaries on its meaning.¹²¹ Wirt interpreted the Clause to mean that recess appointments could be made for any vacancies that existed during the Recess, as opposed to occurring during the Recess.¹²² While acknowledging that the "opposite construction is, perhaps, more strictly consonant with the mere letter" of the Clause, he insisted that the more liberal interpretation was in keeping with the Clause's "spirit, reason, and purpose . . ."¹²³ It was a highly opportunistic interpretation, which was (not surprisingly) eagerly embraced by later presidents desiring a broader range of recess appointments.¹²⁴

Wirt's interpretation placed the avoidance of vacancies as the preeminent and overriding purpose of the Clause. "The substantial purpose of the constitution," he said, "was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed."¹²⁵ What is missing from this analysis is the countervailing purpose of the Constitution to compel both branches to work together in

118. The Committee was composed of John Rutledge (South Carolina), Edmund Randolph (Virginia), Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), and James Wilson (Pennsylvania). 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 43, at 106. John Rutledge would later become relevant in a different way to the meaning of the Recess Appointments Clause.

119. Portions of this section are largely taken from *Executive Overreach*, *supra* note 13.

120. Notably, this was not the first time that Wirt and Randolph found themselves on opposite sides of a legal issue. Wirt was one of the lawyers prosecuting Aaron Burr in 1807, and Burr's defense included Edmund Randolph. Brent Tartar & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1809*, 49 AM. J. LEGAL HIST. 257, 280 (2007).

121. Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823).

122. 1 Op. Att'y Gen. at 633.

123. 1 Op. Att'y Gen. at 633–34.

124. Notably, as will be discussed below, the recent OLC opinion goes even beyond the Wirt interpretation. *See infra* Part II.D.

125. 1 Op. Att'y Gen. at 632.

filling these positions, which is the substantial purpose of the preceding Appointments Clause.

Wirt effectively converted the words “as may happen to occur during the Recess” in the Clause to “as may happen *to exist* during the Recess.” Vacancies could “happen to exist” for a number of reasons, including the Senate’s opposition to the candidate or a president’s gaming the system for a recess appointment. In refashioning the language, Wirt made the existence of a vacancy the sole and outcome-determinative consideration, stating that he found it “highly desirable to avoid a construction” that would produce the “pernicious” and “ruinous” result of allowing a vacancy to continue through a recess.¹²⁶ To reinforce his view, Wirt hypothesized a variety of exigent circumstances:

It may arise from various other causes: the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions: a sudden and destructive pestilence, disabling or destroying a quorum of that body; such an invasion of the enemy as renders their reassemblage elsewhere impracticable or inexpedient; and a thousand other causes which cannot be foreseen. It may arise, too, from their rejecting a nomination by the President in the last hour of their session, and inadvertently rising before a renomination can be made.¹²⁷

The parade of horrors offered by Wirt is notably less relevant to the modern context for recess appointments. All of these examples presuppose the type of lengthy recess that existed at the time with months of inactivity. Moreover, Wirt highlights problems with delays in notification of such things as the death of an official in a far off part of the country—a death that would today be almost immediately known. Congress has even prepared for disaster like the loss of the capital city, let alone the Capitol building.¹²⁸

The actual appointments dispute leading to the Wirt interpretation may reveal the real motivating concern for the broader reading of the Clause. Notably, the necessity of the recess appointment was not prompted by any of the occurrences Wirt listed, and there is no indication that the appointment could not have been handled in the

126. *Id.*

127. *Id.* at 633.

128. FRANK GROTTROU & DANA SHEA, CONG. RESEARCH SERV., R41123, FEDERAL EFFORTS TO ADDRESS THE THREAT OF BIOTERRORISM: SELECTED ISSUES FOR CONGRESS (2010).

regular course of business during the session. The interpretation appears to be a deliberate effort to loosen the grip of Congress over federal appointments. At issue was the desire to fill a position of a Navy agent in New York that became open during the Senate term and remained open into the intersession recess. The context would certainly not lend itself to the establishment of a sweeping interpretation, but Wirt did his best:

[I]f we interpret the word “happen” as being merely equivalent to “happen to exist,” (as I think we may legitimately do), then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished.¹²⁹

It is a prophetic choice of words: the use of the power to address “all vacancies . . . from any casualty.” The common “casualty” in controversial appointments like Cordray’s is the existence of congressional opposition to confirmation. The “casualty” is the very right of advice and consent created in the preceding Appointments Clause. Accordingly, it is not surprising that recess appointments under the Wirt interpretation sanctioned flagrant efforts to circumvent Congress during periods of political division.

C. The Daugherty Interpretation

While Wirt reconstructed the critical language of the Clause to “happen to exist,” it was his successor Attorney General Harry Micajah Daugherty who took that broader interpretation and combined it with a heavy deference to the President in deciding when the recess power could be used.¹³⁰ It is the Daugherty interpretation from 1921 that is cited more heavily by later Attorneys General, including the recent opinion on the Cordray controversy by the Office of Legal Counsel.¹³¹ Daugherty insisted that it was up to the President to decide whether a recess appointment is permissible based on whether the adjournment of the Senate is of such duration that the Senate could “not receive communications from the President or participate as a body in making appointments.”¹³² The emphasis on this functional test inevitably raises

129. 1 Op. Att’y Gen. at 633.

130. Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 25 (1921).

131. Lawfulness of Recess Appointments during a Recess of the Sen. Notwithstanding Periodic Pro Forma Session, 36 Op. O.L.C. 1 (2012).

132. 33 Op. Att’y Gen. at 24.

the question of who should decide whether a session of Congress is a true session. On that question, Daugherty had an answer that would appeal to every subsequent Attorney General: “the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”¹³³ While it may not be “unlimited,” Daugherty insisted “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take.”¹³⁴

Daugherty reaches the conclusion of this heavy presumption without any textual or contextual support. His conclusory analysis does not show where this “large . . . discretion” is “vested” in the Constitution. Instead, he presents the confirmation process as dedicated solely to the filling of positions by the President and assumes that any congressional action that blocks the President from filling a vacancy is by definition unreasonable and unsustainable. He observes, “[i]f the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”¹³⁵ This obviously ignores the possibility that some checks on executive power can be “painful” and have “inevitable results.” The purpose of the process is not the univocal function of filling vacancies; rather, it is to compel both branches to reach agreements on who should hold top positions. Notably, a president can refuse to fill a vacancy on a court or in an agency by refusing to submit a nomination during a session.¹³⁶ Under Daugherty’s approach, a president can deny the Senate a chance to offer advice and consent, but the Senate cannot deny a president the ability to make a temporary appointment. The two powers rest in equipoise—a quintessential check and balance relationship.

Daugherty is notably the first to use the 1905 report of the Senate Judiciary Committee to support the claim that the President may decide that a session is not a true session.¹³⁷ The oft-quoted language from the Report is as follows:

133. *Id.* at 25.

134. *Id.*

135. *Id.* at 23.

136. Such a tactic could be used where there is opposition to a person who was publicly discussed as a candidate, particularly as part of a presidential campaign. Where the opposition is clear and fixed, a president could hold a nomination to avoid a vote in recess. This is certainly no less gross a tactic than Theodore Roosevelt’s use of seconds between ending the first and second sessions of the 58th Congress to make 160 appointments, including two that were controversial officeholders who previously received recess appointments. See HALSTEAD, *supra* note 10, at 10.

137. 33 Op. Att’y Gen. at 23.

It was evidently intended by the framers of the Constitution that it [Article II, Section 2] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.¹³⁸

This language was used not only by the Seitz opinion below as support, but also by various members in the recent House and Senate hearings.¹³⁹ What the Daugherty opinion omitted (as did these later references) is that this excerpt was meant to object to a President redefining recesses.¹⁴⁰ The hearing in 1905 was in response to Theodore Roosevelt's clear violation of both the letter and the spirit of the Recess Appointments Clause.¹⁴¹

In December 1903, President Theodore Roosevelt made more than 160 recess appointments in the seconds between the close of one session of Congress and the opening of the next session.¹⁴² It was a ridiculous, if not contemptuous, exercise. Thus, the Senate was not referring to its "imaginary" or "fictitious" definition of a recess but to the construction given by the White House in the dispute. Roosevelt simply pretended that in the seconds between the sessions, he could no longer wait for the advice and consent of Congress.¹⁴³ What the Senate did not say is that a President could ignore a decision by Congress to remain in session. It is

138. S. REP. NO. 58-4389, at 2 (1905); *see also* 39 CONG. REC. 3823–24 (1905). The report goes on to say:

This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

39 CONG. REC. 3824.

139. *See Executive Overreach*, *supra* note 13, at 36–37.

140. *See Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921).

141. *See* 39 CONG. REC. 3824.

142. *See Executive Overreach*, *supra* note 13, at 62.

143. *See id.*

certainly true that this Senate report makes a functional distinction that could be cited as recognition that some sessions are not functionally true sessions. However, whether members are not required to be in attendance or cannot receive communications is a decision for Congress and, on occasion, it may change its decision. Moreover, Congress has repeatedly and clearly asserted its right to define its own sessions.¹⁴⁴ Ironically, while the Justice Department has dismissed prior statements of Attorneys General like Randolph who recognized the plain meaning of the Clause, it continues to cite these lines as implausible proof that Congress has relented to the authority of presidents to determine what is functionally a recess.¹⁴⁵

Later Attorneys General would rely heavily on Daugherty's opinion for obvious reasons.¹⁴⁶ It expressed overwhelming deference to the President while minimizing any limits placed upon the President by the Clause. This type of analysis, however, was not surprising for anyone familiar with Daugherty's checkered history. Daugherty was widely viewed as blindly loyal to the President and antagonistic toward Congress.¹⁴⁷ The opinion was issued in the midst of Daugherty's struggle with Congress over the Teapot Dome scandal where he was accused of scuttling efforts to investigate various scandals and denounced as something of a political hack.¹⁴⁸ After President Harding died, Calvin Coolidge himself viewed Daugherty as hostile to investigating corruption, including the allegations against the Secretary of the Interior, Albert Fall.¹⁴⁹ Daugherty's hostility and intransigence led to the first appointment of special prosecutors by the Senate.¹⁵⁰ This rather sordid

144. *See id.* at 71, 78.

145. Notably, there is no mention of the Randolph opinion in the Seitz opinion. Lawfulness of Recess Appointments during a Recess of the Sen. notwithstanding Periodic Pro Forma Session, 36 Op. O.L.C. 1 (2012). However, the Office of Legal Counsel repeatedly notes that Congress has yielded to past expansive interpretations by presidents. *See generally id.*

146. 36 Op. O.L.C. at 5.

147. Turley, *supra* note 9, at 1539.

148. *Id.* Before becoming Attorney General, Daugherty was a Republican Party boss, the campaign manager for Harding, and a member of the so-called "Ohio Gang." DAVID GREENBERG, CALVIN COOLIDGE: THE AMERICAN PRESIDENTS SERIES: THE 30TH PRESIDENT, 1923–1929, at 51–52 (2007). He resigned after three years of scandal and allegations of corruption and cronyism, including claims that he was aware of a kickback scam involving bootleggers (operated by his chief aide Jess Smith). *Id.* Smith would later commit suicide. *Id.* Daugherty was indicted and sat for two trials. In his first trial, the jury deadlocked 7-5 in favor of conviction. *Id.* In his second trial, he invoked his Fifth Amendment privilege against self-incrimination. *Id.* He again avoided conviction, reportedly by a single vote. *Id.*

149. JOHN W. DEAN, WARREN G. HARDING: THE AMERICAN PRESIDENTS SERIES: THE 29TH PRESIDENT, 1921–1923, at 156–58 (2004).

150. *Id.*

history is raised not to suggest that any broad interpretation is based on corrupt or distorted analysis. Rather, Daugherty (whose opinion is stressed in the Seitz opinion below) adopted an interpretation that reflected both political and personal pressures of the time.

D. *The Seitz Interpretation*

The Obama Administration put forth Assistant Attorney General Virginia Seitz and the Office of Legal Counsel's (OLC) January 6, 2012 opinion as the legal rationale for the Cordray Appointment.¹⁵¹ The opinion argues that intrasession appointments like Cordray's are entirely legitimate and that historical practice reinforces the broad interpretation given to the Clause.¹⁵² The Seitz opinion threads the needle through textual and historical sources by resolving every interpretative question in favor of the President.

By categorically rejecting the notion of pro forma sessions as avoiding a recess, the Seitz opinion insists that it does not have to address how long or how short a recess can be to justify a recess appointment.¹⁵³ It essentially finds an answer by changing the question. By effectively saying that the President decides what a session is for the purposes of the Clause, it simply concludes that these are not sessions to the satisfaction of the President.¹⁵⁴

While acknowledging the deference given to Congress on defining the meaning of "session" for other constitutional purposes, Seitz insists that those applications of pro forma sessions "affect the Legislative Branch *alone*."¹⁵⁵ She questions whether a branch can unilaterally define such a term when it affects another branch's ability to use a related power.¹⁵⁶ Thus, while Seitz insists that the President may define terms

151. *Executive Overreach*, *supra* note 13, at 49.

152. Lawfulness of Recess Appointments During a Recess of the Sen. Notwithstanding Periodic Pro Forma Session, 36 Op. O.L.C. 1 (2012).

153. *Id.* at 9 n.13 ("Because we conclude that pro forma sessions do not have this effect [that the Senate is unavailable to fulfill its advice-and-consent role], we need not decide whether the President could make a recess appointment during a three-day intrasession recess. This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment.")

154. *But see* Letter from Elena Kagan, Solicitor Gen., Office of the Solicitor Gen., to William K. Suter, Clerk, Supreme Court of the U.S., at 3 (April 26, 2010) ("[T]he Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.")

155. 36 Op. O.L.C. at 19.

156. As someone who has represented members of both parties challenging the assertion of unilateral war powers, I found this argument the most intriguing. *See* Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (June 15, 2011),

that completely negate congressional powers, she also insists that Congress cannot define such basic terms as whether it is in session if the President disagrees.¹⁵⁷ The previous cases deferring to congressional definitions on what constitutes a session reflect the fact that it is Congress that determines when it will meet and conduct business. The degree to which business is addressed remains with Congress, which (as was shown with the tax legislation) can address substantive business during such sessions.

The courts routinely defer to Congress on how it defines and conducts its business.¹⁵⁸ Article I expressly leaves it to members to “determine the Rules of its Proceedings.”¹⁵⁹ Thus, the Supreme Court has held “all matters of method [of proceeding] are open to the determination

<http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/> (discussing representation of members challenging the intervention by President Obama in the Libyan War). Like the Appointment Power, war is a shared power where the President proposes a war and the Congress must declare it. U.S. CONST. art. 1, § 8, cl. 11. Both the text and the history of the Constitution clearly stated that the Framers did not want a President to be able to take the country to war on his own authority. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, *supra* note 80, at 528 (statement of James Wilson); 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 486 (Jonathan Elliot ed., 1901) (statement of Edmond Randolph); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1966); *see also* James Wilson, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON, at 433 (Robert Green McCloskey ed., 1967) (“The power of declaring war, and the other powers naturally connected with it, are vested in congress.”). However, in the Libyan case, the Obama Administration insisted that the President could define the critical term “war” to the exclusion of Congress. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&_r=0. Thus, if the President deemed a military intervention not to be a “war,” then neither Congress nor the courts could countermand that judgment, according to their interpretation. *See id.* Indeed, the Administration successfully fought standing in the case—effectively making the unilateral definition unreviewable and unchallengeable. Scott Wilson, *Obama Administration: Libya Action Does Not Require Congressional Approval*, WASH. POST (June 15, 2011), *available at* http://articles.washingtonpost.com/2011-06-15/politics/35234248_1_libya-operation-libya-campaign-libya-action (discussing the 32-page report the White House gave to Congress, with a link to the report). The Obama Administration has denied that the Libyan operations are a way and, on March 24, 2011, White House Spokesman Jay Carney stated that the Administration had defined these combat operations as “a time-limited, scope-limited military action.” Press Release, The White House, Press Gaggle by Press Secretary Jay Carney, 3/24/2011 (Mar. 24, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/24/press-gaggle-press-secretary-jay-carney-3242011>.

157. 36 Op. O.L.C. at 20.

158. *See generally United States v. Ballin*, 144 U.S. 1 (1892).

159. U.S. CONST. art. I, § 5, cl. 2.

of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.”¹⁶⁰ Certainly, this principle is limited and cannot be used to violate other guarantees of the Constitution. However, the OLC’s objections to deferring to Congress brush over the fact that the pro forma sessions are utilized to keep a President from circumventing the Appointments Clause. Once again, the analysis ignores the fact that it is the President who is engaging in a transparent and artificial claim that he must fill a vacancy because the Senate is not available for a couple of days to offer advice and consent—that is, advice and consent again on a previously blocked nomination.¹⁶¹

While insisting that the President may unilaterally end the constitutional debate by declaring a congressional session to be functionally a recess, Seitz suggests that any recess—even a recess of seconds—could be a legitimate basis for appointments regardless of whether it occurs when Congress is in session or between sessions. Indeed, the only way offered by the OLC for Congress to protect its constitutional right of advice and consent would be for “[t]he Senate [to] remove the basis for the President’s exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations.”¹⁶² Seitz notably never tries to justify such an extreme position in terms of the original or logical purpose of the Clause in the overall context of the appointment process. Nor does the OLC opinion explain why an intrasession recess is not a transparently artificial excuse when Congress is in session and only a matter of days away from advice and consent—and conferral has already been made in the earlier session with unsuccessful results. Even the broader interpretations of recent administrations have acknowledged that the length of a recess can be determinative.¹⁶³

The prior opinions of Attorneys General stressed the length of the recess in maintaining a line of shared authority with Congress, which is a line treated dismissively in the latest opinion.¹⁶⁴ For example, Seitz relies

160. *Ballin*, 144 U.S. at 5 (“It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”).

161. Senators have long recognized that the original purposes of the Clause have limited relevance with the advent of the modern congressional schedule. 106 CONG. REC. 18, 142–43 (1960) (Senator Sam Ervin) (“[T]here is really no crying need for the President to make a recess appointment or for having the recess appointee take office.”).

162. 36 Op. O.L.C. at 1.

163. Memorandum of Jack L. Goldsmith III, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Recess Appointments in the Current Recess of the Senate, at 1 (Feb. 20, 2004) (noting that “a recess during a session of the Senate, *at least if it is sufficient length*, can be a ‘Recess’ within the meaning of the Recess Appointments Clause”) (emphasis added).

164. 36 Op. O.L.C. at 9 n.13.

on the 1921 opinion of former Attorney General Daugherty that “the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”¹⁶⁵ Notably, however, Daugherty also stressed that the length of the claimed recess was key and that it “is of such duration that the Senate could ‘not receive communications from the President or participate as a body in making appointments.’”¹⁶⁶ Moreover, Daugherty stated that “an adjournment of 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution.”¹⁶⁷

Seitz’s position erases any real consideration of duration from the calculus while embracing Daugherty’s extreme expression of presidential deference. This includes his insistence that “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take.”¹⁶⁸ Seitz does not explain why the President should be so indulged or, more importantly, why Congress is not entitled to such a presumption as opposed to the President circumventing the Appointments Clause. There is ample reason to believe that such a presumption rests with Congress. After all, pro forma sessions have been used in other constitutional contexts as true sessions.¹⁶⁹ Thus, the Twentieth Amendment requires that “Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January.”¹⁷⁰ Congress has satisfied this requirement with pro forma sessions.¹⁷¹ Likewise, as previously noted, these sessions have been used to satisfy the Adjournment Clause.¹⁷² There is no clear reason why such sessions are sufficient for these other clauses, but not the Recess Appointments Clause. Ironically, while much of the OLC opinion treated historical practice as largely determinative in interpreting constitutional terms in its favor, it dismisses the fact that the very same term (“session”) has been left to Congress to define.¹⁷³

In advancing this consistently broad interpretation of the Clause, Seitz’s opinion relegates to footnotes or dismisses outright the opposing views of past Attorneys General like Randolph.¹⁷⁴ For example, it

165. Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272 (1989) (quoting 33 Op. Att’y Gen. 20, 25 (1921)).

166. *Id.* (quoting 33 Op. Att’y Gen. 20, 24 (1921)).

167. Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 25 (1921).

168. *Id.*

169. 36 Op. O.L.C. at 18.

170. U.S. CONST. amend. XX, § 2.

171. *See, e.g.*, H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979).

172. 36 Op. O.L.C. at 18.

173. *Id.* at 3–4.

174. *Id.* at 5 n.6.

ignores the views of Attorney General Philander Knox, who wrote at length on the Wirt interpretation and affirmed that it did not apply to intrasession recesses.¹⁷⁵ Knox stressed that this power exists only during “the period following the final adjournment for the session”—it is the intersession recess that is “*the recess* during which the President has power to fill vacancies.”¹⁷⁶ Not only did Knox reject the broad interpretation, but he specifically clarified that “[t]he opinions of Mr. Wirt . . . and all of the other opinions on this subject relate only to appointments during the recess of the Senate between two sessions of Congress.”¹⁷⁷ Knox described the very situation in which we now find ourselves: a fluid interpretation that leaves no structure or limits guiding the respective powers of the two branches in cases of appointments. Knox noted “[i]f a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.”¹⁷⁸ The OLC simply dismisses such views as “reversed”¹⁷⁹ by Daugherty, while representing its current approach as long recognized and accepted.¹⁸⁰

Again, Seitz places overwhelming emphasis on what she views as the acquiescence of Congress to the broader interpretation of the Clause. It is the very adverse possession claim addressed earlier: the claim that somehow the Executive Branch has acquired title to a power of Congress by adversely occupying the area of recess appointments. Moreover, the opinion omits repeated congressional objections to the increasingly broad interpretations of the Clause, including objections to the Wirt interpretation as “a perversion of language.”¹⁸¹

Even past efforts by Congress to deter some recess appointments are cited by Seitz as *support for* the sweeping claim of recess powers. The OLC opinion cites the Pay Act¹⁸² as evidence of “congressional acquiescence to recess appointments” because it allowed for payment in

175. President—Appointment of Officers—Holiday Recess, 23 Op. Att’y Gen. 599, 601–02 (1901).

176. *Id.* at 601.

177. *Id.* at 602.

178. *Id.* at 603.

179. 36 Op. O.L.C. at 5 n.6.

180. *Id.* at 5–6, 13. For the record, it is worth noting that OLC opinions are only “reversed” in the mind of the OLC. They are not precedent binding on anyone outside of the Justice Department and, as shown in the history of recess appointments and the most recent opinion, represent nary a speed bump for Administrations intent on making conflicting claims.

181. S. REP. NO. 37–80, at 5 (1863).

182. 5 U.S.C. § 5503 (2006).

some recess cases.¹⁸³ Thus, by passing a bill that took a moderate position on the salaries of recess appointees, Congress is said to have acquiesced and conceded that the appointments were constitutional. As previously addressed, this use of historical practice is no substitute for constitutional analysis. Again, the OLC suggests a long history of acquiescence by omitting conflicting congressional statements or relegating them to footnotes. Congressional opposition to recess appointments, particularly opposition to intrasession appointments, has been consistent and vocal.¹⁸⁴ However, due to standing barriers and a judicial disinclination to consider these cases,¹⁸⁵ Congress has faced limited options in combating abusive recess appointments, which one Democratic Senator described as putting “a finger in the eye of the Constitution.”¹⁸⁶ The fact that Congress did not apply some nuclear option in dealing with such appointments shows an effort to reach a practical compromise rather than acquiesce to the claim of unilateral power of presidents. Indeed, the OLC opinion seems to be written on the principle of “no good deed goes unpunished.” If anything, the latest OLC opinion would seem to encourage more aggressive responses by Congress to demonstrate its opposition to these claims—a curious message to send the legislative branch.

III. INTRASESSIONS, THE THREE-DAY RULE, AND THE CORDRAY CONTROVERSY

With the effective elimination of the occurrence language from the Clause, later interpretations struggled with the question of what constituted a “session.” On its face, a session refers simply to the period between the reconvening of Congress (after a prior *sine die* adjournment)¹⁸⁷ and the next *sine die* adjournment.¹⁸⁸ However, the

183. 36 Op. O.L.C. at 7. Notably, while citing the Act as support for its interpretation of the Clause, the OLC notes later that it has serious “concerns about the constitutionality of the Pay Act.” *Id.* at 17 n.20.

184. See, e.g., Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees*, N.Y. TIMES, Mar. 27, 2004, at A1, A10 (quoting Senator Charles Schumer).

185. Parties challenging the appointments have advanced broad standing claims with differently affected parties. For example, State National Bank of Big Spring, Texas, along with The Competitive Enterprise Institute and the 60 Plus Association have filed a lawsuit, in Washington D.C., challenging the constitutionality of the Dodd-Frank Act and the creation of the Consumer Financial Protection Bureau. See Puzzanghera, *supra* note 36.

186. See Stolberg, *supra* note 184.

187. *Sine die* comes from the Latin “without day,” indicating adjournment without a further meeting or hearing. BLACK’S LAW DICTIONARY 1511 (9th ed. 2009).

reconstruction of the Clause produced considerable gaming of the schedule and terminology as both branches struggled to assert their authority over federal offices. Once again, the most obvious meaning of recess, including only *intersession* recesses between the first and second sessions of Congress, soon became too restrictive for political advantage.

A. Intrasession Recesses and the Decoupling of Text from Meaning

On its face, the Clause clearly contemplates intersession recesses as opposed to intrasession recesses. Indeed, there is no reference to a “recess” that does not clearly indicate the long periods between sessions. Intrasession recesses were, in fact, relatively rare until well into the nineteenth century.¹⁸⁹ The Framers notably chose to refer to recess in the singular: “all Vacancies that may happen during *the Recess* of the Senate.”¹⁹⁰ The Framers were certainly aware that there would be a break during holidays like Christmas during congressional sessions. However, they refer to only one “Recess”. Thus, while there could be any number of intrasession breaks or recesses, the Clause refers to “the Recess” to denote that recess that would presumably occur between Congresses. The very stipulation of the length of the appointment also reflects this intent. The Framers mandated that the appointment would run to the end “of their next Session.” It makes little sense for an appointment to run for both the end of the current session (which could be only days old) and the following session. If an intrasession appointment were contemplated, the Framers would have presumably specified a termination date of the existing session for such appointments.

References to “recess” in Article I also offer an interesting insight into the original meaning. Before it was superseded by the Seventeenth Amendment, Article I mandated that Senators be selected by state legislatures.¹⁹¹ The Framers stated, “if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next

188. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2076–77 (2002) (defining session as “the space of time between the first meeting and the prorogation or final adjournment”).

189. Carrier, *supra* note 1, at 2210–11 (“While the Senate took one intersession recess each year [from 1789–1946], it took only three intrasession recesses before 1857. In 1800, 1817, and 1828, the Senate took a five-to-seven-day intrasession recess at the end of December. Beginning in 1863, the Senate started taking annual intrasession recesses of approximately two weeks from the end of December through the beginning of January.”).

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

191. U.S. CONST. art. I, § 3, cl. 1.

Meeting of the Legislature, which shall then fill such Vacancies.”¹⁹² Professor Michael Rappaport has noted that this language supports the plain meaning that the vacancy must arise in the recess given its very specific reference to the acts occurring during the recess of “[r]esignation, or otherwise.”¹⁹³ The language can also be viewed as supporting the more limited meaning of an intersession recess.¹⁹⁴ It would make little sense for a governor to appoint a temporary senator for short intrasession break, particularly given the physical barriers and delays of the period. It would take weeks for a newly appointed senator to receive his mandate, pack his belongings, and travel to Washington. Likewise, the word of a resignation of a senator may not have even reached a state capital for days. The Senate Vacancy Clause appears to reflect, again, the commonly long periods between sessions of both federal and state legislatures.

This textual presumption is reinforced by the comments discussed earlier.¹⁹⁵ The contemporary statements at the time of the ratification noted that the Clause was meant to relieve Congress of the necessity of remaining in session all year long.¹⁹⁶ They did not say that it was needed to allow Congress to take short breaks during its session. Nevertheless, in *Evans v. Stephens*,¹⁹⁷ the Eleventh Circuit held “[t]he Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause.”¹⁹⁸ This is certainly true, but that

192. U.S. CONST. art. I, § 3, cl. 2.

193. Rappaport, *supra* note 1, at 1504–05 (“The words ‘by Resignation or otherwise’ refer to the method by which the vacancies arise, making crystal clear that the Clause is saying ‘if Vacancies happen to arise by Resignation or otherwise during the Recess of the Legislature.’ By contrast, it would be extremely awkward to read the Clause as if it said ‘if Vacancies happen to exist by Resignation or otherwise during the Recess of the Legislature.’ Vacancies do not happen to exist by resignation, they arise by it.”).

194. Notably, this same specificity as to the cause of a vacancy was in the North Carolina recess appointment clause that was the presumed model for the federal clause. *See supra* note 56 and accompanying text.

195. *See supra* Part I.

196. *See, e.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 135 (Jonathan Elliot ed., 2d ed. 1863).

197. 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). Some courts adopt what could be viewed as a blind eye to the obvious gaming that occurs in these disputes, noting that such use of presidential power “cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies.” *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962) (quoting 1 Op. Att’y Gen. 631, 634 (1823)). One only has to recall Madison’s admonition of “if men were angels” (discussed below) to refute such assumptions. *See infra* notes 325–26 and accompanying text.

198. *Evans*, 387 F.3d at 1225.

merely raises the question of interpreting the intent and purpose behind the language. The term “Recess” clearly had a meaning for the Framers and referenced the longer recesses of the time. More importantly, the recess power had a purpose designed to deal with such long gaps in legislative business rather than an ever-present escape clause for presidents to circumvent the Senate’s confirmation powers. The Eleventh Circuit in *Evans* relieves itself of any further obligation by embracing the intense judicial deference that characterizes both judicial and executive opinions in the area.

It is telling that every comment from the time of the drafting and ratification of the Clause makes either direct or implied reference to intersession appointments. The common rationale stated by early commentators like Hamilton described the long periods between sessions.¹⁹⁹ Joseph Story noted, “[t]here was but one of two courses to be adopted [at the Founding]; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject.”²⁰⁰ The inclusion of intrasession recesses would have likely turned recorded concerns of delegates over presidential power into an open revolt.²⁰¹ Why would the Framers have created a shared power over the selection of high officials if any break in congressional business could be used to unilaterally appoint officials for not just that session, but the next session as well? For a president in his final two years of office, intrasession appointments could practically avoid any need for the advice and consent of Congress. It is certainly true that Congress could respond with hostile countermeasures, but that is no reason to ignore the counterintuitive basis for the intrasession interpretation.

Even when political expediency encouraged the use of intrasession appointments, past Attorneys General refused to entirely depart from the

199. THE FEDERALIST NO. 67 (Alexander Hamilton).

200. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1551, at 410 (1833).

201. It also can lead to absurd results. For example, Congress briefly recesses intrasession for the State of the Union. Under this logic, a President could gratefully accept the invitation and on his way to Congress sign hundreds of recess appointments during the break. As such, the Constitution becomes the ultimate bait-and-switch. The Constitution first leaves the power to confirm high officials to the Senate in the Appointments Clause (with a temporary exception in the Recess Appointments Clause). Then, Article II, Section 3 requires a State of the Union address to Congress—effectively requiring a recess to reconvene in a joint session of Congress “[to] give to the Congress Information of the State of the Union” U.S. CONST. art. II, § 3. That Senate recess can then become a break in business that would allow for intrasession appointments.

language and the logic of the Clause.²⁰² In a principled opinion later abandoned by modern Justice Departments, Attorney General Philander Knox strongly condemned any claims that the Recess Appointments Clause could be used during an intrasession recess.²⁰³ Knox notably was advising Theodore Roosevelt, the President who insisted that he could appoint 160 officials during a “constructive recess” of just a few seconds.²⁰⁴ In this circumstance, Roosevelt wanted to use an intrasession recess between December 19, 1901, and January 6, 1902, to appoint an appraiser at the port of New York—an eighteen-day break in the middle of the session.²⁰⁵ Knox refused to yield to political expediency on this occasion and forcefully stressed the difference between intersession and intrasession recesses as obvious and unavoidable.²⁰⁶ He told Roosevelt that these intrasession interruptions were “merely temporary suspension[s] of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established”²⁰⁷ Knox dismissed efforts to use recess to mean any interruption in work as obviously not the meaning of recess as used by the Framers.²⁰⁸ For that reason, he noted, “in the many elaborate opinions of my predecessors . . . no case is presented in which an appointment during [an intrasession recess] was involved.”²⁰⁹

Knox’s principled rejection of intrasession appointments is also notable in his rejection of the claim (made in later opinions, including the Seitz interpretation) that the recess appointment power is meant to allow a president to fill vacancies without delay and thus can apply to either intersession or intrasession appointments. Knox acknowledged that Congress could, intrasession, “temporarily” adjourn for several months as well as several days, and thus seriously curtail the President’s power of making recess appointments. But this argument from inconvenience . . . can not be admitted to obscure the true principles and distinctions ruling the point.²¹⁰ Yet, even a delay of several months did not persuade Knox to abandon the clear meaning of the Clause. He seemed to instinctively understand that the abandonment of this distinction would

202. Carrier, *supra* note 1, at 2233–38.

203. President—Appointment of Officers, 23 Op. Att’y Gen 599 (1901).

204. See Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 671 (2004).

205. 23 Op. Att’y Gen. 599.

206. *Id.*

207. *Id.* at 601.

208. *Id.* (“Any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term.”).

209. *Id.* at 602.

210. *Id.* at 603.

lead to a slippery slope problem and absurd results.²¹¹ “I see no reason why such an appointment should not be made during any [intrasession recess], as from Thursday or Friday until the following Monday.”²¹²

Yet, as political divisions mounted in modern times, presidents began to claim that intrasession recesses are encompassed by the Clause. This began with President Andrew Johnson and has continued to this day.²¹³ Until relatively recently, however, they remained rare. In 1928, President Calvin Coolidge raised controversy by appointing John Esch to be Commissioner of the Interstate Commerce Commission during a thirteen-day intrasession recess of the 70th Congress.²¹⁴ This controversy grew when the Senate rejected Esch’s confirmation, but he continued to serve to the end of his recess appointment unlike other rejected recess appointments.²¹⁵ Modern presidents have discarded any hesitation in the use of intrasession appointments. Ronald Reagan made 73 intrasession appointments, often in open defiance of congressional opponents.²¹⁶ Between 2001 and 2007, President George W. Bush made a total of 171 recess appointments, and of those, an astonishing 141 were made during intrasession recesses averaging only twenty-five days.²¹⁷ The result was to reduce the debate to how long of a recess is needed to invoke the power of recess appointments.

Intrasession appointments, however, remain constitutionally dubious for many academics and jurists.²¹⁸ Indeed, this question came up in the challenge to the appointment of Judge William H. Pryor in 2004 when the Eleventh Circuit found that the recess appointment was

211. Though once again, this does not explain the equal absurdity of the “constructive recess” of Roosevelt. See Hogue, *supra* note 204.

212. 23 Op. Att’y Gen. at 603.

213. This practice has been supported by a few courts which reviewed intrasession appointments. See, e.g., *Evans v. Stephens*, 387 F.3d 1220, 1221–22, 1227 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 117 (C.C.N.D. Ga. 1880).

214. Carrier, *supra* note 1, at 2212.

215. *Id.* at 2212 n.46; 69 CONG. REC. 7043–44 (1928). As discussed earlier, recess appointees like John Rutledge felt that they should resign after being denied confirmation. Mayton, *supra* note 39, at 535. There is a strong principle supporting such a decision, and presidents should indicate an expectation that a rejected nominee would not continue in office. However, with the use of this power in modern times to circumvent Congress, the decision of people like Rutledge seems almost quaint.

216. Carrier, *supra* note 1, at 2214.

217. HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33310, RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001 – OCTOBER 31, 2008, at 2–3, 7 (2008).

218. See, e.g., Carrier, *supra* note 1 (arguing for a definition of “recess” that only includes intersession recesses).

valid.²¹⁹ Pryor was given an intrasession appointment on February 20, 2004, during an eleven-day recess.²²⁰ Associate Justice John Paul Stevens wrote a relatively rare concurrence to the denial of certiorari in which he noted that the Pryor controversy “raises significant constitutional questions regarding the President’s intrasession appointment.”²²¹ While he agreed that certiorari was not necessary in the case, he cautioned “it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits”²²²

Presidents, however, soon asserted the right to make appointments not just between sessions but also during sessions. Since Congress by definition is returning to business after a relatively short time in most intrasession breaks, the abandonment of the limitation to intersession appointments left no clear limitation on presidential authority. It is the very slippery slope Knox avoided, when he noted that, if a president could make intrasession appointments, he could just make them during weekends.²²³

The inclusion of virtually any claimed recess as the basis for recess appointments served to shift the analysis from the actual Recess Appointments Clause (and even the general Appointments Clause) to the Adjournments Clause. Article I, Section 5, Clause 4 states that “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days”²²⁴ Under the Adjournments Clause, Congress routinely passes a concurrent resolution to adjourn. Conversely, either house can effectively bar the adjournment of the other house by declining to concur in the adjournment. Since the Adjournment Clause indicates that breaks of less than three days do not require bicameral consent, it would appear clear that such short periods were not viewed as a recess for either the Adjournments Clause or the Recess Appointments Clause. This was the position the Justice Department took in *Mackie v. Clinton*.²²⁵ Likewise, in the 2005 case of *Evans v. Stephens*,²²⁶ the Justice Department reaffirmed this interpretation using the Adjournment Clause:

Given the extensive evidence suggesting that “adjournment” and “recess” are constitutionally equivalent . . . and the

219. *Evans v. Stephens*, 387 F.3d 1220, 1222, 1227 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005).

220. *Id.*

221. *Evans v. Stephens*, 544 U.S. 942 (2005) (Stevens, J., concurring).

222. *Id.*

223. *See supra* note 178 and accompanying text.

224. U.S. CONST. art. I, § 5, cl. 4.

225. *See HOGUE, supra* note 1, at 4.

226. 407 F.3d 1272 (11th Cir. 2005).

commonsense notion that overnight, weekend, and perhaps even long-weekend breaks do not affect the continuity of government or other operations, it would make eminent sense, in constructing any de minimis exception from otherwise applicable constitutional rules for “recess,” to apply the three-day rule explicitly set forth in the Adjournment Clause.²²⁷

This view was supported internally within the Justice Department,²²⁸ which accepted “extensive evidence suggesting that ‘adjournment’ and ‘recess’ are constitutionally equivalent.”²²⁹ This position was also voiced directly to the Supreme Court in prior argument.²³⁰ Indeed, even then Solicitor General Elena Kagan embraced this view before taking the bench²³¹:

Because Sundays are not generally considered in this calculation, the result is that four-day breaks have historically not been viewed as a recess. Most recess appointments, even with the inclusion of the intrasessions, have been well beyond four days. The shortest such modern recess appointment was 10 days.²³²

227. Reply Brief for Intervenor United States at 21, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424).

228. Memorandum of Jack L. Goldsmith III, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Recess Appointments in the Current Recess of the Senate, at (Feb. 20, 2004) (“Arguably, the three days set by the Constitution as the time during which one House may adjourn without the consent of the other, U.S. Const. art. I, § 5, cl. 4, is also the length of time amounting to a ‘Recess’ under the Recess Appointments Clause.”).

229. Reply Brief for Intervenor United States, *supra* note 227, at 21.

230. Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457) (accepting that for the President to make a recess appointment “the recess has to be longer than 3 days”).

231. As Solicitor General Elena Kagan wrote, “[a]lthough a President may fill [Board] vacancies through the use of his recess appointment power . . . the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period.” Letter from Elena Kagan, Solicitor General, Office of the Solicitor General to William K. Suter, Clerk, Supreme Court of the United States at 3 (Apr. 26, 2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf>.

232. *Executive Overreach*, *supra* note 13, at 48 (statement of Jonathan Turley, Professor). See also U.S. CONG., CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. Doc. No. 111-157, at § 83 (2d Sess. 2011); HOGUE, *supra* note 1, at 3. Notably, the same analysis has been accepted in the review of the limits of a president’s pocket veto power: “Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and not adjourned for purposes of the pocket veto clause. Congress is not adjourned.” *A Bill to Clarify the Law Surrounding the*

While the three-day rule is a world apart from the original meaning of the Clause as first articulated by Hamilton and the first Attorney General, it did offer a textual basis for some limitation on the use of recess appointments and an acknowledgment that such recesses cannot be defined as virtually any interruption in business of Congress. It is that interpretation that was shattered with the Cordray Appointment controversy.

B. The Cordray Appointment and the Three-Day Intrasession Recess

The Cordray controversy had the distinction of combing virtually every controversial element in the use of the Clause into a single recess appointment—a perfect constitutional storm. Not only did the President make an intrasession appointment, but he did so during a break of only three days in claiming that he could not wait for Congress to return.²³³ In so doing, he installed an official who had been previously considered by the Senate and blocked by a vote of forty-five members in a filibuster.²³⁴ In electing to use an intrasession appointment, the Obama Administration appeared intent upon creating an unprecedented test case of a modern appointment.²³⁵

In July 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),²³⁶ which in turn created the CFPB to regulate consumer financial products.²³⁷ The CFPB's authority is quite broad in the enforcement of consumer protection laws in the financial arena, including over any “consumer financial product or service.”²³⁸ This broad regulatory authority, covering a myriad of different financial laws,²³⁹ made the bureau increasingly controversial. In

President's Use of the Pocket Veto: Hearing on H.R. 849 before the Subcomm. on the Legislative Process of the H. Comm. On Rules, 101st Cong. (1989) (statement of William P. Barr, former head OLC).

233. Jim Puzanghera & Lisa Mascaro, *Obama Bypassing Senate to Appoint Richard Cordray Consumer Chief*, L.A. TIMES (Jan. 4 2012), <http://articles.latimes.com/2012/jan/04/business/la-fi-obama-cordray-20120104>.

234. Neil M. McCabe, *GOP Filibuster against Cordray Holds*, HUMAN EVENTS (Dec. 9, 2011, 3:01 AM), <http://www.humanevents.com/2011/12/09/gop-filibuster-against-cordray-holds/>.

235. This paragraph is taken from *Executive Overreach*, *supra* note 13, at 48.

236. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, (2010), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

237. *Id.* § 1011, 124 Stat. at 1964.

238. *Id.* § 1002(5), (15), 124 Stat. at 1956–60.

239. These include Alternative Mortgage Transaction Parity Act of 1982; Consumer Leasing Act of 1976; Electronic Fund Transfer Act, with the exception of

May 2011, forty-four Republican Senators sent a letter to President Obama warning him that they would oppose a Director for the Bureau absent structural changes in the Bureau to guarantee congressional control over funding and other structural and policy changes.²⁴⁰ Notably, this was more than the members needed to filibuster a vote on the Senate floor. President Obama refused to make such changes,²⁴¹ and on July 18, 2011, President Obama nominated Cordray, the former Ohio Attorney General, to serve as the Bureau's first director.²⁴² While he was given high marks for his service as the Bureau's Director of Enforcement, his nomination brought those controversies to the surface; and the Senate Committee on Banking, Housing, and Urban Affairs divided along party lines in sending his nomination to the full Senate for confirmation.²⁴³ On December 8, 2011, Senate Republicans blocked an up-or-down vote on Cordray's nomination.²⁴⁴ Democrats have previously used filibuster

Section 920; Equal Credit Opportunity Act; Fair Credit Billing Act; Fair Credit Reporting Act, with the exception of Sections 615(e) and 628; Home Owners Protection Act of 1998; Fair Debt Collection Practices Act; Subsections (b) through (f) of Section 43 of the Federal Deposit Insurance Act; Sections 502 through 509 of the Gramm-Leach-Bliley Act, with the exception of Section 505 as it applies to Section 501(b); Home Mortgage Disclosure Act of 1975; Home Ownership and Equity Protection Act of 1994; Real Estate Settlement Procedures Act of 1974; S.A.F.E. Mortgage Licensing Act of 2008; Truth in Lending Act; Truth in Savings Act; Section 626 of the Omnibus Appropriations Act; and Interstate Land Sales Full Disclosure Act. See Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1002(12), 124 Stat. at 1957.

240. Ylan Q. Mui, *GOP Senators Vow to Block CFPB Nominee*, WASH. POST (May, 5, 2011) http://www.washingtonpost.com/business/economy/gop-senators-vow-to-block-cfpb-nominee/2011/05/05/AFG70f2F_story.html.

241. Ylan Q. Mui & Zachary A. Goldfarb, *Obama to Nominate Richard Cordray for Consumer Agency, Bypassing Warren*, WASH. POST (July 17, 2011), http://www.washingtonpost.com/business/richard-cordray-expected-to-be-named-head-of-consumer-agency/2011/07/17/gIQAP41zJI_story.html.

242. Nikki Sutton, *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, THE WHITE HOUSE BLOG (July 18, 2011, 3:55 PM), <http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau>.

243. *Id.*; Ylan Q. Mui, *Consumer Watchdog Nominee Advances; Cordray Faces GOP Blockade on Senate Floor*, WASH. POST (Oct. 6, 2011), http://www.washingtonpost.com/business/economy/consumer-watchdog-nominee-advances-cordray-faces-gop-blockade-on-senatefloor/2011/10/06/gIQAhAEDRL_story.html.

244. Jonathan Bernstein, *In Blocking Cordray, Senate GOP Proves How Radical It's Become*, WASH. POST (Dec. 8, 2011), http://www.washingtonpost.com/blogs/plum-line/post/in-blocking-cordray-senate-gop-proves-how-radical-its-become/2011/12/08/gIQ4x0bfO_blog.html.

votes to block GOP nominees.²⁴⁵ The NLRB was effectively inoperative due to the lack of the required quorum of members.²⁴⁶

The recess appointment came on January 4, 2012.²⁴⁷ The Senate had set two pro forma sessions by unanimous consent to run on January 3 and January 6—part of the schedule set for December 20, 2011, to January 23, 2012.²⁴⁸ However, Congress convened on January 3, 2012, at

245. *Id.*

246. Before the Cordray recess appointment, the Board had had three lawfully appointed members. Two Board members were confirmed on June 22, 2010. Press Release, Nat'l Labor Relations Bd., Brian Hayes, Mark Pearce Confirmed by Senate as Board Members (June 22, 2010), *available at* <http://www.nlr.gov/news-media/news-releases/archive-news>; 156 CONG. REC. S5217 (daily ed. June 22, 2010). A third member, Craig Becker, was recess-appointed by the President on March 27, 2010. Press Release, White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>. However Becker's term expired at the end of the First Session of the 112th Congress before the Cordray nomination. As a result, with only two members, the Board was short of the statutorily required quorum. Peter M. Shane, *The Future of Recess Appointments in Light of Noel Canning v. NLRB*, BLOOMBERG LAW, <http://about.bloomberglaw.com/practitioner-contributions/the-future-of-recess-appointments-in-light-of-noel-canning-v-nlr/> (last visited Sept. 15, 2013).

247. Shane, *supra* note 246.

248. The Administration insisted that the language chosen by the Senate made clear that the pro forma sessions were not in fact actual sessions where business was to be conducted:

Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Tuesday, December 20, at 11 a.m.; Friday, December 23, at 9:30 a.m.; Tuesday, December 27, at 12 p.m.; Friday, December 30, at 11 a.m.; and that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Friday, January 6, at 11 a.m.; Tuesday, January 10, at 11 a.m.; Friday, January 13, at 12 p.m.; Tuesday, January 17, at 10:15 a.m.; Friday, January 20, at 2 p.m.; and that the Senate adjourn on Friday, January 20, until 2 p.m. on Monday, January 23; that following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, and the time for the two leaders be reserved for their use later in the day; further, that following any leader remarks the Senate be in a period of morning business until 4 p.m., with Senators permitted to speak therein for up to 10 minutes each, and that following morning business, the Senate proceed to executive session under the previous order.

157 CONG. REC. S8783–84 (daily ed. Dec. 17, 2011) (statement of Sen. Ron Wyden).

the start of the second session of the 112th Congress.²⁴⁹ The session was preceded by language that did indicate an intention not to conduct substantive business during the session.²⁵⁰

Notably, while this was deemed a “pro forma” session, it did not forestall the possibility of business being conducted by Congress.²⁵¹ On December 23, 2011, the Senate convened and passed a major piece of legislation, the Temporary Payroll Tax Cut Continuation Act of 2011.²⁵² Thus, after Congress used the pro forma session to move a major legislative priority, the Administration proceeded to claim that the pro forma session was void of substance or legislative business.²⁵³ Yet, the Senate clearly had the same ability to consider nominations as it had shown with legislative business.²⁵⁴

While the Cordray appointment drew the most attention, the other appointments are equally problematic with regard to President Obama’s claim of necessity. Some of the labor appointments were left vacant by the White House for sixteen months.²⁵⁵ It was not until December 15th that Obama sent the names to Congress, only to claim exigency in the recess appointment twenty days later.²⁵⁶

Throughout the Cordray controversy, it was clear that the impediment for the White House was politics, not some inability to submit the nominee to Congress during a recess.²⁵⁷ Indeed, when Cordray was blocked by the filibuster, President Obama announced, “We will not allow politics as usual on Capitol Hill to stand in the way”²⁵⁸ Notably, the barrier to Cordray’s appointment was a substantive objection of a significant number of Senators to the new board that he would head. Whatever the merits of that objection, the

249. *Id.* at S8783.

250. *Id.*

251. Regular business has been conducted during pro forma sessions including signing and enrolling bills. 157 CONG. REC. S8789 (daily ed. Dec. 23, 2011).

252. Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280, available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ78/pdf/PLAW-112publ78.pdf>. Likewise, during the August 5, 2011 pro forma session, the Senate passed the Airport and Airway Extension Act of 2011. See 157 CONG. REC. S5297 (daily ed. Aug. 5, 2011).

253. Lawfulness of Recess Appointments during a Recess of the Senate notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 9–17 (2012).

254. This requires only a call for unanimous consent which can proceed without a quorum call. See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. Doc. No. 101-28, at 952 (2d Sess. 1992).

255. Melanie Trotman, *Obama Makes Recess Appointments to NLRB*, WALL ST. J. (Jan. 4, 2012), <http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html>.

256. *Id.*

257. See Mui, *supra* note 5.

258. *Id.*

appointment raised valid concerns for the legislative branch—accountability and funding of federal offices. It is precisely that type of issue upon which presidents are sometimes forced to compromise—or rally political pressure to force opponents to yield. The Cordray nomination offered a particularly good vehicle for Congress to pressure the White House on the controversy because Section 1066 of Dodd-Frank mandates that the functions of the CFPB cannot be turned over from the Secretary of the Treasury “until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.”²⁵⁹ Section 1011, however, requires that “the Director shall be appointed by the President, by and with the advice and consent of the Senate.”²⁶⁰

Thus, this was a problem where the Congress and the President were at an impasse, and the recess appointment was used to avoid having to engage or compromise with Congress.²⁶¹ In a speech announcing the recess appointment, President Obama declared that he would simply not accept the decision to filibuster the nomination, stating, “That’s inexcusable. It’s wrong. And I refuse to take no for an answer.”²⁶² The President’s choice of words is telling. He did indeed receive an answer to his request for confirmation. Forty-five Senators voted to block the nomination in accordance with the Senate’s own rules and prior practices.²⁶³ The President was assuring citizens that he would simply not accept that decision of Congress. That is clearly not the purpose of the Recess Appointments Clause and, in my view, contradicts the core principles of the Constitution in establishing our tripartite system of checks and balances. Whether it is the previously discussed Randolph interpretation or the later-adopted Adjournment Clause (three-day) interpretation (or even the Wirt interpretation), the appointment contradicts the spirit and language of the Constitution. Indeed, it creates

259. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1066(a), 124 Stat. 1376, 2055 (2010), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

260. *Id.* § 1011, 124 Stat. at 1964.

261. Ultimately, a compromise was reached over the Cordray controversy, though largely on the terms of the White House. The Democrats threatened to rescind the filibuster rule if the Republicans did not relent on the nomination. Jim Puzzanghera, *Senate Confirms Richard Cordray as Consumer Bureau Chief*, L.A. TIMES, July 16, 2013, at A1. Cordray, who was never personally the cause for the opposition, was then confirmed by a vote of 66 to 33. *Id.*

262. Peter Nicholas, Lisa Mascaro & Jim Puzzanghera, *With Senate Idle, Obama Goes to Work*, L.A. TIMES, January 5, 2012, at A1.

263. David Nakamura & Ylan Q. Mui, *Obama Blasts GOP Filibuster of Consumer Agency Choice*, WASH. POST, Dec. 9, 2011, at A01.

a virtually limitless rule for future presidents—allowing the briefest of breaks to be sufficient to circumvent Congress.²⁶⁴

IV. HISTORICAL PRACTICE AS AN INTERPRETIVE FACTOR IN CONSTITUTIONAL LAW²⁶⁵

As vividly shown by the Daugherty opinion, the expansion of the meaning of the Recess Appointments Clause occurred during periods of tension with Congress.²⁶⁶ A clear example of such circumvention occurred with President Jimmy Carter, who gave a recess appointment to John McGarry to the Federal Election Commission after the Senate declined to act on the nomination.²⁶⁷ Carter later made 17 other recess appointments shortly before leaving office.²⁶⁸ Once the occurrence of the vacancy was decoupled from the period of the recess, controversies mounted over the circumvention of Congress.²⁶⁹ President Bill Clinton made 139 recess appointments while President George W. Bush made 171 such appointments.²⁷⁰ Both presidents faced determined opposition in Congress over their policies.

Congress has always had strong arguments against some of these recess appointments and there were many who disagreed with the Wirt and Daugherty interpretations.²⁷¹ However, Congress undermined its own institutional authority. As discussed below, while Congress has periodically moved to restrict recess appointments, the Justice

264. It is worth noting that the recess appointment controversy is part of a broader expansion of presidential power involving not just the circumvention of Congress but the non-enforcement of federal law in some areas. *See generally The President's Constitutional Duty to Faithfully Execute the Laws Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley, Professor).

265. Portions of this section are largely taken from *Executive Overreach*, *supra* note 13.

266. *Executive Overreach*, *supra* note 13, at 44. The one exception would appear to be the Wirt interpretation, which was more limited than later interpretations but still broader than Randolph's. Wirt served under Monroe during the "Era of Good Feelings" and the fading of party distinctions. Henry M. Dowling, *William Wirt*, 10 GREEN BAG 453, 456 (1898).

267. *Carrier*, *supra* note 1, at 2213–14.

268. *Id.* at 2214.

269. *Executive Overreach*, *supra* note 13, at 45.

270. *Id.*

271. Indeed, the recess appointment controversy is a perfect microcosm for the continuing divide between formalists and functionalists. *See generally* Turley, *supra* note 9. As the Seitz opinion states, the Daugherty opinion laid the foundation for a "functional understanding" of the meaning of the Clause. Lawfulness of Recess Appointments during a Recess of the Sen. notwithstanding Periodic Pro Forma Session, 36 Op. O.L.C. 1, 12 (2012). Formalists will be more drawn to the Randolph interpretation, particularly due to its reinforcement of more clear lines of separation between the branches.

Department argued that the failure to aggressively oppose the Wirt interpretation meant that Congress had accepted it.²⁷² This perceived passivity was then cited for increasingly liberal interpretations of the Clause.²⁷³ As early as 1862, Attorney General Edward Bates was able to advise Lincoln that there was no longer any debate over his filling preexisting vacancies because the matter “is settled . . . as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate.”²⁷⁴ A few judges have also relied on historical practice to justify the Wirt interpretation as a “settled” question, though the Supreme Court has never ruled on the controversy.²⁷⁵ In *Evans v. Stephens*, the Eleventh Circuit not only started its analysis with a heavy presumption that a president’s actions are constitutional (because he took an oath to uphold the Constitution),²⁷⁶ but (after a rather cursory treatment of the language and history of the Clause) emphasized that “[h]istory unites with our reading to support our conclusion.”²⁷⁷

The court acknowledges its role as “the controlling interpreter of how the Constitution applies,” but then appears to relieve itself of that duty by noting “the President, in his capacity as chief executive of this country, is also sworn to uphold the Constitution.”²⁷⁸ This rather bizarre rationale ignores that it would apply in most every case and ignores that Congress has the same obligation. The question is what the Constitution means—a question that the court answers with a consistently conclusory analysis. This reliance on the interpretation of the Executive Branch

272. 36 Op. O.L.C. at 7.

273. *Id.*; see also *NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 668 (4th Cir. 2013) (Diaz, J., dissenting) (“[A] closer look at the conduct of the coordinate branches, both past and present, reveals that the functional approach not only fits with historical practice, but also better sustains the balance of powers inherent in our constitutional structure.”).

274. *Executive Overreach*, *supra* note 13, at 42.

275. See also *Nippon Steel Corp. v. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int’l Trade 2002).

276. 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). Some courts adopt what could be viewed as a blind eye to the obvious gaming that occurs in these disputes, noting that such use of presidential power “cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies.” *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962).

277. See also *Nippon Steel Corp.*, 239 F. Supp. 2d at 1374 n.13.

278. *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc). The dissenting judge in that case, however, correctly dismissed the use of historical practice to supplant the plain meaning of the text. *Id.* at 1228 n.2 (Barkett, J., dissenting) (“[T]he text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.”)

echoed the same sentiment in *In Re Farrow*,²⁷⁹ where a district court refused to require that vacancies actually occur during a recess in part due to the fact that the Administration's underlying opinions "were rendered upon the call of the executive department, and under the obligation of the oath of office, and are entitled to the highest consideration."²⁸⁰ As in that nineteenth century case, *Evans* seems to flip Madison's warning against relying on our highest angels in government, thereby accepting an interpretation by presuming the best of motivations by the interpreter even when the interpretation works to expand the interpreter's own authority.²⁸¹

Rounding out this extreme form of judicial abdication was the use of historical practice or "legislative acquiescence" by Congress. This "legislative acquiescence" is based on the fact that presidents have succeeded in circumventing Congress. Chief Judge J.L. Edmonson presumes not only that this record could not occur without the acquiescence of Congress or its "implicit agree[ment]" with the constitutional interpretation:

That Congress is willing, under the circumstances, to pay recess appointees filling vacancies that had existed while the Senate was in Session suggests to us that it is the view of the majority of Congress that the President's making of such appointments is likely not unconstitutional. To interpret the statute's significance any other way would seem to attribute to Congress an intent to countenance what they saw as an unlawful practice.²⁸²

Like much of Judge Edmonson's opinion, the use of the historical practice of paying appointees is astonishing in its lack of substantive analysis.²⁸³ Putting aside the various reasons why Congress would be reluctant to cut off pay to recess appointees, the court is assuming acquiescence is acceptance of a constitutional interpretation.²⁸⁴ It is an

279. 3 F. 112 (N.D. Ga. 1880).

280. *Id.* at 115–16.

281. *See generally id.*

282. *Evans*, 387 F.3d at 1226 n.11.

283. This view also runs against the Supreme Court's deference on matters of legislative governance as shown in its holding in *United States v. Ballin*, that each house has the inherent authority to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." 144 U.S. 1, 6 (1892). *See also Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (deferring to "the two houses, through their presiding officers" on whether there is "sufficient evidence . . . that [a bill] passed Congress").

284. The pay factor has played a prominent role in the limited judicial review cases of the Clause. In *United States v. Alocco*, the Second Circuit rejected a challenge

ironic point since judicial deference, or Alexander Bickel's "passive values," is defended in part on a view of judicial incompetence or lack of expertise in addressing political disputes.²⁸⁵ Yet, Judge Edmonson felt confident in concluding that the fact that recess appointees were paid is compelling evidence of congressional acceptance. More importantly, Judge Edmonson indicates that an interpretation vis-à-vis the separation of powers is more credible if a majority in Congress acquiesced to it.²⁸⁶ However, it is obviously possible that a president can control Congress through his party or his own political popularity. Since these provisions are designed in part to avoid the aggregation of power, it is a rather curious rationalization that the success of a president in circumventing Congress is proof of the validity of the underlying interpretation. It is the ultimate triumph of not just functionalism but the faith in checks and balances over judicially enforced lines of separation of powers.²⁸⁷

While the D.C. Circuit in *Canning v. National Labor Relations Board*²⁸⁸ came to the right conclusion on the interpretation of the Recess Appointments Clause, it did not reject the historical practice model of interpretation as much as shift that analysis to an earlier period of application.²⁸⁹ A bottler and distributor of soda products, Noel Canning was subject to the regulations governing employers under the National Labor Relations Act of the NLRB.²⁹⁰ After an administrative judge ruled against him in a NLRB case, he ultimately challenged that decision on the basis that only two of the five members of the NLRB were constitutionally appointed under the Recess Appointments Clause.²⁹¹ While I have criticized the decision for its lack of a unifying theory of

based on the more restrictive interpretation of the Clause by noting in part that "Congress has implicitly recognized the President's power to fill vacancies which arise when the Senate is in session by authorizing payment of salaries to most persons so appointed under the recess power." 305 F.2d 704, 714 (1962).

285. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961) ("[T]he court's sense of *lack of capacity*, compounded . . . [by] the inner vulnerability of an institution which is *electorally irresponsible* and has no earth to draw strength from.") (emphasis added).

286. See generally *Evans*, 387 F.3d 1220.

287. William Eskridge noted that the differentiation between "separation of powers" and "checks and balances" reflects the respective predisposition of both interpretative camps: "'Separation of powers' connotes relatively formalist inquiries of rules, deductions, and sharp lines. 'Checks and balances,' on the other hand, connotes relatively functionalist inquiries of standards, inductions, and flexible interactions." Eskridge, *supra* note 21, at 22. For a discussion of this distinction in the context of recess appointments, see generally Turley, *supra* note 9, at 1561–81.

288. 705 F.3d 490 (D.C. Cir. 2013).

289. *Id.* at 502.

290. *Id.* at 498; National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

291. *Canning*, 705 F.3d at 498.

separation of powers,²⁹² the opinion does reject the functionalist basis for the broad interpretation of the language of the Clause.²⁹³ However, Chief Justice David Sotomayor notably applies the historical practice approach to support a more narrow and static interpretation of the language.²⁹⁴ The court insists that it is the contemporaneous practices, not the long-standing historical practices, that should be given emphasis in interpretations:

The interpretation of the Clause in the years immediately following the Constitution's ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a "critical tool of constitutional interpretation" because it reflects the "public understanding" of the text "in the period after its . . . ratification." With respect to the Recess Appointments Clause, historical practice strongly supports the intersession interpretation. The available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified. The first intrasession recess appointment probably did not come until 1867, when President Andrew Johnson apparently appointed one district court judge during an intrasession adjournment Presidents made only three documented intrasession recess appointments prior to 1947, with the other two coming during the presidencies of Calvin Coolidge and Warren Harding. Whatever the precise number of putative intrasession recess appointments before 1947, it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare [W]e conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic "suggests an assumed *absence* of [the] power" to make such appointments Their early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage. While the Board seeks support for its interpretation in

292. See Turley, *supra* note 9, at 1593–94.

293. The court did reject the functionalist view of interpretation posited by former Attorney General Daugherty. *Canning*, 705 F.3d at 503–04; Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20, 21–22 (1921). The panel correctly rejected this vague approach and noted that this was a matter that called for “high walls and clear distinctions” to maintain a separation of the branches. *Canning*, 705 F.3d at 504 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

294. *Canning*, 705 F.3d at 503.

the practices of more recent administrations, we do not find those practices persuasive . . . [W]e conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.²⁹⁵

The *Canning* approach to historical practice is notably different from the type of adverse possession claims the Obama Administration made.²⁹⁶ Rather than saying that historical practices establish or even change the meaning of language over time, the *Canning* court looked to contemporary practices as reflective of the presumed intent of the framers behind this language.²⁹⁷ The meaning was not secured by adverse possession as much as in contemporary demonstration. Though closer to the mark, the use of such early practices does not, in my view, represent a strong basis for interpretation. Such practices could exist without the agreement of Framers. This was a period of great flux and change as represented by the *Marbury v. Madison*²⁹⁸ decision in establishing the supremacy of the courts.²⁹⁹ While I agree with the result, I cannot say that I find that historical practice approach much more persuasive than the Administration's adverse possession claims. It is also in my view unnecessary given the relative clarity of the historical meaning of these terms.

The Fourth Circuit went even further in adopting historical practice as an interpretative device—again reaching the right conclusion for the (partially) wrong reason.³⁰⁰ The D.C. Circuit insisted on giving historical practices greater interpretive weight for the period closest to the drafting of the Clause.³⁰¹ The Fourth Circuit in *National Labor Relations Board v. Enterprise Leasing Company Southeast, LLC*,³⁰² takes a more conventional approach and noted that presidents often made recess appointments between 1789 and 1921 between sessions.³⁰³ When compared to the “thousands of instances” of intrasession breaks, the court noted that the “[e]xecutive practice was dramatically different.”³⁰⁴ The virtual absence of prior intrasession appointments supported the narrow interpretation of the court: “the infrequency of intrasession recess

295. *Id.* at 501–02 (citations omitted).

296. *See also NLRB v. New Vista Nursing & Rehab*, 719 F.3d 203, 218 (3d Cir. 2013).

297. *Canning*, 705 F.3d at 506.

298. 5 U.S. (1 Cranch) 137 (1803).

299. *Id.* at 177.

300. *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 636–60 (2013).

301. *Canning*, 705 F.3d at 501.

302. 722 F.3d 609 (2013).

303. *Id.* at 649.

304. *Id.*

appointments in the historical record and the relative disdain harbored toward such appointments in at least the first 132 years of our Nation suggests an ‘absence of [the] power’ to make such appointments.”³⁰⁵ The Fourth Circuit suggests that, if the record were different, the success of past presidents would have heavily favored a broader view of interpretation.³⁰⁶ It implicitly recognizes that such practices can change the outcome of an interpretation. While it is not clear whether the Fourth Circuit believed that historical practice can create a new or evolutionary meaning, it clearly is willing to yield to some extent to a meaning defined by practice.³⁰⁷ It is an ironic emphasis for the Fourth Circuit which, like the D.C. Circuit, rejects a more functionalist approach to interpretation. Historical practice interpretations constitute a type of functionalist interpretation that is proven through practice or patterns as opposed to arguments of convenience or efficiency.³⁰⁸ The result of such interpretations differs little from a direct adverse possession claim—the Executive Branch can develop its own interpretative support by succeeding in such appointments over the course of time.

In the end, the dissenting judge in *Enterprise Leasing Company* was the most revealing in the course of his argument for a functionalist interpretation of the Recess Appointments Clause. Judge Albert Diaz stressed that he did not want to “suggest that history should be ignored as a tool of constitutional interpretation.”³⁰⁹ However, he noted that “one

305. *Id.* at 650. Historical practice as a method of interpretation leads inevitably to different views of what the historical record shows. In contrast to the historical practice analysis of the D.C. Circuit, Third Circuit, and Fourth Circuit, the Obama Administration asked for certiorari on the basis that “the appointments in this case are consistent with Executive interpretation and practice going back at least 190 years to the Administration of President James Monroe.” Reply Brief for the Petitioner at 5, *NLRB v. Canning*, 133 S. Ct. 2861 (2013) (No. 12-1281).

306. *Enter. Leasing Co.*, 722 F.3d at 655–56.

307. *Id.* at 651–52.

308. Professor Adrian Vermeule offers a more nuanced, but still an equally unsatisfying, analysis in the wake of *Canning*. Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013). Vermeule dismisses the opinion as “a myopic approach to the regulation of constitutional risks.” *Id.* at 122. He notes that “recess appointments are hardly the stuff of which tyranny is made.” *Id.* Of course, few dangers would seem to measure up to Vermeule’s standard for judicial intervention, and he ignores the role of appointments as a check on the destabilizing effects of the Administrative State. See Turley, *supra* note 9, at 1592–93. However, while citing the need for a functionalist approach, he suggests that the court should have incorporated “historical practice” to tailor its interpretation. Vermeule, *supra*, at 125. He notes “historical practice has liquidated the duration of intrasession recesses within which an appointment may be made (ignoring pro forma sessions). The practice has varied somewhat, but there is a stable basin of attraction in the region of about ten days.” *Id.* at 125. Once again, the analysis treats a historical practice as largely interchangeable with the language and the original purpose of the Clause.

309. *Enter. Leasing Co.*, 722 F.3d at 669 (Diaz, J., dissenting).

need only read the fine briefs in these cases to recognize that, given time, savvy lawyers can excavate historical references to support virtually any proposition.”³¹⁰

It was the Third Circuit in *National Labor Relations Board v. New Vista Nursing and Rehabilitation*,³¹¹ however, that captured the dubious place of historical practice analysis in its ruling against President Obama’s Recess Appointments.³¹² After an exhaustive look at the historical practices of recess appointments,³¹³ the court dismissed reliance on the modern status quo between the branches, stating “recent practices cannot alter the structural framework of the Constitution.”³¹⁴ Like the D.C. Circuit, therefore, it found the early historical record to be the most probative of intent.³¹⁵ However, it emphatically rejected the notion of presidential practices altering the meaning of constitutional text.³¹⁶ The court echoed the view of the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*³¹⁷ that “the separation of powers does not depend on the views of individual Presidents, nor on whether ‘the encroached-upon branch approves the encroachment.’”³¹⁸

A. *Frankfurter and the “Gloss” of Meaning in Constitutional Interpretation*

The recess appointment controversies offer a usual microcosm for considering the use of historical practice in constitutional interpretation. The recent decisions in the D.C., Third, and Fourth Circuits represent departures from a long pattern of judicial avoidance in such cases. Notably, however, these cases largely incorporated historical practice, albeit with a different emphasis and conclusion from past courts. There is no consensus on why or how such analysis should be used as the basis for supporting a particular interpretation of constitutional language. The historical practice has long been a common rationale for more expansive interpretations of executive power. Justice Felix Frankfurter in his

310. *Id.* at 669–70.

311. 719 F.3d 203 (3d Cir. 2013).

312. *Id.* at 239–42.

313. *Id.*

314. *Id.* at 240.

315. *Id.* at 239 (“For over one-hundred years following ratification, recess was generally understood to mean intersession breaks only.”).

316. *Id.*

317. 130 S. Ct. 3138 (2010).

318. *Id.* at 3155 (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)) (citations omitted).

concurrence to *Youngstown Sheet & Tube Company v. Sawyer*³¹⁹ opined that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ vested in the President.”³²⁰ It is not clear what a “gloss” does for constitutional analysis, but it is vintage Frankfurter.³²¹ Yet, in the few decisions on recess appointments, judges have embraced historical practice as a basis for their broad interpretations. Thus, the court relied on the “gloss of history”—a rationale that obscures the seemingly clear language for the ambiguity of practice.³²²

Such historical practice arguments are a poor substitute for constitutional analysis.³²³ The mere fact that Congress has failed to protect its powers under the Constitution does not change that document’s meaning any more than a long history of appointing officials without Senate approval during sessions would constructively change the meaning of the Appointments Clause.³²⁴ These arguments suggest that

319. 343 U.S. 579 (1952).

320. *Id.* at 610–11 (Frankfurter, J., concurring).

321. It appears to be the same type of rationalization that motivated Frankfurter to write his disturbing memorandum in the case of the German saboteurs. Memorandum of Justice Felix Frankfurter, Justice Felix Frankfurter Soliloquy (1942) (on file with the Library of Congress, Manuscript Room, Papers of Robert H. Jackson, Box 124); Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 734 (2002); see also Jonathan Turley, *Quirin Revisited: The Dark History of Military Tribunals*, NAT’L L.J., Oct. 28, 2002, at A17.

322. *United States v. Allocco*, 305 F.2d 704, 713–14 (2d Cir. 1962).

323. Notably, historical practice arguments from the early Republic offer countervailing support for a limited application of recess appointment power. Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1776 (1984).

324. In the aftermath of the *Canning* decision, Professor Cass Sunstein articulated what he called a “Burkean” approach to such interpretations that “stress[es] respect for precedent and the importance of judicial understandings as they evolve over time.” Cass Sunstein, *Originalism versus Burkeanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 122, 126 (2013). In speaking with the originalist, the Burkean states:

Longstanding practices deserve respect for two independent reasons. The first is that in general, practices persist because they work, and this point is particularly likely to hold when we are speaking of settled practices by the President and Congress The second point is yours, and it involves disruption and instability. If courts reject longstanding practices, they may cause all sorts of ripple effects, which are likely to include unintended bad consequences and high costs.

Id. at 128–29. What is striking about the “Burkean” take on the issue is how he over-simplifies the opposing view (including dismissing the language as entirely indeterminate), but ignores the obvious dysfunctional record of recess appointments under the functionalist interpretation during the modern period. These were not “settled

presidents can adversely possess constitutional territory left unclaimed or undefended by Congress. Such views would leave the Constitution dependent on the priorities and motivations of officials in both the Executive and Legislative branches. James Madison sought to create a system that recognized the often flawed nature of mankind.³²⁵ He famously warned: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”³²⁶ The fact that presidents have historically gotten away with abusing recess appointments is not a compelling basis for establishing the meaning of this Clause.

Historical practice as a rationale appears in many forms in both statutory and constitutional interpretations.³²⁷ The most common is the congressional acquiescence argument where the absence of congressional action is treated as evidence of intent or acceptance of broader executive power. Historical practice for the Court can reflect congressional acquiescence or simply an established acceptance of an interpretation as the new constitutional reality. The Supreme Court has cited the reliance of society on a prior interpretation even when a majority of justices once rejected the interpretation. For example, as noted by Justice Antonin Scalia,³²⁸ justices in the majority in *Dickerson v. United States*³²⁹ previously dismissed the notion that *Miranda v. Arizona*³³⁰ established a constitutionally based rule.³³¹ However, in the 7-2 opinion, Rehnquist stressed “[w]e do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part

practices” but often contested muscle plays by presidents. They succeeded due to a history of judicial passivity and avoidance—a trend that was abruptly interrupted by *Canning*.

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

326. THE FEDERALIST NO. 51, at 265 (James Madison) (Yale Univ. Press ed., 2009).

327. This historical practice argument in the federal system can have rippling effects in the states. For example, the New Jersey Supreme Court, in *Fritts v. Kuhl*, 51 N.J.L. 191, 199–201 (N.J. Sup. Ct. 1889), used federal practice to interpret the state’s recess appointments clause. Indeed, even the tension between the branches (due in significant part to judicial inaction) is cited as part of a divine plan: “The history of the federal government had shown frequent disagreement between the president and the federal senate, and the convention could not have supposed that the experience of our state government would be different.” *Id.* at 204.

328. *Dickerson v. United States*, 530 U.S. 428, 444–55 (2000) (Scalia, J., dissenting).

329. 530 U.S. 428 (2000).

330. 384 U.S. 436 (1966).

331. See, e.g., *Davis v. United States*, 512 U.S. 452, 457–58 (1994); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984).

of our national culture.”³³² He even quoted Justice Scalia for the proposition that ““wide acceptance in the legal culture”” is “adequate reason not to overrule” it.³³³ The *Dickerson* opinion is an example of historical reliance or acceptance influencing the Court’s opinion on what the text of the Constitution means. What is remarkable about the decision is this history only extended back to 1966. It was a transparently convenient rationale after decades of opinions that not only granted a myriad of exceptions to the doctrine but also steadfastly declined to embrace it as a constitutional rule.

Historical practice is used to establish that individuals or institutions have acquiesced or accepted a particular meaning—and in so doing have established that meaning for a given provision. Historical practice is also used occasionally to show not just social practices but acceptance of the interpretations underlying the practices. For example, in *Marsh v. Chambers*,³³⁴ Chief Justice Warren Burger rejected an Establishment Clause challenge to Nebraska’s practice of employing a chaplain to give daily opening prayers.³³⁵ Chief Justice Burger’s highly flawed analysis elevated historical practice over textual and purposive interpretation.³³⁶ Chief Justice Burger noted that:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.³³⁷

He then converted this historical observation into an interpretative imperative: “In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress”³³⁸ Chief Justice Burger refused to “cast aside” “Nebraska’s practice of over a century, consistent with two centuries of

332. *Dickerson*, 530 U.S. at 443.

333. *Id.* at 443 (quoting *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)).

334. 463 U.S. 783 (1983).

335. *Id.* at 792–93. For scholars, discussed below, who view the sole or primary purpose of the separation of powers as protecting liberty interests, the use of historical practice or congressional acquiescence to expand executive powers shows the dangers of more fluid or undefined interpretive approaches. See *infra* notes 389–93 and accompanying text.

336. See *Marsh*, 463 U.S. at 790.

337. *Id.* at 786.

338. *Id.* at 790 (emphasis added).

national practice”³³⁹ Chief Justice Burger’s opinion captures the danger and superficiality of historical practice interpretations. Notably, it is based on the history of prayer as opposed to the history of the Establishment Clause.³⁴⁰ It is an ironic use of historical practice since the Establishment Clause protects minority religions and non-believers from majoritarian religious preferences. Such favored religious practices are by definition popular with the majority and likely to be historically dominant. Chief Justice Burger thus used the power of the majority to compel such faith-based traditions as an interpretative element in finding such faith-based traditions to be constitutional. The result is the same circular logic that is so maddening in the context of the Recess Appointments Clause.

Chief Justice Burger used the same questionable basis for congressional acquiescence to support the ruling in *Bob Jones University v. United States*.³⁴¹ In holding that the Internal Revenue Service (IRS) could terminate the tax-exempt status of a university based on their religious-based discriminatory policies, Chief Justice Burger relied heavily on the fact that the IRS had followed the policy for over a decade without a congressional response.³⁴² Chief Justice Burger held “[n]onaction by Congress is not often a useful guide, but the nonaction here is significant.”³⁴³ Yet, it is hard to see how, if it is significant in this case, it would not be significant in most cases. The policy had existed for roughly a decade and, during that time, various efforts were made to overturn the policy legislatively. Instead of seeing such opposition as significant, Chief Justice Burger found the opposition’s failure to succeed as determinative:

During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3). Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to § 501 during this same period, including an amendment to §

339. *Id.*

340. Justice William Brennan, who admitted his own error in prior Establishment cases, noted that the history of the Clause itself is not very illuminating. *Id.* at 795–96 (Brennan, J., dissenting). “[T]he Court’s historical argument does not rely on the legislative history of the Establishment Clause.” *Id.* at 814.

341. 461 U.S. 574 (1983). For criticism of the ruling in *Bob Jones*, see Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 59, 60, 64–69, 73, 75 (Douglas Laycock et al. eds., 2008); see also Jonathan Turley, *Inequality, in the Name of Equality*, WASH. POST, Apr. 16, 2010, at B01.

342. *Bob Jones Univ.*, 461 U.S. at 599.

343. *Id.* at 600.

501(c)(3) itself. Tax Reform Act of 1976, Pub. L. 94-455, § 1313(a), 90 Stat. 1730. It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971.³⁴⁴

While taking judicial notice of the number of attempts, Chief Justice Burger does not concern himself with the underlying political division or pressure in Congress. Nor does he address the fact that a president can have such a dominant hold on Congress as to make such efforts futile. Likewise, a matter like unpopular religious practices or values may make the targeting of a religious organization popular with the majority of the public. Yet, Chief Justice Burger's approach would rely on the dominance of such parties or public opinion as significant support for finding congressional acquiescence.

Other uses of historical practice can be more nuanced but reflect the same underlying assumptions. For example, in his dissent in *United States v. Virginia*,³⁴⁵ Justice Antonin Scalia stressed that same-sex education is not expressly forbidden under the Bill of Rights and then noted that because this textualist interpretation “bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”³⁴⁶ Once again, while the Scalia opinion has strong components, it is dangerous to rely on historical practice in the interpretation of the Bill of Rights, which is designed to protect minority interests, speech, and groups. Some of our worst abuses were maintained as long historical practices of discrimination and isolation.

While changing social norms and practices are accepted elements in establishing such evolving standards as cruel and unusual punishment,³⁴⁷ the use of historical practice in the areas of recess appointments is particularly problematic because it is used to justify a shifting of relative power in favor of one branch. While its use on statutory interpretative matters can be debated, there should be little debate over the inappropriate use of institutional acquiescence or historical practice to

344. *Id.* at 600–01 (footnote omitted).

345. 518 U.S. 515 (1996).

346. *Id.* at 568–69 (Scalia, J., dissenting) (quoting *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

347. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (noting that the Eighth “Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

establish new constitutional meanings or to adjust the lines of separation between the branches.

Notably, while the mere unchallenged use of a presidential power has been treated as establishing a new meaning in the constitutional text, the Court generally does not delve into the political realities of the dominance of one party during these periods or the lack of a meaningful opposition in Congress.³⁴⁸ It is the mere fact that a president succeeded that is the evidence of the interpretation's inherent validity. Thus, in *United States v. Midwest Oil Company*,³⁴⁹ the Court stressed:

[G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.³⁵⁰

Under this view, silence is as good as legislation.³⁵¹ The concept of legislation through acquiescence takes the express power of legislating given to Congress in the separation of powers, and reads it to effectively empower the Executive Branch.³⁵² This approach is most evident in *Youngstown Sheet & Tube Co. v. Sawyer* in Justice Jackson's ill-conceived but widely cited division of presidential assertions of power into three categories ranging from authority "at its maximum" (when pursuant to express or implied authorization of Congress) to its "lowest

348. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

349. 236 U.S. 459 (1915).

350. *Id.* at 472–73.

351. Inaction as the basis for congressional intent can take various forms. See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988).

352. John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 746 (1984) ("Congress' silent acquiescence surely cannot be equated with a new affirmative enactment. Congress can create law only by enacting a statute, and statutes may be enacted only if the specific constitutional prerequisites contained in [A]rticle I, [S]ection 7 of the U.S. Constitution have been met. In short, under our constitutional structure of government, Congress 'cannot legislate effectively by not legislating at all.'" (footnotes omitted)).

ebb” (when in conflict with the express or implied will of Congress).³⁵³ However, his second category articulated the strength of a president acting in the absence of prior opposition by Congress:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. *Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.*³⁵⁴

Jackson embraced the highly questionable contention that the mere lack of action or indifference of Congress can alter the constitutional balance between the branches.³⁵⁵ Jackson’s “twilight zone” is a strikingly undefined place where the failure to speak can be taken as words of concession.³⁵⁶ Not only does he not explain how indifference or inertia can change the meaning of constitutional provisions, but he ignores the obvious problem that a president’s own party could control Congress so that it is facilitating the concentration or aggregation of power in the presidency—the very thing that the Framers wanted to avoid. Jackson’s use of the historical practice rationale would allow presidents with authoritarian or one-party control to secure changes in the constitutional balancing of the government. The separation of powers doctrine presupposes the opposite: the structural limitations are designed to function even in the absence of congressional courage or principles.

The use of historical practice to alter the lines of separation of powers affects a host of rights and protections by allowing the concentration of powers in one branch. For example, in refusing to require presidents to secure congressional declarations of war, federal

353. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

354. *Id.* at 637 (emphasis added).

355. Jackson’s willingness to accept indifference or inaction as the basis for constitutional interpretation is shared by some academics. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260, 269–71, 308–11 (1980).

356. It is not clear whether silence can indeed speak loudly or judicial ears hear what they want from the silence. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court considered the validity of the executive agreements vis-à-vis the International Emergency Economic Powers Act (IEEPA). Looking at the IEEPA and another statute, the Court found them not to be directly applicable but “highly relevant in the looser sense.” *Id.* at 677–78. The Court found “a history of congressional acquiescence in conduct of the sort engaged in by the President.” *Id.* at 678–79.

courts routinely cite historical practice for ignoring the express language of Article I.³⁵⁷ For those of us who have challenged this interpretation in court, it is transparently circular.³⁵⁸ The courts have largely refused to rule in the challenges to unilateral presidential war-making decisions, often denying standing to litigants like members of Congress.³⁵⁹ When they have ruled, they have refused to enjoin a military operation.³⁶⁰ This has led to an ever-lengthening list of military campaigns carried out without congressional authorization, which in turn is used to support the claim that history supports the interpretation.³⁶¹ Despite the express textual language and the clear opposition of the Framers to such wars and foreign entanglements,³⁶² this history of judicial and legislative acquiescence has effectively gutted a core provision of the Constitution. Historical practice has resulted in an interpretation that is diametrically opposed to the express wishes of those who drafted or voted on the Clause.³⁶³ At the Pennsylvania ratification convention, James Wilson, delegate from Pennsylvania to the Constitutional Convention, expressed confidence that the proposed Constitution would guard against unilateral military engagement by the President:

357. See *Berk v. Laird*, 317 F. Supp. 715, 721–31 (E.D.N.Y. 1970).

358. Jonathan Turley, *Federal Judge Dismisses War Powers Challenge by Members of Congress*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (Oct. 20, 2011), <http://jonathanturley.org/2011/10/20/federal-judge-dismisses-war-powers-challenge-by-members-of-congress/>.

359. See, e.g., *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011).

360. See, e.g., *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971).

361. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324, 327–28 (1936); *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971); *Berk v. Laird*, 317 F. Supp. 715, 721–23 (E.D.N.Y. 1970).

362. This was not some passing discussion of the Framers but a focused debate where the clear intent was to make congressional authorization essential. James Madison and Elbridge Gerry moved to replace “make war” with “declare war,” “leaving to the Executive the power to repel sudden attacks.” Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT’L SEC. L. & POL’Y 319, 321 (2012). Gerry vehemently opposed South Carolina delegate Pierce Butler’s proposal to vest all war power in the president alone, declaring that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” *Id.* at 321–22. George Mason echoed Gerry’s opposition to Butler’s proposal by arguing that the Executive Branch was “not safely to be trusted with [the war power].” *Id.* at 322. Mason indicated that he was “for clogging rather than facilitating war”—vesting the war power in Congress would ensure that wars were infrequent. *Id.*; see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 156, at 19 (noting “that the confederation produced no security agai[nst] foreign invasion” because “congress [was] not . . . permitted to prevent a war nor to support it by th[eir] own authority . . .”) (Edmund Randolph); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 56 (2007).

363. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 5 (1993) (noting “the clarity” of the Framers intent on requiring congressional authorization for war).

This system will not hurry us into war; it is calculated to guard against it. *It will not be in the power of a single man*, or a single body of men, *to involve us in such distress*, for the important power of declaring war, is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion, that nothing but our national interest can draw us into war.³⁶⁴

As with recess appointments, presidents have cited a long line of cases where no authorization was secured from Congress before the commencement of major hostilities.³⁶⁵ Courts have steadfastly avoided the issue by declaring the disagreement between the two branches a “political question” and not appropriate for judicial review.³⁶⁶ The flexibility given to presidents is often credited as an efficient compromise in light of modern demands of governance—much like the justification of controversial recess appointments.³⁶⁷ Thus, we now have a constitutional provision, which was expressly designed to keep a president from exercising unilateral war powers, and has been flipped in its meaning by a history of judicial and legislative acquiescence.³⁶⁸

One of the most pronounced examples of this approach in separation of powers cases can be found in *Dames & Moore v. Regan*³⁶⁹

364. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 528 (Jonathan Elliot ed., 1836) (emphasis added); see also 1 JAMES WILSON, THE WORKS OF JAMES WILSON 433 (Robert Green McCloskey ed., 1967) (“The power of declaring war, and the other powers naturally connected with it, are vested in congress.”).

365. This includes President George H.W. Bush ordering roughly a quarter million troops to invade Kuwait. This was done with only informal consultation with Congress. See Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of Additional United States Armed Forces to the Persian Gulf, 26 WEEKLY COMP. PRES. DOC. 1834–35 (Nov. 16, 1990).

366. See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141, 1151 n.28 (D.D.C. 1990).

367. See, e.g., John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1178–79 (1999) (citing long historical practice of undeclared wars and noting that “[t]hese examples suggest that by conduct and consent, the branches of government have established a stable, working system of war powers . . . Congress has allowed the executive branch to assume the leadership and initiative in war, and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations”).

368. Indeed, the usurpation of war powers was a critical element to the Nixonian dream of an Imperial Presidency. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY ix (Houghton Mifflin 1973) (discussing how that model was realized in part by the president’s “capture . . . of the most vital of national decisions, the decision to go to war”).

369. 453 U.S. 654 (1981).

where the Supreme Court held unanimously that the President had the inherent authority to suspend the claims of U.S. citizens against foreign governments.³⁷⁰ Chief Justice William Rehnquist stressed that Congress had long acquiesced to such executive authority, and that “legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures of independent presidential responsibility.’”³⁷¹ It is a remarkably vacuous form of constitutional interpretation. Simply because past members of Congress acquiesced or even invited excessive executive action, the practice has resulted in the permanent loss of constitutional territory—the adverse possession approach to the Separation of Powers. The Executive Branch adversely possesses the territory based on implied consent, “[a]t least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.”³⁷² This approach would allow the constructive amending of whole swathes of the Constitution by simple acts of omission or acquiescence. It ignores the fact that the party of a president will sometimes control Congress or that presidents tend to be overwhelmingly popular during periods of war or national emergency. Congress has rarely shown much courage in standing up to presidents during wartime or national crises.³⁷³ Yet, the Framers designed a system that was not dependent on the good work or motivations of politicians. That is why our leaders do not have to be angels for our system to function correctly.³⁷⁴ The Court in *Dames & Moore* was allowing passivity to alter the meaning of express constitutional language.

An interesting comparison can be drawn between the Recess Appointments Clause and the changing meaning of “cruel and unusual punishment” under the Eighth Amendment. The “cruel and unusual” standard was tied by the Court to the “the evolving standards of decency that mark the progress of a maturing society.”³⁷⁵ The Court has stated it is “guided by ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.’”³⁷⁶ However, beyond the fact that the Court looks to past legislative and

370. *Id.* at 686.

371. *Id.* at 678 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

372. *Id.* at 678–79.

373. *See, e.g., id.*

374. THE FEDERALIST NO. 51, at 265 (James Madison) (Yale Univ. Press ed., 2009).

375. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

376. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

social evidence of acceptance, the comparison is superficial. The Eighth Amendment standard was designed to be adjectival and evolutionary to reflect “nothing less than the dignity of man.”³⁷⁷ Where contemporary practices are used to establish the current view of what is cruel or unusual under the Eighth Amendment, the meaning of the provision does not actually change. Cruel and unusual punishments are prohibited—only the contemporary understanding of what is cruel and unusual punishment changes. It is not enough to say that a word like “recess” can also evolve without saying that all of the words of the Constitution are subject to radical revision from what constitutes a “vote” of a house to what constitutes “two-thirds” of the majority of members. The Recess Appointments Clause is a check and balance provision that delineates the relative authority of two of the three branches. As such, its terms are intended to be fixed and stable. There is no evidence that the Framers ever intended that term to evolve like the meaning of “cruel and unusual.”

Likewise, the use of historical evidence in cases involving privacy is distinguishable from the type of arguments used in the context of the Recess Appointments Clause. Modern terms like privacy are inherently tied to societal concepts of personal autonomy and relations. It is also tied to human perceptions and expectations that defy a static definition. The Court has often cited changing technological and social realities in tweaking its jurisprudence concerning the meaning of terms like “privacy” or more broadly, “liberty.”³⁷⁸ However, the Court is often careful to distinguish between developments that illuminate the flaws in earlier decisions as opposed to changing the meaning of the core terms. Thus, in *Lawrence v. Texas*,³⁷⁹ the Court noted the changing attitudes toward homosexuality in society and in the Court itself.³⁸⁰ However, it also stressed that “*Bowers* was not correct when it was decided.”³⁸¹ There is no question that more expansive meanings of constitutional terms from “due process” to “equal protection” to “privacy” have occurred over the years, but this change is primarily the result of evolving views of the Court and justices. Thus, when the Court reviewed and abandoned the

377. *Trop*, 356 U.S. at 100.

378. In the same fashion, the Court will consider changes in society as part of its classic determination of whether to alter precedent despite the adherence to principles of stare decisis. However, this use of historical change or acceptance concerns the functionality of prior holdings of the Court in cases generally. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) (noting that technology can change the reasonable person’s expectations of privacy).

379. 539 U.S. 558 (2003).

380. *Id.* at 572–79.

381. *Id.* at 578.

doctrine of “separate but equal” in *Brown v. Board of Education*,³⁸² it relied on new research challenging its assumptions from *Plessey v. Ferguson*.³⁸³ It did not find that the underlying terms of the Constitution had changed due to legislation and policies embracing “separate but equal.”³⁸⁴ While historical developments and acceptance are sometimes referenced, the Court has not applied the same historical acquiescence or acceptance to change the meaning of individual rights. To the contrary, even when the federal and state government had rejected the notion of a constitutional right to bear arms as an individual under the Second Amendment for decades, the Court still found the meaning under the Constitution remained unchanged by such historical practice or acquiescence in finding an individual right in *District of Columbia v. Heller*.³⁸⁵ Regardless of any acceptance of the limits on gun ownership over the years by citizens and states, the Court still found the meaning of the Amendment as fixed and unchanged.³⁸⁶ The acquiescence to such limits did not result in the evolution of the meaning of the amendment.

There has been no “evolution” of the term “recess”—only the adoption of different practices to evade the requirements of Articles I and II. While the pro forma session is not something that was used in the early Republic, the Framers were aware of the ability of Congress to remain in session and avoid recess periods. Moreover, pro forma sessions were a predictable act of self-defense by the legislative branch when faced with the new interpretations of the Executive Branch that treated any break in business as justifying recess appointments. In the end, such terms must be treated as fixed in meaning for the foundation of the separation of powers to be stable and predictable. As explained by the Supreme Court in *Freytag v. Commissioner*,³⁸⁷ the appointment provisions of Article II “[preserve] . . . the Constitution’s structural integrity . . . [and] [n]either Congress nor the Executive can agree to waive this structural protection The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”³⁸⁸ The appointments process must be considered a structural provision in delineating the respective powers and prerogative of the respective branches over the selection of high officials. This controversy over the interpretation of a structural provision was heightened further by the central question over the funding and

382. 347 U.S. 483 (1954).

383. 163 U.S. 537 (1896).

384. *Id.* at 543–44.

385. 554 U.S. 570, 624–36 (2008).

386. *Id.* at 634.

387. 501 U.S. 868 (1991).

388. *Id.* at 878–80.

accountability of the office to which Cordray aspired. The circumvention of Congress on such a question denies the system its checks and balances on the very type of question where compromise between the branches is favored.

While academics like Professor Adrian Vermeule have dismissed the concerns expressed in cases like *Canning* by noting that “recess appointments are hardly the stuff of which tyranny is made,”³⁸⁹ they also tend to ignore or to minimize the dangers inherent in the rise of the Administrative State. The center of gravity of the system has shifted dramatically toward the “Fourth Branch” of federal agencies which are increasingly insulated from political or public pressure.³⁹⁰ Appointments have taken on added importance for Congress in the age of regulation, offering an opportunity to demand answers and seek compromises in conflicts with the White House.³⁹¹ In this new quadripartite system, it is not “a myopic exercise in constitutional risk-management” to seek to reinforce this (and other) checks upon the federal agencies.³⁹² There has been an unprecedented increase in presidential powers since September 11th, an expansion that has been widely criticized as an aggrandizement of power that has approached authoritarian levels.³⁹³ In this increasingly lopsided system, historical practices can develop not by consensus but sheer dominance.

The use of historical practice tends to accompany or follow largely functionalist interpretations of the Clause. For formalists, the fact that past presidents have engaged in intrasession appointments or other circumventions of the Clause holds little influence in the analysis over the meaning of the Clause.³⁹⁴ Whether it is a basis for judicial abstention or proof of interbranch compromise, historical practice is used to show that the branch can continue to function without the more rigid interpretations that dominated the earlier recess appointment controversies.³⁹⁵ The result has been the reduction of courts to mere pedestrians as the two branches pushed the meaning of recesses and

389. Vermeule, *supra* note 308, at 122.

390. Jonathan Turley, *The Rise of the Fourth Branch*, WASH. POST, May 26, 2013, at B01.

391. *See generally* Turley, *supra* note 9.

392. Vermeule, *supra* note 308, at 123.

393. Jonathan Turley, *How Nixon Won Watergate*, USA TODAY, March 26, 2013, at 8A; Turley, *supra* note 83.

394. *See generally* Turley, *supra* note 9.

395. Vermeule, for example, suggests alternatives that “optimize” relations between the branches, noting “that historical practice has liquidated the duration of intrasession recesses within which an appointment may be made Observable behavior suggests that the slope isn’t very slippery after all.” Vermeule, *supra* note 308, at 124–25.

recess appointments to absurd extremes. Historical practice has become part of a self-affirming functionality argument: the branches have continued to carry out their core functions even with these recess controversies. Not only is the historical practice rationale circular in logic, but it remains untethered to the core purposes of the Clause. It is also an interpretation that facilitates the increasing transfer of power to executive agencies.

B. Permissive or Adverse Possession: The Acquisition of Constitutional Powers through Historical Practice.

What is most striking is how historical practice is often cited in questions of the separation of powers while the same rationale would be viewed as wildly improper in other areas like police abuse under the Fourth Amendment or censorship under the First Amendment.³⁹⁶ Historical practice appears most appealing in cases of drawing the lines of authority between the branches or between the federal and state governments. While the comparison breaks down beyond some common surface elements, the unstated premise of the historical rationale appears to be strikingly similar to that of common adverse possession. Justice Frankfurter could just as well have cited a property textbook for his claim that new constitutional meanings (and powers) can be based on the “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”³⁹⁷ That “unbroken . . . practice” can divest Congress of constitutional authority in the same way as unbroken possession can divest a titleholder of ownership. Of course, “the right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”³⁹⁸ Constitutional territory comes with a presumption of the ability to exclude intruders or trespassers, though many functionalists would prefer to leave such exclusion to self-help measures based in the system of checks and balances rather than judicial enforcement.³⁹⁹ Most importantly, the shift in authority is viewed by functionalists as corrective, or to use the parlance of property law, to “correct errors in

396. Cf. Bruce P. Merenstein, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of Marsh v. Chambers and the School Prayer Cases*, 145 U. PA. L. REV. 1035, 1064–65 (1997) (“A half-century of unconstitutional police misconduct would not grant a law enforcement agency adverse possession of the constitutional prohibitions on illegal searches and seizures or violations of due process.”).

397. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

398. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

399. See Turley, *supra* note 9, at 1540–41.

conveyancing.”⁴⁰⁰ While few seriously argue that the Framers intended an intrasession recess of a couple days to trigger this power, functionalists see the use of recess appointments as addressing a bottleneck in the legislative branch that is becoming increasingly dysfunctional given the demands of the modern agency-based government.⁴⁰¹

The right to hold land, however, is limited by the concept of non-use and acquiescence. The normative value underlying adverse possession is strikingly similar to the thrust of historical practice claims in constitutional law. The common law has long disfavored the non-use of land—allowing more enterprising individuals to acquire ownership in fee simple of property by adversely taking the property and using it for a period of time.⁴⁰² There is both the element of the failure to make use of potentially valuable land as well as the notion of acquiescence in the face of the adverse actions of another party.⁴⁰³ As Oliver Wendell Holmes noted, “[s]ometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.”⁴⁰⁴ As we have seen, courts and commentators are inclined to treat an historical practice like expanded recess appointments as becoming part of the status quo of interbranch politics— and a practice not only accepted by

400. There is a notion in early writings of optimal use that carries a certain functionalist flavor:

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: “English lawyers regard not the merit of the possessor, but the demerit of the one out of possession.” It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (quoting JAMES BARR AMES, LECTURES ON LEGAL HISTORY 197 (1913)); see also Paula R. Latovick, *Adverse Possession against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 941–43 (1996) (discussing the Ames and Holmes quotes).

401. Editorial, *Recess Appointments May Be Over*, L.A. TIMES (January 29, 2013), <http://articles.latimes.com/2013/jan/29/opinion/la-ed-recess-appointments-nlr-20130129> (“Reining in the president’s ability to make recess appointments wouldn’t be a problem if the confirmation process worked the way the framers intended. But in Washington’s current partisan gridlock, a minority of senators can—and too often do—deny a president a timely up-or-down vote on his nominations, a distortion of the advice-and-consent process.”).

402. Latovick, *supra* note 400, at 940–41.

403. *Id.* at 941.

404. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

Congress but increasingly relied upon by presidents in avoiding the negative effects of partisan politics.⁴⁰⁵ Again, Holmes appeared almost to have recess appointments in mind when he described the basis for adverse possession:

It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.⁴⁰⁶

The use of recess appointments to circumvent Congress—and delays in filling slots in federal agencies—has gone from an adverse practice to an adverse possession over the course of time both due to the lack of congressional assertion of ownership and the growing expectations of ownership by the president. Justice Jackson's defense of the "wise and quieting rule" of accepting actual use of powers in history captures this evolving sense of ownership.⁴⁰⁷ Allowing expanded interpretations of power through historical practice draws the same distinction between the original title and the continuing right of possession.

Common law doctrine also, however, highlights the weaknesses in the historical practice rationale. Such use must be open, continuous, exclusive, adverse, and notorious.⁴⁰⁸ As noted earlier, members have long objected to the intrusion of presidents in the area of recess appointments.⁴⁰⁹ These members have either been in the minority or stymied by the general judicial policy of avoidance in intervening in such disputes. Some courts and commentators simply insist that the system of checks and balances can address these problems (as opposed to judicially enforced separation of powers principles).⁴¹⁰ The result is that the possession has been challenged but not deterred.⁴¹¹ In this sense, the

405. Turley, *supra* note 13.

406. Holmes, *supra* note 404, at 477.

407. *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

408. Notably, some states historically required that adverse possessors show that they have "cultivated or improved" adversely possessed land. *See, e.g.*, N.Y. REAL PROP. ACTS. LAW §§ 512, 522 (McKinney 1979). It is a notion that fits with functionalist views that recess appointments are now needed to address changes in the model of government with the rise of the "fourth branch" of federal agencies. *See* Turley, *supra* note 9, at 1600–01.

409. Turley, *supra* note 13.

410. *See* Turley, *supra* note 9, at 1540–41.

411. This may draw a closer analogy to the concept of a "prescriptive easement" of "a non-possessory right to enter and use land in the possession of another" without

enjoyment of the expanded powers over recess appointments, particularly intrasession recess appointments, would be at best analogous to permissive or consented-to possession, which is generally not sufficient for adverse possession.⁴¹²

Most importantly, Congress may object that constitutional territory is given to branches for perpetuity regardless of the effort or success of a given branch to protect it. This objection is akin to the common law rule of *nullum tempus occurrit regi* (or time does not run against the king).⁴¹³ In the interpretation of the Constitution, time should not run against any branch in the separation of powers—the very structural guarantees of our system. The doctrine of time not running against the king was based on the principle that, regardless of the negligence of current government officials, the public interest should not suffer from their failure to perform their duties.⁴¹⁴ In the same fashion, the failure of Congress to effectively resist adverse actions by presidents should not be the basis for ceding constitutional territory to the Executive Branch without the consent of the public through a constitutional amendment. The claim of Congress to such powers is fixed for time, as noted by Thomas Jefferson when he observed that, “Each house of Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution.”⁴¹⁵

Finally, the expansion of recess appointments has occurred despite the “use” of this land by Congress. Indeed, it is the assertion of its power to refuse confirmation to some officials that has led to the adverse action by presidents. Congress has effectively closed the gate to the intrusion of presidents, who have simply circumvented the fence entirely through recess appointments. The failure to confirm a nominee is not a type of non-use if one accepts a more substantive view of the congressional power. It is important to keep in mind that the Framers were inclined to give the Senate both the nominating and confirming powers over judicial

interference from the possessor. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (2000). Indeed, the Recess Appointment Clause as a whole could be viewed as a type of constitutional easement.

412. *Shandaken Reformed Church of Mount Tremper v. Leone*, 451 N.Y.S.2d 227, 228 (App. Div. 1982) (“When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him.”).

413. See *United States v. Weitraub*, 613 F.2d 612, 614 (6th Cir. 1979)

414. *Id.* (“[T]he maxim remains vital based upon the public policy of preserving public rights and revenues from the neglect of public officers.”).

415. Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), reprinted in 2 THE FOUNDERS’ CONSTITUTION 300 (Philip B. Kurland & Ralph Lerner eds., 1987), available at http://press-pubs.uchicago.edu/founders/documents/al_5s14.html.

nominees until the very last day of the Constitutional Convention. While both judicial and executive confirmations were ultimately left to the Senate, the Framers viewed Congress as sharing the responsibility in selecting the most persons for federal offices, not as simply a rubber stamp for all but the most objectionable or unqualified nominees. Thus, withholding confirmation is a use of the power in many cases where Congress has reservations about the relative qualifications of a nominee over alternative candidates.⁴¹⁶

The purpose of this analogy (which is admittedly limited) is simply to highlight the dangerous fluidity and subjectivity of historical practice rationales. Adverse possession law carefully delineates the required showing of each of the elements to establish a high standard for such loss of property—reflecting the historical unease with the notion of denying ownership to the original holder in fee simple.⁴¹⁷ Justices Frankfurter and Jackson present a far less stringent basis for the loss of a far more important form of realty. It is the comparative lack of objective measures in the historical practice rationale that is so problematic. The functionalist appeal of this approach is that over time the Constitution can evolve to place power in the hands of those who are viewed as most inclined—or in most need—to use it. Yet, adverse possession is narrowly defined because it can produce great instability and strife, as well as other byproducts of uncertainty over ownership. These rigid rules of property law expressly seek to avoid the uncertainty and instability evidenced in recess appointment controversies over the last five decades. It appears that good fences make good neighbors in both society and government.

CONCLUSION

Recess appointments have long been a case of shifting alliances for constitutional experts and members who have called for greater adherence to the language and purpose of the Recess Appointments Clause. For academics, it is a particularly hazardous place to be: between politics and principle. There is a story that a friend once told the poet William Wordsworth that his poem “The Happy Warrior” was his very

416. Of course, Congress can do more in opposing adverse possession of its powers. It is often divided with a sizable number of members supporting the president of their own party. It is also reluctant as a body to use “nuclear options” from withdrawing funding of whole programs or agencies. Likewise, the denial of pay for a given official may not present a serious deterrent for many federal appointees who tend to be affluent and serve for less than two years. See *Executive Overreach*, *supra* note 13; see also Turley, *supra* note 9, at 1578–80.

417. See generally Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420–21 (2001).

best work.⁴¹⁸ Wordsworth reportedly responded, “you are mistaken; your judgment is affected by your moral approval of the lines.”⁴¹⁹ The point is simple. The reader was enthusiastic about the poem not because of the poetry but what the poem said about the ideal of Lord Horatio Nelson and the warrior spirit. Constitutional scholars often experience that same fleeting affection for constitutional provisions where members suddenly embrace language due to their political approval of the lines. The Cordray appointment is a prime example. Some members who were silent during the recess appointments of President George W. Bush have become vocal opponents of the practice under President Obama. Conversely, Democrats who now stand silent once cried foul when Bush used recess appointments to circumvent significant opposition to nominees. There are others, however, who truly love the Constitution not for their political “approval of the lines” but their approval of the system as a whole—a system of delicately balanced powers that should be maintained regardless of the merits of any particular controversy.

The Cordray controversy offers a fascinating glimpse into how historical practice can be used to not only expand the meaning of constitutional provisions but also to justify judicial avoidance in addressing interbranch conflicts. There is an obvious appeal for courts to suggest a type of institutional settlement over the meaning of a constitutional provision based on years of historical practice. This is particularly appealing at a time of intense political divisions where judicial intervention would be immediately denounced as ideologically driven or partisan. Indeed, there is a common habit of referring to our current “extraordinary” political divisions as justifying extraordinary measures like the Cordray appointment. In truth, there is nothing extraordinary about our current politics. If anything, our current political discourse would have been viewed as relatively tame by the Framers. The Framers knew something about rabid politics and its expression in legislative and executive measures. The division between the Jeffersonians and the Federalists was quite literally lethal, with both sides seeking to arrest or even kill their opponents.⁴²⁰ Thomas Jefferson referred to his Federalist opponents as “the reign of the witches.”⁴²¹ All too often the lines in recess appointment controversies are divided along

418. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 2* (Yale, 1962).

419. *Id.*

420. *Executive Overreach*, *supra* note 13.

421. In his letter to John Taylor on June 4, 1798, Jefferson counseled “[a] little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles.” 18 THOMAS JEFFERSON, *Letter to John Taylor*, in *THE WRITINGS OF THOMAS JEFFERSON* 205, 209 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

party lines where unity among legislators is present. Nevertheless, Democrats are willing to look the other way to empower a Democratic president in the same way that Republicans remained silent in the face of recess appointment controversies by his Republican predecessor. Political opportunism in the past is the basis for the historical practice rationale used to expand recess appointment power beyond any recognizable point. Cordray represents yet a new historical practice that will now become support for the de facto claim of authority by the executive branch.

Such historical practice and claimed acquiescence is often shaped by the failure of the courts to resolve these interpretive questions. The result is maddeningly circular with courts refusing to intervene and then claiming the continued exercise of the authority as proof of the accepted meaning of the language. Structural provisions that establish the lines of separation of powers require a fixed and consistent meaning. To rely on the historical practice is to abdicate the vital role of federal courts under Article III. The intrasession recess appointment of Cordray represents the final evolution of the Recess Appointments Clause. With the appointment, President Obama finally finished the work of his predecessors and made confirmation a largely discretionary process for presidents who could now avoid difficult political fights by making appointments during the briefest of breaks in congressional business. What is left is something that is distinctly counter-Madisonian—superfluous language and evasion in the separation of powers. It is a remarkable transformation of a clear constitutional provision made ridiculous by decades of opportunistic claims by presidents and studied passivity by the courts. It is an historical record of institutional failure by all of the branches: a failure of excess by presidents, a failure of acquiescence by Congress, a failure of avoidance by the courts. It is a perfect Madisonian storm with predictably damaging consequences for the system. If this record is to be altered, it will begin with a rejection of the historical practice rationale that has been applied on this and so many other constitutional areas.

Since this Clause was ripped from its textual moorings, it has floated dangerously in the choppy waters between the Executive and Legislative Branches. It is time, in my view, to move back toward the logical limitations on the recess appointment power Hamilton and Randolph articulated. Good politics often make for bad law. The Cordray recess appointment is one such example. However, the greatest concern should not simply be the circumvention of Congress in this matter but the rationale supporting that circumvention. Ultimately, the historical practice rationale is less of an interpretive rule than it is a prescriptive exception to interpretation. Once a historical practice has been recognized as a matter extrinsic to the language, the text and purpose of

the provision become only marginally important. It is the Frankfurterian “gloss” that obscures the separation of powers within the tripartite system and leaves the meaning of provisions like the Recess Appointments Clause to the shifting fortunes of politics.