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## RECESS APPOINTMENTS OF ARTICLE III JUDGES: THREE CONSTITUTIONAL QUESTIONS

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Recess appointments of Article III judges present three major constitutional questions. First, may a recess appointment be made if the vacancy existed prior to the recess? Second, may a recess appointment be made during a recess in the midst of a Senate session? Third, may a recess appointment be made to fill a vacancy on an Article III court? The first two questions, unlike the third, arise in the context of recess appointments to executive offices as well as judicial offices. Although discussion of the first question dates back to the presidency of George Washington, the second to the presidency of Andrew Johnson, and the third to the presidency of Dwight Eisenhower, all three are involved in current disputes concerning the constitutionality of President George W. Bush's appointment of William Pryor to the United States Court of Appeals for the Eleventh Circuit.<sup>1</sup> Before addressing these three

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<sup>1</sup> While this article was in the late stages of production, the United States Court of Appeals for the Eleventh Circuit, sitting *en banc*, upheld the constitutionality of the appointment. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc). The eight judges in the majority gave an affirmative answer to all three questions. *Id.* at 1222-24 (concluding that recess appointments may be made to Article III courts); *id.* at 1224-26 (concluding that recess appointments may be made during intrasession recesses); *id.* at 1226-27 (concluding that recess appointments may be made to fill vacancies that arise before the recess). Judge Wilson dissented, but did not reach any of the constitutional questions, contending that the constitutionality of the appointment should be certified to the Supreme Court under 28 U.S.C. § 1254(2). *Id.* at 1238-41 (Wilson, J., dissenting). Judge Barkett would have preferred to certify the question, but, in view of the majority disposition, reached the merits. *Id.* at 1228 n.1 (Barkett, J., dissenting). She concluded that a recess appointment may be made only if the vacancy was "created during that recess." *Id.* at 1229. She did not reach the question whether recess appointments may be made during intrasession recesses, although she thought that "the text of the Constitution as well as the weight of the historical record strongly suggests that the Founders meant to denote only inter-session recesses." *Id.* at 1228 n.2. Judges Carnes and Pryor were recused. *Id.* at 1221 n.\*. Not a single judge concluded that recess appointments could not be made to Article III courts.

In addition, two petitions for certiorari challenging Judge Pryor's appointment remain

questions, however, a bit of background is in order.

Of the three branches of government created by the Constitution, only one, the executive, needs to be on duty continuously. Both the courts in which the judicial power of the United States is vested, and the Congress in which the legislative power granted by the Constitution is vested, can do their work during limited sessions or terms.

The Constitution goes to great lengths to ensure that there is always someone in place to exercise the executive power vested in the President. Not only did the original Constitution create the office of Vice President—who is constitutionally required to do little more than wait around for the removal, death, resignation, or inability of the President<sup>2</sup>—but two constitutional amendments were designed to avoid the risk of the Presidency ever being unfilled. The Twentieth Amendment provides for the selection of a President in case the President-elect dies, or a President is not chosen before the next presidential term is to begin, and the Twenty-Fifth Amendment provides both a mechanism to fill the office of Vice President and a mechanism for determining a President's disability.

Article III does not establish when federal courts will sit. Instead, Congress is given the power to make laws that are necessary and proper for carrying into execution the judicial power.<sup>3</sup> Under those laws, federal courts traditionally sat for limited terms. For example, under the Judiciary Act of 1789, the Supreme Court had two terms, one commencing the first Monday in February, and another commencing the first Monday in August.<sup>4</sup> The various circuit courts created by that same Act also had limited terms. For example, the Circuit Courts for the Districts of New Jersey, New York, Pennsylvania, Connecticut, and Delaware had April and October terms, while the Circuit Courts for the Districts of New Hampshire and Virginia had May and November terms.<sup>5</sup> The idea that courts would be in session only for limited terms is also reflected in the grant of power in the Judiciary Act of 1789, and subsisting to this day, to individual judges to grant writs of habeas corpus, thereby making the great writ of liberty available during vacation as well as term time.<sup>6</sup> Although the Judiciary Act of 1789 did

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pending in the Supreme Court. *Miller v. United States*, (No. 04-38), petition filed June 24, 2004, originally listed for conference on Oct. 29, and re-listed for Nov. 5, 2004, Nov. 12, 2004, and Jan. 14, 2005; *Franklin v. United States*, (No. 04-5858), petition filed Aug. 13, 2004, originally listed for conference on Jan. 7, 2005, and re-listed for Jan. 14, 2005.

<sup>2</sup> See U.S. CONST. art. II, § 1; amend. xx; amend. xxv. The Vice President is also the President of the Senate, but has no vote except to break a tie. *Id.* at art. I, § 3.

<sup>3</sup> *Id.* at art. I, § 8.

<sup>4</sup> Judiciary Act of 1789, 1 Stat. 73, § 1. Indeed, in light of the rearrangement of the Supreme Court's terms in 1801 and 1802, it did not hold any session at all in 1802. See James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 239 (1992).

<sup>5</sup> Judiciary Act of 1789, 1 Stat. 73, § 5.

<sup>6</sup> See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV.

not explicitly set an end date for the Supreme Court's terms, it effectively did so by staffing the Circuit Courts with Supreme Court Justices, accompanied by the local federal district judge.<sup>7</sup> The Supreme Court's February Term, for example, had to end in time for the Justices to hold the April Terms of the Circuit Courts. Similarly, while it did not explicitly set an end date for the terms of the Circuit Courts, the need for Supreme Court Justices to hold other Circuit Courts, and get back to hold the next term of the Supreme Court, effectively meant that Circuit Court terms had to end in time.

The Constitution plainly does not contemplate that Congress will be continually in session. To the contrary, the Constitution sets up safeguards to ensure that it meets at all. Refusing to vest the President with the royal prerogative to control when and whether the legislature meets,<sup>8</sup> it insists that "Congress shall assemble at least once in every Year,"<sup>9</sup> and even provides a default date for that meeting in case no law is enacted establishing a different date. Moreover, to prevent one house from unilaterally making legislative work impossible, it provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."<sup>10</sup> Only if the two houses cannot agree regarding adjournment does the President have the power to adjourn them "to such time as he shall think proper."<sup>11</sup> Perhaps the clearest demonstration in the constitutional text that Congress would frequently not be in session is the power granted to the President to convene either or both Houses of Congress on "extraordinary occasions."<sup>12</sup>

The default date for the required annual assembly of Congress in the original Constitution was the first Monday in December.<sup>13</sup> Under this default schedule, Senators or Representatives elected (or reelected) in November of an even numbered year would not assemble until December of the following odd numbered year, some thirteen months later. For example, those elected to Congress in the fall of 1804 did not assemble until December 2, 1805. Because Congressional (and presidential) terms began on March 4 and ended on March 3, the result was typically a long session of Congress that began in December of an odd numbered year and might last until June or July of the next even numbered year, and a short session that began in December of the even

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(forthcoming April 2005).

<sup>7</sup> Judiciary Act of 1789, 1 Stat. 73, § 4.

<sup>8</sup> See SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 140, 146 (1779) (1765).

<sup>9</sup> U.S. CONST. art. I, § 4.

<sup>10</sup> *Id.* at § 5.

<sup>11</sup> *Id.* at art. II, § 3.

<sup>12</sup> *Id.* at § 3.

<sup>13</sup> *Id.* at art. I, § 4.

numbered year and ended when the terms of those members of Congress expired on March 3 of the following odd numbered year. Calculating the average time that Congress was in recess therefore can understate matters; in odd numbered years, in the absence of an Act of Congress setting a different date to assemble or a presidential call of an extraordinary session, Congress would be in recess for nine months.<sup>14</sup>

The short session, running from December of an even numbered year until March 3 of an odd numbered year, was a lame duck session. The Twentieth Amendment, denominated the lame duck amendment and envisioned as eliminating lame duck sessions, moved up the default date for the required annual meeting of Congress from December to January 3, and moved up the start and end dates for the terms of members of Congress from March until January 3. Under the Twentieth Amendment, the Congress elected in November of an even numbered year assembles in January of the odd numbered year, approximately two months later.<sup>15</sup>

With this background, let us turn to the Recess Appointments Clause and questions regarding its interpretation. It provides:

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.<sup>16</sup>

The clause was adopted at the Constitutional Convention without dissent or recorded debate.<sup>17</sup> The discussion of the recess appointment power in *The Federalist* was largely devoted to refuting the suggestion that it empowered the President to fill vacancies in the Senate itself, although Hamilton does note:

The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President singly to make temporary appointments . . . .<sup>18</sup>

At the North Carolina ratifying convention, Archibald Maclaine

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<sup>14</sup> For the dates of sessions of Congress, see Joint Committee on Printing, United States Congress, 2003-04 Official Congressional Directory, 108th Congress 512-27 [hereinafter Official Congressional Directory]. The dates can also be found at <http://www.thegreenpapers.com/soc>, and [http://www.clerk.house.gov/histHigh/Congressional\\_History/Session\\_Dates](http://www.clerk.house.gov/histHigh/Congressional_History/Session_Dates).

<sup>15</sup> See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470 (1997).

<sup>16</sup> U.S. CONST. art. II, § 2.

<sup>17</sup> 4 THE FOUNDERS' CONSTITUTION 37 (P. Kurland ed., 1787) [hereinafter FOUNDERS' CONSTITUTION].

<sup>18</sup> THE FEDERALIST No. 67 (Alexander Hamilton) (Clinton Rossiter ed. 1961)

explained:

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.<sup>19</sup>

With this background, we are now in a position to address the three constitutional questions presented by recess appointments of Article III judges. Part One discusses whether recess appointments may be made if the vacancy existed prior to the recess and looks closely at recess appointments in the earliest days of the republic. Part Two evaluates whether recess appointments may be made during recesses that are taken during a session of the Senate. Part Three assesses whether recess appointments may be made to Article III courts.

#### I. WHEN MUST THE VACANCY EXIST?

The first question of constitutional interpretation to address is whether a recess appointment may be made if the vacancy existed prior to the recess.

In approaching this question, consider the default Congressional calendar, prior to the adoption of the Twentieth Amendment, in an odd numbered year. The old Congress would have started a short session the immediately previous December which would expire on March 3, with the new Congress not scheduled to assemble until December. If a vacancy arose on March 22, for example, the President would have the authority to make a recess appointment to fill the vacancy. But suppose the vacancy had arisen in February, when the Senate was still in session. Could the President fill that vacancy with a recess appointment, or would the position have to remain vacant until the Senate confirmed the President's nominee? Bear in mind that under the Constitution's default calendar, that period would be some nine months long.

The textual question is when does a vacancy "happen?"<sup>20</sup> Some

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<sup>19</sup> 4 FOUNDERS' CONSTITUTION, *supra* note 17, at 102-03.

<sup>20</sup> Posing this question assumes, as have all interpreters of whom I am aware, that the prepositional phrase "during the Recess," modifies the phrase "may happen," thereby requiring that the vacancy happen during the recess in order for the recess appointment power to be available.

This assumption is more troublesome than it first appears, because there is an alternative

things—a birth, a death, an arrival, a departure, for example—are generally understood to “happen” at a particular moment in time.<sup>21</sup> Other things—a vacation, an illness, a sabbatical, a leave of absence, a war, for example—are generally understood to “happen” over an extended period of time.<sup>22</sup> Sometimes, there is ambiguity and both are

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phrase—“shall have Power”—that “during the Recess” might be understood to modify. And although the phrase “during the Recess” follows the verb “may happen”—and therefore might be thought to modify only its immediate antecedent, *see, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (applying the “grammatical ‘rule of the last antecedent,’ under which a limiting clause or phrase . . . should [ordinarily] be read to modify only the noun or phrase that it immediately follows”)—it must be understood to modify the phrase “shall have Power,” thereby limiting the exercise of the recess appointment power to times when the Senate is in recess. Otherwise, the recess appointment power would be available for vacancies that “happen[ed] during the Recess” even *after* the recess ended. Of course, as Attorney General Henry Stanberry once observed, “no one maintains that position.” 12 Op. Att’y Gen. 32, 38-39 (1866).

It might be thought, then, that the prepositional phrase “during the Recess,” despite its placement, modifies *only* the phrase “shall have Power.” The difficulty with this interpretation is that it would empower the President, during the recess, to fill up all vacancies that “may happen” at any time—including vacancies that “may happen” in the future, after the end of the recess. If it seems odd to imagine a President making an appointment to an office that is not yet vacant, bear in mind that Presidents do nominate, and the Senate does confirm, individuals to offices in anticipation of a vacancy. *See* text accompanying notes 63-67, 76 *infra*.

For a contemporary example, consider the nomination and confirmation of Condoleezza Rice while Colin Powell continued to serve as Secretary of State. *See* FDCH E-Media, *Transcript: Powell Says Farewell to State Dept. Employees*, WASH. POST., Jan. 19, 2005, at <http://www.washingtonpost.com/wp-dyn/articles/A20895-2005Jan19.html> (reporting Secretary of State Powell’s address to State Department Employees on Jan. 19, 2005, the same day that the Senate Foreign Relations Committee voted to approve the nomination of Condoleezza Rice as his successor); John King et al., *Powell Resigns with Three Other Cabinet Secretaries*, (Nov. 15, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/11/15/powell/> (reporting that Powell announced his resignation on Nov. 15, 2004, and that he expected to continue to serve as Secretary of State for the “weeks or a month or two as my replacement goes through the confirmation process”); 151 CONG. REC. S-34 (Jan. 4, 2005) (nomination of Condoleezza Rice as Secretary of State); 151 CONG. REC. S-529 (Jan. 26, 2005) (confirmation of Rice as Secretary of State)

Accordingly, the prepositional phrase “during the Recess” should be understood to modify *both* the phrase “shall have Power” *and* the phrase “may happen” so that the President has the power only during the recess *and* the vacancy must “happen” during the recess. However, contrary to General Stanberry, *see id.* (arguing that to understand a vacancy to “happen” at the moment it first occurs would be to empower a President to fill vacancies that first occur during the recess even after the recess has ended), this conclusion of dual modification does not resolve the question of *when* a vacancy happens. *Cf.* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. (forthcoming 2005), at 38-39, available at [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=601563](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=601563) (arguing that under “both the arise and the exist interpretations, one must supply the missing language” and claiming that the clause should be read as if the phrase “during that recess” were inserted after the word “Commissions”).

<sup>21</sup> For example:

Smith: My friend’s wife died.

Jones: When did that happen?

Smith: Last Tuesday.

<sup>22</sup> For example:

Smith: My colleague took a leave of absence to work in the Justice Department.

Jones: When did that happen?

plausible.<sup>23</sup>

Is a vacancy something that “happens” at a particular time? Or is it something that “happens” over an extended period of time? There is an ambiguity; both are textually plausible. A vacancy in an office, like a vacancy in a motel room, can be understood to “happen” either at the moment that the prior occupant left, or to “happen” the entire time that the office or room is unoccupied.<sup>24</sup> On the first understanding, “happen” is used in the sense of “originate”; on the second, “happen” is used in the sense of “exist.”<sup>25</sup>

Smith: There was a vacancy in the office of Vice President.

Jones: When did that happen?

Smith: On April 15, 1865, when Lincoln died.

Smith: There was a vacancy in the office of Vice President.

Jones: When did that happen?

Smith: From April 15, 1865, when Lincoln died, until March 4, 1869, when President Grant and Vice President Colfax took office.

If a vacancy is understood to “happen” at a particular moment, the only offices that can be filled by a recess appointment are those in which the vacancy first arose during the recess. On this reading, if the

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Smith: The 2001-02 academic year.

Smith: Did the Vietnam War happen during the Presidency of Richard Nixon?

Jones: Yes, although it began earlier.

<sup>23</sup> For example:

Smith: There was a marriage between John and Mary.

Jones: When did that happen?

Smith: August 12, 1879.

Smith: There was a marriage between John and Mary.

Jones: When did that happen?

Smith: From August 12, 1879 until John’s death in 1920.

<sup>24</sup> For example:

Smith: There was a vacancy in Room 911.

Jones: When did that happen?

Smith: At noon, when the Harrison family checked out.

Smith: There was a vacancy in Room 911.

Jones: When did that happen?

Smith: For two years after the attack on the World Trade Center because no one wanted to stay in that room.

<sup>25</sup> Professor Rappaport, while strongly defending the view that a vacancy “happens” when it first arises, agrees that both of the competing interpretations “can be rooted in the language of the Clause.” Rappaport, *supra* note 20, at 14; *cf.* *Evans v. Stephens*, 387 F.3d 1220, 1229-21 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (asserting that the “language needs no interpretation,” that “the question of when a vacancy must occur admits of very little ambiguity” and that the “plain meaning” is that a vacancy occurs or happens when “a particular triggering event occurs[s]”). Using the definitions in Noah Webster’s 1828 dictionary, Rappaport restates the phrase “a vacancy happens during the recess” as “an office becomes empty or falls out during the recess.” Rappaport, *supra* note 20, at 14 n.45. Using those same definitions, *id.*, one can just as readily restate the phrase as “the state of being destitute of an incumbent . . . come[s] by chance . . . during the recess.”

vacancy arose before the Senate took a recess, no recess appointment could be made. If filling the vacancy were sufficiently urgent, the President could call the Senate back for an extraordinary session.

Attorney General Randolph took this position in 1792, advising Thomas Jefferson in a handwritten opinion that no appointment could be made to a new position, Chief Coiner of the United States Mint, for which no nomination had been made before the Senate recessed.<sup>26</sup> In Randolph's view, an office that has never been filled is vacant, and the vacancy "commenced" on the day the office was created, "or may be said to have *happened* on that day."<sup>27</sup> In accordance with Randolph's

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<sup>26</sup> Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 165, 167 (John Catanzariti ed., 1990) [hereinafter PAPERS OF THOMAS JEFFERSON]. St. George Tucker appears to have held a similar view, although he does not state so explicitly. See 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 342-43 (1969) (1803) (contrasting the availability of a recess appointment when "the office became vacant during the recess of the senate" with what he saw as the result that would otherwise obtain in case of a disagreement between the President and the Senate: the office being "kept vacant"); see also Rappaport, *supra* note 20, at 29-30 (interpreting Tucker as adhering to the Randolph view).

<sup>27</sup> Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 PAPERS OF THOMAS JEFFERSON, *supra* note 26, at 166. In contrast to Randolph's view that a vacancy may be said to have happened on the day that an office is created, the Senate Committee on Military Affairs concluded in 1822 that the recess appointment power may not be used to fill "original vacancies," that is, "offices created by law, and not before filled." 38 ANNALS OF CONG. 489, 500 (1822). It reasoned that such vacancies do not "*happen* in the recess of the Senate," because "the word *happen* must have reference to some casualty not provided for by law," such as "death, resignation, promotion or removal." *Id.* It recommended that the Senate reject the nomination of two individuals who had received recess appointments to original vacancies, *id.* at 501, and the Senate followed the recommendation. *Id.* at 509; see also 6 S. EXEC. J. 415, 415 (July 29, 1813) (motion protesting certain recess appointments on grounds that "no such vacancy can happen in any office not before full"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 416, 417 (3d ed. 1858) (stating that if "the senate are in session, when offices are created by law, which have not as yet been filled, and nominations are not then made to them by the President, he cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate," and relying on the Senate's conclusion that the "word 'happen' had relation to some casualty, not provided by law"); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), reprinted in 4 FOUNDERS' CONSTITUTION, *supra* note 17, at 114-15 (stating that it "has been held by that venerable body [the Senate], that if new offices are created by congress, the President cannot, after the adjournment of the senate, make appointments to fill them. The vacancies do not *happen* during the recess of the senate."); Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett & Jacob E. Cook eds., 1976) (stating that the statutory phrase "[w]hich may have happened" "implies casualty—and denotes such Offices as having been once filled, have become vacant by accidental circumstances") [hereinafter PAPERS OF HAMILTON].

Care must be taken not to read such statements out of context. These authors were addressing the creation of new offices, and relying on the idea, less common in current usage, that only those things that occur by chance can be said to "happen." On this understanding, "happen" is not used to designate a time, but rather to indicate the unplanned nature of the vacancy, best captured today by "happenstance," or "haphazard." See OXFORD ENGLISH DICTIONARY 1096 (2d ed. 1984) (defining "happen" as "[t]o come to pass (*orig.* by 'hap' or chance)"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "happen" as "to fall out; to chance; to come to pass" and "to light; to fall by chance"); cf. *Evans v. Stephens*, 387 F.3d 1220, 1230 n.4 (11th Cir. 2004) (Barkett, J., dissenting) ("The eighteenth-century definitions

advice, President Washington did not issue a recess appointment to Henry Voight to be the Chief Coiner of the United States Mint, but nevertheless retained his services as coiner by declaring his “approbation . . . of the employment of Mr. Voight as Coiner,”<sup>28</sup> pursuant to a statutory provision that permitted the Director of the Mint to “employ as many clerks, workmen and servants, as he shall from time to time find necessary, subject to the approbation of the President.”<sup>29</sup> That is, while Randolph’s view was followed as a formal matter, the very individual whom the President sought to appoint as Coiner was nonetheless employed as Coiner.<sup>30</sup>

Moreover, in issuing his opinion, Randolph confronted what was already a prior practice of recess appointments. Indeed, several of the offices created by the Judiciary Act of 1789 were first held by recess appointees. The Judiciary Act of 1789 was approved on September 24, 1789. Two days later, Thomas Johnson, Edmund Pendleton, and Thomas Pinckney were confirmed as the District Judges of Maryland, Virginia, and South Carolina respectively, and John Marshall was confirmed as the United States Attorney for the District of Virginia.<sup>31</sup> They declined to serve, however, and Washington gave recess appointments to William Paca, Cyrus Griffin, William Nelson, and William Drayton after the Senate adjourned on September 29, 1789.<sup>32</sup>

Randolph believed that recess appointments to fill offices whose confirmed nominees had declined to serve were proper on the theory that it “may be said” that the vacancy “happened during the Recess in consequence of the Refusal.”<sup>33</sup> In other words, Randolph contended that one vacancy “happened” when the office was first created, that “vacancy was filled up, as far as the President and Senate could go,” and a second vacancy “happened” when the nominee refused the office.<sup>34</sup>

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suggest a somewhat more pronounced emphasis on the element of chance or fortuity . . .”).

<sup>28</sup> Letter from George Washington to David Rittenhouse (July 9, 1792), in 24 PAPERS OF THOMAS JEFFERSON, *supra* note 26, at 205.

<sup>29</sup> Act of April 2, 1792, ch. 16, 1 Stat. 246 (April 2, 1792).

<sup>30</sup> Thomas Jefferson once described Randolph as “the most indecisive one I ever had to do business with. He always contrives to agree in principle with one but in conclusion with the other.” Letter from Thomas Jefferson to James Madison (May 12, 1793), in 7 THE WORKS OF THOMAS JEFFERSON (Paul L. Ford ed., 1904) [hereinafter WORKS OF JEFFERSON]; *see also* DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 85 (1962) (quoting the letter).

<sup>31</sup> S. EXEC. J. 29, 29-32 (Sept. 26, 1789).

<sup>32</sup> S. EXEC. J. 38, 38 (Feb. 9, 1790); *see* Richard S. Arnold, *Judicial Politics under President Washington*, 38 ARIZ. L. REV. 473, 482-87 (1996) (discussing the appointments of Paca, Drayton, and Griffin).

<sup>33</sup> *See* Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 PAPERS OF THOMAS JEFFERSON, *supra* note 26, at 167.

<sup>34</sup> *Id.*; *cf.* RESTATEMENT (SECOND) OF PROPERTY § 32.3, cmt. E (1983) (stating that in the absence of an applicable statute, if the donee disclaims the gift within a reasonable time after becoming aware of the gift, the entire transaction is treated as though the inter vivos document of

Randolph's interpretation not only requires treating an office as being filled and subsequently vacated by a person who refuses the office,<sup>35</sup> but also requires ascertaining precisely when a position is created, precisely when an appointee declines an office, and precisely when a holder of an office resigns or dies.

The date that an office is created is usually readily knowable, based on the date that a President approves a bill or Congress overrides a veto.<sup>36</sup> If Congress waits until the final days of a session to act—as it is wont to do<sup>37</sup>—Randolph's view would have the availability of a recess appointment turn on how early in the ten day period allotted for his review<sup>38</sup> the President signed the bill: If he signed early enough that the Senate was still in session, the vacancy would “happen” during the session and no recess appointment could be made, whereas if he waited until the end of the ten day period so that the Senate had recessed before he signed, the vacancy would “happen” during the recess and he would thus have the power to make a recess appointment.<sup>39</sup>

The date on which an appointee declines an office will hardly be as readily available as dates of actions taken by the President or the Senate.<sup>40</sup> Similar uncertainties can arise with resignations or even deaths.<sup>41</sup> For example, no one seems to know when Judge Nathaniel

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transfer had never existed).

Randolph argued that in one situation, “the Senate have had a full opportunity to shew their sense. In the other not.” See Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 PAPERS OF THOMAS JEFFERSON, *supra* note 26, at 167.

<sup>35</sup> In this respect, it anticipates the statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167-68 (1803), that an appointment is complete upon signing and sealing, without need for delivery.

<sup>36</sup> See U.S. CONST. art. I, § 7. Alternatively, if the act creating an office specifies an effective date, an adherent of the Randolph view might conclude that the vacancy “happened” on that effective date and inquire whether the Senate was in session on that effective date.

<sup>37</sup> A search in the United States Code Unannotated database on Westlaw for “March 3” returns more than twenty-three hundred documents. In contrast, a search for “February 3” in the same database returns a mere two hundred documents.

<sup>38</sup> U.S. CONST. art. I, § 7.

<sup>39</sup> Rappaport agrees that, under his interpretation, the availability of a recess appointment could turn on the date within the ten-day period the President chose to sign the legislation. Rappaport, *supra* note 20, at 35 n.104.

<sup>40</sup> The Senate is constitutionally obligated to keep a journal of its proceedings, U.S. CONST. art. I, § 5, and the President is constitutionally obligated to commission all the officers of the United States, *id.* at art. II, § 3. Both journals and commissions include dates. See *Marbury*, 5 U.S. (1 Cranch) at 137, 161 (“A commission bears date[.] . . .”). The records of the State Department regarding resignations and declinations of office, however, are quite spotty. See National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, Record Group 59, Entry 767.

<sup>41</sup> See, e.g., Letter from United States Marshall James H. Cooke, National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, Record Group 59 (April 29, 1848) (reporting the death of George Brown, United States District Attorney for the District of Texas and stating, “His death occurred a few days since at his residence in Colorado County, and I hasten to communicate the intelligence . . .”). Rappaport suggests that some of these problems could be alleviated by concluding that a vacancy “happens” when “notice

Chipman resigned. There is no mention of his resignation in the State Department records of resignations and declinations of office.<sup>42</sup> Although the chronological listing of judges in Federal Cases generally contains a precise date, or at least a month, for termination of a judge's service, for Chipman it simply states the year, 1793.<sup>43</sup> His biographers are no more precise.<sup>44</sup> The Federal Judicial Center reports that he resigned on January 1, 1793.<sup>45</sup> The Documentary History of the Supreme Court of the United States, however, reports that Chipman held the Circuit Court for the District of Vermont in May of 1793 with Justice Wilson.<sup>46</sup>

President Washington issued a recess appointment in September of 1793 to Samuel Hitchcock to replace Chipman.<sup>47</sup> If the date of Chipman's retirement reported by the Federal Judicial Center is correct, then Washington's recess appointment of Hitchcock was inconsistent with Randolph's interpretation of the Recess Appointments Clause because, for Randolph, the vacancy "happened" in January of 1793, while the Senate was in session. If, as is likely, the Documentary History of the Supreme Court is correct and Chipman was still in office in May, then he resigned sometime between May and September during the recess of the Senate, and Washington's recess appointment of Hitchcock was not inconsistent with Randolph's interpretation.<sup>48</sup>

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is received." Rappaport, *supra* note 20, at 23 n.72. It is difficult to see this approach working for deaths.

<sup>42</sup> See National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40.

<sup>43</sup> 1 F. Cas. xxvii (1894).

<sup>44</sup> See DANIEL CHIPMAN, THE LIFE OF HON. NATHANIEL CHIPMAN, LL.D. FORMERLY MEMBER OF THE UNITED STATES SENATE, AND CHIEF JUSTICE OF THE STATE OF VERMONT: WITH SELECTIONS FROM HIS MISCELLANEOUS PAPERS (1846); Roy J. Honeywell, *Nathaniel Chipman: Political Philosopher and Jurist*, 5 NEW ENG. Q. 555 (1932).

<sup>45</sup> See Judges of the United States Courts, Biographical Database, available at <http://www.fjc.gov/history/home.nsf>.

<sup>46</sup> 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 377 (Maeve Marcus et al. eds., 1985) [hereinafter DOCUMENTARY HISTORY]. Delays that can occur between commissioning, declination, and receipt of the declination are illustrated by the commissioning of John Boburn as Secretary of the Territory of Montana. The commission was dispatched on March 8, 1865. In a note dated May 4, 1865, and received May 16, 1865, he declined the office, stating that he had "retained it a few weeks hoping to be able to satisfy myself that I should go" to Montana. National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40.

<sup>47</sup> See Letter of Transmittal from Thomas Jefferson to Samuel Hitchcock (Sept. 9, 1793), available at [http://www.lcweb2.loc.gov/ammem/collections/jefferson\\_papers/](http://www.lcweb2.loc.gov/ammem/collections/jefferson_papers/).

<sup>48</sup> Similarly, under Randolph's view, the validity of Washington's still-earlier recess appointments of Paca, Griffin, Nelson, and Drayton depends on whether Johnson, Pendleton, Marshall, and Pinckney declined their offices before or after the Senate recessed. Cf. *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc) (stating that "as we understand the history, early Presidents . . . made recess appointments to fill vacancies that originated while the Senate was in session" and using the appointment of Griffin as an example). Given that their nominations were confirmed on September 26, 1789, and the Senate adjourned on September 29, 1789, it is likely that the declinations did not occur during that three day window. There is,

Although President Washington may have acted consistently with Randolph's interpretation, there is reason to believe that President John Adams did not. On March 5, 1799, two days after the Fifth Congress expired, he issued a recess appointment to Isaac Parker as United States Marshal for the District of Maine.<sup>49</sup> While it is possible that John Hobby, Parker's predecessor as marshal, resigned on March 4 or 5, it is hard to imagine that he could have communicated such a resignation so quickly as to enable President Adams to appoint a successor on March 5.<sup>50</sup>

Moreover, Parker was a member of the Fifth Congress who "retired voluntarily to become United States marshal for the Maine district."<sup>51</sup> A voluntary decision not to seek reelection to the Sixth Congress, based on a preference for the position as United States Marshal, must have been made well before the final adjournment of the Fifth Congress.

Considering that Parker received a recess appointment to that position two days after the expiration of the Fifth Congress, it is highly likely that Hobby had vacated the position before March 4. If so, then the presidential practice of making a recess appointment to fill a vacancy that first arose while the Senate was in session dates back to our second President, John Adams. It is possible, however, that Adams fired Hobby at the same time he appointed Parker, thus simultaneously creating and filling a vacancy during the recess.<sup>52</sup>

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however, no record of their declinations of office in the State Department records of resignations and declinations of office. See National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40. Pendleton's letter of declination is dated October 13, 1789. See Letter from Edmund Pendleton to George Washington (Oct. 13, 1789) wrongly filed in the National Archives, Acceptances and Orders for Commissions, 1789-1893, Record Group 59, Entry 770, Box 1 (1789-1829). Marshall's letter declining the position is dated October 14, 1789. See 2 THE PAPERS OF JOHN MARSHALL 42-43 (Charles T. Cullen & Herbert A. Johnson eds., 1977).

<sup>49</sup> S. EXEC. J. 325 (Dec. 10, 1799).

<sup>50</sup> While resignations upon the transition from one President to another—and dated March 3 or March 4—were certainly not unusual, 1799 was not a presidential transition year. Note that some officers, such as Attorney General William Evarts in 1869 and Secretary of State Henry Clay in 1829, dated such a resignation March 3, while others, such as Attorney General Caleb Cushing in 1857, dated such a resignation March 4. See National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40. Under the Randolph interpretation, the availability of a recess appointment to fill a vacancy caused by a resignation upon a presidential transition might turn on which of the two dates—March 3 or March 4—the officer selected to resign.

<sup>51</sup> 7 FRANCIS S. DRAKE, DICTIONARY OF AMERICAN BIOGRAPHY 225 (1872). Interestingly, the website of the United States Marshal for the District of Maine includes an explanation for the termination of every marshal's service from 1789 to the present, except for John Hobby. See <http://www.usdoj.gov/marshals/district/me/general/history.htm>

<sup>52</sup> Hobby had been the marshal since his initial appointment in 1793, see S. EXEC. J. 142-44 (Dec. 27 & 30, 1793), and submitted a memorial to Congress in 1797 complaining that the fees and emoluments allowed him by law were insufficient and asking for an increase. See 2 H.R.J. 712-14 (Feb. 22, 1797). He was confirmed for an additional four year term on January 12, 1798,

At roughly the same time, President Adams was engaged in correspondence concerning a different contemplated recess appointment. On March 29, 1799, President Adams wrote to Secretary of War James McHenry about making a particular recess appointment, prompting McHenry to question whether Adams had the statutory authority to make a recess appointment to a newly-created position.<sup>53</sup> Adams responded that he did not rely on statutory authority for the appointment, but instead “I ground the Claim of an Authority to appoint the officers . . . upon the Constitution itself.”<sup>54</sup> He explained: “Whenever there is an office that is not full, there is a Vacancy as I have ever understood the Constitution.”<sup>55</sup> He acknowledged that “[a]ll such appointments, to be sure, must be nominated to the Senate at their next session, and subject to their ultimate decision,” but maintained that he had “no doubt that it is my right and my duty to make the provisional appointments.”<sup>56</sup>

Adams thus rejected the Randolph interpretation, believing that he had the authority to make recess appointments to fill vacancies that existed while the Senate was in recess, no matter when the vacancy first

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*see* S. EXEC. J. 258 (Jan. 12, 1798), but by 1801 was imprisoned for a debt due to the United States which he was unable to pay. *See* 4 H.R.J. 16 (Dec. 14, 1801) (referring a memorial from Hobby seeking relief “in consideration of his past services, advanced age, and injuries sustained in his health by the imprisonment”). The House approved a bill to authorize his discharge from confinement, *see* 4 H.R.J. 49 (Jan. 14, 1802); *see also* Printed Copy of the Bill as Passed by the House, *available at* <http://www.memory.loc.gov> (reciting that the imprisonment was “upon a judgment against him in favour of the United States”), but the bill was defeated in the Senate. 11 ANNALS OF CONG. 148 (1802). Since the debt was owing to the United States, it likely arose from his duties as marshal. *See id.* (tabling a motion to appoint a committee to consider regulations regarding “public officials and agents who shall squander public money officially entrusted to them”). Perhaps, then, Adams waited until March 5, 1799, in order to simultaneously fire Hobby and fill the position with a recess appointee. If so, the appointment is consistent with Randolph’s interpretation, but demonstrates that under Randolph’s interpretation, a President can choose to delay a firing until the Senate is in recess precisely in order to make a recess appointment—hardly a desirable result if an officer is squandering public money or otherwise harming the public interest.

Attorney General Berrien once stated that President Adams had issued another recess appointment on March 5, 1799, to Eugene Brenan as an inspector of the revenue, *see* 2 Op. Att’y Gen. 336 (1830). This appears to be an error, perhaps attributable to the fact that the message from Adams to the Senate listing his recess appointments, including that of Brenan on June 27, 1799, begins with his recess appointment of Parker on March 5, 1799. *See* S. EXEC. J. 325 (Dec. 5, 1799). In any event, Brenan appears to have been the first to hold the office to which he was appointed, and Congress had expressly authorized the President to fill that office with a recess appointee. 1 Stat. 627, 639, 5th Cong., 3d sess., ch. 22, § 17; *cf. supra* note 27 (discussing the position that a recess appointment may not be made to first fill an office because the word “happen” requires a casualty not provided for by law).

<sup>53</sup> *See* 23 PAPERS OF HAMILTON, *supra* note 27, at 71 (noting the correspondence).

<sup>54</sup> Letter from John Adams to James McHenry (April 16, 1799), in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 632-33 (Charles F. Adams ed., 1853) [hereinafter WORKS OF JOHN ADAMS].

<sup>55</sup> *Id.* at 632.

<sup>56</sup> *Id.* at 633.

arose. Although it does not appear that he actually made the recess appointment discussed with McHenry,<sup>57</sup> the views that he expressed bolster the likelihood that his nearly-contemporaneous recess appointment of Hobby was made to fill a vacancy that had been created while the Senate was in session. Yet even if Adams did not act on his view of the Recess Appointments Clause, his rejection of the Randolph view remains significant, for it demonstrates that interpreting the Recess Appointments Clause to permit appointments when the vacancy first arose before the recess is not some later invention, but is older than, for example, *Marbury v. Madison*.<sup>58</sup>

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<sup>57</sup> See S. EXEC. J. 325-26 (Dec. 5, 1799) (reporting various recess appointments, but not including any military appointments). As noted earlier, Alexander Hamilton concluded that the President lacked statutory authority to make the recess appointment because the word “happen” “implies casualty and refers to office that “have become vacant by accidental circumstances.” See *supra* note 27. Attorney General Charles Lee believed that there was statutory authority. See 23 PAPERS OF HAMILTON, *supra* note 27, at 95.

<sup>58</sup> 5 U.S. (1 Cranch) 137, 161-62 (1803). Rappaport acknowledges that “one might interpret Adams to be asserting the exist interpretation: that any unfilled office creates a vacancy that allows a recess appointment during the recess.” Rappaport, *supra* note 20, at 37. He rejects this interpretation, however, because Adams compared the contemplated military appointment to diplomatic appointments, and the President was understood at the time to have the authority to create diplomatic offices by his own act of appointment, thus enabling the President to simultaneously create and fill a diplomatic vacancy in the recess. *Id.* at 33-38. For this reason, Rappaport dubs the Adams view “curious.” *Id.* at 33.

Adams’s view would be curious if he relied entirely on the special case of diplomatic appointments to argue for recess appointment authority regarding other offices. But as the explanation of Adams’s position in the text demonstrates, his position does not depend on the special case of diplomatic posts.

First, Adams begins by pointing to the Constitution as his source of authority and stating, “Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution,” Letter from John Adams to James McHenry (April 16, 1799), in 8 WORKS OF JOHN ADAMS, *supra* note 54, at 632, before saying a word about diplomatic posts. Second, when Adams does mention ambassadors, he refers to judges as well: “To suppose that the President has power to appoint judges and ambassadors, in the recess of the Senate, and not officers of the army, is to me a distinction without a difference, and a Constitution not founded in law or sense, very embarrassing to the public service.” *Id.* at 632-33.

Adams was plainly not arguing that because the President had the power to create diplomatic posts, he therefore had the power to create military offices; there is no doubt that he was addressing the filling of offices that had been created by statute. Nor was Adams suggesting, by referring to judges in the same phrase as ambassadors, that he had the authority to create judgeships.

It is true, as Rappaport notes following Professor David Currie, that one textual argument for permitting presidential creation of diplomatic posts might extend to “Judges of the Supreme Court,” in that “Ambassadors, other public Ministers and Consuls, [and] Judges of the Supreme Court” are specifically named in Article II, Section 2. Rappaport, *supra* note 20, at 34; DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD (1789-1801) 44-45 (1998). That is, such offices might be distinguished from “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law,” so that the President could make appointments to these listed offices without any statute creating those offices. *Id.*

Thankfully, the textual possibility that the President could claim the power to appoint whatever number of “Judges of the Supreme Court” he chose was never pursued. President Washington did not appoint “Judges of the Supreme Court” until Congress established the

There is also reason to believe that President Jefferson made recess appointments to fill vacancies that first arose while the Senate was in session.<sup>59</sup> Several of the individuals whom President Adams had

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number and duties of those offices some five months after his inauguration. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; Judiciary Act of 1789, 1 Stat. 73, §§ 1, 4 (setting number at six, establishing two sessions, imposing duty of holding circuit court); Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (setting judicial pay); S. EXEC. J. 28-29 (Sept. 24, 1789) (submitting nominations). Indeed, neither Currie nor Rappaport point to anyone who made the textual argument about “Judges of the Supreme Court” before Currie did so himself.

The closest may be a note that Jefferson made on the bottom of a draft of a message that he prepared for Washington objecting to the Senate’s claim of authority to determine not simply whether a particular nominee for a diplomatic post should be confirmed, but whether any appointment should be made to the post at all. That note says:

[N]omination of ambassador &c and judges on same footing. Could they decide whether a judge shall be appointed. May happen that one should be appointed during recess. Would his proceeding be void, because [the Senate] had not sanctioned.

23 PAPERS OF THOMAS JEFFERSON, *supra* 26, at 18-19. This note did not make it into the text of the draft itself, much less into the final message prepared for Washington (and Washington never sent the final message anyway). *Id.* Even if we take such a scrap seriously, in context it suggests that Jefferson contemplated that the Senate would have no more authority to conclude that a judgeship that had been created by statute should not be filled at all than to conclude that a diplomatic post should not be filled at all—not that the President himself could create judgeships. Currie himself suggests that “the constitutional principle that dissuaded Congress from creating particular diplomatic offices was not found in the second section of Article II but in the third,” which empowers the President to “receive ambassadors and other public ministers,” thereby giving the President the power “to decide with which government the United States shall have diplomatic relations.” CURRIE, *supra*, at 45.

Yet even if Adams believed that the President had the power to appoint “Judges of the Supreme Court” as well as diplomats without a statute creating the office—and neither Currie nor Rappaport point to any evidence that he did—his letter to Secretary McHenry does not refer to “Judges of the Supreme Court” but to judges generally. No one has suggested that the President had the power to create inferior courts, *see* U.S. CONST. art I, § 8 (empowering Congress to “constitute Tribunals inferior to the supreme Court”); *id.* at art. III, § 1 (vesting the judicial power of the United States “in one supreme Court, and if such inferior Courts as the Congress may from time to time ordain and establish”), making it still less likely that Adams was making a point that depended on the special features of diplomatic office (and *conceivably* Supreme Court judgeships). Without the special diplomatic gloss that Rappaport attempts to place on Adams’s letter, it reads quite straightforwardly as an assertion that the President has the constitutional power, during the recess of the Senate, to fill all offices that happen to be vacant at that time, regardless of when the vacancy first arose. *Cf.* DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* 188 (2001) (criticizing Representative William Bibbs for paraphrasing the Recess Appointments Clause “to require only that the office ‘happen to be vacant’ during the recess”).

<sup>59</sup> In what may be an allusion to the Randolph interpretation, James Madison wrote to Thomas Jefferson in January of 1801, “You may recollect a difficulty suggested in mak[ing] [appointments] with[ou]t a Senate, in case[s] of resignations *prior to March 4*. How have you solved it?” Letter from James Madison to Thomas Jefferson (Jan. 10, 1801), 17 *THE PAPERS OF JAMES MADISON* 170 (David B. Mattern et al. eds., 1991); *see also* Letter from Thomas Jefferson to Tench Coxe (Feb. 11, 1801), in 9 *WORKS OF JEFFERSON*, *supra* note 30, at 456 (stating that if he is elected President “I shall be embarrassed by finding the offices vacant, which cannot be even temporarily filled but with advice of the Senate . . .”); Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), in 9 *WORKS OF JEFFERSON*, *supra* note 30, at 179-80 (stating “I have reason to expect in the outset the greatest difficulties as to nominations. The late incumbents running away from the offices and leaving them vacant, will prevent me from filling them without the *previous* advice of the Senate. How this difficulty is to be got over I know

appointed to the newly-created office of circuit judge in February of 1801 declined the positions.<sup>60</sup> For example, United States District Judge Thomas Bee was nominated and confirmed to be a circuit judge, but declined.<sup>61</sup> Bee's decision to remain on the district bench proved a wise one for him, given that the circuit courts created by the Judiciary Act of 1801 were abolished in 1802.<sup>62</sup> It was, however, unfortunate for Senator Jacob Read who had been nominated and confirmed to the district court in anticipation of Bee's elevation; when Bee declined, there was no office for Read.<sup>63</sup> President Jefferson used a recess appointment to fill the circuit seat refused by Bee with Dominick Hall.<sup>64</sup>

District Judge Benjamin Bourne of Rhode Island, on the other

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not.”). If these are allusions to the Randolph interpretation, the appointments recounted *infra* seem to reflect that Jefferson solved the problem of filling vacancies that arose while the Senate was in session by rejecting Randolph's interpretation. I have not, however, located anything that explicitly recites Jefferson's rejection of Randolph's interpretation.

<sup>60</sup> 2 OLIVER WENDELL HOLMES DEVISE, *HISTORY OF THE SUPREME COURT* 132 & n.128 (1981) (noting that “replacements were found before Adams left office, but two positions in the Fifth Circuit became vacant after March 4” when Thomas Bee and John Sitgreaves declined their commissions).

<sup>61</sup> Letter from Thomas Bee to James Madison (March 19, 1801), in 1 *THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES 28* (Brugger et al. eds., 1986) [hereinafter *PAPERS OF MADISON*] (stating that he felt “unable to undergo the fatigue of the long Journeys necessary,” and thought that he could “render as Essential service to my Country by continuing in the Station of District Judge which I now hold”).

<sup>62</sup> See Act of March 8, 1802, 2 Stat. 132.

<sup>63</sup> See Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 515 & n.133 (1961). It has been suggested that Read attempted to litigate the propriety of the repeal of the Judiciary Act of 1801, but this suggestion seems doubtful. See Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 298-299 n.55 (2003) (discussing the failed appointment of Read and the suggestions regarding litigation).

<sup>64</sup> S. EXEC. J. 400-01 (Jan. 6, 1802). Before appointing Hall, Jefferson had issued a recess commission to Theodore Gaillard, but Gaillard returned the commission, citing “imperious Circumstances of a private Nature.” Letter from Theodore Gaillard to James Madison (June 16, 1801), in 1 *PAPERS OF MADISON*, *supra* note 61, at 324 (noting that the letter was sent from Charleston); PETER GRAHAM FISH, *FEDERAL JUSTICE IN THE MID-ATLANTIC STATES: UNITED STATES COURTS FOR MARYLAND TO THE CAROLINAS 1789-1835* 11-13 (2002); see also Letter from William Marshall to James Madison (June 16, 1801), in 1 *PAPERS OF MADISON*, *supra* note 61, at 322 (noting his brother-in-law Gaillard's resignation and recommending Hall); cf. Brief for the United States, *Miller v. United States*, 2004 WL 2112791 (No. 04-38) (Supreme Court 2004) (stating that the recess appointment of Gaillard occurred on May 30, 1801, but that the final action taken on the nomination is unavailable); Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society Working Paper, app. B, available at <http://www.fed-soc.org/pdf/recapp.pdf> (same).

This declination of a recess appointment calls into question Rappaport's suggestion that the practice of nominating and confirming nominees prior to assurance of acceptance reflects an understanding that recess appointments would otherwise be unavailable. See Rappaport, *supra* note 20, at 22. It suggests, instead, that Presidents sometimes preferred the risk of declination to the delays involved in awaiting assurance of acceptance before making *both* interim and permanent appointments.

District John Sitgreaves of North Carolina also declined, leaving Congressman William Hill, who had been confirmed to take Sitgreave's place, see S. EXEC. J. 384-85 (Feb. 23, 1801), similarly out of luck. Jefferson issued a recess appointment as circuit judge to Henry Potter. *Id.*; see also 2 HOLMES DEVISE, *supra* note 60, at 132.

hand, accepted his position as circuit judge, vacating his position as a district judge, while Senator Ray Greene was nominated and confirmed as district judge in his place.<sup>65</sup> Unfortunately for Bourne, after having given up his position as district judge, he lost his position as circuit judge when the Judiciary Act of 1801 was repealed. Unfortunately for Greene, although he was nominated and confirmed as a district judge, his commission erroneously appointed him as a circuit judge. President Jefferson refused to issue a corrected commission for Greene, and instead gave David Barnes a recess appointment to the district judgeship to which Greene had been confirmed.<sup>66</sup>

District Judge Joseph Clay of Georgia was confirmed as circuit judge, while Thomas Gibbons was confirmed to take Clay's place as district judge.<sup>67</sup> Gibbons had not received a valid commission from the Adams administration, and the Jefferson administration was not about to provide him with one.<sup>68</sup> Indeed, James Jackson, who had been the

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<sup>65</sup> See Turner, *supra* note 63, at 498.

<sup>66</sup> S. EXEC. J. 400-01 (Jan. 6, 1802); see also Letter from Thomas Jefferson to Theodore Foster (May 9, 1801), in *WORKS OF JEFFERSON*, *supra* note 30, at 252 (stating that Foster's "recommendation in favor of Mr. Barnes, has been more than respected, as he has been offered a judge's commission, in the place which Mr. Greene had expected," and noting that when Greene's "commission proved to have been a nullity . . . it fell on me to fill the place"); Letter from David Barnes to James Madison (May 14, 1801), in *PAPERS OF MADISON*, *supra* note 61 at 173 (acknowledging his acceptance of the commission). Jefferson described Barnes as filling the place of Bourne, not the place of Greene. *Id.*; see also Letter from Levi Lincoln to Thomas Jefferson, (April 8, 1801), available at <http://www.memory.loc.gov/ammem/mtjthtml/mtjhome.html>; Turner, *supra* note 64, at 498 n.31; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161-62 (1803) ("When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.").

Hiller Zobel describes this episode as "enough to shake anyone maneuvering, thirsting or even hoping for the ordination of a High Place, and to cause serious self-questioning as to the relative worth of the game and the candle." Hiller B. Zobel, *Those Honorable Courts—Early Days on the First First Circuit*, 73 F.R.D. 511, 522 (1977).

<sup>67</sup> S. EXEC. J. 384-85 (Feb. 23, 1801); see Turner, *supra* note 63, at 515.

<sup>68</sup> Perhaps no commission had yet been made out by Adams for Gibbons, or perhaps his commission, like that of various justices of the peace for the District of Columbia, was found undelivered by the incoming Jefferson administration. See 2 GEORGE HASKINS & HEBERT JOHNSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 141 (1981) (noting that the "frustration that the victorious Republicans felt against the judicial stronghold vented itself initially in their refusal to issue commissions to certain of the judges whom Adams had appointed"); DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM 1801-1805* 73 (1970) (noting, in the context of the justices of the peace for the District of Columbia, that Jefferson treated "appointments as nullities because of the non-delivery of the commissions"); *id.* at 145 (noting, also in the context of the justices of the peace for the District of Columbia, that Jefferson later said that he found commissions lying on a table and forbade their delivery); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 237 (1987) (1922) (describing Levi Lincoln's testimony in *Marbury* that "he had seen some commissions signed and sealed, but did not recollect whether they were those of *Marbury* and of the other petitioners"); *Marbury*, 5 U.S. at 145 (reporting Lincoln's testimony that "he had seen commissions of justice of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States"). Alternatively, perhaps Gibbons had received a commission, but to an office that was not

Governor of Georgia and recently had been elected a United States Senator, wrote to James Madison that “no appointment—if it can be by the most rash construction called one—has created such disapprobation as that of Mr. Thomas Gibbons to the district Judgeship of this State, in the room of Judge Clay,” and recommended William Stephens for a judgeship.<sup>69</sup> President Jefferson took this advice and gave Stephens a recess appointment to the district judgeship to which Gibbons had been confirmed.<sup>70</sup> Gibbons left Georgia for New Jersey, probably due to “disappointment at the decision not to award him a judgeship,” and “formed an alliance with Aaron Ogden.”<sup>71</sup>

Under the Randolph interpretation, the constitutionality of these recess appointments turns on the date when confirmed nominees either declined the office of circuit judge, thereby causing a vacancy to “happen” in that office (as with Bee) or accepted the office of circuit judge, thereby causing a vacancy to “happen” in the district court (as with Bourne and perhaps Clay). It is difficult to be confident of those dates, although some of them may have occurred while the Senate was in session.

Bee declined in a letter dated March 19, 1801, after the Senate recessed.<sup>72</sup> Taking the date of the letter as the date of declination, the

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immediately vacant because Clay declined the office of circuit judge in March and waited until May to resign as district judge. See text accompanying notes 77-86 *infra*.

<sup>69</sup> Letter from James Jackson to James Madison (May 15, 1801), in PAPERS OF MADISON, *supra* note 61, at 175-77. Jackson also questioned how Gibbons could have been appointed to fill a vacancy before the vacancy happened. *Id.* at 176.

<sup>70</sup> S. EXEC. J. 400-01 (Dec. 30, 1801, Jan. 6, 1802). Jefferson treated described Stephens as filling the place of Clay, not the place of Gibbons. *Id.*

<sup>71</sup> Drew University Library, *Biography of Thomas Gibbons* (Dec. 21, 2004), available at [http://www.depts.drew.edu/lib/dre\\_archives\\_tg.html](http://www.depts.drew.edu/lib/dre_archives_tg.html). The alliance had its problems, producing the famous case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The Thomas Gibbons papers at the Archives at Drew University contain two documents suggesting that Gibbons retained a considerable antipathy toward Jefferson. One appears to be an invitation to a party celebrating the end of Jefferson’s presidency, which states:

The history of this world affords abundant proof, that the celebration of important events are very gratifying. You, and I, that have lived half a Century have seen many great revolutions \_\_ to wit, . . . The Treaty of 83 \_\_ The Adoption of the Federal Constitution \_\_ The overthrow of the Federalists \_\_ And now the terrapin Jefferson retiring into his shell . . . are you prepared to celebrate the important event . . . behold an execrable Villain retiring from sight . . . we have a chance of another Magistrate, although of the same family. It would be very uncharitable, to decide, that all Satan’s Children are as wicked as his eldest son Belzebub.

The invitation notes that the party is scheduled for Saturday the fourth; March 4, 1809, was a Saturday. The second is a rather crude drawing alluding to Jefferson’s fathering of a son with “Mrs. Sally Jefferson.”

<sup>72</sup> See note 61 *supra*; Official Congressional Directory, *supra* note 14, at 512; see also 2 HOLMES DEVISE, *supra* note 60, at 132 (stating that the positions declined by Bee and Sitgreaves “became vacant after March 4” and citing the same letter). The earliest indication of Sitgreaves’s declination that I have located is a letter dated March 21, 1801. Letter from Levi Lincoln to Thomas Jefferson (March 21, 1801), available at <http://www.memory.loc.gov/ammem/mjtjhtml/mjtjhome.html>. If, as seems likely, Sitgreaves, too, declined after March 4, then the recess

recess appointment of Hall was consistent with Randolph's interpretation of the Recess Appointments Clause.<sup>73</sup>

Bourne's situation is more difficult to evaluate. A letter from Levi Lincoln (the Acting Secretary of State until Madison arrived in Washington<sup>74</sup>) to President Jefferson explaining Ray Greene's request for a rectified commission states:

It is probable that Bourne was the judge of the district court when the appointment was made—of course there was no vacancy. His letter of acceptance is dated the 23d of March.<sup>75</sup>

In context, it appears that Lincoln was referring to *Greene's* letter accepting the district judgeship and seeking a corrected commission. Perhaps, though, Lincoln was referring to *Bourne's* acceptance of the office of circuit judge. In either case, the only reason to say that it was "probable," rather than certain, that Bourne was the district judge when Greene's appointment was made would be to account for the possibility that Bourne had already resigned as district judge prior to Greene's appointment. Without discovering whether Bourne resigned the district judgeship while the Senate was in session, it cannot be determined whether Jefferson's recess appointment of Barnes was within the Randolph interpretation of the Recess Appointments Clause.<sup>76</sup>

Clay's situation is still more difficult. Indeed, not only is it unclear *when* Clay accepted his circuit judgeship, it is unclear *whether* he ever accepted it. Federal Cases lists him as a circuit judge from February 24, 1801, until the abolition of the court on July 1, 1802.<sup>77</sup> So, too, does the Dictionary of American Biography, although in doing so it relies on

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appointment of Potter is also in accord with Randolph's approach.

<sup>73</sup> Hall, too, of course, lost his job as a circuit judge when the Judiciary Act of 1801 was repealed; he was later appointed by James Madison to be United States District Judge for the District of Louisiana. S. EXEC. J. 476 (Nov. 30, 1804); *see also* text accompanying note 103 *infra* (discussing Hall).

<sup>74</sup> See Editorial Note, in 1 PAPERS OF MADISON, *supra* note 61, at 1 (noting that Levi Lincoln was acting secretary of state while Madison remained in Virginia because of his own health and the declining health and death of his father); *see also* Commission of James Madison, 1 THE PAPERS OF MADISON, *supra* note 61, at 2 (signed by Levi Lincoln Acting as Secretary of State).

<sup>75</sup> Letter from Levi Lincoln to Thomas Jefferson (April 8, 1801), *available at* <http://www.memory.loc.gov/ammem/mtjhtml/mtjhome.html>.

<sup>76</sup> I am putting aside the question of the propriety of treating the office as vacant given the confirmation and commissioning (albeit erroneous) of Greene and the confirmation (and perhaps commissioning) of Gibbons to fill the district seats vacated by Barnes and Clay. *Cf.* Letter from James Madison to Thomas Jefferson (Feb. 28, 1801), in 17 PAPERS OF JAMES MADISON, *supra* note 59, at 475 ("Will not [President Adams's] appointments to offices, not vacant actually at the time, even if afterwards vacated by acceptance of the translations [from district judge to circuit judge?], be null?").

The State Department's records of resignations contains no information about Bourne's or Clay's resignation. National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40.

<sup>77</sup> 1 F. Cas. xv (1894); *see also* 30 F. Cas. 1367-68 (1897) (biography of Clay stating the same dates as circuit judge).

Federal Cases.<sup>78</sup> On the other hand, a letter from Levi Lincoln to President Jefferson states, “Joseph Clay, Jr., declines accepting his commission, as a judge of the circuit court of the fifth district.”<sup>79</sup> Similarly, James Jackson wrote to James Madison that Clay had declined the appointment.<sup>80</sup>

The contemporary sources indicating that Clay declined are more reliable than Federal Cases, which was not published until 1894. Moreover, both the Jackson letter and Federal Cases agree that Clay resigned as district judge in May of 1801.<sup>81</sup> Indeed, the Jackson letter reports *both* Clay’s declination of the circuit judgeship *and* his resignation as district judge, while stating that William Stephens “would make an excellent Circuit, or district judge,”<sup>82</sup> evidently treating both positions as open. In addition, President Jefferson noted on this letter, “Wm. Stephen to be Circuit judge.”<sup>83</sup>

On the other hand, Jefferson did not appoint Stephens to be a circuit judge, but instead appointed him district judge, thereby filling the district seat that had been held by Judge Clay.<sup>84</sup> Moreover, neither the Senate Executive Journal nor Federal Cases reveals Jefferson ever appointing anyone to fill the circuit seat to which Clay had been appointed.<sup>85</sup>

If, as seems likely, Clay declined the circuit judgeship after March 5, and later resigned the district judgeship in May of 1801, Jefferson’s recess appointment of Stephens was consistent with Randolph’s

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<sup>78</sup> 2 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 51, at 180-81. The Federal Judicial Center, in turn, relies on the *Dictionary of American Biography*. See Federal Judicial Center, *Biography of Joseph Clay, Jr.*, available at <http://www.fjc.org>.

<sup>79</sup> Letter from Levi Lincoln to Thomas Jefferson (April 16, 1801), available at <http://www.memory.loc.gov>.

<sup>80</sup> Letter from James Jackson to James Madison (May 15, 1801), in PAPERS OF MADISON, *supra* note 61, at 176. The editors of Madison’s papers also state that Clay refused the appointment. See *id.* at 177.

<sup>81</sup> Letter from James Jackson to James Madison (May 15, 1801), in 1 PAPERS OF MADISON, *supra* note 61, at 176 (“It is true that Mr. Clay has now resigned, & now the vacancy has happened, which the president may fill . . .”); 30 F. Cas. 1367-68 (1897) (stating that Clay resigned as district judge in May of 1801).

<sup>82</sup> Letter from James Jackson to James Madison (May 15, 1801), in 1 PAPERS OF MADISON, *supra* note 61, at 176-77.

<sup>83</sup> Notation by Jefferson on Letter from James Jackson to James Madison (May 15, 1801), in PAPERS OF MADISON, *supra* note 61, at 177.

<sup>84</sup> See S. EXEC. J. 400-401 (Jan. 6, 1802). Note that Jefferson, in a single document, described Barnes as taking the place of Bourne “promoted,” while describing Stephens as taking the place of Clay “resigned.” *Id.*

<sup>85</sup> See 1 F. Cas. xv (1894) (indicating Judges Clay, Harris, and Hall as holding circuit judgeships in the Fifth Circuit upon the abolition of the court on July 1, 1802). Failure to appoint anyone to fill the circuit judgeship to which Clay had been confirmed stands in stark contrast to the appointment of Edward Harris to a circuit judgeship in the Fifth Circuit in April of 1802, after the passage of the act that would abolish the court effective July 1, 1802. S. EXEC. J. 422-23 (Apr. 29, 1802) (nomination and confirmation of Harris); see Act of March 8, 1802, 2 Stat. 132 (repealing Judiciary Act of 1801, effective July 1, 1802).

interpretation. On the other hand, if Clay accepted the circuit judgeship in February or the first days of March, thereby vacating the district judgeship,<sup>86</sup> then Jefferson's recess appointment of Stephens was inconsistent with Randolph's interpretation.

While it is possible, then, that Jefferson's recess appointments to the circuit and district courts were consistent with Randolph's interpretation of the Recess Appointments Clause, I am not confident that they were. Moreover, the very difficulty in ascertaining whether these recess appointments were consistent with Randolph's interpretation underscores one difficulty with his interpretation: the dates on which the President and the Senate act are far more accessible—not only to subsequent researchers but to the President and Senate at the time when decisions need to be made—than are the dates of acceptances, refusals, resignations, and even deaths.

As difficult as it is to determine whether Jefferson's recess appointments to the circuit and district courts were consistent with Randolph's interpretation, evaluating his recess appointments to the office of justice of the peace in the District of Columbia is even more perplexing. On February 27, 1801, Congress provided for "such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office five years."<sup>87</sup> President Adams nominated forty-two justices on March 2, 1801, and the Senate confirmed them on March 3, but not all of them received the commissions signed by Adams.<sup>88</sup> Jefferson, who took over from Adams on March 4, gave recess appointments to thirty individuals (thinking forty-two "too numerous") as justices of the peace, including twenty-five that had been nominated by Adams.<sup>89</sup>

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<sup>86</sup> Professor Turner reports that:

there is a fragment in an unidentified hand dated February 23, which lists the appointments to the fifth and sixth circuits. Beside the name of Clay there is a "plus" mark; besides those of Bee and Sitgreaves, there is a "qu." It would be hard to say whether this might indicate that there was a question about their approval by the Senate or of their acceptance of the office.

Turner, *supra* note 63, at 515 n.131. If viewed as the latter, it would be quite modest evidence that Clay accepted the circuit judgeship while the Senate was in session. See Official Congressional Directory, *supra* note 14, at 512 (noting that the Senate of the Sixth Congress was in session throughout 1801 until its expiration on March 3, and that the Senate of the Seventh Congress held an extraordinary session on March 4 and March 5, 1801).

<sup>87</sup> Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 107.

<sup>88</sup> See John Copeland Nagle, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury's Errors?: The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 321-27 (2003).

<sup>89</sup> S. EXEC. J. 404 (Jan. 6, 1802) (listing twenty-nine); see MALONE, *supra* note 30, at 73, 144 (stating that Jefferson gave recess appointments, on his second day in office, to thirty justices of the peace, including twenty-five who had been nominated by Adams); David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as a Justice of the Peace*, 45 CATH. U. L. REV. 349, 400 (1996) (stating that Jefferson gave recess appointments to fifteen justices of the peace from each county); *id.* at 401 (stating that one of Jefferson's recess

On one view, these vacancies arose on February 27, 1801, when the act authorizing the offices was approved. However, since that act empowered the President to choose the number of such offices, perhaps these offices were not created until the President submitted nominations on March 2.<sup>90</sup> The Senate was not in recess on either of those dates, making these appointments inconsistent with Randolph's interpretation.

One might attempt to reconcile these recess appointments with Randolph's interpretation of when a vacancy happens by viewing the office as filled upon Senate confirmation (or perhaps the signing and sealing of the commission<sup>91</sup>), with a vacancy caused by Jefferson's refusal to deliver the commissions. It is hard to say that this was Jefferson's view, however, for Jefferson plainly rejected the idea that the commissions were effective without delivery.<sup>92</sup>

While not perfectly clear, it does seem that by the end of March of 1802, Jefferson was no longer troubled by Randolph's interpretation of the Recess Appointments Clause. In writing about the office of Collector of Customs for New Haven, Jefferson wrote:

You will doubtless have long ago learned that the office . . . was filled by Mr. Adams some days before he went out of office. I have not considered as candid, or even decorous the crowding of appointments by Mr. A. after he knew he was making them for his

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appointees declined the appointment). The commission itself makes clear that these were recess appointments, stating that it will "continue in force until the end of the next Session of the Senate of the United States and no longer." THOMAS JEFFERSON AND THE NATIONAL CAPITAL 198-99 (Saul K. Padover, ed., 1946) (reproducing the commission for the fifteen in Washington County).

<sup>90</sup> Cf. Rappaport, *supra* note 20, at 36 n.108 (treating a diplomatic office as created upon presidential nomination).

<sup>91</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803).

<sup>92</sup> See, e.g., MALONE, *supra* note 30, at 73; Nagle, *supra* note 88, at 327. It is conceivable that Jefferson drew an exceedingly fine distinction, believing nomination and confirmation (or the signing and sealing of the commission) sufficient to fill the office but not confer the office on the nominee. Note that this approach would involve the rather odd requirement of determining the date—and maybe even the time—when the President decided not to deliver the commissions, thereby creating a vacancy anew, and ascertaining whether that decision was made when the Senate was in recess. Yet even this would probably not save the consistency of these appointments with the Randolph interpretation, because Jefferson must have decided not to deliver the commissions by the time he made the recess appointments on March 5. See MALONE, *supra* note 30, at 73 (stating that the recess appointments were made on Jefferson's second day in office). It is possible, however, that he reached that decision at some time on March 5 after the Senate adjourned its extraordinary session. See Official Congressional Directory, *supra* note 14, at 512 (noting the extraordinary session on March 4 and 5, 1801). The Senate Journals do not reflect the time of adjournment on March 5, 1801. See 3 SEN. J. 150 (March 5, 1801); S. EXEC. J. 386 (March 5, 1801).

Perhaps one might argue that the office was not created until filled by actual appointment, but this would require envisioning a President submitting nominations (and the Senate confirming nominations) to an office that did not even exist. Jefferson did not seem to have treated Adams's nominations as nullities. See S. EXEC. J. 404 (Jan. 6, 1802) ("The nominations which took place on the 2d of March, of Justices of the Peace, for the District of Columbia, having been thought too numerous, a commission issued to fourteen of those then nominated for Washington county [and] another commission issued to eleven of those then nominated for Alexandria county . . .").

successor and not for himself even to 9 o'clock of the night at twelve of which he was to go out of office. I do not think I ought to permit that conduct to have any effect, as to the offices removable in their nature. Of course this would leave me free to fill Mr. Goodrich's place by any other person.<sup>93</sup>

Goodrich had been confirmed as Collector of Customs for New Haven on February 19, 1801, replacing David Austin who had died.<sup>94</sup> Jefferson gave a recess appointment to Samuel Bishop, describing him as "vice Elizur Goodrich, nominated February 18th."<sup>95</sup>

Various other recess appointments by Jefferson also appear to be inconsistent with Randolph's interpretation of the Recess Appointments Clause. Jefferson issued recess appointments to some nineteen individuals whom he described as "vice [name] nominated [date] but not appointed."<sup>96</sup> For example, Jefferson issued a recess appointment to George Maxwell as the Attorney for the District of New Jersey "vice Fred. Frelinghuysen, nominated March 2, but not appointed."<sup>97</sup> President Adams had nominated Frelinghuysen to fill the vacancy caused by the resignation of Lucius Horatio Stockton, and the Senate had confirmed Frelinghuysen on March 3.<sup>98</sup> Similarly, Jefferson issued a recess appointment to James Hamilton as the Attorney for the Western District of Pennsylvania "vice Thos. Duncan, nominated March 3, but not appointed."<sup>99</sup> Duncan had been nominated and confirmed on March 3.<sup>100</sup> Unless the vacancies for which Adams submitted nominees in February or March of 1801 had *themselves* arisen in a prior recess of the Senate—a rather unlikely event considering that the second session of the Sixth Congress had begun on November 17, 1800—these recess appointments would seem to be inconsistent with Randolph's interpretation.<sup>101</sup>

Alternatively, they might be reconciled with Randolph's interpretation by viewing the Adams nominees as filling the prior vacancy, with a new vacancy created by Jefferson's own action. Again,

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<sup>93</sup> Letter from Thomas Jefferson to Pierrepont Edwards (Mar. 29, 1801), in 9 WORKS OF JEFFERSON, *supra* note 30, at 245-26.

<sup>94</sup> S. EXEC. J. 382 (Feb. 19, 1801).

<sup>95</sup> *Id.* at 400-02 (Jan. 6, 1802).

<sup>96</sup> *Id.* at 402.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 389 (Mar. 2-3, 1801).

<sup>99</sup> *Id.* at 402 (Jan. 6, 1802).

<sup>100</sup> *Id.* at 390 (Mar. 3, 1801).

<sup>101</sup> Contemporary defenders of the Randolph position would find these appointments invalid even if the vacancy had arisen in a prior recess. See *Evans v. Stephens*, 387 F.3d 1220, 1229 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (arguing that a recess appointment may be made only if the vacancy was "created during that recess"); Rappaport, *supra* note 20, at 39 (same). There is a remote chance, I suppose, that the vacancies that Adams sought to fill with Frelinghuysen and Duncan were anticipated vacancies that had not arisen at the time of nomination and confirmation but were expected to arise later.

this attempted reconciliation is difficult to attribute to Jefferson: he considered such individuals “nominated . . . but not appointed”—in contrast to others whom he removed and replaced with a recess appointee.<sup>102</sup>

While there is good reason to believe that both President Adams and President Jefferson made recess appointments that were inconsistent with Randolph’s interpretation of the Recess Appointments Clause, I am confident that President Madison did so.

On February 22, 1813, while the Senate was in session, Judge Dominic Hall resigned as District Judge for the District of Louisiana.<sup>103</sup>

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<sup>102</sup> In the very same message in which Jefferson reported his nineteen recess appointments to offices where someone had been “nominated . . . but not appointed,” he also reported twenty one recess appointees “vice [name] removed.” S. EXEC. J. 403-04 (Jan. 6, 1802). For example, Jefferson reported that he had given a recess appointment to “Edward Livingston, of New York, Attorney for the District of New York, vice Richard Harrison, removed.” *Id.*

Jefferson insisted on treating as nullities those appointments to offices held at pleasure that Adams had made after the result of the election was known. *See, e.g.*, Letter from Thomas Jefferson to Doctor Benjamin Rush (March 24, 1801), in 9 WORKS OF JEFFERSON, *supra* note 30, at 229, 230-31 (“I will expunge the effects of Mr. A’s indecent conduct, in crowding nominations after he knew they were not for himself, till 9 o’clock of the night, at 12. o’clock of which he was to got out of office. So far as they are during pleasure, I shall not consider the persons named, even as candidates for the office, nor pay the respect of notifying them that I consider what was done as a nullity.”); Letter from Thomas Jefferson to William B. Giles (March 23, 1801), in 9 WORKS OF JEFFERSON, *supra* note 30, at 222 (“I do not view the persons appointed as even candidates for the office, but make others without noticing or notifying them.”). As the phrasing of his message reveals, however, he did not treat the nominations themselves as nullities. Again, it is conceivable that he viewed nomination and confirmation to be sufficient to fill a vacancy, but not confer the office on the nominee.

<sup>103</sup> Federal Judicial Center, *Biography of Dominic Hall*, available at <http://www.fjc.gov> (stating date of resignation as February 22, 1813). Hall was the same man who had received a recess appointment to the subsequently abolished circuit court. *Id.*

Hall resigned as district judge in order to take a seat on the Supreme Court of the newly admitted State of Louisiana; the court was organized on March 1, 1813. *See* Act of April 8, 1812, ch. 50, 2 Stat. 701 (admitting Louisiana); 4 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 51, at 124 (stating that Hall became a judge of the Supreme Court of Louisiana in 1813); 3 La. 1 & unnumbered facing page (1813) (noting that Hall was one of the judges appointed upon the organization of the state judiciary and reciting that at the opening of the March Term, 1813, Hall’s commission dated February 22, 1813, was read and he took his seat on the court); Bar Association to Take Prominent Part in the Centenary: Early History of Dispute Arbitrator, newspaper clipping placed as frontispiece to 1 La. Rep. (Seton Hall University School of Law Library) (reproducing Hall’s commission dated February, 22, 1813, and minutes of organization of Supreme Court of Louisiana on March 1, 1813); 30 Fed. Cas. 1375 (stating that Hall “resigned to accept a place on the Louisiana Supreme Court, March, 1813”); Henry Plauché Dart, *The History of the Supreme Court of Louisiana*, 4 LA. HIST. Q. 14, 30-31 (1921) (stating that the Supreme Court held its first meeting on the first Monday of March, 1813, and that Dominic Hall presented a commission dated Feb. 22, 1813); The Celebration of the Centenary of the Supreme Court of Louisiana, 133 La. xxv, xxvii (1913) (reproducing the minutes of the Supreme Court of Louisiana, March 1, 1813, including Hall’s commission, dated Feb. 22, 1813, with a notation that Hall took the oath of office on Feb. 25, 1813); *Bermudez v. Ibanez*, 3 La. 2 (1813) (decision of Supreme Court of Louisiana at March Term, 1813, addressing transition from territorial judicial system to new state judicial system). Whether Hall’s resignation is treated as occurring upon his taking a seat on the Louisiana Supreme Court, on the date he took the oath of office, or on the date reported by the Federal Judicial Center (which matches the date of his commission to the

Less than two weeks later, on March 3, 1813, the Senate adjourned.<sup>104</sup> On April 13, 1813, President Madison issued a recess appointment to Theodore Gaillard to fill that vacancy.<sup>105</sup>

Thus the rejection of the Randolph interpretation dates back to at least 1813, to the Presidency of James Madison, and may date back to President Jefferson in 1801 or to President Adams in 1799.

From 1823 through the present, the rejection of the Randolph interpretation has become firmly established. In that year, in the first published volume of formal Attorney General Opinions, William Wirt interpreted the Recess Appointments Clause to permit a recess appointment so long as the vacancy happens to exist during the recess, rather than requiring that it happen to originate in the recess.<sup>106</sup> While Wirt thought that limiting the power to vacancies that happened to originate in the recess was “most accordant with the letter of the constitution,” he concluded that interpreting the power to reach vacancies that happen to exist in the recess was “most accordant with its reason and spirit.”<sup>107</sup>

Wirt focused on the purpose of the Recess Appointment Clause and the unhappy consequences of Randolph’s interpretation: suppose that a vacancy in an important office were created on the last day of the Senate session in a distant part of the country, and the Senate rose before the President even knew about the vacancy. Under Randolph’s interpretation, the office would have to remain vacant until the Senate returned. Wirt found it “highly desirable to avoid a construction” that would produce such “pernicious” and “ruinous” results.<sup>108</sup> Similarly, he imagined other situations in which the Senate would not be available without “guilt, either on the part of the Senate or of the President,” such as “the falling of the building” in which the Senate holds its sessions, or an “invasion of the enemy as renders their reassemblage elsewhere impracticable or inexpedient,” or the Senate “rejecting a nomination by the President in the last hour of their session, and inadvertently rising

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Louisiana Supreme Court) all three dates predated the adjournment of the Senate.

<sup>104</sup> Official Congressional Directory, *supra* note 14, at 513.

<sup>105</sup> See Letter from Theodore Gaillard (April 27, 1813), in National Archives, STATE DEPARTMENT RECORDS OF RESIGNATION AND DECLINATION OF FEDERAL OFFICE, *supra* note 40; Brief for the United States, at app., *Miller v. United States*, 2004 WL 2112791 (No. 04-38) (Supreme Court 2004) (stating the recess appointment of Gaillard occurred on April 13, 1813); Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society Working Paper, app. B, available at <http://www.fed-soc.org/pdf/recapp.pdf> (same).

Although both the Brief for the United States in *Miller* and the Federalist Society Working Paper indicate that the ultimate action taken on Gaillard’s appointment is unknown or unavailable, his letter reveals that he declined the appointment. Letter from Theodore Gaillard (April 27, 1813), *supra*.

<sup>106</sup> 1 Op. Att’y Gen. 631 (1823).

<sup>107</sup> *Id.* at 632.

<sup>108</sup> *Id.*

before a renomination can be made.”<sup>109</sup> In his view, interpreting the word “happen” to mean “happen to exist,” rather than “happen to originate,” is a legitimate interpretation that does “no violence to its language,” and is “the only construction of the constitution which is compatible with its spirit, reason, and purpose.”<sup>110</sup>

As we have seen, this is a plausible interpretation of the word “happen,” treating a vacancy like a vacation that “happens” over a period of time rather than like a death that “happens” at one particular time.<sup>111</sup> Moreover, as we have also seen, the phrase “during the Recess” must be understood to modify the phrase “shall have Power,” as well as the phrase “may happen.”<sup>112</sup> The relevant time, then, is not when the vacancy arose, but rather when the President acts. If the office is vacant and the Senate is in recess, the President has the power to fill those vacancies. As Wirt put it, “[t]he constitution does not look to the moment of the origin of the vacancy, but to the state of things at the

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<sup>109</sup> *Id.* at 633.

<sup>110</sup> *Id.* at 633-34. Notice that Wirt’s view seems to reflect some sense that “happen” involves an element of chance or fortuity. *See supra* note 27.

Wirt was addressing a vacancy in the office of navy agent at New York, previously held by General Swartout. 1 Op. Att’y Gen. at 631. Swartout’s commission had expired during the Senate’s previous session and the Senate had rejected Monroe’s nomination of Christopher Vandeverter to the post on the last day of the Seventeenth Congress. *See id.*; S. EXEC. J. 341 (March 3, 1823). I have not ascertained if Monroe actually made a recess appointment to fill this position. When Monroe submitted to the Senate a list of “[n]ominations to appointments made during the late recess of the Senate,” he did not include a nomination to the office of navy agent for the port of New York, nor to a position previously held by General Swartout. S. EXEC. J. 343 (Dec. 8, 1823). He later nominated James Paulding to be navy agent for the port of New York, and the Senate confirmed him on January 1, 1824. *See* S. EXEC. J. 349 (Dec. 19, 1823) (nomination); *id.* at 353 (Dec. 31, 1823) (correcting first name of nominee from John to James); *id.* at 355 (Jan. 8, 1824) (confirmation). If Paulding had received a recess appointment, he likely would have been included on the list submitted to the Senate. On the other hand, if someone else—such as the rejected nominee Christopher Vandeverter—had received a recess appointment but was not being renominated, he would not have been included on that list.

<sup>111</sup> *See supra* notes 20-25 and accompanying text.

<sup>112</sup> *See supra* note 20. This dual modification also makes clear that Wirt’s interpretation of the Recess Appointments Clause does not make the phrase “that may happen” superfluous. *Cf.* Rappaport, *supra* note 20, at 15 (claiming that Wirt’s interpretation leaves the term happen “with no function”). Not only must the President act during the recess (because the phrase “during the recess” modifies “shall have power”) but the vacancy must “happen”—in either Randolph’s or Wirt’s sense—“during the recess” as well (because the phrase “during the recess” modifies “may happen”). Not all vacancies happen during the recess, even under Wirt’s interpretation of the word “happen.” In addition, as noted above, *see supra* note 27, the term “happen” may also require that the vacancy involve some element of chance. Finally, while Rappaport is surely correct that the language could have been drafted without using the word “happen” in a way that would clearly convey Wirt’s meaning, it could also have been drafted without using the word “happen” in a way that would clearly convey Randolph’s meaning: “The President shall have Power during the Recess to fill all vacancies that first arise during the Recess.” *See also* Rappaport, *supra* note 20, at 62 (making a similar argument that the clause could have been drafted differently to make clear that intrasession recess appointments are permissible). It is hardly surprising that once we find an ambiguity, we can imagine an alternative drafting that would clearly indicate one of the competing interpretations.

point in time at which the President is called on to act.”<sup>113</sup>

Subsequent attorneys general have agreed with General Wirt. For example, Roger Taney, who later became Chief Justice, explained that the:

[C]onstitution was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one. It was the intention of the constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or, at all events, that the vacancy should not be a protracted one.<sup>114</sup>

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<sup>113</sup> 1 Op. Att’y Gen. 631, 633 (1823).

<sup>114</sup> 2 Op. Att’y Gen. 525, 526-27 (1832). Taney also observed that President John Quincy Adams “must have proceeded on the same construction of the constitution,” in issuing a recess appointment to Amos Binney in March of 1825. *Id.* at 530; *see also In re* District Attorney of the United States, 7 F. Cas. 733, 742 (E.D. Pa. 1868) (describing Adams’s recess appointment of Binney, whose prior commission expired in February of 1825 before the recess of the Senate).

In 1845, Attorney General John Mason issued a brief opinion containing a sentence that looks the other way: “If vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate.” 4 Op. Att’y Gen. 361, 363 (1845). It would be wrong to rely too heavily on this sentence. *Cf.* William T. Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 543 (2004) (beginning the discussion of Attorney General opinions with this sentence from Mason). The “only question,” 4 Op. Att’y Gen. 361, 363 (1845), that Mason was addressing involved the appointment of the officers to offices that had just been created, a question that involves whether the word “happens” requires some casualty not provided for by law. *See supra* note 27; *see also* Schenck v. Peay, 21 F. Cas. 672, 674 (C.C. E.D. Ark. 1869) (relying in part on the 1844 Mason opinion to conclude that the first appointment to a newly created office was not within the Recess Appointments Clause and noting Webster’s first definition of “happen”: “To come by chance; to come without previous expectation; to fall out.”). In accordance with this limited question, Mason’s 1845 opinion did not cite or discuss the opinions of Wirt or Taney.

The next year, however, General Mason issued an opinion that did discuss the Wirt and Taney opinions, as well as the Binney precedent; he concluded that when a recess appointment was made, followed by a nomination for permanent appointment, but that the Senate adjourned without acting on the nomination, a second recess appointment was permissible. 4 Op. Att’y Gen. 523 (1846). While the case that Mason was addressing in 1846 did not require him to decide whether to embrace the Wirt view in full, he wrote:

From the commencement of the government, it is believed that a power has been exercised which would appear to be inconsistent with a construction of the section of the constitution which would confine the meaning of the word “happen” to the time at which the office is in fact vacated. In cases where an officer dies during the session of the Senate, but notice of his death is not received until after the adjournment, it has always been filled as a vacancy happening during the recess of the Senate.

*Id.* at 525. Mason also noted that it

is no disrespect to the Senate to suppose that their failure to act on this nomination was accidental; nor is it an unauthorized conclusion, that in view of the construction established by the opinion referred to, the Senate were aware that the President had power to avert any public mischief caused by this omission on their part; but whatever may have been the cause, the vacancy did happen to exist when their session ended, and it is entirely with the objects within which the qualified power was given to exercise it in this case.

*Id.* at 527. Thus Mason plainly rejected the Randolph view of the Recess Appointments Clause. *See also* 12 Op. Att’y Gen. 455 (1868) (opinion by Evarts) (noting that in Mason’s later opinion

Edward Bates advised President Lincoln in 1862 that the question “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.”<sup>115</sup> William Evarts, an extraordinary lawyer,<sup>116</sup> found the interpretation so established by 1868 that it is “hardly useful to express an opinion as upon an original question.”<sup>117</sup> Nevertheless, because of the “renewed interest in the whole subject of executive authority in appointments to office, excited by recent legislation of Congress,” he “attempted to weigh anew the opposing interpretation of this clause of the Constitution.”<sup>118</sup> He concluded, “I . . . cannot but give my concurrence to the views of my learned predecessors.”<sup>119</sup>

One of the recess appointments upon which Evarts opined was that of John P. O’Neill as District Attorney for the Eastern District of Pennsylvania.<sup>120</sup> The District Court of that district concluded that this appointment was invalid, refusing to follow the interpretation by the Attorneys General.<sup>121</sup> District Judge Cadwaladar believed that “the president cannot make the temporary appointment in a recess, if the senate was in session when, or since, the vacancy first occurred, and consequently that Mr. O’Neill is no more in office of right, than he would be if commissioned by the president during a session of the senate without their advice and consent.”<sup>122</sup> He did, however, state that the “clerk of this court should recognize Mr. O’Neill’s right of directing process to issue at the suit of the United States,” due to the authorization

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“he expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors”).

<sup>115</sup> 10 Op. Att’y Gen. 356 (1862) (citing, in addition to the opinions of Generals Wirt and Taney, the opinions of Generals Legare and Mason).

<sup>116</sup> Among other things, Evarts was defense counsel in the Senate impeachment trial of President Andrew Johnson, participated as counsel before the Electoral Commission of 1877, served as founding president of the Association of the Bar of the City of New York, and, as Senator from New York, wrote and shepherded through Congress the act that created the circuit courts of appeals and the Supreme Court’s certiorari jurisdiction. *See generally* CHESTER L. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN (1941).

<sup>117</sup> 12 Op. Att’y Gen. 449, 452 (1868).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; *see also* 12 Op. Att’y Gen. 455 (1868); 12 Op. Att’y Gen. 469 (1868).

<sup>120</sup> *See id.* at 469-70 (advising President Johnson that he may issue a recess commission for O’Neill).

<sup>121</sup> *See In re* District Attorney of the United States, 7 F. Cas. 731 (E.D. Pa. 1868). Although the district judge concluded that a vacancy must arise in the recess in order for a recess appointment to be available, he also observed that the intrasession nature of the recess would not prevent a recess appointment. *Id.* at 744 (“On every adjournment of congress, except such an occasional temporary one as does not suspend the course of business of the two houses, the interval until the next meeting should, I think, be deemed a recess. If so, there was a recess on the adjournment of 27th July last.”).

<sup>122</sup> *Id.* at 736.

of the attorney general.<sup>123</sup>

A circuit court, however, explicitly rejected the district judge's view, stating that it:

is no disparagement to Judge Cadwaladar to say that his opinion, unsupported by any other, ought not to be held to outweigh the authority of the great number which are cited in support of the opposite view, and of the practice of the executive department for nearly sixty years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress.<sup>124</sup>

The recognition by Congress to which the circuit court referred was a statute that denied payment to a recess appointee "if the vacancy existed while the Senate was in session . . . until such appointee has been confirmed by the Senate."<sup>125</sup> In effect, Congress recognized and acquiesced in such recess appointments but guarded against abuse by putting the appointee at risk of serving without pay if the Senate did not ultimately confirm him.<sup>126</sup> In 1940, Congress relaxed this prohibition, making it much easier for those appointed to fill a vacancy that arose when the Senate was in session to receive pay.<sup>127</sup>

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<sup>123</sup> *Id.* at 744.

<sup>124</sup> *In re Farrow*, 3 F. 112, 115 (C. Ct. N.D. Ga. 1880) (Woods, C.J.). Louis Fisher's enormously helpful report on recess appointments of federal judges contains a small error: it incorrectly describes *Farrow* as decided by a federal district court. See Louis Fisher, *Recess Appointments of Federal Judges*, Congressional Research Service, Sept. 5 2001, at 2; see also *In re Yancey*, 28 F. 445 (C.C. W.D. Tenn 1886) (decision by District Judge Hammond to qualify a recess appointee, without deciding the constitutionality of the appointment, and reporting the view of Justice Woods that the appointment was constitutional (citing his own decision in *Farrow*) as well as the view of Circuit Judge Jackson that while he had not seen *Farrow*, he did not think the president had the authority to make the appointment, but advising that the district judge should nonetheless qualify the appointee).

<sup>125</sup> *Farrow*, 3 F. at 115.

<sup>126</sup> Some Senators, such as Senator Trumbull, thought that the President lacked the power to make such appointments, but as he acknowledged, "all persons do not take the same view." CONG. GLOBE, 37th Cong., 3d Sess. 565 (1863); see also *id.* (Senator Fessendum stating, "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments."); see also Sen. Judiciary Committee, Rep. No. 80, 37th Cong., 3d Sess. (Jan. 28, 1863) (rejecting the interpretation by the Attorneys General and suggesting the adoption of a statute enabling the President to order an officer confirmed for one office to perform the duties allocated to a different office that becomes vacant while the Senate is in session) [hereinafter Sen. Judiciary Committee Report].

<sup>127</sup> 54 Stat. 751 (1940); 5 U.S.C. § 5503 (2000). As amended, the statute retains the general bar on payment of "an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate," but adds three exceptions. One exception allows for payment "if the vacancy arose within 30 days before the end of the session of the Senate," *Id.* at § 5503(a)(1) (2000), effectively recognizing the reasonableness of a recess appointment if the vacancy "arose" near the end of a session. A second exception permits payment "if, at the end of the session, a nomination for the office . . . was pending before the Senate for its advice and consent," *Id.* at § 5503(a)(2) (2000), effectively recognizing the reasonableness of a recess appointment if the Senate adjourned without taking action on a nomination. A final exception permits payment "if a

Whether viewed as evidence of original meaning,<sup>128</sup> as interpretive practice that fixed the meaning of an ambiguous provision,<sup>129</sup> as a gloss

nomination for the office was rejected by the Senate within 30 days before the end of the session,” *Id.* at § 5503(a)(3) (2000), effectively recognizing the reasonableness of a recess appointment if the Senate rejects a nominee and adjourns before awaiting a new nomination. The latter two exceptions contain provisos designed to prevent abuse. The exception for nominations pending at the end of the session does not apply if the nominee had previously been the beneficiary of a recess appointment, *Id.* at § 5503(a)(2) (2000), while the exception for rejected nominations does not apply if the president gives a recess appointment to the person who was rejected. *Id.* at § 5503(a)(3) (2000).

Rappaport acknowledges the reasonableness of viewing “this statute as endorsing or at least acquiescing in the constitutionality of appointments in those three situations.” Rappaport, *supra* note 20, at 43. Rather than treat this as constitutional interpretation entitled to some measure of deference and respect—particularly given that it is a Congressional acknowledgment of presidential power rather than an assertion by one branch of its own power—Rappaport concludes that the statute is unconstitutional. *Id.* at 41-44. For him, if the Recess Appointments Clause permits such appointments, it is clearly unconstitutional for Congress to “use its appropriation [power] to restrain the President’s recess appointment authority.” *Id.* at 43. Even assuming the correctness of using the unconstitutional conditions doctrine—which is designed to prevent the government from leveraging its legitimate power in one area into an area where it lacks legitimate power, see Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 *FORDHAM URB. L.J.* 1051, 1068-70 (1995); Kathleen Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1490-96 (1989)—to regulate the relationship between branches of government that were *designed* to use their respective powers to check each other, and overlooking the difficulty of describing any part of that doctrine as clear, see, e.g., *id.* at 1415 (noting that “recent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly”); Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 *MINN. L. REV.* 783, 833 (2004) (observing that “the unconstitutional conditions doctrine is notoriously unsusceptible to a principled doctrinal description”) (footnote omitted), Rappaport does not explain why he finds it clearly unconstitutional for Congress to use its appropriations power in the way it has in this statute to restrain the president’s recess appointment power while also finding it “clearly constitutional” for Congress to use its powers in other ways to constrain the President’s recess appointment power. Rappaport, *supra* note 20, at 58 & n.172 (arguing that “reducing appropriations over key areas of executive authority to small amounts, eliminating various offices, and refusing to confirm officials” are all “clearly constitutional” methods of constraining the President). One possible distinction is that the condition is explicit in the text of Section 5503, while the condition attached to the other methods of constraint would typically be implicit (or, if explicit, then stated outside the statutory text). It is far from clear, however, why textual explicitness is a constitutional vice rather than a constitutional virtue. *Cf.* Michael Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 *NW. U. L. REV.* 771, 785 (1997) (arguing that formal burdens on vetoes are unconstitutional while informal burdens on vetoes are constitutional because this distinction provides a clear line and because informal burdens may not be carried out).

<sup>128</sup> See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1164-76 (2003) (arguing that “congressional, executive, and judicial precedents occurring within the first fifty years following 1787-88 constitute admissible precedents for interpreting the original Constitution”).

<sup>129</sup> See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 521 (2003) (noting that “James Madison and other prominent founders did not consider the Constitution’s meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities and that subsequent interpreters would help ‘fix’ its meaning on disputed points.”); *McCulloch v. Maryland*, 17 *U.S.* (4 *Wheat.*) 316, 401 (1819):

[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not

that history has written,<sup>130</sup> as a stable constitutional construction,<sup>131</sup> as an interpretation well in accord with the purpose of the Recess Appointments Clause, or simply as a wise and practical interpretation of an ambiguous provision by a wide variety of thoughtful and responsible constitutional interpreters over a very long period, the Recess Appointments Clause should be interpreted to permit the filling of vacancies that first arose before the recess of the Senate but continued to “happen” in the recess.<sup>132</sup> We should not now abandon the interpretation that has governed since at least the early 19<sup>th</sup> century simply because some had a contrary view in the 1790’s, any more than we should resurrect a federal common law of crimes despite their rejection in the early 19<sup>th</sup> century simply because some had a contrary view in the 1790’s.<sup>133</sup>

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concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put to rest by the practice of the government, ought to receive a considerable impression from that practice.

See also Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1776 (1984) (viewing the historical practice as “very persuasive evidence” in support of the constitutionality of judicial recess appointments).

<sup>130</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Justice Frankfurter stated:

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, 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, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.

*Id.*; *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915):

It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, 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.

<sup>131</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 9-10, 15 (1999) (describing “constitutional construction” as “resolv[ing] textual indeterminacies” concerning “constitutional subject matter” including “who will hold government office and how they will be selected” while noting that “only time can demonstrate the stability of a constitutional settlement”).

<sup>132</sup> This is hardly the first time that Edmund Randolph’s constitutional interpretation has been rejected. See H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 3 (1999) (reproducing Randolph’s opinion that the bill to create the Bank of the United States was unconstitutional).

<sup>133</sup> See, e.g., Hartnett, *supra* note 63, at 303-06 (discussing the early support for federal common law prosecutions and its rejection); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (describing the rejection of federal common law crimes as “long since settled in public opinion”).

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## II. WHAT COUNTS AS A RECESS OF THE SENATE?

All agree that recesses between sessions—dubbed by commentators, but not by the Constitution, “intersession” recesses—give rise to the President’s recess appointment power. The contested question is whether recesses within a session—similarly dubbed “intrasession” recesses—do so as well.

Consider again the default Congressional calendar, prior to the Twentieth Amendment. In December of an even numbered year, the outgoing Congress would have started a short lame duck session that would end by March 3 of an odd numbered year, with the new Congress not scheduled to assemble until December. No one doubts that the President could make a recess appointment during the recess between March 4 and December, a recess between two Congresses. Similarly, once the new Congress began its long session in December of an odd numbered year and adjourned *sine die* in (say) June of an even numbered year, no one doubts that the President could make a recess appointment during the period from June until December, a recess between two sessions of Congress.

Suppose, however, that Congress, instead of following the default calendar, provided by law for beginning its session on March 4 of an odd numbered year, did not end that session until December, yet took a recess within the long session from April to early July and again from late July to November. May the President make a recess appointment during such intrasession recesses?

The first time that Congress took an extended intrasession recess was during the Presidency of Andrew Johnson.<sup>134</sup> Prior to that time, there had been occasional intrasession recesses lasting about a week or so in December or early January, typically spanning the Christmas and New Year holidays.<sup>135</sup> Indeed, when Congress took such Christmas and New Year intrasession recesses, their length was dwarfed by the length of intersession recesses in those same years. When the Fortieth Congress took an extended intrasession recess, from April 20, 1867, until July 3, 1867, President Andrew Johnson made what appears to be the first known intrasession recess appointment, that of Samuel Blatchford to the United States District Court for the Southern District

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<sup>134</sup> See Official Congressional Directory, *supra* note 14, at 515. This assumes that a recess between an extraordinary session of the Senate of a new Congress in the early days of March and the first regular session of the full Congress is properly characterized as an intersession recess.

<sup>135</sup> See *id.* Note that neither the Official Congressional Directory, nor any other source of which I am aware, compiles information about intrasession recesses of three days or fewer, of which there must have been thousands.

of New York.<sup>136</sup> Judge Blatchford later became a justice of the Supreme Court and was closely involved with the efforts of Senator Evarts of New York to create the circuit courts of appeals.<sup>137</sup>

The Fortieth Congress took a second extended intrasession recess from July 20, 1867, until November 21, 1867.<sup>138</sup> Note that in 1867, the time in intrasession recess, for the first time, was longer than the time in intersession recess. One of the individuals appointed by President Johnson during this intrasession recess litigated his claim for pay before the Court of Claims; the court upheld the legitimacy of the appointment and awarded him his pay.<sup>139</sup>

The Fortieth Congress ended its first session on December 1, 1867, began its second session on December 2, 1867, and did not conclude its second session until November 10, 1868.<sup>140</sup> Although President Johnson was impeached and tried by the Fortieth Congress on various charges concerning his exercise of power to remove and appoint officials, he was not accused of violating the Constitution by making recess appointments during intrasession recesses. After Johnson's acquittal in May of 1868,<sup>141</sup> Congress again took extended intrasession recesses, including one from July 27, 1868 until September 21, 1868.<sup>142</sup> It was during this extended intrasession recess, on August 17, 1868, that Attorney General William Evarts issued his opinion concurring with his predecessors that the President could exercise his recess appointment power even when the vacancy arose while the Senate was in session, as well as two other opinions approving recess appointments.<sup>143</sup>

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<sup>136</sup> See Table of Intrasession Recess Appointments to Article III Courts, in Congressional Research Service Memorandum from Henry B. Hogue, Analyst in American National Government, Government and Finance Division, to Senate Democratic Policy Committee (March 2, 2004); Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 670 (2004). The House and the Senate had recessed on March 30, 1867, but the President called an extraordinary session of the Senate that ran from April 1, 1867, until April 20, 1867. It might be argued that the adjournment *sine die* of the extraordinary session resulted in an intersession recess. See *infra* notes 168-69 and accompanying text. If so, the President can effectively transform an intrasession recess into an intersession recess simply by calling a brief extraordinary session.

<sup>137</sup> See Kathleen Shurtleff, *Samuel Blatchford*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 236 (1993); see also, e.g., Letter from Samuel Blatchford to Williams Evarts (August 11, 1890), in 45 EVARTS PAPERS, Library of Congress 9199.

<sup>138</sup> Official Congressional Directory, *supra* note 14, at 515.

<sup>139</sup> *Gould v. United States*, 19 Ct. Cl. 593 (1884) (“We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned, from July 20 to November 21, 1867, could be and was legally filled by appointment of the President alone[.] . . .”).

<sup>140</sup> Official Congressional Directory, *supra* note 14, at 515.

<sup>141</sup> CONG. GLOBE, 40th Cong., 2d Sess. 415 (May 26, 1868).

<sup>142</sup> *Id.*

<sup>143</sup> 12 Op. Att’y Gen. 449 (Aug. 17, 1868). Thus President Johnson made recess appointments during at least three separate intrasession recesses, not one during a “single intrasession recess,” as Rappaport asserts. Rappaport, *supra* note 20, at 63.

Evarts issued a second opinion that same day concluding that a recess appointment could be made to fill an original vacancy, stating, “I am unable to discriminate, in respect to the

Significantly, in these first Attorney General Opinions addressing the scope of the recess appointment power in the context of an intrasession recess, this esteemed lawyer did not treat an intrasession recess any differently than an intersession recess.<sup>144</sup> Indeed, the opinions, like the text of the Constitution, do not even mention any distinction between intrasession and intersession recesses.

After the turbulence of Reconstruction, Congress returned to its pattern of lengthy intersession recesses, with intrasession recesses limited to a week or two around Christmas and New Year's Day. The Fifty-Seventh Congress, however, began its first session on December 2, 1901, and took an intrasession recess from December 19, 1901, until January 6, 1902.<sup>145</sup> Attorney General Knox advised President Theodore Roosevelt that he could not make a recess appointment during this intrasession recess.<sup>146</sup>

Knox found it "worthy of remark" that his predecessors' opinions, particularly those of "Mr. Wirt and Mr. Evarts . . . related only to appointments during the recess of the Senate between two sessions of Congress."<sup>147</sup> But Knox was wrong about this; as we have seen, Evarts *was* addressing appointments made during an intrasession recess during the second session of the Fortieth Congress, albeit one longer than a couple of weeks. Knox acknowledged that the Court of Claims had upheld the validity of an appointment during an intrasession recess

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exercise of this constitutional power by the President, between cases of continuing vacancy in the recess of the Senate, which originate during the session by the new creation of the office, and those which so originate by a lawful termination of an incumbency." 12 Op. Att'y Gen. 455, 457 (Aug. 17, 1868). He issued a third opinion a few days later advising the President to make a recess appointment to fill the office of United States Attorney for the Eastern District of Pennsylvania. 12 Op. Att'y Gen. 469 (Aug. 21, 1868). These three opinions by Evarts make clear that a brief submitted by Senator Kennedy is wrong to assert that 19th century Attorneys General were never "confronted with any question of an actual or proposed intra-session appointment," Reply Brief of Plaintiffs-Appellees and Amicus Curiae United States Senator Edward M. Kennedy, pro se, in Support of Plaintiffs-Appellees's Motion to Disqualify Member of the Court on the Ground that His Recess Appointment Is Invalid, at 4, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 16424) [hereinafter Kennedy Brief]; *id.* at 4 n.1 (stating that there is "no indication that the Executive Branch seriously considered the constitutionality of these appointments when they were made"). (Professor Laurence Tribe was of counsel on this brief. *Id.* at 52.) It is true, however, that these opinions by Evarts did not discuss the possibility that intrasession recesses might be treated differently than intersession recesses.

<sup>144</sup> *Cf.* Rappaport, *supra* note 20, at 63 (claiming that it is "significant that the executive branch issued no written opinions that attempted to justify [President Johnson's] intrasession recess appointments"). Moreover, the district judge who concluded that one of Johnson's recess appointments in this period was invalid because it filled a vacancy that had arisen prior to the recess, specifically addressed the question "[w]hether there was a recess of the senate upon the adjournment of congress on 27th July last," and concluded that "there was here a recess on the adjournment of 27th July last." *In re* District Attorney of the United States, 7 F. Cas. 731, 734, 744 (E. D. Pa. 1868).

<sup>145</sup> Official Congressional Directory, *supra* note 14, at 517.

<sup>146</sup> 23 Op. Att'y Gen. 599 (1901).

<sup>147</sup> *Id.* at 602.

during the first session of the Fortieth Congress, but thought that the “public circumstances producing this state of affairs were unusual and involved results which should not be viewed as precedents.”<sup>148</sup> He decided to adhere to what he (wrongly) thought to be the “uniform practice of the Executive and the various opinions of my predecessors” rather than the decision of the Court of Claims.<sup>149</sup>

Knox relied heavily on the use of the definite article in the Recess Appointment Clause, emphasizing that “that the phrase is ‘*the* recess.’”<sup>150</sup> As he saw it, while both “recess” and “adjourn” mean “the remission or suspension of business or procedure,” the word “adjourn” implies “a less prolonged intermission than ‘recess.’”<sup>151</sup> While he acknowledged that any temporary adjournment may be “a recess in the general and ordinary use of that term,” he argued that “*the recess* means the period after the final adjournment of Congress for the session, and before the next session begins.”<sup>152</sup> Knox asserted that there “have always been two sittings, sessions, or assemblings of each Congress,” and that the “interval between these two sessions is the recess.”<sup>153</sup>

Subsequent arguments seeking to limit the recess appointment power to intersession recesses largely follow in the footsteps of General Knox. For example, Michael Carrier argues that the use of the definite article “the,” along with the singular “recess,” indicates that the recess appointment power is only available during the “one intersession recess.”<sup>154</sup> Similarly, a brief prepared by Senate Legal Counsel in 1993 contends that since the Constitution uses the singular “recess,” it must refer “only to the single break between Congress’s annual sessions.”<sup>155</sup> So, too, a recent brief submitted by Senator Edward Kennedy relies on the Knox opinion to argue that the use of “the singular phrase ‘the Recess,’ . . . demonstrate[s] that ‘the Recess’ in question is one that separates two sessions of Congress.”<sup>156</sup> There are substantial difficulties with these textual arguments. First, as anyone who has ever attended elementary school, a committee meeting, or a trial can attest, a

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<sup>148</sup> *Id.* at 603.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 600.

<sup>151</sup> *Id.* at 601; cf. JOHNSON, *supra* note 27, at 467 (providing an example from King Charles: “I conceived this parliament would find work, with convenient recesses, for the first three years,” to illustrate the relevant definition of “recess,” as “Remission or suspension of any procedure”); *id.* (defining “adjourn” as “to put off to another day, naming the time; a term used in juridical proceedings; as, of parliament, or courts of justice”).

<sup>152</sup> 23 Op. Att’y Gen. at 601.

<sup>153</sup> *Id.* at 603-04.

<sup>154</sup> Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointment Clause?*, 92 MICH. L. REV. 2204, 2218-19 (1994).

<sup>155</sup> Draft Brief prepared for Mackie v. Clinton, 139 CONG. REC. S8544, 8546 (July 1, 1993). [hereinafter Draft Brief].

<sup>156</sup> See Kennedy Brief, *supra* note 143, at 4-5, 16, 18-19.

“recess” is quite frequently a rather short break; one might readily take a fifteen minute “recess” in the middle of the morning, but “adjourn” for the day in late afternoon. Nor is the idea that a “recess” is an extended period of time dominant in the Senate. The difference in Senate parlance between a “recess” and an “adjournment” has nothing to do with the length of time. Instead, the difference is that when the Senate resumes proceedings after a “recess,” it remains the same legislative day—no matter how many calendar days transpire—whereas when the Senate resumes proceedings after an “adjournment,” it begins a new legislative day.<sup>157</sup>

Significantly, the Constitution cannot plausibly be read to treat an “adjournment” as inherently different and shorter than a “recess.” To the contrary, the Constitution’s use of the term “adjourn” must include the taking of a “recess.” Otherwise, the requirement that neither house adjourn for more than three days without the consent of the other<sup>158</sup> could be evaded by the simple expedient of declaring a unilateral “recess.” Surely the Constitution should not be read to prevent either house from taking a week long break without the consent of the other, while permitting either house to unilaterally close up shop until the next scheduled meeting of Congress. Congressional practice has, quite wisely, treated this requirement of consent to apply not only to breaks in the midst of the session, whether labeled adjournments or recesses, but also to decisions to end a session.<sup>159</sup>

Defenders of the Knox position might respond that there is a difference in that, as Knox put it, there “have always been two sittings, sessions or assemblings of each Congress,” and therefore but one intersession recess each year.”<sup>160</sup> But this is simply wrong, both as a matter of constitutional text and history. The Constitution does not

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<sup>157</sup> See ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 1080 (1992) (noting that in 1980, a single legislative day lasted from January 3 until June 12 because the Senate recessed, rather than adjourned, throughout this period); cf. House Practice, 108th Cong., 1st Sess., A Guide to the Rules, Precedents and Procedures of the House, Ch. 45, § 1, available at [http://www.gpo.access.gov/hpractice/browse\\_108.html](http://www.gpo.access.gov/hpractice/browse_108.html) (“Recess is to be distinguished from adjournment. Recesses are taken during a legislative day, whereas adjournments normally are taken from day to day and terminate a legislative day. Another distinguishing feature is that, during a recess, the Mace remains in place on the rostrum, indicating that the House continues in a receptive mode for business.”).

<sup>158</sup> U.S. CONST. art. I, § 5; cf. The Pocket Veto Case, 279 U.S. 655, 680 (1929) (holding that “adjournment” includes both the final adjournment of a Congress and interim adjournments).

<sup>159</sup> This does not render the phrase “during the Session of Congress” in Article I, Section 5, superfluous. If one house has been called into an extraordinary session by the President, see *id.* at § 3, this phrase permits it to adjourn without the permission of the other house—permission that would be rather difficult, of course, to obtain if that other house is not in session.

In one place, the Kennedy Brief notes that “the bicameral consent requirement of Article I, Section 5, Clause 4 by its terms refers to *only* to specified *intra-session* adjournments,” Kennedy Brief, *supra* note 143, at 18 n.14. This could be read to suggest that one house could end the session without the consent of the other, but it is doubtful that the brief so intended.

<sup>160</sup> 23 Op. Att’y Gen. 603-04 (1901).

provide that Congress “shall assemble once in every year.” Instead, it provides that Congress “shall assemble *at least* once in every year.”<sup>161</sup> Nothing in the Constitution precludes Congress from having multiple sessions each year. The First Congress had three sessions, as did the Fifth Congress. Considering only the antebellum years, four additional Congresses—the Eleventh, Thirteenth, Twenty-Fifth, and Twenty-Seventh—held three sessions each.<sup>162</sup> As a result, there was more than one intersession recess each year during those Congresses, not merely one recess that could be dubbed “the recess.”

Although some of these additional sessions were extraordinary sessions called by the President, others were sessions established by Act of Congress.<sup>163</sup> Nothing in the Constitution precludes Congress from providing by law for the holding of (say) three quarterly sessions each year, one beginning in January, a second beginning in April, and a third beginning in July.<sup>164</sup> Under such a schedule, there would be three intersession recesses each year, not one.

The Kennedy Brief, in apparent recognition of these weaknesses of the Knox position, argues for a slight variant. Acknowledging that there can be more than one intersession recess per year, it contends that the use of the definite article and the singular form indicates, not that there is only one recess per year, but that there is “only one recess—‘the Recess’—per Session of Congress.”<sup>165</sup>

This reliance on the Constitution’s use of the definite article and the singular form, while a crucial aspect of both the Knox position and the Kennedy variant,<sup>166</sup> is particularly weak. Such a grammatical form is frequently used to indicate a state or condition, not a singular

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<sup>161</sup> U.S. CONST. art. I, § 4 (emphasis added).

<sup>162</sup> Official Congressional Directory, *supra* note 14, at 512-13.

<sup>163</sup> See, e.g., Act of Jan. 30, 1809, ch. 10, 2 Stat. 514 (providing that “after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of May, next”); Act of June 24, 1809, ch. 7, 1 Stat. 549 (providing that “after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of November next”). The session that began on May 22, 1809 was the First Session of the Eleventh Congress; the session that began on November 27, 1809 was the Second Session of the Eleventh Congress. The Third Session of the Eleventh Congress began on the Constitution’s default day of December 3, 1810. See Official Congressional Directory, *supra* note 14, at 513.

<sup>164</sup> Starting a new session every quarter, or indeed every month, need not impede efficiency, given the power to provide that “[a]t the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.” S. RULE XVIII.

<sup>165</sup> See Kennedy Brief, *supra* note 143, at 16 (emphasis omitted).

<sup>166</sup> *Id.* at 15-16 (“But the Recess Appointments Clause does not refer to ‘a recess’; nor did the Framers opt for the plural form ‘recesses’ . . . Instead, the Framers employed the singular phrase ‘the Recess,’ . . .”); see also *Evans v. Stephens*, 387 F.3d 1220, 1228 n.2 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (relying on the use of the singular). Judge Barkett makes the even weaker argument that the capitalization of the term “Recess” is significant, *id.*, even though nearly every noun in the original Constitution is capitalized.

occurrence. Consider, for example, the constitutional provision calling for the Senate to choose “a President pro tempore, in the Absence of the Vice President.”<sup>167</sup> Surely no one would contend that the use of the definite article and the singular form somehow means that there is some once-a-year, or once-a-session, absence of the Vice President that constitutes “the Absence” during which a president pro tempore can serve.

Note, too, that the Recess Appointments Clause refers to the recess of the Senate, not the recess of the Congress. With the consent of the House of Representatives, the Senate could adjourn *sine die*, even while the House itself continued to sit. This would presumably result in an intersession recess of the Senate, although it would not result in a recess of the House—and therefore of the Congress—at all. Once the House adjourned *sine die*, there would be an intersession recess of the House and of Congress. In what sense could these separate blocks of time be called the one recess of Congress? Similarly, with the consent of the House of Representatives, the Senate could take a lengthy intrasession recess, even while the House continued to sit, producing an intrasession recess of the Senate, but not a recess of any sort of the House or of Congress itself.

The power of the President to call extraordinary sessions of Congress, or one House thereof, further undermines the Knox position, and the Kennedy variant, by making the distinction between intrasession and intersession recesses rather cloudy. Consider the common practice, prior to the Twentieth Amendment, of a brief extraordinary session at the outset of a Presidential administration in March, with the full Congress not meeting until December. Presumably the recess between the end of the outgoing Congress and the convening of the new Senate would be classified as an intersession recess, even if it were less than a day. If, as is likely, the recess after the adjournment of the extraordinary session of the Senate and the convening of the entire Congress would also be classified as an intersession recess, then multiple intersession recesses of the Senate per year have been commonplace, even without multiple sessions of the full Congress.<sup>168</sup> Similarly, suppose that the full Congress were to meet and then take an intrasession recess, after which the President were to call the Congress, or only the Senate, into extraordinary session. Would the recess between the

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<sup>167</sup> U.S. CONST. art. I, § 3.

<sup>168</sup> The Kennedy Brief relies in part on the juxtaposition of the phrase “the Recess” in the Recess Appointments Clause with the phrase “the End of their [the Senate’s] next Session,” arguing that this marks the Session of Congress as the “frame of reference that matters.” Kennedy Brief, *supra* note 143, at 16. Even on its own terms, however, this argument would not set the sessions of Congress as the relevant frame of reference, but rather the sessions of the Senate.

final adjournment of the extraordinary session and the resumption of the recessed regular session be an intersession recess because it followed the final adjournment of a session, or would it be an intrasession recess because the regular session had not been finally adjourned? What about the recess prior to start of the extraordinary session?<sup>169</sup>

Knox also had two practical arguments, one with little force, but a second that remains quite troubling, both of which continue to be made today. The first is that permitting intrasession recess appointments results in some recess appointees holding commissions for substantially longer periods of time than other recess appointees. Recall that he was writing on December 24, 1901, shortly after the first session of the Fifty-Seventh Congress had begun on December 2, 1901. If the President had made an intersession recess appointment on December 1, 1901, the commission would expire at the end of the first session of the Fifty-Seventh Congress, which, as it turned out, was July 1, 1902, whereas if the President made an intrasession recess appointment on December 24, 1901, it would not expire until the end of the second session of the Fifty-Seventh Congress on March 3, 1903.<sup>170</sup>

Yet the commissions of intersession recess appointees could also be of considerably different lengths. Consider again the pre-Twentieth Amendment default calendar: someone appointed in March of an odd numbered year, immediately after the end of the short session, would serve until the end of the following long session, perhaps in July of the following year, for a total term of some sixteen months. By contrast, someone appointed immediately before the beginning of the short session would serve for three months. Although both received intersession recess appointments, the commission of one would last more than a year longer than the commission of the other.

The second practical argument raised by Knox, and echoed by others to this day, is that if intrasession recess appointments are constitutionally permissible, then there is “no reason why such an appointment should not be made during any adjournment, as from a

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<sup>169</sup> Under the Knox view, which posits that there is only one intersession recess per year, it is unclear which recess would be “the Recess,” although the leading candidate would appear to be the recess after the final adjournment of the regular session. Under the Kennedy variant, it would seem that the recess between the final adjournment of the extraordinary session and the resumption of the recessed regular session would be “the Recess” associated with the extraordinary session, the recess after the final adjournment of the regular session would be “the Recess” associated with the regular session, while the recess prior to the start of the extraordinary session would be an intrasession recess.

<sup>170</sup> 23 Op. Att’y Gen. 599, 604 (1901); *see also* Carrier, *supra* note 154, at 2240 (claiming that the “lengths of commissions of intrasession recess appointees can vary from one to two years,” while all “intersession recess appointees . . . serve approximately the same amount of time”); *cf.* Rappaport, *supra* note 20, at 59 (claiming that “intrasession recess appointments will be longer than intersession recess appointments”).

Thursday or Friday until the following Monday.”<sup>171</sup> As the brief prepared by Senate Counsel in 1993 put it, if intrasession recess appointments are permissible, “then any weekend when the Senate is in recess, or the wee hours of any morning when the Senate is adjourned ‘from day to day,’ indeed any thirty minutes during which the Senate has called a recess, would be sufficient to trigger the President’s unilateral appointment power.”<sup>172</sup>

This is a significant concern, but as the President for whom Knox worked quickly demonstrated, the distinction between intrasession and intersession recesses does not solve the problem of recess appointments during very brief recesses. The Fifty-Eighth Congress had been scheduled to assemble on December 7, 1903. President Theodore Roosevelt, however, called an extraordinary session of Congress to begin on November 9, 1903. The extraordinary session continued until the moment set for the regular session to begin, and the presiding officer simply announced, when that time arrived, that the extraordinary session was adjourned and the new one begun.<sup>173</sup> Operating under the Knox principle that intrasession recess appointments are not permissible while intersession recess appointments are permissible, and observing that there had to be a recess, at least constructively, between two sessions, President Roosevelt made 160 recess appointments during that intersession recess.<sup>174</sup>

While not quite as dramatic as President Roosevelt’s actions, other presidents have made recess appointments during short recesses as well. For example, President William Howard Taft made recess appointments during an eight-day recess, and President Lyndon B. Johnson made recess appointments during a seven-day recess, including A. Leon

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<sup>171</sup> 23 Op. Att’y Gen. 603 (1901).

<sup>172</sup> Draft Brief, *supra* note 155, at 8547; *see also* Memorandum from Senator Edward Kennedy, to the Judges of the United States Court of Appeals for the Eleventh Circuit (March 9, 2004), at 9 (“If a President can make a recess appointment during a brief intrasession holiday break . . . there is nothing to prevent a President from doing so whenever the Senate recesses overnight or on a weekend.”).

Rappaport claims that it would be “absurd to imagine that the Framers would allow recess appointments to prevent an office from being vacant for only a week or two,” and that even “one month recesses seem too short.” Rappaport, *supra* note 20, at 55. At the founding, however, an entire term of a court might come and go within a week or two. *See* 3 DOCUMENTARY HISTORY, *supra* note 46, at 494 (indicating that the Fall 1799 Term of the Circuit Court for the District of New York ran from September 2 to September 6, of the Circuit Court for the District of New Jersey from October 1 to October 7, and of the Circuit Court for the District of North Carolina from November 30 to December 4, while the Spring 1800 Terms of these courts ran from April 1 to April 9, April 1 to April 3, and June 2 to June 9, respectively).

<sup>173</sup> 37 CONG. REC. 544 (1903) (“Senators, the hour provided by law for the meeting of the first regular session of the Fifty-eighth Congress having arrived, I declare the extraordinary session adjourned without day.”).

<sup>174</sup> *See* Hogue, *supra* note 136, at 671; Carrier, *supra* note 154, at 2211-12 (noting that “Roosevelt claimed that a split second separated the two sessions, thus creating a recess which allowed him to make recess appointments”).

Higginbotham, one of the first African-American federal judges, the very day before the Second Session of the Eighty-eighth Congress began.<sup>175</sup> Notice that while the recess in which Judge Higginbotham was appointed was undoubtedly an intersession recess, the eight-day recess in which President Taft made his appointments further illustrates the instability of attempts to distinguish between intersession and intrasession recesses. The Sixtieth Congress expired on March 3, 1909, an extraordinary session of the Senate of the Sixty-first Congress met from March 4 until March 6, 1909, and the First Session of the Sixty-first Congress began on March 15, 1909.<sup>176</sup> Taft appointed Judge Oscar R. Hundley on March 6, 1909.<sup>177</sup> Was that during an intersession recess or an intrasession recess?<sup>178</sup>

The Senate Judiciary Committee responded to Roosevelt's intersession recess appointments with a report construing the phrase "recess of the Senate."<sup>179</sup> It concluded that the phrase should be understood "as the mass of mankind" understood it:

It seems, in our judgment, [to be] the period of time when the Senate is not sitting in a regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate

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<sup>175</sup> Hogue, *supra* note 136, at 671; see Federal Judicial Center, *Biography of A. Leon Higginbotham*, available at <http://www.fjc.gov> (stating recess appointment date of Jan. 6, 1964); Official Congressional Directory, *supra* note 14, at 519 (stating that the First Session of the Eighty-eighth Congress adjourned on December 30, 1963, and the Second Session began on January 7, 1964); Eleanor Holmes Norton, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1829 (1999).

<sup>176</sup> Official Congressional Directory, *supra* note 14, at 517. The First Session, which began on March 15, 1909, was also pursuant to presidential call. See 4 CONG. REC. (March 15, 1909) (reproducing the proclamation).

<sup>177</sup> See Federal Judicial Center, *Biography of Oscar R. Hundley*, available at <http://www.fjc.gov> (stating recess appointment date of March 6, 1909). Presumably, Taft waited until after 2:16 p.m. on March 6, 1909, before issuing the commission. See 44 CONG. REC. 12 (March 6, 1909) (stating 2:16 p.m. as the time of adjournment). Hundley served as United States District Judge for the Northern District of Alabama from April 9, 1907, until May 25, 1909 (with a brief gap from March 3 to March 6 of 1909), under a series of recess appointments, two by Roosevelt and one by Taft. *Id.*

<sup>178</sup> Note that if it is classified as an intrasession recess, then a host of long recesses that followed very short extraordinary sessions of the Senate in March of a presidential transition year, see Official Congressional Directory, *supra* note 14, at 512-18, would likewise be intrasession recesses even though the House of Representatives of that Congress had yet to meet. On the other hand, if it is classified as an intersession recess, then there were many years with multiple intersession recesses: one intersession recess between the end of one Congress and an extraordinary session of the Senate, and a second intersession recess between the end of the extraordinary session of the Senate and the start of the regular session.

<sup>179</sup> S. REP. NO. 4389 (1905), reprinted in 39 CONG. REC. 3823 (1905); see FRUMIN, *supra* note 157, at 1084 ("In 1905, the Committee on the Judiciary made a report to the Senate on what constitutes a 'recess of the Senate,' and what are the powers and limitations of the President in making appointments in such cases.").

as a body in making appointments.<sup>180</sup>

The report did not distinguish between intrasession and intersession recesses, but instead stated that the purpose of the Recess Appointments Clause “was to render it certain that at all times there should be, whether the Senate is in session or nor, an officer for every office, entitled to discharge the duties thereof.”<sup>181</sup> While it is conceivable that it failed to consider this distinction because it simply did not consider the possibility of intrasession recess appointments,<sup>182</sup> it seems far more likely that the members of the Senate Judiciary Committee were aware that President Roosevelt had inquired about making an intrasession appointment in December of 1901 and been advised that it was intersession, not intrasession, recesses that gave rise to his power.

In light of the flaws in the Knox view, beginning with his misreading of Attorney General precedent, and its unfortunate results, it is hardly surprising that subsequent Attorneys General have not followed it. Attorney General Daugherty, relying most significantly on this 1921 Senate Judiciary Committee Report, rejected the distinction drawn by Knox between intersession and intrasession recesses.<sup>183</sup> Paraphrasing the Senate Judiciary Committee Report, he stated that the “essential inquiry” is this:

Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?<sup>184</sup>

Troubled by the possibility that if intrasession recesses are permissible, one might conclude that “the power exists if an adjournment for only 2 instead of 28 days is taken,” he added that he would “unhesitatingly answer . . . no.”<sup>185</sup> Stating that the “line of demarcation can not be accurately drawn,” he further noted, “I do not think an adjournment for 5 or even 10 days,” would be sufficient and 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.”<sup>186</sup>

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<sup>180</sup> 30 CONG. REC. S3823 (1897)

<sup>181</sup> *Id.* at 3824.

<sup>182</sup> See Carrier, *supra* note 154, at 2229 (asserting that the report “did not consider the intersession-intrasession distinction because, at the time of the report, there had been only one documented intrasession recess appointment, made forty years earlier”). As we have seen, Carrier is wrong to treat the appointment of Judge Blatchford as the only documented intrasession recess appointment; the recess appointments addressed in General Evarts’ opinions, in the Court of Claims decision in *Gould*, and in Judge Cadwalader’s decision in *In re District Attorney of the United States*, 7 F. Cas. 733 (E.D. Pa. 1868), were all intrasession recess appointments.

<sup>183</sup> 33 Op. Att’y Gen. 20 (1921).

<sup>184</sup> *Id.* at 25.

<sup>185</sup> *Id.* at 24-25.

<sup>186</sup> *Id.* at 25. General Daugherty did not discuss the appointments made by President Taft

Subsequent Presidents and Attorneys General have agreed in rejecting the view of General Knox, as has the Comptroller General. For example, the first session of the Eightieth Congress began, in accordance with the Twentieth Amendment, on January 3, 1947, but did not end until December 19, 1947.<sup>187</sup> It nevertheless took an extended recess from July 27 until November 17, 1947, at which time the President called them back into session. Similarly, the second session ran essentially all year, from January 6, 1948 until December 31, 1948, but with extended recesses from June 20, 1948, until July 26, 1948, and from August 7, 1948, until December 31, 1948, interrupted by a time in session from July 26, 1948 until August 7, 1948, due to the President's summons.<sup>188</sup> These recesses began as intrasession recesses, although one could characterize them as having been converted into intersession recesses upon the President's call. If so, this illustrates once again the instability of a characterization of a recess as an intrasession recess. Congress did not, however, treat the President's summons as creating a new session, but instead as simply resuming the existing sessions.<sup>189</sup>

During all three of these recesses, President Truman made recess appointments of Article III judges.<sup>190</sup> In response to an inquiry from the Director of the Administrative Office of the Courts whether to pay these judges, the Comptroller General concluded that the "accepted view" since the 1921 Attorney General Opinion was that such appointments "properly may be made."<sup>191</sup> Attorney General Lawrence Walsh stated in 1960 that he "fully agree[d] with the reasoning and the conclusions reached" in the 1921 opinion.<sup>192</sup> The Office of Legal Counsel reached the same conclusion in 1979.<sup>193</sup>

Although the Knox view is quite flawed, and has properly been rejected by his successors, his concern about appointments during very short recesses remains significant. While the distinction between intrasession and intersession recesses fails to obviate the concern, is there any better alternative than the Daugherty view that the President has a large, but not unlimited, discretion?

Perhaps not. Perhaps leaving the matter to accommodation between the Senate and the President—each of which has considerable

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during an eight-day recess.

<sup>187</sup> Official Congressional Directory, *supra* note 14, at 518. With the default date moved to after the New Year, there was scant need for any intrasession recess over the Christmas holidays, and such a Christmas recess, which had usually been the only intrasession recess, has only been taken twice since, once in 1970 and again in 1991-92. *Id.* at 519, 523.

<sup>188</sup> *Id.* at 518.

<sup>189</sup> *Id.* at 527 n.15.

<sup>190</sup> See Table of Intrasession Recess Appointments to Article III Courts, *supra* note 136, at 2.

<sup>191</sup> 28 COMP. GEN. 30, 34 (1948).

<sup>192</sup> 41 Op. Att'y Gen. 463, 468 (1960).

<sup>193</sup> 3 OP. O.L.C. 314 (1979).

power—is the best that can be done.

There is nevertheless at least one modest limit that might reasonably be viewed as an outside fixed minimum. Because the Constitution permits either house of Congress, without needing the consent of the other, to take a recess of not more than three days,<sup>194</sup> the Constitution can be understood as viewing all such recesses as *de minimis*.<sup>195</sup> That is, such a short recess, while it does disable the regular constitutional process, is sufficiently short to be disregarded. However, if one of two entities that must act jointly to perform a constitutional function chooses to disable itself from acting—thereby disabling the joint action—for any longer period of time, a counterbalancing power is triggered in the other. In the case of the House of Representatives and the Senate (who must act jointly in the legislative process), a longer recess triggers a power to withhold consent to the recess. In the case of the Senate and the President (who must ordinarily act jointly in the executive appointment of officers), a longer recess triggers a power to make interim appointments. From this perspective, the three day adjournment rule, which explicitly applies to the relationship between the House and the Senate, offers appropriate guidance for the analogous relationship (in the context of appointments) between the Senate and the President.<sup>196</sup>

Three days is, concededly, not much of a limit on the recess appointment power.<sup>197</sup> Some may think that no appointment could ever

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<sup>194</sup> U.S. CONST. art. I, § 5.

<sup>195</sup> The Department of Justice has suggested this possibility. See Brief of the United States, at 29, *Stephens v. Evans*, 387 F.3d 1220 (11th Cir. 2004) (No. 16424). Indeed, intrasession recesses of three days or less are not even recorded as recesses at all in the Official Congressional Directory. See Official Congressional Directory, *supra* note 14, at 526 n.2.

<sup>196</sup> Cf. *Wright v. United States*, 302 U.S. 583, 598 (1938) (holding, in the context of the Veto Clause, that when “the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session,” the President may veto a bill by delivering “his objections to the appropriate officer of the House within the prescribed ten days,” while reserving judgment as to cases in which the other House consents to a longer adjournment).

Rappaport contends that the three day adjournment provision is designed to balance very different values than those at stake in recess appointments. Rappaport, *supra* note 20, at 50. As he sees it, the three day adjournment provision balances “the value of autonomy for a single house to schedule its activities against the value of restraining one house from unilaterally preventing the Congress from completing its business,” while the Recess Appointments Clause balances “the need to avoid unfilled vacancies and the need for senatorial confirmation.” *Id.* at 50. This way of putting things simply contrasts two different levels of description that can both be applied to both situations. Once we recognize that the Senate’s role in nominations is executive, so that the President and the Senate effectively constitute, in this limited sphere, a bicameral executive, the balance of values involved in the Recess Appointments Clause can be phrased as “the value of autonomy for a single house to schedule its activities against the value of restraining one house from unilaterally preventing the [Executive] from completing its business.” Similarly, the balance of values involved in the three day adjournment rule can be phrased as “the need to enact statutes and the need for bicameralism.”

<sup>197</sup> Cf. U.S. CONST. art I, § 5 (where a quorum is not present, “a smaller number may adjourn from day to day,” thereby preventing a minority who happen to be present from disabling action

be so urgent that it could not wait three days. But what legislation is so urgent that it could not wait three days?

Imagine if the three day adjournment provision did not exist. Even if no particular piece of legislation were urgent, might not one house have some cause to complain if the other house unilaterally took a several day break? (“We’re trying to get some legislation passed here, and we can’t do it without you. Where do you think you’re going?”) In the absence of a Recess Appointments Clause, might not a President feel the same way? (“I’m trying to get people appointed here, and I can’t do it without you. Where do you think you’re going?”) Perhaps, then, the point is not so much the urgency of any particular piece of legislation or any particular appointment, but simply the importance of not giving one part of the government the unchecked power to prevent joint action by merely walking away. (“Don’t take your ball and go home, making it impossible for the game to continue. Stay here and work it out.”)

There is one other argument against intrasession recess appointments that needs to be addressed, an argument barely hinted at by General Knox. The brief prepared by Senate Counsel in 1993 contends that “the words ‘recess’ and ‘session’ [must] be given parallel and equivalent constructions.”<sup>198</sup> That is:

If “session” refers to the entire period of a Congress’ annual meeting, as all . . . agree, then logic dictates that “recess” similarly means the interval between those two annual meetings. If, on the other hand, “recess” were construed to encompass every 10 to 12-day break, then “session” would need to be interpreted consistently as referring to only the reciprocal period, when the Senate is continuously sitting, before taking its next brief “recess.”<sup>199</sup>

As we have seen, however, “session,” does not necessarily refer to the entire period of a Congress’ annual meeting, because Congress may hold more than one “session” in a year. Professor Rappaport does not make this error, but nevertheless argues that “recess” means a “period when the Congress is not in session,” such that “recess” and “session” are “mutually exclusive.”<sup>200</sup>

There are two fundamental difficulties with this view. First, the Constitution plainly contemplates the possibility of recesses that do not

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for more than a single day at a time). On the other hand, unlike the Knox view, it might provide a basis for concluding that even intersession recess appointments are unavailable if the time between sessions is sufficiently short.

<sup>198</sup> Draft Brief, *supra* note 155, at 8546.

<sup>199</sup> *Id.*; see also Kennedy Brief, *supra* note 143, at 16 (noting that “the Framers employed the singular phrase ‘the Recess,’ and they did so in conjunction with the command that the appointee’s commission ‘shall expire at the End of their [the Senate’s] next Session’”).

<sup>200</sup> Rappaport, *supra* note 20, at 47. Again, note that the Recess Appointments Clause refers to the recess of the Senate, not the recess of Congress.

end the session, by providing that neither house may adjourn without the consent of the other for more than three days during a session of Congress.<sup>201</sup> As Rappaport acknowledges, this provision “clearly refers to intrasession recesses.”<sup>202</sup> While it is true that the Constitution uses the term “adjourn” in this provision rather than “recess,” there is no need to attempt to discover some important difference in substantive meaning between the two terms.<sup>203</sup> Instead, there is a simple and straightforward explanation for the usage we find in the Constitution: “adjourn” or “adjournment” is used in the Constitution to refer to the parliamentary action of choosing to take a break, with “recess” used to refer to the resulting break.<sup>204</sup>

There is a second important reason why the words “session” and “recess” need not and should not be given “reciprocal” meanings. The two houses of Congress can control when they are in recess by concurrent resolution,<sup>205</sup> but they must act “by law” to exercise control over their sessions.<sup>206</sup> The two houses of Congress, acting concurrently,

<sup>201</sup> See U.S. CONST. art. I, § 5 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . .”).

<sup>202</sup> See Rappaport, *supra* note 20, at 52.

<sup>203</sup> Rappaport acknowledges that “[w]hen the Constitution was written, the dictionary meaning of ‘adjournment’ was similar to that of ‘recess,’ with both referring to a break in legislative business.” Rappaport, *supra* note 20, at 51. Nevertheless, he contends that while the Constitution uses the term “adjournment” for “all intersession and intrasession recesses,” *id.* at 51, it uses the term “recess” to “refer to a narrower definition of recess,” reasoning that the “most obvious explanation” for the use of two different terms is that “the Framers used the two terms to have different meanings.” *Id.* at 54.

Senator Kennedy simultaneously argues that “recess” is a subset of “adjourn,” Kennedy Brief, *supra* note 143, at 18, and that “‘adjournment’ was the preferred term for a brief or intermittent interruption, while ‘recess’ connoted something more permanent, or pronounced.” *Id.* at 14 n.10; see also *id.* at 5 (relying on Knox’s claim that an “adjournment during a session of Congress means a temporary suspension of business from day to day, or, when exceeding three days, for . . . brief periods over holidays”); 23 Op. Att’y Gen. 599, 601 (1901) (Knox) (stating that the word “adjourn” implies “a less prolonged intermission than ‘recess’”). There is considerable dissonance in simultaneously claiming *both* that all recesses are adjournments, *and* that adjournments are brief while recesses are more permanent or pronounced.

<sup>204</sup> Compare U.S. CONST. art I, § 7 (“unless the Congress by their adjournment prevent its return”), *and* U.S. CONST. art I, § 5 (“Neither House . . . shall . . . adjourn”), *and* U.S. CONST. art II, § 3 (“in the case of disagreement . . . with respect to adjournment,” the President “may adjourn them”), *and* U.S. CONST. art I, § 7 (presentment required “except on a question of adjournment”), *and* U.S. CONST. art I, § 5 (“a smaller number may adjourn from day to day”), *with* U.S. CONST. art I, § 3 (“during the recess of the legislature of any State”), *and* U.S. CONST. art II, § 2 (“during the recess of the Senate”). In all of these instances, it is easy to see “adjourn” or “adjournment” as the parliamentary action, with “recess” as the resulting break. See *Evans v. Stephens*, 387 F.3d 1220, 1225 (11th Cir. 2004) (en banc) (“Instead of describing a block of time, the term ‘Adjournment’ in the Constitution can be read to signify a parliamentary action: Congress’s taking or having taken a break”).

<sup>205</sup> See U.S. CONST. art I, § 7 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of Adjournment*) shall be presented to the President of the United States . . .”) (emphasis added).

<sup>206</sup> *Id.* at § 4 (“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they *by Law* appoint a different Day.”)

can take intrasession recesses and determine when those recesses will end. Likewise, the two houses of Congress, acting concurrently, can end a session. Once they end a session, however, they cannot begin a new session whenever they please. If Congress would like to end a session, take an intersession recess, and return for a new session later the same year, it must act “by law,” that is, by presenting a bill to the President for signature or veto.<sup>207</sup> Nor do they have any power to call themselves into extraordinary session, that power being left to the always-on-duty President.<sup>208</sup>

For example, when the First Congress ended its first session on September 29, 1789, and wanted to start a new session on January 4, 1790, rather than waiting for the default date in December of 1790, it did so by law.<sup>209</sup> It ended that second session in August and then held a third session in December of 1790; thus the law was not designed simply to avoid the Constitution’s default date, but to get Congress back before the default date.<sup>210</sup> Similarly, when the expiring Fourth Congress wanted the Fifth Congress to meet on November 6, 1797, rather than waiting for the default date in December, it did so by law.<sup>211</sup> The Fifth Congress actually began its first session much earlier, on May 15, 1797, pursuant to presidential call.<sup>212</sup> When it wanted to end its first session in July of 1797 and start a new session on November 13, 1797, it acted by law, which included repeal of the prior law that had set November 6, 1797, as the next meeting date.<sup>213</sup> When the Tenth Congress wanted the Eleventh Congress to begin on May 22, 1809 rather than wait until December, it acted by law.<sup>214</sup> And when the Eleventh Congress wanted to end its first session in June of 1809 and begin a second session in November, rather than waiting until December, it did so by law.<sup>215</sup>

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(emphasis added); *id.* at amend. XX (“The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall *by law* appoint a different day.”) (emphasis added).

<sup>207</sup> U.S. CONST. art. I, § 7.

<sup>208</sup> *Id.* at art. II, § 3.

<sup>209</sup> Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (providing that “after the adjournment of the present session, the next meeting of Congress shall be on the first Monday in January next”).

<sup>210</sup> See Official Congressional Directory, *supra* note 14, at 512.

<sup>211</sup> Act of March 3, 1797, ch. 15, 2 Stat. 516 (providing that “after the end of the present session, the next meeting of Congress shall be on the first Monday of November, in the present year”).

<sup>212</sup> See ANNALS OF CONG., 5th Cong., 1st Sess. at 10, 50.

<sup>213</sup> Act of July 1, 1797, ch. 8, 1 Stat. 525 (providing that “after the end of the present session, the next meeting of Congress shall be on the second Monday of November in the present year” and repealing the Act of March 3, 1797 regarding the next meeting of Congress).

<sup>214</sup> Act of Jan. 30, 1809, ch. 10, 2 Stat. 514 (providing that “after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of May, next”).

<sup>215</sup> Act of June 24, 1809, ch. 7, 1 Stat. 549 (providing that “after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of November next”). The session that began on May 22, 1809 was the First Session of the Eleventh Congress; the session that began on November 27, 1809 was the Second Session of the Eleventh Congress. The

I am not aware of any instance in which Congress ended a session and began a new session (other than on the Constitution's default day), without proceeding by law. Indeed, any attempt to not simply adjourn the then-existing session *sine die* but also to provide for a new session on a date certain, would appear to be more than simply a "question of adjournment" and therefore require presentation under Article I Section 7.

By contrast, when the Fortieth Congress wanted to take extended breaks yet remain able to reassemble, it did not end its sessions, but rather took a series of extended intrasession recesses,<sup>216</sup> evidently in order to control its ability to reassemble without the involvement of President Andrew Johnson. A joint resolution adopted in July provided for "the President of the Senate and the Speaker of the House of Representatives . . . [to] adjourn their respective Houses until the third Monday of September, and on that day, unless it be then otherwise ordered by the two Houses, . . . [to] further adjourn their respective Houses until the first Monday in December, 1868."<sup>217</sup> On September 21, 1868, Congress adopted a concurrent resolution providing for further adjournments (absent contrary order by the House or Senate) by the President of the Senate and the Speaker of the House until October 16, 1868, until November 10, and finally until December 7, 1868.<sup>218</sup>

Because the Constitution leaves the process for controlling when recesses begin in different hands than it leaves the process for controlling when sessions begin, it must contemplate that they are not inherently reciprocal.

For these reasons, the recess appointment power is best understood as available during both intersession and intrasession Senate recesses of more than three days.

This is, at first blush, a rather troubling conclusion. It is certainly not one that I reach comfortably. What stops a President from abusing

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Third Session of the Eleventh Congress began on the Constitution's default day of December 3, 1810. See Official Congressional Directory, *supra* note 14, at 513.

<sup>216</sup> See *id.* at 515,

<sup>217</sup> CONG. GLOBE, 40th Cong., 2d Sess. 4518.

<sup>218</sup> *Id.* Although there may have been some sloppiness about this point in the Senate, see CONG. GLOBE, 40th Cong., 2d Sess. 4518 (referring to "closing the present session of Congress by a recess") (statement of President, pro tempore of Senate) (July 27, 1868), the House was clearer. *Id.* at 4501 ("The hour of twelve o'clock m. having arrived, by concurrent resolution of both Houses of Congress the House of Representatives now takes a recess until Monday, September 21 . . .") (statement of the Speaker of the House). Moreover, upon reassembly, the presiding officers in both houses were clear. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 4519 ("The Chair will remark that he has not considered this as a new session, but barely as an adjournment from day to day. It covers a larger period, to be sure, but we have treated it as we have all other temporary adjournments, as a continuation of the original session . . .") (statement of President, pro tempore of the Senate) (Sept. 21, 1868); *id.* at 4520 ("The recess having expired, the House of Representatives resumes its session.") (statement of the Speaker of the House of Representatives).

this power? The answer, I believe, is the same thing that prevents Congress, for example, from refusing to appropriate money to pay the White House electric bill. The Constitution does not attempt to bar all abuse of power by direct prohibition, but rather by giving others a counterbalancing power: “[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments made commensurate to the danger of attack. Ambition must be made to counter ambition.”<sup>219</sup> The Senate has no shortage of constitutional means to counteract what it concludes is an abuse of the recess appointment power.<sup>220</sup>

Notice, too, that a President might think it an abuse of the Senate’s advise and consent power for the Senate to adjourn, at least for any extended period, without acting on his nominations.<sup>221</sup> Bear in mind that the time between nomination and confirmation frequently used to be measured in days, even for Supreme Court justices. For example, John Jay was confirmed two days, William Cushing one day, Oliver Ellsworth one day, John Marshall seven days, Joseph Story three days, and James McReynolds ten days after their respective nominations.<sup>222</sup> “From the administration of Warren G. Harding through that of John F. Kennedy, an average of just twenty-three days elapsed between the announcement of a Supreme Court nomination and the Senate’s confirmation vote.”<sup>223</sup> Indeed, in 1996, a distinguished commission made a wide range of recommendations to improve the process for selection of federal judges, including a recommendation that “if confirmation is delayed,” the president should “make recess appointments to the federal bench.”<sup>224</sup>

A President who was truly aggressive about appointments might not accede to a Senate decision to recess without acting on nominations, but could instead insist on keeping the Senate in session, by calling an

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<sup>219</sup> THE FEDERALIST No. 51 (Alexander Hamilton or James Madison).

<sup>220</sup> See, e.g., Hogue, *supra* note 136, at 668 (noting that Senator Byrd responded to recess appointments made by President Reagan by placing a hold on “virtually all nominations,” including “over 5,700 military nominations,” and lifting that hold when the White House “agreed to provide advance notice of future recess appointments”).

<sup>221</sup> See *In re* District Attorney of the United States, 7 F. Cas. 733, 742 (E.D. Pa. 1868) (commenting that the Senate “may have exceeded their legitimate power” by postponing a nomination to their next session).

<sup>222</sup> 2 WARREN, *supra* note 68, at 757-62.

<sup>223</sup> Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J. LAW & POL. 1, 12 (1999).

<sup>224</sup> MILLER CENTER COMM., CONG., REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES 7 (1996). It is possible to read this recommendation, in context, as limited to district judges. The Commission included Nicholas Katzenbach, Howard Baker, Birch Bayh, Lloyd Cutler, A. Leon Higginbotham, Frederick Lacey, Daniel Meador, and Kimba Wood.

extraordinary session or sessions, until it acted on those nominations. Similarly, if the recess appointment power were not available during intrasession recesses, such a President might not accede to intrasession recesses. Viewed from this perspective, the availability of recess appointments can be seen to serve the interests of the Senate.

Alternatively, the threat of recess appointments can prod the Senate to act on nominations rather than adjourn without taking action. Indeed, in response to the recent use of recess appointments by President Bush, the President and the Senate reached an accommodation whereby the President agreed not to make judicial recess appointments for the rest of his then-current term and Senate Democrats agreed to allow votes on twenty-five judicial nominees.<sup>225</sup>

In contrast, any 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—by declining to adjourn a session until immediately before the start of a new session, while taking as long an intrasession recess as it pleases.<sup>226</sup> Lest anyone think this unlikely,<sup>227</sup> note that the Supreme Court now routinely does something quite

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<sup>225</sup> See Helen Dewar, *President, Senate Reach Pact on Judicial Nominations; Bush Vows He Won't Use Recess Appointments; 25 to Get Vote*, WASH. POST, May 19, 2004, at A21.

<sup>226</sup> Cf. Rappaport, *supra* note 20, at 11 (noting that the Framers may have believed “that Congress should not have been given discretion to deny the President recess appointment authority”). Rappaport’s interpretation, however, would effectively give Congress the power to deny the President recess appointment authority: So long as it did not formally end one session until it was set to begin the next, the President would be unable to issue a recess appointment except in the extraordinarily rare case of a vacancy that happened to originate and be filled during the fall of the gavel. By contrast, Rappaport defends his interpretation by pointing to the possibility that, under the interpretation defended here, a President could use the recess appointment power to “circumvent the Senate’s role.” *Id.* at 27. The tactic necessary for the Congress to defeat the President’s recess appointment authority, however, comes at zero cost to the Congress as an institution or to its members, whereas the President bears a cost in making recess appointments: a recess appointment is simply less valuable, both to the President and to a prospective appointee, than a confirmed appointment. See, e.g., Alexander Bolton, *Bush Urged: Seat Judges Over Recess*, THE HILL, Nov. 12, 2003, at 1 (reporting that one source stated that “the President offered Miguel Estrada a recess appointment to the D.C. Circuit, but he declined”).

<sup>227</sup> Rappaport contends that such an “extreme action” would only occur if a “significant portion of Congress” believed that “the President was abusing his power so much that it was worthwhile to constrain him even though it might create problems filling vacancies.” Rappaport, *supra* note 20, at 58. Maybe so. Yet considering that there would be no cost to Congress or its members of such a calendar, and that it would increase the power of the Senate (and individual Senators, armed with Senatorial courtesy), it might simply become the routine norm—at least once established in a situation where both houses of Congress are controlled by a different party than the President. If both houses agree regarding intrasession recesses, the President has no role. A bare majority of each house is sufficient. “A motion to adjourn is not debatable,” FRUMIN, *supra* note 157, at 3, making a filibuster unavailable.

similar, eliminating its time out-of-term by declining to end one term until the commencement of its new term.<sup>228</sup> Under the Knox understanding, which insists that there is only one recess per year, the President might respond, as President Theodore Roosevelt did, by making intersession recess appointments during that intersession recess, however brief. Under the Kennedy variant, which posits that there is one and only one intersession recess per session, the President might respond by calling an extraordinary session immediately upon the commencement of an intrasession recess, and making recess appointments as soon as the Senate adjourns the extraordinary session.<sup>229</sup> Indeed, under that approach, brief extraordinary sessions at the outset of intrasession recesses might become the norm—at least until both President and Senate realized the futility of distinguishing between intrasession recesses and intersession recesses.

### III. MAY RECESS APPOINTMENTS BE MADE TO FILL VACANCIES ON ARTICLE III COURTS?

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<sup>228</sup> See, e.g., SUPREME CT. J., October Term 2004 1 (Oct. 4, 2004) (“I have the honor to announce, on behalf of the Court, that the October 2003 Term of the Supreme Court is now closed, and the October 2004 Term is now convened.”); SUPREME CT. J., October Term 2003 1038 (June 29, 2004) (“The Court will be in recess from today until the first Monday in October, 2004, at which time the October 2003 Term of the Court will be adjourned and the October 2004 Term of the Court will begin as provided by law.”). Indeed, the current Congressional practice of conditional *sine die* adjournment, whereby Congress adjourns *sine die* subject to the power of Congressional leadership to resume the session, may already approach the effective elimination of intersession recesses. See H. Con. Res. 531, 108th Cong., 2d Sess. (providing for adjournment *sine die*, or until such time as the Congressional leadership notifies the Members of the House and the Senate to reassemble). If Congress were to reassemble and resume the session, the conditional *sine die* adjournment obviously would not have marked the end of the session. As a result, it could be argued that, under current Congressional practice, it is impossible to tell whether a session has truly ended—and an intersession recess begun—until the expiration of a Congress or the beginning of the next session.

<sup>229</sup> Put somewhat differently, under Kennedy’s approach, which insists that there is one recess for each session—the recess that follows the conclusion of that session—the power to call an extraordinary session is effectively the power to convert an intrasession recess into an intersession recess. If the Senate were to attempt to avoid this result by taking an extended intrasession recess within the extraordinary session rather than concluding the extraordinary session, the President could keep calling extraordinary sessions.

Alternatively, if one believes that such an extraordinary session should be considered, not as its own session, but as a resumption of the session already begun and not concluded, the President could simply keep the Senate in session. (If recess appointments and filibusters constitute constitutional hardball, see Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004), imagine if instead of making recess appointments, President Bush had insisted that the Senate sit continuously until it acted on his judicial nominations, and had done so through the final days of the campaign in October and early November of 2004.) Faced with a determined President, Senators who want to get out of Washington without risking that the Senate might do something they oppose in their absence would have to support an intersession recess, thereby triggering the recess appointment power even under Kennedy’s approach.

For many decades, no one questioned that vacancies on Article III courts could be filled by recess appointments. Presidents made such appointments, judges accepted the resulting commissions and relied on them to render judgments, and Senators confirmed or rejected the judges with nary a mention of a constitutional concern.<sup>230</sup>

All but six of our presidents have made recess appointments to Article III courts. All of the first eight presidents—Washington, John Adams, Jefferson, Madison, Monroe, John Quincy Adams, Jackson, and Van Buren—did so. Although Presidents Harrison and Tyler did not make any recess appointments to Article III courts, every President from James Polk through Lyndon Johnson did so, including such diverse presidents as Buchanan and Lincoln, Andrew Johnson and Grant, Theodore Roosevelt and Taft, Hoover and Franklin Roosevelt.<sup>231</sup> The judges who accepted such recess appointments include Bushrod Washington, Benjamin Curtis, Earl Warren, William Brennan, Potter Stewart, Augustus Hand, Irving Kaufman, William Hastie, David Bazelon, Thurgood Marshall, Wilfred Feinberg, Griffin Bell, A. Leon Higginbotham, Spottswood Robinson, and Roger Gregory.<sup>232</sup>

To conclude that recess appointments to Article III courts are unconstitutional would mean that every one of those presidents violated the Constitution. It would also mean that every one of those judges did

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<sup>230</sup> Professor Mayton asserts that the Supreme Court's decision in *Ex parte Ward*, 173 U.S. 452 (1899) barred all challenges to the legal authority of a de facto judge. Mayton, *supra* note 114, at 531. *Ward*, however, held only that the legal authority of a de facto judge could not be attacked collaterally by use of the writ of habeas corpus; it did not hold that a litigant was prevented from directly challenging the legal authority of the judge to preside in his case. *Ward*, 173 U.S. at 455; *see also* *Ryder v. United States*, 515 U.S. 177, 182 (1995) (distinguishing, not overruling *Ward*, and holding that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question").

<sup>231</sup> *See* Brief for the United States, at app., *Miller v. United States*, 2004 WL 2112791, (No. 04-38) ; *see also* Stuart Buck, et al., *Judicial Recess Appointments: A Survey of the Arguments*, Federalist Society Working Paper, app. B, available at <http://www.fedsoc.org/pdf/recapp.pdf>.

<sup>232</sup> *See* Brief of the United States, *supra* note 231, at app.; Buck, *supra* note 232, at app C; Federal Judicial Center, *Biographies of Federal Judges*, available at <http://www.fjc.gov>. It is sometimes said that the Alfred Moore, John M. Harlan, and Oliver Wendell Holmes also received recess appointments to the Supreme Court, but Henry Hogue has persuasively shown that this rests on misunderstanding. Hogue, *supra* note 136, at 660-65. Mayton asserts that a memorandum printed as a preface to Volume 97 of the United States Reports sets forth Harlan's recess appointment, *see* Mayton, *supra* note 114, at 520 & n.17, but there is no such preface to Volume 97. The memorandum that appears immediately prior to the table of cases in Volume 95 states in full: "The Honorable John M. Harlan, whose commission as an Associate Justice of this Courts bears date Nov. 29, 1877, took the oath of office in open Court on the 10th of the following month. Mr. Justice Harlan took no part in the decisions of the cases reported in this volume preceding *United States v. Fox*, p. 670." 95 U.S. (5 Otto) unnumbered page (1877). Neither this memorandum, nor any other in volumes 95, 96, 97, or 98 of United States Reports (Otto volumes 5, 6, 7, 8) report any recess appointment for Justice Harlan; instead, they all recite his date of commission as November 29, 1877. *See also* Federal Judicial Center, *Biography of John M. Harlan*, available at [ww.fjc.org](http://www.fjc.org) (not mentioning any recess appointment).

so as well—not in the way they decided a particular case—but in exercising judicial power in the first place, indeed at the very moment that they took their oath to “faithfully and impartially” discharge their duties “under the Constitution and laws of the United States.”<sup>233</sup> We should hesitate long before reaching that conclusion.

The Recess Appointments Clause follows hard on the heels of the appointments clause itself:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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.<sup>234</sup>

It is difficult to avoid the conclusion that the set of “all Vacancies” refers to all of the offices listed in the immediately preceding paragraph, and therefore that the recess appointment power extends to judicial offices.

Professor Mayton contends that there is an important distinction between accepting the appointment and hearing cases.<sup>235</sup> I find it difficult to see why it is permissible—much less admirable—for a public official to accept an office (and presumably its salary and other emoluments) without doing the job.<sup>236</sup> While it is sometimes said that Justice Harlan and Holmes held recess appointments but did not sit until after confirmation,<sup>237</sup> Henry Hogue has persuasively demonstrated that Justice Harlan did not receive a recess appointment and that while President Roosevelt may have begun the process of a recess appointment for Holmes, Holmes never received one and was quite

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<sup>233</sup> See 28 U.S.C. § 453 (2000). Although a recess appointee may have “little incentive to consider in depth the constitutionality of his own appointment,” *United States v. Woodley*, 751 F.2d 1008, 1027 n.10 (9th Cir. 1985) (en banc) (Norris, J., dissenting), it is wrong to believe that there is “no formal opportunity” to do so. See *id.* (claiming that there is no such formal opportunity). Taking the oath of office is one such formal opportunity. Cf. *Evans v. Stephens*, 387 F.3d 1220, 1221 n.\* (2004) (noting that Judge Pryor recused himself).

<sup>234</sup> U.S. CONST. art. II, § 2.

<sup>235</sup> See Mayton, *supra* note 114, at 534 (“A history of recess appointments to the bench is one thing; a history of those appointees hearing cases prior to confirmation is something else.”).

<sup>236</sup> Cf., e.g., *Putnam v. CIR*, 352 U.S. 82 (1956) (Brennan, J., serving under a recess appointment); *Benedum v. Granger*, 180 F.2d 564 (3d Cir. 1950) (Hastie, J., serving under a recess appointment); *Galbraith v. United States*, 296 F.2d 631 (2d Cir. 1961) (Marshall, J., serving under a recess appointment).

<sup>237</sup> Mayton, *supra* note 114, at 536.

clear that he wanted to remain on the state bench in Massachusetts until he was confirmed.<sup>238</sup> Mayton also suggests that no one, particularly in the Senate, noticed that recess appointees were deciding cases.<sup>239</sup> When the President informed the Senate, upon reconvening, of the judicial recess appointments that he had issued during the recess, what did they think these judges were doing? It is hardly surprising that the practice went “without remark,”<sup>240</sup> precisely because it was so obvious that someone appointed to be a judge would be deciding cases.<sup>241</sup>

Moreover, recall the default Congressional calendar prior to the Twentieth Amendment and the terms of the various federal courts under the Judiciary Act of 1789. In odd numbered years, Congress would be in recess for nine months, from March until December. Meanwhile, the Supreme Court had two terms, one commencing the first Monday in February, and another commencing the first Monday in August.<sup>242</sup> If a vacancy on the Supreme Court arose between March and December and could not be filled by a recess appointment, then, absent the President calling an extraordinary session, the August term would come and go without the vacancy being filled. Worse, bearing in mind that there were no circuit judges and that the Supreme Court Justices held the circuit courts along with the local district judge, such an unfilled Supreme Court vacancy would also affect the spring and fall terms of the various circuit courts.<sup>243</sup> Filling a vacancy on a district court would be at least as compelling. Not only did the district judges hold the circuit courts with the Supreme Court justices, but they held four quarterly sessions of the district court as well.<sup>244</sup> Significantly, there was only one district judge in each district; the entire Article III judiciary under the Judiciary Act of 1789 consisted of nineteen men.

Consider, for example, the recess appointment of Justice Bushrod Washington. Justice James Wilson died on August 21, 1798.<sup>245</sup> On September 29, 1798, President Adams gave Bushrod Washington a recess appointment to the office vacated upon Justice Wilson’s death.<sup>246</sup>

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<sup>238</sup> Hogue, *supra* note 136, at 662-65.

<sup>239</sup> Mayton, *supra* note 114, at 539-41.

<sup>240</sup> *Id.* at 541.

<sup>241</sup> Relying on electronic databases, Mayton reports that roughly 31 percent of lower court recess appointees heard and decided cases prior to confirmation. *Id.* at 540. Considering that both the district courts and the original (pre-1891) circuits courts were trial courts, that the vast majority of trial court decisions were and are not reported, and that appellate judges start participating in cases before oral argument, this figure is almost certainly a significant understatement of the participation of recess appointees in the consideration and decision of cases.

<sup>242</sup> See Judiciary Act of 1789, 1 Stat. 73 § 1.

<sup>243</sup> See Judiciary Act of 1789, 1 Stat. 73, § 5.

<sup>244</sup> See Judiciary Act of 1789, 1 Stat. 73, § 3.

<sup>245</sup> See Federal Judicial Center, *Biography of James Wilson*, available at <http://www.fjc.gov>.

<sup>246</sup> See 1 DOCUMENTARY HISTORY, *supra* note 47, at 132 (reproducing the commission).

On October 19, 1798, Justice Washington wrote to his uncle, George Washington, that he was “preparing to go upon the Southern Circuit, & shall if possible leave this place tomorrow.”<sup>247</sup> Although he left home within five days after receiving his commission, he did not get to Charleston in time to hold the Circuit Court for the District of South Carolina.<sup>248</sup> He did, however, hold the Circuit Court for the District of Georgia from November 9 until November 17, 1798,<sup>249</sup> and the Circuit Court for the District of North Carolina from November 30 until December 5, 1798.<sup>250</sup> The Third Session of the Fifth Congress began on December 3, 1798.<sup>251</sup> Without a recess appointment to fill the vacancy caused by the death of Justice Wilson, there would have been no fall session of the Circuit Courts for Georgia and North Carolina, just as there was none for the District of South Carolina.<sup>252</sup>

Although Mayton claims that none of the recess appointees to the Supreme Court between Justice Rutledge in 1795 and Justice Curtis in 1851 participated in decisions prior to confirmation,<sup>253</sup> the example of Justice Washington makes clear that this is not true—unless one believes that he traveled to Georgia and North Carolina and held court in each state for a week, but did not hear or decide any cases.<sup>254</sup> So, too, Justices Thompson and Woodbury decided cases at circuit prior to confirmation.<sup>255</sup>

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<sup>247</sup> Letter from Bushrod Washington to George Washington (Oct. 19, 1798), in 3 DOCUMENTARY HISTORY, *supra* note 46, at 299.

<sup>248</sup> Letter from Bushrod Washington to James Iredell (Dec. 5, 1798), in 3 DOCUMENTARY HISTORY, *supra* note 46, at 316-17; *see also id.* at 301 (indicating that District Judge Thomas Bee was present for the Circuit Court for the District of South Carolina beginning on October 25, 1798, adjourned the court from day to day until November 3, 1798, and then adjourned the court until the next term, because no Supreme Court justice attended).

<sup>249</sup> *See* 3 DOCUMENTARY HISTORY, *supra* note 46, at 303.

<sup>250</sup> *See id.* at 316; *see also id.* at 493 (table showing dates on which circuit courts were held and the names of the judges holding those courts).

<sup>251</sup> Official Congressional Directory, *supra* note 14, at 512.

<sup>252</sup> Theoretically, another Supreme Court Justice might have held the courts, but it is difficult to imagine how one might have physically gotten there in time. *See* Act of May 19, 1794, ch. 32, 1 Stat. 369, (providing that “when it shall happen that no justice of the Supreme Court attends within four days after the time appointed by law for the commencement of the session,” the circuit court “may be adjourned to the next stated term”). (Note also the use of the term “happen,” to suggest an unplanned fortuity). *See supra* note 27.

<sup>253</sup> *See* Mayton, *supra* note 114, at 535.

<sup>254</sup> *See* Clare Cushman, *Bushrod Washington*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 53-54 (1993) (noting that at the time of his confirmation, Washington “had by then already attended, as a recess appointee, a November circuit court session in Augusta, Georgia, which marked his first experience as a judge”).

<sup>255</sup> *See, e.g.,* United States v. Gourlay, 25 F. Cas. 1382 (C.C. S.D.N.Y. 1823) (Justice Thompson holding the fall term of the Circuit Court under a recess appointment); Luma v. Atlantic Mut. Ins. Co., 15 F. Cas. 1109 (C.C. D. Ma. 1845) (Justice Woodbury holding the fall term of the Circuit Court under a recess appointment); Burnham, et al. v. Rangeley, 4 F. Cas. 773 (C.C. D. Ma. 1845) (Justice Woodbury holding the fall term of the Circuit Court under a recess appointment).

Mayton relies heavily on his assertion that “[o]f the twelve recess appointments to the Court prior to the Eisenhower appointees, only two had heard cases prior to their confirmations.”<sup>256</sup> There were, however, only nine recess appointments to the Supreme Court before Eisenhower,<sup>257</sup> and at least five of them (Rutledge in 1795, Washington in 1798, Thompson in 1823, Woodbury in 1845, Curtis in 1851) heard and decided cases under their recess appointments. Considering all twelve recess appointments to the Supreme Court,<sup>258</sup> we have strong evidence that at least eight of them heard and decided cases under their recess commissions.

Of the remaining four, it does appear that the first recess appointee to the Supreme Court, Thomas Johnson in August of 1791, did not hear and decide any cases prior to his confirmation by the Senate, but this is not because of any sense that he should not act as a judge prior to confirmation. Instead, Johnson made clear that he would only accept the office if he did not have to ride the southern circuit in the fall of 1791; the other justices accommodated him.<sup>259</sup> Johnson held the Circuit Court for the District of Virginia in Richmond beginning on November 22, 1791.<sup>260</sup> Although by that time he had been confirmed by the Senate, it is not clear whether the commission had reached him before holding court in Richmond. He was confirmed on November 7, and his commission sent from Philadelphia on November 10, 1791.<sup>261</sup> His recess commission had taken eight days to reach him at his home in Maryland.<sup>262</sup> Thus Johnson and his fellow judges may well have thought of Johnson as acting under the recess commission when holding the Circuit Court for the District of Virginia in the fall of 1791.

As for the final three, simply because neither Mayton nor I have located any published reports of decisions by Justice Livingston in 1806, Justice McKinley in 1837, or Justice Davis in 1862 does not mean

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<sup>256</sup> Mayton, *supra* note 114, at 520.

<sup>257</sup> See Hogue, *supra* note 136, at 660-65.

<sup>258</sup> See *id.* at 661 (stating that “12 individuals have been given recess appointments to the Supreme Court”).

<sup>259</sup> See 2 DOCUMENTARY HISTORY, *supra* note 46, at 122-23 (“In August, President Washington succeeded in convincing Thomas Johnson of Maryland to come on the Court . . . but only after securing assurances from the other justices that Johnson would not have to ride the Southern Circuit in the fall.”); see also 1 DOCUMENTARY HISTORY, *supra* note 46, at 72-76 (reproducing correspondence between Washington and Johnson including Johnson’s statement that “my weak Frame and the Interest my Family have in me” would preclude him from accepting the office if “the next Southern Circuit would fall to me” and Washington’s assurance that “the Chief Justice informed me that the arrangement had been, or would be so agreed that you might be wholly exempted from performing this tour of duty as that time”). As recorded on his recess commission, Johnson took the oath of office on September 19, 1791. *Id.* at 77.

<sup>260</sup> 2 DOCUMENTARY HISTORY, *supra* note 46, at 232.

<sup>261</sup> 1 DOCUMENTARY HISTORY, *supra* note 46, at 77-79.

<sup>262</sup> *Id.* at 75-76 (cover letter to commission dated August 5 and letter from Johnson stating that he received it on August 13, 1791).

that they did not hear or decide any cases. Indeed, Justice Davis may well have heard argument in cases argued at the outset of the December 1862 term of the Supreme Court prior to his confirmation on December 8, 1862.<sup>263</sup> Davis was not expecting a recess appointment, and upon receiving it, wrote to President Lincoln that the “tenor of your note will hasten my departure.”<sup>264</sup> Davis also told Lincoln that while he could not very well leave before November 11, he would leave “on a moment’s notice by telegram.”<sup>265</sup> He evidently arrived in Washington on November 16.<sup>266</sup> The Supreme Court heard argument that term as early as December 2, 1862.<sup>267</sup> There is no notation in the report of a case argued that day that Davis did not participate.<sup>268</sup> On the other hand, there is evidence that Davis did not take his seat on the Supreme Court until after confirmation.<sup>269</sup>

As far as I have been able to tell, no one breathed a doubt about the constitutionality of recess appointments to Article III courts until Professor Henry Hart wrote to the Harvard Crimson on October 2, 1953, urging that if Earl Warren participated in the decision of cases pursuant to his recess appointment, “he will in my judgment violate the spirit of the Constitution, and possibly also its letter.”<sup>270</sup> Pointing to Article III’s

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<sup>263</sup> See Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124, 125 (1957) (“At the time Davis was appointed, the Court term commenced on December 1, and there is a good chance that he participated between December 1 and December 8, when he was confirmed.”).

<sup>264</sup> Letter from David Davis to President Lincoln (October 30, 1862), available at <http://www.memory.loc.gov/mss/mal/mal1/192/1927000/001.jpg>.

<sup>265</sup> *Id.*

<sup>266</sup> See WILLARD L. KING, LINCOLN’S MANAGER DAVID DAVIS 200 (1960) (discussing a telegram from Davis to Lincoln stating that Davis would arrive in Washington the next day). The telegram was dated November 15, 1862, see *id.* at 354 n.9, and can be found at <http://www.memory.loc.gov/cgi-bin/ampage?collId=mal&fileName=mal1/195/1954500/malpage.db>.

<sup>267</sup> See *Dredge v. Forsyth*, 17 L.Ed. 253 (1862).

<sup>268</sup> *Id.*

<sup>269</sup> See Letter from Attorney General Edward Bates to Senator Jacob Howard (Jan. 5, 1863), Sen. Judiciary Committee Report, *supra* note 126, at 10 (stating that “as soon as the Senate convened, and before he took his seat upon the supreme bench, he was nominated by the President, confirmed by the Senate, and commissioned in due form of law.”); see 17 L.Ed. unpaginated (1884) (stating that Davis was commissioned on December 8 and took the oath on December 10, 1862); *In re* District Attorney of the United States, 7 F. Cas. 733, 739 (E.D. Pa. 1868) (acknowledging that Davis received a recess appointment to the Supreme Court to fill a vacancy that existed before the recess but noting “I believe that he did not take a seat upon the bench of the Supreme Court under this commission”); KING, *supra* note 266, at 201 (stating the Davis took his set on the Supreme Court on December 10); Thomas Dent, *David Davis of Illinois: A Sketch*, 53 AMER. L. REV. 535, 545 (1919) (stating that Davis resigned his office as state circuit judge in October and took his seat on the Supreme Court on December 8, 1862).

<sup>270</sup> Letter to the Editor (Oct. 2, 1953), in HARV. L. SCHOOL RECORD, Oct. 8, 1953, and in Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124, 127 n.12 (1957); see also *id.* at 130 n.18 (“Nowhere was the propriety of recess appointments questioned until 1953.”).

When some Senators in 1937 argued that Supreme Court Justices should not participate in

requirement that judges “shall hold their offices during good Behavior,” and noting that a President might not nominate (or might withdraw a nomination) and that the Senate might not confirm a recess appointee, Hart wrote, “I cannot believe that the Constitution contemplates that any Federal judge . . . should hold office, and decide cases, with all these strings tied to him.”<sup>271</sup>

Professor Henry Hart found a moderately receptive ear in Senator Philip Hart. Senator Hart urged the Senate to adopt a resolution advising the President that:

the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court’s business.<sup>272</sup>

Senator Hart, however, made clear that he found recess appointments to the Supreme Court constitutional, noting that “if ever there was a question for debate, I think time long since has resolved it.”<sup>273</sup>

Nor did the opponents of the resolution argue that recess appointments to Article III courts were unconstitutional. To the contrary, they argued that the resolution was an improper attempt to control the President’s constitutional power to make such recess appointments.<sup>274</sup> Although Senator Jacob Javits of New York viewed the resolution as a “perfectly vain act,” hoping and praying that no President would give “any attention,” he also argued that if a President did heed the resolution, it would “break down the independence of the judiciary,” and “transfer[] to the Senate a power which the Constitution gave to the Presidency.”<sup>275</sup> Referring to the use of the filibuster against civil rights bills, he said if the resolution were heeded, “we would leave it within the power of the Senate to prevent a judge from being confirmed, not for a month or 2 months, but for a year or two, or as long

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decisions until after confirmation; see 81 CONG. REC. 7993-8002 (1937); see also Mayton, *supra* note 114, at 22 (noting these comments), they did not argue that recess appointments to Article III courts were unconstitutional.

<sup>271</sup> Letter to the Editor, *supra* note 270.

<sup>272</sup> 106 CONG. REC. 18,130 (1960).

<sup>273</sup> *Id.* at 18,131; see also *id.* at 18,130 (“The President does have such power and this resolution does not argue otherwise.”).

<sup>274</sup> See, e.g., *id.* at 18,134-35 (contending that the resolution is “an improper interference with Executive powers and privileges”) (statement of Senator Wiley); *id.* at 18,136 (contending that “the pending resolution is simply an unfair, unhappy, unconstitutional attempt to she[a]r away some of the constitutional powers of the Chief Executive in making appointments to the highest tribunal in this land”) (statement of Senator Kuchel).

<sup>275</sup> See *id.* at 18,143-44.

as it would take us to get a civil rights bill passed in the Senate.”<sup>276</sup> Despite these objections, the resolution passed, forty-eight to thirty-seven, with fifteen not voting.<sup>277</sup>

In light of all this, it is hardly surprising that two years later, when the United States Court of Appeals for the Second Circuit faced an objection to a recess appointee presiding in the district court, it rejected the challenge.<sup>278</sup> Holding “that Article II permits the President to appoint Justices of the Supreme Court and judges of the inferior courts to serve for a limited period,” the court concluded that “it necessarily follows that such judicial officers may exercise the power granted to Article III courts.”<sup>279</sup>

Revealing a remarkably judge-centered view of the constitutional universe, a panel of the United States Court of Appeals for the Ninth Circuit concluded in 1985 that recess appointments could not be made to the Article III courts, but the case was reheard en banc and the panel’s constitutional interpretation rejected.<sup>280</sup> The panel’s judge-centeredness is reflected not simply in its willingness to discard the longstanding interpretation of the Constitution by presidents and the Senate,<sup>281</sup> but perhaps most clearly in an assertion that seemed to untether judges from any obligation to the law: “The Framers,” Judge Norris wrote, “sought to make the federal judges servants not of the Executive but only of their consciences.”<sup>282</sup>

In the dissent from the decision of the court en banc, Judge Norris revised this sentence to read: “The Framers were determined to ensure that federal judges would not be beholden to the executive or the legislature but only to the law and their own consciences.”<sup>283</sup> While the

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<sup>276</sup> *Id.* at 18,143.

<sup>277</sup> *Id.* at 18,145.

<sup>278</sup> *United States v. Allocco*, 305 F.2d 704 (2d Cir.1962).

<sup>279</sup> *Id.* at 709.

<sup>280</sup> *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1983), *vacated*, 751 F.2d 1008 (9th Cir. 1985) (en banc).

<sup>281</sup> *Id.* at 1336 (claiming that while “members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning”).

<sup>282</sup> *Id.* at 1332; *cf.* Stephen B. Burbank & Barry Friedman, *Introduction*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS* 11-12 (Burbank & Friedman eds., 2002) (“No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which we mean freedom to decide a case as the court sees fits without any constraint, exogenous or endogenous, actual or prospective.”) [hereinafter *JUDICIAL INDEPENDENCE*]; Kim Lane Schepple, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE*, *supra*, at 230 (“Surely, one must say, judges cannot be completely independent of the law—or at least it would be a novel approach to judging if they were.”); *id.* at 244-45 (arguing that while judges “must be able to approach rules themselves with a critical attitude,” nevertheless “there should be some not-entirely personal guidelines for carrying out this task too, so that judges can be held accountable to something besides their own consciences”).

<sup>283</sup> *United States v. Woodley*, 751 F.2d 1008, 1018 (9th Cir. 1985) (Norris, J., dissenting); *see also* Lawrence Solum, *Legal Theory Blog*, available at <http://www.lsolum.blogspot.com> (noting

dissent fixed this problem in the panel decision, it added a different one. In response to the majority's reliance on the 1803 decision in *Stuart v. Laird*,<sup>284</sup> for the proposition that longstanding practice from the organization of the judicial system fixes the construction of the Constitution, the dissent stated that the practice of circuit riding involved in *Laird*, "had already been eliminated by amendment of the Judiciary Act in 1801."<sup>285</sup> What gave rise to the issue in *Laird*, however, was that the Judiciary Act of 1801 had been *repealed* in 1802, the supposedly life-tenured circuit judges appointed under the 1801 Act dismissed from office, and the duty of circuit riding by Supreme Court Justices restored.<sup>286</sup> Did these dissenting circuit judges really think that circuit riding had ended in 1801? Did they not know that their predecessors had lost their supposedly life-tenured jobs when Congress repealed the act that created the offices they held? Maybe the White House and the Senate, as a matter of full disclosure, should inform all individuals being considered for Article III judgeships about what happened to the circuit judges appointed under the Judiciary Act of 1801.

Notably, not one of the ten judges who recently addressed the constitutionality of Judge Pryor's recess appointment concluded that recess appointments could not be made to Article III courts.<sup>287</sup>

It is true, of course, that a recess appointee lacks life tenure. But a recess appointee does not serve at the pleasure of the President, as Judge Norris claimed,<sup>288</sup> but instead holds the office, subject only to impeachment, until the end of the next session of the Senate. That is, although a recess appointee only holds the office on an interim basis, during that period of time he or she is protected by the "good behavior" limitation of Article III.<sup>289</sup> Similarly, recess appointees should be protected by Article III's guarantee that their compensation "not be

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that the law clerk that drafted Judge Norris's dissenting opinion "had romantic notions about the role of the judiciary . . . imagined innovative judges who would wield the law like a sword, striking down injustice with newly minted constitutional rights," but that that law clerk is now "more skeptical about the transformative role of the law," and "more concerned about text, history, and precedent").

<sup>284</sup> 5 U.S. (1 Cranch) 299 (1803).

<sup>285</sup> *Woodley*, 751 F.2d at 1032 n.16 (Norris, J., dissenting).

<sup>286</sup> *See, e.g.*, Hartnett, *supra* note 63, at 298-301.

<sup>287</sup> *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

<sup>288</sup> *Woodley*, 751 F.2d at 1014 (Norris, J., dissenting) (claiming that by permitting recess appointments, the majority holds "that the judicial power of the United States may be exercised by judges who serve at the pleasure of the President and Senate"); *id.* at 1331-32 (comparing the situation of recess appointees with colonial judges who were "summarily discharged").

<sup>289</sup> The commission that President John Adams issued to Bushrod Washington, for example, provides for Washington to hold the office "during his good Behavior and until the end of the next session . . . and no longer." Commission of Bushrod Washington (Sept. 29, 1798), in 1 DOCUMENTARY HISTORY, *supra* note 46, at 132; *see also* Commission of Thomas Johnson (Nov. 7, 1791), in 2 DOCUMENTARY HISTORY, *supra* note 46, at 77 (same).

diminished during their Continuance in Office,<sup>290</sup> and their pay not be reduced so long as they hold their offices pursuant to the recess commission.

If this point seems insignificant, I suggest that it is only because of our legal culture's fixation on judges.<sup>291</sup> The title of this symposium, after all, is *Jurocracy and Distrust*. If we zoom out a bit, and consider other federal offices whose terms and conditions are set by the Constitution, we can see its importance. Indeed, by examining those other offices, we can see that construing Article III's good behavior and undiminished compensation provisions together with Article II's recess appointment provision is not a matter of deciding which one is somehow more specific than the other,<sup>292</sup> nor of choosing which of conflicting provisions reflects the more important value,<sup>293</sup> but rather presents the unexceptional task of construing a provision establishing the term of an office with a provision for filling that office on an interim basis.

Consider Members of the House of Representatives. The Constitution sets their terms at two years.<sup>294</sup> It also provides that "[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."<sup>295</sup> A member elected to fill a vacancy in the House, however, does not serve a two-year term.

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<sup>290</sup> U.S. CONST. art. III, § 1.

<sup>291</sup> See generally Edward L. Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE, *supra* note 282, at 56 ("To treat independence as intrinsically judicial reflects the jurocentric character of American legal scholarship, which is certainly something that requires justification."); *id.* at 69 (noting that "independence is not an inherent feature of the judiciary, either as a descriptive or a normative matter. Rather, it is a technique of governance that is widely deployed in a modern state and that serves a variety of functions."); see also Terri Jennings Peretti, *Does Judicial Independence Exist?*, in JUDICIAL INDEPENDENCE, *supra* note 282, at 122-23 (suggesting that empirical research shows that tenure and salary protections are less important to judicial independence than a competitive political system, a moderate judiciary, and risk-averse political competitors).

<sup>292</sup> See *Woodley*, 726 F.2d at 1330 (viewing the good behavior and undiminished compensation provisions of Article III as more specific than the general provisions of Article II); *id.* at 1338 (describing the *Allarco* decision as implying "that the general language of the recess appointments clause takes precedence over the specific language of article III," and claiming that the "unusually specific language of article III must supercede the general language of the article II recess appointment clause"); *id.* at 1010 (noting that "while article III speaks specifically about the tenure of federal judges, article II is equally specific in addressing the manner of their appointment").

<sup>293</sup> See *id.* at 1020 (Norris, J., dissenting) (claiming that with "an unresolved conflict between two provisions of the Constitution," the next step is "weighing the values that animate the provisions"); Mayton, *supra* note 114, at 524 (suggesting a resolution between the Recess Appointments Clause and Article III "in terms of purposes"); Virginia L. Richards, *Temporary Appointments to the Federal Judiciary: Article II Judges?*, 60 N.Y.U. L. REV. 702, 718-23 (1985).

<sup>294</sup> U.S. CONST. art. I, § 2.

<sup>295</sup> *Id.*

Consider Senators. The Constitution sets their terms at six years.<sup>296</sup> It also provides that:

[w]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.<sup>297</sup>

A Senator elected to fill a vacancy in the Senate does not serve a six-year term, much less does a Senator temporarily appointed by the governor of a state.

While Representatives and Senators selected on an interim basis do not have the tenure in office set for the regular holders of that office, they have the same power to exercise that office while they hold it, and the same protections. They are no more subject to recall or instruction than a Representative or Senator elected to a full term. Once a governor appoints an interim Senator, the governor cannot fire the Senator.

The pay of Representatives and Senators may not be increased or decreased “until an election of Representatives shall have intervened.”<sup>298</sup> This same rule applies to Representatives and Senators elected on an interim basis to fill a vacancy, just as it does to Representatives and Senators elected for a full term.

Consider, finally, the President. The Constitution sets the President’s term at four years.<sup>299</sup> It also provides for the Vice President to become President if the President is removed from office, dies, or resigns.<sup>300</sup> Yet when a Vice President becomes President, he does not serve a four-year term. He nonetheless has all of the powers and duties of the President during the period in which he holds the office, including protection from removal except by impeachment and conviction, and the guarantee that his compensation “neither be increased or diminished during the Period for which he shall have been elected.”<sup>301</sup> The same powers and protections apply even to a President who was never selected by the presidential electors but who, like Gerald Ford, became Vice President due to a vacancy in that office and subsequently become President upon the death or resignation of the

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<sup>296</sup> *Id.* at § 3; *id.* at amend. XVII.

<sup>297</sup> *Id.* at amend. XVII. Prior to the Seventeenth Amendment, the state legislature filled such vacancies, with the executive of the state empowered to make “temporary Appointments until the next Meeting of the Legislature.” *Id.* at art. I, § 3.

<sup>298</sup> *Id.* at amend. XXVII.

<sup>299</sup> *Id.* at art. II, § 1.

<sup>300</sup> *Id.* at amend. XXV; *see also id.* at art. II (“In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . .”).

<sup>301</sup> *Id.* at art. II, § 1.

President.<sup>302</sup>

Viewed from a perspective that includes Representatives, Senators, and Presidents, along with judges, we can see that there is nothing unusual in the Constitution providing for an office, setting the tenure of that office, imposing rules governing the salary of that office, yet also creating a mechanism to fill that office on an interim basis with individuals who are not given a full term. So understood, there is no conflict between Article II's provision for recess appointments to fill "all" vacancies in the offices listed in Article II (including vacancies in Article III courts) and Article III's provision that judges hold office during good behavior—any more than there is a conflict between the provisions setting the terms of office for the President, Senators, and Representatives and the provisions for filling those offices on a temporary basis.<sup>303</sup>

Moreover, understood from this broader perspective, a litigant has no more right to insist that the law be applied by a judge with the independence that life tenure brings than to insist that the law be enacted by a Senator with the independence that a six-year term brings. A Senator with a full six-year term is certainly more independent than a Senator serving on an interim basis, just as a judge with life tenure is more independent than a judge serving on an interim basis. But because the Constitution provides a method for filling seats in the Senate and on the bench on an interim basis, neither interim Senators nor interim judges can be dubbed unconstitutional simply because they have less independence than one serving a full term.<sup>304</sup>

Although it is important to realize that a recess appointee to an Article III court does not hold his commission at the pleasure of the President, it must be admitted that there is some risk that a recess appointee might seek to curry favor with the President or Senate in order to increase his chances of a new appointment.<sup>305</sup> Yet this risk is

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<sup>302</sup> *Id.* at amend. XXV.

<sup>303</sup> Indeed, there is less of a conflict. Although a recess appointee to an Article III court lacks life tenure, she is still protected by the good behavior provision during the term of the recess appointment. An interim Senator, for example, in no sense serves a term of six years.

<sup>304</sup> Of course, unless virtually every state's judiciary is unconstitutional, due process cannot be understood to guarantee that litigants will have their cases decided by life tenured judges. *See Evans v. Stephens*, 387 F.3d 1224 (11th Cir. 2004) (en banc) ("And, of course, plenty of judges in this country (for example, state judges) then and now do not have all the protection of Article III judges, yet these courts are not seen to be inherently unfair, and the litigants who appear before them have not been held to have been denied due process on that account."); cf. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (criticizing elective judiciaries).

<sup>305</sup> Cf. Edward L. Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE, *supra* note 282, at 87 ("Appointment authority is only tantamount to command authority if the appointment is at will, which is very different from a term of years.")

An appointment based on the advice and consent of the Senate is not a confirmation of a recess appointment, but a new appointment. *See United States v. Kirkpatrick*, 22 U.S. 720, 733-

present for all judges: there are district judges who want to be circuit judges, circuit judges who want to be Supreme Court justices or solicitor general, and Supreme Court justices who want to be Chief Justice or President. As Bruce Springsteen puts it, “Poor man wanna be rich, rich man wanna be king, And a king ain’t satisfied, till he rules everything.”<sup>306</sup> Among the statutory safeguards against this risk are appellate review and multimember courts. Perhaps the most important constitutional safeguard is the lower house of the judiciary, the jury, particularly in criminal cases.<sup>307</sup>

Of course, an Article III court must be composed of judges selected in accordance with the Constitution,<sup>308</sup> just as Congress must be composed of Representatives and Senators selected in accordance with the Constitution, and the presidency held by a person selected in accordance with the Constitution. But unless one thinks that life tenure for Article III judges is somehow more central to the constitutional scheme than two year terms for Article I Representatives,<sup>309</sup> six year terms for Article I Senators,<sup>310</sup> and four year terms for Article II Presidents,<sup>311</sup> it should be no more troubling that some Article III judges lack life tenure than that some Representatives have terms shorter than two years, some Senators have terms shorter than six years, and some presidents have terms shorter than four years.

Some may think that even if recess appointments for judges of the inferior courts are constitutional, and even if Representatives, Senators, and Presidents can properly serve on an interim basis, the Supreme Court is different. Indeed, it hardly seems coincidental that Henry Hart raised his objections to judicial recess appointments not only in the context of recess appointments to the Supreme Court but also at the

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34 (1824) (stating that “a new appointment . . . made by the President with the advice and consent of the Senate” was, upon acceptance, “a virtual superceding and surrender of the former commission. The two commissions cannot be considered as one continuing appointment . . .”).

<sup>306</sup> Bruce Springsteen, *Badlands*, DARKNESS ON THE EDGE OF TOWN (1978).

<sup>307</sup> See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 95 (1998) (noting, among other support for this description of the jury, Thomas Jefferson’s statement: “Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative.”). While the jury continues to have considerable power, especially in criminal cases, it certainly has less than it did at the founding. See, e.g., William E. Nelson, *The Province of the Jury*, 37 MARSHALL L. REV. 325 (2004) (describing the “effort by mainly Federalist judges to seize from juries the power to find law”).

<sup>308</sup> Cf. *Nguyen v. United States*, 539 U.S. 69 (2003) (holding, as a matter of statutory interpretation, that a non-Article III judge may not participate in a case decided by an Article III court).

<sup>309</sup> But see THE FEDERALIST NO. 53 (James Madison) (explaining the significance of two year terms for Members of the House of Representatives).

<sup>310</sup> But see THE FEDERALIST NO. 63 (James Madison) (explaining the significance of six year terms for Senators).

<sup>311</sup> But see THE FEDERALIST NO. 71 (Alexander Hamilton) (explaining the significance of four year terms for Presidents).

same time that he was proclaiming that the Supreme Court has some “essential role . . . in the constitutional plan” that is protected from Congressional power to make exceptions to the Supreme Court’s jurisdiction.<sup>312</sup>

Of course, there is no basis in the constitutional text to treat the appointment of Supreme Court justices as subject to different constitutional rules than the judges of the inferior federal courts.<sup>313</sup> Indeed, for many years, Supreme Court justices *were* the judges of the inferior federal courts, and to this day remain empowered to sit in that capacity.<sup>314</sup>

The Supreme Court of today, however, is not the Supreme Court of the past.<sup>315</sup> To the extent that the Supreme Court functions as a continuing constitutional convention, armed with the power to set its own agenda for constitutional change,<sup>316</sup> rather than as a traditional judicial body, there is an argument for making sure that its members have some greater democratic pedigree than presidential appointment. From this perspective, perhaps Senate confirmation proceedings are properly quasi-referenda on the direction of constitutional change.<sup>317</sup>

Perhaps so. But rather than simply accept that the Supreme Court properly functions as a continuing constitutional convention and adjust the constitutional process of judicial selection accordingly, I (for one) have not given up hope of adjusting the Supreme Court instead.

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<sup>312</sup> Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953).

<sup>313</sup> There is one important statutory difference: vacancies in the lower federal courts can be temporarily filled by assignment of judges appointed to other courts, while there is no provision for the temporary assignment of judges of other courts to the Supreme Court. See Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646-49 (2002). For this reason, it is possible that recess appointments might prove more necessary for the functioning of the Supreme Court than for the functioning of inferior courts.

<sup>314</sup> See text accompanying note 243-62, *supra*; see also 28 U.S.C. § 43 (2000) (making justices competent to sit as judges of the courts of appeals).

<sup>315</sup> See generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000).

<sup>316</sup> See, e.g., Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law 2* (Sept. 2004) (unpublished working paper on file with the *Cardozo Law Review*) (critiquing “the widespread view” that “privilege[s] constitutional updating by judges” and implicitly “entrusts all constitutional change to . . . an ongoing constitutional convention whose delegates are all judges (and hence all lawyers)”).

<sup>317</sup> See Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dares Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 n.28 (2004) (describing the confirmation hearings of Robert Bork as a “virtual national referendum on the Constitution and on its protection for such ‘unenumerated rights’ as sexual privacy and autonomy”); *Planned Parenthood v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J.) (noting the possibility of confirmation hearings acting as “a sort of plebiscite” on the “most favored and most disfavored alleged constitutional rights”).

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At the outset, I posed three questions. First, may a recess appointment be made if the vacancy existed prior to the recess? Second, may a recess appointment be made during a recess in the midst of a Senate session? Third, may a recess appointment be made to fill a vacancy on an Article III court? The best answer to each question is yes.