Michigan Law Review

Volume 92 | Issue 7

1994

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NOTES

When Is the Senate in Recess for Purposes of the Recess Appointments Clause?

Michael A. Carrier

INTRODUCTION

Two weeks before leaving office, President George Bush found himself in a quandary. The President wanted the Board of Governors of the U.S. Postal Service¹ to withdraw a lawsuit it had filed.² The Board, however, by a six-to-five margin, refused to comply with his demands.³ The President then threatened to dismiss the governors who supported the suit,⁴ but the U.S. District Court for the District of Columbia granted an injunction preventing Bush from removing any of the governors.⁵

The President nonetheless continued to pursue his goal. He waited until a recess of the Senate⁶ to replace one of the governors who supported the suit, Crocker Nevin, with Thomas Ludlow Ashley,⁷ a longtime friend who Bush believed would oppose the suit.⁸ Bush thus skirted the usual procedure for presidential appointments, in which the Senate must confirm the President’s nomi-

². The Board had filed a suit seeking to overturn a two-cent discount for machine-processed first-class mail offered by the Postal Rate Commission. See Bush Defies Judge and Names New Member to Postal Board, N.Y. Times, Jan. 9, 1993, at 10. The President claimed that the Board of Governors could not file a suit without the approval of the Justice Department. The U.S. Court of Appeals for the District of Columbia Circuit rejected Bush’s argument, holding that the Postal Service may file suit when the Department of Justice declines to represent or to consent to the self-representation of the Postal Service. Mail Order Assn. of Am. v. United States Postal Serv., 986 F.2d 509, 522 (D.C. Cir. 1993). See generally Neal Devins, Tempest in an Envelope: Reflections on the Bush White House’s Failed Takeover of the U.S. Postal Service, 41 UCLA L. Rev. 1035 (1994).
³. Bush Defies Judge and Names New Member to Postal Board, supra note 2, at 10.
⁴. Id.
by making a "recess appointment," which does not require confirmation by the Senate. The Recess Appointments Clause of the Constitution allows the President unilaterally to fill vacancies in federal offices that happen during Senate recesses, thereby creating commissions that last until the end of the next nine-to-twelve-month session of the Senate. Justifying his attempt to employ this power, the President argued that Nevin's "holdover" position on the Board constituted a "vacancy" that he could fill by making a recess appointment. The U.S. District Court for the District of Columbia, however, invalidated Bush's appointment, holding that no vacancy existed on the Board, and therefore, that Bush could

9. Article II, Section 2, Clause 2 provides the usual procedure for appointments: "[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." U.S. CONST. art. II, § 2, cl. 2. For more detail about this process, see infra note 27.

10. "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." U.S. CONST. art. II, § 2, cl. 3.

11. Article II, Section 2, Clause 2 defines the array of offices to which the President can make recess appointments. See supra note 9. The Supreme Court has stated that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.' " Buckley v. Valeo, 424 U.S. 1, 126 (1976); see also Hoeppel v. United States, 85 F.2d 237, 241 (D.C. Cir.) (holding that any person "appointed in any of the modes prescribed in article II, § 2, cl. 2 of the Constitution" is an officer of the United States), cert. denied, 299 U.S. 557 (1936). Congress may vest the appointment of inferior officers solely in the President. U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

Of all these offices, the judiciary poses an unique problem. Recess-appointing judges may well compromise their independence, as they may make decisions with an eye to garnering the approval of a president who may later offer them a permanent appointment or of a Senate who would confirm that permanent appointment. This poses a constitutional problem because a recess appointee lacks the life tenure demanded by Article III. Although this subject is beyond the scope of this Note, it has been explored in several student Notes. See, e.g., Thomas A. Curtis, Note, Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretations, 84 COLUM. L. REV. 1758 (1984); Note, Recess Appointments to the Supreme Court — Constitutional But Unwise?, 10 STAN. L. REV. 124 (1957).

12. Courts and commentators have considered whether the term "happen" in the clause's text, "Vacancies that may happen during the Recess," U.S. CONST. art. II, § 2, cl. 3, includes vacancies that initially arose when the Senate was in session. The apparent consensus is that vacancies that "happen" during a recess include those vacancies that carry over into the recess, in addition to those that initially occur during a recess. See infra note 148.

13. For an explanation of the determination of lengths of commissions granted under the clause, see infra notes 101-03 and accompanying text.


not make a recess appointment.16

Although the court ultimately struck down Ashley's appoint-
ment, the controversy highlights presidents' increasing use of the
Recess Appointments Clause as a means of evading the require-
ment that the Senate confirm federal officers.17 The Framers
adopted the clause apparently to keep the government functioning
during the six-to-nine month recesses in which Senators were dis-
persed throughout the country and were unable to convene to pro-
vide their advice and consent.18 Throughout history, presidents
have used the clause almost exclusively during intersession recesses,
which are recesses occurring between two formal sessions of a Sen-
ate.19 Intersession recesses have varied in length from the six-to-
ine-month recesses of the early nineteenth century to the one-to-

16. The court found that "Governor Nevin holds and occupies the office of Governor
through December 8, 1993, unless he dies, resigns, is lawfully removed or some 'successor has
qualified,' i.e., has been nominated by the President and confirmed by the Senate." Mackie,
627 F. Supp. at 57-58 (footnote omitted).

Throughout the controversy, neither Nevin nor Ashley attended Board meetings. See
Court Clears the Way to End Postal Dispute, N.Y. TIMES, July 25, 1993, at A27. After the
district court's ruling, Nevin regained his seat on the Board of Governors. When Nevin's
holdover commission expired, President Clinton nominated, and the Senate confirmed, Einar
Dyhrkopp to take Nevin's position. 139 CONG. REC. D1360 (daily ed. Nov. 20, 1993).

In addition to avoiding the Senate's confirmation, Bush's appointment would have al-
lowed recess appointee Ashley to remain in office without being subject to removal by Con-
gress for twice as long as the Postal Act's holdover provision permitted. The Postal Act
allowed Nevin to remain in power for one year beyond the end of his nine-year term, until
December 8, 1993. 39 U.S.C. § 202(b) (1988). This provision strikes a balance between the
continued functioning of the Board of Governors and accountability to the executive and
legislative branches, who select and confirm, respectively, a successor. A recess appoint-
ment, on the other hand, would have allowed Ashley to remain in office for almost two years —
until the end of the second session of the 103d Congress (judging from recent years, no
earlier than October 1994) — without ever being subject to the Senate's approval. See infra
text accompanying notes 199-200.

Bush's ability to avoid Senate confirmation of Ashley's appointment is especially prob-
lematic because the appointment occurred in January 1993—after Bush lost his bid for re-
election, a point that did not escape the notice of commentators at the time. See, e.g.,

17. The power of the President to make appointments during recesses of the Senate is
particularly important because the courts have rejected the idea that the President has an
inherent power to make appointments arising out of his duty to see that the laws are faith-
fully executed. In United States v. Maurice, 26 F. Cas. 1211 (No. 15,747) (C.C.D. Va. 1823),
Justice Marshall, in his capacity as a circuit judge, held that the President could not make an
appointment without Senate confirmation unless Congress had specifically authorized the
President to do so or unless the President acted pursuant to the Recess Appointments
District Court for the District of Columbia also rejected the idea that the President has a
power to make appointments independent of the Recess Appointments Clause or congres-
sional authorization. 360 F. Supp. at 1368-69. For further discussion of Williams, see infra
note 221.

18. See infra section II.B.

19. Intersession recesses include both recesses between two sessions of the same Con-
gress and recesses between the second session of one Congress and the first session of the
subsequent Congress. See infra note 21.
three-month recesses of the late twentieth century. 20 On the other hand, presidents have only recently made appointments during intrasession recesses, which are recesses occurring within a session of the Senate. 21 Intrasession recesses — occurring most frequently in the past twenty-five years 22 — typically last one to four weeks. 23 Recent presidents have more willingly made recess appointments during increasingly shorter intrasession recesses, 24 culminating in Bush’s appointment of Ashley 25 during a twelve-day recess. 26


21. It is possible for either the House or the Senate alone to take an intrasession recess, although the Constitution limits such a recess to three days unless the other chamber consents. U.S. Const. art. 1, § 5, cl. 4.

Distinctions also exist among breaks between sessions. Some authorities use the term final adjournment to refer to intersession recesses that occur at the end of the two-year term of each Congress. See, e.g., Barnes v. Carmen, 582 F. Supp. 163, 166 (D.D.C.), rev'd sub nom. Barnes v. Kline, 743 F.2d 45 (D.C. Cir. 1984). The term intersession adjournment then refers to an adjournment occurring between the sessions of a particular Congress. 582 F. Supp. at 164-65. For the purposes of this Note, however, the term intersession recess shall refer to both types of adjournments. Cf. infra notes 89-97 and accompanying text (describing relationship between adjournment and recess in Constitution).

In addition, Congress sometimes speaks of adjourning to a day certain. See, e.g., LANA R. SLACK, SENATE COMM. ON RULES & ADMIN., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 1, 102d Cong., 1st Sess. § 22.1 (1992); CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 416 (Mary Cohn et al. eds., 4th ed. 1991). As its wording suggests, this term generally excludes intersession recesses, because when Congress adjourns to a “day certain,” it specifies its date of return and thus does not conclude its current session. Barnes, 582 F. Supp. at 164 n.7.

The distinction between types of adjournments nevertheless sometimes blurs. During the period before the Gulf War, the 101st Congress took a final adjournment under the proviso that it should be reassembled if the Senate and House leadership believed “the public interest . . . warrant[ed] it.” H. Con. Res. 399, 101st Cong. 2d Sess. § 2 (1990), 136 Cong. Rec. H12,370 (daily ed. Oct. 27, 1990). Similarly, in the Pocket Veto Case, 279 U.S. 655 (1929), the Supreme Court held that the 69th Congress took a final adjournment on July 3, 1926, despite the fact that on that day, the Senate adjourned to a day certain — November 10, 1926, when it sat as a court of impeachment. 279 U.S. at 672 n.7.


23. Id.

24. See Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs’ Motion, and in Opposition to Defendants’ Motions, for Summary Judgment on Count Two, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (Civ. A. No. 93-0032-LFO), reprinted in 139 Cong. Rec. S8545 app. (daily ed. July 1, 1993) [hereinafter Senate Brief] (brief by Senate Legal Counsel printed in the Congressional Record, with appendix listing recent intrasession recess appointments). Because the resolution to file the brief in the Mackie case did not receive bipartisan support, as is traditional for Senate participation in litigation, the brief was not filed. See 139 Cong. Rec. S8544 (daily ed. July 1, 1993).

25. Bush also named, among others, eight members to the Defense Base Closure and Realignment Commission during this recess. Bush White House Announcements, supra note 7; McAllister, supra note 7, at A13.

26. Presidents have also utilized the clause to grant repeated recess appointments to the same person, a practice that has the potential to evade permanently the Senate’s confirmation. One nineteenth-century court voiced its concern about this practice:

[The President’s] appointments during recesses of the senate might be so made and renewed that they could not properly be called temporary. . . . [He] might, in disregard or defiance of the senate, continue [the recess appointee] in office indefinitely. . . . There is
These intrasession recess appointments reveal a disturbing trend. There is a less urgent need to fill vacancies that exist during brief recesses because the President can rely on the standard appointment process, which occurs when the Senate promptly reconvenes. Moreover, during some recesses, Senate committees meet to consider presidential nominations. Finally, even if a vacancy existed on the Postal Board of Governors, Bush could have utilized the usual method of appointment rather than attempting to avoid the Senate's advice and consent with a recess appointment.

This Note argues that courts should interpret the Constitution to

nothing in the political experience of our country to warrant her security against such temporary appointments being thus made again and again with such results.

In re District Attorney of United States, 7 F. Cas. 731, 735 (E.D. Pa. 1868) (No. 3,924). Presidents have indeed made such repeated recess appointments. For example, President Bush offered repeated appointments to four directors of the Federal Housing Finance Board, and his legal advisers did not indicate any problems with such practices. See 15 Op. Off. LEGAL COUNSEL 98 (1991) ("[T]here is no bar to granting . . . a second recess appointment [to a position] even though [the person receiving such appointment] is already serving as a recess appointee in that position. It is well-established that the President may make successive recess appointments to the same person.") (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 2 (Nov. 28, 1989)); see also 2 Op. Atty. Gen. 525 (1832) (arguing that the President can offer repeated recess appointments to a land office official who was rejected by the Senate for a permanent appointment).

27. The President initiates the typical appointment process by submitting a nomination to the Senate. The Senate then refers the nomination to the appropriate committee, which may refer it to a relevant subcommittee. The subcommittee can then hold hearings, after which it votes on whether to recommend the nominee to the full committee. Next, the committee may hold hearings, at which time it decides whether to recommend the nominee to the full Senate. The Senate then considers the nomination, often summarily following the recommendation of the committee. Once the Senate confirms the nominee, the President signs the appointment. ROBERT F. DOVE & WILLIAM F. HILDENBRAND, U.S. SENATE, ENACTMENT OF A LAW: PROcedural STEPS IN THE LEGISLATIVE PROCESS, S. Doc. No. 20, 97th Cong., 2d Sess. 14 (1981); see also SLACK, supra note 21, § 31.

28. For example, during the recess in which Bush appointed Ashley, Senate committees were meeting to consider President-elect Clinton's Cabinet nominations. See infra note 210.

29. President Reagan also used the clause to avoid the requirement of Senate confirmation. See infra notes 56-61 and accompanying text. One egregious example of Reagan's abuse of the clause was his attempt to weaken the Legal Services Corporation, a program that provides legal aid to the poor. Seven of Reagan's eight budgets allocated no funds for legal services. See, e.g., OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983, at 5-176, microformed on CIS No. 82-H180-1 (Congressional Info. Serv.); see Looming Fight over Legal Services, CHRISTIAN SCIENCE MONITOR, Jan. 11, 1991, at 20. Realizing that Congress would provide funds for the program, the President sought to weaken legal services by alternative means; through his recess appointment power, Reagan appointed directors to the board of the Corporation who were hostile to the program. See 130 CONG. REC. 23,236 (1984) (statement of Sen. Mitchell) ("[T]he administration has ... attempted to dismantle the [Legal Services Corporation] by appointing individuals to operate it who are opposed to its existence."); Jo Ann Boyd, Despite Setbacks, Reagan's Assault on Legal Services Corporation Bears Fruit, 15 NATL. J. 562, 562-63 (1983) ("Reagan . . . has weakened the corporation's ability to deliver legal services to the poor. [He cut its] budget . . . [and] appointed . . . William J. Olson . . . widely believed to have favored the corporation's abolition . . . chairman of the Legal Services board."). President Bush continued this trend, and, together, Presidents Reagan and Bush issued 75 recess appointments to the Legal Services Corporation. Only 11% of appointees to the Board received Senate confirmation during the two Presidents' terms. See Maureen K. Gawler,
allow the President to make recess appointments only during inter-
session recesses of the Senate. Part I chronicles the history of presi-
dential recess appointments. This Part highlights the increasing
frequency of, and questionable need for, intrasession recess ap-
pointments in the past twenty-five years. Part II examines the text
of the Recess Appointments Clause and the intentions of the Fram-
ers regarding the scope of the clause and the appointment power in
general. This Part argues that the text and the Framers' intentions
indicate that the President's power to make recess appointments
should be limited to intersession recesses. Part III focuses upon in-
terpretations of the clause by actors in the political sphere, namely
the Senate and presidential legal advisors. Although these actors
are arguably entitled to some deference by the judicial branch, this
Part argues that executive and legislative opinions issued over the
years fail to undermine the textual analysis limiting the President's
recess appointment power to intersession recesses. Finally, Part IV
contends that allowing the recess appointment power even during
long intrasession recesses would not further the purposes of the
clause. This Part reasons that Senate committees' consideration of
nominations during recesses ensures the continuance of the advice-
and-consent process and that statutes provide an alternative means
of filling vacancies in the executive branch. Such mechanisms high-
light the diminished need for a clause to fill vacancies during re-
cesses, and counsel against invoking the clause during intrasession
recesses. This Note concludes that the purposes of the Recess Ap-
pointments Clause support the text in limiting the President's recess
appointment power to intersession recesses.

I. HISTORICAL PRACTICE OF RECESS APPOINTMENTS

Intrasession recess appointments are a relatively new phenome-
non, occurring almost exclusively since 1947. Prior to 1947, presidents made a total of two intrasession recess appointments. See infra notes 38, 46 and accompanying text. Since 1947, presidents have made a total of 165 intrasession recess appointments. See infra note 48.

This Note attempts to consider all documented recess appointments, with the exception of military appointments, which the President often makes en bloc. Given the nature of recess appointments, however, it is not possible to compile a complete record. As the Congressional Research Service recently observed:

[I]t is virtually impossible to compile a complete list of recess appointments for the pe-
period [prior to] 1965. Before July 1965, when the first issue of the Weekly Compilation of
Presidential Documents was published, recess appointments were recorded in a haphaz-
ard fashion. Although the Congressional Record is the best source from which to com-
pile a list of recess appointments before 1965, it is neither complete nor wholly reliable. Recess appointments do not appear in the Congressional Record at the time they are
shows that between the years 1789 and 1946, presidents used the
power almost exclusively during intersession recesses, mostly of
lengthy duration. Section I.B focuses upon recess appointments
from 1947 to the present. This section demonstrates that recent
presidents have invoked the clause with greater frequency during
intrasession recesses, and during increasingly short recesses.

A. Recess Appointments 1789-1946

From the nation's founding until the mid-nineteenth century,
Congress met for largely uninterrupted sessions separated by re­
cesses of six to nine months. During these intersession recesses,
positions in the federal government would become available as for­
mer officers retired, died, or otherwise left office. Because the
President could not utilize the standard means of appointment
when Senators were dispersed throughout the country and were un­
able to provide their advice and consent, he needed an alternative
means of appointment so that vacancies in federal offices would not
result in governmental paralysis. By allowing presidents unilater­
ally to fill vacancies in federal offices, the Recess Appointments
Clause offered such an alternative. During the late eighteenth and
early nineteenth centuries, presidents utilized the recess appoint­
ment power to fill offices such as judge, marshal, and collector.

made because they do not have to be confirmed by the . . . Senate. It is only when the
President wishes to change a recess appointment into a full term appointment that he
must submit it to the Senate. Only then does the Congressional Record reflect the fact
that a recess appointment was made. As a consequence, if the President does not nomi­
nate for a regular appointment someone who is serving a recess appointment, then that
appointment is not found in the Congressional Record.

Compiling such a list is further complicated by the fact that the Congressional Record
on occasion is ambiguous about whether a recess appointment has been made. Some­
times, there is a notice accompanying a group of nominations stating that certain recess
appointments were made during the last recess of the Senate. It is not always clear,
however, whether all of the nominations in the group were given recess appointments.
Memorandum from Rogelio Garcia, Government Division, Congressional Research Service,
Library of Congress, to Senate Committee on Banking, Housing and Urban Affairs (Mar. 13,
1985) [hereinafter Garcia Memorandum] (on file with author).

32. See Congressional Directory, supra note 20, at 580-82.
33. Mackie v. Clinton, 827 F. Supp. 56, 58 (D.D.C. 1993) ("It is apparent that the purpose
of the Recess Appointments Clause was to prevent disruptions in the functioning of the gov­
ernment occasioned by periods in which the Senate is unable to perform its role of advice
(1905) (stating that "grave inconvenience and harm to the public interest would ensue" with­
out such a clause); 4 The Debates in the Several State Conventions on the Adoption
of the Federal Constitution 135 (Jonathan Elliot ed., 2d ed. 1861) [hereinafter State Convention Debates] (stating that the clause would prevent "public inconve­
niencies"); The Federalist No. 67, at 454-56 (Alexander Hamilton) (Jacob E. Cooke ed.,
1961) (arguing that the purpose of the clause was to "fill [appointments] without delay").
34. For example, in the recess between the First and Second Congresses, from March 3 to
October 24, 1791, President George Washington appointed judges, marshals, surveyors, and
collectors, among other federal officials. 1 Journal of the Executive Proceedings of
the Senate of the United States of America 86 (Washington, D.C., Duff Green 1828)
[hereinafter Journal of the Senate]. In the recess between the Sixth and Seventh Con-
The practice of making recess appointments during the lengthy intersession recesses continued throughout the nineteenth century.\textsuperscript{35} While the Senate took one intersession recess each year in this period, it took only three intrasession recesses before 1857. In 1800, 1817, and 1828, the Senate took a five-to-seven-day intrasession recess at the end of December.\textsuperscript{36} Beginning in 1863, the Senate started taking annual intrasession recesses of approximately two weeks from the end of December through the beginning of January.\textsuperscript{37} Despite the increase in intrasession recesses, presidents continued to make recess appointments almost exclusively during the intersession recess. Indeed, the only documented intrasession recess appointment in the nineteenth century occurred when President Andrew Johnson appointed Samuel Blatchford to a district court judgeship in 1867.\textsuperscript{38} Except for a few lengthy intrasession recesses during the 40th Congress,\textsuperscript{39} the pattern of long intersession and short intrasession recesses continued into the early twentieth century.\textsuperscript{40}

Although presidents in the nineteenth and early twentieth centuries made almost no intrasession recess appointments, President Theodore Roosevelt stirred up controversy in the Senate and the media when he filled vacancies during what he called a "constructive recess." This recess allegedly occurred during the "infinitesimal recesses, lasting from March 4 until December 7, 1801, President Thomas Jefferson appointed Secretaries of the Treasury and Navy, a Postmaster General, various judges and marshals, and commercial agents and consuls at foreign ports. \textit{id.} at 400-04. There was some controversy, however, when President James Madison recess-appointed envoys to Great Britain. Such positions were not established federal offices, but newly created positions to which the President previously lacked the power of appointment. \textit{CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS, supra} note 21, at 266.

\textsuperscript{35} For example, President Andrew Jackson appointed registers, receivers, collectors, and surveyors during the recess between the 23d and 24th Congresses, lasting from March 4 to December 7, 1835. \textit{4 JOURNAL OF THE SENATE, supra} note 34, at 485-88. President Franklin Pierce appointed envoys, judges, consuls, and a commissioner to China between the 32d and 33d Congresses — during a recess lasting from March 4 to December 5, 1853. \textit{9 id.} at 167, 169-70.

\textsuperscript{36} The Senate took recesses from December 23 to December 30, 1800; from December 24 to December 29, 1817; and from December 24 to December 29, 1828. \textit{CONGRESSIONAL DIRECTORY, supra} note 20, at 580-81.

\textsuperscript{37} \textit{See id.} at 582.

\textsuperscript{38} \textit{15 JOURNAL OF THE SENATE, supra} note 34, pt. 2, at 790. Johnson made the appointment during a 94-day recess in the 40th Congress, from March 30 to July 3, 1867. Although this appointment constitutes the only documented intrasession recess appointment in the nineteenth century, it is impossible to determine accurately the existence of other such appointments. \textit{See supra} note 31.

\textsuperscript{39} The only nineteenth-century intrasession recesses that did not occur around the Christmas holiday took place during the 40th Congress, from March 30 to July 3, 1867; from July 20 to November 21, 1867; from July 27 to September 21, 1868; from September 21 to October 16, 1868; and from October 16 to November 10, 1868. \textit{CONGRESSIONAL DIRECTORY, supra} note 20, at 580-83.

\textsuperscript{40} \textit{See id.} at 583-84.
mal" period between two consecutive sessions of the Senate. The Senate ended a special session on December 7, 1903, and, with "one fall of the gavel," immediately commenced a regular session of the 58th Congress. Roosevelt claimed that a split second separated the two sessions, thus creating a recess which allowed him to make recess appointments. The Senate Judiciary Committee responded to this action by preparing a report on what constituted a recess of the Senate. In its report, the Committee rejected the notion of a constructive recess and concluded that recesses occurred only when the Senate was not sitting either as a branch of Congress or in extraordinary session to perform executive duties. Although the Committee's report did not bind future presidents, it highlighted the political backlash that could result from such appointments.

During the early twentieth century, presidents continued to invoke the Recess Appointments Clause almost exclusively during intersession recesses to appoint federal officials. Only one documented intrasession recess appointment occurred in this period. In 1928, President Calvin Coolidge appointed John Esch as commissioner of the Interstate Commerce Commission during a thirteen-day recess at the beginning of the 70th Congress. Commissioner Esch and Judge Blatchford represent the only documented intrasession recess appointees of the nation's first 150 years.

B. Recess Appointments 1947-Present

Frequent presidential use of the recess appointment power during intrasession recesses began in 1947. President Harry Truman

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41. See The Infinitesimal Recess, N.Y. TIMES, Dec. 8, 1903, at 8 (editorial).
42. Special Session Is Merged into Regular, N.Y. TIMES, Dec. 8, 1903, at 1.
43. S. REP. No. 4389, supra note 33. For a discussion of this report, see infra section III.A.1
44. Id.
45. For example, President Theodore Roosevelt — now invoking the power during an actual recess — appointed consuls, lieutenants, collectors, and judges during the recess of May 30 to December 7, 1908, between the first and second sessions of the 60th Congress. JOURNAL OF THE SENATE, supra note 34, at 3-32.
46. 66 id. pt. 1, at 210. This appointment created controversy, primarily because the Senate rejected Esch during the standard appointment process, although he remained in power pursuant to his recess appointment. 66 id. pt. 1, at 586-87; 69 CONG. REC. 7043-44 (1928). Senate rejections of recess appointees do not affect the appointees' commissions, which last until the end of the next session of the Senate. In re Marshalship for the S. & Middle Dists. of Ala., 20 F. 379, 382 (M.D. Ala. 1884); 2 Op. Atty. Gen. 336, 339 (1830).
47. See supra note 38 and accompanying text.
48. RECENT PRESIDENTIAL RECESS APPOINTMENTS

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<th>Intersession</th>
<th>Intrasession</th>
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<td>Harry Truman (1945-1953)</td>
<td>175</td>
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<td>Dwight Eisenhower (1953-1961)</td>
<td>184</td>
<td>9</td>
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<td>John Kennedy (1961-1963)</td>
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<td>0</td>
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<tr>
<td>Lyndon Johnson (1963-1969)</td>
<td>36</td>
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made twenty appointments over four intrasession recesses. President Dwight Eisenhower made nine intrasession recess appointments, during recesses as short as thirty-five days, but neither President John Kennedy nor President Lyndon Johnson made any intrasession recess appointments. President Richard Nixon revived the practice of intrasession recess appointments, making eight such appointments. Although President Gerald Ford sparingly invoked the clause, and made no intrasession recess appointments, President Jimmy Carter resumed the practice, making seventeen intrasession appointments.

President Carter may have been the first modern president to utilize the clause expressly to avoid the Senate's advice and consent. Carter recess-appointed a controversial nominee, John McGarry, to the Federal Election Commission after the Senate

<table>
<thead>
<tr>
<th>President</th>
<th>Total</th>
<th>N IST</th>
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<tr>
<td>Richard Nixon (1969-1974)</td>
<td>33</td>
<td>8</td>
</tr>
<tr>
<td>Gerald Ford (1974-1977)</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>George Bush (1989-1993)</td>
<td>41</td>
<td>37</td>
</tr>
<tr>
<td>Bill Clinton (1993-)</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

This chart is based primarily on a chart compiled for a Senate committee in its consideration of Martha Seger to be a member of the Board of Governors of the Federal Reserve System. See Garcia Memorandum, supra note 31; see also McAllister, supra note 7 (detailing recess appointments of recent presidents). For more recent recess appointments, see the Weekly Compilation of Presidential Documents. Garcia's memorandum notes that the figures do not include appointments for judges, postmasters, U.S. attorneys, customs directors and collectors, the Diplomatic and Foreign Service, and the U.S. Public Health Service. This chart contains all the recess appointments that have been documented since 1945. See supra note 31.


50. Eisenhower appointed an ambassador, a commissioner of the Securities and Exchange Commission (SEC), and members of the Export-Import Bank during the recess that lasted from July 3 until August 8, 1960. 102 id. pt. 1, at 686.


52. Ford may not have made any appointments during intrasession recesses because of the holding in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), that intrasession recesses do not prevent the President from pocket-vetoing legislation. The Pocket Veto Clause concerns a period of time — an adjournment — during which a house of Congress cannot accept a presidential veto. Possibly concerned by the analogy to the Recess Appointments Clause, which concerns a period of time — a recess — during which the Senate cannot confirm a nominee, Ford may have concluded from Kennedy v. Sampson that he could not make recess appointments during intrasession recesses. See 3 Op. Off. Legal Counsel 311, 313 (1979) ("[S]ince Kennedy v. Sampson ... Presidents have been reluctant to make recess appointments during an intrasession adjournment of the Senate . . . .").

53. Carter recess-appointed officers to positions such as Member of the National Labor Relations Board, Undersecretary of Agriculture, and Assistant Director of the Community Services Administration. 122 JOURNAL OF THE SENATE, supra note 34, at 645-46 (recess from Oct. 1 to Nov. 12, 1980).
twice failed to act on McGarry's nomination. In addition, Carter made seventeen intrasession recess appointments as he was about to leave office.

President Ronald Reagan greatly accelerated the practice of intrasession recess appointments, making more — and more controversial — intrasession appointments than any president in history. Reagan made seventy-three intrasession recess appointments, during recesses as short as thirteen days. Reagan often utilized the clause to evade the Senate's advice and consent. For example, he recess-appointed Martha Seger, a controversial nominee, to the Board of Governors of the Federal Reserve System just three days after the Senate Banking and Urban Affairs Committee narrowly approved her nomination, ten to eight on straight party lines. Reagan also avoided controversy over nuclear power issues by making a recess appointment to the Nuclear Regulatory Commission during a twenty-three day intrasession recess. Reagan evaded the Senate's confirmation procedures once again with his seven recess appointments to the National Council on the Humanities. Some believed these recess appointees "appear[ed] inferior"
to appointments that prior presidents made, and the Senate Labor and Human Resources Committee was intending to question the nominees on their politics and credentials before Reagan made the recess appointments. Reagan made numerous intrasession recess appointments just before leaving office, including “controversial candidates whose nominations had been opposed at the State Department and other agencies and blocked on the Hill.” By waiting until the Senate was in recess to appoint controversial figures to federal posts, Reagan shaped executive agencies in ways that would have been difficult, if not impossible, if the President had allowed the Senate to play its normal constitutional role in the appointments process.

Reagan’s successor, President George Bush, did not utilize the clause quite as frequently or controversially as did his predecessor. Bush did nevertheless make thirty-seven intrasession recess appointments. In addition to his appointment of Thomas Ludlow Ashley to the Postal Service Board of Governors during a twelve-day recess, particularly noteworthy were President Bush’s eleven recess appointments to the Board of the Legal Services Corporation. In making these appointments, Bush continued the practice commenced by Reagan of filling the Board almost exclusively with recess appointees. Both the Ashley appointment and the Legal Services Corporation controversy suggest that Bush’s legal advisers viewed the clause as an offensive weapon in tilting the balance of power between the President and the Senate — by evading Senate

59. Mary Beth Norton, the Council’s retiring deputy vice chairperson, noted that Reagan’s “appointments appear inferior to the ones made by Nixon, Ford and Carter. Although [the latter appointees] didn’t have academic credentials either, their commitment to the humanities was deep.” Norman D. Atkins, President Names 7 to NEH Panel: Recess Appointment to Advisory Group Assailed, WASH. POST, July 7, 1984, at D1, D3.

60. See id. at D1 (“[S]ome of [the recess appointees], already under fire over their politics and credentials, had been expected to face questioning by the Senate Labor and Human Resources Committee before being confirmed.”). Another body to which Reagan made recess appointments was the United States Commission on Civil Rights, a commission which had been a “constant irritant to [the President] . . . .” See Robert Pear, Reagan Reported Planning to Name 4 to Rights Panel, N.Y. TIMES, May 22, 1983, at A1.


62. McAllister, supra note 7.

63. See supra notes 1-16 and accompanying text. Besides the appointments to the Postal Board of Governors and Defense Base Closure and Realignment Commission mentioned above, President Bush recess-appointed the Director of the Mint, the Chairman of the Foreign Claims Settlement Commission, and Commissioners to the Copyright Royalty Tribunal, among others, during the Senate recess from January 7 to January 20, 1993. 134 JOURNAL OF THE SENATE, supra note 34, at 488-89.

64. Digest of Other White House Announcements, 1 PUB. PAPERS, app. a, at 1216 (Jan. 10, 1992); Digest of Other White House Announcements, 2 PUB. PAPERS, app. a, at 1683 (Sept. 5, 1991).

65. See supra note 29 and accompanying text.
confirmation procedures — rather than as a supplement to the general appointment power— in filling vacancies when the Senate could not provide its confirmation. In contrast, President Bill Clinton has, as of the publication of this Note, sparingly invoked the clause. He has made only one intrasession recess appointment, naming John Truesdale to the National Labor Relations Board.

The recent practice of intrasession recess appointments demonstrates how presidents have used, with increasing frequency, the recess appointment power during intrasession recesses of decreasing length. As recent invocations of the clause illustrate, such a maneuver may affect the balance of power between the executive and legislative branches by allowing the President to evade an important check on his authority. This prospect encourages a detailed inquiry into the scope of the clause, to determine whether presidential use of the Recess Appointments Clause to make intrasession appointments is consistent with the text of the clause and with the Framers’ intentions regarding the appointment power.

II. TEXT AND FRAMERS’ INTENTIONS

Analysis of a constitutional clause begins with the language of the text. The debates at the Constitutional Convention, at state ratifying conventions, and, to a lesser extent, in contemporaneous publications such as The Federalist Papers, provide additional useful insight into the contemporary understanding of the language. The

66. See infra notes 105-06 and accompanying text.
67. See, e.g., 13 Op. Off. Legal Counsel 299, 309 (1989) (preliminary print) (opinion of Asst. Atty. Gen. William Barr) ("[T]he recess appointment power is an important counterbalance to the power of the Senate."). This Note, in contrast, argues that the Framers intended the clause to allow recess appointments during intersession recesses — in which the Senate could not provide its advice and consent — and that they did not expect the clause to affect the balance of power between the executive and legislative branches. See supra note 33 and accompanying text; infra note 117 and accompanying text.
68. Digest of Other White House Announcements, 30 WEEKLY COMP. PRES. DOC. 162 (Jan. 25, 1994). Clinton made the appointment to provide the five-member labor board — which was operating with two members — with a third member, necessary for a quorum. See Jonathan Groner, NLRB Nominee Gould Stuck in Political Limbo, RECORDER, Dec. 1, 1993, at 3; Recess Appointment of Truesdale Brings NLRB to Voting Strength, Daily Lab. Rep. (BNA) (Jan. 2, 1994), available in LEXIS, Labor Library, Dlabrt File.
69. See Nixon v. United States, 113 S. Ct. 732, 735 (1993) (stating that "courts must, in the first instance, interpret the text" to determine if a controversy is nonjusticiable); Solorio v. United States, 483 U.S. 435, 447 (1987) ("[T]he plain language of the Constitution... should be controlling on the subject of court-martial jurisdiction.").
70. See Mistretta v. United States, 488 U.S. 361, 397-98 (1989) (finding significant the failure of prohibitions against multiple officeholding by judges to reach the floor of the Constitutional Convention); Oliver v. United States, 466 U.S. 170, 178 (1984) (stating that the Framers’ intent is important in determining the degree to which a search infringes upon individual privacy); INS v. Chadha, 462 U.S. 919, 958-59 (1983) (stating that Convention records, contemporaneous writings, and debates clarify the Framers’ intent); Buckley v. Valeo, 424 U.S. 1, 129 (1976) (stating that Convention debates, Federalist Papers, and evolution of a draft version of Constitution support textual analysis).
language of the Recess Appointments Clause gives the President the power to fill vacancies during "the Recess of the Senate."\textsuperscript{71} This Part explores the two possibilities for the meaning of \textit{the Recess} — intersession recesses and all recesses.\textsuperscript{72} Section II.A analyzes the language of the Constitution and concludes that the Recess Appointments Clause refers only to \textit{intersession} recesses. In reaching this conclusion, this section first explores the Framers' choice of the term \textit{the Recess} rather than other potential terms. Section II.A also engages in a structural reading of the clause, concluding that an interpretation of \textit{the Recess} that includes intrasession recesses leads to illogical results by creating commissions that last an additional session beyond those granted to officers receiving recess appointments during intersession recesses. Section II.B examines other sources — most notably, the debates at the Constitutional Convention — to determine the Framers' intentions regarding the scope of the appointment power. Although these sources shed little direct light on the Framers' intentions, they suggest that limiting the Recess Appointments Clause to \textit{intersession} recesses accords most consistently with the Framers' intentions regarding the system of checks and balances, particularly as applied to the appointment power.

A. \textit{Constitutional Text}

The Recess Appointments Clause 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.\textsuperscript{73}

The Framers' use of the phrases \textit{the Recess} and \textit{the End of their next Session} provides the primary basis for concluding that the Recess Appointments Clause refers only to intersession recesses.\textsuperscript{74}

\begin{footnotesize}
\textsuperscript{71} U.S. CONST. art. II, § 2, cl. 3.
\textsuperscript{72} Only two types of recesses are possible: recesses occurring between sessions (intersession recesses) and recesses occurring within a session (intrasession recesses). The phrase \textit{the Recess} can thus refer to one of four possibilities: (i) intersession recesses; (ii) intrasession recesses; (iii) both types of recesses; or (iv) neither type of recess. The fourth possibility is easily eliminated as a meaning for the phrase; if neither type of recess invoked the clause, then the clause, in effect, would be read out of the Constitution. The second option can also be eliminated. The Framers anticipated lengthy intersession recesses and short intrasession recesses. See infra notes 112-16 and accompanying text. In light of the purpose of the clause — to prevent governmental paralysis, see supra note 33 — the Framers would not have intended the power to apply to the short, but not to the lengthy, recesses. See infra note 107 (noting the creation of a committee with appointment power only during an intersession recess of the Continental Congress). The first and third options are thus the only possibilities for the meaning of \textit{the Recess}.
\textsuperscript{73} U.S. CONST. art. II, § 2, cl. 3.
\textsuperscript{74} The Supreme Court emphasized the significance of every word in the Constitution in Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840) (plurality opinion) ("[N]o word was unnecessarily used or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."). See also
\end{footnotesize}
1. The Recess

The Framers anticipated that the Senate would take two types of recesses, intersession and intrasession recesses. Even though, as it turned out, intrasession recesses occurred very rarely in the early days of the Republic, the Framers understood that such recesses could occur, as evidenced by their own recesses within a session of the Constitutional Convention. Article I, Section 5, Clause 4 provides textual evidence for their awareness of intrasession recesses as it addresses the situation in which one House of Congress adjourns “during the Session of Congress.” Under this clause, the Senate could take many recesses, and each recess would be, by definition, an intrasession recess, which is the only type of recess that can occur within a session of Congress.

In light of this awareness of the types of recesses, the Framers’ understanding of how the Senate’s schedule would operate illustrates the importance of their choice of the singular term the Recess. The Framers provided for the Congress to convene every year. Because of the slow transportation of the era and the Framers’ assumption that the Senate would have limited duties, they anticipated that the Senate, each year, would have one largely uninterrupted session, followed by one intersession recess. Even though they anticipated one intersession recess and possibly several intrasession recesses per year, the Framers authored a clause providing for appointments during the Recess, instead of during the Recesses. The Framers’ use of the singular term suggests that they

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United States v. Sprague, 282 U.S. 716, 732 (1931) (stating that the Constitution was drafted with “meticulous care and by men who so well understood how to make language fit their thought”).

75. The Senate took only three intrasession recesses in its first 65 years, and none in its first 10 years. See supra note 36.

76. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS] (“Genl. Pinkney wished to know of Mr. R[andolph] whether he meant an adjournment sine die, or only an adjournment for the day... Mr. Randolph, had never entertained an idea of an adjournment sine die.... He had in view merely an adjournment till tomorrow...”). The motion to adjourn sine die is, in effect, a motion to dissolve the assembly. See CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS, supra note 21, at 416; HENRY M. ROBERT, PARLIAMENTARY LAW 121 (1923).

77. The clause provides: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.” U.S. CONST. art. I, § 5, cl. 4.


79. See infra note 99.

80. U.S. CONST. art. I, § 4, cl. 2 (“The Congress shall assemble at least once in every Year...”).

81. See infra note 114 and accompanying text.

82. See infra notes 112-16 and accompanying text.
intended the Recess Appointments Clause to refer only to the type of recess of which there would be one each year: the intersession recess.

The Framers' choice of the singular term the Recess appears even more significant when compared to the plural phrase all Vacancies in the Recess Appointments Clause. The use of the plural term Vacancies in the Recess Appointments Clause suggests that the Framers deliberately chose the singular form of the term Recess. If the Framers intended the clause to apply to both types of recesses, they could have written it so that the President could fill all Vacancies during the Recesses or all Recesses.

Moreover, the Framers' choice of the definite article the rather than the indefinite article a to precede Recess supports the conclusion that Recess refers only to the intersession recess. The definite article the emphasizes the singular form of Recess. The use of an indefinite article, on the other hand, would not limit as explicitly the meaning of Recess to the intersession recess. In light of the Framers' understanding that each session might include numerous intrasession recesses but would be followed by only one intersession recess, the intersession Recess makes sense whereas the intrasession Recess does not.

The Framers' utilization of the term Recess elsewhere in the Constitution provides further support for limiting the meaning of the Recess to the intersession recess. Article I, Section 3, Clause 2,

83. In rare circumstances, the Senate takes more than one intersession recess each year, when it sits for not only two regular sessions, but also special — or extraordinary — sessions. Examples of this phenomenon occurred in the First Congress, which had three sessions, the first lasting from March 4 to September 29, 1789, the second from January 4 to August 12, 1790, and the third from December 6, 1790 to March 3, 1791; and the Fifth Congress, which also had three sessions, the first from May 15 to July 10, 1797, the second from November 13, 1797 to July 16, 1798, and the third from December 3, 1798 to March 3, 1799. See CONGRESSIONAL DIRECTORY, supra note 20, at 580. These extraordinary sessions, however, are not the usual course of business, and do not negate the traditional pattern of two-session Congresses. See, e.g., 23 Op. Atty. Gen. 599, 603 (1901) (opinion of Atty. Gen. Philander Knox) ("There have always been two sittings, sessions or assemblings of each Congress."). According to the Congressional Quarterly, For more than 140 years . . . Congress stuck closely to the basic pattern of two sessions: the first, a long one of six months or so that began in December of odd-numbered years — more than one year after the election; the second, a short one that met from December to March — a session that did not begin until after the next election had already taken place. CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS, supra note 21, at 54.

84. The phrase "all Vacancies" describes the positions the President may fill through the recess appointment power. U.S. CONST. art. II, § 2, cl. 3.

85. See Senate Brief, supra note 24, at S8546 ("The logical inference from [the Framers'] conspicuous avoidance of the word "all" is that [they] did not intend the recess appointment power to apply to intrasession recesses.").

86. The clause provides: Immediately after [the Senators] shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the
which provided originally for state legislatures' selection of Senators, established that a governor could make temporary appointments to the Senate when vacancies occurred "during the Recess of the [State] Legislature."

The Framers included this clause to ensure the smooth running of the Senate when state legislatures, which often met only once a year, were unable to fill vacancies. As with the Recess Appointments Clause, the Framers thus apparently chose to preface the term Recess with the definite article the to refer to the one expected recess between sessions. The potential of long recesses to interfere with these purposes suggests why the Framers chose to limit the meaning of Recess to the intersession recess.

The Framers could have granted the President the power to make recess appointments during all recesses not only by using the plural recesses or the indefinite phrase a recess, but also by utilizing another term that could apply to both intrasession and intersession recesses, such as adjournment. In the Constitution, the meaning of the term adjournment usually encompasses both intersession and intrasession recesses. Although two of the occurrences of the term adjournment do not indicate what type of recess the Framers

second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.] U.S. CONST. art. I, § 3, cl. 2 (emphasis added) (bracketed material superseded by the Seventeenth Amendment, ratified by three-fourths of the states on Apr. 8, 1913, which provides for the direct election of Senators).


88. Just as the Framers intended the Recess Appointments Clause to fill vacancies in federal offices that happen during the lengthy intersession recesses, see supra note 33, Article I, Section 3, Clause 2 aimed to fill vacancies in the Senate during recesses of the state legislatures. See 2 FEDERAL CONVENTION RECORDS, supra note 76, at 231 ("Mr. Randolph thought [the clause] necessary <in order> to prevent inconvenient chasms in the Senate. In some states the Legislatures meet but once a year. As the Senate will have more power & consist of a smaller number than the other House, vacancies there will be of more consequence.") (second alteration in original).

89. See infra notes 91-97 and accompanying text (discussing U.S. CONST. art. I, § 5, cl. 1; U.S. CONST. art. I, § 5, cl. 4; U.S. CONST. art. I, § 7, cl. 2; U.S. CONST. art. I, § 7, cl. 3; U.S. CONST. art. II, § 3, cl. 1).

The Senate's parliamentary rules — although they do not affect constitutional analysis because they only define parliamentary procedures — distinguish between the terms recess and adjournment. For example, a Senate that reconvenes after an adjournment starts a new legislative day, whereas a Senate returning after a recess does not. "A legislative day is the period of time following an adjournment of the Senate until another adjournment. A recess (rather than an adjournment) in no way affects a legislative day . . . ." DOVE & HILDEBRAND, supra note 27, at 9. This distinction may have less practical significance today because the need to create new legislative days through adjournment has vastly diminished. Under current practices, the Senate proceeds to consider bills under unanimous consent agreements — which do not require the creation of a legislative day — rather than motions to proceed — which require the creation of such a day. Telephone Conversation with U.S. Senate Parliamentarian's Office (July 19, 1994).
Note — Recess Appointments

contemplated, two other instances provide more assistance. The use of *adjournment* most similar to the use of *the Recess* in the Recess Appointments Clause — in its recognition of the dangers of an absent Senate — appears in Article I, Section 7, Clause 2, the Pocket Veto Clause. The Pocket Veto Clause provides that a bill passed by Congress and held by the President for ten days will become law “unless the Congress by their Adjournment prevent its Return.” The clause expressly refers to the inability of the Senate — because of its recess — to receive the President’s message indicating his veto of the bill. Such an inability to receive a veto might occur during either an intrasession or an intersession recess. The Pocket Veto Clause’s use of *adjournment* thereby reveals how the term can be used to encompass both intrasession and intersession recesses.

The Framers used *adjourn* specifically to refer to intrasession

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90. Neither Article I, Section 7, Clause 3 nor Article II, Section 3, Clause 1 provides any information regarding the scope of *adjournment*. The former clause provides that:

> 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; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. Const. art. I, § 7, cl. 3 (emphasis added). The latter clause states:

> [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const. art. II, § 3, cl. 1 (emphasis added).

91. The clause states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. Const. art. I, § 7, cl. 2 (emphasis added).


93. Unlike today’s Senate, the Senate of the late eighteenth century was not able to receive messages from the President during recesses. Recent practice authorizing an agent to receive the President’s veto messages during a recess facilitates return of a bill. See Barnes v. Kline, 759 F.2d 21, 30 (D.C. Cir. 1985), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987); see also infra notes 204-06 and accompanying text.
recesses\textsuperscript{94} in Article I, Section 5, Clause 4.\textsuperscript{95} This clause limits the maximum length of an adjournment of one House that adjourns "during the Session of Congress" without the other's consent to "[no] more than three days."\textsuperscript{96} Because only intrasession recesses can occur "during the Session of Congress,"\textsuperscript{97} this adjournment can only refer to intrasession recesses.

The different meanings of \textit{Recess} and \textit{Adjournment} thus support the conclusion that the Framers, by using the former term in the Recess Appointments Clause, meant to refer only to the intersession recess. Had the Framers intended for the appointment power to include intrasession recesses, they could have extended the power to \textit{adjournments}, a term they clearly understood to include intrasession recesses.

2. \textit{Next Session}

An examination of the Recess Appointments Clause as a whole\textsuperscript{98} — in particular, the phrase \textit{End of their next Session}, which describes when a recess appointee's commission expires — reveals the illogic of interpreting \textit{the Recess} to include intrasession recesses.

The Framers envisioned the Senate schedule to include two types of recesses — intersession and intrasession recesses — but only one type of session — the Senate's annual meeting.\textsuperscript{99} The

\textsuperscript{94}. The other two uses of the verb \textit{adjourn} in the Constitution do not assist in determining the type of recess invoked. First, Article II, Section 3, Clause 1, refers to the President's ability to adjourn the Congress. \textit{See supra} note 90. Such an adjournment may result in either an intrasession or an intersession recess. Second, Article I, Section 5, Clause 1 refers to an adjournment from day to day by a minority of the Congress. \textit{The clause provides:}

\begin{quote}
Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number \textit{may adjourn from day to day}, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.
\end{quote}

\textit{U.S. CONST. art. I, § 5, cl. 1} (emphasis added). Such an adjournment does not provide guidance on the type of recess contemplated because under such a maneuver, the Senate is not in recess. Only a minority of the Senate adjourns, and thus, the Senate continues to meet as a whole. \textit{See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 834 (Boston, Hilliard, Gray & Co. 1833) ("[A] smaller number is authorized to adjourn from day to day, \textit{thus to prevent a legal dissolution of the body . . . .}")} (emphasis added).

\textit{95. See supra} note 77.

\textit{96. U.S. CONST. art. I, § 5, cl. 4.}

\textit{97. U.S. CONST. art. I, § 5, cl. 4. \textit{See supra} notes 77-79 and accompanying text.}

\textit{98. The Supreme Court has utilized an analogous technique called \textit{noscitur a sociis} in the realm of statutory interpretation. Employing this principle, one looks to words associated with the term in question to clarify the term's meaning. \textit{See, e.g.,} Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) \textit{(in determining taxable income, the term \textit{discovery} refers to oil and gas and mining industries because of the meanings of adjacent terms \textit{exploration} and \textit{prospecting}); Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568 (1930) \textit{(under Railway Labor Act of 1926, the designation of arbitration representatives without \textit{influence} — in consideration of the surrounding terms \textit{interference} and \textit{coercion} — refers to pressure or the use of power to induce action).}

\textit{99. One could plausibly interpret the terms \textit{recess} and \textit{session} as being mutually exclu-
Framers anticipated that each year there would be one session followed by one recess.\textsuperscript{100} Envisioning this schedule in determining how long recess appointees would remain in office, the Framers recognized that the session was the only period in which the President could nominate, and the Senate confirm, a permanent appointee. The Recess Appointments Clause grants recess appointees commissions until \textit{the End of their next Session}, giving the President one session in which to submit a nomination to the legislature for a permanent appointment. Officials appointed during the recess between sessions therefore have commissions that last through the end of the session immediately following that recess. If \textit{Recess} were to include breaks \textit{during} a session, however, officials appointed during these breaks would have commissions lasting through the current session and up to, as the clause provides, the end of the \textit{next session} of the Senate.\textsuperscript{101} Officers receiving recess appointments during intrasession recesses would thus receive commissions lasting

\textsuperscript{100} See \textit{infra} notes 112-16.

\textsuperscript{101} See \textit{23 Op. Atty. Gen.} 599, 604 (1901) (arguing that a commission for an officer
up to one session longer than the commissions of those receiving appointments during intersession recesses. Consequently, recess appointees confirmed during brief intrasession recesses could conceivably stay in office twice as long as those receiving recess appointments during intersession recesses. Commissions with such divergent lengths occur only if the Recess includes intrasession recesses, suggesting that the Framers intended the meaning of the Recess to be limited to the intersession recess.

B. Framers' Intentions Regarding the Appointment Power

The Framers adopted the Recess Appointments Clause without debate. Convention debates on the general appointment power, however, shed light on the intended scope of the Recess Appointments Clause.

The Recess Appointments Clause supplements the President's general appointment power. The Framers enacted the clause apparently to enable the President to fill vacancies that occurred during the long intersession recesses when the Senate, with receiving an appointment during an intrasession recess would last until "the end of the next session, not the [end of the] session within which the recess occurs").

102. For a modern illustration of such a result, see infra text accompanying notes 200-01.

103. See infra text accompanying notes 198-99. Moreover, the lengths of intrasession recess appointees' commissions vary widely as opposed to those appointed during intersession recesses. See infra notes 197-99 and accompanying text.

104. Richard Spaight, of North Carolina, proposed the clause, which the Framers adopted without discussion. 2 FEDERAL CONVENTION RECORDS, supra note 76, at 540. See United States v. Woodley, 751 F.2d 1008, 1017 (9th Cir.) (Norris, J., dissenting) ("The contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause. Although the record contains a few scattered references to the Clause, it was never explained, debated or discussed in any meaningful way."). cert. denied, 475 U.S. 1048 (1985).

105. See, e.g., THE FEDERALIST, supra note 33, at 455 ("The relation in which [the Recess Appointments Clause] stands to the [Appointments Clause] . . . denotes it to be nothing more than a supplement to the [latter]; for the purpose of establishing an auxiliary method of appointment in cases, to which the general method was inadequate."); S. REP. No. 4389, supra note 33, at 3824 ("[The Recess Appointments Clause] is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate."). Even though the court in Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979), urged that there is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment," the lack of debate on the clause suggests the minimal impact the Framers intended the clause to have on the thoroughly discussed power of appointment and elaborately devised system of checks and balances. See infra notes 108-17 and accompanying text. Moreover, the Staebler court's claim that the Recess Appointments Clause does not have "subordinate standing" in the constitutional scheme threatens to shift the balance of power on appointments dramatically toward the President. See infra text accompanying note 117. The Staebler court evidently had no qualms about allowing such a shift: "[W]here . . . there is an ambiguity . . . it is appropriate to consider that the President was intended by the framers of the Constitution to possess the active, initiating, and preferred role with respect to the appointment of officers of the United States." Staebler, 464 F. Supp. at 599 (footnote omitted). This Note, in contrast, accords greater significance to the lack of debate about the clause.

106. See supra notes 9, 27.
its members dispersed throughout the country, could not readily reconvene to provide its advice and consent.\textsuperscript{107} In light of the substantial discussion on the appointment power, the lack of debate on the Recess Appointments Clause suggests that the Framers intended the clause to be auxiliary in nature and that they believed it would not affect the Constitution's meticulously developed system of checks and balances. This section argues that the limited purposes of the clause support the conclusion that the Framers intended the meaning of \textit{the Recess} to be confined to the intersession recess.

The Framers heatedly debated the general power of appointment.\textsuperscript{108} Delegates to the Convention voiced great distrust of the executive and expressed the need for checks and balances to counteract the power of the President.\textsuperscript{109} Having rejected attempts to vest the appointment power solely in the executive or the legislature, the Framers ultimately adopted a compromise that required the input of both branches.\textsuperscript{110} They intended the sharing of the appointment power to accomplish two goals: responsibility — from the President's power of nomination — and stability — from the Senate's power of confirmation.\textsuperscript{111}

\begin{footnotes}
\textsuperscript{107} See supra notes 32-35 and accompanying text. The Recess Appointments Clause does not seem to be the first mechanism the Framers used to fill vacancies during lengthy recesses. The Continental Congress, in which many of the Framers participated, appointed a committee that exercised the power of appointment, among other powers, during the five-month recess between sessions in 1784. 26 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 287-88, 295-96 (Gaillard Hunt ed., 1928) [hereinafter JOURNALS], cited in Senate Brief, supra note 24, at 8849 n.16. In support of the limitation of this appointment power to recesses between sessions of the Continental Congress, the Senate Brief further noted that "there is no record of such a committee's being named to sit or make appointments during the Congress's intrasession adjournments of several days or weeks." Id. (citing 24 JOURNALS, supra, at 410 (four-day adjournment in 1783); 25 id. at 807, 809 (21-day adjournment in 1783); 27 id. at 710 (17-day adjournment in 1784-1785)).

\textsuperscript{108} See Joseph P. Harris, The Advice and Consent of the Senate 17-19 (1953).

\textsuperscript{109} See infra note 111.

\textsuperscript{110} U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{111} See The Federalist Nos. 76, 77 (Alexander Hamilton); 2 Federal Convention Records, supra note 76, at 539 (statement of Gouverneur Morris). The goal of responsibility would be achieved through the recognition of a party that would be accountable for nominations, while stability would be achieved through the legislature's check on the unilateral power of appointment. The compromise that the Framers reached emphasizes the maintenance of a system of checks and balances at the expense of the filling of all offices. As an example, the Senate's refusal to act on a nomination during a session leaves the office vacant.

The debate on which branch would appoint judges reveals the power the Framers intended for the Senate. Although a few wished the Executive to enjoy the sole power of appointment, see, e.g., 1 id. at 119 (statement of James Wilson); 2 id. at 389 (statement of Gouverneur Morris), many desired that the Senate would unilaterally appoint judges. See, e.g., 1 id. at 231-33 (statement of James Madison); 2 id. at 41 (statements of Alexander Martin and Roger Sherman), 43 (statements of Gunning Bedford and Edmund Randolph), 81 (statements of Oliver Ellsworth and Charles Pinckney). Although the debate ended in the compromise of presidential nomination and Senate confirmation, it demonstrates the Framers' belief in the strengths of including the Senate in the process. This branch of the legislature provides stability and information in the appointment process, and supplies a needed check
In adopting the Recess Appointments Clause, the Framers anticipated a Senate that would spend substantial amounts of time in recess. Indeed, because the Framers envisioned a Congress that otherwise might not convene every year, they enacted a clause requiring Congress to meet once each year. Many delegates to the Constitutional Convention thought that the Senate would rarely sit, because the legislature only had the powers of making treaties, trying impeachments (both of which seldom occurred), appointing officers (which could be done in the legislature’s absence), due to the Recess Appointments Clause, and passing legislation (of which the Framers expected little). The schedule of the early Congresses confirmed their expectation of short sessions followed by lengthy intersession recesses: the first ten Senate recesses averaged approximately seven months in length. Anticipating this schedule, the Framers allowed presidents to fill vacancies unilaterally during recesses rather than requiring the Senate to remain perpetually in session.


112. The Framers “envisioned that Congress would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year.” Barnes v. Kline, 759 F.2d 21, 38-39 (D.C. Cir. 1985) (examining debates of the Constitutional Convention regarding whether Congress would sit during the winter or spring), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987). Moreover, the Framers failed to adopt the provision from the Articles of Confederation that ensured that “no period of adjournment be for a longer duration than the space of six months.” Articles of Confederation, 1777 art. IX, cl. 7. Such an omission suggests that the Framers anticipated that recesses might exceed six months.

113. See supra note 80.

114. James Wilson, Pennsylvania Convention Debates (Dec. 11, 1787), reprinted in 2 DOCUMENTARY HISTORY, supra note 111, at 568. Other sources, including delegates to the Constitutional Convention, echo this view:

Mr. King could not think there would be a necessity for a meeting every year. . . . The most numerous objects of legislation belong to the States. Those of the Natl. Legislature were but few. The chief of them were commerce and revenue. When these should be once settled, alterations would be rarely necessary and easily made.

2 FEDERAL CONVENTION RECORDS, supra note 76, at 198; see also 4 STATE CONVENTION DEBATES, supra note 33, at 135 (statement of Archibald Maclaine) (“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.”); Roger Sherman, A Citizen of New Haven: Observations on the New Federal Constitution (Jan. 7, 1788), in 15 DOCUMENTARY HISTORY, supra note 111, at 280, 281 (essay written by Connecticut delegate to the Constitutional Convention, noting that “[i]t is not probable that Congress will have occasion to sit longer than two or three months in a year”).

115. See CONGRESSIONAL DIRECTORY, supra note 20, at 580.

116. See United States v. Allocco, 200 F. Supp. 868, 873 (S.D.N.Y. 1961) (quoting 3 STORY, supra note 94, § 1551, at 410 (stating that a requirement that the Senate be perpetually in session “would have been at once burthensome to the senate, and expensive to the public. [The Recess Appointments Clause, on the other hand,] combines convenience, promptitude of action, and general security.”)), aff’d., 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963); see also 4 STATE CONVENTION DEBATES, supra note 33, at 135.
An expansive reading of the Recess Appointments Clause that allows Presidents to make recess appointments during intrasession recesses would contravene the Framers' intention to include the Senate in the appointment process.\textsuperscript{117} Although the Framers recognized that vacancies would often need to be filled during long absences of the Senate, it seems unlikely that they would have enacted without debate a clause that could upset the balance of powers that they had carefully orchestrated regarding the appointment power. Allowing the President to utilize the Recess Appointments Clause during all recesses would have dramatically shifted the balance of power toward the President by providing a broad loophole in the requirement of advice and consent. When both the President and Senate are available to act on nominations, the recess appointment power does not affect the balance of power between the branches. Although the Framers granted the President powers of unilateral appointment during intersession recesses, they expected that the Senate could not possibly provide its advice and consent during such lengthy recesses. On the other hand, presidential utilization of recess appointments during the much shorter intrasession recesses would threaten to evade the standard appointment process, thereby shifting the balance of power toward the President. If the Framers had intended such a result, they would likely have discussed the clause. That the Framers intended to give the President such a loophole to escape the normal system of checks and balances in the appointment process seems unlikely in light of the minimal impact the Framers intended the clause to have on the system of checks and balances.

\section*{III. Legislative and Executive Interpretations of the Clause}

Although opinions from the Senate and the Attorney General are not binding on courts, such opinions may provide useful interpretations of the Recess Appointments Clause, especially in an arena with few judicial decisions. Courts have looked to opinions of the Attorneys General in supplementing textual interpretation,\textsuperscript{118} and have noted that Senate opinions are useful in identify-

\textsuperscript{117} See S. Rep. No. 4389, supra note 33, at 3824 ("[The Recess Appointments Clause] was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate.").

\textsuperscript{118} Attorneys general have advised presidents on the scope of their recess appointment power for the past 170 years. In light of such opinions, and considering the lack of caselaw on the subject, courts have considered the opinions of presidential legal advisers helpful in interpreting the clause. See United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) (noting

(statement of Archibald Maclaine) (stating that the power to make appointments during recesses “can be vested nowhere but in the executive, because he is perpetually acting for the public”).
ing legislative opposition — or the lack thereof — to executive assertions of authority.\textsuperscript{119} The Senate initially expressed its views on the Recess Appointments Clause in 1905 in a Judiciary Committee Report that defined a “recess of the Senate.”\textsuperscript{119} Section III.A argues that this report too narrowly focuses on disproving fictional recesses\textsuperscript{121} to serve effectively as a means of distinguishing between intrasession and intersession recesses.\textsuperscript{122} The section continues by examining several sense-of-the-Senate resolutions\textsuperscript{123} that have been offered in the past decade.\textsuperscript{124} These resolutions typically suggest that the President should make recess appointments only during intersession recesses or intrasession recesses of a minimum length, but they fail to explain why appointments during intrasession recesses of any length are constitutionally permissible.

In the executive sphere, presidential legal advisers have advised presidents on the scope of their recess appointment power since the mid-nineteenth century. As presidents began to exercise the power over shorter intrasession recesses, these advisers acquiesced in supporting such appointments. Section III.B reviews the opinions of presidential legal advisers — specifically the Attorneys General, and more recently, the Office of Legal Counsel — and examines the justifications relied upon in supporting the presidential power to make intrasession recess appointments. This section concludes

the willingness of presidents to follow interpretations by attorneys general of the meaning of the term happen in the Recess Appointments Clause), cert. denied, 371 U.S. 964 (1963); \textit{In re} District Attorney of United States, 7 F. Cas. 731, 737 (E.D. Pa. 1868) (No. 3924) (“[T]he official opinions of attorney-generals may, for a long time, have been so uniformly acted upon by executive and legislative organs of the national government as to have become the unquestioned foundation of a system of legislation, or of administration.”).

\textsuperscript{119} Courts have deemed the Senate’s failure to contest presidential action to be an acceptance of the action. \textit{See} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (“[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.”); \textit{In re} Farrow, 3 F. 112, 115 (C.C.N.D. Ga. 1880) (stating that presidential practice of filling vacancies occurring during the recess “has been sanctioned ... by the unbroken acquiescence of the senate”); \textit{In re} District Attorney, 7 F. Cas. at 737 (“The effect ... attributable to [the executive usage of a power] may, in the absence of judicial contestation, be greater if legislative acquiescence has been evinced or may be implied.”).

\textsuperscript{120} S. Rep. No. 4389, supra note 33.

\textsuperscript{121} The “fictional” recess to which the report refers concerns a constructive recess that President Theodore Roosevelt claimed existed during the “infinitesimal” period between two sessions of the Senate, when the second session immediately followed the first without interruption. \textit{See supra} notes 41-44 and accompanying text.

\textsuperscript{122} As opposed to “fictional” recesses, these two types of recesses are “nonfictional” in the sense that they describe periods in which the Senate as a whole is not present.

\textsuperscript{123} For a definition of a sense-of-the-Senate resolution, see \textit{infra} note 141.

\textsuperscript{124} Although such resolutions lack binding effect in their own chamber, let alone the courts, they are significant in showing the Senate’s nonacquiescence in the President’s use of the clause. \textit{See supra} note 119.
that their opinions — like the Senate opinions — provide insufficient constitutional support for interpreting the recess appointment power to include intrasession recesses.

A. Senate Interpretations of the Recess Appointments Clause

1. 1905 Senate Judiciary Committee Report

The most important Senate pronouncement on recess appointments is the 1905 Report by the Senate Judiciary Committee.\textsuperscript{125} As discussed above,\textsuperscript{126} President Theodore Roosevelt attempted to construe the existence of a recess between the end of a special session of the Senate and the immediate commencement thereafter of a regular session of the Senate.\textsuperscript{127} In response to this action, the Judiciary Committee submitted a report that defined a Senate recess.\textsuperscript{128}

The report found that \textit{recess} was a term of "ordinary, not technical, signification,"\textsuperscript{129} and that it should be construed "as the mass of mankind then understood it and now understand it."\textsuperscript{130} The report continued by defining a \textit{recess} as "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions."\textsuperscript{131} The Committee thus distinguished between recesses during which the Senate chambers stood empty with its members dispersed throughout the country, which fit the definition, and "recesses" that allegedly occurred in the split second between two consecutive sessions of the Senate, which did not fit the definition.

In so defining \textit{recess}, the Judiciary Committee did not distinguish between intersession and intrasession recesses. The Committee's 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.\textsuperscript{132} Although intrasession recesses could arguably qualify as recesses under the report's definition of the term, the Senate in 1905 was not faced with the prospect of presidents' utilizing the clause during intrasession recesses. Instead, the Committee report addressed one abuse: constructive recesses. The report specifically focuses on the concept of a constructive recess on several occasions:

\begin{itemize}
\item \textsuperscript{125} S. Rep. No. 4389, \textit{supra} note 33.
\item \textsuperscript{126} \textit{See supra} notes 41-44 and accompanying text.
\item \textsuperscript{127} \textit{Special Session Is Merged into Regular, supra} note 42.
\item \textsuperscript{128} S. Rep. No. 4389, \textit{supra} note 33, at 3823.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} (emphasis omitted).
\item \textsuperscript{132} \textit{See supra} note 38 and accompanying text.
\end{itemize}
It would seem quite difficult for [a] lawyer or layman to comprehend a “constructive recess” of . . . the Senate.

. . . .

The Framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a period of time during which it would be harmful if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.

. . . .

The theory of “constructive recess” constitutes a heavy draft upon the imagination . . . .133

Because the report addressed only constructive recesses, it should not be used to represent the Senate’s position with regard to recess appointments during intrasession recesses.134 Even if one is so inclined, the report expressly acknowledges the Senate’s recognition of the Framers’ focus on recesses during which it would be harmful if an office were not filled. As noted above, for the Framers those recesses were the longer intersession recesses, not the brief intrasession breaks.135 The report may thus be taken as the Senate’s acknowledgment of the Recess Appointments Clause’s original meaning, the implication of which was to exclude intrasession recesses.

Whatever the report’s meaning in 1905, relying on it today would neglect an important difference between recesses at the beginning of the twentieth century, when the Senate was absent from its chambers, and recesses today, in which committees often meet and hold hearings.136 An example of the difference between the periods is illuminated by the report, which states:

It can not by any possibility be deemed within the intent of the Constitution that when the Senate is in position to receive a nomination by the President, and, therefore, to exercise its function of advice and consent, the President can issue, without such advice and consent, commissions which will be lawful warrant for the assumption of the duties of a Federal office.137

Because today’s Senate receives presidential nominations during recesses138 and can pursue advice-and-consent procedures during

134. For an example of such an attempted justification, see Statement of Points and Authorities in Support of Defendant Thomas Ludlow Ashley’s Motion for Summary Judgment on Count Two of the First Amended Complaint at 13, Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (Civ. A. No. 93-0032-LFO) (“[T]here is no suggestion whatsoever in the report that [an intrasession] recess must be of some particular length in order to be a recess within the meaning of the recess appointments clause.”).
135. See supra note 33 and accompanying text.
136. See infra notes 208–12 and accompanying text.
138. See infra notes 204–06 and accompanying text.
these recesses, the recess envisioned by the Judiciary Committee in 1905 is vastly different today, highlighting the diminished need for an expansive reading of the clause in light of current Senate practices.139

2. Recent Sense-of-the-Senate Resolutions

In response to controversial uses of the Recess Appointments Clause,140 senators have introduced several nonbinding sense-of-the-Senate resolutions141 in the past decade. These resolutions have condemned appointments made during brief intrasession recesses and have suggested restrictions on the use of the clause.142 Although these resolutions do not have binding effect as acts of the legislature,143 they are significant because they provide an example of an interpretation of the clause that allows recess appointments during certain intrasession recesses.144 The sense-of-the-Senate resolutions have suggested allowing recess appointments during intrasession recesses of a particular length. Two resolutions have advocated restricting the power to intrasession recesses of at least thirty days and to intersession recesses. On August 9, 1984, then-Senate Minority Leader Robert Byrd introduced one such resolution, Senate Resolution 430, which stated that the recess appoint-

139. See infra section IV.A.
140. See, e.g., 130 CONG. REC. 23,234 (1984) (statement of Sen. Byrd). Senator Byrd declared that President Reagan used the clause to “avoid[ ] serious and probing debate by the Senate on controversial issues.” 130 id. He further noted that there was “no evidence that the needs of Government required any of [the 17 appointments made during the 23 day recess for the Fourth of July holiday and the Democratic Convention] to be made as recess appointments.” 130 id.
141. A sense-of-the-Senate resolution is technically a “Senate simple resolution.” The influence of Senate simple resolutions is “restricted to the scope of authority of the Senate acting as a single body of Congress, and [such resolutions] are used for such purposes as expressing the sense of the Senate on a matter.” FLOYD RIDDICK, SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOc. NO. 2, 97th Cong., 1st Sess. 975 (1981).
142. S. Res. 213, 99th Cong., 1st Sess., 131 CONG. REC. 22,419 (1985) (suggesting limitation of recess appointments to intersession recess or to intrasession recess of at least 30 days); S. Res. 194, 99th Cong., 1st Sess., 131 CONG. REC. 17,679 (1985) (enacted) (“[R]ecess appointments should not be made to the Board of Governors of the Federal Reserve System except under unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board’s activities . . . .”); S. Res. 430, 98th Cong., 2d Sess., 130 CONG. REC. 23,341 (1984) (limiting recess appointments to intersession recess or to intrasession recess of at least 30 days).

In the 1950s, after President Eisenhower made recess appointments to the Supreme Court, the Senate passed a sense-of-the-Senate resolution condemning such appointments. S. Res. 334, 86th Cong., 2d Sess. (1960), reprinted in S. REP. NO. 1893, 86th Cong., 2d Sess. 1-2 (1960). Chief Justice Earl Warren and Justices Potter Stewart and William Brennan obtained such appointments before receiving permanent nominations and Senate confirmation. Id. at 3. The resolution seems to have been successful in dissuading subsequent presidents from making recess appointments to the Supreme Court.

143. See supra note 141.
144. Presidential legal advisers have also sanctioned certain intrasession recess appointments. See infra notes 158-89 and accompanying text.
ment power should be limited to "a formal termination of a session of the Senate, or to a recess of the Senate, protracted enough to prevent it from discharging its constitutional function of advising and consenting to executive nominations. . . . [N]o recess appointments should be made [during intrasession recesses] of less than thirty days."145

Byrd based his limit on a statute providing for a thirty-day limit on temporary appointments, a limit that has since been expanded to 120 days.146 Even if the Senate found another statute providing some seemingly appropriate numerical line for intrasession recesses, however, the line derived from such a statute would be only a matter of expediency, not a useful bright-line constitutional test. The Recess Appointments Clause refers simply to the Recess. This term can have two possible interpretations — intersession recesses or all recesses.147 The text of the clause does not imply an arbitrary numerical line to permit appointments during intrasession recesses of a certain length. The intersession-intrasession distinction, although not as clear a distinction as it was at the time of the Framers, provides the least arbitrary and only textually based bright line to determine which recesses allow the President to invoke the Recess Appointments Clause. The Senate’s resolutions, like its 1905 Judiciary Committee Report, demonstrate its desire for a standard to limit the scope of the clause, but do little to provide constitutional justification for the limits the resolutions propose.


At the time of the resolutions, Byrd claimed support for the 30-day limit based on the Vacancies Act, Pub. L. No. 89-554, 80 Stat. 378, 425-26 (1966) (codified as amended at 5 U.S.C. §§ 3345-3349 (1988)), which provides for succession at the top of, or within, executive departments. See 5 U.S.C. § 3348 (1982) (amended 1988) ("A vacancy caused by death or resignation may be filled temporarily . . . for not more than 30 days."); 130 Cong. Rec. 23,234 (1984) (statement of Sen. Byrd) ("30 days recommends itself to me [as the limit for intrasession recesses] because current statutory law allows the President to detail an individual to fill any executive office for a period of 30 days."). Congress, however, lengthened the statutory 30-day limit, which was "routinely missed or ignored, in part because 30 days [did] not appear to be enough time to recruit and nominate a presidential appointee." S. Rep. No. 317, 100th Cong., 2d Sess. 13 (1988). The 100th Congress thus amended the Act to allow the President temporarily to fill vacancies in the executive branch for up to 120 days. 5 U.S.C. § 3348(a) (1988) ("A vacancy caused by death or resignation may be filled temporarily . . . for not more than 120 days . . . ."). Consequently, the relevant statutory basis for a 30-day limit is vastly diminished.

The only related statute with a 30-day limit is 5 U.S.C. § 5503 (1988), which provides that officers receiving recess appointments to positions that become vacant when the Senate is in session do not receive salaries from the Treasury. See infra note 177. Such a rule indicates congressional intent to limit recess appointments for vacancies occurring at various times, but does not address the type of recess allowing the President to invoke the clause.


147. See supra note 72.
B. Executive Interpretations of the Recess Appointments Clause

Opinions of the presidential legal advisers have justified recess appointments during increasingly short intrasession recesses in recent years. These opinions distinguish no lower limit to the length of the recess that would allow the President to invoke the clause. Like their legislative counterparts, however, these actors do not provide sufficient textual support from the Recess Appointments Clause to justify recess appointments during intrasession recesses.

Nineteenth-century opinions of the Attorneys General supported presidents' use of intersession recess appointments. Although the Attorneys General did not specifically consider the validity of intrasession recess appointments, the language of their opinions demonstrates that they envisioned presidents exercising the recess appointment power only during intersession recesses. Their statements imply that no intrasession recesses actually existed because, if they did, then the recess and session would occur simultaneously. The Attorneys General provide further evidence that

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148. The opinions of the era primarily dealt with the dilemma of whether the President had the authority to make recess appointments to vacancies that initially occurred while the Senate was in session. This debate centered on the meaning of the term happen in the phrase "Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The opinions of the Attorneys General were unanimous in holding that the President has the power to make such appointments, asserting that the term signifies happen to exist, and not happen to occur initially. E.g., 19 Op. Atty. Gen. 261 (1889); 17 Op. Atty. Gen. 521 (1883); 16 Op. Atty. Gen. 522 (1880); 12 Op. Atty. Gen. 32 (1866); 4 Op. Atty. Gen. 523 (1846); 2 Op. Atty. Gen. 525 (1832); 1 Op. Atty. Gen. 631 (1823); see also United States v. Allocco, 305 F.2d 704, 713 (2d Cir. 1962) (“The Attorneys-General of the United States, committed with the responsibility of advising the President concerning the scope of his constitutional powers, have held in a long and continuous line of opinions that the recess power extends to vacancies which arise while the Senate is in session.”), cert. denied, 371 U.S. 964 (1963). Such an interpretation was consistent with the purpose of the clause, to “keep ... offices filled.” 1 Op. Atty. Gen. at 632; see also 12 Op. Atty. Gen. at 35 (“[I]t is of the very essence of executive power that it should always be capable of exercise.”).

149. Other than the 1867 appointment mentioned above, see supra note 38 and accompanying text, no president appears to have made an intrasession recess appointment in the nineteenth century.

150. The Attorneys General referred to recess and session as mutually exclusive alternatives. See, e.g., 12 Op. Atty. Gen. at 38-39 (“[T]he public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session. ... [W]here the vacancy exists in the recess, whether it first occurred in the recess or in the preceding session, the power to fill is in the President alone.”); 2 Op. Atty. Gen. at 527 (“[A notice of vacancy] informs [the President] ... that [the vacancy] took place while the Senate was in session, and not during the recess.”); 1 Op. Atty. Gen. at 633 (“[W]hether [a vacancy] arose during the session of the Senate, or during its recess, it equally requires to be filled.”).

The mutually exclusive approach taken by the Attorneys General leads to two possible interpretations of their views of the clause. Under the first, recess refers to all of the time when the Senate is not meeting as a whole, and session denotes the period in which they are meeting. As mentioned above, see supra notes 112-16 and accompanying text, such an interpretation is inconsistent with the Framers' notions regarding, and subsequent development of, sessions as the yearly period of the Senate's meeting. The second interpretation, more in accord with the views of the Attorneys General, is that the President could make recess appointments only during the recess that was not part of the session, namely the intersession recess.
they only considered the clause to encompass intersession recesses by referring to the length of commissions of officials appointed during recesses as approximately one year, the length of time from an intersession recess until the end of the subsequent session of the Senate.\textsuperscript{151}

Attorney General Philander Knox explicitly stated the assumption of his predecessors that the recess appointment power applied only during intersession recesses in his 1901 opinion advising President Theodore Roosevelt not to recess-appoint an appraiser at the port of New York during an eighteen-day intrasession recess, lasting from December 19, 1901, until January 6, 1902. The Attorney General asserted that “in the many elaborate opinions of my predecessors ... no case is presented in which an appointment during [an intrasession recess] was involved.”\textsuperscript{152} Knox drew a distinction, still accurate today, between an intrasession recess, which was a “merely temporary suspension of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established,”\textsuperscript{153} and an intersession recess, which was “the period after the final adjournment of Congress for the session, and before the next session begins.”\textsuperscript{154} The Attorney General then specifically advised the President not to make intrasession recess appointments:

It is this period following the final adjournment for the session which is the recess during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session. Any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term.\textsuperscript{155}

Knox specifically rejected the idea that the President could invoke the clause during lengthy intrasession recesses: “It may be that Congress might ‘temporarily adjourn’ for several months as well as several days, and thus seriously curtail the President’s power of making recess appointments. But this argument from inconvenience ... can not be admitted to obscure the true principles and distinctions ruling the point.”\textsuperscript{156} The Attorney General also recognized that no constitutionally supportable line could be drawn allowing presidents to invoke the clause only during certain intrasession recesses: “[If the President could make a recess appointment during this eighteen-day intrasession recess], I see no

\textsuperscript{151} See, e.g., 12 Op. Atty. Gen. at 41 (“[T]he officer appointed to fill the vacancy [of marshal] can scarcely hold for an entire year.”).
reason why such an appointment should not be made during any [intrasession recess], as from Thursday or Friday until the following Monday."157 Knox thus drew a clear distinction between intersession and intrasession recesses, one that allowed the President to invoke the clause only during intersession recesses.

Subsequent presidential advisers, however, have failed to follow Knox's reasoning, and have not provided strong justifications for their divergence from Knox's interpretation. Attorney General Harry Daugherty wrote an opinion in 1921 acquiescing in President Warren Harding's decision to make a recess appointment during a twenty-eight day intrasession recess, from August 24 until September 21, 1921. Daugherty claimed that the term recess should be given a "practical," and not a "technical," construction, and that "the real question" was "whether in a practical sense the Senate is in session so that its advice and consent can be obtained."158 Daugherty drew support for his opinion from the purpose of the clause,159 a nineteenth-century judicial decision,160 and the 1905 Senate Judiciary Committee report.161 These sources of authority do not, however, provide constitutional justification for intrasession recess appointments. First, the purpose of keeping offices filled was not an absolute goal of the Framers, as evidenced by the elaborate system of checks and balances, most notably, the requirement of Senate confirmation of appointments.162 Second, notwithstanding Daugherty's assertion that Gould v. United States163 "is in accordance with my views,"164 this court of claims case involved the payment of recess appointees' salaries, not a determination of what type of recess allows the President to invoke the clause.165 Third, Daugherty's reliance on the Judiciary Committee Report166 was misplaced, because, as noted above, that report specifically responded to a particular use of the Recess Appointments Clause — the "constructive recess" — and therefore does not delineate definitively the scope of the Recess Appointments Clause.167

159. Daugherty relied on his predecessors' statements that the purpose was to keep offices filled. 33 Op. Atty. Gen. at 23 (quoting 23 Op. Atty. Gen. at 35, 36, 38); see also supra note 148.
160. 33 Op. Atty. Gen. at 23 (citing Gould v. United States, 19 Ct. Cl. 593 (1884) (holding that an Army paymaster is entitled to payment for the period in which he was a recess appointee)).
162. See supra section II.B.
163. 19 Ct. Cl. 593 (1884).
166. See supra section III.A.1.
167. See supra notes 133-34 and accompanying text.
As Daugherty recognized, no clear test exists for determining which intrasession recesses are of a length sufficient to allow the President to invoke the clause. The Attorney General identified this line-drawing problem, admitting that such a pursuit involves a “line of demarcation [that] can not be accurately drawn.”\textsuperscript{168} As an example, Daugherty asserted that the President would have the power during the twenty-eight-day recess in question, but that “an adjournment for 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”\textsuperscript{169} Daugherty resolved the line-drawing problem by vesting the President 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.”\textsuperscript{170} Daugherty further argued that “[e]very presumption is to be indulged in favor of the validity of whatever action he may take.”\textsuperscript{171} Thus Daugherty escaped the line-drawing dilemma by appealing to a presumption in favor of the constitutionality of presidential discretion in defining the Recess. This appeal, however, ignores the text of the Constitution, which defines and limits executive authority. If the Attorney General had paid primary attention to the text of the Recess Appointments Clause, he would not have encountered line-drawing problems, because the text of the clause refers only to the Recess. The text does not indicate, for example, the lengthy recess, or — analogous to the Pocket Veto Clause\textsuperscript{172} — a recess preventing Senate confirmation, phrases that might lead to line-drawing problems because of their qualifications of the Recess.

Despite Daugherty’s difficulties in justifying intrasession recess appointments, his successors have willingly followed his example in supporting such appointments. For instance, a 1960 opinion by Acting Attorney General Lawrence Walsh affirmed the President’s use of the recess appointment power during a thirty-six-day intrasession recess.\textsuperscript{173} The opinion relied on a number of sources, including previous opinions by Attorneys General, an opinion by the Comptroller General that followed the rationale of Daugherty’s 1921 Attorney General opinion in allowing intrasession recess appointments,\textsuperscript{174} and a Supreme Court decision on the Pocket Veto Clause\textsuperscript{175} that downplayed the intersession-intrasession distinc-

\textsuperscript{172} See supra note 91.
\textsuperscript{174} 28 Comp. Gen. 30 (1948).
\textsuperscript{175} See supra note 91.
tion. These sources do not, however, provide any additional constitutional arguments for allowing intrasession recess appointments. The Comptroller General's opinion focused on recess appointees' salaries under 5 U.S.C. § 56 and on whether the President made a recess appointment encompassed within the statute's "termination of the session" provision, rather than on whether the recess allowed the President to make recess appointments. Similarly, Walsh's opinion notes the Supreme Court's decision in the Pocket Veto Case, in which the Court determined whether an adjournment "prevent[ed]" the President from returning the bill to the House in which it originated within the time allowed. Walsh drew on the reasoning of the Pocket Veto Case to conclude that the President "ha[s] the power to grant recess appointments during the [intrasession recess from July 3 to August 8, 1960] because that recess 'pre­vents' [the Senate] from advising and consenting to Executive nominations." Walsh was, however, too quick to apply the logic of one constitutional clause to the analysis of another. The dangers lurking in too facile an analogy are illustrated in the different texts of the clauses: the Pocket Veto Clause specifically refers to "an Adjournment [that] prevent[s a bill's] Return" whereas the Recess Appointments Clause refers only to the Recess, not a Recess that

176. The Pocket Veto Case, 279 U.S. 655 (1929) (holding that the test for whether the President could pocket veto a bill was whether a congressional adjournment prevented the President from returning the bill to the House in which it originated within the time allowed).

177. This statute provided that:

No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any 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 such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: Provided, That a nomination to fill such vacancy under (a), (b), or (c) of this section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

5 U.S.C. § 56 (1940) (current version at 5 U.S.C. § 5503 (1988)). Congress instituted a potential limit to the Recess Appointments Clause in using its spending power to prohibit salaries for recess appointments made at certain times. The statute, however, in both its original and its amended versions, does not substantially limit presidents' power to make recess appointments because the majority of vacancies first occur during periods not encompassed by the statute.


179. 28 Comp. Gen. 30 (1948).


182. See supra note 91.
prevents confirmation. 183 Thus, Walsh, like Daugherty, failed to provide a concrete textual justification for his conclusion that presidents can use the recess appointment power during intrasession recesses.

Attorneys General have not been the only executive officials who have interpreted the Recess Appointments Clause. The Office of Legal Counsel ("OLC"), throughout the past fifteen years, has written opinions for the President supporting intrasession recess appointments made during increasingly short recesses. For example, the OLC wrote opinions in 1979184 and 1989185 sanctioning appointments during thirty-three-day intrasession recesses, and the Office wrote a 1992 opinion supporting use of the power during an eighteen-day recess. 186 The 1992 opinion relied on previous executive opinions supporting appointments during short recesses, including Daugherty's 1921 opinion, but was unable to reconcile this conclusion with Daugherty's admonition that "an adjournment for 5 or even 10 days" would not be sufficient "to constitute the recess intended by the Constitution." 187 Moreover, this decision contravened a previous opinion from the OLC that warned that "[t]his Office has cautioned against a recess appointment during an 18-day intrasession recess." 188

Since Daugherty's "practical" construction of the clause and his presumption of constitutionality in favor of the President when he makes recess appointments, the opinions of presidential legal advisors have consistently avoided clear textual analysis of the Recess Appointments Clause in advising the President that he can make recess appointments during intrasession recesses. Although these opinions have formed a background in which each subsequent opinion echoes the conclusions of its predecessors, the opinions have elevated the importance of the purposes of the Recess Appointments Clause — especially those favoring the President — over the constitutional text. Courts should not defer to these opinions' primary emphasis on purposes, but should instead begin their analysis by examining the text of the clause. 189 If courts are inclined to look

183. Moreover, the differences between recess and adjournment are significant; if the Framers wanted to address the same type of Senate absence, they would have selected identical language for both clauses. Cf. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840) (arguing that because "every word [of the Constitution] must have its due force," the words "treaty," "compact," and "agreement" in Article I, § 10 cannot mean the same thing.); see supra note 74.
188. 13 Op. Off. Legal Counsel at 327 n.2 (emphasis added) (citing Memorandum to the Files from Herman Marcuse, Attorney-Adviser, Office of Legal Counsel, Jan. 28, 1985).
189. See supra note 69.
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beyond the text, however, the next Part shows that they will find very little in the clause’s original purpose of relevance in today’s political world.

IV. CURRENT PRACTICE AND THE PURPOSES OF THE CLAUSE

The phrase the Recess can, at most, refer to two possible meanings of recess — intersession recesses and all recesses. This Part takes an independent look at the modern political environment in order to determine which of these possibilities best comports with the original purposes of the clause as they operate today. Even though the frequency and length of intrasession recesses have increased in the past twenty-five years, the governmental paralysis that the Framers feared is absent in today’s political setting. For this reason, courts should be especially reluctant to depart from the text of the Recess Appointments Clause to enforce a purpose that no longer applies.

This Part describes how modern practices affect the application of the clause today. Section IV.A examines current Senate activity. This section first observes that even though the occurrence of intrasession recesses has dramatically increased, the typical intersession recess remains longer than the usual intrasession recess. This section also finds that allowing recess appointments during today’s intrasession recesses would result in divergent and overly lengthy commissions. Next, the section observes that the complete shutdown of activity during recesses which the Framers envisioned does not characterize today’s intrasession and intersession recesses. Rather, committees often continue meeting during a recess, thus providing the first step of their advice and consent as they consider — through the use of hearings — presidential nominees. Section IV.B describes the array of statutory mechanisms that supplement the Recess Appointments Clause in filling vacancies. These statutes, with automatic succession or holdover provisions, ensure that the executive branch fills vacancies smoothly, further diminishing the possibility of governmental paralysis which the Framers feared.

A. Changes in Senate Activity

Today’s Senate schedule is far different from that which the Framers envisioned. The average session has grown longer, shortening the intersession recesses. In addition, the frequency of in-

190. See supra note 72.

191. See infra notes 208-13 and accompanying text.

192. CONGRESSIONAL DIRECTORY, supra note 20, at 580-90.
trasession recesses has increased in the past fifty years. Yet such recesses generally remain shorter than intersession recesses. Most intersession recesses last for at least one month, and some last for three months. In contrast, the overwhelming majority of intrasession recesses last less than twenty days. Only four intrasession recesses in history have exceeded sixty days, and none of these occurred in the past forty years.

These changes in the Senate schedule affect the length of commissions granted under the clause. Because today's session is much longer than the intersession recess, all officers receiving intersession recess appointments receive commissions of roughly the same length, approximately one year. On the other hand, when presidents invoke the clause during an intrasession recess — no matter how long — they may create commissions up to twice as long as those granted to intersession recess appointees. The lengths of commissions of intrasession recess appointees can vary from one to two years, depending on when in the Senate's schedule the recess occurs. Thus, in contrast to intersession recess appointees, all of whom serve approximately the same amount of time, intrasession recess appointees have widely divergent commissions. Even though today's sessions last longer than previous Senate sessions, ensuring that the President has more time to nominate, and the Senate has more time to consider, a permanent officer for a position, all officers receiving intersession recess appointments will remain in office for approximately the same amount of time. On the other hand, the Senate has up to two sessions to confirm officers granted recess appointments during intrasession recesses at the beginning of a Senate session.

This extra session, in effect, doubles the commissions of recess appointees. This longer commission gives the President an incentive to wait until the first intrasession recess after an intersession recess.

193. Id.

194. Approximately 85% — 193 out of 228 from the beginning of the Republic until the start of the 102d Congress — of intersession recesses have exceeded one month. Id.

195. Approximately 87% — 207 out of 238 from the beginning of the Republic until the start of the 102d Congress — of intrasession recesses have been less than 20 days. Id.

196. Two of these recesses occurred in the first session of the 40th Congress, in 1867: a 94-day recess (from March 30 to July 3, 1867) and a 124-day recess (from July 20 to November 21, 1867). The next intrasession recess occurred in the first session of the 78th Congress, a 68-day recess from July 8 to September 14, 1943. The final such recess occurred in the second session of the 81st Congress, a 65-day break, from September 23 to November 27, 1950. Id.

197. The commissions would be approximately the same length because all appointments made during a short intersession recess occur at relatively the same time and last throughout the longer Senate session.

198. For an illustration of such a phenomenon, see infra text accompanying notes 200-01.

199. See CONGRESSIONAL DIRECTORY, supra note 20, at 580-90.
recess to make a recess appointment. President Bush’s appointment of Thomas Ludlow Ashley during the first intrasession recess of the first session of the 103d Congress provides one such example. Instead of appointing Ashley during the intersession recess lasting from October 8, 1992, until January 5, 1993, so that his commission might last until December 1993, Bush waited until the intrasession recess from January 7 to January 20, 1993, to make the recess appointment, extending the prospective commission until approximately October 1994. Allowing recess appointments during intrasession recesses thus leads to unusual results that may tilt the balance of power in the appointment process.

Modern intrasession recesses also do not pose the danger anticipated by the Framers of prolonged Senate absences during which vacancies would remain unfilled. The Framers anticipated six-to-nine-month periods in which the Senate would not be able to provide its advice and consent. Today’s typical seven- or fourteen-day intrasession recess, in contrast, does not threaten such governmental paralysis.

The accessibility of the confirmation process — in particular, committee consideration of nominations — provides another contrast to the schedule the Framers expected. Today’s Senate can receive messages from the President during recesses. In recent years, on the first day of a Congress, the Secretary of the Senate has been given authority, which lasts for the duration of the Congress, to receive messages from the President during Senate recesses. Many of the messages received are nominations, which the Secretary of the Senate refers to the appropriate committee for the commencement of the advice-and-consent process.

201. See supra notes 6-16 and accompanying text.
202. See supra notes 112-16 and accompanying text.
203. Today’s recesses do not even fit the 1905 Judiciary Committee Report’s definition of recess as the time when the Senate owed “no duty of attendance,” when, because of the legislature’s absence, “[the Senate could] not receive communications from the President or participate as a body in making appointments.” S. Rep. No. 4389, supra note 33, at 3823. See supra section III.A.1.
205. A typical grant of authority was made on the first day of the 103d Congress, when Senator Mitchell asked for unanimous consent that “for the duration of the 103d Congress, when the Senate is in recess or adjournment, the Secretary of the Senate be authorized to receive messages from the President of the United States . . . and that they be appropriately referred.” 139 id.; see also 137 Cong. Rec. S7 (daily ed. Jan. 3, 1991); 131 Cong. Rec. 13 (1985).
206. See, e.g., Nominations Submitted to the Senate, 29 Weekly Comp. Pres. Doc. 1032 (June 1, 1993) (Clinton submits nomination of Jean Kennedy Smith to be ambassador to Ireland during intrasession recess from May 28 to June 7, 1993); 139 Cong. Rec. S53 (daily
Moreover, committees can initiate the process of confirming nominees during all recesses. The standing rules of the Senate explicitly give committees full powers even during recesses:

Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require . . . the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures . . . as may be authorized . . . 207

Senate committees play a crucial role in the confirmation process,208 as they often conduct the most thorough examination of the presidential nominee. The first step of the advice-and-consent process occurs when the committee holds hearings on the nominee. In accordance with the provisions of the Senate's standing rules, committees have conducted a wide array of hearings, including nomination hearings, during both intersession and intrasession recesses. For instance, during the intrasession recess lasting from July 1 until July 13, 1993, the Committee on Banking, Housing, and Urban Affairs concluded hearings on three executive officers.209

Prior to presidential inaugurations, when the President-elect assembles the Cabinet, these committees frequently act on nominations made even during recesses. During the intrasession recess from January 7 to January 20, 1993, Senate committees considered nearly every one of President-elect Clinton's cabinet nominations.210

207. SLACK, supra note 21, § 26.1, at 50 (emphasis added).

208. One Supreme Court Justice has emphasized the importance of committees to the operation of the legislature, noting that committees could be viewed "for all practical purposes [as] Congress itself." Doe v. McMillan, 412 U.S. 306, 344 (1973) (Rehnquist, J., concurring in part and dissenting in part) (asserting that a court could not enjoin a congressional committee from distributing its report).


210. The committees ordered that the following prospective nominations be favorably reported to the Senate for consideration: Mike Espy to be Secretary of Agriculture, by the Committee on Agriculture, Nutrition, and Forestry; Henry Cisneros to be Secretary of Hous-
also considered cabinet nominees during Senate recesses in prior administrations, including those of President Bush\textsuperscript{211} and President Reagan.\textsuperscript{212}

These numerous examples of Senate committee activity during recesses illustrate the legislature's continuing involvement in the advice-and-consent process. Even though the Senate as a whole cannot act on a nomination during a recess,\textsuperscript{213} committee consideration of presidential nominees presents the possibility that the advice-and-consent process may commence. In conjunction with short intrasession recesses and the ability to receive messages from the President, Senate committee activity during recesses thus minimizes the possibility of governmental paralysis resulting from unfilled vacancies.

\begin{itemize}
\item Hazel O'Leary to be Secretary of Energy, by the Committee on Energy and Natural Resources; Carol Browner to be Administrator of the Environmental Protection Agency, by the Committee on Environment and Public Works; Donna Shalala to be Secretary of Health and Human Services, by the Committee on Finance; Roger Altman to be Deputy Secretary of the Treasury, by the Committee on Finance; Michael Kantor to be United States Trade Representative, by the Committee on Finance; Warren Christopher to be Secretary of State, by the Committee on Foreign Relations; Leon Panetta to be Director of the Office of Management and Budget, by the Committee on Governmental Affairs; Robert Reich to be Secretary of Labor, by the Committee on Labor and Human Resources; and Richard Riley to be Secretary of Education, by the Committee on Labor and Human Resources. 139 CONG. REC. D46-48 (daily ed. Jan. 20, 1993).
\end{itemize}

In addition, committees concluded hearings during the recess on the prospective nominations of Federico Peña to be Secretary of Transportation, by the Committee on Environment and Public Works; and Alice Rivlin to be Deputy Director of the Office of Management and Budget, by the Committee on Governmental Affairs. 139 id. at D47.

Finally, committees commenced hearings during the recess on other potential nominees: Bruce Babbitt to be Secretary of the Interior, by the Committee on Energy and Natural Resources; and Zoe Baird to be Attorney General, by the Committee on the Judiciary. Id. at D47-48.

211. During the intrasession recess from January 4 until January 20, 1989, the Committee on Foreign Relations favorably reported the nominations of James Baker III to be Secretary of State, and the Labor and Human Resources Committee favorably reported the nomination of Elizabeth Dole to be Secretary of Labor. 135 CONG. REC. D16 (daily ed. Jan. 19, 1989). The Senate also held hearings on then-President-elect Bush's choice for the Director of the Office of Management and Budget, Richard Darman. 135 id.

212. For example, on January 14, 1981, the Committee on Foreign Relations held hearings on the prospective nomination of Alexander M. Haig, Jr., to be Secretary of State, and the Committee on Energy and Natural Resources held hearings on the prospective nominations of James G. Watt to be Secretary of the Interior and James B. Edwards to be Secretary of Energy. 127 CONG. REC. 264 (1981). On January 15, 1981, the Committee on the Judiciary held hearings on the prospective nomination of William French Smith to be Attorney General. 127 id.

213. Nevertheless, during recesses, nearly all of the Senators may in fact be present. Letter from Senators David Pryor, John Glenn, George Mitchell, Wendell Ford, and Robert Byrd to President George Bush (Jan. 12, 1993) (asserting that "[v]irtually every Member of the Senate serves on one of the committees that [met] during the [January 7 to January 20] adjournment to consider prospective Executive appointments").
B. Statutory Supplements to the Recess Appointments Clause

An examination of statutes that Congress has enacted to fill vacancies in the executive branch further demonstrates the limited role of the recess appointment power in today's political arena. Such statutes minimize the possibility of governmental paralysis resulting from unfilled vacancies by ensuring that many executive offices remain filled.

The Vacancy Act is the primary statute governing succession in executive departments. Like the Recess Appointments Clause, the Vacancy Act seeks to "ensure that executive vacancies [are] promptly filled" through, for example, the use of automatic succession provisions. The Vacancy Act provides for automatic succession for the heads of executive agencies or military departments. The Act provides: "When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant . . . shall perform the duties of the office until a successor is appointed or the absence or sickness stops." Automatic succession also applies to subordinate offices, as it provides that the first assistant to "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department" will assume the officer's powers until a successor is appointed or the officer's sickness or absence ceases. Automatic succession provisions thus complement the Recess Appointments Clause by ensuring that vacancies will be filled even if the vacancy arises during an intrasession recess. These provisions, like Senate activity during recesses, diminish the possibility of vacancies in federal offices.

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215. S. REP. NO. 317, supra note 145, at 13. This purpose was reiterated in recent amendments to the Act that extended the temporary appointments to 120 days. 134 CONG. REC. 19,991 (1988) (statement of Sen. Glenn) ("This provision clearly encourages the President to fill vacancies promptly.").

216. The present Act allows for those assuming office to remain for up to 120 days. 5 U.S.C. § 3348 (1988).

217. 5 U.S.C. § 3345 (1988). An example of this provision is 28 U.S.C. § 508 (1988), which provides that the Deputy Attorney General may exercise the duties of Attorney General when the latter position becomes vacant. This provision further allows the Associate Attorney General to act as Attorney General if the Deputy Attorney General is unavailable to act.


219. The Vacancy Act also provides for discretionary succession, as the President "may direct the head [or another officer] of another Executive department or military department . . . whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office." 5 U.S.C. § 3347 (1988).

220. Although courts have construed the Vacancy Act narrowly, so that "the President has authority to make interim appointments only when the express conditions of the Act are satisfied," Olympic Fed. Sav. & Loan Assn. v. Director, Off. Thrift Supervision, 732 F.
Several other statutes, including those allowing federal officials to choose officers to fill vacancies, apply to various executive departments and contribute to the uninterrupted operation of government in the event of vacancies.\textsuperscript{221} The Attorney General, for

\textsuperscript{221} It is possible, nonetheless, for a vacancy to occur that is covered by neither the Vacancy Act nor another statute. Such a situation occurred in 1973, when President Nixon appointed Howard J. Phillips to be Acting Director of the Office of Economic Opportunity ("OEO"). Digest of Other White House Announcements, 9 \textsc{Weekly Comp. Pres. Doc.} 121, 122 (Jan. 31, 1973). Section 3347 of the Vacancy Act did not cover Phillips for two reasons. First, the OEO was not an executive or military department. See \textit{Williams v. Phillips}, 360 F. Supp. 1363, 1367 (D.D.C. 1973). Second, when appointed, Phillips was an OEO Associate Director for Program Review, a post not subject to Senate confirmation. 360 F. Supp. at 1366. Thus, Phillips was not "another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate . . . ." 5 U.S.C. § 3347 (1988).


In response to these events, several members of the Senate sought an injunction to have Phillips removed. On June 11, 1973, the U.S. District Court for the District of Columbia ruled that the President could only appoint an officer if he had the advice and consent of the Senate, unless there was statutory authority to do otherwise or unless the Senate was in recess. \textit{Williams}, 360 F. Supp. at 1367-68. The court noted that because Congress had expressly provided for the details of succession for other agencies through statutes, it had to presume that Congress’s failure to do so in the case of the OEO was intentional. 360 F. Supp. at 1370-71.

By the end of 1973, Nixon had proved partially successful in his attempt to dismantle the OEO. Several of the OEO’s programs were transferred to other agencies, leaving the OEO with three programs, one of which was the predecessor to the Legal Services Corporation — the agency that Presidents Reagan and Bush would seek to weaken through recess appointments. \textit{See Complete Dismantling of OEO Halted in 1973}, 29 \textsc{Cong. Q. Almanac} 585 (1974); \textsuperscript{ supra} note 29.
example, has the authority to appoint U.S. attorneys,\textsuperscript{222} marshals,\textsuperscript{223} and trustees\textsuperscript{224} in districts where such an office becomes vacant. The appointees' commissions last for varying lengths of time,\textsuperscript{225} but all such appointments serve the purpose of keeping offices filled.\textsuperscript{226} In addition, many statutes governing executive agencies\textsuperscript{227} have holdover provisions, which allow an officer to remain in office until a replacement assumes the position.\textsuperscript{228} Such provisions have been utilized by, for example, the Federal Election Commission,\textsuperscript{229} the Postal Board of Governors,\textsuperscript{230} the Federal Housing Finance Board,\textsuperscript{231} and the Legal Services Corporation.\textsuperscript{232} Again, these provisions ensure that positions essential to the effective functioning of government remain staffed.

The limited purposes of the clause, in light of modern developments discussed in this Part, are more consistent with the restriction of the power to the intersession recess. This conclusion comports with the textual analysis of the Recess Appointments Clause and supports confining the recess appointment power to the closest analogue in today's schedule to the recess envisioned by the Framers — the intersession recess.

**CONCLUSION**

The Framers drafted the Recess Appointments Clause to allow the President unilaterally to make appointments to keep the gov-

\textsuperscript{225} For example, temporary U.S. attorneys serve until either a successor has been appointed or 120 days have expired, 28 U.S.C. § 546(c) (1988); temporary marshals serve either until a successor has been chosen, until the thirtieth day following the end of the next session of the Senate has expired, or until the thirtieth day after the Senate refuses to give its advice and consent, 28 U.S.C. § 562(b) (1988); and temporary trustees serve until a successor has been appointed, 28 U.S.C. § 585(a) (1988).
\textsuperscript{226} The General Counsel of the National Labor Relations Board serves as another example of the powers of discretionary selection the President may utilize to fill a vacancy. 29 U.S.C. § 153(d) (1988) (“In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy . . . .”).
\textsuperscript{227} Statutes creating agencies usually provide for members to be appointed by the President and confirmed by the Senate.
\textsuperscript{228} For potential differences among holdover provisions, see supra note 220.
\textsuperscript{229} 2 U.S.C. § 437c(a)(2)(B) (1988) (“A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.”).
\textsuperscript{230} 39 U.S.C. § 202(b) (1988) (“A Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.”). See supra note 14.
\textsuperscript{231} 12 U.S.C. § 1422a(d)(1) (Supp. IV 1992) (“Each director may continue to serve until a successor has been appointed and qualified.”).
\textsuperscript{232} 42 U.S.C. § 2996c(b) (1988) (“Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified.”).
ernment functioning during the six-to-nine-month intersession recesses they envisioned, in which Senators dispersed throughout the country would be unable to provide their advice and consent. The clause provides that the President may make such appointments during the Recess. The particular language the Framers chose indicates that they intended to restrict the meaning of Recess to intersession recesses. This meaning limits the impact of the recess appointment power on the carefully designed system of checks and balances the Framers intended to inform the general appointment power.

Executive and legislative opinions, by failing to consider adequately the text of the Recess Appointments Clause, do not displace the conclusion reached from textual analysis. Even in light of the dramatic changes since the time of the Framers in how vacancies in the executive branch are filled, interpreting the meaning of Recess to include intersession recesses but not intrasession recesses remains consistent with the extant purposes of the clause. Because Senate activity continues during the typically short intrasession recesses, unfilled vacancies do not threaten the shutdown of the government. Moreover, statutory alternatives such as succession and holdover provisions keep the government running smoothly even in the event of such vacancies. Because these changes demonstrate how limited the original purposes of the clause have become in today's political environment, courts should confine presidential power to make recess appointments to the type of recess that most consistently reflects the Framers' understanding of how presidents would use the power, the intersession recess.