



Recess Appointments: A Legal Overview

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Summary

The U.S. Constitution explicitly provides the President with two methods of appointing officers of the United States. First, the Appointments Clause provides the President with the authority to make appointments with the advice and consent of the Senate. Specifically, Art. II, § 2, cl. 2 states that 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.” Second, the Recess Appointments Clause authorizes the President to make temporary appointments unilaterally during periods when the Senate is not in session. Art. II, § 2, cl. 3 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.”

While the Recess Appointments Clause enables the continuity of government operations, Presidents, on occasion, have exercised authority under the Clause for tactical or political purposes, appointing officials who might otherwise have difficulty securing Senate confirmation. Yet, the Recess Appointments Clause is not without its ambiguities, and the President’s use of this power in light of these ambiguities has given rise to significant political and legal controversy since the beginning of the Republic.

This report provides an overview of the Recess Appointments Clause, exploring its historical application and legal interpretation by the executive branch, the courts, and the Comptroller General. Furthermore, congressional legislation designed to prevent the President’s overuse or misuse of the Clause is also explored.

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Background

The Appointments Clause of the Constitution establishes that 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.”¹ Pursuant to the Recess Appointments Clause, the President, further, has the “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.”² The Recess Appointments Clause was adopted by the Constitutional Convention without dissent or debate regarding the intent and scope of its terms.

In light of express provisions and historical pronouncements during ratification of the Constitution, it is generally accepted that the Recess Appointments Clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function.³ Alexander Hamilton referred to the recess appointment power as “nothing more than a supplement ... for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.”⁴ During the ratification debates in Pennsylvania, Thomas McKean, a prominent figure of the American Revolution and member of the Pennsylvania convention, noted with approval the sharing of the appointive power with the Senate and stated that the Senate need not “be under any necessity of sitting constantly, as has been alleged, for there is an express provision made to enable the President to fill up all vacancies that may happen during their recess; the commissions, to expire at the end of the next session.”⁵ Likewise, Archibald Maclaine, a member of the Hillsborough convention during the ratification debates in North Carolina and influential supporter for ratification of the Constitution, stated:

Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments.... This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences.⁶

The idea of the recess appointment power as a practical accommodation is supported by the fact that until the Civil War, Congress consistently met for relatively short sessions followed by long recesses of six to nine months.⁷ Congress largely adhered to this pattern during and after the Civil

¹ U.S. Const., Art. II, § 2, cl. 2. The appointment of other, so-called “inferior officers,” may be vested by Congress in the President alone, courts, or the heads of departments. *Id.*

² U.S. Const., Art. II, § 2, cl. 3.

³ CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

⁴ *The Federalist*, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

⁵ 2 *The Documentary History of the Ratification of the Constitution* 537 (Merrill Jensen, ed. 1976).

⁶ Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 380-81 (2005) (quoting 4 *The Founders’ Constitution* 37, 102-03 (P. Kurland ed., 1787)).

⁷ *Id.* See also Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 *Mich. L. Rev.* 2204, 2212 (1994).

War, scheduling an intrasession recess⁸ of approximately two weeks from the end of December until the beginning of January.⁹ The recess practices of Congress changed in the mid-20th century, and are now characterized by more frequent recesses of relatively short duration within sessions of a Congress. The adjournments of Congress between sessions are also shorter.¹⁰

In addition to fostering administrative continuity, Presidents also have exercised authority under the Recess Appointments Clause for tactical or political purposes throughout the history of the Republic, giving rise to significant political and legal controversy. For instance, President Madison's recess appointments of Albert Gallatin, John Quincy Adams and James A. Bayard as envoys to negotiate a peace treaty with Great Britain in 1813 prompted heated debate in the Senate.¹¹ Presidents Jackson, Taylor, and Lincoln also made hundreds of recess appointments during their terms.¹² Additionally, recess appointments to the judiciary were common during the early years of the Republic, with the first five Presidents making 31 such appointments, including five to the Supreme Court.¹³ Among these, President Washington's recess appointment of John Rutledge as Chief Justice generated significant controversy, ultimately factoring in his rejection by the Senate,¹⁴ though interestingly, "no recorded challenge was made to the constitutionality of his recess appointment."¹⁵ In total, 12 Justices have received recess appointments to the Supreme Court, and many of these Justices participated in Court business prior to Senate action on their nominations.¹⁶ The mid-19th century phenomena of long congressional adjournments, frequent resort to recess appointments, and the rise of the spoils system¹⁷ in the federal government spurred Congress to impose statutory restrictions on the President's appointment and removal power, including restrictions on paying certain classes of recess appointees.¹⁸ Additionally, the Tenure of Office Act of 1867, which figured prominently in the impeachment effort against President Johnson, included several provisions purporting to limit the recess appointment power of the President.¹⁹

⁸ An intrasession recess refers to a recess of the Senate during a session of the Senate.

⁹ Carrier, *supra* note 7, at 2212. Before the passage of the 20th Amendment in 1934, "the term of each Congress began on March 4th of each odd numbered year. ... The Congress ... convened regularly on the first Monday in December. ... So, prior to 1934, a new Congress typically would not convene for regular business until 13 months after being elected." *Congressional Directory* at 526 (2009).

¹⁰ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1500-01 (2005).

¹¹ See 20 Op. A.G. 284 (1996).

¹² See Fish, Carl R. *Removal of Officials by the Presidents of the United States*, Annual Report of the American Historical Association for the Year 1899. Vol. 1. Washington, D.C., Government Printing Office (1900).

¹³ Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1755 (1984).

¹⁴ *Id.* at 1775-76.

¹⁵ *Id.* at 1776.

¹⁶ Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, Presidential Studies Quarterly 34, No. 3 at 661 (2004).

¹⁷ A spoils system refers to a system of patronage, in which the winning political party will give government jobs to its supporters who worked toward the victory as opposed to awarding offices on the basis of some measure of merit, independent from any political activity.

¹⁸ See "Statutory Pay Restrictions on Recess Appointees," *infra* note 99 and accompanying text.

¹⁹ See "Statutory Pay Restrictions on Recess Appointees," *infra* note 103 and accompanying text.

With the inherent ambiguities of the Clause, and the evolution of modern congressional practices,²⁰ the confusion over recess appointments is further complicated by additional factors, such as the application of statutory restrictions to recess appointments. Accordingly, this report first examines the textual and historical interpretation of the ambiguous phrases of the Clause. It then discusses the authority and tenure of recess appointees, and lastly, congressional action to curb potentially politically motivated utilization of the recess appointment power.

Textual Issues and Historical Interpretation

Recess Appointments Clause (Art. II, § 2, cl. 3.)

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 (emphasis added).

Although practices with respect to recess appointments and debates between Presidents and the Congress over the propriety of particular recess appointments occurred in the formative years of the Republic,²¹ formal consideration of the issue has occurred primarily in the context of Attorneys General opinions, with periodic attention from the courts and Congress. Aspects of the recess appointment power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19th century on recess appointments, the earliest being in 1823. Interpretation questions have primarily revolved around the phrases “Vacancies that may happen” and “Recess of the Senate,” and accordingly are discussed in this section. While many of the interpretational questions surrounding the Clause are now deemed, at least by the executive branch, to be settled, there have been numerous contrary opinions and expressions of doubt in the course of arriving at these generally accepted interpretations.

“Vacancies That May Happen”

An initial question that arose was what constitutes a “Vacanc[y] that may happen” during the recess of the Senate? On the one hand, if the term “happen” is interpreted as referring only to vacancies that occur during a recess, or after a recess of the Senate commences, it necessarily follows that the President would lack authority to make a recess appointment to a vacancy that existed prior to the recess. In 1792, the first Attorney General, Edmund Randolph, responded to an inquiry as to whether a recess appointment could be made to the position of Chief Coiner of the Mint, a newly created position for which no nomination had been made before the Senate recessed.²² Randolph concluded that the vacancy occurred on the day the office had been created, and thus could not be filled with a recess appointment because the vacancy existed prior to the Senate’s recess.²³ He based his opinion on the text of the Clause and on the “spirit of the

²⁰ Rappaport, *supra* note 10.

²¹ See Curtis, *supra* note 13, at 1758.

²² Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 The Papers of Thomas Jefferson, at 165-67 (John Catanzariti et al. ed., 1990) (Attorney General Randolph was responding to an inquiry from Thomas Jefferson, then serving as Secretary of Foreign Affairs). See also, Hartnett, *supra* note 6, at 384-86; Rappaport, *supra* note 10, at 1518-19.

²³ Randolph, *supra* note 22, at 166; Rappaport, *supra* note 10, at 1519.

Constitution,” declaring that the Recess Appointments Clause must be “interpreted strictly” because it serves as “an exception to the general participation of the Senate.”²⁴ In 1799, Alexander Hamilton, then serving as Major General of the Army, responded to a similar inquiry from the Secretary of War, stating “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy [pursuant to the Recess Appointments Clause] which happens during a session of the Senate.”²⁵

On the other hand, if “happen” is construed more broadly to encompass vacancies that exist during a recess, the President would be empowered to make a recess appointment to any vacant position, irrespective of whether the position became vacant prior to or during “the Recess of the Senate.” In 1823, Attorney General William Wirt, without mentioning the Randolph opinion, concluded that the phrase encompassed all vacancies that happen to exist during “the Recess.”²⁶ In other words, recess appointments could be made to vacancies that came into being before the recess of the Senate commenced. While Attorney General Wirt acknowledged that the “opposite construction [i.e., Randolph’s narrower interpretation] is, perhaps, more strictly consonant with the mere letter” of the Clause, he opted for, in his view, “the only construction of the Constitution which is compatible with its spirit, reason, and purpose.”²⁷ Wirt further stated: “The substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be sacrificed to a dubious construction of its letter.”²⁸

The Senate expressed opposition to the interpretation offered by Attorney General Wirt,²⁹ and notable scholars such as Joseph Story, in his *Commentaries on the Constitution*, also seemed to adopt a construction different from Wirt’s, at least with respect to newly created offices to which nominations had not been named (akin to the Randolph position).³⁰ Differing interpretations, such as those of Attorneys General Randolph and Wirt, are reflective of the early controversies between the Senate and the President on the meaning of this phrase.

Yet, subsequent opinions of the Attorney General in 1832 and 1841 endorsed Wirt’s interpretation, though both opinions involved second recess appointments after initial recess commissions had expired, and both opined that, under such circumstances, the vacancy occurred after adjournment of the Senate when the first recess commission ended.³¹ Furthermore, echoing

²⁴ Randolph, *supra* note 22, at 166; Rappaport, *supra* note 10, at 1519.

²⁵ Rappaport, *supra* note 10, at 1519. The “special law” to which Hamilton refers is a law that would vest the appointment of an “inferior Officer” in the President alone. Under such a law, Congress could allow the President alone to make “a permanent appointment of an inferior officer, or a temporary appointment extending till the end of the next session, irrespective of when the vacancy arose.” *Id.* at n.92.

²⁶ 1 Op. A.G. 631, 633-34 (1823).

²⁷ *Id.*

²⁸ *Id.* at 632.

²⁹ See George H. Haynes, *The Senate of the United States*, Vol. 2 at 772-73 (Russell and Russell ed., 1960).

³⁰ 3 Story, *Commentaries on the Constitution of the United States* 411 (Da Capo ed., 1970).

³¹ 2 Op. A.G. 525, 526 (1832) (“The appointment ... during the last recess ‘filled up’ the vacancy which had happened, and the office remained full; and there was no vacancy, from the time of his appointment and acceptance until the close of the late session. The nomination made not being confirmed by the Senate, the commission granted by the President expired at the end of the session; and the moment after it closed, the office again became vacant. This was a new vacancy.”); 3 Op. A.G. 673, 676 (1841) (“My opinion is, that the same overruling necessity which applied to the original vacancy applies to the second one, created by an omission of the Senate to act on a nomination.”).

the sentiments of Wirt, Attorney General Roger B. Taney, in the 1832 opinion stated that the Constitution “was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one. It was the intention of the constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or at all events, that the vacancy should not be a protracted one.”³²

He went on to stress, however, that “vacancies are not *designedly* to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate.”³³

Notwithstanding the opinions that agreed with the 1832 Wirt opinion, in a brief opinion from 1845, Attorney General John Y. Mason concluded that “[i]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate.”³⁴ Though he did not make any reference to the preceding opinions to the contrary, the Attorney General noted, in a subsequent opinion, these prior opinions and stated that “[f]rom the commencement of the government, it is believed that a power has been exercised which would appear to be inconsistent with a construction of the section of the constitution which would confine the meaning of the word ‘happen’ to the time at which the office is in fact vacated.”³⁵ Similarly, Attorney General William M. Evarts, in 1868, discussed this later opinion of Mason’s, stating that it “expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors.”³⁶ Also, during this period, several Senators raised questions as to the proper interpretation of the word “happen” in the Recess Appointments Clause. While one Senate Committee on the Judiciary Report from 1863 expressed that vacancies that arose while the Senate was in session could not be filled by recess appointment,³⁷ other Members noted that contrary opinions existed on the subject. Further, an appropriations rider to prevent recess appointees from being paid was enacted, discussed below (“Early Statutory Pay Restriction”).

Despite this brief departure from the broader interpretation of Attorney General Wirt, formal Attorneys General opinions returned to the Wirt interpretation beginning in 1855. These opinions further concluded that “Vacancies may happen” even with respect to newly created offices that had never been filled.³⁸ Attorney General Bates, in an 1862 opinion, stated that the question of when a vacancy may happen “is settled ... as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate.”³⁹ Attorney General Stanberry also justified his interpretation by noting that the term vacancy “implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?”⁴⁰ Stanberry further stated that executive power must always have capacity for action and that to adopt a narrow construction of the Recess Appointments Clause would interfere with that

³² 2 Op. A.G. at 526-27.

³³ *Id.* at 528 (emphasis in original).

³⁴ 4 Op. A.G. 361, 363 (1845).

³⁵ 4 Op. A.G. 523, 525 (1846).

³⁶ 12 Op. A.G. 455 (1868).

³⁷ S. Rept. 80, 37th Cong., 3d Sess. (1863).

³⁸ 7 Op. A.G. 186 (1855); 18 Op. A.G. 28 (1884); 19 Op. A.G. 261 (1889).

³⁹ 10 Op. A.G. 356 (1862).

⁴⁰ 12 op. A.G. 32, 34 (1866) (emphasis in original).

ability.⁴¹ Attorney General Evarts, in an 1868 opinion, declared the matter so settled that it is “hardly useful to express an opinion as upon an original question.”⁴² Evarts nonetheless considered the merits of the opposing interpretation, in light of the “renewed interest in the whole subject of executive authority in appointments to office, excited by recent legislation of Congress,” ultimately concluding that he could not but concur with “the views of [his] learned predecessors.”⁴³ Subsequent Attorneys General opinions have consistently interpreted “happen” to mean “happen to exist” and have acknowledged recess appointments to offices that became vacant while the Senate was in session.⁴⁴

The broader interpretation was first adopted by a federal court in the 1880 decision *In re Farrow*.⁴⁵ In *Farrow*, Circuit Justice Woods adopted the reasoning of the aforementioned Attorneys General opinions, stating that “[t]hese opinions exhaust all that can be said on the subject.”⁴⁶ In reaching his conclusion, Circuit Justice Woods rejected the contrary opinion of a district court, stating that its holding “ought not to be held to outweigh the authority of the great number which are cited in support of the opposite view, and of the practice of the executive department for nearly 60 years, the acquiescence of the [S]enate therein, and the recognition of the power claimed by both [H]ouses of [C]ongress.”⁴⁷ The holding in *Farrow* was also subsequently echoed in *In re Yancey*.⁴⁸ In the modern era, courts have continued to adhere to this interpretation. In *United States v. Allocco*, for instance, the U.S. Court of Appeals for the Second Circuit stated that a contrary interpretation “would create executive paralysis and do violence to the orderly functioning of our complex government.”⁴⁹ Likewise, in *United States v. Woodley*, the U.S. Court of Appeals for the Ninth Circuit stated that a contrary interpretation would “lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes.”⁵⁰ Most recently, in *Evans v. Stephens*, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) stated that “interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning.”⁵¹

⁴¹ *Id.* at 38.

⁴² 12 Op. A.G. 449, 452 (1868).

⁴³ *Id.*

⁴⁴ See 14 Op. A.G. 562 (1875); 15 Op. A.G. 207 (1877); 16 Op. A.G. 522 (1880); 16 Op. A.G. 538 (1880); 17 Op. A.G. 521 (1883); 18 Op. A.G. 29 (1884); 19 Op. A.G. 261 (1889); 26 Op. A.G. 234 (1907); 30 Op. A.G. 314 (1914); 33 Op. A.G. 20 (1921); 41 Op. A.G. 463 (1960); 6 U.S. Op. Off. Legal Counsel 585 (1982).

⁴⁵ 3 Fed. 112, 116 (C.C.N.D. Ga. 1880) (stating that the President has the power to make appointments “notwithstanding the fact that the vacancy filled by his appointment first happened when the [S]enate was in session.”).

⁴⁶ *Id.* at 115.

⁴⁷ *Id.* at 115 (rejecting the holding in *Case of District Attorney of United States*, 7 Fed. Cas. 731 (No. 3924, E.D. Pa. 1868)); see also, contrary opinion in *Schenck v. Peay*, 21 Fed. Cas. 672 (No. 12451 E.D. Ark. 1869).

⁴⁸ 28 Fed. 445, 450 (C.C.W.D. Tenn. 1886) (holding the recess appointment of a marshal by the President to be lawful, and that there was no need to turn to other legal mechanisms to qualify the appointment).

⁴⁹ 305 F.3d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

⁵⁰ 751 F.2d 1008, 1012 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

⁵¹ 387 F.3d 1220, 1226-27 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 1640 (2005). The decisions in *Allocco*, *Woodley*, and *Evans* are additionally significant, in that all three held that the President’s power under the Recess Appointments Clause extends to filling judicial vacancies on Article III courts. For an analysis of the interplay of the Recess Appointments Clause and Article III of the Constitution, see CRS Report RL32971, *Judicial Recess Appointments: A Legal Overview*, by T. J. Halstead.

With respect to this particular phrase, Attorneys General and the courts have rejected a narrow interpretation and have adopted the broader construction, believing it to be both consistent with the spirit of the Clause and necessary for the continuous and efficient operation of the government. It can also be argued that the Congress has acquiesced in this interpretation, primarily through the passage of statutes that recognize the possibility of such appointments, discussed below.⁵² Furthermore, while congressional statements disputing the prevailing interpretation have been made during periods of controversy surrounding recess appointments, such statements have been made by “individual members of the senate ... but not the senate itself.”⁵³

“The Recess of the Senate”

Under the prevailing interpretation, recess appointments seem to be permitted when a vacancy occurs before or during the recess of the Senate, but another question that later emerged was the meaning of the phrase “the Recess of the Senate.” The first formal opinion on the subject was issued by Attorney General Knox in 1901, and concluded that the phrase applied only to adjournments between sessions of Congress, commonly referred to as “intersession” recesses.⁵⁴ Knox placed significant weight on the use of the definite article “the” in the Recess Appointments Clause, emphasizing that “[i]t will be observed that the phrase is *the* recess.”⁵⁵ The opinion further concluded that if recess appointments were allowed during periods other than an intersession recess, nothing would prevent an appointment from being made “during any adjournment, as from Thursday or Friday until the following Monday.”⁵⁶ The opinion specifically rejected a Court of Claims decision that upheld paying the salary of an Army paymaster appointed during a temporary (intrasession) recess in 1867, which had extended from July 20 to November 21, 1867.⁵⁷

Twenty years later, this position was abandoned. An opinion issued by Attorney General Daugherty in 1921 declared that an appointment made during a 29-day intrasession recess was constitutional. The Daugherty opinion focused on the practical aspects of the recess appointment dynamic, stating that “[i]f the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”⁵⁸ In support of this interpretation, the Attorney General cited the 1884 Court of Claims decision that was repudiated in the Knox opinion, as well as a report from 1905 of the Senate Committee on the Judiciary that had been asked to examine the meaning of the term “recess.” The Senate report had concluded:

It was evidently intended by the framers of the Constitution that it [Article II, sec. 2] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, in this connection the period of time when the Senate is *not sitting*

⁵² See “Statutory Pay Restrictions on Recess Appointees,” *infra*.

⁵³ Farrow, 3 Fed. at 115.

⁵⁴ 23 Op. A.G. 599 (1901).

⁵⁵ *Id.* at 600 (emphasis in original).

⁵⁶ *Id.* at 603.

⁵⁷ See *Gould v. United States*, 19 Ct. Cl. 593 (1884).

⁵⁸ 33 Op. A.G. 20, 23 (1921).

in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. ... This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.⁵⁹

Even though he emphasized this functional approach, Daugherty limited the scope of his opinion by rejecting the notion that a broad interpretation would authorize intrasession appointments during brief adjournments, declaring that “an adjournment for 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”⁶⁰ The opinion concluded by emphasizing that while “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take ..., there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.”⁶¹

While it did not specifically address intrasession recess appointments, the 1905 Senate Committee on the Judiciary Report, quoted above and relied on by Attorney General Daugherty in his 1921 opinion, was prompted by what undoubtedly was the briefest recess ever relied on by a President in order to make recess appointments. At that moment the 58th Congress, first session ended at noon, December 7, 1903, and the second session immediately began thereafter, President Theodore Roosevelt announced the recess appointment of over 160 officers—mostly military. Two of these appointees had previously held recess appointments and were controversial officeholders. Although President Roosevelt, like Attorney General Knox, disagreed with the notion of intrasession recess appointments, he construed the period between these sessions as a “constructive recess.”⁶² The 1905 Senate Committee on the Judiciary Report was issued 14 months afterward and emphatically rejected Roosevelt’s actions. Notably, however, the Report, while expressing disapprobation of the President’s exercise of the recess appointment power in such a manner, could be read as validating the execution of intrasession recess appointments generally. Alternatively, it could be argued that this historically anomalous event lends no weight to the overall consideration of the matter.

The question of what constituted a recess for purposes of the Clause arose substantially later than the vacancy issue due to the fact that Congress took few intrasession recesses, other than brief holiday recesses, until the advent of the modern era.⁶³ The question of what constitutes a “recess” has become more critical as the opportunity for the execution of such appointments has increased. Indeed, as illustrated above, there has been a steady and significant increase in intrasession recess

⁵⁹ S.Rept. 4389 at 2 (1905); 39 Cong. Rec. 3823-24 (1905).

⁶⁰ 33 Op. A.G. at 25.

⁶¹ *Id.* at 25.

⁶² See Hogue, *supra* note 16, at 671. Roosevelt’s actions could be viewed as a practical manifestation of the potential infirmities of the Knox interpretation; that is, if a formalistic interpretation of the Clause rests upon a concern that allowing intrasession appointments will foster systematic avoidance of the Senate’s advice and consent function, the fact that a President is able to make such appointments during an instantaneous “constructive recess” of the Senate would appear to belie such a distinction. See Hartnett, *supra* note 6, at 416.

⁶³ See Carrier, *supra* note 7, at 2212-13.

appointments attendant to the shift in the recess practices of the Congress. Subsequent Attorneys General and Department of Justice Office of Legal Counsel opinions have continued to support the constitutionality of intrasession recess appointments, with more recent pronouncements on the issue strongly implying that the Clause encompasses all recesses in excess of three days.⁶⁴

In addition, it would appear that the pocket veto case, *Kennedy v. Sampson*, has influenced, at least to a minor degree, the propriety of recess appointments during short recesses of the Senate.⁶⁵ In *Kennedy*, the court struck down the exercise of the President's pocket veto power during a six-day intrasession recess of the Congress. The Constitution provides that a bill becomes law if not returned by the President after presentment within 10 days, "unless the Congress by their adjournment prevent its return, in which case it shall not be a law."⁶⁶ The case cast doubt on the validity of all intrasession pocket vetoes, not only those of short duration, and Presidents have since limited their pocket vetoes to periods between sessions, or after a Congress has finally adjourned.⁶⁷ In light of the *Kennedy* decision, the Department of Justice, while asserting the validity of a recess appointment during a 33-day intrasession recess, nevertheless informed President Carter that "in view of the functional affinity between the pocket veto and recess appointment powers, Presidents during recent years have been hesitant to make recess appointments during intrasession recesses of the Senate."⁶⁸

Although the decision in *Kennedy* may have moderated the use of the recess appointment power in some instances, recent Presidents have nonetheless made numerous appointments during intrasession recesses of 10 days or longer.

- President Reagan, for instance, made a number of intrasession recess appointments, one during an 18-day recess ending September 8, 1982, nine during a 23-day recess ending on July 23, 1984, and two during a 13-day recess ending on January 21, 1985.
- President George H. W. Bush made eight intrasession recess appointments, the shortest occurring during a 17-day recess.
- President Clinton made numerous intrasession appointments, including five during an 11-day recess ending on January 22, 1996, five during a 16-day recess ending on April 15, 1996, one during a nine-day recess ending on June 3, 1996, and one during an 11-day recess ending on January 20, 2001.

⁶⁴ See, e.g., Brief for the United States in Opposition to Petition for *Writ of Certiorari*, at 11, *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1640 (2005); Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-6, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993) (arguing that the President may be able to make a recess appointment during a recess of more than three days because constitutionally, neither chamber can adjourn for more than three days without the consent of the other, implying that the Framers did not consider one, two, or three day recesses to be constitutionally significant); 16 U.S. Op. Off. Legal Counsel 15 (1992) (explaining that Attorney General Daugherty noted that the "line of demarcation cannot be accurately drawn, and "[t]he longstanding view of the Attorneys General has been that the term 'recess' includes intrasession recesses if they are substantial in length").

⁶⁵ 511 F.2d 430 (D.C. Cir. 1974).

⁶⁶ U.S. Const., Art. I, § 7, cl. 2.

⁶⁷ See *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (invalidating intersession pocket veto), *vacated as moot sub nom.*, *Burke v. Barnes*, 479 U.S. 361 (1987).

⁶⁸ 3 U.S. Op. Off. Legal Counsel 314, 316 (1979).

- President George W. Bush continued the practice of making appointments during brief intrasession recesses, including six such appointments during a recess ending on April 28, 2003, four during a 10-day recess ending on April 19, 2004, and, perhaps most controversially, the appointment of William H. Pryor, Jr., to the Court of Appeals for the Eleventh Circuit on February 20, 2004, on the seventh day of a 10-day recess ending on February 23, 2004.⁶⁹
- President Barack Obama has continued the practice of making intrasession recess appointments. Up through the April 2011 recess, the President has made 28 recess appointments in total, almost all of which were during the second session of the 111th Congress (January 5, 2010, to December 22, 2010). Many intrasession recess appointments were made during arguably lengthy recesses of the Senate; however, President Obama made three recess appointments on July 7, 2010, during an 11-day recess ending July 12, 2010.

Litigation challenging the recess appointment of William H. Pryor, Jr., to the Eleventh Circuit was brought, and in upholding Pryor’s appointment, the Eleventh Circuit stated:

The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause. And we do not set that limit today. Although a President has not before appointed a judge to an Article III court during an intrasession recess as short as the one in this case, appointments to other offices—offices ordinarily requiring Senate confirmation—have been made during an intrasession recess of about this length or shorter. Furthermore, several times in the past, fairly short intrasession recesses have given rise to presidential appointments of judges to Article III courts.⁷⁰

Authority and Tenure of Recess Appointees

As a fundamental matter, a recess appointee possesses the same legal authority as a confirmed appointee.⁷¹ The commission of a recess appointee expires “at the End of [the Senate’s] next Session,” whereas the service of a confirmed appointee continues until the end of the statutory term or at the pleasure of the President, subject to the requirements laid out by Congress in creating the position.⁷² When the Senate reconvenes after a recess during the same session, this is

⁶⁹ Information on recess appointments may be obtained in the *Weekly Compilation of Presidential Documents*.

⁷⁰ Evans, 387 F.3d at 1225.

⁷¹ See also Hogue, *supra* note 3, at 4; Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996) (recess appointment is not an “inferior” procedure to appointment with Senate confirmation); Designation of Acting Solicitor Labor, 2002 WL 34461082 (2002) (distinguishing between an temporary designation under the Vacancies Reform Act and a recess appointment—“An acting official does not hold the office, but only ‘perform[s] the functions and duties of the office.’ [citation omitted] He is not ‘appointed’ to the office but only ‘direct[ed]’ or authorized to discharge its functions and duties, and thus he receives the pay of his permanent position, not of the office in which he acts. [citation omitted] A recess appointee, on the other hand, is appointed by one of the methods specified in the Constitution itself, [citation omitted]; he holds the office; and he receives the pay.”).

⁷² For an exchange on the issue of whether the Senate could alter its recess practices to bring about earlier termination of recess appointments, see Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 Nw. U. L. Rev. Colloquy 82 (2007); Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 Nw. U. L. Rev. Colloquy 88 (2007); Seth Barrett Tillman, *Terminating Presidential Recess Appointments: A Reply to Professor Brian C. Kalt*, 101 Nw. U. L. Rev. Colloquy 94 (2007); Brian C. Kalt, *Keeping Tillman Adjournments in their Place: A Rejoinder to Seth Barrett Tillman*, 101 Nw. U. L. Rev. Colloquy 108 (2007).

considered a continuation of the session and is not regarded as the “next session” within the meaning of the Clause.⁷³ In practice, this means that a recess appointment could last for almost two years. On the one hand, if an individual receives an intersession recess appointment—that is, an appointment between sessions of the same or successive Congresses—such individual could serve until the end of the following session. On the other hand, if the President makes an intrasession recess appointment—that is, an appointment during a recess of the Senate in the middle of a session, like the traditional August recess of a first session of Congress—that appointment would expire at the end of the second session. In the latter case, the duration of the appointment will include the rest of the session in progress plus the full length of the session that follows.⁷⁴ The President may remove a recess appointee before the expiration of his term, either by outright removal (assuming he otherwise has discretionary removal authority with respect to the office) or by having another nominee confirmed by the Senate.⁷⁵

What Is the Tenure of a Recess Appointee Who Is Also the Nominee?

Oftentimes an individual given a recess appointment is also the President’s nominee to the office. With respect to recess appointments to offices that are subject to a fixed statutory term, it has been held that the new commission for the full statutory term commences from the date of the recess appointment should the nominee to the office be confirmed upon the reconvening of the Senate. In other words, the full statutory term relates back to the date on which the person first assumed office by means of the recess appointment. The determination of this question may also depend on the particular statutory provision regarding the terms of the office and filling of vacancies.⁷⁶ Moreover, even if a recess appointee who is also the President’s nominee is rejected by the Senate, this does not constitute a removal. The rejected nominee may still hold office pursuant to his recess appointment under the Constitution until the termination of the session.⁷⁷ Furthermore, upon the expiration of the constitutional term of a recess appointee, a new recess appointment, either of the same, or another person, may be made.⁷⁸ Successive recess appointments of the same individual, however, may implicate certain statutory pay restrictions, discussed below. While there are no constitutional limits on how many times the President may

⁷³ 41 Op. A.G. 463, 470-71 (1960); 28 Comp. Gen. 121 (1948).

⁷⁴ See Hogue, *supra* note 3, at 4. A comparison of two recess appointments during the 108th Congress illustrates the difference in recess appointment duration that results from the timing of appointments. During the recess between the first and second sessions of the 108th Congress, President George W. Bush appointed Charles W. Pickering to a court of appeals judgeship. Several weeks later, during the first recess of the second session of the 108th Congress, President Bush appointed William H. Pryor, Jr., to a judgeship on another court of appeals. Pickering’s commission expired after less than 11 months, at the end of the second session of the 108th Congress, whereas Pryor’s commission would have expired after approximately 22 months, at the end of the first session of the 109th Congress. Although the Pickering and Pryor recess appointments were only several weeks apart, Pryor would be able to serve nearly twice as long because his appointment was made during an intrasession recess. *Id.*

⁷⁵ 41 Op. A.G. at 471.

⁷⁶ 37 Op. A.G. 282 (1933); 9 Comp. Gen. 190 (1929).

⁷⁷ See *In re: Marshalship*, 20 Fed. 379 (D. Ala. 1884); 2 Op. A.G. 336 (1830); 21 Comp. Dec. 789 (1915) (Comptroller of the Currency). Also note that a long-standing pay restriction may be triggered if the rejected nominee were appointed to a successive recess appointment. The provision would prevent an individual pay to a position “for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.” 5 U.S.C. note preceding § 5501. See “Modern Statutory Pay Restriction,” *infra*.

⁷⁸ 2 Op. A.G. 525 (1832); 3 Op. A.G. 673 (1841); 4 Op. A.G. 523 (1846); 11 Op. A.G. 179 (1865); 28 Comp. Gen. 30, 38 (1948); 28 Comp. Gen. 121, 129 (1948).

exercise the recess appointment authority with a particular individual, notably, the court in *Staebler v. Carter* stated that a President “could probably not consistently with the principle of checks and balances grant a recess appointment to one rejected for the particular position by a vote of the Senate.”⁷⁹

When Is There a Vacancy If There Is a Statutory Holdover Provision?

Though, under the prevailing interpretation of “Vacanc[y] that may happen,” the President may exercise his recess appointment authority regardless of whether the vacancy occurred before or during the recess of the Senate, a vacancy must exist before the President can exercise his recess appointment authority.⁸⁰ While this observation may seem self evident, what constitutes a “vacancy” for the purposes of the Recess Appointments Clause may be complicated by the presence of “holdover” provisions that regularly accompany fixed term positions. Judicial interpretation of whether a vacancy exists in light of a holdover provision has been uneven, as discussed below. It is worth noting, however, that the Department of Justice has generally had the long-standing view that as a matter of constitutional law, there is a vacancy for purposes of the Recess Appointments Clause when an appointment for a term of years expires and the officer continues serving under a holdover provision.⁸¹

In *Staebler v. Carter*,⁸² the U.S District Court for the District of Columbia held that a Federal Election Commission (FEC) office was vacant for purposes of the Recess Appointments Clause when the incumbent continued to exercise authority pursuant to a holdover provision. The Federal Election Campaign Act’s holdover provision provided: “A member of the Commission may serve ... after the expiration of his own term until his successor has taken office.”⁸³ The court upheld a recess appointment to the FEC that was still occupied by a holdover Federal Election Commissioner, based on a determination that the expiration of the holdover commissioner’s formal term created an immediate and ongoing vacancy.⁸⁴ The plaintiff in *Staebler* argued that the Recess Appointments Clause was designed to operate only when no person is available to occupy a particular office. Rejecting this argument, the court stated that it was not persuaded this was the intention of the Framers because under such an interpretation, “the President would be prohibited

⁷⁹ 464 F. Supp. at 601, n.41.

⁸⁰ See 3 U.S. Op. Off. Legal Counsel 314, 317 (1979) (“A recess appointment presupposes the existence of a vacancy. If there is an incumbent in the office the recess appointment in itself does not effect a removal of the incumbent so as to create a vacancy. Before the President can exercise his recess appointment power in such a case he must exercise his constitutional removal power to the extent it is available, or, if not available, the incumbent must resign” (citations omitted)).

⁸¹ See, e.g., Appointments to the Board of the Legal Services Corporation, 2005 WL 6086110 (2005); The Inapplicability of the Federal Vacancies Reform Act’s Reporting Obligations for PAS Officers Serving Under Statutory Holdover Provisions, 1999 WL 33232455 (1999); Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute, 18 Op. Off. Legal Counsel 123 (1994); Legal Services Corporation—Effect of Statutory Holdover Provisions, 2 Op. Off. Legal Counsel 398 (1978).

⁸² 464 F. Supp. 585 (D.D.C. 1979).

⁸³ *Id.* at 588 (citing FEC statute 2 U.S.C. § 437(a)(2) (1976)).

⁸⁴ 464 F. Supp. at 589. “The plain implication of that language is that a vacancy does indeed occur as a result of and contemporaneously with the expiration of the term of office not some subsequent time.” *Id.* at 589-90. Furthermore, the court found that the term “vacancy” was somewhat defined by the statute, which mandates that “a ‘vacancy occurring other than by expiration of a term of office’ shall be filled only for the remainder of the unexpired term.” *Id.*

from making a recess appointment when a term of office has expired, as long as someone with a permissive claim to the office is still serving.”⁸⁵ As part of its reasoning for finding that a vacancy existed once the statutory term of office expired, the court stated: “In the absence of clearly-expressed legislative intent, the [c]ourt will not speculate that the Congress sought to achieve a result which would be both unusual and probably beyond its constitutional power.”⁸⁶

Conversely, in *Mackie v. Clinton*⁸⁷ the U.S. District Court for the District of Columbia held that the holdover provision for a member of the Board of Governors of the United States Postal Service did not constitute a vacancy sufficient to allow the appointment of a new member pursuant to the Recess Appointments Clause. The court in *Mackie* declared that whether a vacancy exists for Recess Appointments Clause purposes depends on the wording and structure of the particular holdover provision. Here, the relevant holdover provision states that a “Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.”⁸⁸ In the court’s view, this holdover provision, unlike that in *Staebler*, creates not a present vacancy but a “prospective vacancy,”⁸⁹ such that the Governor holding over would continue to occupy the office for one year past the end of his term unless he died, resigned, was lawfully removed, or some other successor qualified.⁹⁰ The court further emphasized that unlike the indefinite holdover period in the Federal Election Campaign Act, the one-year holdover period prevented this board from being susceptible to the concerns expressed by the court in *Staebler*. Likewise, the court in *Wilkinson v. Legal Servs. Corp.*⁹¹ also found that a vacancy does not occur on the Legal Services Corporation (LSC) upon the expiration of a term of office of one of the Directors. Rather, a vacancy is created upon the “resignation, death or removal of one of the sitting Directors.”⁹² Furthermore, *Wilkinson* distinguished itself from *Staebler* and *Mackie* in finding the holdover provision in the LSC Act mandatory: “Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified” (emphasis added). Although the court found that the LSC Act provided no definition of “vacancy” as in *Staebler* (see note 84), nor any time limit that a holdover may remain in office as in *Mackie*, it held that “the plain meaning of this [holdover] language is that each member of the Board remains a Director after that person’s term has expired until the new Director has been ‘appointed’ by the President and ‘qualified.’”⁹³ The *Wilkinson* court concluded that the holdover provision did not infringe upon the President’s recess appointment power; “it merely defined when ‘vacancies’ exist on the LSC Board sufficient to trigger application of the Recess Appointments Clause.”⁹⁴ The decisions in *Staebler*, *Mackie*, and *Wilkinson* demonstrate that the

⁸⁵ *Id.* at 597.

⁸⁶ *Id.* at 591. See also *McCalpin v. Dana*, No. 82-542 (D.D.C. October 5, 1982) (the President could displace holdover Directors by making recess appointment), *appeal dismissed as moot*, *McCalpin v. Durant*, 766 F.2d 535 (D.D.C. 1994).

⁸⁷ 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993).

⁸⁸ 39 U.S.C. § 202(b).

⁸⁹ *Mackie*, 827 F. Supp. at 58.

⁹⁰ *Id.*

⁹¹ 865 F. Supp. 891 (D.D.C. 1994), *rev’d on other grounds*, *Wilkinson v. Legal Servs. Corp.*, 80 F.3d 535 (D.C. Cir. 1996).

⁹² *Id.* at 902.

⁹³ *Id.* at 900-01.

⁹⁴ *Id.* at 902.

issue of whether a holdover provision constitutes a vacancy for recess appointment purposes may depend upon the specific language contained therein.⁹⁵

Statutory Pay Restrictions on Recess Appointees

It should be noted that there exists a statutory framework that governs the filling of vacancies that falls outside the scope of the Recess Appointments Clause. Since the early history of the Republic, Congress has established a statutory framework designed to protect the Senate's constitutional role in the confirmation process.⁹⁶ The Vacancies Act, which has legislative roots dating back to 1795 and was most recently amended in 1998, establishes which individuals may be designated by the President to temporarily perform the duties and functions of a vacant office and the length of time a designee may serve.⁹⁷

Early Statutory Pay Restriction

Notwithstanding the provisions of the Vacancies Act, Congress, in an attempt to check the President's use of the Recess Appointment Clause and preserve its role in the appointments process, has enacted legislation that would restrict the pay of recess appointees. Pay restrictions on recess appointees have a long history dating back to the mid-19th century. The forerunner to current statutory provisions was an appropriations rider that Congress attached to the FY1864 Army Appropriations Act. Among other conditions, the rider prohibited the payment of money from the Treasury: "as a salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate."⁹⁸

Under this language, an officer might have to serve without pay, until such time as the Senate consented to the nomination. These pay restrictions were enacted in response to President Lincoln's recess appointments of hundreds of military officers in violation of statutory authorization.⁹⁹ Although the interpretation of "Vacancies that may happen" was still in flux, as discussed above, Senator Fessenden, elaborating on the intent of the appropriations rider, stated: "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments."¹⁰⁰

⁹⁵ See Hogue, *supra* note 3, *supra*, at 3-4.

⁹⁶ See also CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue.

⁹⁷ 5 U.S.C. §§ 3345-3349d. The Vacancies Act explicitly states that it is the exclusive means for authorizing the temporary filling of advice and consent positions unless otherwise expressly provided in law, or unless the President exercises his authority under the Recess Appointments Clause. The original version of the act was enacted in 1868, 15 Stat. 168 (1868), and its time limitations that limited the duration of a temporary assignee to six months also date back to 1795. 1 Stat 415 (1795).

⁹⁸ 12 Stat. 642, 646 (1863). The appropriations rider also provided that no money was to be paid from the Treasury "to any person acting or assuming to act as an officer, civil, military, or naval, as salary in any office, which is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law." *Id.*

⁹⁹ See 33 Cong. Globe 564-65 (1863).

¹⁰⁰ 33 Cong. Globe 565 (1863).

Further restrictions on the President's appointment and removal powers were enacted by the passage of the Tenure of Office Act in 1867.¹⁰¹ Section 2 of the act purported to limit the President's power to suspend officers during a recess to instances where it was determined to the satisfaction of the President that an officer was guilty of misconduct in office, crime, or was incapable or legally disqualified to hold office. Removals made during recesses were to be reported to the Senate after it reconvened; and, if the Senate did not concur with the suspension, the suspended officer was to "resume the functions of his office."¹⁰² Section 3 of the act purported to limit the President's authority to make recess appointments, providing that such an appointment could be made only if the vacancy occurred by death or resignation. If a recess appointee's nomination was not thereafter confirmed in the next session of the Senate, the office was to "remain in abeyance."¹⁰³ The act also delineated criminal penalties and cut-off of salary for violations of its provisions. President Andrew Johnson, who believed the act to unconstitutionally infringe upon the power of the Executive, ignored the provisions of the act when he removed Secretary of War Edwin Stanton from office, undoubtedly precipitating his impeachment.¹⁰⁴ Congress repealed part of the act in 1869¹⁰⁵ and then entirely in 1887.¹⁰⁶ Though the act was not challenged in the courts, similar limits on the President's removal power were struck down as unconstitutional in the 1926 decision of *Myers v. United States*.¹⁰⁷ The Supreme Court stated: "we have no hesitation in holding that ... the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so."¹⁰⁸

Modern Statutory Pay Restriction

Even though these types of congressional restrictions on the President's removal powers have been held unconstitutional, the pay restriction for recess appointees that was originally enacted in 1863 remained intact until it was amended in 1940 to provide exceptions to the flat prohibition, making it less burdensome on officeholders. The pay restriction on recess appointees is currently codified at 5 U.S.C. § 5503. It generally provides that an individual who is given a recess appointment to fill a vacancy in an existing office *may not* receive payment from the Treasury of the United States¹⁰⁹ 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.¹¹⁰ Such an individual can

¹⁰¹ 14 Stat. 430 (1867).

¹⁰² *Id.*

¹⁰³ *Id.* at 431.

¹⁰⁴ See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 40 Duke L.J. 1, 87-88 (1999).

¹⁰⁵ 16 Stat. 6 (1869).

¹⁰⁶ 24 Stat. 500 (1887).

¹⁰⁷ 272 U.S. 52 (1926).

¹⁰⁸ *Id.* at 176.

¹⁰⁹ This pay restriction to recess appointees applies to those positions that receive pay from the Treasury of the United States. See, e.g., Permissibility of Recess Appointments of Directors of the Federal Housing Finance Board, 15 Op. Off. Legal Coun. 191, 93 (1991) (concluding that because none of the payment for the Directors came from the Treasury that the pay restriction of 5 U.S.C. § 5503 did not apply to the recess appointees).

¹¹⁰ 5 U.S.C. § 5503(a).

receive pay once he has been confirmed by the Senate. However, there are three exceptions under which a recess appointee *may be paid*:

1. if the vacancy arose within 30 days before the end of the session;
2. if, at the end of the session, a nomination is pending and the nomination is not of an individual who had been given a recess appointment during the preceding recess; or
3. if the pending nomination was rejected 30 days before the session ended and an individual, other than the one whose nomination was rejected, is given the recess appointment.¹¹¹

Interestingly, the second exception, which allows a recess appointee to be paid so long as there is a pending nomination before the Senate that is not of the person who had been appointed during the preceding recess, implicitly prevents individuals, who have a pending nomination and who received a recess appointment in the preceding recess, from being paid. In other words, although there is no limitation on how many times the President may recess appoint the same individual, this provision prevents payment to be made to successive recess appointees if that recess appointee is the current nominee, which is oftentimes the situation.¹¹²

Furthermore, section 5503(b) provides that a nomination to fill a vacancy falling within any of the aforementioned exceptions must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. For this reason, when a recess appointment is made, the President generally submits a new nomination to the position even when an old nomination is pending. Though an individual may serve as a recess appointee through the expiration of the commission, another long-standing appropriations rider that reinforces the third exception under § 5503 prevents any payment to an individual to fill a position “for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.”¹¹³

The three exceptions, which would allow payment, were designed, as stated in a House Report, “to render the existing prohibition on the payment of salaries more flexible.”¹¹⁴ The report further explained that

[f]rom a practical standpoint it frequently creates difficulties especially in those cases in which a vacancy arose shortly before the close of a congressional session, leaving insufficient time to fill the vacancy by nomination and confirmation. Difficulties also arise in

¹¹¹ 5 U.S.C. § 5503(a)(1)-(3).

¹¹² This interpretation has been supported by the Department of Justice, which stated in 1991, “Although its language is far from clear, section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees.” 15 Op. O.L.C. 93 (1991). *See also* 6 Op. O.L.C. 585 (1982); 41 Op. A.G. 463 (1960).

¹¹³ 5 U.S.C. note preceding § 5501; P.L. 110-161, 121 Stat. 2021 (2007) (“Hereafter, no part of any appropriation contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person.”); *See, e.g.*, P.L. 108-447, Div. H, Sec. 609; 118 Stat. 3274. It is also worth noting that for FY2009, Congress enacted another permanent appropriations rider that would prohibit payment “to any individual carrying out the responsibilities of any position requiring Senate advice and consent in an acting or temporary capacity after the second submission of a nomination for that individual to that position has been withdrawn or returned to the President.” P.L. 111-8; 123 Stat. 693 (2009). Though this provision seems designed to prevent payment to persons appointed in accordance with the Vacancies Reform Act, a question may arise as to whether this prohibition could extend to recess appointees, given that they are arguably acting in a “temporary capacity.”

¹¹⁴ H.R. Rept. 2646 (1940).

cases in which a session terminates before the Senate acts on pending nominations, as has at times happened.¹¹⁵

Unlike the Recess Appointments Clause where the term “Session” indicates the adjournment sine die of the Senate, the term “session” for purposes of § 5503 refers to any time the Senate convenes. The version of this law preceding § 5503 used the phrase “termination of the session” as opposed to the phrase “end of the session,” which now appears in § 5503(a)(1). This revision was not intended as a substantive change, however.¹¹⁶ The “termination” phrase was interpreted by the Comptroller General to encompass “any adjournment, whether final or not, in contemplation of a recess covering a substantial period of time.”¹¹⁷

Furthermore, the argument is sometimes forwarded that a recess appointee, who is generally barred from receiving pay unless one of the three exceptions applies, would be then barred from serving because of a provision of the Anti-Deficiency Act, namely 31 U.S.C. § 1342.¹¹⁸ This provision states that “an officer or employee of the United States government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”¹¹⁹ Because the voluntary services prohibition is designed to prevent federal agencies from seeking additional appropriations,¹²⁰ interpretations of § 1342 have concluded that although the section prohibits federal entities from accepting *voluntary* services, it does not prohibit acceptance of *gratuitous* services for which no future claim for compensation will be made.¹²¹ Pursuant to this distinction, the Government Accountability Office (GAO) has ruled that compensation that is *not fixed* by statute *may* be waived, so long as the waiver renders any service gratuitous. Conversely, GAO has ruled that compensation that *is fixed* by statute *may not* be waived and deemed gratuitous without specific statutory authority.¹²²

While § 1342 may be controlling with regard to prohibiting officers and employees from accepting voluntary services, there does not appear to be any basis for its application to recess appointees, who are statutorily barred from receiving pay under 5 U.S.C § 5503, regardless of whether the position at issue carries a discretionary or fixed rate of pay. In other words, it does not seem that § 1342, which prevents the government from accepting voluntary services from officers and employees, would also prevent recess appointees, who are already statutorily barred from receiving pay, from serving in government. Because the President’s appointment power, including the power to make recess appointments, arises from the text of the Constitution, it is difficult to formulate a rationale that would support the conclusion that a congressional enactment may prevent the service of a recess appointee who is already prevented from receiving pay, as the

¹¹⁵ *Id.* See also 28 Comp. Gen. 30 (1948).

¹¹⁶ See S. Rept. 1380 at 105 (1966).

¹¹⁷ 28 Comp. Gen. 30, 37 (1948); see also 41 Op. A.G.463, 473-75 (1960).

¹¹⁸ See Trish Turner, “Democrats Fight Sam Fox Nomination, Charge He Cannot Serve Without Pay,” Fox News Corp., April 5, 2007, available at <http://www.foxnews.com/story/0,2933,264420,00.html>.

¹¹⁹ 31 U.S.C. § 1342.

¹²⁰ The prohibition codified at § 1342 was enacted in response to a practice common late in the 19th century under which lower grade government employees were asked to “volunteer” their services for overtime work and agencies subsequently requested additional appropriations from Congress to pay them. Government Accountability Office, Office of the General Counsel, *II Principles of Federal Appropriations Law*, 6-95, 3d Ed. (February 2006).

¹²¹ *Id.* at 95-96.

¹²² *Id.* at 102.

pay proscription itself clearly contemplates that recess appointees falling within its purview would continue to serve, further obviating the application of § 1342.¹²³

These limitations are designed to protect the Senate’s advice and consent function. By targeting the compensation of appointees as opposed to the President’s recess appointment power itself, the limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. However, the court in *Staebler* commented that “if any and all restrictions on the President’s recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 ... might also be invalid.”¹²⁴ Additional constitutional concerns might arise from the application of these statutory restrictions to judicial recess appointees,¹²⁵ though Attorneys General have consistently advised Presidents of the applicability of the pay restriction statutes without raising constitutional concerns.¹²⁶

The concerns raised in *Staebler*, which questioned the constitutionality of the restrictions with regard to recess appointments, coupled with the scope of the decision in *Evans v. Stephens*, could be seen as arguably giving rise to an expansive interpretation of the President’s power under the Recess Appointments Clause. As touched upon above, the U.S. Court of Appeals for the Eleventh Circuit in *Evans* upheld the intrasession recess appointment of William H. Pryor, Jr., to that court, based upon a broad interpretation of the President’s authority under the Clause. The majority’s acceptance of brief intrasession recess appointments, together with the potential constitutional invalidity of the statutory restrictions could lead to a dynamic whereby the President would have a legal and constitutional basis upon which to completely bypass the Senate confirmation process, in that the President would be empowered to make successive recess appointments during short recesses with the practical effect of enabling an appointee to serve throughout the course of an Administration without submitting to the Senate confirmation process. Recognizing this, Judge Barkett, in a dissenting opinion, argued that a literal and restrictive interpretation of the Clause was necessitated by the “real, concrete concern that the understanding of the recess appointment power embraced by the majority will allow the President to repeatedly bypass the role the Framers intended the Senate to play in reviewing presidential nominees.”¹²⁷ In light of the decisions in *Staebler* and *Evans*, the development of this dynamic could arguably transform the Recess Appointments Clause from the supplementary and auxiliary mechanism, discussed by Alexander Hamilton, into a more significant grant of presidential power.¹²⁸

¹²³ The GAO has relied upon this dynamic in determining that the voluntary services prohibition does not preclude the service of a recess appointee falling within the pay proscriptions codified at § 5503, even in instances where the compensation of the position in question is fixed by statute. Addressing the recess appointment of Sam Fox to serve as Ambassador to Belgium under circumstances triggering a § 5503 payment prohibition, the GAO noted that while the rate of compensation for such a position is set by statute, “[t]he Department of State may allow him to serve without compensation, despite the voluntary services prohibition of the Antideficiency Act, because Mr. Fox’s service would not result in a coercive deficiency or a subsequent claim against the Government, which was the original justification behind the prohibition. Mr. Fox could not make such a claim because of the statutory bar of section 5503.” Government Accountability Office, *Recess Appointment of Sam Fox*, B-309301 at 7-8 (June 8, 2007). The GAO further stated that “an alternative interpretation that would directly curtail the President’s power to make a recess appointment to Mr. Fox would raise serious constitutional concerns.” *Id.* at 8.

¹²⁴ 464 F. Supp. 585, 596 (D.D.C. 1979).

¹²⁵ See Halstead, *supra* note 51, at 11.

¹²⁶ See, e.g., 15 U.S. Op. Off. Legal Counsel 91 (1991); 41 Op. A.G. 463, 472-80 (1960).

¹²⁷ *Evans*, 387 F.3d at 1235.

¹²⁸ Note that in denying the petition for *writ of certiorari*, Justice Stevens commented that “it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made (continued...)”

Over time, Congress has also attempted to influence presidential action in the recess appointment context through resolutions. Resolutions objecting to Madison's appointments of envoys to Great Britain were debated in 1814, but not brought to a vote.¹²⁹ It is arguable that a "sense of the Senate" resolution enacted in 1960 expressing reservation over several recess appointments to the Supreme Court has influenced presidential exercise of the recess appointment power in the judicial context.¹³⁰ Prompted by President Eisenhower's recess appointments of Earl Warren, William J. Brennan, Jr., and Potter Stewart to the Supreme Court in 1953, 1956, and 1958, respectively, Senator Hart introduced S.Res. 334 to discourage such appointments. The resolution provided that it was the sense of the Senate that this type of recess appointment "is not wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States." The resolution further announced the position that such appointments should be avoided "except under unusual and urgent circumstances."¹³¹ No recess appointments to the Supreme Court have been made since the enactment of this resolution, and there has been an attendant decrease in the number of judicial recess appointments generally, with only four such appointments occurring since 1960. The use of the recess appointment power in the judicial context remains a contentious issue in both the political and judicial spheres, as indicated by the 2004 decision in *Evans*.

In recent years, the Senate has employed certain procedures that were thought to prevent the President from making recess appointments. Specifically, it held several "pro forma" sessions, which are "brief meeting[s] (sometimes only several seconds) of the Senate in which no business is conducted. [They are] usually held to satisfy the constitutional obligation that neither chamber can adjourn for more than three days without the consent of the other."¹³² For example, on November 16, 2007, the Senate Majority Leader Harry Reid announced that the Senate would "be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."¹³³ The Senate recessed later that day, and pro forma meetings were convened on November 20, 23, 27, and 29, with no business conducted. The Senate next conducted business after reconvening on December 3, 2007. Similar procedures were followed during the remainder of President Bush's term, and many perceived that this limited the ability of the President to make recess appointments during those periods.¹³⁴ During the 111th Congress, the Senate utilized these procedures during the latter part of the second session. It structured its 2010 pre-election break as a series of shorter recesses separated by pro forma sessions. The use of this approach during two successive Congresses suggests that it may now be regarded as an ongoing tool available to the Senate. Should this practice continue, it may lend support to the argument expressed by DOJ that,

(...continued)

absent consent of the Senate during short intrasession 'recesses.'" *Evans v. Stephens*, 544 U.S. 942, 943 (2004) (order denying petition for *writ of certiorari*).

¹²⁹ See Haynes, *supra* note 29, at 772-73.

¹³⁰ 106 Cong. Rec. 18145 (1960).

¹³¹ 106 Cong. Rec. 12761 (1960).

¹³² Glossary, <http://www.senate.gov>.

¹³³ Senator Harry Reid, "Recess Appointments," remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (November 16, 2007), p. S14609. Though this statement specifically indicates the use of pro forma sessions to prevent recess appointments, Senator Reid on at least one other occasion indicated that the Senate would be holding pro forma sessions for different purposes. On September 17, 2008, he stated, "We are going to have to get some committee hearings underway, which is why we are not going to adjourn. We will be in pro forma session so committees can still meet, though we won't have any activities here on the floor as relates to these markets." Senator Harry Reid, "The Economy," remarks in the Senate, *Congressional Record*, daily edition, vol. 154 (September 17, 2008), p. S8907.

¹³⁴ See Hogue, *supra* note 3, at 2-3.

notwithstanding the scope of the Clause expressed by early Attorneys General, the President may make recess appointments during any brief recess of the Senate in excess of three days.

Conclusion

While generally perceived as a straightforward, pragmatic provision designed to foster administrative continuity, the history of the Recess Appointments Clause shows that it also has been employed by Presidents for tactical and political purposes throughout the history of the Republic. As such, the Clause has been the source of recurrent controversy, beginning with the Administration of George Washington, and continuing to the current Administration of Barack Obama. Historical interpretation and judicial treatment of the Clause have fleshed out many of its inherent ambiguities, to the extent that there is now precedent to support the propriety of recess appointments regardless of when the vacancy at issue arose, and to support such appointments during both intersession and intrasession recesses. However, many tensions remain regarding the proper scope and application of the Clause. These tensions, coupled with the lack of any definitive consideration by the Supreme Court, would thus seem to ensure that the Clause will be a continuing source of political and legal controversy.

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